

The harmonisation of the combat of corruption in Europe and beyond – 7 myths and doubts

Myth 1: We all know what corruption is

The **definition** of the core crimes of bribery and corruption is not clear and differs from country to country. For example, views differ on whether only inherently illegal conduct on the part of the public official should be included, whether bribery also covers the offering of immaterial advantages, and whether a defined “pact” for exchanging services for advantages is required.

Myth 2: Corruption is a rapidly growing threat

It is almost impossible to reliably measure the **quantity of corruption** due to the large dark figure. Claims that corruption has increased in recent years are therefore difficult to prove. In Germany, the cases of corruption known to the police have remained fairly stable (1,000+ per year). Since corruption is a crime without an individual victim, adding police resources for detection and investigation leads to a statistical increase by reducing the dark figure.

Myth 3: Criminal prohibitions stem corruption

We have little empirical evidence as to any (added) deterrent effect of **criminal law** as compared with other kinds of measures to prevent corruption. Any preventive effect depends on detection and visible enforcement, which are difficult to achieve with respect to a crime without an individual victim. When enforcement is uneven or non-existent, criminal laws are useless or even counterproductive because their non-enforcement lessens respect for the law.

Myth 4: Everybody is in favor of fighting corruption

Combating corruption, especially on the higher levels of public administration and government, is a **political rather than a legal problem**. Imperfect laws on corruption, e.g., on bribery of members of parliament, are often a function of politically (or selfishly)

motivated unwillingness to pass such laws. The same applies to prosecution policies. The prosecution of international corruption may massively interfere with a country's foreign policy or economic interests. On the other hand, selective prosecution of political opponents for (actual or fictional) corruption can be abused as a tool in a political power struggle.

The fact that a country has signed and ratified an international legal instrument against corruption does not necessarily mean that that country takes the combat against corruption seriously ("sign and ignore"). Constant monitoring of implementation and compliance on an international level are therefore essential to guarantee the effectiveness of international conventions.

Myth 5: International harmonization of laws is necessary to effectively combat corruption

International cooperation in combating corruption is desirable. Cooperation is necessary to enable states to effectively prosecute instances of transnational corruption and to close loopholes for corrupt officials. Yet most corruption is a local phenomenon and can be combated nationally. Hence the strict harmonization of corruption laws through international legal instruments may not be necessary as long as nations cooperate through mutual legal assistance even when their corruption laws differ in detail. International harmonisation may have the effect of unduly broadening criminal proscriptions. Examples are the "corruption" crimes of illicit enrichment, abuse of official functions and trading in influence as covered by the U.N. Convention against Corruption of 2003.

A strict harmonization of laws against corruption can lead to unexpected and undesirable consequences, especially **internal tensions** in national laws when international demands conflict with differing concepts of internal law. Examples from German law:

- Bribery of *foreign* members of parliament is generally punishable whereas criminal bribery of *German* members of parliament is limited to "buying votes";
- Giving advantages for past service to public officials is punishable with respect to Germans but not with respect to EU and other foreign officials;
- Giving advantages to public officials without a specific agreement on what the public official is to provide in return is punishable in Germany but not according to international instruments.

Added problems exist when international instruments demand a particular sentence level, which may conflict with the general level of sentencing in a particular state.

Myth 6: Criminal laws against corruption should cover situations abroad as well as at home

Extending the reach of national criminal law to acts committed abroad, as exemplified by the Council of Europe Convention, implies two dangers:

- ethical imperialism by enforcing national criminal law on corruption of foreign officials regardless of whether the act is punishable where committed (e.g., a German citizen gives an advantage to an Indonesian public official or business representative in Indonesia when that act is legal in Indonesia but covered by extensive German bribery provision: German standards are indirectly imposed on Indonesia).
- when reach of national law is extended to acts abroad committed by foreigners (as foreseen by the Council of Europe Convention) the prosecuting state interferes in internal affairs of a foreign state, in violation of international law.

It should also be noted that prosecution of corruption abroad cannot work unless local authorities cooperate (because the evidence is in the country where the bribery takes place).

Myth 7: Corruption in the private sector should be treated in the same way as corruption in the public sector

Internationalisation of the combat of private sector corruption leads to a **change of the interest to be protected**. It is no longer the proper functioning of a country's public administration but international economic competition that stands in the focus of corruption law. Thus economic considerations may determine the definition of corruption as well as the level of prosecuting corruption offenses.

On the other hand, the Council of Europe and EU Conventions on corruption in the private sector include corruption to the detriment (only) of the owner of the firm; that again changes the protected interest (e.g., A pays a bribe to bank employee B; in exchange, B makes sure that A gets a bank loan without having his credit properly checked).

It is doubtful whether criminal law fulfils the purposes of combating private corruption:

- The legitimate interest of avoiding waste of resources in corrupt developing countries might better be approached on a larger policy level rather than in individual law enforcement.
- The promotion of fair international competition may also be legitimate interest, but this should also primarily be resolved by economic responses. Moreover, criminal prohibitions work only when *all* states are applying the same standards, and not just 35 states (which have ratified the OECD convention).