Measuring Compliance in the Age of Governance: How the Governance Turn has Impacted Compliance Measurement by the State

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Abstract

Since the 1980s the governance of business behavior in Western societies has been characterized by a move away from state-centered hierarchical forms of governance to networks of governance which include a wide variety of public and private actors. This chapter illustrates how this so-called governance turn has impacted compliance measurement by the state. The chapter begins by outlining the characteristics of the turn to governance and the questions this raises for the measurement of compliance by the state. The chapter is subsequently organized around two key issues: 1) What is it that we measure when we measure compliance? and 2) The reliability, magnitude and ownership of the data used. Drawing on examples of certification and the global anti-money laundering regime, each section discusses how the governance turn has made compliance measurement by regulatory authorities more challenging.

Keywords: Governance, Decentering of Regulation, Corporate Crime, Compliance, Anti-Money laundering, Certification

Introduction

Meet Mark. Mark has been working as an environmental inspector since 1980. Asked about the most significant changes in his work, he sighs:

> "When I started the job, I was always in the field, driving from facility to facility, performing physical inspections of installations and environmental permits, and talking to employees about the regulated entity's operations. Nowadays, I spend most of my days behind my computer, assessing the set-up of compliance management systems and checking procedures and recordkeeping by business. Rather than checking for compliance with my own eyes, I am increasingly relying on monitoring by regulated entities to assess whether they meet certain thresholds".[i]

This evolution in environmental inspection is just one illustration of the ways in which the regulation, monitoring and enforcement of business behavior have fundamentally changed over the past three decades. Other examples include businesses and industries that increasingly have adopted systems of self-regulation (Coglianese & Lazer 2003; Parker & Lehmann Nielsen 2009; Parker & Gilad 2011); financial institutions and insurance companies that hold leverage over firms by demanding compliance as a condition for a loan or insurance (Gunningham, Philipson & Grabosky 1999); the setting of transnational private standards by NGO's, firms or multi-stakeholder initiatives and the monitoring thereof by certification or accreditation bodies (Bartley 2003; 2007; Cashore, Auld & Renckens 2011); and civil society that, facilitated and reinforced by technological advancements and new media, increasingly plays a role in pressurizing business to reduce negative externalities and in exposing a wide range of unethical and criminal behaviors (Grabosky 2013).

What is clear from these examples is that the state is no longer the only sheriff in town (Abbott & Snidal 2009: 87). While the state has traditionally been assumed as key actor in the regulation and enforcement of business behavior, in the last three decades the responsibility and authority for the setting of norms and standards and the monitoring and enforcement of compliance have increasingly been delegated to a wide range of private actors, including businesses, civil society organizations such as NGOs, local

communities, labor and trade organizations, and the media. In the literature these developments have long been conceptualized as a so-called 'governance turn': a move away from hierarchical state-centered forms of control to networks of governance in which other actors than the state have increasingly become involved in safeguarding public interests (Black 2001; Shearing & Wood 2003; Lobel 2004; Scott 2004; Ostrom 2010).

A broad range of theories and concepts such as regulatory governance (Grabosky 1995), smart regulation (Gunningham et al. 1998), regulatory pluralism (Gunningham & Sinclair 1999), regulatory capitalism (Levi-Faur, 2005), decentered regulation (Black 2001), nodal governance (Johnston and Shearing 2003), polycentric governance (Ostrom 2010), new governance (Lobel 2004) and networked governance (Crawford 2005) has been used to highlight the idea that in the age of governance, regulation, monitoring and enforcement can have many different sources and that there is no longer one centralized actor responsible for overseeing and coordinating the entire process.

This also impacts on the measurement of compliance by the state. It implies that government no longer has a front-row seat in monitoring compliance and increasingly has to rely on information by a multitude of other parties to assess whether rules and regulations are being complied with and the extent to which the policy goals underlying public regulation are being achieved. In an excellent review of the methodological challenges social science researchers face when doing compliance research in an age of governance, Parker and Nielsen (2009) raise two key issues about measuring compliance. First, the fact that multiple parties are involved in regulating compliance may mean that they each have different understandings of what compliance means in practice (Parker & Nielsen 2009: 53). This goes hand in hand with the ways in which these different parties think about their own role and that of others in regulating compliance. The views on what compliance and non-compliance is – and what role regulators play – thus vary both among and within different government agencies and between government and non-government actors (Wood & Shearing 2013). Consequently, some may operationalize compliance in terms

