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Detecting and investigating transnational corporate bribery in centralised and decentralised enforcement systems: discretion and (de-)prioritisation in the UK and Germany

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This article analyses how two contrasting enforcement systems, those of the UK (centralised) and Germany (decentralised), go about detecting and investigating transnational corporate bribery and corruption. Comparing these practices in contrasting systems is a useful empirical focus as both jurisdictions inhabit similar institutional contexts for corporate bribery (e.g. relatively strong western European economies, fellow members of the EU/G8, subject to international conventions) while both are considered 'active enforcers' of international bribery conventions, and therefore, being sufficiently involved in policing to have modes of enforcement to analyse. More specifically, the article examines the varied processes of detection and investigation within these differing systems and goes on to analyse how discretion is applied at both stages in the (de-)prioritisation of cases. The article outlines the strengths/limitations and differences/similarities of the two systems in terms of structure and practice, demonstrating *how* responsible authorities implement detection and investigative practices and *why* certain cases are focused on. The article argues that whether centralised or decentralised, and whether guided by flexible or rigid legal frameworks, formal and informal practices of discretion lead to legal and operational tensions that result in the accommodation of bribery by state authorities.

Keywords: bribery; corruption; detection and investigation; discretion

Introduction

This article is about the detection and investigation of corporations that use bribery in international business transactions to win or maintain business contracts and business interests in overseas jurisdictions and how discretion is applied and managed throughout these processes to (de-)prioritise cases. Transnational *corporate* bribery involves at least two willing/consenting (active or passive) actors and different forms of inducements ranging from cash bribes (potentially in the £millions) to more indirect hospitalities or non-monetary favours. The intention is to ensure the commission or omission of certain acts that breach an individual's duties for the benefit of a corporation (though individual gain usually accompanies this) in the context of international business transactions (e.g. a public official accepting/demanding a bribe to facilitate a company winning a business contract). Such 'bribes' are constituted of social practices, relations and processes organised across jurisdictional boundaries (e.g. via intermediaries or third parties; money laundering) and are often ambiguous (e.g. exchange of legitimate services). They are

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clandestine in nature and are characterised by a lack of identifiable consequences and few direct victims although there are substantial political, social, economic and environmental harms (see for example Rose-Ackerman 1997, Delaney 2007, Transparency International 2013a).

It is important for nation-states to promote their own economic and corporate interests, a position that historically normalised bribery, as above, in overseas jurisdictions to ensure business expansion and growth. However, this position was altered when the US government faced internal criticism over the conduct of its corporations in relation to bribery of overseas officials and subsequently enacted the Foreign Corrupt Practices Act 1977. Initially, other jurisdictions did not enact similar provisions and it was only following the coming into force of the Organisation for Economic Cooperation and Development's (OECD) Anti-Bribery Convention 1997 that key economic nation-states became pressured to introduce and enforce anti-bribery provisions. Creating an even playing field is important for countries with strong exports or investments overseas (unless they have key power advantages) in order to ensure their corporations do not lose out to others that use bribery to further their business. Such bribery is now explicitly prohibited under the national legal frameworks of those countries that are signatories to the OECD Convention (e.g. UK Bribery Act 2010; German Criminal Code and German Auxiliary Anti-Corruption Acts (see Wolf (2006) for discussion of these German Acts)). However, the particular nature of transnational corporate bribery generates substantial procedural, evidential, legal, structural and financial difficulties for responsible law enforcement agencies located at the national level in their attempts to regulate the problem (Lord 2014).

Within this context of international pressure and obstacles to enforcement, the focus of this article is on *how* responsible anti-corruption authorities and actors in two contrasting enforcement systems, those of the UK (centralised) and Germany (decentralised), go about detection and investigation, and *why* certain cases are (de-)prioritised. Drawing on qualitative data[1] from a comparative study of the UK and Germany into the variety of regulatory responses to transnational corporate bribery, the article analyses how discretionary practices are intertwined with the structure of the systems and the processes of detection and investigation. Comparing these issues in such contrasting systems is a useful empirical focus as both jurisdictions inhabit similar institutional contexts for corporate bribery (e.g. relatively strong western European economies, fellow members of the EU/G8, subject to international conventions) and both are sufficiently involved in policing to have modes of enforcement to analyse.

The article begins by drawing upon enforcement data which indicate that Germany investigates substantially more cases than the UK but identifies both jurisdictions as 'active enforcers' of the OECD Anti-Bribery Convention (see Transparency International 2013b). These data provide the background for the remainder of the article which is organised with three key issues in mind: structure, practice and discretion. The article is structured as follows: first, the article sets out to explain the differences in levels of investigation by demonstrating how *structure* (the centralised and decentralised enforcement systems) impacts upon detection and investigation. Second, the article analyses in detail *practices* of detection and investigation, discussing commonalities and differences between the two systems, and throughout, identifying areas where *discretion* is being applied and managed by responsible authorities when determining whether to investigate cases once detected. Discretion takes various forms and occurs at various stages, and is underpinned by the *structure* of the two enforcement systems. The key argument of the

article is that whether centralised or decentralised, and whether guided by flexible or rigid legal frameworks, formal and informal practices of discretion lead to legal and operational tensions that result in the accommodation of bribery by state authorities.

