Determining the adequate enforcement of white-collar and corporate crimes in Europe

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Introduction

European nation-states face domestic, regional and international pressures to respond to some white-collar and corporate crimes and scandals. For example, (1) (inter)national, non-governmental organizations such as Transparency International (TI), Global Witness and Global Financial Integrity in addition to nation-state-specific campaign groups, (2) supra-national regional organizations such as the European Union (EU) and the Council of Europe (CoE) and (3) international intergovernmental organizations such as the United Nations (UN), Organisation for Economic Cooperation and Development (OECD) and the (officially informal) Financial Action Task Force (FATF) develop standards, rules and conventions that nation-states are morally and politically compelled to sign up to and implement in order to respond to those white-collar and corporate crimes that fall within their remit. Increasingly, to ensure that such agreements are not merely symbolic, they are accompanied by periodic evaluations (Halliday et al. 2014; Levi and Gilmore 2002).

These concerned parties often focus on law enforcement and other control mechanisms as appropriate policy responses which reflects the symbolic and moral nature of criminal justice in tackling national and transnational impunity. However, this creates tensions with national governments where there has traditionally been a preference for regulation (particularly self-regulation), persuasion, negotiation and non-criminal responses to white-collar and corporate offenders (Slapper and Tombs 1999; Lord 2014c; Nelken 2012; Wells 2011). Both self-regulation and the aversion to criminal prosecution combine ideology with pragmatism, given the huge per-case costs and evidential difficulties in high-profile transnational cases.

But how do we determine when particular sorts of enforcement or regulatory responses are sufficient and adequate, or how active responsible regulators are, both in the immediate case and taking all enforcement responses together? We can properly assess levels of state and non-state activity against crimes and their adequacy only in relation to levels and organization of crime and/or public bads (whether or not the latter can be evidenced as crimes). Existing methodologies for reviewing the latter are under-developed. In light of this, relative to what variables are levels of enforcement and (self-)regulation understood? How can we develop an appropriate ‘threshold’, against which levels of enforcement and (self-)regulation can be
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compared? If this is a serious problem at the national level, it is a far more difficult problem transnationally, where consistent data on both the levels of harms and enforcement practices are unobtainable.

This chapter explores these questions and discusses the implications of the difficulties of establishing adequate enforcement for methodological approaches to researching white-collar and corporate crimes throughout Europe and the subsequent implications for policing strategies. We begin by considering what is and ought to be understood by adequate enforcement/regulatory performance, followed by a brief analysis of the need to understand extent and scope for performance measures to have value. Given the diversity of white-collar and corporate crimes, it would be over-ambitious in a work of this length to attempt to address all such crimes. Instead, in this chapter we explore these general themes in relation to two concrete issues: transnational corruption in the context of international commerce; and, more briefly, insider dealing. Here, we explore available data to inform extent and consider current performance measures, arguing that as we can only ever understand some level of the problem, current performance measures cannot provide valid indicators of levels of enforcement. Instead, research and policing strategies that aim to understand the organization and processes of white-collar and corporate crimes and the corresponding impact of intervention, disruption and prevention strategies provide a more useful indicator of regulatory performance. There is the further complication of fairness in the treatment of different sorts of crimes and social status offenders that makes this unbearably difficult, creating the sorts of tensions between retributive and restorative justice that first exercised the critiques by Braithwaite and collaborators in the 1980s and after. We do not claim to resolve these tensions here; rather we hope to illuminate the underlying problems more clearly.

Understanding ‘enforcement/regulatory’ performance

To determine ‘adequate enforcement’, we need to understand the available mixture of control responses. Competing (if often merely implicit) ideologies are significant given that in the area of white-collar and corporate crimes there have been conflicting approaches to the most appropriate model of criminal justice and law enforcement. For example, in the 1980s and 1990s we saw debates around the purported role of criminal prosecution as being a tool of last resort or a fundamental part of the enforcement response (Reiss 1984), and often characterised by the contrast between the compliance (Clarke 1990; Hawkins 1998) and deterrence (Pearce and Tombs 1998; Slapper and Tombs 1999) approaches. Such binary distinctions around whether to criminally prosecute or not were supplanted by innovative regulatory models based on responsive and reflexive regulators that could draw upon a mixture of enforcement responses when determining whether to punish or persuade (Ayres and Braithwaite 1992). The model remains of importance (see Grabosky 2013; Mascini 2013; Parker 2013) but critique does exist, in particular in relation to assumptions of graduated sanctioning models and their lack of credibility when prosecutions are so rare (Lord 2014c) and the relevance and robustness of the concept in relation to deregulation and neoliberalism (see Tombs and Whyte 2013).

Such thinking influenced current regulatory models where it has been argued that we have seen a shift from Old Governance (i.e. state-centric, centralized, bureaucratic expertise, mandatory rules) to New Governance (i.e. state orchestration, decentralized, dispersed expertise, soft law) (Abbott and Snidal 2009) and notions of the regulatory state (Moran 2001) or regulatory capitalism (though the state retains a primary role) (Braithwaite 2008). Such conceptions of regulation have also been developed at the trans-national level (see Abbott and Snidal 2013; Braithwaite and Drahos 2000; Djelic and Sahlin-Andersson 2006) where the roles of
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intergovernmental and nongovernmental organizations and their interactions with public and private actors become increasingly significant – in this sense, the assumption that the nation-state is the primary unit of analysis when determining the adequacy of enforcement responses might benefit from a re-think.

