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Private Commercial Bribery

A Comparison of National and
Supranational Legal Structures

A Project Report



Introduction

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The papers collected under this cover are the result of an active collaboration between the International Chamber of Commerce (hereafter ICC) and the Max Planck Institute for Foreign and International Criminal Law, located in Freiburg, Germany. This collection comprises thirteen country studies of the law of private-sector bribery (transactions between two persons both of whom are subjects of private law), a study focusing on international instruments addressing the same question and an analytical treatment of the vast amount of material contained in the foregoing studies. It represents the combined efforts of a score of persons resident in thirteen countries of the Organization of Economic Cooperation and Development (hereafter OECD), all of which have adopted the 17 December 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter "the Convention").

The study is the result of an initiative by ICC in 1997 to persuade the OECD Working Group on Bribery in International Business Transactions - the consultative group within OECD which produced the Convention - to complete the Convention by criminalizing bribery in international business transactions, whatever its form and without distinction as to the parties involved. The Working Group had decided in 1997 to limit its focus to transnational bribery of foreign public officials and to leave for a later date related matters such as private-sector bribery. In 1998 it invited ICC to demonstrate whether ICC found that the business community felt a strong commitment to curbing private-sector bribery and would vigorously support action by OECD to condemn it.

ICC has taken a consistent position since adopting its first Rules of Conduct in 1977 that no meaningful distinction exists between public and private bribery, that they both distort commercial dealings and that they deserve similar treatment in the law. Its commitment to this principle has only grown in the succeeding years, which have been marked by the privatization of many formerly governmental functions, by increased complexity and interaction between the public and private sectors in international transactions and by an increase in the monetary value of these transactions.

As a first step in advancing the issue of private-sector bribery, Professor Dr. *Mark Pieth*, the Rapporteur of the OECD Working Group, and ICC agreed that a systematic study of the state of the law of private-sector bribery would lay the foundation for further consideration by the Working Group. ICC was proud to be asked to undertake this study and solicited the support of the *Ford Foundation*, an

American non-profit organization, for a grant to finance the work. The Max Planck Institute was referred to in the ICC application to *Ford* as the likely partner of ICC for production of the study. Upon award of the grant, ICC initiated negotiations in 1999 with Professor Dr. *Albin Eser*, Director of the Max Planck Institute, Professor Dr. *Günter Heine* and Dr. *Barbara Huber*, Senior Research Fellow, to define the extent and terms of the studies required. Two years later, the country reports, whose choice of rapporteur and supervision was assigned to the capable team of Dr. *Huber* and Professor *Heine*, were submitted in draft form and became the foundation for the presentation of the observations of ICC's Commission on Anti-Corruption to OECD on 23 April 2002. Further mention of the observations laid before the OECD is reserved for later discussion.

With 34 countries having adopted or adhered to the Convention and more possible, it is appropriate to have expected that the process of adoption and implementation of the Convention would take a decade or more to achieve. Owing to the "genius" of the instrument, especially its concept of functional equivalency, however, delays due to "transposition" were greatly reduced. Thus, the ratification process proceeded smoothly and was completed on 15 February, 1999. "Functional equivalency" requires countries which adopt the Convention simply to adjust their laws so that they achieve the purpose and effect of the Convention; no specific forms are imposed, and unorthodox or novel techniques unknown to a country's legal system are not ordered. So long as the intent and effect of the Convention is achieved, the country's legal order is given free rein to take conforming action.

The other novelty of the Convention, peer review, ensures that the adoption and implementation of the Convention satisfies its requirements. Once a country has adopted implementing legislation, OECD arranges for a team of specialists from two other signatory countries to visit the country and to examine the result to determine whether the implementation will be effective. To date, there have been four such reviews, a rate of examination which has not kept pace with earlier expectations.

It would be needlessly repetitious of themes developed in Professor *Heine's* analytical survey for me to dwell on major aspects of the law of private-sector bribery. It is enough to state that the criminalization of private-sector bribery, especially if international aspects are present, is a recent phenomenon, tracing its late development to such assumptions as:

- criminal sanctions should be reserved for bribery of public officials, i.e., where public funds or a public duty is involved;
- private-sector bribery, like its public-sector counterpart, is a national problem;

- private persons should deal with commercial bribery by civil remedies or self-regulation; implementation of a state's system of prosecution for this behaviour is unwarranted and wasteful (indicative of this attitude is the fact that in 2001 three of the thirteen OECD countries surveyed had no private commercial bribery statute).

Even where statutes exist, there is no unanimity about the policy goal(s) which private-sector bribery law should vindicate. Is the purpose to curb unfair competition, penalize violations of loyalty due to employers and/or to an economic system, or ensure the protection and proper management of corporate assets? Or a plurality of purposes?

Other explanations of official reticence toward private-sector bribery are the same as for public bribery. In many OECD countries, jurisdictional concepts, based on *situs* of the criminal act within the country, have not kept pace with globalization and so transnational bribery cases remain beyond the reach and control of national authorities. Likewise, the idea that bribery is a national problem dies hard and has limited the development of legal tools for investigating and/or procuring evidence of a crime in an international (i.e., involving two or more countries) setting, for compelling the appearance of witnesses or for the arrest and extradition of suspects in international cases. Procedural and practical roadblocks to preparing cases remain a principal explanation of the rarity of cases actually prosecuted, even where the law provides for action.

