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## WORKING PAPER

# **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 non-trial resolutions, although such tools compromise values of criminal justice. In this article, we describe current legislative patterns and developments, and explain why governments need to learn from other areas of risk-based regulation, and 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 criminal 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.

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## 1. Introduction

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

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 (and if charged, imprisoned).<sup>3</sup> Recent enforcement actions against firms such as 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 of penalties also ticked sharply upward.<sup>4</sup> In policy debates, this stepped-up enforcement is considered a success.<sup>5</sup> Some legal scholars describe anti-bribery legislation, implemented in countries around the world, as the most influential form of business regulation in decades.<sup>6</sup>

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 criminal guilt includes assessment of such factors as corporate culture (especially the "tone from the top"), the corporation's whistleblower system, and its ethical guidelines. To the extent that this evaluation concentrates on the corporation's current performance instead of documenting illegal practices in the past, it increasingly seems to deviate from what we associate with a criminal justice process, resembling instead the process associated with civil/administrative law

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<sup>2</sup> 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 described by M. Pieth and R. Ivory, eds., *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Dordrecht: Springer, 2011).

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

<sup>4</sup> 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).

<sup>5</sup> OECD, *International Regulatory Co-operation and International Organisations: The Cases of the OECD and the IMO* (Paris: OECD, 2014).

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

regulations, i.e. preventive compliance legislation. Such legal strategies are found in areas such as industrial safety, employment law, 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 and necessary reforms, and outline some basic questions for researchers and policy makers. Specifically, we argue that Nordic 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.<sup>7</sup> For insights into what anti-corruption might learn from existing risk-based regulatory regimes, we include in this article a brief review of safety regulations in petroleum production.

## 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 collaboration achieves better oversight and regulation of markets.<sup>8</sup> 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. The current trend, which embraces the Nordic jurisdictions, is to end cases with a pragmatic non-trial solution where the prosecutor and representatives of the accused corporation come to agreement about a penalty, given “the threat” of a riskier and more costly court process.<sup>9</sup>

These practices have evolved within criminal justice systems that were developed for the regulation of individual wrongdoing. Across countries, these systems have evolved differently in accordance with the different purposes of the enforcement process, which again are important to understand the mentioned trend of offering non-trial settlements in corporate bribery cases. The criminal justice system in the United States and other common-law countries developed as adversarial systems of *dispute resolution*, hence the aim of a law enforcement process has been to end a conflict. In continental Europe, the Nordic countries, and other civil law systems, we have systems rooted in inquisitorial systems of adjudication, meaning that the purpose of a criminal law process is to *establish the material truth*, identify the actor

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<sup>7</sup> 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 lead to sanctions from 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.

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

<sup>9</sup> For a review of practices and regulations in 66 countries, see Makinwa, A. O. and T. Søreide. *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences*. The International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee. December 2018.

or actors responsible, and evaluate their degree of guilt in light of the factual circumstances. Both categories of systems assume that enforcement action should reflect the graveness of a given criminal act and should contribute to preventing future crime.

For several reasons, criminal law – 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 encourage 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 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”. Recently, this principle was again confirmed by the European Court of Human Rights Grand Chamber as it found that criminal law provisions without an element of guilt are incompatible with the Convention’s Article 7.<sup>10</sup> When the prosecutor is able to identify the responsible individuals, there is less 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 any reasonable doubt.

Because of these intrinsic difficulties, governments, in their desire and duty 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, this strategy all too often shields the true offenders from enforcement actions, even if the accused corporations pay a hefty fine.

### **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

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<sup>10</sup> G.I.E.M v. Italy Application no. 1828/06; 19029/11, Grand Chamber Judgment of 28 June 2018.

principles described above, it means that actions *are* taken against corporations involved in crime, and the higher risk of sanctions do have a disciplinary effect on corporate strategies in many firms.<sup>11</sup>

