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The Public Prosecutor's Discretion in the Enforcement of Corporate Bribery Cases

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Abstract

Negotiated settlements are increasingly used in corporate bribery cases. When criminal cases are settled out of court, the prosecutor's role and her level of discretion become more important. After studying prosecutors in 62 countries, I find that there is great variation in the degree of discretion granted to prosecutors in the surveyed countries. The study also finds support for the hypothesis that governments that perform well on development indices grant more discretion to their prosecutors.

Key words: Discretion, Corruption, Prosecutor, Negotiated settlements, Independence

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The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the OECD or of its member countries.

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1. Introduction

Corporate bribery, in terms of agents of private corporations bribing government officials, is regulated by criminal law in nearly all countries, and this includes liability for bribes paid in foreign countries (OECD, 1997). The harmful consequences of corruption are obvious (OECD, 2015; IMF, 2016), and efforts in dealing with the problem are gaining some leverage.²

Enforcement cases between 1997 and 2014 show that the United States is leading the way in anti-corruption enforcement, and that the US model is inspiring other countries on how to combat corporate bribery (OECD, 2014). Most US enforcement cases for breaches of the Foreign Corrupt Practices Act (FCPA) are concluded with a negotiated settlement (DOJ, 2017; SEC, 2017a). An example is the case against the Swedish telecom firm Telia Company AB that agreed to settle on a fine of USD 956 million with the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) for bribing government officials in Uzbekistan (SEC, 2017b). The main reasons for the increase in negotiated settlements are more cost efficient procedures and stronger incentives for corporations to cooperate.

The purpose of this article is to investigate the level of prosecutor's discretion in negotiated settlements of corporate bribery cases in 62 countries, and examine the level of discretion among countries that have similar performance on development indices. The analysis is conducted by studying possible drivers for discretion in order to see whether the degree of discretion correlates with indices influencing discretion.

Negotiated settlement can be defined as "an agreed resolution between law enforcement authorities and alleged wrongdoers regarding alleged violations of anti-corruption laws resulting in sanctions or other legal measures" (Makinwa, 2015:12). Discretion is the freedom to decide what to do in a particular situation, and it is defined as "the quality of having or showing discernment of good judgment" or the "ability to make responsible decisions" (Merriam-Webster, 2017). In the context of law enforcement of corporate bribery cases, discretion may refer to the prosecutor's opportunity to reduce the sanction or change a charge in exchange for confessions or evidence provided by the accused corporation.

The motivation for conducting the study is that "[...] a systematic stock-taking of the various prosecutorial systems realized in the world has never taken place. [...] This is even true for the legal science" (van Aaken, Feld and Voigt, 2010:12). More recent studies investigate this further. Makinwa (2015) studies prosecutorial systems in Europe, and concludes in Makinwa (2017:16) that "this array of differences raises the spectre of a fragmented regulatory landscape that is arguably not in the

² Heimann and Pieth (2018) describe the evolution of anti-corruption efforts.

interest of any of the stakeholders impacted by this process.” This fragmented regulatory landscape is a clear motivation for further studies of a system that needs clarification.

The rest of this paper is organised as follows: in the next section, the prosecutor’s role and key terms are presented. In section three, the data is presented, which is analysed in section four. Section five provides a short summary.

2. The prosecutor’s discretion in negotiated settlements

The prosecutor plays a key role in all countries where some degree of rule of law exists, but this role differs between different legal systems (Luna and Wade, 2012; Søreide, 2016). As will be described here, the prosecutor’s position and independence matter for enforcement practices, and, in particular, for negotiated settlements.

Criminal justice systems operate with at least three goals: to deter crime, secure fair process and maximise results given limited resources. Typically, the more weight a government places on one of these goals, the less emphasis is given to the other two, which means there are trade-offs between them (Søreide, 2016). All law enforcement systems are forced to set priorities in order to establish balance between these goals. For political, historical and cultural reasons, this is done differently in different jurisdictions, and of course, these differences come to expression in cross-country studies of enforcement actions, including in the use of negotiated settlements.

2.1 The role and function of the public prosecutor

The public prosecutor is “a legal official who accuses someone of committing a crime, especially in a law court” (Cambridge Dictionary, 2017). For the public prosecutor’s office, I will use the term “procuracy”, referring to the institution, while “the prosecutor” will refer to the lawyer managing a specific case. The procuracy has to be separated on the one hand from the executive branch, and on the other hand, from the judiciary. Van Aaken, Feld and Voigt, (2010:3) list three criteria that an institution must fulfil to qualify as a procuracy: “[...] (i) it has the competence to gather information on the behaviour of criminal suspects, or to instruct the police to gather more information; (ii) on the basis of that information, it has the competence to indict a suspect; (iii) during a trial it represents the interests of the public.”