Enforcement levels in the UK and Germany

Transparency International (TI), the global anti-corruption non-governmental organisation, produces annual reports on the enforcement responses of countries that have signed and ratified the OECD Anti-Bribery Convention. This Convention directly relates to the substantive concern in this article with bribery of foreign public officials in international business transactions. TI's progress report in 2013 identified the UK and Germany as 'active enforcers' of the Convention (along with the USA and Switzerland) – this is determined by a points-based ranking system that uses arbitrary thresholds[2] in considering a combination of country's share of world exports along with the number of investigations, cases and convictions of overseas bribery during a four-year period.

The report indicated that over the four-year period 2009–2012 Germany initiated 78 investigations (defined as pre-trial phase by TI), while the UK initiated 17 investigations (these were all initiated in 2011 and 2012). In other words, Germany initiated over four times more transnational bribery cases than the UK. The nature of these investigations is not provided, but for the same period, Germany brought 'substantial sanctions'[3] in 14 'major' cases and 'sanctions' (not substantial) in 46 other cases (not major). In contrast, the UK brought 'substantial sanctions' in 15 'major' cases and 'sanctions' in one other case. According to TI, a major case involves the bribing of *senior*[4] public officials by major companies, including state-owned enterprises, but additional factors, such as the total amount of the bribe paid, the size of the contract and whether the bribe was part of a scheme involving multiple payments can also influence the categorisation of cases as major. Major and minor cases and investigations include both civil and criminal proceedings brought under laws dealing with corruption, money laundering, tax evasion, fraud, or violations of accounting and disclosure requirements. No clear, measurable criteria are provided by TI as to how these terms are conceptualised and TI acknowledges the process is subjective. These numbers give some indication as to the nature of the cases investigated in the two jurisdictions – in other words, the UK has a focus on 'major' cases while Germany investigates both 'major' and 'minor' cases.

The TI report indicates that between 2009 and 2012, the average share of world exports of the UK and Germany was 3.8% and 8.6%, respectively. This is important given the focus on *transnational* bribery, and it might be assumed that Germany will inevitably have more cases as it possesses more than double the share of world exports. However, meaningful comparisons at this superficial level cannot be made given the lack of recognition of other key variables, such as the number of companies registered, the size of the corporation and its importance in the economy, the type of products traded, the Gross Domestic Product, and the available enforcement resources. More meaningful insights are to be gained through analysis of the social contexts of enforcement. This article examines how such cases are detected and investigated within the two cultures, and why certain cases are prioritised (or not) ahead of others. Several factors at the local level shape this difference in enforcement numbers, in particular the structure of the enforcement system and the application and management of discretion throughout the processes of detection and investigation.

The impact of policing structures on detection and investigation

The enforcement systems of the UK and Germany reflect centralised and decentralised structures respectively. In 2005, the Serious Fraud Office (SFO) became the lead organisation in the UK with national jurisdiction[5] for the investigation and prosecution of transnational corporate bribery, but a variety of other policing and regulatory authorities are also able to investigate and prosecute (e.g. City of London Police; Financial Conduct Authority). The SFO was initially created following the Roskill Report 1986 (see Fraud Trials Committee Report 1986) and prior to this, 'the attitude to commercial fraud taken by all British governments could best be described as benign neglect' (Levi 1986, p. 394). In Germany, transnational corporate bribery is investigated and prosecuted at the decentralised level by regional state authorities across the 16 *Bundesländer* – there are around 110 Public Prosecutor's Offices that have primary responsibility for investigation and prosecution and are each supported by the regional State Criminal Investigation Office and numerous local police headquarters. The dual role of investigation and prosecution is a key commonality in the policing of transnational corporate bribery in both jurisdictions (for further analysis of these systems see Lord 2014).

The differing enforcement systems begin to explain the differences in investigation numbers accumulated by TI. The UK's centralised model provides a more consistent and coordinated regulatory approach as jurisdiction is nation-wide, but in the context of austerity and reduced funding, the SFO has modest resources – the SFO's budget has significantly reduced, dropping from £53.3m in 2008–2009 to £30.8m in 2014–2015.[6] This results in explicit discretionary 'acceptance criteria' being applied to all detected cases and leads to a focus on large and complex cases that is, 'major cases'. Before a case is accepted, pre-investigation vetting considers the following:

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

These questions have now been replaced on the SFO website with four considerations[7]: (1) the scale of loss (actual or potential); (2) the impact of the case on the UK economy; (3) the effect of the case on the UK's reputation as a safe place to do business; (4) the factual or legal complexity and the wider public interest. In addition to these criteria, in determining seriousness and complexity, the SFO conducts further tests, such as, whether the case impacts on the integrity of the financial market, whether it involves multiple countries or evidential material being collected in multiple locations, whether it involves multiple and complex financial transactions (e.g. many companies, accounts, countries) and whether the investigation will need to involve a large accountancy analysis. Thus, the centralised system creates a necessity for overt and formal practices of discretion which is applied and managed by considering the above factors.

