

How the global neoliberal system facilitates corruption in advanced Western  
economies?

Changes in state capacity in the United States and Germany

Master Thesis

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## 1 Introduction

The idea that corruption could be systemic in a modern developed state is counterintuitive. The Western democracies are the models of strong institutional capacity and the rule of law, which are the key to effective control of misconduct (Hellman 1998, Tanzi 1998). However, the massive fraud of the U.S. banking institutions and the consequent global financial crisis in 2007-2009 (Wiegatz and Whyte 2016), Siemens global bribery scandal which lasted over a decade (Lichtblau and Dougherty 2008) and the Troika Laundromat, which involved several Western banks into the largely unnoticed Russian money-laundering scheme (Radu 2019) are just a few drops in the vast sea of international corruption which tell otherwise – while states have strong institutions, the global challenges make it increasingly harder to control misconduct.

The negative impacts of corruption on the development of states regardless of their economic strength are unequivocal. Although the findings are mixed regarding corruption influence on the general domestic economic performance, in the long-run malfeasance negatively influences public and private life, hindering the potential economic, political and social development (see Huang 2016, Lisciandra and Millemaci 2016; Della Porta and Vannucci 2016: 213; Sekrafi and Sghaier 2018, Uslaner 2009). Widespread corruption distorts the economic relations between government and its citizens by increasing the costs and reducing the quality of the public services (Uslaner 2009, Nikoloski and Mossialos 2013). Consequently, it hurts the poorest citizens the most, as they have to pay the highest share of their income in forms of kickbacks, further contributing to income inequality and poverty (Uslaner 2009). In a country's social and political development, corruption lowers trust in the government and the society, and increases absenteeism in politics which may even result in political instability (Intini and Capussela 2015, Walston 2013). Hence, corruption is especially damaging to democracies (De Vries and Solaz 2017, Del Monte and Papagni 2007).

The problem of increasing corruption in Western economies is closely related to the financial and economic openness of the countries. Global trade in goods and services for the past 20 years has increased three-fold (WTO Data 2020). According to Dell and McDevitt (2018), the increase in the global economic activity also raises the risk of illicit economic activity, including transnational corruption and fraud, pulling the actual numbers up. The reason – domestic actors become linked in many ways to the foreign agents, which in the global economy remain hidden within opaque financial and trade networks. Still, strong Western institutions and law enforcement should be able to regulate foreign corruption as any other

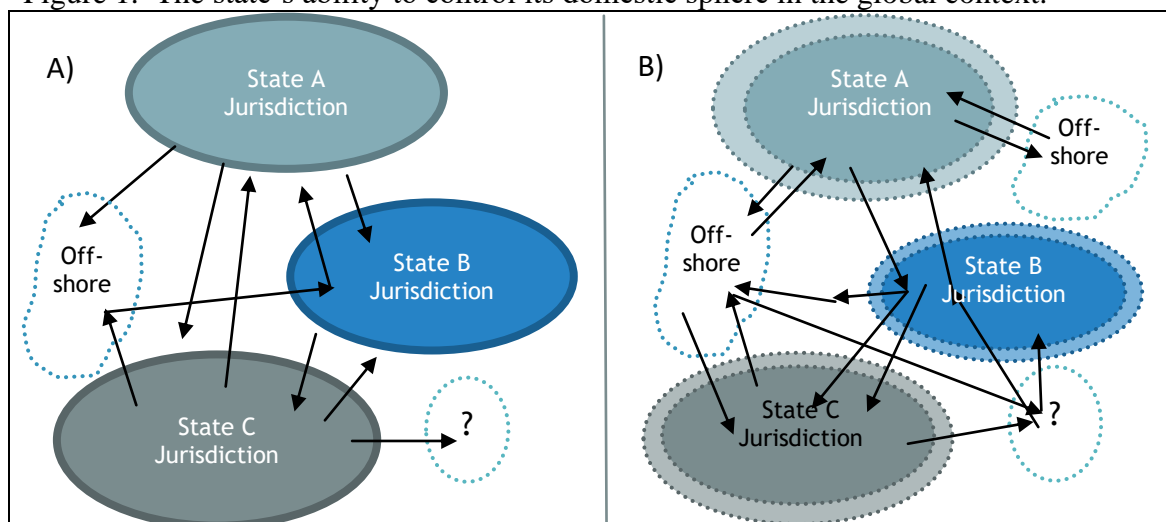
illicit domestic activity. However, despite the efforts to curb it, Western economies face a salient issue of malfeasance to which it seems there is no end (see “Entity Groups Charged per Year” in Stanford Law School n.d., Koehler 2019, OECD 2018b: 58). Hence, although neoliberalism helped states to strengthen before, in a globalized economic system, it undermines state capacity to curb corruption.

To explain why Western economies struggle to control corruption when they are economically and institutionally powerful is a challenge because neoliberalism argues law enforcement and strong institutions are the essences of ensuring the rule of law (Plant 2010). Yet, there are several theories which explain the reasons underlying the connection between the modern global economy and the developed state role in preventing illicit activities, including corruption.

International organizations, including the OECD and non-governmental organizations like Transparency International, propose a dominating view that inability to impose effective control over bribery, financial fraud and similar corrupt acts is a result of low political will or inadequate regulations imposed by national institutions (Dell and McDevitt 2018, OECD 2009). In other words, domestic institutions are fully responsible for the effectiveness of the foreign corruption prevention, hence, if they do not succeed to accomplish this task, the framework of national institutions is at fault and must be improved.

Alternatively, Cerny (1995) proposes, that the current global neoliberal economic system undermines the state institutional capacity to control domestic sphere regardless of the level of sophistication of the institutional framework. He invites to look into the domestic economy as the fragment of the global economy, that is, a domain in which the domestic activity spill-overs more easily to the international sphere and vice-versa (Figure 1). Outward expansion of the domestic economy determines that the domestic institutions are not able to keep up with the increased scope of problems which infiltrate domestic economy and transfers their regulation to the global mechanisms (e.g. treaties, international standards, transnational companies) rather than the government’s own devices. As a consequence, the state tries to impose adequate regulation, but it is limited by the dependence on the global market, domestic jurisdiction and its resources which will not surmount to the international scale. Thus, the capacity, as well as the legitimacy of national institutions will be constantly challenged by the global and domestic forces, failing to accomplish novel tasks given to them.

Figure 1. The state's ability to control its domestic sphere in the global context.



Note: A) Dominating understanding, as proposed by OECD (1977); B) Global perspective, as proposed by Cerny (1999). Arrows illustrate the movement of corrupt activities. With the increase of secretive transactions, the demand and supply for secrecy jurisdictions increases.

Source: Illustration by author, based on the OECD Anti-corruption Convention (1977) and Cerny (1995) theoretical framework.

Indeed, the influence of the global neoliberal system cannot be discounted when national economies depend on the performance and mechanisms of the global economy. On one hand, as Lord (2013) notes, the operating field of the companies, which transcend multiple jurisdictions, hinders the ability of domestic law enforcement to investigate them within time, legal constraints, and cost-efficiency considerations (*ibid*). For instance, the average investigation for U.S. law enforcement lasts around 40 months on average and costs \$2 million per month (Stanford Law School n.d.). Hence, the institutions seek to choose less resource-intensive albeit softer enforcement mechanisms which would provide the higher success of compliance.

On the other, authors Wiegatz and Whyte (2016) observe that the governments fail to establish strict controls due to importance of business and capital to the economic prosperity, which makes the former reconsider their moral preferences. As Fligstein (2001) explain, institutions, including norms, rules and governmental agencies shift according to the developments occurring between the state, capital and labor. Because of capital mobility as a response to the disadvantageous government policies, financial and corporate agents can pressure governments to establish lax regulations over labor and business practices. Although these policies will secure investment and ensure economic growth, from the perspective of the public interest, they may harm the labor rights and social security of a state (*ibid*). Consequently, the government may lower their moral values and tolerate unethical business practices – the behavior of the policy-makers making morally corrupt.

Yet, there is scarce research on the real impact of the global political economy over the domestic institutional capacity of the modern Western states to curb foreign corruption in practice. Therefore, the research question of this thesis is:

*How the global neoliberal system changes the advanced economies' institutional capacity to curb corruption.*

Prior to the literature review, I will define some key terms used in the research.

### 1.1 Key definitions

The definition of **corruption** requires a separate discussion on its own, as it has many forms and causes (Heywood 2016). However, exploring the phenomenon in its own right is beyond the scope of the thesis. Thus, to avoid possible predispositions, it is necessary to use this definition in its most generic sense. The one proposed by Gambetta (2002) is the most appropriate. The author states that corruption is a morally (and legally) illicit transaction in which two agents derive benefit from the abuse of the delegated power and trust by the third actor, consequently harming the latter. Hence, on one hand, corruption is “business as usual” – an illicit transaction between actors – but taking into account the global context, it is transformed into a complex phenomenon which involves foreign and domestic economic actors, jurisdictions and institutions (Cooley and Sharman 2015, Dell and McDevitt 2018).