of specific output measures such as the number of incidents or accidents, or whether emissions meet certain thresholds; others operationalize compliance as having certain processes, procedures and quality assurance programs in place to prevent non-compliance, while still others assess whether the policy goals underlying specific output measures are being achieved. Compliance, therefore, is not a fixed concept; its meaning depends on how different actors operationalize it in practice (Parker & Nielsen 2009: 48). Second, the sheer amount of data about compliance may make it more difficult to compare data sources, to aggregate the data and to evaluate and assess the reliability and validity of the data (Parker & Nielsen 2009: 48).

In this chapter we continue this discussion and illustrate how the governance turn has made compliance measurement by state actors more challenging. This will be illustrated based on two specific examples of the privatization of governance: the use of sustainability certifications or accreditations and the case of the global anti-money laundering regime (AML-regime). In doing so, we take a broad definition of compliance measurement. It entails the collection and analysis of data (variously defined) to assess whether rules and regulations are being complied with and whether public regulations have impact on corporate behaviors. Moreover, we limit the discussion to the challenges that public regulatory bodies and investigative authorities face while measuring compliance.

This chapter continues with a discussion of the turn to governance and by outlining its key characteristics. The two sections that follow each discuss one of the measurement issues described above: the operationalization of compliance and data challenges. This chapter does not provide an exhaustive overview of the challenges public actors face in measuring compliance in an age of governance, but merely presents a broad stroke overview which is illustrated with the cases of certification and the global anti money laundering regime. We conclude by discussing a few key developments in compliance measurement by the state and by considering what questions arise for future research.

From government to governance: The governance turn

Since the 1980s the term governance has been used to refer to the greater involvement of private actors in the safeguarding of public interests (Rhodes 1996; Lobel 2004). Until the 1980s however, government was assumed to be indispensable for the governance of business behavior. The postwar ideal of the welfare state had led to an expansion of legislation and regulations designed to organize economic life. These were often of the 'command-and-control' type: unilaterally imposed rules of conduct with detailed and precisely defined standards and sanctions for violation of those standards (Bardach & Kagan 1982; Gunningham 2009). At the same time, the number of independent regulatory bodies tasked with monitoring and enforcement of these rules rose exponentially (Bardach & Kagan 1982; Levi-Faur 2005). This central role of government in the governance of business behavior came to an end when governments were confronted with the global economic downturn following the oil crises of 1973 and 1982. Facing major budget deficits and rising unemployment numbers, governments across Western societies responded by structural cuts in resources for inspectorates, by limiting direct state intervention in markets and by outsourcing public services to the private sector (Bardach & Kagan 1982; Levi-Faur & Gilad 2004; Levi-Faur 2005; Gunningham 2009). Ultimately, the welfare state made way for neoliberal ideals of deregulation, privatization of public services, and liberalization of markets (Braithwaite 2005; 2008; Levi-Faur 2005). From then onwards, new modes of governance proliferated. These were characterized by greater private sector involvement on the one hand, and an increasingly plural, fragmented, and networked nature on the other (Grabosky 1995; Black 2001; Shearing & Wood 2003; Lobel 2004; Scott 2004).

The greater involvement of the private sector has manifested itself in, for example, business that has increasingly been involved in forms of self-regulation in a variety of ways – by voluntarily implementing

internal controls to manage and monitor compliance (Parker & Lehmann Nielsen 2009; Parker & Gilad 2011), by adopting transnational private standards, and by participating in certification and labelling schemes (Bartley 2003; 2007; Potoski & Prakash 2011; Cashore, Auld & Renckens 2011; Verbruggen 2014a). Moreover, within supply chains, new instruments of governance emerged (Mascini & van Erp 2014) through which companies increasingly hold each other to account to safeguard public interests such as industry codes of conduct, auditing and reporting obligations, commercial contracts and corporate social responsibility policies (Shamir 2010; 2011). Vandenbergh (2007) and Verbruggen (2014b) for example, illustrate how companies increasingly have used commercial contracts to implement and enforce social, environmental, and sustainability standards in supply chains. This responsibilization of business has coincided with a greater involvement of civil society such as consumers, interest groups, NGOs and the media. Bartley (2003; 2007), for example, has shown that NGO's have been the driving forces behind the setting of the aforementioned transnational standards and the establishment of certification and labelling schemes, albeit sometimes with the support of governments and corporations in multi-stakeholder initiatives. The above examples illustrate that the governance of business behavior has increasingly been dispersed over a wide variety of different actors, instruments, and initiatives, many of which were not originally involved with or even interested in regulation of (business) behavior (van Rooij, Stern & Fürst 2016). These are all illustrations of the ways in which regulation is no longer about a relationship between the regulator and the regulated but takes many shapes and forms without one actor truly overseeing the entire process (Black 2001).

