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Regulating corruption in international markets: Why governments introduce laws they fail to enforce

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REGULATING CORRUPTION IN INTERNATIONAL MARKETS: WHY GOVERNMENTS INTRODUCE LAWS THEY FAIL TO ENFORCE

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1. Introduction

Corruption allows firms to earn profits unfairly. In exchange for bribes and inducements that occupy a gray zone of uncertain legality, government officials and politicians offer firms better deals, terms, or benefits than they would otherwise obtain. These unfair advantages are sought by companies for a wide variety of reasons --to win contracts; to obtain production licenses, import permits, or permits to acquire a competitor; to secure subsidies, tax rates (or tax holidays), or tolerance for cartel collaboration; or to achieve any number of other corporate goals. Through corruption, firms can effectively buy impunity for an equally wide range of harmful actions, from producing poor-quality or even dangerous products and services to polluting the environment, violating human rights violations, and conducting illegal trade.[2]

For the firms involved, bribery and bribery-resembling practices (such as expensive gifts and private sector career opportunities for officials) reduce the importance of being productive. Corrupt firms can secure profits without providing a competitive combination of price and quality on what they sell; therefore, market mechanisms fail to produce a marketplace that rewards efficiency and innovation.[3]

For societies, corruption leads to waste, lower value for money, and (especially when politicians are involved) government budgets that are skewed toward spending in sectors where corrupt benefits are secured more easily, such as defense, infrastructure, and extractives (OECD, 2015). The victims, of course, are the citizens, who receive fewer state-financed benefits, suffer from poorer public services, see the gap between rich and poor grow wider, and bear the brunt of slower development. Some countries suffer severely from corruption, whereas others seem less affected by it, but none is immune to the problem.[4]

This chapter aims at explaining why the many initiatives against bribery in international markets seem dysfunctional. It begins in Sections 2 and 3 with a brief overview of current regulations and indicators of their impact. Sections 4-6 address the reasons for inefficient regulations, classified as (i) "technical reasons" including inherent challenges associated with the crime and barriers for efficient enforcement; (ii) "institutional reasons" meaning challenges associated with the organization of various enforcement functions, and (iii) "political reasons" comprising the backdrop for political priorities as well as the relevance of government's coordination of anticorruption strategies internationally.

Based on the given review of reasons for inadequate enforcement, Section 7 describes what policy tracks appear particularly meaningful for governments and other players who want to see markets better protected against corruption. The section emphasizes the importance of designing enforcement mechanisms with a view to affect the players' choices, i.e. their incentives. However, most governments can boost the anticorruption impact of their various enforcement strategies by improving the way different enforcement authorities work together. With an emphasis on market mechanisms and financial stability, reformers may achieve more in terms of controlling corruption, than what have so far been achieved through initiatives targeted specifically at bribery. The section discusses the role of different players in driving reforms – from international governmental organizations to local level civil society – and finds that players in the private sector, who are the subjects for the regulation, might be key supporters of reforms for more efficient enforcement.

[2] See Rose-Ackerman and Palifka (2016); Fleming and Zyglidopoulos (2009); and Campos and Pradhan (2007) for discussions and examples of the mechanisms and risks of corruption. Søreide (2014) summarizes corruption's effect in markets.

[3] For an analysis of the way in which corruptions gives firms the opportunity to skimp on quality and raise prices, see Auriol (2006); Celentani and Ganuza (2002); Bjorvatn and Søreide (2013); and Iossa and Martimort (2016), among others.

[4] See OECD (2015); Svensson (2005); Paldam (2002); Treisman (2007); and Søreide (2016, chap. 2).

2. Government regulations in place to prevent and detect corruption

All modern societies have regulations and institutions that are intended to promote integrity in markets. (In this chapter, "regulation" refers primarily to government's oversight and interference in markets in developed countries where government institutions function fairly well.)[5] Countries have competition law, company law, ownership regulation, and company taxation. Market activities are governed by sales law, contract law, tort law, financial regulation, and, to various extents, arbitration rules. When it comes to markets for government contracts and assets, there are rules regulating public procurement, concessions, and privatization. Government spending is subject not only to constitutional checks and balances such as parliamentary controls but also to public scrutiny via information laws and access to government audits.

The many types of regulations—some of them new, others as old as markets themselves—create real barriers to corporate misconduct. They also constitute key components of a society's integrity system, which is essential for citizens to maintain trust in their governments. While government strategies against corruption must be considered in light of this broader specter of initiatives, it is also necessary to consider governments' ability to regulate and curb the particular problem of corruption.

Explicit regulation of corruption in markets is a relatively new phenomenon. Although bribery has long been illegal, it has persisted thanks to loopholes and gray areas in antibribery laws and uneven enforcement of those laws. Moreover, until recently, politicians hesitated to address this problem, and they found it unwise or undiplomatic to confront firms and leaders of government institutions about suspected corruption, especially in international contexts.

It was not until the 1990s that development banks and civil society began to articulate the threat that corruption poses to development. These players started a crusade against corruption that encouraged voters to demand action and forced governments across the globe to start recognizing the problem. A variety of actors—notably, the US government, the OECD, the World Bank, the European Union, and the United Nations—launched a diplomatic process to push for tighter legislation. Their efforts were successful: corruption was criminalized in an impressive array of conventions, including not only the well-known United Nations Convention against Corruption (UNCAC), which came into force in 2005, but also regional conventions, such as the African Union Convention, the Inter-American Convention, the Council of Europe Criminal Law Convention, and the OECD Anti-Bribery Convention. Together, these conventions helped to harmonize international laws against corruption and provided what at that time appeared to be a solid legal platform for acting against the problem. Less than a decade after the process started in the late 1990s, almost all countries had embraced the conventions and introduced national legislation criminalizing corruption.[6]

In most jurisdictions, the reforms established or reinforced the principle of corporate as well as individual criminal liability. In addition, a sizable majority of the largest export economies criminalized foreign bribery, which meant that prosecutors could pursue firms for bribes paid in a foreign market, regardless of whether the authorities in that foreign country were inclined to prosecute the crime. This

[5] As Estache and Wren-Lewis (2009) point out, in countries with limited regulatory capacity, limited political accountability, limited regulatory commitment, and limited fiscal efficiency, different concepts of regulation apply, and one cannot apply developed country forms of regulation, and expect them to secure well-functioning markets and economic development.
Auriol, Hjelmeng and Søreide (2017) explain the problem with limited mandates for institutions that could otherwise be more important in protecting markets against corruption.

[6] Pieth and Heimann (2017) describe the last decades' evolution toward current anticorruption regimes. For details about the conventions, see the OECD website, https://www.oecd.org/cleangovbiz/internationalconventions.htm.

groundbreaking step meant foreign firms could no longer defend their corrupt benefits as the result of adapting to a foreign business culture.[7]

3. The impact of anticorruption regulations

Since the legal reforms against corruption were introduced, a significant number of criminal cases have been launched against both individuals and firms, including multinational corporations. According to the OECD (2014), 164 criminal cases were prosecuted against corporations in 1999–2014 for foreign bribery, and most of those cases involved settlements with the prosecuting authorities in the United States.[8] For instance, the engineering company Siemens AG, headquartered in Germany, was found guilty of paying huge bribes to secure market benefits. Siemens paid a US$20 million bribe to construct power plants in Israel, a US$40 million bribe to the president of Argentina for a billion-dollar contract to produce safety cards, and a US$16 million bribe to build railway lines in Venezuela.[9] Other cases of corruption on a grand scale include the weapons producer BAE; telecom suppliers Vimpelcom and Alcatel-Lucent; oil suppliers Halliburton, Panalpina, and Baker Hughes; construction companies Technip and Saipem (Snamprogetti); and banks that condoned and laundered the proceeds of corruption, including HSBC, Barclays, and Deutsche Bank.[10] The fines imposed on the corporations amount to at least several hundred million US dollars. As part of the law enforcement processes, the firms also have been subjected to meticulous scrutiny, have had to introduce much stricter reporting and compliance systems, change their bonus systems, replace leaders and board members, and accept external monitoring of their operations. In addition, the corporations have had to pay back what the law enforcers have determined to be the apparent proceeds of the crime, some firms have faced debarment from public procurement, and most large corporations have been sued by subcontractors that have suffered losses because their projects could not continue as they had anticipated.

One might assume that such consequences would deter other players from committing similar misdeeds. And for at least some business leaders, the substantial media coverage of the investigations and law enforcement processes may serve as a wakeup call. Yet, despite these high-profile convictions, there are also facts suggesting that law enforcement's record of combatting corruption is largely a record of failure.

