Regulating transnational corporate bribery in the UK and Germany

Nicholas Lord

PhD

Cardiff University
School of Social Sciences

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CANDIDATE'S ID NUMBER	**0717565**
CANDIDATE'S SURNAME	**Lord**
CANDIDATE'S FULL FORENAMES	**Nicholas James**

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Abstract

Large-scale cases involving multi-national corporations such as the BAE Systems and Siemens bribery scandals illustrate the complex organisation of such serious *trans*-national and *multi*-jurisdictional crimes. Sovereign states that do not have an active enforcement stance against transnational bribery are facing intense criticism from 'moral entrepreneurs' such as international and intergovernmental anti-corruption bodies. However, the regulation of such crimes faces a key contradiction: as business transactions become more global, enforcement and regulation remain at the local and national level. In short, *national* authorities are pressured to respond to *trans*-national corporate bribery using *inter*-national frameworks for enforcement.

This thesis imports regulatory concepts to understand the variety of enforcement (e.g. criminal prosecution, civil sanctioning) and non-enforcement (e.g. self-regulation, accommodation) practices that help explain policy responses to transnational bribery. Comparing these responses in Germany and the UK is a useful empirical focus for examining the strengths and limitations of national enforcement approaches given both jurisdictions inhabit similar institutional contexts for corporate bribery e.g. relatively strong western European economies, fellow members of the EU/G8, subject to international conventions. The research incorporated a qualitative, comparative research strategy that involved semi-structured interviews, participant observation and bilingual document analysis.

The research found that despite significant differences (e.g. centralised or decentralised systems, existence of corporate criminal liability, legal cultures), both UK and German anti-corruption authorities (i) face similar difficulties in enforcement as they are limited by their national jurisdictional boundaries and face several procedural, evidential, legal, financial and structural obstacles but (ii) are converging towards similar prosecution policies (e.g. negotiation of civil settlements for corporations). However, in both cases, evidence suggests enforcement *and* emerging self-regulatory practices are limited in relation to the anti-corruption actors' *own estimation* of the problem. Therefore, (iii) the default position of the response is an accommodation of corporate bribery, even where the will to enforce is high.

Contents

List of tables and figures

List of acronyms and abbreviations

ABPI – Association of the British Pharmaceutical Industry

ACOBA – Advisory Committee on Business Appointments

AG – Attorney General or *Aktiengesellschaft* (working group) when following German company name e.g. 'Siemens AG'

ARA – Assets Recovery Agency

ATCSA – Anti-Terrorism, Crime and Security Act 2001

BAES – BAE Systems

BaFin – *Bundesanstalt für Finanzdiesntleistungsaufsicht* (Federal Financial Supervisory Authority)

BBC – British Broadcasting Corporation

BERR – Department for Business Enterprise and Regulatory Reform

BIS – Department for Business, Innovation and Skills

BKA – *Bundeskriminalamt* (Federal Criminal Police Office)

BPI – TI Bribe Payers Index

BRE – Better Regulation Executive

CAQDAS – Computer Aided Qualitative Data Analysis Software

CART – Civil Actions Recovery Team

CEO – Chief Executive Officer

CJA – Criminal Justice Act

CoE – Council of Europe

CoLP – City of London Police

CPI – TI Corruption Perceptions Index

CPS – Crown Prosecution Service

DoJ – Department of Justice

DPA – Deferred prosecution agreement

EC – European Commission

ECHR – European Court of Human Rights

EU – European Union

EUBestG – *EU-Bestechungsgesetz 1998* (EU Anti-Bribery Act 1998)

FCPA – US Foreign Corrupt Practices Act 1977

FSA – Financial Services Authority

FSA(G) – *Freiwillige Selbstkontrolle für die Arzneimittelindustrie* e. V (Voluntary Self-Control for the Pharmaceutical Industry (Germany))

FT – Financial Times

FTSE – Financial Times and London Stock Exchange

GCR – TI Global Corruption Report

GDP – Gross Domestic Product

GRECO – Group of States against Corruption

ICC – International Chamber of Commerce

IntBestG – *Gesetz zur Bekämpfung internationaler Bestechung 1998* (Act on Combating Bribery of Foreign Public Officials in International Business Transactions 1998)

KorrBekG – *Gesetz zur Bekämpfung der Korruption 1997* (Anti-Corruption Act 1997)

KQ – Key question

LKA – *Landeskriminalamt* (Regional/State Office of Criminal Investigation)

MDB – Multi-lateral development bank

MDP –Ministry of Defence Police

MLA – Mutual Legal Assistance

MNC – Multi-National Corporation

MoD – Ministry of Defence

MoU – Memorandum of Understanding

MPS – Metropolitan Police Service

NASDAQ – originally the National Association of Securities Dealers Automated Quotations (a US stock exchange)

NCA – National Crime Agency

NCIS – National Criminal Intelligence Service

NGO – Non-Governmental Organisation

NPA – Non-prosecution agreement

NSA – Non-state actor

OACU – Overseas Anti-Corruption Unit

OECD – Organisation for Economic Cooperation and Development

OFAC – Office of Foreign Asset Control

OLAF – European Anti-Fraud Office

OWiG – *Gesetz über Ordnungswidrigkeiten* (Administrative Offences Act)

PACI – Partnering Against Corruption Initiative

PIDA – Public Interest Disclosure Act 1998

PMCPA – Prescription Medicines Code of Practice Authority

POCA – Proceeds of Crime Act 2002

PP – *Polizeipräsidien* (Local Police Headquarters)

PPO – *Staatsanwaltschaft* (Public Prosecutor's Office)

PSNI – Police Service for Northern Ireland

PwC - PricewaterhouseCoopers

QC – Queen's Counsel

RESIST – Resisting Extortion and Solicitation in International Transactions

SEC – Securities and Exchange Commission

SFO – Serious Fraud Office

SME – Small and medium enterprises

SOCA – Serious Organised Crime Agency

SOCPA – Serious Organised Crime and Police Act 2005

SPOC – Special Point of Contact

SPPO – Specialist Public Prosecutor's Office

StGB – *Strafgesetzbuch* (German Criminal Code)

StPO – *Strafprozeßordnung* (German Code of Criminal Procedure)

TEL – Tetraethyl lead

TFT – Tit-for-tat

TI – Transparency International

UK – United Kingdom

UKBA – UK Bribery Act 2010

UN – United Nations

UNCAC – UN Convention against Corruption 2003

UNGC – UN Global Compact

UNODC – UN Office on Drugs and Crime

UNTOC – UN Convention against Transnational Organised Crime

UREC – Cardiff University Research Ethics Committee

US – United States

VFA – *Mitgliedsunternehmen des Verbands Forschender Arzneimittelhersteller* (Association of the Research Based Pharmaceutical Companies)

1

Introduction

1.1 Introduction

> **‘**But the way I answer the corruption charges is this. In the last 30 years, we have made- we have implemented a development program that was approximately- close to $400 billion worth. You could not have done all of that for less than, let's say, $350 billion. Now, if you tell me that building this whole country and spending $350 billion out of $400 billion, that we had a- misused or get corrupted with $50 billion, I'll tell you, "Yes." But I'll take that any time. But more important, who are you to tell me this? I mean, I see every time all the scandals here, or in England, or in Europe. What I'm trying to tell you is, so what? We did not invent corruption.’ (Prince Bandar bin Sultan, quote from PBS Frontline Documentary, *Black Money*, 2009)
>
> ‘Bribery is by its very nature insidious; if it is not kept in check it can have potentially devastating consequences’ (Jack Straw, 2009: 4)

Business transactions are increasingly transnational in nature, a factor that has opened up increased opportunities for white collar crimes and the possibility of externalising risk (Gibbs *et al*., 2010: 544). 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 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. According to Passas, cross-border crime is the product of ‘criminogenic asymmetries’ which incorporate conflicts, mismatches and inequalities in the spheres of politics, culture, the economy and the law. This is intensified through globalisation while simultaneously there is no widely accepted nor effective transnational law making and law enforcement body or mechanism – in other words, business becomes global but controllers are generally constrained by divergent domestic rules and limited jurisdiction (Passas, 1999: 400). The intense legal debates about extradition to the US of British businesspeople (see NatWest

Three[1] case) and hackers (see Gary McKinnon[2] 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 most recently with the global economic crisis and subprime mortgage lending (Gibbs *et al.*, 2010: 544). Thus, the difficulties for States attempting to regulate the behaviour of *transnational* corporations often include a host of political concerns and economic interests (Rothe, 2010: 561; Snider and Bittle, 2011).

The first quote above presents a statement from Prince Bandar bin Sultan, the former Saudi Arabian ambassador to the United States, and significant player in the Al-Yamamah arms deal between the UK and Saudi Arabia, for which allegations of bribes paid to Saudi Officials by BAE Systems totalling more than £1bn were made[3]. Some would accept that as the cost of development or the unavoidable dependence of otherwise licit activities and markets on illicit activities in certain jurisdictions. This can be contrasted with the second statement from former Lord Chancellor and Secretary of State for Justice, Jack Straw, which appears in the foreword to the UK Bribery Bill, which was passed in April 2010, and highlights how corruption can have devastating consequences, particularly for those countries where much corporate bribery is directed. Corruption and corporate bribery, then, is 'serious business'.

Transnational corporate bribery and corruption may cause serious political, economic, social and environmental harms (see Transparency International, 2011: website[4]) such as diminished economic development and growth, increased social inequality, and distrust of government (Delaney, 2007: 419). Rose-Ackerman (1997: 42-6) identifies six key consequences of corruption: inefficient government contracting and privatisations; use of

[1] The NatWest Three were extradited to the US on charges linked to Enron corporate fraud case. See BBC article available at: http://news.bbc.co.uk/1/hi/business/5164652.stm <Accessed 02/08/2011>

[2] Gary McKinnon lost his fight against being extradited to the US on charges of computer hacking. See Guardian article available at: http://www.guardian.co.uk/world/2009/jul/31/gary-mckinnon-loses-extradition-appeal <Accessed 02/08/2011>

[3] The BAE Systems case involved the Al-Yamamah arms deal between the UK and Saudi Arabia, for which allegations of bribes paid to Saudi Officials by BAE Systems totalling more than £1bn were made. An SFO investigation into the allegations was halted in 2006 following government pressure whereby Tony Blair alluded to national security fears and economic concerns. In 2010 the SFO agreed a plea-bargain with BAE Systems in relation to other accusations of bribery, although BAE admitted only to relatively minor accounting offences and not bribery.

[4] TI discussion of 'costs of corruption' available at: http://www.transparency.org/news_room/faq/corruption_faq#faqcorr4 <Accessed 05/01/2011>

delays and red tape to induce payoffs; inefficient use of corrupt payments (e.g. payoffs diverted into illegal activities); inequities in reference to the distribution of gains and losses; damaged political legitimacy; and slowed growth whereby the benefits of development are distributed unequally. These moral and socio-economic harms have led concerned parties to focus on law enforcement and other control mechanisms. But criminal justice mechanisms have not proven to be easy, even when motivation to enforce is high. Recent large-scale cases involving multi-national corporations (MNCs) such as the BAE Systems and the Siemens[5] bribery scandals illustrate the difficulties faced by the UK and German sovereign states in controlling complex *trans*-national and *multi*-jurisdictional crimes. Anti-corruption authorities, limited by their national jurisdictional boundaries as well as facing procedural, evidential, legal, financial and structural obstacles, are thought to be easily outflanked by corporations giving bribes to foreign public officials as part of international business transactions. These difficulties of enforcement are demonstrated through the use of empirical data from the two research jurisdictions in **chapter 6** (‘***Mapping the enforcement scene – UK and German anti-bribery enforcement models***’). At the same time, sovereign states who do not have an active enforcement stance against transnational bribery are facing intense criticism from (i) international and intergovernmental organisations such as the Organisation for Economic Cooperation and Development (OECD) and the United Nations (UN) and (ii) international anti-corruption bodies including non-governmental organisations (NGOs) such as Transparency International (TI) to prevent and prosecute international bribery[6]. International measures such as the OECD Anti-Bribery Convention[7], the UN Conventions[8] and numerous regional and European Union (EU) level Conventions[9] provide anti-corruption frameworks within which to tackle these crimes - these often incorporate monitoring and evaluation mechanisms (see for example the Group

[5] The Siemens bribery scandal involved a system of slush funds used to pay bribes to win overseas contracts. To date, Siemens has paid a total of €2.5bn to various agencies in administrative fines while a number of managers were convicted.

[6] For example see the OECD’s Working Group on Bribery country reports available at: http://www.oecd.org/department/0,3355,en_2649_34859_1_1_1_1_1,00.html <Accessed 29/11/2010>

[7] Organisation for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997.

[8] United Nations’ Convention against Corruption (UNCAC) 2003, in part the UN Convention against Transnational Organised Crime (UNTOC) 2000.

[9] Council of Europe (CoE) Criminal and Civil Law Conventions on Corruption 1999 and the EU Convention on the protection of the communities’ financial interests and the fight against corruption, First and Second Protocol 1995; and, the EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States 1997.

of States against Corruption (GRECO)[10] and the OECD's Working Group on Bribery[11]) to establish the efficacy of national anti-corruption policies and enforcement practices. The legal frameworks of anti-corruption enforcement at the international, interregional and national levels are explicitly analysed in **chapter 5** ('***Legal frameworks of enforcement***'). In short, national authorities are pressured to respond to *trans*-national corporate bribery using *inter*-national frameworks for enforcement.

However, both in the official narratives of international conventions and in the narratives of criminological theory, the problem of controlling *trans*-nationally organised corporate bribery has not been sufficiently analysed (see **chapter 2** '***Literature review***'). This control problem, however, raises a number of significant research questions:

- In what ways are nation-states, under pressure from international organisations, reframing transnational corporate bribery as a key public policy issue and attempting to control it?

- In light of this international pressure, to what extent are enforcement frameworks and policy responses at the national level diverging or converging, given wider debates about globalisation, transnational crime and its control?

- What mechanisms are being used to tackle this control problem in different jurisdictions and what can be learned from contrasting the responses of theoretically comparable jurisdictions?

- Which issues (e.g. financial, procedural, legal, political, etc.) influence the extent to which certain mechanisms are adopted, the extent to which such enforcement mechanisms alone are a sufficient response, and if not sufficient, the extent to which other non-state enforced practices are emerging to deal with this problem?

[10] GRECO established as part of the Council of Europe Conventions. Website available at: http://www.coe.int/t/dghl/monitoring/greco/default_en.asp <Accessed 06/09/2011>
[11] Website of the OECD's Working Group on Bribery available at: http://www.oecd.org/document/5/0,3746,en_2649_34859_35430021_1_1_1_1,00.html <Accessed 06/09/2011

These questions imply an analysis of the qualitative aspects of control at the national level to develop understandings of the dynamics involved in regulating and controlling transnational corporate bribery. These dynamics reflect key social practices and relations that may be necessary and/or contingent (see chapter 3.3.1) and which are reflected in the approaches of investigators, prosecutors and other anti-corruption actors at the operational level. The social settings of regulation and the relationships developed (e.g. between regulators and regulatees) also add to this complex control landscape. With this in mind, these questions and issues therefore imply a qualitative research strategy as such rich and idiographic insights cannot be gained through quantitative approaches.

The methodological decisions made are developed in more detail in **chapter 3** ('***Methodology***') but some key aspects will be outlined here. Given the absence of criminological research into transnational corporate bribery, an inductive, exploratory approach to data collection may be expected, but much literature does exist on the control and regulation of corporate crimes within nation-states and such research influenced my prior conceptions towards this control problem. These research questions in tandem with prior knowledge on control and regulation therefore implied a realist, adaptive theory strategy (incorporating aspects of induction and deduction) towards data collection and analysis. My justification for this approach is as follows: a pure positivist, quantitative, nomothetic, deductive approach setting out to test hypotheses will not sufficiently understand the dynamic, multi-dimensional nature of the complex processes involved for those tasked with regulating corporate bribery. Conversely, a pure interpretivist, qualitative, idiographic, inductive approach does not give sufficient consideration to prior knowledge which can assist cumulative theory generation and fails to acknowledge structural properties of regulation, thus rendering it to a degree inflexible. The research approach enabled due consideration to be given to prior theoretical ideas but enabled key questions (see below) to be developed more specifically once data collection was underway.

This approach underpinned the adoption of a comparative research design - the need for comparison is implied in the problem of *trans*-national crime and control (as opposed to *intra*-national). This reflects arguments around the impact of globalisation. It has been debated whether or not there has been convergence in the character of crime problems and

control responses or whether globalisation actually accentuates divergence at the sub-national level - some localities are more vulnerable or resilient than others, have different governing capacities, inhabit different constitutional-legal contexts which constrain/enable the use of various control mechanisms (for discussion on globalisation and crime see for example Aas, 2007). Much can be learned from the contrasting responses of authorities in theoretically comparable jurisdictions to the challenge of transnational corporate bribery. Due to several key intellectual similarities and distinctions (e.g. centralised vs. decentralised enforcement systems; divergent prosecution rates; principle of opportunity vs. principle of legality; existence (or not) of corporate criminal liability; and, two key G8 economic states with the largest share of exports in the EU), comparative analysis of the UK[12] and Germany is particularly suitable for understanding the limits and strengths of national enforcement frameworks and therefore informing the conceptual and theoretical arguments around the policing and regulation of transnational bribery. Within these jurisdictions, semi-structured interviews with investigators and prosecutors, lawyers, representatives of intergovernmental organisations and NGOs, and other anti-corruption experts primarily in the UK and Germany (but also in France and Switzerland) were conducted. Participant observation within the corporate world and extensive bilingual document analysis was also carried out. This enabled rich and contextual insights to be gained into the functioning of a variety of enforcement and non-enforcement mechanisms (see chapter 2.7) at the national level.

The central purpose of this thesis is to address the analytical gap outlined above and its key contribution is to do so by drawing on the broader research literature on regulation to complement criminological insights which hitherto, and notwithstanding notable exceptions (see for example Whyte, 2007), have been preoccupied with problems of white-collar and corporate crime (so variously defined) *within* (rather than across) nation-states. The thesis draws upon a theoretical framework proposed by Gill (2000, 2002; see also Edwards and Gill, 2002) for understanding how regulation can be negotiated through an admixture of enforcement (e.g. criminal prosecution, civil sanctions, etc.) and non-enforcement (e.g. (enforced) self-regulation) mechanisms. The various theoretical approaches to regulation

[12] Specifically England and Wales, and Northern Ireland – Scotland is not included here as it constitutes a separate jurisdiction in relation to transnational corporate bribery (and other offences).

are examined in **chapter 2** (‘***Literature review***’). These mechanisms can be used to regulate populations within markets (e.g. corporations and their actors in international business markets) and reflect regulation as a social relationship between regulators and regulatees. The literature outlined in **chapter 2** shaped and guided the development of five key questions that emerged towards the beginning of the data collection process but that were frequently adapted throughout. These key questions (KQs) and the key findings of each are as follows:

> **KQ1: Are the available regulatory enforcement mechanisms for controlling corporate bribery in both jurisdictions converging due to policy initiatives of inter-governmental and regional organisations and bodies?**

Chapter 5 (‘***Legal frameworks of enforcement***’) demonstrates that at the international and interregional levels, organisations such as the OECD and the UN, in reflection of their ‘moral entrepreneurship’, create legal conventions outlining undesired bribery and corruption offences and related provisions that require implementing at the national level once signed and ratified. Similarly, at the regional level, the EU and Council of Europe (CoE) have produced conventions and requirements of member states in relation to anti-bribery and corruption. These international and regional conventions and legal instruments significantly shape anti-corruption legislation at the national level leading to a significant degree of convergence (although Germany is yet to ratify the UNCAC). However, significant differences remain - corporate criminal liability exists in the UK but not Germany, for example. These differences can co-exist within the ‘functional equivalence’ approach of international conventions and their monitoring and evaluating bodies (e.g. GRECO; the OECD’s Working Group on Bribery). This approach outlines that harmonisation of legal mechanisms to control corruption and bribery is not required within all states. Instead, it is considered more important that the ‘goals’ of the conventions are met rather than the ‘means’ that are used to implement anti-corruption enforcement being harmonised.

The policy initiatives of intergovernmental and regional organisations and bodies have therefore influenced enforcement mechanisms in the form of available legal mechanisms; but these policy initiatives hold less influence over the extent to which the law is enforced

and the ways in which states negotiate with corporations, particularly in relation to self-regulatory mechanisms. For example, aspects of the regulatory strategies of UK and Germany anti-corruption authorities demonstrate convergence in the decisions to utilise civil solutions rather than criminal sanctions. However, as analysed in **chapter 7** (‘***Theories of enforcement***’), convergence in prosecution policy is shaped by several antecedent factors such as the cultural and legal frameworks that emerged long before the policy initiatives of intergovernmental and regional organisations, as well as procedural, evidential, financial and structural obstacles that influence the policy response.

KQ2: Does the centralised enforcement system of the UK enable a more consistent and coordinated regulatory approach than that of the decentralised system in Germany?

KQ2a: But, are the higher prosecution rates of transnational corporate bribery in Germany due to the decentralised enforcement system that, combined with more generous funding, enables a larger number of cases to be investigated and prosecuted?

The enforcement systems and approaches of the UK and Germany are analysed in **chapter 6** (‘***Mapping the enforcement scene’***) and it is here that a key structural difference is outlined. In the UK, a largely centralised system is in place, where the Serious Fraud Office (SFO) is the lead agency for England and Wales, and Northern Ireland, taking responsibility for all cases of transnational corporate bribery that meet the ‘acceptance criteria’. The SFO does, however, receive support from several other enforcement bodies. In contrast, the German system is decentralised, with each of the 16 *Bundesländer* responsible for enforcement within their jurisdiction. This results in no central anti-corruption authorities, even in each *Bundesland*. Instead, there are over 110 Public Prosecutors’ Offices (PPOs) in all *Bundesländer*, some of which contain specialist anti-corruption departments, but some of which do not. These PPOs are supported by the police authorities in their corresponding *Bundesland*. For this reason, the regulatory approach in the UK does enable a more consistent and coordinated approach. Levels of enforcement vary across the German

Bundesländer as the extent of funding, political will and anti-corruption prosecutorial and investigatory expertise differs in each jurisdiction.

In contrast to the above finding, since the introduction of the OECD Anti-bribery Convention, Germany has prosecuted a significantly higher number of cases than the UK (see enforcement rates in **chapters 3** ('***Methodology***') and **9** ('***The default position'***). For example, recent figures suggest that at the end of 2010, Germany had concluded 135 cases but the UK only 17 as of May 2011[13]. These statistics are misleading and reflect a number of issues, not only the decentralised nature of Germany's enforcement system. Germany is able to process a larger number of cases due to the increased number of prosecutors and investigators that are tasked with this control problem, indicating larger availability of resources. The principle of legality (see KQ3 below) also influences the prosecution of small scale cases which may not meet the acceptance criteria of the SFO and reflects an attitude amongst German prosecutors and investigators to prosecute all cases where possible. But this does not present the full picture that is more complex. Germany has prosecuted a large number of individuals related to a small number of corporate cases. The Siemens case (see **chapter 4** '***Grounding the research problem'*** and **chapter 7** '***Theories of enforcement***') resulted in 24 individual prosecutions while other cases have involved multiple individual prosecutions. In addition, the first successful conclusion of a case in the UK only came in 2009, but since then, enforcement rates in the two jurisdictions have been more similar.

KQ3: Does the regulatory mix of enforcement and non-enforcement mechanisms differ in the UK and Germany because of their contrasting legal cultures? As the latter are guided by the legality principle, are regulators of corporate bribery in the UK more responsive?

KQ3a: Do UK regulators have greater discretion in the admixture of enforcement and non-enforcement of corporate bribery? Is the 'negotiation' of regulation more common? And, has there been greater innovation in (enforced) self-regulatory practices than in Germany?

[13] These enforcement statistics are available from Transparency International (TI) at: http://www.transparency.org/global_priorities/international_conventions <Accessed 08/11/2011>

The spectrum of available enforcement and non-enforcement mechanisms, ranging from criminal prosecution to self-regulation, as presented in the regulatory literature, are analysed in **chapter 2** (‘***Literature review’***). The analysis of the enforcement scenes in the UK and Germany in **chapter 6** (‘***Mapping the enforcement scene’***) demonstrates that the level of prosecutorial discretion traditionally differs in the two jurisdictions. Legal frameworks in the UK have long been guided by the principle of opportunity, while in Germany the principle of legality has been most influential. In the UK, the high level of discretion is a key component of the system – it enables the SFO to use specific acceptance criteria to determine their caseload while prosecutions need to have a realistic prospect of conviction and be in the public interest. The constitutional obligation in Germany to prosecute provided there is sufficient evidence provides a significantly more rigid procedural framework for prosecution than that of the UK. This, however, creates tensions between normative and practical concerns of investigators and prosecutors and the legal frameworks within which they operate.

In practice, German prosecutors are able to use legal alternatives to criminal prosecution such as section 153a StGB (German Criminal Code) that enables financial penalties in certain circumstances and the creative use of the statute of limitations which for corruption cases is five years in Germany. Despite significant distinctions between the UK and Germany as written in law, Germany, like the UK, has numerous possibilities for exercising discretion. Despite there being no strict criteria in Germany for taking on (or not taking on) corruption cases, as the SFO uses, German prosecutors still prioritise cases based on similar factors as the UK. For example, insufficient evidence, size of and complexity of case, public interest, and so on. With discretion being of fundamental significance in legal frameworks and in terms of practice, the key question is the extent to which this discretion is acknowledged by relevant actors (e.g. prosecutors, enforcement authorities, etc.) and whether these discretionary practices are regulated on a systematic basis or are open to misuse. In the UK, the practice of discretion appears overtly acknowledged (although its legitimacy has been questioned by the OECD) but in Germany there appears to be tension between law and practice because it is not possible to prosecute in a timely way all cases where there might be sufficient evidence. Besides, ‘sufficiency’ is often something that develops with

investigation. At the legal level there appears more scope for UK regulators to be responsive but in practice both UK and German regulators are able to operate responsively.

'Negotiation' reflects a key social relationship between the regulator and the regulatee in both jurisdictions and significantly influences the admixture of enforcement and non-enforcement mechanisms implemented by the regulator. The interactions between regulators and regulatees provide a basis through which successful negotiation can be achieved and such negotiation may be initiated by the regulator or the regulatee. A key component of negotiation is the dialogue that takes place between regulators and regulatees. Such dialogue may be informal, in the form of meetings at anti-corruption conferences where prosecutors actively engage with corporations or in the form of organised dialogue where, for example, state representatives meet with corporate representatives to offer advice. Dialogue becomes more formal once the above mechanisms are engaged. In practice, the process of negotiation in both the UK and German enforcement frameworks is common with similar developments in the innovation of (enforced) self-regulatory practices. The key difference is the promotion of such negotiation by the authorities. In the UK, this preference for negotiation is publicly and overtly promoted, most notably by the Director of the SFO who frequently encourages relations between the SFO and corporations. This is less the case in Germany where negotiation is less explicitly observable.

This negotiation can be seen in the prosecution policy of both jurisdictions. **Chapter 7** ('***Theories of enforcement***') demonstrates the extent to which both UK and German prosecutors are able use a varied mix of enforcement mechanisms (criminal and non-criminal) but also hybrid mechanisms tending towards self-regulation within corporations. For example, in the UK regulators have adopted a responsive approach to corporations, entering into civil agreements, although some individuals have been criminally prosecuted. As part of these agreements, corporations are often required to implement regime change, to introduce robust compliance systems, to actively cooperate by handing over relevant evidence, to repair damages through recovery and confiscation orders, to remove involved personnel and to implement significant structural and organisational measures – these are enforced by the state but reflect moves towards self-regulatory practices within specific

corporations. A similar approach has emerged in Germany but this is shaped more significantly by the legal framework that allows corporations only to be sanctioned through administrative mechanisms. There are, however, formal procedures available to ensure corporations 'self-clean', as in the UK model.

Such 'negotiation' and mitigating factors often result in non-prosecution for corporations but also reflect the procedural, evidential, legal and financial challenges faced by prosecutors in relation to criminal prosecution. Likewise, processes of self-investigation and self-reporting (although its efficacy appears limited) are a key approach by corporations looking to negotiate reduced sanctioning and an approach actively promoted by the regulators, particularly in the UK. In Germany, a significantly higher number of individuals have been criminally prosecuted (many in relation to the Siemens case) but there is also a strong trend towards the use of non-prosecution agreements. Both UK and German regulators are therefore similarly responsive in their ability to utilise a wide range of criminal offences, civil/non-prosecution mechanisms, but also hybrid approaches tending towards non-enforcement and self-regulation, albeit some differences do exist in relation to the approach towards legal and natural persons in the two jurisdictions.

> **KQ4: Are current enforcement systems, whether centralised or decentralised, inadequate for addressing transnational crimes due to the limitations of national jurisdictional boundaries and traditional forms of policing?**

Significant difficulties are faced by *sovereign* authorities in adapting to *transnational* corporate bribery that takes place *multi-jurisdictionally* in *international business transactions*. The transnational nature of corporate bribery creates significant procedural, evidential, legal and financial challenges for anti-corruption authorities and departments. For example, **chapter 6** ('***Mapping the enforcement scene'***) demonstrates how obtaining evidence from overseas jurisdictions to support prosecutions can be highly problematic. Such procedural and evidential burdens hinder investigation and prosecution when attempting to regulate corporate bribery at the transnational level. Similarly, **chapter 7** ('***Theories of enforcement***') demonstrates how the financial costs of criminal prosecution in times of economic austerity result in anti-corruption authorities and departments pursuing

more ‘cost-effective’ approaches, such as the use of civil solutions. Here, the legal limitations of identifying corporate criminal liability (e.g. its non-existence or high evidential burdens) are also demonstrated, providing a further challenge to prosecution. These challenges are evident in both the UK and German systems. Thus, both enforcement systems and traditional forms of ‘command and control’ policing approaches face difficulties when regulating complexly organised transnational corporate bribery and more innovative approaches to control are required. More specifically, criminal prosecution and criminal law enforcement are alone insufficient due to procedural, evidential, legal, financial and structural obstacles evident in both jurisdictions.

Correspondingly, due to intense pressure from intergovernmental and international organisations and initiatives, as well as corporations aiming to improve their compliance regimes to come in line with legal frameworks, a number of self-regulatory practices, or non-enforcement mechanisms, have emerged. These practices can be analysed in relation to the level of state intervention (e.g. state manufactured or organic within industry) and the level of formality (e.g. voluntary or mandatory). This emerging self-regulatory landscape is analysed in **chapter 8** (‘***Theories of non-enforcement***’) and demonstrates the necessity for non-state actors and organisations to play a significant role in regulation as promoted in several theories of regulation (see **chapter 2** ‘***Literature review***’). The emergence of non-enforcement mechanisms does not always reflect state intervention. In these cases, innovation on behalf of state regulators has little influence over the state-independent practices emerging although legal frameworks may have indirect influences while international and intergovernmental organisations influence the behaviour of corporations.

> **KQ5: Is corporate bribery, due to its *trans*-national, *multi*-jurisdictional, and therefore less visible nature, more impenetrable than other forms of corporate crime, such as health and safety violations, resulting in a certain degree of accommodation as admixtures of enforcement and non-enforcement mechanisms fail?**

Chapter 9 (‘***The default position’***) initially analyses the clandestine nature of transnational corporate bribery that results in a large ‘dark figure’ for this type of crime - much of this

form of criminality goes undetected and unreported and this presents significant difficulties for those aiming to measure the extent and scope of corruption and corporate bribery but also for anti-corruption authorities aiming to control this problem. The less visible nature of transnational corporate bribery creates difficulties for detection, as discussed in **chapter 6** (‘***Mapping the enforcement scene***’), while the impact of preventive self-regulatory mechanisms is unknown. Due to this lack of understanding of the extent of the corruption problem, and due to the limitations of enforcement, the control of transnational corporate bribery appears to reach only a small amount of these activities and of those that are reached, deals with them in a manner relatively favourable to corporations. Anti-corruption actors’ (i.e. enforcement agencies and international organisations such as the OECD and TI) estimations of the extent and scope of the problem do not account for the full picture of transnational corporate bribery – public authorities are only aware of those cases that come to their attention while estimates by international organisations are often based on methodological approaches beset by various inadequacies (see **chapter 9.2.1**). These estimates are nonetheless used as thresholds against which to understand how ‘active’ and effective enforcement at the national level is. However, the inadequacy of enforcement mechanisms and the unknown impacts of self-regulatory mechanisms to account even for the anti-corruption actors’ estimations of the problem results in the control of transnational corporate bribery being located within the ‘default position’ – a *status quo* that accommodates a certain amount of transnational corporate bribery, either due to an inability to control effectively or due to decisions (e.g. for economic/ideological reasons) not to fully prosecute. Antecedent influences to this ‘default position’ are the risk of regulatory capture and the revolving door phenomenon. As admixtures of enforcement and self-regulation are unable to control the (unknown) full picture of transnational corporate bribery, a certain degree of accommodation is inevitable. The emerging landscape of the regulation of transnational corporate bribery may be able to counter this, provided both enforcement and self-regulatory mechanisms are successfully utilised and implemented, and monitored and evaluated. This reflects a dynamic and flexible approach to the negotiation of regulation but given the embryonic stage of this emerging landscape, whether this will come to fruition is unknown.

1.2 Summary

Current 'command and control' regulatory approaches to enforcement that place significant emphasis on criminal prosecution and sanctions to impose standards are insufficient. 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 emerging regulatory landscape and policy response can be understood in terms of an admixture of enforcement (e.g. criminal prosecution, civil sanctioning) and non-enforcement mechanisms (e.g. self-regulatory practices). But only some level of regulation can be achieved, the proportion of which is unknown: determining 'what works' is more difficult than working out what does not work since there is little valid data on the impacts of control mechanisms (see **chapters 9.2.1** and **9.3**)

The overriding argument of the thesis, as drawn together in **chapter 10** ('***Conclusion***'), is as follows: despite significant differences (e.g. centralised or decentralised systems, existence of corporate criminal liability, legal cultures), both UK and German anti-corruption authorities (i) face similar difficulties in enforcement as they are limited by their national jurisdictional boundaries and face several procedural, evidential, legal, financial and structural obstacles but (ii) are converging towards similar prosecution policies (e.g. negotiation of civil settlements for corporations). However, in both cases, evidence suggests enforcement *and* emerging self-regulatory practices are limited in relation to the responsible authorities' *own estimation* of the problem and therefore (iii) the default position of the policy response is an accommodation of corporate bribery.

This research is significant for social scientific studies into the criminological phenomenon of transnational corporate bribery as well as for studies more broadly into theories of regulation. Current regulation theory is limited in the extent to which it can be applied to serious criminality organised at the transnational, multijurisdictional level. Theories of regulation tend to focus on the control of undesired behaviour within nation-states, rather than across nation-states. More specifically, regulation theory has tended to be based on empirical findings within specific industrial sectors (e.g. pharmaceutical industry), on relatively easily detectable and measureable forms of harm (e.g. health and safety crimes,

environmental waste), or on areas already under formal regulation (e.g. financial services). Transnational corporate bribery, in contrast to these examples, is a problem of all corporations and businesses that operate internationally and is therefore not limited to any one jurisdiction, sector or regulator. Instead, a multi-agency/departmental approach to controlling corporate bribery is in existence in the UK and Germany but these traditional 'policing' authorities are adopting regulatory techniques and approaches traditionally associated with those of industry regulators (e.g. enforced self-regulatory practices and persuasion). This research can also make a contribution to an area of public policy that is evolving quickly at a time when there is major pressure on public finances resulting in significant austerity measures. High-cost, labour intensive criminal law enforcement is part of this debate and the focus of this research on alternative approaches to the control of transnational corporate bribery, and criminal behaviour more broadly, is timely given this macro-social context and concern with public funding.

However, this research has several methodological limitations (see **chapter 3** '***Methodology***') that impact on the validity and reliability of the data collected. For example, the findings here are not generalisable to populations and lack external validity in this sense. However, given the character of the comparative cases a *moderatum* generalisation to theory was possible i.e. it is reasonable to expect that limitations in (non-)enforcement practices, amongst other findings, are applicable to other jurisdictions. The sampling process was selective and formal interviews were limited in number for a comparative analysis, though in mitigation, this reflected the difficulties of accessing elites (e.g. prosecutors, defence lawyers) and accessing closed organisations such as the SFO. The available sample was also unavoidably small in the UK given that only the SFO deals with these cases at the national level. However, the research was intended to illuminate rich and insightful data at the level of social relations which can most usefully be found through a qualitative research strategy that promotes an interpretative science that places meanings at the fore. The methodology also inevitably incorporates inherent biases, as interview questions and analysis were shaped by myself and may therefore inadvertently reflect my own conceptual and theoretical interpretations, although a triangulation approach was adopted to counter this.

This research, and its limitations, has implications for future research. **Chapter 10** (‘***Conclusion***’) expands on these issues by outlining potential areas for further research in order to develop and improve the methodological, theoretical, conceptual and empirical approach taken in this thesis. Further research must maintain the comparative dimension, opening up possibilities for collaborative and interdisciplinary studies into transnational corporate bribery, but also more broadly into crime in general as a means of developing the broad applicability of the theoretical model of regulation promoted in this thesis. Research needs to be conducted within the social contexts of transnational corporate bribery in order to understand the necessary and contingent relations that constitute this form of criminality and which are comparable across jurisdictions.

2

Literature review

2.1 Introduction

> 'I will take a tougher line on regulation, because I believe that often the most useful thing governments can do is simply to get out of the way. Every small business can tell a story of how they could do more and hire more people if they spent less time on form filling. Regulation is too often the creature of big businesses with the resources to handle it forcing out the small. The cost to business of regulation currently in the pipeline is around £20bn: far in excess of any direct help the Government does or can give. Of course regulation can be necessary to protect consumers, the environment and the labour force. But it must be proportionate. I used a statement to Parliament yesterday explaining how this Government will embark on radical steps to remove and stop unnecessary and costly regulation' (Dr. Vince Cable, Secretary of State, June 2010[14])

Following the creation of the Conservative-Liberal Democrat coalition government in May 2010, newly appointed Secretary of State for Business, Innovation, and Skills, Dr. Vince Cable, outlined his approach to business regulation. The above quote, from a keynote speech on growth, touches upon a number of key issues about regulating business which are important to this thesis, given the focus on bribes paid by corporations to obtain business contracts abroad. His words indicate his proposed approach to regulating business which seems to reflect his desire for less state intervention and therefore increased deregulation but that regulation should be 'proportionate' and that 'unnecessary and costly regulation' should be removed. He offers no indicators, however, to the question of what is proportionate (and perhaps assumes rationality among businesses in that they will respond accordingly to proportionate regulation), nor to what constitutes unnecessary regulation. This approach suggests a more targeted and parsimonious approach to regulation which was also the direction the previous government intended to go. As Cable's predecessor,

[14] Speech available at: http://www.bis.gov.uk/news/speeches/vince-cable-cass-business-school <Accessed 6/12/2010>

Peter Mandelson (2009: 7, emphasis in original[15]), stated, '[w]e used to talk about the light touch: now it's going to be about the **right touch**'. Thus, the Cable approach may be less radical and more rhetorical than substantial.

But the regulation of business faces a key contradiction: there is no widely accepted nor effective transnational law making and law enforcement body or mechanism – in other words, business becomes global but controllers are generally constrained by divergent domestic rules and limited jurisdiction (Passas, 1999: 400). As business becomes more global, its regulation remains at the local, national level (Braithwaite and Drahos, 2000). This inverse relationship between the globalisation of business and the focus of regulation at the national and sub-national level leaves the regulation of transnational corporate commerce ambiguous and such business transactions vulnerable to criminalised practices such as bribery and corruption. This is particularly the case where transnational corporate commerce is directed to under-developed economies within which regulatory frameworks are less able to address transnational corporate crimes. Thus, anti-corruption enforcement and regulation is national, and the investigation and prosecution of transnational corporate bribery can only be realised through cooperative practices (e.g. Mutual Legal Assistance (MLA)) between jurisdictions that face a number of procedural obstacles (see chapter 6.6).

This chapter aims to inform this problem, but first, relevant literature in relation to the regulation of transnational corporate bribery requires analysis. I begin by framing the thesis in relation to current criminological research in this area where I outline the empirical, conceptual and theoretical gaps in the academic literature in relation to regulating transnational corporate bribery. This is followed by definition of the key concepts of corruption and bribery, and an explanation as to how they are used within this research. I then highlight some of the key difficulties in regulating transnational crimes to enable the reader to understand the complexities involved with addressing this phenomenon. This leads to a discussion of the limitations of the state to manage and control this crime phenomenon. This raises the question of the ability of state agencies to 'police' corporate

[15] Cited in Better Regulation Executive (BRE) annual review 2009, available at: http://www.bis.gov.uk/assets/biscore/better-regulation/docs/10-578-striking-the-right-balance-bre-annual-review-2009.pdf <Accessed 6/12/2010>

bribery in the traditional understanding of 'policing' and leads to the suggestion that state agencies are shifting towards the 'regulation' of crime. It is here I argue for the need to import concepts from regulation theory, due to the conceptual limits of the notion of 'policing' and the evident shifts towards 'steering' and 'regulation' by state agencies. I then discuss and analyse the concept of 'regulation'. Theories of enforcement, theories of non-enforcement and integrated theories of regulation are then analysed and how these may apply to debates about the most appropriate form of regulating transnational corporate bribery. I then propose an analytical framework within which to locate the regulation of corporate bribery and conclude with discussion of the key theoretical arguments made and the extent to which these shape the key questions in this thesis.

2.2 Corporate bribery in the criminological literature

The groundbreaking work of Edwin Sutherland (1883 – 1950), who pioneered criminological research into 'white-collar' and 'corporate crime', despite being much criticised (see Nelken, 2007a for analysis of key ambiguities), provides a framework within which transnational corporate bribery and its control may be located. Defined as 'a crime committed by a person of respectability and high social status in the course of his occupation' (Sutherland, 1949: 9), Sutherland's definition of white-collar crime received much critique for its lack of clarity: this was to an extent acknowledged by Sutherland (1983: 9) himself, who indicated the use of the term was 'for convenience'. While Sutherland's definition focused on individuals, his research established prominent corporations as recidivist offenders, challenging the views of early criminologists concerned with the individual and sociological pathologies of lower class offenders (Croall, 2001: 2). He states:

> 'Corporations have committed crimes…These crimes are not discrete and inadvertent violations of technical regulations. They are deliberate and have a consistent unity…the criminality of the corporations, like that of professional thieves, is persistent: a large proportion of the offenders are recidivists' (Sutherland, 1983: 227)

Such 'corporate crimes', as a sub-category of the broader, umbrella concept of 'white-collar crime', have been defined as:

> '…illegal acts or omissions, punishable by the state under administrative, civil, or criminal law, which are the result of deliberate decision making or culpable negligence within a legitimate formal organization. These acts or omissions are based in legitimate, formal, business organizations, made in accordance with the normative goals, standard operating procedures, or cultural norms of the organization, and are intended to benefit the corporation itself' (Pearce and Tombs, 1998: 107-110).

This definition incorporates various forms of illegalities, but may be criticised for its adherence to state-defined crime along with its failure to incorporate dubious acts or omissions that have not been proscribed by criminal law; though a classification system based on 'informed morality' would raise further issues[16]. Even so, the concepts of 'white-collar' and 'corporate crime' are themselves inadequate and ambiguous, incorporating a diverse array of criminal (and non-criminal) acts and issues (although the same could be said for numerous other re-conceptualisations). Endeavours to conceptualise their meaning and extent, their perpetrators and victims, their regulation and control, or even whether they constitute crime, deviance, transgression or common business practice, have often led to difficulties. In addition, there are great methodological and theoretical problems exacerbated by the absence of adequate or generalisable empirical data (Tombs, 2005).

Despite Sutherland's (1945, 1949) earlier work and more recent research focusing on corporate *crimes*, the phenomenon of corporate bribery has received minimal direct and substantial empirical attention within the criminological academic community. A simple analysis of the content of major criminological journals over the last ten years reinforces this: between 2000 and 2010 the *British Journal of Criminology* contained only *three* publications related to transnational corporate bribery, and only two of these were directly relevant to the substantive focus of this thesis. These two were an analysis of the crimes of neo-liberal rule in occupied Iraq (Whyte, 2007) and a comparative study of corruption derived from a Public Lecture (Zimring and Johnson, 2005). In contrast, the journal contained 245 separate publications on the subject of 'murder' and 170 on the subject of 'burglary' over the same period. Likewise, the leading American journal *Criminology* contained 0 (zero) publications on the subject of transnational corporate bribery: while a number of hits for "corruption" were available, these focused primarily on police corruption

[16] Tombs' (2005) chapter in the most recent edition of the *Encyclopaedia of Criminology* outlines in brief relevant definitional, conceptual, theoretical and methodological issues. Attempts to incorporate acts outside the law are often criticised for being morally rather than legally informed.

and low-level corruption. Expanding the search from corporate bribery in international business to corruption more generally increases the available literature but shifts away from the substantive concern here. This trend is reflected in a number of other leading criminological journals[17]. In Germany, corruption and corporate bribery are discussed even less in the criminological literature, although this reflects not only a preference for 'conventional crime' but also the narrower development and emergence of criminology as an academic discipline (in the Anglo-American social scientific sense) in Germany. Issues of crime and criminality can be located largely within jurisprudence with only few university criminology departments or institutes in Germany. Some notable criminological and legal studies on corruption in Germany do nonetheless exist (see for example Bannenberg, 2002; Huber, 2002).

Analysis of the broader concepts of corruption and bribery can be found within other academic disciplines (for an overview see Shihata, 1997) such as political science (see Doig, 1984, 2003; Doig and Theobald, 1999; Gerring and Thacker, 2004; Goodin, 2010; Montinola and Jackman, 2002), economics (see Lambsdorff, 2007; Rose-Ackermann, 1999), law (see George *et al*., 2008) and sociology (Deflem, 1995). Literature addressing the specific issue of transnational corporate bribery can be found within the public, private and third sectors, as well as emanating from intergovernmental organisations (see chapter 8) but the limitation of such official accounts and conventions, etc., is the predilection for 'content definitions' rather than 'analytical definitions' of the phenomenon. With such accounts, it is also important to be mindful of the 'double hermeneutic' problem. For example, drafters of international anti-corruption conventions such as those of the UN and OECD (see below and chapter 5) place interpretations on what they are doing, meaning social scientists must interpret the interpretations of their research subjects. To do this, concepts from the social scientific language community are utilised but as demonstrated above, there is a lack of criminological conceptualisation and analysis of transnational corporate bribery. Consequently, there is a need here to import concepts and theoretical frameworks from other areas whilst being mindful of the hermeneutic problem of understanding different

[17] The content of six leading criminological journals between 2000 and 2010 was analysed. The titles, abstracts and full texts of all publications in this timeframe were searched for key words and phrases such as 'corporate bribery', 'corporate corruption', 'transnational bribery', and 'foreign bribery', etc. Any publications found were then analysed methodically to determine their relevance and use to this research.

jurisdictions from different perspectives. It is important to establish a broader framework of contemporary governance that provides the context for these processes.

2.3 Corporate bribery and corruption defined

The terms bribery and corruption are often used synonymously. Bribery is considered the main tool of corruption and is the main focus of international conventions aimed at tackling corruption. Within the field of political science, Joseph Nye (1967: 419)[18] offered an early definition of corruption, seeing it as 'behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gain; or violates rules against the exercise of certain types of private-regarding influence'. The definition addresses the key distinction between private and public roles. This distinction has continued to be of significance and results in a focus on public officials, as can be seen in more recent operational definitions (see below). A more sociological definition that focuses on the social relationships involved in bribery and corruption and develops the legal aspect is offered by Deflem (1995: 243), who defines corruption as a 'colonisation of social relations in which two or more actors undertake an exchange relation by way of a successful transfer of the steering media of money or power, thereby sidestepping the legally prescribed procedure to regulate the relation'. This second definition highlights the key role of social interaction as well as developing a more normative aspect in relation to socially constructed laws.

Official sources such as governmental reports and policy documents concerned directly with these issues often choose to offer no definition. In terms of criminal law, the anti-corruption and bribery conventions (OECD, UN, CoE) discussed in chapter 5 do not define corruption, instead establishing the offences for a range of corrupt behaviour (OECD, 2007: 19), therefore providing content definitions rather than analytical definitions. Thus, the conventions define international standards for the criminalisation of corruption by prescribing specific offences that may be located under the umbrella of 'corruption'. This is

[18] Interesting to note is that Nye's work is also frequently used as an argument to support the notion that corruption can be of use for a country's economy.

also applicable to legislation at the national level: from a criminal law perspective, broad definitions result in few prosecutions and convictions. In terms of policy, however, international definitions of corruption are more common, with one frequently cited operational definition from leading global NGO TI stating:

> 'Corruption is operationally defined as the misuse of entrusted power for private gain. TI further differentiates between "according to rule" corruption and "against the rule" corruption. Facilitation payments, where a bribe is paid to receive preferential treatment for something that the bribe receiver is required to do by law, constitute the former. The latter, on the other hand, is a bribe paid to obtain services the bribe receiver is prohibited from providing' (TI website, 2010[19])

This definition clearly covers a broad range of corrupt activities but signifies the real relations and social practices that often appear in the processes of corrupt activities. As the OECD (2007: 19) indicates, the definition is useful as a reference for policy development and awareness-raising as well as for elaborating anti-corruption strategies, action plans and corruption prevention measures. Thus, in addition to the above academic conceptualisations, there is also often a need for operational definitions that can be of use in real social settings.

As indicated in the above definition from TI, the phenomenon of bribery is one of the main tools of corruption. Each country has its own laws and regulations aimed at tackling corporate bribery and corruption and the country-specific legal situations in the UK and Germany are discussed in chapter 5. It is worthwhile here, however, to provide an official definition of bribery. A recent leaflet produced by the Department for Business Enterprise and Regulatory Reform (BERR [now Department for Business, Innovation and Skills (BIS)], in conjunction with other government departments broadly defines bribery as,

> 'the receiving or offering/giving of any benefit (in cash or in kind) by or to any public servant or office holder or to a director or employee of a private company in order to induce that person to give improper assistance in breach of their duty to the government or company which has employed or appointed them' (BERR, 2008[20])

Similarly, TI defines bribery as:

[19] Available at: http://www.transparency.org/news_room/faq/corruption_faq#faqcorr1 <Accessed 29/11/2010>
[20] BERR leaflet available at: http://www.bis.gov.uk/files/file46888.pdf <Accessed 29/11/2010>

> 'The offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, etc.)' (TI, 2009)

These definitions of bribery direct us towards the key actors, relations, processes, objects and employment settings that exist during the processes of transnational corporate bribery. Distinctions between 'active' and 'passive' bribery are also made (see chapter 5.7.1). However, what constitutes 'improper assistance' is not clarified in the first definition – whether the definition is limited by illegal acts or also incorporates immoral acts is not clear. The second definition makes this clearer with reference to actions which are 'illegal, unethical or a breach of trust'. So defined, bribery poses multiple complexities for state agencies aiming to control and regulate corruption but these agencies and actors are largely concerned with illegal acts. Legal but immoral or unethical actions that fall into the grey area of bribery and corruption are also the concern of NGOs and other third sectors organisations (see below). Moral definitions (i.e. broader than the law so as to include legal but undesirable acts) of corruption and bribery may allow freedom from more narrow and restrictive definitions but it is legal definitions that are of operational importance for anti-corruption agencies.

It is important however to be wary of such singular and abstract concepts such as 'bribery' and 'corruption' which can reflect political, academic, or operational aspirations for theoretical or rhetorical purposes, or in other words, their *constructed* rather than obvious and objective qualities. Such abstract terms are difficult to locate in real social relations. Analytically, it is of more use to focus on the processes involved in the giving of bribes, focusing on aspects such as how the finances to bribe are obtained, how potential bribe receivers are identified, etc. (see for example Levi and Lord, 2011; Levi, 2007: 779 more generally), but this will not be dealt with here. By focusing on transnational corporate bribery for the purposes of this empirical research, generalisations to broader problems of 'corruption' or 'corporate crime' *per se* cannot be made. Similar debates about conceptualisation have been addressed by Edwards and Levi (2008) in relation to the abstract nature of 'organised crime' in comparison to the 'organisation of serious crimes' which presents a more concrete and plural notion that can be found in real social relations, as Levi (2008) also addresses in his focus on 'organised fraud and organising frauds'.

Decisions as to whether to employ relatively 'elastic' or 'inelastic' concepts in relation to debates surrounding generalisation-reification on the one hand and specification-decontextualisation on the other are vital (see Edwards and Gill, 2002). For example, the concept of bribery may have different meanings in different social and legal cultures. The extent to which culturally-specific constructs of bribery can be stretched into other cultural contexts without losing their meaning is key and poses a significant problem for policy entrepreneurs developing international conventions attempting to standardise the understanding of bribery and norms for 'its' control. However, the concept of bribery can be understood through processes and practices that can be labelled as bribery, such as the use of hospitality to secure business contracts and therefore market advantage. Such practices and their intentions may be understood in the UK and Germany independent of the concept of 'bribery' while international conventions leading to policy convergence (see chapter 5) may allow greater cross-cultural elasticity of concepts of bribery. There is potential to transcend such debates about conceptualisation by understanding the phenomenon of corporate bribery in terms of the regulation of, and interactions within, the markets in which these activities occur.

As per the above definitions, I consider corruption and bribery as incorporating the involvement of at least two willing (active or passive) actors with no direct victims, that may involve different forms of inducements ranging from cash bribes in the millions to more indirect hospitalities or non-monetary favours, which result in the commission or omission of certain acts that breach one's duties for private gain, and which are prohibited under national and international laws. This thesis focuses specifically on *corporate* bribery, that is to say, bribery involving individuals within corporations carried out for the benefit of the corporation in the context of business - as in law, a distinction may be made between 'legal' (i.e. corporate entities) and 'natural' (i.e. individuals) persons. However, my focus excludes bribes paid by corporations domestically and instead focuses on transnational bribery, explicitly incorporating *multi*-national corporations. I am therefore examining corporations that operate at the international level across at least two jurisdictions in terms of their business activities and which are governed by national *and* international laws. Other forms of corruption and transnational corruption do of course take place, but for conceptual and empirical purposes, it is the control and regulation of transnational corporate bribery that is

examined. Table 1 outlines the key elements of corporate bribery of public and private officials whereby bribery may occur domestically and/or transnationally and may be 'active' and/or 'passive'. Such bribery may occur between private and public actors (i.e. public bribery) and/or between private actors (i.e. commercial bribery). As with the above definitions, bribes may be given or offered, or accepted or solicited. The detection, investigation, prosecution and prevention of such processes have numerous difficulties. It is the regulatory approach that incorporates these processes that is examined through the empirical investigations that form the key questions within this thesis.

Form of bribery	**Origin of bribe**	**Recipient of bribe**	**Transnational or domestic?**	**Active or passive?**
Public bribery (private-public)	Corporation (i.e. board member, employee, subsidiary, intermediary, agent, etc.)	Public official (i.e. foreign or domestic state representatives e.g. politician, state owned firms, police officer, etc.)	Both	Both
Commercial bribery (private-private)	Corporation (i.e. board member, employee, subsidiary, intermediary, agent, etc.)	Private official (i.e. corporate competitor, vendors/contractors, etc.)	Both	Both

Table 1: Corporate bribery of public and private officials

2.4 Controlling corporate bribery in international business transactions: the challenges of policing

Business transactions are increasingly transnational in nature, a factor that has opened up increased opportunities for white collar crimes and the possibility of externalising risk (Gibbs *et al*., 2010: 544): although the possibility of externalising risk for corporations using third-parties and intermediaries to bribe may decrease now the 'corporate offence' of the UKBA has come into force (see chapter 5.7.3). According to Passas (1999), cross-border crime is

the product of 'criminogenic asymmetries' which incorporate conflicts, mismatches and inequalities in the spheres of politics, culture, the economy and the law. This is intensified through globalisation while simultaneously there is no widely accepted or effective transnational law making and law enforcement body or mechanism. In other words, business becomes global but controllers are generally constrained by divergent domestic rules and limited jurisdiction (Passas, 1999: 400). The intense legal debates about extradition to the US of British businesspeople (e.g. the NatWest Three) and hackers (e.g. Gary McKinnon) illustrates the furore extraterritorial reach of the law can cause. Additionally, the global marketplace intensifies the impacts of white collar crimes and risky transactions as we have seen most recently with the global economic crisis and subprime mortgage lending (Gibbs *et al.*, 2010: 544). Thus, the difficulties for states attempting to regulate the behaviour of transnational corporations often include a host of political concerns and economic interests (Rothe, 2010: 561; Snider and Bittle, 2011).

Attempts at global regulation often encounter inconsistencies in the legal requirements between and across jurisdictions and international treaties aimed at harmonising regulation are generally not mandatory (Passas, 2002). Countries are therefore not obliged to ratify relevant treaties and if ratified, the resources required to enforce them are not available (Chaise *et al.*, 1998). This can be seen with Germany, which has signed but at the time of writing is yet to ratify the UNCAC (see chapter 5.3.2). In some instances, multi-national corporations may even be able to operate within 'transnational loopholes' (Rothe, 2010: 561 citing Michalowski and Kramer, 1987) (e.g. using overseas subsidiaries to conduct business using bribery in jurisdictions where accountability to the parent company would be difficult to ascertain). However, not all transnational corporations are criminogenic in nature but criminal activity is more likely to occur under favourable conditions which 'lure' individuals and corporations: this is particularly so if they are predisposed to such behaviour and if there is a lack of self-constraint and credible oversight (Gibbs *et al*. 2010). Thus, lure, predisposition, temptation and non-credible oversight combined with the nature of international transactions pose significant challenges for regulation and enforcement (Gibbs *et al.*, 2010: 549-550): this does, however, present a somewhat conflicting theoretical explanation with elements of rational choice, determinism, self-control and opportunity

theories mixed together but understanding the conditions under which bribery may take place is useful for informing preventative and repressive regulatory approaches.

It has further been argued that powerful nations may also have the ability to influence the creation of international treaties and therefore protect their business activities by resisting criminalisation or refusing to ratify treaties (Michalowski and Bitten, 2005). Developing countries may also be unable to enforce laws and treaties due to insufficient infrastructures and resources (Shover and Hochstetler, 2006). Policing and controlling transnational crimes at the international level, while providing useful international conventions and agreements, is hampered by difficulties in enforcement. Thus, despite attempts to develop and increase the global regulation of business, such regulation largely remains at the local level (Braithwaite and Drahos, 2000). Anti-corruption enforcement is national, and the investigation and prosecution of transnational corporate bribery can only be realised through MLA (see chapter 6.6). The scope of national laws in the UK and US enable a larger reach, with any company or business based or formally passing funds through these countries liable for investigation and prosecution. However, the anonymity involved in international business transactions via numerous financial institutions and through difficult to access jurisdictions causes great difficulties for regulation (Elliot, 2009). Likewise, distant relationships between 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 (Gibbs *et al.*, 2010: 550). Although the work of Gibbs *et al.* (2010) focuses on the global trade in electronic waste, the solution they offer may also be applicable to corporate bribery in international business transactions. They suggest rather than the promulgation of rules, the use of 'smart' (Gunningham and Grabosky, 1998) or 'responsive' (Ayres and Braithwaite, 1992) regulation through a combination of prevention, third-party regulation and state intervention may promote more effective practices. This notion will be explored further in this chapter.

2.5 Limitations of the state? Power, knowledge and legitimacy

The challenges faced in policing transnational crimes due to their cross-border nature, as outlined above, form only one area of complexity. A second set of difficulties refers to the ability of the state to manage and control transnational corporate crimes. The perceived normality of high crime rates in society along with acknowledgment of the limitations of the criminal justice system in official discourse have eroded the myth of modern societies that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries (Garland, 1996: 448) – it is here the basic contradiction between *inter*-national cooperation to deal with *trans*-national problems becomes clearer. As Garland (1996) suggests, this predicament of crime control in late modern society resulted in governments developing new strategies (e.g. 'responsibilisation', 'defining deviance down', 'redefining success and failure'), hysterically denying the problem (e.g. adopting punitive policies that do not reflect evidence), and emphatically reasserting the old myth of the sovereign state (e.g. punitive policies to reaffirm force of law). For example, new genres of criminological discourse such as rational choice and routine activity theory as well as opportunity and situational crime prevention theory became increasingly significant in mid-1970s UK with emphasis being placed on the role of organisations, institutions and individuals of civil society, rather than the state. One key strategy of governing crime that emerged was that of 'responsibilisation' (see O'Malley, 1992). As Garland (1996: 452) states, '[t]his involves the central government seeking to act upon crime not in a direct fashion through state agencies (police, courts, prisons, social work, etc.) but instead by acting indirectly, seeking to activate action on the part of non-state agencies and organizations' – such responsibilisation strategies are a one-way process reflecting the intentions of the state to manufacture self-regulation but similar self-regulatory practices may also emerge independent of state influence (see chapter 8). More recent research has similarly indicated that 'in the absence of effective national and intergovernmental regulation to ameliorate global environmental and social problems, "private" alternatives have proliferated, including self-regulation, corporate social responsibility, and public-private partnerships' (Bernstein and Cashore, 2007: 347). The key theme is that crime control and prevention is not, and cannot be, the responsibility of the state alone, and that private agencies and individuals must recognise their responsibility and be persuaded to

change their practices in order to reduce criminal opportunities and strengthen informal social control. In this model of 'governance-at-a-distance', the state maintains all its traditional functions while simultaneously taking on a new set of coordinating and activating roles, thus leaving the 'centralised state machine' more powerful and with extended capacity but also eroding the idea of the state as the 'public's representative and primary protector' (Garland, 1996: 454). Thus, traditional understandings of the roles of 'sovereigns' and 'states' in relation to crime control have been substituted by concepts of 'governance' that involve a 'process of co-ordination, steering, influencing and balancing' the interactions of public and private groups' (Kooiman, 1993: 255). This also reflects Foucauldian notions of 'governmentality', whereby governance through institutions and varying social practices can be viewed as mechanisms for exercising power over individuals (see Foucault, 1991).

While Garland (1996, 2001) outlined this shift, the work of Gill (2002: 527-528) aids in explaining how the shift can be understood through the knowledge and power problems facing states. Social and economic subsystems in a complex and economic world are highly impenetrable, meaning states and outsiders cannot learn how they work. Where information is required from social and economic subsystems in order to control and/or regulate them, the regulatees have some important tactical powers, though they may be punished if they are found to have withheld information they are legally obliged to disclose (see for example the recent News International case[21] as well as countless corporate crime cases). There are therefore no possibilities for the state to obtain the information independent of those who are to be regulated. If this knowledge problem can be solved, the 'power' problem arises: state agencies and authorities often do not possess sufficient powers and instruments of policy with which to influence the processes of the subsystems (Mayntz, 1993: 13-16). As Mayntz notes:

> 'The assertion basically is that the state, because of the inherent short-comings of its traditional instruments, is not able (any more) to solve the economic and social problems it has identified. Since the state is not able to steer social development in a preferred direction, in order to prevent unwanted developments it is either necessary to look for alternative instruments or to lower the aspirations of central-state control' (Mayntz, 1993: 10)

[21] See article in *The Guardian (*20/07/2011): '*News International "deliberately" blocked investigation*', available at: http://www.guardian.co.uk/media/2011/jul/20/news-international-deliberately-blocked-investigation <Accessed 21/09/2011>

While knowledge and power problems apply to *legal* social and economic activities, they apply in greater force when the state aims to control *illegal* social activities (Gill, 2002: 529, emphasis in original). If the state has difficulty monitoring or gaining access to information from large corporations about their legal operations (e.g. to maintain competitive advantage etc.), it is likely this difficulty is even greater when corporations protect information about their illegal operations (e.g. disguising the making of facilitation payments overseas).