The prosecutor is accountable either directly or indirectly to the voter in a society. She is directly accountable in the US since most attorneys are subject to election. In Europe, the accountability is more indirect, since the procuracy is constructed as a hierarchy where the more senior staff guide the junior staff, and the Minister of Justice holds overarching responsibility (Luna and Wade, 2012). The procuracy’s budget, which may constitute a constraint, is set by the elected parliament (Rasmusen, Raghav and Ramseyer, 2009). The police is responsible for responding to crime reports, safeguarding victims and gathering evidence. Depending on the jurisdiction, the prosecutor either guides the

investigation or is handed the evidence at the end of the investigation. If the prosecutor is involved in the investigation, she decides whether the case should be continued or dismissed. When the investigation has been completed, she can conclude the case through out of court agreements, if available in her jurisdiction, or will be responsible for preparing the trial and running the case through the court system (Luna and Wade, 2012).

The level of discretion a prosecutor has is influenced by the explicit procedural laws (*de jure*), and less formal norms and guidelines (*de facto*), available in the jurisdiction. If plea bargain³ is permitted, the prosecutor can influence the terms of this agreement. She can choose the strategy for both the pre-trial and trial, and can also propose the sanction to be imposed on the defendant. In addition, some jurisdictions grant the prosecutor the possibility of imposing criminal sanctions, called prosecutorial sentencing, which gives the prosecutor an authority formerly only granted to judges. This development comes with the extensive pool of sanctioning options some prosecutors are given to use at their own discretion. This judge-like role can also occur when the prosecutor is involved in sentencing through bargaining, which is when the prosecutor takes part in negotiating court judgments (Luna and Wade, 2012).

2.2 The prosecutor's discretion

The boundaries of what is and is not legal are not always clear. The reason for this can either be a gap between *de jure* and *de facto* procedural rules, or a lack of compliance from the prosecutor. If there is no independent review of the settlement process, this lack of compliance can create a *de facto* legal space wider than what is explicitly stated in legislation. There are multiple reasons for why there is a difference from *de jure* laws and *de facto* ways of interpreting or exercising the law. A country can have no criminal corporate liability, and thus no *de jure* negotiated sanction on corporate misconduct, because it opposes the idea that guilt can be placed on a corporation, since it is not a real person. However, the *de facto* solutions to this exist in case law, where corporations are sentenced to pay fines or other sanctions.

2.3 The prosecutor's independence

In the jurisdictions surveyed, the prosecutor's discretion is protected by the constitution. This formal independence influences the prosecutor's degree of discretion. "The expected utility of corrupt behaviour does not only depend on the (factual) independence of prosecutors, but also on the (factual) independence of judges. If judges are not independent from government, then corruption cases might be brought to court by prosecutors but not be sanctioned by judges. This means that an independent procuracy is primarily expected to have beneficial effects if the judges are also independent from government interference" (van Aaken, Feld and Voigt, 2010:3).

³ "the negotiation of an agreement between a prosecutor and a defendant whereby the defendant is permitted to plead guilty to a reduced charge" (Merriam-Webster, 2018)

Negotiated settlements can have a positive impact on the independence of judges. If judges are not independent, or if they are corrupt, negotiated settlements can be a tool to circumvent dependent or corrupt judges. If the defendant knows that the judge is corrupt, the defendant will have a strong incentive to decline the settlement and bring the case to court, to be able to bribe their way out of the case. On the other hand, the prosecutor can act as a gatekeeper, as long as they have the sole power to bring a case to court. Independent prosecutors or judges who do not comply with the law is obviously harmful. The expected benefit of independent institutions, like the judges or the procuracy, is only clear if both institutions are independent (van Aaken, Feld and Voigt, 2010).

2.4 The prosecutor's goals versus society's goals

In the economic literature, it is explained how the level of prosecutor's discretion can in theory be aligned with a goal of maximising the expected social welfare (Garoupa, 2009) When expected social welfare is the primary goal, it makes sense to apply selective prosecution (principle of opportunity), because mandatory prosecution (principle of legality) will force the procuracy to pursue cases that do not have an impact on social welfare. The principle of opportunity gives the prosecutor wider discretion, which will only benefit society if the prosecutor's goals are aligned with the goals of society. When the prosecutor's goals deviate from the social goals, for example because of low competence, low integrity, or short term gains, the value of selective prosecution decreases. This will reach a point where the cost of having mandatory prosecution is lower than the cost of having selective prosecution.

Differences in the level of discretion among countries can stem from how well countries have, or are perceived to have, aligned the goals of society with the goals of the prosecutor. If decision makers in a country believes to have coherent goals between society and the prosecutor, they can allow for more discretion. However, this does not mean that all countries with wide discretion have a well-developed alignment between society's goals and the prosecutor's goals. We need to be even more specific with regards to society's goals, because what is actually good for society might be given less weight or not be sufficiently understood by decision makers who define goals and develop strategies to achieve them.

An independent prosecutor is more free to align her goals with politically defined goals for society, as she does not fear any political interference with her work, but there is nonetheless no guarantee that this will be done. Finding the right balance between the prosecutor's independence and imposing the right incentive for the prosecutor to align her goals with the goals of society is key for a well-functioning law enforcement system.