The OECD country evaluation reports on how governments enforce their antibribery legislation reveal severe challenges all along the law enforcement value chain, including in the most developed countries. While forty-six countries have signed and implemented the OECD convention on foreign bribery, many of their governments hesitate to let the rules make a difference.[11] For example, the legal details of the convention often become more complicated when translated into legislation at the national level, making

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[7] It still happens that law enforcers consider foreign business culture a mitigating circumstance, such as in the Norwegian Yara case (Oslo District Court 7 July 2015 14-022670MED-OTIR/05), although the upsurge of an anticorruption consultancy industry for the private sector suggests norms have changed because of stricter legislation. For details about corporate criminal liability in cases of corruption, see Pieth et al. (2013); and Pieth and Ivory (2011).

[8] "A settlement is the act of adjusting or determining the dealings or disputes between persons without pursuing the matter through a trial." See *The Free Dictionary*, http://legal-dictionary.thefreedictionary.com/settlement.

[9] The example is part of a review of cases presented by Laura French in "A History of Bribery," *World Finance: The Voice of the Market*, March 6, 2015: http://www.worldfinance.com/comment/a-history-of-bribery

[10] For official information about these cases, see press releases and documents on the websites of the US Department of Justice and the Securities and Exchange Commission: https://www.justice.gov/criminal-fraud/related-enforcement-actions: https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

[11] For the presentation of challenges in Søreide (2016, chapter 3) I conducted a systematic review of official evaluation reports on governments' performance of anticorruption legislation in 2014–15. The challenges mentioned here are detailed in that chapter with citations to the specific country reports - mostly reports by the OECD Working Group on Bribery, see the OECD website for details, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase3countrymonitoringoftheoecdanti-briberyconvention.htm.

the law more difficult to enforce. Many countries have stricter demands for evidence in foreign bribery cases than in purely domestic cases and often insist on additional conditions that must be met for evidence to be admissible.[12] Words and phrases found in international conventions, such as *improper advantage*, *undue influence*, *third party*, and *civil servant*/*public official*—acquire different meanings in different jurisdictions, despite OECD and UN efforts to harmonize enforcement. This problem not only hinders predictable enforcement across borders; if terms are imprecisely defined, wealthy offenders find it easier to appeal verdicts against them, and can afford to drag out the appeals process for years in the court system, until the prosecutors have to let them off because the case has lasted beyond the jurisdiction's statute of limitations.[13]

3.1 Quantifying the impact of regulation and the extent of the problem

For several reasons, the impact of regulation on the extent of bribery is difficult to quantify. Facts about enforcement cases provide little information about the regulatory impact on the problem. Enforcement statistics will often include the number of initiated investigations, the percentage of successful enforcement actions, and the amount of collected monetary penalties. These figures tell us little about the targeted problem because they will rarely reflect the problem's extent, its forms, or fluctuations. Without such facts, it is difficult to draw conclusions about an enforcement agency's ability to detect and prosecute misconduct.[14] The extent of corruption is normally unobservable. Despite academics as well as journalists' inclination to cite Transparency International's Corruption Perception Index as a reliable corruption indicator, it is impossible to give exact information about the magnitude of the problem, and therefore, we cannot compare the situation before and after the legal reforms.

Fairly reliable empirical information about the extent of corruption in countries come from a combination of second-best data sources, and these sources generally confirm bribery continues to distort international markets, despite the mentioned evolution towards a more explicit anticorruption legislation. For example, a survey of nearly 8000 European-based firms, conducted for the European Commission in 2013, revealed that 75% of company respondents think corruption is widespread in their country. Four out of ten consider corruption a constraint on their business operations, while more than three out of ten companies that have participated in a public tender report corruption has prevented them from winning. In addition, citing the survey report, "eight out of ten companies agree that corruption comes from links between business and politics being too close, 73% agree that favoritism and corruption hampers business competition, and 69% agree that bribery and the use of connections are often the easiest way to obtain certain public services" (Flash Eurobarometer 2014:5).

According to the largest business climate survey internationally, the World Bank Enterprise Survey of 130.000 firms in 135 countries, there is substantial variation across regions in how bribery distorts markets. Globally, 35% of firms consider corruption a "major business constraint." In the Middle East and North Africa, this figure is nearly 55% while merely 11% in High Income OECD countries. The

[12] These details may relate to the geographical presence of the briber at the time of the bribery, dual criminality requirements, or a very direct connection with the bribe recipient, and thus the rules fail to cover bribery through intermediaries. In some countries, expenses incurred for paying bribes abroad are still registered in ways that make them de facto tax deductible.

[13] In some countries, the statute of limitations is shorter than the time it takes to bring a corruption case to the supreme court, and thus those found guilty in a lower court can appeal their way out of prison sentences and large fines.

[14] Velikonja (2016) addresses the challenge of providing meaningful figures on enforcement practices, and reviews the US Securities and Exchange Commission's (SEC) enforcement statistics. She points at enforcement agencies' incentives to "massage their numbers" for reputational and budget reasons. While SEC proclaims intensified enforcement and success in the 2002-2014 period, Velikonja (2016) explains the agency's performance has kept a steady level in this period.

survey, which can be broken down to the country level, describes significant variation in the forms bribery – including bribery for contracts, taxation, utility provision, construction permits and more.

The largest international survey of citizens' experience with corruption, Transparency International's Corruption Barometer – involving some 114.000 respondents in 107 countries, confirms bribery is a serious problem. According to that survey, more than one in four individuals report having paid a bribe in the last 12 months. The respondents consider the judiciary and the police to be the most exposed government functions, while they see political parties as the most corrupt institutions. A majority of respondents considers their own government ineffective in combatting the problem, and in most countries citizens report there is now more corruption than it was before. Several international surveys reveal citizens' trust in their governments' ability to control corruption is low and in many places declining.[15]

While it is difficult to say whether these figures represent knowledge of the problem or some general disappointment with political leaders and government institutions, the vast share of citizens claiming corruption is a serious matter underscores the severity of the problem, and calls for evaluation and debate about government strategies to control the problem.

3.2 Regulatory progress and political ambition

The indicators of progress on the anticorruption agenda may be harder to observe but they do exist. For example, PriceWaterhouseCoopers' Economic Crime Survey 2016 reports a decrease (although small) in their around 6000 respondents' experiences with corruption and bribery, from 27% in 2014 to 23% in 2016. Control Risk, an international consultancy that has surveyed anticorruption attitudes globally for more than a decade, finds evidence of slow progress in the private sector: More firms invest in robust compliance systems and consider strategies against corruption a business advantage. There is also an increasing tendency among firms to react with legal means when they are the victims of other firms' bribery (Control Risk 2016).

In a study of 41 countries where governments have introduced national anticorruption strategies --a study commissioned by Norton Rose Fulbright (a law firm), the authors claim there has been progress over the last ten years in 19 of the countries surveyed. The progress is particularly notable in Georgia, China, the Philippines, Lithuania, Egypt and Croatia. Also in war-torn countries like Colombia, Mozambique, and the Central African Republic, the governments seem to be on the right track. Among factors driving change, the authors point at clear signals from the top leadership, "a few hard rules", while there is latitude for officials to make choices in line with the anticorruption agenda. The authors claim these factors are far more important than vague directions of change and anticorruption "toolboxes" – which are also commonly observed (Eastwood et al. 2017).

In addition to the introduction of national strategies and attempts to estimate progress, we see forms of anticorruption action that would not take place some 15 or 20 years ago. Business organizations advise their members on how to establish and operate robust compliance systems to stand against demands for bribes.[16] They also help their members coordinate collective action against governments, so that they can jointly demand that governments provide fair and predictable framework conditions for their market activities.[17] Increasingly, financial service providers reject customers if it appears that they intend to pay

[15] See The Edelman Trust Barometer, http://www.edelman.com/insights/intellectual-property/2016-edelman-trust-barometer/; and the OECD website on why trust matters for governance, http://www.oecd.org/gov/trust-in-government.htm

[16] For B20 initiatives, see https://www.b20germany.org/priorities/responsible-business-conduct-anti-corruption/rbcac-recommendations/

[17] One example is the Maritime Anti-Corruption Network in the shipping sector: http://www.maritime-acn.org/ .

bribes or launder the proceeds of crime; sometimes, the financial service providers report such cases to law enforcement institutions. More than ever - civil society organizations challenge governments and corporations on their anticorruption agendas, including by asking them what they do to tackle this problem in the international arena. Eventually, the leaders of the G20 in 2015 endorsed a set of seven principles stating the detrimental consequences of corruption, and agreed to work against the problem.[18]

In sum, despite general as well as tailor-made integrity mechanisms in place to protect markets against corruption, there are some reasons to suspect severe weaknesses in the system, which means, firms can continue to secure benefits through bribery, with little risk of facing law enforcement consequences. We do see indicators of progress, but that progress varies from slow to extremely slow, and many governments fail completely in their international anticorruption commitments --regardless of their *de jure* reforms. There is every reason to ask why governments introduce laws they fail to enforce.