### 3.1 Enforcement in practice

According to a recent report from the OECD,<sup>12</sup> non-trial resolution instruments – also referred to as *negotiated settlement* – have become the primary enforcement vehicle of foreign bribery laws for the group of countries that are parties to the OECD Anti-Bribery Convention. Among the 44 countries, 23 jurisdictions have successfully concluded altogether 890 foreign bribery cases since the convention entered into force in 1999. Of these, 695 cases were concluded as a non-trial resolution (78% of cases). Some jurisdictions stand out as far more active enforcers than others, including the United States, the United Kingdom, and Germany. Together these enforcers account for 80% of the enforcement actions and nearly 90% of all the non-trial resolutions since 1999. However, of the 23 countries that have successfully concluded a foreign bribery action, 15 have used a non-trial resolution mechanism at least once to resolve a foreign bribery case with either a legal or a natural person or both. Specifically, Australia, Brazil, Chile, Israel, the Netherlands, Spain, and Switzerland have enforced only with non-trial resolutions, while Canada, France, Germany, Italy, Norway, Sweden, the United Kingdom, and the United States enforced both through trial and non-trial resolutions.

These facts suggest non-trial resolution is becoming the norm in corporate bribery cases, including among countries without a plea-bargain tradition, and by law, no explicit opportunity to *negotiate* a settlement with a corporate offender. For example, the OECD report (page 19) points at the Norwegian prosecutor's broad discretion when offering corporate offenders an *Optional Penalty Writ* (also known as a *Penalty Notice*), which formally has the effect of a judgment, although no court validation is required to either issue or conclude the case.<sup>13</sup> At the same time, the legislator (in *travaux préparatoires*) denounces negotiation in the criminal law sphere from the perspective that such practice is inconsistent with the principle of the ascertainment of material truth. Besides, negotiation around the size of punishment is found unethical, especially when there is power imbalance between a (powerful) government and a (far weaker) offender.<sup>14</sup>

While all the Nordic countries have criminalized bribery and implemented the most relevant conventions, the institutional aspect of reforms and guidelines that make the rules fit their respective systems lag behind. None of the Nordic jurisdictions explicitly recognizes negotiated settlements as an efficient enforcement mode. At the same time, they all have provisions in place that make it possible to end cases at the pre-trial stage. Without proper implementation of settlements as an enforcement tool,

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<sup>11</sup> 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>.

<sup>12</sup> OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*. (Paris: OECD, 2019)

<sup>13</sup> The Norwegian Code of Criminal Procedure section 255 states: "If the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority may issue a writ giving an option to this effect (an optional penalty writ) instead of preferring an indictment". The nature and character of such an optional writ establishes an environment for negotiations between the prosecution and the defendant.

<sup>14</sup> Alas, in some bribery cases the corporate offender might be a large multinational and quite powerful vis-à-vis the public prosecutor. A summary of the Norwegian position on negotiated settlements is found in NOU 2016:24 Ny straffeprosesslov pp. 363–381.

with guidelines and instructions, corporations perceive the benefits of self-reporting and cooperating with prosecutors to be unpredictable, and there are few rules about what details to share with the public.

In Sweden, for example, there is no corporate criminal liability, although according to their penal code, corporate fines may be issued for a crime committed in the exercise of business activities if the undertaking has not done what could reasonably be required for prevention of the crime, or if the crime was committed by a person in a leading position.<sup>15</sup> In principle, there is mandatory prosecution, yet according to Chapter 10, Section 10.3 of the Swedish Penal Code, the giving and taking of bribes, trading in influence and negligent financing of bribery should be prosecuted *only if prosecution is of public interest*. This is a form of discretionary prosecution as it includes an assessment of opportunity. Combined with the opportunity to offer a *summary penalty order* upon guilty pleas, the prosecutors have the freedom to end cases with a fine at the pre-trial stage. However, as settlements are not recognized as an enforcement mechanism, there are hardly any guidelines or rules regarding transparency.