2.5 Negotiated settlements

The number of cases resolved by the use of negotiated settlements has increased the last decade (SEC, 2017a). In the definition of negotiated settlement, the notion of *agreed resolution* is important, as this

is what distinguishes it from a traditional court procedure. A court procedure does not require any cooperation from the defendant, which is necessary in a negotiated settlement. The advantages of negotiated settlements are that they are a cost efficient alternative to a court case, they provide greater sanctioning flexibility, which can incentivise cooperation from the defendant, and they are a quicker way of concluding criminal cases, which can increase the number of cases the procuracy can handle under its budget. However, this alternative path towards justice has not developed undisputed.

The increased use of negotiated settlements (OECD, 2014; DOJ, 2017) is criticised for being inconsistent with the rule of law in countries where the prosecutor has wide discretion (Arlen, 2016). Critics like Corruption Watch argue that the development of negotiated settlements fail to deter corruption, and that some of the presumptions for the support of negotiated settlements, like preventing companies from going out of business, are not evidence based (Markoff, 2013; Corruption Watch UK, 2016).

3 The data

This study applies data provided by Makinwa and Søreide (2018). The data was collected with the help of the Structured Criminal Settlements Subcommittee (SCSS) at the International Bar Association (IBA), and is the result of a survey among its members conducted in 2017. The survey is part of the project *Towards Global Standards in Structured Criminal Settlements for Corruption Offences*. Lawyers from 62 different countries contributed with insights about how negotiated settlements are regulated and the prosecutor's degree of discretion. This mapping of negotiated settlement has not been done before, and the survey material sheds light on a part of the criminal justice system that varies substantially across the world.

The participants of the survey were asked to give their professional opinion, referring to the appropriate laws, on how negotiated settlement is conducted in their country. The selection of countries is not random, but dependent on who responded to the survey. The majority of the respondents are from OECD countries and Africa and Asia are relatively underrepresented. The number of total observations in the dataset is low for statistical purposes. The survey questions used in this paper relate to the prosecutor's discretion, and to which extent she can apply her own judgement. Two variables are used as an indicator for the prosecutor's degree of discretion. The variables are de facto prosecutorial discretion and de jure prosecutorial discretion.

The majority of the countries included in the survey have corporate criminal liability. Only eight countries are common law jurisdictions, while the rest have a legal system based on civil law. The countries are given scores (1-5) according to their extent for prosecutorial discretion. It becomes clear from the survey results that de facto discretion does not necessarily overlap with their de jure discretion. Eleven countries have the lowest score (1) on de jure discretion, while four countries, France (after the Sapin II reform), Croatia, Belgium and US score the highest (5). France and Czech

Republic have the highest score on de facto discretion. Out of the 63 countries, 29 are considered to have a deviation between de jure and de facto discretion.

3.1 Explanation of variables

This section explains the survey questions used to construct the de jure and de facto discretion variables. After each question, the respondents were encouraged to explain in more detail. The qualitative responses, in addition to the quantitative responses, were used to determine the de jure or de facto score.

1) *Which rules determine the exercise of prosecutorial discretion in your country? (You can choose more than one option)*

- *Principle of legality and mandatory prosecution*
- *Principle of opportunity*
- *Defence mitigation argued to the judge*
- *Defence mitigation argued to the prosecutor*
- *Other. Please specify:*

If the respondent indicated principle of opportunity and/or defence mitigation argued to the prosecutor, this increased the de facto score. If the respondent indicated principle of legality and mandatory prosecution and/or defence mitigation argued to the judge, this would increase the de jure score.

2) *Which of the following factor(s) is taken into consideration by the enforcement authorities to determine the punishment imposed on the alleged bribe payer? (You can choose more than one option)*

- *Voluntary disclosure of wrongdoing/self-reporting*
- *Cooperation with enforcement authorities through the investigation*
- *Existing prevention and detection measures*
 - *Risk assessment*
 - *Training*
 - *Detection mechanisms such as internal, anonymous*
- *Commitments to institute new prevention and detection measures*
- *Assistance in investigating and prosecuting individuals*
- *Other. Please specify*

If more options were available to the prosecutor when determining the punishment, the de facto and de jure score increased.

3) *Are there limits on what the prosecution can offer?*

Respondents indicate whether there are limits, and what the limits are. If laws impose the limits, the de jure score is effected, and if the limits are based on norms, the de facto score changes.

4) *Role of the court with regards to structured settlements*

Questions regarding the involvement of the courts are considered to influence the degree of discretion. The role of the court before, during or after the settlement process influenced de jure and de facto discretion depending on the respondents' description of the court's role.

