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UK Corporate Bribery and Corruption: An Enforcement Paradox

PhD

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Declaration of Original Authorship

Declaration: I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Date: 03/12/2021

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Abstract

This thesis explores the UK's approach to corporate bribery (and other economic crime) enforcement and the tools it uses to do so. When the Bribery Act 2010 (UKBA) came into force, its section 7 (s.7) offence imposed criminal liability for a corporate failing to prevent bribery. However, as well as a defence permeated by accommodative intentions and self-regulatory capacities, this form of *criminality* is increasingly enforced in characteristically regulatory/non-criminal ways via methods favouring non-prosecution, settlement and negotiation - in the form of Deferred Prosecution Agreements (DPA). Through a noticeable shift in regulatory and enforcement culture, the resulting inquiry is whether the landscape reflects a 'failure to prevent' or more a failure to prosecute. The research seeks to inform literature by proposing how the proclaimed prosecutorial stance of enforcement policy has been redefined and weakened by an inability to do so and replaced with cooperative methods that are too heavily reliant on corporate assistance and bargain and bluff tactics. Using a qualitative approach, the work offers views from practitioners in the field to help enlighten and understand the aetiology of current enforcement practices for corporate offending.

Through an analysis the results illustrate that due to complexities in corporate criminal liability, changes in the approach to prosecutorial enforcement, limited adherence to enforcement rhetoric and policy, self-regulatory reliance, and a growing favourability for DPAs, the UKBA and correlative intent to impart an *enforced* self-regulatory culture is presently lacking clarity in the legal objective – redefining the symbolic application of the criminal law. The work proposes that the control of corporate bribery has therefore become paradoxical: actively promulgating investigation and enforcement, but in reality, succumbing to more amenable tendencies of reliance and settlement. Alongside concerns that point to enforcement inability, illogicality, and inequality - that are not indicated by legislative, policy and publicised intent - these have collectively and negatively impacted the enforcement regime. This research enhances the understanding of enforced self-regulatory practices used in corporate crime control and, drawing on responsive regulatory theory, offers important considerations and implications for policy and social scientific development. If serious corporate crime is to be treated as a serious criminal offence, this work reinforces the appropriate use of escalatory enforcement and prosecution - and not its habitual avoidance.

Contents

Abbreviations and Acronyms

CPS: Crown Prosecution Service

DoJ: Department of Justice

DPA: Deferred Prosecution Agreement

EBRD: European Bank for Reconstruction and Development

ENRC: Eurasian Natural Resources Corporation

EY: Ersnt and Young (formerly)

FCA: Financial Conduct Authority

FCPA: Foreign Corrupt Practices Act 1977

GRECO: Group of States Against Corruption

GSK: GlaxoSmithKline

LIBOR: London Inter-bank Offered Rate

MOJ: Ministry of Justice

NGO: Non-Governmental Organisation

OECD: Organisation for Economic Cooperation and Development

PwC: PricewaterhouseCoopers

SFO: Serious Fraud Office

SMCR: Senior Managers and Certification Regime

TIUK: Transparency International UK

UK: United Kingdom

UKBA: UK Bribery Act 2010

UNCAC: United Nations Convention Against Corruption

UNODC: United Nations Office for Drugs and Crime

US: United States

List of Cases

H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 NZLR 7

R (Abbasi & Anor.) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department [20021 EWCA Civ. 1598. T20031 UKHRR 76

R v Akle & Anor [2021] EWCA Crim 1879

R v British Steel plc 1995

R v Great Western Trains 1999

R v Skansen Interiors Limited (unreported)

R v Woods & Marshall

SFO v Airbus SE, Southwark Crown Court, Case No: U20200108

SFO v Airline Services Limited, Southwark Crown Court, Case No: U20201913.

SFO v Güralp Systems Limited (2019)

SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036

SFO v Standard Bank Plc (now known as ICBC Standard Bank plc), Southwark Crown Court, Case No: U20150854

SFO v Sarclad Limited (2016)

SFO v Tesco Stores Limited, Southwark Crown Court, Case No: U20170287

Tesco Supermarkets Ltd v Nattrass [1972] AC 153

Chapter 1

Introduction

1.1 Introduction

Scholarly attention was first drawn to the crimes of powerful actors by Ross in his article 'The Criminaloid': describing those of advantaged social positions who engaged in criminal activity.[1] Since then, the seminal works of Edwin Sutherland were the first to coin the term white collar crime and explain how it has historically received inadequate attention. Noteworthy of his claims was the concept that like a professional and persistent thief, 'white collar' criminals, or the corporations, are recidivist offenders.[2] The intentions underpinning this suggestion raise the (empirical) question of how best the law should respond if these crimes are committed and how sanctions are to be enforced. Its prevalence has led UK legislation to be developed alongside a field of coordinated international activity, regulation and enforcement (as will be discussed in Chapter 4).

With the prevention and enforcement of corporate crime remaining an elusive subject where too little is known about how to deter or limit it,[3] this thesis focusses on what enforcement options become (or should become) applicable within the context of the UK where corporations have demonstrated their criminal abilities through the commission of serious bribery and corruption. The concern is that historically – as now – corporate *crime* has, for a multitude of reasons, suffered a paucity of sanctioning through the criminal courts in the form of prosecution;[4] despite its criminal law classifications. For the purposes of this work, the term regulation (detailed in the following chapter) is to be used broadly and interchangeably to describe the control of corporate activity and its interplay with enforcement. This will include that undertaken by both state and non-state actors regarding both direct and indirect methods of regulation.

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[1] Edward Ross, *The criminaloid* (1907) 99 The Atlantic Monthly 44–50.

[2] Edwin Sutherland, *White-collar crime: The uncut version* (1st ed, Yale University Press, 1983).

[3] Peter Yeager, 'The elusive deterrence of corporate crime' (2016) 15(2) Criminology and Public Policy 439-451.

[4] Edwin Sutherland, 'White-Collar Criminality' (1940) 5(1) American Sociological Review 1-12; Edwin Sutherland, *White-Collar Crime* (1st ed, Dryden Press, 1949).

In the UK, corporate bribery, the promotion of business integrity and its proclaimed enforcement reached a turning point with the implementation of the Bribery Act 2010 (the UKBA). Section 7 (s.7) in particular, on the face of it, seemed to take aim at such disobedient corporations – enacting a powerful failure to prevent bribery with criminal liability and prosecutorial enforcement.[5] Incumbent to the section is also a full defence, where corporations are tasked with regulating themselves and having in place *adequate procedures* to prevent bribery. If successful, despite their actions and its results, it effectively rescinds the 'corporate's wrongdoing' from prosecution; having shown that sufficient self-regulatory steps were taken to prevent the corruption. The enforcement of corporate bribery has therefore aimed to invoke a dualistic landscape, seeking a regulatory culture of effective self-governance but backing it by the unequivocal threat of criminal enforcement.

1.2 The Enforcement Paradox

This thesis will argue that the enforcement landscape has become subject to a permeating incongruity, leading to what will be referred to as an *enforcement paradox*. Although the UKBA enforcement regime promulgates practices and legislation that speaks both to an ability and willingness to fight serious economic crime - through strict prosecution if required - it has conversely developed an opposite tendency. Due to an array of underlying difficulties that challenge what is proclaimed, the emphasis is conversely found in a reliance on self-regulatory goals, principles, and accommodative justice. When corporate bribery is identified, despite the state strenuously evoking a sense of command-and-control regulation, it is predominantly only able to secure justice in ways akin to non-criminal and regulatory methods. This often leaves both the commercial entity *and* the individuals behind its crimes free from prosecution, achieved through the use of Deferred Prosecution Agreements (DPA). From an ideological view, this represents a continued shift in regulatory culture away from deterrence-based enforcement strategies and towards amenable methods that focus on private governance and see prosecution superseded by persuasion. The result is a disjointed enforcement dynamic which emphasises the paradox in that even though the *threat* of criminal prosecution is postured, the Serious Fraud Office (SFO) seldom pursue it, lesser so achieve it and have difficulty in securing it.

[5] S.7 Bribery Act 2010.

The research does not seek to suggest that the contradiction lies in using regulatory style mechanisms for corporate, or indeed, criminal offences, but in the circumstances under which they are applied, the framing of enforcement rhetoric and the lack of adherence to critical commandments of enforcement policy and guidance. In both this work and in multiple public statements the SFO market themselves as enforcers, and not regulators: investigating and prosecuting serious fraud and economic crime. Yet, they far more frequently pursue *regulatory* sanctions that emphasise persuasion, cooperation and settlement (DPAs) for serious crimes, as opposed to typical *criminal* control sanctions of prosecution and punishment.[6] This furthers the incongruity examined as although the UKBA and its rhetoric have come during a period of increased corporate offences and stricter threats of punishment, the physical sanctioning has come to be seen via a methodology which deviates from and downplays what the criminal law typically offers to its most serious offenders.[7] Therefore, despite the criminal law providing a powerful offence, and therefore a basis/justification for conviction,[8] it has proceeded to adapt its punishment in a way which often excuses corporates and frequently bypasses the individual(s) behind the most grave failings. This has contributed to 'prosecution' being redefined in a way which acknowledges the SFO's engagement in the task of enforcement but questions their process of achievement, their ability to do so and the deterrent effect of the outcomes. The SFO hold their side of the enforcement relationship to be a well-funded and able agency; willing and ready to prosecute where the evidence supports it. On the other side sits a range of industry actors who, when interviewed for this research, suggest quite the opposite; questioning the resource efficiency, expertise and capability of the agency to achieve its self-proclaimed agenda.[9] When persuasive outcomes, and not prosecution, are used for the most egregious examples of corporate bribery, it poses an illogicality. That is because the legislation, policies and guidance upon which the UKBA and DPA strategy is professed, and was developed, provide specific direction upon which each method should be deployed. Although this might be said to fall

[6] Hazel Croall, 'Combating financial crime: regulatory versus crime control approaches' (2004) 11(1) 45-55.
[7] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2(1) Criminal Law and Philosophy 21-51.
[8] Ibid.
[9] Since submission of this thesis a report by Spotlight on Corruption indicated resourcing deficiencies at the SFO and presented its negative impact on enforcement. See, Spotlight on Corruption, Closing the UK's economic crime enforcement gap: Proposals for boosting resources for UK law enforcement to fight economic crime. (2022) < https://drive.google.com/file/d/1UzymaDZZSVF8By1WYGtahRN-gvBI2R-_/view > accessed 14/04/2022.

within the spectrum of discretion afforded to UK prosecutors within a complex prosecutorial environment, the theory of UKBA/DPA enforcement and its reality remain tangibly different. Even during a trajectory of criminal trials increasingly being treated as a luxury confined to the most serious crimes,[10] prosecution has seldom followed in the instances which would, prima facie, match such criteria.

Whilst policy, legislation and the SFO may speak of and broadcast prosecution, it is infrequently sought and has in any event (at least to date) been pursued for relatively small fry cases, where guilt has been admitted or in situations questioning an intent beyond virtue signalling. In addition, although DPA policy and usage is predicated upon the simultaneous pursuit of the individuals behind the corporate crime(s), recent data supports the concerns of this thesis in showing declining levels of convictions.[11] The concern, therefore, is that this has negatively impacted the UKBA regime given the ways in which enforcement deviates from its intended, expected and publicised pathway. The research will show that instead, the enforcement dynamic is one where but for the cooperation and assistance of the regulatee, already complex investigations would become an even greater, and often impassable obstacle. This paradox is entrenched behind the pervading realisation that without such assistance of or dependence on corporate actors to cooperate with investigations, there exists a restricted ability to uncover and sanction allegations of corporate bribery. Theoretical and legislative tensions have come to exist over the reality of how UK corporate bribery is enforced where the boundaries between state enforcement and self-regulatory reliance have become blurred. The implications of which are a weakened ability to enforce corporate wrongdoing in the way the law suggests. This thesis will exemplify this division and evidence concerns of a growing enforcement inequality and illogicality. That is, even when formal sanctions against corporate wrongdoing are available, they have been and are being used differently.[12] This has left "*a contemporary legacy predominantly characterised by the non-prosecution of corporations for substantive criminal behaviours*"[13] and the perspective that

[10] Ashworth and Zedner (n 7).
[11] Spotlight on Corruption (n 9) 27.
[12] Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime* (1st ed, Palgrave MacMillan, 2018).
[13] Nicholas Lord and Rose Broad, 'Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the "Organisational" Component' (2017) 4(2) The European Review of Organised Crime 27-52, 33-34.

"*crime committed by social outsiders is accepted far less gently than crime committed by the respectable company.*"[14]

Some 35 years since reforms were conducted into the investigation and prosecution of serious financial crime[15] - coupled with the changes in market regulation[16] - it is appropriate to challenge the UK's corporate bribery enforcement regime, the reasons behind its increasing prevalence for settlement and to inform discussions on permeating inadequacies. As this work will show, the value of strict and impactful enforcement in this context becomes important as *"the likely imposition of harsh penalties is the principal - if not the only - means of achieving compliance."*[17] This assessment will refer to other corporate crimes to illustrate how a range of offences are also resolved via civil methodologies and a deviation from prosecution – towards both the corporate entity and its responsible personnel - irrespective of apparent underlying evidence. This work echoes an overarching desirability: that "*those who commit such serious crimes as corruption…must not be viewed or treated in any different way to other criminals."*[18] In practice that equates to both the corporate entity and its human representatives being the subject of criminal prosecution where the evidence supports it, legislative policy dictates it, and the circumstances warrant it. Having corporate settlements that are backed by conventional prosecution remains paramount to a criminal justice system that can impose both the purpose of the criminal law in providing for censure and punishment, and in simultaneously being able to apply it in a principled and pragmatic capacity.[19] To aid the understanding of enforcement policy and practice, this work will present evidence from industry actors to prompt a reconsideration of current tendencies towards particular enforcement methods. The discussion will involve an assessment of the law in practice as well as its theoretical underpinnings to propose if - in its extant state - it has paradoxically drifted towards cooperative methods and away from its purported intentions to deter wrongdoing through criminalisation and the framework of the *criminal* law.

[14] Michael Levi, 'Suite Revenge? The shaping of folk devils and moral panics about white collar crimes' (2009) 49(1) British Journal of Criminology 48-67, 51.
[15] Fraud Trials Committee Report (HMSO 1986) (the Roskill Report).
[16] As discussed in the Literature Review.
[17] Yeager (n 3) 445.
[18] R v Innospec Limited, Sentencing Remarks, Crown Court at Southwark, March 26, 2010, Thomas LJ, para 38.
[19] Andrew Ashworth, *Principles of Criminal Law* (6th ed, Oxford University Press, 2009).

This chapter now moves to contextualise some of the issues surrounding corporate offending and introduces the need for an evaluation of enforcement trends to assist in policy and research development. Section 1.3 will briefly contextualise the subject area and need for analysis; Section 1.4 moves to discuss corporate criminality and considers its developments; and Section 1.5 concludes to set the proceeding objectives.

1.3 Research Context

Serious economic crime, fraud and corruption are estimated to cost the UK in the region of £30 billion a year.[20] The extent of this figure reinforces that effective enforcement should be in place to deter its commission. However, if the UKBA exists with the intention of combating corporate bribery and corruption but leaves principal oversight of that responsibility with the corporations themselves, has been seldom used and rarely prosecutes instances of serious criminality, this questions the state's adequacy to enforce corporate wrongdoing. Despite the UKBA's exemplary feedback from the House of Lords UKBA Committee in 2019,[21] this should remain balanced with the lack of enforcement to date[22] and the continual emphasis (and reliance) on "*co-operation and engagement with the private sector*."[23]

The absence of enforcement has been documented to include legal, evidential and resourcing difficulties centring around proving corporate liability and any associated individual accountability.[24] With corporates considered to have "*neither a soul to damn nor body to kick*",[25] it has long vexed the judiciary charged with setting precedents and influencing direction;[26] contributing to an ideological aversion to them being criminally punished.[27] Enforcing corporate crime has consequently been encapsulated by archaic laws that are

[20] Jonathan Fisher, 'Fraud and corruption is costing Britain £30 billion a year', *The Times* (March 11, 2010).
[21] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019).
[22] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 319.
[23] HM Government, 'Economic Crime Plan 2019-22', July 2019, 16.
[24] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1st ed, Cambridge University Press, 1993); Celia Wells, 'Containing Corporate Crime. Civil or Criminal Controls?' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011).
[25] John Coffee, 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) Michigan Law Review 386-459, 459.
[26] James Gobert, 'Corporate Criminality: four models of fault' (1994) 14(3) Legal Studies 393-410, 393.
[27] Nicholas Lord, 'Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti- bribery and Corruption in the UK and Germany' (2014) 14(1) Criminology and Criminal Justice 100-120.

structured in a way that can shield personnel behind the corporation and its complexity which has significantly complicated enforcement efforts. To prove the required *mens rea* enforcement agencies are faced with overcoming the doctrine of identification (or the identification principle). As per Lord Denning's initial commentary (in a civil context), for the law to establish the "*state of mind of the company"*, it must represent those who are "*the directing mind and will of the company*, *and control what it does.*"[28] This wording was officially confirmed in regard to corporate *criminal* liability in the case of Tesco Supermarkets Ltd v Nattrass[29] which currently stands as the precedent. The impenetrability it has created will be evaluated in Chapter 6 as despite the UKBA corporate offence, it still forms (amongst other things) a significant impediment to the enforcement against corporate crime[30] for the context of both this research and criminal law scholarship.

Without detracting from the inability the state possesses to closely regulate corporate activities – and their self-proclaimed intention not to do so[31] - it was not that long ago that a report which foreshadowed the development of the SFO identified how perceptions existed that the legal system was incapable "*of bringing the perpetrators of serious frauds expeditiously and effectively to book*."[32] Since that time, UK commercial anti-bribery laws and approaches to corporate crime and enforcement in general[33] have moved beyond the more common regulatory methods used in corporate settings and have firmly recognised the need to attach *and pursue* criminal liability to the wrongs of both organisations and the acts of the individuals within it. However, since a Ministry of Justice (MOJ) Consultation Paper in 2012 raised concerns that attempts to enforce economic crime had only been intermittently successful,[34] 2013 saw the formal introduction of DPAs to the enforcement arsenal.[35] This

[28] H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159, Denning LJ.
[29] Tesco Supermarkets Ltd v Nattrass 1972 [AC] 153.
[30] Camilla de Silva, 'Corporate Criminal Liability: AI and DPAs' (Herbert Smith Freehills, 2018). <https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/> accessed 10/02/2020.
[31] Serious Fraud Office, 'The Serious Fraud Office's Current Direction and Enforcement Priorities' (GAIN, 2016) <https://www.sfo.gov.uk/2016/10/27/gain-2016-serious-fraud-offices-current-direction-enforcement-priorities/> accessed 03/02/2020.
[32] Fraud Trials Committee Report (HMSO 1986) (the Roskill Report) Summary, paragraph 1.
[33] Consider for instance the Corporate Manslaughter and Corporate Homicide Act 2007 which came into being to hold large companies criminally responsible for serious wrongdoing.
[34] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012.
[35] Crime and Courts Act 2013, Schedule 17.

permitted a corporate the opportunity to have a potential prosecution deferred; allowing for an agreement to be made between the enforcement agency and the commercial entity inclusive of terms, requirements and for a monetary penalty to be paid.[36] Although labelled as a criminal and prosecutorial tool, this research will show that their use has often been deployed by the SFO in ways which lack clarity in the legal objective and coherence to the letter and spirit of the laws which govern them and criminal prosecution. Furthermore, their preference and usage warrant enquiry over the extent to which larger corporations can be seen to have an influence over such routine enforcement inclinations. This has been advanced by the collective response towards serious economic crimes having openly acquired a need for greater coordination and cooperation between the public and private sectors.[37] When considering the historically patchwork regime of corporate enforcement, despite criminal liability overarching the UKBA's methodology behind the s.7 offence, the rarity of prosecution and the competing value on cooperation and negotiation has – in practice - led to the law being unequally and illogically applied in contradiction to legal provisions.

Forming this hypothesis poses interconnected questions surrounding the legitimacy and justiciability of the extant enforcement regime (to be discussed in Chapter 5). If, after all, the meaning of legitimate implies lawfulness, appropriateness and justice itself,[38] the discussion of what sanctions are used for corporate crimes, their application, and the degree of tolerance afforded to corporate rule breakers (both natural and legal) should consider how they achieve these goals and the outcomes they produce. This work does not question the literal legality of the UKBA and DPA regime, nor does it propose that financial sanctions are an impractical tool for a financial entity (a corporation). Rather, it questions the increasing deviation from prosecutorial intentions and the apparent gap in enforcement against both serious corporate offenders and those people behind their crimes. As this research will provide evidence of a shift in regulatory culture, accounts of enforcement inconsistencies and a general reliance on settlement and negotiation, this has created a paradigm of "*power-*

[36] Crime and Courts Act 2013, Schedule 17, paragraph 5.
[37] HM Government, 'Economic Crime Plan 2019-22', July 2019, 11.
[38] Justice Tankebe and Alison Liebling, 'Legitimacy and Criminal Justice: An Introduction', in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 1.

holder legitimacy" and "*self-legitimacy*"[39] on the part of the corporations in a way which questions if the corporate criminal gets what is owed and what is right.[40]

1.4 Corporations and Criminality

> *"It is only when you think of power in terms of the ability to create or destroy, not order but wealth, and to influence the elements of justice and freedom as part of the value-composition of the whole system, that it becomes obvious that big business plays a central, not peripheral role."*[41]

Corporations have become institutions which hold a significant degree of centrality in society. Their role within international political economies and their economic force[42] inflicts an influence far beyond business sectors,[43] raising fundamental questions over where global power lies.[44] It has previously been estimated that of the 100 largest economies in the world, 71 of those are filled by corporations - as opposed to 29 being countries themselves.[45] Through regulatory facilitation[46] and directed lobbying,[47] corporations have oligopolised global power and illustrated a domination contradictory to the very foundations of capitalism; with proposed idealisations of efficiency through competition.[48] Their growth has simultaneously created a scepticism: that despite the benefits of commercial reach, economic

[39] Tony Bottoms and Justice Tankebe, 'A Voice Within': Power-Holders' Perspectives On Authority And Legitimacy, in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 60-82.
[40] Thomas Scanlon, *What We Owe to Each Other* (1st ed, Harvard University Press, 1998).
[41] Susan Strange, 'Big Business and the State' (1991) 20(2) Millennium Journal of International Studies 245-250.
[42] Michael Zakim and Gary Kornblith, *Capitalism Takes Command: The Social Transformation of Nineteenth Century America* (1st ed, Chicago University Press, 2012).
[43] Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (1st ed, Routledge, 2015).
[44] Strange (n 41).
[45] From Poverty to Power, 'Of the World's top 100 economic revenue collectors, 29 are states, 71 are corporates' (Oxfamblogs, 03/08/2018) <https://oxfamblogs.org/fp2p/of-the-worlds-top-100-economic-entities-29-are-states-71-are-corporates/#comments-wrapper> accessed 27/04/20.
[46] John Braithwaite, *Regulatory Capitalism; How it works, ideas for making it work better* (1st ed, Edward Elgar, 2008) 18-20.
[47] John Braithwaite and Peter Drahos, *Global Business Regulation* (1st ed, Cambridge University Press, 2000) 56-87.
[48] Tombs and Whyte (n 43) 11.

interconnection and prosperity, it has caused increasing levels of crises[49] and created an ability for corporations to impose their values upon the less powerful.[50]

Corporate globalisation has in turn increased the opportunities for white collar crime and associated enforcement concerns.[51] Pearce described this environment as the coexistence between the 'real' and 'imaginary' social order,[52] highlighting the apprehension over what corporate power - if uncontrolled - may negatively facilitate. For instance, the 2008 global financial crash did not reveal new trepidations surrounding corporate capitalism, but rather that 'the powerful' (the corporations) can commit crimes which attract insufficient attention.[53] In this research, frequent reference will be made to the term corporate crime; which is defined as "*conduct of a corporation or of individuals acting on behalf of a corporation, that is proscribed and punishable by law*"[54] – capturing corporate economic crimes (mainly bribery) and corruption. As will be explored in Chapter 4, the former is defined by the UKBA as the giving or receiving of a financial or other advantage, in connection with the improper performance of a position of trust, or a function that is expected to be performed impartially or in good faith. The latter is more broadly defined by Transparency International UK (TIUK) as "*the abuse of entrusted power for private gain*"[55] and can be undertaken on both grand and petty levels.

Corporate criminality reiterates an important dichotomy for this research: that although business incurs the need for growth and profit(s),[56] it must be balanced against the consequences of inadequate regulation and/or enforcement.[57] Since Smith provided some of the earliest connections to monopolies of corporate power and its relationship to criminal

[49] Braithwaite (n 46).
[50] Frank Pearce, *Crimes of the Powerful: Marxism, Crime and Deviance* (1st ed, Pluto Press, 1976) 13.
[51] Karin van Wingerde and Nicholas Lord, 'Preventing and Intervening in White-Collar Crimes: the Role of Law Enforcement' in Melissa Rorie (ed) *Handbook on White-Collar and Corporate Crime* (Wiley 2019).
[52] Pearce (n 50) 79-80.
[53] Pearce (n 50) 158.
[54] Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1st ed, University of New York Press, 1983) 317.
[55] Transparency International, 'What is Corruption?' (Transparency.org.uk, 2018) <https://www.transparency.org/what-is-corruption#define> accessed 02/08/2018.
[56] William Boyes and Michael Melvin, *Fundamentals of Economics* (5th ed, South-Western, 2011).
[57] Mitchel Abolafia, *Making markets* (1st ed, Harvard University Press, 1996).

activity,[58] this is now met with the reality that corporations have proven themselves capable of engaging in corrupt activity to a staggering degree[59] and have simultaneously become the beneficiaries of their illicit actions.[60] With some estimations of a growing prevalence of white collar crimes[61] and a raft of authoritative provisions and preventative changes to the legal landscape (discussed in Chapter 4), this has drawn attention to the subject seriousness.[62] This is especially so because grand corporate corruption "*represents a dramatically different kind of corruption"* to that of someone who accepts bribes to pay for basic needs; resulting in a dissimilarity with the 'able' criminal'.[63] As Kagan and Scholz argued, an aptitude to defect from law abidance can be drawn in the suggestion that the corporate criminal is driven by the rational calculation of costs and opportunity, undeterred by the threat of legal penalties unless the costs, severity and implications of compliance outweigh that of defection.[64] These motivations and institutional complexities make it more difficult for the law to address this burden;[65] leaving enforcement incredibly fragmented[66] and substantially difficult.[67]

Despite the ambivalent perceptions Sutherland argued the public held towards corporate crimes due to their non-violent nature,[68] research has not only identified that public observations of white collar crime(s) have developed to the contrary,[69] but that perceptions exist that their economic and moral costs are higher than conventional crimes.[70] Green and

[58] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1st ed, Clarendon Press, 1976).
[59] Steve Tombs and David Whyte, 'Introduction to the Special Issue on Crimes of the Powerful' (2015) 54(1) The Howard Journal of Criminal Justice 1-7.
[60] John Braithwaite and Brent Fisse, 'Self Regulation and the Costs of Corporate Crime' in Clifford Shearing and Philip Stenning (eds), *Private Policing* (Sage 1987) 221.
[61] Financier Worldwide, 'Corporate Fraud and Corruption 2019' (Financierworldwide.com, 2019) <https://www.financierworldwide.com/annual-review-corporate-fraud-corruption-2019-download> accessed 14/03/20; Jane Croft, 'Prosecutions rise for cyber and white collar crime'*, Financial Times,* (May 23, 2016).
[62] Francis Cullen and others, 'The Seriousness of Crime Revisited: Have Attitudes Toward White-Collar Crime Changed?' (1982) 20(1) Criminology 83-102; Nicole Piquero 'White-Collar Crime is Crime' (2018) 17(3) Criminology and Public Policy 595-600.
[63] John Mack, 'The Able Criminal' (1972) 12(1) British Journal of Criminology 44-54.
[64] Robert Kagan and John Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff 1984).
[65] Yeager (n 3) 439.
[66] van Wingerde and Lord (n 51).
[67] Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-corruption in the UK and Germany* (1st ed, Routledge, 2014); Nicholas Lord, 'Regulating transnational corporate bribery: Anti-bribery and corruption in the UK and Germany' (2013) 60(2) Law and Social Change 127-145.
[68] Sutherland (n 2).
[69] Thorsten Sellin and Marvin Wolfgang, *The Measurement of Delinquency* (1st ed, Wiley, 1964).
[70] Francis Cullen and others, 'Public Support for punishing white-collar crime: Blaming the victim revisited?' (1983) 11(6) Journal of Criminal Justice 481-493.

Kugler furthered similar interpretations discovering that whilst there are differences in circumstantial facts, white collar crime can attract a degree of blameworthiness which exceeds that imposed by the courts necessitating strict punishment.[71] In just over the last decade the UK commercial sector has been shrouded with accusations and admissions of wide-ranging criminality. After the LIBOR scandal,[72] to name but a few, the UK has experienced tax scams by Amazon, Starbucks, Google and Vodaphone;[73] global bribery, corruption and collusion by BAE systems,[74] GlaxoSmithKline (GSK),[75] Rolls Royce,[76] Alstom,[77] Güralp Systems,[78] Airbus,[79] Petrofac[80] and Glencore[81]; fraudulent accounting by Tesco;[82] fraud by Serco Geografix[83] and G4S;[84] the broad revelations of the Panama Papers;[85] money

[71] Stuart Green and Matthew Kugler, 'Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud' (2012) 75(2) Law and Contemporary Problems 33-59.

[72] The London Interbank Offered Rate (LIBOR) scandal followed the 2008 financial crash where banking personnel had tried to manipulate LIBOR and EURIBOR (the eurozone's equivalent of LIBOR) rates: a global benchmark rate used for financial deals and to determine transaction pieces. Evidence emerged that the defendants, at the request of multiple traders and banks, submitted false or misleading rate submissions to benefit their positions, change the published rate and make profit.

[73] Rupert Neate, 'Labour plans clampdown on 'sweetheart deals' to close £36bn tax gap', *The Guardian* (April 15, 2017).

[74] House of Commons, 'Bribery allegations and BAE Systems' <https://researchbriefings.files.parliament.uk/documents/SN05367/SN05367.pdf> accessed 01/04/2022.

[75] Serious Fraud Office, 'SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals' <https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/> accessed 30/03/2019.

[76] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036.

[77] Serious Fraud office, 'Five convictions in SFO's Alstom investigation into bribery & corruption to secure €325 million of contracts' < https://www.sfo.gov.uk/2018/12/19/five-convictions-in-sfos-alstom-investigation-into-bribery-and-corruption-to-secure-e325-million-of-contracts/> accessed 01/04/2022.

[78] Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Güralp Systems Ltd' <https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/> accessed 20/12/2019.

[79] SFO v Airbus SE, Southwark Crown Court, Case No: U20200128.

[80] Serious Fraud Office, 'Serious Fraud Office secures third set of Petrofac bribery convictions' < https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/> accessed 10/11/2021.

[81] Serious Fraud Office, 'Glencore to pay £280 million for 'highly corrosive' and 'endemic' corruption' < https://www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa/> accessed 28/11/2022.

[82] SFO v Tesco Stores Limited, Southwark Crown Court, Case No: U20170287.

[83] Serious Fraud Office, 'SFO completes DPA with Serco Geografix Ltd' <https://www.sfo.gov.uk/2019/07/04/sfo-completes-dpa-with-serco-geografix-ltd/> accessed 08/08/2019.

[84] SFO v G4S Care and Justice Services (UK) Limited, Southwark Crown Court, Case No: U20201392.

[85] David Pegg, 'Panama Papers firm did not know who 75% of its clients were', *The Guardian* (June 20, 2018).

laundering claims towards Lloyds and HSBC[86], and admissions by Natwest;[87] unlawful financial assistance and fraud accusations against Barclays and subsidiary holdings;[88] and a $4.9 billion settlement by Royal Bank of Scotland to the US Department of Justice (DoJ) over mis-sold toxic mortgage bonds.[89] This excludes the number of investigations currently being undertaken by the SFO, pending trials of corporate executives and the plethora of those unknown or unreported. A noteworthy concern is the reality that such transgressions took place with legislation in place across the globe and the UK: therefore trailing a period where British companies (and/or their subsidiaries) should have been clear in their legal obligations.

At the time of writing, the SFO is known to have 60 active cases,[90] validating the existence of serious economic criminality and potentially corrupt activity at the forefront of UK business operations. Any claim that this figure may reflect improved regulation and enforcement should be balanced with the clear realisation that corporate crime is thriving. When a World Bank investigation of 213 cases of corporate corruption estimated that corporate offenders had acquired proceeds in excess of $56 billion,[91] this reflects the pre-existence of insufficient regulatory and control mechanisms and an over-reliance on private market discipline[92] - which can interestingly be considered against increasing regulatory/enforcement fines and preventative legislation.[93] Given the multi-jurisdictional nature of corporations and their

[86] Luke Harding and others, 'British banks handled vast sums of laundered Russian money', *The Guardian* (March 20, 2017).
[87] Financial Conduct Authority, 'NatWest fined £264.8 million for anti-money laundering failures' < https://www.fca.org.uk/news/press-releases/natwest-fined-264.8million-anti-money-laundering-failures> accessed 01/04/2022.
[88] Patrick Collinson, 'Barclays bank fraud charges over $3bn Qatar loan thrown out by court', *The Guardian* (May 21, 2018).
[89] Julia Kollewe, 'RBS settles US Department of Justice investigation with $4.9bn fine', *The Guardian* (May 10, 2018).
[90] Spotlight on Corruption (n 9).
[91] Emile van der Does de Willebois and others, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (Stolen Asset Recovery Initiative, World Bank/UNODC, 2011).
[92] Michael Levi, 'Fraud vulnerabilities, the financial crisis, and the business cycle' in Richard Rosenfeld and others (eds), *Contemporary Issues in Criminological Theory and Research: The Role of Social Institutions* (Wadsworth 2010) 269–292.
[93] Piotr Kaminski and Kate Robu, 'A best-practice model for bank compliance' (Mckinsey, 2016) <https://www.mckinsey.com/business-functions/risk/our-insights/a-best-practice-model-for-bank-compliance> accessed 16/04/2019.

complex structures, especially when undeterred by the threat of enforcement, it creates unique opportunities for unlawful behaviour to occur and to be concealed.[94]

Corporate criminality has been seen to enjoy "*a degree of insulation from exposure to the criminal justice system"*, deriving from *"the complexity of investigating and prosecuting their crimes; their ability to mount expensive and challenging defences; their own position…in society; and the criminal justice system's tendency to allow the accused to negotiate a settlement without admitting guilt."*[95] Their documented history to have engaged in – and got away with[96] - *"widespread and pervasive"*[97] criminality aided by the conducive scope of their operations and the opportunities for criminal enterprise[98] creates a collection of asymmetries that may facilitate corporate wrongdoing.[99] In the UK this concern was reflected by MOJ statistics which highlighted a near fourfold increase in fraud related offences since 2011.[100] On an international platform, following a global fraud study by EY over the period of October 2017 to February 2018, they canvassed 2550 executives from 55 countries to explore – inter alia – the problem of bribery and corruption. In an era where regulatory and enforcement efforts are seen to be increasing, the study revealed that whilst 97% of respondents recognised the importance of business integrity, 38% felt corruption occurs widely within business in their country, 11% felt bribery was commonplace to obtain and retain business, and 13% would justify cash payments if required.[101] Within the UK specifically, 34% of executives believed that bribery and corruption remains prevalent in business – demonstrating an increase of 16% since 2014.[102] A comparative study by PwC from over 7,200 UK respondents revealed equally alarming results. This included an increased reporting of bribery and corruption within the UK by 17% compared to 2016 (almost double that of other European and North American countries); a near 20% increase in UK businesses being asked

[94] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57-70, 57.
[95] Gerald Cliff and April Wall-Parker, 'Statistical Analysis of White-Collar Crime' (2017) Criminology and Criminal Justice <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-267> accessed 16/10/2019.
[96] James Gobart and Maurice Punch, *Rethinking Corporate Crime* (1st ed, Cambridge University Press, 2003).
[97] Gary Slapper and Steve Tombs, *Corporate Crime* (1st ed, Pearson, 1999) 36.
[98] Lord and Broad (n 13) 33.
[99] van Wingerde and Lord (n 51) 483.
[100] Caroline Binham, 'White collar prosecutions plummet even as crime rises', *Financial Times* (July 24, 2018).
[101] EY, Integrity in the spotlight, The Future of Compliance – 15th Global Fraud Survey (2018).
[102] EY, Integrity in the spotlight, The Future of Compliance – 15th Global Fraud Survey (2018).

to engage in bribery; the highest rate of reported fraud and economic crimes for nearly 20 years and a near 14% average reported increase of such crimes across the world.[103] These studies illustrate that despite professed declarations, legislation, policy, enforcement agency rhetoric and increased public discontent, a mismatch still exists between the apparent implementation of an enforced self-regulatory methodology, the proclaimed use of enforcement and the reality of the problem.

With corporate criminality increasingly reflected across countries that score positively on corruption perceptions, this presents the *possibility* not only of inadequate enforcement, but that the legal controls in place "*present less of a perceived threat to misconduct than we might expect*"[104] and that corporate crime is less deterred than other crimes.[105] This is generally because of the rarity in corporate and executive prosecutions which subsequently sacrifice the deterrence potential of what the law states to be its most stringent sanctions; impacting the perceived legitimacy of legal rules in corporate cultures.[106] This is particularly so when commercial entities are able to influence laws and regulation that may criminalise or sanction their behaviour through lobbying and financial prowess.[107] If there exists an infrequent or inadequate use of legal enforcement frameworks to prompt internal compliance and accountability,[108] this raises dissuasive caution that rather than punishing corporate crimes as crimes, insufficient regulation and enforcement efforts have contributed to power imbalances and hindered compliance efforts.[109]

1.5 Summary

The aetiology of UK corporate crime and the potential criminality associated to corporate power surpasses purely ethical implications and advocates a need for scrutiny surrounding

[103] PwC, PwC's 2018 Global Economic Crime and Fraud Survey (2018).
[104] Yeager (n 3) 445.
[105] John Braithwaite and Gilbert Geis, 'On theory and action for corporate crime control' (1982) 28(1) Crime and Delinquency 292–314.
[106] Ibid 445.
[107] Laureen Snider, 'Framing E-waste Regulation: The Obfuscating Role of Power' (2010) 9(3) Criminology and Public Policy 569-577.
[108] John Coffee, 'Corporate Crime and Punishment. A Non-Chicago View of the Economics of Criminal Sanctions' (1980) 17(1) American Criminal Law Review 418-476.
[109] Peter Grabosky, 'Globalization and White-Collar Crime' in Sally Simpson and David Weisburd (eds), *The Criminology of White-Collar Crime* (Springer 2009).

the enforcement policies and practices which are there to prevent it.[110] Especially if a paradoxical enforcement environment - which departs from both key regulatory theories and UK legislative policy - has weakened deterrence and enforcement. Pragmatic and transcending concerns will be illustrated through qualitative evidence and recent cases that help inform enforcement practice and point to deficiencies. Through a conglomerate of factors that place an innate and naïve reliance on corporations to effectively determine their own compliance, redefined prosecution and negotiatory methodologies, this research will present a detrimental shift in enforcement ideology. This poses a problem as corporate corruption is by its nature akin to adaptation; making it "*less sensitive to the law's conventional sanctioning threats than the classic model of deterrence would suggest*."[111] With corporations having the ability to self-regulate, insulate themselves from society and often negotiate reduced penalties,[112] this has created a disconnect between how these crimes are proclaimed to be restrictively enforced through the UKBA, supplementary provisions and government rhetoric and are instead accommodated in contradiction to the normative application of criminal law. Evaluating the enforcement approaches, and "*the degree and methods of their practical implementation*",[113] is of value to the study of corporate bribery because it informs an understanding and interpretation of the UK enforcement regime.

Whilst the UKBA and associated procedures have imparted a clear sense of corporate self-regulation through the adequate procedures provision and DPA regime, it must be recognised that enforcement up to and including the use of prosecution remains a necessitous requirement to promote ethical conduct.[114] Although the UK approach to corporate bribery enforcement seeks the benefits associated with accommodative regulation, self-regulation and persuasive enforcement, these tools can and will be shown to have compromised normative values of criminal justice and the very intentions of the UKBA. The following chapter will now move to explore the substantive regulatory, control and enforcement literature which surrounds this arena: identifying the ideologies behind enforced-self regulatory regimes and the equal growth of private governance. Chapter 3 presents the

[110] Karl Polanyi, *The Great Transformation* (1st ed, Farrar and Rinehart, 1944).
[111] Yeager (n 3) 439.
[112] Yeager (n 3) 446.
[113] Wolfgang Friedmann, *Law in a Changing Society* (2nd ed, Penguin, 1972) 198.
[114] King and Lord (n 12).

methods used for the qualitative research and Chapter 4 then briefs the legislative perspective(s) that govern this field. Chapter 5 will ground the research problem by illustrating the key concepts from the UKBA regime which are to be evaluated. Chapter 6 proceeds to illustrate the arguments and paradoxes proposed through assessment of the qualitative data; evidencing the enforcement techniques used and how they have ultimately been redefined. Chapter 7 further supports this and concludes the research findings by discussing, in brief, how the projected image of prosecution has in fact shifted to one of which relies on self-regulatory and settled justice: resulting in enforcement inequality and a weakened enforcement paradigm. Chapter 8 concludes with the key findings, broader observations and recommendations.

Chapter 2

Literature Review

2.1 Introduction

This chapter will inform the primary theoretical backgrounds which are synonymous to an understanding of corporate crime enforcement: that of business regulation and governance. In this context these terms are used and taken to mean the range of processes that aim to influence and control corporate compliance. This grounding begins under the premise that without the use of prosecution within an enforcement matrix, there exists a possibility of abuse and vulnerability to criminal activity as sanctioning may lack in its deterrent value. How the law responds to and regulates corporate crime has long attracted the attention of academic literature and encompasses multiple aspects of regulatory and governance theory, their sub-categories and supporting concepts. Understanding the meaning, intentions, contextual scope and gaps within the techniques advocated throughout criminological literature (which are apparent in the UKBA regime) will help frame the ambiguities in relation to the proposed enforcement paradox. This will explain the key concepts that underpin the proceeding chapters, inform the evidence and questions they present, and will importantly illustrate the growth in newer and more decentralised forms of regulation.

Methods of corporate crime control, enforcement and regulation has changed distinctly as business has become more globalised.[115] This chapter will show how the variety of forms has created a new paradigm ultimately demonstrating a notable shift from traditional command and control structures towards the rise of self-regulatory, privately governed and decentralised mechanisms where the regulatory function is increasingly delegated to private bodies. Examining this landscape is important because of the symbolic and expressive function it serves in defining what the law deems as both desirable and acceptable behaviour.[116] Arguments will be presented to challenge approaches which have become

[115] Braithwaite and Drahos (n 47).
[116] Paul Almond, 'The Dangers of Hanging Baskets: `Regulatory Myths' and Media Representations of Health and Safety Regulation' (2009) 36(3) Journal of Law and Society 352-375.

central to the UKBA enforcement regime (and other corporate crimes) and how they are in reality hindering both the legitimacy of and ability to prevent and enforce corrupt business.

Section 2.2 will begin by discussing the meaning of regulation itself and how the term reflects strategies of control. Section 2.3 moves to identify the predominant model and literature which has been used to shape the regulation of corporate misconduct; that of responsive regulation. This will discuss its importance and the transcending themes. Section 2.4 then leads into the supplementary processes of corporate regulation, the forms it can take and what role enforcement plays in corporate regulatory relationships. Section 2.5 vitally discusses what has become a predominant feature of the UKBA landscape – that of enforced self-regulation. Section 2.6 illustrates how the state has come to govern at a distance and its limitations. Section 2.7 then presents how the latter, through the UKBA and its regulatory goals, has instilled a deeper connection to the broader concept of governance than what is prima facie implied in a typical enforced self-regulatory environment. Section 2.8 concludes with the thematic extractions and identifies how the landscape has undergone a seismic shift where the state has aimed to steer compliance but has done so via decentralised methods, rather than enforced performance.

2.2 Defining Regulation

Regulation can be interpreted as a rule or principle used to control or manage a system or activity and is often synonymous with government led intervention;[117] best known as command and control regulation.[118] More broadly, it can be a "*legal instrument*" and a form of "*social control"*[119] exercised through various interactions. The relationship(s) it creates can offer the heavy hand of authority or a softer form of framing interactions by which compliance is controlled and risk can be governed.[120] The process is not restrictive to government oversight as it often disseminates regulatory roles to private bodies.[121] The result is a co-production between the 'regulator' and the 'regulatee', diffusing roles and removing the

[117] Michael Moran, 'Theories of Regulation and Changes in Regulation: the case of financial markets' (1986) 34(2) Political Studies 185-201.
[118] Julia Black, 'Critical Reflections on Regulation' (2002) 27(1) Australian Journal of Legal Philosophy 1–36.
[119] David Levi-Faur, 'Regulation and Regulatory Governance', Jerusalem Papers in Regulation and Governance Working Papers Series (2010) <http://levifaur.wiki.huji.ac.il/images/Reg.pdf> accessed 30/09/2018.
[120] Ibid.
[121] Moran (n 117).

exclusivity of state control.[122] For this work, analytical focus will highlight the move beyond typical associations with formal regulatory institutions (and strategies) and towards an increasing development and understanding of newer practices and relationships that shape corporate regulation. This is why regulation in fact sits as a large subset within the broader concept of governance (see 2.7); with the former "*steering the flow of events and behaviour"* and the latter providing and distributing the given regulation.[123] Corporate regulation is therefore often deployed via self-governing methods; a position which continues to be the case and is reflected within the UKBA.

Regulation is an intrinsic concept when discussing the control of corporate actors and its application has been directed from both national and international regimes; from the guiding stipulations of the UKBA to the Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention 1997. In the context of corporate crime enforcement, understanding regulatory theory is important because its principles form the basis of the legal framework(s) within which corporate entities are expected to operate and are sanctioned. Such frameworks create an intervention capacity with the ability to make a statement over denoted priorities, values and how they can be best understood.[124] This dialectical outlook helps influence behaviour and both reinforces and formulates notions of acceptability[125] that are key to examining enforcement activity. Whichever form regulation takes, it requires the capacity to set values and modify behaviour: else there is no 'control' in a cybernetic sense.[126] It is therefore important to consider how 'failed' regulation is enforced, and whether it is achieving both theoretical goals, and that which is prescribed by legislation, policy and enforcement rhetoric.

2.3 Regulating Corporate Conduct: Responsive Regulation

The complexity of regulation has historically led to the debate over how it should be applied to the corporate actor. This topic has attracted two diametrically opposite views of advancing,

[122] Black (n 118).
[123] John Braithwaite and others, 'Can Regulation and Governance Make a Difference?' (2007) 1(1) Regulation and Governance 1-7; Braithwaite (n 46) 1.
[124] Paul Almond and Michael Esbester, 'Regulatory inspection and the changing legitimacy of health and safety' (2018) 12(1) Regulation and Governance 46-63.
[125] Ibid 46-63.
[126] Black (n 118) 18.

attributing and enforcing liability; described as punishment versus persuasion[127] - or - deterrence versus compliance.[128] In other words, to either demand the maximal detection and sanctioning of disobedience (punishment/deterrence) - or transversely – to have an emphasis on a considered, selective and cooperative approach (persuasion/compliance).[129] The former camp takes the view of subjects being amoral calculators,[130] where law and regulatory control should be tailored for the "*bad men*" who would try and evade it.[131] To effectively regulate, the former requires a fundamental basis of punishment (through the use of prosecution and sanctioning) to instil fear and encourage prudence.[132] The latter warned of this resulting in a lack of trust (causing resentment and resistance),[133] arguing that positive persuasion, amenability and agreement is better suited to achieve compliance; particularly given a corporation's ability to adapt to the circumstances and to evolve using its amoebic qualities.[134] The persuasive approach endorses decreased market interference and cooperative dialogue tailored for the good political citizens.[135]

Whether driven "*by politics, by ideology, or by global market pressures*"[136] during an era of neo-liberal ascendancies and deregulatory debates,[137] the environment emphasised a wave of "*crude polarisation*"[138] directed towards regulatory pluralism.[139] The seminal text of Responsive Regulation sought to discuss these difficulties by addressing the typically utilised command and control regulatory outlook; a perspective which focussed on the state and the

[127] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1st ed, Oxford University Press, 1992) 24.
[128] Albert Reis, 'Consequences of compliance and deterrence models of law enforcement for the exercise of police discretion' (1984) 47(4) Law and Contemporary Problems 83–122.
[129] John Scholz 'Cooperation, Deterrence and the Ecology of Regulatory Enforcement' (1984) 18(2) Law and Society Review 179-224.
[130] Kagan and Scholz (n 64) 117.
[131] Justice Holmes, in the Corporate Crime Reporter, 18/04/1988. Cited by Ayres and Braithwaite (n 150) 20.
[132] Niall Ferguson, 'The Darwinian Economy' (BBC Reith Lectures, 26 June 2012) <http://www.bbc.co.uk/programmes/b01jmxqp/features/transcript> accessed 24/04/2018.
[133] John Braithwaite and Brent Fisse, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) Sydney Law Review 468-513, 513.
[134] Celia Wells, *Corporations and Criminal Responsibility* (1st ed, Oxford University Press, 2001).
[135] Kagan and Scholz (n 64) 117.
[136] Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-state Actors in the Regulatory Process' (2013) 7(1) Regulation and Governance 114–123.
[137] Daniel Yergin and Josehp Stanislaw, *The Commanding Heights: The Battle for the World Economy* (1st ed, Simon and Schuster, 1998).
[138] Ayres and Braithwaite (n 127) 21.
[139] Grabosky (n 136) 115.

enforcement of legal rules. The resulting enquiry was one which intended to posit a "*third alternative*",[140] posing a solution to those calling for greater public interest focussed regulation of business, and transversely, the business world calling for decreased state-based regulation. According to Black, hesitations towards strict command and control regulation congregated over the following: that the law backed sanctions were inappropriate; governments had insufficient knowledge to explore problems, their causation and to design solutions; the identification of non-compliance; a general lack of inclination to comply; and that regulators/enforcement agencies themselves are insufficiently motivated to always act in the public interest (regulatory capture).[141] What transpired was a far greater contemplation of the role de-centralised agencies could play in being the commanders and controllers; resulting in a re-conceptualisation of regulation.[142]

The contemporary thinking behind responsive regulation encouraged "*creative options to bridge the abyss between deregulatory and pro-regulatory rhetoric.*"[143] Most impactful of all was the proposition of creating a responsive environment through the use of regulatory pyramids: the enforcement pyramid and the pyramid of regulatory strategies. These suppose a sliding scale of administrative and criminal actions, where sanctions are *increased* according to the extent of regulatory failings. Schelling described this as graduated deterrence.[144] The intention is twofold. Firstly, to create a dynamic relationship designed to elicit active responsibility from the regulatee and "*to make effective state regulatory law practicably enforceable by allowing most regulation to be transacted cheaply at the base of the pyramid*" – actioned by the regulatee.[145] Secondly, when resistance or disobedience occurs from a regulatee, it should be met with deterrent opposition by the regulator/enforcement agency – and for that opposition to outweigh the costs and benefits of continued non-compliance.[146] It is at this juncture where these core propositions have developed into additional methods of regulatory intervention.

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[140] Ayres and Braithwaite (n 127) 3.
[141] Black (n 118) 3.
[142] Black (n 118) 3-4.
[143] John Braithwaite, 'Responsive Business Regulatory Institutions' in Anthony Coady and Charles Sampford (eds), *Business, Ethics and the Law* (Federation Press 1993) 89.
[144] Thomas Schelling, *Arms and Influence* (1st ed, Yale University Press, 1966) 78.
[145] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(1) UBC Law Review 475-520, 507.
[146] Laura Langbein and Kerwin Cornelius, 'Implementation, negotiation and compliance in environmental and safety regulation' (1985) 47(1) Journal of Politics 854—880; Braithwaite (n 145) 476.

2.4 Theorising Corporate Control

Despite the attempts of responsive regulation to transcend core regulatory debates – specifically surrounding corporate wrongdoing – criminal justice and regulatory systems are well documented to have in effect failed in their control of such activity.[147] The policing and enforcement of errant corporations presents a collection of difficulties recognised in practice and literature. Some are more openly documented: such as the sanctions that can be used to influence them, the extent of corporate criminal fault and the difficulties of proving liability.[148] Others are more inconspicuous and raise subliminal concerns surrounding a reluctance of enforcement (namely in the form of prosecution), inadequate funding of state agencies or in the ability of corporations to sufficiently shield themselves from liability attribution. Garret synonymously opined that corporations could become too big to jail, too big to fail and/or too big to deter – due to their size and economic influence.[149] Corporates possess an ability to purposefully diffuse responsibility and can easily shift blame,[150] strategically transferring guilt from its collective self to individuals through scapegoat tactics.[151] The complex and often transnational nature of commercial corruption, the interdependency of actors and industries may simplify the denial of responsibility;[152] leaving enforcement agencies to ensure they are not left with "*the photocopy person*" on trial.[153] These positions draw attention to the shortcomings in an attempt to answer the empirical enquiry raised by responsive regulation: how regulatory and enforcement processes can work best to achieve their goals. Flexibility is generally advocated, drawing on the benefits of *both* efficiency techniques and strict prosecutorial enforcement that assist in incentivising and enforcing compliance. The incumbent methods of regulatory intervention and enforcement will now be discussed.

2.4.1 Targeting Compliance: Risk-Based Regulation

The suggestions of 'responsive regulation' have since been developed far beyond its heuristic intention into a broader set of literature and propositions. One proposal has been for it to be

[147] Ralph Nader and others, *Taming the Giant Corporations* (1st ed, WW Norton, 1976).
[148] Wells (n 134); Robert Baldwin and others, *Understanding Regulation: Theory, Strategy, and Practice* (1st ed, Oxford University Press, 2011) 249.
[149] Brandon Garrett, *Too Big to Jail* (1st ed, Belknap Press, 2014).
[150] van Wingerde and Lord (n 51) 472.
[151] Aleksandra Jordanoska, 'Regulatory enforcement against organizational insiders: Interactions in the pursuit of individual accountability' (2019) 15(2) Regulation and Governance 298-316.
[152] van Wingerde and Lord (n 51) 472.
[153] Barney Thompson, 'UK fraud chief moves to speed up investigations', *Financial Times* (April 29, 2019).

considered alongside additional regulatory intervention methods due to the difficulties that may arise in its implementation. The contemporary and perennial question is how and whether regulated actors can instil credibility or if this can only be achieved through government intervention?[154] Ayres and Braithwaite began by noting that "*a fundamental principle for the allocation of scarce regulatory resources ought to be that they are directed away from companies with demonstrably effective self-regulatory systems and concentrated on companies that play fast and loose*".[155] To help decide where resources should be focussed led Tombs and Whyte to suggest that a solution was in the application of risk-based regulation;[156] a model assessing "*the likelihood and seriousness of a particular harm*."[157] This targeted approach helps regulators to essentially structure their choices, and can determine how best regulatory resources are to be used, what enforcement activity is required and when intervention is necessary;[158] therefore becoming essential to the effective implementation of the enforcement pyramid.[159]

Risk-based regulation has become a ubiquitous element of the regulatory landscape[160] so much that it is now considered by some to be a "*norm of contemporary regulatory practice*."[161] Although its development and application has become grounded in both economic and scientific methods,[162] the work of responsive regulation can be seen to act as its conceptual doorway due to the acknowledgement of its principles. Risk-based regulation emerged with the intention of being less burdensome and more directed; emphasising the informed and improved allocation of resources.[163] When the 1972 Robens Report recommended policy "*concentrate regulatory resources more selectively on serious*

[154] Justin O'Brien and Eliot Spitzer, 'Redesigning Financial Regulation' in Justin O'Brien (ed) *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets* (Wiley 2005) 5.
[155] Ayres and Braithwaite (n 127) 129.
[156] Steve Tombs and David Whyte, 'Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK' (2013) 7(1) Regulation and Governance 61-79.
[157] Almond and Esbester (n 147) 48.
[158] John Braithwaite and Brent Fisse 'Self-regulation and the Control of Corporate Crime' in Clifford Shearing and Phillip Stenning (eds), *Private Policing* (Sage 1987) 245.
[159] Tombs and Whyte (n 156) 62-66.
[160] Julia Black 'The Emergence of Risk Based Regulation and the New Public Management in the UK' Public Law [2005] 512–549; Tombs and Whyte (n 159).
[161] Almond and Esbester (n 124) 48.
[162] Bridget Hutter, *The Attractions of Risk-based Regulation: Accounting for the Emergence of Risk Ideas in Regulation* (CARR Discussion Paper 33, London School of Economics and Political Science, 2005).
[163] Hutter (n 162); Robert Baldwin and Julia Black, 'Driving Priorities in Risk-based Regulation: What's the Problem?' (2016) 43(1) Journal of Law and Society 565–595.

problems",[164] this effectively instigated the early approaches towards a regulatory style that prioritised "*activity and the deployment of resources... [via] an assessment of the risks that regulated firms pose to the regulator's objectives.*"[165] Coupled with a political drive for the efficiency of public resources,[166] risk orientation was hailed as a credible demonstration of sustainable and good governance[167] as part of a wider strategy of control:[168] focusing on targeted intervention[169] that recognised the dwindling capacity of the state. Similar to responsive regulation, its process of intervention begins following regulatee disobedience and heavily incorporates the use of voluntary/self-regulatory methods "*where there is sufficient capacity and motivation to suggest that acceptable levels of compliance can be sustained via less intrusive means than state-led inspection*."[170]

The application of risk-based regulatory methodologies, however, comes with complexities that are highly comparable to the challenge facing corporate crime control. They include how risk is to be decided, what will be targeted, what will be tolerated and how costs will be assessed against benefits[171] – all conditional on subjective perspectives and live variations.[172] In the context of UK corporate bribery, this difficulty is personified in the SFO having firmly positioned itself as an enforcer, and not a regulator; thus questioning the process by which investigations (risks) are to be located. Furthermore, regulation which is reactive to risks is of limited use if the state knows too little or lacks the expertise of the target regulatee that it cannot make any reasonable assessment of the risk(s).[173] What is apparent is a need for the regulator to take steps that prevent re-occurrence and instil deterrence.[174] Whilst citing health and safety, Tombs and Whyte put forward a concern which can be seen in the

[164] Robens Committee, 'Safety and Health at Work: Report of the Committee 1970–72' (The Robens Report) paragraph 216.
[165] Black (n 160) at 514.
[166] Almond and Esbester (n 124).
[167] Michael Power, *Organized Uncertainty: Designing a World of Risk Management* (1st ed, Oxford University Press, 2007).
[168] Black (n 160) 519.
[169] HM Treasury, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (Hampton Report, Phillip Hampton, 2005).
[170] Almond and Esbester (n 124).
[171] Black and Baldwin (n 163).
[172] Hutter (n 162); Robert Baldwin and Julia Black, 'When risk-based regulation aims low: Approaches and challenges' (2012) 6(1) Regulation and Governance 2-22.
[173] Neil Gunningham, 'Compliance, Enforcement, and Regulatory Excellence' (2017) RegNet Research Paper No. 124 <http://dx.doi.org/10.2139/ssrn.2929568> accessed 04/09/2020.
[174] Black (n 160).

corporate crime arena; that targeted approaches – which are reflective of much regulatory policy today – ultimately boil down to an observable decrease in both investigations and prosecutions.[175] Coupled with a lack of focussed oversight, this has "*legitimised a neutering of some forms of regulatory intervention*" and impacted the credibility and threat of enforcement.[176] This raises a key contradiction of risk-based strategies: *"how might the past performance of businesses central to risk calculus be measured in a system where there is a diminishing chance of the business having been inspected?"*[177] Aside from an ostensible lack of oversight,[178] risk based regulation *"becomes self-defeating, at least in the terms it formally sets for itself, for it compels a reduction in the types of activity most likely to gather useful data for targeted intervention, so that regulation can be based upon targeted intervention."*[179] Diminished intervention can neglect risks as it ignores the dynamic nature,[180] creating a degeneration of quantitative data and the central qualitative data upon which the very problems can be assessed;[181] such as the value of frontline enforcement. Without enforcement or regulatory intervention, standard setting and/or information gathering, behaviour modification may become vulnerable to increased risk.

2.4.2 Steering Compliance

When discussing how best resources can be used to target corporate misconduct, there remains the aim that regulation should be about social ordering, influencing behaviour and to steer "*continuous improvement.*"[182] Ayres and Braithwaite's responsive regulation sought to do so via the use of a 'tit-for-tat' strategy; that being, a methodology which is both provocable and forgiving[183] – securing compliance through both punishment and persuasion. Without detracting from the importance of punishment as a regulatory lever[184] - particularly

[175] Tombs and Whyte (n 159); Almond and Esbester (n 124) 48.
[176] Tombs and Whyte (n 159).
[177] Ibid.
[178] Paul Almond and Gary Gray, 'Frontline safety: understanding the workplace as a site of regulatory engagement' (2017) 31(1) Law and Policy 5-29.
[179] Tombs and Whyte (n 159) 73.
[180] Baldwin and Black (n 163).
[181] Almond and Esbester (n 124) 50.
[182] John Braithwaite and others, *Regulating Aged Care: Ritualism and the New Pyramid* (1st ed, Edward Elgar, 2007) 199-200.
[183] Ayres and Braithwaite (n 127) 19.
[184] Jeremy Bentham, *The Rationale of Reward* (1st ed, R Heward, 1830).

in corporate crime and misconduct[185] - the role of incentivisation and rewarding compliance have become of equal or greater importance to the regulatory process.[186] Kolieb explained this through the regulatory diamond; implementing a second inverted pyramid of responsiveness (beneath that proposed by Ayres and Braithwaite) as a sliding scale of reward to create aspirational regulation.[187] This sets itself alongside a central claim of responsive regulation; to nurture the virtuous, deter the venal and incapacitate the irrational or incompetent.[188] Incentivising compliance not only follows the underlying meta-goal of regulation - encouraging continuous improvement[189] - but reinforces that strategies should both seek to influence good behaviour (compliance) and sanction unwanted behaviour. The concept of enforce but incentivise strikes an appropriate connection given a transcending theme apparent throughout the intentions of the UKBA. When the House of Lords reviewed the UKBA,[190] multiple references were made to its provisions being positioned to incentivise the prevention of bribery, for corporates to self-regulate (self-report and cooperate) and to generally become part of corporate good governance.[191]

Research by Fisse and Braithwaite;[192] Parker[193] and oral evidence to the House of Lords UKBA committee[194] supported that incentivising compliance can foster a priceless asset[195] for corporates: good publicity. Commercial desire to prevent dirty laundry being aired in public[196] can help play into the hands of an improvement based regulatory approach. If reputation ranks highly, it appropriately follows that if the threat of strenuous sanctions (such as contractual debarment) and degrading publicity matters, then so too can positive publicity.

[185] Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Soreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases* (Elgar 2020).
[186] Peter Grabosky, 'Regulation by Reward: On the Use of Incentives as Regulatory Instruments' (1995) 17(3) Law and Policy 257-282.
[187] Jonathan Kolieb, 'When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond' (2015) 41(1) Monash University Law Review 136-162.
[188] Braithwaite (n 143) 83-89.
[189] Braithwaite (n 182) 322.
[190] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019).
[191] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019).
[192] Fisse and Braithwaite (n 54)..
[193] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (1st ed, Cambridge University Press, 2002).
[194] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected Oral Evidence: Questions 141 – 148.
[195] Ayres and Braithwaite (n 127) 22.
[196] Fisse and Braithwaite (n 54).

Incentivising good practice thus converts itself into a currency corporations value highly; reputation. Research has shown that corporations are willing respond to educatory approaches and normative cognitive influences and can 'copy-cat' the successful practices of counterparts.[197] Incorporation of a reward/incentivisation strategy is not only aligned with the analogy that compliance becomes the path of least resistance, but that there is a reputable and commercial enhancement which is likely to foster future compliance.[198] In the context of UK corporate bribery, reward based regulation is not only supported by the SFO's guidance in that demonstrations of self-reporting and ongoing cooperation are a relevant consideration in determining whether or not to prosecute,[199] but it forms a pretence behind DPAs in incentivising a reduced fine. If reward can help corporations foster compliance and prevent prosecution, it makes it the economically rationale choice.[200] To ensure that purely cosmetic compliance is not induced, according to Parker, there should always be vigilance towards the prospect that regulatory systems may become corrupted, ineffective and no longer responsive.[201] That is especially the case when incentives - especially financial - should be balanced against the view that corporations can see fiscal liabilities alone as a cost of doing business.[202] That risk and/or inefficacy turns to the role of regulatory enforcement.

2.4.3 Enforcement

To sustain the underlying goals of any regulatory system, the state must ultimately be able and prepared to enforce wrongdoing through criminal prosecution, when required. Baldwin and others described enforcement as *"a matter of deploying a strategy or mixture of targeted strategies for securing desired results on the ground."*[203] The conclusive aim of any regulatory/control strategy is to prevent non-compliance; by securing future compliance but being able to sanction malfeasance through enforcement if necessary. Whether the approach taken is orientated from a punishment or persuasive base, each regulatory methodology incorporates and recognises the value (at differing stages) of enforcement. How violations

[197] Parker (n 193) 73.
[198] Grabosky (n 186).
[199] Serious Fraud Office, Corporate Co-operation Guidance (2020).
[200] John Scholz, 'Voluntary compliance and regulatory policy' (1984) 6(1) Law and Policy 385-404.
[201] Christine Parker, 'Twenty years of responsive regulation: An appreciation and appraisal' (2013) 7(1) Regulation and Governance 2–13.
[202] James Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity' (2013) 16(2) New Criminal Law Review 261-299.
[203] Baldwin and others (n 148) 246.

are enforced in practice varies significantly. From the 'punishing' camp, strict enforcement plays a key role under the pretence that actors will comply with rules and regulations when confronted with harsh sanctions and penalties.[204] This could be thought of as a zero-tolerance ideology. At the 'persuasive' camp, it presents the argument that a strictly punitive approach to enforcement undermines overall compliance because it stimulates a degree of resentment on the part of regulated entities.[205] Compliance is more cooperative to encourage good behaviour. Literature broadly recognises the need for synergistic methods[206] that can both push and pull compliance. Achieving the optimal balance has been widely debated, but a longstanding (and inherent) recognition is that punishment is expensive, whereas persuasion is cheap.[207] State enforcement against complex corporate entities in transnational industries is a timely, costly and procedurally challenging task which warrants sparing use. The pragmatic concerns behind enforcement, as will be discussed, have led to the increase in tools typically associated with civil methodologies and non-prosecution (such as DPAs).[208]

What is of evident importance is that the denoted regulatory/enforcement regime is sufficiently and legitimately fulfilling its role; by applying sanctions to those who deserve it so as to not *"compromise the symbolic value of enforcement action at the top of the regulatory pyramid."*[209] This is particularly the case when the laws governing organisational behaviour are historically vague and unspecific.[210] When enforcement is required, using Ayres and Braithwaite's phraseology, there is a need for the regulator to speak softly but carry a big stick.[211] The availability and use of that 'big stick' is still very much argued to be a prerequisite for corporate crime regulation.[212] Although enforcement action at the peak of the pyramid may not be a common occurrence, the availability of the big stick is necessary to stand as the

[204] Ayres and Braithwaite (n 127).
[205] Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1st ed, Temple University Press, 1982).
[206] Ayres and Braithwaite (n 127) 25.
[207] Ibid 26.
[208] The use of civil controls for corporate wrongdoing can be traced as far back as the Law Commission report into the Factories Act 1961 which advocated the use of civil rather than criminal regulation: Law Commission, Working Paper No. 30, Strict Liability and the Enforcement of The Factories Act 1961, (1970) 21-42.
[209] Paul Almond, 'Understanding the seriousness of corporate crime: Some lessons for the new 'corporate manslaughter' offence' (2009) 9(2) Criminology and Criminal Justice 145-164, 159.
[210] Lauren Edelman, 'Legal Ambiguity and Symbolic Structures: Organisational Mediation of Civil Rights Law' (1992) 97(6) American Journal of Sociology 1531-1576.
[211] Ayres and Braithwaite (n 127) 19.
[212] Parker (n 193) 246.

ultimate threat and opposition where persuasion has either failed or there is unmistakeable non-compliance. As Ayres and Braithwaite put it, *"the greater the heights of tough enforcement to which the agency can escalate…the more effective the agency will be at securing compliance and the less likely that it will have to resort to tough enforcement."*[213] Enforcement therefore acts with both a punitive and educatory function. When the state decides to use the big stick, however, its effectiveness is contingent upon the *"ability of enforcement to communicate successfully intended messages about the nature and value of the law."*[214] So, in the context of the UKBA for instance, if the s.7 offence is to succeed in its intended message of tackling corporate bribery and corruption through criminal liability, its enforcement (most commonly undertaken by the SFO) should at least in some capacity successfully achieve that aim. This is why some argue that the *prohibition* of conduct, as opposed to the *encouragement* of conduct, is a matter which should be left to criminal law.[215]

Enforcement has been argued to operate best under a tit-for-tat strategy (see 2.4.2) where prosecution begins as a last resort to incentivise mutually beneficial cooperation. Whilst the regulatee is cooperating and self-regulating, the state agency should refrain from a deterrent response. But when the regulatee *"yields to the temptation to exploit the cooperative posture of the regulator and cheats on compliance…the regulator shifts from a cooperative to a deterrent response."*[216] Escalated enforcement and the use of more dominant forms of control are intrinsic to the legitimacy and justiciability of corporate crime control as it defines the boundary of wrongdoing past which punishment can be expected. In practice, however, this shift does not always take place and the principal instrument of enforcement – prosecution – is infrequent. Research has increasingly shown (and as this thesis will argue) that particularly in business environments, compliance is in fact sought and enforced with discretion and flexibility;[217] leading to the recognition that enforcement is actually approached through a process of negotiation and conciliation.[218] As O'Malley put it,

[213] Ayres and Braithwaite (n 150) 6.
[214] Almond (n 209) 149.
[215] Peter Gill, 'Policing and Regulation: What's the Difference? (2002) 11(4) Social and Legal Studies 523-546, 532.
[216] Ayres and Braithwaite (n 127) 21.
[217] Keith Hawkins and John Thomas, *Enforcing Regulation* (1st ed, Kluwer Nijhoff, 1984).
[218] Robyn Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27(4) Law and Policy 491-519, 495-496.

enforcement has *"shifted away from a focus simply on command and obedience, toward…the central issue as the optimal harnessing of…self-governing capacities."*[219] For Hutter, when describing the trajectory of environmental enforcement, the predominantly supported philosophy is one of encouragement and persuasion.[220] The resulting concern is not that compliance based methodologies are ineffective nor cannot be beneficial, but that the pinnacle threat of enforcement – criminal prosecution – has been replaced with accommodative strategies making it an uncommon and hollow threat. This can result in the bargaining away of legal standards.[221] Enforcement has preferentially become *"compliance centred, accommodative or self-regulatory in nature."*[222]

2.5 Self-Regulation

Central to the pyramidal enforcement theory, corporate crime control and the intentions of the UKBA corporate offence is industry self-regulation. Sitting at the base of the enforcement pyramid, the bottom-up approach departs from the stereotypical command and control regime by reinforcing attempts for regulation to work with low level intervention. This regulatory methodology acquires distinct importance to this work given its connection to the enforcement approach of the UKBA. That is, how it imprints *enforced* self-regulation; by its desire for corporations to have in place adequate procedures to prevent bribery and to regulate their own compliance, with the threat of criminal enforcement for misconduct.