Finland has corporate liability and prosecutors have broad freedoms to offer a settlement upon an admission of guilt. So far, there have been no corporate settlements in corporate bribery cases, and the extent to which prosecutors offer benefits for self-reporting and cooperation is unclear. The situation is similar in Denmark – where there are no formal rules regarding corporate settlements envisaged within the criminal justice system, and by contrast to Finland, plea bargaining is not a feature of the criminal justice system. In practice, some bargaining may occur to achieve a reduced sentence, yet no clear instructions have been developed for settlements in corporate bribery cases and there are no clear rules regarding transparency. In Norway, there is a strict vicarious liability for corporate offenders wherein prosecutors evaluate the extent of negligence. The specific criteria for liability are not sufficiently clear in this respect, and the extent of benefits for those who self-report and cooperate is not stipulated. Combined with broad discretionary freedoms for the prosecutor, described above, the enforcement regime is not sufficiently predictable or regulated. There is discrepancy between the law and the will of the legislator, which is reluctant towards such procedures on the one hand, and allows the prosecutorial authorities' practice, on the other.

See the Appendix for a comparison of bribery legislations in France, the UK and the USA, which – compared to the Nordic countries – are more developed regimes with respect to the use of non-trial resolutions in corporate bribery cases.

### **3.2 The benefits associated with settlements**

For several reasons, prosecutors in the Nordic countries want to exploit the legal space they do have to conclude cases without a trial. Non-trial resolutions in their different forms – negotiated settlements, non-prosecution agreements, deferred prosecution agreements, abbreviated procedure, pretrial diversion, penalty notice, or the Italian *patteggiamento* – are celebrated as a mode of enforcement that encourages firms to operate in compliance with the law and to *cooperate* with enforcement agencies.<sup>16</sup>

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<sup>15</sup> Chapter 36, Section 7 of the Swedish Penal Code

<sup>16</sup> While the listed terms 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

In exchange for milder enforcement action, corporations can be induced to self-report their offenses and even cover the expenses of the investigatory process.<sup>17</sup> 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.<sup>18</sup> Combined with the incentives for integrity, the opportunity to offer a negotiated settlement 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,<sup>19</sup> 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,<sup>20</sup> 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 *expected* benefits with settlements exceed the reduction in administrative expenses per case. 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 a position to request changes within the corporation and facts about the case that would otherwise be difficult if not impossible to retrieve. For these reasons, settlements – or non-trial resolutions – are seen as an opportunity not only to deter crime through law enforcement, but also to promote compliant business practice.

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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.

<sup>17</sup> 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.

<sup>18</sup> 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).

<sup>19</sup> S. Hawley, *Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements Fail to Deter Overseas Corruption?* (London: Corruption Watch, 2015).

<sup>20</sup> Alstom is a French power and transportation company that pleaded guilty to 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.



#### 4. Side-effects associated with expanded discretionary authority

The prosecutorial discretion in setting penalties, however, represents substantial challenges in a criminal law context.<sup>21</sup> The prosecutors have discretion to set a penalty that reflects the facts of the crime and the extent of the offender's cooperation. Upon cooperation, however, the facts of the case 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 cooperation, 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 own bribery. How may the prosecutorial agency evaluate the corporation's self-reporting unless its investigators conduct 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 cooperation combined with the discretion to offer a settlement 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.<sup>22</sup> Whether corporations need protection against self-incrimination is disputed,<sup>23</sup> but when allegations involve individuals – as is often the case – this is a real concern. In any case, the fact remains that several jurisdictions offer companies the privilege against self-incrimination, e.g. in Norway.<sup>24</sup>

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.<sup>25</sup> 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. Hence, under

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<sup>21</sup> J. Arlen and M. Kahan, 'Corporate Governance Regulation through Nonprosecution,' 84(1) *University of Chicago Law Review* (2017) 323–387. 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.

<sup>22</sup> R. E. Wagner, 'Miranda, Inc.: Corporations and the Right to Remain Silent', 11(3) *Va. L. & Bus. Rev.* (2016) 499.

<sup>23</sup> 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.

<sup>24</sup> Judgment of the Supreme Court of Norway 1 June 2011 (Rt. 2011 p. 500). The Supreme Court finds in this judgment that the European Convention of Human Rights Article 6 No. 1 ("fair trial") encompasses a privilege on self-incrimination for legal persons.

<sup>25</sup> E.g. *Serious Fraud Office v. Rolls-Royce PLC/Rolls-Royce Energy Systems* (Case No. U20170036), Judgment of the Crown Court of 17 January 2017 paras 4–5.

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.<sup>26</sup> 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.<sup>27</sup>

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 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.