**Institutional capacity**, according to Willems and Baumert, citing Segnestam et al. (2002) is “a broader ‘enabling environment’ which forms the basis upon which individuals and organisations interact” (2003: 11). While institutions, according to North, Wallis and Weingast (2013: 15) are “the patterns of interaction that constrain the relationships of individuals. [They] include formal rules, written laws, formal social conventions, informal norms of behavior, and shared beliefs about the world”. Still, in the thesis, it mainly refers to the ability of governmental institutions (e.g. law enforcement) to accomplish their functions and a state to exercise its power to prevent morally unacceptable (i.e. corrupt) practices.

**Advanced economies** are classified by the International Monetary Fund (IMF) according to the three factors: high income per capita, high export diversification level and high degree of integration into the global financial system, although these are not strict criteria and take context and social development factors to define country as advanced (IMF 2020).

**Global neoliberal system** is a set of pro-market norms, policies and beliefs, which is driven by the principle that countries have to increase international economic cooperation to

achieve the highest domestic economic potential (O'Brien and Williams 2016). The measures include mainly abolishment of trade and financial barriers, ratification of free-trade agreements and participation in intergovernmental economic organizations (e.g. WTO). Yet, they also affect the domestic policies which seek to attract foreign investment and increase competition in the domestic market (Ostry, Loungani, Furceri 2016).

In the following chapters, I discuss the connection between neoliberalism and corruption in advanced economies in theory and practice. Next, I explain how this relationship changed in the light of globalization and what it means for the institutional capacity of a state. Then I conduct a case study to analyze the hypothesis in practice. Finally, I present the findings, conclusion, and provide suggestions for the future research.

## 2 Literature Review

The thesis proposes that neoliberalism diminishes the institutional capacity of the advanced states to control corruption. However, earlier, neoliberalism was *the key* to strengthening the institutional capacity (Hellman 1998, Plant 2010, Tanzi 1998). This requires to answer, what has changed throughout the past several decades. To answer this puzzle, it is useful to look at the historical development of neoliberalism in theory and practice. Thus, in the following paragraphs, I discuss why neoliberalism was chosen as the primary narrative to fight corruption.

### 2.1 Neoliberalism and corruption in theory and practice

The anti-corruption regulations are related to the development of the neoliberal theory. Historically, the transition from feudalism, in which the select few could use their power to exploit lower castes and natural resources to enrich themselves and cronies (i.e. kleptocracy), into the contemporary Western capitalism is attributed to the social development, particularly to industrialization, democratization (rent distribution among a wider society, instead of cronies) and universal applicability of the rule of law (North, Wallis and Weingast 2013). Neoliberalism draws inspiration from these developments. It presumes that free markets provide an opportunity for everyone to have a stake in the state development regardless of their social standing (Friedman 1951, Thatcher 1976). It also states that albeit the state must restrict its control over the economic mechanisms, its importance in guarding the economic sphere to help the markets to operate to their full potential is necessary. Hence, the rule of law which is supposed to safeguard the competition and equal participation in the market emanates from the neoliberal developments (Friedman 1951, Plant 2010).

In the 1970s, which faced several stagnation-inducing economic crises and the subsequent support for socialism, Western states adopted neoliberalism to accommodate their political and economic ends. First, neoliberalism became the antithesis to the Soviet Union's widespread bribery, nepotism, and shadow economy – all the result of the big state apparatus and total control of the official economy (Grossman 1977, Thatcher 1976, The World Bank 1996). Second, Western leaders had expectations that policies encouraging labor competitiveness and privatization of social security would stimulate economic growth (Bockman 2013). Effectively dealing with stagnation, igniting the sense of moral responsibility of one's fate and intolerance to corruption, and producing enormous growth for the Western societies, the neoliberal order was a great ideological and economic success against both



socialism and Keynesian policies. Hence, the historical developments at the time contributed to the formation of the neoliberal narrative as the order of fairness, freedom and prosperity (Heywood 2016, Plant 2010, Tanzi 1998).

Some of the specific neoliberal anti-corruption policies have been successful, but not in their totality. Decreasing overregulation or incompetent government intervention into the market indeed lowers public corruption (Akerlof and Klenow 2009), while political rent-seeking is controlled through checks-and-balances established by the increased competition and enforcement of the rule of law (Ades and Di Tella 1999, North, Wallis and Weingast 2013). Yet, the modern anti-corruption legislation, such as increased corporate punishment mechanisms are seldom effective to prevent further misconduct. Scholars argue it is because of state incorporation into the global economy, which transfers the function of corruption control into the international sphere (Cerny 1995, Lord 2013). Hence, while the neoliberal policies could help the states to protect their domain from corruption, with the increasing globalization and changing capital, labor and national governance dynamics, neoliberalism undermines institutional ability to enforce effective anti-corruption mechanisms.

## **2.2 Globalization and changes in state institutions**

The current neoliberal system is very different from the expectations of the 20<sup>th</sup> century economists, hence, its modern international issues. Neoliberalism acknowledged the importance of the state in the fair economic activity. As Milton Friedman (1951) noted in his inquiry on the prospects of the post-war neoliberalism, to establish effective and exploitation-proof economic system, a state safeguards competition between consumers, producers, labor and the employers. Consequently, “the citizens would be protected against the state by the existence of a free private market; and against one another by the preservation of competition” (*ibid*). Thus, the state economic policies are oriented to ensure the competition, which would establish a fair gameplay between the market participants.

After almost seventy years, neoliberalism actually hinders the state abilities to ensure competition and other fair market mechanisms. As businesses grew their power internationally and could move their capital to other countries due to decreased cross-border financial and business regulation, states began to recognize the importance of the businesses in the domestic economy, as well as limited state’s capacity to supervise the businesses operating in foreign jurisdictions (Rodrik 2017, Ostry, Loungani and Furceri 2016). Author Cerny (1995) dubs it the “gap” between domestic institutions and the capacity. Additionally, due to the Western government’s aim to expand business globally and the variety of norms surrounding corruption

in other countries, certain policies would tolerate bribes as an acceptable price domestic business pay to establish themselves in the emerging markets (Cooley and Sharman 2015, Crawshaw 1995). By rationalizing foreign corruption of domestic businesses as necessary in foreign jurisdictions, Western governments could justify their tolerance to the foreign corruption even at the risk of undermining the interests of national publics and individuals (Crawshaw 1995, Ostry, Loungani and Furceri 2016, Wiegratz and Whyte 2016). Hence, on one hand, the difficulty to adequately punish internationally operating businesses and on the other, neoliberal pro-business norms undermine the state capacity to fight corruption.

### **2.2.1 Global and internal neoliberal processes hindering state capacity**

The processes which undermine state capacity are a result of the neoliberal policies which in the global context became harmful in terms of corruption prevention. These are inter-state competition, capital account liberalization and governmental institution economization. While the Western states implement other policies, such as privatization and public spending reduction, these policies have less influence on changed state capacity to fight foreign corruption. Discussion on these two policies is in the last paragraphs of this chapter.

#### **2.2.1.1 Inter-state competition**

The economic history of the world is marked with periods of economic interdependence between states and mercantilism<sup>1</sup> or self-sufficiency for several millennia, hence, globalization is nothing new (see Hopkins 2002). Yet, the establishment of first international organizations, end of colonialism and the development of the information technologies led to the modern globalization which is unique in terms of the enormous growth of financialization and global production chains, and the origin of the international community of the states (O'Brien and Williams 2016: 7-8). One of the consequences of this dynamic is the deregulation-led competition between states (*ibid*).

The competition between states encourages them to establish stronger controls which are designed to safeguard the domestic economy from the external influence, but inevitably lead to the lesser ability of domestic institutions to establish adequate regulation for punishment and effective control of malfeasance (Bullough 2018, Cerny 1995). One of the main state's

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<sup>1</sup> Mercantilism – a global political economy perspective which states that all states must constantly wage their power in the international economy vis-à-vis other states due to the limited global wealth (O'Brien and Williams 2016: 8).

functions is to ensure the economic growth-friendly environment in order to provide public goods and fulfil its mission as a capitalist state, which in the global world became more difficult (Cerny 1995). Before globalization, economic growth depended more on the local inputs of capital, labor and technology, but free-trade induced economic interdependence made foreign capital and financial operations increasingly important for the domestic agents' economic progress (van Treeck 2009). As noted by Cerny (1995), countries driven by the belief that they have to compete for capital with other states to ensure the constant investment flows which ensure the economic growth would lower taxation, financial and business regulation. Other states react by lowering their regulation even more and the cycle repeats until the environment for capital is deregulated to the extent, it undermines the capacity of state institutions to competently monitor the "cleanliness" of investments and businesses entering the country from foreign countries (Cooley and Sharman 2015, OCCRP 2019). Although countries increase the capacity of law enforcement, they are still incapable to deal with such high waves of corruption (OCCRP 2019). Hence, competition in laxity among Western states makes them at a much higher risk to experience foreign financial fraud, corporate bribery and other elements of corruption.