Weak enforcement will not necessarily imply governments themselves are corrupt and intentionally allow bribery to proceed, although there are corruption cases, surveys and documentaries that raise such concerns too.[19] On a number of areas where regulation is necessary, political ambitions exceed what is practically achievable. The actual regulation of business practice may well be a result of a situation where more or less legitimate forces draw government decisions in different directions while there are constraints on resources. The strengthened legal platform for acting against corruption, described in the previous section, nevertheless is a leap forward towards better regulation if it has facilitated the move from ambition to action.

In what follows, I will assume countries' anticorruption legislation reflects political ambition - if not yet the intended de facto regulation, and describe the reasons why this regulation is so difficult to enforce. The concerns take different forms: Corruption is a collusive form of crime and has some characteristics that makes it difficult to regulate by help of monitoring and sanctions upon misconduct. Criminal law implies strict criteria for enforcement and the law sometimes is difficult to interpret. Institutional hurdles on the side of regulators prevent efficient law enforcement. For various reasons, politicians interfere with the enforcement cases and strategies. And eventually, one government's incentives to enforce may depend on other governments' efforts, which means, the enforcement situation must also considered in light of governments' ability to coordinate their efforts. The next sections address these different concerns.

4. Technical impediments for efficient criminal law regulation

By "technical impediments" I refer to enforcement obstacles that are either associated with the nature of the crime or the structure of the enforcement system. Even the most reform-friendly governments have difficulties with these impediments, which means efficient enforcement strategies need to be adapted to their existence.

4.1 Features of the crime complicate enforcement

Normally, government regulation is designed to reduce the benefits or increase the costs associated with a harmful activity. For many forms of undesired acts, regulation does its job, imposing efficient control.

The United Nations Global Compact Initiative promotes various collective action initiatives to induce many market players to start operating honestly at the same time, as an effort to reduce their worry of losing business because competitors' profit from bribery: https://www.unglobalcompact.org/take-action/action/anti-corruption-collective-action

[18] The G20 principles are listed in the Appendix.

[19] Globally, there are numerous examples of political involvement in serious and grand corruption cases and practices – including in the wealthiest OECD member countries, see for example Shaxson (2007); Feinstein (2011); and Chayes (2015) --as well as numerous documentaries, for example *All Governments Lie* (2016) https://allgovernmentslie.com/

When it comes to corruption, however, the picture is not so straightforward. It is not obvious what acts should prompt a regulatory action and what form that action should take. Corruption involves collusion, which means that those who are participating in the corrupt act have a secret agreement about how to deviate from formal rules and how to share the benefits of doing so. The colluders have to keep their deal hidden from regulators who would otherwise react against them. Increasing the risk of detection and punishment on either side (the briber on the one side, and the official being bribed on the other side) of the corrupt deal might be expected to reduce the problem. However, the corrupt deal determines the gains from the crime, which means that for those who remain corrupt, intensified control and a higher risk of punishment improve their bargaining position; a stricter enforcement regime will increase the stakes of the deal. Tighter control of government officials will increase the size of the bribes demanded by those officials who remain corrupt, and tighter control of firms will induce corrupt firms to demand more favorable terms in exchange for the bribes they still pay (Rose-Ackerman 1978).

Imposing personal liability on executives, and, when corruption is proved to have occurred, barring them from acting as leaders in registered corporations and public institutions, imposing fines on them as individuals, or jailing them will, of course, influence managers' incentives to take part in corruption. For the owners, the management group at large, and the boards of corporations, however, the deterrent effect is much less; knowing that they can sacrifice a few executives as scapegoats if the crime is detected, their strategies may remain the same. And for many managers, higher bonuses for entering a new market are likely to outweigh the risk of facing severe criminal law consequences for gaining market access through bribes. Even risk-averse executives may authorize the paying of bribes, because, although they dislike the risk of criminal law actions, the risk of detection is only one among several serious risks they are facing as they work to achieve their corporate goals. Their worry about business failure may well exceed the concerns about a criminal law enforcement action against them, especially when the risk of facing such consequences is low.[20]

4.2 Criminal law criteria are not designed for the regulation of corporate liability

While criminalization of bribery underscores the severity of the offences, and equips investigators with tougher enforcement tools than under civil law regulation, such regulation also implies a very high burden of proof placed on public prosecutors.

For the sake of deterring rational decision makers who know that the risk of detection is low, the consequences for those caught in corruption must be both predictable and far more severe than the gains from crime.[21] However, with criminalization, regulators have to abide by strict requirements regarding evidence, and have a high presumption of innocence. For complex forms of corporate crime, it will often be impossible for prosecutors to prove that certain transactions are made with criminal intent, and when they can, the eventual penalty is normally far below what economic theory suggests is necessary to secure a deterrent effect. In many jurisdictions, regulators have imposed ceilings on the size of punishments.[22] Often, it is not even possible to recover the assets obtained through the crime. In cases where large corporations have gained market benefits in part because of bribery, the gains can amount to hundreds of millions or even billions of dollars, yet it is difficult to determine how many of those millions were attributable to bribery and how many to other, legal actions. Hence, while regulators in

[20] Søreide (2009) analyses the role of risk aversion for bribery decisions.
[21] Even with a detection rate as high as 20 percent, the total consequences must be five times higher than the benefits to have a deterrent effect for rational players (Becker, 1968; Shavell, 2004).
[22] Across jurisdictions the system for setting penalties for corporate criminal liability (including the maximum size of penalties) has different names and different forms of regulation, sometimes stipulated by the criminal law itself, listed as a system attached to criminal law (such as the UK's "standard scale"), or determined by instructions from the national public prosecutor.

principle can not only impose stiff penalties but also reclaim large amounts through asset recovery,[23] the offenders' risk of losing all the benefits of a corrupt act in a criminal law process is low. For managers whose own moral code does not restrain them from committing criminal acts, the gains from bribery will often outweigh the costs despite the threat of large fines and other significant consequences.

A further problem is the difficulty of distinguishing between practices that are legal and those that are not, especially under criminal law. Despite the modern character of much anticorruption legislation, courts find it difficult to interpret legal terms such as "undue influence" and "gross negligence" in corruption cases, and to draw the line between illegal and "legal bribes" (e.g., contributing to a politician's campaign war chest, offering public officials a career in the private sector, or transferring funds to charities under the control of a powerful decision maker). As a result, substantial gray zones exist that can be exploited by firms that want to profit from offering benefits to decision makers without running the risk of punishment. If they are caught and charged with the crime the legal gray zones – combined with rigid statute of limitations – offer plenty of room for clever defense lawyers to appeal their client out of the risk of an enforcement action.[24]

4.3 The international financial infrastructure blocks investigation

An even bigger practical hurdle for efficient law enforcement is financial secrecy. Market players can buy financial services to keep secret their financial transactions, assets, and business operations. By help of complex corporate structures, the use of shell companies in tax havens, trusts with apparently no owner, and strawmen in company boards, market players evade taxes, hide bribe transactions, and make it impossible for investigators to connect the reward from a business operation with the necessary level of guilt that is required for law enforcement.[25]

The problem is often associated with financial service providers that operate "offshore" in small states (often island states) and less developed countries. The real problem, however, is located in large cities in the developed world. Typically, it is in those places that both the beneficiaries and the main architects of the secrecy schemes are found, while the specific secrecy provider—if its identity is revealed—is a replaceable piece in the puzzle.[26] The lawyers, financial advisers, and accountants that have condoned or advised on the schemes—whose services are indispensable to the wealthy offenders—are seldom held liable for being complicit in a criminal act.[27]

While there is broad political support for more efficient regulation of international financial markets, this is area where it is difficult to find the best technical solutions.[28] International financial markets are too complex for current regulations to control, transactions happen very fast (much too fast for law enforcers to freeze illegal funds), and there are large profits to be made by those who offer secrecy.

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[23] *Asset recovery* refers to the formal process of tracing and securing monetary or other assets that have been wrongfully taken; either stolen, fraudulently misappropriated or otherwise disposed of to remove them from their rightful owner (see http://encyclopedia.thefreedictionary.com/Asset+recovery).

[24] In some countries, the statute of limitations is shorter than the time it takes to bring a corruption case to the supreme court, and thus those found guilty in a lower court can appeal their way out of prison sentences and large fines (Søreide, Ch. 3).