Moreover, these various modes of governance not only collaborate with and complement each other, but might well compete with one another. Several of these new initiatives emerged relatively independently from within government, as well as without and beyond government, especially in markets where public regulation cannot keep pace with new developments (Börzel & Risse 2010). Hence the governance turn is not only a story about greater private sector involvement, but also about changing power dynamics in the

governance of business behavior. Rather than assuming that the state is ultimately responsible for the governance of business behavior, the governance turn points to the decentralization of governance from the state to networks wherein state actors, market and civil society share responsibilities for achieving policy goals (Lobel 2004: 344).

This implies that state actors also had to assume new roles. Besides setting norms and promoting compliance through monitoring and enforcement, state actors have become committed to orchestrating, coordinating, and facilitating governance within networks (Levi-Faur & Gilad 2004; Gulbrandsen, 2014). In many of these governance networks, government actors still play an 'anchoring' role, especially when it concerns the governance of security (Crawford 2005), but they are increasingly faced with their inability to (sufficiently) deliver on required capacity or expertise (Black 2001). Moreover, especially in liberalized and regulated markets where the state is taking on a more indirect role, there is a greater need for monitoring and oversight (Levi-Faur & Gilad 2004). This has led to a quest for new or smarter forms of governance that make use of and interact with private forms of social control (OECD 2018). These include – for example – forms of governance that rely on the outcomes of companies' internal compliance management systems and assess how corporations organize their own compliance rather than checking for compliance themselves. These have been variously referred to as meta-regulation (Parker 2002; Gilad 2010; Parker & Gilad 2011), enforced self-regulation (Ayres & Braithwaite 1992), systems-based regulation (Gunningham & Johnstone 1999), or management-based regulation (Coglianese & Lazer 2003; Coglianese & Nash 2001; 2006; Gunningham & Sinclair 2009). Furthermore, forms of risk-based regulation emerged which resonate with both the demand to minimize direct state intervention in markets and the responsibilization of the private sector. Risk-based regulation is based on the premise that the limited inspection capacity of the state is allocated in those industries and on those themes and topics that constitute the highest risks (Baldwin & Black 2008; 2016; Black 2010; Black & Baldwin 2010). Where risks

are considered to be lower, the responsibility for monitoring and oversight is delegated to the private sector.

In sum, contrary to the ideology of deregulation, the governance turn has actually led to substantially more rather than less regulation (Vogel 1996; Braithwaite 2005; 2008; Levi-Faur 2005; Schneiberg & Bartley 2008), a state of affairs that Levi-Faur (2005) has labelled 'regulatory capitalism'. Although the extent to which such a momentous shift from government to governance has actually occurred is debated in the literature (see for a discussion Mascini & van Erp 2014) and scholars point to a trend wherein government is retaking a central role in some areas of regulation (Kourula, Moon, Salles-Djelic & Wickert 2019), it is still undeniable that in today's society multiple public and private actors are involved in the governance of business behavior. Indeed, "In certain areas state intervention is being withdrawn, in other areas it is redrawn, and in still others it is being extended." (Crawford 2005: 471). In such a pluriform state of affairs, the question how to measure compliance becomes more challenging.

What's in a name? What is it that we measure when we measure compliance?