Self-regulation originated in the UK as a "*corrective to perceived deficiencies in the operation of the market*";[223] including problematic regulatory environments, pressure from corporations and financial dilemmas of the government's ability to discharge their regulatory duties. It reflects a process by which institutions assist in governance;[224] incorporating both public and private actors into regulatory figures[225] and intrinsically making use of the financial

[219] Pat O'Malley, 'Governmentality and risk' in Jens Zinn (ed) *Social theories of risk and uncertainty: An introduction* (Blackwell Publishing 2008) 55.
[220] Bridget Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (1st ed, Clarendon Press, 1988).
[221] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116(2) Law Quarterly Review 225-256.
[222] Paul Almond, *Corporate Manslaughter and Regulatory Reform* (1st ed, Palgrave Macmillan, 2013) 62.
[223] Anthony Ogus, Regulation: Legal Form and Economic Theory (1st ed, Hart, 2004).
[224] Michael Moran, *The British Regulatory State: High Modernism and Hyper Innovation* (1st ed, Oxford University Press, 2003) 68.
[225] Ibid.

and cognitive resources held by corporate actors. After opinions of inefficiency and ineffectuality created "*a crisis of confidence*",[226] agendas such as 'better regulation'[227] and the bolstering by "*the whole weight of an academic economics profession devoted to its elaboration"*[228] helped self-regulation become a mainstay strategy and a viable alternative to command and control regulation. This rationale has retained its usage across governance practices[229] including the corporate crime landscape[230] and has become a driver in regulatory reform initiatives worldwide.[231] Fundamental to its adoption is what has been described as a regulatory orthodoxy;[232] where advocation and prioritisation of compliance-based perspectives took precedence, signalling a preference towards accommodative persuasion and for prosecution to be a last resort. Self-regulation favoured enhanced control by autonomous agencies;[233] re-conceptualising regulation from and by the state towards more responsive,[234] de-centred[235] and smart[236] systems of governance. As New Public Management initiated the shift from government to a broader concept of governance;[237] self-regulatory efforts accelerated alongside the disillusionment towards command and control regulation.[238] The move from command and control *"explored and encouraged regimes which, because they focus on management structures, incentive devices and forms of self-regulation, seem no longer to rely on conventional sanctions and therefore orthodox*

[226] Ayres and Braithwaite (n 127) 158.
[227] Better Regulation Executive.
[228] David Beetham, Revisiting Legitimacy Twenty Years On, in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 33.
[229] Julia Black and Robert Baldwin, 'Really Responsive Risk-based Regulation' (2010) 32(1) Law and Policy 181-213; Paul Almond, 'Revolution Blues: The Reconstruction of Health and Safety Law as 'Common-Sense' Regulation' (2015) 42(1) Journal of Law and Society 202–229.
[230] John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80(7) Michigan Law Review 1466-1507.
[231] Organisation for Economic Co-operation and Development, 'Regulatory Policy in OECD Countries: From Interventionism to Regulatory Governance' (2002).
[232] Paul Almond and Sarah Colover, 'The criminalization of work-related death' (2012) 52(1) British Journal of Criminology 997–1016; Steve Tombs, 'Crisis, What Crisis? Regulation and the academic orthodoxy' (2015) 54(1) Special Issue of The Howard Journal of Criminal Justice 57-72.
[233] David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' in David Levi-Faur and Jacint Jordana, 'The Rise of Regulatory Capitalism: The Global Diffusion of a New Order' (2005) 598(1) American Academy of Political and Social Sciences 1–21.
[234] Ayres and Braithwaite (n 127).
[235] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(1) Regulation and Governance 137–164.
[236] Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1st ed, Oxford University Press, 1998).
[237] Antonio Palumbo and Richard Bellamy, *From Government to Governance* (1st ed, Routledge, 2010).
[238] Hutter (n 162); Almond and Esbester (n 124).

deterrence theory."[239] Many industries (including corporate crime) saw "*a generalised rejection of deterrence-based approaches*" on the basis of alleged unsustainability.[240] During the "*material and ideological assault on regulation*",[241] it intensified an anti-regulatory climate with the professed itinerary of *better* and focussed regulation rather than *de*-regulation.[242] For Tombs, this led to a detrimental development of regulatory inaction and regulation without enforcement.[243]

In various forms the UK has formulated self-regulation as a principal control mechanism.[244] In full recognition of its local policing approach and multi-dimensional continuum,[245] it has become a new norm of regulatory culture, or rather an ideology;[246] enhancing industry autonomy as a normative principle. Its practical methodology theoretically satisfies the remits of both self-regulation and that which the literature describes as co-regulation. The latter being no different other than a greater labelling and emphasis towards enforcement being carried out by the regulatee, the state and third parties. Therefore, "*self-regulation represents an extension and individualisation of co-regulation theory*"[247] - reflected in the additional steps towards self-enforcement and with the process being led and designed by industry. Transversely, co-regulation underlines a stricter focus on a cooperative regulatory process and a step away from statutory regulation. Co-regulation is "*self-regulation with some oversight and/or ratification by government.*"[248] On the spectrum of regulatory theories (with state and pure voluntary regulation at opposite ends), co-regulation thus acts as the middle ground. With these two theories being such "*close siblings*" and with many regulatory regimes

[239] Anthony Ogus and Carolyn Abbot, 'Sanctions for Pollution: Do we have the right regime?' (2002) 14(3) Journal of Environmental Law 283–298
[240] Tombs (n 232) 58.
[241] Tombs and Whyte (n 156).
[242] Better Regulation Executive.
[243] Steve Tombs, 'Regulatory Inaction? Regulation without enforcement' in Steve Tombs (ed) *Social Protection after the Crisis: Regulation without Enforcement* (1st ed, Policy Press, 2016) 137.
[244] Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15(1) Oxford Journal of Legal Studies 97–108.
[245] Moran (n 224).
[246] Ibid.
[247] Ayres and Braithwaite (n 127) 102.
[248] Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1st ed, Oxford University Press, 1986) 83.

treating them as complements,[249] for this work co-regulation can be treated and covered as self-regulation.

Self-regulation incorporates elements of both an enforced and non-enforced nature, satisfying as Lord describes it, a hybrid mechanism[250] and one which seeks to promote responsible self-rule. The former is present in that if the regulatee fails in its compliance, enforcement results, and latterly; that it begins with the principle of non-enforcement, where the regulatory onus rests with the regulatee. The regulated entity assumes an internalised, subcontracted legislative and almost judicial role, regulating and punishing their own non-compliance. This format can then be mandated in two ways; with the public enforcement of the privately written rules or via a governmentally mandated internal enforcement of publicly written rules.[251] Enforced self-regulation takes the form of existing as an intermediate strategy to fill a void stemming from the delay,[252] red tape[253] and the costs[254] that can result from solely imposing a state regulation. Equally, enforced self-regulation recognised the naiveté[255] and danger which can result in placing complete trust in organisations to regulate themselves.[256] This was illustrated with the failures of the 2008 global banking crisis which elucidated concerns over the potential illegitimacy and inefficiency of self-regulatory practices[257] resulting from subjective interests and influences.[258] The concept acts as a negotiation between the state and the regulated entity, where both parties are involved in a more tailored approach to regulation. In a typical enforced self-regulatory environment, the

[249] Neil Gunningham, 'Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand' (2017) Australian National University <http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-04/NG_investigation-industry-self-regulation-whss-nz_0.pdf> accessed 24/06/2017.
[250] Lord (n 27).
[251] Joseph Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety* (1st ed, University of Pennsylvania Press, 1988).
[252] Murray Weidenbaum, *The Future of Business Regulation* (1st ed, Amacom, 1979).
[253] Richard Neustadt, 'The administration's regulatory reform program: An over-view' (1980) 32(1) Administrative Law Review 129-159.
[254] Alan Moran, 'The business regulation review unit: Canberra Bulletin of Public Administration' (1986) 13(1) Australian Journal of Public Administration 283-287.
[255] Ross Cranston, *Consumers and the Law* (1st ed, Weidenfeld and Nicholson, 1978).
[256] Ayres and Braithwaite (n 127) 106; Robert Baldwin, 'The New Punitive Regulation' (2004) 67(3) Modern Law Review 351-383; Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) Current Legal Problems 103-146.
[257] Black (n 256) 123-124.
[258] Christopher Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (1st ed, Harper and Row, 1975) 93.

government sets standards, the regulatee proposes how they will achieve them, and the state will then generally provide oversight with and/or without the assistance of third parties, such as Public Interest Groups. Once in place, the enforcement element becomes applicable firstly in the regulatee regulating itself through internal compliance systems; and secondly that the state will oversee this regulation with the ability to enforce via a variety of sanctions for non-compliance.

For self-regulation to work, it requires two components.[259] The first being standards; without such, the theory may fail as there is no ideal objective. Regulatee malpractice must be underpinned by state intervention to empower the regulatory process;[260] particularly in the use of enforced self-regulatory systems. When faced with non-compliance, this holds that enforcement action must result in a capacity which matches the level of misconduct to ensure the system is resilient and effective – and not futile.[261] This has been referred to as interactive game theory, due to the applicable 'players' within the regulatory process (the regulator and regulatee) whereby action is taken and is consistent with/comparable to the opponents previous move.[262] Provocation must equal retaliation just like cooperation must equal collaboration. Whilst this is not recognised as being a certainty to obedience nor towards the elimination of regulatory capture; it undoubtedly acts as strong mitigation towards prevention.[263] Cooperation is initially sought but is then enhanced and enforced through a tit-for-tat strategy.[264] The second is that there is a monitored and actionable process available when there is a shortfall in the desired outcome or performance - so the notion of control is not lost.[265] To control corporate crime through a system of corporate liability, it must sit within a credible structure of enforcement[266] - towards both the corporate and the individuals

[259] Roy Baumeister and Todd Heatherton, 'Self-Regulation Failure: An Overview' (1996) 7(1) Psychological Enquiry 1-15.
[260] Frank Pearce and Steve Tombs, 'Hazards, law and class: Contextualising the regulation of corporate crime' (1997) 6(1) Social and Legal Studies 79-107.
[261] Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective', (1997) 19(4) Law and Policy 363-414, 366.
[262] Scholz (n 129).
[263] Ayres and Braithwaite (n 127) 138.
[264] John Braithwaite, 'Convergence in Models of Regulatory Strategy' in John Braithwaite (ed) *Regulation, Crime, Freedom* (Routledge 2000).
[265] Baumeister and Heatherton (n 259).
[266] Slapper and Tombs (n 97) 180-183.

responsible.[267] As Ayres and Braithwaite described it, the more 'sticks' available to the regulatory agency, the better the level of compliance.[268] Whilst responses should initially be persuasive and designed to trigger self-regulatory qualities,[269] without the state being able to utilise options to enforce the duties and responsibilities designated onto those it seeks to regulate, it risks an "*abdication*" of self-control by the regulatee and "*can lead to a serious, protracted breakdown*".[270] Enforcement is therefore needed to embed a system of accountability and compulsory responsibility.

External factors have been argued to play an important role in supporting self-regulation as it contributes to motivation. For instance, Gunningham and Rees proposed that it is generally unlikely for private industry to voluntarily take steps to affiliate their goals with public interests unless they are innately aligned with their own or there is pressure to do so.[271] The likely challenge of self-regulatory relationships is presented in the latter – an external pressure or force to create the affiliation. When this occurs, the most conducive ingredient to a successful self-regulatory environment becomes the credible threat of enforcement. This needn't be overt, as the mere threat and uncertainty of how the state will act may in itself provide the stimulus for effective self-regulation.[272]

2.5.1 The Promise and Perils of Self-Regulation

> *"In business regulation circles these days, there is not much contesting of the conclusion that consistent punishment of business non-compliance would be a bad policy, and that persuasion is normally the better way to go when there is reason to suspect that cooperation with attempting to secure compliance will be forthcoming."*[273]

[267] Jennifer Arlen, 'Does conviction matter? The reputational and collateral effects of corporate crime' in Cindy Alexander and Jennifer Arlen (eds), *Research Handbook on Corporate Crime and Financial Misdealing* (Elgar 2018).
[268] Ayres and Braithwaite (n 127) 19.
[269] Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Robert Baldwin and others (eds), *A Reader on Regulation* (Oxford University Press 1998) 406-409.
[270] Baumeister and Heatherton (n 259).
[271] Gunningham and Rees (n 261).
[272] Ibid 391.
[273] John Braithwaite, 'Rewards and regulation' (2002) 29(1) Journal of Law and Society 12-26, 20.

The persuasive intentions of self-regulation are underpinned by key assumptions. Firstly, that the state suffers a resource inability to oversee compliance towards the private sector; secondly, that a tailored approach was necessary and best directed by non-state actors; and thirdly, that this outlook was not only desirable, but entirely feasible due to the private sectors' motivations as committed and moral actors.[274] Self-regulation is purported to stand as a resolution to such concerns by filling the voids described and complementing regulatory frameworks. However, whilst this paradigm has gained use and endorsement in the discussion of an enhanced internalisation of self-monitoring (alongside effective governmental oversight), mechanisms of self-control carry the concern that any concentration of power immediately carries "*the danger of arbitrariness, of abuse, corruption and advancing self-interest by those in control."*[275] Thus, self-regulatory systems come with openly expressed illogicality:

> *"…there is currently a remarkably optimistic consensus in some academic quarters about how to reduce the harm caused by privileged predators. The heart of it lies in the presumed promise of pluralistic, cooperative approaches, and responsive regulation. These assumptions highlight the need for enhanced prevention, more diverse and more effective internal oversight and self-monitoring, and more efficient and effective external oversight…They make sense theoretically, and we endorse them. We do so not because they have a record of demonstrable success but principally because sole or excessive reliance on state oversight and threat of criminal prosecution is difficult, costly, and uncertain. Still, we are mindful, as others should be, that the onset of the Great Recession occurred during and despite the tight embrace of self-regulation, pluralistic*

[274] Tombs (n 232) 59.

[275] Kees van Kersbergen and Frans van Waarden, 'Governance' as a bridge between disciplines: Cross-disciplinary inspiration regarding shifts in governance and problems of governability, accountability and legitimacy' (2004) 43(1) European Journal of Political Research 143-171, 156.

oversight, and notions of self-regulating markets by policy makers and many academicians."[276]

What becomes apparent is the existence of a theoretical persistence in the 'presumed promise' of and associated faith towards these approaches, despite an avowedly unfounded rationale on which it is to be based given the lack of "*demonstrable success*."[277] This outlook is unfortunately a known reality as despite its rhetoric as a tool to help streamline and simplify the regulatory process, self-regulatory arenas have paradoxically and incontrovertibly been associated with the exploitation of legal loopholes[278] and some of the most sizeable crimes, social harms and regulatory failures of modern times.[279] The array of evidence which questions the empirical and conceptual legitimacy of subjective controls[280] implies a rose-tinted view of self-regulation in its ability to instead create cosmetic compliance ("*Potemkin Villages*"[281]). From grand corporate crime to environmental disasters, the 'trust us' approach of self-regulation has led some to argue that it is abundantly clear voluntary regulation simply does not work.[282] Whilst virtuous corporate social responsibility and behaviour exists, to express this as an underlying assertion - which the state may rely and act upon to the point where they promote subjective regulation - is according to Tombs and Whyte not just a problematic aberration but rather more a threat to lives and stability governed by a hegemonic common sense led from the rise in neo-liberal deregulation.[283]

Proponents argue self-regulation promotes speed, cost and flexibility. Critics maintain that the environment can result in corporatisation and conservationism; serving private interests

[276] Peter Grabosky and Neal Shover, 'Editorial conclusion. Forestalling the next epidemic of white-collar crime: linking policy to theory' (2010) 9(1) Criminology and Public Policy - Special Issue: The Global Economy, Economic Crisis, and White-Collar Crime 641–642.
[277] Tombs (n 232) 59.
[278] David Nelken, 'White-Collar and Corporate Crime' in Maguire and others (eds), *The Oxford Handbook of Criminology* (Oxford University Press 2012) 623-659.
[279] Braithwaite (n 230); Tombs (n 232). Notably expressed through wide spreading financial, pharmaceutical and media corruption scandals.
[280] Paul Almond and Judith van Erp, 'Regulation and Governance versus Criminology: Disciplinary divides, Intersection and Opportunities' (2020) 14(2) Regulation and Governance 167-183.
[281] Garry Gray, 'The Regulation of Corporate Violations: Punishment, Compliance, and the Blurring of Responsibility' (2006) 46(5) British Journal of Criminology 875-892.
[282] Securities and Exchange Commission, 'Chairman Cox Announces End of Consolidated Supervised Entities Program' (USSEC, 2008) <https://www.sec.gov/news/press/2008/2008-230.htm> accessed 05/03/2018.
[283] Steve Tombs and David Whyte 'Counterblast: crime, harm and the state-corporate nexus' (2015) 54(1) Howard Journal of Criminal Justice 91-95.

at public expense.[284] Offering the appearance of efficacious control it fends off more strenuous state intervention[285] creating a lack of state involvement and oversight.[286] Such scepticism arises in that the process in practice is copiously operationalised and interpreted by the regulatee. Citing the global financial crash, Lapavitsas summarised the regulatory landscape as follows:

> "*The characteristic feature of the new regulation is that it has been shaped by the financial institutions…its purpose has been to ensure the ability of the financial system to grow and extract profits. It has not contributed in the slightest to avoiding financial bubbles nor to imposing the costs of financial crises onto those responsible for them. On the contrary, contemporary regulation has led to society bearing the brunt of financial disasters, while private individuals associated with finance have reaped the benefits of expansion."*[287]

The above citation is reflective of a concern known as legal endogeneity.[288] Edelman et al argue that whilst 'compliance' efforts are officially driven by the law and ultimately crystallised by the courts, those understandings predominantly derive from institutionalised and organisational patterns, structures, practices and culture.[289] In other words, how the law is made and what is comes to mean are different; being shaped and acquiring definition as dictated by the environment in which it operates and those it seeks to regulate. By seeing how the law can become endogenous, it is possible to understand the different forms it actually takes and how regulation can be subject to organisational influence.[290] This is reflected in the increasing use of regulatory interventions to resolve criminal cases[291] and the

[284] Braithwaite and Fisse (n 158) 245.
[285] Gunningham and Rees (n 261).
[286] Tombs and Whyte (n 283).
[287] Costas Lapavitsas, 'Costas Lapavitsas Discusses the Financialization of Capitalism', Truthout (2014) <https://truthout.org/articles/costas-lapavitsas-discusses-the-financialization-of-capitalism/> accessed 02/04/2018.
[288] Lauren Edelman and others, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105(1) American Journal of Sociology 406–454.
[289] Edelman (n 210); Edelman and others (n 288); Lauren Edelman, 'When Organizations Rule: Judicial Deference to Institutionalized Employment Structures' (2011) 117(3) American Journal of Sociology 888-954.
[290] Ibid 932.
[291] Wells (n 24) Part 1.

inclination towards industry influenced justice: resolved through negotiation and cooperation.[292] A tendency and degree of bargaining power not afforded to the 'typical' criminal. In that state methods of regulation may undermine the very essence of what it aims to control by recognising and/or accepting institutionalised symbols of rationality or compliance.[293] Similar to self-regulatory methodologies, legal endogeneity creates the potential to undermine legal ideals through ineffective or symbolic compliance.[294] This will not necessarily create an incompatibility to regulatory compliance and crime prevention as arguments exist illustrating that organisations are highly responsive to their legal environments.[295] Instead, it is that it presents questions of legitimacy (particularly from a criminological perspective) and procedural inequality towards privileged actors who have committed serious crimes, may not have admitted wrongdoing,[296] but are subject to a non-enforced rationalisation where their processes become acceptable.

Self-regulation can therefore create polarity; for positive legal compliance, or alternatively, a mechanism to subtly promote the consideration of (and potential faithfulness to) "*insecure or precarious values*"[297] (such as profit).[298] For the latter, self-regulation offers the perfect haven to not only deceive the public and state into thinking an irresponsible actor is responsible, but in also providing an excuse for inefficient governments[299] whose overarching role is to ensure that appropriate legal frameworks exist surrounding risks.[300] Distinct caution is required in permitting a regulatory approach where 'the police' can police themselves as it inherently offers the potential to intractable conflicts of interest,[301] and thus:

[292] King and Lord (n 12).
[293] Edelman 2011 (n 289) 891.
[294] Ronen Shamir, 'Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility' (2010) 6(1) Annual Review of Law and Social Science 531–553.
[295] Lauren Edelman, 'Legal environments and organizational governance: the expansion of Due Process in the workplace (1990) 95(6) American Journal of Sociology 1401-1440.
[296] King and Lord (n 12).
[297] Rees (n 251).
[298] Parker (n 193).
[299] Braithwaite (n 143) 83-89.
[300] Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (1st ed, Edward Elgar, 2011).
[301] Justin O'Brien, *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets* (1st ed, John Wiley and Sons, 2005) 5.

> "*…self-regulation seems to be self-contradicting. If government regulation of an industry or problem is considered necessary, how can that responsibility then be returned to those from whom it was taken*?"[302]

Allowing an organisation to regulate themselves involves a critical element of trust and reliance which is far from a guarantee and one area in which corporations have directly or indirectly abused that position. Following the Leveson Inquiry into gross failures of UK press practices and ethics, it reiterated the presence of a "*current reliance on collaborative approaches and industry self-regulation*"[303] in spite of evidence provided to it surrounding "*the continued failure of…voluntary self-regulatory bodies.*"[304] The risk for industries where a 'regulator' exists through name only becomes the exposure to influence – known as regulatory capture. Rather than acting in the public interest, the agency becomes persuadable or even corrupted; conversely acting in the commercial interests or succumbing to the power of those organisations it is assigned to control.[305] Given the challenges of policing corporate bribery, although a degree of accommodation is inherent, the potential abuse of such relationships can soften the problem it intends to resolve. Without the external motivation of oversight and enforcement, self-regulatory effectiveness has been shown to decrease and is therefore an essential aspect of self-regulatory schemes.[306] Studies into the US Environmental Protection Agency illustrated from over three thousand violations reported between 1997 and 2003 that a robust and visible approach to enforcement promoted efficacious self-regulation as there were frequent inspections, firm regulation and a credible threat of action.[307] Despite corporations often being modelled as the moral actor, if their

[302] Douglas Michael, 'The Use of Audited Self-Regulation as a Regulatory Technique' (1995) 47(2) Administrative Law Review 171-253, 173.
[303] The Leveson Inquiry, *An Inquiry Into The Culture, Practices and Ethics Of The Press*, The right Honourable Lord Justice Leveson (2012, Volume 1) 166.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270939/0780_i.pdf
[304] Ibid, Media Standards Trust (in its submission to the Inquiry), 1.2, 195.
[305] Ian Ayres and John Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16(3) Law and Social Enquiry 435-496.
[306] Jodi Short and Michael Toffel, 'Making self-regulation more than merely symbolic: the critical role of the legal environment' (2010) 55(1) Administrative Science Quarterly 361–396.
[307] Eun-Hee Kim and Thomas Lyon, 'Strategic environmental disclosure: Evidence from the DOE's Voluntary Greenhouse Gas Registry' (2011) 61(3) Journal of Environmental Economics and Management 311–326.

behaviour is driven by industry culture and market forces,[308] without enforcement, this has led to suggestions that their motivations are not dictated by regulatory pressure alone.[309]

Given the complexity of corruption investigations, self-regulation does, however, offer assets to the regulatory relationship. Predominantly, these are in the familiarity and proximity of the regulatee to its own industry. Knowing where "*the bodies"* are buried and being aware of the rules of the game creates an advantageous familiarity, depth and specialism.[310] This can enhance a more proactive regulatory environment[311] by offering "*an ongoing quality*" to the regulator/regulatee relationship[312] where, as is often the case, the industry is able to supply the state with evidence which would otherwise be difficult to obtain. Self-regulation allows regulatory responsibility to be contracted out to the corporate actor, who modify and develop their own compliance in a manner less burdensome that state-led regulation. Assuming that the process is enforcement backed, effective and fair to the interests it seeks to protect,[313] self-regulation should create a normative framework[314] disengaged from a command and control/punitive perspective[315] to demonstrate industry cooperation and compliant goodwill.[316] Subjectively functioning in the shadows of enforced legal rules should incentivise compliance so long as it is known that state enforcement provides less palatable sanctions than adherence to an industry standard.[317] The fear of a benign big gun[318] reiterates itself as a key driver of self-regulatory initiatives.[319] Enforced self-regulation reflects Foucault's isolation of Bentham's panopticism theory, where - to use such phraseology – with the prisoners (corporations) aware that they are being observed, it promotes positive self-rule. According to Foucault "*the practice of placing people under observation is a natural extension*

[308] Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) Modern Law Review 59-94.
[309] Ibid.
[310] Ayres and Braithwaite (n 127) 104.
[311] Ibid 104.
[312] Ibid 54.
[313] Michael (n 302) 182.
[314] Gunningham and Rees (n 261).
[315] Bardach and Kagan (n 205).
[316] Tombs and Whyte (n 156) 72.
[317] Warren Pengilley, 'Competition Law and Voluntary Codes of Self-Regulation: An Individual Assessment of What Has Happened to Date' (1990) 13(2) University of New South Wales Law Journal 212-301.
[318] Ayres and Braithwaite (n 127) 19.
[319] Marius Aalders 'Regulation and In-Company Environmental Management in the Netherlands', Law and Policy (1993) 15(1) 75-94.

of a justice imbued with disciplinary methods and examination procedures."[320] This model of extended observation internalises coercion as it creates a consciousness of seemingly perpetual surveillance; therefore, acting as a control mechanism. Observation with the threat of enforcement creates a level of Foucauldian power from knowledge which induces compliance and docility towards regulation (control) for fear of discipline.

For self-regulation to work, two criteria are therefore stipulated. Firstly; the recognition and reality of enforcement (when self-regulation fails), to instil both institutional and individual responsibility.[321] Secondly; a premeditated course of action tailored towards compliant functions and values that institutionalises "*an inner commitment to moral restraint*";[322] expressed through "*specific arrangements*" (such as reward and incentivisation) that make "*accountability an integral part of corporate decision-making.*"[323] The law can then stand as both a threat and opportunity:[324] enforcing adherence to a prescriptive morality[325] and to permit - and even reward - compliance (respectively). Having this ability ensures that cooperation is not emphasised where misconduct is apparent; reserving it for situations where, for instance, an organisation lacked the capability or understanding to implement the desired goals.[326] The challenge for self-regulatory relationships is to ensure that the regulatee is incentivised towards compliance but that the state can maintain an effectual level of control in accordance with their societal duty and legal/enforcement obligations. Else, such approaches can redefine compliance and fail in their 'regulatory' intentions as organisations are left with substantial latitude to construct a subjective interpretation.

2.6 Guiding Compliance

Government attempts to guide organisations towards better and more compliant behaviour and to verify that performance have developed significantly and in their means of doing so.[327]

[320] Michel Foucault, *Discipline and Punish* (1st ed, Penguin, 1977) 227-228.
[321] Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1st ed, University of California Press, 1992) 345.
[322] Ibid 345.
[323] Ibid 351-352.
[324] Ibid 325.
[325] Ibid 446.
[326] Kagan and Scholz (n 64) 117.
[327] Lauren Edelman and Mark Suchman, 'The Legal Environments of Organizations' (1997) 23(1) Annual Review of Sociology 479–515.

While agreements may vary over the most appropriate form regulation can take, there is an underlying consensus for a multi-faceted toolkit, for regulatee involvement and for it to be underpinned by enforcement. Taking Foucauldian terminology, ensuring the dispersion of power and control[328] allows room to develop its strengths and to enforce wrongdoing.[329] For Haines, it is best that a "*narrow prescriptive"* should be *"eschewed in preference for policy mixes*",[330] so that the collected efforts of the regulatory/enforcement framework can then both "*push*" and "*pull*" accordingly[331] – creating an environment of "*negotiated relationships.*"[332] Although methods of cooperative negotiation have come to hold a key position within the regulation and enforcement of UK corporate bribery,[333] self-regulation and its deregulatory backdrop remains vulnerable to inadequate application, implementation, and enforcement. Baldwin appropriately summed up that whilst "*a more effective route to compliance lies through more proactive stimulation of the self-regulatory capacities of companies*" there is simultaneously a recognition of the "*dangers*" that flow from excessive trust.[334]

With enforced self-regulation featuring within the UKBA regime, the verification of compliance has, like many regulated industries, become a matter for self-attestation; where the subjects of that control/regulation *"are entrusted to faithfully report their own compliance activities."*[335] By the UKBA requiring companies to have in place adequate procedures and for them to self-report wrongdoing, this demonstrates how control has been subcontracted, with the management of compliance going beyond government itself. This provides a basis upon which the state can turn risks or suspicions into further verification and if required enforcement.[336] As the regulatory middle path between punishment and persuasion has increasingly developed its reliance on self-regulatory methods, regulation has

[328] Graham Burchell and others, *The Foucault Effect: Studies in Governmentality* (1st ed, University of Chicago Press, 1991).
[329] Gunningham and Rees (n 261) 389.
[330] Haines (n 300).
[331] Gunningham and Grabosky (n 236).
[332] Lord (n 27).
[333] King and Lord (n 12).
[334] Baldwin (n 256).
[335] Ben Rissing 'Trust but Sometimes Verify: Regulatory Enforcement in Attestation-based Immigration Programs' (2022) 16(1) Regulation and Governance 327-354.
[336] Ibid.

moved to govern at a distance; where the state devolves empowerment to regulatees through administrative control.[337] The way in which the UKBA delegates the adequate procedures requirement demonstrates how the regulation of complex industries has allowed governments to express, loosely certify and articulate values, which help rationalise the image of public control and generally accepted practices.[338] Power referred to this type of position as control of control, where the 'regulator' (the state) simply monitors (with intervention if necessary) the quality of the control systems put in place by the regulated entity, rather than the actual operations themselves.[339] The resulting position allows government to stake a claim in 'observing' rather than strictly 'doing' compliance[340] - under the umbrella of improved costs, quality enhancement and assurance.

Exercising control 'at a distance', however, whilst cost effective, has allowed the state to retain an image of command and control over what Cohen notes to be sectors that, "*are too big and complicated….to manage.*"[341] The concern is that "*quick and banal*" regulatory assessments intended to encourage voluntary compliance can in reality offer little to ensure and importantly enforce their validity.[342] Rather than punish, self-regulatory environments "*give ample opportunity*" for the problem "*to be solved by mutual consultation and assistance."*[343] The resulting risk is that such regimes can typically lead to *"regulated actors' self-reported assertions of compliance as truthful*"[344] where the state then fails to enforce instances of purely symbolic attestations[345] or misrepresented compliance.[346] Whilst recognising the costs, time and resources to do so – and noting the overall decrease in UK corporate crime enforcement - literature identifies a need for an increased frequency in verification efforts[347] and for credible enforcement to pursue failed voluntary/self-regulatory

[337] Michael Power, *The Audit Society: Rituals of Verification* (1st ed, Oxford University Press, 1997).
[338] Ibid.
[339] Ibid.
[340] Ibid 147.
[341] Nick Cohen, 'The Audit Explosion' (NicholasCohen.com, 19 April 2009) < https://nicholascohen.wordpress.com/2009/04/19/comment-is-free-while-we-suffer-the-box-tickers-will-continue-to-prosper-even-if-alistair-darling-offers-an-austerity-budget-one-level-of-bureaucracy-will-emerge-unscathed-comments-22/> accessed 09/06/2017.
[342] Rissing (n 335) 18.
[343] Gunningham and Rees (n 261) 388.
[344] Rissing (n 335) 17.
[345] Susan Shapiro, 'The Social Control of Impersonal Trust' (1987) 93(3) American Journal of Sociology 623–658.
[346] Braithwaite and Fisse (n 158) 245.
[347] Almond and Esbester (n 124).

compliance. This is particularly the case as self-regulatory systems can provide limited regulatory insight[348] and are difficult to scrutinise in the absence of functioning verification efforts.[349] Whilst the state projects the supremacy to control and enforce wrongdoing, the real governing power arguably rests in de-centralised corporate governance and the standards they set. This chapter now moves to consider that concept and the broader meta-regulatory notion within which self-regulation sits: governance.

2.7 Governance

When discussing the regulation of corporate conduct, it is important to recognise that it sits as a subsection to the wider notion of governance; due to its role in steering or directing behaviour.[350] Not only can regulation and control be a form of governance (i.e. governance through regulation), it can also lead to discussions of how methods of control are to be governed. The subject of this research necessitates a focus on private/non-state governance because of the role it has come to hold in determining corporate conduct through not only the UKBA methodology, but in the faith that rests with the assumption that internal compliance structures reduce prohibited corporate conduct.[351] Where regulation is seen as a focussed exercise of control over an activity,[352] governance is a broader term exemplifying a meta-regulatory shift from state hierarchies to de-centered, private or networked rule. Rhodes described governance as signifying "*a change in the meaning of government, referring to new processes of governing; or changed conditions of ordered rule; or new methods by which society is governed."*[353] It assumes the role of steering and co-opting regulatory capacities that has moved from public authority to private authority; where trust and adjustment characterise the relationship between the state and the private sector.[354]

[348] Richard Locke and others, 'Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains' (2013) 51(3) British Journal of Industrial Relations 519–552.
[349] Rissing (n 335) 18.
[350] Braithwaite and others (n 123).
[351] Kimberley Krawiec, Cosmetic Compliance and the Failure of Negotiated Compliance, (2003) 81(2) Washington University Law Review 487-544.
[352] Philip Selznick 'Focusing Organizational Research on Regulation' in Roger Noll (ed) *Regulatory Policy and the Social Sciences* (University of California Press 1985).
[353] Rod Rhodes, 'The New Governance: Governing without Government' (1996) 44(4) Political Studies 652-667, 652.
[354] Ibid.

Internal governance practices have become critical to the evaluation of corporate crime prevention due to their ability to fill regulatory voids left by governments: such as the creation of knowledge backed and industry focussed – 'adequate' - policies and procedures. As Simon observes, private institutions now *"play a governance role...business has become a governmental power to a considerable extent."*[355] This is because the continuum of governance recognises that self-regulatory capacities are often better equipped to understand the denoted environments and are consequently able to control, implement and evaluate them. Opposingly, weakened or poor corporate governance practices may contribute to the susceptibility of corporations to corrupt behaviour.[356]

Levi-Faur argues that governance is a structure, process, mechanism and a strategy;[357] acting as a method of oversight, control or authority. The number of definitions takes form via the perspective from which it is to be applied; such as from both the state and private viewpoint. For instance, the state perspective has been held to more literally focus on the "*processes that determine how power is exercised and how decisions are made.*"[358] Privately, it can be viewed as "*any pattern or rule that arises either when the state is dependent on others or when the state plays little or no role.*"[359] This broader outlook underpins the work of Foucalt who fundamentally emphasised the concept of government and governance by advocating its use towards the direction of individual conduct - "*to structure the possible field of action of others*".[360] Governance takes on a non-unitary meaning by seeking to define the process, patterns and procedures used to rule and coordinate; rather than having any association with a specific institution - such as government.[361] Ford described this as New Governance, arising independently of the state and being "*underpinned by a bottom-up, decentered, horizontal*

[355] Jonathan Simon, 'Sanctioning government: Explaining America's severity revolution' (2001) 56(1) University of Miami Law Review 217-253, 242.
[356] Susan Watson and Rebecca Hirsch, 'The Link between Corporate Governance and Corruption in New Zealand' (2010) 24(1) New Zealand Universities Law Review 42-81.
[357] David Levi-faur, 'From Big Government to Big Governance', Jerusalem Papers – Regulation and Governance (2011) <http://regulation.huji.ac.il/papers/jp35.pdf> accessed 08/04/2017.
[358] Laurence Lynn and others, 'Improving governance: A new logic for empirical research' (2003) 65(1) Journal of Politics 279-281.
[359] Mark Bevir, *Governance: A very short introduction* (1st ed, Oxford University Press, 2012).
[360] Michel Foucault, *Beyond Structuralism and Hermeneutics* (2nd ed, University of Chicago Press, 1982).
[361] Mark Bevir, *Key Concepts in Governance* (1st ed, Sage, 2008) 3.

experimental process by private actors."[362] This conceptually offers, incorporates and bears a strong relationship to self-regulation[363] as internalised governance illustrates the use of a more hybrid style approach whereby private actors become involved as parties well positioned to assist or lead in the creation of frameworks, processes of decision making, policy implementation and delivery (as per the UKBA's adequate procedures requirement).

Differences in approach, style and form, led Kersbergen and van Waarden to suggest that the best way to perceive governance in order to apply it, is as a pluricentric rather than unicentric concept.[364] Whilst government may be involved, it will be one of the many actors within the wider network that organises the appropriate relationships necessary to help formulate and determine governance systems.[365] In these circumstances, *"hierarchy or monocratic leadership*" becomes less important (if not absent) due to the involvement and responsibility of numerous actors within these networks.[366] The term governance can now arguably be seen to reflect the shift away from government orientated command and control[367] towards a political scene involving an alliance of concertation, negotiation and cooperation, often with private actors, forming "*systems of…self-regulating networks.*"[368] The systems it creates can work together to develop order, structure and governance in everyday practice. Outside of government, private actors have thus become the "*critical core*" of governance;[369] with the capability to interact and work together in formulating systems of authority more prevalent and significant to governing in practice. Whilst that may be the case, there remains the need to involve both private and state actors to define capacities and governability without resorting to deregulation as they reflect the legitimacy and accountability of such systems.[370]

[362] Cristie Ford, 'New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation (2010) 2(1) Wisconsin Law Review 441-487, 445.
[363] Ayres and Braithwaite (n 127); Braithwaite (n 230).
[364] van Kersbergen and van Waarden (n 275) 151.
[365] Ibid.
[366] Ibid 152.
[367] Ibid 151.
[368] Eva Sørsensen, 'Democratic theory and network governance' (2002) 24(4) Administrative Theory and Praxis 693-720.
[369] David Levi-faur, 'What is governance' (Governancejournal.wordpress, 2013) <https://governancejournal.wordpress.com/2013/03/10/levi-faur-on-what-is-governance/> accessed 08/04/2017.
[370] Ibid.

Governance in practice has therefore created an informal system of control alternate to, and functional beyond state rule. Bevir and Rhodes describe this shift as being from "*government of a unitary state to governance in and by networks,*"[371] reinforcing the increasing reflection of privatisation. Such a landscape is referred to as networked governance,[372] which is held to supplement and often supplant the stereotypical authority of government.[373] So great is the extent to which this argument is put forward, that writers have claimed that we no longer live in a regulatory state, but instead one of regulatory capitalism;[374] suggesting that perhaps the discussion of deregulation, in fact relates only to *de-state* regulation. According to Rhodes, the power of private actors has created an ability to *"resist government steering, develop their own policies and mould their environments."*[375] Regulation can be argued to have effectively been subjected to corporatisation and even managerialisation,[376] so much so that their influence has questionably surpassed government by filling voids the state cannot through unwillingness or ill-preparedness.[377] As was reflected in much of the self-regulatory literature, the consequence is that private/network governance is characterised by negotiations and interactions that are *"rooted in trust and regulated by rules of the game negotiated and agreed by network participants."*[378]

2.7.1 Private Governance: Informal Authority

The application, use and understanding of governance has evolved parallel to the role government is perceived to have in its operation; emphasising that control, direction, and order is not dependent on and solely attributable to government actors. Sørensen and Torfing go so far as to argue that the state has "*lost its grip and is being replaced by new ideas about*

[371] Mark Bevir and Rod Rhodes, *Interpreting British Governance* (1st ed, Routledge, 2003) 1.
[372] Rod Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1st ed, Open University Press, 1997).
[373] John Braithwaite, 'The Regulatory State' in Sarah Binder and others (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press 2006) 407-430.
[374] David Levi-Faur, 'The global division of regulatory capitalism' (2005) 598(1) Annals of the American Academy of Political and Social Science 12–32.
[375] Rod Rhodes, 'Governance and public administration' in Jon Pierre (ed) *Debating governance: Authority, steering and democracy* (Oxford University Press 2000) 61.
[376] Lauren Edelman and others, 'Diversity rhetoric and the managerialization of law' (2001) 106(6) American Journal of Sociology 1589-1641.
[377] Edward Stringham, *Private Governance: Creating Order in Economic and Social Life* (1st ed, Oxford University Press, 2015).
[378] Rhodes (n 375) 61.

a decentered governance based on interdependence, negotiation and trust."[379] This position reflects the frequent reality that the state often lacks the ability, time, resources and incentive to fulfil its regulatory objectives; leading to Klijn and Koppenjan to observe that government is "*actually not the cockpit*" from which policy and process is controlled – and it is instead an interplay among various actors.[380] To secure compliance across industries, corporate governance assists in the day to day running and control of enterprises;[381] bringing to fruition rules and systems of control which can be set by both the state and the institutions themselves. Private governance regimes acquire notable authority because they in fact form the identification and benchmark of procedures.[382] This gives business actors a great deal of influence over the input of policy process where they regularly impact the design, implementation, acceptance and enforcement of rules.[383] As Stringham argues, similar to the attributes of self-regulation; it is the institutions themselves who know what the issues are, when they exist, how they are defined and how they can be fixed.[384] Through the 'contracting out' of responsibility, private governance has developed into a highly powerful and influential hybrid governing system; working alongside the formal regulatory state structures.

The reality is that the state's role has changed from an authoritative allocator, to an activator of delegated values.[385] The transformation, some argue, is so prominent that the authority of and within private governance mechanisms *"might be that traditional instruments for control of power may become less effective."*[386] This challenges the view that the shift from government to governance has retained the state's capability through a "*state-organised unburdening of the state*"[387] and has even enhanced their aptitude to govern by

[379] Eva Sørsensen and Jacob Torfing, 'Democratic anchorage of governance networks' (2005) 28(1) Scandinavian Political Studies 195–218, 195-196.
[380] Erik-Hans Klijn and Joop Koppenjan, 'Public management and policy networks: Foundations of a network approach to governance' (2000) 2(2) Public Management 135–158, 135.
[381] Bevir (n 361) 3.
[382] UK Finance, 'Anti-Bribery and Corruption Compliance Definition ff Public Officials' (September 2021) <https://www.ukfinance.org.uk/system/files/Anti-Bribery-and-Corruption-Compliance-paper-FINAL.pdf> accessed 18/09/2021.
[383] Doris Fuchs, *Business power in global governance* (1st ed, Lynne Rienner, 2007) 64.
[384] Stringham (n 377).
[385] Rainer Eising and Beate Kohler-Koch, 'Introduction: Network governance in the European Union' in Beate Kohler-Koch and Rainer Eising (eds) *The transformation of governance in the European Union* (Routledge 2000) 5.
[386] van Kersbergen and van Waarden (n 275) 157.
[387] Claus Offe, 'Governance: An "empty signifier"?' (2009) 16(4) Constellations 550-562, 555.

strengthening their own institutional and legal capacities whilst developing closer relations with non-state actors.[388] For governments to steer compliance, if they have 'lost their grip', this presents a concern as whilst the capacities and effectiveness of private actors is important, so too is the state's ability to enforce misconduct.[389] If governance has become too focussed on enhancing the institutional capacities of private actors (predominantly through negotiatory techniques) than it is over enforcement backed incentivisation, this presents an obvious shift in power for how risks and compliance are controlled. To meet the challenges of complex institutions the state is in need of retaining their steering capacities up to and including the use of enforcement.[390] For Krawiec, when a legal regime places an overwhelming and increasing importance on internal compliance structures, and determines liability thereon, this endangers underenforcement.[391] In the case of the UKBA, this translates to a risk of favourable legal treatment being afforded to larger organisations who are able to adopt detailed compliance systems and a correspondingly worse legal treatment of those companies who cannot: risking bias, an under-deterrence of serious corporate misconduct and a proliferation of costly and cosmetic compliance structures.[392]

Decentralisation, market power and the knowledge private actors possess have proven to be effective in creating order and addressing the ineffectiveness of government regulation (as evidenced with the 2001 cyber-fraud attack of PayPal). Governance can and does regularly function independently from the state and has changed from a unitary and centralised system of governing by means of law, rule and order, to more horizontally organised systems *"that govern through the regulation of self-regulating networks."*[393] The ability for corporate actors to develop their own processes and internal criteria with or without state obligation also enables them to establish a system of informal enforcement which they can rely upon to deter or mitigate regulatory/enforcement intervention. This could perhaps be viewed, then, as an institutional governance framework creating structures of compliance between networks of

[388] Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (1st ed, Cambridge University Press, 2009).
[389] O'Brien and Spitzer (n 154) 2.
[390] David Levi-Faur, 'From "Big Government" to "Big Governance?' in David Levi-Faur (ed) *The Oxford Handbook of Governance* (Oxford University Press 2012) 15.
[391] Krawiec (n 351) 491.
[392] Ibid 491.
[393] Sørsensen (n 368) 693.

private actors (within the denoted forum) who together formulate ways of benchmarking how governance is to present itself; which the state then follows in practice. This exemplifies Edelman's argument of the 'meaning' and the often opposing 'making' of the law.[394]

Examples of informal control systems are plentiful. The Fairtrade Foundation, for instance, acts as a body to encourage the adoption of responsible business practices – in their case to make improvements for producers of goods in developing countries regarding sustainable goods. To attract the Fairtrade label, producers and suppliers must achieve the standards set not only by themselves, but the foundation; such as sourcing commitments. In the context of the UKBA, although no such inter-governance regimes are mandated by the state - policies, procedures and standards are inherently developed and modelled by private actors which become a benchmark of legal acceptance. The influence of private networks becomes notably apparent as the industry actors assume a leading role in the creation, attainment and potential enforcement of standards to the extent that the state has been hollowed out.[395] For Rhodes, this demonstrates how power and authority has been eroded from governments towards business communities and non-governmental organisations (NGO).[396] The standards they set are often then taken as barometers of compliance in state enforcement action thus granting private sector governance regimes/frameworks legitimacy. In some networks, if principles are not adhered to, enforcement and sanctioning can be taken by the governance network itself and not the state. The role non-state actors play in defining governance demonstrates how industry developed and self-regulated frameworks become the benchmark for credibility, knowledge and adequacy of standards. Whilst the private sector is typically understood to be a subordinate to government rule, it in fact regularly steers governments towards an acceptance of standards. Examples of such would be the compliance frameworks provided by the International Organisation for Standardisation; and the Environmental, Social, and Governance criteria used for company operations and investors to screen socially responsible projects. So powerful is the autonomous metastasis of private governance and institutionalised rulemaking ability that corporations can end up regulating

[394] Edelman (n 210); Edelman and others (n 288); Edelman 2011 (n 289).
[395] Rod Rhodes, 'The hollowing out of the state: The changing nature of the public service in Britain' (1994) 65(2) Political Quarterly 138–151, 138-139.
[396] Rhodes (n 353) 652.

themselves *"by arranging their operations so that they are subject to…regulatory regimes of their choice."*[397]

2.7.2 Private Governance: De-centralised Empowerment

The power of private governance operating outside the realm of any state body is of key significance to this work. Not only does it provide an example of how governance can apply in practice, but it also exemplifies how it can create, if correctly cultivated and enforced, an informal system effectively establishing a level of legitimacy accepted as both a complement and powerful alternative to public/state regulation.[398] Private/networked governance has entrenched how the state has come to effectively govern at a distance;[399] with the tools and even control being devolved and empowered into the relevant networks/actors. These networks position themselves to assist with the operational efficiency, management and pragmatism inherent with the complexity of market sectors; acting as a horizontal creator of compliance where self-regulating entities (acting within the limits imposed by the state) can produce a functional framework on which these secondary systems of control can operate outside of government intervention. The de-monopolisation of state rule[400] has in effect grown to rely on the benefits of private actors to assist in governing those areas which are beyond the reach of the state. Taking Teubner's expression, this demonstrates a shift from 'hard' to 'soft' law; with the former (conventional legal/legislative rule) being replaced by that directed by private institutions.[401] This has created a facility for governments where outcomes can, on the face of it, be more readily achieved through the interaction and exchange of resources.[402] Whilst the benefits of private governance systems are apparent for efficiency, their independent positioning and comparative relationship to self-regulatory systems have

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[397] Larry Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order' (2011) 18(2) Indiana Journal of Global Legal Studies 751-802, 755.

[398] Kelly Levin and others, 'Can Non-state Certification Systems Bolster State-Centered Efforts to Promote Sustainable Development through the Clean Development Mechanism?' (2009) 44(3) Wake Forest Law Review 777–798.

[399] Andrew Barry and others, *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government* (1st ed, University of Chicago Press, 1996).

[400] Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (1st ed, Cambridge University Press, 1999).

[401] Gunther Teubner, 'The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Codetermination' in Rainer Nickel (ed) *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia 2010) 203.

[402] Lasse Gerrits and Stefan Verweij, 'When Governance Networks Become the Agenda' (2016) 77(1) Public Administration Review 144-146.

given rise to caution of whether governments have thereby retreated from policies of active intervention towards an emphasis of governing through non-enforcement.[403] This perhaps arises in the command and expertise held by these secondary systems which is simply unmatched by state regulators, creating a monopolistic de-centralised strength.[404] Although they are influential, like self-regulation, the resulting concern of private governance is that of its legitimacy and authority;[405] as well as its governability, accountability and responsiveness.[406] Self-governing and self-regulatory systems therefore attract mutual criticism because they may only serve the needs of the regulated parties by producing parameters that purport but in reality fail to address the problems that require regulatory attention. An example of which can be seen with the gross deficiencies and self-preservation infamously revealed with the failures of the global financial crash. The consequences of failed private governance are that traditional methods of checks and balances become obsolete or "*at the very least less effective.*"[407]

The impression attracts a resemblance to governance frameworks being subject to the prisoner's dilemma;[408] the presence of the temptation and/or risk of defection. Ford coincides this with the awareness that the energy required to incentivise good behaviour is significantly more than that allocated to the monitoring, assurance and enforcement of obedience; ultimately impacting the objectivity and effectiveness of the governance initiative as self-governing mechanisms may not always work.[409] Without meaningful accountability and enforcement, weak or irresponsible governance can create nothing more than cosmetic compliance,[410] becoming *"window-dressing mechanisms implemented…to reduce liability or provide the appearance of legitimacy to…stakeholders and the marketplace at large*."[411] This is because the *"indicia of an effective compliance system are easily mimicked and true*

[403] Matias Dewey and Donato Di Carlo, 'Governing through non-enforcement: Regulatory forbearance as industrial policy in advanced economies' (2021) 16(3) Regulation and Governance 930-950.
[404] Ford (n 362).
[405] Benjamin Cashmore 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2003) 15(4) Governance: An International Journal of Policy, Administration, and Institutions 503-529.
[406] van Kersbergen and van Waarden (n 275) 155.
[407] Ibid 151.
[408] Scholz (n 129) 192.
[409] Ford (n 362).
[410] Krawiec (n 351).
[411] Ibid 542.

effectiveness is difficult for courts and regulators to determine, particularly ex post."[412] For Ford, whilst "*it makes sense to enlist the context-specific knowledge of a broad band of stakeholders in a collective, comparative, learning-by-doing regulatory project*",[413] understanding how institutions operate and the weaknesses of self-regulatory governance requires built-in compensatory responses that are designed to address predictable flaws.[414] Without enforcement backed private governance, the tools and networks which seek to resolve the government's desire to govern at a distance stand to malfunction and the advantages of progressive governance concepts can as easily become regressive. It is reasonable to propose that if such approaches to 'new' governance do not show themselves to be actively reducing or enforcing failings, it raises the dangers of under enforcement and over reliance on internal compliance structures. This calls into question *"the increasing influence of negotiated governance models that seek a more cooperative approach to the regulation of business."*[415] Using Krawiec's metaphor, without the implementation and enforcement phases of governance relationships, the 'contract' is incomplete, allowing for opportunistic behaviour, renegotiation and manipulation, and *"two potential problems: an under-deterrence of corporate misconduct and a proliferation of costly – but arguably ineffective – internal compliance structures."*[416]

The reality of private governance has therefore created a haven similar to self-regulation: a mechanism by which the potential dysfunctions of, or poorly equipped state agencies may rely on the facilities and expertise of commercial actors in the hope of producing effective compliance frameworks. This has enabled an informal outsourcing of responsibility where standards set by regulatees are then seen to be reflected in legal policy, procedure and practice. Whilst private conglomerates may not use the same 'big sticks' that the state might, their influence can enable them to set the rules of the game in regulatory negotiations[417] and to corporatize enforcement proceedings.[418] Whilst hailed to act as a suitable gatekeeper for

[412] Ibid 492.
[413] Ford (n 362) 482.
[414] Ibid 444.
[415] Krawiec (n 351) 542.
[416] Ibid 491.
[417] Nancy Reichman, 'Moving Backstage: Uncovering the Role of Compliance Practices' in David Weisburd and Kip Schlegel (eds) *White-collar Crime Reconsidered* (Northeastern University Press 1992) 244-268.
[418] Jordanoska (n 151).

government,[419] the parallels to self-regulation and its subjective design reiterates the critical need for safeguards. That is, that such methods are judged not only by their efficiency, but in how well they perform the role of securing and enforcing regulation. If such processes fail, there remains a need for compliance procedures to enforce wrongdoing (where required). As Braithwaite and Drahos put it, "*ratcheting up standards achieves little without ratcheting up enforcement."*[420]

2.8 Summary

This chapter has illustrated the literature and debates which surround the theoretical methods of corporate regulation and governance. These form the backdrop to the thesis as they relate to the substantive principles and frameworks which are reflected within the UKBA and its approach to enforcing corporate bribery and corruption. Two key points have emerged. Firstly, that there exists a longstanding difficulty in the desired synergy between regulatory methodologies which focus on punishment, versus those advocating persuasion; and secondly, the observations around the changing roles that both the state and commercial entities have come to play in their regulation. Most importantly, however, is the recognition of a relevant permeation: a generational change in regulatory culture – from punishment to persuasion. The result of which has been multifaceted. Firstly, it has shown a diversification of regulation and the rise of self-regulatory agendas; encompassing the limitations of the state towards an emphasis on private and de-centralised self-policing. Secondly (and most appropriately to this work), it has revealed a paradigm shift, where regulatory methodologies have increasingly moved away from command and control, punitive and deterrence approaches towards regimes that are decentralised, self-regulatory/self-governing, cooperative, conciliatory and economically based; questionably eroding the states capacity as an enforcer. Thirdly, and arguably detrimentally, despite many regimes operating an apparent alignment to *enforced* self-regulatory systems, they are increasingly synonymous to declining levels of state intervention and non-enforcement, and demonstrate a clear preference for a strategy of enforcement by bargained compliance.[421]

[419] John Braithwaite and Peter Drahos, 'Ratcheting Up and Driving Down Global Regulatory Standards' (1999) 42(4) Development 109-114.
[420] Ibid 113.
[421] Keith Hawkins, 'Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation' (1983) 5(1) Law and Policy 35-73, 36.

What can be argued from a theoretical context is that the processes surrounding corporate crime control may have fallen victim to becoming a system governed by a reliance and preference on self-regulatory philosophies, where the state has sub-contracted a great deal of their regulatory duties to private actors. Furthermore, the rationalities which support self-regulation have seen those same arguments impact methods of enforcement. Literature has questioned the substance of this shift by expressing the extent to which these changes have served an effective purpose or if its actual impact has become nothing more than an ambivalent formality revolving around economic efficiency as opposed to practical efficacy. Part of this hesitancy is reflected in a fundamental prerequisite to enforced self-regulation; impactful and realistic enforcement – to prevent complacency and to incentivise compliance. Without enforcement or sanctioning to a degree which imposes up to and including criminal liability, the resulting question is whether the repackaging of deterrence mechanisms has de-legitimised the effectiveness of corporate crime enforcement, regulation and liability, its goals and the meta goals of criminal justice and has created the advocated enforcement paradox. If the state is at best rarely and at worst unable to punish corporate misconduct to a degree beyond purely threatening criminal enforcement, this weakens the consequences of corporate criminal wrongdoing and the degree of enforcement probability.

Self-regulatory methods have not been dismissed – but must have the componentry ability upon which they are derived - a responsive and escalatory punitive strategy. This prompts a greater analysis of the proclaimed methods of enforcement used to combat UK corporate bribery for a few reasons. Firstly, its reoccurrence and prevalence questions a degree of regulatory and enforcement futility. Secondly, the increasing preference for justice to be imposed in a compliance orientated, assuaged and negotiated manner diminishes the effectuality of the UKBA criminal intent and the normative argument of criminal enforcement if there is an inclination for settlement and cooperation, favouring sanctioning in a way more modest to 'usual' criminal offences. This platform now leads to the methodology to illustrate the strategy used to obtain the comparative qualitative data.

Chapter 3

Methodology

3.1 Introduction

This chapter presents the methodological approaches and research design adopted. Following the literature review outlining the theories relevant to the enforcement and regulation of UK corporate bribery and crime in general, the work is situated to target the primary empirical focus raised in the introduction. That is, whether the UK is suffering from an enforcement paradox by the declaration of enforced self-regulation and institutionalised responsibility, but the seldom use of its pinnacle tool: criminal prosecution. The research approach seeks to uncover the dichotomy between theoretical legal doctrine and the actuality of enforcement conduct. The research blueprint helped plan how the investigation was to deduce these operational tensions surrounding the value and drawback of the UKBA's enforced self-regulatory nature so as to enhance research and policy development. The work will now outline the strategy taken to examine the above concerns and those cited in the background chapters. This will cover the methodological logic, approaches and its intentions upon which general conclusions can later be drawn. Section 3.2 begins by describing the interlinked scientific research methods used to generate the qualitative information to inform future discussion in this area. Section 3.3 justifies the mixed methods that were used to answer the intentions of this thesis and 3.4 explains the primary data collection tool: interviews. Section 3.5 then proceeds to explain the supportive use of ethnographic observation; 3.6 summarises the data analysis; 3.7 briefs the ethical prerequisites to data collection; 3.8 explores the inherent limits of the work and 3.9 summarises the mixed methodologies used.

3.2 Research Aims and Methods

> *"Scientific research, in both the natural and social sciences, relies on the collection of empirical data, either as a basis for its theories, or as a means of testing them. In either case, therefore, the validity of the*

research findings is determined by a process of empirical investigation."[422]

The above opinion of Chynoweth explains how the collection of data (in this case qualitative) is key to grounding and testing theoretical questions. For this thesis, one such question was whether the approach taken within the UK to enforce corporate bribery is aligned to its legislative, policy and publicised intent; particularly with its self-proclaimed leadership in prevention.[423] What this work contests is that this has been driven with an emphasis, use of and reliance on corporate self-regulatory methods, goals and principles (as imparted by the adequate procedures defence) - rather than processes and practices which actively enforce a compliant culture and are not reliant on negotiating it. This predicament undermines efforts for efficacious regulation, enforcement and compliance as it places a great deal of reliance on corporate entities to police themselves. As was discussed in the preceding chapters, this level of reliance creates a culture where commercial actors are able to guide regulation and enforcement paradoxically. Namely, in their ability to escape criminal enforcement as the state resultingly suffers a difficulty in being able to enforce failed regulation in ways other than negotiated and cooperated settlements, detracting from the deterrence of wrongdoing and the sanctioning of rule breaking. The research therefore included a cross-disciplinary element; covering criminal law, regulatory theory and methods of private governance. The subject of this work required synthesis of these subjects to firstly understand the nexus of interacting topics and secondly, to extend the understanding of how the methods of control and enforcement surrounding UK corporate bribery and corruption have evolved.

This research also needed to answer the extent to which the enforcement of corporate bribery is resolved through punitive enforcement (as per the apparent UKBA rhetoric) or dissuasion by agreement; and what role the state and commercial entities themselves have come to play in choosing a solution to effectively create a compliant culture. These questions are apparent as at the time of writing, the UKBA has been scarcely imposed, governmental

[422] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley 2008) 30.
[423] See House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019), "principal conclusions and overall assessment".

and enforcement guidance remains limited and nor has the legislation been adequately tested before the courts. Therefore, designing a research strategy which directly interrogates this regime, its problems and the paradox was necessary to advocate an increased focus on regulation and enforcement to address the prevalent reality of corporate corruption within the UK.[424] The methods also needed to be informed by an understanding of the conceptual theory of corporate criminal enforcement (such as punishment versus persuasion); as well as the substantive reality of the law in practice so as to provide suitable observations.

To investigate these claims as a growing contemporary problem, the thesis took the approach of covering the subject from two ends of a methodical spectrum: doctrinal and socio-legal. The former could address the predominant analysis of the relevant authoritative provisions (be that theoretical ideologies or legislative) and acted as a necessary precursor to progressive legal questions. The latter then tuned into the concerns and investigative discussions of external perspectives. Both methods compensated their respective and typically cited drawbacks; such as the lack of challenge to legal reality and an insufficient analysis or comparison to the law and/or legal doctrines (respectively). The non-stereotypical hybrid approach thereby supported the need to draw out thematic aims and concepts apparent from the qualitative research. This broadened the reasoning and analytical ability of the work and prevented a finite view to the review process.

3.2.1 Doctrinal

Doctrinal research *"is concerned with the formulation of legal 'doctrines' through the analysis of legal rules."*[425] The process is about the discovery of principles that justify and bring order to the established rules so one can rationalise and reason with the principles derived from the statutory provisions.[426] Doctrinal methods allow for the authoritative materials – and the theories or knowledge they impart - to be tested and analysed. This approach invites a variety of research methods from the interpretation of laws, their descriptions and subsequent commentary, to innovative theory building and synthetisation. This acts as a deductive method from which conclusions can be sourced. Given that doctrine is central to law,

[424] EY, Integrity in the spotlight, The Future of Compliance – 15th Global Fraud Survey (2018).
[425] Chynoweth (n 422) 29.
[426] Ronald Dworkin, 'Legal Research' (1973) 102(2) Daedalus 53–64.

analysing its working(s) through a focus on foundational facts becomes appropriate.[427] This thesis is then heavily reliant on and relatable to the examination of the laws and frameworks, including the primary legislative coverage (the UKBA), the raft of international provisions (such as the OECD Convention) and any complementing provisions (such as the insights from the House of Lords Bribery Act Committee) which have described enforcement culture. The UKBA, through the structure of s.7, presents the essence of the enforced self-regulatory nature that is central to the ambiguities and questions posed by this thesis. Doctrinally assessing the 'black letter of the law', such as s.7 and it's enforced self-regulatory structure, is central to an assessment of how the law is perceived to treat corporate bribery, and the subsequent enforcement ambiguities. This takes the propositions they impose and enquires into their reasoning and application;[428] from which the research can help identify new or highlight emerging solutions. However, despite interpretative commentary, with the act receiving scant testing before the courts, purely examining the law in a doctrinal way would only indicate a legislative intention[429] and not a deeper understanding. In other words, what the law is and what the law has become are mutually appropriate as law does not operate in a vacuum, meaning its development is reliant on the illumination of broader (and often contentious) issues.

3.2.2 Socio-Legal

The socio-legal method supports a doctrinal analysis by questioning how the laws and applicable frameworks come to work in practice; reflecting how these parameters are affected for instance by social, political and economic decisions.[430] These variables proved to be relevant during both the interviews and ethnographic data collection where participants and those observed often referred to enforcement trends having been (and remaining to be) affected by factors such as being seen to respond to societal discontent with corporate offending; the lack of political will to change legislation and to heighten intervention; and the economic costs of prosecution versus the fiscal benefits of DPAs (respectively). So, where

[427] Suzanna Sherry, 'Foundational Facts and Doctrinal Change' (2011) 2011(1) University of Illinois Law Review 145–86, 146.
[428] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Michael McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007).
[429] Anthony Bradney and others, 'How to Study Law' (5th ed, Sweet & Maxwell, 2004) 17.
[430] Ibid 21.

doctrinal research develops the legal propositions, socio-legal research and its contextual discussions proceed to analyse and test those propositions; to discover knowledge within the existing facts. The understanding of legal principles should therefore not be a black letter subject alone as this does nothing to progress knowledge and continuity. Instead, its reality is an instrument of contextual impact with varying rationale and interpretation. As this thesis suggests an enforcement paradox has resulted, it is paramount to discuss more than the law itself; and instead how it may have come to fruition in a way which counters the intentions of corporate crime prevention. By addressing the additional variables (sociological, political and economic), this helps inform the mechanics of how the present situation has been created, what intentions can be derived and where reality contradicts such. Understanding this is key to both formal observations - how it has arrived at its present destination; and informal observations - what this means for wider regulation and enforcement. This was ultimately to be an inductive method through qualitative interviews (as described below). Adopting both doctrinal and socio-legal methods complemented the multi-faceted, opinionated, and dynamic nature of corporate corruption and its common enforcement practices. All of which helps illustrate an understanding of the conflicting elements that are at play, whilst acting as a basis to inform developments.

Marrying the two research methods enabled a spectrum of inquiry over the legal and regulatory perspective as after all, legal analysis is "*not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity.*"[431] In addition, the field of serious economic crime enforcement has and is continuously going through change; be that through new legislation (such as the Criminal Finances Act 2017), the expansion of failure to prevent offences[432] and the Law Commission corporate criminal liability Options Paper 2022.[433] This evolution makes it more vibrant than older statutory provisions as much of the legislation behind corporate bribery is yet to be fully tested in the courts. Therefore, understanding the changing reality of corporate crime and corruption is not a self-contained study and cannot be researched purely through black letter law assessments. Both the law

[431] Richard Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38(4) University of Toronto Law Journal 333-354, 333.
[432] Reportedly set to now include 'failure to prevent fraud' under the Economic Crime and Corporate Transparency Bill 2022.
[433] Law Commission, *Corporate Criminal Liability An Options Paper*, (Law Commission, June 2022).

itself and its extrinsically influential factors are supportive components to analyse the situation to which the law applies. Where doctrinal methods are used to present the law as a coherent net of principles, rules, meta-rules and exceptions,[434] socio-legal supported the discovery of the wider considerations, variables and alternative interpretations that contribute to a substantive analysis.

Whilst this thesis is not written as a comparative study to other jurisdictions, comparative references inevitably formed part of the discussions, interviews and commentary. This not only reflects the global nature and trends of corporate bribery and corruption, but it incorporates how the UK has adopted enforcement tools which originated in other jurisdictions – such as DPAs. Comparing the regulatory and enforcement trends of corporate crime in other countries also enlightened the discussions by transplanting ideas, rules and techniques[435] to support the agenda of this thesis. Salter and Mason argued a comparative approach "*facilitates more critical, questioning attitudes towards laws by undermining the 'taken for granted' positions on legal provisions and practices";* highlighting the peculiarities and distinctive features of certain responses to issues.[436]

3.3 Justifying the Method

Planning an investigation begins with answering the questions of how the collection and subsequent analysis is to be set up and how the selection of empirical 'material' (situations, cases, persons) is to be made.[437] Ragin describes this process as:

> "*a plan for collecting and analysing evidence that will make it possible for the investigator to answer whatever questions he or she has posed. The design of an investigation touches almost all aspects of the research, from the minute details of data collection to the selection of the techniques of data analysis."*[438]

[434] Aleksander Pecznick, 'A Theory of Legal Doctrine' (2001) 14(1) Ratio Juris 75–105.
[435] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) Oxford Journal of Legal Studies 396-406, 398.
[436] Michael Salter and Julie Mason, *Writing Law Dissertations* (1st ed, Pearson Education 2007) 189.
[437] Uwe Flick, 'Design and Process in Qualitative Research' in Uwe Flick and others (eds) *A Companion to Qualitative Research* (Sage 2004) 146.
[438] Charles Ragin, Constructing Social Research (1st ed, Pine Forge Press, 1994) 191.

Choosing and designing a suitable method of research is a crucial decision as the desired outcomes must be matched with the research characteristics and intentions. The Legal Landscape chapter and Literature Review raised explorative questions that challenged firstly the meaning and content of the laws surrounding this field and secondly; the regulatory principles which are designed to govern such behaviour. If - as this thesis posits - there is a paradoxical and underlying disjoint between the theory and practice of how this arena is enforced, enforcement (quantitative) data would not elucidate the problem as it omits the aetiology. Qualitative approaches (in the form of interviews) based on the doctrinal and socio-legal methods were instead undertaken to explore and extrapolate whether common trends and/or opinions exist that point to or reinforce existing weaknesses in the field of UK corporate bribery and corruption.

3.3.1 Qualitative Methods

Simion writes that qualitative research places an emphasis "*on people's feelings, perceptions and experiences in order to explore and understand the meaning individuals or groups ascribe to a social or human problem."*[439] Adopting a qualitative approach enabled as analysis of the cultures, principles and motivations that have determined enforcement/regulatory strategies and whether their aims differ from the practical reality. The goal was to embrace methods of collection that deal with phenomena by analysing experiences, behaviours and relations without the use of statistics and the processing of numerical data.[440] This information was then assessed against the questions that had arisen from the previous chapters so interpretations and conclusions could be drawn. This route created an 'inside out' report; with people commentating who participated or have had experience in the field of corporate crime and corruption. This aligned itself to a core focus of qualitative research in that it "*seeks to contribute to a better understanding of social realities and to draw attention to processes, meaning patterns and structural features."*[441] In other words, word-based research which provides clarity and answers to questions such as how, why, what, when and/or where.[442]

[439] Kristina Simion, 'Qualitative and Quantitative Approaches to Rule of Law Research' [2016] INPROL: International Network to Promote the Rule of Law.
[440] Sharan Merriam, *Qualitative Research: A Guide to Design and Implementation* (1st ed, Wiley, 2009).
[441] Flick (n 437) 3.
[442] Matthew Miles and Michael Huberman, *Qualitative data analysis* (1st ed, Sage, 1994).

According to Maanen, that includes interpretive techniques which tries to describe, decode and translate concepts and phenomena instead of recording the frequency of such.[443]

A broad goal of qualitative methods is to create a degree of flexibility for the researcher by determining the development and detail of the approach; and also to the participant by having questions to consider openly and to selectively direct their responses.[444] Focussing on the self-regulatory nature (and associated weaknesses) of corporate corruption necessitated this method as the inherent discussions were able to address (and challenge) both the known issues and that which is unknown. That is, to firstly confront the laws which surround the field and secondly, to examine if the reliance on self-regulation is a heavy contributor to the paradox this thesis advocates. This method also helped the distinction between "Law in Books and Law in Action":[445] the discrepancy of how the law appears and the dichotomy which empirical investigation reveals. Qualitative methods clarify this variance by showing that understanding legal concepts is not simply the naïve reproduction of known facts – the written legislation. Instead, it is to discover the totality of meanings and representations[446] which reflect how cultures and interpretations impact on the reality.