The argument above outlining the shift in the state's role in crime control to incorporate public-private partnerships and multi-agency policing, and to encourage individual and private agency responsibilisation dismisses those approaches proposing that state capacities for enforcement exist. For example, criminologists working in the tradition of Carson (who influentially studied the conventionalisation of crime in the Factory Acts (Carson, 1979) and the 'motivated regulatory failure in the UK offshore oil industry' (Slapper and Tombs, 1999: 46 making reference to Carson (1982)) argue that under-enforcement can be addressed through changes in political will, proactive inspectorial strategies and increased resources (see Slapper and Tombs, 1999: 186; see also Pearce and Tombs, 1998; Tombs and Whyte, 2007). This is because 'many corporate crimes tend not to be one-off acts of commission, but are actually ongoing states or conditions' (Slapper and Tombs, 1999: 185). For example, the maintenance of false records and collusive relationships, amongst others, would be such 'states' that would be detected through proactive approaches supported by increased resources. Inadequacies in enforcement may also be explained through arguments purporting state complicity in the production of corporate crime: state failures to implement effective legal regimes or to enforce current laws; states being actively complicit in their relationships with the corporate sector e.g. as partners in economic activity; and the state being implicated in the production of corporate crime through the complex inter-dependence of apparently separate sets of entities e.g. state-corporate crime are ways in which the state may be complicit (Tombs, 2011: 70).

Such approaches argue that 'deterrence as a principle informing enforcement activity and the sanctioning of corporate crime has considerable potential' (Slapper and Tombs, 1999: 187). For such scholars,

> 'effective forms of deterrence constitute a condition of existence for law-abiding behaviour on the part of organisations or corporations; that is, the existence of a likelihood of detection and credible sanctions following successful prosecution makes it possible for corporations to obey the law, and thus is central to effective *regulation*' (Slapper and Tombs, 1999: 188, emphasis in original)

This argument is central to debates about the adoption of enforcement (particularly criminal and civil sanctioning) or the promotion of self-regulation as a means of changing behaviour. These rival accounts of the problem of policing corporate crimes present a framework within which the regulation of transnational corporate bribery can be explored. These contrasting approaches and alternatives are analysed below, but first, a distinction between 'policing' and 'regulation' needs clarifying. Transnational corporate bribery is a multi-sector, multi-industry phenomenon where no one 'regulator' has responsibility; instead the problem of corporate bribery remains within the remit of law enforcement agencies but the activities of these agencies reflect approaches more in line with traditional understandings of 'regulation'.

2. 6 Conceptualising the problem: policing vs. regulation

> 'Even though law enforcement remains an area in which states still seek to act as "sovereigns", an examination of what police do suggests that, here too, there are distinct signs of "steering" – an activity more normally associated with regulation' (Gill, 2002: 524)

The key question here is to what extent traditional notions of 'policing', as part of the state's apparatus, provide a useful framework for understanding the control of corporate bribery. The answer lies in the shift towards forms of 'steering', 'governance' and/or 'regulation' (see Kooiman, 1993; Gill, 2002). Literatures utilising the concepts of 'policing' and/or 'regulation' are largely separate, implying some form of distinction between the two types of activities, although more can be gained from viewing the two as essentially similar, rather than essentially different (Gill, 2002: 524). In other words, the similarities between policing and regulation are more analytically significant than their differences. As Gill (2002: 524-526) notes, the enforcement behaviour of police has traditionally been associated with the criminal prosecution of offenders, with prosecution being seen as a 'result' (see for example Reiner, 2000: 89-90). Conversely, non-police agencies, or regulators, seek compliance via alternative measures, with prosecution being seen as unproductive and a last resort (see

Hawkins, 1998: 295). This reflects the ideological/strategic distinction that criminal law seeks to punish anti-social conduct rather than encourage certain purposive activities (Baldwin *et al*., 1998: 3) and this is shaped by internal cultures and 'working rules' (see Dixon, 1997: 7-8) or 'social practices' (Lange, 1999: 549-550). Kagan (1984) reinforced these differences by outlining the differing social functions of police and regulators in relation to their mandates, and the types of offences and offenders they deal with but acknowledged that some commonalities are evident, especially in some forms of policing more than others. Such decades old research may not reflect contemporary policing, however, where more non-traditional methods, such as the use of community approaches, regulatory, disruption and non-justice system approaches, and private sector involvement in relation to the prevention of organised crime, have been developed (see Levi and Maguire, 2004). Likewise, new policing models concerned with combating harms and threats, not just law enforcement, have emerged as can be seen in the radical Dutch model of organised crime prevention and the UK's Serious Organised Crime Agency (SOCA) (Edwards and Levi, 2008).

Some have found this distinction between policing and regulation unconvincing (Baldwin *et al*., 1998; Gill, 2002). For example, the significance of discretion in light of an inability to adopt full-blown enforcement approaches has long since been acknowledged (Goldstein, 1960). As Gill (2002) notes, further studies of policing have indicated that individuals are able to negotiate their way out of prosecution dependent on their acceptance of wrongdoing and the authority of the police to use compliance techniques such as warning and cautioning: thus, 'prosecution is no more the "normal" outcome of policing than it is of regulation' (Gill, 2002: 526). In the specific context of corporate crime, this shift has been acknowledged by Wells (2011: 13) who states 'enforcement of criminal law against corporate crime increasingly uses classic regulatory techniques of negotiation and settlement'. This shift, however, has been influenced by the power and knowledge problems of the state along with the limitations of the sovereign to deal with crime control. By broadening the understanding of 'policing' beyond criminal law enforcement to incorporate other mechanisms for controlling, regulating, and changing the behaviour of populations, it is possible to gain richer insights into various levels of formal and informal control in relation to corporate bribery in overseas commerce. Consequently, this research

imports analytical concepts and theories from the related field of 'regulation' and it is towards these concepts and theories that this chapter now turns.

2.6.1 What is 'regulation'?

The concept of regulation, while appearing to be easily understood, is often discussed in the literature with varied meanings. As noted by Baldwin and Cave (1999: 1-2), '[r]egulation is spoken of as if an identifiable and discrete mode of governmental activity, yet the term has been defined in a number of ways'. They therefore suggest it is useful to think of the word regulation being used in four different senses. First, it may be considered as a *specific set of commands* where regulation involves the promulgation of a binding set of rules to be applied by a devoted body. Second, as *deliberate state influence* where regulation is considered broadly and includes all state actions designed to influence industrial or social behaviour. This would include command-based regimes but also other modes of influence such as those based on the use of economic incentives. Third, as *all forms of social control or influence* where all mechanisms affecting behaviour, whether state-derived or from other sources, are considered regulatory. Fourth, while regulation is often considered restrictive and preventive, the influence of regulation may also be *enabling or facilitative* such as in the regulation of broadcasting operations. Many of these components of regulation (but not all) can be seen in the following definition provided by Scott, who states:

> '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' (Scott, 2001: 331)

This definition usefully directs us to the need to broaden our understanding of policing beyond criminal law enforcement to incorporate other mechanisms for regulating the behaviour of individuals, but also populations. It touches upon the potential for informal responses and there is a normative and prescriptive focus to the definition. Thus, regulation can be thought of broadly, encompassing a wide array of social mechanisms from state agencies through institutional discipline and control as in the Foucauldian sense, to individual self-control and responsibilisation as per Garland (1996; 2001). On the other

hand, it can be viewed narrowly as in a traditional understanding of the regulation of a particular sector such as financial services, and perhaps as the quotes at the start of this chapter refer to in relation to the specific regulation of business. The concept of regulation, then, can be used to cover a broad range of processes and actions (or non-actions) which aim to provide a framework within which companies and individuals can operate in a manner appropriate and acceptable to state or mainstream norms and/or laws. It is the non-compliance of companies paying bribes within such regulatory frameworks and the ways in which this is dealt with that is of interest in this thesis. In line with this, and with reference to the academic literature on regulation, a number of specific approaches have been advocated in relation to the most appropriate means of dealing with corporate 'misbehaviour'. This literature provides a broad set of concepts for comparing regulatory regimes (in, for example, the UK and Germany).

Thus, the nature and context of corporate bribery, in that it is embedded within business and industry, and often involves government aims and ideologies, creates numerous tensions. One key tension is that between the most relevant and effective form of control and response and the level of state intervention this should involve. Thinking in terms of 'regulation' provides a set of concepts for analysing how behaviour can be shaped beyond the use of traditional law enforcement and 'policing' approaches. While criminal law enforcement and prosecution remains significant, it is not only enforcement mechanisms (prosecution, penalties, cautioning, licensing and taxing, and disruption, etc.) but also forms of non-enforcement (self-regulation) that are key in understanding the regulation and control of transnational corporate bribery.

2.7 'Regulating' corporate bribery in international business transactions

Historically there have been numerous debates between regulators and between academics as to the most appropriate approach to effective regulation. On the one hand there are those who believe that compliance to the law requires a significant element of deterrence and the use of severe sanctions and criminal prosecution. On the other hand, there are those who advocate an approach more in line with the persuasion of businesses to comply

with the law. These polemical approaches have been referred to as models of 'deterrence' as opposed to models of 'compliance' (Reiss, 1984) although some analysts have argued it is a question of 'when to punish; when to persuade', incorporating aspects of both (Ayres and Braithwaite, 1992: 21). It is this latter perspective that largely reflects contemporary thinking on regulation (see 2.7.4 below).

The following section expands upon these debates and is demarcated into theories of enforcement, non-enforcement, hybrid mechanisms and integrated theories. The concepts of enforcement and non-enforcement mechanisms are referred to frequently in this thesis. Enforcement mechanisms refer to those 'tools', strategies and practices implemented in a formal manner by the state in order to 'enforce' the law. For example, criminal prosecution and civil sanctioning by the state would fall into this category. Non-enforcement mechanisms refer to those 'tools', strategies and practices that involve minimal or no state intervention to enforce the law: self-regulatory practices, such as those developed through business initiatives, are the most prominent example. However, non-enforcement also refers to practices of accommodation or collusion (see 2.8 below) where the state is unable or unwilling to enforce the law. Hybrid mechanisms incorporating aspects of both enforcement and non-enforcement practices, such as enforced self-regulation within business, are also possible. Integrated theories incorporate aspects of all these approaches and place them within varying conceptual and theoretical frameworks.

2.7.1 Theories of Enforcement: compliance vs. deterrence

Debates analysing compliance and deterrence approaches often focus on the role of criminal prosecution although at times the symbolism of the criminal process, rather than compliance or deterrence specifically, seem to be embodied in their arguments. For Pearce and Tombs (1990: 423), the 'compliance' argument that illegal corporate conduct requires different forms of regulation and a particular enforcement attitude or response than other forms of law-breaking due to its unique nature is 'neither logically nor empirically persuasive', since they reinforce the unfair nature of corporate criminality and of its regulation. They go on to suggest that the distinction between 'traditional' criminals and corporate offenders incorporates real and ideological aspects. They state:

> 'The distinction describes certain aspects of reality in that business is an activity which has certain socially useful consequences. But it remains largely ideological in that it implies that the corporation can have a primary commitment to act in a socially responsible manner; it is ideological in that illegalities are considered to form a marginal rather than an inherent element of business activity; and it is ideological in its acceptance of business's own definitions as to what constitute "reasonable" regulations. Once these assumptions which underpin the distinction between "traditional" and "regulatory" offenders, and the different regulatory responses engendered by this distinction, are challenged, then both the distinction itself and the arguments against the "policing" of industry are greatly weakened' (Pearce and Tombs, 1990: 439).

Thus, Pearce and Tombs call for the policing of industry in the form of a regulator-as-policeman strategy although empirical evidence produced by advocates of the compliance model points to the impracticability of such an approach (Hawkins, 1990). They go on to advocate stricter sanctions with prosecution taking place earlier in the process along with the use of a more varied set of sanctions and legal action in each and every case. As they state, '[a] punitive policing strategy is necessary, desirable, and practicable' (Pearce and Tombs, 1990: 440). However, their empirical focus on health and safety violations renders their inferences to industry-wide regulation or all industry sectors insufficient: such violations are inherently different from those of corporate bribery in international business transactions. Both compliance and deterrence approaches can utilise criminal and civil penalties but the regulatory (i.e. compliance) approach can be distinguished from criminal law in two ways: 'it targets those engaged in specialised activities and its underlying purpose is said to be different in that regulation is concerned to mould or encourage behaviour rather than to condemn it' (Wells, 2011: 15). As indicated above, and also in line with the thesis of Wells (2011: 15), such binary distinctions are debateable and 'the lines between regulatory and criminal procedures are becoming more tangled and blurred'.

Corporate bribery, as examined in this thesis, involves the committing of unlawful acts or bribes between corporate bribe-givers and bribe-takers whereby no direct, physically harmed victims are present (although indirectly such bribes could lead to physical harm to individuals and the wider society as in the Innospec Ltd. tetraethyl lead (TEL) case in relation to lead poisoning (see chapter 4.4)). There are of course economic victims in the individual (e.g. consumers may end up purchasing poor products), organisational (e.g. corporations that lose out on contracts) and societal (e.g. market distortion and instability) sense, but such harms are considered indirect. Health and safety violations meanwhile incorporate commissions and omissions, are often victim-centred with a focus on direct physical harms

and consequences. Thus, a key distinction would be the type of harm caused, i.e. physical or economic (not to mention emotional and/or behavioural), and it would therefore be difficult to justify a blanket application of certain sanctions (e.g. criminal prosecution leading to incarceration) to all corporate crimes given the diversity of harms caused and the nature of the acts (or omissions) that have occurred.

Hawkins suggests the critique offered by Pearce and Tombs on 'existing socio-legal work on social regulation is based on misinterpretation, misunderstanding, and misrepresentation' (Hawkins, 1990: 444). He agrees with the argument that 'it is important to enhance regulatory control over business' and in his opinion, 'stricter enforcement and harsher penalties for regulatory violations are in many instances necessary' (Hawkins, 1990: 444). He points out that while socio-legal policy issues in social regulation look at what the rules should be, and how flexibly or rigidly they should be enforced, Pearce and Tombs fail to address the former other than to stress the need for tougher rules, and in terms of the latter, they do not indicate how rigid enforcement should be or the circumstances in which flexibility could be justified (Hawkins, 1990: 461).

The difficulty with such debates and the reason why progress is rarely made stems from the policy arguments of such scholars who 'assume as givens exactly those political realities which their critics would like to see changed' (Nelken, 2007a: 756). For example, as Nelken (2007a: 757) points out, 'Pearce and Tombs do seem correct in tracing the difference in approach to the (untested) assumption that businessmen are basically disposed to respond well to a compliance approach whereas ordinary criminals are presumed to require punishment, but they prefer the equally untested assumption that businessmen should be dealt with as "amoral calculators"'. As Nelken notes,

> '…the assumption behind much of this work is that business behaviour is in fact particularly well suited to the application of deterrent criminal sanctions. Offences ('it is alleged') are strictly instrumental and offenders have much to lose from prosecution; prison, if only it were to be used more regularly, would be more potent than for ordinary criminals' (Nelken, 2007a: 753)

Thus, such arguments suggest the use of deterrents in the form of criminal sanctions and in particular incarceration are highly appropriate to business offenders. Nelken acknowledges

that such inferences are just assumptions, a point supported by Levi (2010), who states that there is no hard evidence of the relative and absolute impacts of civil and criminal sanctions on tax offenders. He does suggest, however, that 'increased prosecution might be justified for purposes of moral retribution as well as perceived social fairness' (Levi, 2010: 493). He states:

> 'The use of the criminal sanction has a moral component. Governments criminalise acts on the basis that they are morally wrong and deserve public sanction – not just as a pragmatic technique for controlling the behaviour more effectively' (Levi, 2010: 507)

The role of morality or the context of public norms and attitudes towards tax noncompliance in this instance, and not just deterrence, is important. Arguments for the use of criminal as opposed to non-criminal proceedings for these reasons, however, 'needs to be interspersed with a suite of other sanctioning mechanisms that have political support and that are embedded in the public's understanding of how justice can be delivered in the domain of tax noncompliance' (Braithwaite, 2010: 515). Increased prosecutions, however, may be necessary for fairness and may also positively impact upon voluntary compliance (Leighton, 2010: 529) although this raises significant questions as to the meaning of fairness and fairness for who and for what. However, the issue of morality raises another dimension to this debate. Whether governments criminalise acts on the basis that they are morally wrong (*mala in se*), or on the basis that some factions of society (influenced perhaps by the 'moral entrepreneurs' (see chapter 8.5)) *believe* or *perceive* them to be morally wrong, is debateable. Take the BAE Systems investigation, for example. Had the government truly believed such payments to be morally wrong, would it have interfered with and stopped the SFO investigation? Perhaps, then, it is a case of what is 'economically right' (or right in terms of national security), rather than 'morally wrong'. Or maybe some things are morally wrong some of the time, to some people. Furthermore, the 'moral' state of society and the economy may even provide frameworks within which individuals can justify their morally dubious or illegal behaviour (see Karstedt and Farrall, 2006). Clearly a number of factors impact on this complex area.

2.7.2 Hybrid mechanisms: theories of enforced self-regulation

> 'The concept of enforced self-regulation is a response to the delay (Weidenbaum, 1979), red tape (Neustadt, 1980), costs (Moran, 1986), and stultification of innovation (Schwartzmann 1976; Wardell, 1979; Stewart, 1981) that can result from imposing detailed government regulations on business, and to the naiveté of trusting companies to regulate themselves (Cranston, 1978: 61-64)' (Ayres and Braithwaite, 1992: 106)

The limitations of the state have resulted in traditional enforcement practices and 'policing' approaches aiming for criminal prosecution as in the deterrence model, to be rethought. This has resulted in what some analysts have termed the new 'regulatory state' (Braithwaite, 2000; Moran, 2001). This new 'regulatory state' reflects a shift away from crime control as a problem of the state and has seen a transformation of the self-regulation model, as understood in traditional British society (Moran, 2001: 22-23). As Gill (2002: 537) notes, within this 'regulatory state', the most that the authorities can do is establish a structure of enforced self-regulation. Moran (2001: 22-23) highlights this transformation through reference to the regulation of the medical profession, the accountancy profession, and the financial markets. In each example, where traditional forms of self-regulation involving the creation and controlling of rules by the actors themselves used to exist, recent times have seen an encroachment on this way of operating towards governments prescribing how these actors should act. The Financial Services Act 1986 and 2000 and the role of the Financial Services Authority (FSA) represent this transformation. Such enforced self-regulation also shifts away from traditional methods of command and control (see Baldwin and Cave, 1999) and more direct methods of enforcement, as outlined above (see also Braithwaite, 2000: 224-225; Ogus, 1998: 374-388). A similar transformation can be seen in further analyses of 'post-Keynesian policing' whereby the focus on community policing highlights the extent to which the public are seen as 'competent and skilled agents' who are able 'to govern themselves in ways approved by the appropriate experts (police, insurance companies, criminologists)' (O'Malley and Palmer, 1996: 146).

Ayres and Braithwaite (1992: 101) suggest enforced self-regulation involves negotiation between the state and individual firms to establish regulations that are particularized to each firm, rather than its associated industry. In their model, each firm in an industry must propose its own regulatory standards in order to avoid more stringent and less tailored state

imposed standards. Thus, the firm is required by the state to conduct the self-regulation but the privately created rules can be publicly enforced, and if inadequate, can be sent back for revision: in certain contexts it will be more efficacious for the regulated firms to take on some or all of the legislative, executive, and judicial regulatory functions, 'a form of subcontracting regulatory functions to private actors' (Ayres and Braithwaite, 1992: 103), and a way of internalising enforcement duties and costs within the firms (Ayres and Braithwaite, 1992: 106). Such enforced regulation can be distinguished from 'coregulation' theory, which refers to industry-association self-regulation with potential for oversight and ratification by government (Grabosky and Braithwaite, 1986: 83). Enforced self-regulation should also be embedded within schemes of escalated intervention, therefore retaining an element of public enforcement (Ayres and Braithwaite, 1992: 103; see also 'Integrated theories of regulation' below). Thus, state involvement does not involve only monitoring but also sanctioning violations of privately written and publicly approved rules.

Numerous strengths and weaknesses are evident in such models of enforced self-regulation. Ayres and Braithwaite (1992: 110-116) outline a number of key strengths. First, rules would be tailored to match the company, would be more comprehensive in their coverage and could also be adjusted more quickly to changing business environments. Companies would also be more committed to rules they wrote. Second, the confusion and costs of having two rulebooks (government and company) would be reduced while business would bear more of the costs of its own regulation. This would foster regulatory innovation whereby more offenders would be caught more often, caught offenders would be disciplined in a larger proportion of cases and it would be easier for prosecutors to obtain convictions. Compliance would become the path of least corporate resistance.

The authors also point out a number of weaknesses (Ayres and Braithwaite, 1992: 120-128). First, regulatory agencies would bear the costs of approving a vastly increased number of rules each year and in some cases state monitoring would sometimes be more efficient than private monitoring. Similarly, companies would bear increased costs in delay and paperwork from getting new company rules approved. This may worsen cooptation of the regulatory process by business. Second, in legal terms, Western jurisprudence might not be able to accommodate privately written rules being accorded the status of publicly enforceable laws

and particularistic laws might weaken the moral force of laws that should be universal. Furthermore, companies would write their rules in ways that would assist them to evade the spirit of the law and even if not, companies cannot command compliance as effectively as government or their independence could never be fully guaranteed. The model may therefore encourage the trend to 'industrial absolutism'. How these various issues would apply to companies of different sizes is unclear, as is the applicability of the approach to varying criminal activities. For example, would enforced self-regulation only be beneficial in regulating individuals within companies acting against the company, or also for the company? Whether the company is culturally and structurally corrupt would also present difficulties.

2.7.3 Theories of non-enforcement: self-regulation

Non-enforcement refers to a variety of practices, strategies and/or conditions that result in minimal or no state intervention, or an inability or unwillingness of the state to intervene. The most notable form of non-enforcement is that of self-regulation by business, although practices such as 'regulatory capture' and 'accommodation and collusion' may also lead to non-enforcement (see 2.8 below). As Ogus (1994: 108-109) notes, self-regulation regimes cover a wide range of institutional arrangements and can differ according to the following variables: the degree of monopolistic power (e.g. whether all suppliers in a given market are regulated); the degree of formality (e.g. is legitimacy derived from a legislative framework?); their legal status (e.g. are the rules binding?); and, the degree to which outsiders participate in rule formulation and enforcement, or in other ways supervise the system. In other words, self-regulation may refer to non-legally binding standards established for a particular firm or industry, or to rules formulated by a self-regulatory agency but approved by the state, as in enforced self-regulation above. Gill (2002: 536) suggests that in legal markets, it is self-regulation within an industry that will be viewed as the desired outcome of effective education and self-control. He goes on to suggest that due to the limitations of the sovereign state, and the power and knowledge problems that arise, the autonomy of some areas of social life has become so extensive that the notion of effective outside regulation is abandoned. As Clarke (1990: 225) states, 'the private context of business offences, their complexity and frequently their ambiguity make the formality and precision characteristic of

law difficult and require the extensive commitment of resources, which, as in all legal enforcement systems, are limited'. Consequently, governors are forced to abandon ideas of effective outside regulation and aim for the mere triggering of self-regulatory processes (Teubner, 1998: 406-409).

Preferences for self-regulation can reflect the difficulties caused by the use of the criminal law. As Clarke (1990) notes, the polarising impact of legal proceedings on involved parties can lead to increased antagonisms: while this may be acceptable with offences sufficiently serious to warrant the ejection of the offender (if an accountable offender can be located) from privileged business environments and subsequent stigmatisation, such polarisation conflicts with the negotiated character of business crime. Thus, Clarke suggests there are strong grounds for dealing with misconduct by negotiation rather than simple condemnation and sanction as more often than not, there is more to play for than a judgement or conviction – condemnation of an act is not the issue, but rather the negotiation of an agreed practice (Clarke, 1990: 225). In other words, of most significance is an attempt to internalise improved control and compliance within the businesses themselves rather than increase criminal prosecution. This argument, however, appears to transcend the moral and symbolic dimensions of criminalisation and enforcement. Additionally, Clarke suggests a criminal law prosecution is inapplicable even when public interest is involved as the concern is largely reparation and recovery of property and not fines and imprisonment, the involvement of the police is seen as a last resort. This renders public interest marginal and keeps business crime private. The issue of public interest is significant. Should shareholders, consumers, employees and so on be given only marginal consideration when regulating corporate bribery despite their significant, albeit indirect, involvement? The symbolic, moral dimension of prosecution is difficult to ignore when considering these complex cases of corporate bribery.

For Clarke (1990: 234-237) an appropriate regulatory system requires a capacity to identify offenders and to ensure offenders are not permitted to return and offend again. This, he argues, can be done by the implementation of three primary principles, identification, accreditation, and exclusion, and two subsidiary principles, compensation and rehabilitation. He suggests that such a system sounds like a simple licensing system which is

indeed operative in certain sectors of business but may be too onerous and restrictive to be applied generally. Thus, achieving the objectives of prevention and protection to within acceptable levels varies from sector to sector dependant on the evident risks, opportunities and problems. He suggests:

> 'Although state-administered licensing is the fullest version of the control system, it is hence not necessary or appropriate to all sectors. Most, including the financial sector, can be managed with the business sector undertaking the bulk of the administration of the system. Some sectors, despite known and persistent problems of abuses, seem not to generate the political pressure for effective controls' (Clarke, 1990: 238)

Clarke's approach advocates the central role of business in regulation and compliance as opposed to state-intervention and criminal prosecution although he acknowledges the requirement of the latter in certain circumstances. In other words, to most effectively deal with business crime, a system based on internalising improved compliance and methods of control within businesses themselves, and encouraging businesses themselves to regulate these issues is most appropriate. This latter point is one that few would dispute as having companies that self-regulate and ensure correct behaviour is clearly a positive. In terms of corporate bribery, this may be occurring with numerous companies such as Siemens (and others that were 'caught') now implementing stringent compliance regimes. The extent to which this is evident in business as a whole cannot be said without further research.

Critique of such models of self-regulation has come from those advocating deterrence approaches. Slapper and Tombs (1999: 180-183) have argued that self-regulation can only work if used as part of an approach incorporating multiple credible enforcement techniques. Such critique often reflects the concern that such 'creative compliance' may honour the letter rather than the spirit of the rules (Baldwin *et al*., 1998: 20). Despite the above, Clarke does argue that the law remains important. First, it is an important sanction of last resort with criminal prosecution an essential means of enforcement for extreme cases. Second, it can act as a background, both providing a framework for understanding, debating and identifying misconduct, and as a resource in negotiation. Clarke (1990: 226-27) notes, '[t]hreat of recourse to the law is certainly a useful weapon in achieving compliance, though…it is frequently not in practice to be relied upon' – this, however, appears to

contradict his advocacy for negotiation ahead of condemnation, for the role of a 'threat' in negotiation seems counter-intuitive.

2.7.4 Integrated theories of regulation: when to punish, when to persuade

The above approaches represent the enforcement spectrum from self-regulation on the one side, to punitive measures and increased state intervention on the other. Many analysts have suggested that regulation requires a more dynamic approach, incorporating aspects of both. For example, new regulatory models include 'responsive regulation' (Ayres and Braithwaite, 1992), 'smart regulation' (Gunningham and Grabosky, 1998), 'problem-solving regulation' (Sparrow, 2000), 'meta-regulation' (Parker, 2002) 'market based regulation' (Gill, 2000; Edwards and Gill, 2002), the 'governance triangle' (Abbott and Snidal, 2006) and 'really responsive risk-based regulation' (Black and Baldwin, 2010) while there has been recent focus on regulators as 'sociological citizens' (Silbey *et al*., 2009; Silbey, 2011). 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 non-enforcement mechanisms, the necessity of 'negotiated relationships' between the regulators and regulatees, the reflexivity, responsiveness and agency of the regulators, and the involvement of non-state actors and agencies. As Haines notes:

> 'This literature places the regulator within a broad governance framework where the enforcement of rules within narrow prescriptive frameworks is eschewed in preference for policy mixes, combining instruments, third-party actors, and enforcement regimes that collectively can both "push" and "pull" (Gunningham and Grabosky, 1998: 259) regulates into a reflexive appreciation of the goals the regulator wants to achieve and lead them to act in a diligent manner to bring the goals to fruition' (Haines, 2011: 118-119)

Such pragmatic, symbiotic regulatory approaches have been most significantly influenced by the work of Ayres and Braithwaite (1992), although their empirical findings are largely based on the US and Australia and may therefore not apply directly to the UK or Germany. Their approach highlights a convergence between rational choice analysis incorporating economic rationality as well as normative accounts incorporating sociological analyses of actors' desires to comply with norms and to 'do the right thing'. They advocate a responsive regulatory approach that depends on context, regulatory culture, and history. They state:

> 'Responsive regulation is distinguished (from other strategies of market governance) both in what triggers a regulatory response and what the regulatory response will be. We suggest that regulation be responsive to industry structure in that different structures will be conducive to different degrees and forms of regulation. Government should also be attuned to the differing motivations of regulated actors. Efficacious regulation should speak to the diverse objectives of regulated firms, industry associations, and individuals within them. Regulations themselves can affect structure (e.g., the number of firms in the industry) and can affect motivations of the regulated' (Ayres and Braithwaite, 1992: 4)

Thus, it is clear that within this framework the relationship between regulators and regulatees is significant in shaping the most appropriate regulatory responses, in other words, negotiation between these groups is vital. For Ayres and Braithwaite, regulation should respond to industry conduct, so the extent to which industries (and the organisations within them) are effectively making private regulation work should shape regulatory responses. Consequently, in the authors' view, 'responsiveness implies not only a new view of what triggers regulatory intervention, but leads us to innovative notions of what the response should be' (Ayres and Braithwaite, 1992: 4). However, responsive regulation is not a clearly defined program or a set of prescriptions concerning the best way to regulate but considers responsiveness as 'an attitude that enables the blossoming of a wide variety of regulatory approaches' (Ayres and Braithwaite, 1992: 5). Central to the idea of responsiveness is the suggestion that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation (Ayres and Braithwaite, 1992: 4).

They demonstrate this point through the concept of two enforcement pyramids. These pyramids relate to the notion that regulatory objectives are more likely achieved when agencies possess and display both a hierarchy of sanctions (proactive, preventative measures are not explicitly included in the pyramid) and hierarchy of regulatory strategies of varying degrees of interventionism. These interventions incorporate ever-increasing intrusiveness although this correlates with ever-decreasing frequency of use. In line with the idea of responsiveness, it is suggested regulators will do best by indicating a willingness to escalate intervention up the pyramids or to deregulate down the pyramids in response to the performance of the industry in achieving regulatory objectives. Additionally, they argue that the tougher the enforcement level to which the agency can escalate, the more effectively they will be able to ensure compliance and will therefore less likely have to resort

to tough enforcement. They do assume, however, that a hierarchical sanctioning mechanism escalating from persuasion to license revocation or a hierarchical regulatory strategy escalating from self-regulation to a high level of state intervention can be applied to all. While there is flexibility in terms of the content of these pyramids, the structure and form of the pyramids themselves is questionable. Likewise, economic rationality also assumes deterrents (general and specific) are effective. As Nelken (2007a: 757-58) notes, evidence from interviews suggests that managers say they do not think in deterrence terms because only unethical managers are seen to respond to deterrence. Nonetheless, an agency in this sense is termed a 'benign big gun' (Ayres and Braithwaite, 1992: 19-53).

The enforcement pyramids enable regulatory approaches to transcend polarised notions of tit-for-tat (TFT) regulation whereby regulators switch between cooperation and deterrence. It is further argued for a minimal sufficiency principle in the use of varying levels of sanctions whereby the more sanctions can be kept in the background, the more effective the regulation will be. The pyramid of enforcement is aimed at the regulation of a single firm whereas the pyramid of enforcement strategies is aimed at the entire industry. They conclude that 'the possibility has been advanced that compliance is responsive to the existence of a TFT strategy, the existence of an enforcement pyramid appropriate to the particular regulatory domain, and the potency of the upper limits of sanctioning within that pyramid' (Ayres and Braithwaite, 1992: 52). Within this framework, the 'benign big gun' agency is able to speak softly while carrying very big sticks (Ayres and Braithwaite, 1992: 40). It is important, however, for such theoretical approaches of regulation to 'move away from the notion of an optimum level of stringency in the law, an optimum level of enforcement, and an optimum static strategy, and instead converge toward an optimum way of playing a dynamic enforcement game' (Braithwaite, 2000: 105). However, the extent to which this framework can be applied to contemporary, dynamic, transnational criminality as in the case of corporate bribery in international business transactions is debateable given issues of jurisdiction for regulators and therefore the need for MLA and multi-agency cooperation. The framework does not appear to offer sufficient flexibility to those undesired activities that transcend markets/industries, sovereignties, and responsible agencies and does not distinguish between the regulation of legal and illegal markets within industry.

Subsequent theories of regulation (e.g. 'smart regulation', 'really responsive risk-based regulation, amongst others) have echoed elements of 'responsive regulation'. For Gunningham and Grabosky (1998), 'smart regulation' requires regulators to be flexible as well as able and willing to shape their responses to specific actors and situations through the assessment of available interventions and actors that can be used effectively, efficiently, and fairly. For Sparrow (2000: viii), regulatory craftsmanship requires an ability to 'pick important problems and fix them' and for actors to develop distinctive modes and patterns of thought and action that enable effective interventions (Sparrow, 2008). Parker (2002) acknowledges the need for 'the regulated' to acknowledge their responsibility and to self-regulate their own behaviour, with the regulation of such self-regulation being considered 'meta-regulation'. Gill (2000) and Edwards and Gill (2002) draw upon the key 'negotiated relationships' and interactions between traders and the regulated in the context of licit and illicit markets, arguing for the use of a variety of enforcement and non-enforcement techniques. Black and Baldwin (2010) develop responsiveness in their 'really responsive risk-based regulation', whereby regulators have to regulate responsively in relation to five elements: regulated firms' behaviour, attitude and culture; regulation's institutional environments; interactions of regulatory controls; regulatory performance; and, change. This framework argues that regulatory challenges differ across the tasks of detection, response development, enforcement, assessment, and modification. Silbey *et al*. (2009: 203) focus on regulators as 'sociological citizens' who '[s]ee their work and themselves as links in a complex web of interactions and processes rather than as a cabin of limited interests and demarcated responsibilities', viewing 'their organizations, or states, as a dynamic entity in which their own role is reconceived as insignificant by itself yet essential to the whole'.

While these theories of regulation provide significant insights, one concern is the extent to which they can be applied to less tangible offences. For example, the work of Ayres and Braithwaite (1992) largely relates to Braithwaite's (1984) empirical analysis of misdemeanours in the pharmaceutical industry, while Gunningham and Grabosky's (1998) 'smart regulation' is focused on findings related to the undesirable consequences of industrial life for the natural environment. Likewise, Pearce and Tombs (1990; (see also Slapper and Tombs, 1999; Tombs and Whyte, 2007)) have focused on health and safety

offences. These therefore incorporate more tangible offences that can be more easily detected and measured. In comparison, bribes paid to win business contracts may have no noticeable or directly tangible consequences. A bribe given by company A, via intermediary B, to client C may be intended to maintain the status quo, for example, and therefore leaves no public trail. The extent to which the less tangible nature of many cases of corporate bribery can be regulated in a similar manner to the tangible empirical focus of other regulatory approaches is explored in chapter 9.2.

2.8 Developing an analytical framework

The above discussion has highlighted the various approaches to regulation from self-regulation to high levels of state intervention and the use of criminal prosecution. Gill (2000; 2002) and Edwards and Gill (2002) present a useful analytical framework within which regulation can be negotiated through the use of this admixture of enforcement and non-enforcement mechanisms. Figure 1 demonstrates this theoretical range of regulatory practices with the horizontal spectrum relating to the range of markets from the unambiguously legal to the illegal - 'grey' markets will be found in the middle of this spectrum - and the vertical spectrum relating to the range of possible official responses ranging from full enforcement to abnegation of any regulatory effort.

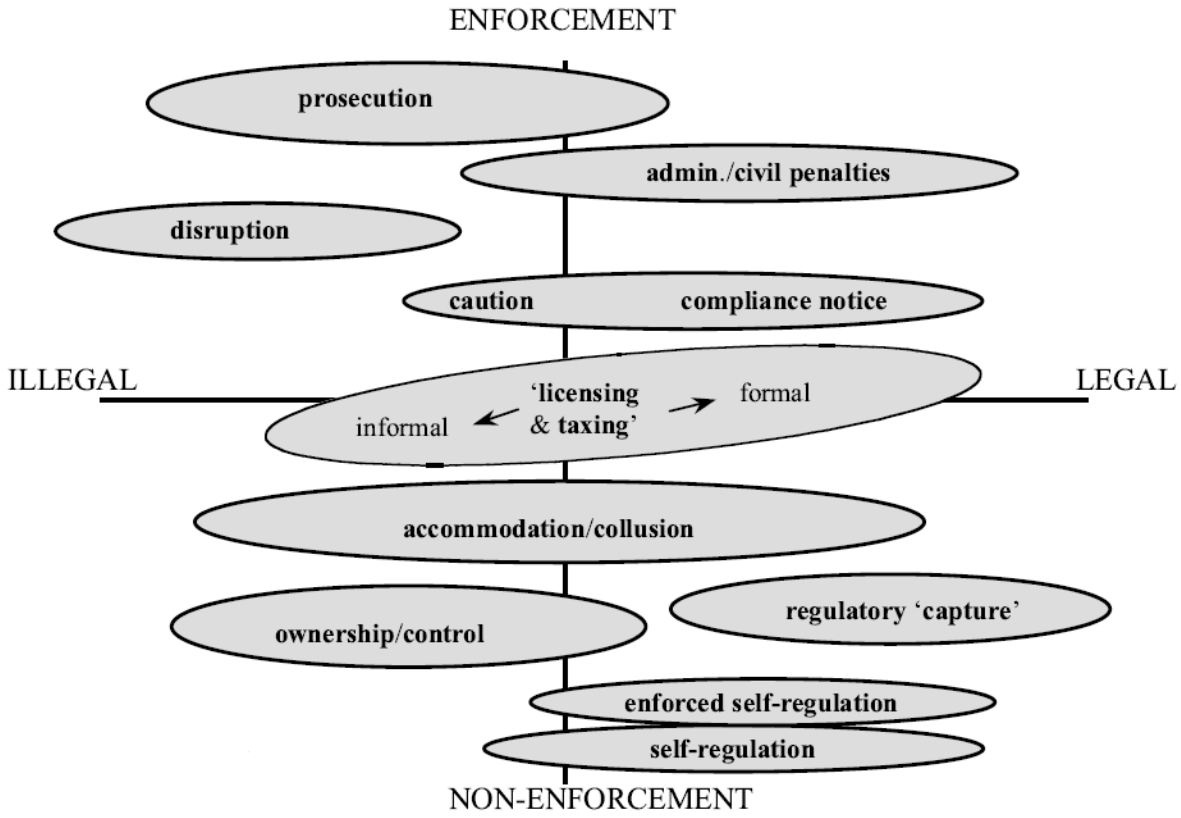


Figure 1: Enforcement and non-enforcement mechanisms in legal and illegal markets (Gill, 2002: 535)

As figure 1 illustrates, at the top end of enforcement, sanctions are more likely to be criminal in relation to illegal markets and administrative/civil in relation to legal markets. The ellipses are therefore located correspondingly although as can be seen, the right hand edge of 'prosecution' and the left hand edge of 'administrative/civil penalties' indicate those cases where activities in legal markets may be prosecuted and where activities in illegal markets may be resolved through administrative/civil means. 'Disruption' of unambiguously legal markets by regulators is not necessary but disrupting criminal operations and markets is becoming increasingly attractive for police and custom agencies due to the higher costs of evidence gathering and the unpredictability of the outcomes of prosecution. Beneath this, the role of 'cautioning' to encourage traders to change their ways and which may be formally or informally used by police as a main alternative to prosecution, can be compared with regulators issuing 'compliance notices' in legal markets. 'Licensing and taxing', as indicated in the model, can represent varying degrees of formality where formal regulation is exercised over dangerous products that can be legally traded but require traders to have relevant licenses. Failure to comply in these cases can result in licence revocation. While

illegal traders cannot be formally licensed, some circumstances occur whereby they may receive informal 'licences' from police or regulators as in the case of street traders who act as police informers. Such traders are vulnerable to sanctions and licence revocation.

In the bottom of half of the enforcement continuum, sanctions are not used at all. Within legal markets, 'self-regulation' in industry is considered the desired outcome of effective education and self-control. This suggests external, state regulation and intervention is not required or not feasible, which relates to arguments discussed above in relation to compliance. 'Accommodation and collusion' relates to the inadequate resources to pursue full enforcement that all regulatory agencies encounter. Consequently, prioritisation inevitably occurs meaning some illegal trading or regulation-avoidance takes place without a regulatory response. Thus, regulators may be aware of certain problematic activities but may be required to tolerate these where their benefits may outweigh their loss (Edwards, 2010). 'Regulatory capture' may occur due to shared ideology and/or personnel, rewards and/or threats resulting in traders 'capturing' the regulators and therefore ensuring non-enforcement. In some extreme cases, 'ownership/control' may even occur whereby the 'regulators' share in the profitability of the market. A key example of this would be the BAE Systems bribery scandal which 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. The subsequent difficulties in investigating and prosecuting this case reflected this government-corporation relationship, amongst other factors. Thus, the conceptual framework outlined above is based on the idea that:

> 'regulation is a social relationship that needs to be negotiated through a mixture of enforcement and alternatives to sanctions. A key implication of this premise is that reducing behaviour deemed problematic and harmful is unlikely to be accomplished through investment in practices of command and control alone, especially where resources for enforcement are economically, politically and/or culturally limited' (Edwards, 2010: 44)

Thus, a variety of formal and informal practices may be adopted by regulators towards traders and markets. However, changes in the market depend not only on the actions of authorities but also on the adaptability and/or successful resistance of traders therefore such 'negotiated relationships' extend to a much broader range of interactions (Edwards and Gill, 2002: 215): this includes attempts by regulators to calculate likely outcomes of

enforcement policies, costs of enforcement in relation to resources, civil rights and ethics (Beare and Naylor, 1999), as well as the study of 'evolutionary struggles' between cops and crooks' that might be compared to arms races or the contest between intelligence and counterintelligence (Ekblom, 1999). This significant relationship between regulators and regulatees is also apparent in the 'responsive regulation' approach of Ayres and Braithwaite (1992). It is such processes at the operational level that appear vital in any regulatory approach. Clearly, markets can vary not only in terms of their degree of illegality – although discussing markets in terms of being a 'bit illegal' or 'more illegal than legal' is itself a difficult task – but also in terms of their size, scope, geography, type of actors and products involved, law invoked, and so on. The range of (non-)enforcement practices, however, can be applied to most regulatory problems. For example, by definition, *corporate* bribery is a market based activity given its location and role within financial markets and transactions and the use of such corruption to facilitate trading etc. This analytical framework will be applied to corporate bribery in this thesis.

2.9 Summary

The literature discussed in this chapter provides a framework for understanding the substantive focus of this thesis. The quote at the beginning from Vince Cable highlights current governmental preferences for regulatory approaches. Regulation, or control and response, is not straightforward and the challenges discussed at the start of this chapter in relation to policing transnational crimes supported this. One key difficulty here are the limitations of the state to provide effective and efficient 'policing' of the crime problem which is in part shaped by problems of knowledge and power. Consequently, it was demonstrated that shifts towards regulation have taken place and that traditional policing practices are now significantly similar to regulation. But what does regulation mean? This concept was discussed and analysed, and various theories of regulation from full-blown enforcement, through enforced self-regulation, to full self-regulation were analysed. Theories integrating aspects of all these were outlined and an analytical framework able to incorporate aspects of all these enforcement and non-enforcement practices was put forward. It was demonstrated that this framework can be applied to regulating corporate

bribery by understanding the negotiated relationships that exist between regulators and regulatees as well as the variety of enforcement practices available.

The above arguments relating to the various enforcement/regulatory approaches have aided in shaping the key questions of this thesis as outlined in chapter 1. The problem of transnational corporate bribery and a comparison of enforcement and non-enforcement responses to this problem in the UK and Germany can empirically, theoretically and conceptually contribute to the above arguments around corporate crime regulation and control. Current theories of regulation are limited by their focus on more tangible phenomena, their focus on specific industrial sectors, their focus on regulation within specific jurisdictions, and/or their focus on narrow understandings of the concept of regulation as it can be applied beyond 'regulated' sectors. Understanding regulation in relation to the transnational problem of corporate bribery provides insight into how such theories can be developed to deal with the exceptionality of multi-jurisdictional corporate crimes and their control. This thesis is concerned with the control of corporations that give bribes to foreign officials in the context of business and significant insights can be gained from the historical differences in the way national authorities have prosecuted 'corporate crime'. For example, the varying extent of 'corporate criminal liability' in a UK, German and US context is one example of this (see chapter 6.4). These have left a contemporary legacy that further complicates *inter*-national co-operation in prosecuting *trans*-national and complexly organised corporate crimes and such historical legacies are important for understanding the limitations of criminal sanctioning by sovereign actors as an enforcement mechanism for controlling illicit corporate behaviour. These key questions require the rigorous collection of data to support and substantiate any inferences that may be made. It requires an appropriate research strategy, research design and research methodology to address these questions and it is to these issues that the thesis now turns. The following section will demonstrate the usefulness of a comparative, qualitative research design.

3

Methodology

3.1 Introduction

> 'Doing comparative research rarely entails selling one's own home and tearing up one's passport, forever to live among the drug dealers of Delhi or the detectives of Düsseldorf. Neither can one, with credibility at any rate, write about continental criminal procedure without stepping outside the ivy clad walls of an Oxford college. Rather the research process entails developing a general theoretical (but distant) understanding at home-base, punctuated by a series of forays (often of increasing duration) into the terrain of study. This itinerary is matched by an intellectual journey which takes one from the perspective of global structures to the minutiae of local detail and back and forth over the course of the research in "a sort of intellectual perpetual motion" (Geertz, 1983: 235). While periods of fieldwork provide for immersion in local culture (the court, the prison, the police station), the journeys between make possible an intellectual distancing. Once more library-bound, the researcher can engage in the detached reflections and distanced evaluation which are the very stuff of comparison' (Zedner, 1995: 19).

The previous chapter analysed literature addressing the various approaches to regulation that can be applied to transnational corporate bribery. The arguments made in this chapter subsequently situated and shaped the key questions outlined in chapter 1. To address these questions, an appropriate research strategy, research design and research method needed to be adopted. Researching a transnational phenomenon required a transnational approach which involved a comparative analysis that enabled the social phenomenon of the regulation of transnational corporate bribery to be better understood through the comparison of two meaningful research sites. It is such an approach that can provide the most insightful data. The quote above from Zedner describes the reality of doing comparative criminal justice research. The content of this quote nicely sums up my experiences in this research, as I travelled back and forth between the UK and Germany, as well as France and Switzerland, which enabled immersion in the research field but also sufficient distancing from both sites. This chapter illustrates these experiences in more detail, analysing my role as the researcher in the various methodological processes. The chapter begins with an explanation of the decision to compare and contrast the UK and German anti-corruption approaches. Here I outline the three main justifications for this

approach. I then move on to discuss the qualitative research strategy which incorporates an adaptive theory approach to research and theory that can be located within a critical realist framework. Following this, the research design is outlined, more specifically, the adoption of a comparative design. At this point I outline how the two sites were accessed. This is subsequently followed by discussion of the research methods adopted, namely semi-structured interviews, participant observation and bilingual document analysis as part of the qualitative research strategy. This includes the approach to sampling and data analysis. The issue of ethics is then addressed as are the limitations of the research. I conclude with a summary of the key points of the chapter.

3.2 Why compare the UK and Germany?

To understand the dynamics involved in the negotiation of regulation through an admixture of enforcement and non-enforcement practices (see chapter 2.8) in one jurisdiction requires extensive qualitative analysis of the necessary and contingent relations (e.g. socio-structural environment of regulator-regulatee relationships) that exist in relation to this phenomenon. Research into these relations within one jurisdiction may illuminate how and why these practices are used but such mono-jurisdictional studies are located within specific cultural and geo-historical frameworks. Such studies offer no insights into the location of these (non)enforcement practices in relation to other jurisdictions and have no significant meaning for wider debates about the control of transnational crimes and are insufficient for building theory. Comparative analysis, however, of two meaningful research sites begins to address this idiosyncratic limitation as comparing these necessary and contingent relations from multiple jurisdictions enables rich insights into significant similarities and differences at the level of substance (as opposed to the superficial level). Consequently, the relationship between theory and research and the concepts within can be more meaningfully extrapolated.

This research therefore incorporates a comparison of two research sites, the UK (England and Wales, and Northern Ireland) and Germany but in order for such comparisons to be meaningful as suggested above, each site has to be relevant for comparison. The

justification of the use of the two case studies, the UK and Germany, is threefold. First, as has been discussed, corporate bribery in international business transactions is a transnational phenomenon. Consequently, the regulation and control of corporate bribery requires a transnational approach. I was therefore keen to research the regulation of corporate bribery in more than one jurisdiction. Second, the research began with general ideas about the control of transnational corporate bribery generated from an extensive analysis of the available academic, public and private literature. An annual review provided by TI analyses the progress of the OECD Anti-Bribery Convention that relates directly to bribery in international business transactions – specific focus is placed on the rates of enforcement (i.e. number of prosecutions) and therefore no consideration is given to the efficacy of non-enforcement mechanisms (i.e. (enforced) self-regulatory practices etc.). Nonetheless, in September 2008 at the beginning of this research, the most recent review at the time of writing provided statistics on the number transnational bribery cases and investigations in the participating countries (see table 2 below). Cases include prosecutions, judicial investigations and civil actions and are recorded on cumulative basis through end 2007 even if discontinued. Investigations (excluding judicial investigations) are on current basis for 2007. These statistics highlighted that in the UK zero cases had been concluded but 20 investigations were under way. This placed the UK in the group of little enforcement of the convention which demonstrated a 'lack of sufficient commitment to date' (TI, 2008: 10)[22]. These figures alone only have significance when compared to those of other jurisdictions. Most notably, of the other EU countries, Germany had the highest number of cases (over 43) and investigations (over 88). According to the report, of the EU countries, the UK (4.56 %) and Germany (8.80%) had the largest share of world exports, although Germany was almost double the UK share. On the surface level, these statistics highlight significant differences in the investigation and prosecution rates of the EU's two largest exporters in relation to transnational corporate bribery. This raised the question as to why the EU's two largest exporters could have significantly difference enforcement rates and provided the second justification for comparing the UK and Germany. Third, however, while statistics enable us to understand where one country stands relative to another, they can only tell us so much. Procedural, evidential, structural, legal, ideological influences etc.

[22] To access the full report visit: http://www.transparency.org/news_room/in_focus/2008/4th_oecd_progress_report <Accessed 24/3/2011>

cannot be understood from statistics alone. It was here that further analysis of the literature indicated significant cultural differences between the two jurisdictions. For example, the existence of a common law system in the UK and a civil law system in Germany, the existence of *corporate* criminal liability in the UK but not in Germany, and the centralised nature of anti-bribery enforcement in the UK vs. the decentralised nature of Germany. These factors further signified the theoretical relevance of researching the UK and Germany comparatively.

Foreign Bribery Cases And Investigations

	Country	Enforcement				Share of World Exports % for 2007 (UNCTAD, 2007)
		Cases		Investigations		
		2008	2007	2008	2007	
1.	Argentina	1	0	0	0	0,36
2.	Australia	1 (1)	u	s (s)	4 (1)	1,06
3.	Austria	0	0	2	0	1,25
4.	Belgium	4	4	s	s	2,90
5.	Brazil	u	0	s(s)	1	1,06
6.	Bulgaria	3	3	0	0	0,14
7.	Canada	1	1	s	s	3,14
8.	Chile	0	0	0	0	0,45
9.	Czech Rep.	0	0	1	0	0,73
10.	Denmark	17 (17)	1	0	21 (21)	0,97
11.	Estonia	0	0	0	0	0,09
12.	Finland	1	0	3	1	0,64
13.	France	19	9	16	u	4,11
14.	Germany	43+	+4	>88	>83 (63)	8,80
15.	Greece	0	u	1 or 0	u	0,38
16.	Hungary	23	18	1	27	0,58
17.	Ireland	0	u	3 (3)	3 (3)	1,23
18.	Italy	2	2	3	1	3,44
19.	Japan	1	1	u	u	5,15
20.	Korea (South)	5	5	1	2	2,20
21.	Mexico	0	0	0	0	1,80
22.	Netherlands	7 (7)	0	3	8 (7)	3,69
23.	New Zealand	0	0	s (s)	2 (2)	0,20
24.	Norway	4	2	u	u	1,04
25.	Poland	0	0	0	0	0,88
26.	Portugal	u	0	u	2	0,41
27.	Slovak Rep.	0	0	0	0	0,32
28.	Slovenia	0	0	0	0	0,17
29.	Spain	2	2	0	1	2,11
30.	Sweden	1	1	15 (12)	14 (12)	1,34
31.	Switzerland	16 (14)	1	36	23 (17)	1,31
32.	Turkey	0	0	1	0	0,72
33.	United Kingdom	0	0	20	15	4,56
34.	United States	103	67	69	60	9,84

( )= Oil for Food cases; some not for bribery
u = unknown
s = some

Note: Cases include prosecutions, judicial investigations and civil actions and are recorded on cumulative basis through end 2007 even if discontinued. Investigations (excluding judicial investigations) are on current basis for 2007. Numbers do not include cases and investigations carried out by OECD countries regarding foreign bribes paid to their own officials. Numbers in brackets refer to cases arising out of the UN's Oil-for-Food Programme in Iraq (1996-2003), some of them not for bribery.

Table 2: Foreign bribery cases and investigations

3.3 The research strategy

Transnational corporate bribery and its regulation are situated within a complex, multi-faceted and densely compacted social world whereby the role of human agency, social relations and social organisation (structures and systems) must significantly shape the regulatory landscapes (see Layder, 1998). For example, regulators negotiate with a variety of industry sectors and individual corporations, they operate multi-jurisdictionally but simultaneously are limited to their national legal frameworks and their work and roles are shaped by the resources they receive and the institutional structures that are provided by the state. Most importantly, the research strategy needed to correspond to the research questions and therefore needed to be able to understand the social interactions between the regulators, the regulatees, and non-state actors, the decision making processes that lead to the use of specific strategies and the in-depth meanings associated with the phenomenon of transnational corporate bribery. The research strategy needed to be flexible to incorporate the constant revising of research objectives and questions, as well as to give due consideration to prior and emerging theories before and during the research. Thus, building theory around the regulation of corporate bribery required an approach that was able to acknowledge these issues. This led me to adopt a qualitative research strategy incorporating an 'adaptive theory' approach to theory and research.

3.3.1 The qualitative strategy, epistemology and ontology

The key questions outlined in chapter 1 imply a qualitative research strategy. The analytical dimensions and relationships of these questions require an understanding of legal cultures and principles, of negotiation based on social relationships between regulators and regulatees, and of policy convergence in relation to the variety of enforcement and non-enforcement mechanisms available in each jurisdiction. I was therefore interested in gaining contextualised insights into the numerous actors (e.g. prosecutors/investigators, lawyers, corporate compliance officers, representatives of NGOs/intergovernmental organisations, etc.), their environments (e.g. public, private, third sectors, etc.) and relationships (e.g. private-public, private-private and public/private-other). Such insights can only be gained through qualitative methodology. A qualitative research strategy that involves an

interpretive, naturalistic approach to its subject matter which incorporates the socially constructed nature of reality, the intimate relationship between researcher and subject, and the influence of the situational context (Denzin and Lincoln, 2000: 1-8) provides such a framework. For example, a survey sample of corporate bribery prosecutors in a broader range of countries (e.g. leading economies) in order to generalise about admixtures of enforcement and non-enforcement mechanisms does not offer the required contextual insights. In more abstract terms, the emphasis here is placed upon 'the qualities of entities…processes and meanings that are not experimentally examined or measured (if measured at all) in terms of quantity, amount, intensity, or frequency' (Denzin and Lincoln, 2000: 8).

In this sense, I am critical of 'abstracted empiricism' that is characterised by 'the methodological inhibition [that] stands parallel to the fetishism of the Concept' (Mills, 1959: 60) given that problems of 'corporate bribery' are in part concept-dependent. Corporate bribery has multifarious meanings attributed to it across and within different jurisdictions and over time in relation to different kinds of business. For example, facilitation payments (aka 'grease payments') are legal under the Foreign Corrupt Practices Act (FCPA) 1977 in the US but prohibited under the UKBA while in Germany no legal exception exists but in practice such payments remain and in some cases are still tax-deductible (see chapter 5.7.4). Such transnational payments may be tolerated to secure export markets and to appease lobbying business arguing they are at a disadvantage, especially when underpinning key national industrial sectors. Despite this, I argue that there is a reality to corporate bribery, characterised by a common referent against which some concepts are demonstrably less plausible than others and that corporate bribery cannot be signified by understandings of any given commentator. This 'reality' can only be approached through concepts, some of which are more tenable that others, given the empirical and methodological difficulties of accessing the problem. For example, to establish the fallibility of competing understandings of corporate bribery, the necessary and contingent relations that are presupposed by its existence can be analysed, enabling corporate bribery as a social object to be explained within its geo-historical context (see Edwards and Hughes, 2005: 350-351). In other words, by analysing the structures, processes and relations, etc., that must be in place, whether it originates from London, Frankfurt or New York, for corporate bribery to be accomplished

whilst acknowledging that such relations do not exhaust explanations of the problem of corporate bribery, such common referents can be determined. This approach to comparison 'acknowledges the existence of a non-discursive or 'intransitive' dimension to social life – its material circumstances and practical contexts. In these terms it is possible to identify the structure of social objects and processes, and what, therefore, their existence presupposes' (Edwards and Hughes, 2005: 350).

Thus, the interpretation of 'qualitative research' adopted in this thesis can be characterised by the following steps which enabled such common referents to be determined and contrasted. The research began with the development of general research questions about those tasked with controlling transnational corporate bribery e.g. which 'strategies' do they use and why are they considered to be 'effective'? Following this, relevant agencies and individuals in the UK and Germany were selected and the processes of designing the research and gaining access commenced. Data was then collected through the use of traditionally qualitative research methods such as semi-structured interviews. This data was interpreted and theories and concepts developed. For example, the significance of 'prosecution policy', 'resources', and 'legality principles', amongst others, emerged here as themes which subsequently tightened the research questions and shaped further data collection. Finally, the findings and conclusions were written up.

3.3.2 Building theory: the adaptive theory approach

Given the above key questions, I was interested in adaptation and not deduction or induction due to the following. My awareness of other relevant theories and concepts related to the control of corporate crimes had an inevitable influence on my approach. Prior to data collection, reading and analysing the literature discussed in chapter 2, along with much literature that has not been included, resulted in the emergence of certain theoretical ideas about how transnational corporate bribery is controlled. For example, there was an initial interest in the levels and types of expertise of the regulators and the ways in which such expertise was used and distributed within anti-corruption agencies. Likewise, there was an interest in the extent to which 'organisational learning' occurred. However, during the processes of data collection and analysis, further ideas and theories were generated by

the data which resulted in the focus on specific theories and concepts. For example, literature on the various theories of enforcement and regulation became more significant (from my own interpretation) as data were generated and this enabled the key research questions outlined previously to emerge. For example, are corporations more suited to self-regulatory models or is a high level of state intervention required, and so on? The research strategy therefore incorporated both processes of induction and deduction through adaptation. This approach enabled me to develop my comparative approach within a framework that can be distinguished from the two predominant approaches to comparative criminology: the nomothetic (seeking universality) and the idiographic (seeking uniqueness) (see Edwards and Hughes, 2005). The empirical data that emerged therefore enabled theory generation in relation to the theoretical ideas developed prior to and during the research. Such insights could not be gained through other research strategies.

As outlined by Layder (1998: 132-133), adaptive theory falls somewhere between what are variously referred to as hypothetico-deductive (theory-testing) and grounded-theory (theory-constructing) approaches: it is epistemologically neither positivist nor interpretivist, ontologically it embraces both objectivism and subjectivism, and it utilises both inductive and deductive procedures for developing and elaborating theory. The approach is synthetic, borrowing from a number of others but also a distinct alternative to them. The theory is 'middle-range' in terms of immediate focus but has an open-ended relation with larger-scale or more inclusive theories or types of research. Thus, adaptive theory both shapes, and is shaped by the empirical data that emerge from research, allowing the dual influence of extant theory (theoretical models) together with those that unfold from (and are enfolded in) the research. Adaptive theorising is an ever-present feature of the research process.

My justification for this approach is as follows: a pure positivist, quantitative, nomothetic, deductive approach setting out to test hypotheses will not sufficiently understand the dynamic, multi-dimensional nature of the complex processes involved for those tasked with regulating corporate bribery. Conversely, a pure interpretivist, qualitative, idiographic, inductive approach does not give sufficient consideration to prior knowledge which can assist cumulative theory generation and fails to acknowledge structural properties of regulation, thus rendering it to a degree inflexible. I acknowledge that by adopting a more

synthetic approach, incorporating both inductive and deductive procedures, the merits of any given perspective may be obscured and that if all social research adopted an 'adaptive' approach, a lack of innovation or advancement may occur due to the possible removal of academic 'turf wars', and so on: it is therefore important for there to be proponents of a diverse collection of perspectives to further cumulative knowledge.

