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Combating Corruption as a Cross-border Mission

(Summary)

Until a few years ago, bribery and corruptibility were typical “state-internal” crimes. In other words, when criminalizing corruption each state protected only the integrity of *its own* public officials and the trust of *its own* citizens in these officials’ integrity. This situation, which was characterized by only moderate national demands, has changed in a fundamental way. The OECD, the Council of Europe, the EU, the United Nations and other international organizations have created legal instruments whose goal is to harmonize anti-corruption laws across national boundaries and to extend the scope of these laws to cover the bribery of foreign public officials. The most comprehensive international conventions are the Council of Europe’s Criminal Law Convention against Corruption of 1999 (SEV No. 173) and the United Nations’ Convention against Corruption of 2003. These conventions include comprehensive guidelines for the criminalization of certain behaviors within countries and abroad, for preventive measures against corruption, and for the investigation, prosecution and sanctioning of corruption. The OECD Anti-Corruption Convention of 1997 aims to extend the scope of criminal penalties which previously applied only to actions within individual countries to cover actions committed abroad with regard to foreign public officials. This approach is also connected with an expansion of the international jurisdiction of national criminal courts, in so far as it aims to make the bribery of foreign public officials punishable even if the act is not defined as punishable in the country where it is committed. This extension causes some reservations with regard to the (indirect) interference in the internal affairs of the state where the act is committed.

The internationalization of the struggle against corruption is — unavoidably, for political reasons — associated with an expansion of the definition of criminal behavior. This can be seen in the expanded definition of crimes of corruption (e.g. the inclusion of “abuse of public office” and “general dereliction of duty” in the UN Convention, and of “trading in influence” in most conventions) and the expanded definition of “official” (now also including parliamentarians). The definition of bribery or corruptibility is also being increasingly expanded beyond its original meaning (giving material advantages to a public official so that he/she will perform an action related to his/her office that is contrary to his/her duties).

However, at the international level this expanded definition is still not as broad as the one in §§ 331, 333 of the German Criminal Code (StGB). Another characteristic tendency of the international anti-corruption movement is the increasing assimilation of bribery and corruptibility in the private sector into bribery and corruptibility in national administrative structures (see in particular the framework resolution of the Council of the EU on July 22, 2003, on combating bribery in the private sector). For the exposure and investigation of crimes of corruption, the authorities generally depend on instruments of covert investigation (tapping telephones and listening in on conversations, covert investigators, anonymous witnesses, principal witnesses).

The sharpened international focus on crimes of corruption and the associated expansion of repressive and invasive elements cannot be explained either through a demonstrable increase of crimes of corruption or through the basic international nature of these crimes. Corruption is primarily a local phenomenon, and the number of known cases has remained constant over a long period of time, at least in Germany. Therefore, there is basically no need for an international standardization of the measures to combat corruption.

In addition, the internationalization of the struggle against corruption is linked with an exchange of protected legislation: instead of the traditionally protected “integrity of public administration”, we now have the protection of equal opportunities in international business competition. In the process, new issues are cropping up in the interpretation of criminal law (e.g. Should they be applied only in cases where there is actual competition? Should the public official also be punished?). Also, the question of the legitimacy of the criminalization of corrupt behavior is presenting itself differently than it used to, reaching far into the prehistory of the actual damage. In particular, we will have to increasingly consider the actual possibility of establishing criminal liability in cases of criminal actions abroad, as well as considering the specific role of criminal law in preventing activities that distort competition.