By their very nature, public authorities are interested in assessing the extent to which rules and regulations are being complied with and public policies have impact. Measuring compliance traditionally meant that public authorities only had to consider their own understanding of compliance. This understanding could be narrow (e.g., do companies meet the criteria for a safe and healthy work environment or do emissions not exceed a certain threshold?) or broad (e.g., how do companies give shape and meaning to being in compliance?), but it was limited to assessing the extent to which regulatory requirements are being complied with. In the age of governance however more and more standards and requirements for behavior are defined, set, and monitored by a wide variety of stakeholders. Public authorities therefore increasingly depend on information by private actors to establish the extent to which

regulatory requirements are being complied with. Yet, all these actors may differ significantly in how they operationalize, monitor and measure compliance. This is illustrated by the example of voluntary sustainability standards and the global anti-money laundering regime.

Voluntary sustainability standards

Fairtrade and organic food labelling were the first voluntary sustainability standards (VSS) that were created by private actors in the 1980s and ever since, they have become an important instrument of transnational private governance (Bartley 2003; 2007; Gulbrandsen 2010; Cashore, Auld & Renckens 2011). VSS can be defined as specific requirements that actors operating in global supply chains need to meet relating to a wide range of sustainability outcomes including respect for human rights, worker safety and health, environmental impact, community impact, and land use (UNFSS 2013: 3). These standards are often set by non-governmental organizations, firms, or multi-stakeholder initiatives and are implemented in supply chains through certification programs which include the monitoring and assessment of compliance with these standards by third parties (UNFSS 2013: 3; Scheltema 2016: 17). Although VSS are a mode of private regulation, these often do not operate independently from public regulation (Scheltema 2016). For example, some VSS assist in monitoring compliance with public rules and standards by certifying compliance with due diligence requirements in countries of origin (Scheltema 2016: 28).

Among the most well-known VSS are the Fairtrade label, the FSC-label for sustainable forestry, and the UTZ Certified label for the sustainable production of coffee, cocoa, tea, and hazelnuts.[ii] According to the United Nations' Forum on Sustainability Standards the number of sustainability standards has grown exponentially since the mid-1990s (UNFSS 2020: 8). The Ecolabel Index of the European Union now identifies over 450 different VSS programs across countries and products (UNFSS 2020: 8). These labels focus on more diverse and substantive issues than ever before (Auld 2014). These all aim to reduce the negative externalities of production and trade and to promote and improve sustainability in supply chains (UNFSS 2013: 3). Moreover, most standards focus on several dimensions of sustainability (fair trade, social impact, environmental impact) and cover a variety of product markets (coffee, tea, bananas, palm oil, etc.) (UNFSS 2020). There is thus considerable overlap in what different VSS-programs cover and therefore

business firms intending to apply for certification often have several options to choose from. At the same time however, there is considerable variation in how the certification process is organized, in the parameters used to assess compliance, in how compliance with standards is being assessed, and in how business firms are held accountable to their commitments (Marx 2013; Marx & Wauters 2013; Scheltema 2014; 2016). Moreover, many of these labels redefine their criteria for sustainability of the production and trade processes to allow for the labels to adapt to dynamically changing environments.

In a study comparing two of the world's largest VSS for sustainable forestry and farming, Scheltema (2014; 2016) showed that these differ significantly in the specificity and prescriptiveness of the norms, the indicators used to assess compliance with these norms, and the ways in which they monitor and enforce compliance. For example, while UTZ Certified uses specific commands for crop protection and transport, and makes use of a list of 50 indicators to assess compliance with these norms, FSC only uses general norms and does not have specific indicators to assess compliance (Scheltema 2016: 24). In other words, while both VSS certify sustainable production, this may mean very different things in practice. Marx and Wauters (2015: 13) argue that this may create confusion about what different certifications stand for and a lack of acceptance by important stakeholders. Moreover, they point to the fact that competition between different VSS-systems may lead to a race to the bottom, continuously lowering standards to increase market share (2015: 13). Public authorities that rely on third-party certification to account for compliance with regulatory requirements therefore cannot assume that different standards use similar definitions of compliance, let alone that these match public authorities' own definition of compliance.

The above makes clear that in the age of governance, there is no longer just one formal definition or understanding of compliance but compliance may mean many different things in practice. What compliance means depends on different industries, markets and businesses, and this ultimately is operationalized in practice. Compliance is therefore a concept that is highly time and situation specific. Measuring compliance by public regulatory bodies increasingly revolves around gaining insight into how

other actors such as business itself, certification bodies and third-party monitors understand compliance. This implies that public authorities need to assess how business and other private actors construct their own meaning of compliance, how this relates to compliance with regulatory requirements, and whether this suffices to achieve the underlying public goals.