3.4 The research design: comparative criminal justice

> 'Even the best of current English-language theorizing about crime and crime control takes much of its sense and point from background assumptions and developments which are most at home in "Anglo-American" legal culture. This can make it difficult to recognize that there are other ways of constructing or rebuilding social order, and can produce a "globalizing criminology" for export that mistakes local treatments for universal panaceas (Newman, 1999; Nelken, 2003)' (Nelken, 2007b: 139)

Determining the research design should involve parsimony and be selected according to the nature of the issues or questions to be addressed (Hakim, 1987: 10). As outlined at the beginning of this chapter, the research adopted a comparative research design, examining the UK and Germany. Simply explained, the comparative research design entails studying two contrasting cases using more or less identical methods and implies that social phenomena can be better understood when compared to two or more meaningfully contrasting cases or situations (Bryman, 2008: 58). Such comparative research can challenge the assumptions of Anglo-American research, as alluded to in the quote above. More practically, 'the case study is, in many ways, ideally suited to the needs and resources of the small-scale researcher' (Blaxter *et al*, 2001: 71). As Pakes (2004: 1) notes, '[b]y means of documenting, analysing and contextualising criminal justice processes and institutions elsewhere and comparing them to more familiar settings a broader understanding of criminal justice can be gained. The other obvious advantage constitutes the acquisition of specific knowledge about arrangements in other jurisdictions'. To understand how an anti-corruption system works, an understanding of the processes, the actors involved, the structures and society within which they work, and the context-specific factors that can shape any given system is required (i.e. the necessary and contingent relations (see above)). As Fairchild and Dammer (2001: 9) have discussed, '[t]he fact is that a nation's way of

administering justice often reflects deep-seated cultural, religious, economic, political, and historical realities. Learning about the reasons for these different practices can give us insight into the values, traditions, and cultures of other systems'. Acquiring such knowledge can prevent ethnocentrism from occurring (Pakes, 2004: 3). Naturally though, comparisons of this type do incur various risks. For example, conceptual and practical problems of translation remain central issues (Newburn and Sparks, 2004: 7). It is all a question of interpretation according to Nelken (1994: 226) who notes, 'the attempt to grasp the meaning of a concept in another culture always parts from and returns to ideas derived from one's own culture'. For example, Nelken (1994: 222) uses the example of the existence of the 'compliance' system in English speaking countries that is characterised by its entrustment to special agencies and inspectorates and its aim to negotiate or induce the end of law-breaking behaviour through pressure to improve standards, rather than punishment through deterrence and stigmatisation by the regulator/police: for Nelken, such a contrast is not evident in Italy. Thus, interpretations of meanings embedded within foreign cultures may be misconstrued: the blanket application to a German context of an understanding of British discourse on transnational corporate bribery may generate inaccurate conclusions. However, this is only partly accurate. Nelken's insistence on idiographic accounts of the complete uniqueness of crime and control within different jurisdictions does not account for the existence of common referents, as explained earlier: corporate bribery within the UK and Germany is not so contextually based that it represents different social relations but has common referents in the form of the relations and practices that constitute it, albeit there is some variation in some relations e.g. facilitation payments as explained above.

The comparative element of the research is integral. Previous studies and literature have highlighted the pros and cons of comparative study within criminology and criminal justice (Nelken, 2000; Garland, 2001; Reichel, 2002; Pakes, 2004) and while it is important to acknowledge that intra-national comparative studies are certainly not yet exhausted, studies comparing different nations and systems can prove highly enlightening. The significant work of Lacey and Zedner (1998), for example, highlighted differences in meaning and application of the concepts of 'security' and 'community' in Britain and Germany. Thus, while surface similarities may be evident, deeper analysis often exposes profound

differences at the level of substance (Newburn and Sparks, 2004: 8). For this reason, comparative analysis organised around the necessary and contingent relations in relation to the control of transnational corporate bribery enables one to learn from the experiences of others in how they address analogous problems and challenges and therefore more insightful understandings. 'Tapping' these different cultural dynamics as sources of cultural knowledge enables such cross-cultural criminology to inform criminal justice (Karstedt, 2001: 300).

Nelken (2000) raises the questions of how we can really know another culture. He suggests this epistemological and methodological problem of comparative research has been variously tackled by relying mainly on foreign experts, by going abroad to interview officials or by drawing on their own experience of living and working in the country concerned – otherwise referred to as being 'virtually there', 'researching there', and 'living there' (Nelken, 2000: 23). This research largely involved 'researching there' as frequent trips were made to Germany to conduct interviews. However, as Nelken (2007b: 145) points out, short research visits can involve considerable reliance on local experts and practitioners. Although obtaining their views is the point of the research, care must be taken about considering such insiders as the direct or indirect source of claims about the given culture. That said, previous experience of living and working in Germany provided me with valuable cultural understandings. I am also a fluent speaker of German which also facilitated these understandings. Such '[i]mmersion in another social context gives the researcher invaluable opportunities to become more directly involved in the experience of cultural translation' (Nelken, 2007b: 145). However, it is vital to guard against the tendency to ignore the context of the researched cases by becoming too immersed in the detailed study (Blaxter *et al*, 2001: 71).

3.5 Access

Given the benefits of conducting comparative research, the first main obstacle arises during the process of gaining access. The issue of access was of paramount importance in this thesis as gaining access to the closed settings of the UK and German anti-corruption

enforcement agencies and state departments posed a significant challenge. As Van Maanen and Kolb (1985: 11) have previously observed, 'gaining access to most organisations is not a matter to be taken lightly but one that involves some combination of strategic planning, hard work and dumb luck'. This was certainly the case in this research along with a significant proportion of 'impression management'. For example, at all times I dressed in a manner suitable for the research environment. In other words, I wore suits, shined my shoes, and occasionally shaved. In addition, business cards were purchased due to the large amount of networking that was undertaken and any research documents sent to respondents were professionally put together, and where applicable, sent on headed paper.

The reason for this effort was that regulators of transnational corporate bribery may be considered as 'elites' within society. As Shore (2002: 4) notes, 'elites can be categorised as those who occupy the most influential positions or roles in the important spheres of social life. They are typically incumbents: the leaders, rulers, decision makers, in any sector of society, or custodians of the machinery of policy making'. As Stephens (2007: 203) notes, '[w]hether elite is defined in terms of social position relative to the researcher conducting the interview in these instances, or relative to the average citizen in society, they are still clearly in a position of power and raised social stature'. This can certainly be said of those individuals responsible for the investigation and prosecution of corporations involved in paying bribes in £multi-million international business transactions. At the national level, state prosecutors, professional investigators, qualified forensic accountants and lawyers, and various other fraud/corruption experts and specialists make up those individuals tasked with the formal state regulation of transnational corporate bribery. At the intergovernmental level, those individuals tasked with creating and monitoring international conventions are similarly made up of elite individuals including corruption experts (including academics), lawyers, and accountants, amongst others. Additionally, private sector elites tasked with implementing and ensuring the compliance of their company or of other companies to bribery laws are highly educated and experienced businesspersons, often with backgrounds in law and other relevant areas. The same applies to representatives of non-governmental organisations, who are represented by significant elites aiming to pressurise and support government and corporations in relation to anti-corruption issues. This

research required access to all these individuals in both the UK and Germany to gain a full and rich understanding of how transnational corporate bribery is regulated.

3.5.1 Accessing the UK

As a native to the UK, it was expected that I would find gaining access more straightforward than in Germany. This was not the case. In the UK, due to the centralised nature of anti-corruption enforcement, there is only one main state agency that aims to manage transnational corporate bribery; this is the SFO, although the City of London Police (CoLP) and other local police forces do assist the SFO (see chapter 6.2.1). Consequently, I was severely limited to the number of respondents I was able to look for. To gain initial access to the SFO, an informal e-mail was sent to the Director of the agency outlining the research interests and requesting a 'meeting' to discuss these issues further. The strategic use of 'name-dropping' was adopted and may have given the e-mails more legitimacy and credibility. For example, a number of respondents were acquaintances of my supervisor Professor Michael Levi, who has written extensively in the related area of financial crime. This enabled the use of Professor Levi as an indirect 'gatekeeper' of sorts. This initial e-mail, sent in December 2009, led to the arrangement of a meeting at the beginning of February 2010 with the Director of the SFO and the Head of the Anti-Corruption Domain. However, on arrival for the meeting I was informed the Director and Head were unable to make the appointment (the following day it transpired that a significant corruption case had been concluded that day[23]). Instead, a meeting was held with an allocated SPOC (Special Point of Contact). During this meeting I was required to outline the nature of the research and its key objectives. These objectives were shaped so to appeal to the agency. It was requested and agreed that I submit a detailed list of questions which could be vetted and approved. Subsequent contact all had to go through this SPOC but often emails were not replied to. Eventually, the interview questions were authorised and interviews were arranged, the first of which took place in mid-April 2010. When the interviews took place, the respondents had rarely seen the pre-authorised questions and were happy for me to proceed as I wished. All

[23] BAE Systems agreed a deal with UK and US prosecutors after pleading guilty to false statements and accountancy practices over deals in Tanzania. See SFO press release from 5/2/2010: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx <Accessed 23/3/11>

interviews with current SFO staff had to go through the SPOC. Emails were sent to other individuals within the SFO due to a lack of response from the SPOC but these received no reply.

3.5.2 Accessing Germany

In Germany the anti-corruption system is decentralised and there are no specialist anti-corruption agencies. Instead, each of the 16 *Bundesländer* (federal states) are required to enforce the law within their jurisdiction and this is primarily done by the *Staatsanwaltschaft* (Public Prosecutor's Office (PPO)) with assistance from the *Landeskriminalamt* (LKA) (Regional/State Office of Criminal Investigation) and the *Polizeipräsidien* (Local Police Headquarters (PP)) (see chapter 6.2.2). This increased the potential number of respondents but made it more difficult to identify who to approach. To gain access, I attended anti-corruption conferences taking place in Germany at which I was able to informally approach relevant actors. In some circumstances these initial conference conversations did not explicitly discuss my role and/or intention to identify potential research respondents. Instead, the initial networking often involved the exchanging of business cards and I was then able to follow up such informal conversations with emails outlining the research and enquiring about the possibility of a meeting at some point to discuss the research issues further. If I was unable to speak with certain individuals at conferences or if I was unaware of some delegates, I was able to scan delegate lists for potential respondents and contact them post-conference. Often, if the individual could not aid me directly, they were able to put me in contact with relevant individuals. These initial conversations and subsequent emails firstly led to a meeting in March 2010 with a public prosecutor in a large German city with an extensive track record of prosecuting transnational corporate bribery. This respondent also put me in contact with a further respondent and recommended other potential respondents. Other meetings and interviews were also arranged with actors within a LKA and a PP as a result of the conferences I attended. All German respondents were located in two specific German regions – both these regions were actively investigating and prosecuting overseas corruption. The selection of these sites was unplanned and resulted from the snowball sampling approach (see below) although respondents were initially approached given their reputations for dealing with transnational corporate bribery and

corruption. However, this caused no limitations for the validity of the research given generalisation to theory rather than to populations was sought (see above). In most cases, authorisation was not required to speak with these individuals. I was able to directly contact the prosecutors and/or investigators and set up meetings, unlike in the UK case. The LKA, however, required that I was given authorisation from the Federal State's Interior Ministry. This was a long process that required a formal letter from my supervisor along with a copy of the interview questions to be asked. Although these conferences mainly enabled access to Germany, UK actors in attendance also became formal respondents.

3.5.3 The internet as a sampling tool

In order to access intergovernmental and non-governmental organisations, I searched online for the names of relevant representatives and emailed these individuals directly. Some contacts were also recommended from other respondents as well as my supervisor. Some did not reply, some replied but were unable to assist, and some replied and were interested in speaking. This led to interviews being conducted with individuals working in anti-corruption at the OECD, the GRECO and TI and included trips to France and Switzerland, in addition to Germany and the UK. The internet also proved valuable in identifying private sector seminars, conferences, and webcasts on transnational corporate bribery. I was able to attend and participate in these along with many private sector individuals working in anti-bribery and corruption (see 'The research method' below for more extensive discussion).

3.6 The research method

In line with the qualitative research strategy outlined above, three distinct qualitative methods were adopted: semi-structured interviews; participant observation; and, document analysis. It was my intent to 'triangulate' (see Bryman, 2008: 611-612) the research methods in order to gain richer insights and to further substantiate the findings from any given method. These methods are outlined below.

3.6.1 Semi-structured interviews: the formal approach

Ideally, the research would have involved a degree of participant observation or 'observant participation' (Nelken, 2000: 25) in the working environments of all these actors but this was not feasible due to access. Prosecutors and investigators work in a confidential and time intensive environment. Instead, 20 formal interviews were carried out. The breakdown of these is as follows: UK – four SFO investigators/prosecutors; one former SFO investigator/prosecutor; one police investigator from a supporting agency to the SFO; one specialist white-collar crime lawyer: Germany – two specialist corruption state prosecutors; one police investigator (based at a PP); five police investigators (based at LKA); one specialist white-collar crime lawyer; one expert on corporate corruption (academic): Other (France, Switzerland and Germany) - one representative of a key IGO; one representative of a second key IGO; and, one representative of an international NGO.

Initially, interviews with those not directly involved in the state investigation and prosecution of anti-corruption cases were not planned as it was an understanding of the regulation of corporate bribery from the perspectives of investigators and prosecutors that was sought. However, it was quickly realised that to gain a true understanding of the control problem and gain insights into the wider changing landscape of anti-corruption enforcement, control and regulation, the respondent sample needed to be expanded to include the diverse array of individuals involved in 'regulating' such behaviour. The sample was therefore extended beyond anti-corruption investigators and prosecutors to include defence lawyers, representatives of NGOs and intergovernmental organisations, and expert academics. The interviews were semi-structured qualitative interviews. All interviews were face-to-face except one which was carried out over the telephone with one German respondent. Conducting face-to-face interviews was vital as it was considered unprofessional and inappropriate to do otherwise. Interview length varied with the longest taking almost three hours and the shortest 30 minutes although on average, most interviews lasted for between 60 and 90 minutes. Interviews largely took place in the respondents' personal offices, although some took place in designated interview rooms within the buildings of the respondents, one took place in a neutral venue, a public house, and one was conducted over the phone.

All interviews bar one with German respondents were carried out in German. As a fluent speaker of German I was able to build rapport with respondents who appreciated the efforts I made to speak in German but also provide material on the research in German. This also enabled respondents to speak more freely and confidently in their own language which increased the insightfulness of the data. I transcribed the Interviews in German and translated appropriate sections and quotes into English. Once the thesis was finalised, German respondents received an executive summary of the research in German while UK respondents received an English version.

When deciding on the implementation of the qualitative interview, various elements, as Fontana and Frey (2000: 654-565) illustrate, must be taken into consideration. These include: how the research setting is to be accessed; an understanding of the language and culture of the respondents; deciding on how to present oneself; how to locate informants, gain trust and establish rapport; and, the collection of empirical materials. Once these issues have been addressed, conducting the interviews poses another set of considerations. In qualitative interviews, it is intended for the interviewee to draw upon familiar ideas and meanings to enable a greater understanding of their point of view (May, 1997: 112). Themes and concepts are therefore embedded throughout interviews which enable broader theoretical or practical explanation (Rubin and Rubin, 1995: 226). This was important as the research questions required respondents to address diverse issues and be able to expand issues they felt were important. The semi-structured interview was considered most appropriate for this purpose. As Gillham (2005: 70) notes, 'it could be argued that the semi-structured interview is the most important way of conducting a research interview because of its flexibility balanced by structure, and the quality of the data so obtained'. The qualitative interview schedule may involve a series of headings or carefully worded questions where it is recommended to begin with less threatening questions and gradually move onto the more probing questions (Barbour, 2008: 115). It involves asking the same questions, ensuring equivalent coverage and time, and putting the kind and form of questions through a process of development to ensure topic focus (Gillham, 2005: 70). The advantages of this are that it 'increases the comparability of the data and that their structuration is increased as a result of the questions of the guide' (Flick, 2002: 93). However, throughout the interview process it is essential the researcher is flexible and

reflexive in order to be able to focus upon and develop meanings that emerge and have the ability to adapt the previously designed questions to fit changing contexts of meaning (Warren, 2001: 87). This was certainly the case in the interviews as different respondents focused on different issues and therefore varying amounts of time were allocated to different issues. Initially, the same questions were posed in each interview, although the structure and order varied dependent on the direction the interview went in. This variance posed no problem as I deemed it more important to let the interviews run smoothly rather than interrupt in order to rigidly adhere to the schedule. In this sense, the interview was more concerned with who the informant is as opposed the route the interview should follow (Kvale, 1996) although I was able to ask 'structuring questions' to guide the interview back to certain topics. Likewise, 'probing questions' were also used to develop ideas and encourage the respondents to elaborate on important topics. 'Introducing', 'follow-up', 'specifying', 'direct', 'indirect', and 'interpreting' questions as well as timed 'silences' (see Bryman, 2008: 445-447) were also strategically used when necessary. The semi-structured interview therefore provides a degree of flexibility which was well suited to this research. It also provided structure which enabled systematic comparisons to be made, an aspect vital to this research (see appendix 1 for an example of the semi-structured interview format).

The interview questions underwent frequent redrafting until I had determined the most appropriate formulation of each question. For example, the question: 'to what extent are you guided by the principle of legality that traditionally exists in Germany?' that was aimed at German prosecutors was soon realised to be too abstract and de-contextualised. It was replaced by more subtle and operational questions such as: 'what happens if you don't have enough resources to investigate or prosecute a case?' and 'how do you decide which cases to prioritise?' which provided an indirect but more accessible way of answering the same questions.

Implementing qualitative interviews also encounters certain problems. As Rubin and Rubin (1995: 54) illustrate, primarily there are issues of available time, access to respondents and financial and emotional costs of carrying out the research. Financial costs in particular were of importance. One planned trip to a German city to spend three days conducting interviews with police investigators was cancelled three days prior to the trip as the corresponding

agency was informed at the last minute that authorisation from the *Bundesland* was required. Flight and hotel costs booked at cheap, non-refundable rates were lost. The visit did take place seven months later. Furthermore, interview setting/environment may influence the respondents' willingness to discuss various issues: in this sense it is important to prearrange a comfortable and neutral environment. Even then, setting up the interview and making it happen are two different things (Warren, 2001). Another concern is that interviewees' responses will present little of interest regarding the research questions or that respondents will actually say what they really feel or what is important to them (Foddy, 1993: 138). Likewise, there may be a significant 'contrast between what people do and what people say they do' (Atkinson *et al*., 2003: 106). For example, would investigators and prosecutors be aware of the ways local and national cultures influence their own perceptions and ideas, and thus their understandings of how they work? Such issues as well as discursive practices in the relevant agencies and departments would only be discovered through an ethnographic approach. Additionally, at an interactional level, some interviewees may find the tape recording inhibiting (May, 1997: 124) as well as problems of 'bias, error, misunderstanding, or misdirection' (Holstein and Gubrium, 1995: 3), not to mention the significance of the relationship and rapport between interviewer and respondent. For example, the researcher's influence may turn interviewee responses into 'a projection of the researcher's preconceptions' (Payne and Payne, 2004: 131). 17 of the 20 formal interviews were recorded using a digital recording device. Notes were made during the other three interviews. Issues regarding transcription and interpretation also surfaced at the analysis stage (see '3.9 Data analysis' below).

3.6.2 Participant observation: the informal approach

Access to all relevant actors in order to conduct interviews was not possible. For example, accessing the closed environments of the private sector had to be undertaken indirectly. This was largely done through attending and participating in conferences and seminars organised for private sector individuals working in anti-bribery and corruption. Representatives of various UK, German, and US state agencies, amongst others, were often also in attendance at these events. I also participated in a number of interactive online webcasts whereby industry and legal experts discussed varying aspects of bribery and

corruption and whereby observers could submit questions in real time. As part of the qualitative research strategy, this research method represents a form of participant observation, although sustained immersion in the research environment was not possible. Instead, seminars and conferences lasted from two hours to three days.

When implementing observation techniques, 'the primary research instrument is the self, consciously gathering sensory data through sight, hearing, taste, smell and touch' (Jones and Somekh, 2005: 138). My role as the researcher was therefore important and took various forms throughout. Gans (1968) provides a classification of participant observer roles and views them as coexisting in any research project. These are: 'total participant' – the ethnographer is completely involved and resumes the researcher position once the situation has unfolded; 'researcher participant' – the ethnographer partially participates so that he or she can function as a researcher throughout; and, 'total researcher' – the ethnographer observes without involvement and therefore has no influence on the flow of events. All three roles were evident in this research project. I had no prior preference as to the degree of involvement and detachment with these emerging roles dependent on the development of the situation. For example, during conversations, my role may or may not have entered the conversation, although at most times, I was wearing a name badge which indicated my role and institution. This was not intentionally overt but simply reflected the development of natural conversations about the research topic. 19 conferences, seminars and workshops where the specific topic of overseas transnational bribery was addressed were attended in both the UK and Germany. At these events, conversations and discussions over transnational bribery with over 50 individuals took place. Usually following the event, but also during, extensive field notes were written. The individuals are not named in this research and any findings are not attributable to any individual. At many of these events, the Chatham House Rule[24] was in place. Consequently, no specific case details are discussed in the research. Chapter 8 in particular discusses findings from discussions held with corporate representatives but for reasons of anonymity specific quotes are not used in order to strictly ensure this remains the case. Themes generated from these discussions are used and supported with evidence from the formal interviews where possible. The

[24] For an explanation of the Rule visit: http://www.chathamhouse.org.uk/about/chathamhouserule/ <Accessed 28/03/11>

information gained at these events provided valuable insights into the anti-bribery landscape from the perspective of corporations.

Adler and Adler (1994: 381) note two chief criticisms of observation. First, it has problems of validity. Observers must rely on their own perceptions meaning bias from their subjective interpretations of situations is inescapably evident. As Jones and Somekh (2005: 138) argue, human behaviour is highly complex rendering it impossible to make a complete record of all the researcher's impressions. They further argue that the subjectivity of the researcher throughout the research process is extremely influential given that the recorded observations become a product of choices about what to observe and what to record. I accept these limitations which reflect the interpretation evident in qualitative research approaches. Furthermore, the 'observed' may not wholly represent the thoughts they express at such events as above and do not necessarily offer direct insights into the discourse on anti-bribery and corruption within private organisations. Second, observational research lacks reliability. While naturalistic observation enables insights into the group or individual observed such findings are not generalisable: in the case of this research, the insights gained from a small number of private sector individuals do not reflect the private sector as a whole. I therefore make no inferences at the nomothetic level. However, Adler and Adler (1994) do suggest that observational research conducted systematically and repeatedly over varying conditions that produces the same findings can be given more credibility.

3.6.3 Document and institutional analysis

To determine the legal, structural and policy frameworks of the various anti-corruption enforcement agencies and institutions, I initially (but continuously) conducted analyses of UK and German laws, international and regional conventions, court documents, Hansards, governmental, intergovernmental and NGO reports and publications, private sector publications, anti-corruption agency publications, and media articles. In terms of the sampling rationale for these documentary sources, no restrictions or limits were placed on which documents were to be collected. Initial searches for public source material in both jurisdictions made clear that there is not an abundance of literature on transnational bribery

thus I collected all sources I came across. This was manageable in terms of analysis. Some internal, private documents were also collected from the research sites. For example, in the UK, the UKBA was extensively analysed as were key SFO documents, such as annual reports, mission statements, press releases and public relations materials although many other internal documents were not made available, such as previous case files and so on. Corresponding documents in Germany were analysed. These documents provided initial (and continuing) insight which was further substantiated and/or contrasted and compared with findings from the above processes of observation and interviewing.

Scott (1990: 6) provides a set of four rigorous criteria for assessing the quality of documents - authenticity; credibility; representativeness; and, meaning. In terms of these criteria, and in relation to documents emanating from state sources, such materials are likely to be authentic and meaningful. In other words, the sources are genuine and of unquestionable origin, and are clear and comprehensible to the researcher. However, in terms of credibility, whether the documentary sources are biased is difficult to determine as they may reflect a particular perspective and therefore not represent the full picture. Caution needed to be taken during analysis, although such biases are interesting in themselves. In terms of representativeness, official, public documents are unique and therefore may not be representative. Given the qualitative strategy adopted in this research, this is less significant. In terms of private-source materials (all of which were in the public domain), such publications are also authentic and meaningful, as above. Again, credibility and representatives were issues as publications may reflect particular perspectives or intentions, as in the case of the 'profiteers' (see chapter 8.4) and may not represent the perspective of a given private organisation or more general perspectives within the sector. Such documents may therefore not provide objective accounts of things behind the scenes and again require examining in the context of other data (see Bryman, 2008: 522). I am aware that documents do not necessarily reflect realities, hence the multi-method approach.

3.7 Case studies: Siemens and Innospec

This thesis frequently refers to two prominent cases of transnational corporate bribery as a means of providing contextualised understandings in relation to the key theoretical and conceptual concerns. These two cases are discussed in detail in chapter 4, but methodologically, the data about these cases were collected from several sources. First, all respondents in the UK and Germany frequently referred to the Innospec and Siemens cases respectively as a means of demonstrating their arguments and points. Thus, much case detail and information was obtained from the investigators and prosecutors that dealt directly with these cases but also from investigators, prosecutors and other respondents that had exceptional knowledge of them. Second, several open source publications were available, outlining in detail the nature and extent of the bribery that had taken place. For example, Siemens provided reports and press releases on their case whilst the US authorities also published detailed accounts of the charges brought against Siemens. Similarly, with the Innospec case, the SFO press releases gave much information. Court documents, Hansards, publications from inter-governmental and non-governmental organisations also extensively covered these cases. Third, media reports also provided much information. In particular, the specialist and business press covered aspects of the cases in great detail. Other cases are also discussed throughout the thesis but the Siemens and Innospec cases are presented as key case studies in chapter 4 to assist in grounding the research problem.

3.8 Sampling: purposive and theoretical

Purposive sampling is a non-probability, non-random form of sampling that aims to sample cases/participants strategically, so those sampled are relevant to the research questions being posed (Bryman, 2008: 415). At the beginning of this chapter, the reasoning behind the selection of the UK and Germany as cases was explained and reflected three issues: the need for a transnational analysis of a transnational phenomenon; the difference in enforcement rates; and, the different cultural and anti-corruption structures and systems. Within these two jurisdictions, participants were purposively selected. For example, in the

UK there is one main agency for anti-corruption enforcement, the SFO. Consequently, it was important for this agency to be sampled. In Germany, while there were more options available, participants were selected in part due to their reputations in relation to anti-bribery enforcement, but also due to the potential for gaining access (see '3.5 Access' above).

More specifically, this purposive sampling took a form of theoretical sampling. Theoretical sampling is considered as 'the process of data collection for generating theory whereby the analyst jointly collects, codes, and analyses his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges. The process of data collection is controlled by the emerging theory, whether substantive or formal' (Glaser and Strauss, 1967: 45). A further definition, considers such sampling as 'data gathering driven by concepts derived from the evolving theory and based on the concept of "making comparisons", whose purpose is to go to places, people, or events that will maximise opportunities to discover variations among concepts and to densify categories in terms of their properties and dimensions (Strauss and Corbin, 1998: 201). Thus, such sampling is continuous in its nature and played a significant role in this research. For example, as data was collected, the data indicated the need to widen the sample from anti-bribery investigators and prosecutors to incorporate intergovernmental organisations, NGOs, and corporations, amongst others. In this sense, the data collection and sampling were shaped by the emerging theory.

A snowball sampling strategy was also employed whereby I made contact with initial respondents and then used these to establish contacts with others. For example, having established contacts with one German investigator, contacts to three other investigators in a German LKA were established. This occurred with other respondents also. Such sampling represents a form of 'convenience sampling' and renders the sample unrepresentative of the population. However, external validity and the need to generalise are of less significance in the qualitative strategy adopted in this research.

The theoretical sampling approach continued until data saturation was evident. Theoretical saturation refers to the saturation of a category following the ongoing processes of

theoretical sampling, data collection, and data analysis. In other words, 'this means, until (a) no new or relevant data seem to be emerging regarding a category, (b) the category is well developed in terms of its properties and dimensions demonstrating variation, and (c) the relationships among categories are well established and validated' (Strauss and Corbin, 1998: 212). Thus, at the stage when the interview, observation and document data began to bring no new data or relevant data, data collection was stopped.

3.9 Data Analysis

Tesch (1990) characterises the main common features of analytic strategies as follows: First, analysis is considered a cyclical process and reflexive activity; second, it is comprehensive and systematic but not inflexible; third, it involves the segregation and division of data into meaningful units while maintaining connection to the whole; and fourth, it involves the organisation of data in relation to a system derived from the data itself. Thus, it is flexible, reflexive and imaginative but also structured, methodological and intellectually competent. It is wrong to suggest that 'there is a single right or most appropriate way to analyse qualitative data' and 'there is not, therefore, consensus about what the term analysis means' (Coffey and Atkinson, 1996: 6). As a result of its diversity, the term and concept of analysis is interpreted and applied differently by researchers.

As has been mentioned throughout this chapter, data analysis was ongoing and incorporated elements of both deduction and induction: prior ideas influenced theory generation but the data subsequently reshaped this, and so on. Qualitative data tend to be extensive and diverse, meaning analysis can be a complex and vast procedure. The data in this research consisted of interview transcripts, field notes, and various other textual sources. Data analysis involves transcription of recorded interviews as well as a means of coding information in order to develop general themes and categories for analysis (Hammersley and Atkinson, 1983). Initially, all interviews were transcribed and along with documents and field notes (which were typed up) imported into NVivo 8, a Computer Aided Qualitative Data Analysis Software (CAQDAS), which facilitates the storage, retrieval, coding and analysis of qualitative data. The last three interviews, however, were only partially

transcribed as analysis of the previous interview transcripts had largely determined the relevant codes, categories and themes. Such '"selectivity" is only possible when one has arrived at a system of coding (classification or labelling) the interview data' (Layder, 1998: 53). The coding system in this research went through numerous phases. Initially, the data were coded in relation to specific issues generated by the research questions into 'nodes' and 'tree nodes'. For example, one 'node' entitled 'legal frameworks of anti-corruption enforcement' was demarcated down into 'tree nodes' consisting of 'UK anti-corruption law', 'German anti-corruption law', 'EU Conventions', and so on. These were further broken down into codes such as 'UK Bribery Act 2010' and 'Prevention of Corruption Acts'. Thus the coding process incorporated various layers (see appendix 2 for a screenshot of this process). Often, specific pieces of data were coded in different categories or themes, or merged into other related themes. The coded pieces of data were very rarely short sentences or words, but rather paragraphs or large pieces of related text. This was in order to keep the context of what was being said and provide a less fragmented dataset. The themes and categories generated were also used to form the chapters and subsections in this thesis. Once coding was completed, theory generation was made more accessible. Thematic analysis (see Riessman, 2004) was used to analyse the data. This entailed a focus on what was being said rather than how it was being said.

3.10 Ethics

It was recognised that the nature of this research could involve access to sensitive and confidential data, thus raising important issues of research ethics and confidentiality to 'the players' as well as the risk of jeopardising ongoing cases of the SFO and the German prosecutors and investigators. In order to gain access to the SFO, for example, I made it explicitly clear that I would not need access to ongoing case materials and that respondents would not discuss any confidential material. This did not affect the research as the aim was to understand the regulatory approaches of the regulators and this could be done without access to specific case details. No such issues were raised prior to the interviews in Germany, although if a respondent did not wish something to be included, it was stated

during the interviews that it should remain 'off the record'. These requests were wholly accepted.

Otherwise, all aspects of the project were conducted in compliance with the British Society of Criminology's guidelines on research ethics[25]. Additionally, in accordance with the University's procedures, the research proposal went through an independent ethical review. The research process also followed the guidelines for good practice set out by the Cardiff University Research Ethics Committee (UREC)[26] and the School of Social Sciences Research Ethics Committee[27]. In line with these guidelines, participant information sheets and consent forms were written but not used. It was deemed inappropriate to use these given the type of respondent that was being researched. Respondents were, however, made aware of their rights and responsibilities. For example, for all aspects of the research confidentiality and anonymity were guaranteed, where possible. I have not named any individual investigators, cases, or German places. However, while individuals have been anonymised as far as possible, as there is one main agency in the UK with the remit of investigating and prosecuting transnational corporate bribery in the UK, it would be straightforward to identify it. Individuals may also be identifiable from the statements they made and this was made clear to respondents and was pointed out in the initial research proposal sent to the SFO. As part of gaining access, and also to ensure anonymity, all respondents were given the opportunity to receive a copy of their interview transcript. Not all respondents took this opportunity, and of those that did, none requested anything additional be removed.

3.10.1 Data protection

Personal data generated consisted of the following: field notes, digital audio-recordings of individual conversations and interviews, and transcriptions of these recordings. All research material was stored securely, on a password-protected computer or in a locked filing cabinet, with access restricted to myself.

[25] See link: http://www.britsoccrim.org/codeofethics.htm <Accessed 23/3/2011>
[26] See link: http://www.cardiff.ac.uk/racdv/ethics/urec/index.html <Accessed 23/3/2011>
[27] See link: http://www.cardiff.ac.uk/socsi/research/researchethics/index.html <Accessed 23/3/2011>

3.11 Validity, reliability and reflections

The above discussion has addressed various limitations of the research as it was mentioned but it is worthwhile here making explicit these limitations. First, the sampling process of interviewees was selective and limited in numbers for a comparative analysis. This reflected the small number of individuals involved in investigation and prosecution of transnational corporate bribery along with difficulties of gaining access. For example, access was restricted by the SFO as interviews with current staff could only be gained through formal procedures. Additionally, the focus of the research was broad, taking a snapshot of a small number of individuals from different perspectives to qualitatively understand a transnational phenomenon. Consequently, the findings are not generalisable to populations and lack external validity in this sense, but qualitative research 'is not an experimental science in search of law but an interpretative one in search of meaning' (Geertz, 1973: 3). Given the character of the comparative cases a *moderatum* generalisation to theory was possible i.e. it is reasonable to expect that limitations in (non-)enforcement practices, amongst other findings, are applicable to other jurisdictions. Second, the research methods incorporate a number of inevitable and inherent biases. For example, the interview questions and data analysis were shaped by myself and may reflect my own conceptual and theoretical interpretations. No interpretation of meaning can be completely reliable, however, but the rigorous use of multiple methods to gain data and evidence from multiple sources as done so in this research can serve to support the inferences made.

With these limitations in mind, it is important to acknowledge how future research in this area could be improved. First, in-depth interviews with corporate individuals and those working in anti-bribery and corruption in the private sector would further substantiate the perspectives of the 'regulatees' which was largely done through the process of participant observation in this research. Gaining access to private companies is a lengthy and difficult process, and once access is gained, may require non-disclosure agreements to be signed and/or any written work to be vetted by the organisation. This could place significant restrictions on any researcher. Nonetheless, accessing this group more formally would lead to potentially significant findings. Second, while I consider a qualitative strategy most suited to answering the stated research questions, it would be beneficial to incorporate

quantitative methods to substantiate and support the qualitative findings and therefore adopt a mixed-strategy and mixed-method approach. For example, surveys of private sector individuals working in anti-bribery and corruption or working to comply with the relevant laws could address whether such laws will restrict business, how compliance systems are being implemented, whether they would be likely to self-report, and so on. Comparing such data with the approaches of the regulators would produce rich insights. This would enable statistical analysis of generalisable amounts of data. Third, although respondents did discuss specific cases, much data generated on the cases discussed in this research also came from press releases from the SFO, intergovernmental reports, and media sources. However, such sources do not give access to the specific details involved in any given case. It would therefore be beneficial to gain some access to old case files of the anti-corruption agencies and departments in order to gainer richer understandings of the context in which transnational bribery occurs.

3.12 Summary

The purpose of this chapter was to explain the adopted research strategy, research design and research method whilst simultaneously arguing why the adopted approach is suitable for the key questions of this research. It was first important to highlight that a transnational crime phenomenon that requires a transnational regulatory approach can be most usefully analysed by adopting a transnational, comparative research approach. The UK and Germany were selected based on statistics indicating the significant differences between their enforcement rates of the OECD's Anti-Bribery Convention, the systems and structures evident in both jurisdictions, and also the key roles the economies of the two countries play in the EU in terms of their share of world exports. Following this justification, the qualitative research strategy was outlined and it was argued that such an approach enables an understanding of how social relationships between regulators, regulatees and non-state agencies function as well as the meanings anti-corruption actors give to adopted regulatory strategies. This approach enabled the necessary and contingent relations of the regulation of corporate bribery, or its common referents, across cultures and jurisdictions, to be contrasted between two meaningful research sites. At this point, the adaptive theory

approach that incorporates elements of deduction and induction in the processes of research and theory generation was outlined. This approach was embedded within a critical realist philosophical framework. This led to a discussion of the comparative research design that enabled two meaningful cases to be contrasted using more or less identical methods in order to better understand social phenomena relative to one another. At this point it was also explained how access to the relevant agencies and actors was gained. The research methods of semi-structured interviews, participant observation and document analysis were than analysed and their usefulness for this research explained. The limitations of each method were also analysed. The purposive, theoretical sampling approach enabled relevant actors to be researched. Ethical issues along with data protection were also addressed. Finally, the limitations of the research were reaffirmed and significant reflections outlined.

4

Grounding the research problem

4.1 Introduction

> '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 organized 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, former UN Secretary-General, 2004: iii)

The quote above from Kofi Annan represents a number of common assertions made about the harms of corruption. It is often argued by intergovernmental and non-governmental organisations, as well as other 'moral entrepreneurs', that corruption and bribery have devastating consequences, in particular for developing countries where much transnational bribery is directed (though in what proportion is unknown). Such arguments may use or even be based on empirical findings, but also often reflect informed morality. Such arguments, however, whether based on evidence or morality, are influential in shaping legal frameworks and enforcement practices, due to the significant powers of persuasion and intense lobbying of governments that these organisations can put forward. Consequently, corruption and bribery are controlled and regulated, and it is this control problem that is the concern in this research: difficulties are faced by *sovereign* authorities in adapting to *transnational* corporate bribery that takes place *multi-jurisdictionally* in *international business transactions*. The global business markets within which multi-national corporations operate also provide the opportunities for transnational corporate bribery to take place. The key questions developed in chapter 1 relate to the regulatory approaches along with the use of enforcement and/or non-enforcement mechanisms in the UK and Germany to manage these problems. A comparison of these two countries, for the reasons outlined in

chapter 3.2, enables rich, contextual insights into the regulatory framework that has been developed to tackle problems of transnational corporate bribery.

This chapter aims to illuminate this control problem by asking why it is important to regulate transnational corporate bribery. This argument is contextualised through an analysis of two recent cases of transnational corporate bribery: Innospec Ltd in the UK and Siemens AG (*Arbeitsgemeinschaft* (Working Group)) in Germany. The nature of the corruption along with the specifics of the investigations, court proceedings and sentencing will be outlined. Key issues emerging from these cases and their relevance to this thesis are explored. The chapter then moves on to discuss the transnational nature of overseas corporate bribery and highlights the difficulties faced by States in controlling and regulating offences which occur within and beyond their jurisdictions. The limitations of current theorising on regulation are also analysed. Here, five significant issues are analysed: the inadequacy of current theories of regulation that appear fragile when applied to multi-jurisdictional corporate bribery; the less tangible nature of transnational corporate bribery; transnational corporate bribery as a multi-sector, multi-industry control problem; inter-national regulation; and, the significance of transnational bribery in contrast to domestic bribery.

4.2 Why is it important to regulate transnational corporate bribery?

As the quote at the beginning of this chapter from Kofi Annan asserts, corruption can cause serious harms. This chapter initially included an in-depth analysis of the causes, consequences and costs of corruption to aid the reader in understanding the nature of corporate bribery. This discussion was removed due to the space constraints of this thesis. However, within this discussion, certain consequences of corruption are consistently noted – in particular, Rose-Ackerman (1997: 42-46) identifies six key consequences of corruption: inefficient government contracting and privatisations; use of delays and red tape to induce payoffs; inefficient use of corrupt payments (e.g. payoffs diverted into illegal activities); inequities in reference to the distribution of gains and losses; damaged political legitimacy; and slowed growth whereby the benefits of development are distributed unequally. Similarly, Delaney (2007: 419) notes diminished economic development and growth;

increased social inequality; and, further distrust of government as significant consequences. Thus, as Rose-Ackerman notes,

> '[c]orruption can produce inefficiency and unfairness. It can undermine the political legitimacy of the state. Corruption is also evidence that deeper problems exist in the state's dealings with the private sector. The most severe costs are not the bribes themselves but the underlying distortions they reveal – distortions that may have been created by officials to generate payoffs' (Rose-Ackerman, 1997: 42)

Thus, transnational corporate bribery penetrates much of society, at the micro, meso, and macro levels. As TI (2011: website[28]) notes, corruption has significant political, economic, social and environmental impacts. Due to these harms, many social actors and organisations have recognised the need to reduce corruption and bribery, and placed its control on the political agenda. This complex nature, however, creates difficulties for the control agencies responsible for investigation and prosecution. For example, how can a German prosecutor investigate the impacts of a bribe given by a German company to a state official in a small African town to maintain a business contract? How can a UK regulator follow the 'cash-flow' of a bribe that was sent to the receiver via multiple international bank accounts and 'shell-firms'? Investigation of domestic financial crime is problematic (see for example Levi, 1987) but the above difficulties reinforce the location of transnational corporate bribery in legal international business markets and it is in this context that shifts in policing away from traditional criminal law enforcement appear necessary. Transnational criminal activities can operate beyond national jurisdictions, and where state agencies and regulators have few if any direct powers.

4.3 Case studies: Innospec Ltd and Siemens AG

As a means of grounding the research problem, it is useful to present some real-life, contemporary examples which aid in fleshing out the content-less abstractions of concepts such as 'corruption', 'bribery' and 'transnational corporate bribery'. Two recent cases will be

[28] TI discussion of 'costs of corruption' available at: http://www.transparency.org/news_room/faq/corruption_faq#faqcorr4 <Accessed 05/01/2010>

analysed: Innospec Ltd. ("Innospec") that was investigated and prosecuted in the UK; and Siemens AG ("Siemens") that is the largest case so far to be prosecuted in Germany.

4.4 Innospec Ltd.[29]

Innospec pleaded guilty on 18 March 2010 at Southwark Crown Court to bribing employees of Pertamina (an Indonesian state owned petroleum refinery) as well as other Indonesian Government Officials in order to secure sales of a fuel additive, TEL (tetraethyl lead). Innospec, based in Cheshire, UK, is a subsidiary of Innospec Inc., a NASDAQ[30] listed company based in the United States and a manufacturer of the above mentioned lead based anti-knock fuel additive TEL. TEL cannot be sold in Europe or the US for motor vehicles on health and environmental grounds but the company continued to produce and sell TEL where it remained lawful, for example, in countries such as Indonesia. The 'directing minds' of Innospec engaged in systematic and large-scale corruption of senior Government officials[31]. They appointed agents in Indonesia to act on their behalf in seeking to win or continue contracts to supply TEL, and between 14 February 2002 and 31 December 2006 (the indictment period), the company paid US $11.7m to its agents. These commissions enabled agents to pay bribes to staff at Pertamina and other public officials at higher regulatory or ministerial levels who were in a position to favour the company by purchasing and influencing orders of TEL. These payments therefore ensured that Pertamina favoured TEL over other unleaded alternatives. The agents acted under the instruction of the company who also authorised the commission fees paid by them. The company accepted that it was aware that a proportion of the commission funds would be used to pay bribes. The company also created 'ad hoc' funds that assisted specific or 'one-off' arrangements with particularly influential individuals within Pertamina or at a political level. One particular fund was structured to protect the interests of the lead based additives industry but was in actual fact

[29] SFO press release available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx <Accessed 29/11/2010>

[30] The NASDAQ Stock Exchange is a US stock exchange. NASDAQ originally stood for the 'National Association of Securities Dealers Automated Quotations'.

[31] See sentencing remarks of Lord Justice Thomas, available at: http://www.judiciary.gov.uk/NR/rdonlyres/5343F038-A6E5-448B-BB2D-7CA31F9E2DDA/0/sentencingremarksthomasljinnospec.pdf <Accessed 11/04/2011>

no more than a slush fund to corrupt senior officials in various Ministries with the intention of blocking legislative moves to ban or enforce the ban on TEL on environmental grounds and/or seeking a higher level buy-in to continued yearly supplies of TEL to Pertamina. This impact can be seen through the fact that while the Indonesian Government's intention to go lead-free was initially conceived in 1999, it was not actually realised until 2006.

4.4.1 Legal proceedings:

The SFO involvement in the Innospec case came following a referral from the US Department of Justice (DoJ) in October 2007 who at that time was investigating Innospec Inc. following the report from the UN Independent Inquiry Committee into the Oil for Food Programme on 27 October 2005. The SFO accepted the corruption case for investigation on 23 May 2008. Following this, the company disclosed to the SFO evidence that the company had sought to influence decision-makers in public contracts for the purchase of TEL in Indonesia between 1999 and 2006. As the SFO press release on this case states, the company provided the SFO with a high level of cooperation throughout the investigation.

The Attorney General (AG) gave consent to the SFO to bring these proceedings on 2 November 2009[32]. Innospec was summonsed on 24 February 2010 on the charge of conspiring with certain of its directors, executives, employees and agents to give or agree to give corruption payments contrary to section 1 of the Criminal Law Act 1977 and section 1 of the Prevention of Corruption Act 1906. After two preliminary hearings, the case was listed for plea and sentence on 18 March 2010.

4.4.2 Sentence:

Innospec agreed that it would be subject to financial penalties and the SFO carried out an investigation in tandem with the Securities and Exchange Commission (SEC) in the US into the company's ability to pay. This investigation concluded that the amount available to the UK was US $12.7m. The company also agreed to pay the costs of a monitor, to be acceptable

[32] The new UK Bribery Act 2010 enables the Director of the SFO to bring prosecutions without the consent of the Attorney General (see chapter 5).

in both the UK and US, for up to three years. In the US, a criminal fine of US $14.1m was paid to the DoJ in relation to the UN Oil for Food programme while parent company Innospec Inc. paid a fine of US $11.2m in profits to the SEC and $2.2m to OFAC (Office of Foreign Asset Control) in line with the FCPA for violating anti-bribery and books and records provisions relating to conduct in Iraq.

4.4.3 Court judgement:

On 26 March 2010 the Crown Court Judgement of Lord Justice Thomas on the case was issued. A number of key points were made by Lord Justice Thomas. He objected to the agreeing of a settlement between the authorities and Innospec and felt forced to accept and limit the fine, as agreed through the SFO and SEC investigation, due to certain unique circumstances. First, the US courts had already agreed the plea agreement made in the US. This reflects the frequent use of civil agreements in such cases in the US which ties in with the *negotiated justice* approach evident there where plea-bargains are common. Second, Innospec had pleaded guilty, fully cooperated and provided evidence that would be of significant assistance to the prosecution of others. Third, sentencing Innospec to a larger fine would have resulted in its insolvency and therefore 'affected the innocent employees of the company, caused considerable difficulties for the pension liabilities of the company and been detrimental to the agreed "clean up" programme the company has in place in the UK' (Lord Justice Thomas, 2010: 12)[33]. Thus, economic and public interest considerations were made (although under the OECD Convention certain economic considerations should not influence the decision to prosecute: see chapter 5.3.1). Fourth, the prospect of a 'global settlement' as described above had already been announced to the markets. What was made clear by Lord Justice Thomas was that he felt the fine was inadequate to reflect the level of criminality. In other words, corruption (especially where the directing minds of the company played a significant role) requires criminal sanctions, and that such 'plea agreements' should not begin to erode the fundamental constitutional principle of judicial sentencing in the UK. He concluded that '…the Director of the SFO had no power to enter into the arrangements and made and no such agreements should be made again' (Lord

[33] Judgement available at: http://www.judiciary.gov.uk/NR/rdonlyres/5343F038-A6E5-448B-BB2D-7CA31F9E2DDA/0/sentencingremarksthomasljinnospec.pdf <Accessed 26/11/2010>

Justice Thomas, 2010: 13)[34]. Commenting on this guidance from Lord Justice Thomas, SFO Director Richard Alderman stated:

> 'This has been a ground-breaking case involving a global settlement that the SFO has brought to the English courts. I am deeply grateful to Lord Justice Thomas for the detailed guidance he has given on all the complex issues involved. This is a very important decision which will guide the SFO in our approach to these matters in future' (SFO website press release, 2010)[35]

These issues of plea-bargaining, agreeing settlements, the potential for deferred prosecution agreements, and so on, have remained a significant issue in the prosecution policy of the UK (see chapter 7).

4.4.4 Key issues:

This case reflects a number of current issues in relation to the regulatory approach and prosecution policy of the SFO as well as tensions with adjudication and these are touched upon in the two quotes from UK investigators and prosecutors below:

> 'Innospec was limited to its own facts because the settlement as it was with the SFO and other US body, was limited by their ability to pay,…..ours was about $12.7 million, had it been any higher than that the company would have gone bust and no one would have got anything' (Interview 114)

> 'I could see the Innospec thing being closed down now that they have got the company out of the way – too hard, too costly to do the individuals….If a company comes in, reports it's non-endemic, senior management are not making a personal benefit out of it and if senior management were involved they have been got rid of then it's a case for a Civil Confiscation Order. If a company is a bit more endemic but still cleared things out, that sort of thing, then it's a plea agreement like Innospec' (Interview 113)

These quotes, along with the above information and comments of Lord Justice Thomas, raise some significant questions. First, there appears to be a preference in the UK towards the use of civil agreements and settlements as opposed to criminal sanctions, but is this regulatory approach that aims to regulate companies through civil approaches appropriate? Additionally, is criminal prosecution (which can lead to debarment of corporations – the 'corporate death penalty' – and of individuals) being legitimately limited by finite resources

[34] Judgement available at: http://www.judiciary.gov.uk/NR/rdonlyres/5343F038-A6E5-448B-BB2D-7CA31F9E2DDA/0/sentencingremarksthomasljinnospec.pdf <Accessed 26/11/2010>
[35] Quote from: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-judgment.aspx <Accessed 25/11/2010>

(cost and difficulty) and other economic considerations (for example, the ability to pay a fine; can't afford to destroy companies as providers of tax and employment) as indicated above? Second, the above questions raise the issue of whether the moral underpinning of legislation and of prosecutorial policy is being weakened or if criminal acts can be dealt with through non-criminal sanctions. Do civil sanctions therefore reflect the level of criminality and what does this mean for regulation? Likewise, should a company that produces and sells a substance banned for motor vehicles in Europe and the US even be allowed to continue its trade in other countries? Third, tensions between the courts and enforcement authorities as indicated above puts the regulatory approach in doubt and raises the question of whether the investigators and prosecutors with the specialist knowledge and expertise in this area should be able to 'negotiate justice' and 'self-adjudicate' as per the US model and whether the role of the courts needs to adapt. For example, should leniency for full cooperation and/or self-reporting be applied to criminal acts of corruption and are all individuals and companies therefore being treated equally before the law? These issues are addressed in chapters 6, 7 and 8.

4.5 Siemens AG

Siemens has been the subject of multiple bribery scandals in various countries. The subsequent investigations resulted in prosecutions and sanctions in various jurisdictions including Germany, the US, Italy, Russia, Nigeria and Libya, and indicated an estimated €1.3bn[36] in bribes was paid. Numerous diverse scandals have emerged. For example, in one investigation in 2004 a Milan court banned Siemens from selling gas turbines to the Italian public administration for one year for its part in an Italian corruption scandal[37]. Further investigations were also initiated in Switzerland, Greece and Lichtenstein. It is the cases in Germany and the US, however, which have received most attention. Towards the end of

[36] See *The Guardian: 'Siemens boss admits setting up slush funds'*, 27/05/2008. Available at: http://www.guardian.co.uk/business/2008/may/27/technology.europe <Accessed 07/04/2011>

[37] In the above mentioned Italian case involving Enelpower, the Darmstadt Regional Court sentenced two former Siemens employees to suspended sentences and order Siemens to disgorge €38m in profits. In 2009, these convictions were partially overturned and partially upheld. See TI Progress Report (2007: 31) available at: http://www.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention <Accessed 05/04/2011>

2006 five Siemens executives were arrested by German authorities on charges of bribery and embezzlement. The allegations involved the payment of up to €420m into secret bank accounts (mainly Swiss and Austrian) over seven years to facilitate the paying of bribes to win overseas contracts. Since then, other individuals have been investigated. In a separate investigation, German authorities examined allegations of illegal payments including one six-figure payment to Saddam Hussein's Iraqi government in order to secure energy and medical equipment contracts in the UN Oil-for-Food programme.

4.5.1 The corrupt activities:

The payment of bribes by Siemens to win and maintain overseas contracts involved various offences. A report[38] from the US DoJ, who investigated the case under the extra-jurisdictional reach of the US FCPA, outlined numerous breaches with regards two counts related to 'internal controls' and 'books and records'. All the offences took place from around March 2001 until at least November 2006. The report states that Siemens knowingly circumvented and knowingly failed to implement a system of internal accounting controls. That is to say, that Siemens (a) knowingly failed to implement sufficient anti-bribery compliance policies and procedures; (b) knowingly failed to implement sufficient controls over third party bank accounts and the use of cash; (c) knowingly failed to appropriately investigate and respond to allegations of corrupt payments; (d) knowingly failed to discipline employees involved in making corrupt payments; (e) knowingly failed to establish a sufficiently empowered and competent Corporate Compliance Office; (f) knowingly failed to report to the Audit Committee substantiated allegations of corrupt payments around the world; (g) limited the quantity and scope of audits of payments to purported business consultants; (h) created and utilized certain mechanisms for making and concealing approximately $1,361,500,000 in payments to third parties; (i) engaged former Siemens employees as purported business consultants to act as conduits for corrupt payments; (j) continued to use off-books accounts for corrupt payments even after compliance risks associated with such accounts were raised at the highest levels of management; (k) used removable Post-It notes to affix signatures to approval forms authorizing payments to

[38] Report available at: http://www.justice.gov/opa/documents/siemens-ag-info.pdf <Accessed 05/04/2011>

conceal the identity of the signers and obscure the audit trail; (l) allowed third party payments to be made based on a single signature in contravention of Siemens' 'four eyes principle', which required authorization of payments by two Siemens managers; (m) changed the name of purported business consulting agreements to 'agency agreements' or similar titles to avoid detection and conceal non-compliance with the 2005 business consulting agreement guidelines; (n) knowingly failed to exercise due diligence to prevent and detect criminal conduct; (o) knowingly included within substantial authority personnel individuals whom Siemens knew had engaged in illegal activities and other conduct inconsistent with an effective compliance and ethics program; (p) knowingly failed to take reasonable steps to ensure Siemens' compliance and ethics program was followed, including monitoring and internal audits to detect criminal conduct; (q) knowingly failed to evaluate regularly the effectiveness of Siemens' compliance and ethics program; (r) knowingly failed to have and publicise a system whereby employees and agents could report or seek guidance regarding potential or actual criminal conduct without fear of retaliation; (s) knowingly failed to provide appropriate incentives to perform in accordance with the compliance and ethics program; and, (t) knowingly entered into purported business consulting agreements with no basis, and without performing any due diligence, sometimes after Siemens had won the relevant project.

In relation to the books and records, the report makes clear that Siemens knowingly falsified and caused to be falsified books, records, and accounts required to, in reasonable detail, accurately and fairly reflect the transactions and dispositions of Siemens. That is to say, Siemens (a) used off-books accounts as a way to conceal corrupt payments; (b) entered into purported business consulting agreements with no basis, sometimes after Siemens had won the relevant project; (c) justified payments to purported business consultants based on false invoices; (d) mischaracterised bribes in the corporate books and records as consulting fees and other seemingly legitimate expenses; (e) accumulated profit reserves as liabilities in internal balance sheet accounts and then used them to make corrupt payments through business consultants as needed; (f) used removable Post-It notes to affix signatures to approval forms authorizing payments to conceal the identity of the signers and obscure the audit trail; and (g) drafted and backdated sham business consulting agreements to justify third party payments; and (h) falsely described kickbacks paid to the Iraqi government in

connection with the Oil for Food Program in its corporate books and records as commission payments to agents.

4.5.2 Sanctions:

In October 2007, a Munich district court imposed a €201m penalty on Siemens in connection to charges against the Communications Group for bribery in Nigeria, Russia and Libya. The court's decision related to the involvement of a former manager of the Communications Group, who, acting in concert with others, committed bribery of foreign public officials in 77 cases in the period 2001-2004 in order to obtain contracts on behalf of Siemens. The court based the level of the fine on the unlawfully obtained economic advantages that Siemens derived from the illegal acts of the former employee. The fine incorporated a €200m disgorgement of profits and €1m administrative fine[39]. In addition to these fines, the Munich prosecutors also pursued a number of individual prosecutions. In May 2008, the Munich prosecutor announced an investigation against Siemens' former Chief Executive Officer (CEO), Chair and members of the Supervisory and Managing Boards for failures in their supervisory duties. Siemens itself also brought a claim for damages against members of the Managing Board's Executive Committee[40]. In July 2008, Reinhard Siekaczek, a mid-level manager, was the first former employee to be convicted. He set up a slush fund and front companies that were used to siphon off €48.8m to fund 'consultancy' fees. Siekaczek was sentenced to two years' probation and a fine of €108,000[41]. In December 2009, six former Siemens executives agreed to pay almost €20m in compensation for their parts in the bribery. Most notably, Heinrich Von Pierer, who was Siemens' chairman from 1992 until 2005, paid €5m in compensation, but still defended himself against the

[39] A Siemens press release from 2007 details these proceedings. Available at: http://www.siemens.com/press/pool/de/events/jahrespk2007/legal-proceedings-q4-2007-e.pdf <Accessed 07/04/2011>

[40] Discussed in TI's 2009 Progress Report (2009: 28) on the OECD Anti-Bribery Convention. The report is available at: http://www.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention <Accessed 05/04/2011>

[41] See *Spiegel Online: 'Former manager convicted of corruption'*, 28/07/2008, available at: http://www.spiegel.de/international/business/0,1518,568504,00.html <Accessed 07/04/2011>

allegations[42]. Siemens also accepted a settlement with German tax authorities for the Communications Group which involved payments of over €179m plus interest in back taxes. In December 2008, a further civil settlement was agreed when the Munich prosecutors terminated other proceedings against the company. This involved Siemens agreeing to pay a fine of €250,000 as well as disgorge profits of €394,750,000.

In December 2008 in the US, in response to DoJ charges of transnational bribery, Siemens pleaded guilty to the abovementioned internal controls, books and record provisions violations. Three of its subsidiaries, Siemens S.A. Argentina, Siemens Bangladesh Limited and Siemens S.A. Venezuela, also pleaded guilty to FCPA violations. The SEC similarly agreed a settlement of books and records charges related to allegations of the payment of over US $1.4bn in bribes to government officials in Asia, Africa, the Middle East, and the Americas. Siemens agreed to pay a criminal fine of US $448.5m to the DoJ and a disgorgement of profits of $350m to the SEC. Its three subsidiaries each paid US $500,000. In addition to the monetary settlements, Siemens agreed to appoint a compliance monitor. The US charges against Siemens AG included charges in relation to books and records violations by its subsidiaries in France and Turkey, amongst others, involved in the UN Oil-for-Food Programme. The fines imposed on Siemens by the US authorities were almost twenty times the previous record fines in an FCPA case. This involved Baker Hughes that was fined $44m in April 2007[43].

In total, Siemens paid €2.5bn in fines and settlements, which includes €850m that was spent on lawyers' and accountants' fees to Debevoise and Plimpton, Deloitte and PricewaterhouseCoopers, amongst others[44].

[42] See *The Independent: 'Siemens bribery deal close'*, 03/12/2009, available at: http://www.independent.co.uk/news/business/news/siemens-bribery-deal-close-1833088.html <Accessed 07/04/2011>

[43] These cases are discussed in TI's 2009 Progress Report (2009: 54) on the OECD Anti-Bribery Convention. The report is available at: http://www.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention <Accessed 05/04/2011>

[44] See *The Guardian: 'Record US fine ends Siemens bribery scandal',* 16/12/2008, available at: http://www.guardian.co.uk/business/2008/dec/16/regulation-siemens-scandal-bribery <Accessed 08/04/2011>

4.5.3 Key issues:

The Siemens case represents a number of further significant issues, some which can be seen in the Innospec case, but additional issues also. First is the issue of corporate criminal liability and the non-existence of this in Germany - although corporations can be sanctioned under *Ordnungswidrigkeitengesetz* (Administrative Law - see chapter 5.8.4). This concern is acknowledged in the following passage from an interview with a German Public Prosecutor.

> 'Of course it would without a doubt be better, I think, if and when you have a proper corporate criminal law, simply for the following reason. For example, imagine the administrative law resolution, not the notice, but the resolution that was given to Siemens for the Communications Group via the County Court; there is a resolution of a court and there is a notice, which we did. The resolution is limited to, for a start to the Communications Group at Siemens and that is a total sum of €201 million that was imposed; why €201m? €200m was the disgorged profit and €1m was basically the fine, the real penalty. That is of course the maximum penalty by law' (Interview 211)

As this quote indicates, in Germany corporations can receive no criminal prosecution but a maximum administrative fine of €1m. Unlimited profits can be confiscated, however. The issue of whether a lack of corporate criminal liability impacts upon the regulation of transnational corporate bribery is therefore significant. For example, does a lack of criminal law threat impact on the level of cooperation of corporations? Does a lack of criminal law have a significant symbolic meaning? As the Siemens case indicates, a number of individuals were successfully prosecuted, but can this lack of corporate criminal liability increase pressure on prosecutors and courts to get successful prosecutions of individuals? Likewise, can the company itself create 'scapegoats' such as Reinhard Siekaczek, for its wrongdoing? Furthermore, once we move beyond the criminal law issue, the question of whether confiscations offer a suitable enforcement mechanism arises.

The Siemens case also outlines the transnationality of overseas corporate bribery, given the global investigations and settlements that are increasingly being reached in these cases. For example, the US and German authorities worked closely together on the Siemens case, but what impact do differing legal frameworks, cultures and approaches have on such cases? How are sovereigns and nation states moving beyond their traditional law enforcement frameworks to enact transnational investigations and utilise a varied set of enforcement mechanisms? These questions are addressed in the following chapters.

4.6 Comparing the cases

As mentioned, Innospec is a UK company and wholly owned subsidiary of US company Innospec Inc. and the corruption in Indonesia was organised by the directing minds of the company based in Cheshire. Innospec Inc., the parent company, employs around 850 employees in 20 countries and in the year 2010 had a turnover of US $683m and a gross profit of just over $217m[45]. The Octane Additives business area of Innospec is the only producer of TEL in the world[46] and according to the sentencing remarks of Lord Justice Thomas, by 2000 Indonesia was one of the four remaining principal customers for TEL. In comparison to Innospec, Siemens[47] is represented in over 190 countries and as of September 2010 had 405,000 employees worldwide. In the financial year of 2010, Siemens posted record Total Sectors profits of €7.8bn, increased new orders to €81.2bn and stabilised its revenue at €76bn. Siemens operates within various sectors spanning industry, energy, healthcare, IT and financial services.

A few simplistic calculations[48] indicate that Siemens' total profits (€7.8bn) work out at around 52 times more than those of Innospec ($217m [€0.15bn]) and that Siemens revenue (€76bn) is around 162 times more than that of Innospec ($683m [€0.47bn]). The total fines paid by Siemens to the Munich prosecutors (€596m) works out at almost 68 times as much as the total fines paid by Innospec to the UK SFO ($12.7m [€8.78m]). The estimated €1.3bn in bribes paid by Siemens equates to around 1.71 % of their 2010 revenue and 16.7 % of their 2010 profits. The estimated US $11.7m in bribes paid by Innospec to Indonesian officials equates to around 1.71 % of their 2010 revenue and 5.4 % of their 2010 profits. It is estimated that the benefit to Innospec may have been as high as US $160m if the contracts that were 'won' are included, although the actual confiscation amount from the SFO was only $6.7m while the German prosecutors, through the disgorgement of profits place that figure for Siemens at around €595m.