### **2.2.1.2 Capital account liberalization**

Capital account liberalization is a policy which seeks to open the domestic capital to the global economy and consequently increase the international domestic business activity, as well as induce the volume of domestic financial activity (Ostry, Loungani and Furceri 2016). Naturally, the higher dependence on the global economy occurs as a result of the increased volume of transactions between foreign and domestic economic agents (Cooley and Sharman 2015). The higher involvement of domestic actors into global financial and trade networks expands the scale of the domestic economy which diverges from the scale of domestic institutions still acting within the state limits. Consequently, the state institutions are challenged globally and locally, in terms of their legitimacy, authority and effectiveness to implement policies.

Yet, the domestic institutions struggle to cover the gap between their actual capabilities and the capacity needed for them to prevent foreign corruption. As observed by Cooley and Sharman (2015) and Lord (2013), the deregulation-induced interdependence makes the transnational financial and business network too opaque and large for domestic institutions to monitor economic agents similarly as the economic agents operating in an exclusively domestic sphere. In every case, domestic institutions have to inspect the actions of companies, which

transcend several countries and involve many third parties. They also have to examine the company offices, legal environment of the host country, and evidence, which is gathered through auditing and the statements of agents involved – foreign officials or foreign institutions (Lord 2013). The latter also requires the legal framework for bi-lateral cooperation, which is yet another hindrance in preventing law enforcement to work efficiently (*ibid*). Because criminal prosecution and more severe cases are very resource-intensive and require substantial evidence, the prosecutors choose to cooperate with defectors more often and even establish regulation encouraging company self-regulation instead of criminal liability. Hence, in the presence of the capital account liberalization, domestic enforcement cannot establish softer enforcement mechanisms more often, and chooses alternatives such as company self-cleaning and lower sanctions.

### **2.2.1.3 Second wave of privatization - Managerialism in public institutions**

One of the assumptions of neoliberal thought is that public institutions are dependent on the government, hence, inefficient (Rodrik 2017). As a response, since the 1980s, governments mainly in the United Kingdom and the U.S. tried to achieve better efficiency in public institutions through privatization of the public services (Clarke, Gewirtz and McLaughlin 2000). Yet, the second wave of privatization encompassed reforms of the public institution framework, leaning it towards the private enterprise model. In other words, the institutions were encouraged to engage in competitive, business-like relations through key quantitative performance evaluations (*ibid*). The prevalence of key performance indicators (KPIs) might influence the work of law enforcement institutions as well.

Although it seems that performance metrics would increase the effectiveness of corruption prevention, they can undermine the work of long-term anti-corruption enforcement. In measuring the value of immaterial things like the public good, the vague and subjective social value of public institutions' work cannot be encompassed fully in economic terms, hence, statistics may not catch the true value of provided public goods (Kahneman and Knetsch 1992). For instance, is “good” enforcement one in which the number of defectors exposed is high or the decrease in corruption rates or the time needed to conduct court work (McLaughlin and Muncie 2000)? As McLaughlin and Muncie (2000) observe, in the 1990s United Kingdom's law enforcement understood its effectiveness in numbers of criminals caught, or courts taking less time to impose enforcement, rather on the measures to curb the anti-social activity. Hence, it did not result in the long-term prevention of criminality. These measures may fail to show the effect of public spending on the quality of corruption prevention

mechanisms, while the number of defectors may not be able to tell whether in totality, law enforcement helps to catch more defectors, or whether the numbers of corruption are rising, especially in international corruption. Consequently, while the high KPIs may be associated with the usefulness of institutions, they may even lead to misinterpretations of the law enforcement effectiveness and development of ineffective strategies in curbing corruption.

Moreover, law enforcement focus on quantitative indicators paradoxically leads to demotivation to find a long-term solution to corruption. Facing the pressure from the central government to achieve short-term quantitative goals, institutions become preoccupied with punishment and lose their focus to their true purpose – to innovate new prevention mechanisms which could decrease the number of cases (McLaughlin and Muncie 2000). Hence, preoccupied with the efficiency statistics on investigations and prosecutions, the public institutions distract themselves from their real purpose – to curb corruption (*ibid*).

#### **2.2.1.4 Reduction in public spending**

Reduction in state expenditures (especially if the state takes austerity approach) is a potentially useful neoliberal policy in this research as it may reduce law enforcement financing, which consequently results in lower state capacity to curb corruption. Yet, I assume the policy would not affect the findings.

First, the premise of this research states that the current domestic institutional structures regardless of their financial resources cannot tackle the international corruption because of the fundamental capacity, which is too low to deal with international problems (Cerny 1995). As a result, despite the maximum efforts and resources, the state could put in, the capabilities of the state remain below those needed to solve the issues, such as transnational corruption. Hence, it does not matter whether law enforcement financing is higher or diminished – the state would be incapable to deal with international corruption in any case.

Second, state-initiated reduction in the law enforcement capacity contradicts the core ideal of neoliberalism – that the effective rule of law is a necessary part of the free-market economy (Plant 2010). It means that the states may not be willing to undermine the law enforcement capabilities even if they lower the budgets of other public spheres. Additionally, in reality, there have been only a few cases when the reduction in public spending has resulted in poorer capabilities of the national law enforcement: during the post-2008 global economic crisis, when countries had to implement harsh public budget cuts, and, after, in the United Kingdom, where the austerity program implemented since the 2010s directly resulted in lower financing of the law enforcement (Mann, Devendran and Lundrigan 2018). The case of the

United Kingdom is a radical case of the austerity agenda and has been highly criticized by media, politicians and even the United Nations (Phillips 2016). Consequently, this policy is seldom considered in the research.

All these developments might complement the globalization effects on the state capacity to fight corruption. Hence, the hypothesis of this thesis is:

*H<sub>1</sub>: The global neoliberal economic system diminishes state capacity to fight corruption.*

In the following chapter, I conduct a case study to analyze these neoliberal developments and their effects on state capacity in two Western states.

### 3 Case Study

The case study tries to answer to the thesis research question, how the global neoliberal system changes the advanced economies' institutional capacity to curb foreign corruption. To answer to this question, I conduct a case study on Germany and the United States and how abilities to prevent corruption change due to the neoliberal policies described in the literature review: deregulation of the domestic economy, capital account liberalization and economization of state institutions.

#### 3.1 Background

The two Western advanced economies - the United States and Germany – are chosen for this case study due to their similar levels of economic development and corruption (Table 1). Both of these federal states possess low levels of domestic corruption, are the leading economies in their respectful regions (Europe and the Americas) and one of the biggest exporters in the world, and have very strong law enforcement and the judiciary. Even in this case, they differ significantly regarding their neoliberal design and the anti-corruption legislative framework. Hence, this case study will try to answer whether despite these crucial differences, the state capacity regarding corruption control is undermined by the neoliberal policies under globalization.

Table 1. Main Statistics of the United States and Germany (1999-2017 average)

<u>Country</u>	<u>Exports (% of total global)</u>	<u>Gross National Income (US\$ per capita)</u>	<u>Government spending (% GDP)</u>	<u>Corruption Perceptions Index (CPI) score</u>		<u>International anti-corruption enforcement</u>
				<u>1999-2009</u>	<u>2009-2017</u>	
Germany	7.8%	37,402	46.0	7.8/10	79.9/100	Active (1999 -)
United States	10.3 %	45,934	38.2	7.4/10	73.1/100	Active (1977 -)

Notes: Definitions, sources and calculations in Annex A.

##### 3.1.1 Neoliberal differences

The neoliberal differences in Germany and the United States determine the government's role in safeguarding the interests of businesses, the society and their ability to

establish the rule of law in case of the business misconduct. While Germany emphasizes the market as a basis through which the state can provide public goods to the society, the federal government of the U.S. emphasizes the importance on the market ability to provide goods to each individual. These differences are explained in more detail.

Precisely, Germany's economic system is a modified version of neoliberalism, which is ordoliberalism or the social market economy (Birch 2017, Schlösser, Schunen and Schürkmann 2017). Although the state was in transition mode during the Unification of Germany, all country has adopted ordoliberalism as the main system afterwards (Gook 2018). The system ensures the freedom of the markets to the extent they are beneficial to the social aims of the country through corporatism, that is a collective organization between workers and the businesses. The state also encourages the exports of domestic businesses (Fligstein 2001: 58). These two parts determine that, although the economic system emphasizes the importance of competition and private property, the negotiations between the state, business groups and civic associations ensure that market is a tool to provide the public good and safeguard domestic businesses (ibid). Thus, the state intervenes into the market as a broker between workers and domestic business groups to secure the interests of either group on a case by case basis.