3.3.2 Semi-Structured Interviews

To develop the required understanding, semi-structured interviews were chosen as the primary method of research as they supported an investigation of the given phenomenon within its natural environment and invited direct feedback towards the subject nature and complexity.[447] The interviews took both a focussed and narrative form. The former helped set the predetermined subject or topic, where the quality and criteria could specifically cover the scope and depth of the research problem – with their personal context and analysis.[448] The latter (and style of questioning) was chosen to promote developmental and semi-structured

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[443] John van Maanen, *Qualitative methodology* (1st ed, Sage, 1983).
[444] Gary Goertz and James Mahoney, *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences* (1st ed, Princeton University Press, 2012).
[445] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) American Law Review 12-36.
[446] Jean-Louis Halperin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) Maine Law Review 46-76, 60.
[447] Izak Benbasat and others, 'The Case Research Strategy in Studies of Information Systems (1987) 11(3) MIS Quarterly 369-386.
[448] Robert Merton and others, *The Focused Interview. A Manual of Problems and Procedures* (1st ed, The Free Press, 1990).

conversation - subject to an open question at the beginning. According to Oppenheim exploratory interviews are not only beneficial to the desired research, but they can broaden and deepen further research; highlighting new dimensions to be studied, suggesting new ideas and hypotheses as well as revealing important differences. This will inherently develop a rich store of attitudes and perceptions whilst also being able to formulate the research problem and its dimensions.[449] Interviews were chosen as the primary method for collection as they not only allow a fluidity to ask questions, but they predominantly offer the capacity to expand on relevant issues, to follow themes that arise in the course of the process and to interpret the data where final conclusions can be drawn on the basis of those observations.[450] Unlike a questionnaire which may have an impersonal or quota sampling feel, interviews are personal and can often achieve better and more informative results.[451] This creates an inherent value by capturing the respondent's own sense of priority, concern (if apparent) and their overall evaluation. Corporate bribery and corruption are inherently complex, so any exploration of a purported issue (in this case the impact of self-regulatory power/reliance and the under-enforcement of corporate bribery) suggested the need for a collection strategy that permitted an abundance of information through informed discussion. Interviews not only permit open-ended questions to facilitate the free flow of information, but they allow for engagement and rapport, which can increase the fertility of material. The arrangement of interviews themselves (when conducted directly with the intended interviewee) often resulted in a pre-established rapport as I had already taken the opportunity to converse; breaking down any significant barriers prior to the interview itself. Whilst more expensive than other means (such as say postal-questionnaires), the benefits presented through interviews were essential to attain nuggets of information and frank commentary.

3.3.3 Approach and Reflections

As a former police officer, I can say with confidence that interviewing, as a method of information gathering, done well, is a skill that requires distinguished development, practice and intuition. A good interview is not adversarial, but conversational and extrapolative. This

[449] Abraham Oppenheim, *Questionnaire Design, Interviewing, and Attitude Measurement* (2nd ed, Pinter, 1992) 67-68.
[450] Yvonna Lincoln and Egon Guba, *Naturalistic Inquiry* (1st ed, Sage, 1985).
[451] Oppenheim (n 449) 81.

is particularly apparent as this research involved interviewing 'elites'; that being those with knowledge, status or those in higher positions.[452] At their most effective, interviewers are required to have the ability to interpret and act upon subtle changes in tone or direction; thereby extrapolating more information by eliciting expert and profound knowledge.[453] Reflecting on and recalling my interviewing experiences as a police officer helped me conduct what Wilkinson refers to as *professional* reflexivity. That was, approaching each interview with my understanding of interview practices; the training received into the effects certain interview styles may have; seeking positive interpersonal dynamics; and adapting communication methods to foster evidential benefit.[454] Interviews thereby cultivate a level of preparation which is unique; helping to develop the background understanding and a sense of the complimentary details which might otherwise appear trivial.[455] To increase the benefit, I approached the interviews recognising the advice of Aberbach and Rockman; to prepare questions which avoided interviewees being strictly closed-off, so they could freely articulate why they think what they think.[456] Doing so could then be followed up by more formulaic questions to extract specific detail.[457] The questions were designed to explore the research problem, not to lead interviewees down a predetermined path shaped by my own beliefs towards. Although I reflected upon my own values and interpretations of the landscape[458] - i.e the intention to explore an enforcement paradox - the interviews were designed to be "*a springboard for interpretations and more general insight*."[459]Whilst far from claiming to be an expert in the interviewing process my familiarity assisted me in the preparation of premediated challenges to likely issues, an interview plan and to probe particular points. This facility is of course not possible with less direct and interactive qualitative methods.

[452] Teresa Odendahl and Aileen Shaw, 'Interviewing elites' in Jaber Gubrium and James Holstein (eds) *Handbook of Interview Research: Context and Method* (Sage 2002) 301.
[453] Alexander Bogner and others, *Interviewing Elites* (1st ed, Palgrave Macmillan, 2009).
[454] Sue Wilkinson, 'The role of reflexivity in feminist psychology' (1988) 11(5) Women's Studies International Forum 493-503.
[455] Odendahl and Shaw (n 452) 313.
[456] Joel Aberbach and Bert Rockman, 'Conducting and Coding Elite Interviews' (2002) 35(4) Political Science and Politics 673-676, 674.
[457] Sharon Rivera and others, 'Interviewing Political Elites: Lessons from Russia' (2003) 35(4) Political Science and Politics 683-688.
[458] Fiona Devine and Sue Heath, *Sociological Research Methods in Context* (1st, Bloomsbury Publishing, 1999).
[459] Linda Finlay, 'Negotiating the swamp: The opportunity and challenge of reflexivity in research practice' (2002) 2(2) Qualitative Research 209–230, 215.

3.4 Interviews

To assess and challenge the UK approach towards the enforcement of corporate bribery advocated an explorative methodology; interviewing participants across the field to obtain a broad spectrum of qualitative data. In-depth qualitative interviews are highly suitable methods of exploring and describing areas of personal experience, generating ideas and in addressing the context of possible social action.[460] Qualitative interviews have been described as and relatable to interpretative sociology. This is due to:

> "*The possibility of enquiring openly about situational meanings or motives for action…collecting everyday theories and self-interpretations in a differentiated and open way, and also because of the possibility of discursive understanding through interpretations*…"[461]

Eleven participants took part in formal interviews, mostly conducted on a one-to-one basis, covering a range of experts within the UK. This included government and policy officials, the SFO, non-governmental organisations, specialist legal practitioners and compliance officials. In addition, a plethora of informal 'off the record' conversations were had with commercial executives, lawyers and anti-fraud staff in the private sector. The formal interviewees were selected on the basis of their capacity to draw upon practical experience (including international work) in addition to their familiarity both pre and post UKBA. This collection of subjects offered objective and diverse insights into the debates, decisions and processes that have shaped contemporary practices - from both private and state perspectives – to help understand why approaches have been chosen, what their interpretations are and where the field could be improved.

The interviewees (and their affiliated organisations) were selected due to their prominence and expertise within the field of corporate crime, anti-bribery and corruption; in regard to

[460] Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (2nd ed, Sage, 2012). See page 39 for details on the advantages of this qualitative method of data collection.
[461] Christel Hopf, 'Qualitative Interviews: An Overview' in Uwe Flick and others (eds) *A Companion to Qualitative Research* (Sage 2004) 203.

enforcement, compliance and regulation. Selection was broadly based upon the following question; who can provide the best information and insight into enforcement realities? When it came to devising the more specific questions, the approach taken was to enable me to obtain perceptions that would permit a contribution to the concerns in this field – and that proposed by the project.[462] Prior to conducting the interviews, I devised questions which targeted the participants' expertise whilst having a background focus on the underlying concerns of this thesis – with oversight undertaken by my supervisors. Two concerns arise during the process of devising questions: firstly, that they will yield useful, relevant and informative data, and secondly, that the recipient will care about the questions – the "so what?" criterion.[463] This has been referred to as 'operationalising'; translating the research into *"specific, concrete questions to which specific, concrete answers can be given."*[464] Doing so helped guide what the questions intended to inform - within the scope of the research. This constituted a purposive sampling strategy to acquire the desired information, although issues of convenience and availability also impacted this process.[465]

The interviewing/sampling process predominantly took place over the course of 12 months and concluded for two reasons. Firstly, the 'recruitment' of interviewees became stagnant. Whilst emails were sent and requests made to over forty potential participants, it became evident that there was i) limited appetite (certainly from state officials) to engage in a meaningful discussion surrounding the enforcement (or the lack thereof) of corporate bribery; ii) scant interest from corporate executives to discuss the impact of corruption enforcement (be that due to availability or otherwise); and iii) little interest in respondents to follow-up on my invitation(s). The second and more important was that of theoretical saturation. Described by Glaser and Strauss as "*the criterion for judging when to stop sampling the different groups pertinent to a category*", it confers the point at which clear

[462] Maggi Savin-Baden and Claire Howell-Major, 'Research questions' in Maggi Savin-Baden and Claire Howell-Major (eds) *Qualitative Research: The essential guide to theory and practice* (Routledge 2012).
[463] Louis Cohen and others, *Research Methods in Education* (6th ed, Routledge, 2007) 78-99.
[464] Ibid 81.
[465] Martyn Denscombe, *The Good Research Guide: for Small-Scale Social Research Projects* (1st ed, Open University Press, 1998) 14.

similarities and themes have emerged from the data.[466] When it became apparent that no new data was being revealed and repeated themes were emerging, data collection ceased.

i) Contact and Access

Contact was made with the participants through a variety of formal and informal methods. Formally, research was conducted along with recommendations to draw up a list of preferred candidates (such as the Director of the SFO) who were then emailed or written to. This was often possible with publicly available email addresses but was at the very least tackled via an official request for access through the employer/organisation. Informally, this included contacts physically met and/or obtained through conference attendance, professional placements and third-party referrals. In those cases, participation was posited as a result of casual conversation or in the subject passing on my email address. The challenge then became to narrow down the list of potential interviewees more finitely; as the recommendations, experts in the field and desirables were somewhat exhaustive. Eliminations were often determined by the participants unavailability and/or whether they responded to my invites. This list this was compiled into a spreadsheet where I was able to track developments; such as agreements or rejections, dates of interviews and where/how the relevant consent forms had been conveyed.

For a researcher, how you are to gain access to the material required forms an important element to the work. Laurila described access in three ways: formal - through official agreement and terms; personal access - through connections; and finally through a developed rapport or organisational collaboration.[467] Although the project required UK access alone, it was not always easily attainable. A considerable amount of time was spent on this task; an issue seldom focussed on or written about.[468] This supports Van Maanen and Knolb's warning that gathering research is not a process to be taken lightly; where both opportunity and

[466] Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (1st, Routledge, 1967) 61.
[467] Juha Laurilla, 'Promoting Research Access and Informant Rapport in Corporate Settings: Notes From Research on a Crisis Company' (1997) 13(4) Scandinavian Journal of Management 407-418.
[468] Martha Feldman and others, *Gaining Access: A Practical and Theoretical Guide for Qualitative Researchers* (1st ed, AltaMira Press, 2003).

planning come into the equation.[469] In some cases, irrespective of a connection, it became apparent to develop the trust and acceptance of the participants to even progress the enquiry. The fact that specific people had been selected for their knowledge and expertise often facilitated their willingness to support the project. However, it was quite frequently evident that the research was perhaps less welcomed; potentially due to considerations of subject or question sensitivity.[470] Gaining access to respondents proved to be a significant research hurdle as did overcoming the lack of comfort many people had in discussing granular details about the enforcement (or lack of) of corporate bribery and corruption. Oppenheim adds that an inherent problem lies within the fact that interviews are perceived as not being an ordinary conversation - despite framing the invitations openly with the desire to be conversational. Consequently, the concept of entertaining a social research interview may either *"not exist or is vigorously resisted precisely because it is not an ordinary conversation."*[471] More appropriately to the topic of bribery and corruption, participants may also "*fear the potential use to which their responses might be put*";[472] from which they are often on their guard.[473] These points were regularly apparent during this process with some subjects requesting that any direct quotations and its context be emailed to them before publishing. This led to the decision to anonymise some quotations to prevent any restrictions or retractions.

ii) Selection and Recruitment

The interviewees were then met from the end of 2018, throughout 2019 and into 2020 (due to varying availability and response times). In many cases, participants included a notable level of seniority in key government positions, such as the SFO whose role it is to investigate and prosecute large scale corporate crime – including bribery and corruption. Obtaining a spread of characteristics within the interview population was desirable to make the data as

[469] John Van Maanen and Deborah Kolb, 'The Professional Apprentice: Observations on Fieldwork Role into Organisational Settings' (1982) 4(1) Research in Sociology of Organisations 1-33.
[470] Fevzi Okumus and others, 'Gaining access for research: reflections from experience' (2007) 34(1) Annals of Tourism Research 4-26.
[471] Oppenheim (n 449) 65.
[472] Ibid 66.
[473] Linda McDowell, 'Elites in the City of London: Some methodological considerations' (1998) 30(12) Environment and Planning A: Economy and Space 2133-2146, 2137.

reflective of a variety of different experiences and contexts as possible. As Oppenheim puts it:

> *"Exact representativeness is not usually necessary, but we need a good spread of respondent characteristics so that we can reasonably hope to have tapped respondents of every kind and background."*[474]

Once participants had agreed to meet they were interviewed for approximately one hour depending on their availability - and more practically - the openness in discussion. Even when this time frame was set, problems which arose included whether interviewee's provided relevant answers, and transversely, whether their insights would actually divulge impactful information.[475] A handful of interviews were also arranged, cancelled due to schedules and the subjects subsequently failed to respond to follow-up invites. Interviews were either conducted in person or via Skype – depending on the preference of the participant. In a handful of cases, whilst the desired subject was not able or willing to be interviewed, alternative contributors were offered – such as team members or colleagues. Once access was achieved, representatives from NGOs were most supportive and relaxed with legal and compliance representatives following not far behind. However, key to the research was to obtain insights from government, policy and enforcement personnel. Access to primary prosecutorial departments such as the SFO was commonly met with a friendly but closed door – as were invitations sent to other government or authoritative organisations including the OECD, the World Bank and the Home Office Joint Anti-Corruption Unit. It was conveyed on more than one occasion that it would not be 'appropriate' for the intended party or organisation to be interviewed in this way and to comment on such matters. The regular result was a referral to public policy documents which provided little insight (and especially investigate critique) into granular details.

Reiner discussed these issues noting that the problem researchers have in accessing bodies (such as law enforcement) is that they are 'outsider outsiders'; being of no formal status thus

[474] Oppenheim (n 449) 68.
[475] William Foddy, *Constructing Questions for Interviews and Questionnaires: Theory and Practice in Social Research* (1st ed, Cambridge University Press, 1993) 138.

lacking any mandate to necessitate cooperation.[476] This limited access to the 'frontline' actors who were likely to be best placed to comment on enforcement processes, their justifications and evident weaknesses. The difficulties experienced in this regard have been described as a "*brick wall of non-cooperation*";[477] an existence for small scale researchers given the "*wide-ranging institutional mistrust of `outside outsider' researchers*".[478] As a result of such issues, small scale regulatory research has come under significant criticism as without established 'credentials'[479] or known profiles,[480] significant impediments exist which obstruct the flow of the project and limit the potential spectrum of the research.

Despite these impediments, following a number of emails (through a rather assiduous process) and some interrogation, contact was eventually made with strategic officials including the former Director of the SFO, the Chief of Policy and Strategy and previous Special Counsels. More often than not, productive results were achieved by naming who had recommended or referred me. In some instances, questions had to be submitted prior to the interview – although these invariably altered during conversation. This process predictably sought to extract the direction of my questions; presumably so the participant (and/or their organisation) could form a judgment on whether I had any adverse motives and if they should even engage in the process. Whyte described this as ideological screening where researchers can be denied access or support if negative evaluation of the person or organisation is perceived to be possible.[481] In other words, they have the power to protect from intrusion or criticism.[482] To best anticipate these enquiries, initial approach/first contact emails were viewed by my supervisor to ensure there had been some oversight of their impartiality and that I was entering discussions with no premediated associations.

[476] Robert Reiner, `Police Research' in Roy King and Emma Wincup (eds) '*Doing Research in Crime and Justice*' (Oxford University Press 2000) 222.
[477] Paul Almond, 'Investigating health and safety regulation: Finding room for small-scale projects' (2008) 35(1) Journal of Law and Society 108-125, 117.
[478] Reiner (n 476) 222.
[479] Almond (n 477) 118.
[480] Reiner (n 476) 205-235.
[481] David Whyte, `Researching the Powerful: Towards a Political Economy of Method' in Roy King and Emma Wincup (eds) *Doing Research in Crime and Justice* (Oxford University press 2000) 419-429, 420.
[482] Robert Mikecz, 'Interviewing elites: Addressing methodological issues' (2012) 18(6) Qualitative Inquiry 482-493.

iii) Conducting the Interviews

The interviews begun with a brief explanation of the thesis and its intentions. This was supplemented by the ethical processes surrounding informed consent and the recordings of the interviews (please see the Ethics and Data protection section below). The process was not necessarily data collection, but ideas collection.[483] This started with an open question to decisively set the general direction and to act as an invitation for the participant to talk freely; exposing their experiences and feelings about the subject.[484] The main questions covered the regulatory frameworks imposed on corporates within the UK (in regard to bribery in particular); the enforcement tools used by the SFO; whether these methods were felt to be effective in the context of corporate self-regulation; how enforcement was viewed by those on the receiving end; the ability of the SFO to enforce serious economic crime; what improvements could be made in the context of the UKBA's corporate enforcement and; where deficiencies existed.

Each interview followed a semi-structured process as it promoted spontaneity and indicated a sense of a free-flowing conversation. Depending on the participant, some questions were edited or removed to reflect the interviewees expertise and the best use of their time. The questions were constructed surrounding the project hypothesis; intended to either confirm existing assumptions or to discover new information. Strauss referred to this as generative questions; *"…that stimulate the line of investigation in profitable directions; they lead to hypotheses, useful comparisons, the collection of certain classes of data, even to general lines of attack on potentially important problems."*[485] Although some questions were premediated (and occasionally outlined on request) to develop a general direction, no rigid structure was imposed to prevent inadvertent restrictions and to promote insightful responses. This approach is according to Oppenheim more effective as an exploratory tool, as it allows for the discovery of themes that may not have been anticipated prior to the investigation.[486] Where interviewees were evidently willing to talk at length, this was permitted; often with ad hoc questioning where additional/related points were discussed. Conversely, some

[483] Oppenheim (n 449) 67.
[484] Steiner Kvale, *InterViews. An Introduction to Qualitative Research Interviewing* (2nd ed, Sage, 2004) 128.
[485] Anselm Strauss, *Qualitative Analysis for Social Scientists* (1st ed, Cambridge University Press, 1987).
[486] Oppenheim (n 449) 65-81.

participants appeared more reserved in their responses where the structure consequently acted as a fallback. This supports Alvesson and Sandberg's suggestion that, in reality, the questioning comes to take a more iterative, evolutionary and interactive style as opposed to being strictly linear and formulaic; promoting and referring to current debates, concerns and possible literature.[487] As Bryman put it, although questions are significant (particularly in qualitative studies), research should avoid a "*dictatorship of the research questions*",[488] so not to steer the enquiry inappropriately. Legewie described this process as being one of stage management; where the interviewer must identify with the responses and perspective received whilst simultaneously progressing action.[489] During the interviews, to facilitate the progress, I also ensured I had some ability to make notes, so I was able to monitor what was being said. This was important as in the middle of a discussion, so not to interrupt the flow, having noted important points enabled further questions and prompted connections.

To compensate the variety inherently created by such live discussion, a general direction was always maintained through a broad discussion of a sequence of issues.[490] Critical to the process was to allow them to discuss that which they felt was important – without losing focus on the transcending theme of the interview. Whilst there was a structure, questions were not necessarily asked in order to permit the interviewee freedom to expand. This required an objective application where no subjective influence was imparted on the interviewees; avoiding for instance the premeditated attitude, culture and/or ethos of the researcher.[491] The interviews – whilst hopefully fruitful – were not intended to be an undirected conversation. Although there was an obvious exchange, an interview should essentially be a one-way process; where questions are met with factual answers, perceptions and attitudes. However, to do this, interviews were aimed to be open ended, non-directive and informal; with the interviewer playing a minimal role to allow the participant to take the

[487] Mats Alvesson and Jorgen Sandberg, *Constructing Research Questions: Doing Interesting Research* (1st ed, Sage, 2013) 22.
[488] Alan Bryman, 'The Research Question in Social Research: What is its Role? (2007) 10(1) International Journal of Social Research Methodology 5-20, 14.
[489] Heiner Legewie, 'Interpretation und Validierung biographischer Interviews', in Gerd Jüttemann and Hans Thomae (eds) *Biographie und Psychologie* (Springer 1987) 141.
[490] Denscombe (n 465) Chapter 7.
[491] Elliot Eisner, *The enlightened eye, qualitative inquiry and the enhancement of educational practice* (1st ed, Macmillan, 1991).

lead.[492] This balanced the serious intentions/nature with the flexibility to attract information. The interviews were audio recorded where possible and if permitted so a more accurate record could be kept. As well as recollection, it assisted in capturing the tone and inflection of what was said. As discussed in the Ethics and Data protection section, the transcripts were made available to the participants for their perusal.

3.5 Ethnographic Observation

A supporting and often precursory element to the interviews was my attendance at conferences and seminars. These were directed either specifically to the field of anti-bribery and corruption or the related umbrella of financial crime which brought discussions of the former. As aforementioned, many intended interviewees were simply unreachable; be that in their availability or their lack of response. The result of this barrier and the known difficulties in discussing corporate corruption[493] supported the need to collect information and canvass opinions by as many means possible and in less direct capacities. Attending these events embodied the research intentions of professional ethnography through participant observation[494] - a common feature of qualitative research.[495] Put simply, the aim of this method is *"to develop a holistic understanding of the phenomena under study that is as objective and accurate as possible given the limitations of the method."*[496] Conducting observational approaches supported the later interview stage in two ways. Firstly, when designing the questions, informed insiders helped develop and hone the lines of inquiry as the research went along. Secondly, it assisted the interview process itself by helping to turn the discussion to key points of contention that had been observed. For instance, when interviewing the SFO, having seen many practitioners comment on the lack of investigative and enforcement activity by the agency, it provided an opportunity to frame a common concern of stagnation and to invite responses. Doing so helped to build theories by describing situations as they had been conveyed and presenting patterns within the applicable context.

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[492] Oppenheim (n 449) 67.
[493] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1st ed, Routledge, 1984) 13.
[494] Christian Luders, 'Field Observation and Ethnography' in Uwe Flick and others, '*A Companion to Qualitative Research'* (1st ed, Sage, 2004) 222.
[495] James Spradley, *Participant Observation* (1st ed, Waverley Press, 2016).
[496] Kathleen DeWalt and Billie DeWalt, *Participant observation: A guide for fieldworkers* (1st ed, Altimara Press, 2002) 92.

Expressions of interest and my status as a PhD researcher were generally welcomed - permitting attendance at some prominent industry events. Although these were directed by predetermined schedules, the topical insights and breadth of discussion commonly raised relative material whilst immersing me within a forum of knowledge. Particularly as these events were led by and invited presentations from leaders within the field (from across the globe); such as directors of corporate compliance, experienced legal advisors, anti-corruption figures, and senior state/prosecutorial officials. Topics covered everything from internal investigations and compliance agendas to enforcement tendencies and SFO statements. This subsequently offered an excellent opportunity to discover the practical realities, developments and mind-sets of corporate crime enforcement. Although I often had little to no involvement, simply listening to and observing often intense debates and sporadic questioning elicited some stark information and perceptions. This was particularly the case for instance when compliance or legal advisors went 'head-to-head' with officials from the SFO – asking far more direct and intrusive questions. Much of which would later be continued during networking breaks. Listening to and engaging within these open and frank peer-to-peer discussions offered the benefits of critical realism[497] as they represented – in their own terms and experience – "*the irreducibility of human experience*."[498] Critical realism measures the underlying causal relationships between social events and provides an increased understanding of the issues by which it is able to offer strategic recommendations to address known social problem(s).[499] It recognises knowledge as being "*a subjective, discursively bound (i.e. transitive) and constantly changing social construction*."[500] This benefited the research as it acknowledged the existence of opposing views which give critical context to the reasons for and the complexity of enforcement reality - rather than simply describing it. Hearing candid discussions of the ways in which UK corporate bribery is enforced (or proclaimed to be) informed the research by distinguishing between the epistemology (what we know) and ontology (what is real).[501] This bolstered what the interviews uncovered by

[497] Roy Bhaskar, *Reclaiming Reality: A Critical Introduction to Contemporary Philosophy* (1st ed, Routledge, 2010).
[498] Paul Willis and Mats Trondman, 'Manifesto for ethnography' (2000) 1(1) Ethnography 5-16, 5.
[499] Amber Fletcher, 'Applying critical realism in qualitative research: methodology meets method' (2017) 20(2) International Journal of Social Research Methodology 181-194.
[500] Steve Vincent and Joe O'Mahoney, 'Critical Realism and Qualitative Research: An Introductory Overview' in Catherine Cassell and others (eds), The SAGE Handbook of Qualitative Business and Management Research Methods: History and Traditions (1st ed, Sage, 2018), Chapter 13, 2.
[501] Vincent and O'Mahoney (n 500) Chapter 13.

generating insights which are revealed from the unique dynamics of inter-peer discussion(s): explaining events in their natural settings as pertaining to the research question surrounding if a paradoxical enforcement phenomenon was occurring. Realistic reflections also helped inform the multitude of theoretical propositions which acted as a baseline for this work: such as the problems with enforced self-regulation; the risks of cosmetic compliance; enforcement agency bargain and bluff tactics; and the power of private governance. The combination of insights from experience and the dynamics between key (and opposing) players helped capture the details of what contributes to prosecutorial difficulty.

All of the conferences and seminars attended operated under the Chatham House Rule.[502] In accordance with its principles, although names and topics were attributed for publication of the event, the association of identity (explicitly or implicitly) to specific information or personal opinions generally remained anonymous unless otherwise stated. This applied to the notes I took during each occasion. In the event that something specific was stated and further information or clarity was desired, I followed-up where possible with a personal approach via email or discussion during networking intervals. Where or when this led to formal interview, any reference was appropriately attributed to the person in accordance with the procedures denoted in this methodology. Being around the in-depth free flow of discussion imparted a sense of direction - the backstage culture[503] - which informed future interviews as they enhanced my awareness of key debates and trends. Thomas referred to this arguing that by conducting observation, the researcher can recognise the possibility they have neglected crucial questions which otherwise would not be asked[504] - "*not out of stupidity or laziness, but because he or she did not know they were there to be asked*."[505] This enhances informative collection "*through relatively intense, prolonged interaction with those persons being studied and first-hand involvement in the relevant activities."*[506] Being part of that environment, taking notes and on occasion being involved in the direct discussions raised

[502] Details provided at: https://www.chathamhouse.org/chatham-house-rule.
[503] Victor DeMunck and Elisa Sobo, *Using methods in the field: a practical introduction and casebook* (1st ed, AltaMira Press, 1998) 43.
[504] Marc Simon Thomas, 'Teaching Sociolegal Research Methodology: Participant Observation' (2019) 14(4) Law and Method 1-16, 2.
[505] Christina Toren, 'Introduction to mind, materiality and history' in Henrietta Moore and Todd Sanders (eds) *Anthropology in theory: Issues in Epistemology* (Wiley Blackwell 2006) 204-219.
[506] Thomas (n 504) 2.

awareness and understanding of becoming an 'effective observer'; seeing the context, details and nature of the activity.[507] The immersion of this method produced meaningful insights into the explicit and tacit realities of corporate crime and its enforcement as open conversation invites knowledge of how and why actors behave the way they do.[508] Unlike the interviews, there was in essence no time restriction with participants being there over the duration of the conference. This was extremely helpful as the greater the time spent within that environment, the greater the quality of data collection and the better I was able to contextualise and interpret it, serving me as both a tool for collection and analysis.

However, the process of observation (especially at event attendance) presents an inherent lack of control over the content. Unlike interviews where my role was to effectively guide the process, at these events I was conversely guided by the process; moving with the conversation in spite of its strict relevance. This issue creates another drawback of observational research – that of subjectivity. Johnson and Sackett caution that as the researcher is left to observe what they want to observe, this can lead to select-bias and not a true representation of the given culture.[509] As a result, confirmation bias can arise in selecting or preferring who the key informants are to be and in later presenting the findings if those interpretations (and the importance given to commentary) are not recorded in an un-bias way.[510] I fully understood and was aware of these criticisms when attending such events and that the insights gained – whilst valuable – were not blindly accepted as a definitive representation of those who spoke. To ensure my work was independent and adhered to the appropriate ethical standards, I followed the advice of Johnson and Sackett who advocate that observation be systematic and structured; through broad sampling and to ensure no data was neglected. To further the ethical standards and reliability, as discussed above and where possible, I followed-up on key commentary so the claims could be clarified and expanded upon to reinforce its accuracy.[511]

[507] DeWalt and DeWalt (n 496) 69.
[508] Spradley (n 495) 7.
[509] Allen Johnson and Ross Sackett, 'Direct systematic observation of behaviour' in Russell Bernard (ed) *Handbook of methods in cultural anthropology* (Altamira Press 1998) 301-332.
[510] Such as the Mead Freeman controversy; James Cote, 'The Mead–Freeman Controversy in Review' (2000) 29(5) Journal of Youth and Adolescence 525-538.
[511] Anne Marshall and Suzanne Batten, 'Researching across cultures: issues of ethics and power' (2004) 5(3), Forum: Qualitative Social Research Art.39.

3.6 Data Analysis

According to McCracken, the aim of analysing qualitative data is to isolate and define categories, before determining the relationships that inform how a respondent really sees and interprets a subject.[512] To achieve this the data was analysed using thematic analysis methods.[513] Drawing out themes from the data gathered incurred an important interpretive responsibility to adequately reflect the views of participants. This process began with the ethnographic observation and conducting the interviews themselves: taking initial notes and beginning to map out thoughts, feelings and concerns in line with the subject matter and intentions of the thesis. Once each interview was conducted, the recording was sent for professional transcription. This produced an accurate record and offered the certainty that I would not miss pivotal comments during my personal note taking at the time of interview.[514]

3.6.1 Thematic Identification

In order to start grounding the concepts, whilst waiting for each transcription I collated my notes, contextualised them and began to identify the themes uncovered – alongside those revealed through the ethnographic observations. Beginning the thematic process at this stage permitted the data to be processed gradually and organically, recording topics as they came up: rather than all at once, at the end and with a larger data set to identify themes from. The advantage was the ability to go into further interviews with a heightened sense of developed questions, awareness of concerns, or at least issues to raise – such as the cost of prosecutions or the potential resource deficiency of the SFO. This allowed me to become more immersed in the data which in turn generated a growing list of factors (new or repeated) by which interviewees were judging the UKBA and the methods of enforcement.

Throughout the process I continually revisited the interviews to help identify patterns, prominent issues and if indicative terminology was used. Making use of my notes and the recordings helped me verify the themes at the transcription phase, indicated where points

[512] Grant McCracken, 'The Long Interview' (1988) 13(1) Sage University Paper Series on Qualitative Research Methods.
[513] Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) Qualitative Research in Psychology 77-101.
[514] As I was working throughout my research period, seeking transcription services saved significant time as this is typically a highly laborious task and something which my funding contributed towards.

were contested and identified new concepts that I may have overlooked. It was important throughout this process to ensure the co-dependent relationship of themes was not lost as this was critical to understanding the effects of enforcement tendencies (or lack thereof) and to make sense of the factors which contributed to what this work calls an enforcement paradox. Therefore, the findings were categorised (coded) and presented in a manner which extracted and abridged the core elements of each testimony, to allow the data to illustrate the themes, conflicts and ultimately the aims of this thesis.

3.6.2 Establishing and Coding the Data

Although the thesis began with a pre-established concern surrounding the growth of non-prosecutorial enforcement of corporate bribery (based upon known concerns), the factors which may have contributed to this; are exacerbating it and any focal points of contention needed exploration. Against this background, it is acknowledged that a purely inductive process may create interpretation of evidence in a way that is favourable to an existing belief or hypothesis. However, the research could not, conversely, adopt a deductive process of theory building as this would lean too heavily upon the formation of a conclusion based on *generally* accepted statements or facts. It instead followed what Layder refers to as adaptive theory,[515] allowing a blend of both inductive and deductive methods that also integrates commonly shared understandings whilst permitting the elaboration of new theories. Adaptive theory finds its origins in grounded theory, which focuses on symbolic interactionism. This basis was suitable for the research as grounded theory pursues the meaning of a reality which is constantly changing, through interpretations and actions: generating a theory from data.[516] Thus, adaptive (and also grounded) theory enables an exploratory investigation to seek an emerging theory and to help paint a clearer picture: drawing on the respondents' experiences whilst giving consideration to known ideas or concepts. As Layder puts it, this produces "*an enhanced or more accurate rendering of the nature of (the) social reality under scrutiny*", contributing to the "*formulation and presentation of ever more powerful explanations of social phenomena*."[517] Following such a methodological approach is, for Strauss and Corbin, well suited for researchers who have a

[515] Derek Layder, *Sociological Practice: Linking Theory and Social Research* (1st ed, Sage, 1998).
[516] Glaser and Strauss (n 466).
[517] Layder (n 515) 142.

"*sense of absorption to the work process*" and intend for it to impact both academic and non-academic audiences.[518] These merits reflected my ambitions for this work and for it to extend beyond academic analysis, and to convey a reality of corporate bribery enforcement practice.

Coding the data typically followed a manual inductive process: creating themes based on and arising directly from the qualitative data itself.[519] A manual process was chosen over computer assisted software as I wanted the development of material to be one of immersed inductive reasoning, personal thinking and theorisation. Ultimately, software packages do not conduct the analysis for the researcher and the researcher must still detect the themes relevant to their work, decipher content and decide how to collate the data.

As the data collection progressed, I adopted a set procedure for coding:

1. Keeping records of the apparent themes from the ethnographic observation and retaining these to compare against that revealed during the interviews. The second limb of this stage was to extract comprehensive detail from the interviews themselves. I coupled my notes taken at the time, listened back to the interviews and did so whilst reading the transcriptions provided. This was vital to detect and piece together any nonverbal cues. Tone of voice (e.g. frustration, laughter), the speed/intensity and what the interviewees chose to emphasise reflected what the written transcripts could not do so alone. These moments may drastically affect the meaning or intention of what was said and supplies contextual detail which a transcriber may have made selective inclusion decisions about.[520] Having revisited both the ethnographic commentary and the interviews, it revealed reoccurring themes and dynamics relevant to the aims of the thesis - such as political will; the cost of enforcement; resource deficiencies and the power of corporate actors in creating reliance and/or dependency on self-regulation.
2. These themes and topics of contention were then collated and categorised to decide what quotations should appear in which category (based upon the content of the

[518] Anselm Strauss and Juliet Corbin, *Basics of qualitative research: Grounded theory procedures and Techniques* (1st ed, Sage, 1998) 6.
[519] Glaser and Strauss (n 466).
[520] Judith Lapadat, 'Problematizing transcription: Purpose, paradigm and quality' (2000) 3(3) International Journal of Social Research Methodology 203–219.

quotation). At this stage, I also denoted the data according to the person it originated from and the position they held: such as the SFO or private practitioners as this would reflect poignant opposing interpretation(s).

3. I finally looked for evidence of commonality within each theme to detect if relationships were appearing, or where there were obvious disagreements that bolstered the argument of an enforcement paradox – such as the disparity in views between those from a state agency and those which were not. This approach to coding was an iterative process. Although it took longer than a deductive approach, it was more thorough and offered a progressive view at the themes throughout my data. This helped to examine the differences and similarities between the apparent viewpoints in an unbiased capacity – noting the themes as they emerged which appropriately captured the aims of the research.

Coding the material was not selective and adopted both open and axial processes: recording the themes as they arrived to invite new understandings and theoretical possibilities. The origin of the data was divided up into and described based upon the position from which they came (such as the SFO, private practitioners, or anti-corruption researchers). Connections were later sought to piece together the materials and align them to topics of contention.

3.6.3 Interview Data Selection

To present the findings it was necessary to extract and abridge the core elements of each testimony.[521] Selecting appropriate interview excerpts was a difficult process but one which was done according to the themes identified and in regard to the nature of the questions sought by this thesis. The approach taken was to pragmatically follow the coding process and themes identified to triangulate, compare, document and validate the apparent views.[522] Selecting which quotations to use was done in a way which attended to the subject matter and sought the interweaving micro-features, elements and contexts.[523] This involved both

[521] Phil Scraton, *Power, Conflict and Criminalisation* (1st ed, Routledge, 2007).
[522] Deborah Finfgeld-Connett, 'Generalizability and transferability of meta-synthesis research findings (2010) 66(2) Journal of Advanced Nursing 246-254.
[523] Layder (n 515) 144.

intuition and followed a selection process guided by the aims of and themes identified through the research.

To ensure the research themes were referenced, each subsection involved taking descriptive quotations which revealed the interrelation of factors and demonstrated personal observations within a wider set of opinions. This approach enabled me to address prominent concerns, contextualise the respondents' experiences and link this to the research themes in a way that did not isolate their views. At times, this meant revisiting previously discussed themes: but this was a necessary consequence to reflect the respondents' reality. Particular attention was given to include quotations which were conveyed with heightened emotion or importance as these clearly reflected an important insight from the respondent. No viewpoints were ignored that went against the aims of the research. Where opinions were expressed which challenged a theme identified or another narrative (such as the SFO lacking in resources or shying away from a prosecution), these were included and were imperative to a good ethics strategy.

3.7 Ethics and Data Protection

In anticipation for sensitive material to be discussed (which is apparent due to the subject nature), ensuring that the research was conducted in an ethical manner was crucial. Prior to the interviews, their content, structure and the procedure to be undertaken was presented in writing for the interviewee - explaining the parameters of the topic and a broad sense of the questions to be asked. This prelude clearly identified the overriding principles of ethical research, such as its voluntary nature and the guarantee of anonymity and confidentiality (if requested).[524] Most important to the ethical process - as a topic of social science - was for the research to be driven by the universal principles such as honesty, justice and respect.[525] With interviews used as the primary method of data collection, one such principle was informed consent. That being the freedom for participants – once adequately updated about the study – to make informed decisions to participate based upon their own judgment, reflection and interests.[526] Homan, however, notes that true informed consent may in fact be rhetoric rather

[524] Hopf (n 461) 334.
[525] Tina Miller and others, *Ethics in Qualitative Research* (2nd ed, Sage, 2012) 19.
[526] Ibid 150.

than reality, as an inherent difficulty exists in explaining the research in a way which the participant unequivocally understands (and doesn't just agree to) whilst recognising the impossibility of not knowing all of the consequences of participating before a study has commenced.[527] To operationalise this as best as possible, each party was fully updated on their desired expectations and that their commentary was to be quoted if necessary, with their agreement. Although consent forms were issued in the pre-interview information pack, these were not always completed. Subsequently, follow up emails were sent to participants and their consent was retrospectively reaffirmed via email.

Although many interviews were eventually conducted via Skype due to subject availability, when possible, this was conducted in person at a location mutually agreed upon. Ultimately, to facilitate their cooperation, this was decided by the interviewee to suit their contentment and schedules. In either event, the interviews were always preceded by a pre-interview information pack (including the consent sheet for recordings and usage), conducted in line with the semi-structured approach and followed up with a transcript where concerns could be aired if apparent. During the interview phase, discussions took place which inevitably incorporated personal opinions and/or first-hand accounts of both former and live criminal investigations. In those circumstances, a balance had to be struck. Firstly, to ensure the ethical obligation that the research provided an accurate depiction of what the interviewees had conveyed; and secondly, to comply with legal restrictions (such as the Official Secrets Act) and any professional obligations. In such conflicting instances any details expressed which were useful to the research and desired to be ascribed to an individual name were confirmed and vetted with that interviewee prior to its use. The purpose of that verification was for the participants to endorse the account provided by the researcher of their interview and to enable them to retract, amend or clarify any material point; although this revision is not designed to prevent or approve the work directly.

Transcending the interview process was to recognise that each participant would have different attitudes, views and outlooks on being interviewed. Whether they were flattered or hesitant having been asked, live interviews present live controversy. The interview process

[527] Roger Homan, *The Ethics of Social Research* (1st ed, Longman 1991).

provided total respect for the participant's right to refuse to answer questions – and to even conduct the interview at all. A 'take what you can get' approach was applied with no undue pressure. As a researcher and interviewer, Oppenheim emphasised the right participants have to feel and act their own way; where it effectively becomes the duty of the researcher to cope with these variations and to treat it objectively.[528] The overriding ethical principle covering data collection is also for no harm to come to respondents as a result of their participation. Maintaining an awareness of how the topic or questions may potentially offend people, or drift into confidentiality issues was critical to the process – to ensure they were effective and not detrimental.

The very essence of the participants being chosen was due to their experience, knowledge and familiarity towards UK commercial anti-bribery and corruption. Therefore, as referred to above, the intention was always to conduct them on the record to be attributed to a named individual. In so doing, confidentiality and permission were highly relevant. The procedures followed throughout this process, as with the project as a whole, were in adherence to both the Reading University Research and Ethics Committee (UREC) and the Economic and Social Research Council Framework for Research Ethics. These guidance notes specifically denoted prerequisites such as undue pressure, project details, deception, funding and the consent of the parties to take part in the research.[529]

The personal data collected from this process included the details of the participants, the audio recordings, transcripts and the notes of interviews. All of which were securely stored before being backed onto a password protected and encrypted memory stick for research material only. With those who consented to personal details being used, once a final transcript or written record was produced, the related materials are set to be destroyed five years after the end of the research project. Where transcripts/recordings were produced, these were not shared beyond the research team and the participants involved.

[528] Oppenheim (n 449) 66.
[529] http://www.reading.ac.uk/web/files/reas/EthicsGuidance_October_2012.pdf; https://esrc.ukri.org/files/funding/guidance-for-applicants/esrc-framework-for-research-ethics-2015/.

Prior to commencing this research, it was recognised that the material may be of use to those seeking to further research the history of this field, and the interviewees were made fully aware of any such potential; where they retained the right to full anonymity. All transcripts were edited where required (if requested by the subject) and any notes taken were then relayed to them for their approval. Personal/sensitive information or material was vetted by the individual participant and was in many cases discussed beforehand (in line with the subjects consent as per the consent form).

3.8 Research Limitations

Although the above sections have briefed the chosen methods and touched upon some of the difficulties faced, it is worth concisely summarising them due to their impact on the research. Without doubt, the overarching and most difficult aspect of this work was to seek prominent interviewees who were prepared to speak candidly about corporate bribery. From the point of the state and the SFO, as already noted, many requests were refused or simply not answered. Even if accepted, the interviews and communications with government officials often publicised the official party line. Conversely, when interviewing private practitioners, they may have conveyed personal views which were reflective of their obligations to clients. This is relatable to a second limitation which was equally uncovered during the ethnographic observation; the lack of concise and/or precise conclusions. This arises from the inherent ambiguities of human language and interpretation and results in a naturally restrictive insight. As the selection of interviewees often became a case of who was willing to accept, the understandings they revealed therefore reflect a small qualitative insight from multiple perspectives. Great care was taken in interpreting the results to ensure that any quotations were accurate and provided a balanced view of their positions and standpoints. The fact that the interviews were conducted individually and not as a discussion meant that they did not always represent a generalised view requiring interpretation throughout the writing.

The second limitation was the inevitable bias from the research and its questions being developed by myself. Given my intentions to investigate the theory of an enforcement paradox, the explorations and subsequent analysis may have been reflective of my own experience, conceptual understandings and theoretical interpretations. My interpretations

are not proposed to be definitive and are therefore open to questions of reliability. However, in full recognition of this and to support the conclusions/inferences made, I ensured to balance this risk by using multiple methods to gain a spectrum of data and evidence from multiple sources in multiple forums. This ensured the research was as open as possible in the circumstances, structured, transparent and could be easily understood by readers.

A third and related constraint can be described by the limitations of 'today's knowledge'. Conducting inductive research methods creates a level of epistemic uncertainty and the views expressed are those of the few and imparted at that time. Evidence of truth or strongly held opinions today may equally be proven false or change tomorrow - especially as people are "*forever re-scripting (their) pasts…making sense of the things that happened in light of subsequent events*."[530] To help mitigate this concern, notes were made at the time of each interview (or event) to record feelings as they happened, allowing for differences as the interviews unfolded. In addition, previous interviews or opinions were referenced – inviting a response and challenge to what another person had said to pursue a diachronic analysis.

To improve the limitations, further or future research would broaden the interviewee requests to canvass as wide a group as possible – including corporate entities and executives themselves. Although interviewees provided informative commentary on the impact of enforcement, this addition would offer more impactful evidence over the deterrence of the UKBA enforcement regime. This would mainly include speaking to more corporate executives and employees (the 'regulatees') to uncover a wider spectrum of analysis, incorporating the views of all the parties in the enforcement/regulatory relationship. This was undertaken during the research but was primarily done through observation at conferences which subjected the evidence gathering to whatever topic of conversation took place at the time; as opposed to targeted discussion. The research could have also benefited from additional data collection tools (such as questionnaires) to help measure the reality in an objective capacity, limiting influence by the researcher and presenting a quantitative element. As was noted in section 3.3, although quantitatively assessing enforcement data was not chosen due

[530] Molly Andrews, 'Never the last word: revisiting data' in Molly Andrews and others (eds) *Doing narrative research* (Sage Publications 2013) 205 – 222, 215.

to its inability to elucidate the aetiology behind corporate bribery (which was most important to exploring if and why an enforcement paradox is occurring), future research would benefit from a mixed method approach which incorporates quantitative methods to bolster the qualitative findings. For example, later chapters briefly refer to enforcement data but no specific break down is drawn which may have helped extrapolate correlations.

3.9 Summary

This chapter has explained that to gain the understandings desired for an analysis of UK corporate bribery enforcement practices and behaviour, a mixed methodology of doctrinal and socio-legal research were used. The choice of methods and their supportive benefits have been explained before illustrating how they directed the research design and ongoing strategy for the qualitative investigation. This was explained to primarily take the form of semi-structured interviews but to bolster the findings through ethnographic/participant observation. The objective is to identify a research strategy which takes the UKBA backdrop and dissects where theory collides with practice; exploring the pitfalls and misnomers to recognise where improvements can be made and/or realistic observations can be highlighted. As corporate bribery and corruption enforcement is commonly regarded as being difficult to enforce, this mixed methodology and the qualitative nature seeks – in full recognition of their limitations - to probe the aetiology of these crimes and their enforcement in a way which examines the regulatory shifts which have manifested into increased complexity. The following chapter will now set out the legal landscape against which corporate crime control has developed. This will explore the relevant legal provisions against which the upcoming research analysis can take place.

Chapter 4

Mapping the Legal Landscape

4.1 Introduction

A primary objective for any regulatory and enforcement forum is to ensure that it sits within an effective legal framework. Particularly when dealing with the complexities of corporate crime, such frameworks formalise a functional and structured set of provisions within which corporates are expected to operate. Instances of corporate bribery and corruption across the globe and the UK have reinforced the importance of having legislation that is able to deter and sanction such behaviour. As the literature review explained, enforcement, whether via conventional state led (punishment) or less conventional collaborative (persuasive) methods, is one such way in which governments proclaim to sanction errant corporates. The UK landscape is, however, faced with the reality that *criminal enforcement* – despite being advocated in every preceding authoritative provision governing the control of corporate bribery – seldomly resorts to the use of prosecution. This chapter will outline the relevant legal frameworks and examine their interplay as they provide an indication of the perceived intentions towards corporate bribery enforcement. That will show that the UK has taken direction from key international provisions advocating the use of prosecution, but has, like regulation and governance ideologies, shifted towards methodologies that are more aligned to persuasion than conventional punishment.

This chapter begins in sections 4.2 and 4.3 by highlighting the antecedent provisions which helped direct the UKBA and continue to act as monitoring pillars for legislative development. This will cover the two main international authoritative provisions: the Organisation for Economic Cooperation and Development (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions 1997 (the OECD Anti-Bribery Convention 1997); and the United Nations Convention Against Corruption 2003 (UNCAC) which have been key in shaping the criminalisation and enforcement of corporate crime. Section 4.4 will then present the supplementary provisions which have parallel relevance and supportive intentions towards private sector enforcement. Section 4.5 will penultimately

consider the primary piece of legislation and its corporate focus, the UKBA and its designated corporate criminal offence. Finally, 4.6 presents what has come to serve as a challenging, but allegedly supporting tool to UK enforcement; DPAs. The analysis of both the UKBA corporate offence and DPA regime will show what the literature review referred to as a shift in regulatory culture; criminalising corporate offending but doing so via methods which are in essence more accommodative than prosecution. Analysing the relevant legal frameworks, their phraseology and intentions will help outline the concepts that have come to shape the UKs enforcement landscape and inform the upcoming data analysis and evaluation.

4.2 The OECD Anti-Bribery Convention 1997 (OECD Convention)

The United States was the first country with notable economic and legal standing to enact legislation which targeted bribery through the use of criminal sanctions with the creation of the Foreign Corrupt Practices Act 1977 (FCPA). Despite its criminalisation of such activity, complaints arose within the US business community of the imbalanced restrictions in comparison to their international counterparts. The resulting request that other nation states follow suit mixed with increased voicings around the world to combat corruption soon led to the creation of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention). This was and is the only international convention to target active bribery, known as the supply side, looking at the bribe giver as opposed to the recipient. Aside from targeting international bribery, the convention correspondingly covered the surrounding elements of enforcement, cooperation, whistleblowing, monitoring and the previous tax deductibility of such crimes. Since being officially ratified by the UK in 1998, is has helped shape the UK legal landscape by facilitating a response to an international phenomenon. Although unenforceable, the OECD Working Group on Bribery continues to monitor signatory's implementation and enforcement. Two components of the OECD convention shall be briefed due to their impression on the UKBA.

1. ***The Offence: Article 1***

> *"1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other*

advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party."[531]

Taking advantage of an encouragingly preventative climate, Article 1 of the OECD convention in seeking to level the playing field addressed a key problem within the business world: foreign bribery. Recognising differing legal systems, the OECD settled on a principle of functional equivalence towards the signatories; emphasising the need for a collective approach to be made in pursuit of Article 1 via the prompt criminalisation of such cases in an effective and coordinated manner. A definition of what is or should constitute 'effective' however, remains undefined. This convention was aimed at targeting, criminalising and resourcing enforcement efforts to tackle corruption on a global platform (see Article 5 below). Although intended to focus upon economically developing countries, the purpose stretched far beyond. Instead, it addressed and stimulated signatory states to recognise corruption as a "*widespread phenomenon*" along with the need for a shared "*responsibility*" to "*deter, prevent and combat*" bribery, by strengthening anti-corruption legislation explicitly within the arena of international business.[532] The scope of the 'offence' was covered by Article 1(4) and defined a foreign public official as:

[531] Article 1, Organisation for Economic Co-operation and Development Anti-Bribery Convention 1997.
[532] Organisation for Economic Co-operation and Development, *Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions and Related Documents* (2011) 6.

> *"Any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation."*[533]

Within the convention, in what was to be reflected with the UKBA, the definition and intention awarded to a "foreign public official" is given an intentionally wide scope.

2. The Enforcement: Article 5

> *"Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."*[534]

Article 5 adopts the unambiguous wording of *investigation and prosecution* (inferring a sense of criminalisation) whilst simultaneously recognising "*the fundamental nature of national regimes.*"[535] This applies a horizontal enforcement model where ultimately, the method and implementation of enforcement is conferred on the respective signatory and their legal system. In line with the wider OECD Convention aims to criminalise bribery in foreign business and stressing the need for adequate resources to be handed to enforcement authorities to achieve such, if prosecution is not pursued, the convention discusses that any discretionary motives must be professional, and not political or via undue influence; such as economic reasonings, fostering relationships or surrounding the identity of those involved. Alarmingly for this prescription, since being ratified, the UK was seen to condone exactly that which the convention prohibits with BAE Systems where – whilst labelled under national security – an

[533] Article 1(4), Organisation for Economic Co-operation and Development Anti-Bribery Convention 1997.
[534] Article 5, Organisation for Economic Co-operation and Development Anti-Bribery Convention 1997.
[535] Article 5, Organisation for Economic Co-operation and Development Anti-Bribery Convention 1997, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, paragraph 27.

investigation into global corruption was subsequently terminated surrounding suspicious pressures and reasons.[536] Having then raised distinct concern from the OECD Working Group,[537] in 2017 the conclusion of the Rolls Royce case[538] ignited analogous questions by TIUK questioning whether ultimately – due to their economic power and/or influence – any prosecution and potential contractual debarment were avoided as Rolls Royce were simply too big for jail.[539]

The OECD convention became the first benchmark and legally binding standards upon which many countries set the course for increased criminalisation and enforcement in international business; with a direction and acceptance that impairing international commercial bribery was to be treated no differently to local corruption. Put simply, it reiterated the importance and rectification of enforcement activity surrounding business bribery and corruption. The ratification of the convention soon led to a filtration of its anti-corruption principles into further legislation; including the UK's Anti-Terrorism, Crime and Security Act 2001 which incorporated the stipulations of foreign bribery into existing legislation,[540] and later, the UKBA. Like the UKBA, the latter created jurisdiction for overseas actions by British nationals and permitted the first conviction of foreign bribery during the Mabey Johnson case.[541]

4.3 The United Nations Convention Against Corruption 2003 (UNCAC)

The UNCAC came to manifestation because of an international consensus to prevent and fight corruption globally. Its aim to implement a common framework and cooperative understanding led to it being referred to as "*the most comprehensive global anti-corruption legal instrument for tackling corruption.*"[542] Having received input, debate and subsequent

[536] David Leigh and Rob Evans, 'National interest' halts arms corruption inquiry', *The Guardian* (December 15, 2006).
[537] OECD, 'United Kingdom: Phase 2 Follow-up Report on the Implementation of the Phase 2 Recommendations' (2007).
[538] By conclusion, this statement refers to the finalisation of a Deferred Prosecution Agreement reached between the SFO and Rolls Royce.
[539] Transparency international UK, 'Rolls-Royce Case: Justice for sale or fair settlement? ' (2017) <http://www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/#.WzJO5S2ZP-Y> accessed 26/06/2018.
[540] Part 12 of the Anti-Terrorism, Crime and Security Act 2001.
[541] David Leigh and Rob Evans, 'British firm Mabey and Johnson convicted of bribing foreign politicians' (*The Guardian*, September 25, 2009).
[542] Bond Governance Group, *Report on the UK's compliance with the UN Convention Against Corruption* (Bond Governance Group 2012).

signatures from 140 countries, like the OECD convention, it fortified the need for the criminalisation of bribery and private sector corruption (in a similarly broad fashion) and the necessity of liability for legal persons. On creation, it's statement of purpose read as follows:

> a) *"To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;*
> b) *To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;*
> c) *To promote integrity, accountability and proper management of public affairs and public property."*[543]

The convention provided many themes which are now apparent through the UK's enforcement methodology. One such mechanism was applied through Article 37 and its cooperative itinerary. As currently seen through the DPA regime, this article advocated for appropriate measures be in place for private sectors to supply information for investigative and evidentiary purposes and for it, where required, to mitigate punishment for substantial cooperation.

Aside from the convention addressing the bribery of public officials for private advantage(s), Article 12 and 21 introduced provisions which focussed specifically on the private sector. Covering trading abuses, embezzlement and enrichment (inter alia), it recommended an increase in effective compliance penalties (whether civil or criminal) and that their design be proportionate and dissuasive to the behaviour. Underpinning its framework was for signatories to implement the convention in a consistent and rigorous manner. To do so, it made two references which are relevant to the subsequent enforcement landscape of the UKBA. Article 6.2 stipulated for enforcement agencies to be adequately resourced (a basis which shall be challenged in Chapter 7 in regard to the SFO) and Article 12.2(F) advocated a recognition of the value of private sector self-regulatory capacities to assist in corruption prevention. Article 39 did, however, acknowledge the challenges arising from self-regulatory

[543] United Nations Convention Against Corruption (2003) Chapter 1, Article 1.

environments and in the overarching need for frameworks to instil public confidence and to uphold the rule of law.[544] As will be challenged in Chapter 7, such caution is warranted given the stark reality of cases where self-regulatory compliance obligations have failed. When coupled with enforcement solutions that impose a financial penalty on the company, but no penalty on the very people behind such crimes, this creates a risk of cosmetic compliance and leaves the state with a hindered ability to prevent and/or deter failed self-regulation in the manner which the UNCAC intended. It was a concern at the time of the UNCAC's creation (despite incumbent suggestions for implementation) as to whether the UK would successfully implement and enforce the provisions against corporations. As the upcoming chapters will show, despite the SFO having the apparent intentions to do so, the successful enforcement of corporate bribery remains a sensitive subject.

4.4 Ancillary Provisions

The OECD convention and the UNCAC are arguably the leading guidelines upon which many other authoritative provisions and indeed the UKBA are guided: specifically in regard to the behaviours they prohibit and the enforcement stance they recommend. However, they reflect a more global perspective and are geographically different in their intent to the more regional provisions which offer a focus on Europe itself. Despite the UK leaving the European Union on December 31st 2020, the Government's Economic Crime Plan 2019-2022[545] reiterated the UK's commitment to continue its shared efforts to combat serious economic crime. The majority of regional European work is offered by the Council of Europe whose objective (specifically through the work of the Group of States Against Corruption (GRECO) – see below) is to promote the prevention of corruption through pluralism.

1. The Council of Europe Criminal Law Convention 1999

This European convention (Treaty No 173) focussed on the co-ordinated criminalisation of a number of corrupt practices (including passive and active bribery across both the public and private sector) with sanctions including extradition. This was signed by the UK in 1999, ratified in 2003 and entered into force in April 2004. Articles 7 and 8 take charge of corrupt activities

[544] UN, 'State of implementation of the United Nations Convention against Corruption Criminalization, law enforcement and international cooperation: Second edition' (2017) 182.
[545] HM Government, 'Economic Crime Plan 2019-22', July 2019.

in the private sector, mirroring one another and other articles in the comments on processes and functions. These sections are specifically designed to focus on the domain of "*business activity*" - defined as any kind of business activity - therefore eliminating non-profit activities.[546] As with most provisions, the scope of recipient is intentionally broad covering the bribing of any person who "*direct or work for, in any capacity, private sector entities.*"[547]

2. The Council of Europe Civil Law Convention 1999

Similar to the above, this convention was attentive to the need for mutual collaboration but focussed on civil controls – namely compensation for aggrieved parties. Covering the contractual clauses of business (as opposed to the criminal offences of Treaty No 173), it was designed to ensure effective remedies existed for damages at national level. This was signed by the UK in 2000 and adopted in 2018 – with its fifth evaluation round adopted in 2021.[548] Unlike any counterparts, the convention provides a definition of corruption in an attempt to broaden the scope of application and to limit any confines.

Once a signatory to either of the above conventions, states become members of GRECO who in effect form the compliance arm of the Council of Europe, ensuring that the applicable standards are met and that corruption risks are rigorously targeted. A vital element of that task and one of distinct significance for this thesis was conveyed by Secretary General Marija Pejčinović Burić who noted that *"legislation and institutional frameworks to combat corruption are not enough. We must see these standards applied effectively in practice, and governments must act with transparency and accountability."*[549] GRECO conducts its operations via cyclical investigations and report writing which are provided to members. In addition, it conducts state visits to monitor compliance and performance, providing reports and recommendations to states inclusive of feedback by the individual state. Once areas of improvement, development or weakness are identified, GRECO makes its recommendations

[546] Explanatory Report to the Criminal Law Convention on Corruption (1999) Paragraph 53.
[547] Article 8, Council of Europe Criminal Law Convention 1999.
[548] GRECO, Fifth Evaluation Round - Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies <https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680a2a1b1> accessed 17/08/2022.
[549] Council of Europe, 'GRECO urges states to prevent corruption risks in measures aimed at tackling the economic impact of the COVID-19 pandemic' <https://www.coe.int/en/web/greco/-/greco-urges-states-to-prevent-corruption-risks-in-measures-aimed-at-tackling-the-economic-impact-of-the-covid-19-pandemic> accessed 19/05/2021.

which are of a binding nature to be actioned within 18 months. GRECO will only finalise its compliance procedures once the recommendations have been fully implemented.

4.5 The Bribery Act 2010 (UKBA)

Prior to the current legislation the UK took direction from the Public Bodies Corrupt Practices Act 1889[550] and the Prevention of Corruption Acts 1906 and 1916.[551] Viewed to be "*unduly complicated and confusing as a result of their piecemeal development to deal with specific issues or problems that, at the relevant time, were deemed necessary to resolve by the introduction of new legislation*",[552] it was illustrated that significant cavities appeared from such reactive steps. Following the OECD's Working Group on Bribery statement that they were "*disappointed and seriously concerned*" with the "*UK's continued failure to address deficiencies in its laws*" and to fall in line with international obligations,[553] the UK government began to focus on development. The OECD had specifically made recommendations towards an enhanced attention on corporate liability, given the then growing cases and allegations of corruption within business dealings. Being that the UK had ratified the OECD Anti-Bribery Convention in 1998, its failure to bring one case against any commercial entity until 2008 encouraged modernised legislation. After both disapproval and decades of legislative dormancy, the then government sought to address this body of archaic law following events which exposed, in an exacting nature, the very weaknesses in addressing such matters.

Following an investigation into extensive corruption claims against BAE Systems Plc in 2010, international pressure soon advised that modifications directed towards bribery in international business become a "*a matter of political priority*."[554] To distinguish itself from political predecessors and other jurisdictions, the then Labour government marketed the UKBA as a global leader in the prevention of bribery and corruption, "*intended to make*

[550] Public Bodies Corrupt Practices Act 1889.
[551] Prevention of Corruption Act 1906 and Prevention of Corruption Act 1916.
[552] CMS Cameron McKenna, *Law Now: A guide to existing bribery and corruption offences in England and Wales* (CMS Cameron McKenna LLP 2010).
[553] Organisation for Economic Co-operation and Development, 'OECD Group demands rapid UK action to enact adequate anti-bribery laws' (2008) <http://www.oecd.org/daf/anti-bribery/oecdgroupdemandsrapidukactiontoenactadequateanti-briberylaws.htm> accessed 25/06/2018.
[554] Organisation for economic co-operation and development, 'OECD Group demands rapid UK action to enact adequate anti-bribery laws' (2008) <http://www.oecd.org/daf/anti-bribery/oecdgroupdemandsrapidukactiontoenactadequateanti-briberylaws.htm> accessed 25/06/2018.

Britain's anti-corruption laws fit for purpose and fit for regulating international business."[555] The UKBA consolidated and repealed former laws and created a draconian package extending to domestic, overseas and business activities. The UKBA was the first piece of legislation to target overseas bribery and to update the previously common law only offence of corporate bribery and the associated liability. This implementation was seen to reflect and extend the impression left by the United States' FCPA which was widely considered to be the first piece of legislation with the aim of targeting business related corruption. The UKBA can be divided into three dominant subdivisions which will each be considered in turn.

4.5.1 The General Offences (S.1 - S.5)

S.1 of the Act explains the direct offence of bribery itself. The offence is explained in two forms, Case 1 and 2: neither of which contain a requirement to establish or prove dishonesty.

> *Case 1 (S.1(2)):*
> *a) "A person ("P") is guilty of an offence if"…. "P offers, promises or gives a financial or other advantage to another person, and:*
> *b) P intends the advantage-*
> *(i) to induce a person to perform improperly a relevant function or activity, or*
> *(ii) to reward a person for the improper performance of such a function or activity".*
>
> *Case 2 (S.1(3)):*
> *a) "A person ("P") is guilty of an offence if"…. "P offers, promises or gives a financial or other advantage to another person, and"*
> *b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity".* [556]

[555] David Aaronberg and Nicola Higgins, 'The Bribery Act 2010: all bark and no bite?' (2010) 5(1) Archbold Review 6-9.
[556] S.1 Bribery Act 2010.

In accordance with the general approach taken by this piece of legislation and the authoritative provisions already described, the terms "*relevant function or activity*" are given incredibly wide definition by s.3(2). Covering any function of a public nature, any activity connected with a business, that which is performed in the course of a person's employment or any activity performed by or on behalf of a body of persons (whether corporate or unincorporated), it intentionally criminalises multiple possibilities. The attached caveats for this section to bite are that the person performing the function or activity (i.e. the recipient) is expected to perform it in good faith, with impartiality and that by virtue of performing said function or activity they are in a position of trust. Although this would capture business dealings, if any uncertainty with regards to its application remained, s.3(6) additionally clarifies that it is irrelevant whether there is a connection with the UK or even if the action takes place outside of the UK. This is based on the jurisdiction provided within s.12 which reaffirms that the British courts will have jurisdiction over an offence committed outside of the UK where the person committing them has a *close connection* with the UK. This arises by being a British national, a UK resident, a UK incorporated body or a Scottish partnership.

Both s.3 and s.4 (carrying out an activity or function and improper performance of such, respectively) require the application of an expectation text. Contained within s.5, this asks "*what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned*",[557] thus excluding any local or accepted custom/practice unless they are written into the law of that country (s.5(2)). The final aspect to be briefed within the general offences is that covered by s.2, which seeks to target those who solicit or accept bribes. The offence is divided into four explanatory cases:

> *S.2 (2), Case 3: where a person ("P") requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by P or another).*

[557] S.5 Bribery Act 2010.

S.2 (3), Case 4: where P requests, agrees to receive or accepts a financial or other advantage and that constitutes the improper performance by P of a relevant function or activity.

S.2 (4), Case 5: where P requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (by P or another) of a relevant function or activity.

S.2 (5), Case 6: is where, in anticipation of, or in consequence of P requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly, either (a) by P, or (b) by another person at his request or with his assent or acquiescence.[558]

Importantly, we see that knowledge or belief that the function or activity is improper remains irrelevant as per s.2 ss (2) – (8). Similar to the principles of the s.5 expectation test, the very agreement or action itself will be sufficient for the offence to be completed, irrespective of whether the desired outcome is achieved. It is the mere fact that it would fail to meet a standard expected of the reasonable person.

4.5.2 Bribery of Foreign Officials (S.6)

This section makes it an offence for:

- *"A person ("P") to bribe a foreign public official ("O") intending to influence O in his official capacity (S.6 (1)), with the intention to obtain or retain business, or an advantage in the conduct of business (S.6 (2)).*
- *The offence can only be committed if P, whether directly or through a third party, offers, promises or gives any financial or other advantage either to O or to another at O's request or with O's assent or acquiescence (S.6 (3)(a)(ii)) and;*

[558] S.2 Bribery Act 2010.

- *If O is neither permitted nor required by the written law applicable to him to be influenced in his official capacity by the offer, promise or gift (S.6 (3)(b)).”* [559]

The s.6 offence in terms of its core substance, adds nothing more than already provided in the preceding general offences. In fact, s.1 and s.6 may capture similar conduct when considering a prosecution (albeit it with s.1 bringing a higher burden of proof). The standalone offence applies directly to the briber and does not capture the official who receives or agrees to receive such a bribe. It’s founding intention was to “*prohibit the influencing of decision making*” in publicly funded business.[560] This section makes it clear that any payment (including facilitation payments), for any advantage, in the course of any business, will be an offence both in the UK and overseas. What is importantly lacking is any requirement for P to intend O to actually carry out his function improperly. It is the mere intent to influence O, to obtain or retain business, or any advantage in the conduct of business. Given the wide definition of that which comprises the “*written law*” for the purpose of (s.6 (7)), the onus will remain with P to understand the position and know what the law requires.

Despite the Law Commission having proposed that a defence should exist if the defendant could show he had reasonable belief that the advantage was permitted, this outlook was not implemented. No defence of ignorance exists, nor does the act deem it legitimate to hold any belief that O is allowed or officially tolerated to act in a particular way; eliminating the possibility of customary practice. With a main objective of targeting the supplier of the bribe, and not the receiver, its intention - as will be demonstrated with the s.7 offence - is to prevent corruption before its commission.

Although the offence title uses the words “Foreign Public Official”, s.6(5) goes on to clarify in typically apparent fashion that the term will incorporate a purposively wide definition:

“Foreign public official” means an individual who—

[559] S.6 Bribery Act 2010.
[560] Ministry of Justice, ‘The Bribery Act 2010: Guidance’ <www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>, accessed 30/05/2019.

- *(a)holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),*
- *(b)exercises a public function—*
  (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
  (ii)for any public agency or public enterprise of that country or territory (or subdivision), or
- *(c)is an official or agent of a public international organisation."*[561]

4.5.3 Failure of Commercial Organisations to Prevent Bribery (S.7 - S.9)

Under the UKBA, the creation of the corporate offence saw an inventive step towards the regulation of and enforcement against corporations themselves by targeting organisational fault where proof of wrongdoing by an individual human actor is not required. Whilst not removing the ability for individual personnel to be prosecuted, s.7 created strict liability for a business' failure to prevent bribery. s.7 of the Act states the following:

> *"that a relevant commercial organisation ("C"), will commit an offence if a person ("P"), associated with that commercial organisation, bribes another person intending either to obtain or retain business for C or an advantage in the conduct of business for C."*

A relevant commercial organisation is defined within S.7(5) as:

a) *"a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),*
b) *any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,*

[561] S.6(5) Bribery Act 2010.

c) *a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or*

d) *any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom."*[562]

For the purpose of the s.7 offence, an associated person is defined in s.8(1) as someone who performs services for or on behalf of the relevant commercial organisation, including an employee, agent or a subsidiary. In determining whether someone falls into this category (performing services), the act importantly notes that the relationship between the parties ("C" and "P") by itself will not be the defining factor in assessing whether this criterion is satisfied; instead, that to determine such, reference should be made to all of the relevant circumstances. The section reveals two apparent subjects. Firstly, a provision for corporates to be held criminally liable; and secondly, that the geographical scope of this law demonstrates a powerful 'catch all' approach with regards to commercial activity and failings. Unlike the aforementioned "*close connection*" (as per s.12) requirements, s.7(3) enables liability for the company from the actions of someone who is neither a British citizen nor a direct employee of the company, but purely an associated person. S.12(5) widened the spectrum and potential for prosecution by the unrestricted ability to capture any acts or omissions which take place outside of the UK, so long as there is activity or that part of the company's business operations take place on UK soil. Even if the company was incorporated outside of the UK, this provision will adequately serve a prosecution thus strengthening bribery and corruption prevention. As was noted by David Aaronberg KC and Nicola Higgins "*this is, as it was indented to be, a draconian provision.*"[563] Instead of diplomatically suggesting deterrence, s.7 aims to explicitly prevent corporate bribery without needing any clarity on the self-regulatory necessity for businesses to proactively police the conduct of its employees or associates.

[562] For the purposes of the section, the act clarifies that simply a trade or profession will constitute a business.
[563] Aaronberg and Higgins (n 555).

The corporate offence revealed what Lord and Broad called a "*transition towards…new models of liability and accountability*."[564] As opposed to requiring the usual *actus reus* the offence enables a jury to assess liability with a consideration of much broader concepts such as whether corporate culture, policy or practice had contributed to such a failure. Unlike the identification principle, the s.7 offence never intended to demarcate an identifiable person who was responsible for that failure, only that the failure occurred. Liability is therefore, as Gobert submitted, based on the company being or should have been aware of the risk; that they had a duty to prevent it; they had the capacity to prevent it; and that they failed to prevent it.[565] The approach took into account the functional complexities of corporations and according to Wells acted as an important "*concession for the development of corporate liability*:" taking corporate liability "*from the frying pan of identification*" to the "*fire of negligent failure.*"[566] By creating criminal liability for corporates to actively prevent such far reaching behaviour is more expansive than the criminal law typically applies. This incurs multiple considerations.