5) *De Facto or De Jure: In view of your answers to 3.1 - 3.4 above⁴, would you describe the criminal settlement process for corruption offences in your country as a de jure process (i.e. subject to clearly defined legal rules governing the proposal and implementation of structured settlements) or de facto (i.e. no clear legal framework for settlements)?*

This question contributes to clarifying the basis of whether negotiated settlements are founded in a de facto or de jure system. The final survey question, which was used as an input to de jure and de facto discretion, is the following:

6) *Do prosecutors have unfettered discretion with regards to the following:*

- *Deciding whom to charge with a crime?*
- *Deciding what charges to file?*
- *Deciding whether to drop charges?*
- *Deciding whether or not to plea bargain?*
- *Is there a threshold that determines when a prosecutor should make a decision to prosecute?*
 - *How clearly are the factors of this threshold defined?*

For some countries, it can be difficult to draw the line between de jure and de facto systems of negotiated settlement. In order to strengthen the distinction of de jure and de facto systems, research by van Aaken, Feld and Voigt (2010) has been included because their data relies exclusively on verifiable information. Adding other sources of data contributes to increasing the reliability of the study.

4 Analysis

This section contains the analysis of the selected survey data. The hypothesis investigated originates from the following assumption: countries with higher levels of trust in the procuracy will award them with more discretion. By investigating the correlation between levels of discretion and measures of trust in and development of the procuracy, we can test whether the assumption holds. These correlations will also test the assumption that countries tend to follow the manner in which the US

⁴ The questions that are here numbered from 1 to 4.

organises negotiated settlements and how it grants a high degree of discretion to its prosecutors. If there is no correlation between prosecutorial discretion and performance on good governance indicators, there is arguably no clear argument or consensus regarding the optimal level of discretion for the prosecutor in negotiated settlement situations.

4.1 Differences in regulation

The results of this study highlights the differences in regulation. Despite the United States' role as the main contributor on law enforcement of corporate bribery cases, other jurisdictions do not necessarily converge in the direction of the US de jure system when it comes to the use and regulations of negotiated settlements.

4.1.1. Rule of Law Index

The Rule of Law index ranks countries from best to worst, where the closer you are to 1, the better the rule of law is considered to be in that country. The hypothesis that countries with well-functioning rule of law will have a higher degree of discretion is tested here. As we can see in Figure 1, there is no clear correlation between rule of law and the level of de jure discretion. Countries that do well on the Rule of Law Index are spread across the spectrum of de jure discretion. However, no countries score 5 on de jure discretion in the lower half of the data. This can be interpreted as a possible indication that more discretion is given to prosecutors in jurisdictions with better rule of law, which supports the hypothesis that better rule of law allows society to entrust more discretion to its prosecutors.

The World Justice Project publishes the Rule of Law index. The index is based on 110,000 households and expert responses to the survey, which in 2016 covered 113 countries. The index relies on eight factors: government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice (World Justice Project, 2016).

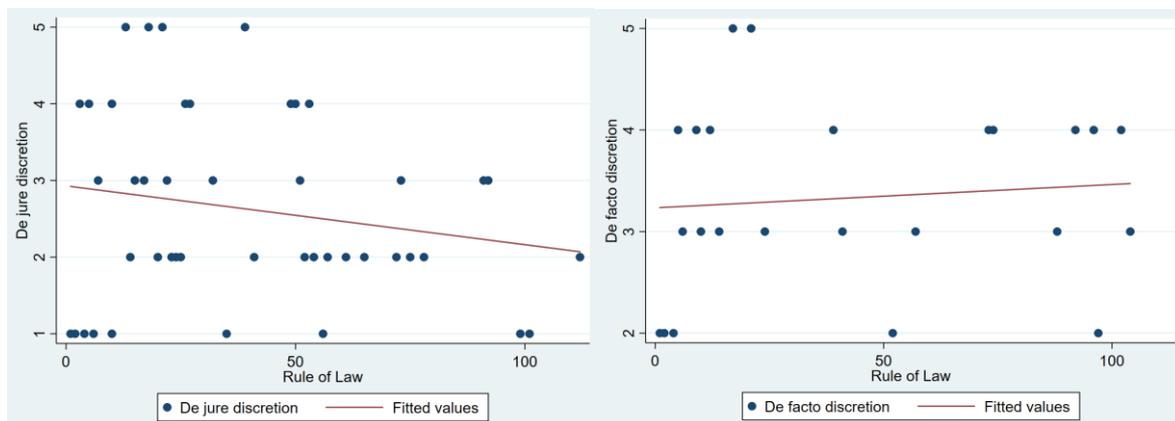


Figure 1: Rule of Law Index vs. de jure discretion

Figure 2: Rule of Law Index vs. de facto discretion

Figure 2 shows the de facto degree of discretion, which is rather inconclusive. There is a slight upward trend on the fitted values, but considering the low number of observations and the subjectivity of the observations, this does not constitute sufficient evidence for clear conclusions.

If we compare the same Rule of Law data with van Aaken, Feld and Voigt's (2010) data, we observe that the de jure independence actually increases as the rule of law gets weaker (Figure 3). On the other hand, the de facto independence (Figure 4) shows that more independence is in reality given to prosecutors in countries with a stronger rule of law.