So policy responses to white-collar and corporate crimes in most European jurisdictions can be located within a spectrum of regulatory mechanisms. At one end of the spectrum, there are a variety of enforcement practices such as criminal prosecution, debarment, civil sanctioning, disruption/reduction/intervention strategies and licensing mechanisms where the state retains a primary role in both the strategic and operational response. But at the other end policy responses also incorporate various levels of self-regulation within business and industry. These include compliance mechanisms and industry/sector regulation that cover a wide range of institutional arrangements and can differ according to the degree of monopolistic power, the degree of formality, their legal status, and the extent to which outsiders participate in rule formulation and enforcement (see for example Ogus 1994: 108–109). The level of state intervention in such practices is often reduced, although such practices may be manufactured/stimulated by the state (e.g. as part of criminal/civil sanctioning or enforced self-regulation) or may be more organic in their creation (e.g. business initiatives, market responses embodying mutual self-interest). Such responses may be targeted at specific offenders or at the markets within which such offenders operate. Also, a variety of regulatory actors is evident that includes both state (e.g. law enforcement, industry regulators) and non-state (e.g. commercial enterprises, voluntary organizations, business communities) organizations and actors. Thus, ‘the lines between regulatory and criminal procedures are becoming more tangled and blurred’ and in the area of corporate crime, the ‘enforcement of criminal law […] increasingly uses classic regulatory techniques of negotiation and settlement’ (Wells 2011: 15, 13), although increased political will, proactive inspectorial strategies and increased resources can enable prosecution (Slapper and Tombs 1999: 186; see also Almond 2013; Pearce and Tombs 1998; Tombs and Whyte 2007).

But if we take enforcement to include traditional policing responses, mechanisms of (enforced) self-regulation and the corresponding multiplicity of regulators, we need to understand the extent and impacts of all such practices, not to mention states or conditions of non-enforcement that may take the form of accommodation, collusion and/or regulatory capture where the state has no desire or ability to provide a formal response (for analysis of these concepts see Edwards and Gill 2002; Gill 2002). But even if an understanding of both enforcement and non-enforcement is obtained, understanding regulatory performance, as above, is part ideological. In the absence of clear evidence for most white-collar offences about what works under what circumstances, it is difficult to adjudicate between preferences for enforcement and regulation, just as there remain tensions between equal punishment for all and a purer effectiveness with minimal punishment perspective.

With this in mind, there is a clear problem with current attempts to understand adequate regulatory performance, as crude indicators of levels of enforcement (in its narrow sense) such as prosecution numbers (see below) are often used to determine how active any given jurisdiction may be in dealing with these problems. An intended or unintended consequence of this is to neglect the performance of broader regulatory practices of negotiation, compliance and self–regulation. If we accept we need to understand performance in relation to this broader notion of regulation, a second problem arises in the realization that determining how adequate and effective such enforcement and self–regulation practices are requires an understanding of the extent and scope of the problem. In short, effective at what, and against which numerator?
Understanding the extent and scope of white-collar and corporate crimes

Reports that say that something hasn’t happened are always interesting to me, because as we know, there are ‘known knowns’; there are things we know we know. We also know there are ‘known unknowns’; that is to say we know there are some things we do not know. But there are also ‘unknown unknowns’ – the ones we don’t know we don’t know.

*(Donald Rumsfeld, former US Defence Secretary, 2002)*

When Donald Rumsfeld spoke of ‘known knowns’, ‘known unknowns’ and ‘unknown unknowns’ in relation to weapons of mass destruction in 2002, he took a phrase from business vocabulary to distinguish between things we know that we know, things we know we do not know, but can anticipate their existence, and things we do not know that we do not know, and therefore cannot anticipate their existence. While these phrases may have several indirect and direct meanings and therefore can be used for rhetorical purposes (e.g. to refute accountability), they do point to a significant criminological limitation – the dark figure of crime – that is of significant relevance in relation to white-collar and corporate crimes. There are two components of the dark figure. The first comprises acts that if we knew about them we would unhesitatingly classify as crimes; the second comprises acts that we (and/or lawyers) might argue about whether they were crimes at all and who if anyone was legally culpable for them.

The extent and scope of white-collar and corporate crimes remain difficult to estimate for the following reasons: (1) the complexities of ascertaining who if anyone is legally responsible for the conduct; (2) the relative invisibility of white-collar and corporate crimes, the range of actors, their relations and transactions (i.e. insufficient knowledge, statistics, theory, research, control, politics and panic (see Davies et al. 1999: 5–23; Davies et al. 2014, for more extensive analysis of the characteristics of invisible crimes); (3) the lack of identifiable consequences and the long-tailed impact of some of them (e.g. direct victims or harms often obscured); and (4) the knowledge and power problems faced by the state in attempts to understand corporate subsystems (see Mayntz 1993). A more detailed analysis of how we might measure the extent and scope of white-collar crimes is provided elsewhere in this handbook. Generally, however, attempts have been made to infer extent and scope from diverse data sources such as official statistics (limited to enforcement responses), perception studies, victim surveys (individuals and organizational), self-report studies and, where accessible, private-sector data (Levi 2011). These are explored in relation to the two case studies of transnational corruption and insider dealing.

**Case study 1: transnational corporate corruption**

The EU’s Anti-Corruption Report 2014 indicated that while corruption ‘varies in nature and extent from one country to another, […] it affects all Member States’, and in doing so ‘impinges on good governance, sound management of public money, and competitive markets’ (European Commission 2014: 2). According to the report, 76 per cent of Europeans think that corruption (in general terms) is widespread in their country. In terms of business, 81 per cent of Europeans think that too-close links between business and politics in their country lead to corruption and 67 per cent that corruption is part of the business culture in their country, while 75 per cent of European companies say that corruption is widespread in their country and 43 per cent see corruption as a problem when doing business. (The report did not analyse the nature or extent of corruption within EU institutions themselves.) One particular example of the relationship between corruption and business is that of European corporations using bribery (both monetary,
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e.g. commissions, kickbacks, and non-monetary, e.g. gifts, hospitalities, favours) in international commerce to win or maintain contracts and interests in foreign (European and non-European) jurisdictions. Huge cases involving Siemens in Germany and BAE Systems in the UK provide recent examples. But accepting that there might be judgements based on morality and symbolism as much as more administrative concepts of rationality, how might we go about measuring the extent and scope of this problem in order to determine the adequacy of enforcement responses by European states?

