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Governments´ Enforcement of Corporate Bribery Laws: A Call for a Two-Track Regulatory Regime

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Governments' Enforcement of Corporate Bribery Laws: A Call for a Two-Track Regulatory Regime

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ABSTRACT: Internationally, there is a trend toward a regulatory regime for corporate bribery with more emphasis on *ex ante* oversight and preventive systems, and less emphasis on investigations driven by suspected crime. Governments want the benefits associated with civil law regulation – including corporate self-regulation and the flexibility associated with negotiated settlements, although such tools compromise criminal justice values. In this article, we explain why governments need to establish a two-track regulatory regime consisting of a forward-looking administrative/civil law system with a focus on crime prevention and a backward-looking criminal law process for investigation of crime incidents. A clearer institutional distinction between intrinsically different regulatory tasks will secure a more efficient regulation of corporate bribery and other forms of corporate misconduct.

1. Introduction

Governments all over the world forbid bribery for two main reasons; firstly to protect the rule of law and government institutions, secondly to safeguard fair competition in markets. All jurisdictions adhering to the rule of law has criminalized bribery. A vast majority also extend criminal liability to legal entities, and bribes paid abroad.[2]

Governments' performance in enforcing their anti-bribery legislation is largely debated in terms of their enforcement statistics: the number of enforcement actions, the size of fines, and whether leaders are charged (or if charged, imprisoned).[3] Recent enforcement actions against firms like Odebrecht, Rolls-Royce, and Siemens imply that even the largest and most powerful firms are subject to a tougher enforcement regime than they were some ten, not to mention twenty, years ago. Data compiled by the OECD show that the number of enforcement actions in cross-border bribery cases increased exponentially in the decade before 2015 – albeit driven primarily by the United States – while the size

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[2] The Organisation for Economic Co-operation and Development (OECD) describes governments' progress in implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on their website at http://www.oecd.org/corruption/oecdantibriberyconvention.htm. Corporate liability is well described by M. Pieth and R. Ivory, eds., *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Dordrecht: Springer, 2011).

[3] See U. Velikonja, 'Reporting Agency Performance: Behind the SEC's Enforcement Statistics', 101 *Cornell L. Rev.* (2015) 901.

of penalties also ticked sharply upward.[4] In policy debates, this stepped-up enforcement is considered a success.[5] Some legal scholars describe anti-bribery legislation, implemented in countries around the world, as the most influential form of business regulation in decades.[6]

The record also shows, however, that during this period the regulation of corporate liability in bribery cases has focused narrowly on suspected crime. Absent a suspicion of bribery, there has been little reason for regulators to bother about a corporation's strategies for mitigating corruption risk. Across jurisdictions that enforce corporate liability, the strategy has been to collect evidence in order to prove criminal liability, i.e. that bribery has taken place. As the individual criminal liability of corporate leaders is nearly impossible to prove, the investigation centers on the question of corporate liability. Whether a particular corporation was managed negligently with respect to corruption risk depends on what preventive strategies it had in place before the alleged bribery occurred. In practice, the investigators' evaluation of negligence includes assessment of such factors as corporate culture (especially the "tone from the top"), the corporation's whistleblower system, and its ethical guidelines. The assessment of such factors increasingly seems to deviate from what we associate with a criminal justice process and to resemble instead the process associated with civil/administrative law regulations, i.e. preventive compliance legislation. Such legal strategies are found in areas such as industrial safety, employment rights, and more recently, money laundering.

Is there a trend toward a regulatory regime for corporate bribery with more emphasis on *ex ante* oversight and preventive systems, and less emphasis on actions driven by suspected crime? We think so. In this article, we describe some indicators of this evolution, necessary reforms, and outline some basic questions for researchers and policy makers. Specifically, we argue that governments might secure a more efficient regulation of corporate bribery and other forms of corporate misconduct by establishing a clearer institutional distinction between intrinsically different regulatory tasks. This would require a two-track regulatory regime consisting of a forward-looking administrative/civil law system with a focus on crime prevention (in all firms) and a backward-looking (*ex post*) criminal law process for investigation of crime incidents.[7]

2. Intrinsic difficulties with corporate criminal liability for bribery

The regulation of bribery and other for-profit forms of crime is in constant evolution as markets develop, new technological or regulatory loopholes appear, and, increasingly over the last century, international

[4] OECD statistics on foreign bribery enforcement actions are available on their website (see note 1 above). For a review of obstacles to efficient enforcement of foreign bribery cases, see T. Søreide, *Corruption and Criminal Justice: Bridging Legal and Economic Perspectives*, Chapter 3. (Edward Elgar, 2016).