[25] Schjelderup (2016); and Shaxson (2011). See also Tax Justice Network and its Financial Secrecy Index: https://www.taxjustice.net/

[26] The Panama Papers scandal, for instance, revealed that the Panamanian law firm Mossack Fonseca had helped wealthy individuals, politicians, and other leaders hide funds and keep ownership secret. For details of the revelations, see the coverage on the website of the International Consortium of Investigative Journalists, https://panamapapers.icij.org/.

[27] See Harrington (2016) for detailed explanation and examples.

[28] The Financial Stability Board monitors challenges and policy efforts for better financial regulation. For the current situation, see its letter to the G20 leaders of 3 July 2017: http://www.fsb.org/2017/07/fsb-chairs-letter-to-g20-leaders-building-a-safer-simpler-and-fairer-financial-system/

However, international efforts to reduce the problem are starting to make a difference, especially the work conducted by intergovernmental organizations such as the OECD, the Financial Action Task Force, the World Bank, and the International Monetary Fund.[29]

5. Organization and pragmatism across enforcement agencies

A second category of obstacles to efficient law enforcement is associated with organization and practical solutions. Many features of today's enforcement practices and systems have evolved for the sake of other aims than corporate liability in corruption cases, and enforcement difficulties occur simply because prosecutors and other law enforcers need to find pragmatic solutions within these systems.

5.1 The inclination to let firms negotiate their own penalty

The various enforcement hurdles associated with criminal law (described above) have led prosecutors to offer benefits to firms that choose to collaborate for the sake of identifying evidence and complete a law enforcement action.[30] The arrangement builds on the well-established principle in criminal law that offenders who confess are treated milder than those who deny the facts even if they are guilty. In cases where a corporation provides information about its own crime, many jurisdictions allow their prosecutors to settle the case without court proceedings. Upon exchange of information about the bribery, the prosecutors "offer" the corporation the opportunity to accept a penalty. If it does, the case is completed; if not, the prosecutor brings the case to court.[31]

The use of negotiated settlements makes it possible for law enforcers to process a much larger number of cases, compared to a situation where each enforcement reaction must be subject to a court proceeding, while expenses for investigation and litigation are much lower. For several reasons, however, the role of such settlements in preventing future bribery is uncertain, especially because the arrangements offer corporations an opportunity to bargain down their own penalty.[32] Upon some awareness that prosecutors will investigate their operations (for example if there have been leakages about bribery to the press – or threats that such details will be shared with law enforcers), managers can secure a penalty discount by offering information about the corporation's misdeeds and what it did to prevent them from happening. In some jurisdictions, a corporation can obtain a milder penalty simply by promising to secure honest business behavior in the future. By promising to improve its compliance system, change the composition of its management, create reporting channels for whistleblowers, and allow external monitoring, firms can reduce their penalties substantially.

The problem with that, in terms of deterrence, is that even very high benchmark penalties (i.e., the starting point for negotiations) will not necessarily exceed the gains a firm has achieved from committing the crime. By bribing officials, a company can secure market benefits in several countries at a low risk of detection, well aware that, if its corrupt acts are detected, it can negotiate down the consequences while investigators are unlikely to trace all criminal gains.[33] The possibility that it will have to shoulder the burden of an investigation and law enforcement process will raise a firm's

[29] See the OECD Global Forum on Transparency and Exchange of Information, http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm; the Financial Action Task Force, http://www.fatf-gafi.org/; the Stolen Asset Recovery Initiative (StAR) at the World Bank, http://star.worldbank.org/star/; and the IMF Financial Sector Assessment Program, http://www.imf.org/external/np/exr/facts/banking.htm.

[30] Arlen (2016); Ivory (2014); and Garoupa and Stephen (2008).

[31] The prosecutor's decision obviously depends on the evidence. For explanation of the litigation process in corporate liability cases, see (Pieth and Ivory 2011).

[32] Daughety and Reinganum (2017) explain the impact of different settlement rules.

[33] For both progress toward and obstacles impeding prosecutors' endeavors to recover stolen assets and the proceeds from corruption, see Pieth (2008) and Ivory (2014).

awareness of the risks of corruption, but that awareness will not significantly affect the underlying factors that drove the firm to pay bribes in the first place.

Across jurisdictions, there is significant variation in the formal regulation of negotiated settlements between corporations suspected of bribery and the relevant enforcement agency.[34] In some jurisdictions, there is clear resistance against the use of settlements, while in others there are rules intended to ensure a certain compliance with principles of fairness and legitimacy. In practice, prosecutors normally enjoy wide discretion when the settle cases with corporate offenders. Often, they can operate with few checks on how they handle cases, even though the threat of a court case can allow them to dictate what firms need to do to become trustworthy, despite the prosecutors' diktats having little support in terms of official guidelines or academic research.[35] Details of the crime are not necessarily made known to the public, the precise nature of the deal is kept secret, and, in some countries, firms can negotiate even the contents of the prosecutor's press release on the case.[36] The wide discretion may also influence the law enforcement bureaucracy. The opportunity to close cases by negotiating settlements might tempt a prosecutor to quickly reach a settlement rather than pursue a lengthy case with an uncertain outcome.

When such concerns are relevant, the negotiated settlements jeopardize basic criminal justice principles. Combined with the secrecy that shrouds the settlement processes, the practice dilutes citizens' trust in the law enforcement system, which in turn may weaken the system's impact on citizens' moral development. A judicial system that signals a clear stand on the difference between right and wrong while protecting innocent individuals and firms from unfair treatment, can contribute to shape common views on what is acceptable and not, and thus deter citizens from committing bribery – simply because it is wrong (a function too often ignored in the economic literature on crime control).[37] However, a system that allows corporations to pay their way out of a law enforcement situation might not seem either just or fair to many people. [38]

Governments struggle to introduce efficient, legitimate, and predictable solutions for the use of settlements in corruption cases involving corporations. This is an area where both corporations and civil society call for better solutions, and as discussed below, an area where we can expect policy evolution in the years to come.[39]

5.2 Failure to coordinate strategies across enforcement institutions

Government's set of integrity mechanisms consists of many elements, as mentioned in Section 2. For the protection of markets against corruption and other forms of business-related crime, countries have whistleblower protection, tort law reaction, public procurement regulations, competition or antitrust authorities, financial oversight agencies and beneficial ownership registries, as well as tax authorities. Even if explicitly regulated by criminal law, corruption will often have ramifications into the oversight area of several of the mentioned authorities. However, governments have established these enforcement institutions with a narrow mandate to detect and act against a different problem than corruption, and in

[34] Makinwa and Søreide (2017) provide details on settlement processes in 63 countries around the globe <to be updated fall 2017>.
[35] Arlen (2016, 2017)
[36] Makinwa (2015)
[37] Tyler (2006) explains why legitimacy and procedures are essential for inducing citizens to trust governments and obey the laws they produce.
[38] Uhlmann (2013); Corruption Watch (2016); and Reuters on March 15, 2016, "Anti-corruption Groups Press OECD over Use of Corporate Settlements," http://www.reuters.com/article/corruption-transparency-idUSL2N16N1FC.
[39] See for example The High Level Advisory Group (HLAG) to the OECD Secretary General 2017 Report Recommendation 6 on the development of model guidelines for settlements in corporate liability cases: http://www.oecd.org/daf/anti-bribery/oecd-hlag-anti-corruption-and-integrity.htm

practice, they rarely fulfill their potential when it comes to acting upon the symptoms of corruption because their enforcement actions are inadequately coordinated.[40]

Competition law, for example, serves to prevent and provide the legal competence for acting upon constraints on fair competition. It prohibits acts that harm the function of markets and regulates mergers and acquisitions. The leniency arrangement for a cartel member who first admits cartel collaboration is generally considered a success, and so is the introduction of settlement-based enforcement actions with demands for compliance and external monitoring on operations. However, in cases where cartel collaboration is combined with bribery (or some other form of crime), a competition agency (normally) can offer leniency for the competition law violation only, and not for the criminal law violation.[41] If the agency acts against the bribery, for example by sharing evidence of the crime with criminal law investigators, it may undermine its own leniency institute, because future offenders are less inclined to self-report for competition law leniency if they end up with liability for bribery (or other forms of for-profit forms of crime).