Germany's decentralised model is more fragmented. Political will and 'enthusiasm' to enforce the law varies across the 16 *Bundesländer*, which results in different levels of personnel, funding and expertise. The 16 *Bundesländer* are territorial units entrusted with significant wide powers and their own decision-making bodies (Juy-Birmann 2002, p. 292). On a simplistic level, the various sources of law are structured with the Basic Constitutional Law at the top, federal law and regulations beneath this, then the constitutions, the laws and the regulations of the *Bundesländer* (Juy-Birmann 2002, p. 292). As responsibility lies with a multitude of actors and departments across the regions, harmonised enforcement cannot be ensured (which concerns intergovernmental organisations such as the OECD) and the central state is less able to impart one-sided and partial procedures, as is the case in the UK. Figures are not publicly available in Germany, but when contrasting resources, it can be said that Germany invests significantly more into anti-bribery and corruption enforcement as most *Bundesländer* have in some form or other anti-corruption capabilities (although this can vary greatly) ensuring that more cases can be investigated – each *Bundesland* is responsible for funding the authorities within its borders and all respondents spoke of the possibilities for obtaining extra resources if required (though respondents were located in affluent regions with political support). In some cases, public prosecutors are reluctant to pass on ownership of cases to other jurisdictions where the intensity of investigations into overseas bribery and corruption is less.

Cases in Germany do not need to meet certain acceptance criteria, as in the UK, but cases are prioritised dependent on a number of factors. For example, in Germany, the Principle of Expediting Proceedings ensures certain cases must be dealt with swiftly, such as those where a suspect is under arrest and there is a risk of breaching human rights. Otherwise, cases are prioritised in relation to the size of the case, with large cases subsequently given priority. Cases are not formally disregarded based on seriousness and complexity as prosecutors are required to investigate all cases that come to their attention (see below). Available resources and the decentralised structure begin to explain Germany's high investigation numbers (relative to the UK) as no pre-investigation criteria are applied, which inevitably leads to a higher number of 'minor cases' being taken on.

The structure of the enforcement systems, therefore, influences how intensely authorities seek to detect and investigate. However, within these systems, detection and investigation are also shaped by legal and cultural factors, which create conditions for formal and informal practices of discretion. The article now goes on to analyse the specific practices implemented to detect and investigate transnational corporate bribery in some detail and intertwines this analysis with consideration of why certain cases are (de-) prioritised through the use of discretionary principles.

Detecting transnational corporate bribery

In both the UK and Germany, investigators and prosecutors view uncovering corruption cases as the most difficult part of the process. The enforcement authorities are only aware of those cases that come to their attention through the various practices of detection but in reality the extent and scope of the corruption problem can be presumed to be much greater as indicated by various perception studies (e.g. see Kaufmann et al. (2007) for discussion of attempts at measuring corruption). Such knowledge of bribery cases reflects only the extent of the resources invested into detection or the extent to which other parties

are willing or able to notify the authorities. Cases come to the attention of the enforcement authorities in three main ways: referrals, whistleblowers, and self-reporting.

Referrals

Referrals from other agencies, individuals or companies are the main source of cases for the SFO. Once received, the SFO trawls through all allegations relating to UK companies. These are analysed and categorised by intelligence teams and placed on the UK's Anti-Corruption Register – this is held centrally by the SFO. Domestic law enforcement partners such as the Financial Conduct Authority and the Overseas Anti-Corruption Unit of the City of London Police refer cases to the SFO. Similarly in Germany, police authorities at the local (e.g. other State Criminal Investigation Offices and/or Public Prosecutor's Offices across the 16 *Bundesländer*) and national (e.g. Federal Criminal Police Office) level refer cases to corresponding authorities in other regional jurisdictions.

Also at the domestic level, but most notably in Germany, tip-offs from other non-law enforcement authorities are common:

> vital in combating international corruption is the close cooperation with the financial authorities, this is in my view, the deciding factor. (German Police investigator 1)

In one researched *Bundesland*, for example, a particularly advanced multiagency cooperation model has been developed. This involves what is termed 'interdisciplinary cooperation' whereby the tax authorities/investigators, accountants, auditors and customs offices that have access to corporate accounts are able to provide evidence and intelligence on dubious payments to law enforcement authorities and public prosecutors, which they would otherwise not be able to detect. These relationships are enabled through the Tax Relief Act 1999/2000/2002. Prior to the Act, corporate bribes were tax-deductible, and therefore permitted, but any such suspicious deductions are now legally *required* to be reported by the tax authorities to the Public Prosecutor's Office. In the UK, Section 19 of the Anti-Terrorism Crime and Security Act 2001 permits but places no requirement on the UK tax authorities to disclose information subject to secrecy obligations for use in criminal investigations or proceedings.

At the international level, law enforcement partners such as the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) in the USA, and other international organisations such as the World Bank, all refer cases to the enforcement authorities in the UK and Germany. One of the most significant sources of overseas bribery cases are the leads from investigations conducted by overseas authorities where Mutual Legal Assistance (MLA) (see below) has been requested and a potential investigation arises from that.