[5] OECD, *International Regulatory Co-operation and International Organisations: The Cases of the OECD and the IMO* (Paris: OECD, 2014).

[6] R. Brewster and S.W. Buell, 'The Market for Global Anticorruption Enforcement', 80(193) *Law and Contemporary Problems* (2017).

[7] In this paper, we use the term "two-track regime" to highlight the difference between criminal law and civil law. In practice, there can be more "tracks". What we propose in this article would be compatible with *three* tracks: In addition to a criminal law system that reacts on incidents in the past and a civil law system for preventing incidents in the future, incidents in the past can also trigger a reaction (a penalty) by civil law institutions. Such a three-track system is common in Europe and exists for example in Germany, Switzerland, Austria, France, the Netherlands and the Nordic countries among others.

collaboration achieves better oversight and regulation of markets.[8] When it comes to crime for the sake of securing corporate market-related benefits, however, a main driver of change is the actions of enforcers and stakeholders, who understand with increasing clarity the intrinsic difficulty of holding corporations liable within a criminal law system.

Only the most harmful acts in a society are normally defined as crimes. For these, strict enforcement systems and actions are considered necessary because the acts are deemed unacceptable, irrespective of their extent. (For many other problems, like pollution, speeding on the highway, and flouting of safety regulations, a certain degree of violation is tolerated.) Bribery is defined as a crime because of its serious consequences. It creates conflicts of interests for public officials and politicians in ways that can undermine whatever a government is trying to achieve. In a market context, benefits available through bribery typically lead to higher prices and lower quality of goods and services, while also impeding innovation.[9] As a result, the value for money of government spending decreases; moreover, competent individuals may seek positions where they can secure bribe revenues, rather than participating in productive activities. While consequences obviously differ from case to case, the harm associated with corruption justifies a criminal law definition.

The criminal justice system, however, evolved for the regulation of individual wrongdoing. Across countries, justice systems have evolved differently in accordance with the different purposes of the enforcement process. In the United States and other common law countries, with an adversarial system of dispute resolution, the process aims to end a conflict. In continental Europe, the Nordic countries, and other civil law systems with an inquisitorial system of adjudication, the purpose of a criminal law process is to establish the material truth, identify the actor or actors responsible, and evaluate their degree of guilt in light of the factual circumstances. Both systems assume that enforcement action should reflect the graveness of a given criminal act and should contribute to preventing future crime.

For several reasons, the criminal law process – especially in systems with an inquisitorial character – is unsuitable for corporate offenders. First, the corporation itself is intangible, an abstract structure for a group of activities or simply the name of a set of transactions. Prosecutors might investigate the activities associated with a corporation. Once they take action against the firm, however, they hit real people who may be either responsible or innocent, including owners, employees, and customers. When they go after people with influence over corporate decisions, law enforcers incentivize these individuals to demand that corporate transactions occur in compliance with the law. Within a criminal law context, however, the risk of punishing innocent individuals persists and is incompatible with the aims of protecting citizens against unreasonable harm and unfair treatment – the very aims that justify the prosecutor's high burden of proof.

Second, corporate structures, financial secrecy, and the many ways of disguising bribes as legitimate transactions all thwart the process of determining the facts of the case. With sufficient resources, it will usually be possible to identify and classify transactions as either bribes or legitimate payments. However, in a criminal law context, and especially in civil law systems, it is also necessary to identify

[8] See F. Heimann and M. Pieth, *Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies* (New York: Oxford University Press, 2017).

[9] OECD, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development* (Paris: OECD, 2015).

some element of moral blame, which means that one or more individuals must have acted with a certain extent of guilt, that is, "the Schuldprinzip". When the prosecutor is able to identify these individuals, there is no reason to charge the whole corporation. The problem in many corporate crime cases, especially those involving for-profit forms of crime, is that it is impossible for prosecutors to verify individual guilt in accordance with a standard sufficient to protect individuals from unfair treatment, that is, proof beyond every reasonable doubt.