The first is that given the lack of cases and contested prosecutions to date, Campbell proposes the objection that this could "*usurp substantive criminalisation, prosecution and punishment*"[567] and it is, for Horder, via the threat of such punishment that the criminal law can deter conduct.[568] Through the UKBA lense the purpose of the law has changed from being one of punishment in response to an act, to actively encouraging a fulfilment of duty; encapsulating *"a view of the criminal law…as a preventative device and a mechanism to influence behaviour, rather than something that operates primarily in reactive mode*."[569] An appropriate association arises in Black's definition of regulation: "*the sustained and focused attempt to alter the behaviour of others according to standards or goals with the intention of producing a broadly defined outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification*."[570] Taking that

[564] Lord and Broad (n 13).
[565] James Gobert, 'Squaring the circle: the relationship between individual and organizational fault' in James Gobert and Ana-Maria Pascal (eds) *European developments in corporate criminal liability* (Routledge 2011) 139–157, 144-145.
[566] Celia Wells, 'Opening the Eyes of the Sentry' (2010) 30(3) Legal Studies 370-390, 387.
[567] Campbell (n 94) 65.
[568] Jeremy Horder, 'Bribery as a form of criminal wrongdoing' (2011) 127(1) Law Quarterly Review 37-54.
[569] Campbell (n 94) 59.
[570] Black (n 118) 26.

meaning, s.7 is therefore more akin to a 'regulatory criminal law' and represents that which the literature showed, a shift in enforcement attitude/intentions, as its focus is directed towards preventative strategic planning and risk reduction rather than for harm already done.[571] Ashworth and Zedner treat this shift with some suspicion holding the view of such being a largely unwelcome encrustation on good old-fashioned, 'truly criminal' law, arguing that: "*the historic orientation of the criminal justice system towards reactive policing and post-hoc punishment is (now) overlaid by a pro-active, preventative rationale that seeks to avert harms before they occur."*[572]

The second issue is that the collection of ambiguities presents a practical difficulty for implementation. As the nature of the corporate offence is to prevent criminality via the imposition of procedures, with evidence lacking that compliance programmes are necessarily effective at inhibiting corporate criminality and improving corporate culture,[573] the form this offence has taken may result in unproductive ritualism[574] - especially if enforcement is lacking. As opposed to incentivising compliance it can produce superficial results which defeat the very intentions of the offence. The UKBA approach leaves elements of unpredictability for all parties. Assuming a defence case is able to demonstrate a proclaimed adherence to the s.9(1) guidance through a myriad of policies and procedures purporting to prevent, whether this will satisfy the burden of proof is unknown. Even if it does not, the potential use of a DPA then challenges what the UKBA suggests will be the outcome. Prior to DPAs coming into effect, one can only presume that a corporate found guilty of the s.7 offence would have likely faced criminal prosecution: now such a fate is unknown. Conversely, for the prosecution, it creates (as Chapter 6 will discuss) a difficulty to prove that a corporate's procedures were in fact inadequate. A problem which has to date, due to so few cases, been insufficiently tested before the courts.

A third query arises in the offence's reverse burden and its ability to leave companies at significant risk from the behaviour of its personnel. With no proof of fault being required to

[571] Jeremy Horder, 'Bureaucratic 'Criminal' Law Too Much of a Bad Thing?' in Anthony Duff and others (eds) *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 101-131, 114.
[572] Ashworth and Zedner (n 7) 40.
[573] Campbell (n 94).
[574] Braithwaite and others (n 182).

incur liability, but merely the failure to prevent bribery, this challenges due process as it contests that the accused is innocent until proven guilty: a principle of criminal law and procedure and a right conferred to both natural and legal persons under Article 6(2) of the European Convention on Human Rights (ECHR).[575] Attached to the offence is, however, a full defence provided by s.7(2). This mitigates the corporate's liability via what is known as a reverse onus clause: following a similar path to the Anti-Money Laundering Regulations 2007 and their requirements for effective due diligence practices, appropriate training as well as reporting and acting on suspicious activities. The defence will come into play if the commercial organisation has in place "*adequate procedures*" that are "*designed to prevent persons associated with C from undertaking such conduct*." S.7 is not officially an offence of strict liability, as if adequate procedures are held to have been in place, no offence is committed. Campbell describes this as giving corporate defendants the opportunity "*to exonerate themselves through articulation of compliance procedures*."[576] Even though s.9(1) proceeds to impose a duty on the Secretary of State to "*publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)*",[577] there remains a conflict to the presumption of innocence as discharging that right becomes a matter for the defendant. This challenges the presumption of innocence and one of its requisites that the state must bear the burden of proof beyond all reasonable doubt. The reversal provides ostensible benefits to the prosecution in both time and costs but lacks notable advantage to the organisation. However, one such advantage is that the company can produce evidence in its defence to a lower threshold than that required of the prosecution who are left to prove the substantive offence(s) at the standard criminal level of beyond all reasonable doubt.

The final reflection arises in what will constitute adequate procedures. This subject remains largely undefined and omitted from any and all guidance for fear of setting an imitable precedent. Although this hesitation is understandable from the point of view of the SFO who

[575] European Convention on Human Rights 1953.
[576] Campbell (n 94) 62.
[577] S.7(1) Bribery Act 2010.

"*are not in the business of telling"* corporates *"how not to rob a bank*",[578] it creates debate over the degree of certainty that is associated to the ideal and intentions of the rule of law. This is, however, not always achievable in practice and the law is used to guide behaviour even if it does not achieve maximum certainty.[579] Aside from generic advice, what is adequate will be decided upon a case by case basis and is ultimately for the court's interpretation:[580] thus, what conduct amounts to a criminal offence? Or conversely, even if deemed to be a criminal offence, what conduct will warrant prosecution, and what will incur a purely financial penalty? As Lord Bingham once suggested, "*the law must be accessible and so far as possible intelligible, clear and predictable."*[581] Despite the s.7 offence facing criticism over its imprecise advice and guidance,[582] the SFO have maintained a position reiterating their strict role as an enforcer, being of the opinion that:

> *"…others can and have been doing that work for some time now, often very well. Indeed, the government recently published a report into awareness and impact of the Bribery Act among SMEs, in which it was recorded that of those SMEs who had read the Secretary of State's guidance, 89% found it useful. Of those SMEs who had sought professional advice on Bribery Act compliance, 96% found it useful and good value for money."*[583]

In accordance with their statutory requirements, the Ministry of Justice (MOJ) guidance provided six principles to be considered when implementing measures: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including

[578] Hannah Von Dadelszen, 'The Serious Business of Fighting Fraud' (Speech at the Fighting Fraud and Eliminating Error Conference today, 2017) <https://www.sfo.gov.uk/2017/01/19/the-serious-business-of-fighting-fraud/> accessed 11/08/2020.
[579] Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74(1) Modern Law Review 1-26, 7; Tim Endicott, 'The impossibility of the rule of law' (1999) Oxford Journal of Legal Studies 19(1) 1-18.
[580] Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions.
[581] Thomas Bingham, *The Rule of law* (1st ed, Allen Lane, 2010).
[582] Barry Vitou, 'Bribery Act guidance is too vague, says Law Society' (Out-Lawcom, 30/11/2010) <https://www.theguardian.com/business/2009/sep/25/mabey-johnson-foreign-bribery> accessed 22/06/2018.
[583] Alun Milford, 'The Nature of Compliance' (SFO Speeches, 2016) <https://www.sfo.gov.uk/2015/09/08/the-nature-of-compliance/> accessed 11/07/2018.

training); and, monitoring and review. In other words, a strong, top-down self-regulated commitment to compliance. For TIUK, "*a company's anti-bribery programme is more likely to be regarded as constituting 'adequate procedures' if it is based on good practice rather than an approach that solely uses compliance with laws to determine the structure of the programme*".[584] Although this outlook was labelled by the MOJ as being "*largely about common sense, not burdensome procedures*"[585], there is of course the recognition that simply having in place anti-bribery and corruption procedures are a costly and unguaranteed defence. Whilst the intention reflects the very essence of an enforced self-regulatory system where the state sub-contracts the onus of responsibility to the regulatee, the state's lack of sufficient information about the effectiveness of compliance procedures[586] leads to "*difficulties in ascertaining adequacy and/or reasonableness*."[587] The SFO have provided the indication that "*in the final reckoning"* the essence of compliance and any subsequent enforcement is to be based on "*a culture in which people are able to spot what is in front of them, and react to it.*"[588]

4.6 The Crime and Courts Act 2013 - Deferred Prosecution Agreements (DPAs)

Since the UKBA brought corporate and economic crime to legislative attention, the government soon professed their desire to consider additional tools for the SFO and Crown Prosecution Service (CPS) which would aid in the momentum to tackle corporate bribery and corruption. In 2012 the MOJ conducted a consultation process where it proceeded to argue that "*the present justice system in England and Wales is inadequate for dealing effectively with criminal enforcement against commercial organisations in the field of complex and serious economic crime*."[589] It put forward that the enforcement of economic crime had gained intermittent success as the predominant dichotomy of prosecution or asset recovery was alone unsuitable to the environment faced. The formal implementation of DPAs served

[584] Transparency International UK, 'The 2010 UK Bribery Act Adequate Procedures: Guidance on good practice procedures for corporate anti-bribery programmes', 2010.
[585] Ministry of Justice, The Bribery Act: Guidance, 2.
[586] Krawiec (n 351).
[587] Campbell (n 94) 64.
[588] Ben Morgan, 'First use of DPA legislation and of s.7 Bribery Act 2010' (SFO Speeches, 2015) <https://www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/> accessed 08/07/2018.
[589] Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements (Cm 8348) (May 2012), paragraph 23.

a dual purpose. For the corporate, it offered to reduce the likelihood of trial and conviction. For the government; it mitigated the complexity and costs of criminal investigations whilst seeking to encourage good governance and self-reporting. DPAs consequently arrived to "*overcome many of the current difficulties associated with prosecuting commercial organisations*"[590] and have since earned themselves the recognition as "*an excellent way of handling corporate bribery*."[591] Their use was not and has never been, publicly, intended to replace prosecution; as "*the SFO and the CPS are first and foremost prosecutors*"; and, *"in many cases, criminal prosecution will continue to be the appropriate course of action."*[592] DPAs are, then, a court approved agreement between the prosecutor and corporate to suspend criminal proceedings. In return, the commercial entity must agree to conditions including the payment of a financial penalty, compensation and ongoing cooperation for both internal compliance and the prosecution of any individuals.[593]

During the MOJ consultation, it remarked that DPAs should:

> *"be effective in tackling economic crime and maintaining confidence in the justice system; have swifter, more efficient and cost effective processes; produce proportionate and effective penalties for wrongdoing; provide flexibility and innovation in outcomes, such as restitution for victims, protection of employees, customers and suppliers, and compliance audits; drive prevention, compliance, self-policing and self-reporting; and enable greater cooperation between international crime agencies."*[594]

The consultation went on to argue that without the use of tools such as DPAs, it would make "*negotiations between…prosecutors, and ultimately resolution of the case, difficult*.[595] When

[590] Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements (Cm 8348) (May 2012), paragraph 14.
[591] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 328.
[592] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 2.1.
[593] Crime and Courts Act 2013, Schedule 17, paragraph 5.
[594] Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements (Cm 8348) (May 2012), paragraph 30.
[595] Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements (Cm 8348) (May 2012), paragraph 40.

the SFO and CPS drafted their Code of Practice on DPAs, this too covered the process for inviting a corporate to enter into negotiations; where similar to commercial negotiation practices, reference is made to factual matters being "*resolved*" and agreed[596] and open to "*offers*" or "*concession*."[597] It became apparent that from the very outset, the enhanced enforcement toolkit and its guidance had acquired a regulatory style focus on engagement, cooperation and negotiation; where detailed recognition and arguable dissuasion was laid against the complications and costs of lengthy investigations and their impact on barriers to outcomes. Without these assets it argued that prosecutions would be hindered. This justification of pragmatism has created an unease towards their usage[598] and is, for Campbell, an unpalatable but genuine state of affairs.[599] Even under circumstances where a DPA is breached can the legislation be seen to maintain its reconciling tone and prosecutorial aversion where the prosecutor and offender may be invited to *agree* proposals to remedy the continued compliance failure.[600] As Croall argues, the DPA strategy saw corporate criminal law and language acquiring an emphasis on conciliation through the pursuit of compliance rather than the prosecution of crime.[601] The resulting concern is that the difficulty in proving corporate intent means that such violations are "*not really*" treated as a crime, but a "*technical*" offence.[602] Although the MOJ terminology does infer criminal law principles such as deterrence, rehabilitation, restitution and retribution, as Hawley and others note, "*the underlying intent appears more concerned with a need to produce certainty and speed of enforcement action on practical and pragmatic grounds (i.e. to be seen to be doing something about these crimes), rather than an evidence based assessment of what would result in crime reduction."*[603] When the reality is presently one of low prosecution rates, this reduces the

[596] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 6.2.
[597] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 3.4.i.
[598] King and Lord (n 12) 58.
[599] Liz Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales' (2021) 43(2) Sydney law Review 187-223.
[600] Crime and Courts Act 2013, Schedule 17, paragraph 9(3)(a).
[601] Croall (n 6) 46.
[602] Croall (n 6) 45.
[603] Susan Hawley and others 'Justice for whom? The need for a principled approach to Deferred Prosecution in England and Wales' in Tina Søreide and Abiola Makinwa (eds), Negotiated Settlements in Bribery Cases: A Principled Approach (Edward Elgar 2020).

likelihood of deterrence value[604] in criminal sanctions and may lead to the adverse effect of a cultural or subcultural tolerance of offences.[605]

The integration of criminal law into a regulatory form is for Horder problematic as it blurs the substantive and procedural line "*between 'truly' criminal offences and 'merely' administrative penalties*."[606] The fact that DPA procedures have, to date, never resorted to any form of prosecution suggests a correlation to the latter and legitimately raises an accountability deficit for corporate crime.[607] In regard to proportionate and effective enforcement practice, any distortion can present the risk of unfairness from the point of view of those sanctioned by differing forms and consequences of penalisation.[608] Chapter 7 will illustrate how present cases have shown the reality of unequal and illogical treatment in DPA enforcement where there does not appear to be a difference in value or evidence so as to displace the general principle of equal treatment. This questions what Lacey refers to as the need for the moral principle of equal impact in the law's application.[609] If considered more broadly it is therefore a doctrinal enquiry under the principle of fair labelling as to whether the use of DPAs as a method of sanctioning for corporate bribery fairly represents the offender's wrongdoing.[610] Alternatively put, is the degree of misconduct adequately respected, signalled and labelled by the law so as to reflect the nature and magnitude of the law-breaking.[611] When the SFO argue that DPAs "*enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction*",[612] this depiction is telling because it adopts a luxury not afforded to natural legal persons. Given the complexities associated with corporate liability, the DPA regime aims to alter behaviour before trial is contemplated in contrast to being predicated on enforcement through prosecution and conviction.[613] Such reasons become relevant to Ashworth's enquiry of whether the "*unprincipled and chaotic*

[604] Ibid
[605] Croall (n 6) 55.
[606] Horder (n 571) 130.
[607] Campbell (n 599).
[608] Horder (n 571) 130.
[609] Nicola Lacey, *State Punishment* (1st ed, Routledge, 1994) 113.
[610] Andrew Ashworth, 'The Elasticity of Mens Rea' in Colin Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 53.
[611] Ibid 88.
[612] Serious Fraud Office, Deferred Prosecution Agreements, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/> accessed 10/02/2021.
[613] Ashworth (n 221) 288.

construction of the criminal law…prompts the question whether it is a lost cause."[614] At least in regard to the use of DPAs, if the law is criminalising serious wrongdoing but failing to proportionately sanction it, it can render the criminal law unable to "*reflect proper assessments of the culpable wrongs involved.*"[615]

The development of DPAs and certainly in regard to their use for the s.7 offence has demonstrated what Campbell refers to as "*a shift from the binary of criminal law, from guilty/not-guilty to a more gradated notion centring on negotiation and compliance*."[616] The criminalisation of corporate bribery under the DPA regime has, like other regulatory environments, become the subject of an apparent tension between deterrence and compliance schools of thought where cooperative enforcement styles prevail. For Stewart, the changes in corporate liability have not arisen out of its coherence with the surrounding legal systems, but as a result of the state having no other practically meaningful option.[617] Although the roadmap to DPA usage and the supplementary SFO commentary stress the importance of investigation, detection and prosecution the direction of DPAs reflect the reality that financial crime control is undertaken by "*forward looking compliance orientation*" with "*arrest, prosecution and imprisonment viewed as subordinate methods*."[618] As Levi and Lord suggest, prosecution is "*overwhelmingly the road not taken.*"[619] The lean towards more informal enforcement[620] to resolve a criminal offence is not without disdain and has been argued to hinder the development of legal precedent that is used to establish the boundaries of permissible behaviour.[621] For Arlen, particularly if abused or used incorrectly, the DPA process can therefore challenge the rule of law.[622] Waldron grounded this trepidation arguing

[614] Ibid 225.
[615] Ibid 254.
[616] Campbell (n 94) 65-66.
[617] Stewart (n 202) 271.
[618] Michael Levi, `What Works in Combating White-Collar Crime: Some Reactions' in Sven-Ake Lindgren (ed), *White- Collar Crime Research. Old Views and Future Potentials, National Council for Crime Prevention* (National Council for Crime Prevention, 2001) 1.
[619] Michael Levi and Nicholas Lord, 'White-Collar and Corporate Crimes' in Alison Liebling and others (eds), *Oxford Handbook of Criminology* (Oxford University Press 2017) Chapter 32, 734.
[620] Edward Rubin, 'Executive Action: Its History, Its Dilemmas, and its Potential Remedies' (2016) 8(1) Journal of Legal Analysis 1–45.
[621] Nicholas Lord and Colin King, 'Negotiating non-contention: Civil recovery and deferred prosecution in response to transnational corporate bribery' In Liz Campbell and Nicholas Lord (eds), *Corruption in commercial enterprise: Law, theory and practice* (Routledge 2018) 234-257, 246.
[622] Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8(1) Journal of Legal Analysis 191–234.

that public authorities should exercise the power they hold within a constrained framework of public norms as opposed to applying sanctions on the basis of other variables.[623] Thus, as Chapters 6 and 7 will show, when the SFO and courts have been seen to deploy DPAs on an unequal and illogical basis, this method of enforcement contradicts a conformity with the rule of law as there lacks a consistency in punishment.

4.6.1 The DPA Process

To enter into a DPA, the SFO/CPS seek to safeguard the process by applying a two-stage test: the evidential stage and the public interest stage. The former requires that the evidential stage of the Full Code Test[624] is met. If not, there must at least be "*a reasonable suspicion based upon some admissible evidence"* that the corporate has "*committed an offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, to the extent that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.*"[625] The latter (public interest stage), requires that any non-prosecution (DPA) properly serves the public interest.[626] Here, the prosecutor enters an indictment which is then suspended, pending "*the satisfactory performance, or otherwise, of the DPA*."[627] This can include performance of set obligations and the use of a monitor to report on progress. The latter is, however, far from clear or effective, as monitors have not been imposed in every case and even when they have, this has included supervision by internal compliance staff with no mechanism within the DPA to compel improvement or external oversight - [628] defying central concepts of *enforced* self-regulation. When coupled with the fact that even the DPA guidance notes that their use will depend on the circumstances and should be "*approached with care*",[629] this has led to scrutiny as any subsequent ineffectiveness would not amount to a breach of the DPA.[630]

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[623] Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) Georgia Law Review 1-62, 5.
[624] The Code for Crown Prosecutors 2018. This requires that any prosecution provide a realistic prospect of conviction and that any prosecution be in the public interest.
[625] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 1.2.i.
[626] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 1.2.ii.
[627] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 1.6.
[628] See for instance SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019; SFO v Güralp Systems Ltd, Southwark Crown Court.
[629] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 7.11.
[630] Campbell (n 599).

During the process no formal admission of guilt is required by the company, only that they "*admit the contents and meaning of key documents referred to in the statement of facts.*"[631] Whilst considered a circumstantial choice for prosecutors, the guidance reiterates that "*where either limb of the evidential stage is passed, the prosecutor must consider whether or not a prosecution is in the public interest. The more serious the offence, the more likely it is that prosecution will be required*";[632] reinforcing the notion that the conventional application of the criminal law should not be replaced and have regard to the common purposes of dealing with any offender - punishment, crime reduction, deterrence, rehabilitation, public protection and restitution.[633] After all, if the UK approach was designed to imitate the US, as Roger Burlingame described to the House of Lords UKBA Committee, to obtain a DPA *"entails providing human beings for the Government to prosecute."*[634]

The intention behind offering a DPA was to encourage corporates to self-report. In other words, to adequately self-regulate as opposed to face prosecution. Omissions to this principle, such as a failure to notify the SFO of wrongdoing within a reasonable time or by failing to even make an initial report, would (and should) go against the functional purpose of DPA utilisation and lead prosecutors unlikely to conclude that one would be in the public interest. An important point to note was that part of this process, according to the DPA Code of Practice and the House of Lords committee report was that self-reporting and the negotiation of a DPA would inevitably involve the corporate "*providing law enforcement agencies with evidence, information and analysis that it would otherwise be impossible or impractical for them to obtain."*[635] This identified two important strands. Firstly, at an investigative level, the imperative function cooperation plays and that the SFO could be needful or reliant on vital disclosure(s). The second reinforced that the DPA process "*far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted*."[636] In other words, the information provided and

[631] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013) paragraph 6.3.
[632] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 2.4.
[633] Criminal Justice Act 2003, S.142 (1).
[634] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Questions 177 – 183, Roger Burlingame.
[635] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 312.
[636] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Written evidence from Eversheds Sutherland (BRI0024).

"*the co-operation necessitated by the use of DPAs grants the SFO access to information which increases the likelihood of individual prosecutions and, in fact, forces companies to provide information and co-operate with the prosecutor in relation to the prosecution of individuals."*[637] As will be discussed in due course, these concerns have become a transcending feature of the practical use of DPAs, in that whilst full cooperation is expected – it is not always apparent. Without it, evidence may be deficient and thus compromising towards a criminal investigation. Furthermore, it entrenched that cooperation in the form of early self-reporting is a prerequisite to being offered a DPA. Despite this requirement being apparent in early cases,[638] with Rolls Royce and Airbus, this was not the case and has in any event, not led to any individual prosecutions.

4.7 Summary

The effect and complexities of corporate corruption demonstrate the need for comprehensive legal and enforcement frameworks. This chapter has provided the historical legal coverage which ultimately led towards the UKBA and DPA regime. The laws and conventions governing this arena clarify how corporate bribery is classified as a crime; recognising both individual and collective liability and for sanctions up to and including criminal prosecution. Tracing the landscape's roadmap has illustrated central points in the assessment of the legal approaches towards enforcement. Firstly, the UK has adopted vast guidance at the international level to mould the UKBA and its corporate offence. These have emphasised more impactful capacities, the need for corporate liability, criminalisation and, to achieve these via investigatory and prosecutorial enforcement. Secondly, both UK law and wider conventions advocate a multiplicity of criminal and civil methodologies to deter both the company and implicated individuals. Finally, the UKBA has sought to both simplify the actions required to commit bribery offences and to circumvent the challenges associated to the identification principle by enacting liability for an omission: through failure to prevent. The construction of the offence has adopted an enforced self-regulatory approach by

[637] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Written evidence from Baker McKenzie (BRI0030). Paragraph 13 of Schedule 17 to the Crime and Courts Act 2013 sets out how that material may be used in subsequent proceedings.

[638] SFO v Standard Bank plc (now known as ICBC Standard Bank plc), Southwark Crown Court, Case No: U20150854, November 30, 2015; SFO v XYZ Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016.

including a no-fault defence which will apply if the company can show it had in place adequate procedures to prevent the bribery.

The legislative trajectory has, however, identified a pathway echoing that seen through the literature; a shift under the guise of strict enforcement towards a blend of regulatory style methodologies that favour cooperation, persuasion and negotiation. This has created an ambiguity by aiming to mandate a culture of compliance but doing so through accommodative principles rather than strict practices (as indicated by the UKBA). The resulting question is whether there has come to be a preferred and more accommodating direction taken towards the enforcement of corporate bribery, and thus, if the prosecutorial intentions of the UKBA and authoritative provisions are being adequately realised in their extant state. The debate is not if DPAs are better suited to control such crimes, but whether this more informal and regulatory style of enforcement has taken too great a degree of precedence over prosecutorial efforts and is therefore detracting from the criminalisation of the UKBA and the objectives it set. The resulting concern advocated is that this has contributed to the erosion of the paradigm of the criminal law and the criminal trial,[639] and thus, the pinnacle of that which responsive and enforced self-regulatory methodologies prescribe. Although limited data exists to establish whether the use of DPAs themselves have achieved the intentions of the UKBA, what is known is the reality that in all too many cases, evidence of severe criminality has gone unprosecuted under circumstances which indicate pragmaticism over policy. This not only detracts from the original guidance upon which DPA usage is based; but has (and continues to) significantly blurred the line between punishment and persuasion.[640]

Assessing the s.7 offence and the DPA regime has raised considerations over broader criminal law principles; such as the impact on due process, the omission of *actus reus*, their focus from responsive punishment to proactive encouragement and whether utilisation of a DPA for corporate bribery adequately represents the crime committed. Despite the SFO repeatedly

[639] Ashworth and Zedner (n 7).
[640] Wells (n 566)

indicating that they "*have the appetite, stamina and resources to prosecute",*[641] increasing resolutions via settlement and/or negotiation has subjected corporate bribery enforcement to "*cooperation through criminalisation*."[642] Whilst the s.7 development of omissions-based liability has criminalised corporate failure, the DPA regime and the apparent remodelling of criminal enforcement has instead focussed on leveraging corporate actors towards compliance. The hesitation is that this pathway is representing the continued accommodation of international bribery.[643]

The proceeding chapters will begin by presenting the key conceptual extrapolations of the UKBA regime before moving to evidence the concerns raised in this chapter around the enforcement of s.7. This will thematically illustrate how the prosecutorial ability of the UKBA is finding itself, in practice, relegated in favour of negotiated settlement which is heavily reliant on corporate self-regulatory cooperation.

[641] Ben Morgan, 'First use of DPA legislation and of s.7 Bribery Act 2010' (SFO Speeches, 2015) <https://www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/> accessed 08/07/2018.
[642] Campbell (n 94) 66.
[643] Lord (n 67).

Chapter 5

Conceptualising the Research Problem

5.1 Introduction

The preceding chapters have illustrated an overview of the legal approaches and regulatory methods which define the enforcement style adopted in the UK against corporate bribery (and similar economic crimes). As the state cannot alone control corporate criminal activity, this has paved the way for an increased use of newer and complementary theories of regulation and governance that centre around devolved responsibilisation, cooperative reliance and self-regulatory policing by non-state actors.[644] The aim here is to conceptualise those enforcement and self-regulatory trends and to define what underpins the UKBA regime (in particular) and broader corporate crime enforcement methodology. Doing so will inform whether the UKBA personifies the intentions it proclaims or whether it has instead paradoxically metastasised to a degree which undermines the application of criminal law and redefined its usage.

To expand upon these notions, firstly, in regard to enforcement, this chapter will consider the concepts which have emerged from the legal frameworks and particularly the UKBA. Secondly, it will analyse the extent to which the self-regulatory and theoretical practices identified in the literature review have embodied the UK approach towards corporate corruption. Finally, it will consider whether the defining trends are indeed echoing the regulatory goals of prevention and deterrence, or if they have contributed to a landscape lacking in enforcement legitimacy and justiciability. Bridging these will help inform the qualitative data to be outlined in chapters 6 and 7, and ground the evaluation. This shall define if these mechanisms are collectively targeting corporate corruption or whether their relationship has instead come to reinforce the paradoxical landscape advocated by this thesis. The chapter concludes by suggesting that whilst the UKBA was intended and claims to advance criminal liability for corporate bribery and to foster compliance via the use of

[644] David Garland, *The culture of control: crime and social order in contemporary society* (1st ed, Oxford University Press, 2001).

enforced self-regulatory principles, it has conversely created a reliance and favourability on compromise, which results in the unequal application of justice and a negative impact on its legitimacy and justiciability. As the later data analysis will support, weakened enforcement, involuntarily and ineffective practices, and legal endogeneity have placed too great a reliance on self-regulatory capacities and too little attention on criminal prosecution.

5.2 The UKBA Narrative

At a theoretical level, the UKBA regime and its corporate offence emphasised approaches demonstrated throughout the literature in its reflection of regulatory and governance concepts. Firstly, through the SFOs aim to implement a mixture of persuasion and prosecution;[645] and secondly, in how the responsibility for preventing wrongdoing has been formed via a new dynamic of collaborative control, orientated by public-private partnerships.[646] The wording of the offence and its imparted subcontracting of regulatory and governing duty on the corporate personifies how government 'regulation' has moved to exercise its power via an increasing dependence on societal actors[647] and networked governance; departing from the typically vertical nature of command and control towards a horizontal and pluricentric emphasis of steered and cooperative compliance. Where the UKBA places the onus on the corporate to implement preventative procedures, this reiterates the shared role they play in the process and formulation of control - where the state effectively delegates their authority in at least some respects. The nature of this style of self-regulatory governance, whilst claimed to be enforcement backed, reinforces the degree of hegemony by the corporate actor, where the complexity of corporate crime policing becomes dependent on the corporate developing its own meaning (and making) of what compliance will look like. Although Ayres and Braithwaite's enforcement pyramid considered the role of non-state actors, its essence was heavily state centric. However, the choreography of this legislation, its devolved nature and the limited intervention from enforcement agencies (to date) reflects the converse view that the very problems this legislation was intended to

[645] Hawley and others (n 603).
[646] Graeme Hodge and Carsten Greve, *The Challenge of public private partnerships* (1st ed, Edward Elgar, 2005).
[647] Erik Klijn, 'Public Management and Governance: a comparison of two paradigms to deal with modern complex problems' in David Levi-Faur (ed), *The handbook of governance* (Oxford University Press 2012) 201-214.

address are to be resolved via governance methods which are fragmented[648] and decentred, and enforcement approaches that are accommodative.

The stipulations of the UKBA, whilst seeking to balance the interests of market freedom and the realistic abilities of state enforcement agencies have thereby followed previous precedents in maintaining approaches centred around self-regulation, collaboration and commercial accommodation. It is no secret that the SFO has long encouraged businesses to cooperate with them and is rather reliant on corporate self-reporting.[649] As van Wingerde and Lord suggest, particularly for international offences and more complex transactions, "*authorities often largely depend on the cooperation and information of the perpetrators themselves to gain sufficient insight into the modus operandi*."[650] The favoured direction towards self-governance is further advocated within the associated MOJ guidance.[651] Despite the MOJ guidance advocating a zero-tolerance approach to corporate bribery, the SFO has in practice been seen to express a highly proclaimed value in the importance of self-regulation and the deemed integrity of corporations.[652] That is despite UK and international policymakers previously suggesting that self-regulation should not be used for matters which pose high risk or are of significant public interest:[653] such as corporate abuses. Nonetheless, relationship building and collaboration continues to be "*the theme that runs throughout*" UK economic crime strategy.[654] Although it is fully understood that clear benefits exist from mutually collaborative relationships, the result is that regulatory power, influence and accountability becomes less to do with government and legislative force, and more with the recognition of the importance informal private governance authority has to shape and

[648] Levi-Faur (n 233).
[649] The National Archives, 'How the SFO and corporates can work together' <https://webarchive.nationalarchives.gov.uk/20100815072159/http://www.sfo.gov.uk//about-us/our-views/speeches/speeches-2009/how-the-sfo-and-corporates-can-work-together.aspx> accessed 30/04/2021.
[650] Karin van Wingerde and Nicholas Lord, 'The Elusiveness of White-Collar and Corporate Crime in a Globalized Economy' in Melissa Rorie (ed) *Handbook on White-Collar and Corporate Crime* (Wiley 2019) 477.
[651] Ministry of Justice, 'The Bribery Act 2010: Guidance' <www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>, accessed 30/05/2019.
[652] Memorandum of Understanding between the Association of the British Pharmaceutical Industry, the Prescription Medicines Code Of Practice Authority and the Serious Fraud Office 2011 <www.pmcpa.org.uk/aboutus/Documents/Memorandum%20of%20Understanding%20between%20the%20ABPI,%20PMCPA%20AND%20SFO%20Final%20June%202011.pdf> accessed 01/09/2019.
[653] Better Regulation Taskforce, Alternatives to State Regulation (2000).
[654] The Rt Hon Robert Buckland KC MP, 'Lord Chancellor addresses the Cambridge Economic Crime Symposium' <https://www.gov.uk/government/speeches/lord-chancellor-addresses-the-cambridge-economic-crime-symposium> accessed 12/09/2021.

influence compliance.[655] So, under the guise of government control, the UKBA can be seen to reinforce that the process of steering compliance is arguably "*de-governmentalized*" as the state no longer monopolises the grip over corporate disobedience and has been effectively replaced by governance through "*interdependence, negotiation and trust*."[656]

On a practical level, the second construct of the offence sought to circumvent the identification principle (discussed further in Chapter 6):[657] avoiding the complications of proving the directing mind and will. The s.7 UKBA offence vitally aimed to make prosecutions easier by taking a strict liability approach of guilt by failure to prevent. Rather than focussing liability on the outcomes of an activity, the solution made corporate liability turn on what internal precautions have been taken - and their adequacy. Simplifying and thus facilitating prosecutions reflected the fundamental concepts of the UKBA which were subsequently echoed by the House of Lords post-legislative scrutiny committee: that the UKBA be "*clear, effective and robustly enforced*."[658] Having now reviewed the legislative and ancillary theoretical perspectives which explain its workings and intentions, these have identified challenges to its conceptual basis. In terms of its clarity, what has in practice become conversely unclear is the meaning and realistic application of the incumbent defence to the s.7 offence: of corporations having in place adequate procedures to prevent bribery. This defence demonstrated how the UKBA has allied its regulatory goals with private capacities; seeking control through the utilisation of regulatee accountability and efficiency. This approach requires that certain standards are met but is - particularly if unenforced or under enforced - unclear as to how the attestation is to be scrutinised or how they are to be achieved. The concern echoed that discussed in the literature review; that any reliance on outsourced control should be verified and that non-compliance should be shaped, in part, by the 'regulators' scope of enquiry and engagement.[659] Else, the adequate procedures approach creates a mandate of unenforced performance and/or false reassurance; which can defeat the object of incentivising self-regulatory capacities and control by failing to instil enforced behaviour and oversight.

[655] Levi-Faur (n 390).
[656] Sørsensen and Torfing (n 379) 195-196.
[657] As per Tesco Supermarkets Ltd v Nattrass [1972] AC 153.
[658] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 5.
[659] Rissing (n 335).

To avoid prosecution and to resolve the extent to which compliance procedures are adequate clearly stem from a key association to the regulatory literature: that the corporation has demonstrated sufficient self-regulatory steps to prevent the corruption. This at best avoids enforcement action completely, or at worst presents an opportunity for the corporation to face sanctions which align and are associated with civil methodologies.[660] Clarifying what constitutes adequate procedures remains enigmatic for several reasons. First, limited and speculative guidance; second, too few cases have been tested before the courts leaving much of its determination to conjecture; and lastly, the SFO have publicly stated that they are not in the business of telling people how to not rob a bank.[661] This collection has been argued to leave industry awaiting the clarity it wants/needs best; *"confirmation on what procedures would be considered adequate for an organisation not to be prosecuted"* – especially if such actions are conducted by an 'associated person'.[662] In January 2020 the SFO updated its compliance guidance providing greater indication as to what a compliant culture might look like.[663] However, the fact remains that without state intervention and/or case precedent(s) to exemplify much needed clarity, the threats of prosecution if consequently unable to prove or progress ring hollow when they remain just a threat. This consequently creates a direct challenge to the idea of *enforced* self-regulation, where the state promotes prosecution as a pinnacle outcome in response to failures of the regulatee. If the UKBA imparts the devolved goal of the regulatee (the corporate) avoiding prosecution if it can demonstrate self-regulatory compliance by creating and implementing its own compliance procedures, the situation is left rather ambiguous when the state appears to be suffering from an absence of action to more regularly pursue investigations when compliance failures are apparent. The result is an unclear formalisation of what the state will do to help ensure/enforce that conduct moves beyond mere statements and instead includes verifiable compliance and clear procedures of oversight.[664]

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[660] Wells (n 24) Part 1.

[661] Hannah Von Dadelszen, 'The Serious Business of Fighting Fraud' (Speech at the Fighting Fraud and Eliminating Error Conference today, 2017) <https://www.sfo.gov.uk/2017/01/19/the-serious-business-of-fighting-fraud/> accessed> accessed 11/08/2020.

[662] Andrew Cheung, 'Failure to prevent bribery: The first s7 sentence' (Dentons, 26/02/2016) <https://www.dentons.com/en/insights/articles/2016/february/26/failure-to-prevent-bribery-the-first-s7-sentence> accessed 05/01/2021.

[663] SFO Compliance Guidance.

[664] Michael Burns, *Open Trading: Options for Effective Monitoring of Corporate Codes of Conduct, NEF and CIIR* (1st ed, New Economics Foundation, 1997).

The additional understandings observed by the House of Lords post-legislative scrutiny committee were that the UKBA be *effective* and that there be a need for *robust enforcement.* It is perhaps at that juncture where the conceptual reality of the UKBA has left its most questionable impressions: via an analysis of the UKBA, its devolved methods and its synonymity to the pyramidal enforcement strategy outlined by Ayres and Braithwaite.[665] Critical to a responsive regulatory methodology (see Chapter 2) are the foundations of *risk based* and *self*-regulation. The former is apparent through the UKBA in that the state (through the SFO) imposes a strategy that is responsive to risk; targeting instances, intelligence or likelihood of serious fraud/economic harm and intervening via enforcement activity if required. This is complemented via the latter, whereby the primary emphasis is through utilisation of regulatee oversight – which chimes well with the SFO's declaration that they are not a regulator, and purely an enforcer.[666] Both methods and the UKBA ultimately establish boundaries between the state and the corporate as they embed primary control responsibility in the regulatee, before projecting *enforced* self-regulatory principles; via the requirement for the corporate to devise its own control procedures under the warning of state enforcement. Although the benefits of these approaches have been previously discussed, in terms of its practical implications for the state, the SFO's withdrawal from and collapse of multiple high-profile cases have conversely suggested that in such instances of risk and/or failed self-regulatory compliance, the ability of the UKBA to robustly enforce corporate bribery is questionable. If the aim of the UKBA was to broaden corporate liability in instances of demonstrable failed self-regulation, its success is premature if there is a limited likelihood of prosecutorial enforcement and instead a growing prevalence,[667] or even dominance[668] of settled, persuaded, or negotiated justice. This indicates a contradiction to responsive regulatory values as even when self-regulatory efforts have failed, the state remains willing, and is possibly only able, to cooperate with entities who have already demonstrated social irresponsibility: arguably conveying a relationship which is forgiving, but not ferocious.[669]

[665] Ayres and Braithwaite (n 127).
[666] Mathew Wagstaff, 'The role and remit of the SFO' (Speech at the 11th Annual Information Management, Investigations Compliance eDiscovery Conference, 2016) <https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/> accessed 12/12/2020.
[667] King and Lord (n 12).
[668] van Wingerde and Lord (n 51).
[669] Ayres and Brathwaite (n 127) 27.

When the House of Lords scrutiny committee concluded that the UKBA should be used as a gold standard for other legislators, its report failed to fully comprehend or discuss the lack of enforcement to date.[670] This concern, however, was rebuffed and avoided by the SFO in 2016 arguing that i) cases were in fact emerging,[671] ii) that the complexity of matters posed challenges and, iii) that many of its investigations have and will continue to apply to timescales before the UKBA came into force.[672] Regardless of the SFO's position, in 2021, the government actioned such concerns over the corporate criminal liability regime and have now received an Options Paper from the Law Commission.[673] Whilst the s.7 offence and ongoing proposals to expand legislation[674] towards increased corporate liability are necessary to encourage ethical business, without the "*absolutely critical*"[675] element of enforcement against those playing an active or complicit role in corrupt business (corporate and individual), there remains an inevitable over-reliance on corporations to purely self-regulate. Exclusive of adequate enforcement and the intentions of the UKBA being realised more regularly, the s.7 offence and its self-regulatory connotations cannot become the "*very effective tool*" it is hailed to be.[676]

As a concept, enforced self-regulatory methods, by name and nature, require the existence of escalated intervention up to and including criminal enforcement;[677] where failed cooperation and modest punishment should be met – if needed - with more punitive action.[678] This does not suggest that the compliance school of thought should be forgotten, or that financial sanctions are unsuitable for corporate crimes, but purely reinforces that in instances and anticipation of non-compliance, there is a need for increasing levels of

[670] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 319.
[671] This claim was conversely supported by citing DPAs and - in any event - small prosecutions.
[672] Mathew Wagstaff, 'The role and remit of the SFO' (Speech at the 11th Annual Information Management, Investigations Compliance eDiscovery Conference, 2016) <https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/> accessed 12/12/2020.
[673] Law Commission, *Corporate Criminal Liability An Options Paper*, (Law Commission, June 2022).
[674] Such as the movements behind the Economic Crime and Corporate Transparency Bill and Sir Robert Buckland KC MP's comments that "what isn't in the bill is as interesting as what is" (indicating potential discussion of amendments towards an offence of failure to prevent economic crime).
[675] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) Corrected oral evidence: Question 153, Sir Brian Leveson.
[676] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) Corrected oral evidence: Questions 112 – 118, Hannah von Dadelszen.
[677] Ayres and Braithwaite (n 127).
[678] John Braithwaite, *Restorative Justice and Responsive Regulation* (1st ed, Oxford University Press, 2002) 30.

sanctioning, formality and approach.[679] The leading writers who oppose corporate criminal liability argue that it serves little to no purpose; predominantly on grounds of efficiency and the acceptance that a corporation cannot be imprisoned.[680] Their position is that if the aim of corporate criminal liability is to deter, approaches akin to civil liability deter corporate misconduct and apply sanctions more efficiently than criminal liability; notably due to the latter's lower burden of proof.

These should, however, be balanced against a number of corresponding opinions. As studies have shown that compliance can be heavily reactive,[681] enforcement in the criminal sense, as a tool, becomes important for multiple reasons. Firstly; those who support corporate criminal liability critique the aforementioned views on the basis that there is an incorrect assumption that deterrence is its only aim.[682] Although civil liability methodologies may be more fiscally efficient, criminal liability is grounded in its justification as retribution.[683] Secondly; corporations (especially wealthy multinationals) can interpret a financial penalty as a cost of doing business.[684] Thirdly; criminalisation symbolically signifies a commitment to punishing serious wrongdoing;[685] where legal persons – like others - are rightfully controlled through the moral authority of criminal law. Criminalisation therefore legislates against that which is morally wrong and sanctions acts which are deserving of public sanction.[686] This incurs clear importance for corporates who have been associated to incomprehensible levels of criminal behaviour.[687] Fourthly (and particularly as argued in this environment), it supports the moral and legal legitimacy of regulatory processes where enforcement may be limited, undermined or reticent.[688] Finally, a realisation of the actual or potential imposition of criminal sanctioning

[679] Bridget Hutter, *Compliance: Regulation and Environment* (1st ed, Clarendon Press, 1997).
[680] Vikramaditya Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve? (1996) 109(7) ' Harvard Law Review 1477-1534; Daniel Fischel and Alan Sykes, 'Corporate Crime' (1996) 25(1) Journal of Legal Studies 319-350.
[681] Fairman and Yapp (n 218).
[682] Lawrence Friedman, 'In Defense of Corporate Criminal Liability' (2000) 23(3) Harvard Journal of Law and Public Policy 833-858; Wells (n 24).
[683] Friedman (n 682).
[684] Wells (n 24) Part 1, 14-32.
[685] Steve Tombs, *Social Protection after the Crisis: Regulation without Enforcement* (1st ed, Policy Press 2015) 144.
[686] Michael Levi, 'Serious tax fraud and non-compliance: A review of evidence on the differential impact of criminal and non-criminal proceedings (2010) 9(3) Criminology and Public Policy 493-513, 507.
[687] Bethany McLean and Peter Elkind, *Smartest Guys In The Room: The Amazing Rise and Scandalous Fall Of Enron* (1st ed, Portfolio, 2004).
[688] Braithwaite (n 678) 33.

activates different motivations which can incentivise virtuousness and therefore compliance.[689] The effectiveness will of course be dependent on its degree and method of implementation.[690] Especially when studies have illustrated a lack of regulatory and/or enforcement activity,[691] considerable evidence correlates that low levels of compliance are related to low numbers of prosecutions.[692]

In choosing when and if enforcement activity should take place, a focus of broader corporate bribery and corruption literature is that in such cases, there must be an emphasis for enforcement bodies to investigate and prosecute not only the company, but the individuals responsible.[693] This forms the essence of responsive regulation and more importantly characterises the sliding scale of regulatory intervention throughout enforced-self regulatory literature, where the threat of enforcement is cumulative, effective and is critically used if required. Without enforcement, it remains a hesitant and hollow threat. Now this work has analysed both the literature and the authoritative legal provisions, it appears that despite the objective to apply, and proclaimed environment of, heightened regulatory and enforcement clout, the landscape under the UKBA has seemingly drifted away from prosecution and towards a prevalence of pluralistic, cooperated and negotiated justice. That is not to argue that non-criminal sanctions such as DPAs do not have their place on a sliding scale of enforcement, but more a concern that there is a greater frequency of use for regulatory and enforcement tools that are "*cheaper, quicker and more certain for all parties."*[694] Where demonstrable efforts, cooperation and redress has been made to correct misconduct, prosecution would not be best placed to steer and motivate compliance. However, one cannot help but question whether the more prevalent method of justice imposed bears sufficient relationship to the severity and scale of the crime(s) committed.

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[689] Ibid 33.
[690] Friedmann (n 113) 198.
[691] A three-year study of 96 Australian regulatory agencies found a third had not launched a single prosecution during the period: John Braithwaite and others, 'Research note: Corruption allegations and Australian business regulation' (1986) 19(3) Australian and New Zealand Journal of Criminology 179-186.
[692] Jeremy Rowan-Robinson and others, *Crime and Regulation: A Study of the Enforcement of Statutory Codes* (1st ed, T and T Clark, 2000) Chapter 8.
[693] Arlen (n 267).
[694] David Green, 'Ethical Business Conduct: An Enforcement Perspective' (Speech at PwC, 2014) <https://www.sfo.gov.uk/2014/03/06/ethical-business-conduct-enforcement-perspective/> accessed 05/06/2019.

This work does not refute that a significant fine may not be seriously punishing. As was observed by many practitioners during the ethnographic stages,[695] a company - being an artificial and financial entity – is best and primarily punished through affecting its prosperity. It is instead posited that the deterrence effectiveness or appropriateness of fines, as a lone method of retribution, if improperly used, is open to inquiry.[696] One important reason for this was evidenced following the Clapham rail collision in 1987, when the chosen fate of British Rail was heavily considered by the judge as the costs were ultimately to be borne by those who funded them - the taxpayer and its consumers. In the case of Rolls Royce, the DPA judgment expressed caution and estimation over the profits resulting from the corruption upon which the fine was based (£497 million). Whilst Rolls Royce was handed a 5 year repayment period, within a year of the case conclusion it reported profits of nearly £2 billion and almost 5,000 job cuts.[697] Fisse conveyed such unease commenting that unless a corporate is punished for crimes it perpetrates, "*the social cost…will be passed on to society as a whole or to particular segments of the public*."[698] To be effective, the level of deterrence must be sufficient enough so as to ensure that "*those observing the penalties imposed on others decide not to violate the law*."[699] The penalty of criminal law must satisfy the problem it seeks to amend and not lose the function of its aim.

Wells described corporate fines as not being an example of radical rethinking as they "*suffer the same deterrent weakness as conventional fines, which is that risk of apprehension and punishment is likely to be the major deterrent factor*."[700] So, if the use of prison for an individual traditionally aims to emphasise, punish and impact the socially undesirable nature of their wrongdoing,[701] it is then inconsistent to use fines for a corporation, because: "*fines do not emphatically convey the message that serious corporate offences are socially intolerable. Rather they create the impression that corporate crime is permissible provided the offender merely pays the going price.*"[702] Take for instance the conclusion against Petrofac Ltd

[695] ABC Minds International Conference 2020.
[696] Braithwaite and Geis (n 105).
[697] Julia Kollewe, 'Rolls-Royce to cut 3000 jobs in UK', *The Guardian* (June 14, 2018).
[698] Brent Fisse, 'Sentencing options against corporations' (1990) 1(1) Criminal Law Forum 211-258, 212.
[699] Braithwaite and Geis (n 105) 303.
[700] Celia Wells, *Corporations and Criminal Responsibility* (2nd ed, Clarendon Press, 2001) Chapter 2.
[701] Fisse (n 698) 219.
[702] Ibid 220.

following an admission of guilt for seven separate counts of failure to prevent bribery. Analysis by Hargreaves Lansdown led to commentary that with access to liquidity of nearly £1 billion, the fines imposed compared to the value of the contracts involved would be "*a relief*", where the company would be "*more than capable of covering the fine*."[703] Despite the 3 corporate prosecutions to date, it is somewhat incongruous to think when considering the majority of past cases and the relevant SFO guidance that companies can admit to bribery of such severe extents, provide in-depth and agreed evidence of such, and yet neither the company, the bribe payer(s), nor the individuals/management that allowed the crime to happen are frequently held criminally responsible. In the case of the company receiving a DPA, there is not even a requirement to admit guilt.[704] Without the attached need to perforate ongoing corporate compliance and to sanction the individuals, this questions whether the UKBA is in fact symbolically seeking to enforce, but is in reality acquiring an exogenous shape and meaning by the corporate arena in which it seeks to regulate[705] – where settled and cooperated justice is alone easier to achieve.

5.3 The Self-Regulatory Nature

The second prism through which key conceptual understandings need to be viewed are the ways in which regulation and governance theory have developed in regard to the control and enforcement of UK corporate crime. Central to that discussion was the illustration of how there has been a reconceptualisation of regulatory practices, with the state outsourcing much of its duty to non-state actors; capitalising on regulatee expertise and ultimately conserving costs for the state to target its resources. This reaffirms two apparent themes of corporate self-regulatory ideologies: firstly, to activate internal controls and to incentivise a compliant culture, and secondly; to bolster this devolved duty with state enforcement if required.[706] As the typical command and control regulation shifted to a greater emphasis on self-regulation, what remained apparent was the requirement of graduated deterrence in response to instances of failed self-regulation.[707] Prior to any enforcement action being taken, however,

[703] Tom Waite, 'UK SFO says bribery probe continues after Petrofac fine' Rolls-Royce to cut 3000 jobs in UK', Alliance News, (October 5, 2021) < https://www.lse.co.uk/news/update-uk-sfo-says-bribery-probe-continues-after-petrofac-fine-v6hb579hxs88ptq.html> accessed 05/10/2020.
[704] Deferred Prosecution Guidance – SFO Operational Guidance.
[705] Edelman (n 288).
[706] Braithwaite and Fisse (n 60).
[707] Ayres and Braithwaite (n 127) Chapter 2.

self-regulation begins under a key pretence; that the regulatee (the corporate) can be trusted to self-regulate their own compliance. The UKBA corporate offence personifies this approach in two ways: firstly, by requiring corporates to implement procedures to prevent bribery, and secondly, that they further self-regulate by conscientiously self-reporting wrongdoing if uncovered. A concern, however, is that of why corporations should spend time, expertise and money to prevent corruption when they are both the offender and the recipient of its rewards?[708] Simply because they are more capable does not mean they are willing to and are effective at self-regulating.[709] This point does not refute the reasons identified earlier as to why corporations can exemplify a compliant culture, but to instead introduce a focus on a subtle but evidently imperative concept of self-regulation analysis: trust.

Trusting and permitting a regulatee to effectively self-monitor compliance sits at the heart of the most dominant regulatory theory, responsive regulation, and the system could not be constituted without it.[710] A meta-goal of both responsive and self-regulation is its concept as a strategy of "*trust as a first choice followed by escalation to more punitive regulation when trust is abused*."[711] This is exemplified in the trajectorial layout and preliminary intentions of the enforcement pyramid. In this context, trust is essentially believing that the corporate has the intention(s) and competence to fulfil the compliance role asked of them – in this instance, to implement procedures to prevent bribery and corruption. According to Merriam Webster's dictionary, trust is additionally defined as a *reliance* on the character, ability, strength, or truth of someone or something. As the notion implies the absence of compulsion, the level of trust imparted should naturally depend on conditions – and not pure good will. Consideration can be given to the regulatee's degree of sensitivity to what influences their own calculations, as what works for and threatens one may not have the same effect for another. The conditions under which trust is established or failure sanctioned is recognised to play a role in shaping patterns of enforcement and compliance.[712] Additionally, if trust is defined as a reliance on criteria such as character and truth, if there has been a gross failure or there exists a known

[708] Braithwaite and Fisse (n 158) 245.
[709] Braithwaite (n 230) 1469.
[710] Ayres and Braithwaite (n 127) Chapter 2.
[711] Toni Makkai and John Braithwaite, 'Reintegrative Shaming and Compliance with Regulatory Standards', (1994) 32(3) Criminology 361–85.
[712] Rissing (n 335).

or possibility of risk, this might imply a discontinuity of such reliance; or at least its verification.[713]

For trust to find its place within a system of self-regulatory control and enforcement (which is necessary to the payoffs it seeks),[714] it is seemingly obvious to be acceptingly cautious of its inherent weaknesses. Firstly, that it exists on incomplete knowledge and an uncertainty about the trustee's future behaviour;[715] and secondly; that it is both impractical and unaffordable for the regulator/enforcement agency "*to return every day to check that it is still in place*."[716] For the system to work and for it to not attract pure optimism, it demands a relationship that recognises selectivity and one which does not attract overreliance, preference or a lack of responsiveness; where the regulatee is permitted the necessary freedom but the regulator stands ready to intervene in a strict capacity.

This work argues that the trust which is imparted upon corporations to self-regulate legitimately advocates a powerful reliance on them to demonstrate beyond cosmetic compliance. Given the known disparities which exist between government and private resources, this environment can expose the state to risk of regulatory capture or inefficacy.[717] After all, by the state adopting a commitment to cooperation, trust and reasonableness it can "*build good faith among some…and be exploited by others*."[718] This is an important consideration because of the obvious paradox that exists in policing powerful corporations in that they require more regulatory/enforcement efforts to limit violations, yet it is very difficult to achieve due to their complexities, international character and economic value.[719] It should be noted that whilst a trusting predisposition is recognised to set the direction for a cooperative relationship,[720] given the discussed shortfalls of self-regulation and particularly

[713] Reiner Quick and others, *Auditing, Trust and Governance: Developing Regulation in Europe* (1st ed, Routledge, 2007).
[714] Ayres and Braithwaite (n 127) 96.
[715] Frederique Six, 'Trust in Regulatory Relations' (2012) 15(2) Public Management Review 163-185.
[716] Ayres and Braithwaite (n 127) 96.
[717] Rachel Ashworth and others, 'Regulatory Problems in the Public Sector: Theories and Cases' 2002 30(2) Policy and Politics 195–211.
[718] Ayres and Braithwaite (n 127) 96.
[719] Stone (n 258).
[720] Diego Gambetta, 'Can we trust trust?' in Diego Gambetta (ed) *Trust: Making and Breaking Cooperative Relations* (Blackwell 1988) 227.

in regulating/enforcing grand bribery or corruption, it should not be unqualified – and instead earned or lost dependent on circumstances. Alternatively put, in the context of organisational trust, there must be reasons upon which that trust is based;[721] such as the behavioural routines of the regulatee, the reflexivity/interaction of the regulatory relationship[722] and the compliance systems that the regulatee has shown to be in place.[723] So, what for the corporates who are recidivist offenders, cosmetically compliant, or those who have initially failed to self-report serious wrongdoing, do not assist investigations and then subsequently deliver cooperation? Are such instances a demonstration of appropriately trustworthy (and compensatory) behaviour sufficient to earn them a deferral from prosecution, or should it instead be treated as mitigation during prosecution? For Shapiro, too little attention has been directed to the enforcement tools deployed to challenge failed – albeit it symbolic - attestations of compliance.[724] The pervading reality for UK corporate bribery cases is that the cooperation received provided the SFO (admittedly) with evidence they would have never obtained alone. This weakens an enforcement regime as not only can the trust to self-regulate be abused, but if the probability of being detected and prosecuted (without cooperation) is low, then the risk of non-compliance may increase and is undoubtedly open to abuse.

Literature has widely recognised that trusting self-regulatory systems can instil desirable behaviour,[725] but there is importantly the contrasting appreciation that it provides limited regulatory insight[726] and has – particularly in corporate capacities – been exposed as woefully inadequate in a number of arenas.[727] Studies have found evidence that such programmes negatively impact compliance[728] and can lead to worse performance in the absence of

[721] Denise Rousseau and others, 'Not so Different After All: A Cross-discipline View of Trust' (1998) 23(3) Academy of Management Review 393–404.
[722] Guido Möllering, *Trust: Reason, Routine, Reflexivity* (1st ed, Elsevier, 2006).
[723] Christine Parker and Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference' (2009) 41(1) Administration and Society 3–37.
[724] Shapiro (n 345).
[725] Michael Toffel and Jodi Short, 'Coming Clean and Cleaning up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?' (2011) 54(3) The Journal of Law & Economics 609–649.
[726] Richard Locke, 'The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy. (1st ed, Cambridge University Press 2013).
[727] Toffel and Short (n 725) 3.
[728] Craig Pirrong, 'A theory of financial exchange organization' (2000) 43(2) Journal of Law and Economics 437-471.

impactful sanctions.[729] With accusations of limited or ineffective regulatory insight comes the issue of whether this in practice leads to a debilitated prospect of enforcement. In the two largest DPAs secured by the SFO to date – Rolls Royce and Airbus – these have been overtly accomplished due to the level of cooperation received from the corporates – and not strictly from a state investigation.[730] Without detracting from the benefits of cooperation to help see inside the 'black box' of corporate wrongdoing, in neither of these cases, notwithstanding evidence deemed sufficient enough to warrant declarations of "*extraordinary*" and "*exemplary*" assistance (respectively), prosecutions did not follow in any capacity. For Airbus, that was despite the judge declaring that the scale, scope and "*the seriousness of the criminality…hardly needs to be spelled out…it was grave."*[731] It is only reasonable to enquire, then, that if these cases are examples of the realistic pathway which *enforced* self-regulation will take for the UKBA corporate offence, the approach is suffering from a favouring of settlement in instances which reflect the worst levels of offending. As criminal investigations go it does not say much for an investigator if they cannot solve a crime without the assistance of the offender, the trust that they will be supported in their attempts to seek justice and for the terms of the case conclusion to be agreed. It presents a limitation that leads to a prosecutorial inability at worst or lack of inclination and reliance at best. Ogus and Abbot expressed this as a shift from command and control to self-regulatory attitudes which no longer rely on conventional sanctions and therefore orthodox deterrence theory.[732] If this is the case, it challenges if the *severity* of punishment for failed self-regulation is being substituted for the *certainty* of punishment in the form of negotiated settlements. Such a shift supports wider literature indications that governing power, the capacity of actors, the predominant styles of regulation and the traditional institutions of checks and balances on power and accountability are being diminished.[733]

The arguments proposed here do not suggest that there should be no trust, as this is a both a necessity to regulatory relationships and, if not offered, may result in resentment where

[729] Andrew King and Michael Lenox, 'Industry self-regulation without sanctions: The chemical industry's Responsible Care program' (2000) 43(4) Academy of Management Journal 698-716.
[730] A similar outcome has since been seen in the prosecution of Glencore – which came following notable cooperation and evidence being provided to the SFO.
[731] SFO v Airbus SE, Southwark Crown Court, Case No: U20200128, January 31, 2020, paragraph 64.
[732] Ogus and Abbot (n 239).
[733] van Kersbergen and van Waarden (n 275) 151.

non-compliance is likely to be a self-fulfilling prophecy.[734] Instead, it is to recognise the need to balance the high degree of reliance typically afforded to corporate crime control[735] so that the trust inherent to self-regulatory systems does not diminish the need for enforcement when there is a culmination of harm. That is, after all, not only the very predication upon which an enforced self-regulatory system operates, where it must remain rational not to cheat,[736] but is also critical to the UKBA corporate offence of punishing those who fail to prevent bribery. Without this it challenges the legitimacy and justiciability of the laws designed to prevent corporate crime and the extant regime. As Ayres and Braithwaite explain, for those actors who are shameless cheaters, tough sanctions remain necessary to empower strategies and *"to sustain the commitment of fair players to the justice of the game*."[737]

A key question is whether corporations have demonstrated a sufficient level of self-regulatory cooperation and reliability to suggest that the state can indeed trust them to effectively self-regulate? This is especially appropriate given studies which have questioned whether trust in corporate governance exists and to what extent, after instances of fraud.[738] The chapters so far have considered a list of cases which would most certainly cast doubt. If so, and there is indeed a growing emphasis on persuading and incentivising corporates to self-report wrongdoing, rather than enforcing wrongdoing via the conventional application of the criminal law, this reiterates concerns that corporate actors are not only being treated differentially,[739] but are finding themselves relieved of the pinnacle consequence of an enforced self-regulatory system – criminal enforcement. The present analysis echoes that which the results will show; that it is ok to trust, but for it to be verified, enforced and not too willingly relied upon. Dependence on voluntary self-regulation, if not independently attested or proactively investigated must be underpinned through both the threat and use of a range of regulatory and enforcement tools. The state should still aim to avert a culture of corporate

[734] Braithwaite and Fisse (n 133) 513.
[735] Susan Shapiro, 'Policing Trust' in Clifford Shearing and Phillip Stenning (eds) '*Private Policing*' (Sage 1987) 194; Also see, for instance, the FCA's principle of openness and cooperation which create an expectation that regulated bodies will self-report issues: FCA Principles, Principle 11.
[736] Charles Moore, 'Taming the Giant Corporation? Some Cautionary Remarks on the Deterrability of Corporate Crime' (1987) 33(1) Crime and Delinquency 379–402.
[737] Ayres and Brathwaite (n 127) 96.
[738] David Farber, 'Restoring Trust after Fraud: Does Corporate Governance Matter' (2005) 80(2) The Accounting Review 539-561.
[739] King and Lord (n 12).

resistance by utilising sanctions that promote self-induced compliance,[740] but to balance this against the criminological basis that crime - and corporate criminals - should be treated accordingly and be subject to the same consequences as the 'ordinary criminal.' To align with responsive, self-regulatory and enforcement theories, the landscape must have a structure which optimises appropriate form of delegation (reliance and trust), with equal forms of escalation.[741]

5.4 To Enforce or Not to Enforce?

The conceptual issues apparent from both the analysis of the UKBA and the self-regulatory principles have characterised a key issue; the understanding, application and lack of *enforced* self-regulation against corporations. Without prosecutorial enforcement backed legitimisation of relying on corporations to monitor their own compliance, this work proposes the normative argument that the criminal law and the intentions of the UKBA are being inadequately used to resolve corporate bribery. For some, this problem is argued to exist due to the history of theoretical and procedural obstacles[742] associated with applying the law to an artificial entity. Others assert that the criminal justice system is likely to fail as a primary mechanism of deterrence and control because it is founded on unrealistic views of the corporate actor and overly optimistic views of the legal system's capacity to control them;[743] such as the difficulty in liability attribution and the corporate proclivity to buffer itself against external threats.[744] The criminal law has always taken a very conservative and weak approach towards criminalising and sanctioning organisational wrongdoing; instead capitalising on its deep roots for individualism[745] and its grounded associated theories of culpability and establishing the necessary mens rea.[746] Hence, it has been common to question why a corporation should be punished – an unusuality not afforded to other serious crimes or criminals where there is no objection as to its fit within the operation of the criminal law.[747] The SFO have, however (and rightly so), reinforced that *"the issue at stake is simply this:*

[740] Bardach and Kagan (n 205).
[741] Ayres and Brathwaite (n 127) 161.
[742] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (3rd ed, Sweet and Maxwell, 2013), Chapter 2.
[743] Moore (n 736).
[744] Michael Clarke, 'Prosecutorial and Administrative Strategies to Control Business Crime' in Clifford Shearing and Phillip Stenning (eds) *Private Policing* (Sage 1987) 247-265.
[745] Wells (n 134).
[746] Ibid 84.
[747] Ibid 13.

where employees…engage in serious criminal conduct in the course of their employment as a result of a failure of corporate controls or an absence of compliance…is there not a case…that the corporate…should be held to account for those failings?"[748] The sense of affiliation to individualism is nevertheless entrenched in the roots of corporate liability and blameworthiness; not only where masters were held vicariously responsible for the acts of their servants,[749] but in the current leading authority on corporate liability where the embodiment of an organisation is defined by the autonomy of those individuals who control, direct or manage its affairs.[750] Despite the challenges that have come with the "*pragmatic structural amorality*"[751] of dealing with corporations, UK jurisprudence has recognised organisational criminal liability for over a century.[752] The consequence is a generally accepted notion that there is a non-enforcement of laws designed to control business misconduct and that even when they are used, their usage focusses on the smallest and weakest with largely insignificant consequences.[753]

A relevant factor in the discussion of corporate crime control is the recognition that whilst regulatory activity may be argued to have increased,[754] across almost all industrialised nations for a quarter of a century there have been diminishing levels of enforcement.[755] In the UK specifically, recent years have shown marked decreases in economic crime prosecutions[756] (certainly in instances of large bribery and corruption) which more broadly follow decades of combined attacks on the idea of regulation leading to regimes "*that are based, variously, upon declining levels of enforcement*", regulatory inaction and regulation without enforcement.[757] Certainly within the UK corporate bribery and corruption sphere at least, this tendency has

[748] Mathew Wagstaff, 'The role and remit of the SFO' (Speech at the 11th Annual Information Management, Investigations Compliance eDiscovery Conference, 2016) <https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/> accessed 12/12/2020.
[749] William Holdsworth, *A History of English Law* (3rd ed, Sweet and Maxwell, 1944).
[750] Tesco Supermarkets Ltd v Nattrass [1972] AC 153.
[751] Stuart Hills, *Corporate Violence: Injury and Death for Profit* (1st ed, Rowman and Littlefield, 1987) 190.
[752] Slapper and Tombs (n 97).
[753] Laureen Snider, *Bad Business: Corporate Crime in Canada* (1st ed, Nelson, 1993). Consider for instance the case of R v Skansen Interiors Limited (unreported), regarded as an easy target and where – due to it being a dormant company - there was no hope of any meaningful penalty on conviction.
[754] Braithwaite (n 46).
[755] Nikos Passas, 'Global Anomie, Dysnomie, and Economic Crime: Hidden Consequences of Neoliberalism and Globalisation in Russia and around the World' (2000) 27(2) Social Justice 16-44.
[756] Jane Croft, 'White collar prosecutions plummet even as crime rises', *Financial Times* (July 23, 2017); Carrie Brooker, 'White Collar Crime prosecutions in UK fall to five-year low', *Thomas Reuters* (December 23, 2019).
[757] Tombs (n 243) 137.

reflected more than just investigative and evidence complexities. Instead, the UK has suffered from a generally constrained and difficult corporate liability framework[758] and even political and economic interference in spite of severe wrongdoing.[759] Whilst this shift has taken place, in contrast to the UK's 2019-2022 Economic Crime Plan of there being an ongoing agenda to strengthen the capability to investigate *and prosecute* bribery and corruption, billions have been and continue to be recovered through new ways of 'enforcement' – using DPAs in the apparent increase of US style settlements.[760]

With the range of non-prosecutorial options becoming part of the enforcement toolkit, this has identified a marked end from what was essentially a dualistic choice for prosecutors: to prosecute or not. The development of this and the current landscape was arguably – albeit it with a contradictory message – projected long ago. The 2012 MOJ "*Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations*" (which addressed the then new idea of DPAs) argued in the case for change that economic crime was to be treated "*as seriously as other crime and taking steps to combat it effectively are key commitments."*[761] Although one would naturally read that to indicate that serious crime would be treated with more serious ramifications, the consultation ultimately emphasised inadequacies; necessitating a more flexible system which made the better use of time, processes and resources.[762] For some, these steps have reinforced a broader concern that the criminal law has never quite adapted to the rise of corporations and is slightly at a loss in coping with their complexities and diversity.[763] If there is a variance in how corporations are treated, this challenges mainstream principles. Firstly; the legitimate expectation of legal certainty that should follow criminal wrongdoing - reinforcing the concerns of Sutherland that preferential treatment is being awarded to corporate criminality

[758] Ministry of Justice, Corporate Liability for Economic Crime, Call for Evidence. Cm 9370 (January 2017).
[759] Ben Russell and Nigel Morris, 'Court condemns Blair for halting Saudi arms inquiry', *The Independent*, October 23, 2011).
[760] HM Government, 'Economic Crime Plan 2019-22' (2019), Action 48 and Paragraph 1.5 (respectively).
[761] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012. Chapter 1, paragraph 22.
[762] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012.
[763] Gobert and Punch (n 96).

via the way in which it is procedurally dealt with.[764] Secondly; that this degree of permissibility cannot be said for the ordinary criminal, who would instead have to use any demonstration of 'good behaviour' in sentencing mitigation.

The fact that a gulf exists between the way in which the law purports to treat corporate criminals and how the opposite can come to pass displaces the positive rhetoric emerging from enforcement trends and warrants review. This junction appropriately points back to a concern identified in this work and regulatory theory: legitimacy. This will now be briefed alongside related concerns of justiciability given the questions they invite over their relationship towards the suitability, and especially the outcomes of, sanctioning.

5.5 Legitimacy

This work has so far touched upon the theoretical concerns that exist in systems of private governance: surrounding their governability, accountability and responsiveness to regulatory intervention.[765] These are highly relevant as the legitimacy of how corporate bribery is prevented and enforced within the confines of the law is a highly influential factor in determining whether the UKBA is accomplishing its primary goal. The submitted drawback and inconsistency is that whilst the increasing usage of DPAs may be a procedurally appropriate enforcement tool, the circumstances behind their use and the lack of associated prosecution has come to delegitimise the proclaimed purposes of DPAs; the UKBA corporate offence; DPA intent and surrounding enforcement policy. For the SFO, its perceived power as an enforcement agency, the sanctions it imposes, and its authority or ability to do so, rests on a sense of legitimacy.[766] An absence of legitimacy can not only lead to a lack of cooperation or adherence by the regulatee, but a lack of public faith in the genuineness and efficacy of the system designed to prevent the wrongdoing. If the public have no confidence and 'the criminal' is undeterred, or even accommodated, the process is delegitimised and is unlikely to deliver justice. With a range of enforcement options at the SFO's disposal, it is important,

[764] Sutherland (n 2) 7.
[765] van Kersbergen and van Waarden (n 275) 155; Levi-Faur (n 390).
[766] Max Weber, The Theory of Social and Economic Organization, translated by Alexander Henderson and Talcott Parsons, (1st ed, Free Press, 1947) 126-32, 324-328.

therefore, that the frameworks *and the way they are used* are legitimately achieving the UKBA aims of prevention and enforcement.