De jure discretion and de jure independence can have a different correlation with rule of law because independence does not entirely explain discretion. Other factors might therefore influence the extent of discretion and thus shift the direction of the fitted values line. The extent of de facto independence, however, supports the hypothesis that countries with a stronger rule of law are more inclined to grant their prosecutors more discretion and independence.

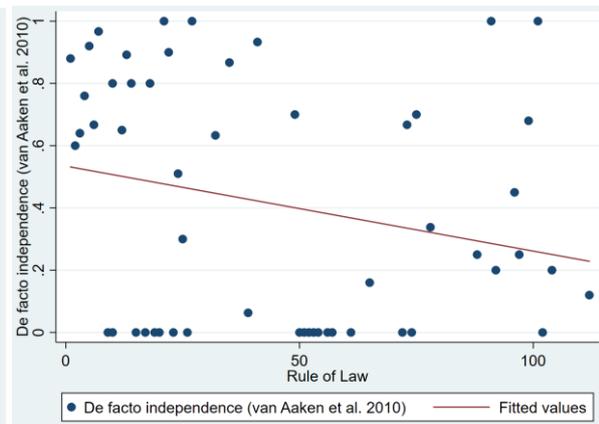
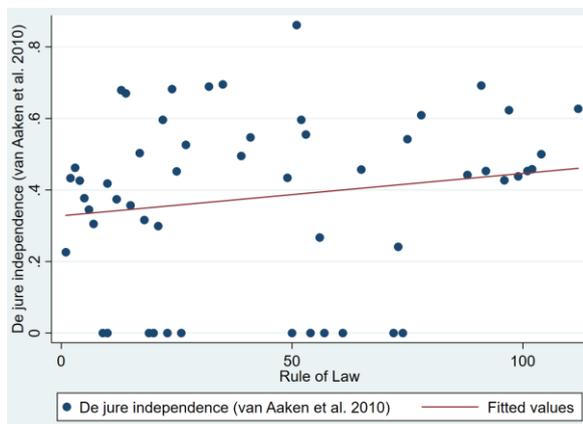


Figure 3: Rule of Law Index vs. de jure independence
facto independence

Figure 4: Rule of Law Index vs. de

4.1.2. Corruption Perception Index

Following the intuition from earlier, we want to investigate if countries with low perceived levels of corruption score higher on prosecutorial discretion, because a trusted procuracy can be granted more discretion. The data gives the same indications as in the comparison with the rule of law. The lower the extent of perceived corruption in a country, the more de jure discretion is entrusted to the prosecutors (Figure 5). The de facto comparison is inconclusive for the same reasons as presented above (Figure 6).

Transparency International's Corruption Perception Index (CPI) has been widely cited in policy and academic papers. The index informs about perceived levels of corruption across 176 countries. The scale goes from 0, which is highly corrupt, to 100, which is very clean (Transparency International, 2016). While the index' emphasis on perceptions makes it unclear how well it informs about actual extents of corruption, it does tell us something about citizens' trust in their government and law

enforcement systems. Corruption in the judicial system is often perceived to be high in countries that score low on the CPI.

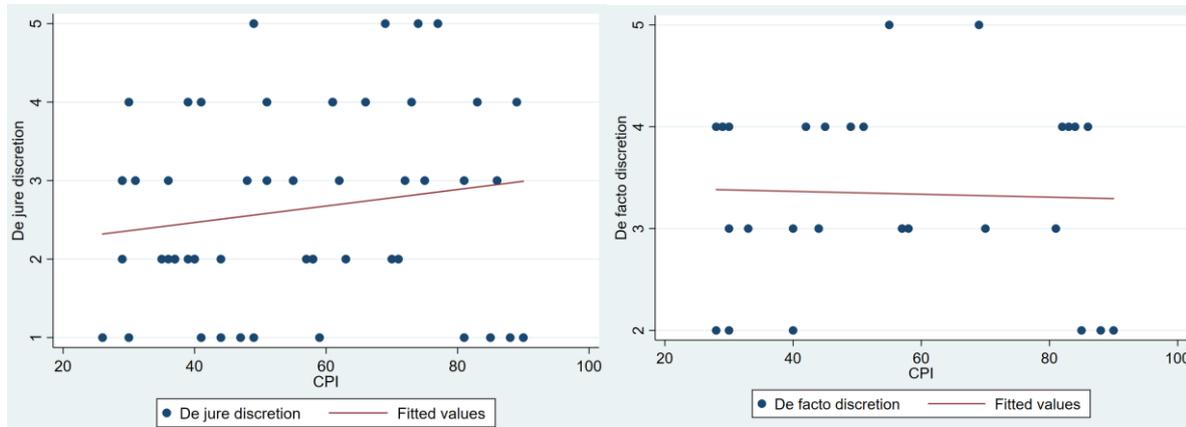


Figure 5: CPI vs. de jure discretion

Figure 6: CPI vs. de facto discretion

In their paper, van Aaken, Feld and Voigt (2010) compare their data with the CPI, and conclude that more de facto independence of the prosecutor correlates with lower perceived levels of corruption.