Because of these intrinsic difficulties, governments, in their desire to combat bribery and other forms of crime for profit, have introduced tools that are largely unfit for the task. At the onset of this millennium, when it was implemented in countries around the globe, the strategy of corporate criminal liability combined with the criminalization of corporate bribery appeared as a tough and promising approach to a serious problem. In reality, as we will explain in more detail below, this strategy all too often shields the true offenders from enforcement actions.

3. Enforcement through collaboration and settlements

What Europe is now learning from the United States, where the number of enforcement actions against bribery is higher than in Europe, is that corporate criminal liability for bribery could be implemented and enforced with a solid dose of pragmatism. While that pragmatism at times compromises the principles described above, it means that actions *are* taken against corporations involved in crime. Many leaders in the private sector consider enforcement actions a real threat – and this has a disciplinary effect on corporate strategies in many firms.[10]

According to the OECD enforcement statistics, nearly two-thirds of enforcement actions in foreign bribery cases were the result of a negotiated settlement.[11] In the United States, nearly all enforcement actions against corporations are the result of such pretrial agreements.[12] Negotiated settlements in their different forms – non-prosecution agreements, deferred prosecution agreements, abbreviated procedure, pretrial diversion, penalty notice, or the Italian *patteggiamento* – are celebrated as a mode of enforcement that incentivizes firms to operate in compliance with the law and to *collaborate* with enforcement agencies.[13] In exchange for milder enforcement action, corporations can be induced to self-

[10] Control Risks, *International Business Attitudes to Corruption: Survey 2015/2016*, http://www.ethic-intelligence.com/wp-content/uploads/2015-Control-Risks-Corruption-Survey-2015-2016.pdf.

[11] See note 3 above. The OECD enforcement statistics include actions by all signatories to the OECD antibribery convention, and not only actions by OECD members.

[12] J. Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops* (2017). NYU School of Law, Public Law Research Paper No. 17-12; NYU Law and Economics Research Paper No. 17-09.

[13] While the terms listed as forms of negotiated settlements refer to slightly different procedural arrangements with different conditions regarding admission of guilt, they all allow prosecutors some discretion to reduce a penalty conditional upon certain acts or information from the accused. For a study of US enforcement authorities' impact on corporate compliance programs, see T. Lohse, P. Razvan, and C. Thomann, 'Public Enforcement of Securities Market Rules: Resource-Based Evidence from the Securities and Exchange Commission', 106 *Journal of Economic Behavior & Organization* (2014) 197-212. See also, regarding enforcement and the effect of compliance in firms, M. S. Ege, 'Does Internal Audit Function Quality Deter Management Misconduct?' 90(2) *Accounting Review* (March 2015) 495-527.

report their offenses and even cover the expenses of the investigatory process.[14] The enforcement agencies argue that by reducing the size of a fine in exchange for a firm's promise to introduce a more functional crime preventive system, with external monitoring of compliance performance, they promote a healthier corporate culture – one that in the end reduces a corporation's inclination to pay bribes.[15] Combined with the incentives for integrity, the use of negotiated settlements allows prosecutors to process each case faster and at a lower cost, thus enabling them to increase the total number of enforcement actions for a given amount of resources.

While some critics have pointed to negotiated settlements as a simple way out of an enforcement process for corporations,[16] representatives of enforcement agencies are confident that their actions help prevent corporate misconduct. At the US Securities and Exchange Commission's press conference on the Alstom case, on 22 December 2014,[17] former assistant attorney general Leslie R. Caldwell clarified:

> "We encourage companies to maintain robust compliance programs, to voluntarily disclose and eradicate misconduct when it is detected, and to cooperate in the government's investigation. But we will not wait for companies to act responsibly. With cooperation or without it, the department will identify criminal activity at corporations and investigate the conduct ourselves, using all of our resources, employing every law enforcement tool, and considering all possible actions, including charges against both corporations and individuals."

The option of offering corporate offenders a settlement implies a flexibility that prosecutors could use to influence the corporation. Holding out the threat of a lengthier and riskier court process, prosecutors are in position to request changes within the corporation and facts about the case that would otherwise be difficult if not impossible to retrieve.