In the TI Global Corruption Report 2007, Kaufmann et al. (2007) identified six myths in relation to corruption measurement. Myth one, ‘corruption cannot be measured’, is from the authors’ perspective not the reality. They suggest corruption can be measured (1) by gathering informed views of relevant stakeholders (e.g. firms, public officials, NGOs, experts, etc.), (2) by tracking countries’ institutional features (e.g. to determine opportunities of incentives for corruption and therefore provide useful indications of the possibility of corruption), and (3) by careful audits of specific projects (e.g. financial audits and comparisons of spending with the physical output of projects in order to provide project-specific corruption). Myths two and three relate to the vague, generic and unreliable subjective data that is obtained from perception studies. The authors argue that perceptions of corruption are sometimes the best and only information available, suggesting that perceptions matter directly in that they influence individuals’ behaviour towards institutions, etc. This may be the case but it does not inform an understanding of measurement or extent. Kaufmann et al. also suggest specific survey questions that enable more specific and focused findings (although such questions remain distanced from the social context); and that any kind of data measurement involves an irreducible element of uncertainty. Myths four and five suggest that though the nature of corruption makes it virtually impossible to satisfy policymakers’ desires for objective measures, specific, focused surveys can aid in identifying priority areas for action. Myth six, the notion that countries perceived to have high levels of corruption also have fast economic growth, is also challenged by the authors who argue that in the medium to long term adverse effects can be seen. In short, available empirical data is weak, and no strategy will yield a perfect measure of corruption.

Where collected by the state, data may also be inaccessible, although recording practices vary by jurisdiction. In the UK, for example, the Serious Fraud Office (SFO) maintains an anti-corruption register of all suspicions, allegations and cases of corporate corruption, but these figures are private, although other enforcement agencies are granted access. SFO data are available only in its annual reports and prosecutions are included in Ministry of Justice statistics, but not in recorded crime data. Likewise, neither general victimization and self-report studies (e.g. Crime Survey for England and Wales) nor business victimization surveys (Home Office 2012) have ever included crimes by corporations against consumers, workers or taxpayers in the UK or elsewhere.

Beyond official statistics, attempts to measure corruption have been made in numerous ways – some focus on the number of corrupt transactions that take place in a country, others analyse the amount of money that changes hands as part of corrupt transactions (Bardhan 2006: 342). Theoretical models have measured corruption as a percentage of government officials that are willing to accept a bribe (Cule and Fulton 2005) and by the size of the bribe (Cadot 1987; Choi and Thum 2005). Other methodologies include the use of public expenditure tracking surveys, service provider surveys and enterprise surveys to collect quantitative micro-level data (Reinikka and Svensson 2006). In addition, there have been approaches involving axiomatic measurements that entail formal definition of potentially important properties of a measure and then classification of measures according to such properties (Foster et al. 2009) and approaches involving corruption-victimization measures based on survey research (Seligson 2006). International organizations, such as the World Bank and the World Economic Forum, have conducted large-scale
surveys, but the main source of data more broadly comes from studies of perception, such as TI’s Corruption Perceptions Index and Bribe Payers Index, but such studies are methodologically limited by their focus on perceptions only. The key question is whether the trend data produced provides valid indicators of corruption, even if numbers might not be accurate. In this sense, some measures may be more convincing than others, e.g. self-report surveys and victimization studies may offer more reliable data than perception studies, while the collation of empirical datasets may increase understanding of levels of transnational corruption.

How do we determine the adequate enforcement of transnational corruption?

The limitations in measuring and understanding the extent and scope of corruption – especially transnational corruption – raise the question as to how an appropriate threshold, against which enforcement and self-regulatory efforts can be compared, can ever be determined. Given this flaw, against which variables should adequate enforcement be measured and more specifically, can adequate enforcement ever be determined?

Current approaches to determining adequacy

According to TI’s 2013 progress report on the enforcement of the OECD Anti-Bribery Convention 1997, only three European countries (Germany, the UK, Switzerland) are considered to be active enforcers. The remaining European countries included in the report are located within the categories of ‘moderate’, ‘limited’ or ‘little or no’ enforcement. Levels of enforcement are assessed using arbitrary thresholds that aim to consider a combination of the share of world exports of a country along with the number of investigations, cases and sanctions for foreign bribery in the most recent four-year period. For example, thresholds for enforcement are based on a country’s actual percentage of world exports together with a points system that weights different enforcement actions: 1 point for commencing investigations (pre-trial phase), 2 points for commencing cases (trial phase of a legal procedure), 4 points each for commencing major cases or concluding cases with sanctions, and 10 points for concluding major cases with substantial sanctions. (It is unclear on what basis these points thresholds have been allocated.)

Substantial is defined by TI as sanctions that include ‘deterring prison sentences, large fines, appointment of a compliance monitor, and/or disqualification from future business’. In previous reports TI failed to define what was meant by substantial and in this instance defines it ambiguously. For example, there is no clarification of what length or form of prison sentence begins to act as a deterrent (should suspended sentences be included?), or whether ‘large fines’ are considered in relation to an individual’s or company’s overall turnover and profits, or whether a monitor ought to be appointed by the enforcement authorities rather than the corporation – these are key issues. The blanket application to multiple jurisdictions of this methodology also fails to consider local contexts, e.g. understanding in which jurisdictions corporations conduct their foreign business and in which sectors are they involved is necessary for meaningful comparison. In the report, the three active European enforcers, Germany, the UK, and Switzerland, required scores of 344, 152 and 63 to be categorized as ‘active’ and scored 464, 251 and 93 respectively, in addition to meeting the requirement of commencing or concluding at least one major case in the last four-year period. In contrast, the only other ‘active enforcer’ globally was the US which received a score of 1117 to easily reach its target of 407. The general trend appears to be that the larger the share of world exports, the more ‘active’ a country is at enforcing the OECD Convention, though the most active European states remain substantially behind the US. However, this
superficial methodology reinforces the need to understand enforcement responses in the context of the proportion of all bribery cases, otherwise such analyses are meaningless beyond raising awareness of corruption and bribery.