Meanwhile, the neoliberal thinking in the United States focuses solely on the interests of the firms, which determines the business ability to use policy-making for its gains (Fligstein 2001, Longley 2019, Moffitt and Ziliak 2019). As Fligstein (2001: 56) explains in more detail, the government, unable to directly intervene in the economy, regulates the market through mechanisms which facilitate the interaction between the society and the business. Yet, the state prevents firms to control markets directly and their ability to influence the markets is also adjusted according to the international image a country seeks to project – that is, of a fair and free nation (Fligstein 2001, Heller 2016). Unlike in Europe, where the state plays an exclusive role in providing the public goods, most of the public provision depends on both private and public agents in the U.S. (Longley 2019, Moffitt and Ziliak 2019). Hence, although the country's institutions do not intervene in the market, the state imposes control over market inefficiencies to secure its international image as a defender of the liberal values - both in the political and economic sense.

### **3.1.2 Anti-corruption frameworks**

The anti-corruption legislative frameworks of Germany and the United States are both built to secure their international reputation and domestic business interests (Birkenstock 2011,



House of Representatives 1977). Yet, as the globally dominating power of the U.S. economic and foreign interests were highly influenced by foreign corruption scandals, the country had a more serious impetus to establish effective regulation with an ambitious goal to “curb” foreign corruption (House of Representatives 1977, Koehler 2019). Meanwhile, as Germany in the 20th century led an aggressive business expansion in emerging markets policy, the foreign bribery was not truly dealt with before the civil society groups and certain politicians pressured the country to establish regulation against corruption, which the country pledged in 1999 under the OECD Anti-bribery Convention (Birkenstock 2011, Crawshaw 1995). Additionally, countries also differ in liability of legal persons (e.g. companies), which depend on their constitutional design.

### **3.1.2.1 Germany’s legislative anti-corruption framework**

The level of corruption in Germany is low, as the country stands as the 9th least corrupt from 198 countries in 2019 Transparency International Corruption Perception Index (Transparency International 2020). Still, two sectors – healthcare and construction, are the most susceptible to corruption in Germany (Birkenstock 2011). From the macro perspective, the country’s measures against international corruption are the most active among the signatories of the OECD Anti-bribery Convention (OECD 2011, 2018b: 5). Although the legislation is active against foreign corruption, there is still a high risk of bribery in the public procurement, especially regarding the projects in the military, energy and healthcare sectors, and the pharmaceutical industry (OECD 2018b: 10).

The history of Germany’s enforcement is highly related to the OECD Anti-bribery Convention, ratified in 1999. The Convention, which Germany is a part of, states that the reason of its establishment is a response to the call “for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions” (OECD 1997: 3). In other words, it also seeks to efficiently lower the instances of international corruption, rather than just regulate them. When Germany signed the Convention, the foreign bribery was legal and even tax-deductible as “useful expenses” until 2002 (Dougherty 2007). Not until 2005, the first sanctions against natural persons become more common, while legal sanctions against legal persons, i.e. companies, gained momentum in 2007 (OECD 2011: 25).

The anti-corruption legislation in Germany is laid out the German Criminal code, Administrative Offences Act and the Act of Combating International Bribery (Arnsperger 2013). The laws provide a clear definition of corruption, also, its types and clauses regarding punishment (OECD 2018b). The anti-corruption legislation applies to foreign and domestic

agents, but criminal liability is only applicable to individuals, as according to the constitution, companies cannot have a legal personality (Arnsperger 2013, Helck 2020, Lord 2013). Still, companies can be held accountable for administrative offences which impose punitive component of the fine of up to € 10 million (OECD 2018b). The anti-bribery enforcement is decentralized: corruption investigations and court hearings are the responsibility of Länder – the 16 federal states of Germany – rather than the federal institutions, which also determine the law enforcement discrepancies between the regional units (ibid). Each Land deals with international corruption risk differently – some have established separate anti-corruption units while others assigned prosecution offices (OECD 2011: 41). Around 2016, the country established a national Financial Intelligence Unit to investigate financial fraud. Thus, the country's anti-corruption legislation provides grounds for strong enforcement against foreign corruption and financial fraud.

### **3.1.2.2 The anti-corruption framework of the United States**

The corruption level in the United States is moderate – the country was 23rd out of 198 least corrupt countries in 2019, which result is highly negatively influenced by the Trump's administration practices (Transparency International 2020). Public corruption modestly exists on the local administration level (Cordis and Milyo 2016, GAN Integrity n.d.). The defense, public procurement and energy sectors are at the high risk of corruption in the U.S. (Koehler 2019). From a macro perspective, the country is also one of the most active countries worldwide against international corruption (Dell and McDevitt 2018, OECD 2010). The 1977 Foreign Corrupt Practices Act (FCPA) criminalizes the foreign misconduct of domestic firms as well as foreign agents' malfeasance in the U.S. jurisdiction, which, considering the worldwide activity in the New York stock exchange, determines extensive law applicability (Brewster and Buell 2017, Margolis and Wheaton 2009). Since the establishment of the FCPA in 1977, there have been 300 individual foreign corruption cases (Koehler 2019). Thus, the U.S. enforcement against corruption is very active, although some instances of internal corruption are present.

The creation of the 1977 Foreign Corrupt Practices Act in the United States is more closely related with the country's experience in the Watergate scandal and its changing role in the post-Cold War international community, rather than the country's economic considerations (Brewster and Buell 2017). These developments also highlighted the problems of the domestic firms bribing foreign officials abroad (ibid). The damage the domestic firms made to the international U.S. image by bribing public officials in Japan and Italy was the impetus to

increase control over the international business relations, both foreign agents acting in the domestic economy and domestic companies acting abroad. Hence, the goal of the federal anti-corruption institutions was to diminish, rather than to simply impose control over foreign bribery (Koehler 2019).

The FCPA establishes measures against both domestic and foreign corporate agents (Koehler 2019, Meyer, Devaney, and Tomczak n.d.). The three main federal U.S. institutions: Department of Justice (DOJ), Securities and Exchange Commission (SEC) and Federal Bureau of Investigation (FBI) conduct the investigations and act as plaintiffs during the court rulings (Koehler 2019, OECD 2010). Criminal liability applies to both individuals and companies (ibid). Additionally, the Foreign Account Compliance Act (FATCA) obligates foreign financial institutions to inform the U.S. regulators about assets owned by the U.S. citizens in their institutions (Bullough 2019). However, FATCA does not provide other jurisdictions with any information regarding the foreign assets kept in the country, which is considered the major loophole of the legislation (ibid).

### **3.2 Data availability**

Germany does not disclose its court cases to the public, but as the country is a member of the OECD Anti-bribery convention, these cases are collected and publicly reported by the organization. For this analysis, the base set of data on court cases and investigations in Germany is taken from the “OECD Phase 4 Report” Annex 1 (OECD 2018b). Additional information is taken from the news, Transparency International Germany chapter publications and other academic articles.

The United States provides substantial data on investigations. Most of it is compiled in the Stanford Law School’s “Foreign Corrupt Practices Act Clearing House”, which publishes statistical analysis and has a database of the investigations and enforcement of the FCPA (Stanford Law School n.d.). Additional resources are taken from the OECD Anti-bribery Phase 3 report (2010), official DOJ and SEC court hearings and other documents.

### **3.3 How neoliberal policies change the institutional capacity to fight corruption in the context of the United States and Germany**

The three policies: domestic deregulation, capital account liberalization and economization of domestic institutions, and their effect on the United States and Germany’s state capacity to prevent foreign corruption have undermined domestic capacity differently. Their nuances are discussed below.

### 3.3.1 Domestic economic and financial deregulation

Since the 1980s, regulatory frameworks in Germany have changed as a result of the international competition. Increased capital mobility led the largest transnational firms to move their profits to foreign jurisdictions, which the government institutions could not prevent (Weichenrieder 1996). Although the government had established prevention mechanisms on capital movement to off-shore institutions and limits on external debt financing, the companies could overcome these measures because of the loopholes established by the international treaties (*ibid*). In other words, the double-taxation agreements ensure that Germany will not tax companies which subsidiaries are established in the partner countries to avoid double taxation, hence, the countries as Ireland abused this agreement by lowering taxation and attracting capital from Germany in the early 1980s (The Fiscal Code of Germany 2017, Weichenrieder 1996). Consequently, Germany had to retaliate by decreasing profit taxes from 55% to 40% in the 1980s-1990s, to 30% today, in order to collect at least some portion of taxes (Bundeszentralamt für Steuern n.d., Weichenrieder 1996). However, the competition in liquidity continues on this day, as Deutsche Bank argued the need for Germany to lower its corporate taxes again to secure its international role as an attractive destination for investments (Bräuninger 2018).