This prosecutorial discretion in setting penalties, however, also represents a weakness of negotiated settlements in a criminal law context.[18] The prosecutors have discretion to set a penalty that reflects the facts of the crime and the extent of the offender's collaboration. The facts, however, are constructed based on whatever information the corporate offender chooses to share with the investigator. The prosecutor is supposed to evaluate the extent and quality of the offender's collaboration, essentially judging how well it has self-reported. The intrinsic problem for the prosecutor, however, is that the corporate offender might be the only player who knows the true extent of its bribery. How may the prosecutorial agency evaluate the corporation's self-reporting unless is investigators conduct

[14] The argument on lenient treatment in exchange for confessions easily comes in conflict with barriers against self-incrimination. This might be less of a concern with respect to corporations than individuals yet in many countries, it explains governments' reluctance to introduce settlements as a form of penalty negotiation.

[15] Conceptual argument by J. Arlen, 'Corporate Criminal Liability: Theory and Evidence', in A. Harel and K. N. Hylton, eds., *Research Handbook on the Economics of Criminal Law* (Cheltenham, UK: Edward Elgar, 2012).

[16] S. Hawley, *Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements Fail to Deter Overseas Corruption?* (London: Corruption Watch, 2015).

[17] Alstom is a French power and transportation company that pleaded guilty in bribery and agreed to pay a $772 million fine to resolve charges for bribery in several countries. See Department of Justice, 'Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges', news release, 22 December 2014.

[18] J. Arlen and M. Kahan, 'Corporate Governance Regulation through Nonprosecution,' 84(1) *University of Chicago Law Review* (2017) 323-387.

independent and comprehensive fact-finding exercises? It may claim that it conducts such exercises, but how credible is that claim if the country's government and media evaluate the agency based upon the number of enforcement actions and the size of fines? By conducting costly, time-consuming fact-finding exercises, the prosecutors would lose the cost-saving benefits associated with settlements and process far fewer cases. On the other hand, they can demand a large fine from a corporate offender and close the case by promising *not* to scrutinize the corporation's performance around the world.

For the corporate offender, the prosecutor's call for collaboration and discretion involves pressure to pay a fine to end the case, and this might be a tempting outcome even for corporations that consider the question of their own criminal liability uncertain – which means there is a risk of self-incrimination.[19] Whether corporations need protection against self-incrimination is disputed,[20] but when allegations involve individuals – as is often the case – this is a real concern.

In another scenario, the corporation may be guilty of *more* than what the prosecutor includes in the charge, and this is especially a risk in international cases with complex corporate structures that go via financial secrecy providers. As a settlement normally ends a case, often with prosecutors' promises not to share evidence with other authorities, such a deal may well offer an easy way out for notorious bribers. By accepting the fine, they may secure *de facto* impunity. At the same time, they can protect their corruption counterparts in government in various countries (*i.e.*, those that provide their markets) from prosecution if this would depend on evidence shared with the settling prosecutor. Under such circumstances, a corporate offender might regard even very large fines as a comparatively small expense, given the benefits of continued market activities and protection of clients.

For society, the results of settlements are often highly unpredictable, the process behind them opaque, and the legitimacy uncertain.[21] Multijurisdictionality in the sense of settlements reached upon a coordinated process between several jurisdictions with claims against an offender, adds to this problem. Besides, few countries have clear principles or guidelines for the settlement process, and the level of discretion afforded to prosecutors makes it appear as if their integrity can always be taken for granted – which is not necessarily the case.[22]

It is not clear, moreover, how enforcement actions that are the result of settlements deter other firms from offering bribes, especially as managers normally avoid personal liability. It is not even clear whether corporations *end* their illegal practices once they have settled a case. They claim to do so, but how credible is that when their true performance is difficult to monitor, and the enforcement actions

[19] R. E. Wagner, 'Miranda, Inc.: Corporations and the Right to Remain Silent', 11(3) *Va. L. & Bus. Rev.* (2016) 499.

[20] H. D. Gans and I. Shapiro, 'What Rights Do Corporations Have?' In *Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution* (New York: Palgrave Macmillan) pp. 6-12.

[21] The United States has by far the highest number of settlement-based enforcement actions in bribery cases, and while they have strived to enhance predictability, their prosecutors have broad discretion to set the terms for settlement-based enforcement actions. See J. Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements,' 8(1) *Journal of Legal Analysis* (2016) 191-234.