4.1.3. Ease of Doing Business Index

As explained, lower degrees of discretion is associated with a less flexible and more predictable law enforcement system. Will business-friendly governments allow their prosecutors vast discretion for the sake of lenient enforcement vis-a-vis commercial players? Or, will such inclinations be trumped by the aimed for predictability associated with low discretion? Figures 7 and 8 indicate that more business-friendly governments grant their prosecutors more discretion, since there is a slight decrease on the ease of doing business ranking when discretion is reduced.

The Ease of Doing Business Index was developed by the World Bank. It measures the framework conditions for trade in 190 countries and cities on their business regulations and law enforcement. The data indicates how easy or difficult it is to start and run a small or medium sized business in the given country (World Bank, 2016). The data is ranked, where 1 is the country with the best opportunities for doing business, and the higher the ranking is, the worse the country's performance on the index. The predictability of law enforcement influences a country's score on this index.

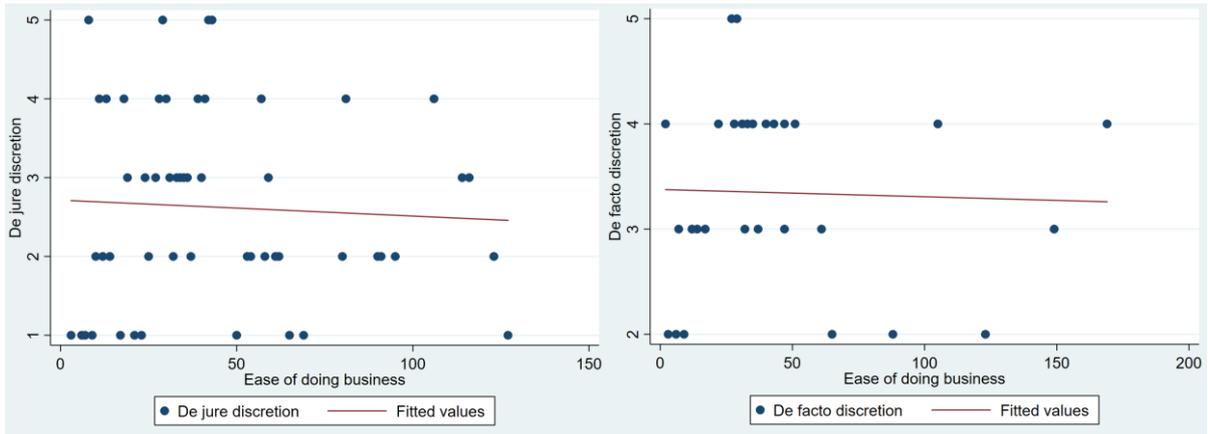


Figure 7: Ease of Doing Business vs. de jure discretion

Figure 8: Ease of Doing Business vs. de facto discretion

De jure independence (Figure 9) shows that more predictability, in terms of less independence being granted to the prosecutor, affects ease of doing business as assumed in the hypothesis. However, we find that the de facto independence is the opposite (Figure 10).

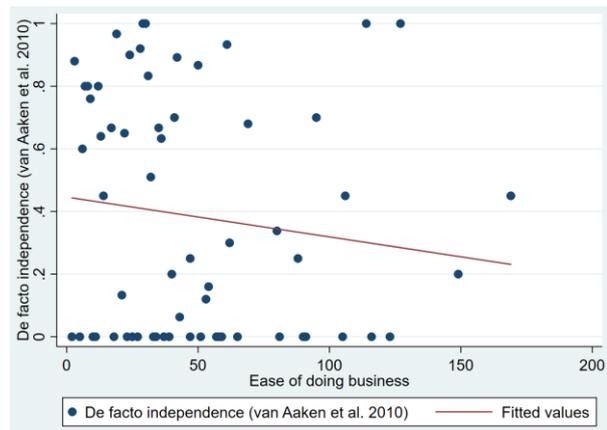
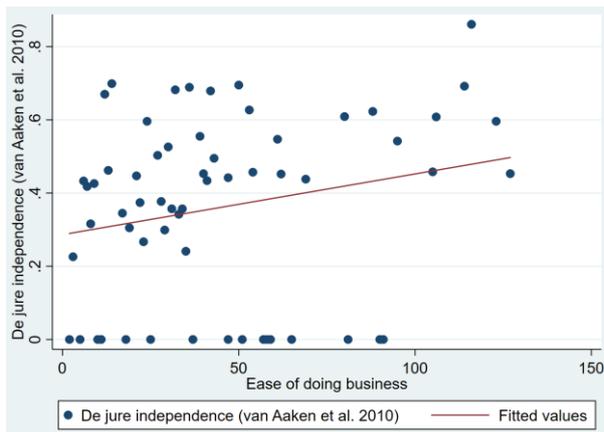


Figure 9: Ease of Doing Business vs. de jure independence

Figure 10: Ease of Doing Business vs. de facto independence

A possible explanation of why we do not observe the anticipated positive correlation between the Ease of Doing Business Index and prosecutorial discretion is that there are other factors than just predictability that influence the ease of doing business. The other unobserved variables have a greater impact than predictability and shift the direction of the correlation.