Understanding how business constructs compliance, however, requires detailed knowledge of how business operates, of business and industry cultures, and about compliance behavior in practice. This actually implies more rather than less interaction with and oversight of regulated businesses. However, this may run counter to the need in many areas of regulation to allocate the limited inspection capacity as efficiently as possible. As discussed in the previous section, public authorities have increasingly been operating at a greater distance from business through forms of meta-regulation, enforced self-regulation or risk-based regulation. This likely makes it more challenging to assess how business shape the meaning of compliance in practice, to distinguish between compliance intentions and actual compliance behavior, and, consequently, to detect problematic conceptualizations of compliance in an early stage to prevent violations. The case of the global anti-money laundering regime illustrates this challenge.

The global anti-money laundering regime (AML-regime)

The global AML-regime is built on the responsibilization of private, non-state actors, such as notaries, lawyers, financial advisors, banks and other financial institutions to act as gatekeepers. These gatekeepers are obligated to prevent money laundering by monitoring (potential) clients and transactions and by signaling and reporting risks to the authorities. The AML-regime is based on a risk-based approach which prescribes that gatekeepers themselves make risk assessments of clients, designate clients to high and low risk categories, and have customer due diligence measures that are proportionate to the level of risk involved (Bergström 2018: 39). Most AML-requirements are formulated as “open” standards which implies that gatekeepers need to operationalize these in practice. Compliance with these standards is

monitored by public regulatory bodies, such as financial market authorities. In many countries, gatekeepers that fail to adequately fulfill their role can be subjected to criminal prosecution.

Over the past few years, several major European and global financial institutions were involved in and punished for facilitating money laundering. These not only highlighted the profound inability of these financial institutions to adequately prevent and reduce flows of illicit money but has also shown that detecting AML-breaches and preventing these is a challenging task for public regulatory authorities. Many cases had been ongoing for many years before the authorities had sufficient insight into how financial institutions were operating and realized that the ways in which these financial institutions had operationalized their AML-requirements in practice did not suffice to achieve the prevention of money laundering. A case in point is the ING case in the Netherlands.

On 4 September 2018, the Netherlands Public Prosecution Service (NPPS) published a €775 million settlement with the Dutch bank ING Group NV, the largest financial services provider in the Netherlands, for serious and structural violations of the Money Laundering and Counter-Terrorist Financing (Prevention) Act (AML/CTF). The settlement, consisting of a fine of 675 million euros and disgorgement of 100 million euros, is the largest ever in the Netherlands and until then the fifth largest ever agreed upon by a bank for facilitating money laundering. Together with the settlement, the NPPS published an extensive statement of facts on the criminal investigation against ING (NPPS, 2018). The report presents a shocking picture of the bank's internal operations. Not only were client investigations not carried out properly (resulting in files missing or being incomplete), the internal risk monitoring system - which was specifically intended to pick up risks of money laundering - turned out to be capped at only three risks per day for some categories of risks (NPPS 2018, 11). As a result, the bank had missed important signals of money laundering. According to the NPPS, these shortcomings were deeply rooted in the bank’s corporate culture in which cutbacks had come at the expense of compliance (NPPS 2018, 17). Although the Dutch Central Bank (which is responsible for monitoring AML-compliance by financial institutions) had reported

shortcomings already since 2005 and also acted against these on some occasions, it was unable to fully comprehend how the bank had organized its compliance process. It was not until criminal investigations were initiated that the full extent of the case became apparent.

The downside of the privatization of governance is that businesses are often perfectly capable of interpreting and deploying laws and regulations in a way that is favorable to them (McBarnett, 2001; Krawiec, 2003; Edelman, 2007). It is therefore essential for public authorities to have detailed knowledge of how business and markets operate and to understand how they shape compliance in practice. This knowledge would enable regulators to understand whether motivations for compliance are geared towards anticipating and defusing possible state intervention (so as to minimize risk to the business), or whether compliance is motivated by a normative commitment to comply with rules and regulations.