Whistleblowers

Both UK and German enforcement authorities have developed capabilities for individuals to make disclosures (e.g. confess or allege bribery) in the public interest, otherwise known as 'blowing the whistle'. Beginning with the UK, in November 2011 the SFO created 'SFO Confidential'. This system enables whistleblowers to contact the SFO via online reporting, email or post. A confidential answer phone service is also in operation at the Overseas Anti-Corruption Unit of the City of London Police. In the UK, whistleblowers are encouraged to disclose information openly in order to aid

investigations and receive better protection under the Public Interest Disclosure Act 1998. Under the Act, whistleblower identity is not protected but protection is in place for potential unfair reprisal from employers. Individuals blowing the whistle can approach the SFO through various channels and may be internal or external to the corporation under suspicion. For example, employees may become aware of issues during internal reviews and by observing dubious practices, external auditors may come across cases, or competitors that have suffered due to corruption (e.g. missed out on certain contracts) may approach the SFO. In each case, whistleblowers may notify the SFO via media sources (e.g. the Guardian's investigations into BAE Systems brought key informants to the SFO's attention), via non-governmental organisations and charities, or may contact the SFO directly. All information provided by whistleblowers is vetted to determine credibility and reliability and to establish whether sufficient evidence exists to initiate an investigation under Section 1 of the Criminal Justice Act 1987 (CJA).

In Germany, as in the UK, capacity for (anonymous) whistleblowing is vital and analogous 'corruption hotlines' have been developed to aid individuals wishing to notify the authorities directly, while web-based systems are also in use. Employees of corporations can also anonymously notify ombudsmen to report suspicions and remain under no obligation to testify openly as a witness. Of note is the development of whistleblowing provisions from the private sector and companies such as Business Keeper AG that offer whistleblower services to all sizes of corporations. For monthly or annual fees, companies can subscribe to external online systems through which employees can anonymously (or not) inform the company and/or authorities of suspicious behaviour. German investigators suggested that a number of reports are false but that determining the credibility of sources is relatively straightforward depending on how detailed the facts about organisations provided by individuals are. Investigators maintain that 'insiders' with understanding of internal corporate networks and systems form a fundamental component of case construction. A key difference with the UK, however, is the inability of German law to provide extensive protection to whistleblowers – only in cases where there is threat to life or limb, or where there are substantial economic disadvantages (e.g. threat of bankruptcy to a company), can protection be provided by the authorities.

Self-reporting

In the UK, the SFO, in the context of reduced funding and with recognition of the difficulties of detecting corruption cases, has created a policy of actively encouraging what is termed corporate 'self-reporting'. Cases of transnational corporate bribery are predominantly detected by corporations themselves as part of internal compliance systems. Suspicious activities are internally investigated in tandem with external legal consultants and professional advisers. Should it be determined that the issue is credible, corporations can notify the SFO and provide corresponding documentation and evidence. According to the SFO (2009):

> the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively.

The SFO reviewed this policy in 2012 and retracted this guidance in an attempt to shift attention away from civil negotiations and towards reaffirming the SFO's primary

function of criminal prosecution. However, since this review, several cases have been settled following self-reports indicating that the method remains fundamental to the SFO's strategy (see Lord 2013 for further analysis). This approach signals the intention to follow 'negotiated justice' principles in the USA, where corporations are able to enter into deferred prosecution agreements. Such agreements became available to the SFO in February 2014 following their introduction by the Crime and Courts Act 2013. In Germany, there is no explicit strategy promoting self-reports and no incentives should a corporation choose to self-report – corporations in Germany cannot be criminally prosecuted and are in any case sanctioned through administrative mechanisms (see Rogall 2011).

Investigating transnational corporate bribery

> There's more matters for investigation than we have resources to investigate. It's always a difficult one: how many cases do you investigate? For how long do you investigate a case before you abandon it? … [O]ne measure you might have for performance indicators is how many cases do you abandon … For example, if you prosecute there's always one defendant who's found guilty as a result of a prosecution. How does that square with however many have not been taken to prosecution? On the other hand if you are not seen to be investigating a wide number, perhaps it doesn't have a market deterrent. (UK investigator/prosecutor 1)

Once uncovered, decisions are made as to whether to proceed to a formal investigation. By law, the SFO can investigate only those cases where there is evidence to show that serious or complex fraud and/or corruption has taken place (see 'acceptance criteria' above). More specifically, there must be 'a suspected offence which appears to the Director on reasonable grounds to involve serious or complex fraud' (CJA 1987 s. 1(3)). There is no evidentiary requirement, but in practice these concepts appear unclear – a UK Memo to the OECD Working Group on Bribery in response to their Phase 2 Report stated that, for there to be a 'suspected offence', there must be 'credible information to show that an offence has *probably* taken place' (OECD 2008, paragraph 221). Thus, discretion is formally available at the pre-investigation stage.

Section 3.2 of the England and Wales Code for Crown Prosecutors 2010 states '[t]he police and other investigators are responsible for conducting enquiries into any alleged crime and for deciding how to deploy their resources. This includes decisions to start or continue an investigation and on the scope of the investigation' (Crown Prosecution Service (CPS), 2010). This reflects the traditional influence of the 'principle of opportunity' in the jurisdiction where a high level of discretion is significant. As Spencer notes, 'it is not, and has never been, the case in England that the authorities are obliged to prosecute for all the offences that come to their attention' (2002, p. 161). For an investigation to proceed to prosecution, the Full Code Test is applied [(1) is there 'sufficient evidence to provide a realistic prospect of conviction'? (2) is a prosecution required in the public interest?]. Thus, due to the division of functions between the police and CPS, the discretion to prosecute is exercised in two stages: first by the police when they decide whether to institute proceedings; and, second by the CPS when they decide whether to continue the case (Spencer 2002, p. 161). However, in the case of corruption, this is complicated by the independence of the SFO and its role as investigator and prosecutor which is able to use discretion immediately from the pre-investigation stage.