[45] Innospec press release on Full Year 2010 Financial Results available at: http://www.innospecinc.com/assets/_files/documents/feb_11/cm__1297870465_2011-02-15_Innospec_Reports_Fo.pdf <Accessed 11/04/2011>
[46] Information obtained from company website: http://www.innospecinc.com/investor-relations/corporate-overview.html <Accessed 11/04/2011>
[47] Siemens Annual Report 2010 available at: http://www.siemens.com/investor/pool/en/investor_relations/siemens_ar_2010.pdf <Accessed 08/04/2011>
[48] Exchange rate of 1 USD = 0.691603 EUR/1 EUR = 1.44592 USD obtained from xe.com on 11/04/2011.

Superficial comparisons do not give any great insights into the cases, for example, in both cases the bribery took place over a number of years, but they do indicate differences in the size and scope of the two companies as well as the sheer multi-jurisdictional and transnational nature of the offences. Some key enforcement mechanisms can also be seen in both the cases. In the Innospec case, the SFO adopted a mixture of sanctions that included a fine made up of a criminal fine, civil settlement and confiscation, as well as the imposition of a monitor in the company to observe future behaviour for up to three years. The company took steps to restructure and remove involved individuals itself and implemented an enhanced compliance programme: this represents a form of enforced self-regulation triggered by the prospect of criminal prosecution. As Innospec gave an early guilty plea, it was also entitled to a credit well in excess of 50% and cooperated fully in the investigation which aided in mitigation: this represents a form of legal incentive. Most recently (October 2011), three former executives have been charged with corruption[49].

In Germany, Siemens faced an administrative fine and disgorgement of profits, with no *corporate criminal* sanctioning possible due to German law. Individuals were criminally prosecuted and required to pay compensation. A compliance monitor was also put in place to observe Siemens future conduct and report to the US authorities. As in the Innospec case, Siemens also implemented extensive changes in its compliance regime prior to settlements being agreed, and now markets its compliance programme as a 'recognized leader in terms of integrity'[50]: this latter example highlights the potential of market based incentives (i.e. increasing profit and share prices through actively selling the company's compliance programme) to change behaviour that represents a form of market self-regulation. Other regulatory mechanisms are also evident such as the use of civil enforcement mechanisms, the enforcement of improved compliance in Siemens by the state, and the allocation of a state monitor. This admixture of enforcement and non-enforcement regulatory practices is discussed in chapters 7 and 8 respectively.

[49] SFO press releases available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-two-more-executives-charged-with-corruption.aspx and http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd--former-executive-in-court-on-fraud-and-corruption-charges.aspx <Both accessed 09/11/2011>

[50] See an external presentation from Siemens entitled 'Siemens Compliance Program – Track Record and Challenges' available at: http://www.siemens.com/sustainability/pool/collectiveaction/ourlearnings/pdf/Siemens_ComplianceProgram_EN.pdf <Accessed 12/04/2011>

4.7 Transnationality

The Innospec and Siemens cases indicate the sheer transnational nature of these offences and this raises a number of significant issues for the key questions in this thesis. First, transnationality questions the extent to which the various forms of regulation and regulatory models discussed in chapter 2 can apply to transnational offences. The discussed models of (self-)regulation are limited to certain industry sectors, offences occurring domestically, and to state agencies and regulators limited by their national jurisdiction. For example, Ayres and Braithwaite's (1992) 'responsive regulation' relies heavily on illustrative material from the United States, Australia and to a lesser extent Britain, and refers to specific industries (pharmaceutical, nursing homes etc.) to illustrate its arguments. Likewise, Gunningham and Grabosky's (1998) 'smart regulation' in relation to environmental policy was developed based on empirical findings largely on specific case studies on the chemical and agricultural industries in North America, Western Europe and Australia. Such models and regulatory approaches face difficulties when focusing on acts that transcend sectors, nations and jurisdictions, as in the case of transnational corporate bribery. How can a 'regulator' regulate acts that are not specific to one sector and which occur across two or more jurisdictions? This is further complicated given the differing legal frameworks that exist in different countries.

Second, and in relation to the first point, the tangibility of the nature of the object of regulation creates difficulties. It is possible to see how a regulator can focus his activities on the dumping of chemicals in rivers, or the impacts of a certain drug on individuals and populations, as such activities have tangible harms and consequences. Transnational corporate bribery, however, is less tangible in nature. There are a lack of direct victims and harms as such corruption usually involves at least two willing actors and is beneficial to both direct transacting parties. Detecting such activities raises further issues. While a river can be tested for levels of pollution, cash flows between corrupt individuals or organisations are difficult to locate, follow and attribute to responsible agents. Such cash payments may result in an official conducting his usual roles therefore further disguising the corruption. Other forms of bribery and corruption such as exchanging services are even less tangible.

Third, the regulation of industry as outlined in previous regulatory literature largely involves specific regulatory agencies tasked with controlling and managing undesirable behaviour by companies within the industry. These agencies are usually state created and enforced and are often limited in their enforcement to one specific sector. For example, in the UK the FSA is a state created, industry funded regulator of financial institutions and cannot extend its regulatory scope beyond this sector. Such industry specific regulation cannot be applied to transnational corporate bribery which occurs within and between many sectors (although most notably construction and manufacturing) that exist beyond specific sectors and national markets. The SFO has national jurisdiction for serious corruption but its remit incorporates a large variety of serious frauds, not just bribery. This further questions the validity of regulatory models such as 'responsive' and 'smart regulation' as each requires some form of constant negotiation between the regulator and regulatee. This is possible where an industry is regulated and may be under constant monitoring, but in cases of transnational corporate bribery such monitoring of individual companies or sectors is more complex. A company may only be monitored once a company has been prosecuted. In these cases, specific deterrence based on a pyramid of escalating enforcement strategies and sanctions may prove effective. In such instances, the criminal law as argued for in deterrence models may be of more significance. As a general deterrent for all corporations operating overseas this may be less so.

Fourth, the above issues highlight the difficulty of transnational, multi-jurisdictional regulation. The legal frameworks in the US and the UK are wide-reaching allowing regulators in both jurisdictions to investigate and prosecute overseas corporations (see chapter 5). For example, a UK citizen or company working in China that is part of a joint-venture with a US company or that has a listing on a US stock exchange falls into FCPA jurisdiction. Similar jurisdiction applies to the UKBA, although guidance published at the end of March 2011 provided legal loopholes and will depend on the courts' interpretation when it comes to prosecution (see chapter 5.7.7). In other cases, peer-investigations, peer-prosecutions, and 'global settlements' often shaped through MLA are conducted but such inter-national regulation faces numerous significant challenges such as evidence gathering from countries that have not ratified international conventions (see chapters 5 and 6). 'Ownership' of the problem or case also becomes an issue, as does potential for double jeopardy, sharing fines

and confiscations (see 4.4.2 above in relation to Innospec), and providing compensation to the relevant countries and victims. Such a clash of sovereignties reinforces the inadequacies of states and previously discussed regulatory models.

Fifth, the focus on transnational corporate bribery in this thesis reflects intergovernmental pressure beginning in the 1990s to create stringent enforcement regimes to combat overseas bribery. Why, however, is there significance placed on transnational bribery and less so on domestic bribery? Statistics on the enforcement of domestic bribery cases are unavailable. The most useful source is TI's Progress Reports on the OECD Anti-Bribery Convention in which country experts also report on domestic bribery. The 2009 report[51] indicates that in Germany, all foreign companies doing business in Germany were acting through subsidiaries established according to German Law and which were consequently considered as German domestic companies. The only case of note was that of Bristol Myers Squibb subsidiaries who were reportedly under investigation by a Munich prosecutor in 2006 for bribery in the health sector. The report describes the UK situation as 'unknown' with only one case reported in 2007 that involved a senior Ministry of Defence official Michael Hale and the American company Pacific Consolidated Industries. There is no empirically grounded explanation as to why domestic bribery cases are not on the agenda to the same extent as transnational bribery cases. This may reflect there being fewer domestic bribery cases (perhaps bribes are directed to developing countries), a lack of political will (difficult to prosecute when you are taking the bribes?), a preference to investigate and prosecute 'active' (bribe givers) rather than 'passive' (bribe takers) bribery (does this reflect a greater level of seriousness?), or perhaps difficulties in a lack of jurisdiction to prosecute overseas companies. Of course, the true reasons are unknown.

[51] Report available at: http://www.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention <Accessed 11/04/2011>

4.8 Summary

This chapter aimed to highlight the nature of the problem of transnational corporate bribery and contextualise and ground the research problem. The quote at the beginning indicated the frequent use of symbolic and emotive language by intergovernmental and non-governmental organisations aiming to bring attention to the harms and consequences of corruption. Assertions made about the harms of corruption may be based on empirical findings, but often also reflect informed morality (although determining how 'informed' such 'informed morality' is, is a difficult methodological question). Two case studies were analysed: Innospec and Siemens. These cases highlighted the sheer complexity and transnationality of these cases given that such large corporations operate in multiple jurisdictions and in high-level business transactions. The difficulties posed by such transnationality were then raised where it was argued that current theories of regulation do not sufficiently address transnational offences. The less tangible nature of transnational corporate bribery further complicates the regulatory landscape for state agencies and regulators. Likewise, the multi-sector and multi-industry nature of the companies operating in international business transactions and of transnational bribery itself renders industry/sector specific regulators inadequate. Thus, current regulation appears to involved 'global settlements' and inter-national regulation between regulators which itself raises further problems.

This chapter has acknowledged the limitations of current models of regulation as proposed in the literature in that they do not address the multi-jurisdictional nature of transnational crimes that in turn transcend the jurisdiction of state regulators. However, the case studies also pointed towards the use of a variety of enforcement and non-enforcement regulatory mechanisms at the national level. For example, there is evidence of criminal and civil sanctions, attempts at formal and informal means of persuasion to comply, and the triggering of self-regulatory processes. Innovation amongst regulators also appears to be occurring with firsts being obtained with regards joint investigations and global settlements. These issues reinforce the location of transnational corporate bribery in legal markets within international commerce. It is in this context of these markets that shifts in policing away from traditional criminal law enforcement appears necessary. Transnational criminal

activities can operate beyond national jurisdictions where state agencies and regulators are limited. As chapter 2 indicated, understanding this control problem in relation to the market and populations therein provides a framework for understanding admixtures of enforcement and non-enforcement mechanisms. These themes will be explored in the following chapters.

5

Legal frameworks of enforcement

5.1 Introduction

> 'The objective of the [UK Bribery] Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. 99% of organisations try their hardest and probably would find themselves the wrong side of this Act, simply because something had slipped through the system. What we're interested in at the SFO in administering this Act, is to go after the real offenders, and that is to say, the people who persistently, that very small minority, persistently engage in corruption to give themselves an unfair advantage over those who do behave ethically.' (Vivian Robinson QC, then General Counsel of the SFO, Securities Docket webcast, (13 January) 2011[52])

A key 'tool' in any regulatory landscape is the legal framework within which the regulator must operate. The reality and problem of transnational corporate bribery require a legal framework able to manage this extra-territorial issue. The recent noise created by intergovernmental and non-governmental organisations such as the OECD, the UN and TI has required nation states to evolve and adapt their legislation in order to create a more effective transnational anti-corruption and bribery legal landscape. Investigative and prosecutorial approaches have also changed in the light of these international and domestic pressures and as a result of the availability of more legal tools. The statement above reflects this. Vivian Robinson QC[53], then General Counsel of the SFO (and since moved to an American-based law firm in London), implies that despite the available criminal law threat that the Act provides, the 'full force of the criminal law' will only be used in a 'very small minority' of cases that involve persistent offenders. This can only be done, however, given an appropriate legal framework.

[52] Webcast available at: http://www.securitiesdocket.com/2011/01/04/january-13-webcast%E2%80%94100-days-and-counting-the-impact-of-the-uk-bribery-act-on-u-s-companies-2/ <Accessed 04/11/2011>
[53] Queens Counsel (QC)

The law alone, however, is an insufficient mechanism for changing behaviour within corporations and business, and provides only a normative framework within which certain activities have been condemned (usually in response to the 'moral entrepreneurship' of non-state organisations but occasionally also of political 'champions'). Comparative analysis of the legal frameworks in the UK and Germany therefore informs an understanding of the limits of various enforcement mechanisms for controlling transnational corporate bribery. This can be seen in two key issues. First, the criminal law and criminal prosecution is rarely used to deal with 'corporations' that pay bribes due to the procedural, evidential, legal and financial difficulties of a full blown criminal prosecution approach (see chapter 7.2). For example, the difficulties in locating the 'controlling mind' for UK prosecutors and the non-existence of 'corporate *criminal* liability' in Germany (see chapter 6.4) render the use of the criminal law against companies impracticable in both jurisdictions. Second, if these procedural, evidential, legal and financial burdens are overcome, criminal prosecution remains unlikely due to the risk of debarment i.e. the risk of corporations being excluded from public contracts which can subsequently cause their demise (see chapter 7.3). Such debarment has negative financial impacts upon the nation state and its economy and may be taken into consideration by states despite international pressure not to and the ratification of international conventions that make this impermissible. The complexity of the organisation of transnational corporate bribery reinforces the limitations of criminal law enforcement for addressing this problem. The criminal law framework is however a significant tool for prosecutors for its symbolic and (potentially) deterrent effect in order for the state (i) to negotiate regulation with corporations and (ii) to demonstrate to the various publics that it is actively enforcing the law against corporations that bribe. For this reason it is important to outline the legal frameworks in both jurisdictions, analysing how they have been influenced by international pressure and how these internal and external pressures have been transformed by national legal traditions and cultures.

This chapter analyses the extent to which legal frameworks and legislation at the national level in the UK and Germany have been adapted and changed to come in line with international and regional conventions and guiding principles. The chapter retains a focus on the relevant legislation and conventions covering 'foreign bribery', or 'international bribery', as opposed to 'domestic bribery' although where relevant, domestic bribery

offences will also be outlined. The chapter begins by demonstrating the relevance of a UK-German legal comparison and then moves on to the international and inter-regional level. Here, conventions of the OECD and the UN are analysed with the key articles and clauses being discussed. The chapter then moves on to the regional level and the provisions of the CoE and the EU. The UK and German legal frameworks are then analysed with regards the extent to which the international and regional conventions are implemented within their national laws. Relevant national Acts and offences are discussed. This highlights the significant impact of the 'moral entrepreneurs' at the international, regional and national levels in evolving conceptions of the bribery and corruption 'problem'. At this point, key issues of concern that have been raised during the research by respondents shall be explored in further detail. The US FCPA is also discussed here, given its extra-territorial reach and therefore its relevance to UK and German corporations operating overseas. Throughout the chapter, limitations along with the strengths of the legislation and conventions will be addressed. The chapter concludes with the following argument: comparative analysis of the UK and German legal frameworks demonstrates a large degree of convergence but notes fundamental and substantial differences in legal principles (e.g. culpability of legal or natural persons) that outline the limitations of the criminal law as a means of control. Even in leading G8 economies such as the UK and Germany, not to mention those jurisdictions less developed in relation to their anti-corruption frameworks, key legal distinctions render legal frameworks ambiguous. International organisations do, however, promote a pragmatically driven preference for 'functional equivalence' which in itself demonstrates the inadequacy of criminal law alone as an anti-corruption mechanism.

5.2 How does a comparison of UK and German law inform this thesis?

Comparative analysis of UK and German legal frameworks is particularly suitable for demonstrating the limits of nationally-constituted legal frameworks for controlling transnational bribery. These legal frameworks are shaped by significant cultural influences that determine to what extent they can be applied to corporations bribing overseas. For example, the UK and German bribery laws contain key legal distinctions such as differences between corporate criminal liability and strict liability elements of the criminal law, the

extent to which they comply with international conventions, and differences in the practice of similar provisions such as facilitation payments. Both jurisdictions, however, are considered by TI as 'active enforcers' of the OECD Anti-Bribery Convention suggesting they possess sufficient legal frameworks, but by comparatively analysing the differences and similarities at the deeper level of the involved social relations, various limitations can be seen. Surface-level analysis may suggest comprehensive national bribery laws but most significantly it is the inability of such laws to transcend national boundaries and therefore reflect the transnational nature of corporate bribery that presents a key limitation. For example, whilst both laws may contain provisions for any UK or German national, or in the case of the UK any corporation with business presence in the UK, wherever they may be in the world, such laws break down when operating at this transnational level given several procedural, evidential, legal and financial obstacles (see chapter 6). Subsequently, this supports the argument for rethinking control in terms of admixtures of enforcement and non-enforcement mechanisms within business markets that operate transnationally across national legal systems. This comparative analysis therefore aids the conceptual arguments around policing and regulation in transnational environments. To better understand this, it is important for these legal frameworks to be analysed. Such frameworks are significantly influenced by conventions and policies at the international, inter-regional and regional levels. It is at the international and inter-regional level that this analysis begins.

5.3 The international and inter-regional level

Nation states are often concerned with economic and corporate interests. Creating an even playing field is therefore important for those countries with corporations interested in exporting or investing overseas. In the 1970s, the US government faced internal criticism over the conduct of its corporations and subsequently enacted the Foreign Corrupt Practices Act 1977 (see 5.9 below), expecting that other jurisdictions would follow suit. This did not immediately occur, however, and so the US pressured the OECD to create one of two significant transnational bribery conventions at the international level: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) 1997 required key economic countries to

create similar transnational bribery provisions at the national level (see 5.3.1 below). The second key convention is that of the UN Convention against Corruption (UNCAC) 2003. The UNCAC was more complex and organic in its creation and represented the interests of a wider number of stakeholders and jurisdictions (see 5.3.2 below). Germany and the UK ratified the OECD Anti-Bribery Convention in September 1998 and December 1998 respectively. At the time of writing, Germany has yet to ratify the UNCAC but signed it in December 2003. The UK ratified the UNCAC in February 2006.

5.3.1 The OECD Anti-Bribery Convention

The OECD Convention was the first and remains the only legally binding instrument focusing on the *supply side* of bribery. The Convention deals with what is termed 'active bribery' in contrast to 'passive bribery' as differentiated in UK and German law (see below). This means the focus is on the offence committed by the person who promises or gives a bribe. That said, the Convention does not use the term 'active bribery' in order to avoid non-technical readers mistakenly viewing the briber as taking the initiative and the recipient as a passive victim (OECD Convention, 1997: 14, paragraph 1[54]): it is often the case that the recipient will have induced or pressured the briber and thus be more 'active'. The Convention seeks a 'functional equivalence' amongst the measures taken by the Parties to sanction bribery of foreign public officials and therefore does not require uniformity or changes in fundamental principles of a Party's legal systems (e.g. there is corporate criminal liability in the UK but not Germany). The Convention is highly focused and targeted towards those countries that account for the majority of global exports and foreign investment. After opening for signature in 1997, it came into force in 1999; 60 days after five of the ten countries with the largest export shares and which represent a minimum of 60% of the combined total exports of those ten countries deposited their instruments of acceptance, approval or ratification. Article 1 of the Convention outlines that Parties in relation to the offence of bribery of foreign public officials have agreed that:

[54] Official text of the OECD Anti-Bribery Convention available at: http://www.oecd.org/dataoecd/4/18/38028044.pdf <Accessed 13/04/2011>

> '1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
>
> 2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.' (OECD Convention, Article 1, 1997[55])

The OECD Convention therefore establishes legally binding standards to criminalise bribery (and related offences) of foreign public officials in international business transactions and provides measures to make this effective. The Convention also outlines that Parties must establish the liability of legal and natural persons for such offences and ensure effective penalties and measures are in place (though what constitutes 'effectiveness' remains undefined). Furthermore, Parties are required to establish jurisdiction when an offence is committed in or in part of their territory. As noted by the leading global, civil society, anti-corruption NGO, Transparency International (TI: website[56]), the obligations of the parties to the OECD Convention fall into five categories: criminalisation; money laundering; provisions regarding private sector; international cooperation; and, monitoring. The OECD is not able to force directly implementation of the Convention, but monitors the implementation of legislation and its effectiveness within participating countries. This is largely undertaken by the OECD Working Group on Bribery. Under the Convention, foreign bribery is a crime in all 38 States Parties (the 34 OECD members plus Argentina, Brazil, Bulgaria and South Africa). These countries also agreed to remove tax deductions for bribe payments.

Key in transnational corporate bribery are the public officials and foreign countries where the bribes are directed, the definitions of which are vital. The Convention outlines that:

> 'a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign

[55] Official text of the OECD Anti-Bribery Convention available at: http://www.oecd.org/dataoecd/4/18/38028044.pdf <Accessed 13/04/2011>
[56] TI's overview of the OECD Convention available at: http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/oecd_convention <Accessed 13/04/2011>

> country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
>
> b) "foreign country" includes all levels and subdivisions of government, from national to local;
>
> c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.' (OECD Convention, Article 1, 1997)

This provides a broad and inclusive definition of foreign public official. Senior politicians through managers at state owned organisations to local police officers would all fall within this definition. Similar broad definitions are adopted in UK and German laws. Article 5 of the Convention on 'Enforcement' is also worthy of further consideration:

> 'Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They 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' (OECD Convention, Article 5, 1997)

The Innospec case outlined in chapter 4.4 clearly indicated Lord Justice Thomas' view that imposing a higher fine on Innospec would have more appropriately reflected the level of criminality but that in doing so would have resulted in immediate insolvency and would have 'affected the innocent employees of the company…[and]…caused considerable difficulties for the unfunded pension liabilities of the company…' (Sentencing Remarks, 2010[57]). What, then, constitutes 'national economic interest' and how does it differ from smaller economic interests? Similar concerns were also raised by the OECD in relation to the BAE Systems investigation that closed due to issues of 'national security' which highlighted significant concerns that the Convention had been breached[58]. The independence of the judiciary from the executive is also an issue here – the legislature can impose a mandatory sentence, but can the government be criticised for 'failing' to apply the convention in this context? The interpretation of the courts at the national level on this matter is clearly significant, as is the interpretation of the OECD itself in deciding whether or not to criticise and even to impose formal sanctions.

[57] See 'Sentencing remarks of Lord Justice Thomas', note 42, iii. Available at: http://www.judiciary.gov.uk/NR/rdonlyres/5343F038-A6E5-448B-BB2D-7CA31F9E2DDA/0/sentencingremarksthomasljinnospec.pdf <Accessed 14/04/2011>

[58] See OECD Phase 2 on the UK. Report available at: http://www.oecd.org/dataoecd/43/13/38962457.pdf <Accessed 14/04/2010>

5.3.2 The UN Convention against Corruption

The purposes of the UNCAC are:

> 'a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
>
> b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
>
> c) To promote integrity, accountability and proper management of public affairs and public property.' (UNCAC, 2003, Article 1[59])

The UNCAC is the first global legally binding instrument in the fight against corruption (UN, 2009[60]). It requires the States Parties to implement numerous and detailed anti-corruption measures impacting upon their laws, institutions and practices. The purpose is to aid prevention, detection and sanctioning of corrupt practices and encourage the cooperation of States Parties. The Convention requires States Parties to establish a range of offences associated with corruption and attaches particular importance to prevention and the strengthening of international cooperation to combat corruption. It also includes 'innovative and far-reaching' provisions on asset recovery and technical assistance and implementation. The UNCAC opened for signature in 2003 and came into force in 2005. It contains eight chapters and 71 Articles, in comparison to the OECD Convention that is relatively short with 17 Articles. The UNCAC, when compared to other conventions, is more detailed and extensive with its provisions and incorporates an extensive global reach: it was negotiated by representatives of more than a hundred countries from all regions while civil society organisations, such as TI, also had a significant role in this process. As of the beginning of November 2011, the Convention had 140 Signatories and 154 Parties, which demonstrates its wide reach. As TI (2011: website[61]) indicates, the obligations of the parties fall into the following categories: preventive measures; criminalisation; international cooperation; asset

[59] Official text of the UNCAC available at: http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf <Accessed 12/04/2011>

[60] As explained in the UN's Technical Guide on the United Nations Convention against Corruption (2009: xvii), available at: http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf <Accessed 12/04/2011>

[61] TI's overview of the UNCAC available at: http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/uncac <Accessed 12/04/2011>

recovery framework; technical cooperation and information exchange; and, implementation mechanism.

The UNCAC follows an almost identical definition of the term 'foreign public official' to that of the OECD Convention, but includes also any person holding an 'executive' office of a foreign country. The UNCAC goes beyond the scope of the OECD Convention in numerous ways. For example, Articles 15 and 16 require the criminalisation of 'active' *and* 'passive' bribery of national public officials *and* foreign public officials respectively. Amongst others, Article 21 explicitly incorporates bribery in the private sector into the Convention whilst numerous other offences (e.g. embezzlement, abuse of functions, etc.) not included in the OECD Convention are explicitly included in the UNCAC. All these provisions are included in UK and German law (see below). Both the UNCAC (Article 6, section 2) and the OECD Convention (paragraph 27[62], commentary on Article 5) outline the importance of the independence of anti-corruption bodies. This is of particular relevance to the UK. Under the UK Bribery Act 2010, section 10 now permits the Director of the SFO to bring proceedings without Attorney General (AG) consent. However prior to this, the Director of the SFO, despite being independent in theory, required authorisation from the politically appointed AG to prosecute any overseas corruption case. The BAE Systems case brought the independence of the SFO into question following the closing down of the case by the then Director of the SFO, Robert Wardle, who was put under pressure from the then AG, Lord Goldsmith, to do so[63]. The difficulty for the OECD, and for other countries, is the identification of political independence and/or its absence – although political influence can be linear, not binary, and can take various forms e.g. resource starvation or abundance without being linked to specific prosecutions. The UNCAC also prescribes the requirements of States Parties in relation to relevant processes in more detail. For example, Article 46 goes into significant depth on MLA with 30 separate points outlined as to how States Parties should afford one another assistance. In contrast, the OECD Convention outlines three points on MLA. Thus, the UNCAC covers similar requirements as the OECD Convention but goes significantly beyond in scope.

[62] Commentaries on the OECD Convention available at: http://www.oecd.org/dataoecd/4/18/38028044.pdf <Accessed 26/04/2011>

[63] See *The Guardian: 'Nobbling the Police'*, available at: http://www.guardian.co.uk/baefiles/page/0,,2098531,00.html <Accessed 14/04/2011>

5.4 The regional level: Council of Europe and the European Union

The OECD and UN Conventions are global in scope, albeit the OECD Convention is specifically targeted at those countries with the largest share of international exports. There are, however, significant conventions and provisions at the regional level, although such provisions can and do incorporate countries from outside of Europe, but they retain specific focus on European matters as well as more general concerns. Of most significance are the Council of Europe and EU conventions and protocols.

5.4.1 Council of Europe (CoE)

The CoE Criminal Law Convention 1999[64] came into force in 2002. As of November 2011, the total number of ratifications/accessions was 43 and the total number of signatures not followed by ratification was seven. The UK signed the Convention in 1999 and ratified in 2003. Germany signed in 1999 but is yet to ratify – the incrimination of cross-border corruption in Germany lacks consistency and thus does not allow the Convention to be ratified[65] while as with UNCAC, the domestic bribery aspect prevents ratification (see section 5.5 below). The Convention is also open to six non-member States of the CoE – of these, the USA and Mexico have signed and Belarus has signed and ratified. The Convention aims for the coordinated criminalisation of numerous corrupt practices whilst also providing for complementary criminal law measures and for improved international cooperation in the prosecution of offences of corruption. Articles 2 through to 11 require signatory states to establish as offences active and passive bribery of domestic and foreign public officials, members of domestic and foreign public assemblies, officials in international organisations, members of international parliamentary assemblies, and judges and officials of international courts. Active and passive bribery in the private sector must also be criminalised. The Convention further requires the corrupt activities of trading in influence, money laundering and accounting offences connected to corruption offences to be criminalised. The

[64] Official text of the CoE Criminal Law Convention available at: http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm <Accessed 15/04/2011>

[65] See GRECO 'Third Evaluation Round' report on Germany - paragraphs 98 and 123 specifically – available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3%282009%293_Germany_One_EN.pdf <Accessed 01/05/2012>

Convention also incorporates provisions with regards aiding and abetting, immunity, criteria for determining the jurisdiction of States, liability of legal persons, the setting up of specialised anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities, gathering of evidence and confiscation of proceeds.

The CoE also created a Civil Law Convention on Corruption 1999[66] that came into force in 2003. The UK and Germany signed this Convention in 2000 and 1999 respectively but have yet to ratify it. In the UK, ratification is dependent on finding legislative time to address the problem of the absence of appropriate limitation periods for civil actions in domestic law[67] while the ambiguities surrounding parliamentarians in Germany present obstacles to ratification (see section 5.5 below). As of November 2011, the total number of ratifications/accessions was 34 and the total number of signatures not followed by ratifications was 8. The Convention is the first attempt at defining common international rules in relation to civil law and corruption. As Article 1 states, Contracting Parties are required to provide in their domestic law 'for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage'. The Civil Law Convention also provides a definition of corruption, the only Convention to explicitly do so, but this is imprecise and does not distinguish between public and private corruption, legal and natural persons, or whether the advantage is for personal or organisational gain[68].

A number of multifaceted legal instruments have been developed and adopted by the CoE. These include:

- the Additional Protocol to the Criminal Law Convention on Corruption 2003[69]

[66] Official text of the CoE Civil Law Convention available at: http://conventions.coe.int/treaty/en/Treaties/Html/174.htm <Accessed 15/04/2011>
[67] See GRECO evaluation report on the UK – paragraph 29 specifically – available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1%282001%298_UnitedKingdom_EN.pdf <Accessed 01/05/2012>
[68] Article 2 of the CoE Civil Law Convention 1999 states: 'For the purpose of this Convention, "*corruption*" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof' (Italics in original)
[69] Official text of the Protocol available at: http://conventions.coe.int/Treaty/en/Treaties/Html/191.htm <Accessed 15/04/2011>

- the Twenty Guiding Principles against Corruption 1997[70]

- the Recommendation on Codes of Conduct for Public Officials 2000[71], and;

- the Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns 2003[72]

These instruments address issues including the criminalisation of corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of the public officials and the financing of political parties. The instruments provide States with the capacity to fight corruption both domestically and internationally, while compliance with the standards is monitored by the Group of States against Corruption (GRECO), which was established in 1999.

5.4.2 Group of States against Corruption (GRECO):

The role of GRECO[73], through the processes of mutual evaluation and peer pressure, is to identify inadequacies in national anti-corruption policies, subsequently advise the necessary legislative, institutional and practical reforms, and provide the structures for information sharing on best practice in the prevention and detection of corruption. As of November 2011, GRECO is comprised of 49 European States and the USA, with membership therefore not being limited to CoE member states. Any State which is Party to the Criminal or Civil Law Conventions automatically accedes to GRECO and its evaluation procedures.

5.4.3 European Union (EU)

Within the EU, anti-corruption enforcement is shaped by two main conventions: the EU Convention on the protection of the European communities' financial interests, First and

[70] Official text of the Principles available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=593789& <Accessed 15/04/2011>
[71] Official text of the Recommendation available at: http://www.coe.int/t/dghl/monitoring/greco/documents/Rec%282000%2910_EN.pdf <Accessed 15/04/2011>
[72] Official text of the Recommendation available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=2183 <Accessed 15/04/2011>
[73] GRECO website available at: http://www.coe.int/t/dghl/monitoring/greco/default_en.asp <Accessed 15/04/2011>

Second Protocol 1995[74]; and, the EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States 1997[75]. The Convention and Protocol 1 entered into force in 2002, while Protocol 2 entered into force in 2009. The Convention aims to tackle fraud affecting the financial interests of the European Communities and does so by requiring that fraud affecting both expenditure and revenue must be punishable by effective, proportionate and dissuasive criminal penalties in every EU country. The EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States 1997 requires each Member State to ensure that active and passive corruption by officials is a punishable criminal offence. The Convention further requires Member States to take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in cases of active corruption by a person under their authority acting on behalf of the business. Signature and notification from the UK and Germany have been provided for both Conventions. In addition to these Conventions, in 1999 the EU formed the European Anti-Fraud Office (OLAF)[76] which has inter-institutional investigative powers, with this office becoming a useful instrument in the EU's tackling of corruption. OLAF's legal status was further altered by articles 317 and 325 of the Treaty on the Functioning of the EU which shapes OLAF's role in the coordination of Members States' cooperation against fraud[77]. In June 2011, the European Commission (EC) established a mechanism for the periodic assessment of the EU States' efforts to address corruption[78]. The mechanism also facilitates the exchange of best practices, identifies EU trends, gathers comparable data on the EU 27 and stimulates peer learning and further compliance with the EU and international commitments.

[74] Information available at: http://europa.eu/legislation_summaries/fight_against_fraud/protecting_european_communitys_financial_interests/l33019_en.htm <Accessed 15/04/2011>
[75] Information available at: http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm <Accessed 15/04/2011>
[76] OLAF website available at: http://ec.europa.eu/anti_fraud/index_en.html <Accessed 15/04/2010>
[77] Further information available on the OLAF website at: http://ec.europa.eu/dgs/olaf/legal/274/en.html <Accessed 15/08/2011>
[78] Text of the EC evaluation mechanism available at: http://ec.europa.eu/home-affairs/news/intro/docs/110606/3673/COM%20Decision%20C%282011%29%203673%20final%20_EN.pdf <Accessed 15/08/2011>

5.5 The national level: legal frameworks and implementation of international conventions

The abovementioned international and regional conventions shape legislation at the national level. The above conventions largely cover the same provisions and together provide extensive anti-corruption frameworks. These are subsequently required to be implemented with legislation at the national levels following ratification. Germany has yet to ratify the UNCAC, and the CoE Criminal and Civil Law Conventions. This lack of ratification reflects the 'domestic bribery' requirements of these conventions that are not evident in the OECD Convention. The GRECO's (2009[79]) third round evaluation report on Germany outlines these discrepancies. First, in 2006, decisions of the German Federal Court of Justice ruled out from the legal definition of 'public official' members of local self-governing bodies such as communal and city councils and county councils unless they are entrusted with administrative duties (e.g. members of a supervising committee), therefore creating a gap in anti-corruption provisions at the local level. Second, the incrimination of bribery of members of domestic assemblies under section 108e of the StGB is limited to the buying and selling of a vote for an election or ballot. No other form of active or passive bribery is criminalised in relation to domestic public assemblies and the provisions regarding domestic public officials (see section 331 *et seq*. StGB below) are not applicable to them. In addition, immaterial advantages and third-party beneficiaries are not covered. With this in mind, one could bribe a parliamentarian for an internal party vote, or bribe the wife of such a person, and face no consequences. For these reasons, Germany is unable to ratify UNCAC and the CoE conventions – a draft law incorporating amendments that would have enabled ratification to these conventions was presented in German Parliament in 2007 but not accepted[80]. The UK has yet to ratify the CoE Civil Law Convention. Nevertheless, the UK and Germany have implemented stringent legal provisions for the regulation of transnational corporate bribery, providing the enforcement authorities with tools to investigate and prosecute foreign bribery cases.

[79] Full report GRECO (2009) *Third Round Evaluation* on Germany (see paragraphs 37 *et seqq*. and 106 *et seqq*.) available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3%282009%293_Germany_One_EN.pdf <Accessed 05/08/2011>

[80] Full draft (in German) available at: http://dipbt.bundestag.de/dip21/btd/16/065/1606558.pdf <Accessed 05/08/2011>

5.6 The UK

The UKBA that came into force on 1 July 2011 is the key piece of anti-corruption legislation in the UK, but prior to this (and analogous in some respects to the criminalisation of fraud before the Fraud Act 2006), the UK legal system presented a somewhat complex and fragmented picture of bribery, with several overlapping laws covering specific corruption offences. As Jack Straw indicated in the foreword to the Bribery Draft Legislation,

> 'Our current statutory criminal law of bribery is functional: cases are prosecuted successfully. However, it is old and anachronistic – dating back to around the turn of the twentieth century – and it has never been consolidated. Consequently, there are inconsistencies of language and concepts between the various provisions and a small number of potentially significant gaps in the law. Furthermore, the exact scope of the common law offence is unclear. The result is a bribery law which is difficult to understand for the public and difficult to apply for prosecutors and the courts' (2009: 3[81])

Bribery and corruption legislation was primarily provided under the Prevention of Corruption Acts 1889 – 1916, with amendments from the Anti-Terrorism, Crime and Security Act 2001.

5.6.1 The Prevention of Corruption Acts 1889 – 1916

The Public Bodies Corrupt Practice Act 1889[82] criminalised the active or passive bribery of a member, officer or servant of a public body. The Prevention of Corruption Act 1906[83] addressed corrupt transactions with agents, with agents being prohibited from active and passive bribery. It also became an offence for any person knowingly to give any agent or for any agent to knowingly use with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal. The Prevention of Corruption Act 1916[84] creates a presumption of corruption in certain cases prosecuted under the 1889 and 1906

[81] Bribery Draft Legislation 2009 available at: http://www.justice.gov.uk/docs/draft-bribery-bill-tagged.pdf <Accessed 18/04/2011>
[82] Official text of the Act available at: http://www.legislation.gov.uk/ukpga/Vict/52-53/69/contents <Accessed 18/04/2011>
[83] Official text of the Act available at: http://www.legislation.gov.uk/ukpga/Edw7/6/34/contents <Accessed 18/04/2011>
[84] Official text of the Act available at: http://www.legislation.gov.uk/ukpga/Geo5/6-7/64/contents <Accessed 18/04/2011>

Acts: if it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of Her Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from Her Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.

5.6.2 Anti-Terrorism, Crime and Security Act (ATCSA) 2001[85]

Part 12 of the Act made amendments to the Prevention of Corruption Acts. The Act imports a 'foreign' element into the offences of domestic bribery under the Prevention of Corruption Act 1906 and the common law, and establishes nationality jurisdiction for these offences. It became immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom. It also gave jurisdiction for corruption offences committed overseas by UK nationals and by bodies incorporated under UK law. These amendments partially addressed the extra-territoriality requirement of the OECD Convention. Part 3 of the Act contained a provision lifting restrictions on the sharing of information by tax and customs authorities in order to facilitate criminal investigations or proceedings. Prior to this amendment and in the subsequent years up to 2009, there had been zero prosecutions in the UK for bribery in overseas contracts. Since the Mabey and Johnson[86] case became the first successful case in 2009, a number of further cases were successfully concluded. It was the passing of the UK Bribery Act 2010, however, that created a legal landscape more capable of regulating transnational corporate bribery.

[85] Official text of the Act available at: http://www.legislation.gov.uk/ukpga/2001/24/contents <Accessed 18/04/2011>

[86] Mabey and Johnson, a supplier of steel bridging, pleaded guilty to bribing overseas officials in relation to public contracts - SFO press release available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx <Accessed 18/04/2011>

5.7 The UK Bribery Act (UKBA) 2010[87]

The UKBA contains four offences: the general offences of active and passive bribery, the bribery of foreign officials, and the failure of commercial organisations to prevent bribery.

5.7.1 Active and passive bribery

The two general offences are in many respects similar to previous law. Section 1 outlines the offence of bribing another person:

> (1) A person ("P") is guilty of an offence if either of the following cases applies.
>
> (2) Case 1 is where—
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P intends the advantage—
> (i) to induce a person to perform improperly a relevant function or activity,
> or
> (ii) to reward a person for the improper performance of such a function or activity.
>
> (3) Case 2 is where—
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity. (UK BA, 2010, Section 1)

Section 2 covers offences related to being bribed:

> (1) A person ("R") is guilty of an offence if any of the following cases applies.
>
> (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
>
> (3) Case 4 is where—
> (a) R requests, agrees to receive or accepts a financial or other advantage, and
> (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
>
> (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

[87] Official text of the Act available at: http://www.legislation.gov.uk/ukpga/2010/23/contents <Accessed 18/04/2011>

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—
    (a) by R, or
    (b) by another person at R's request or with R's assent or acquiescence. (UK BA, 2010, Section 2)

These offences therefore cover active and passive bribery and in doing so introduce the key concepts of 'relevant function or activity' and 'improper performance'. The former includes any function of a public nature and any activity connected with a business, performed in the course of a person's employment or performed by or on behalf of a body of persons (whether corporate or unincorporate). The person performing the function or activity must be expected to perform it in good faith or impartially or is in a position of trust by virtue of performing it. The latter will be determined by whether the function or activity is performed in breach of a relevant expectation and there is a failure to perform the function or activity which is itself a breach of a relevant expectation. The function or activity is relevant even if it has no connection with the UK and is performed in a country or territory outside the UK.

5.7.2 Bribing a foreign public official

Section 6 is of most significance for this research. It outlines the offence or bribery of foreign public officials.

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—
    (a) business, or
    (b) an advantage in the conduct of business.

(3) P bribes F if, and only if—
    (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
        (i) to F, or
        (ii) to another person at F's request or with F's assent or acquiescence, and
    (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift. (UK BA, 2010, Section 6)

This offence incorporates the OECD requirement for the supply side of bribery in relation to foreign public officials as well as the active and passive bribery requirements of domestic

and foreign bribery in the UN and CoE Criminal Law Conventions. The UKBA retains a similar definition of a 'foreign public official' to that of the above Conventions and again includes that bribery only occurs where the applicable national law of the foreign public official neither permits nor requires the official to be influenced. Conceptually, there is an explicit focus placed on the intention of the bribe, which *must also* aim to obtain or retain a business or business advantage, which ties into the focus on international business transactions and the location of corporate bribery within transnational markets. In some respects, this 'business' aspect creates a narrower test than the general offences, but conversely, the broader focus on the 'intention to influence' rather than induce 'improper performance' as in the general offences, creates a wider test. That said, under the UKBA, it is only illegal to bribe a foreign official if it is in connection to business transactions, although it may be a rarity that a bribe would be given in other circumstances in this context. Hypothetically, a corporation may bribe a foreign official to encourage changes in policy to reflect the UK's general interests, for example, with no specific business advantage linked to the bribe.

5.7.3 The corporate offence

Section 7 has provided the most concern within the private sector. This section creates a new offence of failure of commercial organisations to prevent bribery:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.
>
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

In the UK, criminal sanctioning, as one mechanism of enforcement, is enormously limited for controlling corporate bribery because of the ease at which senior managers can sub-contract offending behaviour and distance themselves from prosecution. However, the section 7 offence is intended to reverse current corporate liability laws by introducing the possibility of 'strict liability' for corporations failing to prevent bribery: the company may be found criminally liable even if no one within the company was aware of the bribery.

> 'With the new Bribery Bill you can start off like the Americans do which is proving that a bribe was paid by someone associated with the company – the association thing is quite wide – in connection with the business, obtaining/retaining that sort of thing or gaining an advantage in the course of conducting that business. The only thing then is that you test the ultimate controlling company's regime designed to stop that sort of thing going on – adequate procedures. So it's not a controlling mind, it's the opposite way round. Rather than actually having the board expressly authorise the bribery, what you have got is the board not having a good enough regime to stop it and it has got to permeate the whole of the fabric of a group's business.' (Interview 113 with former SFO prosecutor)

The section 7 offence therefore allows companies to be criminally prosecuted for the actions of its 'associated persons' (for a more detailed discussion of corporate criminal liability see chapter 6.4). Section 8 defines 'associated person' as a person who performs services for or on behalf of the company. Accordingly, this person may be the company's employee, agent or subsidiary. A recent PricewaterhouseCoopers event[88] highlighted this third party integrity risk to companies (see chapter 8.4 for a discussion of the role of the private sector). It was stated that the average FTSE[89] 100 company has over 50,000 external entities that it regularly interacts with and for large MNCs this can be over 100,000. Section 7 includes a defence for companies: to activate this, they must prove that 'adequate procedures' (see 5.7.7 UKBA Guidance below) were in place to prevent 'associated persons' committing bribery. This places the emphasis on corporations to ensure anti-corruption procedures and compliance regimes are robust enough to prevent employees, agents, third parties or intermediaries acting for the company from committing bribery. The implications of this are a shift away from limited approaches of criminal prosecution towards the promotion of non-enforcement mechanisms and variations thereof (e.g. enforced self-regulation and self-regulation (see chapter 8)).

5.7.4 Facilitation payments

The topic of facilitation payments has created much concern amongst businesses, where it has been argued that such payments are common and even suggested their criminalisation places UK business 'on an uneven playing field'[90]. Facilitation payments are otherwise

[88] PricewaterhouseCoopers' seminar 'Managing 3rd Party Integrity Risk' took place 9 November 2010, London.
[89] Financial Times and London Stock Exchange
[90] See *London Evening Standard: 'Bribery Act lawsuits "could ruin bosses"'*, 21/02/2011, available at: http://www.thisislondon.co.uk/standard/article-23925017-bribery-act-lawsuits-could-ruin-bosses.do <Accessed 19/04/2011>

known as 'small bribes paid to facilitate routine Government action'[91]. For example, these could include lorry drivers required to make small payments to pass through borders, or payments given to officials to speed up the process of obtaining a trading licence or passport. Such payments could trigger the section 6 offence of bribery of foreign public officials. Where there is intention to induce improper conduct and where the acceptance of such payments is improper, the section 1 offence of active bribery could be triggered and therefore also the section 7 corporate offence. Facilitation payments were unlawful under previous law and unlike the US FCPA (see 5.9 below) the UKBA does not provide any exemption for such payments. This position ties in with the 2009 Recommendation of the OECD[92] which acknowledges the corrosive effect of small facilitation payments, particularly on the sustainable economic development and the rule of law, and requests Member countries to encourage companies to prohibit or discourage their use. The US legislation, however, predated the OECD Convention, whereas the UK's position was clearly influenced by the international pressure from the OECD, although facilitation payments were illegal under previous UK law.

The likelihood of being prosecuted for facilitation payments is low, although corporations cannot rely on this likelihood. That said, the Government recognises the problems of international commerce in certain sectors in some parts of the world and that the eradication of facilitation payments is a long-term objective requiring economic and social progress and sustained commitment to the rule of law where such payments are a problem: this requires collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations[93]. Thus, as Richard Alderman, Director of the SFO, recently stated:

> '…the prospects of the SFO prosecuting shall we say a $50 one off facilitation payment picked up by a corporate and remedied by them is remote in the extreme. That remains my view. This view though does not mean that it is open to companies to allow small facilitation payments of up to a certain amount each year. This becomes a course of conduct which is likely to lead to consideration by the

[91] See paragraphs 44 – 47 in the Bribery Act 2010 Guidance available at: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf <Accessed 19/04/2011>
[92] Full text available at: http://www.oecd.org/dataoecd/11/40/44176910.pdf <Accessed 19/04/2011>
[93] See paragraph 46 of the Bribery Act 2010 Guidance available at: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf <Accessed 19/04/2011>

SFO of a prosecution.' (Speech by Richard Alderman at the Association of the British Pharmaceutical Industry Legal Day, 2010[94])

Such figures are not a particularly useful measure against which corporations can monitor their facilitation payments given differences in exchange rates, different cultural requirements or the extortion element of much facilitation payments. The common law offence of 'duress' is very likely to be available as there are circumstances in which individuals have no choice but to make payments in order to protect against loss of life, limb or liberty[95]. Thus, small one-off facilitation payments are unlikely to be prosecuted by the UK authorities. This is due to the limited resources of SOCA and the SFO to fully enforce the law and due to a high level of discretion as a willingness to increase the reporting of criminal activity is likely to result in no prosecution or investigation. However, since the UKBA came into force, individuals and corporations are required to inform SOCA or its planned successor body, the National Crime Agency (NCA), of any facilitation payments made. This obligation to self-report is also in line with the OECD's 2009 Recommendation that companies 'must in all cases be accurately accounted for in such companies' books and financial records' (OECD, 2009: recommendation VI, ii[96]). The real risk for business individuals making small facilitation payments (as well as the directors of companies who may become liable for aiding and abetting the payments) arises when the acquisition, use or possession of the criminal property (e.g. financial profit from such a payment) is not disclosed to the authorities. It is then that such individuals will be committing money laundering offences under the Proceeds of Crime Act 2002 (POCA)[97]. Failure to report places the individual that makes the facilitation payment at risk of criminal prosecution for the offence of money laundering, with potential for 14 years imprisonment and an unlimited fine.

[94] Speech available at: http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2010/association-of-the-british-pharmaceutical-industry-legal-day.aspx <Accessed 19/04/2011>
[95] See paragraph 48 of the Bribery Act 2010 Guidance available at: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf <Accessed 19/04/2011>
[96] Full text available at: http://www.oecd.org/dataoecd/11/40/44176910.pdf <Accessed 19/04/2011>
[97] Part 7 of the Proceeds of Crime Act 2002 criminalises various money laundering offences that may be used in corruption prosecutions. Full text of POCA available at: http://www.legislation.gov.uk/ukpga/2002/29/contents <Accessed 19/04/2011>

5.7.5 Corporate hospitality

A further area of concern is that of corporate hospitality and the potential for such hospitality, promotional or other business expenditure to amount to bribery under the UKBA [98], although some media articles on the matter have been inaccurate and sensationalist[99]. The UKBA Guidance[100], however, has made clear that such expenditure to improve a commercial organisation's image, or establish cordial relations, is accepted as an established and important part of doing business and such behaviour is not intended to be criminalised under the UKBA providing it is reasonable and proportionate. For example, covering reasonable travel and accommodation expenses to allow foreign officials to visit a workplace, or hospitality involving fine dining and tickets to a football match at the given location would not raise the necessary inferences. That said, it is recognised that such behaviour can be employed as bribes under section 6. To amount to a bribe, it would be necessary to prove an intention for a bribe to influence an official in their official role and thereby secure business, or a business advantage. It will be a question for prosecutors and, later, jurors whether, on the totality of the evidence in such cases (e.g. type and level of advantage offered, manner and form in which the advantage is provided, and level of influence official has on awarding contracts), the unavoidable inference is that the expenditure was intended to influence the official to grant business or a business advantage in return.

5.7.6 Extra-territorial jurisdiction

Section 12 of the Act gives the UK courts jurisdiction over sections 1, 2 or 6 offences committed in the UK but also over offences committed outside the UK where the person has a close connection to the UK. This includes British nationals, individuals ordinarily

[98] See for example The Guardian: 'Revamped Bribery Act is giving firms the jitters', 01/04/2011, available at: http://www.guardian.co.uk/law/2011/apr/01/revamped-bribery-act-firms-jitters <Accessed 19/04/2011>
[99] See for example the *London Evening Standard* articles: *'Golf trips ruled illegal under "confusing" Bribery Act'*, 11/01/2011, available at: http://www.thisislondon.co.uk/standard/article-23912904-golf-trips-ruled-illegal-under-confusing-bribery-act.do <Accessed 19/04/2011> and *'Bribery law may drive sponsors out of sport, says Formula 1 team'*, 13/01/2011, available at: http://www.thisislondon.co.uk/standard/article-23913788-bribery-law-may-drive-sponsors-out-of-sport-says-formula-1-team.do <Accessed 19/04/2011>
[100] See paragraphs 26 – 32 of the Guidance, available at: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf <Accessed 19/04/2011>

resident in the UK, bodies incorporated in the UK or Scottish partnerships. This close connection requirement does not apply to section 7 (the corporate offence). Under section 7, if an organisation is incorporated or formed in the UK, or the organisation carries on a business or part of a business in the UK, irrespective of where it is incorporated or formed, the UK courts will have jurisdiction.

5.7.7 The UKBA Government Guidance

The UKBA, in particular section 7, was subject to much lobbying from national and international businesses before and, especially, after its passage. The issues of 'adequate procedures' and what constitutes 'carrying on business' in the UK were a particular focus of this lobbying. The Government, under section 9 of the Act, was required to publish guidance about commercial organisations preventing bribery. This Guidance was published on 30 March 2011, therefore enabling the UKBA to come into force three months later on 1 July 2011. The Guidance addressed these issues but received a mixed response (as perhaps may be expected). For example, TI branded the guidance 'deplorable' and argued it would weaken the Act - Chandrashekhar Krishnan, Executive Director of TI UK explained:

> 'The Bribery Act, as passed by the last Parliament, is one of the best anti-bribery laws in the world. But the Guidance will achieve exactly the opposite of what is claimed for it. Parts of it read more like a guide on how to evade the Act, than how to develop company procedures that will uphold it.' (Chandrashekhar Krishnan, 2011: website[101])

Conversely, many private sector organisations have made reference to the 'common sense' approach of the Guidance[102]. The role of lobbying from business groups may have played a significant role in this, as the perspective of one leading private sector organisation indicates:

> '…the final version [as compared to an earlier consultation draft] is in our view a significant improvement and we are pleased to note that many of the concerns we raised in our response to the

[101] See article on TI website available at: http://www.transparency.org.uk/all-news-releases/167-government-guidance-deplorable-and-will-weaken-bribery-act <Accessed 20/04/2011>

[102] See *The Independent: 'Guidance notes on Bribery Act suggest common sense will rule'*, 30/03/2011, available at: http://www.independent.co.uk/news/business/news/guidance-notes-on-bribery-act-suggest-common-sense-will-rule-2256658.html <Accessed 20/04/2011>

> consultation draft have to a lesser or greater extent been addressed' (Personal Email Correspondence, 2011)

The Guidance addressed the concept of 'adequate procedures' which raised a series of questions following the passing of the UKBA. Six guiding principles (proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including training); and, monitoring and review – these principles are discussed in more detail in chapter 6.5.3) are set out along with commentary and case study examples. The Guidance makes clear that these are not prescriptive or a one-size-fits-all approach, acknowledging that small and medium enterprises (SMEs) will likely require different procedures to MNCs. The principles promote a risk-based and contextual approach to managing bribery risks, with the Guidance recognising that no policies or procedures are capable of detecting and preventing all bribery. It will be the final assessment of the courts that determines whether any given organisation's procedures were adequate.

Concern has been raised over so-called 'carve-outs' of the Guidance. The Guidance states the following in relation to 'carrying on business' in the UK:

> 'The government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a "relevant commercial organisation" for the purposes of section 7. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies' (Paragraph 36, Ministry of Justice Guidance)

This statement raises two issues: first, overseas companies may be exempt from the Act; and, second, parent companies with UK subsidiaries may not satisfy the test of 'carrying on business' in the UK. Interpretations of this statement can, however, vary. For example, a UK based investors group in conjunction with the International Corporate Governance Network wrote to the *Financial Times (FT)*[103] to express their concern that the Guidance exempts certain overseas issuers in the London market from the purview of the UKBA. This 'mooted carve out', as it was termed, would be based on these companies having no other business

[103] See *Financial Times: 'Investment groups seek Bribery Act assurance'*, 29/03/2011, available at: http://www.ft.com/cms/s/0/db911444-598b-11e0-baa8-00144feab49a.html#axzz1K47uE0RO <Accessed 20/04/2011>

presence in the UK apart from raising capital. They challenged the possible interpretation that this does not amount to carrying out business in the UK and argued that such a 'carve-out' could adversely impact upon the integrity of the London financial market, disadvantaging UK companies. Chandrashekhar Krishnan of TI went even further, claiming that 'foreign companies could be listed on the London Stock Exchange, pay bribes and get away with it' which will disadvantage all honest companies and go back on the Government's stated aim of creating a level playing field through the Act's extra-territorial reach (Krishnan, 2011: TI website[104]). Conversely, it has been argued that the inclusion of such overseas companies within the jurisdictional reach of the Act would negatively affect London as a capital raising market, as in the case of Kazakh companies that may be diverted away from the London Stock Exchange[105]. The Director of the SFO, Richard Alderman, has warned companies not to rely on a 'technical approach' to the Act as it will be rare that an overseas company's listing is its only connection to the UK[106]. For the SFO, if an overseas company has a presence in the UK, they fall within the scope of the Act, but it will be down to the courts to determine which circumstances satisfy the test. Concerning foreign corporations with UK subsidiaries, Richard Alderman states, '[w]e have to look at the simple test in the Bribery Act and ask whether or not that foreign corporation is carrying on business here. If it is, then corruption that it commits anywhere else in the world is within our jurisdiction' (Salans speech, 2011[107]). On this basis, it is possible for a parent company with a UK subsidiary to be prosecuted for bribery by one of its other subsidiaries in a third country. For Alderman, this enables ethical UK companies not to be disadvantaged by foreign corporations using different standards and using bribery to undermine UK businesses.

[104] See article on TI website available at: http://www.transparency.org.uk/all-news-releases/167-government-guidance-deplorable-and-will-weaken-bribery-act <Accessed 20/04/2011>

[105] See *The Telegraph: 'Britain's new Bribery Act will encourage firms to avoid the London Stock Exchange'*, 20/09/2010, available at: http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8012137/Britains-new-Bribery-Act-will-encourage-firms-to-avoid-London-Stock-Exchange.html <Accessed 20/04/2011>

[106] See article *thebriberyact.com: 'A mirage? The Bribery Act "exemption" for overseas companies and subsidiaries'*, 18/04/2011, available at: http://thebriberyact.com/2011/04/18/a-mirage-the-bribery-act-exemption-for-overseas-companies-subsidiaries/ <Accessed 20/04/2011>

[107] Full speech available at: http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2011/salans---bribery-act-2010.aspx <Accessed 20/04/2011>

5.8 Germany

The Anti-Corruption Act 1997 (*Gesetz zur Bekämpfung der Korruption*, "KorrBekG") was the last measure to improve Germany's criminal law that was solely initiated by German political actors (Wolf, 2006: 785). The KorrBekG formulated sections 331 – 338 of the German Criminal Code (*Strafgesetzbuch*, "StGB"[108]). Anti-bribery and corruption legislation is further supplemented by the EU Anti-Bribery Act 1998 (*EU-Bestechungsgesetz*, "EUBestG"[109]) and the Act on Combating Bribery of Foreign Public Officials in International Business Transactions 1998 (*Gesetz zur Bekämpfung internationaler Bestechung*, "IntBestG"[110]). The Bundestag has largely confined its implementation legislation to the minimum requirements of the respective international legal instruments, a policy that has led to legal inconsistencies (Wolf, 2006: 789). In 2006 the German Federal Ministry of Justice created a governmental draft (*Referentenentwurf*) of a Second Anti-Corruption Act (*Zweites Gesetz zur Bekämpfung der Korruption*) intended to bind the international conventions and provisions of the CoE Criminal Law Convention, the Additional Protocol to the Criminal Law Convention, the EU Framework Decision on Combating Corruption in the Private Sector, and the UNCAC. At the time of writing, this new law has not been enacted. However, as one prosecutor stated:

> 'With regards the law in Germany, I think we can be at ease. The laws are alright I think, you can apply it ok. I would say there's no need for changes' (Interview 212).

Thus, some are of the opinion that the law in Germany is already more than capable of addressing transnational corporate bribery.

[108] Full text of the criminal code (in German) available at: http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf <Accessed 21/04/2011>
[109] Full text of the Act (in German) available at: http://www.gesetze-im-internet.de/bundesrecht/eubestg/gesamt.pdf <Accessed 21/04/2011>
[110] Full text of the Act (in German) available at: http://www.gesetze-im-internet.de/bundesrecht/intbestg/gesamt.pdf <Accessed 21/04/2011>

5.8.1 The German Criminal Code (StGB)

All national provisions on corruption related criminal offences can be located in the StGB, in addition to the abovementioned auxiliary laws. The German StGB distinguishes between *Bestechung* and *Bestechlichkeit*, and *Vorteilsannahme* and *Vorteilsgewährung*. These offences make a distinction between passive and active bribery that involve an official breaching or violating their official duties, and accepting or giving an advantage that did not result in the official breaching or violating their duties. These sections also distinguish between future and past actions, enabling the main offences of active and passive bribery, and accepting or giving an advantage to be applied in cases where the act has not yet been committed. The key clauses are outlined below.

Section 331 – Vorteilsannahme (acceptance of an advantage or benefit for future or past actions that did ***not*** involve the official breaching their duty)

> '(1) A public official or a person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of an official duty shall be liable to imprisonment not exceeding three years or a fine.' (Section 331, StGB, unofficial translation[111])

Section 332 – Bestechlichkeit (passive bribery for past and future actions that induced an official to breach their duties)

> '(1) A public official or person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from six months to five years. In less serious cases the penalty shall be imprisonment not exceeding three years or a fine. The attempt shall be punishable.' (Section 332, StGB, unofficial translation)

Section 333 – Vorteilsgewährung (giving of an advantage or benefit for future or past actions that did ***not*** involve the official breaching their duty)

> '(1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier in the Armed Forces for that person or a third person for the

[111] Unofficial translation available at: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf <Accessed 21/04/2011>

> discharge of a duty shall be liable to imprisonment not exceeding three years or a fine.' (Section 333, StGB, unofficial translation)

Section 334 – Bestechung (active bribery for future or past actions that induced an official to breach their duties)

> '(1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier of the Armed Forces for that person or a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from three months to five years. In less serious cases the penalty shall be imprisonment not exceeding two years or a fine.' (Section 334, StGB, unofficial translation)

All the offences involve either the offering, promising, granting or demanding, allowing, accepting of a bribe or benefit to or by a public official. Section 335 ('Aggravated cases'), 336 ('Omission of an official act'), 337 ('Arbitration fees') and 338 ('Confiscatory expropriation order and extended confiscation') further relate to sections 331 – 334. The concept of a 'benefit' or 'advantage' within the StGB is open to broad interpretation with benefits incorporating modest gifts and hospitality. These provisions, which focus largely on the public sector and public officials (*Amtsträger*), are accompanied by sections 299-302 of the StGB in which 'accepting and granting a bribe in business transactions' (Section 299: '*Bestechlichkeit und Bestechung im geschäftlichen Verkehr'*) is covered. Section 299 states:

> '(1) Whosoever as an employee or agent of a business, demands, allows himself to be promised or accepts a benefit for himself or another in a business transaction as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services shall be liable to imprisonment not exceeding three years or a fine.
>
> (2) Whosoever for competitive purposes offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employee's or agent's according him or another an unfair preference in the purchase of goods or commercial services shall incur the same penalty.
>
> (3) Subsections (1) and (2) above shall also apply to acts in competition abroad.' (Section 299, StGB, unofficial translation)

Bribery of employees (*Angestellte*) and agents (*Beauftragte*) in the private sector is accounted for. Section 298 also criminalises collusive tendering in relation to the restricting of competition through agreements in the context of public bids. Further sections of the StGB incorporate bribery related offences. For example, section 108e criminalises the

bribing of delegates and the buying or selling of votes for an election or ballot in the European Parliament or German public assemblies, while section 263 'Fraud' and section 266 'Breach of Trust' may also be used in corruption cases. However, section 334 of the StGB in conjunction with article 2 section 1 of the IntBestG is of most significance for this research.

*5.8.2 Act on Combating Bribery of Foreign Public Officials in International Business Transactions 1998 (*IntBestG*)*

The passing of this Act implemented the OECD Convention (see 5.3.1 above). It extends section 334, as well as sections 335, 336 and 338 of the StGB, by providing for active bribery of foreign officials and officials of international organisations in the course of international business transactions. It ensures equal treatment of foreign and domestic public officials in the event of acts of bribery. The main section 1 offence states:

> **'Equal treatment of foreign and domestic public officials in the event of acts of bribery**
>
> For the purpose of applying section 334 of the Criminal Code (Strafgesetzbuch), also in conjunction with sections 335, 336 and 338 subsection 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions, the following shall be treated as equal:
>
> 1. to a judge:
> a) a judge of a foreign state,
> b) a judge at an international court;
>
> 2. to any other public official:
> a) a public official of a foreign state,
> b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state,
> c) a public official and other member of the staff of an international organisation and a person entrusted with carrying out its functions;
>
> 3. to a soldier in the Federal Armed Forces (Bundeswehr):
> a) a soldier of a foreign state,
> b) a soldier who is entrusted to exercise functions of an international organisation.' (Section 1, IntBestG, 1998, unofficial translation[112])

[112] Unofficial translation available at: http://www.oecd.org/dataoecd/62/3/2377209.pdf <Accessed 26/04/2011>

Section 2 of the Act also criminalises the bribery of foreign Members of Parliament in connection to international business transactions. Section 3 extends the scope of German criminal law to the offences of bribery of foreign public officials in connection to international business transactions (sections 334 – 336 StGB and section 1 IntBestG) and bribery of foreign MPs as above committed by a German abroad. Prior to this Act, it was not illegal for German nationals to bribe foreign public officials. A key similarity here with the UKBA, is that large scale bribery involving foreign public officials is only illegal under German law if it occurs in the course of international business transactions thus allowing for foreign bribery not in the course of business.