Data: Reliability, Magnitude, and Ownership

In the age of governance, public authorities increasingly rely on information collected and recorded by a wide variety of private parties to assess the extent to which public policies are being complied with. In this section, we will discuss three challenges public authorities face while being dependent on data from private actors: reliability, the vast amount of data involved, and ownership. We again illustrate these issues by the examples of Authorized Economic Operator certificates and the global anti-money laundering regime.

Reliability

Criminological research has long recognized that all sources of information about compliance have their strengths and weaknesses. For example, official statistics from regulatory bodies and investigative authorities are often incomplete and therefore merely mirror enforcement capacities and priorities, not

necessarily the impact thereof (Gibbs & Simpson 2009; Parker & Lehmann Nielsen 2009; Walburg 2015; Cliff & Wall-Parker 2017). Moreover, self-report data from regulated businesses about how they have organized their compliance process and the outcomes thereof are inherently biased. Businesses for example may overreport relatively minor offences and underreport more serious violations or present data in a way that is favorable to them (Parker & Lehmann Nielsen 2009: 61). Due to definitional or registration differences it may be difficult to compare data from various sources and it is not always possible to corroborate the information from one source with information from another.

These reliability problems also extend to information provided by third party monitors, such as certification or accreditation bodies as well as public authorities in other countries. In international supply chains, public authorities often have no other choice but to rely on third party monitors to check for compliance with regulatory requirements because regulated entities may not always be located in the same jurisdiction. Regulated businesses that aim to operate in certain markets are then required to adopt internationally recognized standards that are either certified by public authorities elsewhere or accredited by a designated certification or accreditation body. However, the reliability of these certifications remains contested. Short, Toffel and Hugill (2014) for example show that the ability to assess non-compliance with standards depends on the specific training of auditors. Yet, finding skilled auditors across jurisdictions has often been described as a challenging task for accreditation bodies (Scheltema 2016). Moreover, certification and accreditation bodies have an inherent conflict of interest since they are paid by those firms they need to audit (Short, Toffel & Hugill 2014). This may mean that they are not always independent. However, it is also important to note that public authorities differ in the quality of their assessments and may be subjected to influence from within business. This may affect the reliability of the information generated through these certifications, as seen in the case of Authorized Economic Operator Status certifications.

Authorized Economic Operator Status

To facilitate international trade, customs organizations across the world have adopted the so-called Authorized Economic Operator (AEO) Status. This is an internationally recognized quality mark that signals that businesses have taken certain safeguards to make their supply chain safe. Businesses that have an AEO-status enjoy several benefits, such as being subjected to fewer and less extensive border controls, priority treatment, and notifications in case a shipment is selected for physical controls.[iii] AEO-certificates are granted by Customs in the country of origin, but they involve a self-assessment by business itself as well as third-party certification of internal control management systems. Although the AEO-status has important consequences for border control, previous research has indicated that it is not necessarily a reliable indicator for secure and safe supply chain management. For example, in a study on waste shipments, Bisschop (2016) found that AEO certificates were sometimes awarded to companies or persons who would not meet the conditions in countries of origin. In a study on drug crime in the port of Rotterdam, Staring, Bisschop, Roks, Brein, and van de Bunt (2019) documented that the system is not watertight and that companies having an AEO-certification had been linked to drug smuggling.

Magnitude of the data involved

Apart from the reliability of the data, the vast amount of data generated by a wide range of different actors about compliance poses another challenge to public authorities. Compliance data not only includes inspection data, such as observations by inspectors or official measurements of incidents or pollution registration data, but also data generated from firms' internal compliance management systems, audit reports by third party monitors, complaints by citizens or consumers, and – in many complex and dynamic markets – data from various other public authorities. To assess the extent to which their public policies

are being complied with, public authorities therefore are dealing with an enormous amount of data that is difficult to sift through and cannot always be compared and verified easily.

Moreover, as we have seen, regulated firms might have a tendency to overreport on their regulatory obligations, especially in areas of regulation where firms are at risk of significant sanctions. For example, as part of their AML-obligations banks must monitor financial transactions and file so-called Suspicious Activities Reports (SAR's) when they suspect that their clients have been involved in irregular activity. These reports should be based on specific indicators of risk. The 4th AML-Directive in the European Union introduced an indicator cataloging countries that pose a high risk for money laundering. Due to a perceived lack of guidance about how to interpret this obligation, banks started reporting almost every transaction relating to these high-risk countries. Consequently, the Financial Intelligence Unit in the Netherlands was inundated with relatively unimportant reports. Between 2017 and 2018, the number of SAR's by banks increased from 22,789 to 68,217 (FIU 2019: 42). The FIU therefore had to communicate that it was unable to analyze these reports and that it had initiated conversations with the legislator aimed at deleting the country indicator from the AML-requirements (FIU 2019: 21).