The deregulation of finance also resulted in increased money laundering from the third countries. Although the German central bank (*Bundesbank*) established transparency enforcement mechanisms (Bundesbank 1995), most of them were ineffective to prevent the cases of fraud and money laundering, which flood the country. Only in the 2000s-2010s, Germany's leading Deutsche Bank has been involved in three Russian Laundromat scandals: The Russian Laundromat between 2010-2014 (OCCRP 2019a), mirror-trading between 2011-2015 (Down 2019) and the Troika Laundromat between 2006-2013 (Radu 2019), all of which were discovered by the independent media. In case of the Russian Laundromat, the involvement in illicit financial channels as "high", while breach of internal regulations was evaluated as "possible" (Down 2019). Hence, the length and context of discovery suggests that even regardless of the regulations, German banks and the *Bundesbank* cannot adequately monitor the illicit flows entering the country. Worse, there is possibility the Western headquarters fail to control their subsidiaries in more corrupt countries, where corruption is more pervasive.

The global system affected states of the United States more than the federation. Although, the government massively deregulated the captured<sup>2</sup> regulatory agencies, in terms of the stock investment field regulation, the U.S. remained very regulated (Wall 1995). Yet, several states, like South Dakota and Delaware annulled the laws safeguarding tax and local debt interest rates, *de facto* turning the states to the off-shore banking jurisdictions (Bullough 2019). The move was a response to the grave 1970s situation in states induced by the global crises and encouraged by the largest domestic corporations. As the then-governor of the South Dakota reflecting on his decision stated: “The economy was, at that time, dead. ... I was desperately looking for an opportunity for jobs for South Dakotans” (*ibid*). Other states, “especially after 2014 FATCA legislation soon followed the example, resulting in an increasing number of domestic and foreign persons to use the law loophole to hide their trust funds in the states (Bullough 2019, Scannell and Houlder 2016).

Decrease in taxes or creation of the secrecy jurisdictions is not corruption *per se*, but the context through which the governments shift their principles away from those established by the system designed to avoid high risks of corruption suggest that for the countries it is not easy to secure their original political and economic principles. German government is designed to be a mediator between business and labor to achieve a free-market economy based on social responsibility (Schlösser, Schunen and Schürkmann 2017). Yet, the international competition and other types of pressure pertaining the economy, German regulators do not have an alternative to increasing their tolerance to these instances, as they seem inevitable.

Meanwhile, although the U.S. framework ensures the federal government’s neutrality in most market relations between different interest groups, it is designed to prevent the abuse of market power by both (Fligstein 2001). However, the reduction of financial safeguards and establishment of the financial secrecy on the state level undermines the federal moral principles too (Scannell and Houlder 2016). Although the rationale of the states is to provide the public good, it at the same time ignores the principle of market transparency to avoid financial and corporate abuses. Therefore, the globally induced competition in laxity on state (in the U.S.) and federal (in Germany) levels lead to less ability to control the domestic economic sphere and produce higher moral hazards.

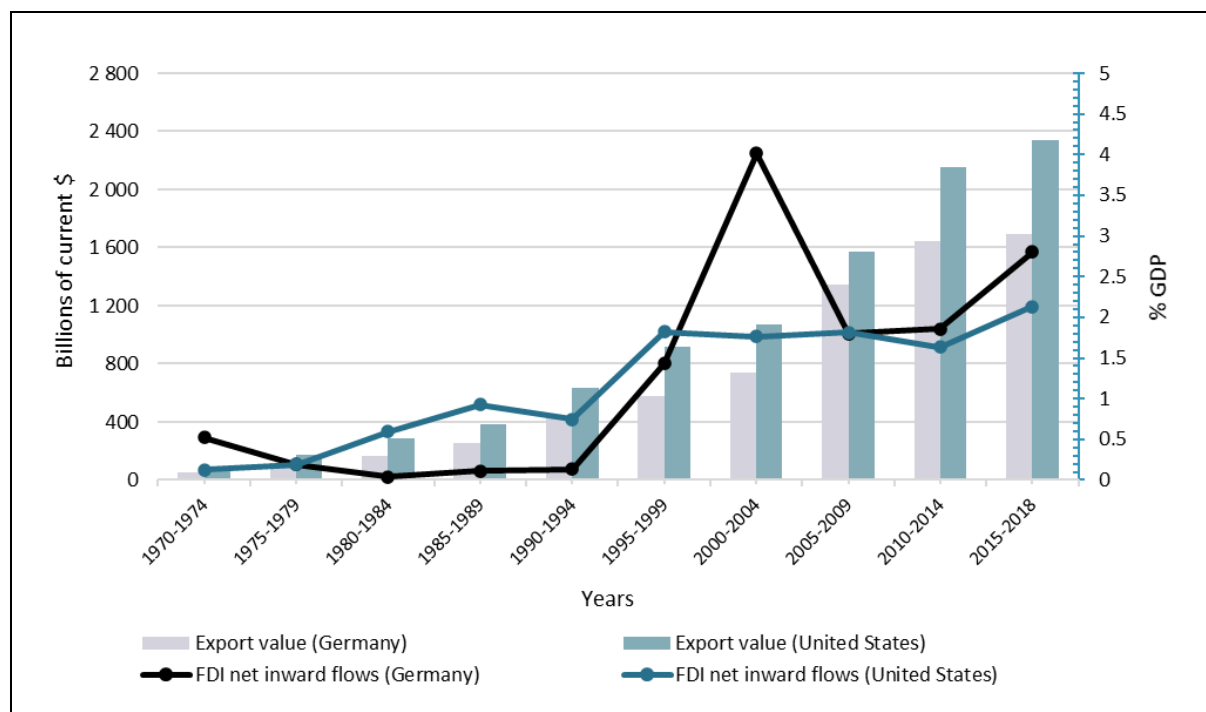
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<sup>2</sup> A government agency is captured by the business when it is defending the interests of a particular industry instead of regulating it (Prasad 2006: 71).

### 3.3.2 Capital account liberalization

Capital account liberalization was intensive since the 1980s in both countries. According to the World Bank data (2020), from 19803 to 2018, the monetary value of exports in Germany grew seven-fold (or, from 18.6 to 47.4 % of GDP), while the net inward foreign direct investment (FDI) now constitutes almost 3% of the total country's GDP (Figure 1). During the same period in the U.S., the export value increased six-fold (from 9.8% to 12.1% of GDP), while the inward FDI equals to over 2% GDP. Hence, the period after 1985 marks an exponential growth of countries' global market integration.

Figure 2. External trade and inward investment comparison since 1970 in the U.S. and Germany.



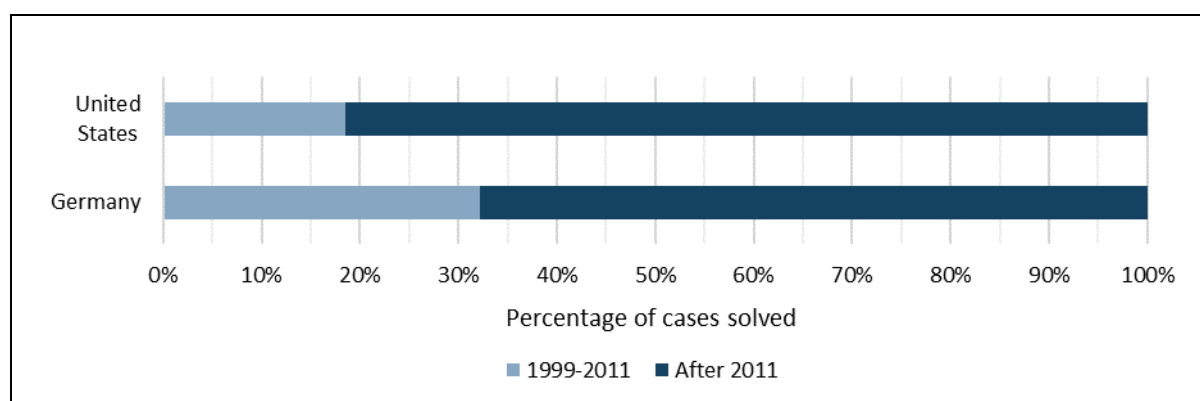
Note: the spike in Germany's 2000-2004 FDI data is due to the 2000 global tech crash, which significantly decreased country's economic performance (GDP), hence, increased the FDI to GDP ratio

Simultaneously, international attention to foreign corruption increased accordingly. The number of investigations and cases of foreign bribery rose since 1999, and especially since around the 2010s. Comparing the change in the volume of resolved cases between 1999-2011 and 2011-2017, there is a significantly larger part solved after 2011 for both Germany and the United States (Figure 3). Out of those, there are over 60% of cases in Germany and over 80%

<sup>3</sup> The 1989 Unification of Germany also had an influence on the country's economic development, but export to GDP growth rate does not have outliers in data in 1980-1995.