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.<sup>28</sup> At last (but not least): the procedural aspects associated with negotiated settlements, as described, are not possible to reconcile with the leading underlying principle of all civil law criminal procedure systems, that is, to find and establish the material truth of the case.

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<sup>26</sup> 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.

See 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.

<sup>28</sup> According to 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>. See also Transparency International Global Corruption Barometer 2017: see [www.transparency.org](http://www.transparency.org).

## 5. Regulatory evolution: risk-based regulation of economic crime

In accordance with the pragmatism of settlement-based enforcement actions, a range of supplementary principles and more or less formalized norms have 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.<sup>29</sup> As another established principle, there should be predictable *benefits* for those who self-report – and in accordance with the *non bis in idem* principle, enforcement agencies are expected to offer protection against double jeopardy also upon enforcement action made by other jurisdictions.<sup>30</sup>

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 European Union directive on public procurement<sup>31</sup> – and they become eligible to again bid on government contracts; in other words, they are not debarred after all. Moreover, competition authorities

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<sup>29</sup> 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.

<sup>30</sup> Internationally, the recognition of double jeopardy protection is encouraged but formally unsettled, although much debated in policy circles, including the OECD Working Group on Bribery. Kevin Davis, law professor of NYU, explains the debate boils down to “what weight should one country give to an outcome of a prosecution in another country”, see ‘OECD Public consultation on liability of legal persons: Secretariat summary of responses.’ Paris: OECD December 2016.

<sup>31</sup> 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). For discussion, see E. Hjelmeng and T. Søreide. ‘Debarment in public procurement: rationales and realization’, in GM Racca & CR Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014) 215.

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.<sup>32</sup> 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 of whether the company has sound systems in place 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.

## **6. Lessons from other areas of risk-based regulation**

### **6.1. Introduction**

In several areas of economic life, governments already have in place comprehensive risk-based regulations, and this is especially the case for industrial safety – including chemical processes, petroleum production and aviation. A regulatory system for prevention of accidents, oversight, and for holding corporations responsible, has evolved over decades. Corporations and governments share the ambition of preventing accidents, yet without proper regulation, some producers might be tempted to cut the expense of some of the safety measures – and in this sense, there are parallels to economic crime: it is possible for firms to profit from a “safety level” below what is optimal for society. For these reasons, it makes sense to ask what regulations for anti-bribery can learn from systems with risk-based regulations of the sort that we see emerging also with respect to economic crime. We have chosen oil regulation as the case in point for this discussion. North Sea oil producing countries are highly recognized for their offshore safety regimes. Particularly on the Norwegian Continental Shelf, health and safety have been a key concern since oil production started in the late 1960s. At present, the regulatory system is being reformed due to EU harmonization efforts. For the Nordic countries, the contrasts between the Norwegian regime and the new EU system highlight regulatory aspects of relevance for the development of clearer principles on corporate criminal liability.

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<sup>32</sup> 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.

## 6.2. The Norwegian offshore safety regime

The offshore safety regime in Norway is based on a set of goal-setting rules in which the performance of safety control is carried out by the industry through internal control systems, with the safety authorities monitoring the safety performance of the industry.<sup>33</sup> The operator and the licensee must make sure that facilities and activities fulfil all safety requirements, yet it is the operator who carries the overall responsibility to *monitor* that operations happen in compliance with all applicable safety offshore rules; this constitutes duties on licensees, employees, owners, contractors and sub-contractors to create a safety management regime in which it is possible to ensure that all parties comply with the safety requirements.<sup>34</sup> It therefore falls on the industry to identify *what needs to be done* to ensure the necessary safety level. In other words, the operator not only has the duty to ensure that the activities are being operated safely, it also has the responsibility to ensure that sub-contractors follow the regulations. In addition, the general rules apply: employers must ensure a safe working environment.<sup>35</sup>

The goal-setting characteristic of the safety regime implies that the Norwegian authorities determine the extent of expectations, whereas the industry is left with flexibility and discretion with respect to how they obtain the required safety levels. The regulatory authorities monitor the safety levels through verification of the internal control systems of the operator and the licensees, evaluation of self-reported incidents as well as independent inspections, including evaluations of firms' management systems. They have the competence to impose sanctions upon violations of the required safety norms – including revocation of licenses, fines and suspension of activities.<sup>36</sup>