5.8.3 EU Anti-Bribery Act (EUBestG) 1998

This Act implements the EU Conventions (see 5.4.3 above). It deals with both active and passive bribery as outlined in sections 332 and 334 of the StGB and essentially extends German law to deal specifically with bribery of public officials of other EU Member States and officials of the EU. These provisions include also acts of bribery committed by Germans in foreign countries, not only those committed from Germany.

5.8.4 Corporate liability in Germany

Unlike the UK, corporations in Germany cannot be held *criminally* liable (for more detailed discussion see chapter 6.4). 'Legal persons' can, however, be penalised under administrative law. Section 130 'Violation of obligatory supervision in firms and enterprises' of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*, "OWiG") states:

> '(1) Whoever, as the owner of a firm or an enterprise, wilfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.
>
> (2) A firm or an enterprise in accordance with subsections 1 and 2 shall include a public enterprise.
>
> (3) If the administrative offence is subject to punishment, it may be punished by a fine not exceeding one million Deutsche Mark [now Euros]. If the violation of duty is punishable by a fine, the maximum

> amount of the fine for a violation of obligatory supervision shall be dependent on the maximum amount of the fine provided for the violation of duty. The second sentence shall also apply in the event of a breach of duty which at the same time is punishable by a penalty and a fine if the maximum amount of the fine is in excess of the maximum amount in accordance with the first sentence.' (Section 130, OWiG, unofficial translation[113])

This offence 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 Siemens case (see chapter 4.5) demonstrated this as in the first settlement with the Munich prosecutors, a maximum fine of €1m was given. However, as was also demonstrated, an unlimited amount in the form of a disgorgement of profits can be confiscated, while there may be civil actions for compensation with aggravated penalties in some jurisdictions.

5.8.5 Tax deductibility

Prior to the OECD Anti-Bribery Convention, companies were able to deduct any bribes to foreign public officials as business expenses on their tax report. In November 1998, Germany implemented the Tax Alleviation Act, subsequently preventing any deduction of taxes from bribes. This prevention of tax deduction also does not depend on the punishment of the crime. The Siemens case (see chapter 4.5) again demonstrates the use of tax legislation as part of anti-corruption measures as Siemens was required to pay an additional €179 million to tax authorities for deducted foreign payments as business expense. The tax authorities are also required to disclose any suspicions about expenses that may be part of criminal or administrative offences to the public prosecutors.

5.9 The US Foreign Corrupt Practices (FCPA) Act 1977

The US is keen to protect its economic interests and ensure its corporations are not disadvantaged in international business transactions. This is largely addressed by the

[113] Unofficial translation available at: http://www.oecd.org/dataoecd/62/54/2377479.pdf <Accessed 26/04/2011>

FCPA[114] that came into force in the US in 1977 and has extra-jurisdictional reach. The FCPA applies only to the bribery of non-US public officials (other US statutes criminalise commercial bribery e.g. the Travel Act 1961[115]) and significantly impacts upon UK and German business in relation to corruption and bribery offences. The FCPA criminalises certain classes of persons and entities making payments to foreign government officials with the 'corrupt intention' to obtain or retain business. More specifically,

> '…the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value with be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person' (DoJ: website[116])

The extra-jurisdictional reach of the FCPA extends to the UK and Germany. While the FCPA applied to all US persons and certain foreign issuers of securities, amendments[117] to the Act in 1998 ensured conformity with the OECD Convention while simultaneously ensuring the anti-bribery provisions also applied to foreign firms and persons acting directly or via agents to make corrupt payments in the 'territory' of the US. The term 'territory' has been broadly interpreted by the DoJ as their *Criminal Resource Manual* for prosecutors states: 'Although this section has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or national *causes* an act to be done within the territory of the United States by any person acting as that company's or national's agent'[118]. This interpretation enables the prosecution of foreign nationals who have never been to the US, provided that they caused some act in furtherance of the offence to occur in

[114] Full text of the Act available at: http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf <Accessed 26/04/2011>
[115] The Travel Act criminalises the use of a facility of foreign or interstate commerce e.g. email, telephone, courier, personal travel etc., with the intent to promote, manage, establish, carry on, or distribute the proceeds of an unlawful activity that is a violation of state or federal bribery laws, amongst others.
[116] FCPA Overview on DoJ website available at: http://www.justice.gov/criminal/fraud/fcpa/ <Accessed 26/04/2011>
[117] Full text of the amendments available at: http://www.justice.gov/criminal/fraud/fcpa/docs/s-2375.pdf <Accessed 26/04/2011>
[118] Manual available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm <Accessed 26/04/2011>

the US, and of foreign companies who are liable for acts carried out on their behalf – a form of strict liability.

Prosecutions are often brought in relation to the accounting provisions of the FCPA that require companies with securities listed on any US stock exchange to (a) make and keep books, records and account that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain a system of internal accounting controls (see United States Code, Title 15, Section 78m). Such provisions enabled Siemens and Innospec to be prosecuted in the US (see chapters 4.4 and 4.5).

5.10 Summary

The discussion in this chapter focuses on the key regulatory 'tool' of the law and therefore the legal frameworks within which anti-corruption regulators must operate. The chapter analysed conventions, policies and laws at the international and inter-regional, regional and national levels. At the international and inter-regional level, the OECD Convention and its review mechanisms can be seen to be key in regulating transnational corporate bribery. It was the first and only legally binding instrument focusing on the supply side of bribery, that is, 'active bribery'. The Convention, amongst other requirements, establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. The focus is therefore limited to transnational active bribery that specifically occurs in the context of international commerce. The UNCAC is the most comprehensive and extensive international anti-corruption instrument, covering both domestic and transnational active and passive bribery. Germany has yet to ratify the UNCAC. Both Conventions require the establishing of the liability of legal and natural persons. At the regional level, the CoE Criminal and Civil Law Conventions largely echo the key provisions of the OECD and UN Conventions, but also require the criminalisation of active and passive bribery in the private sector and provide the first attempt at defining common international rules in relation to civil law and corruption. The EU Conventions and Protocols focus specifically on the European Community and Member States. At the national level, such conventions require implementing. In the UK, the UKBA implements the above conventions.

In Germany, anti-corruption provisions can be found in the StGB and the supplementary Acts on international and EU bribery. The US FCPA, due to its extra-territorial reach and the economic interest of the US in ensuring that its corporations are not disadvantaged, also plays a significant role in the regulation of transnational corporate bribery by UK and German corporations.

Three significant arguments have emerged in this chapter but in each case the key difficulty lies with the limitations of the law and the extent of enforcement. First, international and regional conventions and legal instruments significantly shape anti-corruption legislation at the national level leading to a significant degree of convergence. This relates to KQ 1 (see chapter 1) that questioned policy convergence in the two jurisdictions. Domestic and international pressures on the UK and Germany have resulted in their national laws being adapted and changed in order to comply with these requirements. Consequently, there is evidence of convergence with regards the provisions in the laws in the UK and Germany although significant differences remain. For example, corporate criminal liability exists in the UK but not Germany. However, the 'functional equivalence' approach of international conventions does not require harmonisation amongst states providing the 'goals' of the conventions are sufficiently met. Second, given the reality and complexity of the problem of *transnational* corporate bribery, legal frameworks must be able to address bribery that occurs across and within different jurisdictions. Both the UK and German laws enable this, as UK and German 'nationals' respectively can be prosecuted for foreign bribery. The scope of the UKBA goes even further, enabling non-UK companies to be prosecuted if they are 'carrying on business' in the UK whether this is directly or via a subsidiary. However, while in law there are such capabilities, in practice the reality of prosecuting 'persons' for overseas criminality faces several problems, such as the procedural, evidential, legal and financial difficulties caused by cross-border investigation (chapters 6 and 7 expand upon this). Third, the legal tools available to regulators in the UK and Germany incorporate a variety of enforcement mechanisms and practices, for example, the use of criminal prosecution, the use of civil fines, confiscations and settlements, and the ability to enforce regime changes and monitors. These will be explored further in chapter 7. Thus, while legal frameworks at the national level shape current anti-bribery and corruption strategies, the criminal law as a key component of criminal sanctioning is alone an inadequate response to complex criminal

activities such as the organisation of transnational corporate bribery. The comparative analysis of UK and German legal frameworks demonstrates that while international and regional conventions and policies have largely been adopted at the national level, there are significant and substantial differences over fundamental issues (such as the subject of prosecution – e.g. legal or natural persons) which highlights the limitations of criminal sanctioning as a mechanism of control. The next chapter extends this argument.

6

Mapping the enforcement scene - UK and German anti-bribery enforcement models

6.1 Introduction

The comparative analysis in the previous chapter outlined that while pressure from international and intergovernmental organisations have influenced legal convergence in the UK and Germany, significant and substantial legal differences remain, reinforcing the limitations of the criminal law as a sole mechanism of control. However, the available legal frameworks in the two jurisdictions are only one part of the enforcement framework. Key to the criminal law, of course, is the extent to which it is enforced by state authorities. In chapter 3.2 (see table 2) the enforcement rates of the UK and Germany in relation to the OECD Convention were outlined as one justification for the comparative analysis of the UK and Germany. The early statistics indicated a significant difference in enforcement rates, with Germany having substantially more successfully concluded cases and ongoing investigations. The most recent figures suggest enforcement rates in the UK have increased with the UK now considered by TI, along with Germany, the US, Denmark, Norway, Italy and Switzerland, as an 'active enforcer' of the Convention[119]. However, such enforcement statistics are superficial as they are not grounded theoretically by the OECD or TI, and do not reflect the contextualised social relations that represent enforcement AND non-enforcement at the national level.

[119] The latest TI progress report is available here: http://www.transparency.org/publications/publications/conventions/oecd_report_2011 <Accessed 10/11/2011>

It is a comparison of the necessary and contingent social relations of anti-bribery and corruption enforcement at the national level that illuminates insightful findings. For example, in explaining the difference in enforcement rates, one German investigator suggested

> 'there are two possible explanations: either there is more corruption in Germany than in England; or, as corruption is a *Kontrolldelikt* (an offence often victimless that is only ever uncovered by the authorities), the more one invests in investigations, the more cases come to light' (Interview 231).

There may be some truth in this statement, but the landscape is much more complex than either explanation. These enforcement statistics do, however, raise a number of important questions as to the enforcement systems, regulatory strategies and available enforcement mechanisms in the two jurisdictions, not to mention the legal frameworks and cultural understandings of criminality. Given the inadequacy of the criminal law and legal frameworks as outlined in the previous chapter, the extent to which these laws are enforced at the national level further strengthens the argument of this thesis that the criminal law and its enforcement, while one important 'tool' of regulation, is not sufficient for dealing with complexly organised transnational and multi-jurisdictional corporate bribery. This chapter therefore comparatively examines these social relations to develop the core analytical focus on regulation. By comparing the two jurisdictions and their enforcement frameworks, the limitations and strengths of each system can be clarified. This chapter outlines the structural, evidential, procedural, legal and financial burdens in relation to enforcement and thus aids the analytical focus on the necessity of an admixture of enforcement and non-enforcement mechanisms that can address corporate bribery in international business markets by shifting beyond traditional enforcement practices.

The chapter begins with an analysis of the UK and German anti-corruption systems. Here the centralised model of the UK and the decentralised model of Germany are outlined and compared and contrasted. The key anti-corruption agencies, the structure of these and their resources are addressed. This is followed by a discussion of the traditional existence of the principle of opportunity in the UK and the principle of legality in Germany in relation to the prosecution of criminal offences and the level of discretion available. This leads on to the issue of corporate criminal liability which significantly varies in the two jurisdictions and

offers key insights into the available enforcement mechanisms for 'legal' and 'natural' persons. The specific enforcement procedures and practices are then examined to provide insight into anti-corruption enforcement at the formal, operational level. Here, the processes of detection, investigation and prevention are compared and contrasted and the difficulties of inter-national enforcement outlined. The process of prosecution is the focus of chapter 7. The chapter concludes with a summary of the main arguments: the social relations that represent the criminal law enforcement of transnational corporate bribery are shaped by a number of key systemic, structural and cultural influences and through cross-jurisdictional comparison, the limitations of enforcement at the national level emerge. Subsequently, while the enforcement practices outlined in this chapter are significant in the broader, emerging landscape of the regulation of transnational corporate bribery, alone these enforcement mechanisms are an insufficient mechanism of control.

6.2 Anti-corruption enforcement systems in the UK and Germany

Two diverse anti-corruption enforcement systems exist in the UK and Germany which reflect geographical, historical and cultural factors. This first section analyses the development and structure of each system and compares and contrasts key issues. Understanding the systems clarifies the strengths and weaknesses of different enforcement structures which in turn inform the core focus in this thesis on regulation.

6.2.1 Anti-corruption enforcement in the UK: the centralised model

Despite the Prevention of Corruption Acts dating back to the late 19th Century, the ratification of the OECD Convention in 1998, and the introduction of a 'foreign' element to bribery as clarified by the ATCSA 2001, it was only in 2005 that the SFO became the lead agency in the UK for investigating and prosecuting transnational bribery and corruption[120]. Prior to this, responsibility for investigation and prosecution was with an extraordinary

[120] See 'Revised Memorandum Of Understanding On Implementing Part 12 Of The Anti-terrorism, Crime And Security Act 2001' available at: http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-0269.pdf <Accessed 24/05/2011>

number of state agencies including the SFO, the National Criminal Intelligence Service (NCIS – replaced by SOCA), the 43 local police forces (the Metropolitan Police Service (MPS) in particular), the City of London Police (CoLP), the Ministry of Defence Police (MDP) and the Companies Investigation Branch of the Department for Trade and Industry (now BIS). The SFO now has national jurisdiction (excluding Scotland) and receives support if and when required from the Overseas Anti-Corruption Unit (OACU) of the CoLP and the various local police forces. The Financial Services Authority (FSA) is also able to sanction regulated financial institutions for failures in anti-bribery and corruption compliance[121] while the MDP replaces the OACU if the case involves allegations against Ministry of Defence (MoD) employees or defence contracts to which the MoD is a party. Similarly, the Police Service for Northern Ireland (PSNI) replaces the OACU if the case relates to Northern Ireland. The Crown Prosecution Service (CPS) prosecutes any case not falling within the remit of the SFO and SOCA has special investigatory powers to support SFO investigations and may also investigate a case if not accepted by the SFO. Figure 2 illustrates the key agencies in this enforcement framework.

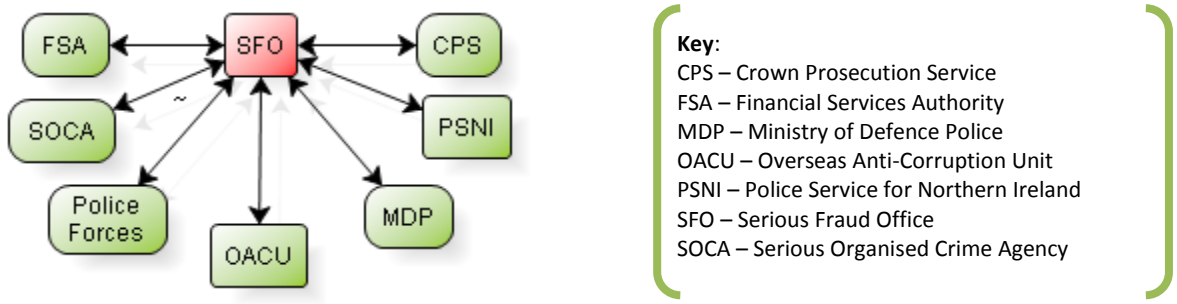


Figure 2: Key UK anti-corruption agencies

The UK system may be considered a largely centralised system in this respect, with one lead agency responsible for investigating and prosecuting transnational corporate bribery in England and Wales, and Northern Ireland. The SFO was established by the Criminal Justice

[121] In the AON case, for example, the company was fined for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption. FSA press release available at: http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/004.shtml <Accessed 24/05/2011>

Act (CJA) 1987 following recommendations from the Fraud Trials Committee Report (Roskill Report) 1986. The main recommendation was for the creation of a new organisation responsible for detecting, investigating *and* prosecuting cases of serious fraud. The report stemmed from the public dissatisfaction with the UK system for investigating and prosecuting serious fraud. As Levi (1986: 394) notes, '[u]ntil the 1980s, the attitude to commercial fraud taken by all British governments could best be described as benign neglect'. It was thought to be key to have an organisation that investigated and prosecuted serious and complex frauds, an argument further reinforced by the de Grazia Review[122] of the SFO in 2008 which concluded the roles of investigation and prosecution must be combined when dealing with serious fraud - a model that has been evident in the US since the late 18th Century. Following the creation of the Conservative-Liberal Democrat coalition in May 2010 there was suggestion that the SFO's functions of investigation and prosecution would again be separated, with its investigations becoming part of the new NCA and prosecutions being merged into the CPS. Home Secretary, Theresa May, was forced to back down on these plans with the SFO model for tackling economic crime being supported by the cabinet[123].

According to the most recent Annual Report 2009-2010[124], the SFO had a planned spend of £34,739,000. Table 2 outlines the SFO's budget from the financial year 2006-2007 onwards and illustrates the significant decrease in budget from the financial year 2008-2009. This budget decrease has played a significant role in the SFO's approach to bribery and corruption, in particular in relation to prosecution policy and the increased use of non-criminal alternatives (see chapter 7.4).

[122] Jessica de Grazia, a former senior New York City prosecutor, was commissioned to conduct a review of the SFO by the former SFO Director Robert Wardle and former Attorney General Lord Goldsmith. In the review she compared the SFO with the US Attorney's Office for the Southern District of New York (SDNY), a Federal prosecution agency, and the Manhattan District Attorney's Office (DANY), a local prosecutor's office. Review available at: http://www.sfo.gov.uk/media/34318/de%20grazia%20review%20of%20sfo.pdf <Accessed 11/05/2011>

[123] See *BBC*: '*SFO saved by cabinet revolt*' available at: http://www.bbc.co.uk/news/13585972 <Accessed 15/08/2011>

[124] SFO Annual Report 2009-2010 available at: http://www.sfo.gov.uk/media/112684/sfo%20annual%20report%202009-2010.pdf <Accessed 24/05/2011>

Total public spending for the SFO

	2006-2007 Outturn	2007-2008 Outturn	2008-2009 Restated	2009-2010 Outturn	2010-2011 Plan
	£'000	£'000	£'000	£'000	£'000
Total resource budget	40,678	43,318	51,529	39,616	34,139
Total capital budget	3,933	4,223	1,177	3,100	3,100
Total public spending	43,369	45,937	50,952	40,007	34,739

Table 3: SFO Budget since 2006-2007

As figure 3 indicates, 'bribery and corruption' form one area of focus for the SFO. Within the SFO, and at the time of this report, there were 307 permanent employees of whom, at the time of data collection, around 20 individuals worked specifically on overseas bribery. These individuals are made up of permanent SFO staff including lawyers, accountants and professional investigators as well as individuals such as barristers and other external experts contracted largely as counsel – outside counsel are used to prosecute all cases, these costs including other external experts are around £10m annually.

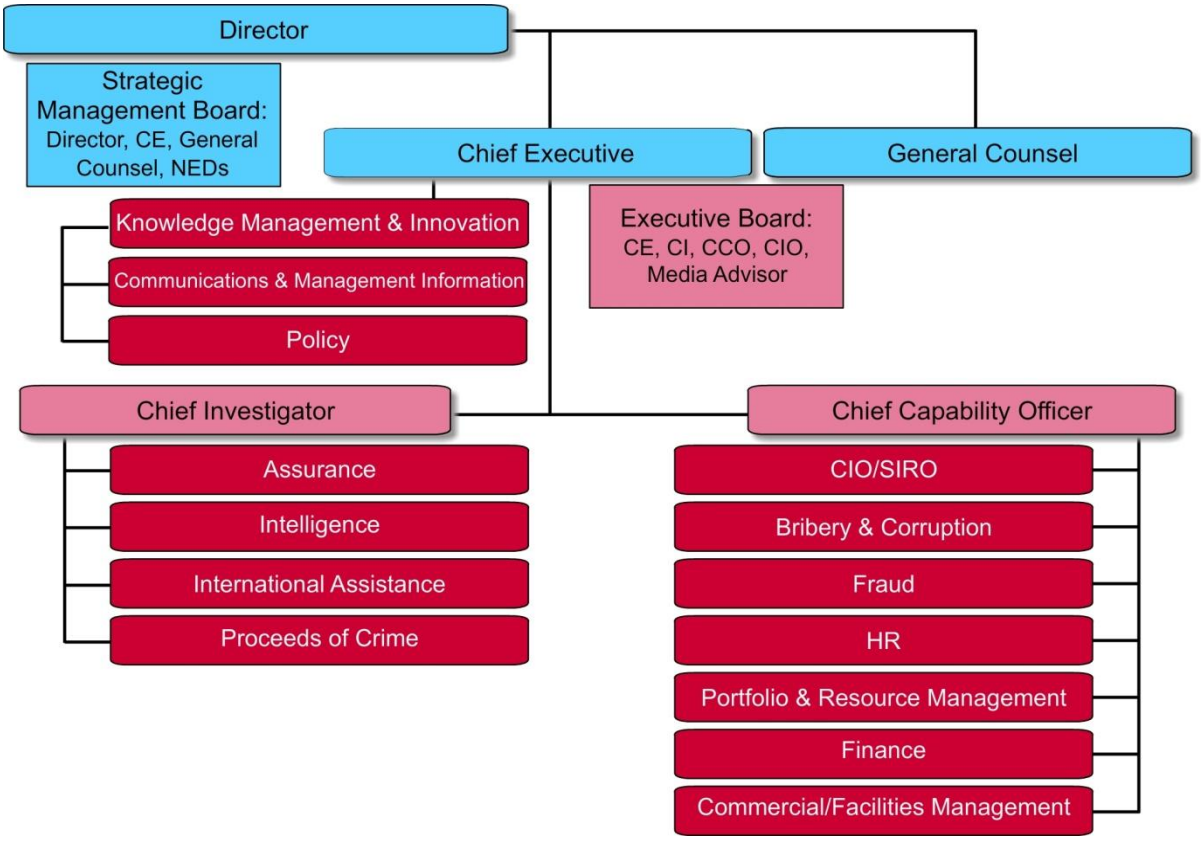


Figure 3: Structure of SFO[125]

The SFO, as lead central agency, represents a centralised enforcement model although cases not accepted by the SFO can be investigated and prosecuted by other decentralised police agencies and prosecutors. This system can be contrasted with the German anti-corruption model which represents a largely decentralised system – there is no lead, national agency for anti-corruption and bribery enforcement.

6.2.2 Anti-corruption in Germany: the decentralised model

The decentralised system has geographical and historical foundations dating back to the fragmented nature of German cities and principalities as far back and beyond the 15th Century. The unification of Germany in 1871 represented the beginnings of the federalist system, and since reunification in 1990, Germany has been made up of 16 states or *Bundesländer*. Germany has no central justice system, with the one exception of the

[125] Model available at: http://www.sfo.gov.uk/about-us/who-we-are/internal-structure.aspx <Accessed 24/05/2011>

Bundesanwaltschaft (Federal Public Prosecutor's Office) that deals with issues such as terrorism and has national jurisdiction. All other offences are investigated and prosecuted at the state level and this includes transnational bribery and corruption.

Within the 16 *Bundesländer*, there are around 110 *Staatsanwaltschaften* (Public Prosecutor's Offices, "PPO"). Each *Bundesland* and each PPO can be organised very differently. For example, a Prosecutor's Office may be responsible specifically for an area such as corruption and bribery, or more broadly for a more general area such as economic crime, or they may simply be responsible for cases with defendants' surnames A – C, and so on. Within each *Bundesland* there are a number of PPOs, a *Landeskriminalamt* (State Criminal Investigation Office, "LKA") and numerous *Polizeipräsidien* (Local Police Headquarters, "PP") (see figure 4). The PPOs lead all transnational bribery and corruption cases and are supported by the LKA and the PPs during investigations. As in the UK, in transnational bribery cases, the German PPO is involved in investigation and prosecution throughout the case and often conducts interrogations, analysis of documents, and so on, without the assistance of the police – this dual role of investigation and prosecution is a key commonality in the policing of serious and complex crimes such as transnational bribery. The police (LKA and PP) only become involved when directed to do so by the PPO, while the *Bundeskriminalamt* (Federal Criminal Police Office, "BKA") can facilitate investigations at the national level.

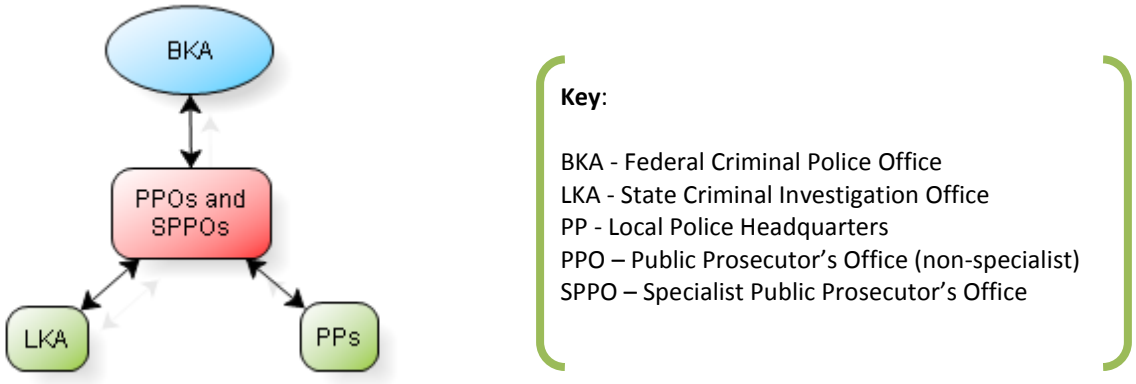


Figure 4: Key German anti-corruption agencies

Corruption and bribery only began to be substantially prosecuted following the creation of the first *Schwerpunktstaatsanwaltschaften* (prosecutor's offices with a special competence, in this case in the area of corruption, "SPPO"). Not all *Bundesländer* have such specialist prosecutor's offices, but all usually have specialist departments, units or centres that deal exclusively with corruption and bribery. For example, since 1999 in the *Bundesland* of Northrhein-Westfalia there have been four SPPOs for combating corruption in existence. These are at the PPOs in Bochum, Bielefeld, Cologne and Wuppertal and together have jurisdiction throughout the *Bundesland*[126]. The PPOs, LKAs and PPs can directly contact and assist their equivalents in other *Bundesländer*, but the BKA is always informed parallel to this. The BKA operates at the national level and aids in facilitating information exchange between *Bundesländer*, collects knowledge and information of the cases, and has connections to overseas authorities. The PPOs and police can also directly contact overseas authorities in the case of transnational crimes. Thus, while the LKA mainly operates at the regional level (i.e. in one *Bundesland*) and the PPs mainly operate within one district in a *Bundesland*, both are able to investigate cases throughout the whole of Germany if required, or request that a corresponding authority carries out an operation on their behalf. This must be agreed with the corresponding LKA. Most respondents stated, however, that some *Bundesländer* are significantly more 'enthusiastic' than others in their anti-corruption investigation and prosecution efforts. The intensity varies in different *Bundesländer* due to varying political will, varying resources (financial and personnel) and varying levels of expertise. This can lead to the PPOs in some jurisdictions preferring to keep ownership over cases instead of passing them on to other authorities due to concerns that the case will not be intensively pursued. This highlights some of the difficulties of the decentralised system. One German expert argued that the German system needs to be reorganised and become more centralised. They stated:

> 'Central organisations, for each *Bundesland* at least, would not be a bad idea. With regards personnel, if they were equipped with highly skilled staff and would accumulate expert and technical knowledge, that would be great, but it's utopian. It doesn't function practically' (Interview 241)

[126] More information on the institutional resources of all the *Bundesländer* for fighting corruption can be found at: http://www.transparency.de/fileadmin/pdfs/Themen/Justiz/Korruptionsbekaempfung_in_Deutschland_Vergleich_Bundeslaender.pdf <Accessed 12/05/2011>

This impracticability of central anti-corruption agencies in German *Bundesländer* relates again to the historical and geographical development of the federal states. Each *Bundesland* has a number of small, medium and large cities and municipalities, each with decision making powers with which the *Bundesland*, or even the nation state, cannot always interfere. This creates a number of obstacles to reorganising the system. One representative of an intergovernmental organisation expressed concern over the implementation of the Convention throughout Germany given that analogous implementation across the board cannot be obtained. This was reinforced by a German lawyer who stated:

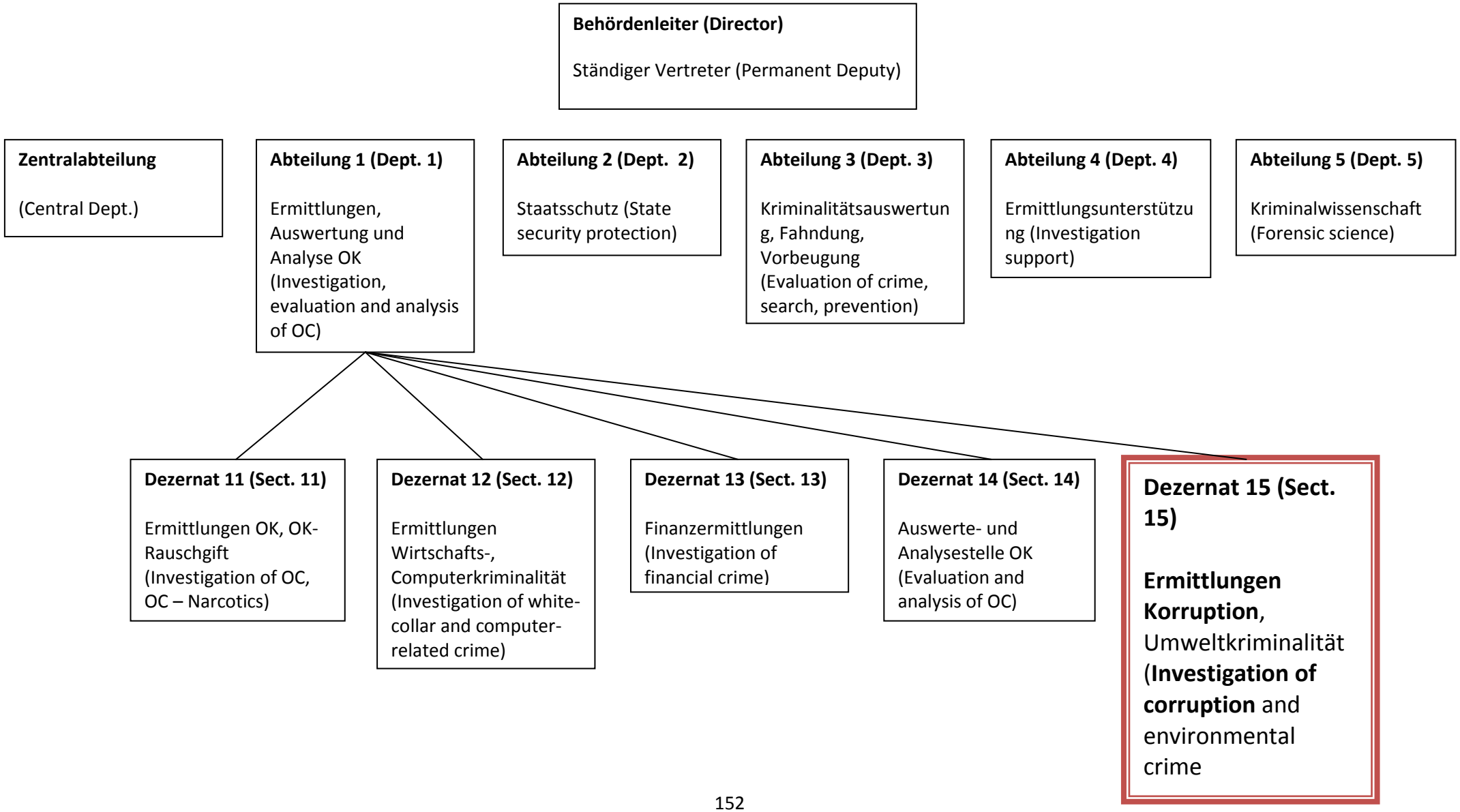
> 'The rules in Germany are valid for all *Bundesländer*. That means every *Bundesland* must actually be the same. But as so often with other themes it is the case that there are some *Bundesländer* or some public prosecutor's offices that simply have more experience as they have more cases than others. Naturally, the prosecutors in the large cities have a much better sense than the smaller cities. You find that in smaller cities there are often no specialists for these issues' (Interview 221)

There are also strengths of the system. As one investigator argued, the decentralised structure of German enforcement minimises the risk of one-sided and partial procedures and political influences.

In terms of resources, each *Bundesland* is responsible for funding the various investigatory and prosecutorial authorities within its borders. This can result in significant differences in available resources in each of the 16 *Bundesländer*. In a recent OECD report on Germany, German respondents indicated that all *Bundesländer* were sufficiently resourced for investigating and prosecuting overseas bribery[127]. This was confirmed by the respondents in this research, all of whom spoke of the ability to obtain resources at short notice, whether this be extra police officers for searches, extra prosecutors for large cases and whether this be in their corresponding *Bundesland* or from another *Bundesland*. Cooperation and multi-agency work functions effectively in Germany. Financial figures were not obtainable, but the PPO, LKA (Figure 5 below indicates the structure of the LKA in one of the *Bundesländer)* and PP emanating from the two *Bundesländer* in this research are located in relatively affluent regions and were well resourced, equipped with multiple SPPOs which indicates the political will and available resources to investigate and prosecute overseas bribery in these areas.

[127] See paragraph 118 in OECD (2011) *Germany Phase 3* report available at: http://www.oecd.org/dataoecd/5/45/47416623.pdf <Accessed 24/05/2011>

Figure 5: Structure of LKA in a *Bundesland*



6.2.3 Comparing the two systems

KQ 2 (see chapter 1) questioned whether the centralised enforcement in the UK enables a more consistent approach and whether the decentralised system of Germany enables a larger number of cases to be processed. There are clear historical and geographical reasons for the structures of the two systems with both the centralised and decentralised models creating structural difficulties (e.g. lack of resources in the UK and harmonisation across German *Bundesländer*). When contrasting resources, i.e. personnel and funding, it is clear to see that Germany invests significantly more resources into anti-bribery and corruption enforcement. Each *Bundesland* alone has in some form or other specialist anti-corruption departments ensuring more cases can be taken on, investigated and prosecuted, which perhaps reflects the level of political will in Germany. Thus, sheer numbers alone in part explains Germany's high enforcement rates, in particular the higher number of minor cases dealt with as indicated in TI's (2011[128]) enforcement statistics of the OECD Convention in table 4 below. Interestingly, however, these statistics also suggest the number of major cases is relatively similar and this may be a bigger indicator of corruption levels. Why though can the rates of minor and major cases vary in the two systems? Statistics alone offer no in-depth, contextualised understandings of these relations. To begin to explore these differences and these social relations this chapter now turns to the influence of legal principles in the two jurisdictions.

[128] TI (2011) Progress Report on Enforcement of the OECD Convention available at: http://www.transparency.org/publications/publications/conventions/oecd_report_2011 <Accessed 10/11/2011>

STATUS OF FOREIGN BRIBERY CASES

Country	Total Cases through 2010	Major Cases	Year last major case was initiated	Criminal (and Civil) Sanctions – to end 2010		Acquittals [I]		Share of World Exports (% for 2010) [I]
				Individuals	Companies	Individuals	Legal Persons	
Active Enforcement								
Denmark	14 [II]	> 3	2008	0	0	0	0	0.8
Germany	135	> 16	2010	34 (4)	7	0	0	8.2
Italy	18	10	2009	21	18	1	0	2.9
Norway	6	3	2008	5	1	2	0	0.9
Switzerland	> 35	> 3	2010	3	0	0	0	1.6
United Kingdom	17 [III]	17 [III]	2011 [III]	8	7	0	0	3.5
United States	227	> 39	2011 [III]	40 (48)	48 (27)	0	0	9.8

I Numbers from the OECD Working Group on Bribery 2010 Annual Report
II Cases all related to UN Oil-for-Food Programme. Some of these cases may have been brought for sanctions violations. This was a civil settlement in Australia
III Includes 2011 cases
IV Number unknown or based on media reports

Table 4: Status of foreign bribery cases

6.3 Opportunity vs. legality principle

Of the key questions outlined in chapter 1, KQ3 directly related to the contrasting existence of the opportunity principle and the legality principle that traditionally exist in the UK and Germany respectively. It was proposed that due to these principles, the regulatory mix of enforcement and non-enforcement mechanisms may differ, and that regulators of transnational corporate bribery in the UK are more responsive than those in Germany, as the latter are compelled by law and tradition to prosecute all cases brought to their attention as warranting criminal sanctions. Principles of legality and opportunity at the stage of prosecution traditionally determine how cases should be processed and relate to the level of discretion on behalf of the prosecuting authority. In countries such as Belgium, France, England and Wales, and the Netherlands, levels of prosecutorial discretion are high, where the principle of opportunity is adopted. In other European countries, such as Germany, the principle of legality is upheld; meaning prosecutions should be sought for every offence that comes to the attention of the prosecution office for which there is

sufficient evidence (Pakes, 2004: 58). The opportunity principle falls in line with the adversarial tradition whereby state officials have more freedom in decision-making.

6.3.1 The opportunity principle in the UK

> 'There's more matters for investigation than we have resources to investigate. It's always a difficult one: how many cases do you investigate? For how long do you investigate a case before you abandon it? [O]ne measure you might have for performance indicators is how many cases do you abandon…For example, if you prosecute there's always one defendant who's found guilty as a result of a prosecution. How does that square with however many have not been taken to prosecution? On the other hand if you are not seen to be investigating a wide number, perhaps it doesn't have a market deterrent' (Interview 112, UK investigator/prosecutor)

In the UK, the opportunity principle in relation to prosecution is adopted. This high level of discretion is a key component to the system in England and Wales. As Spencer (2002: 161) notes, 'it is not, and has never been, the case in England that the authorities are obliged to prosecute for all the offences that come to their attention'. He goes on to discuss the creation of the CPS was in part to ensure prosecutorial discretion was exercised consistently all over the country which also led to the creation of a Code (Code for Crown Prosecutors (2000) was then the current version – the 2010 version[129] does not affect Spencer's general argument) which laid out principles for how this discretion should be exercised (Spencer, 2002: 161). He points out that this Code indicates the decision to the prosecutor must be made in two stages: the prosecutor must first be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' – if not, prosecution must not proceed; second, even where there is a realistic prospect of conviction, the prosecutor must be satisfied that it is in the public interest to prosecute (Spencer, 2002: 161) – the meanings of public interest in England and Wales are publicly available. Due to the division of functions between the police and CPS, the discretion to prosecute is exercised in two stages: first by the police when they decide whether to institute proceedings; and, second by the CPS when they decide whether to continue the case (Spencer, 2002: 161). However, in the case of corruption, this is complicated by the independence of the SFO and its role as investigator and prosecutor which is able to use discretion immediately from the pre-investigation stage.

[129] Code for Crown Prosecutors 2010 version available at: http://www.cps.gov.uk/publications/docs/code2010english.pdf <Accessed 29/10/2011>

Given the issue of resources, as the quote above indicates, the SFO makes explicit the discretionary criteria it applies transnational bribery cases. When the SFO receives referrals or comes across potential cases of transnational bribery, this information goes through pre-investigation vetting to make sure certain criteria are met, and that the SFO has jurisdiction. By law, the SFO can investigate only those cases where there is evidence to show that serious or complex fraud and/or corruption has taken place. The SFO outlines the following factors that are considered before a case is accepted[130]:

- Does the value of the alleged fraud exceed £1 million? (This could relate to the size of the contract obtained and not the size of the bribe although if it was the size of the bribe it would eliminate most cases – this reflects the formulation of these criteria at a time when the SFO did not deal with corruption, only fraud)
- Is there a significant international dimension?
- Is the case likely to be of widespread public concern?
- Does the case require highly specialised knowledge? E.g. of financial markets
- Is there a need to use the SFO's special powers, such as Section 2 of the Criminal Justice Act?

In addition to these questions, in determining seriousness and complexity, the SFO conducts further tests such as whether the case impacts on the integrity of the financial market, whether it involves multiple countries or evidential material being collected in multiple locations, whether it involves multiple and complex financial transactions (e.g. many companies, accounts, countries etc.) and whether the investigation will need to involve a large accountancy analysis. In response to whether such factors as public interest, likelihood of prosecution and being able to gather relevant evidence are important, one UK investigator stated:

> 'Throughout an investigation that's fundamental, we will be considering whether this is going to go anywhere, whether criminal prosecution is the right answer, or whether there's a civil penalty that can be imposed, serious crime prevention order, you know, the variety of other outcomes that we can employ' (Interview 111)

[130] SFO criteria available at: http://www.sfo.gov.uk/fraud/report-it-in-confidenceanonymously/serious-fraud-office-%28sfo%29-criteria.aspx <Accessed 13/05/2011>

Anti-corruption enforcement in the UK permits investigators and prosecutors much procedural discretion. If a case does not meet certain criteria, it does not require investigating by the SFO although the SFO should, where appropriate, attribute the case directly to the OACU, other police forces or a prosecution authority (an OECD report questioned whether this procedure is followed[131]). The SFO also has no obligation to aim for criminal sanctions, given the variety of enforcement mechanisms available as the quote indicates.

6.3.2 The legality principle in Germany

Germany is a Federal Republic made up of 16 *Bundesländer*. These *Bundesländer* are territorial units entrusted with significant wide powers and their own decision-making bodies (Juy-Birmann, 2002: 292). On a simplistic level, the various sources of law (*Rechtsquellen*) are structured with the *Grundgesetz* (German constitution) at the top, federal law and regulations beneath this, then the constitutions, the laws and the regulations of the *Bundesländer* (Juy-Birmann, 2002: 292). Traditionally in Germany, criminal prosecution is guided by the principle of legality. The following passage from Freckmann and Wegerich succinctly outlines this principle:

> 'The *Legalitätsprinzip* (principle of legality) is laid down in §§ 152 II, 170 I StPO and provides that prosecution of an offence is mandatory for the public prosecutor. It demands that the public prosecutor starts investigations once a sufficient suspicion arises and that he prefer charges in cases of sufficient suspicion of an offence. To be certain that this duty is properly performed, there is an offence called *Strafvereitelung im Amt* (obstruction of criminal prosecution by an officer of the law - § 258 StGB) which can be used against an official who breaches his duty. However, in certain cases a public prosecutor may refrain from prosecuting offences for pragmatic reasons under the premises specified in §§ 153 *et seq.* StPO (*Opportunitätsprinzip* – principle of discretionary prosecution)' (Freckmann and Wegerich, 1999: 187)

The above principle is based on 'the absolute equality of all citizens before the law in criminal matters: the public prosecutor must prosecute all offences' (Juy-Birmann, 2002: 309) but as can be noted, a certain level of discretion to prosecute has to an extent replaced the principle of legality, more in line with the UK system. However, as one prosecutor noted:

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[131] Paragraph 224 of OECD (2008) *United Kingdom Phase* 2bis report available at: http://www.oecd.org/dataoecd/23/20/41515077.pdf <Accessed 24/05/2011>

> 'I think it's important that we don't have discretion, that we have to investigate…we can simply say to ourselves, it's irrelevant how it is, who it comes from, whether it's the Emperor of China, or anyone else, it doesn't matter. We investigate, we have to investigate….We very clearly have the occupational duty, in each and every case, to investigate' (Interview 211)

Prosecutors are required to investigate all potential cases that come to their attention and aim to bring criminal charges where possible. Likewise, the police are required to investigate any potential criminal offence and subsequently report all evidence, in all cases, to the PPO. This reflects the *Gleichheitsgrundsatz* (Principle of Equality), ensuring all are treated equally before the law. One police investigator summed up this debate as follows:

> 'I believe the principle of legality - that we must investigate when a criminal offence has occurred - is very important, because otherwise the door of unequal treatment is opened. When decision-making is made based on what "we just want" or "we just don't want" to do, then the criminal law loses its justification…it doesn't come across as just, and this wouldn't be accepted' (Interview 231)

However, a significant difference can be observed in the treatment of natural and legal persons, in other words, individuals and corporations. While individuals are subject to the mandatory principle of criminal prosecution, discretion in line with the opportunity principle is evident for legal persons and corporations. Subsequently, corporations can only be sanctioned under administrative law and not criminal law (see 6.4 Corporate criminal liability below).

Cases are prioritised dependant on a number of factors. For example, in Germany, the *Beschleunigungsgrundsatz* (Principle of Expediting Proceedings) ensures certain cases must be dealt with swiftly, such as those where a suspect is under arrest and there is a risk of breaching human rights. Otherwise, cases are prioritised in relation to the size of the case, with large cases subsequently given priority. The prosecutor's offices are also able to determine whether a case should be further investigated, or whether proceedings should be initiated. The constitutional obligation to prosecute does appear very rigid. In practice, however, this may not be the case. One expert in Germany spoke of prosecutors who simply left cases untouched, and when probed further, they stated:

> 'Actually they're not allowed to do that, legally they're not allowed…[but in some cases] a file reference number will be recorded, so completely formal, but they'll carry on as if they will initiate preliminary proceedings but will conduct no investigation. It just lies there and after years it's just forgotten, it'll be discontinued due to the statute of limitations and even because apparently no

> evidence is produced. This occurs very frequently. It does of course depend on how well the relevant departments of the Public Prosecutor's Offices are equipped but also to what extent other authorities such as the municipal authorities are interested in it…when no one is interested, then nobody asks "why are you not investigating this and this despite these suspicions and despite the initiated proceedings?" This is frequently the practical problem.' (Interview 241)

This argument was also put forward by a number of UK respondents, one of which stated:

> 'What they [German prosecutors] call prosecute is actually open an investigation isn't it, but [name of UK lawyer] was talking about this: [if] nothing happens on a case in 5 years and day, it dies. I have talked to plenty of prosecutors and investigating magistrates in Europe and yes, they have got the legality principle, but they don't devote all their time and resources to cases if a case isn't going anywhere, they put it away.' (Interview 113, UK investigator/prosecutor)

Additionally, as mentioned earlier, sections 152-157 of the *Strafprozeßordnung* (German Code of Criminal Procedure, "StPO") do provide a number of possibilities for non-prosecution. In practice, investigators do therefore possess certain possibilities for discretion but this is not regulated on a systematic basis as in the UK with the various codes for prosecutors, etc. For example, one investigator in Germany explained how in one case where a whistleblower called their corruption hotline but appeared uncertain about the allegations, the investigator suggested the whistleblower first submit an anonymous tip-off not disclosing the specific facts of the cases: for example, 'Mr. L has received £10m as part of an arms deal with the UK, would this be liable for prosecution?' As the investigator explained, this then does not create difficulties for both the whistleblower and the investigator. The investigator can then pass judgement on the tip-off and if there is not sufficient information can request that the whistleblower anonymously submits relevant documents to support the claim. However, if the whistleblower discloses names and sources, the investigator has no discretion in this case and must pursue. Following this, any information must be presented to the PPO who has the final decision on the case.

6.3.3 Legal principles in the UK and Germany

Previous literature has argued that the mandate of full enforcement of the criminal law is never possible with discretion therefore always being evident (see for example Goldstein, 1960). This argument is apparent in the enforcement practices of both the UK and Germany. The constitutional obligation in Germany to prosecute provided there is sufficient evidence

provides a significantly more rigid procedural framework for prosecution than that of the UK. This, however, creates tensions between normative and practical concerns of investigators and prosecutors and the legal frameworks within which they operate. In practice, German prosecutors are able to use legal alternatives to criminal prosecution such as section 153a StGB that enables financial penalties in certain circumstances and the creative use of the statute of limitations which for corruption cases is five years in Germany – despite significant distinctions between the UK and Germany as written in law, Germany, like the UK, has numerous possibilities for exercising discretion. However, a clear distinction exists in the treatment of natural and legal persons in both jurisdictions (see chapter 7.2). Despite no strict criteria in Germany for taking on corruption cases, as the SFO uses, German prosecutors still prioritise cases based on similar factors as the UK. For example, insufficient evidence, size of and complexity of case, public interest, and so on. The key question, as one German respondent made clear, is not whether legal discretion aids or prevents effective anti-corruption, but whether or not there is political will to deal with corruption. They suggested that if anti-corruption departments within the PPOs were appropriately equipped and that a political signal was given to reaffirm an intent to investigate powerful individuals and organisations, then anti-corruption enforcement would be more effective. This respondent used the example of Siemens to explain this by highlighting that if the US authorities had not investigated, the case would not have become so significant: in the end, Siemens was required to hire a law firm who uncovered the real extent of the problem internally. With discretion being of fundamental significance in legal frameworks and in terms of practice, the key question is the extent to which this discretion is acknowledged by relevant actors (e.g. prosecutors, enforcement authorities, etc.) and the extent to which these discretionary practices are regulated on a systematic basis. In the UK, the practice of discretion appears overtly acknowledged but in Germany there appears to be tension between law and practice, as demonstrated above. Perhaps, then, there is scope for international collaboration to determine effective and systematic use of resources multi-jurisdictionally:

> 'When resources [are] not enough? Well, my answer to that is that you have a clear and transparent and announced policy. And I suppose you'd have to do it on a risk based approach, wouldn't you…So I think that you could let it be known that you are focusing on particular sectors, particular industries. That you're looking particularly at some country or area of the world where it seems to be particularly

> prevalent…so here's an idea: isn't it, that basically the OECD, that member states, ought to adopt a thematic approach and in cooperation and collaboration, that the Germans and the Brits would target the construction sector in a particular part of the world and they'd chose particular targets to have a look at. That would be one way' (Interview 112, UK investigator and prosecutor)

Risk-based approaches to resource management and discretion may provide a cooperative framework for harmonising enforcement approaches. As of yet, there is no such framework in place.

The current issues of discretion and acceptance criteria may to some extent explain the difference in enforcement rates in the UK and Germany. The UK approach ensures the SFO takes on only 'major' cases while in Germany, all cases require investigation and prosecution (where possible) by law, explaining the increased number of non-major cases that make up the majority of overseas bribery cases in Germany. As the figures for the number of major cases in both countries are similar, around 17 each (see table 4), principles of legality and opportunity may be influential in these statistics.

6.4 Corporate criminal liability

A significant distinction between the UK and German systems can be found in the area of corporate criminal liability. This determines whether 'legal persons' (i.e. corporations) can be prosecuted under the criminal law in the same way that 'natural persons' (i.e. individual persons) can be prosecuted. Corporate criminal liability in the UK 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 (Gobert and Punch, 2003: 38). This historical focus on the individual has caused the legal mind to struggle with locating *mens rea* in an aggregate entity (Punch, 2011: 111). Up until the UKBA (see chapter 5.7), this has remained a key difficulty for those investigating and prosecuting transnational corporate bribery:

> 'I mean the major problem remains that we have horrendously bad corporate liability laws. If companies are a little bit clever and export their corruption to foreign commission agents they can distance themselves sufficiently far from it so as to keep the controlling mind well out…The only

> reason smaller companies like Mabey and Johnson got done is the directors are actually doing the work - the controlling mind - are actively involved in the work.' (Interview 113)

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 (this influences the use of civil sanctions in the UK (see chapter 7.4)). Under section 7 of the UKBA (see chapter 5.7.3), however, a corporation can be held criminally liable for the actions of its associated persons (i.e. its employees, third parties, intermediaries and agents, and so on) that are carried out on behalf of the corporation. Thus, corporations in the UK can be criminally prosecuted for active bribery of overseas officials providing the 'controlling mind' can be located or for a failure to prevent bribery occurring within the corporation. This reflects the argument that

> '[t]he organization often provides the motive, opportunity and means; it is the scene of crime; and the offences can be committed across time and in diverse locations depending on the structure of the company. These factors form difficulties for a legal system based on individual liability stemming from discrete offences at specific locations with direct causal relations' (Punch, 2011: 110)

Unlike the UK, corporations in Germany cannot be held *criminally* liable. 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' (Gobert, 2011: 154). In Germany, however, this distinction has more meaning as a corporation cannot act, thus has no criminal responsibility, and what a corporation does cannot be interpreted as an 'act' in German Penal Law (Hefendehl, 2001). As one German lawyer explained:

> 'The German system is based on the principle of guilt, and only someone considered a natural person can have guilt. A legal entity is an empty body and only the person able to act for the entity can realise this guilt' (Interview 221).

Consequently, under German law, only 'natural persons' can be held criminally liable. 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 (Rogall, 2011: 334). 'Legal persons' can be penalised under administrative law: liability may be imposed on

corporations by state authorities only for administrative offences (*Ordnungswidrigkeiten*) which result only in administrative fines (*Geldbußen*). 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 (see chapter 5.8.4). However, a lack of corporate criminal liability is not necessarily a problem, as one representative of an intergovernmental organisation stated:

> 'I don't really care whether Germany has a genuinely criminal concept or a para-criminal concept, that doesn't matter very much. I find a million Euros [maximum administrative fine for the offence] is too little and in the [name of organisation] context, it is on the lower side. I am not unhappy in the way that they apply it – on corruption they have done quite a lot in the meantime' (Interview 411, representative of intergovernmental organisation)

This reflects the 'functional equivalence' position of intergovernmental bodies that places emphasis on successful outcomes of bribery cases as opposed to harmonisation of the mechanisms adopted to investigate and prosecute (see chapter 5.3.1).

6.5 Enforcement: detection, investigation and prevention

This section analyses the practices of the UK and German enforcement agencies in relation to detection, investigation and prevention. The key role of prosecution is discussed more extensively in chapter 7. Transnational corporate bribery is a clandestine crime that is difficult to measure and uncover (see chapter 9.2). The first step, therefore, is often the most difficult as in corruption and bribery cases, the bribe giver and bribe receiver are satisfied and are therefore unlikely to report it. It is therefore with detection that this section begins, followed chronologically by investigation and prosecution.

6.5.1 Detection in the UK

Much overseas bribery goes undetected, or unreported, but those cases that are detected appear in numerous ways to the enforcement agencies. Referrals are the main source of cases for the SFO (although the SFO can begin an inquiry without a referral). These may come from other agencies, individuals or companies. All overseas bribery allegations related to UK companies are actively trawled through and categorised by the SFO's intelligence teams and subsequently are placed on the UK's only Anti-Corruption Register, which is held centrally by the SFO as part of a Memorandum of Understanding (MoU) with the other law enforcement agencies. The SFO's law enforcement partners such as the DoJ, the FSA, the World Bank, and so on, all refer cases to the SFO. One of the most significant sources of overseas bribery cases is leads from investigations conducted by overseas authorities where MLA has been requested and the SFO has seen a potential UK investigation from that.

Whistleblowers, or individuals making a disclosure in the public interest (e.g. coming forward to confess or allege a bribery case), are also a key source of cases. The SFO can be contacted via its website or via its information hotline[132]. The SFO has also recently (November 2011) created 'SFO Confidential[133]' which provides a telephone hotline and online reporting for individuals who are not victims of corruption but have knowledge of suspected corruption. Other agencies have similar reporting options; the OACU has a confidential answer phone service[134], for example. Whistleblowers are encouraged to disclose information openly as this aids investigations and provides better protection under the Public Interest Disclosure Act 1998 (PIDA). PIDA protects whistleblowers from unfair reprisal from their employer but offers no identity protection. These individuals may come to the SFO directly, via media sources, or via NGOs and charities. Information provided by these individuals goes through the pre-investigation vetting (see 6.3.1 above for SFO acceptance criteria) that involves analysing the key suspects, the allegations and any

[132] Reporting guidelines for SFO available at: http://www.sfo.gov.uk/fraud/report-it-in-confidenceanonymously/serious-fraud-office-%28sfo%29-criteria.aspx <Accessed 16/05/2011>
[133] Details of SFO Confidential available on SFO website: http://www.sfo.gov.uk/fraud/sfo-confidential---provide-information-in-confidence.aspx <Accessed 01/11/2011>
[134] Details of OACU hotline available at: http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/anticorruptionunit/howdoireport.htm <Accessed 16/05/2011>

corroborating information the SFO may have. This is used to determine whether there is sufficient evidence (not all evidence is required at this stage) to initiate a section 1 of the CJA 1987 [135] investigation. Cases are often discovered in internal reviews of companies, or where auditors come across cases, and in some cases competitors that have suffered due to corruption, for example, or been frozen out of bidding for certain contacts, may approach the SFO.

A significant recent strategy of the SFO is that of self-reporting. The SFO is actively encouraging corporations to report any overseas bribery offence once the corporation has ascertained, following legal advice and internal investigations by its professional advisers, that there is a 'real issue'. Why would a corporation self-report criminal behaviour? According the SFO, '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' (2009 SFO Guidance to self-reporting[136]). This presents a key indicator of the intended prosecution policy of the SFO (see chapter 7.2.1 for more extensive analysis) and reflects the development of more innovative approaches due to the current budget cuts, as highlighted earlier. A number of settlements have been agreed since this approach was taken.

6.5.2 Investigation in the UK

For the SFO to open an investigation there must be 'a suspected offence which appears to the Director on reasonable grounds to involve serious or complex fraud' (CJA 1987 s. 1(3)). There is no evidentiary requirement but in practice these concepts appear unclear as a UK Memo to the OECD Working Group on Bribery in response to the Phase 2 Report indicated. The Memo stated for there to be a 'suspected offence', there must be 'credible information

[135] Full text of the Criminal Justice Act 1987 available at: http://www.legislation.gov.uk/ukpga/1987/38 <Accessed 16/05/2011>
[136] SFO Guidance to self-reporting available at: http://www.sfo.gov.uk/bribery--corruption/the-sfo%27s-response/self-reporting-corruption.aspx <Accessed 17/05/2011>

to show that an offence has *probably* taken place' (emphasis added by OECD) (2008)[137]. This reflects the available discretion in the UK, as outlined above.

Following the initiation of an investigation, a decision will be made on whether there is sufficient evidence to prosecute or proceed (for example, this could be six months into the case), and if it is unlikely that evidence will be secured, the case will be dropped. Once a case is accepted, it is taken over by a Case Manager who will be provided with the relevant resources (e.g. personnel such as accountants, lawyers, professional investigators) to investigate. The investigation begins covertly until a search of premises or a company's documents or interviews with suspects are required, at which point it becomes an overt investigation. As one UK investigator explained, the main difficulty in corruption investigations, and what makes them distinct from other forms of economic crime, is 'proving what's the bang for the buck'. Proving the buck can be straightforward. For example, money changing hands in unusual circumstances or wrongly accounted for transactions in difficult to trace bank accounts using front companies are usually recorded somewhere. Proving the bang, or the trade-off, is more complex as it may be an inducement or a reward with no written record, making a clear understanding and *a fortiori* proof of that understanding more difficult. The solution to this often starts with the initial allegation and who has reported the case. If it has come from an insider, the foundation is usually solid. If it comes from an outsider, it is less reliable (e.g. a company that missed out on a contract or a misunderstanding over a transaction). In both cases, the credibility of the individual is tested. No two cases are the same and while an insider may be a key element, charges can successfully be reached through other evidential sources (e.g. strong evidence obtained from a suspect's computer).

Most cases involve the issuing of a section 2 (CJA 1987[138]) notice. Section 2 outlines the investigatory powers of the Director of the SFO. It enables the SFO by notice in writing to require the person under investigation to provide any relevant documents ('information recorded in any form') for the investigation. For example, this may be used on banks to

[137] See paragraph 221 of the OECD (2008) *United Kingdom Phase* 2bis report available at: http://www.oecd.org/dataoecd/23/20/41515077.pdf <Accessed 24/05/2011>
[138] Full text of the Criminal Justice Act 1987 available at: http://www.legislation.gov.uk/ukpga/1987/38 <Accessed 16/05/2011>

provide the bank accounts of a particular individual or company in order to follow the flow of funds. It enables the SFO to obtain contracts, emails, and many other forms of document to support the investigation. If this request is not complied with, amongst other reasons, the SFO is able to issue a warrant to enter, search and take possession of any relevant documents. Thus, a warrant can only be issued once the formal written request for the documents has, for whatever reason, not been complied with. How the SFO prevents the destruction of documents in the time between is unclear, although it can request the police conduct a search under their powers. The SFO's powers were strengthened by section 59 of the Criminal Justice and Immigration Act 2008[139] which enables the SFO to compel the production of documents at the earlier vetting stage of foreign bribery cases. Relevant evidence can therefore be collected earlier, swifter and more proactively in well-founded cases.

The SFO is also trying to make more use of cooperating witnesses. Section 73 of the Serious Organised Crime and Police Act 2005 (SOCPA)[140] enables the SFO to make an agreement with defendants in exchange for a reduction in sentence, even immunity from prosecution (Section 71, SOCPA) or some form of limited prosecution (chapter 7.4 discusses this further). Recent cases have raised doubts as to the efficacy of this approach. For example, in connection with the DePuy International[141] case, Robert John Dougall extensively cooperated with the SFO and it was expected he would receive a lighter sentence for doing so. In April 2010, however, he received a 12 month prison sentence from the courts which jeopardised the SFO's intention to encourage whistleblowers and offer incentives in the form of 'light' sanctions. This SFO strategy was reprieved following the subsequent overturning of Dougall's sentence in May 2010. However, since this case, a number of individuals have been prosecuted, but as the SFO makes clear, it cannot unconditionally guarantee that there will be no prosecution of the corporate or its individuals even where

[139] Full text of the Criminal Justice and Immigration Act 1987 available at: http://www.legislation.gov.uk/ukpga/2008/4/contents <Accessed 24/05/2011>
[140] Full text of the Serious Organised Crime and Police Act 2005 available at: http://www.legislation.gov.uk/ukpga/2005/15/contents <Accessed 16/05/2011>
[141] DePuy made £4.5m in corrupt payments to medical professionals in the Greek state healthcare system. SFO press release available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx <Accessed 16/05/2011>

the case was self-reported and the individuals fully cooperated (although the SFO faces significant obstacles when aiming for criminal prosecution (see chapter 7.2.1)).

6.5.3 Prevention and reduction in the UK

Law enforcement is traditionally reactive in its approach to sourcing cases and responding to offences. However, as seen above, the SFO utilises a mix of reactive and proactive detection mechanisms. While referrals from other agencies may be reactive, the SFO through self-reporting and encouraging whistleblowers has developed more proactive strategies, and this proactive approach is further reflected in the preventative mechanisms being adopted. UK investigators and prosecutors within the SFO are very clear that the statutory remit of the organisation is to focus on investigation and prosecution. This trend is very evident in the responses of UK respondents to the question of prevention and reduction, which is of secondary importance. However, since Richard Alderman became Director of the SFO, the organisation has adopted elements of a more resourceful approach which recognises the wider picture of changing corrupt corporate cultures and preventing overseas bribery. Reduced resources may influence this, as may an acknowledgment that corporate bribery cases can be more effectively managed through alternative strategies.