The vast quantities of data collected, the lack of specificity of data and the failure to verify the data can prevent meaningful assessment of it and may ultimately undermine the public authority's capacity to account for the extent to which public policies are being achieved. This can have serious consequences for the authorities involved, as is illustrated by the FinCen files-scandal.

The FinCEN files

On 20 September 2020, the International Consortium of Investigative Journalists (ICIJ) together with BuzzFeed News and various other news media published the so-called FinCEN Files-investigation.[iv] This investigation revolves around more than 2,600 leaked files from the United States Treasury Department's intelligence unit Financial Crimes Enforcement Network (known as FinCEN). These files include more than

2,100 Suspicious Activities Reports by banks across the globe. The implication raised in the FinCEN files is that the world's largest banks, some already on probation for earlier violations, moved large flows of illicit money through the global financial system between 1999 and 2017. Apart from scrutinizing banks, criticism was also directed at supervisory bodies and government authorities across the globe. Despite having the information at their disposal (through these Suspicious Activities Reports), these authorities were unable to detect and act against these violations. In response to the revelations, the UK Parliament's Treasury Committee for example has launched a formal inquiry into the role of government regulators and law enforcement in the prevention of money laundering: "It's important that the relevant bodies are held to account and scrutinised effectively to ensure that the UK is a clean place to do business", wrote the Chairman in a statement.[v] In addition authorities in several countries have announced major reforms in their AML policies.

Ownership

Finally, the decentering and privatization of governance also imply that data about compliance is owned by private actors and business itself. Through forms of meta-regulation, risk-based regulation or enforced self-regulation, regulatory authorities and investigative bodies in many areas of regulation, depend on the cooperation and information of regulated businesses to gain sufficient insight into how businesses operate, how they have organized their compliance processes, how their internal controls function and the results thereof. This also implies that regulated businesses – at least to some extent – have discretion as to when, how, and the extent to which they inform public authorities about their compliance behavior. For example, firms can be selective in what they report about, they can frame issues in such a way that deflects attention away from more structural or serious compliance issues, and firms operating in transnational markets can opt to report violations in jurisdictions with the most lenient enforcement

regime. In this way, the ownership of compliance data impacts upon what it is that public authorities are able to register as compliance or non-compliance; this reinforces the already existing information asymmetry between public authorities and businesses.

Furthermore, this can have consequences for the enforcement of non-compliance. Firms of course have first-hand knowledge about the nature, extent, and modus operandi of the violations that they (and sometimes also business partners in the supply chain) have been involved in. In an era of governance, with limited inspection capacity and regulatory agencies operating at a greater distance of regulated entities, public authorities may not even become aware of certain violations without this first-hand knowledge. Government authorities therefore have tried to incentivize firms to self-disclose violations voluntarily before these are discovered by other means by offering lenient enforcement, deferred prosecution agreements or settlements rather than guilty pleas in cases of misconduct. Voluntary self-disclosure policies have arisen in several policy domains, such as environmental enforcement (Pfaff & Sanchirico 2000; Short & Toffel 2008; 2010), transnational corporate bribery (Lord 2013; Lord & Levi 2018; Søreide & Makinwa 2020), and money laundering (Bergström 2018; Warin et al., 2018). Take, for example, money laundering. Money laundering by definition is difficult to uncover for the authorities because it is often concealed through normal business practices. AML-policies in many countries are therefore built on a system of self-reporting by gatekeepers like financial institutions. In turn, most of these cases are dealt with through deferred prosecution agreements and corporate settlements (van Wingerde & Merz, 2021). Yet, having something to offer to the authorities (namely information that can help solve the case more efficiently) also means that businesses have something to negotiate. These negotiations however often take place behind closed doors (Ulhmann 2013; Garrett 2014; Steinzor 2014) making effective public scrutiny of enforcement practices more difficult. As said before, this may ultimately undermine the public authority's capacity to account for its policies.