## 6.3. Regulatory evolution: harmonization across the European Economic Area

The Norwegian offshore regulations are now subject to reform due to the European Union's ambition of harmonizing safety measures across member states. Directive 2013/30/EU<sup>37</sup> (hereinafter the Directive) defines the elements of a comprehensive EU-wide framework for preventing major accidents and limiting their consequences. According to this Directive, the operator and owner must demonstrate *technical and financial capacity* throughout the lifecycle of operations. Before exploration or production begins, operators must prepare a Major Hazard Report for their offshore installations and submit it to the country's competent authority. This report must contain a major accident prevention policy, a risk assessment, a safety and environmental management system and an internal emergency response plan. Operations cannot commence or continue until the report has been assessed and accepted by the country's competent authority. The plan is subject to periodic review by the operator every five years or earlier if required by the competent authority.<sup>38</sup> Various Annexes to the Directive lay out all technical aspects that need to be mentioned in the Major Hazard Report. Prior to start-up of a production facility, technical solutions that are critical for safety must be independently verified by an entity or an

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<sup>33</sup> The Norwegian Petroleum Act (*Lov om petroleumsvirksomhet (Lov av 29 November 1996 nr. 72)*), Article 9-1

<sup>34</sup> Framework Regulation of the Petroleum Act, Article 7, and the Petroleum Act, Article 10-6.

<sup>35</sup> The Norwegian Working Environment Act (*Lov om Arbeidsmiljø, arbeidstid og stillingsvern (Lov av 17 Juni 2006 nr. 62)*), Article 2-3

<sup>36</sup> Framework Regulation, 10-13 and 10-16 of the Petroleum Act.

<sup>37</sup> Directive 2013/30/EU of the of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC

<sup>38</sup> All requirements listed explicitly by the Directive.

organizational part of the operator or the owner that is not under the control of or influenced by the organizational part using those statements.

At the licensing stage, applicants must ensure adequate provisions to cover liabilities potentially deriving from offshore oil and gas operations, in addition to providing evidence of technical and financial capacity to the licensing authorities. When a major accident has occurred or there is an imminent risk of such an accident, the operator or owner has a *duty to notify* the relevant authorities. Then, the government in question has to ensure that the operator or owner takes all suitable measures to prevent escalation and to limit potential consequences. To reinforce operators' incentives to prevent accidents, the Directive places the legal responsibility for accidents and their consequences (including environmental consequences) with the operator. Every licensee is henceforth liable for damage caused without the need for regulators to prove negligence on his or her part, as long as a causal link is established.<sup>39</sup> The licensee will have to compensate public authorities for any work done to restore the environment to its baseline condition, or perform this work themselves.

Whilst the operator/industry mainly has to provide information to prove technical and financial capabilities, the Directive places the responsibility for supervising that the operator meets safety requirements with the national authorities. Regulators are expected to assess information, evaluate licenses and conduct inspections in accordance with this far more *prescriptive regime* than the Norwegian tradition. Pursuant to Article 4 (3) of the Directive, each government is obliged to put in place procedures to ensure prompt and adequate handling of compensation claims, including transboundary claims, as far as liability is provided by national law.

National authorities must *verify* safety provisions, environmental protection measures, and the emergency preparedness of rigs and platforms by appointing a competent authority.<sup>40</sup> Governments must ensure the independence and objectivity of their competent authorities i.e. prevent conflicts of interests arising by having a clear separation between regulatory functions relating to offshore safety and the environment and those relating to economic development. The tasks of the competent authority range from assessing the Major Hazard Report, overseeing compliance by operators, inspections, investigations, advising other bodies, and producing reports. Essentially the competent authority must determine if an operator has the capacity to meet the relevant requirements under the Directive and carry the primary duty to supervise offshore safety and respond accordingly in case of accidents. If operators do not respect the minimum standards evident from the Major Hazard report, investigations and other documents submitted, national authorities can *impose sanctions*, including halting production – even if no accident or incident has occurred.<sup>41</sup>

For the sake of legitimacy, information about how companies and EU countries keep installations safe must be made available for citizens; the Directive introduces EU-wide requirements on transparency. This includes the sharing of information on accidents and near misses as well as on other indicators of the safety performance of industry and regulators in the sector. Furthermore, governments must ensure *public participation* relating to the effects of planned offshore oil and gas operations prior to operations.