Consequentialist theories of punishment are very much evident in the form of specific and general deterrence, and rehabilitation. As part of civil settlements (discussed in more detail in chapter 7.4), as in the Innospec case, corporations are required to introduce anti-bribery and corruption compliance regimes and remove those corrupt or complicit board members, executives and employees as part of an initiative to change corporate culture and subsequently prevent further bribery. This may be viewed as a form of specific deterrence with an element of rehabilitation. Corporations that have not been charged or investigated are also being encouraged to approach the SFO (and an unknown number have approached the SFO) with the intention of obtaining advice as to how to improve the compliance systems and comply with the law. (In the event of an investigation into such a company, these meetings would not provide any mitigation during prosecution). The published Guidance on the UKBA (see chapter 5.7.7), for example, outlines six key principles of compliance systems: proportionate procedures; top-level commitment; risk assessment;

due diligence; communication (including training); and, monitoring and review. While these are not compulsory, they aid corporations aiming to introduce or improve their compliance systems. This represents a wider preventative approach, aimed at ensuring the compliance of corporate cultures, although it is not known whether this actually reaches corrupt organisations or only those organisations that are otherwise ethical. These principles represent a form of enforced self-regulation. Albeit the principles are not prescriptive and corporations are not regulated to ensure they have effective compliance systems, if investigated for bribery by their associated persons (e.g. third parties, subsidiaries, agents) as per section 7 of the UKBA, they can provide a defence to the offence. This in turn pressurises corporations into introducing the principles into their systems, albeit government accepts that commercial organisations vary in terms of size, resources and capability, and so on, and thus intends the principles to be flexible and outcome focussed. The six principles are briefly explained below:

Principle 1: Proportionate procedures - bribery prevention procedures should be proportionate to the risks the commercial organisation faces and to the nature, scale and complexity of the organisation's business activities. They should also be clear, practical, accessible, effectively implemented and enforced.

Principle 2: Top-level commitment – top-level management (e.g. board of directors, owners or other equivalents) should be committed to preventing bribery by persons associated with their commercial organisation. A zero-tolerance culture towards bribery should be fostered.

Principle 3: Risk assessment – the commercial organisation should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by associated persons. The assessment should be periodic, informed and documented.

Principle 4: Due diligence – the commercial organisation should take a proportionate and risk based approach to applying due diligence procedures in respect of persons who perform or will perform services for or on behalf of the organisation in order to mitigate identified bribery risks.

Principle 5: Communication (including training) – proportionate to the risks it faces, the commercial organisation should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training. This should include a secure, confidential and accessible 'speak up' procedure.

Principle 6: Monitoring and review – the commercial organisation should monitor and review procedures designed to prevent bribery by associated persons and make improvements where necessary. Monitoring and review should be regular and also be conducted in response to other stimuli such as governmental changes in countries where they operate.

From the initial consultation process that ran from September to November in 2010, two of the original principles, 'Clear, practical and accessible policies and procedures' (originally principle 4) and 'effective implementation' (originally principle 5) were replaced by 'Proportionate procedures' and 'Communication (including training)'. The principles of 'Risk assessment' (originally principle 1) and 'Top-level commitment' (originally principle 2) also switched places. This reflects the Government's intention to ensure a 'proportional', 'common sense' approach is of core significance. These procedures, although not prescriptive, provide a prevention framework for corporations to regulate their own behaviour (see chapter 8.3.4). This extends beyond traditional enforcement practices towards the manufacturing of an indirectly enforced self-regulatory landscape.

UK investigators, however, still view more traditional forms of general deterrence as effective mechanisms for behaviour change. For example, it is taken for granted that in certain cases, criminally prosecuting a corporation can serve as a deterrent to other corporations. As one UK investigator explained:

> '…when every boy in the class sees Johnny getting taken to task, it's a deterrent to their activity. Enforcement has a deterrent effect and that is therefore a preventative effect but that is different from taking all the classmates of little Johnny aside and saying you do realise that it's naughty to do what little Johnny has done' (Interview 112)

Thus, elements of more traditional understandings of prevention along with more innovative strategies of prevention are evident within the SFO. However, as another respondent explained, such prevention is not measureable, making it more difficult to assess the impact of the SFO.

6.5.4 Detection in Germany

As in the UK, determining the facts of the case, such as the form of dubious payments, or financial transactions, is of secondary difficulty to proving which advantages came from the payments: of most difficulty is uncovering the case in the first place. Echoing the comments of the German investigator at the beginning of this chapter in their explanation of the enforcement rates, one prosecutor stated:

> '…when you attempt to detect corruption, you will always discover cases. When you don't attempt it, then perhaps you're in the top rung [in the 'active enforcement' section – see tables 2 and 4) although there's potentially much more corruption in your country than you think' (Interview 211)

This of course is a flawed argument especially as this respondent goes on to explain how one of the most important sources for detecting corruption is *anonymous* tip-offs. However, capacity for anonymous whistleblowing and tip-offs is vital in Germany where all anonymous allegations are pursued. For example, one *Bundesland* has developed a 'corruption hotline' which connects directly to the LKA. Web based systems can also be utilised to this effect. For example, Germany and the UK have seen the private sector emergence of companies such as Business Keeper AG in Germany that aim to offer 'whistleblower' services to all sizes of corporations (see chapter 8.4.1). Of course, a number of tip-offs are false, but it is often straightforward to ascertain credible sources when the individual provides detailed facts about the organisation. Having an 'insider' who knows and understands the internal networks and systems of a corporation is highly useful. The difficulty in Germany is the lack of whistleblower protection under German law. The authorities can only protect the identity of a whistleblower when there is a threat to life or limb, or when there are substantial economic disadvantages (e.g. threat of bankruptcy to a company). Employees are also able to anonymously contact ombudsmen to report corruption suspicions without the obligation to testify openly as a witness.

A second key tool of detection stems from tip-offs from other authorities. As one German investigator explained,

> '…vital in combating international corruption is the close cooperation with the financial authorities, this is in my view, the deciding factor' (Interview 241)

This cooperation model, as promoted in one *Bundesland*, is the most developed in Germany: such cooperation varies significantly throughout the 16 *Bundesländer* but in this *Bundesland* attempts have been made to introduce others to such multi-agency cooperation in the area of corruption and bribery. It involves 'interdisciplinary cooperation' with the tax authorities and investigators, the accountants, auditors, and the customs offices that are able to see and examine the accounts and bookkeeping of corporations. In this way, dubious payments disguised for example as provisions for consultancy can be detected. Without this evidence, the investigators and prosecutors do not become aware of certain cases. Key in this area is the *Steuerentlastungsgesetz* (Tax Relief Act) 1999/2000/2002[142]. Prior to this, bribes paid by German corporations were tax-deductible but the OECD Convention required this to change. Subsequently, corporations attempting to deduct bribes from the tax are picked up by the tax authorities. There is a legal requirement for the tax authorities to notify the PPO of any suspicious tax deductions. This is a significant difference with the UK. Section 19 of the ATCSA 2001 permits but places no requirement on the UK tax authorities to disclose information subject to secrecy obligations for use in criminal investigations or proceedings.

Compliance departments in companies are also significant in detection but there is no legal obligation in Germany for the compliance departments to report any irregularities to the enforcement authorities. This reflects the *Grundgesetz* (Basic Constitutional Law) in Germany which outlines that persons cannot be required to incriminate themselves. This differs from the UK where although traditionally a 'right to silence' exists, the SFO under section 2(2) of the CJA 1987 has special powers to require individuals to answer all questions. A criminal offence will be committed if an individual refuses to comply, though

[142] Full text of the Acts in German available at: http://www.business-keeper.com/Docs/Attachements/e4f93181-97d0-45ee-94a6-18f8fa744a35/b199015f.pdf <Accessed 19/05/2011>

since the *Saunders* appeal to the European Court of Human Rights (ECHR) following the Guinness case, self-incriminating answers given under compulsion cannot be used in evidence against the person. Numerous cases are also detected following investigations into allegations from the above sources. For example, in a sort of 'domino effect', an investigation into one company often leads to suspicions of other companies and other officials and this can often develop and take cases forwards.

6.5.5 Investigation in Germany

Although the prosecutors are significantly involved from the first allegations or suspicions of corruption, the separation of powers in some instances can create procedural difficulties at the stage of investigation. If a PPO has no specialist corruption remit, police investigators providing initial suspicions to these non-specialists may face a barrier as such prosecutors do not possess the expertise or experience to further investigate and prosecute complex bribery cases. For this reason, the SPPOs are vital in order to ensure the relevant capability and will is evident.

Unlike the UK, German authorities are not required to firstly submit a notice to corporations to request documents and information. German investigators, with judicial orders, are able to go directly to the corporations and search the premises. This has the advantage that documents cannot be destroyed or removed. The public prosecutors obtain the relevant search warrants from the judge, a process which can take as little as 30 minutes or as long as four weeks. This is context dependent. For example, if a search is taking place and becomes known that the suspect has a second residence, a warrant for this can be swiftly obtained. These searches are often not limited to one premises but involve the simultaneous searching of the private residences of all suspects in the corporation and other related organisations. These large operations can involve up 30 – 35 premises being simultaneously searched. These investigations involve large numbers of public prosecutors, police officers as well as tax investigators. For this reason, one prosecutor explained how corporations cannot afford not to cooperate with the PPOs in corruption cases as each search or raid creates negative exposure to their organisation. First, it is difficult and concerning for the employees of the corporations to observe and be impacted on by such

searches and arrests. For example, job insecurities arise, concerns of the nature of their employer, and so on. Second, these raids are often leaked to the media and subsequent media reports can lead to reputational damage and financial difficulties (e.g. share prices dropping, consumers choosing competitors, etc.).

Following searches, key tools for German investigators and prosecutors are the interrogations and analyses of documents. Interrogations enable the prosecutor to ascertain key information from the accused and witnesses which can be further substantiated through an extensive examination of the confiscated documents. In Germany, a recent development has enabled investigators to use telephone surveillance since 2008 but this method is not a decisive tool and only aids a small number of cases, not to mention the high costs and time that it requires. As one prosecutor explained, key in all investigations are the social interactions with the accused. This prosecutor estimated that 95% of their role is based on interactions with individuals. This means being open and direct with accused individuals, determining what sort of person they are dealing with and how they can most effectively extract the desired information. Contrasting bribery suspects with suspects of 'conventional crime', this prosecutor explained that the former are often intelligent personalities, aware of their wrongdoings and therefore easier to reach and communicate openly with.

6.5.6 Prevention and reduction in Germany

As in the UK, the German authorities have a statutory remit aimed at repression. Mechanisms of prevention, however, are frequently adopted in Germany in combating corruption and bribery, but there is no legal requirement to do so, and this voluntariness was reflected in the attitudes of some respondents. The potential benefits of preventative action are, however, largely understood amongst investigators and prosecutors in Germany, although as in the UK, German investigators also acknowledge that the effectiveness of prevention cannot be measured. One investigator from a PP stated:

> 'Well, we're the police and an investigatory authority and it's our main duty to prosecute. But like in many other areas of criminality, you quickly realise that certain areas can't only be combated by the

> police, or only through prosecution. That's why I consider it also important…that in the cases we investigate, we also identify ways to prevent [corruption] in future' (Interview 231)

This respondent is explicitly acknowledging the limitations of criminal prosecution and 'policing' in changing behaviour. This respondent argued that criminal prosecution serves a number of key purposes: it expresses what the state wants, or does not want; it speaks to the public and has therefore a symbolic influence; and, it creates a feeling of justice. However, they also suggested that prosecution alone cannot deal with corruption: in the long run, prevention is most important, but strong repression goes hand in hand with prevention. Education in this process is vital, as is the need to encourage and ensure that corporations change, and want to change, their own behaviour: a need to trigger self-regulatory practices. This respondent also acknowledged the key role that institutions such as TI play in shaping this self-regulatory landscape 'since the state alone can't do it'. While repression is the responsibility of the authorities, prevention is the responsibility of a number of institutional settings.

In the LKA in one *Bundesland*, this education process involves giving frequent talks internally and externally to explain how corruption can be prevented as well as frequently publishing documents and brochures available to corporations on a variety of corruption related. For example, events aimed at addressing representatives of corporations and SMEs are held in conjunction with anti-corruption organisations such as TI. In addition, non-state agencies provide much material and guidance on effective compliance in Germany, as in the UK (see chapter 8).

As outlined above, the UK has published specific guidance with regards adequate procedures in relation to the law. No such formal, all-encompassing document exists in Germany, but investigators and prosecutors do nevertheless convey similar principles to commercial organisations. For example, the significance of 'the tone from the top' was frequently referred to when attempting to implement culture change within corporations, as was the need to review compliance systems. Thus, while no extensive document exists, similar messages are being conveyed. Relating to the focus placed on interdisciplinary cooperation in Germany, an interdisciplinary working group was created and has provided

numerous publications on differentiating customer care and corruption and triggering prevention (see chapter 8.3.4).

One investigator was strongly of the opinion that there is not prevention without repression, a view reinforced by one prosecutor who did not consider preventative measures as part of their remit. On the subject of changing the behaviour of corporations, this prosecutor stated:

> '...the main incentive from our side is the fear of criminal prosecution. Actually, that's the only stimulus that we can actually apply. We can't go giving out prizes in the sense that you say, "ok, the corporation is great". We can't do that so our incentive is primarily, that those who are clean or will in any case see that they're better off than those who don't care. We are a pure criminal prosecution authority, we don't do anything other than prosecute criminal offences....We don't do anything with prevention. It's not our field.' (Interview 212)

This prosecutor did acknowledge that awareness was increasing about the newly found significance of compliance and the role of corporations in monitoring their own behaviour, but remained of the view that prosecution is the main task of the PPOs. Thus, a mixed response in Germany with regards to prevention exists.

6.6 Mutual Legal Assistance (MLA)

Given the transnational and multijurisdictional nature of corporate bribery, Mutual Legal Assistance (*Rechtshilfe*, "MLA") is of great importance to the enforcement agencies in the UK and Germany. Investigators and prosecutors, in all transnational corporate bribery cases, must cooperate with agencies in other jurisdictions in order to ascertain information and evidence. The efficacy of MLA varies significantly in different countries. For example, while the German authorities have excellent relations with neighbouring countries such as Austria and Switzerland, difficulties often emerge further afield. This can be due to simple factors such as language barriers. For example, while Germany and the UK have worked effectively together, language difficulties can emerge (while PPOs are often fluent in English, this is less frequently the case further down the enforcement regime) which requires employing interpreters and translators at high cost – one UK investigator talked of some individuals

advocating automated translation as the way forward, but he (understandably) did not appear convinced about the standard of English that came out of this. As in the UK, more difficulties arise when requesting assistance from developing countries, or those countries with inadequate anti-corruption enforcement systems. Searching premises in Germany functions effectively, but determining the actual overseas recipients of bribes can prove difficult and can only work through MLA, which can take a very long time.

Some countries have been notoriously difficult to obtain information from. Lichtenstein, Switzerland and Luxembourg, for example, have traditionally had very stringent secrecy laws and provisions in relation to the banking system, making obtaining information about financial transactions and banks accounts more difficult. One UK investigator gave the example of an individual in Switzerland having 17 separate opportunities to appeal against material being transferred to the UK. Other countries may have different procedures, for example, only cooperating via formal written requests rather than giving prior information via a simple telephone call, as it goes against their legal system based on *Commissions Rogatoires* between judicial authorities, not the police. In another case, the French authorities complained that a search conducted for them in the UK was of no use to them because all the UK authority had done was send them the original documents that were confiscated – as no investigator's report was attached outlining the nature of the MLA request, they were not able to use it under their system. This can make cooperation long-winded despite celerity being of paramount importance in some cases. However, one UK investigator suggested that in the view of other European countries, the UK does not have a good reputation for MLA – a view substantiated by some German prosecutors and investigators (see also Levi, 1987, showing that this is not a recent phenomenon). Even more difficult is cooperation with those countries that have no anti-corruption authorities or no political will to assist. These factors reinforce limited enforcement models at the national level. However, recent global settlements between the UK and the US, and between Germany and the US, have demonstrated how MLA can work effectively and attempt to address this transnational difficulty.

6.7 Summary

This chapter aimed to compare and contrast the UK and German anti-corruption systems with the intention of aiding an understanding of the significant difference in enforcement rates of the two jurisdictions. It also intended to reinforce the limitations of both centralised and decentralised enforcement in relation to the core analytical focus on regulation, helping to question what can be achieved through traditional law enforcement and policing approaches. This was done by addressing five distinct but related issues. First, the structure of the two systems in relation to the relevant agencies and their resources was analysed. Here it was demonstrated that two significantly different systems exist, with a more centralised approach in the UK as compared to the more decentralised system of Germany. It was suggested that the German system, due to its substantially more resourced authorities, is able to conduct more investigations and prosecutions and therefore process more cases, as reflected in the enforcement statistics although the number of major cases is more similar. Second, the principles of opportunity and legality, as traditionally prevalent in the UK and Germany respectively, were analysed in relation to the available investigatory and prosecutorial discretion. While on paper the German system offers much less discretion, requiring investigation and prosecution in all cases where possible, it does not significantly differ from the UK system as there are a number of legal and procedural mechanisms enabling non-prosecution. Third, the key issue of corporate criminal liability demonstrated the significant difference in the two jurisdictions in relation to the possible prosecution of 'natural' and 'legal' persons. In Germany, corporations cannot be criminally prosecuted, unlike the UK where it is possible, at least in theory, to find the 'controlling mind' of the company for the purpose of criminal prosecution. Fourth, three key enforcement processes were analysed: detection, investigation and prevention. Key similarities and differences were outlined but it was demonstrated that both jurisdictions have strong enforcement possibilities, that traditional perceptions about the role of criminal prosecution still exist, but that innovative approaches, most notably in the UK are being developed. Finally, the issue of MLA demonstrated how the transnational and multijurisdictional nature of corporate bribery significantly highlights the limitations of sovereigns, unable to operate as effectively beyond their national boundaries, to address this phenomenon. It is here where innovative approaches are required and therefore a

more advance admixture of enforcement and non-enforcement mechanisms that can transcend this transnational difficulty.

The procedural, evidential, legal, financial and structural difficulties outlined throughout this chapter inform a key argument of this thesis whereby traditional forms of policing and law enforcement are substantially limited when applied to the complexities of transnational corporate bribery. Considering both the UK and Germany are considered 'active enforcers' of transnational corporate bribery, this raises significant questions about the 'known' extent of the problem (see chapter 9) relative to the prosecution rates of the better resourced and more effectively organised prosecuting authorities in the UK and Germany. Thus, these many difficulties highlight the limitations of enforcement and it is the practice of 'prosecution' that most significantly represents these. The following chapter explicitly analyses prosecution policy, highlighting how the difficulties outlined in this chapter shape the varied enforcement mechanisms and prosecution practices.

7

Theories of enforcement - prosecution policy and the admixture of enforcement mechanisms

7.1. Introduction

> '[W]e are a prosecutor but what has to be recognised is that…effective enforcement…doesn't just mean criminal prosecutions. It means a whole gambit of any powers that you can use to enforce it including civil recovery, including Civil Companies Act offences. So we would look at it, if it goes high up in the organisation, if it is not isolated, if it's a systemic problem, then clearly nothing other than a criminal prosecution will do but then if you have, for example, they come to you and they tell you look we have done this report, we have had these systems in place, these are our procedures, this isolated case has gone outside of our procedures and has fallen through the net but we have uncovered it, we have dealt with it by getting rid of the people involved in it, we've strengthened our procedures to deal with it - then those are all factors that might sway towards a civil resolution. There's no guarantees and that's what we tell everyone that comes to us, there's no guarantees, you come to us, it's at your own choice, you come to us and we will then decide which way it goes' UK Prosecutor, (Interview 114)

The previous chapter established several structural, procedural, evidential, legal and financial limitations inherent in the enforcement practices of anti-corruption authorities in both the UK and Germany. These limitations outline the difficulties that states face when attempting to regulate and control complex, transnational corporate crimes such as bribery in international business transactions. However, it is through the prosecution policy of both jurisdictions that the limitations of 'enforcement' can be most clearly demonstrated. In reducing corporate corruption, engineering behaviour change within corporate cultures is equally, if not more, important than obtaining prosecutorial 'results'. UK and German prosecutors and investigators, though socialised into the centrality of criminal law to their professional work and values, understand the limits of criminal law but are limited by their statutory remits and the available 'tools' at their disposal. The quote above acknowledges this, but alludes only to the available *enforcement* mechanisms such as criminal

prosecutions and civil resolutions. This chapter analyses these mechanisms within the UK and German regulatory frameworks and outlines a shift beyond traditional law enforcement practices (i.e. the use of criminal prosecution) towards the expanding use of *non-criminal* alternatives that fall within the remit of state agencies and authorities. This reflects the emerging landscape of the negotiation of regulation of transnational corporate bribery.

Such enforcement mechanisms are located within what has been termed a command and control regulatory strategy (Baldwin and Cave, 1999), a strategy which is dominant in the UK and German anti-corruption approaches (see enforcement models in chapter 6.2). The actors and organisations that use this variety of formal enforcement practices shape the formal regulation of corporations operating in legal markets. This chapter begins with analysis of the use of criminal prosecution in the UK and Germany with the strengths and limitations of this traditional and symbolic approach being outlined. Special attention is given to the most severe form of corporate sanction, debarment, or the 'corporate death penalty' as it has otherwise been termed. The increasing use of non-criminal alternatives to deal with corrupt corporations, in particular the use of civil remedies and mechanisms aimed at ensuring changes in corporate culture, are then addressed. The above enforcement practices are then linked into the analytical framework of this research. It is argued that investigators and prosecutors in the UK and Germany are aiming to negotiate regulation through the use of a varied set of enforcement mechanisms shifting away from criminal prosecution towards non-criminal forms of enforced self-regulation, including financial civil settlements and *hybrid* enforcement mechanisms including 'self-reporting', 'self-cleaning', 'monitoring' and forms of re-integrative shaming.

7.2 Criminal prosecution in transnational corporate bribery cases

The arguments for the use of criminal prosecution (Pearce and Tombs, 1990, 1991; Green, 1990) and for its use as a last resort (Hawkins, 1990, 1991; Clarke, 1990) for corporate and white-collar crimes were analysed in chapter 2.7. These arguments touched upon the symbolic nature of criminal prosecution, the relevance of criminal prosecution for white-collar offenders, and the requirement of alternative forms of regulation. But the use of

criminal prosecution goes beyond ideological debates and depends also upon the practical realities of enforcement. As Nelken (2007a: 753) notes, proving intention when dealing with decisions within organisations is difficult while trials can be long and expensive, juries may not understand evidence in complex cases, and professional advisers and legal teams can delay or defeat prosecution. All these factors, in addition to the structural, procedural, evidential, legal and financial obstacles outlined in chapter 6, are apparent in the prosecution of corporations that bribe overseas. Interestingly, it is also unlikely for corporations to bring criminal charges against internal perpetrators of economic crimes such as bribery even when committed *against* the organisation, as corporations' reactions are often motivated by minimising damage to their reputations – this results in privileged treatment for both internal and high-status economic crime offenders (Bussmann and Werle, 2006).

Figures from a TI report on the progress of the OECD Convention[143] show that in 2008 and 2009, Germany criminally prosecuted 26 individuals and four companies. Conversely, between 1999 (the entering into force of the OECD Convention) and 2009, the UK had criminally prosecuted one individual and one company. In line with this, the TI report in 2011[144] indicated that in Germany this had increased to 34 criminal and four civil sanctions for individuals, and seven criminal sanctions for companies[145]. In the UK, the figure for individual criminal prosecutions had increased to eight and to seven for companies. Given the location of both the UK and Germany in the 'active enforcement' category of TI's report, it would appear that the 'moral entrepreneurs' are satisfied with this level of enforcement. It is important, however, not to take such statistics at face value. The TI figures suggest a significant difference in enforcement rates but taking these bribery cases out of their

[143] Full 2010 report available at: http://www.transparency.org/publications/publications/conventions/oecd_report_2010 <Accessed 08/06/2011>

[144] Full 2011 report available at: http://www.transparency.org/news_room/latest_news/press_releases/2011/2011_05_24_oecd_progress_report <Accessed 08/06/2011>

[145] These prosecutions refer to administrative fines. The criminal sanctions of legal persons in Germany indicated in the report refer to cases where there is an underlying bribery related criminal offence by a natural person within the corporation and where the legal person has subsequently been sanctioned under Administrative Law as per sections 30 and 130 OWiG. Thus, criminal proceedings may be brought against the natural person and the legal person becomes part of these proceedings as a secondary party, but these proceedings may also go ahead in cases where the natural person is no longer prosecuted.

context for the purposes of numerical comparison can be misleading. For example, a significant number of the 34 individual prosecutions in Germany relate specifically to the Siemens case (see chapter 4.5). Take away this one case, and the UK/German enforcement rates of individual prosecutions over recent years become more comparable with a similar number of individual and corporate prosecutions. With the UK having conducted 17 major cases, and Germany more than 16, and with enforcement rates similar in 2009 and 2010, this initial difference of earlier TI reports appears to have been bridged. However, what constitutes 'adequate' enforcement is contestable (see chapter 9.3 for a discussion of this problematic) – such statistics do not reflect the broader regulatory mechanisms that are emerging in both countries, nor do they illuminate the social context and relations that represent these wider mechanisms. Before this admixture of (non-)enforcement mechanisms is explored, how criminal prosecution can be, and is being used, requires analysis.

7.2.1 Criminal prosecution and sanctioning in the UK

As per the Code for Crown Prosecutors and the UKBA Joint Prosecution Guidance[146], various mitigating and aggravating factors influence the level of criminal sanctions. In the context of bribery offences, the Code sets out a number of factors tending in favour of prosecution. For example, a conviction for bribery is likely to attract a significant sentence, offences will often be premeditated and may include an element of corruption of the person bribed, offences may be committed in order to facilitate more serious offending, and those involved in bribery offences may hold positions of authority or trust and therefore take advantage of that position. Conversely, factors tending against prosecution may include cases where the court is likely to impose only a nominal penalty, where the harm caused was minor and was the result of a single incident and where there has been a genuinely proactive approach involving self-reporting and remedial action. In law, natural persons found guilty under sections 1, 2 or 6 UKBA (active bribery; passive bribery; bribery of a foreign public official) on summary conviction are liable to maximum imprisonment of 12 months or to a fine not

[146] Prosecution guidance available at: http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf <Accessed 09/06/2011>

exceeding the statutory maximum (£5000), or both. On conviction of indictment, natural persons are liable to a maximum prison sentence of 10 years, an unlimited fine, or both. Legal persons found guilty under these offences are liable to a fine not exceeding the statutory maximum (£5000) on summary conviction, or to an unlimited fine on conviction of indictment. Any person found guilty of a section 7 offence (failure to prevent bribery) on conviction of indictment is liable to an unlimited fine. Thus, on paper, if bribes are large, repeated, planned or accepted as standard within a corporation, then criminal prosecution with potentially severe sanctions is likely, but in practice, has this been the case?

At the time of writing, only a handful of SFO bribery cases have so far involved criminal prosecutions, all of which came under the bribery laws prior to the UKBA. Criminal prosecutions of individuals in the UK have increased over the last two years but the criminal prosecution of corporations remains minimal. In September 2009, Mabey and Johnson Ltd, the first corporation to be criminally sanctioned, received a criminal fine that along with a Confiscation Order and other costs involved a total financial penalty of £6.6m[147].

A Confiscation Order is similar to but differs from a Civil Recovery Order (see below). Confiscation orders in the UK can be made in the crown court and reflect the amount of money that the state can realistically confiscate from the corporation or individual. This amount is usually made up of the financial benefit (profits and revenue) generated by the corporation as a result of the criminal act. Innospec was required to pay both a confiscation penalty of $6.7m and a recovery order of $6m in relation to the bribery in Indonesia.

A further two corporations, Innospec Ltd (see chapter 4.4) and BAE Systems[148], received criminal fines in tandem with civil sanctions. While each of these three corporate prosecutions are substantive transnational bribery cases, Mabey and Johnson and

[147] SFO press release on Mabey and Johnson available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx <Accessed 10/06/2011>

[148] BAE Systems pleaded guilty to one offence of failing to keep accounting records "sufficient to show and explain the transactions of the company" contrary to Section 221 of the Companies Act 1985. See sentencing remarks available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf <Accessed 10/06/2011>

Innospec[149] were charged with the offence of 'conspiracy to corrupt' while BAE Systems was charged with failure to keep adequate accounting records. However, a number of individuals have been criminally prosecuted. In October 2010, Julian Messent, director of PWS International Ltd., was sentenced to 21 months imprisonment and a fine of £100,000[150]. In April 2010, John Dougall, a former director at DePuy International Ltd., was sentenced to 12 months imprisonment[151] (suspended on appeal). In February 2011, two former directors and a former sales manager of Mabey and Johnson Ltd. (see above) were sentenced to prison sentences of 21 months, eight months, and eight months suspended respectively. The two former directors were also disqualified for acting as company directors for five and two years respectively and also ordered to pay prosecution costs[152]. In October 2011, three former Innospec executives[153] and an international businessman, Victor Dahdaleh[154], were charged with overseas corruption. These cases were ongoing at the time of writing and all fall under bribery laws prior to the UKBA.

Individuals may also be prosecuted for bribery under money laundering offences using POCA[155]. These powers only became available to the SFO in April 2008. Under sections 327 *et seq.* POCA (Concealing etc.; arrangements; acquisition, use and possession), persons are liable, on summary conviction to maximum imprisonment of six months, a maximum fine of £5000, or both. On conviction on indictment, there is a maximum prison sentence of 14 years, an unlimited fine, or both. Under sections 330 *et seq.* (failure to disclose; tipping off),

[149] See Innospec sentencing remarks available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf <Accessed 10/06/2011>
[150] SFO press release on Messent and PWS available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx <Accessed 10/06/2011>
[151] SFO press release on Dougall and DePuy available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx <Accessed 10/06/2011>
[152] SFO press release on Mabey and Johnson employees available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx <Accessed 10/06/2011>
[153] SFO press releases available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd--former-executive-in-court-on-fraud-and-corruption-charges.aspx and http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-two-more-executives-charged-with-corruption.aspx <Both accessed 31/10/2011>
[154] SFO press release available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/victor-dahdaleh-charged-with-bribery.aspx <Accessed 31/10/2011>
[155] Full text of POCA available at: http://www.legislation.gov.uk/ukpga/2002/29/contents <Accessed 09/06/2011>

persons are liable, on summary conviction to maximum imprisonment of six months, a maximum fine of £5000, or both. On conviction of indictment, persons are liable to maximum imprisonment of five years, an unlimited fine, or both. At the time of writing, the SFO has made use only of the confiscation and recovery powers of POCA (Parts 2 and 5) for corruption offences but mainly recovery orders. For example, in October 2008 in the first case of this sort, Balfour Beatty was required to pay £2.25m plus costs as part of a Civil Recovery Order[156]. In February 2011 MW Kellogg Limited was required to pay over £7m due to sums it would receive that were generated through contracts obtained by bribes made by its parent company and other third parties[157].

7.2.2 Criminal prosecution and sanctioning in Germany

In Germany, the criminal prosecution of individuals remains at a steady rate but corporations cannot be criminally prosecuted. According to a recent OECD report on Germany[158], of the 30 bribery convictions of individuals since 2005, only 10 were for the criminal offence of bribery of foreign officials (s. 334 StGB). A further 10 were for the criminal offence of commercial bribery (s. 299 StGB) and 10 were for the criminal offence of breach of trust (s. 266 StGB). An additional four sanctions were brought for breach of supervisory duties (s. 130 OWiG) and 35 individuals agreed to civil arrangements in line with section 153a StPO ((diversion from criminal prosecution) – see discussion on discretion, chapter 6.3.2) – 24 of these individuals were in relation to the Siemens case. These arrangements are not published, therefore the underlying offence alleged by the prosecution cannot be ascertained – further transparency is required here. In total, since the first conviction for overseas bribery in Germany in 2005 and as of May 2011, 69 individuals (35 non-prosecution agreements (NPAs)) and 7 companies (administrative fines) had been processed by the prosecutors. This presents significant evidence of the use of both criminal and non-criminal enforcement mechanisms in Germany, despite arguments

[156] SFO press release on Balfour Beatty available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx <Accessed 10/06/2011>
[157] SFO press release on MW Kellogg available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mw-kellogg-ltd-to-pay-%C2%A37-million-in-sfo-high-court-action.aspx <Accessed 09/06/2011>
[158] OECD phase 3 report on Germany available at: http://www.oecd.org/dataoecd/5/45/47416623.pdf <Accessed 09/06/2011>

surrounding the legality principle and the legal requirement to aim for criminal prosecution (see chapter 6.3.2). Over half of individual sanctions have been concluded through non-criminal prosecution mechanisms.

In Germany, then, prosecutors are more frequently using a variety of prosecution options, in particular sections 199 and/or 266 StGB, commercial bribery and breach of trust respectively, to prosecute and sanction in foreign bribery cases rather than the section 334 StGB that covers the specific offence of bribery of a foreign public official (see chapter 5.8). The Siemens case, for example, was largely dealt with by the Munich prosecutors in relation to violations of 'breach of trust' due to the slush fund that was created – the *Bundesverfassungsgericht* (Federal Constitutional Court) recently confirmed that the use of slush funds can be considered a 'breach of trust'[159]. This is occurring as offences under sections 266 and 299 *et seq.* can be proven without MLA, thus enabling prosecutors to settle cases in line with the time constraints as outlined in the *Beschleunigungsgrundsatz* (Principle of Expediting Proceedings). The use of alternative offences provides prosecutors in Germany with evidential ease as the offences require less investigatory complexity and a lower burden of proof – section 299 does not require proof that the recipient of a bribe is a foreign public official, despite this likely being the case. This is therefore more cost-effective, swift and pragmatic enabling a larger number of cases to be processed and countering the practical difficulties that emerge. This is similar to the SFO's use of anti-money laundering offences and the section 7 UKBA offence as well as the use of civil actions for similar reasons. More notably, the use of NPAs with individuals symbolises a significant shift away from criminal prosecution for reasons of practicality – where criminal prosecution is not possible, NPAs offer a 'safety net' within which individuals can be caught.

Available criminal sanctions for natural persons for the bribery of foreign officials and related offences (as outlined above) vary significantly. For the section 334 offence of active bribery of a foreign official, sentences can range from imprisonment of three months to five years or six months to 10 years in especially serious cases. Fines can be used in place of

[159] Full text of the decision (in German) available at: http://www.bundesverfassungsgericht.de/en/decisions/rs20100623_2bvr255908.html <Accessed 09/06/2011>

imprisonment (unless it is an especially serious case), and are mandatory should the imprisonment be less than six months. In 2010, for example, a further two former senior managers at Siemens were convicted of bribery related offences and received suspended sentences of two and one and a half years, and corresponding fines of €160,000 and €40,000. In a case involving MAN Turbo AG, a former executive received a two year suspended sentence and was ordered to pay €100,000 to charity. For the commercial bribery offence which is being used as an alternative, there is a possibility of imprisonment for three months to five years in especially serious cases – all foreign bribery cases have been deemed especially serious thus far. Alternatively, following an amendment in 2009, a maximum criminal fine of €10.8m against individuals is available. This is more than ten times the maximum fine for a corporation which can be fined up to €1m under administrative law (see below). For the breach of trust offence, imprisonment of one month to five years or six months to 10 years in especially serious cases is available although criminal fines for cases not especially serious can be used. In practice, the average prison sentence for the foreign bribery offence is two years and three months, the longest of which was a five year prison sentence in conjunction with a €2.16m fine. Over half of the prison sentences were suspended. For the commercial bribery offence, no defendants were imprisoned but there is an average suspended sentence of one year and six months with fines in the majority of cases but usually not more than €20,000. For the breach of trust offence all defendants received prison sentences averaging one year and six months with fines in some cases. Thus, sanctions for the foreign bribery offence are significantly higher but as has been demonstrated, German prosecutors are adopting alternative offences to achieve swifter and most cost-effective prosecutions. Administrative sanctions for breaches of supervisory duties are also available with potential fines of up to €500,000 for negligence and €1m for intent. Such sanctions have been used where it has not been possible to prove a criminal offence. In other cases, agreed sanctions are made (under section 153a). Settlements in these cases usually amount to twice the amount of the profit made or of the bribe given. Settlements have ranged from €600 to €50,000.

Legal persons can only be sanctioned under administrative law (see chapter 5.8.4). Sections 30 and 130 OWiG where a natural person has breached their supervisory duties enable legal persons to be fined up to €500,000 for negligence and €1m for intent. Section 17(4) OWiG

ensures that the fine must be higher than the profits gained from the bribery offence. Thus, the profits of any bribery offence can be confiscated. Interestingly, the confiscatory dimension of the fines is tax deductible. Such confiscations (similar to Confiscation Orders in the UK – see above) are significant in Germany, where the regional courts can impose financial confiscations of the profits of bribery constituting the majority of financial penalties given to corporations. As explained in chapter 5, there is a maximum fine of €1m for corporations but an unlimited amount can be confiscated. In the Siemens case, for example, Munich prosecutors confiscated almost €600m in two separate decisions. Another example involves the MAN Group that was fined €150.6m that equated to a disgorgement of the profits made.

Sanctions for both natural and legal persons are influenced by various aggravating and mitigating factors. For example, for natural persons, the cooperation of defendants, solicitation (e.g. acknowledgement by the courts that bribes are expected in certain countries), if the bribes were not for direct personal gain, or if the defendant was a first time offender, had recompensed the company, arrived after the bribery system was in place or left the company after the offence was detected can all provide mitigation. For legal persons, the seriousness of the offence (i.e. size of bribes, long-term bribery, if it was usual company practice, if senior executives involved), solicitation, the degree of cooperation (e.g. voluntary disclosure) and the extent to which the company has subsequently addressed the issue are all of significance.

7.2.3 Prosecutorial convergence

Prosecutorial convergence in the two jurisdictions is evident not only in relation to criminal prosecution but also in relation to the use of non-criminal measures although variances are evident. In both jurisdictions there is a trend to use non-criminal approaches for both individuals and corporations (NPAs and civil sanctions) as well as a wider variety of criminal offences to deal with overseas bribery (e.g. money laundering, breach of trust, etc.). Whether criminal or civil/administrative approaches are used, every case has involved financial penalties for the corporation in both jurisdictions. It is important, therefore, to explore this regulatory mix of enforcement mechanisms further as these reflect how

responsive regulators can be within their legal frameworks but also demonstrate the strengths and limitations of criminal prosecution for such complex transnational crimes. Prosecutors acknowledge these limitations and are subsequently adapting their approaches. Such discretion to determine appropriate sanctioning and/or type of legal offence is fundamental in both UK and German approaches, an issue acknowledged by intergovernmental organisations:

> '…economic crime doesn't work without this kind of discretion. You have to have the freedom, for instance, to say let's concentrate on one part of the case that we can really prove and drop the rest because otherwise we will be bogged down for years and will miss prescription or something...So if you really want to be effective you have to have discretion here. The next question is, of course, should there be rules of how to apply discretion. I think the UK has been struggling with that for a long time' (Interview 411, representative of an intergovernmental organisation)

The last comment refers to the BAE Systems case that was stopped on the basis of 'national interest'. Thus, while discretion is key, intergovernmental organisations argue there are 'illegal forms' of discretion e.g. when considering economic and/or national interests (see chapter 5.3.1). Discretion enables a variety of non-criminal alternatives to be adopted, but before these are explored further, the most severe of criminal sanctions, that of debarment, requires analysing, as it plays a significant role in the decisions not to criminally prosecute and pursue alternative enforcement actions.

7.3 Debarment: 'the corporate death penalty'

The issue of debarment repeatedly appeared throughout the research and requires special analysis. Article 45 of the EU public procurement directive 2004/18/EC[160] creates provisions for a mandatory exclusion, or debarment, of candidates or tenderers who have been convicted for certain criminal offences including corruption. The Directive allows Member States to determine implementing conditions, but only if there are overriding requirements in the general interest can the mandatory exclusion be derogated. In the UK, the Directive is enacted through the Public Contracts Regulations 2006[161]. Part 4 (23c) stipulates that

[160] Full text of the Directive available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:En:HTML <Accessed 27/05/2011>
[161] Full text available at: http://www.legislation.gov.uk/uksi/2006/5/contents/made <Accessed 27/05/2011>

'contracting authorities' must exclude an 'economic operator' (i.e. a supplier) from public contracts if it, its directors or any other person with powers of representation, decision or control have been convicted of the 'offence of bribery'. Overseas corruption and bribery are of course not solely related to procurement, but this area creates many opportunities for corrupt behaviour. Debarment has increased in significance internationally, with the five main multilateral development banks (MDBs), the World Bank Group, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group signing an agreement[162] in April 2009 ensuring that a company debarred by one of the MDBs will subsequently be debarred from all others. However, the banks 'may decide not to enforce a debarment…where such enforcement would be inconsistent with its legal or other institutional considerations' (see paragraph 7 of the agreement). Thus, there is a discretionary element to this agreement. In a related corruption case to that discussed in chapter 4.5, the World Bank Group debarred Siemens subsidiary, Siemens Russia, for up to four years, while Siemens AG and all its consolidated subsidiaries and associates agreed a voluntary two year debarment from bidding on Bank business[163].

Debarment has frequently been referred to as the 'corporate death penalty' given the significant financial impact it brings. For example, a corporation's business may be solely reliant on public contracts and if debarred from such contracts could potentially lose £millions, face insolvency and go out of business, not to mention the reputational damage and the subsequent potential stigma attached to the corporation, its directors and employees if it continues to operate. This has wider impacts: losing such corporations as providers of employment and tax could have a detrimental impact on a country's economy at the local and national level. This raises an economic dimension for prosecutors, although the OECD Convention states that economic interests should not influence decisions to prosecute. It further creates potential for the misuse of the derogation 'get-out' by contracting authorities keen to retain certain suppliers. Debarment, however, is a complex

[162] Full text of the agreement available at: http://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf <Accessed 07/06/2011>

[163] See World Bank press release available at: http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22234573~pagePK:64257043~piPK:437376~theSitePK:4607,00.html <Accessed 07/06/2011>

sanctioning process. For example, corporations may face indeterminate or determinate (12 months, four years, etc.) debarment, or may face suspended, conditional or voluntary debarment, and the debarment may be applicable only in certain jurisdictions, with certain organisations (e.g. the MDB contracts as above) or for certain associates of a corporation (e.g. Russian subsidiary of Siemens). The sanction is more complex and varied than a simple exclusion or not from any given public contract.

Significantly in the UK, corporations criminally prosecuted under section 7 UKBA for failure to prevent bribery will not face mandatory exclusion. Ken Clarke stated:

> 'The Government have also decided that a conviction of a commercial organisation under section 7 of the Act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK's implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations will be amended to reflect this' (Ken Clarke, Ministerial Statement, 30 March 2011[164])

This statement ensures debarment for conviction for the section 7 offence is discretionary (possible but unlikely) and indirectly implies that criminal conviction for the section 1, 2 and 6 offences will retain mandatory exclusion. This likely reflects the distinction between committing an 'offence of bribery' and failing to prevent this offence. However, how this discretion will be exercised by the SFO and other prosecutorial bodies is unclear, as is any direction as to the length of debarments, the requirements of disclosure (e.g. 'rehabilitation period') in the tendering process or whether a section 7 conviction would nonetheless lead to corporations not being considered for contracts (e.g. following negative press).

The discussion in chapter 6.4 on corporate criminal liability significantly demonstrated that corporations in Germany *cannot* be criminally prosecuted: cultural influences and subsequent legal frameworks mean corporations cannot 'act' under German law, and can only be sanctioned under administrative law. This creates a significant difference in the potential exclusion of corporations based or operating in the UK and Germany (although UK and German corporations criminally prosecuted in other EU jurisdictions are liable to debarment). This would seem to indicate an uneven playing field as the criminal prosecution

[164] Ministerial statement on the UKBA from Ken Clarke available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110330/wmstext/110330m0001.htm#11033059000255 <Accessed 07/06/2011

of a corporation for bribery in the UK would trigger mandatory debarment under EU regulations; this is not possible in Germany. That said, German courts do have available discretion to debar companies from public procurement contracts if found liable under administrative law: but as yet, this has not occurred. As one German investigator outlined, such debarment would be desirable but other factors, as above, create obstacles for its use:

> 'What I would really like is that at the EU-level companies were consistently debarred for two or three years but this, I believe, is theory. This doesn't happen in practice: jobs, politics, convoluted corporations making it difficult to know where to direct attention – for example, with Siemens there may be one or two smaller subsidiaries so who do I target then? Which was the operational subsidiary? It's difficult…There are legal possibilities to debar corporations in Germany but nobody at all does this' (Interview 242, German investigator)

Public contracts often involve large scale projects but such projects can often only be managed by large MNCs. While in previous years tenders for large scale projects may have received a high number of bids, this is not the case currently due to take-overs that have created conglomerates, and so on, leaving only a small number of capable corporations. This creates a difficulty for debarment as if one of these MNCs is debarred, the number of potential corporations is reduced. If, for example, Siemens had been debarred for the bribery offences outlined in chapter 4.5, the removal of one of few MNCs able to produce large scale projects may remove legitimate competition creating potential for market monopolisation and unfair pricing. That said, in the majority of public contracts, given that corruption increases the scope of non-competitive awards, the debarment of corrupt corporations should increase competition by enabling access to the contracts to non-corrupt corporations (Williams, 2006: 731). However, when economic considerations are so significant, a non-discretionary corporate debarment can appear counterintuitive. No state will ignore economic considerations, rendering somewhat utopian and idealistic requirements, as with the EU Directive and the OECD Convention, non-applicable to the 'real world'. As Williams (2006: 732-733) notes, any state aiming to adopt a strict interpretation and implementation of the mandatory exclusion will face significant costs and delays in the procurement process. Procedurally, determining the relevance of a conviction from other jurisdictions and whether a corporation has actually received a relevant conviction is difficult. Further, given the lack of clarity regarding subsidiaries and associated persons and only by incurring significant investigative costs can debarment provisions be

effectively applied to persons related to convicted contractors. In any case, determining the exact procedure to be followed is not specified by the Directive.

A key prerequisite in the mandatory debarment of companies convicted of the 'offence of bribery' is the requirement of a criminal prosecution but this runs against the 'functional equivalence' concept of international anti-corruption bodies such as the OECD and GRECO (see chapter 5.3). As Williams remarks in her assessment of European Commission (EC) procurement directives:

> '…whilst the provisions might reduce corruption in government contracts, either because they act as a sanction against corrupt suppliers, preventing them from accessing the procurement process or because they are able to deter other suppliers from engaging in corrupt practices, the tool is limited as it relies on the conviction of a corrupt supplier' (Williams, 2006: 731)

Given the criminal prosecution policies in the UK and Germany (see above) along with the difficulties in detecting bribery offences (see chapter 6.5), convictions and therefore debarments are unlikely. For Williams (2006: 733-734) it appears necessary to choose between making the mandatory debarment measure effective with the attendant increased procedural and financial burdens or leaving the measures symbolic so as not to disrupt the procurement process. However, in the first case, there would be a retributivist assumption that debarment is a proportionate punishment to certain cases of corruption but the potential societal 'collateral damage' (i.e. innocent individuals losing employment, stakeholders losing assets, the state losing taxes, etc.) appears significantly disproportionate. Despite that, one German expert remarked,

> 'I'd say tough luck. Tough luck. That's just the way it is. The corporations say in response, "[debarment] costs us jobs and we might go bankrupt". But they previously damaged their competitors through corruption who maybe went bankrupt and lost jobs because this company went against the law and was corrupt, but they never ask about that, and for this reason it's no argument for me.' (Interview 241)

Both arguments are empirically unsubstantiated given the dearth of debarments for corruption offences, rendering both hypotheses unfalsifiable under current circumstances. In the second case Williams points out, there is classicist assumption that corporations (or their employees) are rational and will be deterred by strong, symbolic punishments. However, as one UK lawyer stated, 'debarment must be a "death penalty" otherwise it has

no purpose'. In other words, debarment without the destruction of a corporation is little different to a criminal fine given the corporation is essentially 'immortal'. A key issue with debarment appears to be that of deterrence and the question of whether without debarment there is no significant deterrent for corporations? As above, a message of affordable risk may be communicated if there is no significant risk for corporations but as discussed, the risk for individuals is much greater. Debarment, along with criminal prosecution, is therefore one significant enforcement tool that should be available to prosecutors in those cases that require it. However, the EU Directive requiring mandatory debarment creates inconsistencies at the national level, in particular in relation to guidance for prosecutors in considering the potential debarment result. One respondent from an inter-governmental organisation stated:

> 'I think it is a problem that the EU has this mandatory debarment that is causing trouble. It should be more flexible. It is not well thought through. It actually goes as far [to say] that under the concept of public interest one should consider whether debarment would be the consequence. It is something that we picked up in the [name of organisation] and were quite troubled about that you would not go ahead with the case because you were in fear of debarment. Now it shouldn't be that way it should be that you go ahead with the case and the debarment issue should be made discretionary on the basis of how serious the offence is.' (Interview 411)

This represents a more practical approach, with debarment being reserved for those particularly serious offences of bribery – this reflects a model of escalation, similar to that proposed by Ayres and Braithwaite (2002) (see chapter 2.7.4). Determining which offences are suitable for debarment is open to interpretation but would likely include prevalence of grand corruption and those corporations with systemic and endemic corruption throughout that do not plead guilty and that have demonstrated no intention to change the culture of the organisation.

7.4 Non-criminal alternatives

> 'I think that law enforcement tends to work by the stick rather than by the carrot, so therefore what it tends to think in terms of is, you're not doing this, we'll shame you into doing it, rather than look how successful we are at this, why aren't you doing it too, so the pull of the standard. I think that is partly because of the penal mindset of most people that are attracted to investigation and prosecution that we tend to believe in sanctions as a way of behaviour change rather than incentives, so I do think some kind of incentives would help' (Interview 112, UK prosecutor)

Why, then, is there an apparent development away from criminal prosecution and the subsequent debarments of corporations towards non-criminal alternatives? The answers to this appear to be financial and practical, but may also be ideological or symbolic. In the related area of corruption in public procurement, Williams (2010: 143) focuses on 'the shortcomings of penal measures in the fight against corruption such as the difficulties of obtaining corruption convictions, the difficulties of meeting the burden of proof and the difficulties of prosecuting companies and the inability of penal sanctions to affect some of the kinds of corruption that occur'. Similar difficulties became clear during this research, with four main issues influencing the increased use of civil solutions. First, criminal prosecution is extremely expensive due to the high costs of investigation to meet the substantial evidential and procedural 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. Conversely, civil solutions are more cost effective, with corporations often covering the costs of investigation. In relation to the demand for resources and the use of civil solutions for overseas bribery cases, one UK prosecutor stated:

> '…that doesn't mean that they are any less criminal [companies that bribe compared to 'conventional criminals'] it just means that you are trying to bring them to justice in a way that doesn't sap all of your resource because obviously we are having our budgets cut quite drastically so it is an extremely efficient way if they come to you and report and then correct the problem which is part of the solution isn't it' (Interview 114)

Second, the practical difficulties of obtaining the relevant evidence (e.g. through MLA) and burden of proof create a time-consuming process and lower the likelihood of prosecution. Chapter 6.4 outlined the difficulty in the UK of locating the 'controlling mind' of a corporation in order to pursue criminal prosecution. This 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. 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. Third, in the current economic climate, particularly in the UK, available resources are influencing the adoption of

more cost-effective approaches. The SFO has had its budget reduced as seen in chapter 6.2.1. In Germany, resources are more widely available but the decentralised system results in some prosecutors being better equipped than others. Fourth, 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 light of the above, innovative and parsimonious approaches have emerged. This is certainly the case in the UK where the SFO has developed and actively promoted its approach. On answering whether the aim in overseas bribery cases was to achieve criminal prosecution, one UK investigator stated:

> 'Well achieving a just outcome is the aim. Given that our cases are all at the top end of seriousness for financial crimes, the expectation has always been that prosecution will be the natural outcome. The new director…Richard Alderman, has said that we will employ a variety of the tools available to us including civil settlements and including particularly inviting companies and individuals to come forward, and often that's done with the encouragement of we will look favourably on a suggestion to deal with the case civilly rather than criminally which of course for a company is massively attractive given things like the disbarring provisions of the EU' (Interview 111)

An SFO press release described this new approach as being 'more effective and costing less' and resulting in the SFO becoming 'stronger, faster and leaner'[165]. Prosecutors and investigators in the UK accept the reality of financial, evidential and procedural restraints and are adopting other strategies to compensate such as voluntary disclosures and self-reporting (see below and chapter 8.3.2). Similarly, in Germany prosecutors are adopting non-prosecution agreements as a way of addressing evidential difficulties. It has been argued, however, that such shifts away from criminal prosecution may provide a more suitable enforcement framework. Khanna concludes that 'if we start with the notion that corporate wrongdoing is not sufficiently deterred at present, then we would want to argue for *curtailing* corporate criminal liability and increasing the focus on corporate civil liability and managerial liability. This raises serious questions about how we regulate this area' (Khanna, 2004: 141, emphasis in original). Khanna's (2004: 95) argument is based on the premise that corporate crime legislation may be the preferred outcome for corporate interests as it (i) satisfies public outcry but (ii) imposes low costs on businesses, and (iii)

[165] SFO press release available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/serious-fraud-office---more-effective-and-costing-less.aspx <Accessed 08/06/2011>

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. To what extent, therefore, can civil and managerial approaches be applied to transnational corporate bribery?

7.4.1 Civil solutions

Transnational corporate bribery is a criminal offence but civil solutions are becoming more frequently used in the UK and Germany, and represent a key enforcement mechanism in dealing with this crime phenomenon. Civil solutions can take several forms: financial settlements and fines; restitution via Civil Recovery Orders that include the amount of the unlawful property (e.g. often profits from contracts won but also revenue), and investigatory and prosecutorial costs. Other 'hybrid mechanisms' also often form part of civil solutions (see below). Given the multi-jurisdictional nature of overseas bribery, the prosecutors may attempt to offer finality to the corporation by reaching global settlements with other jurisdictions – the Innospec and Siemens cases (chapters 4.4 and 4.5) are examples of this in the UK and Germany.

The SFO acknowledges, however, that for such global civil settlements to be reached, the judiciary needs to be informed and involved early in the process so judges understand the reasoning behind such approaches and therefore will not present problems when it reaches the court stage. The comments of Lord Justice Thomas in the Innospec case and Mr. Justice Bean in the Dougall case outline the tensions that had been created between judges and the SFO, with judges of the opinion that prior arranging of settlements could potentially erode the constitutional rights of the courts to adjudicate. One UK investigator stated:

> '[The use of global civil agreements] has very recently been thrown into some question by the Innospec judgement with Lord Justice Thomas saying that you can't carve these cases up with the Americans and come to the court and expect the court to rubberstamp the outcome that you've agreed. The courts will take an independent view of what justice requires, so we're still very much in the throes of absorbing that and adapting it to the way that we do our work' (Interview 111)

Financial settlements and fines can be made up of recovery or confiscation orders, or be straightforward standalone fines. In the UK, nearly all civil fines have been made up of

recovery and confiscation orders. The SFO currently has no statutory powers to fine corporations with all civil proceedings having to go through the court. In Germany, as has been established, there is a maximum fine of €500,000 or €1m depending on the level of negligence or intent involved.

7.4.2 Civil Recovery Orders

In the UK, a Civil Recovery Order is an order made by the high court, not the criminal court, in order recover property (money or assets) obtained through unlawful acts. Such orders require no criminal offence to be established. Finality can therefore be obtained without a costly criminal prosecution. For corporations, the stigma is less and debarment is avoided. The SFO obtained civil recovery powers in April 2008 following provisions in the Serious Crime Act 2007 that merged the Assets Recovery Agency (ARA) into SOCA and transferred its recovery powers to other agencies. In October 2008, Balfour Beatty became the first corporation in the UK to be sanctioned with a Civil Recovery Order for bribery in Egypt. The company was ordered to pay £2.25m plus costs. In April 2011, the SFO obtained a Civil Recovery Order in the High Court against DePuy International Limited. The company was required to pay £4.829m, plus prosecution costs, for overseas bribery offences in Greece[166]. MW Kellogg, as described earlier, also represents the use of Civil Recovery Orders in the UK in overseas bribery cases.

A key question is whether such orders, but also criminal fines, are effective in changing behaviour within corporations. One UK investigator explained his view:

> 'I am somewhat more cynical about the way in which corporates make their money and rather suspect that they would seek to recover any fines that are imposed in relation to one lot of activity by their economic activity at a later stage. So I'm not so sure that it necessarily works in that way, nor do I necessarily think that the imposition of a fine on the company particularly changes corporate culture' (Interview 112)

Fines alone may not change corporate behaviour. For this reason civil agreements in the UK and Germany often incorporate a requirement for regime change, often in the form of 'self-

[166] SFO press release on DePuy available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/depuy-international-limited-ordered-to-pay-%C2%A34829-million-in-civil-recovery-order.aspx <Accessed 14/06/2011>

cleaning' which represents a form of hybrid enforcement (see 7.5 Shifts towards non-enforcement: hybrid mechanisms below).

7.4.3 Deferred and non-prosecution agreements (DPAs and NPAs)

Currently in the UK, DPAs are not available to the SFO but are one enforcement tool that they are keen to use. DPAs are legal mechanisms consisting of voluntary agreements between the corporation and prosecutor whereby no criminal prosecution will be pursued in exchange for the fulfilment of certain requirements. DPAs enable the symbolic aim of criminal prosecution but with deference. A criminal charge is initially made but at the end of the deferment period, the charges will be dropped if the requirements are met. Alternatively, if these requirements are not met, the prosecutors maintain the right to prosecute at this time. NPAs do not involve an initial charge. Similar to the above mechanisms, DPAs and NPAs often require the corporation to cooperate fully, providing evidence for individual criminal prosecutions, to 'self-clean' (see 7.5.2 below), to agree to a monitor (see 7.5.3 below), and to make restitution payments. DPAs and NPAs are prevalent in the US and are increasingly being used by the DoJ for dealing with transnational corporate bribery. It is the perceived success there that has influenced the SFO's desire to be granted such powers.

Primary legislation would be required for them to come into use, as would early judicial involvement in the process for it to be effective. Alternatively, 'practice directions' issued by the Lord Chief Justice, may facilitate this also. Although not statutory, 'practice directions' may make it easier for court cases to be conducted but are currently only used after a charge is brought. The key argument is that such agreements cannot be done informally and it would be preferable for primary legislation to enable DPAs, as in the US. However, consideration must be given to the extent to which such crime polices and strategies are able to 'travel' or transfer across jurisdictions – decisive in the success and impact of such transfers are the cultural, socio-political and institutional context at the receiving end (Karstedt, 2007: 147). Nonetheless, despite no legal framework for the use of DPAs and NPAs in the UK, similar mechanisms are being utilised through the civil agreements as outlined above. The only significant difference is that there is no deferral of a potential

criminal charge. Individuals in both Germany and the UK have received suspended sentences which operate on a similar principle, while NPAs with individuals are now being extensively used in Germany but only as part of formal proceedings (see 7.2.2 above).

7.5 Shifts towards non-enforcement: hybrid mechanisms

The above mechanisms largely reflect traditional understandings of policing and law enforcement whereby criminal prosecution or alternative non-criminal sanctions are used. 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 non-enforcement mechanisms. UK and German prosecutors and investigators understand this problematic but are limited by their statutory remits and the available 'tools' at their disposal. However, a number of key trends representing a shift away from enforcement practices towards non-enforcement mechanisms on behalf of the state are emerging. These mechanisms may be considered 'hybrid mechanisms' that incorporate high levels of state intervention to induce corporations to regulate their own behaviour. The following examples outline this trend.

7.5.1 Self-reporting

In the UK, the SFO has placed much emphasis on self-reporting and has even published guidance on how and when corporations should self-report. The SFO (the director in particular) 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 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 the EU Public Sector Procurement Directive in 2004 will not apply.' (SFO Self-Reporting Guidance, 2009[167])

This extract provides several key insights. First, civil actions for criminal sanctions are being proposed by the SFO which indicates a preference to shift away from criminal prosecution towards a form of 'negotiated justice' whereby corporations can approach the SFO, report bribery cases, and negotiate a sanction. Second, this negotiation between regulator and regulatee becomes even more apparent in the potential for the corporation to manage any publicity jointly with the intention of improving the corporation's reputation and public image – a form of re-integrative shaming although the SFO were strongly criticised by Lord Justice Thomas[168] for suggesting Innospec could draft an approved press notice on their case. Third, the SFO makes explicitly clear that it does not want to debar corporations under the EU Directive (see 7.3 Debarment above). This undermines the EU but also acknowledges the preference for a more flexible, discretionary sanctioning framework. According to the 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. It is such behavioural change that enforcement statistics do not demonstrate.

It is expected that corporations, on detection of a possible bribery case, will conduct internal investigations, seek advice from professional advisers and the corporation's legal teams, and then make the decision to self-report or not. Should the SFO come across an overseas bribery case and ascertain that the corporation could have self-reported earlier, a criminal prosecution will become more likely (this was argued at least by SFO respondents). For example, if it should come to the knowledge of a senior officer that a bribe has been paid to gain a contract, the SFO maintains that it is vital the executive self-reports. Failure to

[167] SFO guidance on self-reporting available at: http://www.sfo.gov.uk/bribery--corruption/the-sfo%27s-response/self-reporting-corruption.aspx <Accessed 10/06/2011>

[168] See paragraph 50 of Lord Justice Thomas' sentencing remarks on Innospec available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf <Accessed 17/08/2011>

report in such an instance has the risk of being prosecuted under a money laundering offence in line with POCA.

Following a self-report, the SFO will seek to determine if the Board is committed to resolving the issues and changing the corporate culture, if the corporation will fully cooperate, whether the corporation will agree to proposed civil sanctions, whether the corporation understands that the resolution must satisfy the public interest and be transparent (e.g. public statement), and whether the corporations would like the SFO to negotiate with other UK and overseas regulators and enforcement authorities to reach a global settlement. If these factors are satisfied, the SFO will attempt to settle the case civilly and enter into plea negotiations in line with the AG's Framework for Plea Negotiations[169]. An exception to this would be any case whereby a Board member had engaged in a corrupt activity and perhaps benefited personally from the bribery. Such cases will likely lead to a criminal investigation and prosecution.