In previous reports, the methodology employed by TI used cumulative raw numbers (e.g. number of prosecutions, investigations and cases since the OECD Convention came into force) combined with a country’s share of world exports. The use of raw numbers rather than the proportion of estimated cases dealt with again presented problems for understanding levels of enforcement as well as for comparative understandings between jurisdictions. In TI’s 2012 report, ‘active enforcers’ referred to those countries with a share of world exports over 2 per cent and with at least ten major cases on a cumulative basis, at least three of which were initiated in the last three years and resulted in ‘substantial sanctions’ (see above). The category ‘active enforcer’ could also be given to those countries with less than 2 per cent world export shares but these countries had to have brought at least three major cases, at least one of which resulted in substantial sanctions and at least one case pending that was initiated in the last three years. Again, these thresholds were arbitrary and were not premised on any logical foundation (e.g. it is unclear why the threshold was ten major cases – it is possible that this was set as a number that allows a ‘reasonable number’ of countries to meet the target). Under this methodology, seven countries, the US plus Germany, the UK, Italy, Switzerland, Norway and Denmark, were identified as ‘active’ enforcers.

In both approaches, enforcement is considered more active and acceptable once a certain number of investigations and prosecutions are being regularly concluded or when prosecution numbers satisfy the informed perspectives of those moral entrepreneurs that played such a significant role in the generation of rules. But how such measures reflect a reduction in prosecution numbers due to effective prevention strategies through, for example, corporate compliance and/or situational measures that remove the opportunities for corruption is uncertain. Prosecution numbers without an understanding of proportion are an insufficient measure of enforcement/regulatory performance.

Although the TI statistics incorporate economic variables such as share of world exports as comparison points, meaningful comparisons cannot be made, given the lack of recognition they give to other key variables, not to mention the social context of regulation and bribery. For example, against what denominator are these enforcement statistics being measured for them to represent active enforcement? While world export shares may be used as markers for the categorization of these jurisdictions within ‘active enforcement’, this gives a false picture of active enforcement in terms of the broader regulatory landscape, e.g. prevention, disruption and reduction strategies, and therefore may fail to explain how local regulatory regimes and cultures might better explain these (apparent) differences.

For example, European jurisdictions are culturally diverse and represent geo-historical contexts that have developed over time – such diversity represents a distinctive opportunity for cross-European research in this area. Different legal cultures (e.g. adversarial/inquisitorial, opportunity/legality principles), different policy responses (e.g. criminal justice – social justice – risk management – restorative justice) and different political-economic priorities and imperatives (e.g. social/corporate welfare) are fundamental to understanding levels of corruption. However, the same jurisdictions face similar obstacles – the particular nature of transnational corruption (e.g. organized across jurisdictions; clandestine; few direct victims; consensual between transacting parties), as characterized by the necessary and contingent relations and processes of foreign bribery, is common across European jurisdictions. Additionally, normative and legal constructions of the problem are now shared following the harmonization of international standards at the domestic level (see Lord 2014a). In the light of these issues, it is unreasonable to consider that superficial indicators such as prosecution and investigation numbers provide sufficient comparison points.
This can be seen when considering the enforcement numbers of the US with those of Germany and the UK, as above. The legal framework for responding to foreign bribery in the US was enacted in 1977 (Foreign Corrupt Practices Act). However, it was only in 2001 in the UK (following the inclusion of a foreign element to domestic corruption laws in the Anti-Terrorism Crime and Security Act 2001) and in 1998 in Germany (following the enactment of the Act on Combating Bribery of Foreign Public Officials in International Business Transactions) that appropriate legal frameworks were created. This has procedural impacts given the US now has a well-developed structure for entering into deferred prosecution agreements with corporations (the primary enforcement tool for foreign bribery in the US) while similar provisions were only introduced in the UK in 2014 and while Germany continues to have no formal corporate criminal liability – corporations can only be sanctioned through administrative law. Thus, comparing such jurisdictions at different stages of development is problematic.

Furthermore, hypothetically it may be the case that a jurisdiction, such as Germany, has high levels of undetected corruption but retains the ‘active enforcer’ category for prosecuting a small percentage of this corruption; while other jurisdictions such as Finland or Sweden have lower perceived levels of corruption than Germany but may be prosecuting a higher proportion of these – the percentage of all corruption offences being prosecuted is currently unknowable in any country. Likewise, the Netherlands are considered to have ‘little or no enforcement’ but, according to TI’s Bribe Payers Index 2011, corporations from the Netherlands are least likely to bribe abroad. This may reflect a more effective set of self-regulatory mechanisms but receives no recognition in enforcement rates. Neither do the statistics distinguish between different cases as can be seen with the Siemens case which accounts for over 20 of the prosecutions in Germany, which distorts the picture. International studies such as TI’s Bribe Payers Index and Corruption Perceptions Index inform understandings of the extent of transnational bribery, perhaps more so than estimations of the problem by enforcement authorities (whose estimations are based on those cases that come to their attention). In addition, other 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 along with many significant legal, procedural, evidential and financial processes are not acknowledged. These variables would provide different measures against which prosecution numbers could be considered. Thus, ‘active enforcement’ in current terms does not necessarily reflect effective anti-corruption systems or measures, and does not inform any understanding of the extent of the corruption problem.

### Potential data sources

An understanding of extent requires the collation and analysis of multiple data sources. Such data sources do exist to some extent and emanate from the private, public and third sectors and are located at the local, national and supranational level (see Table 3.1). In this sense, such sources provide proxies for the missing data outlined above and provide data on both traditional enforcement mechanisms of state investigation and prosecution but also mechanisms of a self-regulatory nature.