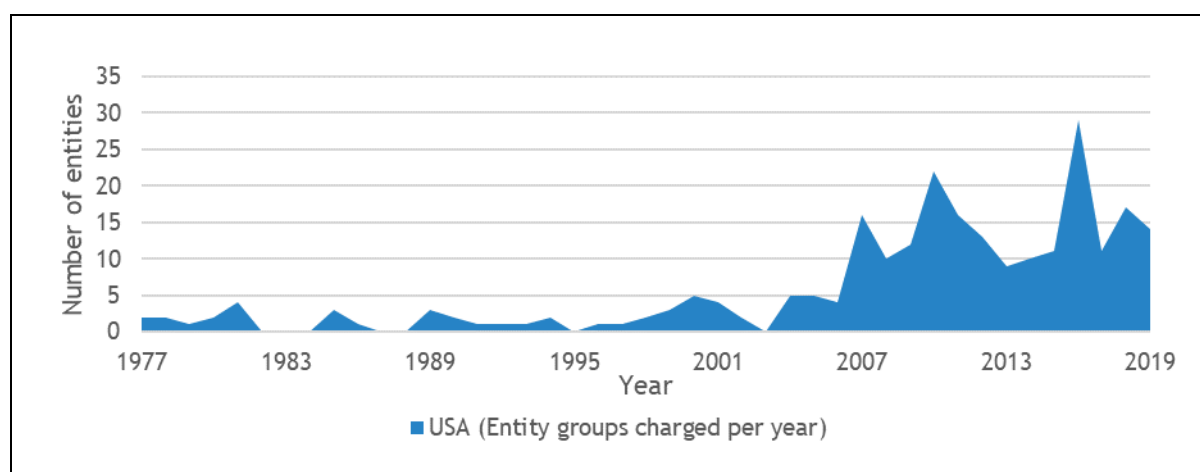
of cases in the United States. It is visible in more detail in Figure 4, where the number of cases solved in the U.S. jump after 2005<sup>4</sup>. The reasons for increased cases, when the actual extent to corruption is unknown, could be interpreted variously (see Birkenstock 2011, Dell and McDevitt 2008, Department of Justice 2016). However, in the cases of Germany and the U.S., they could suggest two main things: first, the awareness of international corruption as the problem became more salient; second, international anti-corruption work-load for the domestic law enforcement rose significantly (Birkenstock 2011, Department of Justice 2016). The latter may affect how well the institutions accomplish their job.

Figure 3. Share of total unique cases comparing 1999-2011 and 2011-2017.



Source: author's calculations based on Stanford FCPA data (for the United States) and OECD Anti-bribery convention implementation Phase 4 Working group collected data (for Germany)

Figure 4. Number of entities charged between 1999 and 2017 in the United States.



Note: Data for Germany is publicly unavailable.

Source: World Development Indicators Database (2020).

<sup>4</sup> No annual data for Germany is available publicly.

### 3.3.2.1 Germany - Soft enforcement is in the public interest

Since the 1990s, Siemens encouraged several hundred employees to bribe public officials in Europe, Asia, Middle East, Africa and Latin America to win public procurement projects (Department of Justice 2008). The corruption was so deeply rooted in the firm's framework that throughout these years the company paid bribes worth of over \$1.4 billion (Schubert and Miller 2009). The investigation and the trials were in close coordination between German and U.S. authorities and other countries – then, a very unusual phenomenon (*ibid*). Due to the cooperation and establishment of proper anti-corruption mechanisms, Siemens and its employees got a lower total sanction of \$1.6 billion (Department of Justice 2008, Lichtblau and Dougherty 2008, Venard 2018). Hence, the case is a good example of international enforcement cooperation, the effects of punishment on the company's future conduct and differences between Germany and the United States in anti-bribery enforcement.

Although the Siemens case is just one of the examples of the enforcement against the foreign bribery, in general, the level of sanctions in Germany is disputed to be effective. When the OECD Anti-bribery Working Group (WG) conducted its analysis in Germany between 2011 and 2017, they have stated that 43 individuals out of 73 had their foreign bribery cases settled under the 153a provision of the Criminal Code (153a CC)<sup>5</sup> in 2011-2017, while prosecutions were “almost always suspended” (OECD 2018b: 36-38). Moreover, less than a quarter of legal persons<sup>6</sup> were liable for foreign corruption defections, while, according to the OECD WG, the amount of €10 million is not adequate to punish companies with annual turnovers significantly surpassing this amount (*ibid*: 67). In response, representatives of the German law enforcement assured that the fines are fair according to those imposed in Germany, but the OECD group expressed their concerns whether the sanctions imposed are proportionate and result in effective prevention, as stated in the OECD Anti-bribery Convention (OECD 2018b: 70). The German chapter of the Transparency International also noted that they demanded the government to raise the fines “for years” (Dehmel and Humborg 2011). Still, the fines remain the same as of 2019 (Park Wirtschaftsstrafrecht 2019).

The enforcement could be related to the normative aspects based on the historically strong links between the states, business and labor (Birkenstock 2011, Crawshaw 1995). At the

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<sup>5</sup> Provision states that the non-prosecution of a “less serious criminal offense” is possible with a set of conditions “if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle thereto.” (StPO)

<sup>6</sup> Legal person – According to Merriam-Webster, an entity or a body of natural persons who have the capacity to go into legal agreements and have legal responsibility (n.d.).



beginning of the 2000s, Germany was not active in anti-corruption enforcement. In fact, before 2000, foreign bribery in Germany was even “tax-deductible” (Crawshaw 1995, Venard 2018). In 1995, Hansgeorg Hauser, a government financial policy spokesperson in response to allegations that German tax system fosters corruption stated that the German tax law “never had anything to do with morality”, while from the political sphere there were concerns that the enforcement against foreign bribes would even result in job losses (Crawshaw 1995). Yet, these traditions are still present in the modern anti-corruption framework. When the OECD WG asked for explanations why the non-prosecution were decided in some cases, among the strangest arguments there was the absence of personal enrichment, “loss of employment” which may result from prosecution, and non-prosecution because the bribery was a usual company’s practice dating back to the times when corruption was still legal (OECD 2018b: 39-40). These explanations indicate that in some cases, the bribery was not seen as serious, as to prosecute the individual or harm the domestic company. Hence, considering that before 1999 international business norms in Germany deemed foreign bribery as acceptable, and the recent anti-corruption norms were established only recently, it could determine why, with the increase of the international trade and financial openness, the anti-corruption enforcement in Germany is soft and even perceived as ineffective to prevent it.

Alternatively, German institutions are incapable to exercise quality enforcement due to the complexity of the international networks. Yet, it is not related to the lack of financial resources, as the federal government funds law enforcement offices whenever they require higher capabilities (2018b: 42). Instead, law representatives from Bavaria state that a constant challenge is collecting and preserving evidence within multiple foreign jurisdictions at the same time (*ibid*: 49-50). Moreover, when the bribery is executed through a chain of international transactions, it is difficult to have evidence strong enough to sanction the defendant. As the investigators explain, experienced lawyers frequently succeed in undermining the parts of the chain and getting lower sanctions, if at all (*ibid*). It is especially applicable to criminal prosecutions which require more substantial evidence.

The constraints of the length of investigations is another issue, albeit very much related to the ability to manage different simultaneous searches in multiple jurisdictions. The case can be discontinued if the investigations take more than five years, which is the legal limit in the country. For instance, German defense company Atlas Elektronik argued to terminate their foreign bribery case as it has violated the limitation (Dobnik 2015). Thus, the government’s ability to conduct timely investigations and efficiently build the case is very much weakened due to the complexity of the trade and financial networks.

These limitations consequently push prosecutors towards softer enforcement. The German governmental institutions, faced with difficulty to gather strong evidence or conduct investigation within time limitations, choose 153a CC provision, as it at least would guarantee the company to establish stronger prevention mechanisms and require to pay the fine, hence it represents the public interest more than the harsher sanctions (OECD 2018b: 53). While it is not strong enforcement, in some cases, as to argue German representatives in the OECD report, it may even be more in the public interest, rather than the harsher sanctions (ibid). Still, the rationale and argumentation to choosing softer enforcement are based on the institutional incapability to build quality cases regarding international corruption. Thus, although the German law enforcement has substantial abilities to investigate the international corruption cases, the searches in multiple jurisdictions take away the limited time to build a successful case, which they make up with less costly non-prosecution decisions.

### **3.3.2.2 The United States – Vast resources do not result in effectiveness**

The United States enforcement is more punitive than in Germany, but it does not result in higher quality enforcement either. The sanctions for foreign bribery acts since 1999 involved 125 entities and 99 individuals (OECD 2018c)<sup>7</sup>. Meanwhile, the average amount of sanctions to entities rose from \$75,000 in 1999 to \$88 million in 2010, and \$170 million in 2018, which mean they are highly punitive (Stanford Law School n.d.). Moreover, the three FCPA agencies receive substantial financing and training to conduct investigations (Committee on the Judiciary 2015: 15, OECD 2010: 58). However, the enforcement quality has been questioned by the U.S. Senate, as well as journalists and academia because of the length of investigations and high numbers of cases (Committee on the Judiciary 2015: 15, Koehler 2019). Thus, its effectiveness both in terms of prevention of foreign corruption and efficiency of the institutions is considered as doubtful (FCPA Professor 2018).