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

Most cases involve the issuing of a Section 2 (CJA 1987) notice. Section 2 outlines the investigatory powers of the Director of the SFO. Traditionally, a 'right to silence' exists in the UK, but the SFO under Section 2(2) (CJA 1987) has special powers to require individuals to answer all questions – this is not possible in Germany in line with Basic Constitutional Law which outlines that persons cannot be required to incriminate themselves. A criminal offence will be committed if an individual refuses to comply with SFO requests, although since the *Saunders* appeal to the European Court of Human Rights (ECHR) following the Guinness case, self-incriminating answers given under compulsion cannot be used in evidence against the person. Section 2 also enables the SFO by notice in writing to require the person under investigation to provide any relevant documents ('information recorded in any form') for the investigation. For example, this may be used on banks to provide the bank accounts of a particular individual or company in order to follow the flow of funds. It enables the SFO to obtain contracts, emails, and many other forms of document to support the investigation. If this request is not complied with, amongst other reasons, the SFO is able to issue a warrant to enter, search and take possession of any relevant documents. Thus, a warrant can only be issued once the formal written request for the documents has, for whatever reason, not been complied with. How the SFO prevents the destruction of documents in the time between is unclear, although it can request the police conduct a search under their powers. The SFO's powers were strengthened by Section 59 of the Criminal Justice and Immigration Act 2008, which enables the SFO to compel the production of documents at the earlier vetting stage of foreign bribery cases. Relevant evidence can therefore be collected earlier, swifter and more proactively in well-founded cases.

The SFO is also trying to make more use of cooperating witnesses. Section 73 of the Serious Organised Crime and Police Act 2005 (SOCPA) enables the SFO to make an agreement with defendants in exchange for a reduction in sentence, even immunity from

prosecution (Section 71, SOCPA) or some form of limited prosecution. Recent cases have raised doubts as to the efficacy of this approach. For example, in connection with the DePuy International[8] case, Robert John Dougall extensively cooperated with the SFO and it was expected he would receive a lighter sentence for doing so. In April 2010, however, he received a 12-month prison sentence from the courts which jeopardised the SFO's intention to encourage whistleblowers and offer incentives in the form of 'light' sanctions. This SFO strategy was reprieved following the subsequent overturning of Dougall's sentence in May 2010. However, since this case, a number of individuals have been prosecuted, but as the SFO makes clear, it cannot unconditionally guarantee that there will be no prosecution of the corporate or its individuals even where the case was self-reported and the individuals fully cooperated (although the SFO faces significant obstacles when aiming for criminal prosecution of corporations (Lord 2014)).

Anti-corruption enforcement in the UK permits investigators and prosecutors much procedural discretion. If a case does not meet certain criteria, it does not require investigating by the SFO although the SFO should, where appropriate, attribute the case directly to other police forces or a prosecution authority (an OECD (2008, paragraph 224) report questioned whether this procedure is followed). The SFO also has no obligation to aim for criminal sanctions, given the variety of enforcement mechanisms available. As seen with the earlier statistics, there is a filtering out of smaller cases and a focus on 'major' cases. For example, cases involving 'facilitation payments' ('grease payments') are unlikely to be investigated and prosecuted by the SFO and are subsequently accommodated by enforcement agencies – focus is instead placed on corporations to eradicate such payments within and by their organisations over time (i.e. self-regulation). The SFO and government have also faced lobbying from small and medium enterprises that argue the costs of compliance and impact on overseas business is too onerous.[9] Thus, formal, overt discretion results in much transnational petty corruption being accommodated which in turn reduces the legitimacy of the enforcement response given the criminalisation of such bribery under the UK Bribery Act 2010 – a clear tension exists between law and operation.

In Germany, although the prosecutors are significantly involved from the first allegations or suspicions of corruption, the separation of powers in some instances can create procedural difficulties at the stage of investigation. If a Public Prosecutor's Office has no specialist corruption remit due to the fragmented enforcement landscape (see above), police investigators providing initial suspicions to these non-specialists may face a barrier as such prosecutors do not possess the expertise or experience to further investigate and prosecute complex bribery cases. For this reason, Specialist Public Prosecutor's Offices are important in order to ensure the relevant capability and will is evident.

Prosecutors are required to investigate all potential cases that come to their attention and aim to bring criminal charges where possible. Likewise, the police are required to investigate any potential criminal offence and subsequently report all evidence, in all cases, to the Public Prosecutor's Offices. Traditionally in Germany, criminal investigation and prosecution is guided by the 'principle of legality':

> The *Legalitätsprinzip* (principle of legality) is laid down in §§ 152 II, 170 I StPO (*Strafprozeßordnung* – German Code of Criminal Procedure) and provides that prosecution of an offence is mandatory for the public prosecutor. It demands that the public prosecutor starts investigations once a sufficient suspicion arises and that he prefer charges in cases of sufficient suspicion of an offence. To be certain that this duty is properly performed, there is

> an offence called *Strafvereitelung im Amt* (obstruction of criminal prosecution by an officer of the law – § 258 StGB (Strafgesetzbuch – German Criminal Code) which can be used against an official who breaches his duty. However, in certain cases a public prosecutor may refrain from prosecuting offences for pragmatic reasons under the premises specified in §§ 153 *et seq*. StPO (*Opportunitätsprinzip* – principle of discretionary prosecution). (Freckmann and Wegerich 1999, p. 187)