[22] See data on integrity in law enforcement at the World Justice Project, https://worldjusticeproject.org/. See also K. Moene and T. Søreide, 'Good Governance Facades', in S. Rose-Ackerman and P. Lagunes, eds., *Greed, Corruption, and the Modern State: Essays in Political Economy* (Cheltenham, UK: Edward Elgar, 2015) pp. 46-70.

against the corporate offender create no changes in the external institutional contexts that allowed the firm to gain business benefits through bribery in the first place?

For potential offenders, settlement-based enforcement actions provide weak results in terms of case law, and thus offer little guidance as to where to draw the line between legal and illegal practices. One may claim this is not a problem because firms should operate well within the margin of compliant performance. It is a problem, however, if an unreasonable concern about enforcement action prevents firms from entering markets where there is a risk of corruption – yet where foreign investors are greatly needed to ensure proper quality of government-financed goods and services and development.

4. Indicators of regulatory evolution

In accordance with the pragmatism of settlement-based enforcement actions, a range of supplementary principles and more or less formalized norms has evolved. For example, it is a well-established principle that corporate offenders have the possibility to get off with a lower fine if they introduce integrity systems that will contribute to reducing the risk of corporate offenses in the future, especially if the corporation allows and pays for an external compliance monitor.[23] As another established principle, there should be predictable *benefits* for those who self-report – and in line with the *non bis in idem* principle, enforcement agencies should offer protection against double jeopardy.

Consistent with the evaluation of guilt in personal liability cases, enforcement agencies seek to evaluate the offender's degree of blameworthiness, which means they need to verify whether someone acted irresponsibly on behalf of the corporation (as mentioned above). In practice, this evaluation includes an assessment of the corporation's ex ante compliance system and risk assessment procedures. It is difficult to retrospectively judge the functionalities of such internal systems at a certain moment in the past, so in reality, therefore, the evaluation will often center on the corporate culture and its development with respect to preventing bribery. As these evaluations are difficult to perform externally, on the basis of information from independent actors, they will often be conducted in collaboration with the corporate offender – for example, with the acquisition of a survey report conducted by a law firm whose services are paid for by the corporate offender.

These trends suggest that the enforcement of corporate criminal liability deviates substantially from what is associated with criminal procedure. Enforcement actions are not based merely on responsibility for a certain incident in the past; they also take into account management systems, subtle characteristics of corporate culture (or tone from the top), and measures taken to prevent illegal acts in the future.

In parallel with these developments in settlement-based enforcement actions, other regulatory functions support a tendency toward a regime where the functioning of corporate internal compliance systems is the core criterion for the question of enforcement action. For example, producers that have committed certain offenses – corruption included - are supposed to be debarred from public procurement. However, those producers that take organizational measures to act in stricter accordance with the law are considered to be "self-cleaned" – the term widely used to describe provisions in the most recent

[23] F. J. Warin, M. S. Diamant, and V. S. Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better', 13 *U. Pa. J. Bus. L.* (2010) 321.

European Union directive on public procurement[24] – and they become eligible to again bid on government contracts; in other words, they are not debarred after all. Moreover, competition authorities treat corporations found guilty of cartel collaboration more leniently if these firms introduce more efficient compliance systems to prevent such acts in the future. And, across Europe, money laundering regulations have been reformed to place more emphasis on preventive measures: regulatory actions will ensue when corporations fail to put in place systems to prevent offenses, regardless of whether an act of money laundering can be proven.[25] Of course, if it can be proven that a criminal act has occurred, law enforcement actions may follow.

What we observe, then, is an evolution towards a form of regulation of corporate misconduct with clear civil law characteristics. Governments appear to be endorsing the development of a new enforcement regime vis-à-vis corporations for certain forms of offences. For those that have committed corporate bribery, however, governments have not taken the steps necessary to align the relevant legislation and institutional enforcement systems with practices on the ground.

The new, de facto strategy bears the characteristics of a preventive, compliance-enhancing approach. Instead of a legal regime that focuses on criminal conduct (i.e. bribes) committed in the past (*ex post*), the compliance-enhancing approach centers around the question whether the company has in place sound systems to mitigate and prevent corruption in the future (*ex ante*). Inherently, the requested compliance systems aim at preventing bribery, which means they hold a forward-looking character; they follow from a risk-mitigation enforcement regime.