Why would a corporation self-report and therefore incriminate themselves? There are four reasons for this. First, 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, 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). Third, the corporation will have greater control over any publicity, with statements potentially being jointly drafted. Fourth, the corporation can negotiate that the subsequent investigation is conducted by the corporation's professional advisers (e.g. third-party legal, accountancy, investigations teams). Such incentives to cooperate provide alternatives to traditional enforcement approaches involving formal sanctioning. As one UK investigator suggested:

[169] Full text of AG's guidelines on plea discussions available at: http://www.attorneygeneral.gov.uk/Publications/Documents/AG%27s%20Guidelines%20on%20Plea%20Discussions%20in%20Cases%20of%20Serious%20or%20Complex%20Fraud.pdf <Accessed 13/06/2011>

> '…the penal mindset of most people that are attracted to investigation and prosecution is that we tend to believe in sanctions as a way of behaviour change rather than incentives, so I do think some kind of incentives would help' (Interview 112)

There are no data available on the effectiveness of this self-reporting approach although a recent article from the *FT* ('*"Plea bargaining uncertainty" hits SFO drive*' 07/08/2011[170]) suggests since the inception of the approach in 2009, only 10 companies have self-reported. According to the SFO Director, Richard Alderman, this lack of self-reporting is attributed to the uncertainty over how judges respond to such deals (see Innospec case study in chapter 4.4). Furthermore, the lack of incentive for individuals to self-report needs addressing given an individual who cooperated and gave evidence may only receive a few months less in jail that 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. Such an explicit self-reporting approach does not exist and is not actively promoted in Germany but the use of civil solutions for corporations and individuals is also prevalent.

7.5.2 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 (Arrowsmith *et al*., 2009). Arrowsmith *et al*. (2009: 259-261), based on their analysis of jurisdictions that recognise the concept of self-cleaning but mainly Germany, suggest 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. Corporations are first required to actively assist with the criminal proceedings in order to clarify the facts and the responsibility of all individuals involved. This must be comprehensive and swift to ensure subsequent self-cleaning measures appropriately reflect the facts of the case, otherwise the process may not be credible. In particular, there is often a preference for special audits by outside certified public accountants or other independent persons. Second, any financial damage caused must be repaired. Third, the corporation must immediately and comprehensively dismiss the shareholders, executives and employees involved in the criminality. All such individuals

[170] FT article available at: http://www.ft.com/cms/s/0/c55f88e6-bf6f-11e0-898c-00144feabdc0.html#axzz1WWTWzWSA <Accessed 30/08/2011>

must be prevented from having any further influence on the management of the corporation (e.g. shareholders may have trust agreements enabling them to recall their share in the corporation at any time), or in cases where the individual had minor involvement, dismissal with notice, a termination agreement or a reprimand may also be appropriate. These personnel measures are a key component of the self-cleaning process. Fourth, future misconduct must be prevented. This can include in-house training for staff and creating binding company guidelines, standards and codes. Other measures may include the appointment of intra-corporate or external compliance officers to assist whistleblowers and the establishment of compliance departments, amongst others. Such organisational and structural measures are key in preventing future wrongdoing.

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*. (2009: 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, the prevention of future criminality cannot be guaranteed, but the likelihood of future acts of bribery can be reduced.

Self-cleaning, while already established in the Germany anti-corruption system, is becoming more significant in the UK 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. How effective such requirements for culture change are though is unclear and difficult to measure. As things stand, apart from cases that involve the use of monitoring (see below), there is no revisiting and reassessment as to the extent of the culture change by the anti-corruption authorities.

7.5.3 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 the theories of regulation discussed in chapter 2.7.4 may have 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 the pyramids of enforcement as outlined by Ayres and Braithwaite (1992).

7.6 Summary: Negotiating regulation through enforcement mechanisms

To demonstrate this negotiation of regulation, this chapter began by analysing the use of criminal prosecutions in the UK and Germany in transnational corporate bribery cases. Criminal prosecution of corporations (legal persons) is not preferred in the UK and corporations in Germany are unable to be criminally prosecuted under current law. A number of individuals (natural persons) have been prosecuted with enforcement statistics suggesting the rate of individual prosecutions in both jurisdictions has been similar in recent years. Such prosecutorial convergence is evident not only in relation to criminal prosecution but also in relation to the use of non-prosecution measures. While a wider variety of legal offences are being utilised by authorities (e.g. money laundering offences, breach of trust offences, etc.) for both legal and natural persons, the use of non-criminal sanctioning and/or agreements in relation to these offences is significant. The shift towards non-criminal alternatives can be explained through practical and financial reasoning. The high costs and evidential and procedural burdens of criminal prosecution make civil agreements more practical and wide-reaching. The significant economic risk of criminally prosecuting a corporation in that it should lead to debarment is also an influential factor. A mixture of civil fines, recovery and confiscation orders with hybrid mechanisms of self-reporting, self-

cleaning and monitoring provide a number of non-criminal measures to deal with the complexity of transnational corporate bribery and to attempt to influence and change behaviour within business. Thus, traditional policing approaches that favour full-blown prosecution cannot in themselves achieve behaviour change in relation to transnational corporate bribery. Instead, regulation is being negotiated on behalf of the state through this above discussed admixture of enforcement practices which due to practical and financial factors can more readily reach such white-collar criminals.

A significant aspect of the trend in the UK and Germany towards the negotiation of regulation through a variety of enforcement mechanisms is the role of non-prosecution and non-criminal sanctioning. These measures enable negotiation between the regulator and the regulatee and a satisfactory outcome for both parties. The influence of the US anti-corruption authorities, the DoJ and SEC in particular, on these anti-corruption approaches in the UK and Germany is significant. The Siemens case in Germany was largely guided by the US, and may not have been so stringently investigated and prosecuted in Germany if the US had not become involved. Likewise, the involvement of the US in the Innospec and BAES cases in the UK has shaped subsequent SFO approaches. In both jurisdictions, there has been a shift towards a US style 'negotiated justice' where the use of civil agreements and non-criminal alternatives involving extensive negotiation and agreement between the authorities and the corporations has been of great importance. This chapter has demonstrated the ways in which UK and German investigators and prosecutors are 'negotiating regulation' through a variety of enforcement sanctions including criminal prosecutions, civil sanctions and a variety of innovative, enforced self-regulatory approaches such as self-reporting and self-cleaning. The analytical framework outlined in chapter 2 locates these measures within the top right section of figure 1 which demonstrates the available enforcement practices for regulating populations within legal markets. Through these mechanisms, the SFO and German prosecutors are creating a regulatory role in which they police, supervise and monitor all corporations and in extreme cases criminally sanction those not complying with the law. This approach demonstrates the shift in policing practices towards activities traditionally associated with industry regulators; the similarities between policing and regulation are more analytically significant than their differences (Gill, 2002). Regulation, however, cannot only be negotiated through a variety of enforcement

mechanisms but also requires an admixture of non-enforcement practices. The following chapter extends this discussion, analysing the emerging self-regulatory practices within business to deal with transnational corporate bribery which simultaneously along with the above discussed enforcement and hybrid mechanisms reflect the emerging regulatory landscape of transnational corporate bribery.

8

Theories of non-enforcement - self-regulatory practices and the role of non-state agencies[171]

8.1. Introduction

> 'What I envisage is a kind of complex form of hybrid regulation…I think that we are moving the way of hybrid [regulation], meaning the outlines are given like here (points to the organisation's 'good practice guidance' addressed to companies). [For example], it doesn't say what you have to do about facilitation payments but you have to find a way to regulate them. You can have various options and for me this is the place where self-regulation comes in. The same thing with gifts, to define what is an adequate gift and what is an illegal gift. Anything between a little present and a Rolex so that is something you had better leave to self-regulation. So the framework has to be created by states or by international bodies and then leave it to the private sector to find its own insight.' (Interview 411, representative of intergovernmental organisation)

> 'I believe the task of the authorities, or the task of the state, is to provide a system through which it's ensured that when the rules of the game are not adhered to consequences are threatened and implemented. This, I believe, is important' (Interview 221, German lawyer)

Theories of enforcement encompassing the prosecution policies of formal state agencies are alone an insufficient means of regulating transnational corporate bribery. The previous chapter outlined the variety of enforcement mechanisms from debarment and criminal prosecution to civil agreements and hybrid mechanisms that are available for state anti-corruption authorities. The state, however, faces significant limits when attempting to manage and control this form of criminality through enforcement measures alone. Chapter 2.4 highlighted the significant contradiction between complex, transnational, multi-jurisdictional crimes in international business transactions and regulation at the national

[171] The reader should note that some of the data in this chapter emanating from the corporate sector was obtained through the 'participant observation' method as explained in chapter 3. Due to reasons of confidentiality and strict anonymity, these data are non-attributable to specific individuals/corporations. Thus, while the themes and arguments are discussed, direct quotes are not used for this reason. However, data from the formal interviews are evidenced to support these arguments.

level - at the national level, the sovereign state is not capable of providing security, law and order, and crime control within its territorial boundaries which has resulted in a subsequent shift towards the responsibilisation of non-state agencies and actors (Garland, 1996; 2001). Thus, traditional ideas of the state have been redefined and substituted by concepts of 'governance' involving the coordination, steering, influencing and balancing of public and private groups (Kooiman, 1993: 255) with this shift being explained by the power and knowledge problems of the state (Gill, 2002): corporations and their business activities represent a complex economic and social subsystem that is highly impenetrable to the state and that poses significant difficulties for regulators when attempting to understand how they work (see Mayntz, 1993). To obtain information and subsequently influence such systems through formal state enforcement mechanisms is highly problematic. For example, obtaining information about legitimate international business transactions is in itself not straightforward but when such transactions involve illegal activities, such as bribery and corruption, it is self-evident that obtaining information on such illegitimate business transactions is even more problematic. As a consequence of these difficulties, those tasked with 'governing' such problematic areas are forced to acknowledge the limitations of their formal intervention and instead aim to trigger self-regulatory practices (Teubner, 1998). Such self-regulatory practices, or non-enforcement mechanisms, are the subject of this chapter. These practices are emerging simultaneously with the more formal enforcement mechanisms of the state and together, along with hybrid mechanisms of regulation, create the emerging anti-corruption regulatory landscape.

The chapter begins with conceptualisation of these non-enforcement mechanisms and self-regulatory practices. Analysing these practices in relation to the level of state intervention and level of formality as well as the location (i.e. micro, meso, macro-level) of these practices provides a useful framework for framing this emerging self-regulatory landscape. The chapter then moves on to discuss these non-enforcement practices in relation to key influential 'players'. Here, the role of state actors and agencies (the 'negotiators'), the role of the market (the 'profiteers') and the role of non-state, non-private sector actors and organisations (the 'moral entrepreneurs') in relation to the emergence of these self-regulatory practices are analysed. The negotiators make use of a number of formal and informal mechanisms aimed at creating self-regulatory structures amongst business. The

profiteers represent significant trends within the private sector towards making profits out of the increased corporate concern over bribery and corruption risks by 'selling' compliance systems and certification. The moral entrepreneurs create anti-corruption frameworks within which corporations can operate, lobbying government and business to introduce sufficient anti-bribery self-regulatory measures and provide a number of tools to assist. These self-regulatory practices are then located within the conceptual model outlined at the beginning of the chapter and a number of key reference groups within this framework discussed. The chapter concludes with a summary of the key issues and makes the argument that the emerging self-regulatory landscape of transnational corporate bribery encompasses a variety of non-enforcement mechanisms that can be analysed in terms of the level of state intervention and the level of formality – these practices emerge at the micro, meso and macro levels and can be of specific or general applicability with the potential to supplement enforcement mechanisms (see chapter 7) that alone are insufficient in dealing with this criminality.

8.2 Conceptualising self-regulatory practices

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 (Ogus, 1994: 108-109). On the one hand, self-regulation may be state created and mandated by law but on the other hand may emerge independently of state within an industry or even a corporation whereby standards are created and enforced autonomously. Self-regulation, then, can take a variety of forms but the overriding issue is the negotiation of an agreed practice rather than the condemnation of an act (Clarke, 1990: 225), with such industry self-regulation and negotiation being seen as the desired outcome of effective education and self-control (Gill, 2002: 536). Self-regulation, then, refers not just to rigid and formal models of industry regulation, but also to more broader conceptions of a variety of self-regulatory mechanisms. In line with this broader understanding of regulation, several non-enforcement mechanisms (i.e. minimal or no state intervention) have emerged within the regulatory landscape of transnational corporate bribery. Given the early stage of these developments, it is not

possible to evaluate their effectiveness in regulating this criminality but the potential of these non-enforcement practices to change corporate behaviour can be outlined.

These practices, which can take various forms, will shortly be analysed, but a useful means of understanding the framework within which these practices are emerging is in relation to the level of state intervention in their creation and the degree of formality that they incorporate. Figure 6, below, illustrates the interaction of these two analytical elements. Accompanied by a high level of state intervention, self-regulatory practices take a more manufactured form as in the top half of the spectrum. In other words, these non-enforcement practices are organised by the state with the specific intention of developing self-regulatory mechanisms within international commerce. In the bottom half of the spectrum, self-regulatory practices which emerge organically can be found. 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.

Both manufactured and organic non-enforcement practices/self-regulatory mechanisms can be analysed in relation to the level of formality involved. For example, in relation to manufactured practices, in the top-right corner of the spectrum, these can be formal whereby they are enforced by the state and retain a significant mandatory element – corporations are required to comply with the demands of the state. These manufactured practices may also be informal, as in the top-left corner of the spectrum, whereby they are advised or recommended by the state and therefore involve a significant voluntary component. In relation to organic practices, these may also be formal and mandatory as in the bottom-right corner of the spectrum. They may also be informal and voluntary as in the bottom-left half of the spectrum.

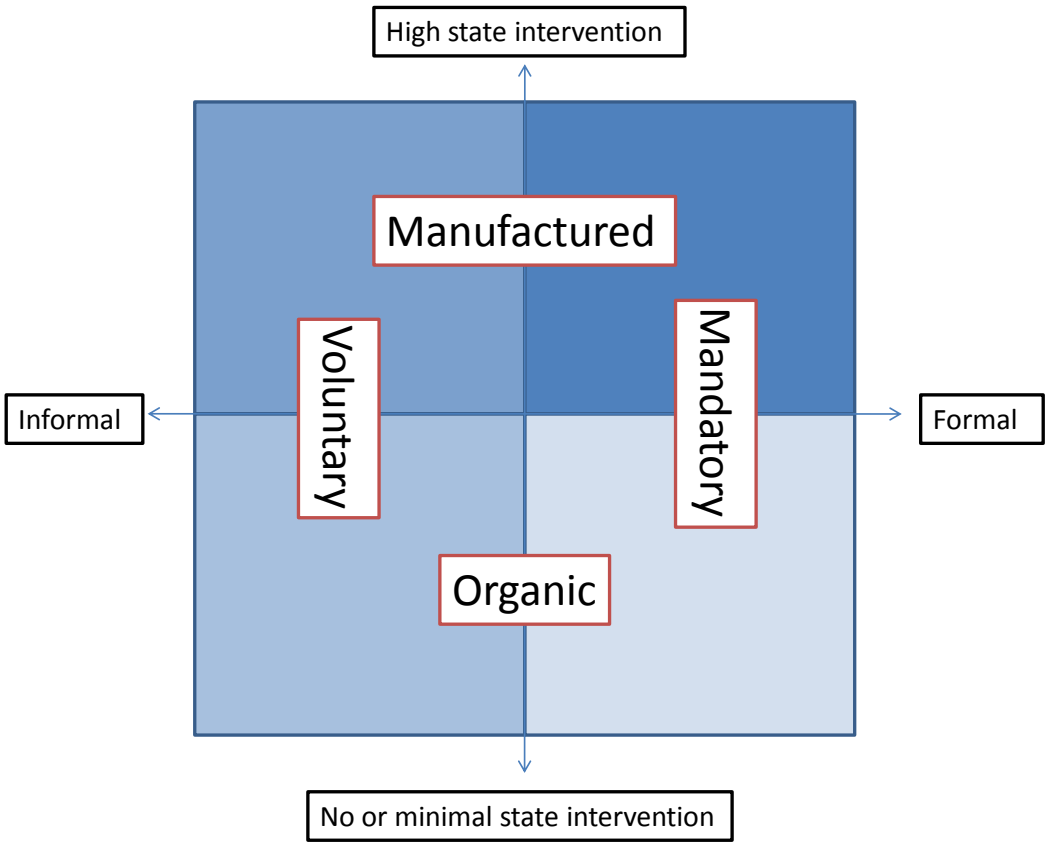

Figure 6: Conceptualising self-regulatory practices

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.

This figure does not however acknowledge the complexity of the self-regulatory practices which can be the product of single corporations or multi-national initiatives like the Wolfsberg Group of private international banks. Self-regulatory practices can emerge 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. To understand this framework it is important to contextualise these self-regulatory practices. The following section illuminates these practices in relation to the key actors that create them and the key processes involved. The practices can then be located in the above model to demonstrate how they tie in with this conceptual framework.

8.3 Self-regulatory practices and the state: the negotiators

> 'If the state remains involved we are confronted with risks that the system is biased for the sake of strategic positions abroad if it comes to international bribery cases. Would that mean that having a much more liberal model leaving it entirely to the private sector would that be better I am not sure [see chapter 8.4 below]. I think also in the private sector there is a tendency sometimes to put the "dust under the carpet". No I think that for the time being the state should remain involved I think' (Interview 311, representative of intergovernmental organisation)

Theories of non-enforcement and self-regulation (see chapter 2.7.3) imply a shift away from state intervention but within the emerging landscape of the regulation of transnational corporate bribery, there is evidence of several state 'triggered' self-regulatory practices within business. As the quote above indicates, however, state intervention may reflect 'strategic positioning' while the private sector alone may not sufficiently address the problem (see 8.4 below): thus, for some anti-corruption actors, the state should remain involved. Vogel (2010: 68) similarly argues that 'while private regulation has resulted in some substantive improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority at both the national and

international levels'. Thus, it is argued that private regulation should be integrated with state-based regulatory policies.

The previous chapter outlined a number of 'hybrid mechanisms' that also represent what can be considered formal, state manufactured self-regulatory practices. Key in these practices is negotiation between the regulator and the regulatee, with these relationships creating platforms for such practices to function. These practices, in both the UK and Germany, include the use of corporate self-investigation, self-cleaning, monitoring, public disclosure and self-reporting. Each of these mechanisms are used by UK and German state agencies and prosecutors for financial and procedural reasons and provide a means of changing behaviour within individual corporations by requiring the corporation to self-regulate its own behaviour. These practices are what may be considered individual or specific self-regulatory practices that are used to change behaviour within corporations that have been investigated and sanctioned, and involve a significant degree of manufacture and formality – although not legally required to be accepted by the corporation, the negotiation of civil agreements in the shadow of criminal prosecution and its collateral consequences renders them virtually mandatory. These practices are discussed in more detail in chapter 7.5 in relation to hybrid mechanisms involving elements of both enforcement and non-enforcement but it is useful to recap the key elements here.

8.3.1 State enforced mechanisms for specific corporations

> 'I think that as far as self-regulation is concerned you might be able to do that if you've got an acceptable method of measuring whether a corporate culture is high risk or low risk and you might move into the self-regulation area a corporate that has effectively a low tolerance of corruption and bribery as a culture. But that presupposes that you have already done the basic work to work out what is a low risk environment and I don't know if any work has been done on it. I don't think it has actually. So I think those are interesting areas to develop… I suspect that it'll be another 10 years or so before we start seeing or being able to judge whether the measures that are put in place to try and affect corporate culture change have been effective' (Interview 112, UK investigator/prosecutor)

The above quote relates to risk-based approaches to determining whether self-regulation is appropriate for specific corporations but the respondent questions whether such risk factors have been analysed. While no systematic analysis has been conducted by anti-corruption agencies in this regard, there is evidence in their approaches towards negotiating

self-regulatory practices within corporations based on specific mitigating factors e.g. depending on level of cooperation, admitting guilt, etc. 'Self-investigation' 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. 'Self-cleaning' and regime change is a prerequisite of civil agreements and involves the corporation clarifying the relevant facts and circumstances of the corruption, repairing the damage caused, removing involved personnel and taking further structural and organisational measures (see Arrowsmith *et al*, 2009: 259-261). Self-cleaning is usually ensured through the use of 'monitoring' where monitors are placed in offending corporations for a given period of time and observe the corporation's implementation of the required anti-bribery and corruption compliance systems, amongst other things, as above. The monitor also has the ability to report to the state if the standards or requirements are not being met. Corporations are also required to make a 'public disclosure/statement' about their corrupt activities. In the UK this is done in tandem with the SFO and involves a period of negotiation and re-drafting until the content is agreed by both parties. These practices involve significant state intervention and are largely formal, albeit that they incorporate informal aspects also but as the quote above indicates, their impact may not be understood for some time.

8.3.2 Self-reporting

The state is also making use of a number of more informal, but state created, self-regulatory mechanisms. Most significantly in the UK, the SFO is encouraging corporations to self-report any corrupt behaviour within their organisation. This was analysed in chapter 7.5.1 as a form of hybrid regulation and will only briefly be discussed here. Corporations that self-report are encouraged to pay for their own investigations, using their own lawyers and advisers who liaise with the prosecutor to ensure the investigation is carried out in the scope and manner that has been agreed. This 'self-reporting' strategy therefore enables corporations to report their corrupt behaviour to the prosecutor on their own terms and usually follows extensive internal investigations and advice by the corporation's legal

advisers. It enables the corporation to receive prosecutorial incentives such as the agreement of the use of non-criminal sanctions. Self-reporting often results in the above related mechanisms of self-investigation, self-cleaning, monitoring, and public disclosure/statement. The effectiveness of self-reporting requires further analysis but this mechanism can potentially enable a higher number of bribery cases to come to light and be resolved.

8.3.3 Co-regulation

More general self-regulatory practices aimed at managing groups or populations are also evident in the form of co-regulation. In contrast to specific practices as above, co-regulation theory refers to industry-associated self-regulation that involves a certain degree of state oversight and/or ratification (Grabosky and Braithwaite, 1986: 83). This represents a formal, state manufactured mechanism that aims to promote self-regulation within the market and therefore resonates at the meso-structural level but directly influences specific corporations within that framework. An example of this is the (soon to be demerged) FSA. The FSA was set up by government and is accountable to Treasury Ministers and therefore Parliament. The government is responsible for the overall scope of the FSA's regulatory activities and powers. However, the FSA operates independent of government but has statutory powers in line with the Financial Services and Markets Act 2000. The organisation has rule-making, investigatory and enforcement powers to meet these statutory objectives. The FSA is a company limited by guarantee and is funded by the financial services industry, that is to say, the organisations that is regulates. The FSA regulates most financial services markets, exchanges and firms (over 29,000) and influentially sets the standards that they must meet. If these standards are not met, the FSA can take action against these firms. As part of its remit, the FSA ensures that corporations have sufficient compliance systems to prevent bribery and corruption with recent cases reinforcing its ability to regulate and enforce the law to encourage its standards to be met. Most recently, for example, the FSA fined insurance broker Willis Limited £6.895m for failings in its anti-bribery and corruption systems and controls[172]. According to the FSA, these failings created an unacceptable risk

[172] FSA press release available at: http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml <Accessed 26/07/2011>

that payments made by Willis Limited to overseas third parties could be used for corrupt purposes. This is the biggest fine imposed by the FSA in relation to financial crime systems and controls to date. Similar findings have also been demonstrated in the area of organised crime where the state has compelled private organisations to play a part in preventive strategies, punishing them for not doing so (Levi and Maguire, 2004: 416-417). In Germany, the equivalent to the FSA would be the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority, "BaFin") which has a similar function and remit, working independently but subject to oversight by the *Bundesministeriums der Finanzen* (Federal Ministry of Finance). Such co-regulatory agencies represent a more traditional form of industry-wide self-regulation as understood within more narrow conceptions of self-regulation but this approach implicitly points to the lack of resources and/or inability of the state to regulate whole markets to the same degree of scrutiny:

> 'Where are we in relation to regulation. The FSA for example – its approach is a risk based approach and what a risk based approach means is that you focus for greater scrutiny those organisations which on some kind of scale you consider to be more likely to be at risk. Now that in one way is a way of trying to use thin resources more rationally and more effectively but the very fact that you are having a risk based approach suggests that you don't have enough resources to regulate to the same standard and scrutiny every part of the market' (Interview 112, UK investigator)

However, such self-regulation need not only be aimed at the industry as a whole and may also refer to negotiations between the state and individual firms that result in flexible, particularistic standards and enforcement and which views self-regulation as a form of subcontracting regulatory functions to private actors (Ayres and Braithwaite, 1992: 102-103). This is termed 'enforced self-regulation' (see chapter 2.7.2). In this sense,

> '…enforced self-regulation envisions that in particular contexts it will be more efficacious for the regulated firms to take on some or all of the legislative, executive, and judicial regulatory functions. As self-regulating executives, firms would monitor themselves for noncompliance; and as self-regulating judges, firms would punish and correct episodes of noncompliance' (Ayres and Braithwaite, 1992: 103)

Self-regulation in this framework consistently appears in the emerging regulatory landscape of transnational corporate bribery but does not reflect only formal mechanisms, as outlined by Ayres and Braithwaite, but also informal mechanisms. In addition, it is not only the state that manufactures such self-regulatory practices but such practices also emerge organically

within business. For Ayres and Braithwaite, it is important for such 'enforced self-regulation' to be embedded in schemes of escalating interventions where public enforcement (detection, punishment, prosecution) is retained (see chapter 2.7.4). Such a hierarchical intervention framework is not necessarily required if the analytical focus is placed upon the negotiation of regulation through an admixture of enforcement and non-enforcement mechanisms as this thesis has argued.

8.3.4 State guidance on compliance

One more informal approach to providing individual corporations but also the market as a whole with the relevant self-regulatory standards is via literature made publicly available to assist corporations with their anti-bribery and corruption approaches. On the whole, literature emanating from the UK and German governments has been relatively sparse, with only the occasional leaflet or comparable document being made available to corporations to inform them of the risks of corruption and bribery. Such publications are more indicative than substantive and offer little operational and practical support and advice for companies. However, more recently both jurisdictions have provided more practical resources for implementing self-regulation regimes in the form of guidance on how to effectively regulate against corrupt behaviour through rigorous compliance systems. In the UK, for example, the government's guidance on adequate procedures provides a number of case scenarios, examples and guidelines to assist corporations in implementing anti-bribery and corruption systems[173]. It is such an approach that embodies the desire to change behaviour within corporations and populations within the market:

> 'If you look at the kind of whole ethos of the Bribery Act, it is built around people policing themselves, organisations policing themselves, especially Section 7 [corporate offence, see chapter 5.7.3], it's a self-perpetuating thing that we want companies to then have adequate procedures in place to stop this happening. Ultimately if we don't prosecute anyone because everyone's got perfect systems well that's a great place to be, probably utopian in its vision, but it's very important for us to look at this change in behaviour' (Interview 114, UK investigator/prosecutor)

The UKBA guidance explains the policy behind the law and aims to support commercial organisations of all sizes and sectors in understanding what sorts of procedures that can put

[173] Guidance available at: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf <Accessed 28/07/2011>

in place to prevent bribery. This is done with reference to six guiding principles designed to be of general application (see chapter 6.5.3). Such guidance is not prescriptive, taking a more informal approach with a voluntary basis.

The decentralised nature of Germany's anti-corruption system (see chapter 6.2.2) whereby each *Bundesland* is responsible for anti-corruption enforcement, but without specific anti-corruption agencies, means that publications are more likely to be produced at this level, emanating from specific PPOs and/or LKAs. For example, although no such formal 'guidance' on the law exists, as it does in the UK, enforcement agencies are still able to advise corporations on appropriate anti-bribery mechanisms. One initiative from one *Bundesland* reflects the interdisciplinary approach of the *Bundesland* whereby a 'working group' (made up of representatives from enforcement, academia, lawyers, private-sector corporations, courts, etc) has over the last few years published guidance on hospitality and corruption. This publication presents corporations with a traffic light system that can be used to determine what constitutes bribery or accepted business practice. For example, individuals are advised as to what is allowed ('green'), what is prohibited ('red') and what requires authorisation ('yellow/amber'). According to the document, 'the objective of the traffic-light concept is to describe an operational framework that is to be satisfied and clearly defined by corporations in the framework of their compliance strategies in addition to the agreement of standards whose communication and training are permanently monitored for compliance'[174]. This framework reflects the quotes at the beginning of the chapter as well as theoretical arguments within regulation theory suggesting frameworks need to be created within which corporations are then required to self-regulate their own behaviour.

A key theme in both the UK and German guidance on implementing effective self-regulatory models is the corporate culture and how this needs to be shaped around an anti-bribery ethic. As one German respondent stated:

> 'In order to change corporate cultures, I believe, there is one point that is absolutely the most important point. The most important point that is more important than any instruction is "the tone from the top". The management must make a clear decision whether they take it serious or whether don't take it serious. When the management takes the middle ground, then it can't be that great of a

[174] Taken from publication provided during data collection.

> compliance system….This was the case at Siemens as well as other corporations where they introduced a system but the "tone from the top" was just not congruous and then the best system is of no use because the people don't have the spirit to say "we simply stand for doing things correctly". This spirit must be borne out of the corporate culture.' (Interview 221, German lawyer)

This outlines the practical difficulties of implementing compliance systems that function effectively. Whilst such governmental guidance may provide frameworks within which corporations can locate their self-regulatory models, there is the risk that such models will not be fully supported. This concern was reinforced by one UK investigator:

> '…I am not sure that the current mechanisms that are being tried for changing corporate culture will necessarily be that effective. You know, the kind of corporate ethos policy and so on, because if you have a look, the US has had those running for many years and it doesn't seem to have necessarily reduced the number of either serious frauds perpetrated by senior managers or indeed corruption matters' (Interview 112)

The impact of state guidance on changing corporate cultures requires further substantiation. Such culture change was considered part of the 'remit' by UK respondents, but this was less the case in Germany. While some German investigators and prosecutors acknowledged that criminal mechanisms alone cannot always ensure prevention, several of these respondents were more conservative in their understandings, suggesting that ensuring culture change should not be the responsibility of the state, but the responsibility of industry and corporations themselves (see 8.4 below).

8.3.5 Informal dialogue

There is a dearth of formal private-public partnerships to address bribery in both jurisdictions. More informal practices have emerged, however. For example, a further practice encouraging self-regulation is that of dialogue between the regulator and business, not just in the UK and Germany but also internationally. In the UK, these can take the form of discreet meetings between SFO and corporate representatives whereby corporations are able to seek advice from the SFO, though this would provide no defence or certification of their compliance systems. As one UK investigator and prosecutor explained when questioned about how changing behaviour in corporations:

> 'One [way] is engaging with those companies who are ethical companies and want to do the right thing. We are already doing that. I'm already having lots of good conversations with good companies who want to make sure their systems are OK and we give them our views, there are no non-prosecution guarantees but it is just our views on what we think are adequate from our experience of seeing others. So we engage with those good companies and we very much welcome them coming to talk to us and we are happy to have that dialogue and that is part of the preventative side of this. We are looking to get out there and get the message out there and help people to get to the right place if they are not there already' (Interview 114, UK investigator and prosecutor)

In the UK and Germany, law enforcement authorities also actively engage with the private sector at corporate conferences and seminars whereby prosecutors and investigators are present on panels and discussion groups. Corporate representatives can approach regulators during scheduled sessions but also informally. Through such meetings, regulators and corporations are able to develop relationships which can subsequently lead to the negotiation of self-regulation and compliance. Corporations have also been advised to contact overseas British officials working in jurisdictions where the corporation operates or intends to initiate business. Local British officials knowledgeable of the cultural and legal frameworks within which business takes place in potentially 'high risk' areas can obtain informal advice on appropriate operating procedures. Corporations are then able ensure proportionate systems and risk assessments are in place. These practices represent a key relationship between the regulator and the regulatee, a relationship which appears as prominent in the majority of literature in regulation theory. It also reflects an informal mechanism that may be state or industry initiated.

8.3.6 Naming and shaming, and reporting competitors

The SFO's Director has encouraged companies encountering corrupt officials overseas to name and shame these individuals and/or organisations by making use of the popular micro-blogging site Twitter[175]. Companies coming across such demands should make such corruption public by 'tweeting' what has occurred and where. The suggestion is that such public 'naming' will 'shame' officials, governmental departments, etc, into implementing sufficient reform and changing behaviour. This approach largely reflects innovative naming and shaming approaches such as the Indian website 'http://ipaidabribe.com/' that enables

[175] See article *Financial Times*: '*Expose bungs on twitter, says SFO*', available at: http://www.ft.com/cms/s/0/c52834d0-92ca-11e0-bd88-00144feab49a.html#axzz1VzMZClwu <Accessed 10/06/2011>

individuals to report bribery and corruption that they encounter. While this may appear an innovative idea, such 'naming and shaming' brings with it libel risks for individuals, the risk of interfering with ongoing investigations, and the risk of false allegations being made. Corporations have also been encouraged to report the corrupt behaviour of their competitors but reports may also reflect disgruntled competitors and lead to false allegations and a misuse of state resources.

8.4 Self-regulatory practices within the market: the profiteers

> 'Compliance is…a new business market for legal firms. So, once some legal firms take a look at this compliance market, they grow like fungi on it. Much has happened here [in relation to prevention] but it's not just the task of the public prosecutor but also, however, the task of corporations, of consultants, and of lawyers.' (Interview 212, German public prosecutor)

Self-regulatory practices are not only emerging through manufacture by the state but also more organically within industry, business and corporations themselves. One German lawyer suggested that

> '[o]ne can say that the large corporations, so those with turnovers of several billion, that many of those corporations have in any case already established very good functioning compliance systems and take care of corruption prevention in these systems' (Interview 221).

This may (or may not) be the case for the majority of large corporations, but recent cases such as the Siemens case have demonstrated that even such corporations may not take their compliance systems seriously. A report in Germany into the relationship between compliance and corporate cultures argues '[the] fact is…[c]ompliance does not appear free willingly but results from increasing pressure from outside' (PwC (Germany), 2010: 3[176]). The report suggests that corporations worldwide are introducing prevention measures not because they have learned from damages involved in other economic crimes, but predominantly as a reaction to pressure from the media, NGOs, intergovernmental organisations etc and due to legislative requirements. Whatever the reason for this increase

[176] PricewaterhouseCoopers report conducted in conjunction with Professor Kai-D. Bussmann, Martin Luther Universität Halle-Wittenberg available at: http://www.pwc.de/de/risiko-management/assets/studie_Compliance-und-Unternehmenskultur.pdf <Accessed 18/08/2011>

in compliance within corporations, large corporations, as well medium sized enterprises (less so small enterprises given proportionality arguments), are nonetheless keen to ensure they have rigorous compliance models able to regulate the behaviour of their employees, subsidiaries, intermediaries and other third-parties and therefore comply with external pressure in the form of legal standards, lobbying from NGOs and intergovernmental organisations. For this reason, and as the quote above suggests, there has been a significant expansion within the private sector towards private to private compliance and other market based self-regulatory incentives, but for such systems to function effectively, a positive corporate culture needs to be created and appropriately supported and accepted:

> 'Corporations must themselves do something…There must be clear rules: what is allowed and what isn't allowed, and this needs to be communicated…It must be discussed with each other, teams must be educated. An atmosphere must be created in which one is able to immediately address [corruption] cases. So one is jointly armed against it. So one says "no, we're not accepting that, we're not getting involved"…If someone is left alone, the danger is great and they may become weak. But if everyone is in a team in which they feel comfortable and where the others won't want to betray or deceive them, and want to have secrets, then it's hard to become corrupt' (Interview 231, German investigator)

Two recent surveys suggest that corporations in the UK have been increasing their ability to regulate their own behaviour by implementing anti-bribery and corruption compliance programmes. A Thomson Reuters survey published in June 2011[177] (just prior to the coming into force of the UKBA) claimed 'one in five firms not ready for [UK] Bribery Act'. Of course, this also suggests 80% of firms have taken relevant steps to comply with the law. This research also suggested that one in six firms have not discussed the issue with their board, but again, this suggests the boards of over 83% of corporations have been involved with this compliance issue. Likewise, KPMG's (2011) 'Global Anti-Bribery and Corruption Survey'[178], published in February 2011, found that 86% of British companies taking part in the survey had created a formal, written anti-bribery and corruption compliance programme in their company. In their 2009 report, this figure was much lower at 57%, demonstrating a significant increase on the part of those UK executives responding to the survey. The report

[177] Press release on the report available at: http://thomsonreuters.com/content/press_room/legal/452685 <Accessed 21/07/2011>

[178] KPMG report available at: http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Advisory/23816NSS_Global_ABC_Survey.PDF <Accessed 21/07/2011>

suggests this increase is likely due to the passage of the UKBA, the increased number of SFO enforcement actions, and recent media and public attention focused on the subject.

Such reports, despite the methodological caveats of quantitative research, provide insights into the perspectives of the corporate subsystem but simultaneously create a 'culture of fear' by framing these issues in a certain form. Although in Germany criminal prosecution of companies is not possible, a similar trend has emerged given the current threat from the extensive international reach of the US Foreign Corrupt Practices Act 1977 and the UKBA. For example, two notable publications include a PricewaterhouseCoopers (2010) report entitled, 'Will you act now or pay later?[179], and a KPMG (2010) report entitled, 'Blessing in disguise: How the UK Bribery Act creates opportunities for better corporate culture and control'[180]. This latter report begins with the following paragraph:

> 'Some business people see the new Bribery Act as a piece of politically correct window dressing. Not so: this law has teeth, and the prosecutors are deploying accordingly. Moreover it threatens to ensnare those we would normally think of as innocent; those whose only crime is not to have taken active steps to prevent corruption' (KPMG, 2010: 1)

There is certainly no lack of emphasis, immediacy, and opportunity in the above examples and similar publications can be found from many other organisations. Whatever their motivation ('consciousness raising' and consultancy fees), there is no doubt that such publications and other sources emanating from the private sector provide a useful source of information on anti-corruption and anti-bribery compliance and can be seen as a vital tool for raising societal awareness in the business community and supporting compliance with the law. Such methods play a role in promoting (in)formal social control and self-regulation of corporate behaviour and cultures.

Such publications and seminars may create a culture of fear among the business community and within MNCs that may in turn generate additional work. Nonetheless, given the emergence of these private sector organisations and departments within already

[179] Report available at: http://www.pwc.co.uk/pdf/act_now_or_pay_later_uk_bribery_bill_white_paper.pdf <Accessed on 17/11/2011>
[180] Report available at http://www.kpmg.co.uk/pubs/202441%20ADEQUATE%20PROCEDURES_Accessible_2.pdf <Accessed on 17/11/2011>

established firms with the purpose of profiting from anti-bribery and corruption, as above, this illustrates the need to rethink traditional conceptions of criminality as being the sole concern of the state, as public-private relationships take on new found importance in regulating and controlling transnational bribery.

As Nils Christie (2000) outlined in relation to increasing prison populations in the US at that time, the potential for and occurrence of privatisation of many aspects of the prison system led in part to crime control becoming an industry. He states '[t]he crime control industry….provides profit and work while at the same time producing control of those who otherwise might have disturbed the social process' (Christie, 2000: 13). The current private sector role in anti-corruption regulation can be considered an extension and contemporary example of these processes: public-private boundaries have become blurred even to the extent that companies suspected of international bribery may be required to hire and pay external auditors, legal/accountancy firms, and professional financial investigatory firms, and so on, to investigate them and pass on all findings to the state agency responsible for investigating and prosecuting corporate bribery (see 8.3.1 above). International pressure (e.g. from moral entrepreneurs (see 8.5 below)) to conform to anti-corruption standards has presented numerous opportunities for these private sector companies and organisations both in the UK and Germany. These private sector organisations in their actions provide a form of self-regulation that has emerged organically at the meso-market level but which largely occurs on a voluntary basis.

8.4.1 Private-private compliance

This private sector interest has therefore resulted in numerous publications, seminars, training sessions, services, and so on, being offered by firms aimed at businesses that under anti-corruption and bribery laws run the risk of prosecution, such as for the section 7 UKBA offence of failure to prevent bribery, or the lack of supervision offence under administrative law in Germany. In other words, private consultancies, accountancy firms, and legal firms etc are being hired to advise MNCs on how to deal with any acts of corruption that may come to their attention, how to introduce 'adequate procedures' and sufficient compliance systems and therefore how to comply with the law and manage the bribery problem. By

employing such external firms, in many cases companies are able to receive third-party 'certification' to verify the quality of their compliance systems:

> 'Yes, the industry's being used and there is a lot of third party certification. One motivation is to have a document in your filing cupboard that you pick up when something goes wrong and you say we are well organised here we are – they certified it. The alternative is that you proactively go out with it and say this is our business model - we are the best - you don't risk being cheated with us [see chapter 8.4.2 below]' (Interview 411, representative of intergovernmental organisation)

As outlined in chapter 6.5.3, rigorous compliance regimes can mitigate the decision to prosecute. The section 7 offence UKBA in relation to 'adequate procedures' has not yet been tested with the meaning of 'adequate' therefore remaining unclear.

A number of firms have also emerged in the private sector that aim to offer 'whistleblower' services to all sizes of corporations. Business Keeper AG[181] in Germany is one example of this where for a monthly or yearly fee (the size of which depends on the size and revenue of the company), corporations can subscribe to the use of the Business Keeper Monitoring System that provides a certified, internet-based communication platform through which the subscribing company's employees can report irregularities, abuses and risks. Whistleblowers can choose to remain anonymous or not and it is claimed that the whistleblower's identity is completely protected and that leads cannot be decrypted or interpreted by third parties including Business Keeper AG. An examiner (*sic*) (for example a compliance officer in the subscribing company, an anti-corruption investigator, an ombudsman, etc) can enter into direct dialogue with the whistleblower who continues to provide information. Such organisations provide corporations operating transnationally that may be at risk of bribing with a self-regulatory mechanism aimed at giving employees the opportunity to 'speak up' and inform the company or the regulator of potential criminal activity.

Online companies have also been created which seek to offer e-learning solutions to assist corporations in need of introducing anti-bribery and corruption training as part of their compliance systems[182]. These training courses are often customisable and can be sector

[181] Website available at: http://www.business-keeper.com/whistleblowing-compliance.html <Accessed 29/07/2011>

[182] For an example of such private sector e-learning tools see: http://www.inmarkets.com/uk_bribery_act.html <Accessed 27/07/2011>

specific, offering information on various aspects of bribery such as its consequences, the company's policy on bribery related risks (e.g. corporate hospitality), due diligence and associated persons, and so on. Online tools are also provided to assist employees in their decision making when faced with uncertain situations and potentially corrupt actions. Such e-learning solutions are also available from other non-profit sources. The UN Global Compact (UNGC) and the UN Office on Drugs and Crime (UNODC) jointly provide an e-learning tool that uses six interactive learning modules to further the audience's understanding of the UNGC's principles against corruption as well as the UNCAC as it applies to the private sector[183]. Online, video modules cover issues including receiving and giving gifts and hospitality, facilitation payments and corruption, the use of intermediaries and lobbyists, corruption and social investments, and insider information. Both organisations encourage corporations to integrate this e-learning tool into their own anti-bribery and corruption learning frameworks requiring no fees or subscriptions to do so, unlike the private sector equivalents.

These private to private mechanisms create an environment whereby the market, through basic profit-making principles, is able to generate self-regulatory processes within those corporations at most risk of transnational bribery in international commerce. These practices have emerged organically, that is independent of state influence, within the market but remain informal with no mandatory requirement on behalf of corporations to do so. Corporations are, however, making use of these services for a number of reasons: first, to mitigate the risk of prosecution and provide a legal defence if investigated; second, to support an awareness that ethical business practices and effective compliance can in turn generate income in fair markets and that corruption itself distorts the market and increases the costs of business; and, third to symbolically communicate to shareholders, clients, partners, charities, pressure groups, etc, that the organisation is socially responsible.

[183] Website available at: http://thefightagainstcorruption.unglobalcompact.org/ <Accessed 23/07/2011>

8.4.2 Market incentives as self-regulation

Self-regulation within the private sector also appears due to market-based incentives. Where the above processes largely involve corporations employing other companies to certify their anti-bribery and corruption systems, another alternative is for corporations to actively market their anti-corruption model. As one respondent stated:

> 'I don't believe in integrity awards as such – I think the award is the market. It has to pay on the market otherwise they won't do it because business is motivated by self-interest. So if it pays to be compliant, well, you evade risk but also it is a selling argument, then OK, it works. If you ruin your career as a manager by not complying or the other way round, if your company has a better image and this reflects on the books at the end and that is the motivation' (Interview 411, representative of intergovernmental organisation)

Corporations may promote their compliance programmes (most likely after these have been 'certified' by legal experts and consultants, as above) as a means of attracting business and therefore creating financial benefit. Additionally, as a PwC report in Germany demonstrated, corporations with a positive culture are more frequently and more convincingly able to communicate their strict anti-corruption policies externally with the result that their employees appear 'incorruptible' and subsequently find themselves less frequently in situations where bribes are expected (PwC (Germany), 2010: 4[184]) or indeed demanded. Siemens is one example of this promotion of a corporation's compliance system. Following the bribery scandals, as discussed in chapter 4.5, Siemens implemented significant regime change including a substantial overhaul to the anti-bribery and corruption compliance system. A presentation from a Siemens compliance officer (2010: 29)[185] argued 'Siemens has fundamentally changed and is now seen as an industry benchmark in compliance and sustainability'. Siemens has actively promoted and marketed their compliance approach, 'selling' the concept to potential investors, partners, contracting agencies, etc, as a means of generating business, but also to reassure shareholders and regulators (Siemens had a monitor appointed by the DoJ/SEC to watch their compliance progress). In June 2011

[184] PricewaterhouseCoopers report conducted in conjunction with Professor Kai-D. Bussmann, Martin Luther Universität Halle-Wittenberg available at: http://www.pwc.de/de/risiko-management/assets/studie_Compliance-und-Unternehmenskultur.pdf <Accessed 18/08/2011>

[185] Presentation available at: http://www.siemens.com/sustainability/pool/collectiveaction/ourlearnings/pdf/Siemens_ComplianceProgram_EN.pdf <Accessed 23/07/2011>

Siemens reported a potential bribery scheme to the US and German authorities with it being suggested Siemens was keen 'to showcase its revamped compliance program' – Siemens pointed out that the subsequent Munich investigation, rather than being a mark against the company, was actually a positive as it demonstrated that sufficient measures are in place to prevent a corrupt deal taking place[186]. Such is the influence of Siemens' compliance programme, the six guiding principles outlined in the UK government's 'adequate procedures' guidance for section 7 UKBA can all be found in the Siemens programme (albeit the UK guidance is not as extensive or detailed). This marketing of a company's compliance programme may be based on the premise that it will generate more income (minus the costs of implementation and monitoring) through obtaining more contracts as contracting agencies are more likely to award contracts to overtly ethical companies. Alternatively, it may be a means of satisfying the demands of regulators and moral entrepreneurs. In either case, the secondary benefit, as alluded to in the above quote, is that risk may be evaded, with the primary benefit for the corporation being that such promotion of a company's compliance programme can provide financial benefits which therefore represents a market based incentive to self-regulate.

8.4.3 Lateral litigation and class actions

An interesting but unknown potential area for self-regulatory practices is that of lateral litigation and class actions. As one UK lawyer phrased it,

> '…the fear of what is called "third-party litigation", as it's known in the trade, can be huge' (Interview 121).

This refers to the risk of a corporation being sued by its competitors. For example, if in a hypothetical bidding process for a public contract, company A, which put in an equally good, if not lower, tender, in comparison to company B, subsequently lost out on the contract because company B was mysteriously allowed to re-tender and lower its tender because there was a change in specification to accommodate them, then it is likely due to

[186] See *Wall Street Journal* blog *Corruption Currents*: *'Siemens Compliance Program Made The Catch, Company Says'*, 10/06/2011 available at: http://blogs.wsj.com/corruption-currents/2011/06/10/siemens-compliance-program-made-the-catch-company-says/ <Accessed 23/07/2011>

corruption. If company B is then later investigated and sanctioned for bribery in this contract there is potential for company A to litigate against company B. These scenarios present the possibility of another non-enforcement mechanism whereby the market regulates its own behaviour through lateral litigation. While there has been suggestion that this may occur in the near future, at the time of writing, no such litigation has taken place. While such lateral litigation and/or civil actions are legally and theoretically possible in both the UK and Germany, it is unlikely to occur. According to one respondent,

> '[t]he problem is you would never be able to prove the causality. It is true that even if it is proved somebody has bribed, you still can't prove that you have lost because of that unless in a very rare case somebody testifies to that but there might be other competitors so you will never prove the causality. General Electric has been asking itself whether they should go against Siemens saying we have lost out in the 10 cases but I don't think it works. You have to prove too many other things.' (Interview 411, representative of intergovernmental organisation)

Further difficulties include the unlikelihood of a company, despite their innocence, to report and/or make public the corruption as they may be viewed as an 'informer' and subsequently be outlawed within in the industry sector, losing contracts as a result. This risk is too high for companies, not to mention the financial costs of litigation which must be covered by the companies themselves, which provides a further risk.

A second similar example is that of class actions. Class actions are again legally possible in both the UK and Germany (though cuts in Legal Aid may make them less likely in the UK).

> 'You might have class actions in those countries which permit class actions because shareholders will say that now you have been named and shamed the stock price has gone down therefore the value of their investments has gone down and they can sue. One of them suing would be an irritation but twenty thousand of them suing can [be a problem] and that happens from time to time' (Interview 121, UK lawyer)

Again, the likelihood of this occurring is at the time of writing unknown but such actions may begin to take place. Similar difficulties such as the cost of litigation, proving causality, and so on, exist. As above, however, this non-enforcement mechanism could provide a means of self-regulation that is emerging organically and informally within the market.

In addition, victims of corruption 'can recover a significant portion of their losses, either through actual recovery of the assets or money that were stolen by "tracing" the proceeds to wherever the perpetrator has placed them, or by prosecuting claims against various actors in the liability chain' (Davis, 2011: 64). Such recovery through private civil actions can be conducted by non-state actors (NSAs) such as Civil Actions Recovery Teams (CARTs) made up of qualified and experienced professionals. These teams can prevent perpetrators further moving or dissipating assets and the proceeds of crime and are increasingly assisting victims to locate and recover misappropriated assets and successfully prosecute claims (Davis, 2011: 92).

8.4.4 Transnational business initiatives

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 non-enforcement 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). The ICC considers itself the 'voice of world business' speaking with authority on behalf of corporations throughout the world in different sectors. The Anti-Corruption Commission of the ICC[187] encourages self-regulation by enterprises in confronting issues of extortion and bribery and provides business input into international initiatives to fight corruption. In 2005 the ICC published a revised version of its 'Rules and Recommendations to Combat Extortion and Bribery'[188] that provides substantive rules and implementation procedures for voluntary application by enterprises. The ICC has also published a number of versions (most recent 2008) of a handbook on international corporate integrity and fighting corruption[189]. The World

[187] Website available at: http://www.iccwbo.org/policy/anticorruption/ <Accessed 23/07/2011>
[188] Document available at: http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf <Accessed 23/07/2011>
[189] Details of publication available at: http://www.iccwbo.org/policy/anticorruption/id13014/index.html <Accessed 23/07/2011>

Economic Forum's PACI[190] is a transnational, multi-industry initiative that provides a platform for companies to commit to developing, implementing and monitoring anti-bribery and corruption programmes and systems through peer network meetings and the use of private-sector driven support tools. The PACI's rationales for addressing corruption are fourfold, there being significant financial, legal, ethical and socio-economic incentives to do so. For example, PACI states that corruption increases the costs of doing business globally by 10% on average, while doing business with integrity attracts and retains principled, motivated employees and ethically-oriented investors (although not if you have a product that is inferior to others and costs insufficiently less to get the business other than by corruption).

These organisations, along with other non-governmental organisations such as TI and the UNGC (see 8.5 below) also work together to encourage self-regulation as can be seen most significantly with the Resisting Extortion and Solicitation in International Transactions (RESIST) tool-kit which is a joint initiative of all four. The RESIST (2010: 4[191]) tool provides 'practical guidance for company employees on how to prevent and/or respond to an inappropriate demand by a client, business partner or public authority in the most efficient and ethical way, recognizing that such a demand may be accompanied by a threat'. The tool provides 22 real-life scenarios to illustrate potential bribery situations and threats and provides advice on how the enterprise can prevent the demand in the first place and how the enterprise should react if such a demand is made. This tool is voluntary and has emerged organically independent of state influence, providing a further example of the emergence of self-regulatory practices within the market.

8.4.5 Industry and sector specific initiatives

Transnational corporate bribery is not limited to one sector or one industry but is a multi-sector, multi-industry problem. As a result of this fragmented nature, there is scope for sector specific and/or industry specific anti-bribery and corruption initiatives to emerge

[190] Website available at: http://www.weforum.org/issues/partnering-against-corruption-initiative/index.html <Accessed 23/07/2011>
[191] Information on RESIST available at: http://www.iccwbo.org/uploadedFiles/RESIST2_Oct2010.pdf <Accessed 23/07/2011>

independent of state intervention. These initiatives usually form part of a broader intention to promote industry specific goals and have become more prominent since the recent increased focus on transnational bribery at the international and national levels. For example, in the UK the Association of the British Pharmaceutical Industry (ABPI) is a trade association founded and funded by the industry and representing the views of research-based pharmaceutical companies in the UK. In June 2011 the ABPI published guidance in the form of a MoU[192] for its members (who make up 90% of the UK industry) on the overlap between the UKBA and the APBI's Code of Practice[193] that is administered by the Prescription Medicines Code of Practice Authority (PMCPA). This was published following liaison ('informal dialogue') with the SFO and outlines the SFO's support for the self-regulation policy of the industry, indicating that while the SFO reserves the right to take action against member corporations, it will not routinely intervene with actions covered by the ABPI's Code of Practice. Similar provisions and initiatives of trade associations can be found in Germany. Remaining with the pharmaceutical industry, for example, in 2004 the Association of the Research Based Pharmaceutical Companies (*Die Mitgliedsunternehmen des Verbands Forschender Arzneimittelhersteller* (VFA)) founded the *Freiwillige Selbstkontrolle für die Arzneimittelindustrie e.V* (Voluntary Self-Control for the Pharmaceutical Industry (FSA(G))) which outlines a code of practice incorporating anti-corruption elements[194].

8.5 Self-regulatory practices and the moral entrepreneurs

It is not only state and private sector agencies and organisations that have significantly influenced the regulatory framework of transnational corporate bribery and the self-regulatory practices that have emerged, but also other organisations such as intergovernmental and third sector organisations, NGOs and charities: '[o]ne of the most

[192] MoU available at: http://www.abpi.org.uk/our-work/news/2011/Documents/Memorandum%20of%20Understanding%20between%20the%20ABPI,%20PMCPA%20and%20SFO%20June%202011.pdf <Accessed 01/11/2011>
[193] ABPI's Code of Practice available at: http://www.abpi.org.uk/our-work/library/guidelines/Pages/code-2011.aspx <Accessed 01/11/2011>
[194] For further information (in German) see: http://www.vfa.de/de/wirtschaft-politik/positionen/pos-antikorr.html <Accessed 01/11/2011>

significant changes in recent years is that the "who" in "who governs?" must now be expanded to include the participation of nongovernmental and noncorporate actors' (Haufler, 2006: 92). These organisations may be considered the 'moral entrepreneurs', as it is these actors that have significantly shaped the 'rules' of anti-bribery and corruption:

> 'Rules are the products of someone's initiative and we can think of the people who exhibit such enterprise as *moral entrepreneurs'* (Becker, 1973: 147, emphasis in original)

If, as Howard Becker noted, 'crusading reformers', unsatisfied by the current rules and profoundly disturbed by some given evil, exist in society, then in relation to international corporate bribery, these moral entrepreneurs are largely to be found within intergovernmental organisations and other campaigning organisations. It is also here that the majority of the literature on international corporate bribery emanates from with international organisations such as the UN, the OECD, and GRECO, as well as NGOs such as TI, Global Witness, and CornerHouse, amongst others, playing a significant role in shaping the anti-corruption 'rules'. These organisations produce frequent and often detailed reports on the implementation of international conventions and anti-corruption enforcement at the national level including operational capability and willingness as well as legal frameworks. Through their critical reports, increasing public awareness and support, and/or via political lobbying, such organisations play a significant role in shaping legislation and advising companies on good practice and behaviour. It is therefore the aim of such organisations and the individuals within them to fight and reduce corruption and bribery in order to 'strengthen development, reduce poverty and bolster confidence in markets' (OECD, 2010)[195]. Similarly, TI, a highly significant player, states in relation to its fight against corruption and bribery:

> 'We are committed nonetheless to the core values and principles that have guided our work from the inception of our movement in 1993. The basic principles of TI's anti-corruption struggle have been defined from the start: coalition building, proceeding incrementally, and remaining non-confrontational. What does this mean? TI believes that keeping corruption in check is only feasible if representatives from government, business and civil society work together to agree on a set of standards and procedures they all support. TI also believes that corruption cannot be rooted out in one big sweep. Rather, fighting it is a step-by-step, project-by-project process. TI condemns bribery and corruption vigorously and courageously wherever it has been reliably identified, although TI does

[195] OECD (2010): http://www.oecd.org/department/0,3355,en_2649_34855_1_1_1_1_1,00.html <Accessed 18/11/10)

> not seek to expose individual cases of corruption. Finally, TI's non- confrontational approach is necessary to get all relevant parties around the table' (TI website, 2010)[196]

The evocative, rhetorical, and symbolic language used by TI indicates the enterprise of organisations such as this whereby the long-term goal is to implement rule and enforcement change through moral persuasion. Board members of TI national chapters are largely constituted of individuals with extensive experience with corruption who emanate from legal, business and political backgrounds and these individuals, due to their knowledge and expertise, can hold significant influence over legislature. TI highlights its key accomplishments as putting corruption on the global agenda by breaking the taboo against speaking out on corruption, as playing a vital role in anti-corruption conventions (TI was involved in drafting UNCAC [197] and was closely involved in the OECD Anti-Bribery Convention), and as raising standards in public life by helping to define certain behaviours as corrupt, such as the improper acceptance of gifts. Whether such rule changes, as Becker suggests, will be good for those companies, is largely dependent on perspective (there may be numerous successful corporate bribe givers and takers who may feel that doing what these moral entrepreneurs believe is right, is not necessarily good for them, not to mention their subsequent label as 'outsiders'). However, it has to be agreed that in relation to the class structures that Becker referred to, those in less favourable positions stand to benefit from the rule changes. The Innospec Ltd. case where leaded petrol was continued to be produced and sold in Indonesia due to corruption and bribery despite the environmental and health effects is just one example of this.

These inter-governmental organisations have produced numerous reports and guidelines to aid anti-corruption. Since the OECD Anti-Bribery Convention came into force, its Working Group on Bribery has published 6 reports[198] on the UK and 4 reports[199] on Germany in relation to the implementation of the Convention. These reports clearly detail the anti-

[196] TI (2010): http://www.transparency.org/news_room/faq/corruption_faq <Accessed 18/11/10>
[197] United Nations Convention against Corruption
[198] Reports can be found at: http://www.oecd.org/document/28/0,3343,en_2649_34859_44583772_1_1_1_37447,00.html <Accessed 18/11/10>
[199] Reports can be found at: http://www.oecd.org/document/44/0,3343,en_2649_34859_44576364_1_1_1_1,00.html <Accessed 18/11/10>

corruption landscapes in the two countries, offer critique for areas of improvement including legal and operational recommendations, and acknowledge and re-evaluate steps taken to implement these recommendations. The pressure placed on states through such mechanisms is significant, as one UK prosecutor explained:

> '…my perception is that the OECD has been instrumental in ramping up the pressure on the UK to do more…The perception was that all the other signatories to the convention were busy investigating and prosecuting overseas corruption and we were not, and I remember the previous director in a speech saying 'we have got to do better. Other countries we like to poke fun at for poor compliance…and low corporate standards'. But he named some and said 'they've all brought prosecutions and we haven't, so we're in no position to be casting aspersions at others' so I always saw that as coming from the OECD, and the moral pressure really that was being applied to us (Interview 111)

Likewise TI has produced a number of significant publications such as The Global Corruption Report (GCR), first published in 2001 and subsequently published annually from 2003 onwards, which examines corruption worldwide but also includes country specific reports detailing the legal and institutional changes, case-specific examples and discussion of the 'theme' of the report in that country (the theme of the GCR 2010 was corruption and the private sector). The report therefore 'brings together news and analysis on corruption and the fight against corruption, addressing international and regional trends, highlighting noteworthy cases, and providing useful empirical evidence of corruption' (TI website, 2010)[200]. In relation to this last point, TI produces the Corruptions Perceptions Index (CPI) which annually ranks countries by *perceived* levels of corruption among public officials, the Bribe Payers Index (BPI) which ranks leading export countries according to their propensity to bribe when doing business abroad, and the Global Corruption Barometer which assesses general public *attitudes* towards and experiences of corruption in countries around the world. In 2010, the UK was ranked 20 with a score of 7.6 (the UK's lowest score and down from 8.6 in 2006, although this may reflect recent 'MP expenses' scandals and the 'cash for honours' scandal) and Germany ranked 15 with a score of 7.9 in the CPI: scores are ranked 0 to 10 with 10 being the least corrupt. In the BPI 2008, the UK and Germany were ranked joint 5th with a score of 8.6. These instruments are useful in putting corruption on the political agenda and increasing awareness but the methodological approach whereby such results are based on perceptions and survey data is questionable. National chapters of TI

[200]Available at: http://www.transparency.org/about_us/approach <Accessed 19/11/10>

also produce frequent publications in response to government reports and draft legislation, offering comment and critique and play a significant role in lobbying at the national and EU levels.

These organisations have influenced self-regulatory practices within corporations in two main ways. First, reports they have produced on the extent of corruption, on state enforcement, or aimed at influencing legal frameworks have indirectly increased pressure within the private sector to conform to the laws. Second, they have directly produced documents specifically for corporations to assist them in creating effective compliance regimes and thus assist them in regulating their own behaviour. For example, the OECD (2010) published a document entitled 'Good Practice Guidance on Internal Controls, Ethics, ad Compliance'[201] which is based on findings of the OECD's Working Group on Bribery as well as consultations with the private sector and civil society. As the quote at the beginning of the chapter advises, this document provides a framework and guidelines for corporations at a high level of generality which can be implemented as corporations wish. This reflects the 'functional equivalence' position of the OECD that promotes 'goals' ahead of 'means'. TI has published 'Guidance on good practice procedures for corporate anti-bribery programmes' in relation to the UKBA[202]. This document is much more wide-ranging, extensive and detailed than the official guidance by the UK government or the framework provided by the OECD above. It provides analysis of the UKBA in addition to practicable and operational guidance on creating a sufficient control environment, risk assessment, policies and procedures, implementation, applying due diligence, and monitoring and review. Corporations making use of these two documents are provided with an overarching compliance framework along with more practical advice to implement this. As above with state and private sector guidance, providing such frameworks accounts for the diverse nature of corporate cultures, enabling corporations to adapt practices suitable for their organisation:

> 'Corporate cultures can be so multifaceted…I have a lot to do with various corporations and it's unbelievable. It's almost like with natural persons. You can feel just how different the cultures are

[201] Document available at: http://www.oecd.org/dataoecd/5/51/44884389.pdf <Accessed 23/07/2011>
[202] Full report available at: http://www.transparency.org.uk/attachments/138_adequate-procedures.pdf <Accessed 29/07/2011>

> when you go into a corporation, you can just tell what type of culture it is and because they can be so varied, I don't believe you can say that the authorities must bear responsibility [for each corporation]' (Interview 221, German lawyer)

A further key organisation in this area is the UNGC. The UNGC[203] is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. The UNGC provides publications and guidance on a wide variety of anti-corruption related issues such as implementing proper business practice, reporting, and taking collective action, amongst others, as well as a variety of tools for businesses to use when implementing change. This is a multi-stakeholder initiative reinforcing that the private sector shares responsibility for addressing corruption and bribery. Although a voluntary initiative, there is a mandatory requirement for participating businesses to annually disclose certain performance changes.