To determine ‘adequate’ or ‘active’ enforcement, consideration needs to be given to the variety of enforcement and self-regulatory mechanisms, along with aspects of repression and prevention/reduction. Determining an appropriate ‘threshold’ against which enforcement and self-regulatory mechanisms should be compared is problematic for a number of the reasons outlined above. However, a useful place to start would be within the social contexts where such bribery and corruption occur and where the necessary and contingent relations of corporate bribery can be fully explored and understood. For example, in addition to the methodologies outlined above (e.g. victim surveys and self-report studies, etc.), data collected by and on corporations’ anti-bribery
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1 The number of corporations implementing ‘certified’ anti-bribery and corruption compliance systems and the extent to which these are regularly monitored and adapted, e.g. as compelled by formal or informal self-regulatory mechanisms.

2 The frequency (e.g. how often are bribe requests made to the company), intensity (e.g. how insistent are bribe requests), intention (e.g. facilitation of otherwise legitimate service, to win or maintain business contracts, to be accepted in the tendering process, etc.) and type (e.g. cash bribes, services, hospitality, etc.) of bribery and the extent to which these factors change over time and correlate to different localities.

3 The risk assessments of foreign jurisdictions that are conducted by corporations or third-party experts (e.g. how is the risk of corruption determined?), and the extent to which these risk assessments change over time and why, e.g. have corporate compliance mechanisms reduced bribe frequency in country A and in what ways?

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**Table 3.1 Potential data sources at the micro, meso and macro levels**

<table>
<thead>
<tr>
<th>Level</th>
<th>Key organizations</th>
<th>Data</th>
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<tbody>
<tr>
<td>Micro</td>
<td>Individual corporations and business enterprises</td>
<td>Data on contextual factors such as how often bribes are requested from corporations and in which areas (geographical and business), etc. (see points 1–6 below)</td>
</tr>
<tr>
<td></td>
<td>Media outlets</td>
<td>Accounts of investigative journalism as developed through sustained and focused investigations Exposés on multi-national corporations, e.g. the Guardian and BAE Systems</td>
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<td></td>
<td>Activist groups</td>
<td>Case construction and analysis to support lobbying and moral entrepreneurship Exposés</td>
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<tr>
<td>Meso</td>
<td>Industry and trade associations of transnational sectors and markets</td>
<td>Industry/trade data generated through member surveys and monitoring of financial transactions and market performance</td>
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<tr>
<td></td>
<td>Whistleblowing organizations external to corporations</td>
<td>Data on reported cases from multiple sectors/industries, internal/external reporting and responses and outcomes</td>
</tr>
<tr>
<td>Macro</td>
<td>National/regional-level enforcement and regulatory agencies</td>
<td>Data collated on number of cases detected (via myriad sources), on number of cases investigated (or not) and of number of cases concluded (whether (non-)prosecution or closure)</td>
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<tr>
<td></td>
<td>International organizations, e.g. NGOs such as TI</td>
<td>Large-scale survey data based on self-report studies, victimization surveys and studies of perceptions, etc.</td>
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<td></td>
<td>Intergovernmental organizations, e.g. OECD, UN</td>
<td>Country monitoring to establish enforcement activity whereby investigation and prosecution numbers are collated for jurisdictions</td>
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<td></td>
<td>Transnational business initiatives, e.g. World Economic Forum</td>
<td>Market/sector data generated through disclosure of financial transactions by member corporations and data collected through member surveys</td>
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</table>

Source: Table 3.1 reprinted by permission of the Publishers from ‘Understanding “regulatory” performance and determining “adequate” enforcement’, in Regulating Corporate Bribery in International Business by Nicholas Lord (Farnham: Ashgate, 2014), pp. 163–178. Copyright © 2014
4 The identification and recruitment of potential bribers within the corporation by external solicitors/demands of bribes, e.g. at which organizational level are employees approached (e.g. executives, middle managers, low-level employees), do these represent particularly ‘at risk’ positions (e.g. high contact with foreign officials, independent positions, etc.), are certain corporate departments consistently approached (e.g. telecommunications, construction, etc.)?

5 Public disclosure and increased transparency of payments made to foreign public officials and governments for public contracts (in line with the Publish What You Pay (PWYP) initiative in the extractive industries: http://www.publishwhatyoupay.org/ (accessed 7 July 2014)).

6 Public disclosure of country-by-country reporting of financial performance broken down into production, profits, sales and costs to enable transparency of contracts and transactions and discrepancies to be identified.

These processes represent only some of those involved in bribery but an understanding of these would inform an understanding of transnational corporate bribery and more specifically, an understanding of effective prevention and control. The impact of corporations’ compliance mechanisms on the regulation of transnational corporate bribery could therefore be measured over time. For example, to what extent are companies operating in high-risk country A receiving fewer bribe demands/requests over time, and how has this been influenced by company policies? Of course, such an approach assumes both that the majority of corporations are good, ethical organizations willing to collect such data accurately and honestly. (There may be many legitimate reasons why they would not wish to, e.g. too much transparency on their legitimate business transactions that may influence competition and the market.) It also focuses only on the demand side of bribery, or passive bribery. Those corporations actively committing bribery would unlikely be reached without some form of mandatory, regulatory intervention (albeit compulsory self-reporting is arguably a violation of the privilege against self-incrimination). If corporations can be encouraged or compelled to collect such data, an understanding of the impacts of self-regulatory mechanisms on bribery reduction could be explored (although gaining access to this data without formal regulatory coercion would prove difficult). Thus, the problem of transnational corporate bribery could be made more tangible through methodological innovations in researching the organization of serious crimes such as corporate victim surveys; but also by altering the research question to ask how known incidents of bribery were organized and what such ‘known knowns’ do for criminological understanding. The latter would assist corporations’ own efforts as well as criminological thinking.

As things stand, however, how ‘adequate’ or ‘active’ enforcement may be cannot be determined without some inference about the volume of crime from victim surveys and self-report studies along with official records and other sources of data (e.g. corporations). Given the difficulties of detection and accessing corporate subsystems, while the above proposal may begin to bridge this gap, this knowledge is currently not available, nor is it plausible that it would be in the near future. This in addition to the less tangible nature of transnational corruption reinforces the location of transnational corporate bribery amongst the ‘known unknowns’.