Cooperation with other jurisdictions is necessary to conduct foreign corruption investigations. Yet, differences in legislative frameworks and jurisdictions' lack of support hinder the work of the domestic agencies. As the OECD WG reported, the U.S. agencies reported a high rate of support from other jurisdictions, but those who are unwilling to provide access to the evidence can stall the case investigation altogether (OECD 2010: 56). For

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<sup>7</sup> The updated numbers exclude the violations of bookkeeping and internal controls and include plea agreements, DPAs and NPAs. Deferred Prosecution Agreements (DPAs), Non-prosecution Agreements (NPAs) and plea agreements all fall into the category of non-prosecution when the case is suspended or settled.

instance, in 2007, the agencies made an MLA request, but as of 2010, there was no response and the officers were still in a stale-mate (OECD 2010: 56). Additionally, the U.S. authorities noted inconsistency in the European Union's data protection laws as a hindrance to gather evidence both for companies and the U.S. agencies (OECD 2010: 57). With the establishment of the GDPR<sup>8</sup>, personal data can be collected by the company even from its subsidiaries to conduct investigations, but the application of directive is supplemented by the legislation of each EU member state on exact exemptions (Directive (EU) 2016/680). Hence, the agencies name the data protection and uncooperativeness as taking the most amount of time required to conduct an investigation.

The time constraints are already a very salient issue in the U.S. The highest length of the FCPA investigation was over nine years, while the average length of the FCPA investigation in 2017 was staggering 4.5 years (FCPA Professor 2018). In 2005, the then-Assistant Attorney General of DOJ hoped the higher capabilities would result in "ending the days of five-year investigations" (Department of Justice 2005). However, ten years later, the U.S. Senate saw no progress in fast-tracking the investigations, to which the then-candidate Attorney General Loretta Lynch responded that the FCPA enforcement is much more difficult and time-consuming because of its dependence on the collection of evidence abroad (Committee on the Judiciary 2015: 15). Since then, the U.S. Supreme Court imposed a five-year limit on the investigations, although the OECD WG states that the limitation, at least in 2010 is too strict to impose quality enforcement (OECD 2010: 17, Satran 2017). These limitations, similarly as in Germany determine that government agencies choose softer enforcement mechanisms.

The softer enforcement mechanisms usually result in DPAs, NPAs and self-enforcement by the companies. In 2012, the 93 month-length investigation on Pfizer H.C.P. was resolved with no court rulings because, as the U.S. DOJ noted, the company has made substantial progress in its anti-corruption efforts and "assist[ed] U.S. authorities in [their] ongoing FCPA investigations of other companies and individuals" (Department of Justice 2012). Besides this case, there have been 92% and 74% of defendants who settled their case respectively with SEC and DOJ through mediation and other types of non-prosecution mechanisms (OECD 2010, Stanford Law School n.d.). However, softer enforcement does not

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<sup>8</sup> GDPR – General Data Protection Regulation (EU) 2016/679 of the European Union establishes the privacy of the personal data of individuals as a fundamental right (Directive (EU) 2016/679).

prevent the future corruption cases, as the significant amount of still emerge into the public (Koehler 2019).

In general, the cases in Germany and The U.S. show that domestic institutions struggle to impose enforcement mechanisms over transnational companies due to discrepancies between the freedom of transnational companies and domestic jurisdictions to act in the global economy. In both countries, time and work with foreign jurisdictions are the main limitations impeding the quality of investigations, but the countries also differ due to their design of the domestic political economy. In Germany, the inclination to accommodate business and labor's interests vis-à-vis the norms inscribed in the international treaties poses an additional hindrance to effective anti-corruption enforcement. Meanwhile, in the U.S it is the data protection laws of the European Union.

### 3.3.3 Second wave of privatization: Managerialism in public institutions

In the United States, the race to prosecute more persons has evolved gradually since 1977. During the FCPA legislation, the House of Representatives obligated public agencies to diminish foreign corruption, as it damages international U.S. reputation (House of Representatives 1977). In 2006, the Assistant Attorney General of the DOJ reaffirmed that the goal of the U.S. is “to root out global corruption and preserve the integrity of the world’s markets”<sup>9</sup> (Department of Justice 2006). However, after the cases started to rise, the agencies very much emphasized statistics. In 2016, the DOJ Attorney General celebrated the multi-billion gains collected from the FCPA prosecutions (see Department of Justice 2016). Similarly, in 2017, the Co-Director of the SEC Enforcement Division emphasized that due to the *effective enforcement*, the institution has imposed over 100 enforcement actions (Peikin 2017). Hence, with the increase in numbers of cases, the emphasis on the performance statistics became very significant.

However, according to Koehler (2019), the salience of these metrics could determine the opposite – that the U.S. agencies fail to achieve their purpose to curb corruption. First, KPIs provided by DOJ and SEC do not illustrate whether the increasing number of corruption cases result in lower corruption. The FCPA is present for 40 years, which by now should result in lower numbers of cases if the measures were truly effective, but they are stable instead (*ibid*).

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<sup>9</sup> Although the discussion on the extent to which this policy is extraterritorial is interesting and is touched upon in this thesis when discussing the Western economies’ institutional capacity, a deeper inquiry to this issue is out of the scope of this thesis.

Thus, these statistics may be the indication that the current measures do not change the corporate culture and result in corruption prevention in the first place.

Second, paradoxically, the institutions may prioritize quantitative performance indicators over their long-term purpose to curb corruption (Koehler 2019). As the emphasis of agencies' directors fall on the annual numbers of cases or the money collected, but not on the long-term strategies on how to diminish corruption, it is a symptom of preoccupation with short-term, instead of long-term aims of the agencies (see Department of Justice 2016, Peikin 2017). However, these aspects might be a feature of the non-interventionist government, as historically all five 1977-1979 cases also resulted in non-enforcement (Stanford Law School n.d.). Still, since 1998 the U.S has to establish effective corruption prevention mechanisms according to the OECD Anti-bribery Convention, which they struggle to achieve more than twenty years after. Hence, soft enforcement might be due to the law enforcement agencies seeking quantity over quality of the anti-corruption.

Alternatively, the federal agencies would be inclined to use foreign anti-corruption enforcement as a long-term profit-making strategy, subsequently prioritizing punishment to prevention. The agencies may lose the focus to improve the prevention mechanisms into better ones to preserve their status as an important part of the country's law enforcement (Koehler 2019). In the U.S. case, the constant and not diminishing corruption cases may ensure that the agencies still have work and collect fines to the Federal Treasury, which are emphasized by the directors of the leading anti-corruption agencies (Department of Justice 2016, Peikin 2017). Consequently, while high KPIs may be associated with the usefulness of institutions, stable corruption numbers and agency preoccupation with quantitative statistics might determine that the institutions distract themselves from their real purpose – to curb corruption (ibid).

Not everybody would agree with this statement. The FCPA, although existing since 1977 was more intensively expanded in the 2000s – together with the entrenching globalization and increasing cooperation with economically developing countries (Department of Justice 2016). Hence, the actual advances in FCPA enforcement could be for around 15 years, instead of 30. Moreover, Urofsky, Moon and Rimm (2012) add that the stricter measures, especially after 2007, have increased corporate awareness about foreign corruption and made them create better compliance frameworks and intensively report the misconduct. Finally, the argument does not imply that the FCPA does not have any effective corruption prevention mechanisms. For instance, one of the main prevention tools is the industry-wide sweeps, during which agencies randomly choose to investigate whole industries for their involvement in foreign corruption cases (OECD 2010: 18). Still, in the presence of all the available latest technology,

financing and extensive human resources, there is a question why the agencies cannot perform better and lead to a changing corporate culture if they have a strong influence on the companies. This suggests they do not have a long-term plan or goal to diminish companies' misconduct.

The efforts of domestic institutions put to prove their effectiveness in Germany are very different than in the United States. In the former country, the representatives do not publicly disclose enforcement statistics and numbers of cases or collected funds (OECD 2018b). The different attitude could be related to the trust in public institutions, which determine to what extent the institutions are inclined to put efforts to prove that they are necessary to the public's well-being (Bradford, Jackson and Hough 2016). In 2018, the public trust in the justice system in Germany was over 70% (European Commission 2018), but in the U.S., the trust was equal to 54%, thus, the difference between trust in public bodies in Germany and the U.S. is significant (European Commission 2018, Gallup 2018).<sup>10</sup> Consequently, in Germany high trust may explain that the country's institutions are not inclined to focus on the performance indicators to the extent they may define their whole work, while in the U.S., where the survival and funding of agencies depend on their ability to show the federal government they are effective in accomplishing certain functions (Department of Justice 2016). Hence, the aspect of performance indicators does not undermine the work of Germany's institutions.