As a second example of inadequate coordination can be found in public procurement regulation, which implies principles for selecting the best price-quality combination in government acquisitions and these principles promote competition in markets. Bribery for contracts is nevertheless a concern, and governments have introduced "debarment rules", which mandate exclusion of bidders who have been involved in corruption and some other forms of crime; the "debarred firms" are not eligible for bidding on government contracts. In principle, the rule could protect government spending and contribute to deter bribery. In practice, however, very few firms are debarred. One reason is that governments tend to make exemption from the rules when there are few bidders, when the firms' services are highly demanded, or they offer unique technology, which indicate the rules are not sufficiently aligned with the aim of securing certain forms of supply and competition. Another reason is that firms found guilty in bribery increasingly settle their cases with enforcement institutions upon promises of operating with compliance systems and external monitoring of their business practices.[42] Such a settlement often implies "self-cleaning" – the term used in public procurement regulations for what companies can do to become re-eligible for bidding – and thus, the firm found guilty in bribery is not debarred after all, which creates reason to question the impact of the debarment rules.

The system for tort law enforcement is a third example of how enforcement suffers from weak coordination across institutions. On a number of areas, private enforcement complements government regulation in terms of securing opportunities for the victims of offences to claim compensation for damages (or government authorities claim compensation on behalf of victims). Such claims not only adds to the enforcement consequences that may deter crime; they also bring to light the damages caused by illegal business practices and creates incentives for offenders to desist their illegal acts. However, if prosecutors settle bribery cases with corporations, the basis for claiming compensation is less clear than what would follow from a court case. Besides, under EU debarment rules (mentioned above), compensation to victims eases a firm's opportunity to regain status as an eligible bidder. However, if the firm is already "self-cleaned" because of the terms agreed in the negotiated settlement, there is "no

[40] This section summarizes main points in Auriol et al. (2017).

[41] Lambert-Mogliansky (2011) explains reasons to expect cartel members to facilitate their collusion with bribery. Eriksen and Søreide (2012) and Auriol et al. (2017) describe this lack of coordination across enforcement institutions, while Luz and Spagnolo (2017) review how this lack of coordination comes to expression in the legal system in several countries.

[42] In the 2017 settlement case involving Rolls Royce, for example, the company may have avoided a court case because the consequences of debarment could have been substantial (see Transparency International Blog Discussion in January 2017: http://ti-defence.org/rolls-royce-exaggerate-the-impact-of-debarment/). In the case of Norconsult in Norway, the highest appeal court decided not to place corporate liability on the company because the following debarment from public procurement would imply too substantial enforcement consequences (for details, see Auriol et al. 2017).

reason" to pay compensation for the sake of market participation. Unless these conflicting enforcement mechanisms are sorted out, we cannot expect private enforcement to contribute much for corruption control.

Inadequate coordination across enforcement agencies reduces the enforcement predictability for firms that might self-report its offences; one enforcement agency cannot constrain another agency's enforcement actions. The uncertainty regarding what (total) sanctions will follow upon detected misconduct may well reduce firms' inclination to collaborate with law enforcers. Unpredictable enforcement actions may also affect managers' inclination to silence those who blow the whistle on corporate crime, if it is too uncertain what happens if they listen to them and protect them.[43]

6. Political leaders with multiple aims and ambitions internationally

The third and last category of enforcement difficulties is associated with the political level – what in the popular as well as academic literature is often described as a "low political will" to enforce corruption cases, (and what in many cases might be the correct description). This section will point at underlying factors that add nuance to the perception of low political priority, especially regarding enforcement of foreign bribery cases.

6.1 Politicians seek to protect commercial interests and domestic employment

In addition to the mentioned hurdles, governments rarely give their law enforcement systems the independence and resources they need for efficient law enforcement.[44] Even in the richest OECD member countries, prosecutors complain that they lack the resources to investigate cases even when they have strong reasons to suspect bribery. The OECD country performance reports suggest that in all countries the impressive progress toward better laws against corruption has not been matched by the institutional progress necessary to enforce those laws. In fact, several of the countries that introduced foreign bribery legislation around the year 2000 have not enforced the rules in a single case.

This enforcement failure is difficult to explain unless one considers political priorities. Could narrow commercial concerns be the reason why politicians fail to equip enforcement agencies with the resources they need for their responsibilities? There are obvious reasons to suspect governments want "their" firms to secure contracts internationally, no matter how the firms win those contracts. Foreign contracts may lead to more jobs at home, a better trade balance, higher GDP growth, export of cultural values, and stronger diplomatic ties to other governments, even if the deals are purely commercial. Besides, in many countries, some of the largest firms receive large state subsidies, are owned in part by the state, or have close ties to the government in other ways. In such contexts, the government might be particularly eager to see the firms succeeding abroad and may have little motivation to investigate exactly how they secure contracts. Furthermore, contracts obtained through bribery may well be more lucrative than other contracts simply because they are not the result of a competition to provide the best balance of price and quality. Once a firm has struck a deal—for example, a contract to drill for oil—the government of the firm's home country may want to nurture a good relationship with the regime of the oil-producing country for the sake of the business, rather than to question whether the deal involved corrupt transactions. Moreover, it is not uncommon for government representatives—sometimes accompanied by the country's president or members of its royal family—to exercise their diplomatic influence in foreign countries precisely for the sake of securing contracts for their private sector. And those representatives do not want accusations of corruption to cloud negotiations. Although bribery is

[43] OECD (2016) provides an overview of whistleblower legislation internationally. While many bribery cases have emerged as the result of a whistleblower report, most governments fail in protecting whistleblowers from reprisals.
[44] Van Aaken
et al. (2010).

unacceptable and regulated by the penal code, public exposure of corruption might well damage the otherwise positive relations between two countries.[45] The different commercial interests may contribute to explain why some politicians hesitate to equip prosecutors for their job. Given the short term benefits associated with contracts obtained through bribery, these politicians will not see their hesitation as a "narrow concern", even if it implies a total disregard for the values associated with fair markets internationally.

Across the globe, enforcement of antibribery laws is hindered not only by a lack of budget; there also are numerous examples of government interference in the investigation of cases, which means politicians or high-ranking civil servants have stopped an investigation into bribery from proceeding. While it is unclear what aims or concerns drive them to violate constitutional principles for the protection of private firms, personal benefits for themselves or their political allies cannot be ruled out. After all, for elected politicians, the barriers against corruption are generally very weak, including in countries ranking high in terms of indicators of good governance.[46] The line between campaign finance and corruption is often blurred and the rules on what funds should be reported in what ways (and on who should control party funds in what ways for whose benefit) are often not respected.[47] In addition, parliamentarians, who normally have to register their wealth and revenues, do so with great room for discretion on what they report. Shareholder remunerations and overseas bank accounts are normally left out of such registries, as are spouses' wealth and incomes.[48] With financial secrecy relatively easy to achieve, there are few barriers in the way for a minister who wants to own and profit from a company in the sector that he or she regulates. Moreover, promises of well-paid positions in the private sector obviously can have a significant personal value for elected officials but are rarely, if ever, required to be disclosed and registered.[49]

Politicians always have to weigh multiple factors and balance competing goals before they support a policy, modify a regulation, or allocate funds over the state budget. That means they will always be able to find a seemingly legitimate excuse for making a particular decision, which can make it almost impossible for outsiders suspecting political corruption to prove that the decision was bought. We cannot ignore the risk that firms already involved in bribery for commercial gains are also inclined to offer benefits in return for protection against the reactions from law enforcement institutions. However, the different forms of enforcement hurdle suggest we cannot jump to conclusions about political corruption without substantial evidence.

6.2 Governments' enforcement strategies are inadequately coordinated internationally

In the absence of an efficient international enforcement mechanism, a government's motivation to enforce the law against "their firms" is likely to decrease if it sees a higher level of enforcement failure among other countries, especially countries whose firms are competing for the same business. This brings us to what might be the biggest obstacle in the international enforcement of foreign bribery laws: the failure of countries to coordinate their efforts for their common benefit—which in this context is markets free from corruption.

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[45] For a case discussion of Norway's role in contributing to reduced petroleum-related corruption internationally, see Eriksen and Søreide (2017).

[46] Transparency International (2012) provides empirical details, and so do the GRECO evaluation reports (http://www.coe.int/en/web/greco/evaluations). Rose-Ackerman (2016) provides a useful discussion of what is meant by "governance" and "good governance".

[47] OECD (2014b) on lobbyism.

[48] Incomplete registry of parliamentarians' wealth has been criticized in several GRECO reports which evaluate EU member states' performance on anticorruption and integrity: http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp .

[49] Some countries do require a "quarantine" period between an official leaving public office and accepting a position in a firm that bids for public contracts.