This can firstly be considered from the perspective of legal and procedural acceptability. Whilst both enforced and non-enforced methods are procedurally and legally legitimate, this may not be the case empirically if they fail to fairly sanction or deter wrongdoing, or detract from their developmental intentions. Although procedural acceptability may drive institutional legitimacy (by way of corporate acceptance in the use of the sanctions), and is a crucial element of legitimacy in itself,[767] what is procedurally and legally sound is alone an inadequate criterion leaving a need for broader development.[768] Omitting the latter risks misplaced legitimacy. Procedures are not simply legitimate, justified and suitable because they are rules imposed by a designated authority.[769] Weber, when discussing legitimacy, makes the apt observation that "*submission to an order is almost always determined by a variety of motives*".[770] This raises the consideration that even though a corporation may be the subject of legal sanctions (DPAs), the motive behind their compliance may not be one of deterrence, but agreement. Tyler describes this as distinguishing between "*compliance with the law and voluntary, willing acceptance of the law*".[771] The resulting question is whether the legitimacy of the process is in fact "*conformity with the values and beliefs of the society*"[772] (i.e. legislative intent), or instead that which is suitable, accommodative or even beneficial to the values, longevity and beliefs of the corporation - where they play an interventional role in the outcome. The ability for an enforcement regime to command authority, deterrence and legitimacy must be something that extends beyond its ease or preferred suitability, and instead imposes values in situations where authority is expected to be exercised and the necessary sanctions can be brought to bear.[773] If the aim of a regulator/enforcement agency

[767] Tom Tyler, *Why People Obey the Law* (1st ed, Yale University Press, 1990).
[768] Tankebe and Liebling (n 38) 2.
[769] David Beetham, *The Legitimation of Power* (2nd ed, Palgrave Macmillan, 2013).
[770] Weber (n 766) 132.
[771] Tom Tyler, 'Self-Regulatory Approaches to White-Collar Crime: The Importance of Legitimacy and Procedural Justice' in Sally Simpson and David Weisburn (eds) *The Criminology of White-Collar Crime* (1st ed, Springer, 2009) 199.
[772] William Smith, 'The Concept of Legitimacy' (1970) 35(1) Theoria 17-29, 1.
[773] Talcott Parsons, 'Authority, Legitimation, and Political', in Carl Friedrich *Authority* (1st ed, Harvard University Press, 1958) 212-213.

is to impart compliance, this is likely to be judged on how they perform and the *outcomes* produced.[774]

The more appropriate consideration for this assessment of legitimacy is directed towards understanding the suitability of the *outcome* produced by the enforcement. That is to say, the process through which power and obedience are justified, and the nature and exercise of that power.[775] From a typical criminal justice perspective, whilst difficult to calibrate, legitimacy requires that when sanctions are imposed, that they be lawful, fair, appropriate, and justly serve the interests they are intended to achieve[776] whilst punishing wrongdoing as defined by society and the law. The intention for an enforcement regime would be, from Rousseau's perspective, to transform "*force into right and obedience into duty*;"[777] a position which aligns with the aspirational self-regulatory models discussed throughout the literature review. If achievable the agency and process has succeeded in its goal and is arguably deemed to be legitimate. Where procedures are willingly adopted according to standards common to "*both those who command and those who obey",*[778] through deterrence or innate values, it follows that they create a sense of legitimacy. It equally follows that the perceived power holders (the enforcement agency) must provide 'services' that "*respond to and reasonably satisfy key needs and expectations of non power-holders."*[779] But what is the resulting position for an enforcement regime which has not obtained obedience or where it is exploited? If the law's promotion of compliance is exploited, judicial outcomes and sentences need to be realigned to enhance legitimacy because it is not the black letter of the law that deters, but the imposition of liability and punishment for violations.[780] Following a US DPA imposed against HSBC in 2012 for anti-money laundering failings, the appointed corporate monitor reported how interactions with the bank were "*marked by combativeness*" and senior

[774] Valerie Braithwaite, 'Dancing with tax authorities: Motivational postures and non-compliant actions' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate 2003) 15-39.
[775] Jean-Marc Coicaud, 'Crime, justice and Legitimacy: A brief Theoetical Inquiry', in Justice Tankebe and Alison Liebling (eds) Legitimacy and Criminal Justice: An International Exploration (Oxford University Press 2013) 40.
[776] Tankebe and Liebling (n 38).
[777] Jean-Jaques Rousseau, The Social Contract (1st ed, Penguin Books, 1968) 52.
[778] Samuel Beer, 'The Analysis of Political Systems' in Samuel Beer and Adam Ulam (eds), *Patterns of Government* (2nd ed, Random House, 1962).
[779] Coicaud (n 775) 40.
[780] Paul Robinson and John Darley 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) Oxford Journal of Legal Studies 173–205.

personnel pushing back against adverse findings in a way that demonstrated a lack of acceptance of the role and legitimacy of the sanctions. So, what for the enforcement agency that relies on compliance; cannot or struggles to compel it; is not perceived as the benign big gun and may, in any event, leave the 'directing minds' behind the crimes unpunished? Without a recognition by 'the ruled' and society that 'the ruler' has capacity and willingness to do so, the label of 'legitimate' is too simplistic: necessitating a distinction between normative legitimacy (standard setting) and empirical legitimacy (the extent to which outcomes actually satisfy external and/or objective criteria).[781] In such instances legitimacy becomes *"in danger of being hijacked"* or *"becoming the captive of the self-serving dynamics of power"*[782] as the enforcement of business misconduct is instead centred around the pleading with corporations to be responsible rather than imposing the demands and control of the state.[783]

From an empirical perspective the circumstances in which sanctions are applied and "*the way that that power is exercised*"[784] is of importance - especially if they detract from the wider purpose(s) of the legislative regime and intentions under which it operates. Authorities that fail to address prominent concerns (as was the case leading up to the Leveson Inquiry) and too regularly resort to discretion in turn risk demise, disempowerment, or a decline into irrelevance.[785] Given that the UKBA enforcement regime is presently suffering from an opacity in the lack of sanctioning towards those individuals behind the crimes committed by corporations, how can enforcement legitimacy be clearly deduced when the power that is being exercised over elite rule breakers is failing to sanction the primary culprits - those upon which DPA policy was predicated? As Beetham indicates (when citing the banking crisis), if the 'power-holders' suffer no meaningful public retribution, "*they will simply continue as*

[781] Mike Hough and others, 'Legitimacy, Trust, and Compliance: An Empirical Test of Procedural Justice Theory Using The European Social Survey' in Justice Tankebe and Alison Liebling (eds) Legitimacy and Criminal Justice: An International Exploration (Oxford University Press 2013).
[782] Coicaud (n 775) 41.
[783] Steve Tombs and David Whyte, 'Introduction: Corporations Beyond the Law? Regulation, Risk and Corporate Crime in a Globalised Era' (2003) 5(2) Risk Management 9-16.
[784] Richard Sparks and Anthony Bottoms, 'Legitimacy and Imprisonment Revisited' in James Byrne and others (eds) *The Culture of Prison Violence* (1st ed, Pearson/Allyn and Bacon, 2008) 91-104.
[785] Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44(1) International Politics 157–74; such as fresh calls for the SFO to be merged with the CPS - Lord Ken Macdonald KC and Tim Owen KC, 'Episode 17: Clare Montgomery KC - Getting Away With Fraud' (12 December 2022) <https://anchor.fm/double-jeopardy-podcast> accessed 4 January 2023.

before, only with renewed confidence", paving the way for a legitimacy deficit, and even a crisis.[786]

Another aligning and *"significant problem of legitimacy"* is that not only are those behind the crimes left unpunished, but that such crimes exist against the backdrop of *"non-adherence or at best partial adherence…to legal rules that are nowadays near-universal."*[787] Questions arise, therefore, whether the continual use of non-prosecutorial outcomes are alone suitable, and legitimate, for such premeditated and egregious crimes. Particularly when charges are withdrawn, as in the Al-Yamamah Arms case, this can further lead to loss of legitimacy as such a response fails to live up to pre-established claims of condemnation.[788] If these cases never reach trial, arguments have been presented of an additional loss of legitimacy as the defendant (corporate or otherwise) is never subject to public (or jury) scrutiny. Levi *hypothetically* indicated that acquittals by 'professionals' – and decisions to agree to monetary fines only - may be interpreted as elites looking after their own;[789] especially if charges against those representing the directing mind and will do not follow. With much of the enforcement decision-making being conducted in forums difficult to review, this leaves accounts of suitable culpability or a lack thereof open to speculation.

Whilst a corporate may agree to and 'accept' a procedurally legitimate a sanction orientated around monetary sanctions, it should be remembered that fairness is "*at least as important a source*"[790] of legitimacy so as to invoke normative understandings of proportionality, transparency and consistency in treatment. With corporate offenders finding themselves separated from the typical risk of prosecution, and subject to private negotiations of agreed justice, this detracts from what has been argued to be a minimal and necessary level of enforcement legitimacy: sanctioning that is both dissuasive and communicate of instilling justice; and equally proportionate to ideas of wider public interest and social fairness.[791] The

[786] Beetham (n 228) 35.
[787] Michael Levi, 'Legitimacy, Crimes, and Compliance in 'The City': de maximis non curat lex?' in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 160.
[788] Ibid 165.
[789] Ibid 169.
[790] Ibid 174.
[791] Nicholas Lord, 'Establishing enforcement legitimacy in the pursuit of rule-breaking "global elites": the case of transnational corporate bribery' (2015) 20(3) Theoretical Criminology 376-399.

fairness of outcome to be faced by corporate offenders is further scathed given the prerequisite that it should be heavily dependent on "*the autonomy of investigators and prosecutors from political decisions and on the activism and competence of those authorities*".[792] Given the politically swayed circumstances of the Al-Yamamah case; economic considerations in Rolls Royce and Airbus (despite its express OECD convention denouncement); and the growth in rhetoric of SFO deficiencies or the advantageous DPA revenue generation, this adds to the complexity of forming a simplistic or de facto view of the UKBA's enforcement legitimacy.

With the enforcement trends witnessed behind the largest UKBA corporate offences to date (as opposed to that of smaller offenders), the inequality in treatment, and the historically differing approaches taken by SFO Directors more generally, this has revealed an incoherent and uncertain approach to enforcement. For Lord, when proposing an ideal view, he suggests that *"the minimum, necessary requirements for legitimacy would be the need to communicate a message of regular/certain and predictable outcomes to comparable enforcement actions to ensure 'audience' confidence in the authorities. Inconsistent policies and conflicting responses of enforcement regimes communicate uncertainty"* - and as the interviewee data will show - breed *"a lack of confidence on behalf of corporations considering whether to self-report offending behaviour such as in the UK where leniency is informally implied but formally uncertain."*[793] As ensuring an equality of outcome is a position upon which criminal justice and social fairness is based, is it legitimate for a system to declare prosecution for its most serious offenders, but seldomly resort to it, and instead target those seemingly underserving of it? Similarly, how can it be deemed legitimate for there to be the inconsistency of a sanctioning regime predicated upon the simultaneous prosecution of the individuals behind the companies' crimes (DPAs), but for this to be omitted or unachievable in reality?

5.6 Justiciability

The term justice incurs a variety of meanings from the Norman French *justicer* - to bring to trial or to punish; or the Latin *iustitia* – meaning righteousness. The first chapter of this work

[792] Levi (n 787) 174.
[793] Lord (n 791) Table 3.

presented Scanlon's view that 'justice' conveys that which is owed to people,[794] following an act which is deemed to be wrong. When such a wrong is committed, justice is what someone is then entitled to as an outcome, because it is right.[795] In a criminal law context it follows that to be justiciable, justice is seen to be served and a sanction suitably applied when the criminal gets what is deserved and righteousness is restored. In one sense this seems straightforward. However, further clarity is warranted over the nature of what is *owed*; how the given outcome is to be evaluated; and how it is to be implemented.[796] Coicaud proposes that to answer these should: i) ensure that expectations and rights are not overlooked; ii) consider what contextual duties are owed to others; and iii) to assess the social dimension of justice and the way it is imposed by those institutions in charge of organising, projecting, and defending it.[797] These factors arguably indicate an overarching interpretation of justice; fairness,[798] in that they convey an equality in how it is to be applied. From one perspective it could be argued that once a system defines how it is to regulate actions, such as through its policies, this becomes the charter against which "*no one is set to be advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances*."[799] However, how something is to be deemed justiciable also "*depends, not on general principle, but on subject matter and suitability in the particular case."*[800]

Similar to the aforementioned legitimacy discussion, for something to be just it necessitates a *procedural* righteousness as a baseline (to pursue fair and respectful processes – as opposed to outcomes).[801] However, for Hough et al, that in itself requires the need for 'moral alignment'.[802] Simply because a decision is made by a judicial authority; or has been ratified by a legal process, does not alone make it justiciable.[803] It is at this junction and with this

[794] Scanlon (n 40).
[795] Coicaud (n 775) 38.
[796] Ibid 38-39.
[797] Ibid 39-40.
[798] John Rawls, A Theory of Justice (1st ed, Harvard University Press, 1971) 10.
[799] Ibid 11.
[800] R (Abbasi & Anor.) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department [20021 EWCA Civ. 1598. T20031 UKHRR 76. para 85.
[801] Hough and others (n 781) 328.
[802] Ibid 328.
[803] Robert Summers, 'Justiciability' (1963) 26(5) The Modern Law Review 530-538.

collection of perspectives where the justiciability of sanctioning imposed under UKBA and wider corporate crime enforcement warrants review. Not because there is no principled system of punishment or justice, but in the outcomes of what sanctioning is imposed, the circumstances and way in which they are imposed, and their growing regularity.

This work has already briefed how the application of liability and punishment in a corporate setting is fraught with complexity and that the practical application of 'just deserts' requires a combination of justice *and* utility.[804] However, it remains fundamental that sanctions be allocated according to the degree of blameworthiness.[805] How justice is expressed towards corporate criminals becomes a matter for attention when the expectations promoted by legislation and surrounding policy are inconsistently and illogically applied; when prosecution is seldomly pursued against the most serious offenders – let alone the personnel behind the crime; and where the agency tasked with its enforcement suffers from a diminished ability to command authority over those it seeks to 'prosecute'. So, like legitimacy, although the application of justice and the identification of 'what is right' involves utilitarian, procedural and fairness considerations, crime - especially serious crime - constitutes the epitome of wrong[806] and remains deserving of strict condemnation.

To inform whether the UKBA enforcement regime and corporate crime sanctioning evokes a sense of justiciability requires an analysis of what 'justice' means in these contexts – and in practice. After chapter 4 presented the legislative parameters within which the enforcement of corporate bribery is purported to exist, as well as the subsequent specifications behind the DPA toolkit, the analysis becomes the degree to which these parameters are applied in practice and labelled to be justiciable. An appropriate barometer would therefore be to consider: i) the form 'justice' takes in the eyes of the courts; ii) how it is relatedly referred to within enforcement frameworks / policies; and iii) how these interact and evolve in practice. The data (and forward analysis) will show this to be often imprecise given the disconnect that exists between prosecutorial enforcement policy and rhetoric, and the converse culture of

[804] Nicola Lacey, 'Punishment, Justice and Consequentialism' in Anthony Duff and Nigel Simmonds (eds) Philosophy and the Criminal Law (Wiesbaden, Franz Steiner Verlag, 1984).
[805] Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From "why punish?" to "how much?" (1990) 16(1) Criminal Law Forum 259-290.
[806] Coicaud (n 775) 41.

accommodative settlement. When coupled with illogical and questionable application that deviates from both enforcement policy and SFO rhetoric (see the discussions in chapters 6 and 7), leaving the corporate potentially subject to monetary sanctions alone, this questions the value of the fairness and condemnation that is imposed in response to these serious crimes. Adapting Coicaud's terminology, when the duty that corporations owe 'to others' has no value from a principle standpoint, and violation is not valued or treated as a serious crime (in that prosecution may never follow) this deprives the enforcement relationship from justice and even its legitimacy.[807] Especially when sanctioning has been seen to be applied "*equally among actors of same status, and unequally among actors of unequal status,*"[808] there results the recognition of a hierarchical application of justice and a sense of instability in the differing ways and circumstances in which 'justice' is applied.

With so many cases now being resolved via DPAs and settled justice, the legitimacy and justiciability of the methods used to enforce UKBA and other corporate crimes has become questionable. When the most serious and deviatory transgressions can repeatedly attract a suitability for settlement, the intentions of the criminal law and its application within this arena are misaligned if prosecutorial enforcement is a rare sight for all except those who do not or cannot contest it. When enforcement exists but is subject to a web of influence,[809] this results in a shift from command and obedience to a consensual exercise of power.[810] Thus, the state's opposition to grand misconduct does not outweigh the costs (and even benefits) of non-compliance. With the s.7 offence only offering a defence for companies who can show they had in place adequate procedures, no defence is even suggested for the company who failed to satisfy the latter, does not admit guilt but simply agrees to cooperate and be on their best behaviour. Yet, this is exactly the predicament enforcement tends to excuse, legitimise, and justify for non-prosecutorial sanctioning. When coupled with a limited likelihood of prosecution, it is hardly a legitimate threat to incentivise and steer companies to effectively self-regulate and/or to self-report wrongdoing. It instead appears that the UKBA has legitimised and justified an increase in the compliance/accommodative school of thought,

[807] Ibid 44.
[808] Ibid 44.
[809] Rhodes (n 372).
[810] Peter Miller and Nikolas Rose, Governing the Present: Administrating Economic, Social and Personal Life (1st ed, Polity, 2008).

and a departure from the deterrence school of thought, for reasons too heavily aligned to efficiency than of legislative intent.

Since DPAs came into force in 2014, it is evident that the SFO has turned to newer methods of sanctioning that seldomly involve prosecution. As the former head of the DoJ criminal division stated; these agreements "*have become a mainstay of white collar criminal law enforcement*."[811] This is a stark difference to that conveyed by the SFO and the desires of the former Director, who defended the collapsed Barclays case arguing that pursuing trials reflected the UKBA's prosecutorial nature where the agency *should* be pursuing tough cases, and not just easy wins.[812] The current SFO Director has also made her wishes clear to expand the agency toolkit by developing the s.2 Criminal Justice Act 1987 powers to compel suspects of fraud or domestic bribery to answer questions to support if investigations can progress beyond suspicion.[813] Whether that would be used to aid prosecution is unknown, but on the face of it and without efforts to do so, this reinforces this research's theme: a rhetoric of enforcement, but a reality of settlement. According to King and Lord, the trajectory has seen the status of corporate crime "*as more dependent on the nature of the negotiated relationship between regulators and regulatees, rather than on the inherent 'social bads' that represent the basis on which these harmful behaviours were criminalised."*[814] This dependence indicates that the current UK approach to corporate crime enforcement has fallen victim to a paradoxical and hollow reality: demanding self-regulation by corporations in exchange for prosecutorial leniency but being found to speak loudly and carry few sticks.[815]

5.7 Summary

This chapter has aimed to challenge whether the reality of the UKBA corporate offence has reflected its conceptual intentions. It has shown that between the theoretical perspectives

[811] Lanny Breuer, 'Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association' United States Department of Justice (2012) <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association> accessed 02/07/2021.
[812] Michael O'Dwyer, 'Former Serious Fraud Office boss Sir David Green defends failed Barclays trial', *The Telegraph* (March 3, 2020).
[813] Jim Armitage, 'SFO boss Lisa Osofsky demands new powers to help prosecute corporate "bad guys" after collapse of Barclays Qatar trial' *The Evening Standard* (September 8, 2020).
[814] King and Lord (n 12) 118.
[815] For instance: Graham Ruddick, 'Serious Fraud Office Boss Warns Big Names to Play Ball—or Else', *The Observer* (April 2, 2017).

and how the UKBA operates in practice, the regime which was set to impose corporate liability via an enforced self-regulatory system is fraught with tension. Concerns have been noted that alongside the difficulties in regulating corporate misconduct, the 'law in books' and the 'law in action' are opposed. Although civil methods of enforcement can be a suitable tool for corporate crime sanctioning, this work (and its results) seek to reinforce that they must be bolstered with the threat *and use* of prosecution if required. When Geis argued that corporate environments contain a long line of personnel appropriately socialised into the strategics and systematics of rule bending,[816] it does not bode well, then, for either a criminal justice system or regimes of intended self-regulatory compliance if there is a limited threat of punishment against either such persons or the errant corporation. These are the very problems the UKBA and preceding international outcries sought to address. However, the difficulties incumbent with establishing corporate fault have led to a weakening of corporate criminal liability and a marked resolution in newer approaches to enforcement which align more with civil settlement and less with criminal prosecution. As these methods and their usage are not applied to other settings of criminal justice, they challenge the justiciability principles of equal treatment and its criticality to ensure a legitimacy of procedure and outcome.

The concerns for many observers of the UKBA and the regime it purports to advocate is that its limited use compared with the increasing use of DPAs has reached a point of enforcement uncertainty, prosecutorial lameness or even incapacitation. With no attempts to prosecute large scale corruption, few and unsuccessful efforts to prosecute the individuals and a recent spell of discontinued investigations - in spite of evidence clear enough to guarantee a DPA – the concepts behind the UKBA regime are reflected via an opposing reality. This not only leaves the corporate commanding a dominant position during the negotiations whilst escaping any criminal tarnish but suggests that UK corporate bribery and corruption has entered into a new normal of limited and/or redefined enforcement; 'Americanising' our regime without the necessary ancillary tools, liability focus, less restrictive laws and framework to maximise it potential.[817] Whilst evidence exists that cooperative enforcement

[816] Gilbert Geis, 'White-Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961', in David Ermann and Richard Lundman (eds) *Corporate and Governmental Deviance* (Oxford University Press 1978).
[817] Arlen (n 185) Chapter 8.

methods can result in an increase of[818] or equal compliance,[819] these should not diminish the ability to use criminal enforcement if necessary – as intended by the UKBA and the breadth of complementary guidance. When David Green worked to emphasise that the SFO was an enforcement agency, this rhetoric, the UKBA and the prominent self-regulatory trends all imply that if required and in accordance with the necessary legal tests, prosecute to deter, and do so without hesitation. The next chapter will begin to thematically discuss the conceptual reflections and the issues identified against the research data to verify how, where and why these tensions exist in practice.

[818] John Braithwaite and Toni Makkai, 'Trust and Compliance' (1994) 4(1) Policing and Society 1-12.
[819] Jennifer Arlen (n 267).

Chapter 6

Evaluating the Paradox

6.1 Introduction

The work undertaken in this thesis has so far sought to draw out and give consideration to some of the key tensions which inform the reality of the way in which UK corporate bribery and corruption is enforced. The purpose of this chapter is to begin analysing the research results and to synthesise what this tells us about the shift in UK enforcement culture; identifying its paramount weaknesses, what is indicated for improvement and ultimately how an enforcement paradox exists. Analysing this change is important because it has redefined contemporary understandings of *enforced* self-regulatory systems and the role of criminal prosecution: therefore, challenging the UKBA's approach to corporate bribery enforcement as it is synonymous in nature. The discussions here, and in chapter 7, are conducted with reference to the relevant literature, legislative and conceptual ideas identified previously to situate the findings in the context of existing theoretical and practical concerns.

This chapter will, through an evaluation of the qualitative evidence, thematically substantiate the primary concerns in holding corporate criminals to account and begin to present the extent to which they have unveiled an enforcement paradox. The evidence provided here, and in chapter 7, adds to the literature by offering commentary, perceptions and experiences that highlight clear discrepancies in enforcement practices. This paradox brings into question the essence of the UKBA corporate offence and both its intended and actual effects; by placing a too great a focus and reliance on self-regulatory principles (to be discussed in the next chapter) rather than enforced processes and practices. Section 6.2 will begin by discussing one of the pervading difficulties in enforcing corporate crime; corporate liability and its relationship to the s.7 offence. It will then critically analyse the law's attempt to resolve this uncertainty through the criminalisation of failure. Section 6.3 discusses the need for and value of prosecutorial enforcement. It will then put forward the essence of the enforcement paradox by explaining the way in which prosecution has been redefined. This reframing and the scarcity of individual enforcement couple together to produce significant

questions over the way in which corporate crime and criminals are treated. Section 6.4 summarises the key findings, fundamentally noting how enforcement strategies have seemingly been redefined with a preference for non-prosecution techniques.

6.2 Attributing Liability

> *"One of the big problems that the government has is that it has different regimes for corporate liability for different economic crimes. So, you see, particularly with…big corporate fraud, basically large companies cannot be easily prosecuted in the UK. You can have a great law but if you can't enforce it then it's almost meaningless."*[820]

The above interviewee (Executive Director of a UK anti-corruption NGO) comments describe two distinct themes (and concerns) which are not new to discussions surrounding the application of the UKBA; corporate liability attribution and the need for enforcement. Each will be discussed separately (here and 6.3) as they help explain the most obvious practical challenge towards the UKBAs ability to apply what is intended to be its most severe corporate sanction; criminal punishment. These are important considerations because although no procedural or legislative obstacles exist to prosecution, "*the means by which criminal responsibility can be ascribed and conviction attained are not straightforward nor realised often in practice."*[821]

The two predominant views of corporate criminal liability drawn upon in the UK have been described as the derivative/nominalist and the realist/organisational.[822] The former holds that corporations are merely, and nothing more than, a collection of individuals; where criminal responsibility rests with the humans which comprise it. The latter views the corporate entity as more than the sum of its parts, having an existence, meaning and legal personality of its own; so as to make it capable of acting aside from and beyond its

[820] Interview 1.
[821] Campbell (n 94) 57.
[822] Wells (n 700) 75.

constituents.[823] That is to say that without the organisation, there would simply be no crime – so responsibility and sanctioning should rest with the entity.[824] The blend of these formed the doctrine of identification and – as outlined in the introduction - underpins the current corporate criminal liability regime as set by Tesco Supermarkets Ltd v Nattrass. Although the area gained some convolution from the Privy Council in Meridian Global Funds Management Asia Ltd v Securities Commission - where a broader attribution of individuals to corporate liability was advocated as being a matter of case-by-case interpretation[825] - this was firmly rejected by the Court of Appeal in R v Great Western Trains and the Nattrass principle was reaffirmed.[826]

The result of the perceivable reluctance to declare anything more than attribution to those of a directing mind has led to perpetual criticism of the difficulty in establishing who is precisely of such capability as being – according to the former Director of the SFO - *"ridiculous, and demonstrably so."*[827] This is because – as David Green previously remarked – *"the email trail has a strange habit of drying up at middle management level."*[828] During his interview for this work, he extended this adding that:

> *"…it is uniquely difficult, in this jurisdiction, to hold a company to account in a criminal court…it's so much easier to hold a company to account, say in America, where they have vicarious liability…the identification principle requires you to identify the controlling mind of a company, and then prove that that person is complicit in the particular criminality with which you're concerned. That's usually almost impossible (and the evidence) dries out at middle management, almost inevitably."*[829]

[823] Ibid Chapter 5.
[824] Maurice Punch, 'The Organizational Component in Corporate Crime' in James Gobert and Ana-Maria Pascal (eds) *European Developments in Corporate Criminal Liability* (Taylor and Francis 2011) 101-113.
[825] Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 NZLR 7.
[826] R v Great Western Trains 1999. The led to the Attorney-General's Reference (No.2 of 1999) which reaffirmed the doctrine set out in Tesco v Nattrass.
[827] Interview 2.
[828] David Green, 'Cambridge Symposium 2013' (Speech at the Cambridge Symposium on Economic Crime, 2013) < https://www.sfo.gov.uk/2013/09/02/cambridge-symposium-2013/> accessed 18/03/2020.
[829] Interview 2.

He furthered when commenting on the LIBOR investigations:

> *"…we could never prove the controlling mind was complicit in the manipulation of LIBOR. We could prove traders did it at ground level, as it were, but not that the management on the 36th floor knew all about it, though I don't doubt that they did, and it was known throughout the industry. So what happens as a result of that? A British bank is held accountable, not in London, but in an American courtroom in New York, and fined $750 million, which goes to the American Treasury, which seems ridiculous."*[830]

The current Director of the SFO, Lisa Osofsky, explained that this negatively impacts corporate criminal justice as enforcement agencies can "*go after Main Street"* but not *"after Wall Street.*"[831] The hindrance can often make "*identifying responsible individuals challenging or impossible*."[832] Fisse argued long ago that the "*combination of corporate loyalty, secrecy, and sanctimonious policy directives presents a formidable challenge to any enforcement agency seeking to uncover evidence of managerial mens rea."*[833] As was supported during the ethnographic observations, unless there exists an extensive reliance on the corporate, the use of spies, electronic surveillance and/or entrapment, these barriers are nearly insurmountable.[834] To this day, criticism of the "*perceived shortcomings*" and "*limits*"[835] of the rule remains perpetual and led a former General Counsel of the SFO to publicly summarise that: "*it is unfair in its application, unhelpful in its impact and it underpins a law of corporate liability that is unprincipled in scope."*[836]

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[830] Interview 2.
[831] Lisa Osofsky in Michael Goodwin KC, 'Failing to prevent economic crime', The Law Gazette (April 9, 2019).
[832] Serious Fraud Office, 'We're defending the UK as a safe place for business' (SFO Speeches, 2021) < https://www.sfo.gov.uk/2021/06/30/were-defending-the-uk-as-a-safe-place-for-business/> accessed 06/07/21.
[833] Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions', Southern California Law Review (1983) 56(6) 1141-1246, 1188.
[834] Gilbert Geis, 'Deterring Corporate Crime' in Ralph Nader and Mark Green (eds) *Corporate Power in America* (Grossman Publishers 1973) 182-197, 192.
[835] Interview 3.
[836] Alun Milford, 'Control Liability – Is it a good idea and does it work in practice?' (Speech at the Cambridge Symposium on Economic Crime, 2016) <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/> accessed 09/12/2020.

Despite the hesitancies associated with artificial persons and the difficulties in a system with no blueprint or underpinning design,[837] corporate entities are attributed legal responsibilities in the same capacity as natural legal persons. That personalisation sensibly brings attached duties and it is a logical consequence that in an equal manner to natural persons, the law takes steps to "*ensure corporate responsibility and accountability.*"[838] Its success, however, is questionable if practically unenforceable, as rather than bolstering executive conduct and accountability, it creates ambiguity. The difficulties surrounding the conventional doctrine of identification has always been (and remains to be) in the linkage of the individual to the corporate; where its limitations, the need for equity and justiciable attrition are all sought. Following the 2017 Call for Evidence on corporate criminal liability for economic crime, such complications formed the basis of why 75.9% of respondents agreed that the identification doctrine inhibits holding companies to account for economic crimes.[839]

Problematic corporate accountability was recently reiterated following the acquittals of three Barclays executives in 2020.[840] After their case conclusions, this led to the release of the judgments against the bank itself where it became clear that the reasoning behind the dismissal of the charges against Barclays itself was that the executives, including the Chief Executive Officer, did not represent the 'directing mind and will', and that they could not act without the approval of the board. Consequently, the bank could not be criminally liable. The case personified how managerial *mens rea* is difficult to define because "*decentralisation and delegation of tasks often make it impossible to distinguish 'managers' - those who make corporate policy - from those who carry it out*."[841] Other UK enforcement agencies have sought to overcome this. The Financial Conduct Authority (FCA), for instance, under the Senior Managers and Certification Regime (SMCR), have taken steps in financial regulation to demarcate and strengthen responsibility by adopting a mechanism to make individuals –

[837] Celia Wells, 'Corporate Responsibility and Compliance Programs in the United Kingdom' in Stefano Manacorda and others (eds) *Preventing Corporate Corruption: The Anti Bribery Compliance Model* (Springer 2014) 505–513, 506.
[838] Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) Research Paper Series 3-10 Journal of Business Law 6-7.
[839] Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence: Government Response 2020.
[840] Kalyeena Makortoff, 'Three former Barclays executives found not guilty of fraud', *The Guardian* (February 28, 2020).
[841] Fisse (n 833) 1188.

namely senior managers - more accountable for their conduct and competence.[842] Where the identification principle falls, this route effectively overcomes the obstacle by placing a compliance responsibility on managers, allowing a court – if required - to identify persons of sufficient responsibility to satisfy the directing mind and will. If something similar was to ever be adopted by the SFO, aside from necessitating cross agency cooperation to implement any reproduction - to consider a view raised in the House of Lords review – it may lead to UKBA charges being substituted for regime convenience over reasoned consideration.[843] To implement a means which punishes a 'certified someone' is naturally laden with the risk of officialising a scapegoat or human shield for an amoral corporation. To use Braithwaite's analogy, by disciplining someone "*in the name of traditional morality*" punishment can, although permitting the "*minnows*" to cough up the "*big fish*", become "*about symbolism rather than equality before the law*."[844] Until a time where a newer provision of liability attribution might be adopted, according to a former SFO General Counsel, the identification principle *"is there to stay."*[845]

6.2.1 Criminalising Failure

Although the potential of reform and a more expansive outlook to corporate liability would undoubtedly alleviate the current hurdles, the important consideration apparent from this research is that the UKBA s.7 offence was constructed and intended to circumvent this very problem and offer a solution. The hybrid nature avoids the complexity of the identification doctrine whilst not going so far as to create full vicarious liability; which has been generally criticised by many - bar the SFO. With the s.7 offence requiring corporates to demonstrate a reasonable degree of preventative measures (adequate procedures), as one interviewee who chairs a global anti-corruption watchdog described it, this targeted one of the main impracticalities faced by the SFO in attributing responsibility:

> *"…for obvious legal reasons…they (companies) ensure that discussions around the…bribes are removed from the company as far as possible and this is what the*

[842] Financial Conduct Authority, 'Senior Managers and Certification Regime' (2019).
[843] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 57.
[844] John Braithwaite, 'What's wrong with the sociology of punishment?' (2003) 7(1) Theoretical Criminology 5-28.
[845] Interview 3.

> *role of intermediation in these deals and in these companies is all about…intermediaries effectively provide that legal distance for the company. And companies have become smarter and smarter and smarter at doing this…now the main way in which bribes are paid is not only through an intermediary but intermediaries developing contracts that are often completely separate (from the company*), *and the bribery is routed through those offset contracts."*[846]

By avoiding the need to locate requisite intent in a senior officer and eliminating the difficulty of dividing employees "*into those who act as the 'hands' and those who represent the 'brains'*",[847] s.7 facilitated prosecution, not hindered it. As a senior SFO official put it, the s.7 offence "*made it easier…to take companies to account*."[848] It firstly avoided the troublesome issue of *mens rea* by adopting a regime of strict liability, and secondly, the questions of *actus reus* by defining offences with terminology in respect of a failure; such as to act, or to devise/implement reasonable or appropriate procedures. A former General Counsel of the SFO described that it vitally "*aimed at trying to deal with the problem at source."*[849] As it does not impute liability from agent to principal, but by making the agent and principal into the same person,[850] it helps navigate prosecutorial complexity. It equally applies logic: if fault underlines individual liability, why should it not precede corporate liability?[851] At its most extreme and simplistic interpretation, it permits the *ex hypothesi* argument that if "*the procedures fail to prevent bribery they are, by definition, inadequate*," and therefore the company is at fault.[852] This is, of course, rarely the case, difficult to show and not collectively agreed upon: so much so that the House of Lords UKBA committee implied (and Sir Brian Leveson agreed) that *adequate* should, in effect, mean "*reasonable in all the circumstances*."[853] Having an approach to liability which can assist in holding disobedient corporations to account, especially in instances of severe criminality, was perceived by a

[846] Interview 4.
[847] Wells (n 700) Chapter 5, 101.
[848] Interview 5.
[849] Interview 3.
[850] John Coffee, 'Corporate Criminal liability: An Introduction and Comparative Survey' in Albin Eser and others (eds) *Criminal responsibility of legal and collective entities* (Edition Luscrim 1999) 1.
[851] Richard Gruner, *Corporate Crime and Sentencing* (1st ed, Michie, 1994) 80-82.
[852] Campbell (n 94) 60.
[853] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) Corrected oral evidence: Question 153, Lord Saville of Newdigate.

majority of the interviewees to be vital in an environment where companies are increasingly seeking to avoid prosecution. With the number of DPAs to date, only three convictions under the s.7 offence and historic examples of corporate intent to dispute allegations of criminal wrongdoing,[854] it perhaps demonstrates that whilst corporates are willing to engage in negotiations, they are less willing to accept criminal records. If this is the case, ensuring the ability to both prevent wrongdoing and secure (not avoid) enforcement is evident.

Since in force, aside from enforcement intentions, government bodies and Parliament have always been eager for the failure to prevent approach to acknowledge the role self-regulatory behaviour plays in such complex industries and for it to have an incentivisation effect on internal governance.[855] Using the criminal law to impose liability for serious failures whilst inviting good governance and activating internal regulation conveys an imperative message about the failure to prevent model and the responsibilities imparted on corporates; by demarcating morally unacceptable conduct and establishing the imposition of expected norms.[856] In line with the six principles set out in the MOJ's guidance to the UKBA,[857] the failure to prevent model sought "*to influence behaviour and encourage bribery prevention*" via it supporting established notions of good corporate governance.[858] Balancing the desire to influence with the ability to enforce earned this approach praise by a former SFO General Counsel as "*a perfectly sensible model…dealing with the problem at source*" but offering, when required, the ability to "*bear down on the problem*" and to "*make them (the corporate) take responsibility.*"[859] This supports broader views of effective corporate criminal liability structures which, as Arlen argues, must present *"a genuine, material threat of being held liable for all of their employees' crimes."*[860] Whilst the dual potential offers a reassuring

[854] Consider for instance R v British Steel 1995, where it appealed a £100 fine for a negligently caused workplace death.
[855] See for instance: Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence: Government Response 2020.
[856] Paul Almond (n 222) 144-145.
[857] Ministry of Justice, The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
[858] Ministry of Justice and Department for Business, Innovation and Skills, Insight into awareness and impact of the Bribery Act 2010 Among small and medium sized enterprises (SMEs) (2015) 3 <https://www.gov.uk/government/uploads/system/uploads/ attachment_data/file/440661/insight-into-awareness-and- impact-of-the-bribery-act-2010.pdf> accessed 26/06/2020.
[859] Interview 3.
[860] Arlen (n 185) 166.

benefit the SFO claims to be lacking surrounding liability from the identification doctrine,[861] this reaffirms a noteworthy direction identified throughout this work; that when dealing with corporate bribery, the criminal law has become 'particularised' according to the subject,[862] taking on an increasing alignment towards influence and prevention, as opposed to punishment and deterrence.[863]

For enforcement purposes the failure to prevent model notably provides the relief of a more equal approach than that offered with the identification principle; where larger companies are feasibly less at risk given the difficulty in establishing their directing mind, versus the comparative ease of identifying those responsible in smaller enterprises.[864] This difference can result in differential sanctioning, discrimination and concerns "*of equality, and therefore legitimacy, before the law, as larger organisations will be better positioned*" to battle a prosecution or negotiate a DPA.[865] The outlook was shared by both respondents to the MOJ's 2017 Call for Evidence on corporate criminal liability for economic crime[866] and the former Director of the SFO, David Green:

> *"…it is unfair on small companies as opposed to large companies with complex corporate structures. Why? Because in a two-man company, for instance, it's perfectly easy to identify the controlling mind because it's the two men, but when you have a complex corporate structure, it's almost impossible."*[867]

It also helped build a sense of practical progression and avoid what Gobert notes to be one of the prime ironies of the identification principle; "*that it propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is*

[861] Alun Milford, 'Control Liability – Is it a good idea and does it work in practice?' (Speech at the Cambridge Symposium on Economic Crime, 2016) <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/> accessed 09/12/2020.
[862] Almond (n 222) 146.
[863] Hill (n 838).
[864] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Written Evidence from the Serious Fraud Office (BRI0018).
[865] King and Lord (n 12) 82; Brent Fisse, 'Consumer Protection and Corporate Criminal Responsibility: A Critique of Tesco Supermarkets v Natrass' (1971) 4(1) Adelaide Law Review 113-129.
[866] Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence: Government Response 2020.
[867] Interview 2.

needed most."[868] As this remains the way corporate lability is attributed for the substantive offences, it leaves a system of liability subject to the risk of weakened or uncertain enforcement due to a plausible reality; that now companies have become aware of the potential for the SFO to be "*hamstrung*",[869] they can organise operations in such a way as to insulate or disperse senior management from any identified decision-making - although some argue this is not a widespread reality.[870] For this reason, the s.7 approach was deemed by the former SFO Director to be *"extremely effective as drafted."*[871]

The stalemate between those calling for greater corporate liability and those against has, since submission of this work (June 2022) been reviewed by the Law Commission.[872] After the consultation was announced in 2021, its objective was to assess if and where the laws currently surrounding corporate criminal liability should be reformed to better capture and punish criminal offences committed by corporations, and their directors or senior management.[873] The options sought were intended for corporates to be *appropriately* held to account and to ensure that public trust was not damaged if corporates *"cannot be prosecuted for criminal offences carried out in their name*."[874] In total, the Law Commission provided 10 options – 4 of which related to new failure to prevent corporate offences. The remaining 6 largely preserved the status quo: maintaining the identification doctrine, utilising monetary penalties and bolstering compliance obligations. It did not include any 'options' for a failure to prevent economic crime offence; to consider the doctrine of *respondeat superior* ('let the master answer' – more commonly known as vicarious liability); or any offences relating to punishing company culture. Ultimately, the Law Commission stressed that its report was *not* recommendations. Although it omits any clear focus on reform and presented

[868] Gobert (n 26) 393.
[869] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Questions 157, Lisa Osofsky.
[870] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Question 136, Eoin O'Shea.
[871] Interview 2.
[872] Law Commission, *Corporate Criminal Liability An Options Paper*, (Law Commission, June 2022).
[873] Law commission, 'Law Commission sets out options to Government for reforming how companies are convicted of criminal offences' (2022) <https://www.lawcom.gov.uk/law-commission-sets-out-options-to-government-for-reforming-how-companies-are-convicted-of-criminal-offences/> accessed 08/01/2021.
[874] Law Commission, 'Law Commission begins project on Corporate Criminal Liability' (2020) <https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/> accessed 12/01/2021.

less-comforting indications that future corporate defences of *adequate* procedures should be replaced with the vaguer notion of *reasonable* procedures, it has demonstrated a change in tone towards the widening of corporate liability. The outcome, and it's practical meaning, remains to be seen.

The construction of and liability attributed via the s.7 methodology is, at least presently, not only a more practical tool to be using but is currently considered to be "*very sensible*"[875] and the reasonable compromise for corporate liability[876] when facing the difficulties of the identification doctrine. As Gobert described it: "*if there is fault to be attributed to the company, it is to be found in the way that the company organises or operates its business affairs. It is often argued that a company cannot act except through real persons…this may be so, but it need not control the law's approach to corporate criminality.*"[877] Expanding failure to prevent liability has, however, been met with caution even from its supporters. When speaking before the House of Lords UKBA committee, a former Director of the National Crime Agency voiced the need for "*real care*" over the structure and focus of any expanded failure to prevent models so as to proportionately understand the mitigations needed to ensure corporate structures had protections from too wide a risk of economic crime liability.[878] This view has been – perhaps unsurprisingly – echoed by corporate advisors/lawyers. As an experienced corporate crime Partner said during one interview:

> *"…it doesn't mean that I don't think companies should ever be criminally liable. It just means that I don't think we should be bending our laws, changing our laws, so that you make it an automatic criminal offence and then you can go for the company first, get the cash in and maybe then say, ah, let's not worry about the individuals. I think it's arse about tit."*[879]

[875] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Question 117, Hannah Von Dadelszen.
[876] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 170-171.
[877] Gobert (n 26) 409-410.
[878] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Questions 184-190, Donald Toon.
[879] Interview 6.

In October 2020, the current Director of the SFO, Lisa Osofsky, publicly reiterated their role in the UK's enforcement and prosecution agenda by setting out a wish-list. The failure to prevent model and its expansion sat at the top as a desired addition to the enforcement toolkit.[880] In the view of Sir Brian Leveson: *"the ability to say 'you've not taken steps to prevent', is, to my mind, absolutely critical… extending it to other offences of fraud, I personally think that that would be in the public interest."*[881] For the former Director of the SFO, this was an essential part to practically improving corporate criminal liability:

> *"I would like, and I've campaigned for this since 2012, and two Parliamentary committees have backed the suggestion, that Section 7 of the Bribery Act should be widened so that it reads that a company has failed to prevent acts of economic crime by persons associated with it, thus all fraud offences."*[882]

A senior SFO figure reinforced that the desired expansion addresses a fundamental abnormality:

> *"So, you can be held liable for the actions of associated persons who are bribing on behalf of the company, or who are facilitating tax evasion…but not for fraud, not for money laundering, not for false accounting…it's been the long-standing SFO position that that is quite an anomaly and we think the corporate liability…should be extended across all forms of economic crime."*[883]

Expanding the failure to prevent landscape addresses what the former Director of the SFO described as "*the absolute kernel of the problem: if it's so difficult to prosecute a company, why should a company agree to a DPA? It's obvious and simple, that circle needs to be squared…by broadening s.7."*[884] Such an expansion is hailed – at least by the SFO and

[880] Lisa Osofsky, 'Future Challenges in Economic Crime: A View from the SFO (SFO Speeches, 2020) <https://www.sfo.gov.uk/2020/10/09/future-challenges-in-economic-crime-a-view-from-the-sfo/> accessed 04/05/2021.
[881] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Question 153, Sir Brian Leveson.
[882] Interview 2.
[883] Interview 5.
[884] Interview 2.

government - to be a primary solution to successfully combating corporate bribery. It would of course remain a hollow conception if – as is currently the case for corporate bribery – the failure to prevent approach is seldom used in place of more amenable enforcement techniques (DPAs); despite the SFO official interviewed arguing "*it has been very useful in the bribery and corruption field to be able to hold corporates to account."*[885] Having had the House of Lords Committee declare that the s.7 offence "*deals more than adequately with the question of corporate responsibility*",[886] it prompts coverage, then, of either an insufficiency by masking an inability to prosecute under the guise of strategies of responsibilisation[887] or of insufficient usage. Although in recent years the SFO have faced criticism for a number of collapsed or failed investigations and an underutilisation of prosecution, the rationale for expanding 'failure to prevent' offences was dualistic; to increase enforcement potential and for corporates to improve internal compliance. A concern, however, is that even with the desire for improved corporate behaviour, as Campbell notes, "*there has been no reported causative or correlative decrease in corporate misdeeds since the introduction of compliance requirements*" (such as the prosecutorial leniency of DPAs), "*nor any qualitative indication from individuals in corporations that their behaviour is altered/improved*."[888]

Since submission of this work and the expression of the above views, despite a former SFO General Counsel declaring that development of the failure to prevent toolkit had been firmly left "*sitting in the long grass*",[889] in January 2023, the government finally voiced its intention to create a new offence of failure to prevent fraud under the Economic Crime and Corporate Transparency Bill 2022.[890] In a mark of what this thesis advocates to be consistent rhetoric, the current Director of the SFO hailed the development as possessing the "*potential to transform prosecution.*"[891] However, even if enacted in constructive detail, the SFO remain in need of productively using such tools to mitigate the gaps in enforcement; against both egregious corporate offenders, and certainly the people behind their crimes (see 6.3.2 for

[885] Interview 5.
[886] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 108.
[887] Gobert and Punch (n 96) 294.
[888] Campbell (n 94) 63.
[889] Interview 3.
[890] Robert Wright, 'UK to make 'failure to prevent fraud' a criminal offence', *Financial Times* (January 25, 2023).
[891] Louis Goss, 'Serious Fraud Office: Osofsky backs government's plan for new 'failure to prevent' fraud offence', City AM (January 25, 2023).

further discussion). Else, if there again comes a time where judges find themselves referencing systematic criminality and an "*extraordinary…full co-operation and willingness to expose every potential criminal act,*"[892] the landscape will remain questionably paradoxical. That is because, similar to the impact of the UKBA in 2011, unless such powers come to enforcement fruition, further (and 'transformative') prosecutorial legislation, will remain hollow if prosecutions remain unseen.[893] This not only underpins the DPA system which would undoubtedly be used to sting offenders, but a responsive regulatory environment; whereby the company cooperating with investigators to punish on one front (against individuals), may then be presented *"the carrot of immunity from further prosecution on other, more serious, charges"* (corporate prosecution under s.7).[894]

6.3 Enforcement

> *"The key priority has got to be enforcement of the Bribery Act…enforcement is the absolute key to everything…You can't tackle economic crime fairly and justly in the UK without making sure that the big financial actors in this country can be held accountable before the law equally to the rest of us."*[895]

From regulatory theory to legislative frameworks, enforcement has been discussed throughout this work to play a characteristically important role and is embodied in the UKBAs enforced self-regulatory corporate offence. For the purposes of this work, the enforcement tools referred to are that of individual and/or corporate prosecution and DPAs. In recent years, the importance of enforcement across this arena has, however, been confronted with a spate of inactivity. As Interviewee 6 (a corporate crime Partner) observed:

> *"They've abandoned Rolls-Royce, they've abandoned GlaxoSmithKline, they finished the Tesco investigation with no convictions, and they've opened an investigation into a bakery (Patisserie Valerie) and a couple of other small things,*

[892] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, paragraph 19 and 62 respectively.
[893] Jennifer Arlen (n 267).
[894] Ayres and Braithwaite (n 127) 43.
[895] Interview 1. Executive Director of a global anti-corruption NGO.

> *very small things. I do not understand, at the moment, what all those people who were working on Rolls-Royce, Tesco, Glaxo, etc., what they're doing now…When you see a drop in publicised enforcement…anxiety levels about bribery and corruption, as a compliance risk, will drop and that will probably lead to a lowering of standards."*[896]

This work does not advocate that enforcement should be defined through the medium of prosecution alone and has cited the role of non-enforcement tools; such as DPAs. This includes the benefits of securing and steering compliance through means less attached to command and control as they have clear benefit to all parties involved; the state, regulatee and society. This coincides with broader agreements that corporate criminal liability should be structured to deter, rather than simply punish.[897] The growth of DPAs supports this standing and demonstrates how enforcement options can recognise the limits of criminal law application and the associated need to embrace additional tools to support an enforcement continuum. This view was recognised by Simpson and others who, when examining the effects of interventions to deter corporate crime found that using a plethora of interventions at the same time had "*a small but consistent effect on deterring non-compliance among individuals and among corporations."*[898]

What is instead argued is that to control and punish the most severe cases, the symbolic application up to and including the use of prosecution via the criminal law should remain a primary tool to punish wrongdoing. The threshold upon which prosecution should be decided is, of course, multifaceted. However, where evidence exists of serious wrongdoing; harm to victims, industries or communities; and especially where there has been no active role in self-reporting or cooperation, the norm and legal status (of both corporations and their directing mind(s)) enables, and not disables, prosecution to be a primary tool for sanctioning. After all, the SFO Director recently reaffirmed that in fighting complex financial crime, "*we achieve this*

[896] Interview 6.
[897] Arlen (n 185) 161.
[898] Sally Simpson and others, 'Corporate Crime Deterrence: A Systematic Review', Campbell Systematic Reviews (2014) 10(1) 1-105, 1.

by prosecuting criminals."[899] For an anti-corruption Director, "*prosecution absolutely has to be part of the equation.*"[900] Campbell furthered this position noting how the capacity of deferred and non-prosecution alternatives to enable "*the circumvention of criminal justice by corporations is ineluctable",* so there always needs to be "*a sufficiently robust alternative."*[901] Fully acknowledging the benefits of DPA efficiency and predictability, prosecutorial enforcement resumes a critical role for a number of reasons. Firstly, to not compromise transparency, accountability, proportionality and due process;[902] secondly, because it is often deserved; and thirdly, because enforcement should not be too dependent on the optimism of future compliance or cooperation[903] when a wrongful act has been committed – and should instead be treated as a matter for sentencing mitigation.

Criminal punishment (in the right circumstances) provides the necessary incorporation of *"exposure, labelling, deterrence, prevention, reform/rehabilitation, remediation, punishment and retribution*" which is not met by DPAs.[904] The Criminal Bar Association grounded this position noting that even with measures such as DPAs, they *"are only as effective as the willingness and capacity of the State to prosecute complex crime where necessary."*[905] Arlen argues that to achieve corporate crime compliance there must be *"a genuine, material threat of being held liable for all of their employees' crimes*":[906] coinciding with the broader intent to increase the failure to prevent model. Governments should not only have the courage to appropriately legislate, but to fully act on that legislation.[907] As a Chief Compliance Officer of an international bank advocated:

[899] Serious Fraud Office, 'HMCPSI praises SFO's "effective and proactive" recovery of the proceeds of crime' (News Releases, 2021) <https://www.sfo.gov.uk/2021/07/22/hm-crown-prosecution-service-inspectorate-praises-sfos-effective-and-proactive-recovery-of-the-proceeds-of-crime/> accessed 22/07/2021.
[900] Interview 1.
[901] Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Justice 269-291, 270 and 287 (respectively).
[902] Karen Yeung, *Securing Compliance* (1st ed, Hart Publishing, 2004) 151.
[903] Ashworth (n 250) 248.
[904] Campbell (n 843) 287.
[905] Criminal Bar Association response to the DPA consultation, obtained under Freedom of Information Act by Corruption Watch.
[906] Arlen (n 212) 166.
[907] Interview 7.

> "*Fraud and corruption has always been a crime, and it should always be, and that's the issue. And although (corporates) can self-regulate to some extent, to have an internal controlled environment to lessen the opportunity for crime, you'll always need an effective enforcement agency."*[908]

That is so when procedures fail and they are identified to be inadequate, the law must contain an ability to invoke a process whereby the "*rule-breaker is not minded to violate rules in the future, or so that others who might also be tempted to break rules choose to do otherwise, for fear of an unpleasant fate.*"[909] As this field has moved beyond the sole reliance on the identification doctrine towards the growth of attribution based upon systemic failures, the law has therefore not moved away from criminal liability; but rather towards it in a redefined capacity. Prosecution remains an obvious means by which the actions are punished and despite attempts to contradict the connection of punishment to criminal law,[910] it should instead be understood as symbiotic;[911] having a close connection and providing many conditions upon which liability is to be dealt with.[912]

Even though the method of enforcement directed towards corporate crimes will depend not only on the standard evidential tests and Code for Crown Prosecutors, but the extent to which the organisation has shown the adequacy of its procedures and whether there has been a degree of cooperation, these additions do not mean or indicate these crimes should be enforced differently. In fact, there is an arguable obligation on both the state and criminal justice system to provide the victims of corporate crime with a system of enforcement that strengthens the message that these are serious criminal offences and should be treated accordingly.[913] Prosecution is, furthermore, at the heart of the SFOs modus operandi: the Roskill Model.[914] That provides that the SFO is to both investigate *and* prosecute. During this

[908] Interview 7.
[909] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (1st ed, Oxford University Press, 2002) 4.
[910] Lacey (n 609).
[911] Michael Davis, 'How to Make the Punishment Fit the Crime?' in Ronald Pennock and John Chapman (eds) *Criminal Justice* (NYU Press 1985) 119.
[912] Ashworth (n 221) 225.
[913] Wells (n 700) Chapter 2.
[914] The 'Roskill Report' (Fraud Trials Committee Report) 1986.

research, interviewees generally praised the model's approach to combatting serious fraud - but a concern was apparent. As Interviewee 6 put it:

> *"…it has to be doing something and it has to be seen to be effective. I don't really see how the SFO can maintain its credibility if it's not going to conduct and prosecute significant investigations, which was the purpose for setting up that organisation…in the first place. If it is investigating any new cases, it needs to tell people it's investigating new cases, otherwise if it's outwardly seen as doing nothing…on the enforcement side, which is an increasing perception at the moment, as we sit here in November 2019, people will pay less attention to this."*[915]

Since the House of Lords conducted their review into the UKBA, similar to the intentions embodied in the OECD convention, the need for robust enforcement activity was explicitly identified.[916] Determining what constitutes adequate or appropriate enforcement is the problem. In the House of Lords review, it included an evaluation of enforcement activity for prosecutions and the use of DPAs; against both legal and natural persons. Seemingly therefore, the question of adequacy and/or appropriateness was to give consideration to the *number* of actions taken. On the face of it this seems a little premature as crimes of corruption are typically unknown and difficult to quantify, so low intervention may simply imply an overall success in prevention. This should warrant hesitation because: i) very little polling has been carried out in the UK on corruption; ii) there are few court trials for crimes of corruption; and iii) there is little public debate or discourse on such.[917] If, however, the adequacy of enforcement is predominantly a numbers game, the results published by the House of Lords showed low intervention and a historically low rate of prosecution.[918] Reference was also made to the UK's standing against the OECD Convention who, in their 2019 report highlights, the OECD Working Group on Bribery provided that since the entry into force of the OECD Convention in 1999 through to 2019, including prosecutions for the s.1-3 UKBA primary

[915] Interview 6.
[916] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 5.
[917] Sappho Xenakis, 'The Dog(s) that Didn't Bark: Exploring Perceptions of Corruption in the UK', Discussion Paper 10 (Crime and Culture Research Project, 2007).
[918] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 47.

offences, the UK had convicted or sanctioned 33 natural or legal persons (including the use of DPAs).[919] In regard to its corporate activity specifically, what is apparent from this data is the prevalent use of DPAs and the lack of criminal enforcement in the form of prosecution. Whilst the UK may be regarded as a 'major enforcer' by the OECD[920] and the SFO "*highly effective in effectively tackling complex fraud cases, including foreign bribery*",[921] this should be balanced against the amplification that across a 10 year period, the UK has undertaken limited bribery and corruption enforcement in the form of both prosecutions and DPAs. This concern is now reflective of newly published data by Transparency International who, on assessing foreign bribery enforcement in 43 of the 44 signatories to the OECD Convention, found that not only has global enforcement against foreign bribery reached a historic low, but that the UK has dropped from its position as a 'active' enforcer.[922] For DPAs alone, one of their senior architects, a former Solicitor General and someone who acted for the SFO in Rolls Royce reaffirmed the vacant landscape stating that: *"I was hoping when we started this that we'd get five, six, seven, eight a year; not five in five years."*[923]

When the interviewee made this comment, it reflected what was supposed to be a leading trade-off for DPAs; that whilst not a prosecution, they were intended to be punishing and effective through frequent occurrence. Arlen observes that if DPAs are incorrectly used and solely operate "*primarily to reduce the sanctions imposed on companies for corporate crime*", they can undermine deterrence and "*weaken the public's faith in the criminal justice system*."[924] For instance, the DPA model has drawn criticism for doing little to deter future criminal misconduct by disobedient corporations;[925] as has been illustrated (inter alia) by HSBC and Arthur Andersen who repeatedly offended across the globe but avoided prosecution. If the aim of punishment is to deter, repetitive offending proposes an evident

[919] OECD, Working Group on Bribery, 2019 Enforcement of the Anti-Bribery Convention; Investigations, Proceedings and Sanctions, (2020).
[920] OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report United Kingdom (2017) 5.
[921] OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report United Kingdom (2017) paragraph 62.
[922] Transparency International, Exporting Corruption 2022, Assessing enforcement of the OECD Anti-Bribery Convention (2022).
[923] Interview 8.
[924] Arlen (n 185) Chapter 8, 158.
[925] Nicholas Ryder, 'Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) The Journal of Criminal Law 245-263, 262.

failure or incompatibility. Garrett warned when reflecting on the introduction of DPAs in the US that with this new tool in hand:

> *"…prosecutions did not become more frequent, despite a rash of corporate scandals…corporate convictions actually began to decline. Convictions of smaller corporations and non-public corporations remained stable, but large and public corporations increasingly received agreements allowing them to avoid a conviction."*[926]

This highlights not only a tension between the proclaimed and actual benefits of DPAs but indicates some broader recognitions of this style of enforcement. Firstly, it seems to dilute the impact or perceived intentions of the s.7 corporate offence by restricting its likelihood of application. Secondly, if one enforcement tool is to be rarely used and its favoured alternative more amicable than prosecution, it endorses the questions this work has raised towards legitimacy and justiciability; and reiterates how both prosecution has been redefined and the corporate criminal being treated differently in these contexts (see 6.3.1).

It is appropriate to observe that as an enforcement tool, DPAs were developed to hold organisations to account "*in a focused way without the uncertainty, expense, complexity or length of a criminal trial.*"[927] The meaning of 'focussed' is unclear; but what is clear is the repeated reflection of their use by-passing the challenges of prosecution. This gives rise to an observation noted by King and Lord: that when a corporation proactively responds to and engages in DPA proceedings, whether this "*reflects an ethical and socially responsible corporate leadership, or an amoral calculation for the benefit of the business."* [928] In other words, in instances where the SFO may face greater complexity and the corporate "*more extensive culpability*", it may be more rational for the corporate to not disclose wrongdoing given the low risks of detection.[929]

[926] Garrett (n 149) 64.
[927] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012, 3.
[928] King and Lord (n 12) 86.
[929] Ibid 86.

The overall lack of prosecutorial activity remains to be the biggest irregularity facing the UK's exposure to grand corporate crime and serves to enhance the paradox which exists. After all, it is important to recognise such weaknesses given that the prism of the UKBA's impact and the success of enforcement, according to the former SFO Director, *"will be looked at through…the number of convictions it achieves."*[930] If those convictions and enforcing the s.7 offence is a rare sight, the aforesaid barometer would indicate questionable success. One former SFO division head turned corporate crime lawyer made the following comments:

> *"You always need to have a fallback position of viable prosecutions. Frankly I was involved in the Rolls Royce case and I was amazed it only ended up being a settlement because it was, as Leveson stated…over three decades, five continents, all seven lines of business…it was endemic, it was every single chair of their organisation, it was their head of their far east operations…it's like a history of how to bribe. In the seventies they had bags of cash, the eighties they were giving Rolls Royce's, in the nineties they were paying consultants and, in the noughties, and 2010s they were busy paying different agents in different jurisdictions to do various advisory services. It's a history of bribery. More to the point, it's a history of….sanctioning at board level and (they) failed to take actions. When they had whistle-blowers….they investigated…and found it was unwarranted. So basically, they knew about it, they complained about it and they did a whitewash investigation and failed to do anything, and then they just continued. That went through until all of the stuff from Airbus and a couple of other investigations…all relates to the same fucking agent's Rolls Royce used, and have been used in extensive bribery across the airline industry. So, when you're looking at a case of how worse could it get, that it's not in the public interest to have a settlement and that you should prosecute…you can't think of much worse than that. A company that's been built on corruption and made an absolute fortune on it. So, I must admit that's one thing where you need to have a prosecution to then make the carrot more appealing…you do absolutely need those prosecutions."*[931]

[930] Interview 2.
[931] Interview 9.

When this section opened with a quote highlighting enforcement as being key to the UKBA's success, the seldomly recognised reality facing the SFO is that achieving those goals is "*incredibly difficult*."[932] Interviewee 9 (a former SFO division head) described the spectrum of attributing liability in corporate criminal investigations as follows:

> "*It's difficult for the prosecution to get cases against individuals…it's really difficult for them to get cases against companies because corporate criminal liability…is very difficult to meet and overcome…and…section 7 is really easy to meet because you're strictly liable. However, if you've got reasonable procedures, and most companies should be able to show this…it's difficult for the SFO to say your procedures are clearly not reasonable."*[933]

When the UKBA first arrived, a time lapse in enforcement was entirely feasible. Twelve years on, we are yet to see exemplification of the SFO's commitment that "*quick wins, or low hanging fruit, aren't an option."*[934] As Campbell described, prosecution is necessary as although DPAs were introduced to resolves legislative difficulties, they are still "*predicated upon it. If DPAs are to be a useful addition to the legal landscape then there must be mutual incentives to agree one, as well as a possible alternative for the state to deploy. Even if prosecution is a last resort, it must be viable and feasible*. *The…incentive will derive from the nature of the process and the possible penalty discount, when compared to the likelihood of conviction under the conventional corporate criminal liability model*."[935]

6.3.1 Redefining Prosecution

Since the UKBA has been in force, there have (to date, and with trials reportedly pending) only been four successful corporate prosecutions: Sweett Group Plc, Skansen Interiors Ltd, Petrofac Ltd and Glencore Energy (UK) Ltd. The first (2015) followed an uncontested guilty plea that corrupt payments had been made to the Chairman of a Committee to secure a

[932] Interview 4. Executive Director of Anti-Corruption NGO.
[933] Interview 9.
[934] Hannah Von Dadelszen, 'The Serious Business of Fighting Fraud' (Speech at the Fighting Fraud and Eliminating Error Conference today, 2017 <https://www.sfo.gov.uk/2017/01/19/the-serious-business-of-fighting-fraud/> accessed 11/08/2020.
[935] Campbell (n 901) 285.

contract for the building of a large hotel in Abu Dhabi. The second (2018) – which shall be considered in chapter 7 - followed a contestation and conviction after trial. The third (2021) was an uncontested and agreed plea to seven counts of failing to prevent former employees from offering or making payments to agents in relation to projects awarded between 2012 and 2015. The fourth (2022) was a further uncontested plea to seven counts of offences under the UKBA relating to bribes to secure access to oil and generate illicit profit. Glencore notably stands as the first instance of a corporation admitting to the substantive s.1 UKBA offence of bribery itself. Under the same s.7 offence, 8 corporates have been dealt with via DPAs.[936] These are Standard Bank (2015), Sarclad Ltd (2016), Rolls-Royce (2017), Güralp Systems Ltd (2019), Airbus SE (2019), Airline Services Ltd (2020) and 2 UK companies (2021) which are presently unidentified for legal reasons.[937] With the total number of cases brought under the corporate offence standing at 12, two thirds of them (including by far the larger and most grave) have resulted in DPAs and no convictions of any form - reflecting a questionably low figure for prosecution under the s.7 offence. This is especially so given the facts behind some of those cases, the years the UKBA has been in force and the present Director's warning to corporates that the SFO *"will use all the powers at its disposal to root out and prosecute companies and individuals, whose criminal activity detrimentally affects the reputation and integrity of the United Kingdom."*[938] It is to be noted that the SFO are still to consider individual charges in the Glencore case, however a decision is reportedly not due until Spring 2023. If charges are not even brought, Glencore will join the list of concerning cases that are incongruent to and deviate from prosecutorial policy. With the judge declaring that the facts demonstrated significant, sophisticated, disguised and prolonged criminality, with senior personnel closely involved,[939] questions over prosecutions are already poised to ask: if not, why not?

[936] At the time of writing, since introduced in February 2014, the SFO has entered into DPAs with twelve companies in total.
[937] Serious Fraud office, 'SFO secures two DPAs with companies for Bribery Act offences' (News Releases, 2021) <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/> accessed 20/07/2021.
[938] Serious Fraud Office, 'Serious Fraud Office secures third set of Petrofac bribery convictions' (News Releases, 2021) <https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/> accessed 04/10/2021.
[939] The Serious Fraud Office v Glencore Energy UK Ltd, Sentencing Remarks of Mr Justice Fraser, Southwark Crown Court, 3 November 2022.

The aforementioned cases brought under s.7 represent a growing inclination in the legal relationships between corporates embroiled in significant multi-year corruption probes and state agencies. Despite being coupled with prosecutorial statistics (that are subject to a deferral), the distinction is that serious corporate crime is increasingly resolved with settled and cooperated agreements, rather than prosecution, conviction and conventional punishment.[940] The usage of "*non-trial resolutions*" has captured the attention of the OECD and admittedly represents how companies are able to avoid either the harshest consequences or even criminal liability altogether.[941] The law has been effectively reframed so as to become more business orientated[942] and context dependent;[943] illustrating how pragmatism has come to influence corporate resolutions regardless of the surrounding legal intentions to attribute criminal liability.[944] This has given rise to concerns about equality of treatment as to what cases and circumstances will be singled out (or possibly overlooked) for certain types of enforcement.[945] It would therefore not be outlandish to confirm that corporate crime is indeed "*differentially enforced*"[946] and that with the opportunity for DPAs in corporate bribery cases - exclusive of individual prosecutions - companies are left (prima facie) to pay their way out of a bribe. When speaking as a proponent and in support of DPAs, Sir Brian Leveson acknowledged this apprehension stating that he was originally "*very concerned*" that the UK was "*creating a system whereby corporations were dealt with differently from individuals.*"[947]

Whilst this work recognises the ramifications of a corporate prosecution, when the former Director of the SFO was positively discussing the creation and use of DPAs, he fortified the

[940] King and Lord (n 12).
[941] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019).
[942] Almond (n 229) 221.
[943] Paul Almond, 'Workplace Safety and Criminalization: A Double-edged Sword' in Alan Boggs and others (eds), *Criminality at Work* (Oxford University Press 2020) 391-408, 408.
[944] Liz Campbell, 'Settling with corporations in Europe: a sign of legal convergence?' in Nicholas Lord and others (eds), *European White-Collar Crime: Exploring the Nature of European Realities* (Bristol University Press 2021) 237-251.
[945] Ashworth (n 221).
[946] Wells (n 24) Part 1, 16.
[947] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Questions 149-154, Sir Brian Leveson.

impression of differential treatment and the atypical luxury simply not provided to individual offenders of serious crimes stating the following:

> *"…the consensus seems to be that they (DPAs) are particularly suitable for corporate bribery where the bad guys have moved on, the damage has been done, the damage has been repaired, a compliance regime has been put in place. So why punish, why cause collateral damage through a prosecution when something short of a prosecution is available?"*[948]

Navigating the complexity of corporate crime has seen the law take what Zedner calls a "*preventative turn.*"[949] Its control is no longer a state only function dictated by strict punishment and instead now draws on the hopeful responsibility held by the involved parties, in turn conflicting with "*the paradigmatic sequence*" of criminal law: shifting from "*prosecution-trial-conviction-sentence*",[950] to non-prosecution, no trial, no conviction, and purely financial 'sentencing'. This supports the findings in the literature review that the law and enforcement has moved beyond conventional criminal punishment towards a sense of self-regulatory and educative persuasion:[951] now enlisting the support of businesses in an unprecedented way.[952] Morris appropriately expressed that whilst being 'punished' and informed of violated values is to teach a moral lesson, it is for offenders to come to see what is good and to choose it in the future.[953] Whether corporate crime should be a prominent example of contemporary criminological problem solving, persuasive trends and communication[954] is another debate, but it should undoubtedly be recognised given the importance attached to the "*neglect of business law-breaking*."[955]

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[948] Interview 2.
[949] Lucia Zedner, 'Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control' (2006) 46(1) British Journal of Criminology 78-96; Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11(2) Theoretical Criminology 261-281, 264.
[950] Ashworth and Zedner (n 7) 23.
[951] Lord (n 67).
[952] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 171.
[953] Herbert Morris, 'A Paternalistic Theory of Punishment' in Antony Duff and David Garland '*A Reader on Punishment'* (1st ed, Oxford University Press, 1994) 92.
[954] Anthony Duff, 'Punishment, Communication, and Community' in Matt Matravers (ed) *Punishment and Political Theory* (Hart 1999) 48.
[955] Braithwaite (n 844) 7.

The shift from state-centralisation to devolved responsibilities is not a new phenomenon for corporate regulatory regimes where offences have changed from the 'conventional' aim of a defined/specific harm, to the prohibition of the failure to act or prevent.[956] But as Ashworth points out, at the core of criminal law is that if a wrong is to be labelled as a crime and serious enough to justify punishment beyond civil sanction, a prerequisite – conventionally – is that fault is required. Increasingly in regulatory settings, additional considerations are put forward to determine the way in which the criminal law is defined. Namely, as the UKBA has adopted the regulatory position of guilt by omission, presumptions that *mens rea* is a prerequisite of criminal liability and that the prosecution bears the burden of proof are avoided.[957] Thus, the move from standard criminal process and the denunciation of corporate offences are typically characterised as matters of *mala prohibita* rather than *mala in se.* The problem is that if the "*prohibited activity is not thought to be 'real' crime"* this simultaneously paves the way for an undervaluing of the seriousness of corporate misbehaviour.[958]

The s.7 failure to prevent approach was avowed to demonstrate the seriousness of corporate bribery offences and to activate responsibilisation by changing corporate culture, promoting better self-regulation and improving compliance. Within the desire to induce self-reporting and to make non-cooperation and silence unattractive, Campbell argues that corporate criminal liability has come to avoid "*the fundamental punitive component for preventative and remedial logics*."[959] Even the application of DPAs, whilst defined as a prosecutorial tool and spoken of in a prosecutorial manner adopt in practice an adaptive terminology; so as to be acknowledged by the SFO to conceptually be "*somewhere between a guilty plea and a civil recovery*."[960] That terminology is in itself a point at which the prosecutorial image becomes distant to the reality. As was highlighted in chapter 4, at no point throughout a DPA negotiation is any admission of guilt required; but rather, for the parties to mutually agree upon a set of facts.