Non-profit organisations have also emerged that aim to provide resources such as anti-bribery and compliance solutions for MNCs and their intermediaries. One example is that of TRACE. This organisation provides several core services and products such as due diligence reports on commercial intermediaries, model compliance policies, online resources centres, in-person and online anti-bribery training, and research on corporate best practices. Corporations and their intermediaries can apply for membership (the fees of which fund the organisation). Membership with TRACE signifies a high level of transparency within the member corporations or intermediary as well as a commitment to implementing rigorous compliance systems. This provides corporations with a practical and cost-effective alternative to expensive and time-consuming corporate compliance and provides intermediaries with a marketing advantage by building relations with corporations operating internationally.

Organisations such as the OECD, TI and the UNGC clearly are influential in the development and monitoring of corruption standards and legal conventions and have significantly shaped the corruption landscape. These organisations and individuals undoubtedly embody the

[203] UNGC website available at: http://www.unglobalcompact.org/Issues/transparency_anticorruption/index.html <Accessed 23/07/2011>

characteristics of moral entrepreneurship as highlighted by Becker. However, the extent to which those investigators, lawyers, forensic accountants and so on that form the anti-corruption agencies and departments equally share the moral crusades of the 'rule creators' and/or are more objective in their role as 'rule enforcers' is open to question.

8.6 Conceptualising self-regulatory practices in relation to transnational corporate bribery

At the beginning of this chapter, a framework was outlined for locating self-regulatory practices in relation to the level of state intervention and the level of formality involved. The subsequent discussion analysed self-regulatory practices as they are emerging in relation to transnational corporate bribery with specific focus on the key players, and the two above analytical elements. Figure 7 below locates these practices as identified in the emerging regulatory landscape of transnational corporate bribery. These are located in relation to the two spectrums. The higher a practice is located on the vertical spectrum, the more significant the role of state intervention. Conversely, the lower a practice is found on this spectrum, the more significant the role of non-state sources such as private sector and intergovernmental actors and organisations. The further right a practice is located on the horizontal spectrum, the more significant the mandatory requirement is. Conversely, the further left a practice is found on this spectrum, the more significant the voluntary element is.

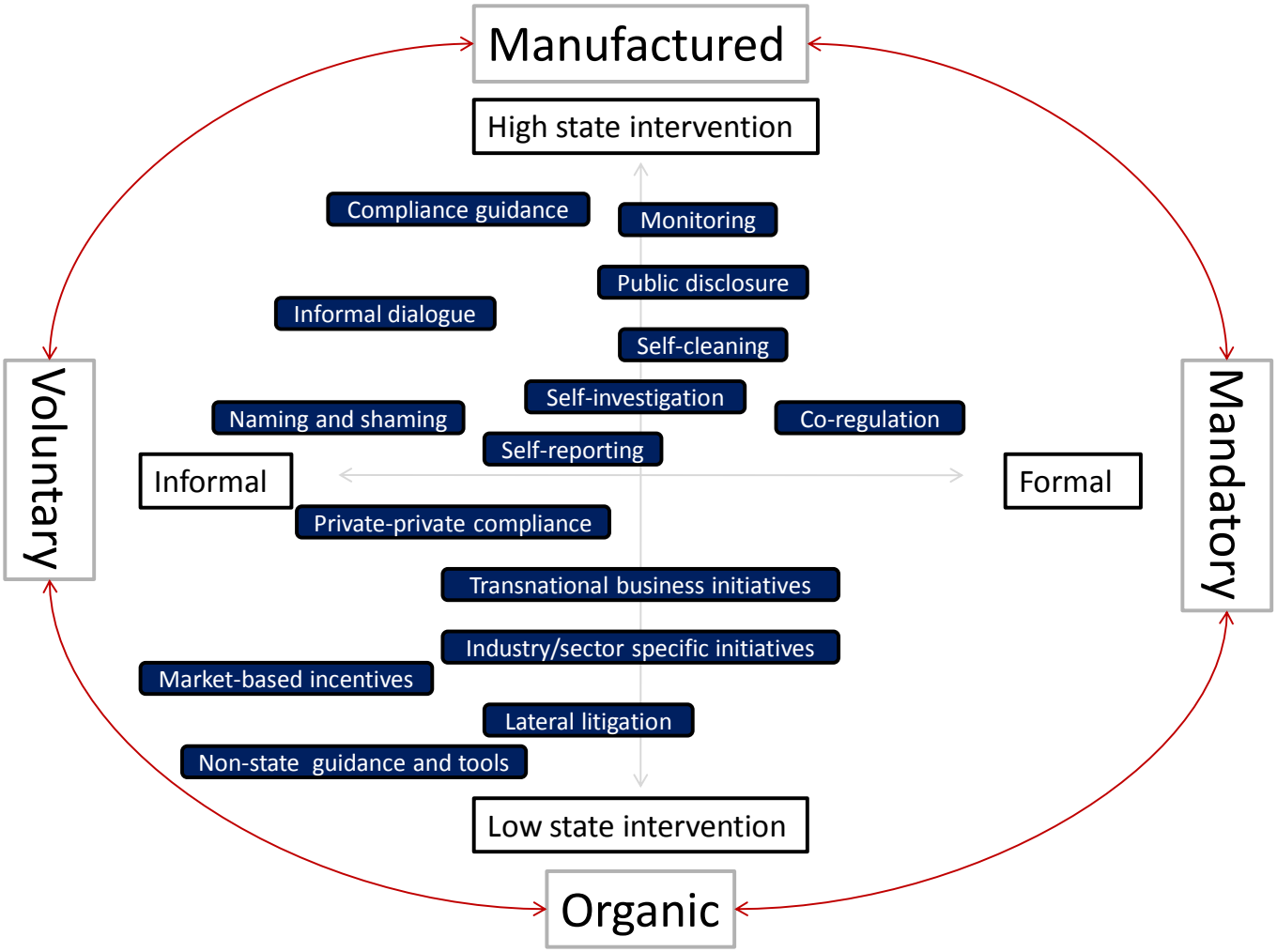

Figure 7: Self-regulatory practices in relation to transnational corporate bribery

8.6.1 Reference groups and stakeholders

Within this figure and conceptual framework, a number of key reference groups and multi-stakeholders can therefore be found, 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 groups 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**: 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, industry created regulators who play a significant role with the development of business-led self-regulatory practices such as transnational agreements to deal with bribery and corruption, the media.

8.7 Summary

The objective of this chapter was to move beyond traditional approaches of enforcement, and demonstrate the extent to which non-enforcement mechanisms in the form of self-regulatory practices are emerging within the regulatory landscape of transnational corporate bribery. As in the analytical framework outlined in chapter 2.8, the regulation of transnational corporate bribery in international business transactions is being negotiated through an admixture of enforcement and non-enforcement mechanisms. Within this framework, the analytical focus on regulation as a social relationship between the state regulator and the regulatee, or between the regulatee and the 'unintended' regulator as demonstrated in this chapter, provides a means of understanding the emergence of such regulatory practices. The chapter began by conceptualising what is meant by self-regulatory practices. It was demonstrated that a broad conception of self-regulation is useful and can be characterised in this area in relation to two analytical elements: the level of state intervention and the degree of formality with these practices. In other words, the extent to which these practices are manufactured by the state, or emerge organically within business and non-state sectors, or the extent to which these practices are mandatory or voluntary, provide a useful means of understanding the diverse array of non-enforcement mechanisms that have emerged. These practices were also analysed in relation to their location at the micro, meso and/or macro levels, and the extent which they are of specific of general applicability. The roles of the 'negotiators', the 'profiteers' and the 'moral entrepreneurs' in relation to the emergence of these practices was outlined with each having an important

influence in creating regulatory frameworks that can be implemented at the operational level by corporations. The many self-regulatory practices that were outlined were then located on the conceptual framework as illustrated.

The negotiation of regulation through an admixture of non-enforcement mechanisms 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. In this sense, there are similarities with Gunningham and Grabosky's (1998: 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. Such models are limited, however, by the promotion of escalation of enforcement responses by any set of parties, as in the hierarchical pyramids proposed by Ayres and Braithwaite (1992), when standards are not met – criminal prosecution, for example, is unlikely to be reached (see chapter 7). Gunningham and Grabosky's (1998) approach does outline the necessity for a more coordinated, creative approach to regulation incorporating a variety of 'quasi-regulators' as do the self-regulatory practices presented in this chapter. Such practices 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 (see for example Garland, 1996, 2001). Such developments also reflect the 'governance triangle' of Abbott and Snidal (2006) that analyses regulation in relation to the development, implementation, monitoring and enforcement of international standards by combinations of states, corporations and NGOs. These practices of 'responsibilisation' are evident in the top half of the regulatory spectrum in figure 7, but such practices demonstrate a largely one-way process and discount the organically emerging practices within business itself. In both instances, these emerging self-regulatory practices enable the 'policing' of bribery activity that in many cases would remain undetected by state agencies. This enables the 'dark figure' of transnational corporate bribery to be further reached although due to these 'unknowns' and the difficulties in measuring the impacts of self-regulatory practices in terms of reduction, the extent that such practices are effective is not clear (see chapter 9.2). In any case, the emergence of manufactured and organic self-regulatory practices with varying degrees of formality reinforces the core argument of this

thesis that the control of complexly organised, transnational corruption requires a more innovative and broader regulatory approach incorporating both enforcement and non-enforcement mechanisms as a means of negotiating regulation.

9

The default position

9.1 Introduction

> 'Reports that say that something hasn't happened are always interesting to me, because as we know, there are "known knowns"; there are things we know we know. We also know there are "known unknowns"; that is to say we know there are some things we do not know. But there are also "unknown unknowns" - the ones we don't know we don't know' (Donald Rumsfeld, former US Defence Secretary, 2002[204])

When Donald Rumsfeld spoke of 'known knowns', 'known unknowns' and 'unknown unknowns' in relation to weapons of mass destruction in 2002, he took a phrase from business vocabulary to distinguish between things we know that we know, things we know we do not know, but can anticipate their existence, and things we do not know that we do not know, and therefore cannot anticipate their existence. While these phrases may have several indirect and direct meanings and therefore can be used for rhetorical purposes (e.g. to refute accountability), they do point to a significant criminological limitation – the 'dark figure' of crime – that is of relevance in relation to transnational corporate bribery. The less tangible nature of corporate bribery creates a large 'dark figure' of this form of criminality and therefore renders estimates of its extent and scope difficult to ascertain. Consequently, official enforcement statistics of corporate bribery can only partially inform understandings of the effectiveness of enforcement mechanisms (and certainly not non-enforcement mechanisms as defined in this thesis). Given these limitations in our understanding of the bribery problem and given the limitations of traditional enforcement mechanisms as argued throughout this thesis, the control of transnational corporate bribery appears to reach only a small amount of these activities and of those that are reached, deals with them in a manner supportive of corporations (e.g. no or limited criminal prosecutions of corporations

[204] Quote used in article *BBC*: '*Rum remark wins Rumsfeld an reward*', 02/12/2003, available at: http://news.bbc.co.uk/1/hi/3254852.stm <Accessed 23/08/2011>

in the UK or Germany (see chapter 7.2)). Subsequently, the control of transnational corporate bribery through the inadequacy of enforcement mechanisms and the unknown impacts of non-enforcement mechanisms appears located within the 'default position'. It is here that jurisdictions accommodate these criminal activities, either through an inability to do otherwise or through choice.

This short chapter begins by highlighting the difficulties in measuring corporate bribery which consequently renders available enforcement statistics invalid for comparisons of effective enforcement. The chapter first explains transnational corporate bribery in reference to its less tangible, or its 'known unknown', nature. Attempts at measuring this 'dark figure' of transnational corporate bribery are then discussed. Second, these analyses inform the subsequent discussion of what can be considered 'adequate enforcement' and against what threshold enforcement should be measured. Here, a potential approach for measuring the impact of non-enforcement mechanisms is proposed that incorporates an understanding of the processes of compliance within the social context of corporate bribery. Given the limitations in understanding the full extent and scope of transnational corporate bribery, the proportionality of current enforcement rates provided by international and intergovernmental organisations to the corruption problem is unclear. Prosecution rates may reflect all corrupt activity but this is unlikely due to legal, evidential, procedural and financial limitations of enforcement as argued throughout this thesis. It is more likely that much corporate bribery currently goes undetected and is therefore unknown. Third, this difficulty in tandem with limited enforcement leads to a discussion of the location of transnational corporate bribery control within accommodation and collusion. Also discussed here are the key influential phenomena of 'regulatory capture' and the 'revolving door', both of which place control in the default position. The chapter concludes with a summary of the key points and makes the argument that much transnational corporate bribery is accommodated by anti-corruption authorities and state representatives given the inadequacy of enforcement mechanisms and the unknown impacts of non-enforcement mechanisms.

9.2 Transnational corporate bribery and the 'dark figure' of crime

The dark figure of crime, or the 'known unknowns', refers to those crimes committed but not recorded in official statistics. Transnational corporate bribery is a criminal activity that due to its clandestine and less tangible nature largely falls within this dark figure. Such crimes have been referred to as 'invisible crimes' (see Davies *et al*, 1999: 5-23) whereby the degree of invisibility is dependent on a number of characteristic features: no knowledge (little individual or public knowledge that the crime has been committed); no statistics (official statistics fail to record or classify the crime); no theory (criminologists and others neglect to explain the crime, its existence and its causes); no research (such crimes are not the object of social research, either in terms of their causes of their control); no control (no formal or systematic mechanisms for the control of such crimes); no politics (such crimes do not appear as a significant part of the public political agenda); and, no panic (such crimes are not constituted as moral panics and their perpetrators are not portrayed as folk devils). Transnational corporate bribery reflects six of these features, with only the 'control' feature evident (although the efficacy of which is questionable – see previous chapters). As discussed in chapter 4.7 in relation to the limitations of current regulation theory, the tangibility of the object of regulation creates substantial difficulties for control. Transnational corporate bribery frequently involves consenting actors whereby both parties benefit from the corrupt transaction – drug takers and sex workers are also consensual crimes and may share these characteristics but the fact that the damage is very high once bribery is exposed differentiates it. The lack of identifiable consequences (e.g. no direct victims or harms), the 'invisibility' of actors, their relations and transactions due to the ambiguous nature of bribes (e.g. exchange of legitimate services), the knowledge and power problems of the state ensuring corporate subsystems and their transactions remain difficult to access and understand, and the limited resources of enforcement agencies for detection, make corporate bribery a less tangible crime. For this reason, understanding the full extent of corporate bribery in transnational business transactions is difficult although attempts have been made to measure the corruption problem.

9.2.1 Measuring corruption

Data recording of transnational corporate bribery in the UK and Germany is limited and where collected by the state, inaccessible. For example, the SFO maintains the Anti-Corruption Register of all suspicions and cases etc of corporate bribery but these figures are not accessible and remain within the organisation, although other enforcement agencies are granted access. Other official police statistics and/or offending data on transnational corporate bribery do not contain these crimes given the lead status the SFO holds. Likewise, general victimisation and self-reporting studies (e.g. British Crime Survey) do not incorporate such corporate crimes into their scope. Similar difficulties exist in Germany where enforcement statistics are centrally collected and inaccessible within the individual *Bundesländer*. The main source of data available on the extent of corporate bribery and corruption more broadly comes from studies of perception, such as TI's CPI and BPI, but such studies are methodologically limited by their focus on perceptions only.

Attempts to measure corruption have been made in numerous ways - some focus on the number of corrupt transactions that take place in a country, others analyse the amount of money that changes hands as part of corrupt transactions (Bardhan, 2006: 342). Theoretical models have measured corruption as a percentage of government officials that are willing to accept a bribe (Çule and Fulton, 2005) and by the size of the bribe (Cadot, 1987; Choi and Thum, 2005). Other methodologies involve the use of public expenditure tracking surveys, service provider surveys and enterprise surveys to collect quantitative micro-level data (Reinikka and Svensson, 2006), an axiomatic measurement approach that entails formal definition of potentially important properties of a measure and then classification of measures according to such properties (Foster *et al*, 2009), and corruption-victimisation measures based on survey research (Seligson, 2006).

As Kaufmann *et al*. (2007) demonstrate, a number of myths and their associated realities in relation to measuring corruption have emerged. Myth 1, 'corruption cannot be measured', is from the authors' perspective not the reality. They suggest corruption can be measured (i) by gathering informed views of relevant stakeholders (e.g. firms, public officials, NGOs, experts etc) (ii) by tracking countries' institutional features (e.g. to determine opportunities

of incentives for corruption and therefore provide useful indications of the possibility of corruption), and (iii) by careful audits of specific projects (e.g. financial audits and comparisons of spending with the physical output of projects in order to provide project specific corruption). However, in addition to developing estimations of the incidence, prevalence and concentration of bribery and corruption through these measures, the analytical focus could be shifted onto the *modus operandi* of *how* those incidents of bribery (that do come to the attention of the authorities and are successfully prosecuted) have been organised. For example, lessons can be drawn from an understanding of the vulnerabilities of particular actors (e.g. executives, corporations) in particular economic sectors (e.g. construction, finance, defence, etc) and in specific legal contexts (e.g. UK, Germany) and thus how such vulnerabilities can be reduced. Levi and Maguire (2004) in their analysis of organised crime prevention, for example, outlined one case study as most promising. This approach 'was aimed primarily at understanding the dynamics of Turkish and Chinese gangs involved in the trafficking of illegal immigrants – particularly the methods and routes used' (Levi and Maguire, 2004: 457). The strategy approached crime prevention primarily through a careful and comprehensive analysis of the nature of the problem to be addressed, including developing a clear understanding of the various crime scenes, actors and their resources in order to identify the broad range of possible intervention points and options for disruption. Thus, to render social problems such as transnational corporate bribery sufficiently 'tangible', there must be some 'known knowns' to infer from. For example, in addition to victimisation surveys, self-report studies, perceptions studies and interviews with offenders, data collected by corporations, enforcement agencies, business and sector specific trade associations and bodies, international organisations and development banks as well as court records, police notification schemes, etc, could together inform understandings of the bribery problem.

Myths 2 and 3 relate to the vague, generic and unreliable subjective data that is obtained from perception studies. The authors argue that perceptions of corruption are sometimes the best and only information available, suggesting that perceptions matter directly in that they influence individuals' behaviour towards institutions, etc. This may be the case but it does not inform an understanding of measurement or extent. Again, broader debates about the possibilities of measuring 'organised crime' as contrasted with how particular types of

serious crime have been organised is a relevant analogy (see Edwards and Levi, 2008). Kaufmann *et al*. also suggest specific survey questions enable more specific and focused findings – such questions remain distanced from the social context, however – and that any kind of data measurement involves an irreducible element of uncertainty. However, some measures are more convincing than others e.g. self-report surveys and victimisation studies may offer more reliable data than perception studies. Myths 4 and 5 suggest objective measures of corruption are required to support the fight against corruption and assist policymakers, but as the authors acknowledge, the nature of corruption makes it virtually impossible to create precise objective measures of it but that specific, focused surveys can aid in identifying priority areas for action. Myth 6 challenges the myth that countries perceived to have high levels of corruption also have fast economic growth but the authors argue that in the medium to long-term adverse effects can be seen.

The limitations in measuring and understanding the extent of corruption raise the question as to how an appropriate enforcement 'threshold', against which enforcement rates can be compared, can ever be determined if the extent of the problem to be enforced is largely unknown. Given this flaw, against which variables should 'adequate enforcement' be measured and more specifically, can 'adequate enforcement' ever be determined? To understand the impacts of the negotiation of regulation through a variety of enforcement and non-enforcement mechanisms, an understanding of the extent of corruption and how this changes over time is required.

9.3 What is adequate enforcement?

There are clear difficulties in measuring corruption accurately and this raises significant questions about what constitutes 'adequate enforcement'. At various points throughout this thesis the UK and Germany have been referred to as 'active enforcers' of overseas bribery, as categorised by TI in their reports on the progress of enforcement in relation to the OECD Anti-Bribery Convention. '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'[205]. 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 (i.e. it is unclear why the threshold is 10 major cases, for example). Does enforcement become adequate once a certain number of prosecutions are being regularly concluded? Or is it when prosecution rates are reduced to reflect the success of prevention and reduction through non-enforcement mechanisms? Or is it adequate when prosecution rates simply satisfy the informed perspective of those 'moral entrepreneurs' that played such a significant role in the generation of rules? What is clear is that prosecution rates themselves are alone an insufficient measure of 'effectiveness' and therefore insufficient in determining 'adequate enforcement'. This rating as 'active enforcers' suggests that TI is officially satisfied with the level of enforcement (as based on prosecution rates) in both jurisdictions, implying adequate enforcement is currently evident.

Data taken from the most recent TI Progress Report from 2011[206] indicate that from February 1999 (when the OECD Convention came into force) up until the end of 2010, Germany had concluded 135 cases (of which over 16 were 'major') while the UK had concluded 17 cases (all of which were 'major') up until May 2011. Although the TI statistics incorporate economic variables such as share of world exports as comparison points, meaningful comparisons cannot be made, given the lack of recognition they give to other key variables, not to mention the social context of regulation and bribery. For example, against what denominator are these enforcement statistics being measured for them to represent active enforcement in the two jurisdictions? While world export shares may be used as markers for 'active enforcement' categorisation, this gives a false picture of the effectiveness of the broader regulatory landscape. For example, hypothetically it may be the case that Germany has high levels of undetected corruption but retains the 'active enforcer'

[205] 'Substantial' is itself a difficult construct and its meaning in this TI report is unclear. Does this mean substantial-sounding, like a headline figure in terms of the financial penalty, or perhaps substantial as a ratio of profits? These questions need clarifying.
[206] Full report available at: http://www.transparency.org/global_priorities/international_conventions <Accessed 02/11/2011>

category for prosecuting a small percentage of this corruption; while other jurisdictions such as Finland or Sweden may have lower levels of corruption[207] but prosecute a higher percentage of these – the percentage of prosecutions of all corruption offences is currently unknowable in any country. Likewise, the Netherlands are considered a 'moderate enforcer' but according to TI's BPI 2011[208], corporations from the Netherlands are least likely to bribe abroad which may reflect a more effective set of non-enforcement mechanisms involving self-regulatory practices but which receive no recognition in enforcement rates. Neither do the statistics distinguish between different cases as can be seen with the Siemens case which accounts for over 20 of the prosecutions which distorts the picture. International studies such as TI's BPI and CPI inform understandings of the extent of transnational bribery, perhaps more so than estimations of the problem by enforcement authorities (whose estimations are based on those cases that come to their attention). However, these estimations are beset by various methodological limitations (e.g. often perception studies) (see chapter 10.2). For these reasons, enforcement rates can be a misleading indicator of 'adequate' or 'effective' enforcement. In addition, other variables such as the size of the country, the Gross Domestic Product (GDP), available resources along with many significant legal, procedural, evidential and financial processes as discussed throughout this thesis are not acknowledged. Thus, 'active enforcement' in these terms does not necessarily reflect effective anti-corruption systems or measures and does not inform any understanding of the extent of the corruption problem.

To determine 'adequate' or 'effective' enforcement, consideration needs to be given to the variety of enforcement *and* non-enforcement mechanisms that incorporate aspects of repression and prevention/reduction. Determining an appropriate 'threshold' against which enforcement and non-enforcement mechanisms should be compared is problematic for a number of the reasons outlined above. However, a useful place to start would be within the social contexts where such bribery and corruption occur and where the necessary and contingent relations of corporate bribery can be fully explored and understood. For

[207] They are both ranked as less corrupt in TI's Corruption Perceptions Index 2010 although perception-based surveys have obvious limitations. The sample of respondents for TI's CPI is calculated using data from 13 sources by 10 independent institutions. Evaluation of the extent of corruption in countries/territories is done by two groups: country experts, both residents and non-residents, and business leaders.

[208] TI's BPI 2011 available at: http://bpi.transparency.org/results/ <Accessed 18/08/2011>

example, in addition to the methodologies outlined above (e.g. victim surveys and self-report studies, etc) data collected by and on corporations' anti-bribery and corruption compliance departments with regards the following processes would aid measurements of the impacts of non-enforcement mechanisms:

- The number of corporations implementing 'certified' anti-bribery and corruption compliance systems and the extent to which these are regularly monitored and adapted e.g. as compelled by formal or informal non-enforcement mechanisms.
- The frequency (e.g. how often are bribe requests made to the company), intensity (e.g. how insistent are bribe requests), intention (e.g. facilitation of otherwise legitimate service, to win or maintain business contracts, to be accepted in the tending process, etc) and type (e.g. cash bribes, services, hospitality etc) of bribery and the extent to which these factors change over time and correlate to different localities.
- The risk assessments of foreign jurisdictions being conducted by corporations (e.g. how is the risk of corruption determined?), and the extent to which these risk assessments change over time and why. E.g. have corporate non-enforcement mechanisms reduced bribe frequency in country A and in what ways?
- The identification and recruitment of potential bribers within the corporation by external bribe solicitors e.g. at which organisational level are employees approached (e.g. executives, middle-managers, low-level employees), do these represent particularly 'at risk' positions (e.g. high contact with overseas officials, independent positions, etc), are certain corporate departments consistently approached (e.g. telecommunications, construction etc)?

These processes represent only some of those processes involved in bribery but an understanding of these processes would inform an understanding of transnational corporate bribery and more specifically, an understanding of 'effective' prevention and control. The impact of corporations' compliance mechanisms (i.e. non-enforcement mechanisms) on the regulation of transnational corporate bribery could therefore be measured over time. For example, to what extent are companies operating in high-risk country A receiving fewer bribe demands/requests over time, and how has this been

influenced by company policies. Of course, such an approach assumes both that the majority of corporations are good, ethical organisations willing to collect such data accurately and honestly[209] and focuses only on the 'demand-side' of bribery, or passive bribery. Those corporations actively committing bribery would unlikely be reached without some form of mandatory, regulatory intervention[210]. If corporations can be encouraged or compelled to collect such data, an understanding of the impacts of non-enforcement mechanisms on bribery reduction could be explored (although gaining access to this data without formal regulatory coercion would prove difficult). Thus, the problem of transnational corporate bribery could be made more tangible through methodological innovations in researching the organisation of serious crimes such as corporate victim surveys but also by altering the research question to ask how known incidents of bribery were organised and what such 'known knowns' do for criminological understanding.

As things stand, however, how 'adequate' or 'effective' enforcement may be cannot be determined without some inference about the volume of crime from victim surveys and self-report studies along with official records and other sources of data (e.g. corporations). Given the difficulties of detection and accessing corporate subsystems, while the above proposal may begin to bridge this gap, this knowledge is currently not available. This in addition to the less tangible nature of transnational corporate bribery reinforces the location of transnational corporate bribery amongst the 'known unknowns'.

9.4 Regulating transnational corporate bribery: the default position

Chapter 2.8 presented a framework for understanding the negotiation of regulation through an admixture of enforcement and non-enforcement mechanisms where regulation is considered a social relationship between regulators and regulatees in legal and illegal markets (see Gill, 2000, 2002; Edwards and Gill, 2002; Edwards, 2010). This theoretical framework is based on the premise that a variety of enforcement practices such as criminal

[209] There may be many legitimate reasons why they would not wish to e.g. too much transparency on their legitimate business transactions that may influence competition and the market.
[210] However, compulsory self-reporting is arguably a violation of the privilege against self-incrimination.

prosecution and civil settlements along with (enforced) self-regulatory practices (see chapters 7 and 8) can be used to control criminalised activities and in this thesis it was applied to corporate bribery in international business transactions. The previous chapters have demonstrated the extent to which enforcement and non-enforcement mechanisms are being used to control corporate bribery, in particular highlighting the inadequacy of criminal prosecution and therefore traditional policing approaches for dealing with complex, transnational crimes. Emerging manufactured and organic self-regulatory practices (see chapter 8) are also key in controlling this criminal phenomenon and arguably more important for changing behaviour within corporations but the impact of these mechanisms is largely unknown. There is, however, an assumption that this admixture of enforcement and non-enforcement mechanisms provides sufficient means for dealing with transnational corporate bribery, but in reality, this is unlikely to be the case. Given the limitations in understanding the full extent and scope of transnational corporate bribery, the proportionality of current enforcement rates provided by international and intergovernmental organisations to the corruption problem is unclear. Prosecution rates may reflect all corrupt activity but this is unlikely due to legal, evidential, procedural and financial limitations of enforcement as argued throughout this thesis. More likely is that much corporate bribery currently goes undetected and is therefore unknown. What is more, of the bribery that is known, limitations in enforcement (see chapter 7) create difficulties for the criminal prosecution of such crime, highlighting 'accommodation' of the problem by prosecutorial agencies and departments. As outlined within the framework of Gill (2000, 2002) and Edwards and Gill (2002), there remains the risk that control, whether it is through enforcement or non-enforcement mechanisms, or both, may simply fail with the default position being accommodation and collusion.

> 'Accommodation and collusion reflect 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' (Gill, 2002: 537)

These inadequacies, which exist in both the UK and German enforcement systems, have been discussed at various points in this thesis. The SFO's 'acceptance criteria' (see chapter 6.3.1), for example, make clear that only large, complex cases will be investigated meaning

smaller bribery cases may be accommodated. The same can be said of facilitation payments (see chapter 5.7.4), which although prohibited in UK law are unlikely to be investigated according to the Director of the SFO. 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 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 must manage criticism from 'moral entrepreneurs' which appears only possible through increasing enforcement 'successes'. Accommodation and collusion, however, are not the only reason why enforcement mechanisms may fail as regulatory agencies may be 'captured' by those they aim to regulate.

9.4.1 Regulatory capture

Regulatory capture signifies that because of shared ideology and/or personnel, rewards and/or threats, the traders have 'captured' the regulators and thereby ensure non-enforcement (Gill, 2002: 537). As Dorn (2010: 34) notes, this can be understood from two perspectives. From a perspective favourable to public regulation, initially independent regulatory agencies risk becoming the captive of those they are supposed to regulate, through repeated interactions with them. From a deregulatory perspective (Thatcher – Reagan), regulatory ineffectiveness arises from regulatory over-reach: the markets know best. In either case, regulation may be fated to fail. The former conception of 'capture' here reflects occurrences in the anti-corruption landscape in both the UK and Germany where 'regulators', or the state, have adopted the interests of business. For example, following business lobbying, the UK government revised the UKBA guidance in relation to the

circumstances within which an overseas company is considered to be conducting business in the UK which reflected the concerns of business (see chapter 5.7.7). Likewise, the discretion being applied by the SFO not to investigate small facilitation payments caters for those corporations operating in countries where such payments are required to enter the market. In addition, the lack of transparency in relation to the frequent and informal dialogue between the SFO and corporations raises further concerns. The German government has also refrained from revising legal frameworks in relation to 'corporate criminal liability' (see chapter 5.8.4) ensuring German corporations remain free from criminal prosecution. Thus, with such practices there is a risk that 'the regulated system comes to be operated in the interest of the regulated firms rather than the more general public interest' (Ricketts, 2006: 38). If, for example, the substantial benefits, for wealth creation and tax yield, of under-regulated transnational financial markets remain desired, then certain levels of corruption and bribery become accepted as 'necessary evils'.

9.4.2 The revolving door

In some extreme cases, the 'regulators' may share in the profitability of the market, for example, if a regulator was to hold shares in a regulated company (Gill, 2002: 537). The 'revolving door' phenomenon between regulators and business demonstrates this 'grey' area. This term refers to 'the movement of individuals between positions of public office and jobs in the private sector, in either direction' (TI, 2011: 2[211]). A relevant example of this is that of BAE Systems and Britain's former envoy to Saudi Arabia, Sir Sherard Cowper-Coles[212]. Sir Sherard Cowper-Coles left the Foreign Office in October 2010, but played a central role in pressurising the SFO to drop the investigation into BAE Systems in relation to the Al-Yamamah arms deal with Saudi Arabia. Controversially, he was then hired by BAE Systems in February 2011 as the international business development director, focusing on the Middle East and south-east Asia. This move raised questions over the relationship between BAE Systems and the UK government, and the circumstances surrounding the closure of the SFO case into the deal. The reasons for concern over such public-private and

[211] TI report entitled 'Cabs for hire? Fixing the revolving door between government and business' (2011) available at: http://www.transparency.org.uk/publications <Accessed 23/08/2011>
[212] See *Guardian*: '*BAE Systems hire Britain's former envoy to Saudi Arabia*', 18/02/2011, available at: http://www.guardian.co.uk/business/2011/feb/18/envoy-saudi-bae-systems <Accessed 23/08/2011>

private-public movements relate to the potential for 'conflict of interests' that can occur before, after, or during a role in government. As the TI report (2011:3[213]) states: public officials might allow the agenda of their previous private sector employer to influence their government work; public officials might abuse their power while in office to favour a certain company, with a view to ingratiating themselves and gaining future employment; former public officials who accept jobs in business might influence their former government colleagues to make decisions in a way that favours their new employer; and, former public officials may use confidential information to benefit their new employers, for example, during procurement procedures. Alternatively, the revolving door phenomenon may be viewed positively as those with expert knowledge of bribery and corruption and their control, may have increased influence in changing the behaviour of corporations that are more difficult to reach when employed by the state. In any case, of course, there are some procedures in place to regulate this phenomenon. Ministers and senior crown servants must seek advice from the Advisory Committee on Business Appointments (ACOBA) before taking private sector employment but ACOBA does not have the resources to assess specific risks in individual cases or to monitor compliance. Some changes have been evident, with initiatives to ban former public officials from engaging in lobbying for two years after leaving office, but the TI[214] report argues this is not enough.

The SFO is a prime example of such revolving door practices with key anti-corruption investigators and prosecutors moving to the private sector in recent times. Keith McCarthy, who was the Head of Anti-Corruption but most recently Chief Investigator and Executive Board member, left to take up a position beginning 1 January 2012 with PricewaterhouseCoopers' Forensics team[215]. In January 2011, Robert Amaee, the Head of the SFO's Anti-Corruption Domain, left to join US legal firm Covington and Burling at their London office to advise and assist clients on the UKBA and other anti-corruption issues[216]. Also in January 2011, Charlie Montieth, the SFO's Head of Assurance and key figure in the

[213] *Ibid*. 217
[214] *Ibid.*
[215] See PwC press release, 11/10/2011, available at: http://www.ukmediacentre.pwc.com/News-Releases/PwC-appoints-Keith-McCarthy-to-its-Forensics-practice-1115.aspx <Accessed 12/12/2011>
[216] See Covington and Burling press release, 17/01/2011, available at: http://www.cov.com/news/detail.aspx?news=1593 <Accessed 23/08/2011>

drafting of the UKBA, left to join US legal firm White and Case at their London office[217]. The SFO's General Counsel, Vivian Robinson QC, also recently left the organisation to join international law firm McGuireWoods in their London office[218]. As part of his new role, Robinson has been advising clients on the UKBA and fraud and corruption more generally. Interestingly, all three of these examples demonstrate how key regulatory actors have moved on to assist and advise those they previously regulated on the specific criminality that they assisted in prosecuting during their time with the SFO. Interestingly, Richard Alderman, Director of the SFO (at the time of writing!), stated the following on such departures:

> 'It is a testament to the high levels of professionalism inside the SFO that our personnel are highly valued in private practice. At the moment, in particular, those with experience dealing with overseas corruption and bribery and an understanding of the Bribery Law and how it is likely to be implemented are even more valuable….As director of the SFO I welcome enhanced links between the organisation and private practice, whilst assuring the public that there are other able and talented people inside the SFO to take on the responsibilities of those who have left.' (Richard Alderman, Director of the SFO, 2011[219])

A number of issues are of interest in this statement. First, the moving of key individuals out of the SFO that were key to the enforcement approach outlined in chapter 7 raises questions over available resources (although the SFO will never be able to match private sector wages), capability to investigate and prosecute (loss of valuable expertise and experience), and therefore the legitimacy of the organisation as an anti-corruption agency. Second, the enhancement of links between the SFO and private practice, whilst potentially productive, requires transparency to ensure the relationship does not shift towards 'regulatory capture'. The 'revolving door' phenomenon therefore aids analysis of the blurring of public-private boundaries in relation to close relationship of regulators and regulatees. A high level of regulatory capture and increased movement of actors between regulators and regulatees further reinforces the default position of the control of transnational corporate bribery.

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[217] See White and Case press release, 17/01/2011, available at: http://www.whitecase.com/press-01172011-1/ <Accessed 23/08/2011>

[218] See publication by McGuireWoods from *Bribery Library*: '*The SFO's Vivian Robinson to join McGuireWoods*', 27/04/2011, available at: http://www.briberylibrary.com/fcpa/sfos-vivian-robinson-to-join-mcguirewoods/ <Accessed 23/08/2011>

[219] Quotes taken from article *Legalweek.com*: '*Senior SFO duo quit for moves to London offices of US firms*', 18/01/2011, available at: http://www.legalweek.com/legal-week/news/1937710/sfo-anti-corruption-chief-joins-firm-covingtons-london-office <Accessed 23/08/2011>

9.5 Summary

KQ 5 questioned whether corporate bribery, due to its transnational, multi-jurisdictional and less visible nature is more impenetrable that other forms of corporate crimes and whether this may result in some accommodation of the problem as enforcement practices fail to sufficiently address it. This chapter began with analysis of transnational corporate bribery as a clandestine form of criminality – corporate bribery is less tangible due to the involvement of consenting parties, a lack of identifiable consequences, the invisibility of transactions and arrangements, and the limitations of the state to access the corporate subsystems including the procedural, evidential, legal and financial obstacles faced by anti-corruption authorities. Due to the 'known unknowns', or 'dark figure' of transnational corporate bribery, therefore, attempts at measuring corruption are often hindered by methodological and conceptual flaws rendering understandings of the extent and scope of this problem unreliable. Varieties of measurement approaches have been adopted, but perception studies such as TI's CPI and BPI, despite their obvious flaws, are the most used form of understanding the problem. Without a full understanding of the extent of the problem, how can 'adequate' or 'effective' enforcement be determined? Enforcement statistics provided by international organisations imply that the UK and Germany, due to their 'active enforcer' status, have an adequate level of enforcement. Such understandings that focus on enforcement statistics alone do not acknowledge the impact of the broader regulatory landscape and of non-enforcement mechanisms such as self-regulatory practices. To determine adequate enforcement, consideration needs to be given to these mechanisms but to gain data on their effectiveness, research at the micro-level of corporations and their compliance mechanisms to understand the key social relations of bribery is required.

Due to the lack of understanding of the extent of the corruption problem, and due to the limitations of enforcement (see chapter 7), the control of transnational corporate bribery appears to reach only a small amount of these activities and of those that are reached, deals with them in a manner supportive of corporations. Subsequently, the control of transnational corporate bribery through the inadequacy of enforcement mechanisms and the unknown impacts of non-enforcement mechanisms appears to be located within the 'default position' – a *status quo* that accommodates a certain amount of transnational

corporate bribery, either due to an inability to control effectively or due to decisions (e.g. for economic/ideological reasons) not to fully prosecute. Antecedent influences to this 'default position' are the risk of regulatory capture and the revolving door phenomenon. Where the relationship between regulators and regulatees 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. The argument of this chapter therefore aims to demonstrate that much transnational corporate bribery is accommodated by anti-corruption authorities and state representatives given the inadequacy of enforcement mechanisms and the unknown impacts of non-enforcement mechanisms. The emerging landscape of the regulation of transnational corporate bribery may be able to counter this provided an admixture of enforcement and non-enforcement mechanisms are successfully utilised and implemented, and monitored and evaluated, ensuring a dynamic and flexible approach to the negotiation of regulation.

10

Conclusion

10.1 Introduction

The central purpose of this thesis was to address the analytical gap presented in **chapters 1** ('***Introduction***') and **2** ('***Literature review***'). Here it was outlined how sovereign states face significant difficulties in controlling complexly organised transnational and multi-jurisdictional crimes such as corporate bribery in international business transactions. In short, *national* authorities are pressured to respond to *trans*-national corporate bribery using *inter*-national frameworks for enforcement. Exemplary instances of transnational criminality such as the Siemens and Innospec cases discussed in **chapter 4** '***Grounding the research problem***') demonstrate this problematic whereby anti-corruption authorities at the national level are limited by their national boundaries as well as procedural, evidential, legal, structural and financial ones. Much concern has been expressed in international conventions and discourse but in these official narratives as well as those of criminological theory on corporate and white-collar crime, the problem of controlling trans-nationally organised corporate bribery and not been sufficiently analysed.

This thesis addressed this analytical gap by drawing on the broader research literature on regulation to complement criminological insights which have largely been concerned with problems of corporate crimes within, rather than across, nation-states. Corporate bribery as analysed in this thesis is a multi-sector, multi-industry, less tangible and consensual crime with no direct individual victims and difficult to identify harms that takes place within complex corporate subsystems that operate across jurisdictions. To understand this control problem, concepts and theory derived from regulation literature incorporating theories of enforcement (e.g. criminal prosecution, civil solutions, hybrid mechanisms) and non-enforcement (e.g. self-regulatory practices, non-state actors as 'quasi-regulators') were

imported and enabled theory to be developed into the regulation of transnational corporate bribery. Insights were gained by contrasting responses in the theoretically comparable jurisdictions of the UK and Germany in order to understand how national authorities can adapt to the challenge of transnational corporate bribery. Key intellectual similarities and differences in these two jurisdictions (e.g. centralised vs. decentralised enforcement systems; principle of opportunity vs. principle of legality; existence (or not) of corporate criminal liability; and, two key G8 economic states with the largest share of exports in the EU) provided a meaningful comparison, particularly suitable for understanding the limits and strengths of enforcement frameworks at the national level. This was done through a qualitative research strategy utilising a varied set of research methods. The rich and contextual insights gained from this approach resulted in a number of key findings and key conclusions in relation to the admixture of enforcement and non-enforcement mechanisms, practices and tools emerging within the broad landscape of the regulation of transnational corporate bribery. These practices can help an understanding of the policy response to transnational corporate bribery.

Chapters 1 and **2** of this thesis presented five interrelated key questions as shaped by the literature and preliminary findings from the research as part of the adaptive approach to theory and research. Each of these questions has been addressed at various stages throughout this thesis but the key findings in relation to each were outlined in **chapter 1**. These key findings will not be discussed again in detail here but the reader may wish to refer back to **chapter 1** for an overview. Instead, the purpose of this final chapter is to draw together conclusions on the overriding argument of the thesis by elaborating on the methodological problem of demonstrating how accommodation, rather than enforcement or self-regulation, is the normal policy response around which theoretically comparable jurisdictions such as Germany and the UK are converging. The chapter also goes on to outline the policy and social scientific relevance of these findings as well as presenting some key areas for further research.

10.2 Key conclusions: accommodating transnational corporate bribery

This thesis has demonstrated how the policy responses of the UK and Germany can be understood in terms of an admixture of enforcement (e.g. criminal prosecution, civil sanctioning) and non-enforcement mechanisms (e.g. self-regulatory practices). These mechanisms can be analysed in relation to the social relationship between law enforcement agencies/regulators and corporations operating overseas at risk of bribery and corruption and the process of negotiation between these parties. However, only some level of regulation can be achieved through these mechanisms, the proportion of which is unknown: there is little valid data on the impacts of control mechanisms which presents difficulties in determining 'what works'.

Thus, the overriding argument of the thesis is that despite significant differences (e.g. centralised or decentralised systems, existence of corporate criminal liability, legal cultures), both UK and German anti-corruption authorities (i) face similar difficulties in enforcement as they are limited by their national jurisdictional boundaries and face several procedural, evidential, legal, financial and structural obstacles but (ii) are converging towards similar prosecution policies (e.g. negotiation of civil settlements for corporations). However, in both cases, evidence suggests enforcement *and* emerging self-regulatory practices are limited in relation to the anti-corruption actors' *own estimation* of the problem and therefore (iii) the default position of the policy response is an accommodation of corporate bribery.

This latter argument that suggests convergence towards accommodation is the normal policy response of the UK and Germany requires further exploration. The key methodological question is how do we determine the (in)adequacy of enforcement and self-regulation responses relative to the bribery problem if no clear estimation of the extent and scope is available? 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 to international bodies such as the OECD as part of the requirements of their Convention and it is these international and intergovernmental organisations 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 (as experienced in all social sciences, see **chapter 9.2.1**). 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 uses the number of investigations and prosecutions as indicators of how 'active' a state is in enforcing the law (see **chapter 9.3**).

The key point, however, 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 inability to criminally prosecute 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, as demonstrated throughout this thesis, inhibit the policy response of the UK and Germany to address transnational bribery. Consequently, the default position of regulating transnational corporate bribery is accommodation (see **chapter 9.4**). However, whether such accommodation is unique to transnational bribery or may be the case in more (or all) forms of criminal activity requires further research. It may be that accommodation, even where the will to enforce the law is high, is a significant part of all control responses. In this case, it would be 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.

The policy response of jurisdictions can therefore be more appropriately informed through insights into *how* corporate bribery is organised across different jurisdictions rather than

into its real incidence and distribution. This methodological approach enables an understanding of the key processes, social relations and actors involved which can in turn inform practices of disruption and prevention. Such insights can be informed through a variety of data. For example, in-depth interviews with corporate individuals would further substantiate the participant observation approach of 'regulatees' in this thesis but inform an understanding of how and under what conditions bribes are solicited or offered. As **chapter 9.3** outlined, contextualised insights into self-regulatory practices within corporations and the collection of data by corporations themselves would provide valuable insights. However, gaining access to corporations is time-consuming and difficult, and may require various levels of vetting and non-disclosure agreements, placing restrictions on the researcher. For these reasons, this approach was not formally pursued in this research.

A qualitative approach was most suited to this research, as outlined in **chapter 3.3.1**. However, a mixed-method approach designed to illuminate data on the extent and impact of compliance and self-regulation within the private sector and on the strengths and vulnerabilities of enforcement authorities in different regulatory frameworks would be beneficial. This would inform understandings of the dynamics and relationships of various variables (e.g. impact of law on compliance within corporations) and of the nature of transnational bribery. For example, as **chapter 9.3** discussed, a wider variety of data such as digital datasets of court cases, judgements, data collected by corporations, media reportage of 'signal' cases, and so on, can inform understandings of *how* corporate bribery is carried out. Survey methods may be useful for determining patterns of corporate bribery but do not provide understandings of the complex processes involved nor into the vulnerabilities in different regulatory frameworks that facilitate corporate bribery.

10.3 Theory development

Current regulation theory is limited in the extent to which it can be applied to serious criminality organised at the transnational, multijurisdictional level. Theories of regulation tend to focus on the control of undesired behaviour within nation-states, rather than across nation-states. More specifically, regulation theory has tended to be based on empirical

findings within specific industrial sectors (e.g. pharmaceutical industry), on easily detectable and measureable forms of harm (e.g. health and safety crimes, environmental waste), or on areas already under formal regulation (e.g. financial services). Transnational corporate bribery, in contrast to these examples, is a problem of all corporations and business that operate internationally and is therefore not limited to any one jurisdiction, sector or regulator. Instead, a multi-agency/departmental approach to controlling corporate bribery is in existence in the UK and Germany but these traditional 'policing' authorities are adopting regulatory techniques and approaches traditionally associated with those of industry regulators.

Key themes promoted in earlier regulation theory remain fundamental to the approach analysed in this thesis. Ayres and Braithwaite (1992) reinforced the key role of 'negotiation' between regulators and regulatees. Gunningham and Grabosky (1998) outlined the use of a variety of state and non-state actors as 'quasi-regulators'. Both these principles emerged as significant in this research. The difficulty for current regulation theory, however, lies with the transnationality of the problem. Transnational corporate bribery is inherently a market phenomenon whereby specific undesired corrupt practices occur within otherwise legal commerce and business transactions. This research has demonstrated how understanding regulation in the context of these international markets and the interactions between regulators and regulatees within them, an admixture of enforcement and non-enforcement mechanisms can be applied that provides those agencies and authorities responsible for control with a dynamic and flexible set of mechanisms (i.e. not rigidly as with hierarchical sanctioning approaches). This research therefore adds to both regulation and criminological theory. In terms of regulation theory, the above demonstrates how complex, transnational bribery can be understood by focusing on the international markets within which these crimes occur but argues that regulatory concepts are useful for analysing the problems of controlling transnational corporate bribery. In terms of criminological thinking, policing approaches have traditionally been associated with prosecution but in this research, and as argued by Gill (2000), the approaches of anti-corruption authorities reinforce the role of 'policing as regulation' whereby the similarities between policing and regulation are more analytically significant than the differences.

10.4 Policy relevance and recommendations

This research can also make a contribution to an area of public policy that is evolving quickly at a time when there is major pressure on public finances resulting in significant austerity measures. High-cost, labour intensive criminal law enforcement is part of this debate and the focus of this research on alternative approaches to the control of transnational corporate bribery, and criminal behaviour more broadly, is timely given this macro-social context and concern with public funding. The issue of bribery and corruption in international markets is currently high on the agenda of intergovernmental and international organisations and has resulted in increased pressure at the national level to control the problem as has been demonstrated in this thesis.

Anti-corruption authorities would benefit from an understanding of the control problem in terms of the broader regulatory landscape that is emerging in relation to the variety of non-enforcement mechanisms that can be used in tandem with enforcement mechanisms. Findings from this comparative study of Germany and the UK suggest the policy response to transnational corporate bribery is characterised by various regulatory deficits. By more formally engaging with business, state agencies and actors could utilise the benefits and impacts of non-enforcement mechanisms (e.g. self-regulatory practices, non-state actors) in their ability to change behaviour within corporations to a greater extent than enforcement mechanisms. Triggering self-regulatory practices within business and businesses extends the reach of the state, reduces the procedural, evidential and financial burdens of prosecution, but most importantly can lead to improved compliance with the law. With this in mind, the following recommendations and issues could be explored by the state:

1) The potential for formal public-private partnerships incorporating mandatory and voluntary elements for corporations should be explored whereby participating corporations may receive prosecutorial incentives and/or market advantages.
2) The state should be proactive in ensuring the evaluation, monitoring and review mechanisms of corporations' compliance systems are sufficiently implemented and made mandatory for corporations operating internationally.

3) State anti-corruption agencies and departments should be granted formal mechanisms for the use of plea-bargaining, deferred prosecutions and civil settlements that should incorporate official sentencing guidelines for implementing these approaches.
4) Courts and judges should receive relevant education and training on the complexity of transnational corporate bribery and be incorporated into the processes of agreeing civil settlements and plea-bargains prior to charging and formal sentencing.
5) States should promote and seek innovative mechanisms for the implementation of more preventive, non-enforcement practices in which business is able to regulate its own behaviour through a variety of formal and informal self-regulatory practices.
6) States should ensure that the key processes of investigation and prosecution are not separated as the complex organisation of transnational bribery requires those with the expertise and knowledge to carry out both aspects.

The above proposals are, it is acknowledged, lacking in detail and require more development. States and non-state organisations (i.e. corporations, NGOs, charities, etc), however, must cooperate in their approach for the full benefits of a regulatory approach incorporating an admixture of (non-)enforcement mechanisms to function effectively. However, accommodation may be the unavoidable outcome as argued above.

10.5 Limitations of the research

While this research has made a number of significant findings and conclusions, it is important to critically evaluate these in relation to the limitations of the research process. **Chapter 3.11** made explicit a number of key methodological limitations that impact on the validity and reliability of the data collected. First, the findings here are not generalisable to populations and lack external validity in this sense. However, given the character of the comparative cases a *moderatum* generalisation to theory was possible i.e. it is reasonable to expect that the findings here are applicable to other jurisdictions and can be further tested within these. The sampling process was selective and formal interviews were limited in number for a comparative analysis but this reflected the difficulties of accessing elites (e.g.

prosecutors, defence lawyers) and accessing closed organisations such as the SFO. The available sample was also unavoidably small in the UK, because only the SFO deals with these cases at the national level. The research, however, was intended to illuminate rich and insightful data at the level of social relations which can most usefully be found through a qualitative research strategy that promotes an interpretative science that places meanings at the fore. Second, the carrying out of the research methods incorporated inevitable and inherent biases as interview questions and analysis were shaped by myself and may therefore inadvertently reflect my own conceptual and theoretical interpretations. A triangulation approach was adapted to counter this.

10.6 Further research

Posing questions about the extent, scope and prevalence of different kinds of regulation relative to the bribery problem as a whole cannot be sufficiently answered given difficulties in estimating and measuring the problem. However, some methodological approaches provide more suitable frameworks than others e.g. to understand the how and why of the organisation of transnational corporate bribery rather than extent and enable research questions to be developed that can be sufficiently answered. With this in mind, the following questions can be posed about corporate bribery and the assessment of the policy response of different jurisdictions in order to develop further theoretical, conceptual and empirical insights in the regulatory landscape of transnational corporate bribery. Such research would benefit from a comparative criminological approach, incorporating two or more jurisdictions, and would take into consideration the above methodological limitations:

(1) How and under what conditions does transnational bribery occur? Development of a process model of transnational corporate bribery and analysis of the opportunities and vulnerabilities that exist within these processes.

- By understanding the key, complex processes involved in bribes given overseas by corporations, understanding how finance is obtained, created and transferred for use in corrupt activities by legitimate corporations,

how intermediaries are recruited, how foreign officials are identified as potential bribe receivers, and so on, will aid the development of a process model. Such a model would be beneficial in illuminating under what conditions opportunities for transnational bribery arise and what vulnerabilities are evident during the process of bribing overseas – this will aid reduction and prevention strategies. Data could be collected through analyses of how those cases that are brought to prosecution/investigation are organised and incorporate varied data sources such as case files and court documents.

(2) What are the impacts of non-enforcement practices and mechanisms (e.g. (enforced) self-regulation) within the private sector and how do these inform an understanding of the nature of transnational bribery?

- Understanding the dynamics involved in the implementation of corporate compliance systems, the social relations and key social actors, the extent and impact of corporate compliance would provide insights into the problem of bribery (see **chapter 9** also). This would aid theoretical and conceptual development of the regulatory ideas promoted in this thesis. Quantitative and qualitative data collected by corporations on the circumstances and conditions within which bribes are offered to or by individuals within their organisation would be beneficial here. For example, understanding in which environments and situations bribes are offered, what types of individuals are offered bribes (e.g. executives, middle-managers, etc), how are bribes offered, amongst others, would aid opportunity reduction.

(3) In what ways do further jurisdictions (e.g. further EU/European, the US, non-Western liberal democracies, etc.) adopt admixtures of enforcement and non-enforcement mechanisms to regulate transnational corporate bribery and what vulnerabilities or strengths are evident?

- The regulatory model promoted in this thesis would benefit from further comparative analysis on a larger scale. By incorporating other jurisdictions such as New Zealand, Singapore, and Norway where estimations of the bribery problem are perceived to be lower and jurisdictions such as the US, Switzerland and Denmark where enforcement is considered to be 'active', insights can be gained into the strengths and weaknesses of other regulatory approaches. This could involve a mixed-method approach analysing state and non-state agencies to understand why some mechanisms may work in some conditions. Case analysis, court documents, interviews with investigators/prosecutors and country experts would provide useful data sources.

(4) In what ways is domestic bribery addressed, how does this differ from transnational bribery and what can be learned from comparing both?

- Increased emphasis has been placed on the policing of overseas bribery by corporations. However, domestic bribery has received minimal attention, particularly in developed countries such as the UK and Germany. Understanding why this is the case, as well as the nature of domestic bribery, will be the focus of this research and aid theory building in relation to the applicability of the regulatory approach demonstrated in this thesis to criminality within nation-states given the different dynamics that would be in place. Understanding the organisation of domestic bribery in comparison to transnational bribery through the analysis of 'known' cases would again supplement the development of theory and opportunity reduction.

(5) To what extent does the regulation of transnational corporate bribery compare with and cross-over to other crimes?

- The theoretical, conceptual and empirical interests developed in this thesis are broadly applicable to transnational criminality in general, and

not only corporate bribery. The application of these theoretical ideas to other forms of criminality (e.g. organised crime, other economic crimes, conventional crimes) and the relationships between the regulation of transnational corporate bribery and other criminological issues (e.g. fear of crime) will further test the regulatory approach outlined in this thesis.

The existence of transnational corporate bribery is known but its full extent is not. It is worthwhile, therefore, to shift the analytical focus away from 'how much' of a problem it is (relative to the capacity for enforcement approaches) to how known bribery is organised and how such knowledge and analysis can aid reduction and prevention. Rather than evaluating the outcomes of enforcement mechanisms, analysing the vulnerabilities inherent in corporate bribery can aid the reduction of opportunities to commit such acts. By questioning current regulation and criminological theory in relation to the control of transnational corporate bribery, the under-researched and under-theorised area of transnational corporate bribery can be placed on the criminological agenda, shifting the phenomenon from the margins where it may currently be located under the framework of white-collar and corporate crime. This thesis has made an initial step in developing criminological understandings of transnational corporate bribery and with further research, these understandings may be further illuminated.

11

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Appendices

Appendix 1

Below is the interview guide for the interview on 16 January 2011 with the representative of an IGO. Questions were placed into different categories and interviews usually ran from top to bottom although some interviews were more unstructured. This interview guide is presented as it covers in both the UK and Germany but also at the intergovernmental level.

Guide for interview 411 on 16 January 2011

[Name of IGO] Convention

Q. Recent data has indicated the prosecution rates of the [Name of IGO] signatories but to what extent can the number of prosecutions/civil resolutions indicate whether a country is rigorously implementing the Convention?

- e.g. Germany has more than UK but doesn't have Corporate Criminal Liability

Q. Would you say the methodological approach of the [Name of IGO]'s evaluations is sufficient to represent the actual state of anti-corruption enforcement in the countries? Can the opinions of a few experts and representatives be enough to understand what is actually occurring?

Q. To what extent can the [Name of IGO] ensure the independence of experts provided by member states?

Q. Are the signatories under obligation to report all figures to the [Name of IGO]?

Q. Which direction do you envisage the [Name of IGO] taking? Continuous evaluation or are any other strategies in mind?

Q. What is more important for the [Name of IGO], prevention or repression of corruption in the member countries?

Q. What would you say are the two or three major concerns of the [Name of IGO]?

Q. How does the work of the [Name of IGO] differ from international bodies such as [Name of other IGO]?

Q. Do you think we need so many international bodies and Conventions all looking to have ownership of the problem of corruption?

Prosecution Policy: Criminal vs. civil in command and control regulatory strategy

Q. Do you think civil sanctions are a viable resolution to corporate bribery or should criminal prosecution always be the first aim? To what extent should mitigating factors be taken into consideration? E.g. economic considerations

Q. Should leniency or the more likely use of civil sanctions be granted to companies which self-report?

Q. Where do you stand on the use of Deferred and Non-Prosecution Agreements as in the US? Are Confiscation or Civil Recovery Orders as in the UK sufficient to address corporate bribery?

Q. Can plea-bargains and amnesties be used to allow companies to start afresh following difficulties in changing their culture or is it too late for this now?

Q. Do you think debarment should be used in prosecuting corporate bribery?

Q. When should a case move from a criminal to a civil case and when should a case be dropped at all?

Resources

Q. Given resource restraints and the current economic downturn, how should cases be prioritised?

Q. Do you think prosecutorial discretion is important? E.g. in Germany there's the legality principle

Q. Should resources and costs shape the use of criminal and civil sanctions?

Q. Should agencies such as the SFO and State Prosecutors in Germany divert more funds to prevention rather than repression?

Regulatory strategy and approach

Q. Thinking of the regulatory strategy as a whole, can you see any scope for less state intervention and a move towards self-regulation within business? Could such models of self-regulation work?

Q. Could the use of incentives, both financial and non-financial, be used to encourage ethical behaviour?

Q. Companies often bring in lawyers or accountancy firms to investigate themselves internally, is this a step towards self-regulation?

Q. In some cases companies are expected to pay for the investigations, again does this suggest more self-regulation could be a viable alternative?

Q. Should lateral litigation and class actions be more prominent?

Q. Should corporate criminals and conventional criminals be treated the same, or do you think corporate bribers are unique and therefore require a unique approach?

UK

Q. What do you make of recent calls for the corporate offence in the new Bribery Act to be changed?

Q. Two key concerns are evident amongst business: what are adequate procedures? And what can count as hospitality?

Q. Do you think more specific guidelines are required as to what is acceptable?

Q. With the new Bribery Act and its wide-ranging jurisdiction due to come into force from April, and with prosecution rates increasing in the UK, do you think the UK can be considered legitimate in its approach to bribery, despite the recent BAE case?

Q. Do you think there needs to be more independence in the UK from political pressure? E.g. the role of the AG, although this changes under the BA 2010, there is still some influence there.

Q. If you could change anything about the UK AC system, what would you change?

Germany

Q. How do you view the Germany anti-corruption system? Is the decentralised model effective?

Q. Some Länder in Germany do not investigate and prosecute as enthusiastically as others, do you see this as a major problem?

Q. Do you think Germany requires corporate criminal liability?

Q. As corporations cannot be criminally prosecuted in Germany, does this render EU Directive 45 on debarment for German corporations void?

Q. In Germany companies can only be sanctioned under administrative law with a maximum fine of 1m Euro and the rest profit confiscation as with Siemens, is this sufficient?

Q. If you could change anything about the German AC system, what would you change?

Innospec

Q. Should settlements be shaped by economic considerations? E.g. ability to pay, tax and employment providers.

- Code for Crown Prosecutors allows this discretion but Convention forbids it.

Q. If not, should we be bankrupting companies or is it more important to take into consideration the public interest?

Q. This case caused much tension between the courts and SFO, at what stage should the judiciary become involved in such cases?

Enforcement

Q. Are you convinced there is sufficient political will in the UK and Germany to enforce anti-bribery laws?

Q. How can we improve the detection rate of corporate bribes?

Q. What do you think about the US initiative to offer whistle-blowers 20-30% of any confiscation following successful prosecution? Does this cause tensions between encouraging companies to improve internal compliance and whistle-blowing?

Corporate cultures

Q. Key to tackling corruption is the long-term aim of changing corporate cultures but how can this be most effectively implemented?

International Enforcement

Q. Do you see any possibility of an international anti-corruption agency or are peer/joint-investigations the only way forward?

Q. How should cases be allocated to jurisdictions? Who should take priority on cases or should separate cases be carried out?

Q. Is there need for more formal compensation guidelines? So, if a bribe has been paid in country X, how should agency A in country B decide what level of compensation should be paid?

Harmonisation

Q. Differences in approach in UK and Germany, use of criminal law, corporate criminal liability etc, but do you think harmonisation of laws and approaches is necessary?

- Or, is it more appropriate to respect cultures and what they consider effective?

Q. Is the harmonisation/unification of legal frameworks a necessary step within the EU anti-corruption framework?

Q. Is the harmonisation/unification of regulatory strategies within the EU necessary?

Appendix 2

Below is a screenshot taken from NVivo 8. The image shows some of the 'tree nodes' that were used during analysis for the UK. The image shows only a small proportion of the nodes but indicates to the reader the specific form this analysis took.