Each government that ratifies an international anticorruption treaty and implements legislation to enforce the anticorruption rules is unable to observe how other countries perform in the same respect. This lack of transparency can decrease a government's motivation to enforce the law regardless of whether the government believes other governments are *or are not* enforcing the law. No matter what other governments say they do, the risk exists that they are condoning bribery. A government that does enforce the law robustly may conclude that it is sacrificing too much for the sake of the international common good. However, for each country, the temptation to condone bribery might increase in relation to the strictness with which regulations are imposed on competing firms from other countries; such strictness is clearly a business advantage for firms that operate without strict enforcement in their own country.[50] Hence, a government that believes that other countries enforce the law might be tempted to condone bribery for the sake of securing the benefits. However, a government that believes that other countries fail to enforce the law might also condone corruption simply because it does not want to suffer as a consequence of trying to work for the common good. And worse, the more robustly other countries enforce the law, the greater the benefits for free riders (i.e., countries that fail to enforce the law), and thus the number of enforcers will *not* increase exponentially.

Given these obvious coordination problems, the failure to enforce is predictable, and one may well wonder why so many governments ratified the anticorruption conventions.[51] The answer might be that anticorruption initiatives are popular among voters, and few governments want to be seen as opposing such a principled stance. Besides, why would a government oppose it if its anticorruption performance is unobservable? This is an area of law where governments can easily collect the benefits of an initiative while avoiding the associated costs: a government may declare its support for the convention regardless of its intentions to enforce the ensuing law.[52]

Enforcement failure is thus largely attributable to the fact that information about firms' inclination to pay bribes abroad *as well as* governments' enforcement of antibribery legislation is hidden. Each government does not know the other governments' true intentions, and its own true intention is hidden from other governments. Also, market players declare zero tolerance for corruption, but no one knows for certain how each firm conducts its business. If these conclusions are accurate, they may also explain why governments fail to give their prosecuting authorities the resources and independence they need for enforcing the antibribery legislation.

7. Policy tracks for more efficient enforcement

The concerns reviewed this far make it easier to understand why benevolent governments fail in the enforcement of the anticorruption legislation they themselves have introduced. That does not mean they legitimate enforcement failure. The slow pace in which governments improve in their enforcement endeavors, the inherent challenges associated with the crime, and the need for coordinated strategies against the problem are all aspects that call for reflection on policy choices. For insights into promising policy tracks, however, one needs to understand not only the function of enforcement tools, but also the drivers of reform and the political momentum necessary to carry through the reforms. This section addresses each of these three dimensions in turn: First, how economists have contributed to develop a variety of conceptual tools which can contribute to shape more effective regulation. Second, why an emphasis on market protection might generate a stronger governance drive against corruption than what

[50] Bjorvatn and Søreide (2013) explain the market consequences when competing firms operate with different risk of facing sanctions for their bribery at home.
[51] Tullock (2005) describes governments' inclination to approve conventions they have no intention to enforce.
[52] Moene and Søreide (2015) analyze how a "façade anticorruption initiative" may benefit the corrupt. The introduction of integrity systems with a narrow mandate may reduce attention to risks that are not addressed by the systems, and make it possible for decision-makers to secure even more illegitimate benefits than without the systems.

we associate with pure anticorruption initiatives. Third, how political momentum requires a constant demand from non-governmental players. In sum, the discussion summarizes promising tracks for policy reform.

7.1 The introduction of smart enforcement techniques

In order to facilitate enforcement of antibribery laws, economists have suggested one should seek to incentivize those involved in bribery to report their own offences. That may sound as though economists are expecting governments to embrace irrational strategies. Corporations, however, are hydra-headed creatures, and even if one head commits bribery, another head can be induced to report misconduct in exchange for the corporation as a whole receiving little or no punishment. This is the rationale behind what Jennifer Arlen and Rainier Kraakman (1997) describe as a *duty-based sanctions regime* (also known as *compliance-based defense*), which offers a predictably lower penalty the more the offender has done to prevent and report the crime.[53] This concept is associated with the use of negotiated settlements, described in Section 5, and enforcement procedures applied in the United States, which has processed more bribery cases than any other country, and which is now inspiring other jurisdictions to try similar approaches.[54] However, not even in the United States the tool is used as predictably as economists suggests, and the discretionary authority in the judgment of what firms have done to prevent the crime is very broad.

Another smart approach for tackling corruption is to exploit the fact that it is a collusive form of crime. There will always be more than one party involved and the deal between them *is* the crime. As Susan Rose-Ackerman (1978) explains, this fact poses a difficulty for regulators because the players involved can neutralize the effect of law enforcement actions by raising the stakes of the deal (as explained in section 4); that problem can be solved, however, by penalizing each player in proportion to the gains obtained.[55] In addition, regulators can seek to distort the trust between the colluders by treating the party that first speaks out about the crime very leniently, while severely punishing the one that stays loyal to the illegal deal. Regardless of what they promise at the time of entering into the corrupt deal, each party will experience the prisoner's dilemma and be incentivized to be the first to report the crime. Each player's knowledge that a potential counterpart in corruption will have incentives to depart from the deal once it has been struck might be sufficient to deter corruption, and thus the approach can have an important preventive effect.[56]

The effectiveness of showing leniency to those who report their crime first has revolutionized competition law strategies against cartels; in most jurisdictions with a well-established competition authority, the corporation that reports cartel collaboration first now faces no punishment (or heavily reduced punishment).[57] In the criminal law system, however, there is significant hesitancy about offering mild treatment to any party involved in crime. Even if prosecutors normally reduce the charge in cases when the offender has confessed his or her own crime, self-reporting rarely leads to a very sharp and predictable punishment reduction. A major concern from the criminal law perspective is how short-term gains from incentivizing self-reporting may present the risk of more serious indirect costs, namely, the

[53] Arlen (2012) explains how far the economic idea of duty-based sanctions with strict residual liability is compatible with US enforcement practices. Strict residual liability implies a minimum penalty imposed for committing an offense whatever the corporation has done to prevent and report the crime, and that penalty should exceed the cost of maintaining an efficient compliance system.

[54] In the United States, the settlements are referred to as "negotiated prosecution agreements" or "deferred prosecution agreements" (N/DPA). For an overview of the extent to which eight European countries have introduced negotiated settlements in their regulations of business bribery, see Makinwa (2015).

[55] See Rose-Ackerman (1978, 2010) for explanation.

[56] Dufwenberg and Spagnolo (2015); Lambsdorff (2002); Basu and Cordella (2014).

[57] For more details about the competition law leniency arrangement, see Bigoni et al. (2012); and Harrington and Chang (2016).

risk of jeopardizing the criminal justice system's ability to serve as a catalyst for moral development in society, mentioned in Section 5.1. That ability, however, will in any case be limited if the alternative is no law enforcement action even when bribery is strongly suspected of distorting markets. A promising trend in anticorruption is policymakers increasing inclination to consider and recommend incentive-based criminal law solutions vis-à-vis corporations. It is now time to consider how the incentives for self-reporting can best be secured while combined with structures that secure legitimacy and fairness, especially in the use of negotiated settlements, see Rui and Søreide (2017).[58]

Debarment as stipulated in public procurement rules, discussed in section 5, is a policy tool that may appear efficient, while scrutiny reveals its effectiveness is not so obvious. Rules introduced to exclude corrupt bidders from market participation can be harmful to competition. Therefore, the function of the rules is decisive not only for their deterrent effect but also for potential harmful consequences in society. Exclusion of bidders who have been involved in corruption can have a disciplinary impact if the corporations place a high enough value on future contracts for the government (i.e. the discount rate is high enough) *and* the risk of detection and ensuing consequences is substantial (Auriol and Søreide, 2017). By contrast, if bribery implies sole source procurement (with profitable terms) in a situation with many competitors and otherwise low chances of obtaining the contract, the benefits of bribery will easily exceed the consequences of debarment and the tool has no deterrent effect. When there are few firms in a market, the value they place on future contracts is much higher, and given a real risk of detection and debarment, a firm now will be far more concerned about offering bribes. Hence, debarment as an anticorruption device works primarily when there are few firms in the market. In practice, however, these are exactly the circumstances when governments tend to make exemptions from the debarment rules.[59]

If there is too low political willingness to use a specific tool for anticorruption (for example if there are costly side effects), it must be replaced by strategies that will be used. These could be stricter penalties upon misconduct, intensified external monitoring, or an instruction that managers responsible for the misconduct are replaced – strategies that will not hinder the producer in supplying desired products or services. Over the last two decades, we have seen a growing ambition among policy makers to apply the enforcement tools that best affect players' choices, including by taking into account their behavioral irrationalities[60], and this is a promising track for reformers. The message from economists, however, is that regulatory tools for anticorruption must be designed in ways that do secure their intended impact while market distortions are minimized.