Moving beyond estimations of extent and scope towards understanding ‘organization’

Two problems are evident. First, determining adequate levels of enforcement only makes sense in relation to accurate judgements about extent and scope but this latter endeavour is methodologically idealistic. Second, the only attempt to address adequate enforcement across Europe comes in the form of the above comparison of prosecution numbers by TI. However, these adopt a narrow view of enforcement that is limited to the investigation, prosecution and sanctioning of
transnational corruption – this gives us no insight into those enforcement practices characterized by prevention and self-regulation and which incorporate the widely accepted role of non-state actors and organizations.

With this in mind, in addition to developing estimations of the incidence, prevalence and concentration of transnational bribery and corruption, the analytical focus could be shifted onto the *modus operandi* of how transnational bribery and corruption is organized (see Edwards and Levi 2008). For example, white-collar crime reduction has been analysed through an opportunity perspective approach, the tools of which are predominantly situational crime prevention, routine activities theory and crime pattern theory (see Benson and Simpson 2009; Benson et al. 2009).

Based on the crime triangle (i.e. motivated offender, opportunity and capable guardians), the propensity to commit offences is assumed and analytical focus is placed on opportunity structures. By identifying the features of the immediate situations within which white-collar crimes take place and the processes involved, it is possible to intervene and reduce (or perhaps displace) such crimes. Understanding the technical dimensions of corporate bribery is clearly important for enforcement authorities. However, such approaches must be supplemented with an understanding of the social dimensions (i.e. the necessary and contingent relations (see Edwards and Hughes 2005) of corporate bribery and the nature of these relations in different geo-historical contexts).

In other words, it is important to understand the processes, relations and routine activities of white-collar and corporate crimes in the context of political, cultural and economic structures (see Levi 2008). For example, analysis of the necessary involvement of particular actors (e.g. executives, corporations) in particular economic sectors (e.g. construction, finance, defence, etc.) and in contingent legal or cultural contexts (e.g. UK, Germany) informs an understanding of why such crimes are organized in specific societies. Understanding the organization of transnational corruption over time and in different places informs enforcement practices of intervention – to render social problems such as transnational corruption sufficiently ‘tangible’, there must be some ‘known knowns’ from which the impact of self-regulatory and non-repressive mechanisms can be understood. Additionally, analysing context informs an understanding of the impact of mechanisms designed to respond to or reduce corrupt activities. For example, in an enforcement culture of non-prosecution and negotiated civil sanctioning, the ripple effect of one or two notable criminal prosecutions is likely to have a greater impact within business and the market in terms of shifts towards improved compliance and internal oversight. To understand context and the social processes, relations and practices of transnational corruption then, research might aim to understand the following issues (adapted from Lord (2014c), drawing on Levi’s (2007: 781) process model of transnational serious crimes):

**Table 3.2 Necessary and contingent relations of transnational corporate bribery**

<table>
<thead>
<tr>
<th>Necessary</th>
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<tbody>
<tr>
<td>• How are the finances for bribes obtained? For example, how do legitimate corporations channel funds for the creation of slush funds and what are the concealment practices involved (e.g. use of front companies; fake conferences to generate funds; inflated prices)?</td>
</tr>
<tr>
<td>• How are bribe payers and receivers recruited (e.g. internal/external, domestic/foreign to the corporation) and how do they develop the expertise/technical ability to develop bribery schemes? Which criteria identify potential intermediaries and bribe receivers (e.g. politicians, state officials)?</td>
</tr>
<tr>
<td>• Which corporate mechanisms and tools are utilized and necessary to be able to bribe (e.g. bank accounts in difficult-to-reach jurisdictions)? How are the proceeds of bribes concealed and converted (i.e. money laundering) from the various domestic and foreign authorities (e.g. law enforcement, tax authorities) and what are the particular legal/structural contexts that enable this?</td>
</tr>
</tbody>
</table>
Understanding the necessary and contingent relations of bribery enables key vulnerabilities in the above processes to be determined for strategic interventions, even if it may not be possible in the short term politically to close off those loopholes. Law enforcement agencies, however, are under pressure to produce results, usually in the form of prosecutions, in order to ensure they maintain their existence and function. Shifts towards prevention and disruption reduce the number of measurable results but may also contradict statutory remits.

A variety of methodologies and data sources would be useful for understanding these issues. For example, primary data may be generated through script analysis of those cases that come to the attention of the authorities, victimization surveys, self-report studies, perceptions studies, interviews with offenders while secondary data collected by corporations, enforcement agencies, business and sector-specific trade associations and bodies, international organizations and development banks as well as court records and police notification schemes could also inform understandings of the bribery problem.

Understanding the non-enforcement of transnational corruption

There is an assumption that if we can understand the abovementioned enforcement and self-regulatory practices in relation to the organization of transnational corruption and white-collar and corporate crimes, then regulatory performance can be determined. In reality, this will not be enough as non-enforcement may emerge. In the case of transnational corruption, even where the will to enforce the law is high and where political support may be evident, the particular nature of transnational corporate bribery can render criminal enforcement implausible while the impact of emerging self-regulatory practices is currently unknown (Lord 2014c). It might seem sensible to think of current enforcement numbers provided by international and intergovernmental organizations in proportion to the corruption problem within and caused by businesses from each jurisdiction: but given our inadequate appreciation of these, it is hard to work out how we might justify the proportionality of these sanctioning efforts. Prosecution numbers may reflect all corrupt activity but this is unlikely, due to legal, evidential, procedural, structural and financial limitations of law enforcement (Lord 2014a). More likely is that much corporate bribery currently goes undetected and is therefore unknown. What is more, of the bribery that is known, limitations in enforcement create difficulties for the criminal prosecution of such crime.