[956] Wells (n 700) Chapter 1, 5.
[957] Ashworth (n 221).
[958] Wells (n 700) Chapter 1, 8.
[959] Campbell (n 94) 65.
[960] Ben Morgan, 'The future of Deferred Prosecution Agreements after Rolls-Royce' (Speech at Norton Rose Fulbright, 2017) <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/> accessed 22/03/2020.

Another dimension to reflect on this shift is to evaluate the significance and utilisation of the criminal law. That is to say, is the criminalisation of corporate bribery doing what it so proudly declares and achieving what its publicised objectives are set to be? As the former Director of TIUK described it; "*the Bribery Act is…quite simple, if you pay a bribe you've broken the law and you get punished for it. It's a blunt legislative instrument in that effect…you break the law you get punished*."[961] This direct nature, despite criticism from those who have questioned its applicability to corporations and if "*the wrong of failing to carry out the duty is serious enough for criminalisation,*"[962] is continuing to gain political traction and proposed expansion.[963] The reiteration of criminalisation prompts questions of why the criminal law and its conventional resolutions are so rarely pursued despite having the rhetoric, tools and what often seems to be the evidence to do so. Even outside of the SFO sphere, UK enforcement agencies are predominantly sanctioning corporate crime via financial settlements: be that in single or multi-jurisdictional conclusions. In October 2021, the FCA announced its second-largest fine for "*serious financial crime due-diligence failings*" against Credit Suisse for a matter deemed to be "*tainted by corruption.*"[964] Without the use of prosecution to enforce serious corporate corruption, this emphasises another focal observation of this thesis: that the current regime has paradoxically sacrificed the severity and range of punishment, for the certainty of punishment in the form of DPAs. This point was arguably demonstrated in the 2019 case against Serco Geografix Ltd where a DPA was agreed due to their prompt and voluntary self-disclosure, their substantial cooperation and their significant remedial efforts:[965] despite the SFO openly advertising that they could have prosecuted on charges of fraud and false accounting. When the Statement of Facts was submitted to the court and agreed by the company, whilst names were anonymised, it cited the evidence the SFO relied upon in support of a prosecution under the identification principle

[961] Interview 10
[962] Andrew Ashworth, 'A new generation of omissions offences?' (2018) 5(1) Criminal Law Review 354-364.
[963] See the current changes proposed under the Economic Crime and Corporate Transparency Bill 2022.
[964] Financial Conduct Authority, 'Credit Suisse fined £147,190,276 (US$200,664,504) and undertakes to the FCA to forgive US$200 million of Mozambican debt', 2021 <https://www.fca.org.uk/news/press-releases/credit-suisse-fined-ps147190276-us200664504-and-undertakes-fca-forgive-us200-million-mozambican-debt> accessed 21/10/2021.
[965] Serious Fraud Office, 'SFO announces DPA in principle with Serco Geografix Ltd' (Case Updates, 2019) < https://www.sfo.gov.uk/2019/07/03/sfo-announces-dpa-in-principle-with-serco-geografix-ltd/> accessed 24/04/2020.

by noting firstly, that the criminal wrongdoing was committed by the two former executives, and secondly, that these two directors were the directing minds of the company.[966]

The utilisation of the criminal law and the change in enforcement was, however, for one interviewee (a former SFO division head), argued to be aligned with the UKBA aim of not wanting to punish, but to persuade. Due to the difficulties and costs of achieving corporate prosecutions, it was put forward that although the act was draconian in content, it was "*never actually meant to be enforced*", but to incentivise corporates to self-regulate.[967] Similar to a compliance methodology, regulatory responsibility is not only dispersed to the corporate, but its aim is to promote good practice with sanctioning treated as a last resort. There is no wonder that tensions remain between advocates of 'equal punishment for all' and those of a purer effectiveness with minimal punishment perspective.[968] In terms of s.7 prosecutions, interviewee 9 contextualised this reality by stating:

> "*How can you (the SFO) say somebody's procedures are not adequate, unless you basically take the extreme view which is 'not adequate' simply means a bribe was paid. These prosecutors…even though they don't know anything about how the company operates…they don't anything about the jurisdiction…that kind of sector…what business practices are like, they've got to say it was inadequate. That's a really tough thing for them to show. So, the reality is they only ever prosecute when there's no procedures*."[969]

Thus, as Almond noted (in the context of health and safety enforcement): *"only when it is manifestly clear that organisational controls have broken down will the locus of responsibility be shifted onto the corporate form."*[970]

[966] Statement of Facts, Serious Fraud Office v Serco Geografix Limited, 20/06/2019. See paragraph 6 and 7.
[967] Interview 9.
[968] Nicholas Lord and Michael Levi 'Determining the adequate enforcement of white-collar and corporate crimes in Europe' in Judith van Erp and others (eds) *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge 2015).
[969] Interview 9.
[970] Almond (n 943) 407.

During the research, to contextualise the environment in which prosecution has been redefined or eschewed for more amendable sanctioning, a question was put to interviewees to explore, in their view, if there existed any possibility that the SFO struggled to prosecute. For the Director of a global anti-corruption NGO, the answer was simply: *"I think it finds it incredibly difficult and I think we're finding that that's the reason that they're going down the route of settlement. Because it is a much easier route."* [971] Interviewee 6 raised another perspective; that of finances. He stated:

> *"If they can do a deal and do a DPA and get a load of money out of them (the corporation), like they did on Rolls-Royce and like they did on Tesco, that's excellent for the SFO. And probably the single biggest thing that secured the future of the SFO, when David Green was in charge, was the Rolls-Royce DPA, because it generated so much cash that who could criticise the SFO as being a drain on resources?"*[972]

This provided an interesting insight given its relationship to a commonly cited drawback to pursuing criminal prosecution; the cost. In public appearances and policy documents, both the SFO and the government have continuously described a leading benefit of DPAs as avoiding the lengths and costs of criminal investigations. The concern that finances may play a decisive role in choosing the path of justice was firmly rejected by the SFO. At both the interview and ethnographic stages, compliance and legal representatives expressed corroborated concern that revenue generation may have become a consideration for enforcement strategy. Not only was this discussed against the known difficulties of corporate criminal prosecutions, but in regard to what was felt to be an emerging pattern of the agency struggling to compete with private resources. For the SFO, however, this was overtly rejected, who stated "*no, and we've said this publicly."*[973] The SFO interviewee expanded:

> *"…we would never shirk from taking on a case through lack of resources… absolutely not, no. The decisions to prosecute are taken on the basis of the*

[971] Interview 4.
[972] Interview 6.
[973] Interview 5.

> *evidence that we've gathered through an investigation. So the decision to open an investigation is a crucial one and when you open an investigation you very often don't know how big that case is going to be and there's certainly not been a case where the director has closed an investigation because we ran out of money or he felt that, budget-wise, couldn't afford to keep doing it…the budgetary side of it isn't the consideration."*[974]

Finances are, however, something which has been specifically mentioned by the Director of the SFO who noted that she was *"quite conscious of what our cases are going to cost*."[975] It also found notable mention in both the Rolls Royce and Airbus judgments. In the former, when referencing the interests of justice, consideration was given to avoiding "*the significant expenditure*" to the extent that "*when an agreement such as this can be negotiated, the public interest requires consideration to be given to the cases that will not be investigated if very substantial resources…are diverted to it*."[976] In the latter, the judge referenced the need for the "*efficient use of public resources*"[977] adding that by securing a DPA, "*the SFO avoids the significant expenditure in time and money inherent in any prosecution of Airbus, and it can use its limited resources in other important work.*"[978] What such 'important' work includes – if not to prosecute the most egregious bribery and corruption – remains to be seen. Whilst the SFO may indeed be able to seek further funding to pursue a case, it appears to have been a ratified consensus that cost benefit analyses are to be factored in. This is not surprising, nor argued to be irrelevant. However, it should be recognised that in the most serious cases, prosecution is repeatedly balanced against cost to an extent that one must ask if the public interest is to be determined by its equation to the public purse? Yet in cases of smaller scale, severity and which demonstrate adherence to DPA criteria/policy requirements, prosecution has been ruthlessly deployed in a manner raising broader questions of the UK regime's justiciability. The direct link to Hawkins' proposition cannot be ignored: that legal decisions, remits and mandates come to be subliminally dependent on the boundaries of the "*decision*

[974] Interview 5.
[975] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Questions 155-161, Lisa Osofsky.
[976] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, paragraph 58.
[977] SFO v Airbus SE, Southwark Crown Court, Case No: U20200108, January 31, 2020, paragraph 83.
[978] SFO v Airbus SE, Southwark Crown Court, Case No: U20200108, January 31, 2020, paragraph 119.

field."[979] For Interviewee 8, whilst stressing the view that funding was *not* a reason for the SFO to 'pull their punches', they provided an observation that echoed the above sentiments:

> "*It is a small agency unquestionably and certainly when I was in the United States…the people were amazed at how small the SFOs budget was…in New York, a state prosecutor…thought the then budget for the SFO…was just for one office. I think if the Serious Fraud Office is to be an internationally effective investigator and prosecutor of serious economic crime, it needs to be well resourced. But…they do the best with what they've got.*"[980]

Doing 'the best with what they've got' was a theme identified through much of the research; where those on the side of the state tended to speak of sufficient resource, and those in the private sector leaned toward the opposite. The House of Lords UKBA committee subsequently questioned whether the SFO were able to compete with the private sector in both skillset and attracting/retaining staff. Whilst politely rejected by Lisa Osofsky,[981] it should be balanced against the disparity in opinion apparent from this research. The opinion expressed by Interviewee 8, whilst not directly implied, might indicate that the ability to 'afford' a prosecution in a complex and lengthy corporate investigation could be a factor in seeking (or preferring) settlement. When considering that a responsive and enforced-self regulatory environment, to be successful, must be characterised by empowered and countervailing interests to corporate power,[982] this reflects a weakness in the underlying regulatory structure upon which compliance is sought and criminality is minimised. The SFOs ongoing desire to increase the failure to prevent landscape may (see 6.2.1), given the size of the financial penalties reaped when those cases have been diverted from prosecution to a DPA, be a key financial incentive for them favouring their expansion. Despite the SFO having received increases in their core funding, as any case exceeding a £2.5 million annual spend requires an application for 'blockbuster funding', this questions whether the larger and more complex investigations (those the SFO claim to be focussing on) may be in financial peril;

[979] Hawkins (n 909) 144.
[980] Interview 8.
[981] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019). Corrected oral evidence: Questions 155-161, Lisa Osofsky.
[982] Ayres and Braithwaite (n 127) 54-100.

reinforcing concerns of what is affordable and the fear of state disempowerment. The former Director of TIUK put forward a permeating observation: *"you need a well-resourced SFO and I don't think we have that sufficiently."*[983] The environment of affordability and capability has recently attracted commentary surrounding the expansion of corporate criminal offences/liability as being "*to compensate for a lack of prosecutorial resource*."[984] It is appropriate to note that during the research interviews, even the more critical commentators who argued that enforcement was generally lacking were complimentary of the SFOs *intentions* and their more recent case efforts to prosecute personnel (although unsuccessful). Nonetheless, the reality emphasised by a global anti-corruption specialist was that "*in an ideal world, you'd have a prosecution. We don't live in an ideal world. Prosecutors really struggle to get prosecutions."*[985]

Some interviewees even debated that another hurdle aligned to the need for redefined prosecution may be correlated to a lack of judicial and/or jury expertise. Reference the former, Interviewee 1 firstly raised the risk of judicial capture because of "*the same lawyers coming before them*", and added:

> *"What we hear from prosecutors quite frequently is a feeling that they're coming up in front of judges who don't really get it. And then there's a question of actually, should we have specialised judges who really know their stuff*."[986]

The above was personally witnessed during this research at a high profile SFO trial where highly experienced silks made several (subjective) comments on the judge misdirecting, incorrectly intervening and – in their view – insufficiently understanding arguments. The second limb (juries) was more complex. It should, for instance, be noted that accusations of jury inadequacy were not only firmly protested after the Jubilee Line fraud case,[987] but by the SFO in general. Both current and former SFO employees argued it ultimately falls to the

[983] Interview 10.
[984] City of London Law Society Company Law Committee, Response to the Law Commission's Discussion Paper on Corporate Criminal Liability (2021), paragraph 3b.
[985] Interview 1.
[986] Interview 1.
[987] David Leigh, ' Juror tells of outrage after collapsed trial', *The Guardian* (March 24, 2005).

prosecutor to make the core ingredients simple; namely proving dishonesty. Multiple references were made citing that if the evidence is presented in a manner that jurors would not or cannot comprehend, it is likely to be similarly unintelligible to other members of the public. Jury trials were, however, noted by the former SFO Director – when citing the LIBOR cases – to present a problem; that they were "*reluctant to convict people who they thought were relatively junior, and they were falling over themselves to convict people who were obviously making a lot of money and were relatively senior…juries take all sorts of things into account that they shouldn't."*[988] The inherent reflection is that *"different juries reach different conclusions"*[989] and "*strong evidence…does not mean they will always result in convictions."*[990] For Interviewee 1 there was another comprehension that due to the length of fraud and economic crime trials:

> "*…you end up with a jury that is composed largely of unemployed people. And that must have some kind of impact. The SFO could never say that because the jury is a very sacred sacrosanct thing in the British justice system."*[991]

Whilst the former Director of the SFO stated that he did not feel 'judge only' trials would necessarily lead to many more convictions and nor was any reference made to jury incompetence, he was of the view that:

> *"…after 25 years at the Bar I was always in favour of jury trials. I knew their imperfections, but I thought, it's the least bad system. Having done my term at the SFO…now, I've moved from that supportive position to basically sitting on the fence, if not veering towards a judge only trial. The advantage of a judge only trial is you get reasons for the decision, rather than just, not guilty. You get a reasoned evaluation of the evidence, which I think is very important."*[992]

[988] Interview 2.
[989] Interview 2.
[990] Serious Fraud Office, 'We're defending the UK as a safe place for business' (SFO Speeches, 2021) < <https://www.sfo.gov.uk/2021/06/30/were-defending-the-uk-as-a-safe-place-for-business/> accessed 06/07/2021.
[991] Interview 1.
[992] Interview 2.

This questions whether legislation such as that permitted by s.43 of the Criminal Justice Act 2003, though not in force, is indeed right to permit non-jury trials in serious and complex fraud cases where: *"the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome' to the jury that 'the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury."*[993] Although outside the scope of this research, with the creation of the 2025 expected Economic Crime Court, there is further debate and research[994] to be had over specialist judge-only trials, the use of juries and their impact on complex criminal trials.

The existence of prosecutorial struggles led Interviewee 1 to propose: *"Is it better that companies face a fine, have a corporate monitor imposed and are in the news for what they did than get away with it completely?"*[995] Ashworth, when citing potential justifications for departing from principles of equal treatment (see chapter 7.3) proposed that it might be better for the state *"to cut its losses and try to reach some accommodation*" where sacrificing "*the appropriate penalty is worthwhile in view of the cost savings*."[996] When describing the s.7 offence - although the same concerns would apply to the difficulty with all corporate prosecutions – Interviewee 9 described the problem facing the SFO as follows:

> *"…the reality is its virtually impossible to get a prosecution under s.7. You've got to decide, these cases cost a lot of money. It's millions to investigate. Are you really going to investigate if clause ten of a five hundred page…policy is inadequate and that in fact led or failed to prevent employee x paying a bribe? Are you going to spend ten million and bet your house on that? You're not going to get too many prosecutors that are willing to do that."*[997]

[993] S.43 Criminal Justice Act 2003.
[994] Matthew Stephenson and Sofie Arjon Schütte, 'Specialised anti-corruption courts: a comparative mapping', Anti- Corruption Resource Centre, U4 Issue (2016) No7.
[995] Interview 1.
[996] Ashworth (n 221) 248.
[997] Interview 9.

If this is the case, the enforcement and punishment of corporate bribery has acquired the form of *something* being better than *nothing*. As Interviewee 6 explained, the resulting problem is that:

> "*We've lost sight of what the criminal law is supposed to do, because we want to make the companies criminally liable, so we can rake in a load of cash in fines. I can't remember when I studied criminology…but I can't remember the bit about it all being about generating loads of cash for the Treasury*."[998]

The suggestion that revenue may be a (or even *the*) focal point for enforcement was further raised in a recent speech by the current Director of the SFO, who positively commented:

> *"Our strategy is paying dividends. As companies learn the lessons from DPAs, compliance and behaviour improves. And, in the four years to 2020, the SFO's financial impact has tripled. Through fines and other penalties the agency has contributed more than £1.3 billion to the Treasury."*[999]

These comments reinforce the paradoxical landscape by showing an inconsistency in the UKBA's perceived intention: that the advocation of criminal sanctioning for failed self-regulation is in fact imposed as a financial penalty and applauded for its heavily fiscal benefits. Whilst labelled as criminal enforcement, the methodology is undertaken by settlement, cooperation and negotiation and supports the view that prosecution has been redefined. Not only are both the commercial entity and the individuals often free from any actual or attempted prosecution, but there is a clear focus on proceedings being suspended to *encourage* good behaviour as opposed to prosecuting serious criminal behaviour. The circumstances exemplify how criminal law has been described as either instrumental/purposive or symbolic/expressive; "*that is, criminal laws can be seen as there to achieve a purpose or to make a (moral) statement*."[1000] Prosecution, in these instances,

[998] Interview 6.
[999] Serious Fraud Office, 'We're defending the UK as a safe place for business' (SFO Speeches, 2021) < https://www.sfo.gov.uk/2021/06/30/were-defending-the-uk-as-a-safe-place-for-business/> accessed 06/07/21.
[1000] Wells (n 700) Chapter 2, 14.

acquires a purposive outlook of generating revenue under the perception of sanctioning; as opposed to an expressive purpose of sending a message about wrongdoing. This can make "*the criminal law a less-than-effective means of delivering the social goods that justify criminalisation.*"[1001] If carried out in specific ways, it reiterates whether corporate bribery enforcement is having its intended impact; both literally and expressively.

The redefined nature of corporate criminal prosecution(s) was commonly grounded during many of the interviews by the cost, time and difficulties associated to prosecuting commercial organisations. Though unintended to replace prosecution, the pervading reality remains that non-prosecution is simply easier and cheaper. Interviewee 9, a former SFO department head, summed up the position surrounding prosecutions as follows:

> *"…they're really expensive and they're really difficult to do. So, if you've got a company…and this is the US position: in the past they were a bunch of pricks, and they did a shit load of corruption. But currently they realise the writings on the wall…if they don't change, they are going to go bust…this is their last chance. They are presently responsible and are willing to totally change. Rolls Royce…spent something like fifteen million on their compliance reforms….overhauled their…programme…paid for the prosecutor's investigation, as have Airbus, and have then resolved…to then pay back…the monies they swindled out of them and they have pledged…to continue that compliance improvements. You get to the point of…what's the advantage of a criminal conviction? You spend five, ten years stumbling through the criminal courts just to get a bit of good press…to spank them a bit more…but you spend a shit load of public money on something which has no guarantee of a conviction. The Barclays case took seven years, well over ten million and failed…and that was a case which the SFO thought was good, David Green staked his reputation on getting the big boys in Barclays...and fucked it up."*[1002]

[1001] Almond (n 943) 391-392.
[1002] Interview 9.

6.3.2 Individual Liability

Even though corporate prosecutions may be difficult, when prosecution is under consideration, Interviewee 8 made clear that for commercial corruption cases:

> "*If you're going to arrange or discuss for a criminal outcome for the company, you have to make sure that, in the appropriate case, you've got a criminal outcome for the human agents as well*."[1003]

This raised another and arguably more important enforcement consideration identified through this research: the present lack of individually backed liability, its recognition as a paramount ingredient behind corporate criminal liability and its corresponding foundations to an effective DPA regime.[1004] This work has not objected to financial sanctions for financial entities (corporates), but instead challenges the frequency of their usage and the resulting position of how the UKBA regime is gradually exempting corporate crime, and *all* of its participants, from prosecution in its entirety – in all bar small or uncontested matters. In corporate investigations, resultant individual investigations are often facilitated as the corporation "*will ordinarily be the main repository of material relevant to the prosecution of individuals.*"[1005] There are those who feel that individual prosecution serves limited purposes in corporate criminal liability as "*even if the prosecution of a corporate officer results in a conviction, it will seldom affect the way the corporation will behave itself in the future*."[1006] Nonetheless, even critics of corporate criminal liability not only support the necessity of personal liability, but argue that it is both efficacious and pragmatic for the circumstances.[1007] Feinberg suggested that when any theories of punishment overlook the expressive and denunciatory value of individual conviction and punishment in criminal law, they will seem "*offensively irrelevant*."[1008] Arenas of corporate liability and contemporary neoliberal

[1003] Interview 8.
[1004] Arlen (n 185) Chapter 8.
[1005] SFO v Tesco Stores Limited, Southwark Crown Court, Case No: U20170287, April 10, 2017, paragraph 73.
[1006] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43(1) International and Comparative Law Quarterly 493-520, 518.
[1007] Khanna (n 680); Fischel and Sykes (n 680).
[1008] Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (1st ed, Princeton University Press, 1970) 105.

constructions have typically circled back to the understanding of responsibility residing in individual agency.[1009]

From a regulatory and control view, managing behaviour forms the basis of a compliant culture, as irrespective of any preventative process, a central understanding is that:

> "*…the goal of having a compliance culture…is that if you still have fraud and corruption, it must be an individual's decision, and an individual* (emphasis) *must have acted contrary to rules and been able to breach the internal controls."*[1010]

The role of individual liability in corporate crime enforcement is important for two identifiable reasons. Firstly, as the corporation is a representation of its beings, the personalised nature of individual fault is considered by some to be the primary motivation to incentivise corporate compliance. According to a former US Attorney General, "*the greatest deterrent effect is to…prosecute the individuals in the corporations that are responsible for those decisions*."[1011] After all, as the former Director of the SFO argued: "*it's the people that commit crime, not companies*."[1012] That reality was echoed in the ethnographic research where it was generally observed that prosecuting individuals was not only critical for public confidence, but to preserve arguments that the compliant corporation had simply been perforated by unlawful employees. When conducting the interviews, this informed an approach to questioning to understand how by DPAs permitting access to information which would (prima facie) increase the likelihood of or evidence for individual prosecutions, this did not occur. Interviewee 6 substantiated this point contending that the pathway should therefore be one of *"prosecute the individuals first, and then work out whether that could be attributable to the company."*[1013] Interviewee 6 emphasised this sense of individualisation pointing out that the fear of punishment is a subjective risk:

[1009] Almond (n 943) 408.
[1010] Interview 11, Senior Compliance Officer.
[1011] Transcript of Attorney General Eric Holder, 'Transcript: Attorney General Eric Holder on 'Too Big to Jail'' (American Banker, 06/03/2013) <https://www.americanbanker.com/news/transcript-attorney-general-eric-holder-on-too-big-to-jail> accessed 04/04/2021.
[1012] Interview 2.
[1013] Interview 6.

> "D*eterrence is a personal thing. It's not about what happens to your current employer at some distant point in the future…the fact that the corporate entity may be criminally liable does not deter anyone from committing an offence."*[1014]

Research by Simpson and others summarised 106 studies on the effectiveness of formal strategies and actions by law enforcement agencies to lower the risk of corporate crime non-compliance. Although mixed conclusions were apparent, it found that unlike varied results at company level, regulatory and enforcement interventions at the individual level have a modest but consistent effect.[1015] The subjective effect of deterrence and punishment arises given the direct application of the risks and benefits perceived toward the individual themselves.[1016] If it is perceived to be of individual cost, where the firm cannot insulate, hinder or prevent enforcement against them (or risk losing the benefit of a settlement for doing so), it presents an inherently impactful barrier to malfeasance by making the individual most amenable to deterrence.[1017] As Warren Buffet once commented: "*…if your only fear is that you are going to have to write a big cheque, little will change."*[1018]

The second importance is that punishing a company and its innocent parties "*for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility*."[1019] As many lawyers conveyed during the interviews, companies are right to have the defence that in spite of its controls and efforts, the corruption was an isolated issue by rogue individuals. Thus, collateral damage should not fall onto blameless parties. Clarkson, however, challenged this argument noting that "*it must be borne in mind that such persons are not themselves subject to the stigma of conviction and criminal punishment. Those who*

[1014] Interview 6.
[1015] Simpson and others (n 898).
[1016] Raymond Paternoster and Sally Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30(3) Law and Society Review 549-584, 553.
[1017] Christopher Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59(4) Modern Law Review 557-572, 562.
[1018] Tim Worstall, citing Warren Buffet in 'Why Warren Buffett's Idea That Regulators Target Individuals Not Companies Won't Work' (Forbes, 04/04/2014) <https://www.forbes.com/sites/timworstall/2014/05/04/why-warren-buffetts-idea-that-regulators-target-individuals-not-companies-wont-work/?sh=35f7cae26e20> accessed 22/03/2021.
[1019] Jed Rakoff, 'Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?' (Corporate Crime Reporter, 11/12/2013) <https://www.corporatecrimereporter.com/wp-content/uploads/2013/11/rakoff.pdf> accessed 20/02/2021.

take the benefits should also shoulder the burdens. A company should not be permitted to cut corners in its desire to make profits for its shareholders."[1020] Foster essentially conjoined these considerations arguing that whilst it is undeniably the individual who carries out the crime for the corporation(s);[1021] justice should apply to both the 'legal person' but more so the real or natural being behind the action(s) and its harm. It is increasingly apparent from case judicial dicta that the courts are hesitant to outwardly punish a company citing public interest reasons. As Sir Brian Leveson noted in the case of Tesco Stores Ltd: *"stripping out the human beings, a company itself can have no will or ability to decide how it should behave."*[1022]

Importantly to this work is that individual liability sits firmly alongside the very conception and use of DPAs, as whilst they effectively redefine the way in which corporate 'guilt' is to be sanctioned, their intention was for the cooperation and evidence given to be such that it did "*not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals*."[1023] The process does not protect individuals from prosecution,[1024] but rather facilitates its prospect; encouraging such "*material to be used in evidence and for the purposes of disclosure."*[1025] The MOJ's response to the governments initial consultation on the development of DPAs even noted that "*DPAs should not be used as a means for individuals to avoid being prosecuted for their crimes. Criminal prosecution is effective in dealing with individuals who commit economic crime…including the ultimate punishment of imprisonment."*[1026] The intentions embedded within this array of commentary was agreed by the House of Lords who remarked that *"the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted."*[1027]

[1020] Clarkson (n 1017) 563.
[1021] Nick Foster, 'Individual Liability of Company Officers' in James Gobert and Ana-Maria Pascal (eds) *European Developments in Corporate Criminal Liability* (1st ed, Taylor and Francis, 2011) 114-138.
[1022] SFO v Tesco Stores Limited, Southwark Crown Court, Case No: U20170287, April 10, 2017, paragraph 53.
[1023] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 2.9.1.
[1024] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, paragraph 6.
[1025] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013), paragraph 7.8.
[1026] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012, 15.
[1027] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 315.

Although not the focus of this thesis, some practitioners argued that individual liability could be addressed via the use of personal DPAs. During the passage of the Crime and Courts Bill, an amendment to extend them for individual application was proposed but eventually removed with the assurance of a government review when the DPA scheme came into force. There has, to date, been no evaluation due to a perceived lack of necessity as individuals (unlike corporates) could technically be prosecuted with relative ease: despite reality showing the opposite. During the ethnographic stages individual DPAs were argued by practitioners to be a logical pathway to improve the SFO's success rate against personnel and to complement a culture of self-reporting and early pleas; a view which was echoed by other interviewees. This would strategically allow the SFO to strengthen its cases by obtaining the witness evidence it so frequently lacks and is perhaps a reason why the Director of the SFO has expressed the desire to have similar powers as possessed by her US counterparts.[1028] For Interviewee 6, offering DPAs to individuals would avoid the "*bizarre"* and *"very inconsistent"*[1029] inappropriateness of corporate agreements 'naming and blaming' individuals. Especially when later found not guilty at trial, futile attempts to retrospectively vary a DPA or to remove references to individuals identified in Statements of Facts have consequently caused unease. With scant information in any of the supporting policies, protocols and guidance on protecting such individuals, it ponders whether this route would exist merely for income generation, or as a bargaining tool so as to generate a desired outcome against the corporate. Personal DPAs would undoubtedly expand the toolkit and ability to apply individual fault - indicating clear involvement in formal decision making. However, doing so runs the risk of continuing to water down punishment for what is criminal conduct - and thus - the UKBA intentions, the s.7 offence and the role of criminal prosecution. King and Lord appropriately encapsulate the sensation noting that, "*the concern is not so much on due process rights in the criminal process*" and rather that such criminals are "*negotiating their way out of the criminal process*."[1030] For Ashworth, such trends exemplify the "*diversion and downgrading"* of the criminal law[1031] against the converse background of

[1028] Barney Thompson, 'UK fraud chief moves to speed up investigations', *Financial Times* (April 29, 2019).
[1029] Interview 6.
[1030] King and Lord (n 12) 14.
[1031] Ashworth and Zedner (n 7).

an overall increase in the number of criminal offences directed towards corporate crime and the (purported) severity of penal measures.[1032]

Personal liability, as it stands, is a junction which creates an at best questionable and at worst contradictory reality. During this research, a senior SFO representative quantified the suitability of the DPA regime under a central proviso: "*provided we go after the individuals as well, which we always do, where the evidence supports it*."[1033] Whether the evidence 'supports it' is therefore a primary factor in the pursuance of a prosecution. On evaluating Rolls Royce's case, for instance, this degree of assurance for personal prosecutions was not only put to the test, but evidently contested. According to Interviewee 8, a practitioner who previously acted for the SFO: "*I saw material dealing with the corporation which indicated to me that there was an arguable case, so that a number of individuals were in danger of being prosecuted.*"[1034] This work can only speculate the severity of the evidence assessed and the subsequent decision not to prosecute; particularly when the SFO have conclusively (and unhelpfully) stated that there was either insufficient evidence or that it was not in the public interest to continue.[1035] Despite the SFO's declared position, as the former Director of TIUK stated: "*that just doesn't stack up, there's something really, really odd there…. it was said in court by the presiding judge that bribes had definitely been paid so there's no doubt about that, but then somehow nobody seems to have paid them and nobody's responsible for it."*[1036]

An additional level of opaqueness was presented by the House of Lords UKBA committee, who, despite being tasked with a review into the effectiveness of the UKBA and its enforcement, when referencing prominent cases and the lack of prosecutions declared that "*it is not for us to speculate on why…the evidence, much of it supplied by the company, was not strong enough for prosecutions of the individuals to succeed, or why…prosecution of the individuals was not even initiated."*[1037] It would, of course, be unfair not to consider that any

[1032] Ibid.
[1033] Interview 5.
[1034] Interview 8.
[1035] Serious fraud office, 'SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals' (Case Updates, 2019) <https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/> accessed 18/10/2020.
[1036] Interview 10.
[1037] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 319.

failure or restriction to prosecute individuals is partly attributable to the legal frameworks and burdens within which a case must operate. For instance, whereas a DPA is entered into on the basis of wrongdoing with the civil burden of proof, prosecution rests on the higher burden of 'beyond all reasonable doubt.' Given that this produces different forms of disclosure – with evidence not previously seen or examined – this is accepted to be a factor in differing conclusions. Nonetheless, the lack of clarity obtained through decisions not to bring prosecutions does little to illuminate a transparent review of why the conventional application of the criminal law has become fragmented, and the sanction of last resort.

The lack of or restricted punishment towards individuals is not a dilemma purely facing corporate corruption. In commercial health and safety, since the Health and Safety at Work Act regime has been in force, it almost never attributes responsibility to individuals despite powers to do so. The locus of responsibility is philosophically organisational. Due to "*contextual limits of the offence*" and the risk of failure, this route tends to be pursued rarely.[1038] Punishing corporates is, for Gunningham, an almost cynical reflection of a tendency for enforcers/regulators to pursue those with deep pockets, adding that organisational prosecutions may be preferred as there is an ability to absorb the costs of compliance and continue trading[1039] without the collateral damage or counter-productiveness of, say, individual prosecutions. This can be viewed as a constructive decision where pursuing the overarching organisation can be used to engineer change; aiding the objective of incentivising compliance in a way which perhaps is less obtainable through sole actors.

Rolls Royce (similar to Airbus) was the first major bribery case to mark a now commonly voiced criticism; that in a case deemed to be of "*such egregious criminality*"[1040] and an example of extraordinary cooperation, with evidence of targeted and extensive corruption, how and why was prosecution not at least pursued surrounding the individuals involved? With Airbus, it began with citations of "*endemic*" corruption, moved to recognitions of "*exemplary cooperation*" and found conclusion with no prosecutions of the company or

[1038] Almond (n 943) 404.
[1039] Neil Gunningham, 'Negotiated Non-Compliance: A Case Study of Regulatory Failure' (1987) 9(1) Law and Policy 69-91.
[1040] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, paragraph 61.

associated persons.[1041] When the House of Lords post-legislative Scrutiny Committee reviewed the efficacy of the UKBA, its provisions and the enforcement against individuals (at that time), they ambiguously noted that although there is "*no disagreement about the importance of a DPA being followed by the prosecution of the individuals involved, matters are not always so straightforward."*[1042] This immediately preceded an acceptance of the judicial rationale in the Rolls Royce case (and Tesco – albeit not a case of bribery) noting that the "*criminal conduct was the result of criminal offences by named senior individuals, and this has also been the view of the SFO*."[1043] In a mark of scant reporting and deficient examination, the House of Lords Committee concluded that it was not for them to speculate on why evidence was insufficient for individual prosecutions or - in what was then only Rolls Royce (now Airbus too) - prosecutions were not even sought.[1044] The House of Lords' wording prompts enquiry that if individuals were named and evidence was condemnatory, then what makes matters not so 'straightforward'? This lack of 'straightforwardness' has led to multiple high-profile cases concluding with no individual(s) being prosecuted. Perceptions arise that prosecutors have become too cautious; fearing the expense and potential failure, thereby neglecting to sufficiently pursue individuals.[1045] Not only does this question the legitimacy and justiciability of enforcement if even those identified are not pursued, but it vitally defeats what was specifically intended to be one of the core justifications of the DPA regime (as explained by Interviewee 9, a former SFO division head):

> *"The whole idea behind Deferred Prosecution Agreements was it was a carrot, but you needed the stick at the same time.…the whole quid pro quo…for the DPA system was that companies would come in and hand over all of the material and the prosecutors would take that material and go after the individuals. As a result, what you'd get is basically a two way street; one is you'd get the company paying back…and you'd get the individuals being hung up to dry for then actually doing the bribes. So, the company which made the financial benefit would pay the*

[1041] SFO v Airbus SE, Southwark Crown Court, Case No: U20200108, January 31, 2020, paragraph 64 and 73 respectively; Kirstin Ridley, 'UK prosecutor ends investigation into Airbus individuals – sources', Reuters (May 4, 2021).
[1042] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 318.
[1043] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 318.
[1044] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 319.
[1045] James Stewart, 'Bribery, But Nobody Was Charged', *New York Times* (June 25, 2011).

financial benefit, and the person paying the bribes would get taken to court and they would get publicly lynched. They physically carried it out, they physically do the punishment, whereas the company whose made the profit pays the profit back. But that didn't happen in Rolls Royce nor did it happen in Airbus - so far. And the whole thing with the judiciary in approving the DPA system was that they wanted us (the SFO) to go after individuals. They said they would only allow and support DPAs if the SFO went after individuals. If a company is coming in to buy its freedom by handing over information, you use that information to go after the individuals… and that hasn't happened."[1046]

To repeat that cited above, this is not intended to imply that a simplistic view suits complex matters, or that a presumption should be made on a decision to charge, but to share it alongside the reality that since the UKBA and supplementary provisions have been in force, whilst being constructed to make prosecution easier, they have in fact made it a broadly rare sight. Campbell, when citing Garrett, references how this recognition is analogous to the US where since non and deferred prosecution agreements have been available, there has been a limited number of individual prosecutions[1047] resulting in its absence being "*technically and morally suspect*."[1048] Since submitting this work, data collated by Spotlight on Corruption has reminded us of this stark impasse:

"The number of individuals being convicted by the SFO every year is on a noticeable downward trajectory from 13 in 2016/17 to 8 in 2019/20, even prior to the effects of COVID-19 pandemic taking hold, reaching 4 in 2020/21 and is also reflected in the decline in the overall conviction rate from 86.7% in 2016/17 to 67% in 2020/21."[1049]

[1046] Interview 9.
[1047] Garrett (n 149).
[1048] Jed Rakoff, 'Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?' (Corporate Crime Reporter, 11/12/2013) <https://www.corporatecrimereporter.com/wp-content/uploads/2013/11/rakoff.pdf> accessed 20/02/2021.
[1049] Spotlight on Corruption (n 9).

If a regime built upon philosophies of enforced-self regulation is unable, unwilling or unlikely to enforce, it signals that the state is incapable of neither steering nor rowing compliance and that its purported concern to do so is no more than legislative and political marketing. Thus, the less likely it is to compel compliance and good governance by a veiled threat[1050] - the benign big gun.[1051] As Interviewee 6 put it, instead of incentivising enforcement backed self-regulation and good corporate governance, it evokes a poor standard and an acceptance of *"just put your house in order and move on."*[1052] This questions where the incentive to compliance exists if cases are few, DPAs are offered to the gravest of offenders, individual prosecutions are non-existent and the overall likelihood of settlement is high. Without a degree of insistence, by the courts, legislature and/or the SFO that a DPA must be presented alongside a comprehensive investigation and intended prosecution of underlying individual culpability, the regime contains a structural weakness. According to Interviewee 6:

> *"…you've now got this inconsistency that no one seems to care about too much, where the corporate entities are paying huge penalties and individuals just aren't then being held accountable. In fact, it's not just they're not being held accountable, they are being, they're being held to account, but often being found to be not guilty."*[1053]

6.4 Summary

Analysing the research evidence presented so far has aided the understanding of how the UK has sought to address the issues surrounding corporate criminal liability. Predominantly, this has seen the enforcement approach shift from the characteristically difficult identification doctrine to one focussed on omission. Although intended, labelled and promoted as a prosecutorial mechanism, the modified enforcement toolkit has effectively been redefined to incorporate the role of non-prosecution techniques – retracting from the need identified through the literature to *both* push and pull compliance. The extent to which this preference has taken place, based on the evidence, seems to indicate that the theoretical debate over

[1050] Robert Kagan, 'Editor's Introduction: Understanding Regulatory Enforcement' (1989) 11(2) Law and Policy 89-119, 98.
[1051] Ayres and Braithwaite (n 127) 19.
[1052] Interview 6.
[1053] Interview 6.

whether to punish or to persuade has been settled with an accumulative preference for the latter disguised as or rerouted to the former.

Important observations regarding the enforcement of corporate bribery have been highlighted. Firstly, state agencies continue to struggle to prosecute against the challenges of the identification principle. This, and the disparity between both UK and US enforcement, has paved the way for a methodology surrounding omissions-based liability so as to circumvent such challenges whilst not extending to vicarious liability. Although the UKBA approach was hailed as successful legislation "*on steroids*",[1054] it has failed to produce any large-scale prosecutions, and had, until recently, resisted political support for expansion. Secondly, whilst DPAs are an available option, some have argued that their design was founded upon the aim of avoiding prosecution completely and to formalise settlement: leading to criticism of corporates being subject to a unique degree of leniency and differential enforcement. Thirdly, even since the implementation of the s.7 offence (and its design to circumvent this problem) the complexities of prosecuting corporate crime and white collar criminals has remained influential enough to see the favouring of enforcement which relies heavily on self-regulatory philosophies and conciliation for the corporate. When cases turn to the subject of individual prosecutions, they have repeatedly succumbed to procedural obstacles and have had no success.

Echoing the literature across other regulatory landscapes, there has been a compelling shift from the conventional use of the criminal justice system to methods aligned with civil process and non-prosecution. As observed throughout this research, although the SFO remain resolute in their commitment to prosecution - whilst commendable - their pendular activity of speaking to prosecution but being either unable to do so or inclined towards settlement suggests they are equanimous but marooned. This is perhaps the reason why some feel that despite many known successes the SFO has lost its zeal,[1055] and is hardly, as the current Director has claimed, "*relentless in using all*"- and not just some of - *"the powers*

[1054] Nathan Koppel, 'Introducing The New "FCPA on Steroids", *The Wall Street Journal* (December 28, 2010).
[1055] Franz Wild, 'Activists worry Britain's Serious Fraud Office is Losing its Zeal', *Bloomberg* (November 14, 2019) <https://www.bloomberg.com/news/articles/2019-11-14/activists-worry-britain-s-serious-fraud-office-is-losing-its-zeal> accessed 08/08/2021.

available."[1056] Although enforcement via DPAs may have empowered the state to intervene in corporate wrongdoing, it has at best diluted or at worst avoided the impact of prosecution. The following chapter will exemplify this divide by explaining the implications of the contrast between the projected image of enforcement and the resulting self-regulatory reliance: illustrating how the UK enforcement scene is currently akin to being one of "*castles made of sand*."[1057]

[1056] Lisa Osofsky, 'SFO Director Lisa Osofsky gives keynote speech at Cambridge Symposium' (SFO Speeches, 2022) < https://www.sfo.gov.uk/2022/09/05/sfo-director-lisa-osofsky-gives-keynote-speech-at-cambridge-symposium/> accessed 19/09/22.

[1057] Colin King and Nicholas Lord, 'Deferred Prosecution Agreements in England & Wales: Castles Made of Sand?' Public Law [2020] 307-330.

Chapter 7

Failure to Prevent or Failure to Prosecute?

7.1 Introduction

This chapter finalises the research findings. It supports chapter 6 in evaluating the argued enforcement paradox by reinforcing the less than pragmatic results and limited deployment of criminal prosecution in cases to date. Without a greater and fairer utilisation of criminal enforcement, it is conclusively argued that the boundary between state enforcement and self-regulatory reliance has become blurred, leading to a weakened ability to prevent and enforce corporate bribery. When enforcement does occur, it impacts the few and typically favours accommodative justice in the most serious cases; leading to a deliberation of whether the legislative intent of addressing a 'failure to prevent' has instead come to fruition through a failure to prosecute. Section 7.2 will offer evidence that the SFO has consistently placed itself onto a pedestal by evoking an image as a powerful and able prosecutorial agency, resulting in various tensions across the enforcement landscape. Section 7.3, by discussing some of the foremost cases, contends that the projection of prosecutorial power has in reality, led to enforcement incongruity at best and inequality at worst; questioning the application and justiciability of corporate crime enforcement. Section 7.4 illustrates the way in which corporate crime has come to be most prominently enforced: through self-regulated and conciliatory justice. This discusses how the criminalisation of corporate bribery through the UKBA is in reality paradoxically 'enforced' via settlements; where sanctioning – arguably through necessity - has become more amenable and reliant on the assistance of corporate actors, favouring settlement and avoiding prosecution. The shift from prosecution to conciliation due to a reliance on self-regulated cooperation is discussed in section 7.5 against the pervading reality and implications of a criminal enforcement system reliant on the cooperation of those it seeks to control. Section 7.6 concludes with the key extrapolations before moving to conclude the thesis.

7.2 The Imagery and Projection of Enforcement

> "*We are definitely an enforcement agency, not a regulator…we don't need any encouragement from government to use the powers that are available to us. We will use them as and when we think they are necessary*."[1058]

Inspection of the SFO website reaffirms what they project their role to be within the UK criminal justice system: a specialist investigator and prosecuting authority for serious or complex fraud, bribery and corruption.[1059] The image has been especially evoked since the UKBA came into force, and as the above quote from a senior SFO official reflects, has been reiterated throughout almost every public engagement with reference to their desire and ability to enforce these crimes with, if required, prosecution. The tactic is not new, with regulatory agencies often painting a picture of regulatees needing to 'avoid trouble' before the enforcement process inexorably moves towards forced compliance.[1060]

This research has so far identified the ways in which corporate crime can be enforced; acknowledging both sides of the punishment versus persuasion debate. For corporate bribery, literature, government and international frameworks have striven for the increased recognition, criminalisation and punishment of private sector corruption. The complexity is that its enforcement has aimed to achieve this via a pathway of least resistance; recognising the challenges faced in this arena, the need for industry cooperation and the hindered availability or limits of criminal law. This potentially incongruous combination, whilst not removing the SFOs intent to be an enforcer, has created significant tension across the spectrum of how corporate bribery is actually controlled and enforced.

The tensions are best illustrated when divided into three dimensions. The first can be described as the 'idealistic' view (see page 201), where the criminal law, the SFO and the UKBA are held to contain appropriate provisions to successfully attribute liability to corporations for failing to prevent bribery – via the s.7 methodology. This is characterised in

[1058] Interview 5.
[1059] www.sfo.gov.uk
[1060] Hawkins (n 421) 52.

the image of the state being a willing enforcer of the criminal law, with the ability to exert influence over corporates and in possessing an ability to gain compliance by speaking softly but carrying a big stick.[1061] In this frame the state is endorsed as being assuredly flexible with its interpretations of the law and thus its enforcement. The second and diametric position is the 'pacifistic' view (see page 202-203), where the law has taken the difficulty in punishing corporates via criminal prosecution and has increasingly adopted controls that are less complex and financially fraught. These are commonly associated to civil methodologies; namely financial penalties. This is evidenced in the development of DPAs, which, whilst described as a criminal enforcement tool renders the parent corporate free from prosecution in a manner which Hutter would describe as a mark of regulators and enforcers having leant towards accommodation.[1062] The third and final dimension which is argued to exist could be described as the 'realistic' view (see page 206). In this position, the state and the SFO have - despite the image portrayed and stalwart expressions - adopted a binary middle ground where although prosecution is hailed to be of equal consideration to deferred prosecution, most cases appear to be concluded with a preference for the latter. Taking Kagan's phrase, the approach therefore drifts into the realm of "*retreatism*"[1063] where enforcement only occurs beyond all reasonable accommodation and conciliation; questioning the legitimacy of corporate crime enforcement if the state suffers from an inability to enforce failed self-regulation in ways other than settlement.

Despite the arena being captured by what was considered to be draconian *criminal* legislation which, according to the former SFO Director, *"scares the pants off most corporations"*[1064] and is surrounded by threats of enforcement, it has come to be paradoxically and favourably dealt with (at least on present statistics) in non-criminal ways. Wells identified this some time ago with the apprehension that there existed little evidence of a concerted desire to deal with corporations in onerous ways as the criminal law has always been considered as a last resort.[1065] It seemingly remains the case that this type of offending "*constitutes a radically*

[1061] Ayres and Braithwaite (n 127) 19.
[1062] Hutter (n 220).
[1063] Kagan (n 1050) 93.
[1064] Interview 2.
[1065] Celia Wells, Corporations, *Crime and Accountability* (2nd ed, Oxford University Press, 2001).

different political and legal context to mainstream criminal justice."[1066] Not because enforcement does not occur, but because the way it is approached and how it is consequently deployed is simply different. Although the 'law in books' and the rhetoric behind it implies that sanctioning up to and including the pinnacle of prosecution stands ready to be used, the 'law in action' finds a reality quite different where prosecution has been rarely and unequally used. Even though this follows the pyramidal sequence of a responsive regulatory approach by only applying more punitive action when, and only if, cooperative strategies fail, what is unclear is when the idea of the carrot is ever to be replaced with the stick.

The SFO remains steadfast in their aim to enforce corporate corruption and argue that companies "*are much more fearful of the SFO coming calling*" (as compared to a regulator) since the UKBA has come into effect.[1067] This stance, however, reveals a conception made apparent through this research and identifies a broader debate surrounding the practical reality of enforcement. From the collection of interviews, conferences attended for this work and perusal of SFO material, the state (through the SFO) has constructed an image of its desire to prevent these crimes upon a clear foundation of prosecutorial power and discretion; with a varied arsenal to do so. This would be comparable to the above cited 'idealistic view'. Whether it be their marketing as an enforcer, or from many of the interactions with and/or observations of both current and former SFO employees, there exists a resolute and highly voiced commitment in their ability to investigate and handle the most serious instances of corporate corruption. Be it the demands they set for compliance programmes, the reiteration of their ability to refuse a DPA, their analysis of credible defences or their expectations for the quality and quantity of corporate self-reporting, at nearly all public appearances attended during this research, the materials perused and in those interviews from or on behalf of the SFO, there existed a clear sense of confident posturing. So much so that the approaches and enforcement style(s) taken by the SFO were self-proclaimed to be of a calibre that "*others aspire to"* because they "*are seen as a very effective agency in tackling bribery and corruption*".[1068] To adopt Ayres and Braithwaite's phraseology, the SFO frequently spoke

[1066] Almond (n 222) 4.
[1067] Interview 5.
[1068] Interview 5.

loudly and threatened the use of very big sticks.[1069] Thus, it would be imprecise to deny that where deferred prosecution is not to be considered, the SFO remains as it proclaimed in 2015; with "*the appetite, stamina and resources to prosecute in the ordinary way*."[1070]

The problem with this ideal, is not that it is flawed, nor impossible, but that it appears to be of limited reality, weakened ability and decreasing prevalence.[1071] Take for instance figures obtained by Howard Kennedy pursuant to a Freedom of Information request; where it was revealed that between 2012 and 2017, of the individuals proceeded against for offences under s.2 of the Criminal Justice Act 2003,[1072] only two had been found guilty. Aside from revealing a remarkably low success rate, the tool was outwardly not the suggested iron fist behind the SFO's velvet glove.[1073] Although their usage increased dramatically under David Green's directorship, with the SFO being seen to blink first, drop charges and Lisa Osofsky's enforcement position being unclear, critics question whether "*the SFO's threats may very well be all bark and no bite*."[1074] A second observation is the watermark behind much of the SFO's activity and DPA policy: the clear emphasis on co-operation and the need for an "*active and engaged approach*" to enforcement.[1075] A third observation is that it has arguably proceeded to reverse its direction. Whereas the first ever UKBA corporate case against Sweett Group resulted in a prosecution and a robust line in the sand, cases have since retracted in intention and/or outcome. The effect is not one of enforcement prevalence, but a reminder that there is a presumption of persuasion with enforcement being *"spread around thinly and weakly*"; magnified by hardened or worse offenders who "*learn that the odds of serious punishment are low for any particular infraction*."[1076] Enforcement has consequently been redefined;

[1069] Ayres and Braithwaite (n 127) 19.
[1070] Ben Morgan, 'First use of DPA legislation and of s.7 Bribery Act 2010' (Speech at the Managing Risk and Mitigating Litigation Conference, 2015) <https://www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/> accessed 18/09/2019.
[1071] See the data published by Spotlight on Corruption (n 9).
[1072] S.2 of the Criminal Justice Act 2003 gives the SFO the power to compel people to answer questions, to produce documents and to prosecute any person who, knowing or suspecting that an investigation into serious or complex fraud is being or is likely to be carried out, falsifies, conceals, destroys, or otherwise disposes of documents known or suspected to be relevant to such an investigation.
[1073] Ian Ryan and Kyle Phillips, 'Fraud office's iron fist looks soft', *The Times* (November 10, 2018).
[1074] Ian Ryan and Kyle Phillips, 'Fraud office's iron fist looks soft', *The Times* (November 10, 2018).
[1075] Lisa Osofsky, 'Ensuring our country is a high risk place for the world's most sophisticated criminals to operate' (SFO Speeches, 2018) <https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/> accessed 10/12/20.
[1076] Braithwaite (n 145) 487.

framing limited prosecutions and prevalent DPAs as successful, legitimate and justified responses to the most serious corporate offenders. This tension reflects the 'pacifistic' position. As one former SFO divisional head turned private practitioner explained:

> "*It is ironic to say there is an SFO strategy; the UK has so few cases a theme is difficult to predict. In the US you can see trends of sector enforcement. For the UK it is whatever case lands."*[1077]

In light of both known and publicised enforcement infrequency; and it being a 'grey area' conveyed during the ethnographic observations, each interviewee was asked questions surrounding the enforcement activity of the SFO. Broadly speaking, they sought to uncover whether firstly; the SFO is fulfilling its reported intentions to investigate and prosecute serious economic crime, and secondly; whether its claims of prosecutorial enforcement were effective and actually sufficient to deter corporate crime. For the former SFO Director, the answer was far from clear, stating: *"you'd have to ask corporations."*[1078] Interviewee 9 stated that a big difficulty surrounding the impact of any SFO strategy was that its direction was "*virtually a cult of whoever is in charge*."[1079] This supports the view that agency strategy, operational character and enforcement policy and practice can be seen to be influenced by surroundings;[1080] or "*external forces*" (such as political or economic factors) that shape the formulation of policy and affect how decisions are made[1081] through an interrelation of views that can constrain prosecutorial case decision-making.[1082] The resulting tensions between rhetorical idealism and reality - vis-à-vis proclaimed strategy and actual operation - are apparent and communicate a lack of certainty which impacts upon the legitimacy and justiciability of enforcement. This is an important consideration given that the enforcement and prosecution of grand corporate corruption and the possibility of influence by 'external forces' is notably prohibited within the foundations of overarching legal frameworks. As was briefed in chapter 4 when discussing the OECD convention (see 4.2), reference is specifically

[1077] Patrick Rappo of DLA Piper. Speaking at the ABC Minds International Conference 2019.
[1078] Interview 2.
[1079] Interview 9.
[1080] Hawkins (n 909) 115.
[1081] Ibid 178 and 116.
[1082] Ibid 178 and 176.

made to the need for investigations to not be influenced by factors such as economic or political interest. A principle the UK remains committed to.[1083] The reality is that corporate bribery - on a global playing field – is and has been handled with overt consideration to economic logic and political imperatives.[1084] In the US, this was aptly illustrated where the decision not to prosecute HSBC (ending in a settlement of $1.92 billion) was publicly stated to factor that a criminal conviction would further weaken and negatively impact the already fragile financial system that was still in recovery.[1085] In the UK, the Al-Yamamah Arms deal with BAE Systems found nefarious fame for its politically-led collapse when former Prime Minister Tony Blair intervened under proclaimed concerns for national security; compelling the then SFO Director Robert Wardle to retract the investigation.[1086] For HSBC, the settlement, no prosecutions and an apology sufficed.[1087] For BAE, the SFO investigation was abandoned, the company faced no legal consequences in the UK and nor was any individual ever prosecuted.[1088] An analysis of the interconnected political and economic power stemming from these organisations led Werle to conclude that this *"shows how the government's power to deter corporate crime breaks down in the context of a highly concentrated political economy."*[1089] Such situations led Tombs and Whyte to express the view that "*the major barrier to such crimes being dealt with…is not one of practicality but of politics. Pursuing such crimes requires sufficient political will*", yet "*the system of corporate crime regulation that exists…is one that ensures minimal interference in the financial system. This is a core feature of regulation that is often overlooked*" with the purpose being "*to reproduce the conditions under which capital can reproduce itself*", leaving "*most corporations for most of the time…relatively free to engage in such criminal practices*."[1090]

[1083] Crown Prosecution Service, Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions (2019).
[1084] Wells (n 24) Part 1, 13.
[1085] Former US Attorney General Eric Holder, as cited in Mark Gongloff, 'Eric Holder Admits Some Banks Are Just Too Big To Prosecute', *The Huffington Post* (March 6, 2013).
[1086] Christopher Hope, 'SFO illegally dropped Saudi arms inquiry, judge rules', *The Telegraph* (April 10, 2008).
[1087] HSBC, 'HSBC Announces Settlements With Authorities', *HSBC News Release* (December 11, 2012).
[1088] In a suggestion that history may not repeat itself, the SFO have, however, announced charges against and three individuals in connection with corruption allegations concerning the conduct of an Airbus subsidiary's arms trade business in the Kingdom of Saudi Arabia between January 2007 and December 2012.
[1089] Nick Werle, 'Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review' (2018) 128(5) The Yale law Journal 1174-1477, 1466.
[1090] Steve Tombs and David Whyte, 'The Shifting Imaginaries of Corporate Crime' (2020) 1(1) Journal of White Collar and Corporate Crime 16-23, 20.

The idea of decision-making being based on 'whoever is in charge' gave context to a comprehensive consensus revealed by the majority of interviews; that the enforcement activity of the SFO - in reality - struggled to find a successful synthesis between the pendulous agendas of settlement and prosecution. This sense of uncertainty was, perhaps unsurprisingly, not a position supported by those currently working for the SFO. Aside from the multiple public displays witnessed throughout the research of prosecutorial steadfastness, when asked during interview if anything could underpin the growing sense of prosecutorial discretion, the response was that every case was viewed "*right from the outset as potential prosecutions*."[1091] That said, the extent of enforcement inactivity and mere rhetoric was enough for Interviewee 9 (a former SFO division head) to feel that *"nobody knows what Lisa Osofsky wants to do."*[1092] Despite her suggestion of being a "*different kind of director*" - ready to build on successes "*with taking on and cracking the most complex and difficult crimes*"[1093] - the proclaimed paradigm of enforcement remains in question as was described by Interviewee 9:

> *"…apart from dropping cases, Lisa Osofsky hasn't got a history of much enforcement at all; she's lost Tesco's, she's lost Barclays and then she's dropped a bunch of cases. So, when you look at what's in the scales, it's basically Airbus, which wasn't even her case."*[1094]

In their recent podcast 'Double Jeopardy', Lord Macdonald KC and Tim Owen KC spoke with Clare Montgomery KC where the topic of prosecuting both general and serious frauds – as well as the SFO's success rate – was discussed. Montgomery summarised the paradoxical essence echoed by the findings of this research noting that: "*I'm not saying nothing is happening, my concern is that nothing of any substance is happening that would actually deter a professional fraudster*." If "*I were inclined to live my business life in that way, I don't think I'd be very scared of anything that's available to bring me to book."*[1095] All of this creates

[1091] Interview 5.
[1092] Interview 9.
[1093] Lisa Osofsky, 'Ensuring our country is a high risk place for the world's most sophisticated criminals to operate' (SFO Speeches, 2018) <https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/> accessed 10/12/20.
[1094] Interview 9.
[1095] Lord Ken Macdonald KC, Tim Owen KC and Clare Montgomery KC (n 785).

a problematic environment for the SFO where it becomes increasingly unclear to locate where the gun is pointing and if it's even loaded. Interviewee 9 added the following:

> *"The SFO hasn't had the ability to show its teeth, because they haven't said 'we're out to prosecute and we will get you', and when they have sort of said it…the reality is…they fucked it up. You look at other cases…where all of the individuals got off...they failed in relation to them. Do they have enough ability to really prosecute things, I don't think so? They are difficult cases, they are very international, there's problems with disclosure and ultimately you sweep away most of this stuff and you get down to the one core bit in every case; does Joe Bloggs…facing the jury, is he dishonest? If you've got a grey haired bloke who everybody says is brilliant and just a really nice man, a victim of circumstances. Most juries, unless they think he's an absolute shit will end up acquitting. They're in difficulties. So no, they don't have adequate firepower; in terms of staff, money or legislation."*[1096]

The trajectory of enforcement activity reveals that the narrative of corporate enforcement and prosecution is reluctant to accept that it not only faces an abundance of procedural and practical challenges, but that it sits noticeably behind the adoption of various negotiating and bargaining tactics designed to secure and maintain corporate compliance.[1097] In other words, a 'realistic' view. For Interviewee 1 (an anti-corruption NGO Director), whilst praising of the SFO's efforts, this reluctance was expressly voiced with the concern that the SFO are "*maybe not honest enough*" about what has gone wrong with its cases; raising "*really fundamental questions about our justice system*" and how corporate criminals are treated.[1098] When chapter 4 briefed DPAs, it was referenced that despite their label as a mechanism to treat these crimes "*as seriously as any other kind of offending*",[1099] the language, treatment and subsequent direction has been far more accommodating. Even during the consultation

[1096] Interview 9.
[1097] Hawkins (n 421) 39.
[1098] Interview 1.
[1099] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012, Chapter 1, paragraph 4.

stages, the terminology identified a need for flexibility and cooperation where terms are finalised on a basis of discussion and agreement.[1100] Whilst the notion of flexibility is aligned with responsive regulatory themes, it conversely reinforces the argument that compliance in this arena has become less to do with enforcement itself, and more to do with a show of force underpinned by negotiation.

But what purpose does a heightened degree of toleration serve if adversarial enforcement is a disinclined or at least rare step; particularly if corporations can act in a capacity where the benefits of non-compliance may outweigh compliance and be rational for their interest?[1101] A company will only be deterred if its expected penalty of non-compliance exceeds its expected gains.[1102] Where a position of strength is promulgated by the state, but the tools in which it shows that strength rather depend on compliance being highly self-regulatory and a negotiated or cooperated actuality, it reiterates a power imbalance and corporate influence as it permits the bargaining away of legal standards where business interests come to define legality.[1103] Instead, as Almond put it when referring to corporate health and safety regulation, threatening prosecution as a last resort by signifying moral fault becomes the strategy necessary "*to preserve the law's gravity*."[1104] In Ashworth's phraseology the SFO's enforcement backed rhetoric of the UKBA creates the "*favourable impression*" that corporate corruption "*has been taken seriously and dealt with appropriately*",[1105] but lacks the physical shaping of turning the image and principle of enforcement into operational policy. His conclusion, as now, is that the quest for the criminal law to achieve (or enforce) better conformity between idealistic principles and legal doctrine has proven somewhat elusive.[1106] Despite the UKBA regime and legislative tones encapsulating methods of risk-based and responsive regulatory strategies, instead of sanctioning the most serious offenders, the state rarely seems to do so in ways other than financial penalties alone – unless guilt is admitted.

[1100] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012) Consultation Paper CP9/2012, Chapter 1, paragraph 43.
[1101] Celia Wells, Corporations, Crime and Accountability' (2nd ed, Oxford University Press, 2001) 74.
[1102] Clarkson (n 1017) 562.
[1103] Wells (n 24) Part 1, 16.
[1104] Almond (n 222) 128.
[1105] Ashworth (n 221) 225.
[1106] Ibid 225-256.

For some, this environment had led to views of "*an emasculated enforcement pyramid*" which can but "*fail to deter.*"[1107] Thus, "*the 'threat' of credible enforcement – the sometimes explicit, but increasingly unspoken basis on which 'responsive' regulatory arguments are pro-posed – is notable only for its absence."*[1108]

When Interviewee 4 was questioned on why the SFO may not pursue a course of prosecution and instead reconcile an investigation with a DPA, the answer was:

> *"…because they can show prima facie evidence of corruption or other malfeasance to the company but they don't have to prove the specific offence. And of course the company would like the nature of the offence to remain as vague as possible and they negotiate that with the SFO…this process of settling avoids prosecution and I believe those prosecutions should be enabled to involve both the corporate entity…as well as individuals and senior individuals within those corporate entities."*[1109]

Using the above language, the enablement of prosecutorial power is clearly an influential perspective which should not be avoided. It needs to be reminded than when a DPA is reached, the SFO makes clear the prerequisite that it must come with a genuine commitment to cooperation and ultimately the admission(s) of bribery and agreed evidence to support it. These conditions imply that the state is able to leverage its position and may even hold the keys to avoiding prosecution. When Lisa Osofsky assumed her directorship in 2018, she remarked that the aim was to leverage private sector expertise to "*build strong cases*."[1110] As opposed to securing prosecutorial success and commanding control, cases and this research reveal that what is instead sought is influence or projected dominance over corporations; with a primary goal to intimidate and shape future compliance. Securing future compliance is not to be condemned, but should be contrasted against the acceptance that the SFO (like its

[1107] Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (1st ed, Oxford, 1999) 123.
[1108] Tombs and Whyte (n 156) 74.
[1109] Interview 4.
[1110] Lisa Osofsky, 'Ensuring our country is a high-risk place for the world's most sophisticated criminals to operate' (SFO Speeches, 2018) <https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/> accessed 10/12/20.

'opponents') has for some time been well aware of both the financial and procedural hurdles of pursuing criminal investigations and to better direct its efforts towards a strategy of 'reduction' which is not reliant on the criminal justice process.[1111] Equal to Braithwaite's proposal that regulatees can develop postures toward agency authority,[1112] this arena indicates the existence of the opposite, where it is instead the agency posturing towards the sector it polices to make their bark seem *"more inevitable and more terrifying than it is.*"[1113]

For any hopeful leverage to work the SFO must possess two abilities which are imbedded within responsive regulatory theory. Firstly, genuine and uncompromised capacity to escalate deterrence that reflects the regulatee's degree of uncooperativeness, non-compliance and criminality. Secondly, for this to be done in accordance with a tit-for-tat approach: responding to failures to self-report; an unwillingness to cooperate; and/or a premediated lack of adherence to compliance provisions with a corresponding level of sanctioning that is aligned to legislative and policy intent. Hawkins unfortunately points out that the broader approach of enforcement usually transpires through the softer form of bargaining, with the semblance of responsive state power, but the reality of corporate influence.[1114] When referencing water pollution he substantiates the existence of how enforcement agencies project their power arguing that in an environment with low prosecutions, "*threats and bluffs about legal powers become important tactics in everyday enforcement work*."[1115] For Nielsen and Parker, research conducted in the context of Australian competition and consumer protection violations by corporations even revealed "*little evidence of tit for tat responsiveness actually occurring in practice".*[1116] The result is a discrepancy between enforcement and actual practice: the "*gap between legal word and legal deed*."[1117] Bluffing corporations into believing that there is an increased chance of enforcement is understandable, but soon lacks presence

[1111] Michael Levi, 'Political Autonomy, Accountability and Efficiency in the Prosecution of Serious White-Collar Crimes' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Taylor and Francis 2011) Part 3, 199.
[1112] Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (1st ed, Edward Elgar, 2009).
[1113] Ayres and Braithwaite (n 127) 44.
[1114] Hawkins (n 421) 47-48.
[1115] Ibid 48.
[1116] Vibeke Lehmann Nielsen and Christine Parker, 'Testing responsive regulation in regulatory enforcement' (2009) 3(4) Regulation and Governance 376–399.
[1117] Hawkins (n 421) 47-48.

if, as interviewees revealed, the reality is in fact improbable. This is highly informative of models of regulation in that corporations thereby become detached from the ability to be co-opted under the threat of increased discipline. Even when enforcement interactions amounting to responsive regulation do take place, they may have little to no impact on business behaviour;[1118] reinforcing that the regulatee "*must perceive the legal system and the enforcement action itself as inexorably moving up the pyramid*."[1119] Instead it is the entity that co-opts the state when it becomes empirically apparent that the claim of enforcers speaking softly but carrying big sticks is practically speculative. This predicament supported how one interviewee subsequently felt that the UKBA had "*lost an enormous amount of its strength and power*."[1120]

According to the former Director of TIUK many of these pitfalls can be attributed to a lack of political backing:

> *"…you've got to have…really strong political will driving this…and I absolutely don't think we've got that at the moment. I'd say arguably you had it immediately when the Bribery Act was passed…you'll get individual government ministers, sometimes the Prime Minister will say positive things, but you're not, if you speak to officials at the Department of Business or the Department of Trade or the Treasury, they're not lined up with the same messaging."*[1121]

Without the appropriate ability, tools and will to escalate enforcement, both the state and the SFO may have to resort to the rationalisation of bargain and bluff tactics as the most poignant sanction cannot be used and is therefore unable to deliver a calculable punishment payoff.[1122] Ayres and Braithwaite questioned this predicament asking whether or not state agencies "*foster a demeanour of confidence*" and keep "*doubts about the fragility of their powers to themselves*" by nurturing "*a culture of invincibility*"; where bluffing "*while skating*

[1118] Nielsen and Parker (n 1116) 395.
[1119] Nielsen and Parker (n 1116) 388.
[1120] Interviewee 4.
[1121] Interview 10.
[1122] Ayres and Braithwaite (n 127) 36.

on thin legal ice" enables them to "*cast a bigger shadow than it does*."[1123] Although a fear of the unknown is a recognisable tactic to encourage deterrence, this is dependent on how easily the recipient is frightened. The capacity to threaten, bluff and intimidate entities of a smaller nature may have no bearing upon the much larger international corporation who is more averse to idle threats and ultimately able to defend itself with deeper pockets.

7.3 Inequality and Illogicality

As enforcement under the UKBA has increased so too has another glaring variation, the often unequal and illogical path it follows. Analysing and comparing the diametrically opposed cases of Skansen Interiors and Rolls Royce personify the existence of such differences. The Skansen case related to a small UK refurbishment company who, following the appointment of a new CEO, initiated an internal investigation into claims that payments had been made permitting them an improper advantage (leading to the dismissal of two senior employees). The CEO instructed the company to establish an anti-bribery and corruption policy after it appeared one was not in place. Skansen did have guidance on ethical dealings with third parties, expectations of ethical business practices, and financial controls in place to prevent such activity. After making a suspicious activity report to the National Crime Agency, the allegations of bribery were reported to the police. Throughout, they confessed, cooperated fully, gave extensive assistance to police, disclosed legally privileged material and seemingly did their utmost. Although charged under the s.7 UKBA offence, Skansen declined to plead guilty arguing that whilst limited, its controls were proportionate for such a small UK company and were in any event addressed immediately upon discovery of the crimes. Despite hopes for a DPA, the company was charged where at trial, the jury found Skansen guilty which ultimately finalised their liquidation. Even though the judge, when sentencing the company, emphasised the paramount importance of there being public confidence in the tendering processes, he did question why prosecution was necessary given that the company was then dormant. Even though it was agreed that no financial penalty could be imposed and that the only sentence could be an absolute discharge, the CPS declared that as the public interest test had been met, a prosecution was required to send a message to others in the industry. Rolls Royce, however, were engaged in bribery on an international basis over decades, did not self-

[1123] Ibid 46.

report or disclose any criminal conduct until after the media reported allegations and the SFO investigation had commenced, initially denied any wrongdoing and originally failed to cooperate. Despite the obvious contrasts in substance, their dissimilarity in severity and their reflections according to the public interest test and Deferred Prosecution Agreements Code of Practice, Skansen faced the full weight of prosecution and were subject to the CPS' desire to 'send a message', whereas Rolls Royce secured a DPA and no prosecutions against any personnel.[1124]

The cases subsequently require three important annotations. The first is that during the early consultation stages surrounding the UKBA, as the Law Commission specifically referenced that a company should not be liable "*on the basis of a single instance of carelessness*" (if it had robust management systems),[1125] this has been unfairly applied in practice and contradicts the spirit of the reforms. The second is that ultimately, the DPA Code of Practice states that "*the more serious the offence, the more likely it is that prosecution will be required in the public interest*."[1126] This juncture is contextually important as although Skansen was an assetless dormant company at the time of sentencing and could therefore not have complied with a DPA, industry surprise resulted when it was deemed that prosecuting a small and fully cooperative company was in fact in the public interest. Finally, the cases reiterate serious questions surrounding the negotiation and approval of a DPA absent of the prerequisite corporate self-report (albeit with future cooperation), its intended embodiment of open collaboration and its contradiction to a primary focus of the regime - to increase enforcement and compliance by encouraging self-reporting. The Director of the SFO reinforced the spirit of the DPA process noting that *"DPAs demand full co-operation. In short, companies have to come out with their hands up. They must demonstrate a commitment to rooting out wrongdoing and fulfil all the obligations by a deadline."*[1127] What seems to be missing is the term *eventually*. The evident observation is that despite the disparity of the Rolls Royce and

[1124] At the time of writing, Airbus (having now succeeded Rolls Royce as the largest UK DPA settlement) may also be awaiting a similar conclusion of non-prosecution.