The above principle is based on 'the absolute equality of all citizens before the law in criminal matters: the public prosecutor must prosecute all offences' (Juy-Birmann 2002, p. 309). This reflects the *Gleichheitsgrundsatz* (Principle of Equality), ensuring all are treated equally before the law. However, a certain level of discretion to prosecute has to an extent replaced the principle of legality in relation to pragmatism, more in line with the UK system, but the requirement to investigate is seen as fundamental by actors at the operational level:

> I believe the principle of legality – that we must investigate when a criminal offence has occurred – is very important, because otherwise the door of unequal treatment is opened. When decision-making is made based on what "we just want" or "we just don't want" to do, then the criminal law loses its justification … it doesn't come across as just, and this wouldn't be accepted. (German Police investigator 2)

> I think it's important that we don't have discretion, that we have to investigate … we can simply say to ourselves, it's irrelevant how it is, who it comes from, whether it's the Emperor of China, or anyone else, it doesn't matter. We investigate, we have to investigate…. We very clearly have the occupational duty, in each and every case, to investigate. (German Prosecutor 1)

Thus, in Germany a more rigid legal framework exists which stipulates that prosecution of an offence is mandatory for public prosecutors and investigations *must* be commenced when sufficient suspicion arises. However, a significant difference can be observed in the treatment of natural and legal persons, or in other words, individuals and corporations – what a corporation does cannot be interpreted as an 'act' in German Penal Law (Hefendehl 2001). Thus, while individuals are subject to the mandatory principle of investigation/prosecution, discretion in line with the opportunity principle is evident for legal persons and corporations. Subsequently, corporations can only be sanctioned under administrative law and not criminal law.

The Public Prosecutor's Offices are also able to determine whether a case should be further investigated, or whether proceedings should be initiated. Thus, while the constitutional obligation to prosecute does appear very rigid, in practice, this may not be the case. One expert in Germany spoke of prosecutors who simply left cases untouched, and when probed further, stated:

> Actually they're not allowed to do that, legally they're not allowed … [but in some cases] a file reference number will be recorded, so completely formal, but they'll carry on as if they will initiate preliminary proceedings but will conduct no investigation. It just lies there and after years it's just forgotten, it'll be discontinued due to the statute of limitations and even because apparently no evidence is produced. This occurs very frequently. It does of course depend on how well the relevant departments of the Public Prosecutor's Offices are equipped but also to what extent other authorities such as the municipal authorities are interested in it … when no one is interested, then nobody asks "why are you not investigating this and this despite these suspicions and despite the initiated proceedings?" This is frequently the practical problem. (Country Expert Germany)

Thus, whether cases are formally (de-)prioritised or are benignly neglected is shaped by the decentralised structure. If political will, resources and/or expertise are lacking, cases will receive no further action and will be creatively circumvented (e.g. through the use of the statute of limitations). In regions where capabilities do exist, these will follow the criteria outlined above to determine the priority of cases. This argument was also put forward by a number of UK respondents, one of which stated:

> What they [German prosecutors] call prosecute is actually open an investigation isn't it…: [if] nothing happens on a case in 5 years and day, it dies. I have talked to plenty of prosecutors and investigating magistrates in Europe and yes, they have got the legality principle, but they don't devote all their time and resources to cases if a case isn't going anywhere, they put it away. (UK investigator/prosecutor 3)

Sections 152–157 of the German Code of Criminal Procedure do provide a number of possibilities for non-prosecution. In practice, investigators do therefore possess certain possibilities for discretion, but this is not regulated on a systematic basis as in the UK with the various codes for prosecutors and 'acceptance criteria'. For example, one investigator in Germany explained how in one case where a whistleblower called their corruption hotline but appeared uncertain about the allegations, the investigator suggested the whistleblower first submit an anonymous tip-off not disclosing the specific facts of the cases: for example, 'Mr. L has received £10m as part of an arms deal with the UK, would this be liable for prosecution?' As the investigator explained, this then does not create difficulties for both the whistleblower and the investigator. The investigator can then pass judgement on the tip-off and if there is not sufficient information can request that the whistleblower anonymously submits relevant documents to support the claim. However, if the whistleblower discloses names and sources, the investigator has no discretion in this case and must pursue. Following this, any information must be presented to the Public Prosecutor's Office who has the final decision on the case. Thus, the formal, rigid legal framework in Germany can be circumvented at various stages through informal discretionary practices, causing attrition in the process and accommodation of possible acts of bribery. As in the UK, therefore, tensions between law and practice also exist in Germany.

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

raids are often leaked to the media and subsequent media reports can lead to reputational damage and financial difficulties (e.g. share prices dropping, consumers choosing competitors).

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

Mutual Legal Assistance

Given the transnational and multijurisdictional nature of corporate bribery, Mutual Legal Assistance (MLA) is of great importance to the enforcement agencies in the UK and Germany. Investigators and prosecutors, in all transnational corporate bribery cases, must cooperate with agencies in other jurisdictions in order to ascertain information and evidence. The efficacy of MLA varies significantly in different countries. For example, while the German authorities have excellent relations with neighbouring countries such as Austria and Switzerland, difficulties often emerge further afield. This can be due to simple factors such as language barriers. For example, while Germany and the UK have worked effectively together, language difficulties can emerge (while Public Prosecutor's in Germany are often fluent in English, this is less frequently the case further down the enforcement regime) which requires employing interpreters and translators at high cost – one UK investigator talked of some individuals advocating automated translation as the way forward, but he (understandably) did not appear convinced about the standard of English that came out of this. As in the UK, more difficulties arise when requesting assistance from developing countries, or those countries with inadequate anti-corruption enforcement systems. Searching premises in Germany functions effectively, but determining the actual overseas recipients of bribes can prove difficult and can only work through MLA, which can take a very long time.