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<sup>39</sup> Operators listed in Annex III of the Directive fall under strict liability.

<sup>40</sup> The Directive, Article 8 (1), a – f) describes the regulatory functions of the competent authority

<sup>41</sup> The Directive, Article 6 (4), ref. Art. 18 a), e). Article 18 gives the competent authority determined by member states the competence to prohibit operations

In addition, there have to be mechanisms in place for confidential reporting on safety and environmental concerns relating to operations and follow-up investigations. Governments have a duty to make sure the competent authority establishes a *whistleblower procedure*.

At the EU level, the Directive establishes a European Maritime Safety Agency (IMSA) that assists in the implementation of the Directive, oversees regulatory performance, and promotes cooperation with third countries that undertake offshore oil and gas operations, facilitates the exchange of information between countries, and promotes high safety standards for offshore oil and gas operations globally.

#### **6.4. Contrast between Norwegian and EU regulations**

Notwithstanding common safety ambitions, there are notable differences between the Norwegian tradition and the new EU regime, in particular across the following three dimensions.

##### *6.4.1. Prescriptive versus performance-based regulation*

The EU Directive presents a prescriptive regime in which national authorities describe required safety measures and supervise compliance. This might be considered the only practical solution for reform across very different societies, i.e. EU member states. The Norwegian *performance-based* safety regime offers an alternative in the sense that it combines goal-setting rules for safety with demands for internal control mechanisms. While the industry is given freedom to identify or develop the most adequate risk-mitigation solutions, their system for securing rule compliance is subject to verification by the regulatory authorities. In this manner, the Norwegian safety regime recognizes the difficulty for government institutions to keep up with the pace of technological development, which means it is up to the industry to develop proper safety measures before a new technology is brought into use. The EU Directive, by contrast, requires that regulatory authorities lay ahead of technological developments and stipulates not only the specific safety requirements for new private sector solutions, but also how these apply in different contexts.

##### *6.4.2. Allocation of responsibility for risk-mitigation measures*

Under the Norwegian regime, the responsibility for safety in offshore petroleum activities is placed with the operator of the production license. The operator bears the clear overall responsibility of ensuring compliance with all applicable regulations. The EU Directive defines the allocation of safety responsibilities. However, the responsibility is placed partly with the competent authorities, and partly with the operator. Offshore operations might be subject to higher risks if circumstances arise where it is unclear who is ultimately responsible for safety. This is particularly relevant for internal and external emergency control. Whilst emergency planning and control under the Norwegian regime falls on the operator, the EU Directive places the responsibility of developing an external emergency response plan with the government. In a Norwegian context, adopting the Directive implies a transfer of responsibility from the operator, who is closest to the operations, to the government. While co-responsibility may strengthen the overall oversight and emergency preparedness, the solution might lead to a more relaxed attitude in the industry, since, after all, the government is also responsible.<sup>42</sup>

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<sup>42</sup> Moreover, the EU Directive does not address civil liability that the licensee may bear for third party damage arising from offshore oil and gas operations. Here, offshore accidents mostly fall under the tort law of national law.

#### 6.4.3. *Bureaucracy for regulation and oversight*

Compared to the Norwegian regime, the prescriptive character of the EU Directive means more resources and bureaucracy are required for regulation and compliance. The Directive requires operators to provide very detailed information about a production facility in the Major Hazard Report, which is then subject to evaluation and approval by the competent authorities before operations can start. This process, in addition to the split responsibility for safety described above, leads to more administration compared to the Norwegian safety regime. Moreover, in order to let regulation reflect the gravity of safety violations and sharpen incentives for compliance, the European Commission considers if certain acts that might cause serious damage under the Directive should be brought under the scope of criminal law; in other words, a criminalization of compliance failures – on top of the described safety regulation regime.<sup>43</sup>