Source: Table 3.2 reprinted by permission of the Publishers from 'Understanding “regulatory” performance and determining “adequate” enforcement', in Regulating Corporate Bribery in International Business by Nicholas Lord (Farnham: Ashgate, 2014), pp. 163–178. Copyright © 2014
highlighting accommodation of the problem by prosecutorial agencies and departments as the default position (Lord 2013, 2014c).

In the UK, for example, the SFO’s acceptance criteria make clear that only large, complex cases will be investigated, meaning smaller corruption cases may be accommodated – formal and informal discretion is applied throughout detection and investigation in the (de)prioritization of cases (Lord 2014b). The same can be said of facilitation payments, which although prohibited in UK law, are unlikely to be investigated. Similar accommodation exists in other European jurisdictions, such as Germany, where unevenly distributed funding and expertise results in some Bundesländer being less enthusiastic than others in relation to bribery enforcement. Consequently, regulatory agencies, restricted by their powers of enforcement, accommodate a certain level of transnational corruption either through their inability to do otherwise or their conscious or unconscious decisions to prioritize or focus on other issues.

Accommodation occurs not only due to practical limitations but also in respect of political and economic ideologies. The BAE Systems case that involved a government-to-government arms contract between the UK and Saudi Arabia but enlisted BAE Systems as the arms producer and provider in this deal is a prime example of this. In 1985, the UK and Saudi Arabian governments signed the contract for the initial al-Yamamah I arms deal (al-Yamamah II followed in 1988) where it was agreed that the UK would provide 72 Tornado and 30 Hawk aircraft, amongst other defence equipment, in return for oil (up to 600,000 barrels a day) – BAE was appointed to be the prime contractor to deliver the deal and it is estimated to have been worth around 43 billion pounds. However, to facilitate the deal, BAE was alleged to have paid more than 6 billion pounds in bribes and inducements. A Serious Fraud Office (SFO) investigation into the alleged bribery was halted in 2006 following government pressure where the UK Prime Minister at the time, Tony Blair, alluded to national security fears. It was asserted that Saudi Arabia had threatened to withdraw counter-terrorism assistance and intelligence should the investigation continue. Economic interests were also endangered as Saudi Arabia threatened to withdraw from a 10 billion pound deal to buy Eurofighter Typhoons. However, this was an impermissible rationale, since halting an investigation for economic reasons would contravene international conventions – however, governments understand the importance of large corporations to a country’s economic and national security interests that are shaped by transnational business agreements (e.g. UK–Saudi Arabia). Simultaneously, however, they must manage criticism from moral entrepreneurs and from international performance evaluations which appears only possible through increasing enforcement successes.

Antecedent influences to non-enforcement are the risk of regulatory capture and the revolving door phenomenon. Where the relationship between the regulator and the regulated becomes too intertwined due to shared ideologies and/or personnel, rewards and/or threats, the regulator may be captured and subsequently ensure non-enforcement. Where the movement of key actors from the public to the private sector, or vice versa, is frequent, conflicts of interest may also emerge which can result in attempts at regulation being undermined. However, accommodation, even where the will to enforce the law is high, may be a significant part of all control responses. In this case, it is more important to understand how resources are allocated and how intelligence is used (e.g. prioritization and disruption) to address certain aspects of any given form of criminality.

Case study 2: insider dealing

Whereas the victim status of corruption, especially transnational bribery, is now culturally assured – at least to the extent that few dare to defend publicly on more than a purely pragmatic basis the giving and acceptance of bribes – this is not true for all white-collar crimes. Insider
dealing is a particularly intriguing example since symbolically, profiting from trading on inside non-public information strikes at the heart of the claim that capitalist markets are free and honest. Yet it has no obvious victims, nor is it clear what impact the misconduct itself (or even its exposure) has on investor behaviour or sentiment, at least below the level that everyone assumes that many prices are fixed. An insider dealer who buys shares offers people already in the market to sell at a perhaps higher price than they would have obtained otherwise; though one who sells on the basis of inside information may depress the market slightly for other sellers, which benefits buyers. This is to be distinguished from the real harms caused by boiler rooms scams, market manipulation of share values by false information and/or undisclosed rings of conspirators; and the selling off of state companies using valuations that insiders know to be false, common in the former Soviet bloc in transition to capitalism, but also elsewhere under neoliberal pressures to privatize public assets.

There has been ongoing controversy as to whether criminal or civil measures are the most effective method of reducing insider dealing (Rider 2000; Rider et al. 2009) but as in the corruption case, there are symbolic issues also. In some elite cases, since the mid-1980s, American and to a far lesser extent British prosecutors have sometimes adapted the strategy used in organized crime cases of rolling up white-collar offending networks via plea bargaining: this saw its apotheosis to date in the Michael Milken, Dennis Levine, Martin Siegel and Ivan Boesky insider trading web of the mid–late 1980s, and the US Galleon insider trading case in 2012. These cases offer absorbing examples of how insider dealing is accomplished (see Raghavan 2013 for an absorbing cultural account). But this enforcement strategy applies only where (1) there are such networks of offenders, rather than individuals and small groups acting alone to defraud, and (2) expected probability of conviction and expected sentences are high enough to incentivize betrayal rather than loyalty/self-interest in silence. It is assumed that respectable offenders will fear prison more than organized criminals would, and therefore will need a lower threshold to inform against others.