[1125] Law commission, 'Reforming Bribery', No 313, (2008), 6.106 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/04/lc313.pdf> accessed 08/04/2021

[1126] SFO and CPS, Deferred Prosecution Agreements Code of Practice (2013) paragraph 2.4.

[1127] Serious Fraud Office, 'We're defending the UK as a safe place for business' (SFO Speeches, 2021) < https://www.sfo.gov.uk/2021/06/30/were-defending-the-uk-as-a-safe-place-for-business/> accessed 06/07/21.

Skansen cases, in both merit and substance, the fact that the criminal law has paradoxically been used to settle the most serious and prosecute the least serious reiterates a foundational weakness to this regime: that the most severe cases are enforced differentially and adopt (or at least accept) differing definitions of cooperation. Given Skansen's demonstration that both corporate and individual prosecution was warranted even when the offending was relatively minimal and did not result in personal gain, one cannot help but question the divergence in outcome faced by Rolls Royce. The former Director of the SFO personified this sense of disproportion by offering a fittingly apparent deduction. When referencing Rolls Royce's DPA, and being a supporter of it, it was still felt that that the judgment "*made a very good effort at putting a square peg in a round hole*."[1128]

Any accusations of the rarity of Rolls Royce's treatment are unfortunately premature as a similar fate can be noted for Airbus in their DPA. Despite the judge recognising widespread and severe corruption – even noting that "*Airbus could have moved more quickly*"[1129] – no prosecution(s) followed with the SFO announcing its conclusion of all criminal investigations into associated individuals.[1130] A striking point is that the SFO had previously gone on record in the Standard Bank case (2018), several times, to reaffirm that one of the most prominent reasons it agreed to the DPA route with the bank was because of the applaudable early self-reports it and its lawyers had made and the full cooperation demonstrated from the outset.[1131] This rationale supported the themes and precedents set in Sweett Group (2015) where a DPA was not offered for various reasons. Firstly, the SFO felt the company had not fully and transparently cooperated *throughout* the process. Secondly, the judge highlighted that as the company only self-reported once the Wall Street Journal had tipped them off that they were about to publish the allegations, Sweett's hand had consequently been forced and therefore no credit was due for early self-reporting. Thirdly, there was initially no admission that bribes had been paid; and finally, the company had even tried to divert prosecutors' attention away from parts of the company's business. Reviewing the rationale applied to these cases, however, draws a reminder to their incompatibility towards the essence of risk-

[1128] Interview 2.
[1129] SFO v Airbus SE, Southwark Crown Court, Case No: U20200108, January 31, 2020, paragraph 73.
[1130] Kirstin Ridley, 'UK prosecutor ends investigation into Airbus individuals – sources', Reuters (May 4, 2021).
[1131] SFO News Releases, 'SFO agrees first UK DPA with Standard Bank' (News Releases, 2015) <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/> accessed 19/08/2020.

based regulation. That is, for regulatory and enforcement strategies to be organised around and based upon those who pose the highest risk – targeting the worst offenders in order to apply maximum deterrent effect.[1132]

Despite the set of logical justifications outlined by the judge and SFO for not offering Sweett a DPA, there remains an obvious inequality and intellectual inconsistency in treatment. This is perhaps most apparent where a company has initially failed to cooperate, not self-reported and/or denied any wrongdoing. Such reasons led Interviewee 6 to highlight the "*ridiculous*" handling of and opposing precedent set by Skansen and how it personified the inequalities of the regime, which instead of incentivising compliance, would make most corporates wonder: "*why would anyone ever want to self-report?"*[1133] Ashworth grounded the matter of inequality arguing that *"the principle of equal treatment is assigned a high priority…there is no justification for differential enforcement systems that detract grossly from the principle of equal treatment and the sense of fairness about proportionate responses to wrongdoing."*[1134] Alternatively put, it is both procedurally logical and fair to see that those "*who commit wrongs of equivalent seriousness in relevantly similar circumstances should be subjected to censure of a similar magnitude*."[1135] Thus, when round pegs fail to fit round holes, but square pegs manage to do so, it simply propels concerns of illegitimacy and justiciability (specifically in regard to outcome fairness); that some companies are indeed too big to fail/too big to jail;[1136] or that the SFO is wanting/only able to target lower hanging fruit. The results seen imply the need for clearer, more cogent and stricter definitions of what will constitute cooperation. Whilst the SFO has published corporate cooperation guidance,[1137] the theme that has remained a list of expectations, rather than defined parameters of when a DPA will not be considered. Although each case will inherently turn on its own facts, it would be beneficial for there to be clarity on the extent and nature of how cooperation is to be assessed so as to reassure cooperating organisations and demarcate non-cooperating ones as to who may benefit from a DPA as opposed to risk prosecution. As Interviewee 1 stated:

[1132] Hutter (n 162); Baldwin and Black (n 163).
[1133] Interview 6.
[1134] Ashworth (n 221) 236.
[1135] Ibid 245.
[1136] Garrett (n 149).
[1137] Serious Fraud Office, Corporate Co-operation Guidance (2020).

> *"…we're in a tricky territory because the trouble is that…they've kind of shifted the ground subtly to say, 'we will define a self-report as when you start telling us new information once you're under investigation.' That completely undermines the self-reporting regime…why would a company not take the risk of not going to the SFO first? There's no clear incentive in the system to actually get companies to go, oh, OK, we've got this new information, let's go forward."*[1138]

The incongruity exemplified by the Skansen and Rolls Royce polarities serve only to highlight that the image of prosecutorial power and the disparity of enforcement carry a futile purpose as the mixed messaging does little to influence or incentivise desirable behaviour. This is significant because the paradoxical nature fails to empower the regime and its enforcement, offers unclear guidance as to what the legal system expects from businesses and does not demarcate how offenders should be treated.

Whilst signalling and posturing alone may be hopeful and moralistic in tone, they serve no purpose if rarely, inconsistently, illogically and unequally enforced. As a Chief Compliance Officer described it:

> "*…it doesn't do anybody any good to go after, to bring an enforcement action or a prosecution, or whatever you want to call it, against a small company here or there… That's not as effective. Bringing a case against Rolls Royce is effective. Failure to do that, and to agree the DPA, as we heard from the Head of the SFO, damaged the SFO's reputation, it continues to feel the pain from that decision*."[1139]

The disjointed and illogical treatment has created a problematic image for the SFO in its ability to be considered as an enforcer and not a negotiator. This is especially so because of one of the potential ingredients of the DPA process: the imposition of a corporate monitor. As was briefed in chapter 4 (see 4.6.1), the fact that monitors are not mandatory for all DPAs and have – when required - permitted internal oversight only, removes the critical ability for the

[1138] Interview 1.
[1139] Interview 7.

state/SFO to oversee - and if needs be - scrutinise the level of purportedly reformed compliance. Surely this is necessary for an organisation that intends to enforce failed compliance and requires offending companies to reform?[1140] Without this assurance and agencies generally "*doing their bloody job*",[1141] the "*value and weight of the terms of DPAs, as well as adherence to them, is questionable.*"[1142]

When DPAs were first introduced, they were devised for companies that self-reported new information that the prosecutor had never and might never see. Rolls Royce and Serco Geografix Ltd (although the latter was not a UKBA charge) challenged this and showed how the gateposts seem to have been subtly moved askew from case and framework precedent to an accommodating width where the SFO are in fact willing accept a self-report and cooperation to be when the corporate *starts* providing new information. In what could be viewed as desperate, leniency proceeds to be offered even though the corporate is already under investigation and has failed to show adherence to the letter and spirit of the DPA Code of Practice. Particularly when large corporates are often able to outstrip the state in both resources and acquired expertise, often nullifying *"the standard economic incentives…to adequately disincentivise criminal activity*",[1143] this not only reinforces the theory and practice of state enforcement as distinct contrasts but fuels the stance that some companies are too big to deter.[1144] The former Director of TIUK commented the following:

> "*If a big company wants to fight the SFO all the way…however guilty it is, if it just wants to block accountancy of the SFO and so on, and one sees that at the moment with the ENRC case that's going through…it can almost break the SFO because the resources of those huge companies are so big, they'll employ the top lawyers in London, they'll use any procedural device to delay things (and) they'll make sure officials in countries around the world don't cooperate. So pragmatically I think DPAs are necessary*."[1145]

[1140] Serious Fraud Office, SFO publishes Annual Business Plan 2021/22, 13/05/2021.
[1141] Interview 9.
[1142] Campbell (n 599) 215.
[1143] Werle (n 1089) 1179.
[1144] Garrett (n 149).
[1145] Interview 10.

The paradoxical reality is that if corporates are able to guide or influence the outcome they face – in respect of legislation designed to restrict corporate wrongdoing - this undermines the legitimacy and justiciability in the sanctioning of serious corporate crime. In full recognition of the negative implications of a criminal trial, the difficulties in successfully pursuing corporate liability may leave companies inclined to consider whether facing the evidential burden of a criminal trial is more risk averse and even advantageous than self-reporting or cooperating with the SFO. Levi reflected on this and commented that for "*most of the professionals and defendants interviewed…over the last four decades would have difficulties in identifying the Serious Fraud Office or its UK predecessors as a frightening adversary."*[1146] The reality behind such a predicament is that "*most official enforcement instruments are no match to the economic power of multinational business firms."*[1147] Interviewee 4 (when referencing global arms corporations) deemed that the SFO and the UKBA:

> "*…barely acts as a disincentive to corrupt behaviour. At best they are an inconvenience. At worst they are a charade to give the impression that British companies are conducting international business in a legal manner. The SFO, the Bribery Act, the process of settlement is nothing more than a cost of doing business."*[1148]

But what might cause a corporation to acquire such feeble impressions? It is perhaps the nature of SFO enforcement which has demonstrated: i) that DPAs agreed on the basis of individual liability can result in no prosecutions being brought against the alleged directing mind(s); and ii) the possibility (on more than one occasion) that corporates can choose to not self-report or initially cooperate, yet still be availed of a highly discounted DPA if they change course (or if their crimes are uncovered). As Interviewee 1 explained:

[1146] Levi (n 787) 174.
[1147] van Wingerde and Lord (n 650) 473.
[1148] Interview 4.

> "*…if you sit on your hands until we start investigating you and then you cooperate, you will get exactly the same discount and exactly the same terms as if you had come to us with the new information*."[1149]

Whether or not the SFO have reached an impractical junction where they are simply better off following a pathway associated with settled justice was put to interviewees. Interviewee 9 provided the following remarks:

> *"Absolutely, that's why we brought in DPAs. The reality is we can't investigate everything, we don't have enough money, we don't have enough clout because the law is against us. The only way that we can properly enforce is by companies admitting to us and companies begging us to get a settlement. The only way that happens is if we avoid a criminal conviction for them, we entice them and give them a promise that they won't get convicted…give them a get out of jail card (adequate procedures) and then a further get out of jail card which is if they're really good boys, they then just pay a fine and get a deferred prosecution and continue trading."*[1150]

7.4 Conciliation and Settlement: Self-Regulated Justice

With the failure to prevent offence having been shown to be enforced in the form of settlements, this chapter now moves to advocate why this should not become the new norm of corporate bribery enforcement; where cooperation, persuasion and negotiation play an all too influential role in justice. When coupled with the challenges already facing prosecutors, it places too great an emphasis on the corporate actor to invariably select what degree of self-regulation will suffice, and in any event, to then be able to negotiate its way out of criminal prosecution. Enforcing crime in this way detracts from the principle of both a compliance methodology and *enforced* self-regulation; as enforcement has been adapted and redefined to address corporates in a far more accommodating way than the law permits the average criminal. Although self-regulation is a clearly necessary component to achieving

[1149] Interview 1.
[1150] Interview 9.

compliance, by rewarding instances of failed self-regulation with lesser sanctions (than prosecution) and scrutiny (given its negotiatory nature), as the literature identified, the result is a vulnerability to cosmetic compliance.[1151] The influence corporate actors can have on the application of justice is as Estlund puts it, to risk having "*the foxes in charge of the chicken coops.*"[1152] For one Director of an anti-corruption NGO, when commenting on his experience and investigations over the implications of the UKBA s.7 offence, he echoed a sense of cosmetic compliance noting that:

> *"…this particular offence has significantly improved companies' PR around their compliance procedures and in some cases it has resulted in significant structural change, in significant increase in hiring in these sorts of areas. In terms of the actual practical difference on the ground…in terms of the conducting of business, it has been marginal. So it's largely business as usual."*[1153]

Facilitating the fulfilment of self-regulatory goals not through violations being punished, but by emphasising how acceptable levels of compliance are to or can be negotiated[1154] is as Teubner argued, a shift from 'rule-orientation' to 'purpose-orientation'.[1155] When reflecting on the health and safety industry, Gunningham noted that such regimes can become too focussed on reflexive laws designed to encourage more effective self-regulation than they are at facilitating its failed enforcement.[1156] If the aim of the UKBA methodology was to encourage compliance in the first instance, it raises considerations whether the state should or could do more to proactively guide corporates in advance of misconduct being reported or to more frequently utilise enforcement for both wider demonstration effect and to articulate granular details of serious corporate failings. With limited case law compared to a growth in settlements via DPAs, as the former SFO Director argued, ambiguity arises as to when you

[1151] Krawiec (n 351).
[1152] Cynthia Estlund, 'Corporate Self-Regulation and the Future of Workplace Governance' (2009) 84(2) Chicago Kent Law Review 617-634, 623.
[1153] Interview 4.
[1154] Almond (n 222) 70.
[1155] Teubner (n 269) 403.
[1156] Neil Gunningham, 'Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment' (1998) 19(1) Comparative Labour Law and Policy 547-584, 547.

should or should not prosecute, who you should hold accountable and in what circumstances should you decide that a company must be held to account?[1157]

Placing corporates into a dominant position of control prompted the research to explore whether the state and the SFO have become reliant (or indeed over reliant) on corporate cooperation. As chapter 5 illustrated (see section 5.3), being an enforced self-regulatory system, its success is initially dependent on the trust imparted in the regulatee. This mostly begins through the internal investigations initiated or requested in response to allegations of misconduct.[1158] Due to resource and investigative constraints, as the former FCA Director pointed out, regulators/enforcers may end up dependent on these – at least as a starting point.[1159] If that trust fails and is not appropriately sanctioned (be it lacking, departing from its purported intentions or having redefined intentions) without the aid of corporate actors, it indicates that enforcement has become weakened by or reliant on the self-regulatory support and cooperation of commercial entities. Interviewee 8 felt that: "*…we need a mix, don't we, of straightforward trust and cooperation, and straightforward criminal prosecutions*."[1160] The concern with this desire is not in its idealistic simplicity, but its likelihood of achievement for three identifiable reasons. Firstly; because prosecution is rarely seen in practice. Secondly; because of the known inequalities between state and private resources and in the ability of such differences to expose the state to capture or inefficacy.[1161] Finally; because governments have historically faced challenges of inadequate knowledge and power when seeking to prosecute big business.[1162]

For Interviewee 4, the response to whether such dependence impacted upon enforcement was: "*absolutely and unequivocally*."[1163] It was explained (when referencing financial institutions) that state bodies can often require support because:

[1157] Interview 2.
[1158] Katrice Copeland, 'The Yates Memo: Looking for Individual Accountability in All the Wrong Places' (2017) 102(1) Iowa Law Review 1897-1927.
[1159] Mark Steward, 'Practical implications of US law on EU practice' (FCA, 2017) <https://www.fca.org.uk/news/speeches/practical-implications-us-law-eu-practice> accessed 15/03/2021.
[1160] Interview 8.
[1161] Ashworth and others (n 717).
[1162] Lord (n 67).
[1163] Interview 4.

> *"…the regulator frankly didn't understand…or doesn't understand the industry it's regulating. I don't think the problem was…regulation as an idea and a concept, it was the nature of that regulation and the implementation…where the regulator would have one person who had a partial understanding of the industry and each bank would probably have a dozen people who were earning five or ten times what the one person at the regulator was earning and they had a far more sophisticated understanding of what it is they did and basically they ran rings around the regulator. I found meetings, as a banker…with the regulator, I actually felt sympathy for and sorry for the regulator and deeply concerned for society as a whole."*[1164]

For Interviewee 9, the sense of reliance was illustrated in a similar regard, reinforcing the concerns echoed through literature that government is not the cockpit of control (as per 2.7.1):

> *"The SFO doesn't have the expertise to say each industry should have these types of procedures. It's very difficult for the SFO to meet the response which will be: 'My procedures are adequate. Everybody in our industry has similar procedures. Why is mine any worse than anybody else's? We have been defeated by a bent employee…to get around our procedures. The employee was at fault.' It would be difficult for the SFO to counter that."*[1165]

Whereas prevailing theories treat the law in practice as being exogenous to the field it regulates, the concerns identified across this landscape reinforce Edelman's view of how the law has instead become endogenous.[1166] Many interviewees supported the view that the difficulties faced by the SFO had lead to the control and enforcement of corporate bribery being characteristically reliant on industry expertise. Thus, irrespective of intended or publicised desires to investigate and prosecute, anti-bribery procedures (and a subsequent defence to any case) and enforcement becomes legitimised and constructed by the

[1164] Interview 4.
[1165] Interview 9.
[1166] Edelman and others (n 288).

institutions themselves – and therefore delegitimised at state/enforcement agency level. The impact on SFO investigations and enforcement was, for an anti-corruption NGO, serious. They commented:

> *"We saw this particularly with the Rolls-Royce case where the SFO did no investigation of its own, it basically relied on investigations that Rolls Royce had itself undertaken, sometimes done by outside parties for the company…when something is commissioned by a corporation, particularly when it relates to corporate crime, the consequences is most often something that the company finds palatable. From our investigative work on Rolls Royce it was very quickly and easily apparent that the investigative work done had missed a whole number of very, very serious violations of the Act that had been ignored by the SFO and therefore were ignored in the settlement."*[1167]

The tendency for investigations and courts to essentially succumb to the expertise of individual industries with their own guidance and risk assessments has created a poignant worry for the pinnacle tool of enforcement; that in addition to the difficulties of the identification doctrine, when it comes to s.7, "*the reality is they only ever prosecute when there's no procedures."*[1168] The views obtained directly from the SFO on this subject conversely indicated that no such reliance or adverse influence existed. Other UK enforcement agencies have similarly reiterated this outward expression in that corporate influence has "*limited determinative value*" on investigation outcomes.[1169] Echoing the capable and prosecutorial image discussed above, the SFO argued that:

> "*…before we even get to the point of a DPA, we will have made our own minds up where we think this is going and it's only when you've got that unprecedented level of either first self-report or cooperation or telling us something, all of these things that we didn't know about, then the DPA might be in consideration."*[1170]

[1167] Interview 4.
[1168] Interview 9.
[1169] Mark Steward, 'Practical implications of US law on EU practice' (FCA, 2017) <https://www.fca.org.uk/news/speeches/practical-implications-us-law-eu-practice> accessed 15/03/2021.
[1170] Interview 5.

Rather than indicating an inability to prosecute (if necessary), it supported the SFO and government's professed view that the current regime had increased its ability to decide upon its chosen course of enforcement; somewhat irrespective of corporate aid. Cooperation was, as above, purely deemed by the SFO to "*lend support to the potential of giving them a DPA*"[1171] – although this is firmly publicised to not be guaranteed.

7.5 The Implications of Redefined and Reliant Prosecution

Having trust in corporate entities to implement and demonstrate effective compliance is an inherent aspect of the UKBA s.7 offence. Its enforced self-regulatory nature via the adequate procedures defence imparts a clearly devolved duty on corporates to take the prevention of bribery seriously. Here, the relationship between the state and corporates and its meta-regulatory character is most prominent; with reliance on and trust in self-regulatory capacities, and for it to be supplemented with guidance and backed with enforcement if those instruments demonstrably fail.[1172] This exemplifies the states increasingly indirect position to steer rather than row compliance, inversely creating legal liability for companies and to induce corporate crises of conscience.[1173] During this research, the delegated duty on corporates and the government's efforts to steer compliance, under the threat of enforcement, was positively recognised. For many legal and compliance personnel, the threat of SFO enforcement for failure to prevent bribery acted as a powerful incentive for corporates. As Interviewee 6 described:

> "*The Bribery Act has done more to put compliance on the board room agenda than any other piece of legislation I can ever remember…when I go back, the first two decades of my practice I was never asked by corporate client entities, what do we need to do about bribery compliance? Now, we're asked all the time. It started in 2009/2010 as the Bribery Act was getting ready to come into force, and it's continued ever since…we get lots of questions about that. People are focused on it. They may not be very effective in all cases, but at least they're thinking about*

[1171] Interview 5.
[1172] See, for instance, Christine Parker's reference to restorative justice, where liability backed self-regulatory systems require the regulatee to be guided on having in place systems and safeguards to prevent, detect and correct wrongdoing; echoing the s.7 adequate procedures defence and MOJ guidance; Parker (n 193) 246.
[1173] Ibid 246.

> *it, and that in itself is a very dramatic shift towards self-governance and self-regulation."*[1174]

Its *"deterrent and educative effect"* was argued by the former Director of the SFO to have given the public confidence that there was a body, independent of government, able to enforce serious economic crimes.[1175] But by the UKBA creating a sense of command and control, via a punitively backed route to compliance, this is actually where the deterrent effect has moved to educative; creating a favouring of reliance strategies which are intended to successfully and more proactively stimulate the self-regulatory capacities of companies. The issue, as per chapter 5, is whether the SFO has become too reliant on methods of responsibilisation that depend on obliged cooperation, investigation and support, and whether this has adversely impacted the UKBA's enforcement capabilities. For the head of an anti-corruption NGO, this was affirmed: "*all the reliance on self-reporting and self-regulation of companies makes"* the UKBA and its failure to prevent approach *"completely unworkable because it is working against the very logic of the ways in which these companies operate."*[1176]

This impact can be considered against the backdrop of another question: how would an investigation have resulted had the corporate collaboration or support not been present? As Interviewee 6 stated when referring to reviews and in-depth investigations of corporate internal affairs: "*the only people who can really do the deep dive are you, yourself, externals aren't going to be able to do that*."[1177] Considering, then, the three year and £13 million investigation into Rolls Royce, when it was asked of the former SFO Director if without the cooperation of the company, whether the SFO would have been problematic situation, he responded:

> *"I think that's probably true; I think the SFO would have been left with a small number of offences, areas of business to prosecute…of course co-operation is important."*[1178]

[1174] Interview 6.
[1175] Interview 2.
[1176] Interview 4.
[1177] Interview 6.
[1178] Interview 2.

What these comments indicate is the probability – at least in this instance - that without the assistance of Rolls Royce, the SFO would have been left with little evidence and fewer areas to consider prosecution (which subsequently did not take place). Sir Brian Leveson reaffirmed this in justifying the subsequent DPA, accepting that despite the failure to self-report, *"given that what has been reported has clearly been far more extensive (and of a different order) than is may have been exposed without the co-operation provided*",[1179] he was prepared to accept the SFO's recommendation. The conclusion once again draws attention to the value of corporate assistance and detracts from the suggestive SFO claim that "*all we do is serious and complex."*[1180] Even if that claim is to be true, it should be balanced against the acknowledgement that to date, there have been no cases to suggest that irrespective of cooperation, the SFO would have achieved the same result.

The understated value of cooperation and assistance continues to be something which lurks in the background of the SFO's projection as an able enforcer. Having experienced delays and/or failures in a plethora of high-profile cases, the current Director, Lisa Osofsky, has repeatedly indicated that the SFO "*are intently exploring*"[1181] the development and usage of the US-style tactic of persuading employees to become 'co-operators' to help with investigations.[1182] In the most frank display of such intention, the Director was quoted as saying "*you can spend 20 years in jail for what you did or wear a wire and work with us*."[1183] This implies the use of existing tools currently within the Serious Organised Crime and Police Act 2005 (where immunity or sentencing leniency can be offered in return for assistance) which the SFO have used in the past.[1184] It should be noted, however, that such leniency for co-operation in the UK has not only be used sparingly, but is less straightforward according

[1179] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, paragraph 22.
[1180] Mark Steward, 'Practical implications of US law on EU practice' (FCA, 2017) <https://www.fca.org.uk/news/speeches/practical-implications-us-law-eu-practice> accessed 15/03/2021.
[1181] Lisa Osofsky, 'Keynote address at the FCPA Conference, Washington DC' (Speech at the at the 35th International Conference on the Foreign Corrupt Practices Act, 2018) <https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/> accessed 08/09/2021.
[1182] Justice Committee, Oral Evidence: Serious Fraud Office, Lisa Osofsky, HC 1653. 18/12/2018.
[1183] Martin Bentham, 'Wear wire or face jail, white-collar criminals are warned by top British law enforcement official', *The Evening Standard* (April 26, 2019).
[1184] FOI2014-063 – Serious Organised Crime and Police Act 2005 <https://www.sfo.gov.uk/download/foi2014-063-serious-organised-crime-police-act-2005/> 22/01/2015.

to CPS guidance. This states that "*where sufficient evidence exists to provide a realistic prospect of conviction, the public interest will normally require that an accomplice should be prosecuted whether or not he or she is to be called as a witness*" and "*only in the most exceptional cases will it be appropriate to offer full immunity*."[1185] Whilst an obviously beneficial tool used throughout the policing world, if sought with the intent suggested, this prompts three indications. Firstly, the reiteration that corporate crime and criminals are treated differently with a pursuit of accommodation techniques. Secondly, that cooperation should be a factor for sentencing and not immunity. And finally, in light of so many prolific shortcomings and irrespective of procedural hurdles, there exists the consideration that the SFO are – without such help – at an obvious disadvantage to successfully enforce complex corporate bribery (and other corporate crimes). Alternatively put, the SFO may need to seek methods to strengthen their cases by obtaining evidence it currently fails to acquire without cooperation.

The fact that no cases have been brought to prosecute large scale bribery and that those few so far have been small or uncontested strengthens the argument that the UKBA corporate offence has not achieved its purported intention of tackling serious corporate bribery.[1186] The position is not solely one impacting corporate bribery and is instead reflected across the corporate health and safety field, where small to medium-sized enterprises - or low hanging fruit - tend to find themselves targeted for prosecution whereas the size and complexity of larger organisations become major obstacles against their prosecution.[1187] In Rolls Royce's case, the judge overtly recognised that when first considering the evidence, *"if Rolls Royce were not to be prosecuted in the context of such egregious criminality…then it was difficult to see when any company would be prosecuted."*[1188] If the cases to date are to be defined as successful enforcement it supports the proposition that corporate bribery and corruption is

[1185] Crown Prosecution Service, Queen's Evidence: Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005 (2020) <https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime> accessed 27/04/2021.

[1186] Even the SFO's recent successes against GPT Special Project Management Ltd and Petrofac came from uncontested guilty pleas. The former relating to charges under s.1 of the Prevention of Corruption Act 1906 and the latter s.7 of the UKBA.

[1187] Steve Tombs, 'The UK's Corporate Killing Law: Un/fit for Purpose?' (2018) 18(1) Criminology and Criminal Justice 488-507.

[1188] SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, paragraph 61.

at worst preferentially and at best realistically resolved by non-prosecutorial resolution. This point is made because although cooperation, redress and/or remediation are inherently relevant in the decision of whether a company should be punished for the acts of a few, where so many corporate crime cases have revealed details amounting to - as was described in the Tesco DPA - "*the very fullest co-operation, providing all relevant documents*",[1189] it remains important how prosecutions are so few and far between. The acquittals of senior executives and/or discontinuations of a series of cases represents a trend that the SFO are entering into DPAs following corporate cooperation but are then subsequently unable to successfully bring prosecutions.

Despite what regularly seems to be described as high-quality evidence and invaluable corporate assistance, an underpinning disconnect remains between the ability of the SFO to settle cases and in building trial worthy prosecutions. Not for want of trying, the irregularity and apparent prosecutorial difficulty faced by the SFO has been illustrated in the attempted prosecutions of personnel in Tesco (for fraud and false accounting), Serco (for fraud) and Unaoil (for bribery). Following the Tesco DPA, the SFO's decision to charge three of its former executives collapsed with the judge declaring that there was no case to answer because the evidence against them was "*so weak it should not be left for a jury's consideration.*"[1190] For the Serco executives, with reports suggesting that the SFO conceded that its disclosure procedure was so flawed that it would require a complete and lengthy re-review, the judge concluded that the errors had "*undermined the process of disclosure…to the extent that the trial cannot safely and fairly proceed*."[1191] Following an unsuccessful application to adjourn the case, the SFO offered no further evidence and the trials collapsed. In the Unaoil investigation (and the associated cases of R v Woods & Marshall[1192] and R v Akle & Anor [2021] EWCA Crim 1879[1193]) into alleged corrupt payments to secure contracts, the cases again saw the SFO thwarted by disclosure mistakes resulting in the underlying convictions being overturned. The concerns of both matters led to independent reviews by Brian Altman

[1189] SFO v Tesco Stores Limited, Southwark Crown Court, Case No: U20170287, April 10, 2017, paragraph 37.
[1190] Nils Pratley, 'Tesco trio cleared by a court but damned by other means', *The Guardian* (January 23, 2019).
[1191] Amar Metha, 'Former Serco bosses cleared of hiding £12m in profits from electronic tagging contracts', Sky News (April 26, 2021).
[1192] R v. Woods & Marshall.
[1193] R. v Akle & Anor [2021] EWCA Crim 1879.

KC ("the Altman review") and Sir David Calvert-Smith into the SFO's handling of and circumstances behind the collapsed investigations. Since the submission of this work, the reviews identified a plethora of failings that led to a loss of judicial confidence: identifying organisational issues, disconnects, and failures to follow policies and procedures; as well as conduct, practice, procedural and cultural anomalies within the SFO (respectively).[1194] Both, furthermore, identified resourcing issues which pervade the SFO's operation - reinforcing the concerns echoed in this work and lay bare the reluctant reality that the proclaimed image of prosecutorial strength is not, conversely, without significant obstruction and limitation. The difficulties have revealed an "*organisation in some distress*" with indications that "*essential characteristics*" behind large corporate investigations have been shown to be "*lacking, and at times altogether absent*."[1195]

The highly positive and encouraging levels of cooperation so often referenced by judges should be clarified to the extent that it can offer help to conclude a DPA - but is repeatedly insufficient to bring a prosecution. Whilst the differing burdens of proof between a DPA and prosecution are acknowledged, this constant dissimilarity, hinderance, failure or disinclination to prosecute questions the extent to which the SFO is able, resourced and has the expertise to do so: or if settlement is its better hope. When the aim of this regime was, after all, to help incentivise compliance, the unease according to Interviewee 6 was:

> *"…if the SFO is not enforcing and investigating on a reasonable scale, it's very difficult to highlight this to corporate clients as a risk that they should take seriously. Once enforcement is happening or investigations are happening at a significant level, a reasonably significant level, then compliance is going to get on the agenda."*[1196]

[1194] Report to the Serious Fraud Office - The Collapse of R v. Woods & Marshall on 26 April 2021 (2022) Brian Altman KC and Rebecca Chalkley; Independent Review into the Serious Fraud Office's handling of the Unaoil Case – R v Akle & Anor, Sir David Calvert-Smith.
[1195] Shula De Jersey and Matt Davies, 'Distrust, bias and incompetence at the SFO' (Reports Legal, 18/08/2022) <https://reportslegal.com/distrust-bias-and-incompetence-at-the-sfo/> accessed 03/09/2022.
[1196] Interview 6.

The spate of discontinuations and acquittals in its largest cases prompts multiple questions and broader observations – and is perhaps a reason behind impressions that "*it is not at all clear that prosecutors take corporate recidivism seriously*."[1197] Firstly, of why, following the detailed, costly and timely negotiations to conclude DPAs with corporates, and the evidence they produce, the SFO are unable to successfully continue or often even initiate individual prosecutions? It is strange to consider that the evidence so comprehensively put before a court of sufficient persuasion for a DPA is failing to stand up before the evidential tests for prosecution or a jury regarding the same company, under the same circumstance and for same people. At the time of submission, in addition to the failures of Sarclad, Tesco and Güralp Systems,[1198] the announcement of the two former Serco executives being directed by the judge to be found not guilty marked the SFO's fourth breakdown, in four attempts, to successfully prosecute senior individuals for their involvement in DPAs where corporate criminal liability was agreed on the basis that those employees were personally guilty of the offences.[1199] The cases have therefore produced seemingly contradictory outcomes with regard to corporates (accepting criminal liability) and individuals (all subsequently acquitted) which are based on the same foundational evidence. Pervading questions of this and wider enforcement processes were concluded in the Altman review which indicated that "*some hard questions*" needed to be asked *"about the process which led to the manufacture of a flawed case against an individual, in order to suit the convenience of a DPA."*[1200] Equally critical of the SFO's investigative ability were the defence team in the Serco investigation, expressing the fact that this took place "*after an eight-year-long criminal investigation - and three weeks into a trial - should be a matter of profound concern to everyone concerned with justice.*"[1201]

As it stands the regime has, in effect, created a two-tiered system of justice and paucity of evidence where that which is sufficient to secure a DPA is then inadequate when subject to the scrutiny of an individual's criminal trial. Questions arise in what can be said for an

[1197] Garrett (n 149) 166.
[1198] SFO v Sarclad Limited (06/07/2016), SFO v Tesco Stores Limited (10/04/2017) and SFO v Güralp Systems Limited (22/10/2019) respectively.
[1199] Whilst not following a DPA, this poses a collective similarity to the failure to prosecute Barclays executives.
[1200] Adrian Darbishire KC, Report to the Serious Fraud Office - The Collapse of R v. Woods & Marshall on 26 April 2021 (2022) Brian Altman KC and Rebecca Chalkley, paragraph 446.
[1201] Amar Metha, 'Former Serco bosses cleared of hiding £12m in profits from electronic tagging contracts', *Sky News* (April 26, 2021).

enforcement system where neither the resolutory failure to prevent offence is able to avail the SFO of corporate liability failures nor are the resulting few individual prosecutions viable or successful. This trend and the views echoed in the above quotes may lead companies under investigation to highly scrutinise and contest the case against them, rather than agreeing to evidence of criminality and to a DPA at a preliminary stage. At its most critical it bolsters the concern that corporate bribery enforcement can (or is at least likely to) only succeed against the lower civil burden of proof and where parties mutually agree to the outcome. When collectively assessed, especially with the assistance of experienced and well-resourced defence lawyers, if the SFO have been unable to pass the prosecutorial threshold in an increasing number of instances, companies could easily invest in questioning the quality and merits of the evidence. This reinforces the perception that the UK's corporate bribery landscape and its enforcement is suffering from a power imbalance and lameness.

Whether corporate actors facilitate the enforcement arena acquires an interesting perspective from the direction previously set by the Director of the SFO. Not long after taking office, Lisa Osofsky explained that when investigating a case, it was the role of the corporation to "*help the prosecutor find the truth*" and that cooperation should be "*making the path to a case easier*."[1202] What is again identifiable within these comments is their accommodative nature; appealing to the support of the corporate in a manner which implies that – without such – investigation and/or prosecution may be hampered. It is of course contextually understood that the SFO is seeking the highest level of cooperation it can so as to justify potential qualification for a DPA. However, with requests to "*point us to the evidence that is most important*",[1203] it indicates that the SFO begins the fight on the back foot; in full recognition of the potential inability to locate the evidence which is most important.

[1202] Lisa Osofsky, 'Keynote address at the FCPA Conference, Washington DC' (Speech at the at the 35th International Conference on the Foreign Corrupt Practices Act, 2018) <https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/> accessed 08/09/2021.

[1203] Lisa Osofsky, 'Keynote address at the FCPA Conference, Washington DC' (Speech at the at the 35th International Conference on the Foreign Corrupt Practices Act, 2018) <https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/> accessed 08/09/2021.

The extent to which the usage of non-prosecution techniques has grown within the UK for corporate bribery offences (and other corporate crimes) is posited to be one of concern. Not because DPAs lack value or punitive capacity, but because their prevalence versus the isolated usage of prosecution weakens the very intentions of the UKBA corporate offence – and DPA policy itself. What is desired is that crimes as serious as global corruption be treated with sanctioning of reflective severity. This should be reflected in the pursuit of a dual and not separate resolution: of both a DPA for the company and prosecution of the human actors. It would cause concern if serious street crimes - by a human actor - could be forgiven with an apology and cooperation; yet those deemed equally grave, egregious and harmful – by corporations (with human actors behind them) – are habitually resolved differently. As this work has argued, this results in a disparity of enforcement, where the personnel behind corporate actions are either simply not prosecuted or are seemingly beyond the reach of a guilty verdict. That is not to say that DPAs should not be used, but to ensure that due consideration is given to highly prevalent concerns. Firstly, as Ryder explains, "*DPAs are aimed at preventing collateral consequences but they have done little to deter future criminal misconduct by corporations*."[1204] Secondly, if such resolutions are not used in conjunction with the prosecution of human actors who are responsible for the physical criminality – as per the intentions during the development of the DPA regime – it questions whether the enforcement surrounding the s.7 offence is in fact style over substance.

7.6 Summary

This chapter has evidenced the overarching impression that when enforcement is warranted, the state - through the SFO – has set out to enforce the UKBA based upon a position of prosecutorial power. Whilst depicting themselves to be offering and controlling both the carrot and the stick, the reality is that despite this projection and desire, settlement, cooperation and negotiation have become predominant (and arguably necessary) factors in corporate criminal justice. The interviews identified this disparity denoting, for a variety of reasons, a power imbalance where corporates are able to influence proceedings. Even when enforcement action is taken, it has been argued that both DPAs and the UKBAs revamped s.7 methodology of corporate liability are yet to be equally, logically or regularly enforced. If

[1204] Ryder (n 925) 262.

anything, this chapter has presented that the larger the corporate and the scale of offences, the more likely it is to be dealt with via settlement. The wider implication is that despite DPAs being labelled as an alternative to prosecution, they have – to date – been less of an alternative and more of a predilection. Even though the offering of a DPA is hailed and derived to be contingent upon noteworthy cooperation, compliance proactivity and adherence to legislative policy - to justify the 'public interest' – current evidence challenges this position and demonstrates that quite the opposite is tolerated with limited interrogation at government level. This emphasises the need for increased clarity and stringency over what should constitute cooperation. Furthering the sense of illogicality and inequality is that although DPA procedures intend for the uncovered evidence to be admissible in any subsequent criminal prosecution of either the entity or an individual, present demonstrations are that any form of prosecution is exceptionally rare; and even when pursued, fail to bear fruits. This presents a significant problem to the entire regime. If DPAs are not used correctly and to support individual prosecutions, as the former SFO Director put it: "*because it's so difficult to prosecute a company, why on earth should a company agree to it?"*[1205]

Whereas Hawkins argued that enforcement in a compliance system should be adaptive, equipped with a range of adjustable tactical options[1206] and akin to responsive regulatory strategies, respondents for this research have presented the view that the SFO are ill-equipped to deal with serious corporate bribery (and other economic crimes) and are marooned. This has led to a raft of implications stemming from an over-reliance on self-governance, evidential cooperation, negotiation and the risk of unenforced or cosmetic compliance. The parallel use of enforcement has not been argued to be non-existent (albeit scarce), but rather illogically and unequally applied to the extent that neither corporations nor individuals are appropriately targeted in cases which would seem to warrant it. The essence of such sentiments is that, despite the value of enforcement actions and efforts – both domestically and extraterritorially - there remains shortcomings with current methods that prevent it from achieving its potential.[1207] It is, therefore, not radical to concur with the feeling "*that the criminal law and criminal justice mechanisms...simply do not deliver*

[1205] Interview 2.
[1206] Hawkins (n 421) 67.
[1207] Branislav Hock, *Extraterritoriality and International Bribery* (1st ed, Routledge, 2020).

justice"[1208] and have fallen short - in their substance - in satisfying early signals of increased accountability and onerous liability.[1209]

As the final chapter will conclude, the trajectory of enforcement activity identifies that the UKBA regime has come to adopt more of a reduction than prosecution strategy; arguably failing to live up to expectations. When coupling the difficulties and scarcity of prosecution to the prevalence of DPAs, this highlights the limitations, paradoxical usage and inefficacy of the UK's extant corporate bribery enforcement strategy as there exists no credible threat to support the UKBAs desired "*educative effect*"[1210] – especially against buccaneering corporates. Until there is an apparent stride towards appropriately addressing the need for and use of criminal liability, this critically undermines any intended or positive impact of DPAs and may even impact the probability of corporations agreeing to them. The result is that the state's desire to project prosecutorial strength and capability is reminiscent of them having brought a knife to a gunfight; where the rattling of sabres[1211] is ultimately deflated by a reliance on corporations to volunteer information and, in any event, for settlement to be the path of least enforcement resistance.

[1208] Punch (n 824) 111.
[1209] As per the suggestions of Lord and Broad (n92); and Celia Wells, 'Opening the Eyes of the Sentry' (2010) 30(3) Legal Studies 370-390, 387.
[1210] Interview 2.
[1211] Ryder (n 925) 254.

Chapter 8

Conclusion

8.1 Introduction

This thesis has explored the enforcement of UK corporate crime having specific regard to the provisions set by the UKBA and how the criminal law is consequently used as a mechanism of control. In addition, it has advocated how the proliferation of and reliance on voluntary corporate self-regulatory tools has - in practice - produced a problematic enforcement environment. This has been achieved by covering a recurrent debate: the increasing enforcement of corporate crime and criminal law through non-criminal means – namely DPAs. The focus was to research the concern that the UK is faced with an enforcement paradox. In brief, it has been presented that the control of corporate bribery has aimed to criminalise wrongdoing whilst wanting to construct and incentivise a culture of effective self-governance; but has done so via an emphasis on self-regulatory practices that rely on settlement and cooperation, rather than enforcing that culture through criminal prosecution if needed. The result is a balancing act between state enforcement and self-regulatory reliance, where multiple trade-offs and mediatory tactics have taken place leading to a weakened ability to criminally enforce corporate wrongdoing without a pervading dependence on cooperation and settlement.

The main intersections of the study have been as follows. Chapter 1 commenced by introducing the extent of corporate bribery and corruption and its analytical importance. This introduced two watermark themes; that corporate crime is subject to a dissimilarity of treatment to that faced by 'typical' crime and criminals; and that corporate bribery, corporate crime and corporate criminals warrants the need, in the right circumstances, for prosecutorial enforcement. Chapter 2 moved to assess the theoretical backgrounds underpinning the way in which corporate wrongdoing is controlled, regulated and governed. The debate – in brief – was the perennial question of how the state should and can adequately enforce the complexity of business regulation; known as the punishment (deterrence) versus persuasion (compliance) debate. This phase revealed a systematic shift in regulatory culture which has

transfused the landscape; where the control of corporate activity has been decentralised and self-regulatory methodologies have become favoured. Chapter 4 then briefed how the UK, in line with and taking direction from a raft of international provisions, has formalised the criminalisation of corporate bribery under s.7 of the UKBA. This juncture identified the way in which guilt and fault is attributed (through a failure to prevent) and synonymously showed how the challenge of enforcing corporate crime has been met with the introduction of DPAs. Chapter 5 then conceptualised that in essence, the UKBA whilst permitting the criminalisation of corporate bribery, does so with a heavy reliance on self-regulatory capacities and cooperative strategies. Chapter 6 and 7 mutually presented the findings of this research. These shall now be discussed in more detail.

8.2 Key Conclusions

This research has illustrated the overarching acceptance that contrary to established views that corporate criminal liability may serve no purpose,[1212] corporate bribery and corruption has been strenuously demarcated at both an international and national level as a serious criminal offence. This background provides the foundations of the UKBA, its intention to overcome the challenges of corporate liability and the creation of a draconian corporate criminal offence. The overall purpose of this background has been to then show how corporate crime is enforced - in a multitude of ways - paradoxically. This is apparent in two predominant situations. Firstly; whilst the UKBA is a criminal piece of legislation, corporate bribery is increasingly resolved via non-criminal means. Secondly, although criminal enforcement is hailed to incentivise good corporate governance, there exists a distinct level of trust in and reliance on corporations to self-regulate. When assessing these points, this work has subsequently revealed a number of conclusive points (to be briefed hereafter) surrounding the enforcement of corporate bribery which are of note for both legislative and research development; encompassing a multitude of theoretical and practical concerns.

The first is that from a regulatory theory perspective, literature has long sought to balance the enduring debates of punishment versus persuasion, or deterrence versus compliance. This research has presented that from a theoretical point of view, whilst

[1212] Khanna (n 680); Fischel and Sykes (n 680).

punishment/deterrence is frequently postured (and even attempted) by the SFO, imprinted into legislation and frequently publicised by the state, it is seldom used. The results of this have led to the conclusion that there no longer seems to exist a debate at all; and that persuasion/compliance has become the favourable (and certainly most common) method of corporate bribery enforcement and corporate regulation. This has created tensions between principles of equal treatment and punishment for all criminal offenders. Of notable importance is that preferred punishment, a lack of escalatory responsivity and an inability to deploy (or even possess) a benign big gun detracts from the primary spirit of a responsive regulatory environment upon which the UK methods of corporate bribery enforcement are reflective. That is, to be impactful, regulators/enforcers and their tools must adapt and respond with escalating intervention according to the action(s) of the entities or people they purport to regulate.[1213] This has been specifically shown as being imprinted within enforcement and DPA policy and practice which practically function on either escalating enforcement or de-escalating forgiveness. The evidence obtained and the construction of the UKBA have supported this shift as conveyed throughout general governance theory; where the centralised nature of state rule has been transformed from government to private governance. What has unfolded is the undermining of pyramidal enforcement and a far less dynamic or potent model of deterrence. Non-state actors are, as indicated by the data gathered, relied upon to self-regulate. As the responsibility for compliance has been heavily contracted-out, the state no longer assumes the role of being the primary controller of corporate crime and is therefore weakened in its ability to balance when "*a more or less interventionist response is needed*"[1214] due to its apparent inability to do so. Whilst these changes present obvious benefits for the state, this work has challenged whether the balance of power has negatively shifted to a space where the regulation and enforcement of corporate bribery is subjectively governed by the power of the regulatee (the corporate) where hard options rarely find their way onto the enforcement table. Analysis and commentary of the UKBA adequate procedures defence has exemplified this concept showing how commercial organisations have subjectively constructed industry processes and standards which come to hold legal influence. When courts understandably recognise and

[1213] Ayres and Braithwaite (n 127).
[1214] Braithwaite (n 46) 88.

legitimise organisational custom and practice - that reflect legislative form - it confers legal, societal and compliance influence upon corporate actors. This complexity blurs the boundary of punishment as the state has become inferior to corporate influence to the extent that the landscape runs the risk of cosmetic compliance.

The second extrapolation is that enforcement agencies are clearly faced with an uphill struggle to prosecute corporate crime due to a historically predominant challenge; the attribution of liability under the identification principle. Despite this hurdle leading to the creation of the s.7 failure to prevent methodology (inverting fault through omissions-based liability) and its intended aim of circumventing such challenges, the UKBA has had limited success in producing large scale prosecutions despite multiple and suitable opportunities. Although the failure to prevent model has only been added to the legislative books for tax evasion at present, recent developments have indicated government approval for its expansion to 'fraud' – supporting that indicated by interviewees and industry alike. However, even if expanded, given the model's lack of success to date in all except small fry or uncontested investigations, this has led to two questions: i) the insufficiency of the method, or ii) insufficiency of usage. The reality is even if a corporate is deemed worthy of a s.7 UKBA charge, to prove their guilt beyond all reasonable doubt against an argument of procedural reasonability is – according to interviewees who have sat on both sides of the adversarial process, and the former Director of the SFO – very difficult. So difficult in fact that if our courts are not to apply strict liability in a strictly literal sense, both this research and broader opinion demonstrates the existence of reasonable adequacy, doubt and plausible corporate deniability. This work has considered the ex hypothesi argument and shown that in practice - or at least at present - this is unlikely to be applied and is not collectively agreed upon. Most impactfully, judicial commentary has made this difficult to prove reinforcing that *adequate* should be taken to mean circumstantially reasonable.[1215] The collection of evidence surrounding the difficulty to prosecute corporate bribery leads to a recognition that accommodative enforcement, even with a will or intent to enforce, has had to become a significant element of its regulation and enforcement.

[1215] See Chapter 6.2.1.

In 2021, commentary over the US FCPA proudly advertised record levels of enforcement action and penalties. This was hailed as being due to the significant resources dedicated to enforcement and the large backlog of FCPA investigations to be actioned. Even though the UK has similarly had both criminal and DPA enforcement options at its disposal for some time also, the aforementioned difficulties faced when prosecuting corporate crime has, according to Clare Montgomery KC, left the UK enforcement scene coming second "*by quite a long way*."[1216] This contributes to a third conclusion: that there is currently a lack of extensive prosecutorial enforcement against either the most flagrant companies, and especially their personnel. This identified deficiency was clear from the interviews and – whilst recognising the difficulties – led many to express confusion and dissatisfaction at its blunt impact resulting in a spotlight shining over the subject(s). Especially since the UK adopted the use of DPAs to complement prosecution and enforcement there has been a growing disparity in usage. The research evidence obtained showed that unlike the US (upon which DPAs were modelled), enforcement even in the form of settlement is simply not a regular occurrence. This contradicts the intentions and expectations of their architects who both during the research interviews and public appearances have been left wondering why a tool developed to alleviate prosecutorial difficulty is so seldomly used.

This work and its responses also raised doubt (both directly and implicitly) over whether the SFO has the resources, tools and expertise to adequately investigate and enforce grand corporate corruption. With Spotlight on Corruption revealing (post-thesis submission) that UK law enforcement capacity is "*under-resourced, over-stretched, and out-gunned*",[1217] this detracts from a key component of regulatory/enforcement regimes and theory: the ability to monitor and enforce established standards.[1218] With the SFO having contributed £1.63 billion between 2016 and 2021 to the public purse, compared to a budget of £304 million over that period,[1219] a strikingly apparent conclusion is that far greater funding is required: to both increase resources as well as attracting (and retaining) talent. Steps in this direction may alleviate the turbulent concerns that have arisen for the SFO over the last 12 months and

[1216] Lord Ken Macdonald KC, Tim Owen KC and Clare Montgomery KC (n 785).
[1217] Spotlight on Corruption (n 9).
[1218] Christine Parker and others, 'Introduction' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004) 1.
[1219] Spotlight on Corruption (n 9).

move the agency from what some view as a serious farce, to a serious force.[1220] Pleasingly, associated requirements are gaining political attention[1221] which may in due course lessen current (and prominent) concerns of the SFO's structure and efficacy being unconvincing.[1222]

When discussing prosecution in particular, whilst not expressly stated or admitted to be a factor, the financial cost (when coupled with procedural and current legislative difficulty) has not only found itself referred to in multiple settlements, but throughout this research. This implies that the expense of enforcement is a subliminal influence the state has had to consider – and correlate to 'the public interest' - all too often. This leads to the risk (and criticism) that the bigger the corporate and resources they can deploy to fend off a prosecution, the more likely it may be that they are able to 'buy' their way out of certain punishment. The broad observation has revealed that the enforcement of corporate crime is one of scant prosecution and occasional (but preferential) settlement; raising questions whether the state has the political will and the SFO are in fact able and/or prepared to actively enforce these crimes with prosecution if necessary. The research has not rebuffed those who submit that a fine can be punishing, but instead that conviction can and does matter for the purpose of deterrence, incapacitation and retribution, and that the criminal law serves a normative purpose. The transcending reality of an effective system of corporate liability is that commercial entities (particularly amoral actors) are unlikely to demonstrate proactive compliance, self-report any wrongdoing and then extensively cooperate unless they are set to face strict repercussions for failing to do so.[1223] This is especially so given that some of the more critical responses received during this work felt that mere threats of prosecution and offers to negotiate did little to intimidate bad actors. It has therefore been presented that if available evidence is not used to help prosecute and corporate liability remains too difficult to attain, this may encourage disobedient corporations to risk a battle, fight and likely win. This reduces incentives for corporates to self-report and clearly undermines the intentions of

[1220] Helen Taylor and Susan Hawley, 'From Serious Farce to Serious Force – 4 priorities for beefing up the Serious Fraud Office in 2023' (Spotlight on Corruption, 10 January 2023) <https://www.spotlightcorruption.org/serious-fraud-office-sfo-4-priorities/> accessed 18 January 2023.
[1221] This has included the 2022 All-Party Parliamentary Groups on Anti-Corruption & Responsible Tax and Fair Business Banking and recent parliamentary committees - including the House of Lords Fraud Act 2006 and Digital Fraud Committee: Fighting Fraud: Breaking the Chain (Report of Session 2022-23).
[1222] Lord Ken Macdonald KC, Tim Owen KC and Clare Montgomery KC (n 785).
[1223] Jennifer Arlen (n 185).

the DPA regime, the UKBA and their effectiveness. From a theoretical perspective, such a predicament poses further interrogation of whether the UK corporate bribery (and other corporate crime) enforcement toolkit is a benign big gun or even if the enforcer carries a big stick.

The fourth conclusion is that when it comes to enforcing – and certainly prosecuting – corporate crime, like regulatory theory and practice, this too has undergone an unequivocal shift; redefining its conventional usage to incorporate processes which demonstrate a distinct alignment to accommodation, cooperation, negotiation and settlement. Assessment of the literature has shown that this is less of a transformation and more of a transition towards common regulatory rhetoric and methods. Although this transference has been commented on throughout broader research, this work has firmly reiterated its reality; bolstering views that "*regulation by enforcement*"[1224] has been replaced in favour of "*regulation by settlement*".[1225] The rarity of prosecutorial enforcement and the way it is undertaken has been shown to be overshadowed by the prevalence of DPAs under a transition towards informal enforcement.[1226] Whilst labelled as an alternative to prosecution, cases to date (even those of extreme severity) and the views of many interviewees have illustrated their use to be of notable favourability – and even necessity. This infers that the current regime has paradoxically sacrificed the severity and range of punishment for the hopeful certainty of punishment in the form of DPAs. Unlike the views of Khanna, this work argues that the criminal law has not failed[1227] but instead been bypassed. It has been argued that given the extent of DPA usage, when coupled with the egregious evidence revealed by cases to date and the qualitative data uncovered herein, there still exists a profound need for viable prosecutions as there are plausible concerns that DPAs are being used to settle cases for those corporations which are too big for jail and/or too big to fail. This, when coupled with the lack of associated individual prosecutions, fundamentally questions the purpose and function of DPAs within the wider enforcement regime and forms the basis of why some respondents

[1224] Harvey Pitt and Karen Shapiro, 'Securities Regulation by Enforcement: A Look Ahead at the Next Decade', (1990) 7(1) Yale Journal on Regulation 149-304.
[1225] Matthew Turk, 'Regulation by Settlement', (2017) 66(2) University of Kansas Law Review 259-324.
[1226] Rubin (n 620).
[1227] Khanna (n 680).

argued that their design was to simply avoid prosecution completely, to formalise settlement and to offer prosecutors a path of least resistance.

It can be conceived more broadly that – using Wells' phraseology - the enforcement of corporate bribery and the UK's approach has succumb to preferential outcomes where the sentry has not failed to open its eyes, but merely begun to look in different directions.[1228] Evidence has been offered to challenge this, conversely suggesting that prosecution has not been redefined but that DPAs simply offer a sensible opportunity to achieve an outcome where 'the bad guys have moved on and the damage has been done';[1229] avoiding the unnecessary damage and rigmarole of punitive spanking where fault is accepted. The avoidance of unnecessary collateral damage is permissively pragmatic and morally agreeable. However, this must be balanced with caution towards the realpolitik. Firstly, because there exists clear empirical evidence that like unnecessary prosecutorial punishment, overly persuasive and accommodative regulation can backfire too.[1230] Secondly, this research has shown the reality that any defence of historical behaviour and motivation to avoid further unnecessary damage can always be applied as there will forever be innocent parties, workers and shareholders. This creates two likely outcomes. Firstly, "*the larger the company, the more important or sensitive its role, and the greater the potential for 'collateral' damage, so the less likely it is that it will be pursued in an adjudicated criminal sense*."[1231] Secondly, it effectively implies an almost guaranteed exemption – so long as the company realises the 'writing's on the wall', is 'presently responsible' and eventually comes clean.[1232] It has not been argued that punishment should be applied unconsciously, but that contrary to the view held by critics such as Khanna, civil liability is not alone sufficient. Even with the recommendation of managerial liability, as enforcement lacks in this capacity too, the overall result is the acknowledgement of Wells' view that corporate crime and criminals are indeed treated differently, subject to a unique degree of tolerance and differential enforcement not provided to 'lesser' offenders and – perhaps through their power, resources, influence and

[1228] Wells (n 566) 388.
[1229] Interview 2 (n 948).
[1230] Braithwaite (n 230); Braithwaite (n 145).
[1231] Campbell (n 599) 215.
[1232] Interview 9 (n 1002).

seemingly realistic tendency – are able to guide enforcement proceedings. That is at least so it seems in light of the case trajectory to date and their respective circumstances, and evidence.

One of the most important conclusions revealed by this research is that the very pretence of DPAs was for the evidence uncovered to facilitate and/or be used in individual prosecutions if required. By way of comparison, between 2016 and 2020, the US DoJ prosecuted individuals in 37% of its 146 cases which followed corporate settlements.[1233] Although that figure is far from breath-taking, the UK figures represent an expressively unalike story. Whilst the SFO have made efforts to pursue individuals, they have to date either chosen not to bring *any* charges against personnel in the most extreme cases; have subsequently been unsuccessful at trial in the handful pursued; or have secured convictions based upon a guilty plea. It is quite plain to see that this pervading necessity is at best rare and at worst unattainable. The breakdown of all attempted prosecutions following DPA agreements remains the highlighted anomaly and now gives the SFO an unfortunate record of four tried and four failed instances in regard to conduct which their respective companies had already agreed criminal liability. It is strange, therefore, to think that a company can settle allegations of wrongdoing when no person can be held to account. In all of the DPAs in question, each admitted corporate liability on the basis that the guilt of individuals made the companies liable. So, what does it say when such personnel are not even pursued? This challenges whether DPAs, if used in this manner, can be an adequate, legitimate and justiciable enforcement tool for bribery when they do not ultimately sit alongside a system of 'individual backed' targeting and rarely come with impactful mechanisms that monitor compliance or decree steps to help guard against future breaches by offending corporations. The research can conclude a paradoxical and more systemic issue surrounding both individual prosecutions and DPAs: that prosecutorial claims – upon which a DPA is premised and agreed – may be weaker than proclaimed. Despite the legislative landscape expanding there has been a continuous dilution of the reality of corporate criminal enforcement. This has on occasion been attributed to the fault of the identification principle in a manner which demonstrates a perpetual cycle: a foundational

[1233] Anoushka Warlow and Suzanne Gallagher, 'Bring Up the Bodies, Renewed Expectations for Corporates from the US Department of Justice' (BCL Solicitors, 25 January 2023) <https://www.bcl.com/bring-up-the-bodies-renewed-expectations-for-corporates-from-the-us-department-of-justice/> accessed 25 January 2023.

problem, a purported solution and yet another underlying obstacle to negate its success. The rare pursuit and subsequent failure to establish involvement of individuals in conduct expressly identified as criminal in the DPAs has naturally led to scrutiny and formed the basis of many interviewees' unease; raising questions as to what the fines under the DPAs *alone* represent. This work has presented that in effect, the blend of successful DPAs when countered by failed individual prosecutions has created a two-tiered system of justice; where the evidence deemed sufficient to secure a DPA is then repeatedly inadequate when subject to the scrutiny of an individual's criminal trial. In the absence of a more rigorous review of corporate liability and the current evidence available in this regard (a subject the UKBA House of Lords Committee and Law Commission examined with too little focus), this does nothing other than fuel the concern that DPAs are a 'soft option' for disobedient corporates to absolve themselves of responsibility, negotiate a settlement and avoid any risks attached to potential prosecutions. This led interviewees and broader commentary to reaffirm the need for the SFO to improve its pursuit of individuals and its record of proving individual culpability following the signing of a DPA. After all, irrespective of what regularly seems to be described as high-quality evidence and invaluable corporate assistance, there remains a clear disconnect between the ability to settle and to prosecute individuals involved. If DPAs are applied inconsistently (see below) and individual prosecutions have failed to date, as aforementioned, this can only question whether the SFO is inadvertently incentivising companies to chance an investigation and even contest a prosecution rather than acquiescing to a DPA. The research can conclude that if DPAs are to have the publicised and intended deterrent effect to incentivise compliance and reduce future misconduct – as per the goal of an enforced self-regulatory regime - they must be used in conjunction with criminal proceedings against respective corporate employees and/or its agents. The combination of both mechanisms and a robust approach to investigations and prosecutions will have a greater deterrent effect than if used disjointedly. This not only keeps corporates on their toes, but it incentivises compliance, increases the efficacy of enforcement methods and reduces unwanted societal effect.

Cases to date and the commentary they have attracted from this research have shown that the enforcement of corporate bribery is faced with a notable degree of inequality, illogicality and/or irregularity. The evidence shows that if anything, and at least generally, the larger the

corporate and the scale of offence(s), the more likely it is to be dealt with via settlement. Thus, despite DPAs being labelled as an alternative to prosecution, they have been less of an alternative and more of a predilection for the most serious offenders. When DPAs came to fruition they were hailed and derived to be contingent upon full cooperation and compliance; in turn justifying the 'public interest' and legitimising the avoidance of unnecessary retribution. Yet, cases to date again challenge this position and have demonstrated (despite the precedent set in Sweett Group) that a DPA is seemingly not always dependent on when cooperation is offered and that quite the opposite can be tolerated. This had led to criticism that, in effect, square pegs can often fit round holes. Chapter 7.3 illustrated a major trepidation through the polarity with which cases have recognised and enforced fault against different companies. Enforcement appears to have been levied on two levels. First, in relation to the size of the company where low hanging fruit has seemed easier to pick. Secondly, the method of enforcement has often taken place in total contradiction to the direction and intention of relevant policies. These points of dissimilarity were illustrated using the cases of Rolls Royce and Skansen Interiors as they personified incongruous differences in severity, initial cooperation, precedents and procedural/policy intentions whereby the handling and opposing conclusions raised severe questions of legitimacy, justiciability and enforcement intent. It must be remembered, after all, that the purpose of the entire UK corporate corruption regime is designed to incentivise compliance and to punish the venal. In its extant state, if those who come forward and fully comply are to be extensively punished, and those who do not (or are at least in strenuous contradiction to legislative intent and policy) are treated with greater favour, this entrenches the paradoxical nature of enforcement and creates the unequal potential for larger companies to knowingly play fast and loose with the law. When a regulated actor is not faced with an enforcement regime that makes clear a dissuasive and proportionate escalatory pyramid exists, or that it operates when most needed, it cannot be said to be fostering principles of legitimacy and justiciability.

Despite the above reflections and the difficulties in prosecutorial success, this work has illustrated how the SFO, legislative rhetoric and policy material all convey the same message; one of 'the state' being active and capable enforcers who are able to offer and control both the carrot and the stick. The research conversely revealed from multiple respondents that there in fact exists a regulatory power imbalance between the state (the 'regulator/enforcer')

and the corporations (the 'regulatee') which has led to hindered prosecutions. Part of this is due to the invariable fact that most corporate bribery investigations begin with and rely on the act of self-regulation: via self-reporting. However, the other possibility is that of financial, resource and expertise difficulties faced by the SFO. The latter has been shown (notably financial) to find repeated reference by the judiciary to weigh heavily on the public interest to pursue cases. This is despite international provisions expressly noting for such factors to be excluded from decision making. Any lack therein has – in addition to enforcement troubles – questioned whether the SFO is effectively able to bring prosecutions or if what is often seen constitutes nothing more than posturing, bargain and bluff tactics. If threats of interventionism are unlikely probabilities, or if disobedient regulatees know that the likelihood of severe sanctioning is difficult for enforcers to achieve (thus reducing their chances of being coopeted), this impacts the formidability of deterrence. The research has supported such obstacles evidencing instances of collapsed or failed trials against individuals where the courts have issued blunt criticism over the SFO's failures or in their evidential inadequacies. The growing pattern of under-enforcement (criminally) and redefined enforcement results in a wider inability to establish a symbolic message of the value of controlling corporate bribery and corruption and the state's ability to do so.

8.3 Observations

From the qualitative analysis contained in chapters 6 and 7 and by viewing the roadmap to the UKBA, it can be argued that corporate criminal liability is continually seeking to find easier ways for enforcement. S.7 came to alleviate the difficulties of the identification principle and DPAs soon followed to alleviate the attribution of corporate liability. The reactive and circumventing nature poses the view that the law, courts, SFO and the state are rather incapacitated to handle this form of crime. This work has reiterated a growing concern for UK corporate crime enforcement: that prosecution is rare, very difficult and arguably impossible. Thus, settled, cooperated and negotiated justice is gradually becoming the norm for corporate criminal enforcement. This work has not implied that a compliance school of thought or negotiated/cooperated justice is ineffective and has recognised its clear benefits for those companies that are proactively engaged in compliance. Instead, it has advocated that accommodative justice will be a blunt instrument for the most extreme cases where there is too great a focus on encouraging or rewarding good behaviour and not enough on

sanctioning criminal behaviour when it is warranted. This work has presented that the foundations of a responsive and enforced self-regulatory environment when coupled with the nature and complexity of economic and corporate crime require a flexibility in the forms of intervention and the liability it can incur so as to ensure the punishment matches the crime. If not, as the interviews exhibited, the symbolic impact of enforcement may be lost if criminal prosecution is to be essentially replaced by regulatory techniques of persuasion and negotiation; running the risk of sanctioning becoming no more than a symbolic degradation ceremony.[1234] The consequential point is to entirely concur with the view that the law has become endogenous.[1235] Corporates are not only capable of shaping law and practical policy through their dominance and complexity, but they have succeeded in physically actualising their power to influence and negotiate the conditions under which they are then to be punished.[1236] It can therefore be proposed that the enforcement of UK corporate crime is so paradoxical that it is now accommodating their influence (and discretions), and predominantly relying on their self-regulation and good governance.

When enforcement is on the table, cases to date and the results of this work have shown a plethora of tensions. The first is in the variable and paradoxical reality as to when a company should be prosecuted and what circumstances should necessitate and/or demand a prosecution according to the public interest, policy and procedure. Instances which would prima facie warrant prosecution have been avoided whereas those who have complied with the letter and spirit of practical policy have faced the full weight of the law; a polarity which drew much criticism from interviewees. The second and more concerning tension exists in the dissimilar considerations that have arisen from an approved (and agreed) DPA with a corporate versus prosecuting any associated individual(s) due to the contradictory outcomes that have been reached. Although both surround the same sets of circumstances and respective evidence, the outcomes are not indicative. A number of observations should accordingly be emphasised to give caution to the SFO's projection as a willing and able enforcer. Firstly, the standard of proof required for a DPA is lower (and thus easier) than a prosecution. The former requires the SFO to show sufficient evidence for a realistic prospect

[1234] Levi (n 14).
[1235] Lauren Edelman and others (n 288).
[1236] van Wingerde and Lord (n 650) 477.

of conviction whereas the latter requires a jury to be convinced beyond all reasonable doubt. Secondly, as has already been cited, whilst corporates may wish to pursue a DPA to avoid risk of prosecution, by contrast, they (like charged individuals) may tactically consider it more beneficial to challenge the case, well resource their defences, fight back and likely win. Finally, as a DPA process conducts limited scrutiny and analysis of the SFO's investigative process, conclusions, recording methods and evidence, what might look to be sufficient evidence for a realistic prospect of conviction on paper and convincing during negotiations may (as has done so) collapse at trial. This collection of factors led many respondents to conclude the pervading reality that settlement has therefore become an easier route for prosecutors.

This research has shown that the pathway of enforcement for corporates has gradually narrowed towards a similar rhetoric: that the conduct is always of notable extremity and seriousness, but evidently not so extreme or serious to warrant prosecution – often of neither the company nor the relevant personnel – unless it is already admitted and/or uncontested. The judicial use of retractive adjectives and excusably fitting square pegs into round holes must soon be due to run out! All of which exists alongside the SFO standing by the view that all of the cases they "*bring to court will always be based on strong evidence*."[1237] If the grave nature and strong evidence seen in many UK cases is insufficient for criminal prosecution, what will suffice? Where does the line in the sand get drawn? Dame Sharp illustrated what is submitted to be a distinct sense of flexibility for *corporate* crime and criminals in the Airbus judgment when she noted that *"the real question therefore is whether in these circumstances, and given this extremely high level of seriousness, the interests of justice are nevertheless served by a DPA rather than a prosecution."*[1238] Needless to say, in the largest case (financially) presented before UK courts, it was felt they were. Nor did it seem to be a marginal decision with the judge noting that *"the public interest factors against prosecution clearly outweigh those tending in favour of prosecution*."[1239] If the baseline for prosecution to even be considered and justified as being in the public interest is for severity to be matched with both resistance and little to no cooperation, it is logical that the odds of aligning so many textbook

[1237] Serious Fraud Office, 'We're defending the UK as a safe place for business' (SFO Speeches, 2021) < https://www.sfo.gov.uk/2021/06/30/were-defending-the-uk-as-a-safe-place-for-business/> accessed 06/07/21.
[1238] SFO v Airbus SE, Southwark Crown Court, Case No: U20200108, January 31, 2020, paragraph 67.
[1239] SFO v Airbus SE, Southwark Crown Court, Case No: U20200108, January 31, 2020, paragraph 87.

factors are rare to impossible. Especially when it is probable that legal advisors will prevent this from occurring. One could argue the implied view that if such depravity is to be tolerated, the SFO need to either be baited into a prosecution, have it served up to them or have such an incomprehensibly corrupt case that they are effectively forced into pursuing prosecution. This had led, understandably, some academics to express views that the SFO are too scared to prosecute.[1240] What remains to be seen and will arguably be the greatest test of the UKBA and SFO's teeth is what the fate will be for a UK corporate who breaches the terms of its DPA and/or engages in further corrupt conduct.[1241]

In May 2022 the SFO published its Business Plan for 2021-2022; detailing the action(s) it will take and its priority areas for the next 12 months in order to meet its strategic objectives. Pride of place is their commitment to "*deliver on its mission to fight complex economic crime, deliver justice for victims and protect the UK's reputation as a safe place to do business."*[1242] However, in light of the complications highlighted in this work, one cannot help but feel that this statement is restricted and in need of enquiry. Ultimately, if fighting complex crime, delivering justice and protecting the UKs reputation is to be achieved through limited and/or non-existent prosecution, paradoxical enforcement and corporate settlements, this not only raises questions of justiciability but reinforces how – for corporate crime – enforcement and prosecution has been redefined and become conciliatory to those it proclaims to punish. This research has not sought to disparage the UKBA or the SFO and fully recognises the often unavoidable obstacles faced which can hinder investigations. The work instead seeks to raise awareness that criminal enforcement has shifted away from its apparent intentions. At the time of writing, despite the SFOs continued aim to investigate and prosecute the most serious and complex bribery and corruption, complications will undoubtedly have arisen from the coronavirus lockdowns and reviews into their practices – likely impacting their ability to expeditiously pursue its investigations. Whilst speculative, considering the timescales of investigations to date, it is therefore questionable whether these events will have had a knock-on effect further complicating corporate bribery cases and any charging decisions.