The flexibility offered to prosecutors may well be desired for the sake of reaching a solution to complex cases of corporate misconduct. In practice, however, it is a problem if a lack of regulations and appropriate institutions leaves the prosecutors with too many functions – by becoming de facto responsible for (i) acting upon crime investigation; (ii) evaluating corporate risk assessment and prevention, and (iii) assessing the appropriate penalty by ending a case with a settlement. Of course, the bundling of roles is especially a challenge if the integrity among prosecutors is variable.[26]

5. Toward a two-track enforcement regime

Governments seeking to reform their enforcement regimes vis-à-vis corporate offenders face a complicated task. They desire smart systems that reward compliance but also impose sanctions with a credible deterrent effect. The systems should be predictable, legitimate and proportionate, yet allow prosecutors the flexibility they need to bring cases to conclusion. Information about the settlement process and its result should be available to the public, but it cannot be too transparent, lest offenders

[24] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, in which self-cleaning is described in Article 57(6) and (7).

[25] The European Union Fourth Anti-Money Laundering Directive, EU No. 2015/849, entered into force on 26 June 2015 and was implemented as national law in European countries by 26 June 2017.

[26] According to the data provided by the World Justice Project 2018 weak integrity in law enforcement systems impedes criminal justice in a large number of countries. Judicial corruption is a serious, global challenge. For details, see https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018. The perception is supported by the results of Transparency International Global Corruption Barometer 2017: see www.transparency.org.

seeking to keep sensitive information confidential be reluctant to come forward and self-report. While victims should be compensated, corporations are disinclined to admit the negligence that leads to such responsibility. Overly strict demands on corporations will induce firms to stay silent about their offenses – and overly severe penalties may harm society more than they punish the corporations involved in the illegal acts. As if these concerns at the national level were not enough, governments recognize that the international character of markets requires harmonized solutions and coordinated actions across jurisdictions with different criminal law traditions.

In light of such trade-offs, some hesitancy around reform is understandable. However, it should not be a bar to thoughtful action. One fruitful approach, we would argue, involves constructing a two-track regulatory system that contains elements of both the risk mitigation enforcement regime, described above, and criminal law legislation. This is the direction in which current practices are, in any case, evolving, though many questions remain to be answered.

A two-track regulatory system could establish a clearer distinction between backward-looking *ex post* criminal law regulation and a more forward-looking and preventive administrative/civil law regulation (*ex ante*). Once we set forth explicit requirements for the integrity mechanisms that all market players must have in place, it becomes possible for a market protection agency to sanction a corporation's failure to take these mandatory measures.[27] If such measures are explicitly designed to prevent risk, they will likely be more effective in preventing bribery compared with today's often vague demand for "compliance-friendly culture." If they are also designed with an awareness that firms have incentives to hide profitable forms of crime, regardless of what they claim – and if they are not based on an assumption that top management is generally honest – such mandatory measures can facilitate criminal investigations in cases where that is relevant.

Measures designed to prevent for-profit bribery decisions should be targeted at the strategic choices that allow bribery. While internal checks and balances, whistleblower systems, and ethical training are all important, regulators need information about a firm's anticorruption risk assessment procedures and results, as well as about the strategic decisions that have been made in response to that assessment. If such decisions are approved and signed by the firm's top leaders, regulators will have far more detailed information about what individuals in top management knew and did – information that is necessary to evaluate negligence or guilt. In contrast to the situation some twenty years ago, corporate leaders now hold far more information about corruption risks in a given market, and they conduct risk assessments in any case.

With a two-track regulatory system, corporate failure to put in place systems to prevent bribery would trigger actions, irrespective of suspected crime. Instead of one regulator that focuses narrowly on suspected crime and evaluates a firm's compliance measures only when the firm is suspected of bribery – as is the case today – a market protection agency could base (administrative/civil law) actions on the

[27] France has introduced bribery regulation in line with this principle – the "Loi Sapin II pour la transparence de la vie économique" ("Sapin II"), which includes risk mitigation measures in all corporations and competence for law enforcers to act upon corporate failure to implement the proper measures. That means, *some* form of enforcement action can be imposed on offenders even if an act of bribery cannot be proven (which if it could would trigger a much stricter penalty). The reform expands French criminal law's extraterritorial effect, especially because it removes a dual criminality requirement that was formerly in place.

quality of an organization's ongoing compliance measures. In addition, the authority to determine whether a corporation would be eligible to bid on public contracts, or, alternatively, would be disbarred, could be included in such regulations instead of being vested in procurement agents – who are the ones in a position to take bribes.