Some countries have been notoriously difficult to obtain information from. Lichtenstein, Switzerland and Luxembourg, for example, have traditionally had very stringent secrecy laws and provisions in relation to the banking system, making the obtaining of information about financial transactions and banks accounts more difficult. One UK investigator gave the example of an individual in Switzerland having 17 separate opportunities to appeal against material being transferred to the UK. Other countries may have different procedures, for example, only cooperating via formal written requests rather than giving prior information via a simple telephone call, as it goes against their legal system based on *Commissions Rogatoires* between judicial authorities, not the police. In another case, the French authorities complained that a search conducted for them

in the UK was of no use to them because all the UK authority had done was send them the original documents that were confiscated – as no investigator's report was attached outlining the nature of the MLA request, they were not able to use it under their system. This can make cooperation long-winded despite celerity being of paramount importance in some cases. However, one UK investigator suggested that in the view of other European countries, the UK does not have a good reputation for MLA – a view substantiated by some German prosecutors and investigators (see also Levi 1987, showing that this is not a recent phenomenon). Even more difficult is cooperation with those countries that have no anti-corruption authorities or no political will to assist. These factors reinforce limited enforcement models at the national level. However, recent global settlements between the UK and the US, and between Germany and the US, have demonstrated how MLA can work effectively and attempt to address this transnational difficulty.

Comparing the discretionary practices of the UK and Germany

Full enforcement of the criminal law is never possible with discretion always being evident (see Goldstein 1960). Despite significant distinctions between the two jurisdictions as written in law, Germany, like the UK, has numerous formal (e.g. pragmatism when faced with evidential difficulties) and informal (e.g. creative use of statute of limitations) possibilities for exercising discretion. Despite no strict criteria in Germany for taking on corruption cases, as the SFO uses, German prosecutors still prioritise cases based on similar factors as the UK (e.g. public interest, likelihood of conviction, available resources) albeit a lack of political will may also be significant (e.g. facilitation payments in UK). Thus, the key question, as one German respondent made clear, is not whether legal discretion aids or prevents effective anti-corruption, but whether or not there is political will to deal with corruption. They suggested that if anti-corruption departments within the Public Prosecutor's Offices were appropriately equipped and that a political signal was given to reaffirm an intent to investigate powerful individuals and organisations, then anti-corruption enforcement would be more effective. This respondent used the example of Siemens[10] to explain this by highlighting that if the USA authorities had not investigated, the case would not have become so significant: in the end, Siemens was required to hire a law firm who uncovered the real extent of the problem internally. In any case, such discretion is recognised as a key component by intergovernmental organisations:

> economic crime doesn't work without this kind of discretion. You have to have the freedom, for instance, to say let's concentrate on one part of the case that we can really prove and drop the rest because otherwise we will be bogged down for years and will miss prescription or something…. So if you really want to be effective you have to have discretion here. The next question is, of course, should there be rules of how to apply discretion. (Intergovernmental Organisation Representative)

While discretion is key, intergovernmental organisations argue there are 'illegal forms' of discretion for example, when considering economic and/or national interests. Creating systematic frameworks for the application of discretion is, therefore, fundamental. Perhaps, then, there is scope for inter-national collaboration to determine effective and systematic use of resources multi-jurisdictionally:

> When resources [are] not enough? Well, my answer to that is that you have a clear and transparent and announced policy. And I suppose you'd have to do it on a risk based

> approach, wouldn't you … So I think that you could let it be known that you are focusing on particular sectors, particular industries. That you're looking particularly at some country or area of the world where it seems to be particularly prevalent … so here's an idea: isn't it, that basically the OECD, that member states, ought to adopt a thematic approach and in cooperation and collaboration, that the Germans and the Brits would target the construction sector in a particular part of the world and they'd chose particular targets to have a look at. That would be one way. (UK investigator and prosecutor 1)

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

Conclusion

This article has analysed how responsible anti-corruption agencies and actors located at the *national* level detect and investigate transnational corporate bribery within the context of two contrasting enforcement systems. Within these structural frameworks, responsible authorities detect and investigate transnational corporate bribery utilising a variety of different (e.g. obligations of tax authorities/self-reporting) but also similar (e.g. use of whistleblowers/MLA) mechanisms. A fundamental part of detection and investigation, however, is how discretionary practices are applied.

While, on paper, the German system offers much less discretion, requiring investigation and prosecution in all cases where possible, it does not significantly differ from the overt UK system as there are a number of legal and procedural mechanisms enabling non-investigation. However, with discretion being of fundamental significance in legal frameworks and in terms of practice, the key question is the extent to which this discretion is acknowledged by relevant actors (e.g. prosecutors, enforcement authorities) and the extent to which these discretionary practices are regulated on a systematic basis. In the UK, the practice of discretion appears overtly acknowledged, while in Germany discretion may be more informal, but in both cases there is a tension between law and practice. Such tensions at the stages of detection and investigation lead to the accommodation of certain transnational bribery cases which in turn reduces the legitimacy of enforcement responses in line with both international and national legal frameworks as they do not have the capacity to respond to even their own conservative estimations of the problem.