### **3.3.4 Discussion**

The case study findings indicate, that although Germany and the United States possess strong economies and are very active in ensuring enforcement against foreign corruption, they both face substantial issues which undermine their capacity to effectively control and prevent foreign corruption. Yet, due to their different types of neoliberalism and political economies, the nuances of their state capacity to effectively enforce corruption control differ.

In terms of domestic deregulation, state competition within the U.S. and the competition with other countries in Germany determine the lower taxation and financial regulation, as noted by Wiegatz and Whyte (2016). Although the rationale of deregulation is the same: to ensure the public good, whether in terms of provision of jobs (U.S.) or ensuring the stability of public budget (Germany). Still, looking from the national perspective, the countries undermine the moral principles – transparency of the market in the U.S. and social

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<sup>10</sup> In 2018 Eurobarometer, 87% trust police, 71% trust public administration and 78% trust regional authorities in Germany (European Commission 2018). While in the United States and as of 2018, 54% trusted the police, 22% trusted the criminal justice system (Gallup 2018).

responsibility of business in Germany. Additionally, the deregulation of financial markets also results in lower capability of the regulators to monitor and prevent illicit financial flows entering the countries. However, while the international links with Eastern European banks produce a higher risk of German banks to monitor the funds, in the U.S. the biggest issue derives from the FATCA regulation and its loopholes letting to establish domestic financial secrecy jurisdictions.

The foreign corruption enforcement due to large amounts of time needed to conduct global financial and trade network investigations also weaken the cases of domestic institutions in both countries, and push them to choose softer and more cost-efficient enforcement, as Lord (2013) noted. Although in Germany, the historical links between state business and the labor, producing weak corporate anti-corruption norms, contribute highly to the current quality of foreign corruption enforcement, the manifold links of international bribery transactions pose the risk of losing evidence when conducting searches abroad and building a weak case against a defendant. Meanwhile, the U.S. agencies name the data processing standards in the European Union, as the main impediment of the investigations, which, regardless of the newest technology and training of the U.S. officers is powerless against the foreign jurisdictional frameworks.

Managerialism due to the much lower trust in public institutions than in Germany and the historical neoliberal developments, much more negatively affects the quality of enforcement in the U.S. The exclusive focus on the numbers of cases or financial gains from the enforcement which result in punishment rather than prevention and do not result in the long-term “curbing” of corruption are in line with the McLaughlin and Muncie (2000) observations that the law enforcement becomes ineffective as the quantitative measures fail to describe the actual value of the public good provided by the institutions.

## 4 Conclusion

The thesis researches how neoliberalism can actually undermine the state capacity to fight foreign corruption of the Western states in the context of deeper globalization. At first, the idea that corruption could be systemic in a modern Western state is rather counterintuitive as the neoliberal principles ensure the capacity of its law enforcement (Plant 2010). However, the global economy has massively expanded since the 1970s, and with it, the risk that corruption can cross the state borders as easily as the other economic activities is very high (Dell and McDevitt 2018, Lord 2013). This context determines that the policy-makers have to adapt to the new environment by changing the primary principles, which guard the social contract of the state (Wiegratz and Whyte 2016), and that the neoliberal policies, which previously helped to expand the state capacity to enforce the rule of law, now, as the states become more economically open, deregulated and competitive, undermines it.

While the dominating view is that anti-corruption enforcement depends on the internal state institutions, e.g., political will or the legal anti-corruption enforcement framework, there is a global perspective, which states that corruption no longer depends solely on domestic mechanisms. According to Cerny (1995), with globalization, the economic activity of a state expands outside of the domestic jurisdiction, which creates a gap between the capacity of domestic institutions to impose order, and the domestic economic issues which pertain an increasingly transnational nature. Hence, although neoliberal policies and norms at first helped governments to expand their power, in the presence of globalization, a gap between state capabilities and the deregulated domestic economy appears (Cerny 1995).

The gap is created with the deregulation of the economy, which determines the lower state's power over the economy. Hence, the policies like domestic economic deregulation, capital account openness and privatization of the services of domestic institutions further undermine the state ability to effectively control corruption.

The case study analyses these policies' effect on the state capacity in two Western countries, Germany and the United States. It shows that the deregulation since the 1980s, supplemented by the inter-state competition (on federal and international level), has resulted in regulatory inability to guard the interests of the societies, as the states could no resist the power of the transnational firms and accommodate their interests, which resulted in the better economic situation, albeit may be perceived as undermining the interests of the public. Alternatively, the law enforcement institutions struggle to investigate foreign corruption cases due to the domestic business involvement into complex financial and trade networks, which



weaken the allegations, are cost- and time-inefficient. Interestingly, the new managerialism affects only the U.S. quality of enforcement, as the public distrust in federal law enforcement is relatively low and the agencies have to concentrate on their short-term goals and profitability, instead of the provision of the long-term public good.

To conclude, the thesis contributes to the international corruption issue, and particularly, its effects on the corruption in the advanced economies, which is still a novel topic. Still, there have been important limitations to the study. Although the information on the United States is substantial, the data from Germany is extremely hard to find, as the country does not provide public disclosure of foreign corruption enforcement. Corruption research is also constrained by the lack of objective and accurate data due to the illegality of the phenomenon. The lack of additional theoretical sources due to the general bias that corruption largely depends on the state capabilities and that systemic corruption is not relevant to the advanced Western economies poses as a limitation on the available literature, but is also an opportunity for the future research. Additionally, the study raised a philosophical (or rather international law) puzzle, whether the advanced economies should impose foreign corruption enforcement on businesses, which operate in countries that are not members of the OECD Anti-bribery Convention, as it may undermine these states sovereignty. Yet, these remain the ideas for future research.

## Annex A. Detailed comparison between Germany and the United States

Year	Germany						United States					
	Exports* (percentage of world)	GNI		Government spending (%)	CPI		Exports* (percentage of world)	GNI		Government spending (%)	CPI	
		current US\$, in trillions	US\$ per capita		1999-2011	2012-2017		current US\$, in trillions	US\$ per capita		1999-2011	2012-2017
1999	8.3%	1.69	26 840	48.21	8	-	13.9%	6.01	33 670	34.66	7.5	-
2000	7.6%	2.47	26 150	47.76	7.6	-	13.8%	8.53	35 960	34.3	7.8	-
2001	8.1%	2.29	24 740	47.42	7.4	-	13.3%	8.84	36 710	35.61	7.6	-
2002	8.4%	2.20	23 620	47.87	7.3	-	12.4%	9.39	37 310	36.71	7.7	-
2003	8.8%	2.15	26 070	48.3	7.7	-	11.1%	10.15	39 770	37.26	7.5	-
2004	8.8%	2.04	31 570	46.79	8.2	-	10.3%	10.46	43 510	36.88	7.5	-
2005	8.4%	1.95	35 710	46.82	8.2	-	10.1%	10.73	46 190	36.96	7.6	-
2006	8.3%	2.15	38 230	45.24	8	-	9.9%	11.54	47 880	36.67	7.3	-
2007	8.6%	2.61	40 440	43.4	7.8	-	9.6%	12.74	48 500	37.43	7.2	-
2008	8.3%	2.95	43 570	44.2	7.9	-	9.3%	13.65	48 980	39.82	7.3	-
2009	8.1%	3.15	43 520	48.2	8	-	9.9%	14.29	47 730	43.26	7.5	-
2010	7.6%	3.33	44 550	48.14	7.9	-	9.7%	14.61	48 990	43.17	7.1	-
2011	7.5%	3.58	47 220	45.24	8	-	9.3%	14.89	50 570	42.05	7.1	-
2012	7.1%	3.56	46 530	44.92	-	79	9.6%	14.64	52 770	40.23	-	73
2013	7.2%	3.64	47 190	44.94	-	78	9.7%	15.15	53 950	39.01	-	73
2014	7.4%	3.79	47 620	44.3	-	79	9.9%	15.76	55 850	38.35	-	74
2015	7.4%	3.74	45 850	44.04	-	81	10.6%	16.56	56 740	37.94	-	76
2016	7.6%	3.81	44 290	44.3	-	81	10.6%	17.05	57 180	38.26	-	74
2017	7.5%	3.86	43 640	44.42	-	81	10.2%	17.78	59 060	37.99	-	75
Average	7.8%	3.06	37 402	46.03	7.8	79.9	10.3%	13.93	45 934	38.24	7.4	73.1

Notes: \*Exports for a country = Exports of goods and services (US\$, country) / Exports of goods and services (US\$, World). \*\*CPI differs in methodology between periods 1999-2011 and 2012-2017, maximum scores are 10 and 100 respectively.

Sources: Exports – author’s calculation of the World Bank Development Indicators (2020); GNI – World Bank Development Indicators (2020); Government spending – OECD General government spending (2020); CPI – Transparency international (2019).

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