7.2 Enforcement emphasis on protection of markets and financial stability

The "right design" of enforcement tools implies self-reporting initiatives must be sufficiently predictable, tort law mechanisms must be enforceable, and the obtainable benefits must be sufficiently substantial so that gains exceed the costs of using the initiatives. However, the challenges described in Section 5.2 – on the failure to make enforcement tools work well together, suggests it is necessary to place more emphasis on the coordination between different enforcement agencies involved in protecting markets from bribery and other forms of misconduct. This coordination requires better organization across civil law/administrative and criminal regulatory tracks, as well as a closer collaboration between different authorities (Rui and Søreide, 2017).

The regulatory evolution towards more rewards for self-reporting combined with the increasing use of settlements for corporate liability, calls for a clearer distinction between civil law and criminal law

[58] Rui and Søreide (2017) explain how these different values can be secured with a better allocation of enforcement responsibilities across civil law and criminal law enforcement systems.
[59] Auriol and Søreide (2017). In oligopoly markets governments prefer certain producers for a number of reasons.
[60] Madrian (2014).

regulatory functions. This evolution implies enforcement authorities evaluate corporations' liability (including criminal liability) upon an assessment of what they did to prevent the crime, whether they have systems for whistleblower reporting, and how well they have collaborated with law enforcers. Inherently, some of these judgments are closer to what we associate with civil law regulations (like industrial safety regulations, i.e. did the firm have solid fences?) than to the matter of proving individual guilt under criminal law. Similar to established systems for safety regulations in industrial production, it makes sense to introduce minimum requirements on what firms need to have in place for the prevention of bribery. If so, regulators can hold corporations responsible for a failure to have in place necessary elements of a compliance system – regardless of whether an act of bribery can be proven or not. Of course, the penalty upon a failure to have a solid compliance system would be much lower than the penalty for verified bribery. A regulatory system for the prevention of bribery can function in combination with a criminal law system that becomes relevant upon suspected bribery and criminal law investigation. In the United Kingdom, the corruption legislation has gone very far in this direction,[61] while Control Risk (2016) points at how such trends already make the proper function of an anticorruption compliance system a comparative advantage – and not a disadvantage -- for firms operating internationally.[62]

Efficient anticorruption regulation of market players also requires coordination between agencies responsible for different forms of regulation, as described in Section 5.2**.** Automatic exchange of information would ease the coordination of enforcement actions as that would alert the different agencies about the need to inspect certain firms' performance. Today, privacy protection laws sometimes stand in the way for the exchange of sensitive information, and some governments may need to modify those for the sake of detecting and preventing serious market-related crime.

For several reasons, however, governments may need to think bigger when it comes to the institutions mandated to detect and act upon business-related offences. Auriol et al. (2017) argue for an expansion of competition authorities' current mandate (de facto a different market oversight body). Normally, competition authorities do not search for corruption as a cause of market distortions, but they do address market distortions, and they do enforce laws against corporate misconduct. In addition, when they function well, their role in protecting competition in markets is a barrier against the consequences of "legal forms of corruption" – meaning the many forms of undue influence, loopholes for biased decision-making and crony capitalism that fall outside the criminal law regulation of bribery. Competition authorities have the competence to see the market consequences of government policies, and thus, they can react in cases when policies will benefit the few involved in a corrupt scheme, regardless of whether there are indicators of bribery. The agencies' experience with leniency rules make them more inclined to practice smart, necessary enforcement strategies of the sort discussed in Section 7.1. Competition authorities already collaborate closely across borders, and they exchange evidence in cases in a simpler fashion than is typical in criminal law cases. With expanded powers, they could be mandated to oversee a larger set of market distortions and coordinate the different implications that need to be taken better into account when corporations settle a sanction with a law enforcement agency (discussed in Sections 5.1 and 7.1). Individual liability can still be handled by the criminal justice system (in line with the two track civil law law/criminal law regulation discussed above, this section and Rui and Søreide 2017).

[61] The UK Bribery Act 2010 introduces liability for the "Failure of commercial organisations to prevent bribery": http://www.legislation.gov.uk/ukpga/2010/23/contents

[62] In this context it is relevant to note that some of the more successful reforms for the protection of markets, are 'soft law', which means that they are not codified in an international convention ratified by states, but written into recommendations to which states are politically, but not legally bound – like the FATF Recommendations: http://www.fatf-gafi.org/

A strategy that places market protection at the center of reform, and targets bribery indirectly, may have a higher likelihood of succeeding than the strategies developed specifically for the problem. Initiatives for better market performance might be better shielded against the failures and drawbacks with the enforcement of bribery legislation, especially foreign bribery legislation, described in Sections 3 and 6. In recent years, there have been broad support for money-laundering and tax-evasion initiatives and there has been significant political concern for international security and financial stability, as described at the end of Section 4. Better regulation on these areas will imply a higher likelihood of detecting illegal transactions and corrupt revenues, and will contribute to reducing corporations' opportunities to profit from bribery – at least in international markets. Of course, a stronger recognition of these civil law policy tracks' role for better control of business-related corruption will not need to imply a weaker policy emphasis on corporate and individual criminal liability when evidence of crime exists.

Whatever institutional redesign governments will make for better protection of markets against corruption, the institutions need robust checks and balances. Business-related corruption involves the most powerful, wealthy individuals and institutions, and market players suspected of bribery are inclined to bribe enforcement agencies if that make them ignore the offences. The World Justice Project (2016) reports significant risk of corruption within law enforcement institutions in all world regions, and as described in Section 3.1., citizens around the globe have very low trust in the judiciary and police. Even in countries scoring high on governance indicators, there is a substantial risk of political interference in law enforcement processes.[63] This concern brings us to the next question; what will make governments comply with their anticorruption commitments?

7.3 Government compliance with international commitments and drivers for reform

Section 6.2 described why coordination failure between countries might be a major reason why governments fail to enforce their laws against corruption in international markets. If the notion is right, only limited progress in the anticorruption drive can be made by relying on the commonly prescribed remedies, such as introducing corporate reporting requirements, improving corporate compliance systems, raising penalties, and debarring guilty firms from public procurement. These remedies can certainly help in the fight against corruption, as explained in several sections, but major progress will hinge on substitute enforcement mechanisms at the international level and, most importantly, on access to (reliable) information about what governments do to enforce their laws.

While various types of players outside government—including civil society, private sector standard setters, and representatives from other governments and court systems—can evaluate a country's law enforcement performance, the players that command most respect are international governmental organizations. When these organizations coordinate the evaluations, the governments subject to scrutiny normally first approve the evaluation process, then give the evaluators access to information, and finally make sure that the results are circulated at high political and policymaking levels. The information obtained can be used in various ways (e.g., it can be fed into cross-country comparisons of performance), but it is critical that the evaluations are made publicly available, irrespective of what the individual governments feel about the results.

Independent, comprehensive, and honest reporting of how a government performs helps drive anticorruption progress because the reported facts provide a necessary basis for demanding change.

[63] See The Council of Europe: Challenges for judicial independence and impartiality in the member states of the Council of Europe (2016): http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp#P19_102, and Transparency International (2012). Corruption at the political level has market consequences. Charron et al. (2017) find substantial variation across Europe in the tendency to let political connections affect recruitment processes, and what impact such inclinations have on public procurement decisions. Also Hessami (2014) describes political corruption in OECD countries.

Access to the information, however, is not a sufficient condition for change, and will hardly matter in situations with authoritarian governments. Also, when governments are democratic and transparent they can be subject to the commercial priorities discussed in Section 6.1, with both politicians and citizens opposing or criticizing the enforcement of foreign bribery laws that hurt "their" firms. Therefore, evaluations that reveal severe enforcement failure need to be followed by some form of action from international players. Unfortunately, however, this is also where the constraints on international organizations come into play. The organizations are steered by leaders who want progress, but the organizations are controlled by governments that want to keep external monitoring functions within certain limits.