#### 6.4.4. *Relevant insights; what anticorruption may learn from petroleum regulation*

The contrast between the EU and the Norwegian safety regime illustrates the difficulty of designing optimal regulatory systems. Considering key aims and principles across these petroleum safety regulations, we take note of the following insights of relevance for our analysis of corporate liability in bribery cases:

- Under circumstances when production implies significant risk to society, it is necessary to let a regulatory agency have the oversight and competences necessary for risk mitigation.
- Regulators should have the authority to evaluate risk mitigation systems, even if there is no indicator of rule violation.
- Market players should face a risk of sanctions for inadequate risk mitigation systems, even if no incident has occurred.
- Market players should have a duty to notify regulatory agencies when safety regulations have been violated.
- Suspected gross negligence or intent may lead to criminal law investigation.
- Civil law regulations of compliance systems and criminal law regulations of incidents in the past may be combined in a *two-track system for efficient risk prevention*.
- If possible to set criteria for acceptable risk, the responsibility for developing risk mitigation systems may well rest with the market player.
- The relationship between regulatory performance and the resources for administration is non-linear in the sense that more bureaucracy will not necessarily imply more safety.<sup>44</sup>
- Regulatory transparency enhances legitimacy and allow citizens' to evaluate risk mitigation.

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<sup>43</sup> This step will be considered after the Directive is fully implemented. European Commission Report of 16 October 2016 on liability, compensation and financial security for offshore oil and gas operations, (2015/2352(INI)).

<sup>44</sup> Still, budget obviously matters for regulatory performance. 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.



## 7. Toward a two-track enforcement regime for corporate bribery and similar corporate offences

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 enforcement processes and their result should be available to the public, but cannot be “too transparent”, lest offenders seeking to keep sensitive information confidential become 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 a risk mitigation enforcement regime and criminal law legislation. In any case, this is the direction in which current practices are evolving, though many questions remain to be answered.

### 7.1 The benefits of combining criminal and non-criminal regulation

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.<sup>45</sup> 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 a “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. In these respects, a new regulatory regime needs to contain protection against double jeopardy (*ne bis in idem*), which has been raised several times as a complaint to European Court of Human Rights.<sup>46</sup>

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<sup>45</sup> In 2016 France passed new 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. This means that *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.

<sup>46</sup> See the European Court of Human Rights. *Guide on Article 4 of Protocol No. 7*. Council of Europe. 31 Dec. 2018.

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.<sup>47</sup> 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 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 debarred, could be included in such regulations instead of being vested in procurement agents – who are the ones in a position to take bribes.<sup>48</sup>

Criminal law investigations would be reserved for circumstances in which an offense most probably has occurred. 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). Facts about the corporate offender's compliance system, including its risk mitigation measures, whistleblower channels and internal monitoring, are relevant in criminal law investigations of corporate negligence. However, the (non-criminal) regulator would perform the assessment of whether the corporation in question has deviated from the expected corporate compliance performance.

## **7.2 Implications for institutional design**

A two-track system could be compatible with supranational market regulation such as 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.<sup>49</sup>

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

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<sup>47</sup> E. Hjelmeng and T. Søreide. 'Bribes, crimes and law enforcement.' *European Business Law Review* 28.1 (2017): 19–40.

<sup>48</sup> E. Auriol and T. Søreide. "An economic analysis of debarment." *International Review of Law and Economics* 50 (2017): 36–49.

<sup>49</sup> 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.

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 still desire self-reporting and cooperation from corporate offenders – which means that negotiated settlements will be relevant in these contexts as well. A two-track regime makes it easier to let rewards for cooperation 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.

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.<sup>50</sup> 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).

## 8. Conclusion

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.

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<sup>50</sup> 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>.

Instead of stretching that system further than its limits allow, we propose regulatory reform. With a well-developed, balanced and properly coordinated 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-based approach. In several areas of regulation, the civil/administrative law track (*e.g.* competition law and anti-money laundering law) has a broad spectrum of tools that allows regulators to impose sanctions that are adequate for the circumstances (*e.g.* administrative fines, naming and shaming-provisions, withdrawal or suspension of authorization to conduct business, a temporary ban against any person discharging managerial responsibilities). However, within this sphere, where enforcement processes tend to end at the pre-trial stage with some sort of settlement, the settlement process itself remains largely unstudied and unregulated. When it comes to criminal law regulation, settlements are offered, not only in lack of principles, but also as a solution that challenges several criminal justice principles.