Concluding thoughts

In increasingly pluriform relations, the questions of whether and how rules and regulations are being complied with and the extent to which public policies have impact are not only more important, but also more complex, to answer. This chapter has discussed two challenges that public authorities face while measuring compliance in an age that is characterized by greater private sector involvement in the governance of business behavior on the one hand and fragmentation of the responsibility for governance on the other. First, the turn to governance implies that regulatory authorities must rely on information from a wide variety of public and private actors which may all have different understandings of what compliance means. Second, this also means that data about compliance is more difficult to verify and this ultimately may also impact upon the extent to which public authorities are able to account for the achievement of their policy goals. Measuring compliance by public authorities therefore increasingly revolves around having to understand how all these different actors conceptualize and operationalize compliance and around critically assessing the vast quantities of data that private actors report about compliance.

Of course, these issues are not new. Public authorities responsible for measuring compliance in complex, dynamic and often international markets are continuously innovating and have launched initiatives to relate to these challenges. Take for example the emergence of regulatory sandboxes in financial regulation. Regulatory sandboxes are testing grounds for new developments and innovations for financial technology that fall outside the scope of existing regulations.[vi] In such a sandbox, firms can experiment with new financial technologies and products under regulatory supervision. The aim of regulatory sandboxes is to operationalize compliance with strict financial regulations in such a way that it can keep pace with innovation while also safeguarding public interests, such as consumer protection. These sandboxes thus allow for a two-way dialogue between public authorities and businesses about how to

conceptualize and operationalize compliance in practice. In this way, these sandboxes account for the fact that what it means to comply is constantly evolving in many industries due to emerging technologies, innovation, and economic or political developments.

Moreover, driven by international bodies such as the OECD, public authorities across regulatory domains and jurisdictions have sought for ways to collect better data on compliance and for making this data available for other agencies (OECD 2018). An example is the so-called *Inspectionview* which aims to improve cooperation and GDPR proof data-sharing among inspectorates in the Netherlands.[vii] It includes data from 1,5 million inspections from more than 50 regulatory bodies and investigative authorities. Originally intended to minimize the regulatory burden on business by coordinating inspections, it also allows for more effective oversight since regulators can use and build on the results of previous inspections by other public authorities. This provides better insight into how businesses operate more in general and allows for a better understanding of how businesses shape compliance in practice. Moreover, *Inspectionview* allows for better data analysis of compliance on a wide range of regulatory problems. The success of such initiatives however depends on the quality of the data. A recent review of *Inspectionview* by the Netherlands Court of Audit (2021) concluded that the data in the part of *Inspectionview* that records the results of environmental inspections and enforcement contained a lot of errors in the records and inconstancies between the different underlying databases. These errors hampered the enforcement of environmental violations in businesses working with the most hazardous materials.

Much remains to be studied, however, like the role of new and emerging technologies such as artificial intelligence, big data analysis, the use of algorithms, Blockchain and other types of distributed ledger technology. These technologies can aid (the automation of) compliance measurement. Such technologies however require specific expertise within regulatory bodies, expertise that is often difficult to find, not least because government often competes with business for qualified personnel. Finally, this also includes questions about how changes in modes of governance impact on the transparency and accountability of

public authorities. All in all, even though we are living in an age of governance, it is often still the government that is ultimately held accountable for ensuring compliance and safeguarding public interests.

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[i] The name Marc is fictitious. The example and quote are taken from an interview the first author conducted with an environmental inspector on 20 November 2009 in a project focusing on general deterrence and environmental compliance in the Dutch waste industry.

[ii] In 2018, UTZ Certified merged with the Rainforest Alliance, creating one of the world's largest programs for sustainable farming and forestry, About Us | Rainforest Alliance (rainforest-alliance.org)

[iii] https://ec.europa.eu/taxation_customs/general-information-customs/customs-security/authorised-economic-operator-aeo/authorised-economic-operator-aeo_en#heading_2

[iv] https://www.icij.org/investigations/fincen-files/

[v] https://committees.parliament.uk/committee/158/treasury-committee/news/120234/committee-launches-new-economic-crime-inquiry/

[vi] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU(2020)652752_EN.pdf

[vii] https://www.toezine.nl/artikel/347/interessante-inspecties-inzien-dat-kan/