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Notes

1. These empirical data were collected through a series of semi-structured interviews with UK and German investigators and prosecutors, lawyers and country specific experts in their own language as well as interviews with representatives of inter-governmental and non-governmental organisations in addition to extensive analysis of German and UK documents.
2. For example, enforcement actions are weighted differently but this it is not explained how the weighting is determined.
3. What constitutes 'substantial' is ambiguously defined by TI (2013b, p. 105, note 583), referring to 'deterring prison sentences, large fines, appointment of a compliance monitor, and/or disqualification from future business'.

4. TI goes on to suggest that the seniority of public officials depends on their ability to influence decisions.
5. England and Wales, and Northern Ireland. Scotland does not fall under the jurisdiction of the SFO.
6. The SFO is able to supplement its income through monies obtained via civil settlements and awarded costs and by requesting 'blockbuster funding' from the Treasury should investigations be likely to cost more than £1.5m.
7. http://www.sfo.gov.uk/fraud/sfo-confidential—giving-us-information-in-confidence/serious-fraud-office-[sfo]-case-selection.aspx.
8. http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx [Accessed 20 August 2013].
9. See Financial Times '*Relaxation of UK bribery law on government agenda*' 28 May 2013: http://www.ft.com/cms/s/0/cab2111c-c6c8-11e2-a861-00144feab7de.html#axzz2XKZvEhvO [Accessed 26 June 2013].
10. The Siemens scandal involved a system of slush funds used to pay bribes to win overseas contracts. To date, Siemens has paid a total of €2.5bn to various agencies in administrative fines while a number of managers were convicted.

References

Criminal Justice Act (CJA), 1987.

Crown Prosecution Service, 2010. *Code for crown prosecutors 2010* [online]. Available from: http://www.cps.gov.uk/publications/code_for_crown_prosecutors/introduction.html [Accessed 20 August 2013].

Delaney, P.X., 2007. Transnational corruption: regulation across borders. *Virginia journal of international law*, 47 (2), 413–461.

Fraud Trials Committee Report, 1986. *Roskill report*. London: HM Stationery Office.

Freckmann, A. and Wegerich, T., 1999. *The German legal system*. London: Sweet and Maxwell.

Goldstein, J., 1960. Police discretion not to invoke the criminal process: low visibility decisions in the administration of justice. *Yale law journal*, 69, 543–594.

Hefendehl, R., 2001. Corporate criminal liability: model penal code section 2.07 and the development in western legal systems. *Buffalo criminal law review*, 4 (1), 283–300.

Juy-Birmann, 2002. The German system. *In*: M. Delmas-Marty and J.R. Spencer, eds. *European criminal procedures*. Cambridge: Cambridge University Press, 292–347.

Kaufmann, D., Kraay, A., and Mastruzzi, M., 2007. Measuring corruption: myths and realities. *In*: Transparency International (TI), *Global corruption report 2007*. Available from: http://archive.transparency.org/publications/gcr/gcr_2007 [Accessed 10 November 2013].

Levi, M., 1986. Fraud in the courts: Roskill in context. *British journal of criminology*, 26 (4), 394–401.

Levi, M., 1987. *Regulating fraud*. London: Tavistock.

Lord, N., 2013. Regulating transnational corporate bribery: anti-bribery and corruption in the UK and Germany. *Crime, law and social change*, 60 (2), 127–145.

Lord, N., 2014. Responding to transnational corporate bribery using international frameworks for enforcement. *Criminology and criminal justice*, 14 (1), 100–120.

OECD, 2008. *United Kingdom Phase 2bis report*. Available from: http://www.oecd.org/dataoecd/23/20/41515077.pdf [Accessed 20 August 2013].

Rogall, K., 2011. Country report: Germany. *In*: J. Gobert and A.-M. Pascal, eds. *European developments in corporate criminal liability*. London: Routledge, 342–350.

Rose-Ackerman, S., 1997. The political economy of corruption. *In*: K.A. Elliot, ed. *Corruption and the global economy*. Washington, DC: Institute for International Economics, 31–60.

Serious Fraud Office, 2009. *Corporate self-reporting* [online]. Available from: http://www.sfo.gov.uk/bribery–corruption/the-sfo%27s-response/self-reporting-corruption.aspx [Accessed 20 August 2013].

Spencer, J.R., 2002. The English system. *In*: M. Delmas-Marty and J.R. Spencer, eds. *European criminal procedures*. Cambridge: Cambridge University Press, 142–217.

Transparency International, 2013a. *Costs of corruption* [online]. Available from: http://archive.transparency.org/news_room/faq/corruption_faq#faqcorr4 [Accessed 20 August 2013].

Transparency International, 2013b. *Exporting corruption: progress report 2013: assessing enforcement of the OECD convention on combating foreign bribery* [online]. Transparency International. Available from: http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd [Accessed 10 November 2013].

Wolf, S., 2006. Modernization of the German anti-corruption criminal law by international legal provisions. *German law journal*, 7 (9), 785–792.