4.1.4. Democracy Index

A developed country might have a higher degree of trust in their procuracy and thus grant them more discretion. The Democracy Index measures a range of factors that characterise a country's development. Democracy and discretion might not have a direct relationship, but my opinion is that factors influencing the Democracy Index are factors that influence discretion.

The Democracy Index was developed by the Economist Intelligence Unit. It measures 167 countries on 60 different indicators with a 0 to 10 score, where 0 to 4 is an authoritarian regime and 8 to 10 is a full democracy (The Economist Intelligence Unit, 2016). A good score on the Democracy Index means that the country possesses a bundle of attributes like free elections, voter's security, independence from foreign powers and civil servants capability of implementing policies.

The de jure discretion (Figure 11) increases slightly when the level of democracy increases, supporting the hypothesis that more developed countries offer more discretion to their prosecutors. The de facto discretion (Figure 12) points in the other direction, an indication that we cannot be certain about the correlation.

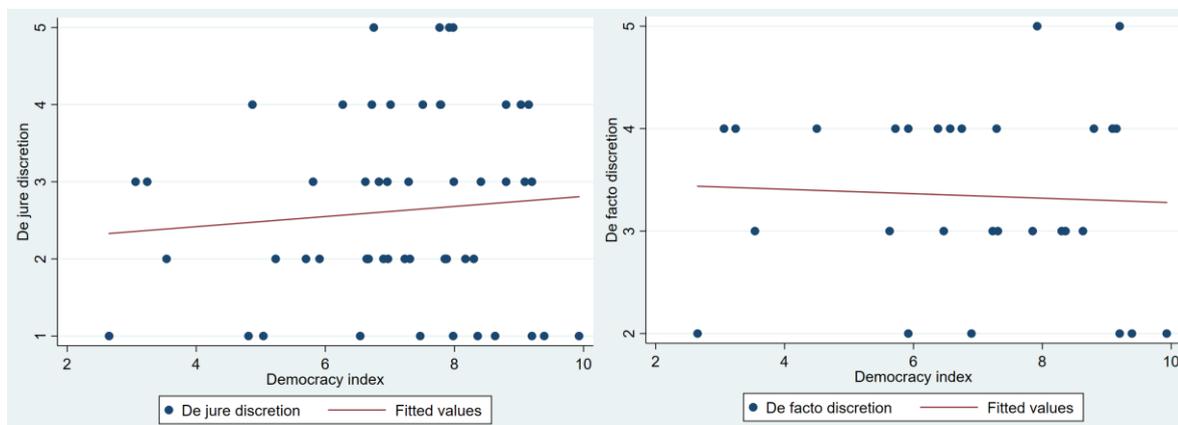


Figure 11: Democracy Index vs. de jure discretion

Figure 12: Democracy Index vs. de facto discretion

In the data produced by van Aaken, Feld and Voigt (2010) there is a more convincing correlation between prosecutors independence and the Democracy Index. A prosecutor's independence tends to be higher in countries with a better developed democracy. By regressing the variables on the Democracy Index, de facto independence is shown to have a positive impact on democracy on a 90% confidence interval.

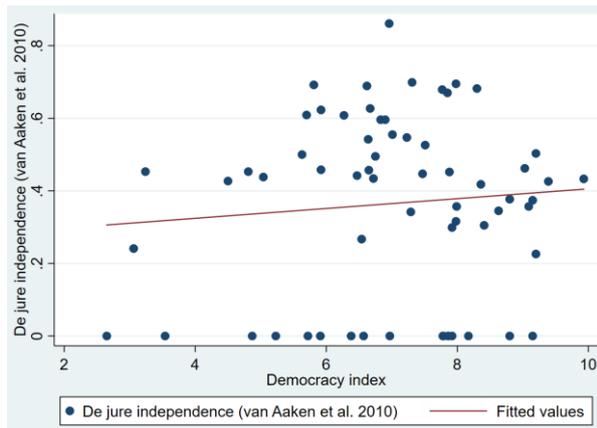


Figure 13: Democracy Index vs. de jure independence

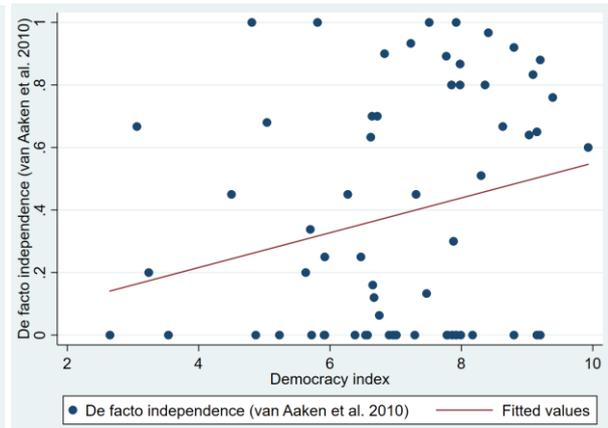


Figure 14: Democracy Index vs. de facto independence

Based on the different correlations presented here, we can make two presumptions. Firstly, there is great variation in the degree of discretion granted to prosecutors in the surveyed countries. Secondly, there seems to be support for the hypothesis that more developed countries give more discretion to their prosecutors.