While reform-friendly governments should continue to support and strengthen various forms of international collaboration for the protection of markets against corruption and other business-related offences, more trends and drivers work for similar aims. One of them is the private sector. Corporations and their owners --the category of players who might profit from bribery--are rarely considered frontrunners for more efficient enforcement strategies. However, current regulatory systems are highly unpredictable for firms. With several law enforcement agencies opting to impose fines, demand compensation, or debar offenders, while managers may or may not be imprisoned, the regulatory landscape appears highly unpredictable. Corporations involved in misconduct internationally may face claims from several countries, and there is no guarantee that a law enforcement action in one jurisdiction prevents another jurisdiction from bringing claims. Leaders in the private sector want more convincing assurances that the total set of penalties will be reduced if they operate with solid compliance systems, conduct risk mitigation efforts, and report offences that still happen to enforcement agencies. To collaborate with enforcement agencies, they will often demand some discretion about the details of their offences for the sake of avoiding damaging consequences for business operations or partners. In practice, regulators need to compromise between enforcement transparency and the incentives necessary for firms to self-report their offences (this is one reason why they are given broad discretion, discussed in Section 5.1), and the private sector wants these incentives secured and guaranteed in de jure legislation. This demand resonates with economic ideas of more efficient regulation, discussed in Section 7. Better regulatory coordination and higher sanction predictability will also facilitate private enforcement under tort law and international arbitration because such reactions depend on the total set of consequences for a bribery offence and hinge on public institutions for enforcement.[64]

Eventually, there is also the chances that a majority of corporations operates in recognition of the law, even if the risk of detection and sanctions is low (as described in Section 4), and this implies a risk of being victimized if competitors pay bribes. Private informal solutions, like the collective action initiatives of the sort mentioned in section 3 may have some impact on the integrity in markets. Asymmetric information about firms' performance (i.e. they can promise one thing and do something else), implies an additional need for formal regulations with a clear risk of crime detection and severe sanctions for offenders. Those who fear corruption obstructs their business opportunities are inclined to prefer efficient (formal) regulations for all market participants.

In the world of anticorruption, civil society organizations have played a major role in demanding reforms and stricter enforcement, and especially, the Corruption Perceptions Index published annually by Transparency International has attracted attention to the problem. Whether the civil society drives processes towards *efficient* reforms, is not always so obvious. As discussed in section 2, 3 and 6, some reforms may have been pure window-dressing initiatives -- serving primarily to silence critics, while real change requires demands, commitment and leadership from the most powerful players. However, the more solid knowledge researchers, investigative journalists and civil society organizations produce

[64] Jackson and Roe (2009) analyses the performance of public versus private enforcement. Betz (2017) describes condition for international arbitration.

about unreasonable failures to enforce anticorruption legislation, the harder it is for governments to ignore their commitments. The more correctly experts describe the consequences of corruption and governments' obligations to control the problem, the less tolerance citizens and voters will have for enforcement failure.

8. Conclusion

Given the consequences of corruption, it is obviously of mutual benefit for countries that their governments control corruption not only in their own markets but also internationally.[65] Since the 1990s, governments have taken impressive steps forward in terms of the harmonization of laws against corruption. When it comes to actual enforcement, however, there is significant variation across countries; many jurisdictions have yet to see a single foreign bribery case prosecuted. Most governments declare zero tolerance for corruption and support international anticorruption initiatives, but they fail when it comes to enforcing their criminal laws against foreign bribery.

It is tempting to assume that various anticorruption initiatives—from more transparency to better whistleblower systems and new reporting requirements—will combine to form an effective set of strategies against business corruption. However, that will not necessarily be the case if none of the initiatives increases the detection rate for this form of crime or raises the consequences for those who are caught. The considerable attention that is today given to anticorruption in the press, within business organizations, and by civil society might strengthen moral barriers against the crime but might do so primarily among those who are already inclined to be honest. For rational market players who are inclined to exploit institutional weaknesses in their hunt for profit, talking about corruption will do little to deter it. Deterrence depends on there being a real risk of detection followed by a law enforcement reaction, and the imposition of hard, painful sanctions. Unless governments are able to make their enforcement systems function effectively, the many softer anticorruption initiatives will add up to nothing more than a pleasing façade of progress, behind which corruption will continue to wreak its damage.

This chapter has pointed out some of the difficulties in law enforcement and discussed reasons why governments fail to enforce their laws against corruption in international markets: Features of the crime complicate enforcement, and so does rigid criminal law criteria for imposing sanctions, while financial secrecy obscures investigators' search for evidence of bribe transactions. While countries have several, different law enforcement agencies mandated to protect markets against forms of business-related misconduct a lack of coordination between them makes their total value less than the sum of the parts. Political leaders promise to secure efficient anticorruption regulation, while in practice, many of them ignore these commitments for the sake of securing commercial benefits and employment in domestic markets, and they do not want to sacrifice potential contracts abroad for a greater common good.

Even if these concerns challenge the most reform-friendly government, there are reasons for optimism. This review of current regulations and economic insights on how to improve them suggests that efficient strategies against market-related bribery already exist. Although corruption is hard to eradicate, governments can design regulations and penalties in ways that incentivize firms to do what they can to avoid the problem and self-report the crime when it happens. Noncriminal regulatory tools can supplement criminal law regulations. Such tools work well in cases of corporate misconduct, because the burden of proof is lower in noncriminal cases. Increasingly, offenders in the private sector are "rewarded" with milder penalties if they self-report offences and collaborate with law enforcement agencies. There is a need for clearer principles and rules on how enforcement agencies should coordinate their strategies and how different aims should be secured in recognition of human rights, fairness and

[65] Described by the G20 principles on corruption (see the appendix).

transparency. With powerful players among the beneficiaries of such principles, including the private sector, we can expect progress on this area in the years to come.

When there are limits to how much pressure for anticorruption law enforcement governments will accept, the chapter has discussed how the problem can be tackled from other angles. If we cannot attack the corruption that hams markets, we can at least protect markets in other ways. Rules securing fair and open markets are de facto barriers to corruption, and governments have shown themselves far readier to collaborate on competition control and financial stability than on anticorruption.

The focus in this chapter has been primarily on the regulation of markets in developed countries, and more particularly, on how governments deter corporations from taking part in corruption. Critics may complain that the chapter contributes to what appears to be a skewed policy focus on what corporations should do to prevent bribery—skewed because controlling the supply of bribes can never be a complete solution to government corruption, which is a form of crime that involves at least two sides. Media coverage of cases of international bribery usually leaves the impression that corruption is primarily the fault of the corporations that have paid the bribes; less attention is paid to the culpability of those foreign officials who have *taken* the bribes. Governments and development banks also tend to overlook or downplay the role of corrupt foreign officials, especially high-ranking officials. One reason why governments turn a blind eye might be the general lack of facts that could confirm suspected corruption. Allegations involving high-level foreign officials and government leaders would need to be tested in a national court case. Not only would the outcome of such a case be uncertain, but also it would generate the sort of publicity and ill-feeling that could complicate or undermine diplomatic relations with the other country. In other words, any claims a government might make about corruption in another government might lead to nothing more than a muddled or poisoned diplomatic relationship that thwarts other political aims.

Such concerns may provoke anyone who takes a principled stance to the corruption problem and governments' regulatory performance. They are nevertheless a reality --which implies studies of the regulation of corruption in international markets should not focus purely on narrow managerial interests or optimal forms of regulation; researchers and scholars also need to examine government involvement, political power games, distinguish the true drivers of reform, and identify the promising policy tracks that do exist.

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Appendix: The G20 High-Level Principles on Corruption and Growth

Pressed by international organizations to recognize the gravity of the challenge posed by corruption, the political leaders of the world's twenty largest economies—with the secretarial support of the Organization for Economic Co-operation and Development (OECD) and the World Bank—agreed in 2014 to endorse a statement titled "High-Level Principles on Corruption and Growth," which consists of seven tenets, several of them laying out the severe consequences of corruption for markets:[66]

[66] https://www.oecd.org/g20/topics/anti-corruption/

1. Corruption damages citizens' confidence in governance institutions and their supporting integrity systems, and weakens the rule of law.
2. Corruption impacts the costs of goods and services provided by government, decreasing their quality and directly increasing the cost for business, reducing access to services by the poor, ultimately increasing social inequality.
3. Corruption discourages foreign investment by creating an unpredictable and high-risk (financial and reputational) business environment.
4. Corruption reduces healthy competition through deterring the entry of additional market players, thereby lowering incentives for innovation
5. Corruption distorts decision making at the highest level and can cause severe economic damage through the ineffective allocation of public resources, particularly when diverted to benefit private and not public interests. The laundering of corruption proceeds can impact the national economy and the integrity of the international financial system.
6. Corruption may reduce the impact of development assistance and hinder our collective ability to reach global development goals.
7. Corruption facilitates, and is fueled by, other forms of criminal activity including transnational organized crime, money laundering and tax crime which may represent significant threats to global and national security and to national budgets.[67]

In their statement, the G20 countries "endorse these principles and reaffirm the importance of acting collectively to combat corruption as a vital part of the broader G20 growth agenda."

[67] See the Australia G20 presidency website, http://www.g20australia.org/official_resources/g20_high_level_principles_corruption_and_growth.html

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