In this article, we have addressed many of the challenges and drawn the contours of a system that might combine criminal justice principles with the practical benefits associated with regulatory discretion and non-trial resolutions/settlements. Numerous questions remain unanswered and require separate in-depth analyses.

## 9. Appendix

	SAPIN II (FRANCE)	THE FCPA (USA)	THE BRIBERY ACT (UK)
Central provision	Article 3-2 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.	<i>Books &amp; Records:</i> Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)).  <i>Internal Controls:</i> Section 13(b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B)).	The Bribery Act (2010 c. 23), Section 7-9.
Scope of regulations	Extraterritorial jurisdiction. No dual criminality requirement. Applies to persons or entities who carry out all or part of their economic activity on French territory. Prosecutors have no monopoly in bringing cases to court. Other actors/associations able to file a complaint with an investigatory judge in order to trigger prosecution.	Applies to companies that fall within the definition of <i>issuers</i> in the FCPA, including any issuer of securities on a US stock exchange, whether the issuer is a US or non-US company, or any officer, director, employee, or third-party agent of such issuer or any stockholder thereof acting on behalf of such issuer.	“Relevant commercial organization” – “a body or partnership incorporated or formed in the UK ...or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation” (The UK Ministry of Justice 2011). Extraterritorial jurisdiction includes liability for corporations that <i>fail to prevent</i> bribery
Liability	<i>Legal persons:</i> Based on number of employees and the revenues of the company.  <i>Individuals:</i> CEOs of companies, board members and presidents and directors of companies accountable under the law.	<i>Legal persons:</i> Strict vicarious liability for crime committed by employees, sub-divisions or associates.  <i>Individuals:</i> Liability reaches CEOs, CFOs and employees for the stipulated acts and for proven intent to commit the act. Vicarious liability for “control persons” – those with the practical ability to manage, direct, and oversee those who have direct liability.	<i>Legal persons:</i> The directing mind of the corporations must be involved.  <i>Individuals:</i> Liability relevant for he or she who performs or knows about or connives in any act or omission which forms part of an offence under the Act in the UK.

<b>Requirements for preventive measures</b>	<p>There are eight concrete measures firms are expected to implement, see text. Discretionary regulatory judgment in the evaluation of the thoroughness of compliance measures based on risk exposure.</p>	<p>No concrete measures specified: high degree of flexibility within the scope of “reasonable detail” for books and records and “reasonable assurances” for internal controls.</p>	<p>Six specific principles that need to be adhered to, see text. The rigor with which a company chooses to implement these guidelines should be “proportionate to risk” and result in “robust and effective anti-bribery procedures”.</p>
<b>Monitoring and enforcement</b>	<p>Enforced by the French Anti-Corruption Agency (AFA).  The AFA monitors not only suspected economic crime but also the preventive measures of companies.</p>	<p>Enforced by Dept. of Justice and the SEC (The UK Ministry of Justice (2011), pp. 4-5). Difficult to identify ways of monitoring, although information points towards action being taken only if actual crime is suspected. “High premium” on self-reporting. (U.S. Securities and Exchange Commission 2012)</p>	<p>Enforced by the UK Serious Fraud Office (SFO)  Self-reporting encouraged.</p>
<b>Sanctions for insufficient internal control systems</b>	<p>Chance of being punished without corruption if internal control systems are insufficient and firm shows low willingness to take warnings into account.  Administrative fines up to €1M for legal persons and €200 000 for natural persons.</p>	<p>None.</p>	<p>None: Section 7 only comes to use upon indictment for corrupt behaviour (The Bribery Act (2010 c. 23), Section 7).</p>
<b>Duty-based sanctions if corruption is detected</b>	<p>N/A</p>	<p>Development towards lower tolerance for firms accepting a “heightened risk” of corruption.</p>	<p>Maximum penalty for general offences: 10 years imprisonment, unlimited fines.  Can achieve full defense in case of detected corruption if sufficient compliance measures were taken prior to the incident.</p>

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