The direct results of this model are visible. In the Galleon insider dealing case, Raj Rajaratnam, CEO of Galleon, was sentenced to 11 years (plus 156 million dollars in financial penalties); though this was 100 months below the minimum in the sentencing guidelines for an offence of this gravity. Despite support from Bill Gates, Kofi Annan and others for his charitable work carried out prior to the criminal investigation, former Goldman Sachs partner and McKinsey’s director Rajat Gupta was jailed for two years for leaking confidential information to Rajaratnam. Under Manhattan US attorney Preet Bharara, 13 out of 72 persons charged with insider dealing cooperated with the government, all but one of whom got probation. Since 2010, the 26 insider-trading defendants who did not cooperate with prosecutors have received an average sentence of two years and ten months: a third under their average federal guideline range (Rothfeld and Strumpf 2012), but significantly (to them) longer than what they would have got had they cooperated. In the UK, sentences have been much smaller, but from zero prosecutions before 2008, the Financial Services (now Conduct) Authority has obtained 23 convictions to May 2013. These cases involved illicit profits totalling less than 9 million dollars, according to a Wall Street Journal analysis of public disclosures. Five people charged with insider trading have been acquitted, and seven others were awaiting trial at the beginning of 2014, at which point the Financial Conduct Authority had 480 staff in its intelligence and financial crime section. By not entirely equivalent comparison, the US Securities and Exchange Commission had filed more than 50 insider-trading civil cases in each of the past three years. One recent hedge-fund case featured hundreds of millions of dollars of alleged illicit profits and avoided losses: see Enrich and Agnew (2014).

There are several effects about which one might hypothesize. One relates to deterrence (see generally, Nagin 2013): little is known about what traders and directors know about the law, but it seems reasonable to assert that they are vaguely aware of what is prohibited. However, where enforcement is at or close to zero, both rational choice theorists and neo-Durkheimians looking
for evidence that this is viewed as a serious wrong might see little reason to obey the law. When they hear/read about high status and lowly persons prosecuted (and perhaps jailed), however, the risks become more salient. The question then is how much or little prosecutions create this effect, and for how long it persists? This is linked to broader issues of how we can measure credible deterrence among elites. The other approach relates to measures of market cleanliness, which provides insights into the general level of insider trading in markets (Monteiro et al. 2007; Del Guercio et al. 2013). This looks at how many pre-announcement spikes in trading there are, which picks up egregious or heavily networked examples of insider trading, which can be used to guide more detailed investigations into who bought and sold these shares, and whether or not they are (and can be proven to be) linked to insiders as defined variously in national legislation. Developments in software do this relatively more easily today than in earlier times. In some cases, despite anti-money laundering legislation requiring the identification of beneficial owners, it may be too hard to penetrate who controls accounts and to link the perpetrators to insiders: but shareholdings and funds can be frozen depending on the powers available, even without being able to prove a case against anyone. However, given the relatively low actual compared with symbolic harm involved, there is room for argument about how much enforcement against insider dealing is adequate, and how resources should be allocated to this relative to other harmful features of financial crime. This can be intermingled with issues of agency mission and legal mandate: many more harmful financial crimes lie outside the FCA’s powers, and it cannot transfer its funds (which come from levies on the financial sector) to police and prosecute them. So we should not see these individual issues in isolation: looking at the adequacy of enforcement across the board – difficult though it is – may hide issues of ‘who pays for what’ that can be central to the operational component of the analytical task.

Concluding thoughts

White-collar and corporate crimes are not a homogeneous group and vary significantly in terms of their nature and organisation, their intent and purpose, and the harms that they cause. This chapter has used the examples of transnational corporate corruption and insider dealing to instigate a debate over how we might go about determining how adequate white-collar/corporate crime enforcement is, or how active responsible regulatory and enforcement agencies are. The key issue to recognize is that adequacy is dependent upon what we know or could plausibly know about levels of offending behaviour: without a valid indication of the levels and organization of such crimes or public bads, our understanding of the relative impact of enforcement is partial and subjective. Various sources produce data on narrow indices such as prosecution or investigation numbers but without contextual understanding of how important these cases are or without ‘good enough’ measurement of the scale of the offending, these data are rendered largely meaningless. This is a problem at the national and even more so at the transnational level where available data on enforcement practices and harms are difficult to obtain.

To address this problem, we outlined data sources that have the potential to fill the gaps and provide more valid understandings of prevalence, extent and scope. Collating and analysing data emanating from public, private and third-sector sources across local, national and supranational levels provides proxies for these missing data. But better informing our quantitative understandings of the extent of the problem has much more meaning when supplemented by qualitative understandings of how such crimes are organized domestically and transnationally. Once we know more about the size and distribution of the criminal markets, a major challenge remains in linking different models of enforcement to changes in those actual as well as formal enforcement changes. We see no reason to suppose that ‘what works’ is independent of cultural context and expectations,
including but not restricted to the independence of regulators, prosecutors and the courts. It seems plausible that where compliance is linked to expectations of how others are complying, more can be achieved with a lighter nudge than where offending is or is believed to be commonplace.

In the light of this, the key argument is that understandings of the organization of white-collar and corporate crimes offer an alternative means by which enforcement levels can be measured and policing strategies informed. To this end, we identified some key questions to explore the necessary and contingent relations of such activities and the contexts within which they occur. Such thought processes and research questions are transferable to all white-collar and corporate crimes, and provide empirical research frameworks that we consider useful to reasoned assessments that go beyond the normal claims of advocacy organizations.

Beyond this, however, is the more philosophical problem of what we want from the enforcement of white-collar and corporate crimes. Do we want displays of how unfair and unequal enforcement is across the range of crimes and/or of the evils brought about by contemporary capitalism in order to unveil class justice? Do we want fairer treatment of different forms of offending so that enforcement is less the product of social stereotypes and more a reflection of harms (and – a different issue – intentional wrongs) done? Do we want a form of reassurance policing and sanctioning that reduces levels of social anxiety about different harms (e.g. food security, identity theft/fraud)? Or do we mainly want to reduce future harms by negotiating reductions in harmful behaviour, perhaps supplemented by restorative justice mechanisms that incorporate victims personally or at least collective and individual victim interests? These are simply examples within a range of objectives which we may want to satisfice unless we are willing to choose just one primary underlying principle. It seems plain to us that unless we resolve both evidence about effectiveness and the aims of control, we can never properly determine how inadequate the enforcement of white-collar and corporate crime is going to be.

Note


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The enforcement of white-collar crime in Europe


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