[1240] Ryder (n 925) 262.

[1241] Consider for example HSBC, who have been repeatedly sanctioned in the US for recurring criminal misconduct.

[1242] Serious Fraud Office, 'SFO publishes Annual Business Plan 2021/22' (News Releases, 2021) < https://www.sfo.gov.uk/2021/05/13/sfo-publishes-business-plan-for-2021-22/> accessed 16/05/2021.

The evaluation conducted into prosecuting individuals and the associated DPA process has revealed its own array of paradoxical problems. DPAs must be used in conjunction with criminal proceedings against employees and/or agents of corporations if they are to have a deterrent effect to reduce future misconduct. The failures to do so leads to a highly problematic environment for the SFO moving forward. Corporates who have already taken DPAs may be wishing, with hindsight, they had not, as legal advice now appears to be carefully shifting for corporates "*to do all they can to evaluate and test the strength of the case…that may impel settlements*" and not to "*simply accept that prosecutors have the goods to prevail*."[1243] For Sarclad and Güralp Systems, had they not accepted DPAs and risked a trial, as the individual not-guilty verdicts were in respect to the very personnel who allegedly attributed guilt to the parent company, they would have likely been faced with similar acquittals. If they were not guilty, then the company clearly could not be either. Testing the risks of prosecution Russian roulette for a company is clearly different and less fraught to the delicacy faced by an individual. However, if putting the UKBA and the SFO to the test is set to reveal hurdles and limitations to corporate crime enforcement, this work has revealed that it may well be a risk worth taking as the assumption of proof may be a costly misconception.

8.4 Research Limitations

Whilst the collection of qualitative material gained through this research revealed substantial findings to support its concerns, these need to be evaluated against the inherent restrictions and limitations faced. Chapter 3 (section 3.8) noted some of the methodological limitations faced including the difficulty in obtaining research participants, (particularly those 'representing' the state or SFO), the subjectiveness of interviewee opinions, the limitations of ethnographic observation and the inherent personal bias given the research design coming from my own conceptual understandings and interpretations. Although this was mitigated by a multiple methods approach and impartial data selection process which conveyed both evidence in support of the research claims and those against, further research would benefit from a broader set of interviewees (including more corporate and state/enforcement officials), additional data collection tools (such as questionnaires) to better explore the reality

[1243] Joel Cohen and others, 'Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements' (2021) 265(86) New York Law Journal.

in a less researcher influenced and potentially more objective capacity; and/or the specific design and collection of quantitative data to support and add depth to conceptual findings.

Given the nature of the topic and the facets behind corruption itself, it would be unreasonable not to note that despite interviewing senior figures from various perspectives of the enforcement interchange, the work has left no doubt that this topic shall remain a subject cautiously and restrictively spoken about. It is also recognised that interviewing people and obtaining anecdotal accounts, without supporting quantitative analysis and/or further analysis, is alone a limited reflection of the rationale(s) behind the enforcement landscape. This does not detract from the quality of the evidence they provided, but simply recognises that the true motives, extent of and the intimate nature behind enforcement decision making surrounding globally powerful industries is complex. For instance, it would be impossible to comment on a true state perspective as each request to speak was deferred or unanswered. To take Woodrow Wilson's views, it should at least be understood that corruption thrives in secrecy, avoids public places and inherently involves discreet impropriety.

8.5 Contributions, Further Research and Recommendations

This study has aided and enhanced an understanding of the enforcement approaches and self-regulatory practices which are used for corporate crime enforcement. The qualitative evidence obtained through the interviews, in particular, furthers commonly cited knowledge and supports subsequent data and concerns which have been published post-thesis submission. This work points to a fledgling conclusion: that there is no longer a debate between punishment or persuasion. Not only has punishment (in its contemporary command and control sense) been displaced, but evidence has been presented to highlight, through first-hand experience(s), that there exists an array of enforcement weaknesses. By extending the existing critique of corporate crime enforcement and providing analysis over the reality that is prosecutorial by design but settling in nature, this has provided important considerations for policy and social scientific development and made contributions to key conceptual and substantive concerns regarding how UK corporate bribery is enforced. Given the increasing trend of criminalising corporate wrongdoing, the Law Commission's June 2022 options into corporate criminal liability and the UKs unfavourable results in TIUK's 2022

Corruption Perceptions Index,[1244] this research area is highly relevant and timely to the UK's development and its once proclaimed global standing as a major enforcer (as per the OECD, see chapter 6.3). By employing both traditional and contemporary methodologies, it has been able to analyse the relevant academic trends and the practical realties faced by this arena. This work does not finitely conclude whether enforcement levels are adequate or not, but is instead (within the parameters, word limit, time constraints and attainable contact(s)) informative of the everyday reality of enforcement; providing foundations for further analysis; and supportive of why it is important to ensure responsive regulatory and escalatory enforcement is applied in practice.

Four contributions are apparent from this research. First, it has conceptualised how the self-regulatory and theoretical practices identified in the literature review are embodied within the UKBA approach towards corporate bribery enforcement and its underlying agenda to motivate governance. This has been achieved by analysing the similarities in regulatory style, method and in the extent to which UK corporate crime enforcement has exemplified the shift from centralised government to decentralised private governance. Second, the work has reinforced the power of private/corporate actors by empirically assessing the role they play in negotiating justice and the influence they obtain from the state having to trust decentralised compliance. Consequently, the literature surrounding the enforcement of corporate crime has been contributed to by clearly illustrating how enforcement policy and ultimately practice is cornered into settling upon methods of accommodation rather than strict enforcement. Thirdly, the work has developed research by commenting on the seldomly covered point that following a breach of the same laws there exists a growing pattern within the UK corporate bribery landscape of unequal, illogical and hindered enforcement activity which directly contradicts government legislation, policy and procedure. All of which are to be summarised as redefined enforcement at best, or under-enforcement at worst. This implies an inefficacy of the state's ability to enforce corporate *crime* with sanctions other than those akin to civil settlement and reflects a broader incapacity to establish and enforce the symbolic message which necessarily follows the most serious criminal wrongdoing and thus

[1244] Transparency International UK, 'UK Plunges to Lowest-Ever Position in Corruption Perceptions Index?' (Transparency.org.uk, 2018) < https://www.transparency.org.uk/uk-corruption-perceptions-index-2022-score-CPI> accessed 01/02/2023.

the value of the UKBA corporate offence. Previous debates around corporate criminal liability and its enforcement have been impeded by an unwillingness to question this premiss and the consequences it can bring. Finally, the work contributes to developing a research agenda which continues to bridge the gap between theories of state regulation and enforcement and the realities of private sector influenced compliance. Whereas regulatory theory has presented findings on these interactions, it has done so in regard to specific sectors (such as health and safety offences) and other regulated industries (e.g. financial services) usually covering the growth of compliance/persuasion based approaches. This work has focussed on the overall approach to corporate crime enforcement and the withdrawal from deterrence/punishment - irrespective of the sector or industry.

The completion of this work has prompted a critical view and need for further enquiries to explore what the repetitive failure to bring to justice corporations and personnel denoted to be responsible for such egregious crimes signifies to the weaknesses in our prosecutorial system. Now that the Law Commission's Option Paper on corporate criminal liability reform has been published, it has echoed a number of concerns highlighted in this thesis: such as the pervading need for individual liability and enforcement; and that if the identification doctrine is to stay, given its inherent challenges, necessary supporting modifications (such as the expansion of failure to prevent offences and for the identification doctrine to capture 'senior management') should be made. This, pleasingly, aligns with its pre-Options Paper statement of the "*broad consensus that the law must go further to ensure that corporations – especially large companies – can be convicted of serious criminal offences."*[1245] To achieve this aim there exists a clear need for the appropriate criminalisation of that and those who have engaged in seriously reprehensible conduct.[1246] Hesitation remains as to whether or to what extent the government will commit to any of the Law Commissions' recommendations; especially during a climate where UK companies can be said to be facing increased financial pressures. Committing to and actually acting upon brazen reform may, at this time, prove a step too far

[1245] Law commission, 'Law Commission sets out options to Government for reforming how companies are convicted of criminal offences' (2022) <https://www.lawcom.gov.uk/law-commission-sets-out-options-to-government-for-reforming-how-companies-are-convicted-of-criminal-offences/> accessed 08/01/2021.
[1246] Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, at para 3.137.

for the government. This work prompts the need for the subject to be addressed due to two imperative questions:

i) How and why have no involved senior personnel been prosecuted despite being 'named' in DPA proceedings and the respective companies having agreed liability based upon such?

ii) How severe does a case of corporate corruption need to be to warrant prosecution of a company?

Whilst every case will turn on its own facts, recent acquittals, collapses and withdrawals from investigations has left the enforcement of UK corporate bribery in a precarious position. This covers a range of aspects including the way cases are handled, the capability of the SFO, its funding, the DPA process and its potential to become less attractive and most importantly, why the state appears to speak of and legislate against corporate criminal offences but is, in reality, unable to enforce them in ways other than civil style settlements. Part of this is inevitably due to that recognised by the former Home Office Minister of State for Security and Economic Crime (Ben Wallace MP) who told the House of Lords UKBA committee that "*there is not enough intelligence on bribery*" and "*our knowledge of that landscape is not good enough.*"[1247] Even during the interview stages the former Director of the SFO (and arguably the most vocal government enforcer) when commenting on the scale of corporate bribery as a problem noted: "*I really don't know*."[1248] The inherent result is the perennial difficulty in measuring what enforcement methods are deemed to be effective solutions as this field cannot be measured given the covert nature of corruption. Although the soon to be established National Assessment Centre for Economic Crime will hopefully facilitate improved intelligence sharing, data collection, understanding and thus enforcement, this naturally provides the suggestive insight that until such progress is made, these will remain limited. Until there is more informed data on enforcement and compliance, the landscape will lack insight into prevention and enforcement capabilities because there is a developmental gap in the extent of corporate corruption and the adequacy of both the enforcement and self-regulatory response. The research has identified that the government and SFO intend to

[1247] House of Lords, *Select Committee on the Bribery Act 2010*, (HL Paper 303, 2019) paragraph 90.
[1248] Interview 2.

bolster this weakness by pursuing an increase in the failure to prevent (strict liability) landscape for specific economic crimes. Whilst the SFO will undoubtedly continue to exert pressure on government until substantive reform is realised, it cannot be ignored that the toolkit is of no benefit if it is not to be used, and DPAs are instead relied upon. Unless of course the intention is to expand the failure to prevent landscape to simply increase the spectrum of DPA/revenue potential.

Numerous interviewees as well as that observed during industry events have revealed that whilst generally supportive of DPAs, there exists a vocal need for the regime to be changed in some specific capacities or for it to at least be subject to review. Without which, this work has questioned the purpose and function of DPAs as was echoed by those respondents who felt their design was to simply avoid prosecution entirely. Firstly, many respondents revealed what is arguably a known known; that the SFO must have and be given the capacity, expertise and resources to pursue prosecutions of both corporations and senior individuals; and that there must be the political will to do such. Since beginning her tenure, Lisa Osofsky has repeatedly made the point that many investigations have simply taken too long and have consequently failed. As the former Director of TIUK propositioned, its *"about resourcing and political will as much as anything else."*[1249] Even with the risk of potential failure, to have the resources to try and fail says a great deal more about the UKs commitment to prosecuting serious bribery and economic crime than negating cases with little to no explanation. With that said, if the legislation and environment is not right to do so, the pursuit will be destined to fail.

Secondly, the unremitting SFO rhetoric, the views of current staff and both the former and present Director all argue that widening the ambit of s.7 is essential: without which, as it's so difficult to prosecute a corporate, companies are less likely to agree to a DPA. The literature revealed this through its assessment of the benign big gun theory and in the need for the pinnacle of enforcement to be actualised if necessary. This necessitates the correct legal structure to overcome the archaic challenges of the identification principle. This is not to suggest the law circumvents the right to one's innocence, but to have in place the tools to

[1249] Interview 10.

challenge situations where complex corporate structures intentionally blur liability. When the House of Commons initially debated a proposed corporate offence of failure to prevent economic crime in 2021, although not proposed in the Law Commission's 2022 Options Paper, it signifies an overdue step beyond toothless theoretical discussion and towards progressive expansion. The broad application would mark a significant change in emphasis for corporate criminal wrongdoing and fuel the need for self-regulatory compliance to be more important than ever for both companies and individuals. With the increase in US enforcement and the EU's Sixth Anti-Money Laundering Directive requiring its states to introduce a corporate offence of failing to prevent money laundering by June 2022, it remains key for the UK government to be seen to keep up with the global changes and enforcement efforts in line with its ongoing international commitments.

Finally, despite attracting caution from its critics, both the SFO and those defending/advising corporates agree that the incentivisation of self-reporting must be increased. They cite that this can primarily be achieved by offering even greater discounts to the fines imposed by the courts. This, however, involves two elements. Firstly, that the company which took the financial benefit must pay back the benefit gained in full along with an impactful fine so as to not encourage future wrongdoing, and secondly (and most importantly); that the person(s) responsible must then be subject to pursued prosecution. This not only encourages companies to come forward but fuels the defence that the compliance procedures were not themselves at fault, but instead a corrupt employee who operated outside.

This work can also suggest that if prosecution is to be sought, then further research at both policy, governmental and academic level is required to consider the rules and regulations that result in, for instance, contractual debarment. Interviews and the ethnographic research both indicated concerns that without clearer indications of what will or will not warrant prosecution, or any intervention at all, leads to a great deal of uncertainty. Especially when self-reporting is not a legal requirement – leaving much to speculation. Addressing the costs of the corporate 'death penalty' which clearly leads prosecutors, courts and corporations to discuss the ramifications of prosecution and thus their preference of non-contentious settlements "*would remove one barrier to the more robust pursuit of corporate wrongdoers*

through the conventional criminal process."[1250] If the DPA process exists to overcome the challenges of corporate criminal liability, but is similarly there to soften the potential outcome, the law needs to decide if it is to bolster liability, or to dilute it. As David Green noted: *"if the Holy Grail is corporate compliance, and that's to be achieved in part through DPAs, how do you make DPAs truly effective?"*[1251] This thesis answers that question with the evidenced conclusion that prosecution must be used when necessary and in conjunction with DPAs. DPAs present a sensible tool for corporate crime, but the balance between settlement and prosecution is one which must be carefully nurtured to both compel a positive change in corporate culture and to enforce the strict sanctioning of malevolent corruption. At present, the ability to both bolster and dilute enforcement has left the UKBA marooned as an enforcement tool and the SFO as an enforcer, serving to explain the often illogical and unequal outcomes to date.

The pervading reality is that at present, the enforcement of corporate bribery is not achieved through prosecution and DPAs appear to be the path of least resistance. Although they have been confidently declared to be in the public interest, as Yeung points out, what exactly this means will depend on the objectives the government wishes to prioritise:[1252] be that the censure of corporations, the intended modification of behaviour or indeed to inadvertently 'punish' them differently and with greater leniency. This work has shown that the UK enforcement of corporate bribery, in its extant state, has left this purpose unclear with paradoxical enforcement. Doctrinally, the enforcement of corporate bribery demonstrates that the relationship serious corporate offending has to how the criminal law usually operates is unique. If egregious bribery and corruption has occurred and there is an evidential sufficiency to the allegations, this work advocates that there remains the normative (as well as a public interest) argument to pursue criminal proceedings.

The UK landscape of corporate bribery is currently burdened with an ideological assumption: that it *criminally* enforces serious wrongdoing if required. The inconsistency is that it is battling with the task of preventing this – as with other corporate crimes - and in the

[1250] Campbell (n 901) 287.
[1251] Interview 2.
[1252] Yeung (n 902) 6.

complexity of its achievement. This work has shown that whilst the SFO is physically engaged in the task of enforcement; they are seemingly unable to achieve it, or instead bypass it, for a variety of reasons. Until there is open recognition that there exists a contradictory reality to the enforcement of such crimes; underlying enforcement weaknesses; that corporate crimes are increasingly being treated as negotiations; and in the treatment of corporate criminal personnel, there will remain a narrow view of success and a misaligned reality. This work, in light of the evidence, indicates a clear perspective contravening enforced self-regulatory theory: if the state remains unable to or constrained in how it can punish serious economic crime and criminals, they will remain undeterred relative to the ideal. It appears that as it stands, the UKBA enforcement regime wishes to ostensibly address, control and criminalise corporate bribery, but is unable to enforce it as proclaimed. Instead, it has come to be excused through all too frequent settlement and a lack of prosecution which has helped redefine the contemporary application of the criminal law and prosecution - personifying its concerningly differential treatment.

Bibliography

Marius Aalders, 'Regulation and In-Company Environmental Management in the Netherlands' (1993) 15(1) Law and Policy 75-94.

David Aaronberg and Nicola Higgins, 'The Bribery Act 2010: all bark and no bite?' (2010) 5(1) Archbold Review 6-9.

Joel Aberbach and Bert Rockman, 'Conducting and Coding Elite Interviews' (2002) 35(4) Political Science and Politics 673-676.

Mitchel Abolafia, *Making markets* (1st ed, Harvard University Press, 1996).

Toke Aidt and others, 'Governance Regimes, Corruption and Growth: Theory and Evidence' (2008) 36(1) Journal of Comparative Economics 195–220.

Tage Alalehto, 'Economic Crime: Does Personality Matter?' (2003) 47(1) International Journal of Offender Therapy and Comparative Criminology 335-355.

Paul Almond, *Corporate Manslaughter and Regulatory Reform* (1st ed, Palgrave Macmillan, 2013).

Paul Almond, 'Investigating health and safety regulation: Finding room for small-scale projects' (2008) 35(1) Journal of Law and Society 108-125.

Paul Almond, 'Revolution Blues: The Reconstruction of Health and Safety Law as 'Common-Sense' Regulation' (2015) 42(1) Journal of Law and Society 202–29.

Paul Almond, 'The Dangers of Hanging Baskets: `Regulatory Myths' and Media Representations of Health and Safety Regulation' (2009) 36(3) Journal of Law and Society 352-375.

Paul Almond, 'Understanding the seriousness of corporate crime: Some lessons for the new 'corporate manslaughter' offence' (2009) 9(2) British Society of Criminology 145-164.

Paul Almond, 'Workplace Safety and Criminalization: A Double-edged Sword' in Alan Boggs and others (eds), *Criminality at Work* (Oxford University Press 2020) 391-408.

Paul Almond and Gary Gray, 'Frontline safety: understanding the workplace as a site of regulatory engagement' (2017) 31(1) Law and Policy 5-29.

Paul Almond and Judith van Erp, 'Regulation and Governance versus Criminology: Disciplinary divides, Intersection and Opportunities' (2020) 14(2) Regulation and Governance 167-183.

Paul Almond and Michael Esbester, 'Regulatory inspection and the changing legitimacy of health and safety' (2018) 12(1) Regulation and Governance 46-63.

Paul Almond and Sarah Colover, ‘The criminalization of work-related death’ (2012) 52(1) British Journal of Criminology 997–1016.

Mats Alvesson and Jorgen Sandberg, *Constructing Research Questions: Doing Interesting Research* (1st ed, Sage, 2013).

Molly Andrews, 'Never the last word: revisiting data' in Molly Andrews and others (eds) *Doing narrative research* (1st ed, Sage, 2013) 205 – 222.

Stephen Arbogast, *Resisting Corporate Corruption: Cases in Practical Ethics from Enron Through the Financial Crisis* (1st ed, Scrivener Publishing, 2017).

Jennifer Arlen, ‘Does conviction matter? The reputational and collateral effects of corporate crime’ in Cindy Alexander and Jennifer Arlen (eds), *Research Handbook on Corporate Crime and Financial Misdealing* (Elgar 2018).

Jennifer Arlen, ‘Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements’ (2016) 8(1) Journal of Legal Analysis 191–234.

Jennifer Arlen, ‘The potential promise and perils of introducing deferred prosecution agreements outside the U.S.’ in Tina Soreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases* (Elgar 2020).

Andrew Ashworth, ‘A new generation of omissions offences?’ (2018) 5(1) Criminal Law Review 354-364.

Andrew Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) 74(1) Modern Law Review 1-26.

Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116(2) Law Quarterly Review 225-256.

Andrew Ashworth, 'The Elasticity of Mens Rea' in Colin Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981).

Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2(1) Criminal Law and Philosophy 21-51.

Rachel Ashworth and others, ‘Regulatory Problems in the Public Sector: Theories and Cases’ 2002 30(2) Policy and Politics 195–211.

Ian Ayres and John Braithwaite, *Responsive Regulation Transcending the deregulation debate* (1st ed, Oxford University Press, 1992).

Larry Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order' (2011) 18(2) Indiana Journal of Global Legal Studies 751-802.

Robert Baldwin, 'The New Punitive Regulation' (2004) 67(3) Modern Law Review 351-383.

Robert Baldwin and others, *Understanding Regulation: Theory, Strategy, and Practice* (1st ed, Oxford University Press, 2011).

Robert Baldwin and Julia Black, 'Driving Priorities in Risk-based Regulation: What's the Problem?' (2016) 43(1) Journal of Law and Society 565–595.

Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) Modern Law Review 59-94.

Robert Baldwin and Julia Black, 'When risk-based regulation aims low: Approaches and challenges' (2012) 6(1) Regulation and Governance 2-22.

Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1st ed, Temple University Press, 1982).

Andrew Barry and others, *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government* (1st ed, University of Chicago Press, 1996).

Roy Baumeister and Todd Heatherton, 'Self-Regulation Failure: An Overview' (1996) 7(1) Psychological Enquiry 1-15.

Samuel Beer, 'The Analysis of Political Systems' in Samuel Beer and Adam Ulam (eds), Patterns of Government (2nd ed, Random House, 1962).

David Beetham, Revisiting Legitimacy Twenty Years On, in Justice Tankebe and Alison Liebling (eds) Legitimacy and Criminal Justice: An International Exploration (Oxford University Press 2013).

David Beetham, *The Legitimation of Power* (2nd ed, Palgrave Macmillan, 2013).

Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (1st ed, Cambridge University Press, 2009).

Izak Benbasat and others, 'The Case Research Strategy in Studies of Information Systems (1987) 11(3) MIS Quarterly 369-386.

Michael Benson and others, 'White-Collar Crime from an Opportunity Perspective' in Sally Simpson and David Weisburd (eds), *Crime, Prevention and Control, The Criminology of White-Collar Crime* (Springer 2009).

Jeremy Bentham, *The Rationale of Reward* (1st ed, R Heward, 1830).

Mark Bevir, *Governance: A very short introduction* (1st ed, Oxford University Press, 2012).

Mark Bevir, *Key Concepts in Governance* (1st ed, Sage, 2008).

Mark Bevir and Rod Rhodes, *Interpreting British Governance* (1st ed, Routledge, 2003).

Roy Bhaskar, *Reclaiming Reality: A Critical Introduction to Contemporary Philosophy* (1st ed, Routledge, 2010).

Thomas Bingham, *The Rule of law* (1st ed, Allen Lane, 2010).

Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(1) Regulation and Governance 137–164.

Julia Black, 'Critical Reflections on Regulation' (2002) 27(1) Australian Journal of Legal Philosophy 1–36.

Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) Current Legal Problems 103-146.

Julia Black 'The Emergence of Risk Based Regulation and the New Public Management in the UK' (2005) Public Law 512–549.

Julia Black and Robert Baldwin, 'Really Responsive Risk-based Regulation' (2010) 32(1) Law and Policy 181-213.

Alexander Bogner and others, *Interviewing Elites* (1st ed, Palgrave Macmillan, 2009).

Tony Bottoms and Justice Tankebe, 'A Voice Within': Power-Holders' Perspectives On Authority And Legitimacy, in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 60-82.

William Boyes and Michael Melvin, *Fundamentals of Economics* (5th ed, South-Western, 2011).

Anthony Bradney and others, *How to Study Law* (5th ed, Sweet & Maxwell, 2004).

John Braithwaite, *Regulatory Capitalism; How it works, ideas for making it work better* (1st ed, Edward Elgar, 2008).

John Braithwaite, 'Convergence in Models of Regulatory Strategy' in John Braithwaite (ed) *Regulation, Crime, Freedom* (Routledge 2000).

John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1st ed, Routledge, 1984).

John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80(7) Michigan Law Review 1466-1507.

John Braithwaite, 'Responsive Business Regulatory Institutions' in Anthony Coady and Charles Sampford (eds), *Business, Ethics and the Law* (Federation Press 1993).

John Braithwaite, *Restorative Justice and Responsive Regulation* (1st ed, Oxford University Press, 2002).

John Braithwaite, 'Rewards and regulation' (2002) 29(1) Journal of Law and Society 12-26.

John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) UBC Law Review 475-520.

John Braithwaite, 'The Regulatory State' in Sarah Binder and others (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press 2006).

John Braithwaite, 'What's wrong with the sociology of punishment?' (2003) 7(1) Theoretical Criminology 5-28.

John Braithwaite and others, 'Can Regulation and Governance Make a Difference?' (2007) 1(1) Regulation and Governance 1-7.

John Braithwaite and others, *Regulating Aged Care: Ritualism and the New Pyramid* (1st ed, Edward Elgar, 2007).

John Braithwaite and others, 'Research note: Corruption allegations and Australian business regulation' (1986) 19(3) Australian and New Zealand Journal of Criminology 179-186.

John Braithwaite and Peter Drahos, *Global Business Regulation* (1st ed, Cambridge University Press, 2000).

John Braithwaite and Peter Drahos, 'Ratcheting Up and Driving Down Global Regulatory Standards' (1999) 42(4) Development 109-114.

John Braithwaite and Brent Fisse 'Self-regulation and the Control of Corporate Crime' in Clifford Shearing and Phillip Stenning (eds), *Private Policing* (Sage 1987).

John Braithwaite and Brent Fisse, 'Self Regulation and the Costs of Corporate Crime' in Clifford Shearing and Philip Stenning (eds), *Private Policing* (Sage 1987).

John Braithwaite and Brent Fisse, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) (11(3) Sydney Law Review 468-513.

John Braithwaite and Gilbert Geis, 'On theory and action for corporate crime control' (1982) 28(1) Crime and Delinquency 292–314.

John Braithwaite and Toni Makkai, 'Trust and Compliance' (1994) 4(1) Policing and Society 1-12.

Valerie Braithwaite, 'Dancing with tax authorities: Motivational postures and non-compliant actions' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate 2003).

Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (1st ed, Edward Elgar, 2009).

Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) Qualitative Research in Psychology 77-101.

Alan Bryman, 'The Research Question in Social Research: What is its Role?' (2007) 10(1) International Journal of Social Research Methodology 5-20.

Graham Burchell and others, *The Foucault Effect: Studies in Governmentality* (1st ed, University of Chicago Press, 1991).

Michael Burns, *Open Trading: Options for Effective Monitoring of Corporate Codes of Conduct, NEF and CIIR* (1st ed, New Economics Foundation, 1997).

Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57-70.

Liz Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales' (2021) 43(2) Sydney law Review 187-223.

Liz Campbell, 'Settling with corporations in Europe: a sign of legal convergence?' in Nicholas Lord and others (eds), *European White-Collar Crime: Exploring the Nature of European Realities* (Bristol University Press 2021) 237-251.

Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Justice 269-291.

Benjamin Cashmore 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2003) 15(4) Governance: An International Journal of Policy, Administration, and Institutions 503-529.

Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley 2008).

Michael Clarke, 'Prosecutorial and Administrative Strategies to Control Business Crime' in Clifford Shearing and Phillip Stenning (eds), *Private Policing* (Sage 1987) 247-265.

Christopher Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59(4) Modern Law Review 557-572.

Marshall Clinard and Peter Yeager, *Corporate Crime* (1st ed, New York Free Press, 1980).

John Coffee, ‘Corporate Crime and Punishment. A Non-Chicago View of the Economics of Criminal Sanctions’ (1980) 17(1) American Criminal Law Review 418-476.

John Coffee, ‘Corporate Criminal liability: An Introduction and Comparative Survey’ in Albin Eser and others (eds), *Criminal responsibility of legal and collective entities* (Edition Luscrim 1999).

John Coffee, ‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79(3) Michigan Law Review 386-459.

Joel Cohen and others, ‘Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements’ (2021) 265(86) New York Law Journal.

Louis Cohen and others, *Research Methods in Education* (6th ed, Routledge 2007).

Nick Cohen, 'The Audit Explosion' (NicholasCohen.com, 19 April 2009) < https://nicholascohen.wordpress.com/2009/04/19/comment-is-free-while-we-suffer-the-box-tickers-will-continue-to-prosper-even-if-alistair-darling-offers-an-austerity-budget-one-level-of-bureaucracy-will-emerge-unscathed-comments-22/> accessed 09/06/2017.

Jean-Marc Coicaud, ‘Crime, justice and Legitimacy: A brief Theoetical Inquiry’, in Justice Tankebe and Alison Liebling (eds) Legitimacy and Criminal Justice: An International Exploration (Oxford University Press 2013).

Hugh Collins, ‘Methods and Aims of Comparative Contract Law’ (1991) 11(3) Oxford Journal of Legal Studies 396-406.

Katrice Copeland, ‘The Yates Memo: Looking for Individual Accountability in All the Wrong Places’ (2017) 102(1) Iowa Law Review 1897-1927.

James Cote, ‘The Mead–Freeman Controversy in Review’ (2000) 29(5) Journal of Youth and Adolescence 525-538.

Ross Cranston, *Consumers and the Law* (1st ed, Weidenfeld and Nicholson, 1978).

Hazel Croall, ‘Combating financial crime: Regulatory versus crime control approaches’ (2003) 11(1) Journal of Financial Crime 45-55.

Francis Cullen and others, ‘Public Support for punishing white-collar crime: Blaming the victim revisited?’ (1983) 11(6) Journal of Criminal Justice 481-493.

Francis Cullen and others, ‘The Seriousness of Crime Revisited: Have Attitudes Toward White-Collar Crime Changed?’ (1982) 20(1) Criminology 83-102.

Michael Davis, ‘How to Make the Punishment Fit the Crime?’ in Ronald Pennock and John Chapman (eds), *Criminal Justice* (NYU Press 1985).

Victor DeMunck and Elisa Sobo, *Using methods in the field: a practical introduction and casebook* (1st ed, AltaMira Press, 1998).

Martyn Denscombe, *The Good Research Guide: for Small-Scale Social Research Projects* (1st ed, Open University Press, 1998).

Fiona Devine and Sue Heath, Sociological Research Methods in Context (1st, Bloomsbury Publishing, 1999).

Kathleen DeWalt and Billie DeWalt, *Participant observation: A guide for fieldworkers* (1st ed, Altimara Press, 2002).

Matias Dewey and Donato Di Carlo, 'Governing through non-enforcement: Regulatory forbearance as industrial policy in advanced economies' (2021) 16(3) Regulation and Governance 930-950.

Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).

Julan Du, 'Corruption and Corporate Finance Patterns: An International Perspective' (2008) 13(2) Pacific Economic Review 183-208.

Anthony Duff, 'Punishment, Communication, and Community' in Matt Matravers (ed) *Punishment and Political Theory* (Hart 1999).

Ronald Dworkin, 'Legal Research' (1973) 102(2) Daedalus 53–64.

Lauren Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law' (1992) 97(6) American Journal of Sociology 1531-1576.

Lauren Edelman, 'Legal environments and organizational governance: the expansion of Due Process in the workplace (1990) 95(6) American Journal of Sociology 1401-1440.

Lauren Edelman, 'When Organizations Rule: Judicial Deference to Institutionalized Employment Structures' (2011) 117(3) American Journal of Sociology 888-954.

Lauren Edelman and others, 'Diversity rhetoric and the managerialization of law" (2001) 106(6) American Journal of Sociology 1589-1641.

Lauren Edelman and others, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105(1) American Journal of Sociology 406–454.

Lauren Edelman and Mark Suchman, 'The Legal Environments of Organizations' (1997) 23(1) Annual Review of Sociology 479–515.

Rainer Eising and Beate Kohler-Koch, 'Introduction: Network governance in the European Union' in Beate Kohler-Koch and Rainer Eising (eds), *The transformation of governance in the European Union* (Routledge 2000).

Elliot Eisner, *The enlightened eye, qualitative inquiry and the enhancement of educational practice* (1st ed, Macmillan, 1991).

Tim Endicott, 'The impossibility of the rule of law' (1999) Oxford Journal of Legal Studies 19(1) 1-18.

Cynthia Estlund, 'Corporate Self-Regulation and the Future of Workplace Governance', (2009) 84(2) Chicago Kent Law Review 617-634.

Robyn Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27(4) Law and Policy 491-519.

David Farber, 'Restoring Trust after Fraud: Does Corporate Governance Matter' (2005) 80(2) The Accounting Review 539-561.

Joel Feinberg, '*Doing and Deserving: Essays in the Theory of Responsibility*' (1st ed, Princeton University Press, 1970).

Martha Feldman and others, *Gaining Access: A Practical and Theoretical Guide for Qualitative Researchers* (1st ed, AltaMira Press, 2003).

Deborah Finfgeld-Connett, 'Generalizability and transferability of meta-synthesis research findings (2010) 66(2) Journal of Advanced Nursing 246-254.

Linda Finlay, 'Negotiating the swamp: The opportunity and challenge of reflexivity in research practice' (2002) 2(2) Qualitative Research 209–230.

Daniel Fischel and Alan Sykes, 'Corporate Crime' (1996) 25(1) Journal of Legal Studies 319-350.

Brent Fisse, 'Consumer Protection and Corporate Criminal Responsibility: A Critique of Tesco Supermarkets v Natrass' (1971) 4(1) Adelaide Law Review 113-129.

Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56(6) Southern California Law Review 1141-1246.

Brent Fisse, 'Sentencing options against corporations' (1990) 1(1) Criminal Law Forum 211-258.

Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1st, Cambridge University Press, 1993).

Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1st ed, University of New York Press, 1983).

Amber Fletcher, 'Applying critical realism in qualitative research: methodology meets method' (2017) 20(2) International Journal of Social Research Methodology 181-194.

Uwe Flick, 'Design and Process in Qualitative Research' in Uwe Flick and others (eds), *A Companion to Qualitative Research* (Sage 2004).

William Foddy, *Constructing Questions for Interviews and Questionnaires: Theory and Practice in Social Research* (1st ed, Cambridge University Press, 1993).

Cristie Ford, 'New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation' (2010) 2(1) Wisconsin Law Review 441-487.

Nick Foster, 'Individual Liability of Company Officers' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (1st ed, Taylor and Francis, 2011).

Michel Foucault, *Beyond Structuralism and Hermeneutics* (2nd ed, University of Chicago Press, 1982).

Michel Foucault, *Discipline and Punish* (1st ed, Penguin, 1977).

Lawrence Friedman, 'In Defense of Corporate Criminal Liability' (2000) 23(3) Harvard Journal of Law and Public Policy 833-858.

Wolfgang Friedmann, *Law in a Changing Society* (2nd ed, Stevens and Sons, 1972).

Doris Fuchs, *Business power in global governance* (1st ed, Lynne Rienner, 2007).

Diego Gambetta, 'Can we trust trust?' in Diego Gambetta (ed) *Trust: Making and Breaking Cooperative Relations* (Blackwell 1988).

David Garland, *The culture of control: crime and social order in contemporary society* (1st ed, Oxford University Press, 2001).

Brandon Garrett, *Too Big to Jail* (1st ed, Belknap Press, 2014).

Gilbert Geis, 'Deterring Corporate Crime' in Ralph Nader and Mark Green (eds), *Corporate Power in America* (Grossman Publishers 1973) 182-197.

Gilbert Geis, 'White-Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961', in David Ermann and Richard Lundman (eds), *Corporate and Governmental Deviance* (Oxford University Press 1978).

Lasse Gerrits and Stefan Verweij, 'When Governance Networks Become the Agenda' (2016) 77(1) Public Administration Review 144-146.

Peter Gill, 'Policing and Regulation: What's the Difference?' (2002) 11(4) Social and Legal Studies 523-546.

Barney Glaser and Anselm Strauss, *The discovery of grounded theory: Strategies for qualitative research* (1st ed, Aldine Transaction, 1967).

James Gobert, 'Corporate Criminality: four models of fault' (1994) 14(3) Legal Studies 393-410.

James Gobert, 'Squaring the circle: the relationship between individual and organizational fault' in James Gobert and Ana-Maria Pascal (eds) *European developments in corporate criminal liability* (Routledge 2011) 139–157.

James Gobert and Ana-Maria Pascal, *European Developments in Corporate Criminal Liability* (1st ed, Routledge 2011).

James Gobert and Maurice Punch, *Rethinking Corporate Crime* (1st ed, Cambridge University Press, 2003).

Gary Goertz and James Mahoney, *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences (*1st ed, Princeton University Press, 2012).

Michael Gottfredson and Travis Hirschi, *A General Theory of Crime* (1st ed, Stanford University Press, 1990).

Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-state Actors in the Regulatory Process' (2013) 7(1) Regulation and Governance 114–123.

Peter Grabosky, 'Globalization and White-Collar Crime' in Sally Simpson and David Weisburd (eds), *The Criminology of White-Collar Crime* (Springer 2009).

Peter Grabosky, 'Regulation by Reward: On the Use of Incentives as Regulatory Instruments' (1995) 17(3) Law and Policy 257-282.

Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1st ed, Oxford University Press, 1986).

Peter Grabosky and Neal Shover, 'Editorial conclusion. Forestalling the next epidemic of white-collar crime: linking policy to theory' (2010) 9(1) Criminology and Public Policy - Special Issue: The Global Economy, Economic Crisis, and White-Collar Crime 641–642.

Garry Gray, 'The Regulation of Corporate Violations: Punishment, Compliance, and the Blurring of Responsibility' (2006) 46(5) British Journal of Criminology 875-892.

Stuart Green and Matthew Kugler, 'Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud' (2012) 75(2) Law and Contemporary Problems 33-59.

Stuart Green, 'What's Wrong With Bribery' in Robert Duff and Stuart Green (eds), *Defining Crimes: Essays on the Criminal Law's Special Part* (Oxford University Press 2005).

Richard Gruner, *Corporate Crime and Sentencing* (1st ed, Michie, 1994).

Neil Gunningham, 'Compliance, Enforcement, and Regulatory Excellence' (2017) RegNet Research Paper No. 124 <http://dx.doi.org/10.2139/ssrn.2929568> accessed 04/09/2020.

Neil Gunningham, 'Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand' (2017) Australian National University <http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-04/NG_investigation-industry-self-regulation-whss-nz_0.pdf> accessed 24/06/2017.

Neil Gunningham, 'Negotiated Non-Compliance: A Case Study of Regulatory Failure' (1987) 9(1) Law and Policy 69-91.

Neil Gunningham, 'Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment' (1998) 19(1) Comparative Labour Law and Policy 547-584.

Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1st ed, Oxford University Press, 1998).

Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (1st ed, Oxford, 1999).

Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective', (1997) 19(4) Law and Policy 363-414.

Fiona Haines 'Addressing the risk, reading the landscape: the role of agency in regulation' (2011) 5(1) Regulation in Governance 118-144.

Fiona Haines, *'The Paradox of Regulation: What Regulation Can Achieve and What It Cannot'* (1st ed, Edward Elgar, 2011).

Jean-Louis Halperin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) Maine Law Review 46-76.

Christian Hauser and Jens Hogenacker, 'Do Firms Proactively Take Measures to Prevent Corruption in Their International Operations?' (2014) 11(3-4) European Management Review 223-237.

Susan Hawley and others 'Justice for whom? The need for a principled approach to Deferred Prosecution in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020).

Keith Hawkins, 'Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation' (1983) 5(1) Law and Policy 35-73.

Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (1st ed, Oxford University Press, 2002).

Keith Hawkins and John Thomas, *Enforcing Regulation* (1st ed, Kluwer Nijhoff, 1984).

David Hess and Thomas Dunfee, 'Fighting Corruption: A Principled Approach: The C Principles (Combating Corruption)' (2000) 33(3) Cornell International Law Journal 593-625.

Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) Research Paper Series 3-10 Journal of Business Law 6-7.

Stuart Hills, *Corporate Violence: Injury and Death for Profit* (1st ed, Rowman and Littlefield, 1987).

Paul Hirsch and Daniel Milner, 'When scandals yield "it's about time!" rather than "we're shocked and surprised!' (2016) 25(1) Journal of Management Inquiry 447-449.

Branislav Hock, *Extraterritoriality and International Bribery* (1st ed, Routledge, 2020).

Graeme Hodge and Carsten Greve, *The Challenge of public private partnerships* (1st ed, Edward Elgar, 2005).

William Holdsworth, *A History of English Law* (3rd ed, Sweet and Maxwell, 1944).

Roger Homan, *The Ethics of Social Research* (1st ed, Longman, 1991).

Christel Hopf, 'Qualitative Interviews: An Overview' in Uwe Flick and others (eds) *A Companion to Qualitative Research* (Sage 2004).

Jeremy Horder, 'Bribery as a form of criminal wrongdoing' (2011) 127(1) Law Quarterly Review 37-54.

Jeremy Horder, 'Bureaucratic 'Criminal' Law Too Much of a Bad Thing?' in Anthony Duff and others (eds) *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 101-131.

Mike Hough and others, 'Legitimacy, Trust, and Compliance: An Empirical Test of Procedural Justice Theory Using The European Social Survey' in Justice Tankebe and Alison Liebling (eds) Legitimacy and Criminal Justice: An International Exploration (Oxford University Press 2013).

Bridget Hutter, *The Attractions of Risk-based Regulation: Accounting for the Emergence of Risk Ideas in Regulation* (CARR Discussion Paper 33, London School of Economics and Political Science, 2005).

Bridget Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (1st ed, Clarendon Press, 1988).

Allen Johnson and Ross Sackett, 'Direct systematic observation of behaviour' in Russell Bernard (ed) *Handbook of methods in cultural anthropology* (Altamira Press 1998).

Aleksandra Jordanoska, 'Regulatory enforcement against organizational insiders: Interactions in the pursuit of individual accountability' (2021) 15(2) Regulation and Governance 298-316.

Robert Kagan, 'Editor's Introduction: Understanding Regulatory Enforcement' (1989) 11(2) Law and Policy 89-119.

Robert Kagan and John Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff 1984).

Vikramaditya Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109(7) Harvard Law Review 1477-1534.

Colin King and Nicholas Lord, 'Deferred Prosecution Agreements in England & Wales: Castles Made of Sand?' [2020] Public Law 307-330.

Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime* (1st ed, Palgrave MacMillan, 2018).

Andrew King and Michael Lenox, 'Industry self-regulation without sanctions: The chemical industry's Responsible Care program' (2000) 43(4) Academy of Management Journal 698-716.

Eun-Hee Kim and Thomas Lyon, 'Strategic environmental disclosure: Evidence from the DOE's Voluntary Greenhouse Gas Registry' (2011) 61(3) Journal of Environmental Economics and Management 311–326.

Erik Klijn, 'Public Management and Governance: a comparison of two paradigms to deal with modern complex problems' in David Levi-Faur (ed), *The handbook of governance* (Oxford University Press 2012).

Erik-Hans Klijn and Joop Koppenjan, 'Public management and policy networks: Foundations of a network approach to governance' (2000) 2(2) Public Management 135–158.

Jonathan Kolieb, 'When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond' (2015) 41(1) Monash University Law Review 136-162.

Kimberley Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Compliance' (2003) 81(2) Washington University Law Review 487-544.

Steiner Kvale, *InterViews. An Introduction to Qualitative Research Interviewing* (2nd ed, Sage, 2004).

Nicola Lacey, 'Punishment, Justice and Consequentialism' in Anthony Duff and Nigel Simmonds (eds) Philosophy and the Criminal Law (Wiesbaden, Franz Steiner Verlag, 1984).

Nicola Lacey, *State Punishment* (1st ed, Routledge, 1988).

Laura Langbein and Kerwin Cornelius, 'Implementation, negotiation and compliance in environmental and safety regulation' (1985) 47(1) Journal of Politics 854—880.

Judith Lapadat, 'Problematizing transcription: Purpose, paradigm and quality' (2000) 3(3) International Journal of Social Research Methodology 203–219.

Costas Lapavitsas, 'Costas Lapavitsas Discusses the Financialization of Capitalism', Truthout (2014) <https://truthout.org/articles/costas-lapavitsas-discusses-the-financialization-of-capitalism/> accessed 02/04/2018.

Juha Laurilla, 'Promoting Research Access and Informant Rapport in Corporate Settings: Notes From Research on a Crisis Company' (1997) 13(4) Scandinavian Journal of Management 407-418.

Derek Layder, *Sociological Practice: Linking Theory and Social Research* (1st ed, Sage, 1998).

Heiner Legewie, 'Interpretation und Validierung biographischer Interviews', in Gerd Jüttemann and Hans Thomae (eds), *Biographie und Psychologie* (Springer 1987).

Vibeke Lehmann Nielsen and Christine Parker, 'Testing responsive regulation in regulatory enforcement' (2009) 3(4) Regulation and Governance 376–399.

Michael Levi, 'Fraud vulnerabilities, the financial crisis, and the business cycle' in Richard Rosenfeld and others (eds), *Contemporary Issues in Criminological Theory and Research: The Role of Social Institutions* (Wadsworth 2010) 269–292.

Michael Levi, 'Legitimacy, Crimes, and Compliance in 'The City': de maximis non curat lex?' in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013).

Michael Levi, 'Political Autonomy, Accountability and Efficiency in the Prosecution of Serious White-Collar Crimes' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Taylor and Francis 2011).

Michael Levi, ‘Serious tax fraud and non-compliance: A review of evidence on the differential impact of criminal and non-criminal proceedings’ (2010) 9(3) Criminology and Public Policy 493-513.

Michael Levi, 'Suite Revenge? The shaping of folk devils and moral panics about white collar crimes' (2009) 49(1) British Journal of Criminology 48-67.

Michael Levi, `What Works in Combating White-Collar Crime: Some Reactions' in Sven-Ake Lindgren (ed) *White- Collar Crime Research. Old Views and Future Potentials, National Council for Crime Prevention* (National Council for Crime Prevention, 2001).

Michael Levi and Nicholas Lord, ‘White-Collar and Corporate Crimes’ in Alison Liebling and others, *Oxford Handbook of Criminology* (Oxford University Press 2017)

David Levi-Faur, ‘From "Big Government" to "Big Governance”?’ in David Levi-Faur (ed) *The Oxford Handbook of Governance* (Oxford University Press 2012).

David Levi-faur, 'From Big Government to Big Governance', Jerusalem Papers – Regulation and Governance (2011) <http://regulation.huji.ac.il/papers/jp35.pdf> accessed 08/04/2017.

David Levi-Faur, 'Regulation and Regulatory Governance', Jerusalem Papers in Regulation and Governance Working Papers Series (2010) <http://levifaur.wiki.huji.ac.il/images/Reg.pdf> accessed 30/09/2018.

David Levi-Faur, The Global Diffusion of Regulatory Capitalism” in David Levi-Faur and Jacint Jordana, The Rise of Regulatory Capitalism: The Global Diffusion of a New Order (2005) 598(1) American Academy of Political and Social Sciences 1–21.

David Levi-Faur, ‘The global division of regulatory capitalism’ (2005) 598(1) Annals of the American Academy of Political and Social Science 12–32.

David Levi-faur, 'What is governance' (Governancejournal.wordpress, 2013) <https://governancejournal.wordpress.com/2013/03/10/levi-faur-on-what-is-governance/> accessed 08/04/2017.

Kelly Levin and others, ‘Can Non-state Certification Systems Bolster State-Centered Efforts to Promote Sustainable Development through the Clean Development Mechanism?’ (2009) 44(3) Wake Forest Law Review 777–798.

Yvonna Lincoln and Egon Guba, ‘*Naturalistic Inquiry’* (1st ed, Sage, 1985).

Richard Locke, *‘The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy’* (1st ed, Cambridge University Press 2013).

Richard Locke and others, ‘Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains’ (2013) 51(3) British Journal of Industrial Relations 519–552.

Nicholas Lord, 'Establishing enforcement legitimacy in the pursuit of rule-breaking "global elites": the case of transnational corporate bribery' (2015) 20(3) Theoretical Criminology 376-399.

Nicholas Lord, *Regulating corporate bribery in international business: anti-corruption in the UK and Germany* (1st ed, Ashgate Publishing, 2014).

Nicholas Lord, 'Regulating transnational corporate bribery: Anti-bribery and corruption in the UK and Germany' (2013) 60(2) Law and Social Change 127-145.

Nicholas Lord, 'Responding to transnational corporate bribery using international frameworks for enforcement: Anti-bribery and corruption in the UK and Germany' (2013) 14(1) Criminology and Criminal Justice 100-120.

Nicholas Lord and Colin King, 'Negotiating non-contention: Civil recovery and deferred prosecution in response to transnational corporate bribery' In Liz Campbell and Nicholas Lord (eds), *Corruption in commercial enterprise: Law, theory and practice* (Routledge 2018) 234-257.

Nicholas Lord and Michael Levi 'Determining the adequate enforcement of white-collar and corporate crimes in Europe' in Judith van Erp and others (eds) The Routledge Handbook of White-Collar and Corporate Crime in Europe (Routledge 2015).

Nicholas Lord and Rose Broad, 'Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the "Organisational" Component' (2017) 4(2) The European Review of Organised Crime 27-52.

Christian Luders, 'Field Observation and Ethnography' in Uwe Flick and others, *A Companion to Qualitative Research* (1st ed, Sage, 2004).

Laurence Lynn and others, 'Improving governance: A new logic for empirical research' (2003) 65(1) Journal of Politics 279-281.

John Mack, 'The Able Criminal' (1972) 12(1) British Journal of Criminology 44-54.

Toni Makkai and John Braithwaite, 'Reintegrative Shaming and Compliance with Regulatory Standards', Criminology (1994) 32(3) 361–85

Anne Marshall and Suzanne Batten, 'Researching across cultures: issues of ethics and power' Forum: Qualitative Social Research (2004) 5(3), Art.39.

Catherine Marshall and Gretchen Rossman*, 'Designing Qualitative Research'* (2nd ed, Sage, 2012).

Bethany McLean and Peter Elkind, 'Smartest Guys In '*The Room: The Amazing Rise and Scandalous Fall Of Enron*' (1st ed, Portfolio, 2004).

Linda McDowell, 'Elites in the City of London: Some methodological considerations', Environment and Planning A: Economy and Space (1998) 30(12) 2133-2146.

Grant McCracken, 'The Long Interview' (1988) 13(1) Sage University Paper Series on Qualitative Research Methods.

Sharan Merriam, '*Qualitative Research: A Guide to Design and Implementation*' (1st ed, Wiley, 2009).

Robert Merton and others, '*The Focused Interview. A Manual of Problems and Procedures'* (1st ed, The Free Press, 1990).

Douglas Michael, 'The Use of Audited Self-Regulation as a Regulatory Technique' (1995) 47(2) Administrative Law Review 173.

Robert Mikecz, 'Interviewing elites: Addressing methodological issues' (2012) 18(6) Qualitative Inquiry 482-493.

Matthew Miles and Michael Huberman, '*Qualitative data analysis'* (1st ed, Sage, 1994).

Peter Miller and Nikolas Rose, Governing the Present: Administrating Economic, Social and Personal Life (1st ed, Polity, 2008).

Tina Miller and others, '*Ethics in Qualitative Research'* (2nd ed, Sage, 2012).

Guido Möllering, *'Trust: Reason, Routine, Reflexivity'* (1st ed, Elsevier, 2006).

Charles Moore, 'Taming the Giant Corporation? Some Cautionary Remarks on the Deterrability of Corporate Crime' (1987) 33(1) Crime and Delinquency 379–402.

Alan Moran, 'The business regulation review unit: Canberra Bulletin of Public Administration' (1986) 13(1) Australian Journal of Public Administration 283-287.

Michael Moran, '*The British Regulatory State: High Modernism and Hyper Innovation'* (1st ed, Oxford University Press, 2003).

Michael Moran, 'Theories of Regulation and Changes in Regulation: the case of financial markets' (1986) 34(2) Political Studies 185-201.

Herbert Morris, 'A Paternalistic Theory of Punishment' in Antony Duff and David Garland '*A Reader on Punishment'* (1st ed, Oxford University Press, 1994).

Ralph Nader and others, *Taming the Giant Corporations* (1st ed, WW Norton, 1976).

David Nelken, 'White-Collar and Corporate Crime' in Maguire and others (eds), *The Oxford Handbook of Criminology* (Oxford University Press 2012) 623-659.

Richard Neustadt, 'The administration's regulatory reform program: An over-view' (1980) 32(1) Administrative Law Review 129-159.

Teresa Odendahl and Aileen Shaw, 'Interviewing elites' in Jaber Gubrium and James Holstein (eds), *Handbook of Interview Research: Context and Method* (Sage 2002).

Claus Offe, 'Governance: An "empty signifier"?' (2009) 16(4) Constellations 550-562.

Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1st ed, Hart, 2004).

Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15(1) Oxford Journal of Legal Studies 97–108.

Anthony Ogus and Carolyn Abbot, 'Sanctions for Pollution: Do we have the right regime?' (2002) 14(3) Journal of Environmental Law 283–298.

Fevzi Okumus and others, 'Gaining access for research: reflections from experience' (2007) 34(1) Annals of Tourism Research 4-26.

Trond Olsen and Gaute Torsvik, 'Collusion and renegotiation in hierarchies: a case of beneficial corruption' (1998) 39(2) International Economic Review 413-438.

Justin O'Brien, *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets* (1st ed, John Wiley and Sons, 2005).

Justin O'Brien and Eliot Spitzer, 'Redesigning Financial Regulation' in Justin O'Brien (ed) *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets* (Wiley 2005).

Pat O'Malley, 'Governmentality and risk' in Jens Zinn (ed) *Social theories of risk and uncertainty: An introduction* (Blackwell Publishing 2008)

Abraham Oppenheim, *Questionnaire Design, Interviewing, and Attitude Measurement* (2nd ed, Pinter, 1992).

Antonio Palumbo and Richard Bellamy, *From Government to Governance* (1st ed, Routledge, 2010).

Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (1st ed, Cambridge University Press, 2002).

Christine Parker, 'Twenty years of responsive regulation: An appreciation and appraisal' (2013) 7(1) Regulation and Governance 2–13.

Christine Parker and others, 'Introduction' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004).

Christine Parker and Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference' (2009) 41(1) Administration and Society 3–37.

Talcott Parsons, 'Authority, Legitimation, and Political', in Carl Friedrich *Authority* (1st ed, Harvard University Press, 1958).

Nikos Passas, 'Global Anomie, Dysnomie, and Economic Crime: Hidden Consequences of Neoliberalism and Globalisation in Russia and around the World' (2000) 27(2) Social Justice 16-44.

Raymond Paternoster and Sally Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30(3) Law and Society Review 549-584.

Frank Pearce, *Crimes of the Powerful: Marxism, Crime and Deviance* (1st ed, Pluto Press, 1976).

Frank Pearce and Steve Tombs, 'Hazards, law and class: Contextualising the regulation of corporate crime' (1997) 6(1) Social and Legal Studies 79-107.

Aleksander Pecznick, 'A Theory of Legal Doctrine' (2001) 14(1) Ratio Juris 75–105.

Warren Pengilley, 'Competition Law and Voluntary Codes of Self-Regulation: An Individual Assessment of What Has Happened to Date' (1990) 13(2) University of New South Wales Law Journal 212-301.

Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (3rd ed, Sweet and Maxwell, 2013).

Nicole Piquero, 'White-Collar Crime is Crime' (2018) 17(3) Criminology and Public Policy 595-600.

Craig Pirrong, 'A theory of financial exchange organization' (2000) 43(2) Journal of Law and Economics 437-471.

Harvey Pitt and Karen Shapiro, 'Securities Regulation by Enforcement: A Look Ahead at the Next Decade', (1990) 7(1) Yale Journal on Regulation 149-304.

Karl Polanyi, *The Great Transformation* (1st ed, Farrar and Rinehart, 1944).

Richard Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38(4) University of Toronto Law Journal 333-354.

Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) American Law Review 12-36.

Michael Power, '*Organized Uncertainty: Designing a World of Risk Management*' (1st ed, Oxford University Press, 2007).

Michael Power, '*The Audit Society: Rituals of Verification'* (1st ed, Oxford University Press 1997).

Maurice Punch, 'The Organizational Component in Corporate Crime' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Taylor and Francis 2011).

Reiner Quick and others, *Auditing, Trust and Governance: Developing Regulation in Europe* (1st ed, Routledge, 2007).

Charles Ragin, *Constructing Social Research* (1st ed, Pine Forge Press, 1994).

John Rawls, A Theory of Justice (1st ed, Harvard University Press, 1971).

Joseph Rees, *Reforming The Workplace: A Study of Self-Regulation in Occupational Safety* (1st ed, University of Pennsylvania Press, 1988).

Nancy Reichman, 'Moving Backstage: Uncovering the Role of Compliance Practices' in David Weisburd and Kip Schlegel (eds), *White-collar Crime Reconsidered* (Northeastern University Press 1992) 244-268.

Robert Reiner, `Police Research' in Roy King and Emma Wincup (eds), '*Doing Research in Crime and Justice'* (Oxford University Press 2000).

Albert Reis, 'Consequences of compliance and deterrence models of law enforcement for the exercise of police discretion' (1984) 47(4) Law and Contemporary Problems 83–122.

Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44(1) International Politics 157–74.

Rod Rhodes, 'Governance and public administration' in Jon Pierre (ed) *Debating governance: Authority, steering and democracy* (Oxford University Press 2000).

Rod Rhodes, 'The hollowing out of the state: The changing nature of the public service in Britain' (1994) 65(2) Political Quarterly 138–151.

Rod Rhodes, 'The New Governance: Governing without Government' (1996) 44(4) Political Studies 652-667.

Rod Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1st ed, Open University Press, 1997).

Roderick Rhodes, Understanding governance: policy networks, governance, reflexivity and accountability (1st ed, Open University, 1997).

Ben Rissing 'Trust but Sometimes Verify: Regulatory Enforcement in Attestation-based Immigration Programs' (2022) 16(1) Regulation and Governance 327-354.

Sharon Rivera and others, 'Interviewing Political Elites: Lessons from Russia' (2003) 35(4) Political Science and Politics 683-688.

Paul Robinson and John Darley 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) Oxford Journal of Legal Studies 173–205.

Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (1st ed, Cambridge University Press, 1999).

Susan Rose-Ackerman, 'Grand Corruption and the Ethics of Global Business' (2002) 26(9) Journal of Banking and Finance 1889-1918.

Edward Ross, *The criminaloid* (1907) 99 The Atlantic Monthly 44–50.

Denise Rousseau and others, 'Not so Different After All: A Cross-discipline View of Trust' (1998) 23(3) Academy of Management Review 393–404.

Jean-Jaques Rousseau, The Social Contract (1st ed, Penguin Books, 1968).

Jeremy Rowan-Robinson and others, *Crime and Regulation: A Study of the Enforcement of Statutory Codes* (1st ed, T and T Clark, 2000).

Edward Rubin, 'Executive Action: Its History, Its Dilemmas, and its Potential Remedies' (2016) 8(1) Journal of Legal Analysis 1–45.

Nicholas Ryder, 'Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) The Journal of Criminal Law 245-263.

Michael Salter and Julie Mason, *Writing Law Dissertations* (1st ed, Pearson Education 2007).

Maggi Savin-Baden and Claire Howell-Major, 'Research questions' in Maggi Savin-Baden and Claire Howell-Major (eds), *Qualitative Research: The essential guide to theory and practice* (Routledge 2012).

Thomas Scanlon, *What We Owe to Each Other* (1st ed, Harvard University Press, 1998).

Thomas Schelling, *Arms and Influence* (1st ed, Yale University Press, 1966).

John Scholz 'Cooperation, Deterrence and the Ecology of Regulatory Enforcement' (1984) 18(2) Law and Society Review 179-224.

John Scholz, 'Voluntary compliance and regulatory policy' (1984) 6(1) Law and Policy 385-404.

Phil Scraton, *Power, Conflict and Criminalisation* (1st ed, Routledge, 2007).

Thorsten Sellin and Marvin Wolfgang, *The Measurement of Delinquency* (1st ed, Wiley, 1964).

Philip Selznick 'Focusing Organizational Research on Regulation' in Roger Noll (ed) *Regulatory Policy and the Social Sciences* (University of California Press 1985).

Philip Selznick, '*The Moral Commonwealth: Social Theory and the Promise of Community'* (1st ed, University of California Press, 1992).

Ronen Shamir, 'Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility' (2010) 6(1) Annual Review of Law and Social Science 531–553.

Susan Shapiro, 'Policing Trust' in Clifford Shearing and Phillip Stenning (eds), '*Private Policing'* (Sage 1987).

Susan Shapiro, 'The Social Control of Impersonal Trust' (1987) 93(3) American Journal of Sociology 623–658.

Suzanna Sherry, 'Foundational Facts and Doctrinal Change' (2011) 2011(1) University of Illinois Law Review 145–86.

Jodi Short and Michael Toffel, 'Making self-regulation more than merely symbolic: the critical role of the legal environment' (2010) 55(1) Administrative Science Quarterly 361–396.

Kristina Simion, 'Qualitative and Quantitative Approaches to Rule of Law Research' [2016] INPROL: International Network to Promote the Rule of Law.

Jonathan Simon, 'Sanctioning government: Explaining America's severity revolution' (2001) 56(1) University of Miami Law Review 217-253.

Sally Simpson and others, 'Corporate Crime Deterrence: A Systematic Review' (2014) 10(1) Campbell Systematic Reviews 1-105.

Frederique Six, 'Trust in Regulatory Relations' (2012) 15(2) Public Management Review 163-185.

Gary Slapper and Steve Tombs, *Corporate Crime* (1st ed, Pearson, 1999).

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1st ed, Clarendon Press, 1976).

William Smith, 'The Concept of Legitimacy' (1970) 35(1) Theoria 17-29.

Laureen Snider, *Bad Business: Corporate Crime in Canada* (1st ed, Nelson, 1993).

Laureen Snider, 'Framing E-waste Regulation: The Obfuscating Role of Power' (2010) 9(3) Criminology and Public Policy 569-577.

Eva Sørsensen, 'Democratic theory and network governance' (2002) 24(4) Administrative Theory and Praxis 693-720.

Eva Sørsensen and Jacob Torfing, 'Democratic anchorage of governance networks' (2005) 28(1) Scandinavian Political Studies 195–218.

Richard Sparks and Anthony Bottoms, 'Legitimacy and Imprisonment Revisited' in James Byrne and others (eds) *The Culture of Prison Violence* (1st ed, Pearson/Allyn and Bacon, 2008).

James Spradley, *Participant Observation* (1st ed, Waverley Press, 2016).

Susan Strange, 'Big Business and the State' (1991) 20(2) Millennium Journal of International Studies 245-250.

Anselm Strauss and Juliet Corbin, *Basics of qualitative research: Grounded theory procedures and Techniques* (1st ed, Sage, 1998).

Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43(1) International and Comparative Law Quarterly 493-520.

James Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity' (2013) 16(2) New Criminal Law Review 261-299.

Edward Stringham, *Private Governance: Creating Order in Economic and Social Life* (1st ed, Oxford University Press, 2015).

Christopher Stone, '*Where the Law Ends: The Social Control of Corporate Behavior*' (1st ed, Harper and Row, 1975).

Anselm Strauss, *Qualitative Analysis for Social Scientists* (1st ed, Cambridge University Press, 1987).

Robert Summers, 'Justiciability' (1963) 26(5) The Modern Law Review 530-538.

Edwin Sutherland, *White-Collar Crime* (1st ed, Dryden Press, 1949).

Edwin Sutherland, *White-collar crime: The uncut version* (1st ed, Yale University Press, 1983).

Edwin Sutherland, 'White-Collar Criminality' (1940) 5(1) American Sociological Review 1-12.

Justice Tankebe and Alison Liebling, 'Legitimacy and Criminal Justice: An Introduction', in Justice Tankebe and Alison Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013).

Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Robert Baldwin and others (eds), *A Reader on Regulation* (Oxford University Press 1998).

Gunther Teubner, 'The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Codetermination' in Rainer Nickel (ed) *Conflict of Laws and Laws*

of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification (Intersentia 2010).

Marc Simon Thomas, 'Teaching Sociolegal Research Methodology: Participant Observation' (2019) 14(4) Law and Method 1-16.

Michael Toffel and Jodi Short, 'Coming Clean and Cleaning up: Does Voluntary Self-Reporting Indicate Effective Self-Policing? (2011) 54(3) The Journal of Law and Economics 609–649.

Barbara Toffler and Jennifer Reingold, *Final Accounting: Ambition, Greed, and the Fall of Arthur Andersen* (1st ed, Doubleday, 2004).

Steve Tombs, 'Crisis, What Crisis? Regulation and the academic orthodoxy' (2015) 54(1) Special Issue of The Howard Journal of Criminal Justice 57-72.

Steve Tombs, *Social Protection after the Crisis: Regulation without Enforcement* (1st ed, Policy Press 2015).

Steve Tombs, 'Regulatory Inaction? Regulation without enforcement' in Steve Tombs (ed) *Social Protection after the Crisis: Regulation without Enforcement* (Policy Press 2016).

Steve Tombs, 'The UK's Corporate Killing Law: Un/fit for Purpose?' (2018) 18(1) Criminology and Criminal Justice 488-507.

Steve Tombs and David Whyte, 'Counterblast: Challenging the Corporation/Challenging the State' (2015) 54(1) The Howard Journal of Criminal Justice 91-95.

Steve Tombs and David Whyte, 'Introduction: Corporations Beyond the Law? Regulation, Risk and Corporate Crime in a Globalised Era' (2003) 5(2) Risk Management 9-16.

Steve Tombs and David Whyte, 'Introduction to the Special Issue on Crimes of the Powerful', (2015) 54(1) The Howard Journal of Criminal Justice 1-7.

Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (1st ed, Routledge, 2015).

Steve Tombs and David Whyte, 'The Shifting Imaginaries of Corporate Crime' (2020) 1(1) Journal of White Collar and Corporate Crime 16-23.

Steve Tombs and David Whyte, 'Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK' (2013) 7(1) Regulation and Governance 61-79.

Christina Toren, 'Introduction to mind, materiality and history' in Henrietta Moore and Todd Sanders (eds), *Anthropology in theory: Issues in Epistemology* (Wiley Blackwell 2006).

Matthew Turk, 'Regulation by Settlement', (2017) 66(2) University of Kansas Law Review 259-324.

Tom Tyler, 'Self-Regulatory Approaches to White-Collar Crime: The Importance of Legitimacy and Procedural Justice' in Sally Simpson and David Weisburn (eds) *The Criminology of White-Collar Crime* (1st ed, Springer, 2009).

Tom Tyler, *Why People Obey the Law* (1st ed, Yale University Press, 1990).

Judith van Erp and others, *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (1st ed, Routledge 2015).

Kees van Kersbergen and Frans van Waarden, 'Governance' as a bridge between disciplines: Cross-disciplinary inspiration regarding shifts in governance and problems of governability, accountability and legitimacy' (2004) 43(1) European Journal of Political Research 143-171.

John van Maanen, '*Qualitative methodology'* (1st ed, Sage, 1983).

John Van Maanen and Deborah Kolb, 'The Professional Apprentice: Observations on Fieldwork Role into Organisational Settings' (1982) 4(1) Research in Sociology of Organisations 1-33.

Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From "why punish?" to "how much?" (1990) 16(1) Criminal Law Forum 259-290.

Steve Vincent and Joe O'Mahoney, 'Critical Realism and Qualitative Research: An Introductory Overview' in Catherine Cassell and others (eds), The SAGE Handbook of Qualitative Business and Management Research Methods: History and Traditions (1st ed, Sage, 2018).

Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) Georgia Law Review 1-62.

Susan Watson and Rebecca Hirsch, 'The Link between Corporate Governance and Corruption in New Zealand' (2010) 24(1) New Zealand Universities Law Review 42-81.

Max Weber, The Theory of Social and Economic Organization, translated by Alexander Henderson and Talcott Parsons, (1st ed, Free Press, 1947).

Shang-Jin Wei, 'How Taxing is Corruption on International Investors?' (2000) 82(1) Review of Economics and Statistics 1– 11.

Murray Weidenbaum, *The Future of Business Regulation* (1st ed, Amacom, 1979).

Celia Wells, 'Containing Corporate Crime. Civil or Criminal Controls?' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011).

Celia Wells, 'Corporate Responsibility and Compliance Programs in the United Kingdom' in Stefano Manacorda and others (eds), *Preventing Corporate Corruption: The Anti Bribery Compliance Model* (Springer 2014) 505–513.

Celia Wells, *Corporations and Criminal Responsibility* (1st ed, Oxford University Press, 2001).

Celia Wells, *Corporations and Criminal Responsibility* (2nd ed, Clarendon Press, 2001).

Celia Wells, *Corporations, Crime and Accountability'* (2nd ed, Oxford University Press, 2001).

Celia Wells, 'Opening the Eyes of the Sentry' (2010) 30(3) Legal Studies 370-390.

Nick Werle, 'Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review' (2018) 128(5) The Yale law Journal 1174-1477.

David Whyte, `Researching the Powerful: Towards a Political Economy of Method' in Roy King and Emma Wincup (eds), *Doing Research in Crime and Justice* (Oxford University press 2000) 419-429.

Paul Willis and Mats Trondman, 'Manifesto for ethnography' (2000) 1(1) Ethnography 5-16.

Karin van Wingerde and Nicholas Lord, 'Preventing and Intervening in White-Collar Crimes: the Role of Law Enforcement' in Melissa Rorie (ed) *Handbook on White-Collar and Corporate Crime* (1st ed, Wiley 2019).

Karin van Wingerde and Nicholas Lord, 'The Elusiveness of White-Collar and Corporate Crime in a Globalized Economy' in Melissa Rorie (ed) *Handbook on White-Collar and Corporate Crime* (Wiley 2019).

Ronald Wraith and Edgar Simpkins, *Corruption in Developing Countries* (1st ed, Routledge, 1963).

Sappho Xenakis, 'The Dog(s) that Didn't Bark: Exploring Perceptions of Corruption in the UK', Discussion Paper 10 (Crime and Culture Research Project, 2007).

Peter Yeager, 'The elusive deterrence of corporate crime' (2016) 15(2) Criminology and Public Policy 439-451.

Daniel Yergin and Josehp Stanislaw, *The Commanding Heights: The Battle for the World Economy* (1st ed, Simon and Schuster, 1998).

Karen Yeung, *Securing compliance: A principled approach* (1st ed, Hart Publishing, 2004).

Michael Zakim and Gary Kornblith, *Capitalism Takes Command: The Social Transformation of Nineteenth Century America* (1st ed, Chicago University Press, 2012).

Lucia Zedner, ‘Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control’ (2006) 46(1) British Journal of Criminology 78-96.

Lucia Zedner, ‘Pre-crime and post-criminology?’ (2007) 11(2) Theoretical Criminology 261-281.

Stelios Zyglidopoulos and others, 'Expanding Research on Corporate Corruption, Management, and Organizations' (2017) 26(3) Journal of Management Inquiry 247-253.