Criminal law investigations would be reserved for circumstances in which an offense most probably has happened. They would aim to identify the facts of the case (which would not be negotiable, as in today's settlements) and would impose a criminal law penalty on the liable individual(s) or corporate offender(s).

A two-track system could be compatible with supranational market regulation, like that of the EU Commission for Competition in Europe or the Securities and Exchange Commission in the United States. Stronger international collaboration for more efficient protection of markets against corruption would enhance harmonization and predictability in law enforcement while allowing countries to keep their criminal law principles and peculiarities.[28]

While solutions to the many regulatory difficulties can likely be found, there are still challenging aspects for policy makers and researchers. For example, negotiated settlements will be most clearly compatible with administrative sanctions in situations where firms want to defend their corporate compliance system and risk assessment procedures but there is no reason to suspect an act of bribery. However, despite explicit demands for corporate corruption prevention measures and a clearer institutional allocation of oversight responsibilities, offenses will still occur, and criminal law investigators will still need to induce corporate offenders to self-report these offenses –which means that negotiated settlements will be relevant in these contexts as well. A two-track regime makes it easier to let rewards for self-reporting depend on crime confession alone, and the space for negotiations can be smaller.

There are, nevertheless, limits to enforcement agencies' ability to induce self-reporting by promising a lower penalty. Offenders, after all, make rational decisions to pay bribes in exchange for huge market or personal benefits that typically exceed the size of the potential fine. In order to detect and prevent such crimes, enforcement needs to reach both sides of the corrupt deal, even when one side includes public officials or politicians in a foreign country. Two mechanisms in particular may contribute to achieving such aims.

First, criminal law regulators could coordinate their actions and draw lessons from the leniency mechanisms in competition law: that is, by reducing the penalty substantially for the party that is first to confess the crime, they can exploit the potential lack of trust between the two parties. Even if both parties promise to keep their corrupt deal hidden, each will prefer to be the first to deviate from that promise, and not the second. Such coordination requires, as a start, collaboration across jurisdictions – and if that is not possible between all jurisdictions, it is possible between some.

[28] Such a system could strengthen the anticorruption impact of market integrity mechanisms, including tort law, antitrust law, and debarment in public procurement. This is explained by E. Auriol, E. Hjelmeng, and T. Søreide, "Deterring Corruption and Cartels: In Search of a Coherent Approach," *Concurrences* 1-2017.

Second, law enforcement agencies could pledge to share evidence of crime with enforcement agencies in the jurisdiction where the bribery has taken place (regardless of what corporate offenders may desire), and international organizations may help distribute information about jurisdictions' failure to act on such evidence.[29] Enforcement agencies that impose large fines on corporations can decide to consider local enforcement actions when deciding whether to share the proceeds of the fine payment with the relevant governments. Further questions that we will not address here include how to determine the size of assets to be recovered in bribery cases, which victims are to be compensated, and whether an enforcement action should be coordinated with actions from other oversight institutions or should have implications for private enforcement (claims).

6. Conclusion

The prosperity and development of societies depend on the proper functioning of organizations and markets. Governments therefore use regulatory tools and enforcement regimes to promote the rule of law (i.e. protect government institutions from being corrupted), fair competition in markets, protect society against various other threats, and reduce the risk that some players may obtain narrow benefits at unreasonable costs to society.

Governments are constrained, however, in enforcing the necessary regulations. For various reasons, there are limits to what they are able to monitor, including the international character of markets, complex corporate organizational and ownership structures, financial secrecy, legal loopholes for illegitimate activities, and inadequate exchange of information with foreign jurisdictions. High standards of proof combined with difficulties in retrieving evidence make it costly and often cumbersome to take enforcement actions against suspected corporate misconduct. Investigations and court procedures tend to require advanced forensic expertise and substantial budgets, conditions rarely met in practice.[30]

Given such law enforcement difficulties, governments increasingly lean on self-regulation to secure improved compliance with their regulations. This makes sense because corporate leaders are in a better position than external enforcement agencies to detect and act upon corporate misconduct. If enforcement agencies treat corporations more leniently when corporate leaders do more to prevent crime, and when they reliably self-report incidents that occur, then the firms will have stronger incentives to self-police their operations and comply with regulations.[31] As discussed in this article, such reasoning explains the