4.2 Deviation from de jure regulation

A countries de jure rules, principles and institutions provide stakeholders and citizens with some amount of predictability as to what the outcome of a criminal case may be. Among the stakeholders in corporate bribery cases there are opposing forces (the prosecutor vs. the defendant), that have different interests in terms of how predictable the legal system should be. Rational decision makers in a corporation would prefer as much predictability as possible. This would enable them to incorporate the expected gain or loss from complying or breaching the law into their decision making.

This spectre of discretion vs. predictability is created when discretion is explicitly structured in procedural laws or when there is a deviation from the de jure rules. As Sørøide (2018) explains, OECD members are obliged to incorporate the OECD convention on foreign bribery, but the actual implementation shows that its incorporation in local laws complicates legislation, making enforcement difficult. In addition to making enforcement difficult, poor implementation can create less predictability without necessarily adding to the prosecutors' degree of discretion.

Theoretically, it is possible to deter most forms of crime by setting sanctions and the probability of getting caught high enough to outweigh the gains from crime (Becker, 1968). In reality, it is impossible for law enforcement agencies to set these variables at a level that deters crime, and this justifies the introduction of other strategies for preventing crime – such as settlement based sanctions and more tools available for the procuracy. More discretion for the prosecutor, however, will easily lead to less predictability in law enforcement outcomes, including for the accused corporations. The

prosecutor's degree of discretion and the corporation's predictability varies greatly from country to country, as we have seen in the previous section.

The United States is an example of a country with a high degree of prosecutorial discretion and in our data, it scores 5 out of 5 on de jure bargaining freedom. When investigating why American prosecutors enjoy a high degree of de jure discretion, the explanation shows that not only do they have de jure discretion, but also an additional and further stretching de facto discretion. The reasons for why they have such a high degree of discretion poses a question for reflection; "When do prosecutors or judges have too much discretion?" For the US, this question can help to understand and critically assess the deviation from de jure discretion. Pizzi in Luna and Wade (2012) explains that the de jure and additional de facto discretion stems from a lack of trust in the judiciary system. Judges have been criticised for having too much discretion. A single judge in Texas can sentence a person to between 5 and 99 years for robbery, and as long as the length of a sentence falls within this interval, there are few possibilities of appeal. Because of this development, negotiated settlements have seen a huge increase, not only in corporate bribery cases but also for other felonies.

A possible explanation to be reaped from the comparison between prosecutor's independence from the van Aaken, Feld and Voigt (2010) study and the de jure and de facto discretion, is that it is possible to have discretion with or without independence. We have studied de facto and de jure discretion, and have uncovered that there are real differences between de jure and de facto discretion. For example Germany is the country in Europe with most settlement cases, but there are few de jure laws regulating settlements. Van Aaken, Feld and Voigt (2010) find a difference between de jure and de facto independence for prosecutors, which supports the conclusion that there can be significant differences between a country's de jure and de facto level of discretion and independence.

5 Summary

The opportunity to offer accused corporations a negotiated settlement implies a broadening of prosecutors' range of tools available for acting on complex forms of corruption. Negotiated settlements change the structure of criminal enforcement and can be used in ways that reward corporations for their self-policing and self-reporting initiatives (Arlen and Kraakman, 1997). The increased use of negotiated settlements can encourage remedial actions, compensation of victims and efficient compliance programs, depending on the principles, predictability and aims behind enforcement.

The OECD (2014) report on law enforcement statistics reveals that settlements were used in 3/5 of enforcement cases, with a clear majority taking place in the United States. The study finds that different countries apply very different degrees of prosecutorial discretion, and there is no clear trend that countries are moving in the direction of US practices and regulations regarding settlements when it comes to prosecutorial discretion. However, we see some indications that more discretion and

independence is given to countries that have a stronger rule of law more generally. More discretion is also given to prosecutors in countries that do well on other good governance indicators, including on corruption, business regulations, and democracy.

The survey results reveal an observable difference between de jure and de facto discretion for prosecutors who negotiate settlements with corporations. Most jurisdictions with high de jure discretion also have high de facto discretion. However, there are some countries that have low de jure discretion combined with high de facto discretion.

The findings of this study highlight questions that deserve further research, for example regarding the value of more harmonised guidelines for settlements internationally, and what degree of discretion for prosecutors can be associated with efficient and legitimate law enforcement systems.

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