[29] The World Bank releases statistics on 'referrals', that is, on its practice of sharing evidence of bribery with the relevant developing-country governments. The Bank's statistics include updated information about domestic law enforcers' response, specifically whether the evidence shared resulted in any law enforcement action against the individuals or institutions that received the bribes. To date, such enforcement actions have rarely followed. See World Bank, *Our Development Resources Must Reach the Intended Beneficiaries: Annual Update, Integrity Vice Presidency* (Washington, DC: World Bank, 2016), http://pubdocs.worldbank.org/en/118471475857477799/INT-FY16-Annual-Update-web.pdf.

[30] There are few studies of the importance of enforcement budget, but Howell and Roe apply such data from the United States. See J. E. Howell and M. J. Roe, 'Public and Private Enforcement of Securities Laws: Resource-Based Evidence', 93(2) *Journal of Financial Economics* (2009) 207-238.

[31] J. Arlen, 'Corporate Criminal Liability: Theory and Evidence' (see note 12 above).

increased emphasis across jurisdictions on compliance-based defense in corporate liability cases, often coupled with a negotiated settlement, that is, a pretrial agreement on penalties.[32]

Negotiated settlements have become the predominant vehicle for corporate enforcement actions in cases where firms collaborate with law enforcers. In several countries, this tool has increased the number of enforcement actions against corporations. However, in cases of for-profit forms of corporate misconduct, like tax evasion, fraud, bribery, collusion, money laundering, and more, negotiation-based pretrial law enforcement procedures pose some intrinsic difficulties – especially because enforcement agencies have incomplete information about corporations' true performance.

In this article, we have described challenges with current regulatory regimes and explained why enforcement practices are evolving in the direction of a more sensible system. The problem, we contend, is the extent to which institutions and laws remain unchanged. The increasing pragmatism with which criminal law is enforced vis-à-vis corporations compromises the values associated with criminal law, and especially the inquisitorial characteristics associated with civil law systems.

Instead of stretching that system further than its limits allow, we propose regulatory reform. With a two-track system, one in which separate enforcement agencies oversee risk reduction measures and act on incidents of bribery, it should be possible to secure the benefits afforded by the current pragmatic approach while at the same time enshrining the fairness, legitimacy, proportionality and crime-preventive purpose associated with criminal law.

There is an underdeveloped potential in the use of a preventive compliance approach. The well-developed prevention- and compliance-focused civil/administrative law track (e.g. competition law and anti-money laundering law) has in place several tools to remedy violations (e.g. administrative fines, naming and shaming-provisions, withdrawal or suspension of authorization to conduct business temporary ban against any person discharging managerial responsibilities). However, within this sphere, where enforcement processes tend to end at the pre-trial stage with a negotiated settlement, the settlement process itself remains largely unstudied and unregulated. The vast majority of legal tools does not forbid settlements in the preventive compliance track. In fact, in most jurisdiction, e.g. many continental law systems, the possibilities to undertake negotiated settlements in this track are significantly wider than in the criminal law track in many jurisdictions. . However. in criminal procedural systems adhering to the principle of the material truth (inquisitorial systems), negotiated settlements are, in principle (with very few exceptions), not possible. Given the additional fact that legal persons cannot be subject to criminal sanctions in many European countries, an expanding use of negotiated settlements in corporate bribery cases – increasingly with multijurisdictional character – cannot continue without suitable regulations, and as described – an institutional reform of civil law character.

Based on facts and arguments presented in this article, we can draw the following two conclusions: First, within the criminal law track there is a limited legal space for settlement negotiations in many jurisdictions. In systems that do allow settlements in the criminal law track, it has proved difficult to

[32] A. Makinwa and T. Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association, Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee, 2018).

secure foreseeability, legitimacy and proportionality in settlement-based enforcement actions. In a preventive compliance-based civil/administrative law track, these limitations and challenges are less pronounced

Second, research is necessary to (i) identify whether and to what extent negotiated settlements take place within the preventive compliance track, (ii) identify possibilities, limitations and challenges for negotiated settlements within this track, and (iii) carve out principles/best practices for negotiated settlements within this track. It is necessary to (iv) study and understand the pragmatic and principled differences between the two tracks before embarking on (i) to (iii).

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