The slow pace of development of the law of private bribery may also be determined by reticence about the nastiness of "dirty laundry" which victims do not wish to wash in public. ICC surveyed attitudes of its national committees as well as leading business enterprises and corporate counsel and found that business generally preferred to handle such matters in house by self-regulation, or at most, through civil suit. In stark contrast, however, a majority of those polled favoured adoption of criminal legislation making clear that private-sector bribery in international transactions is outlawed. The result of these paradoxical attitudes is that although the incidence and magnitude of private-sector bribery has not been confirmed by empirical studies, there appears to be consensus that a clear proscription against it is needed.

Criminalization of Private-sector Bribery

Whatever the reason for past reluctance about curbing private-sector bribery and despite difficulties with collecting meaningful statistics on the problem, ICC's Commission on Anti-Corruption asked the Max Planck Institute to survey the criminal law of private-sector bribery according to a uniform checklist, to assess the effectiveness of civil law and civil law remedies to give redress for bribery

and to evaluate self-regulation as a means of preventing commercial bribery. The effect of these strategies in international business transactions was to be specifically addressed. Without wishing to dilute Professor *Heine's* complete analysis, let me summarize certain points:

- There is no uniform, systematic definition of the crime of private-sector bribery today in the thirteen countries or in international legislation.
- Divergent criminal laws produce different burdens of proof and different defences.
- The existence of "international elements" in a criminal bribery case virtually assures the case will not be prosecuted. This may result from procedural or evidentiary hurdles, from a requirement of "double criminality", from the need for a request to prosecute from the victim or authorities of his country, from victim's reticence or because prosecution of such crimes is not a high priority of the state.
- Jurisdictional concepts have been too narrow to support vigorous prosecution of private-sector bribery. A "territorial" basis for jurisdiction - a reflection of the national roots of bribery law - is not sufficiently extensive to reach the new international dimensions of transactions today, with their complex and exotic patterns.

Effectiveness of Civil Remedies

Regarding the use of civil law and its remedies as a method of compensating for private-sector bribery, the reports reflect a spectrum of results extending from robust enforcement of liability in some countries to a total absence of case law in others, suggesting that general principles of tort/fault law have not always been implemented or vindicated in this field. In jurisdictions where cases have been brought, private bribery is actionable on such grounds as unfair competition, breach of trust or fiduciary duty, and tortious interference with employment obligations. However, in many others, although the rapporteurs may refer to principles such as "no injury without remedy", case law demonstrating the liveliness of this principle in matters of private-sector bribery is lacking. Moreover, strict separation between criminal and civil process for the same wrong can encumber and discourage resort to a claim for damages in some countries. A number of other factors discouraging civil suits were disclosed in the reports:

- Rules in some countries substantially limit the plaintiff's possible claim.
- Damage claims must be brought in separate proceedings from criminal prosecutions.
- Damages do not adequately compensate for the costs of protracted litigation.

- The ability to investigate and compel the production of evidence and witnesses in international cases is severely hampered.
- Showing damages with certainty and proving causal links is another difficulty in international cases, as is obtaining jurisdiction.
- Reticence of victims again plays a role.

Administrative Measures and Self-regulation

The study also inquired about practices to stem private-sector bribery present in regulatory measures and/or developed internally by business enterprises. Although here, too, a wide spectrum of initiatives has been taken in the countries surveyed, the survey results reflect varying commitments and approaches to the problem. Thus, some countries' legislation disqualifies companies convicted of the crime of corruption (itself or by vicarious liability through actions of officers) from bidding on contracts of public procurement. A small minority of others allow disqualification on grounds of suspicion of such behaviour. Certain rapporteurs saw evidence of heightened willingness to combat the problem in the general duty of auditors of companies to report unusual financial transactions adversely affecting the company's business or assets to its shareholders. Another emphasized legislation seeking to raise ethical standards of business practices or provide for channels for "whistle-blowers" to report corrupt practices to a manager responsible for corporate oversight. Likewise, recent efforts to ensure that bribery payments are not tax-deductible under local law in the OECD countries has produced some encouraging results.

Despite the harvest of initiatives, it must be said that governmental condemnations of bribery have been uneven in the countries surveyed. No uniformity of approach exists and the recognition of private-sector bribery as a serious problem is not acknowledged.

Corporate codes of conduct and training programmes implementing them are the essential expression of corporate commitment to self-regulation; but they too are subject to regional and cultural variations in their frequency of adoption and implementation. Thus, while ethical codes provide a framework in which managers, employees, unions, and business associations can articulate standards of behaviour and provide for compliance procedures, they must be recognized to operate in a specific ethical and legal context, which can be supportive in varying degrees. Large multinational companies in Europe and the USA have adopted such codes and implement them to a substantial extent. One Asian country, determined to reform practices which led to serious economic problems in the late 1990s, has joined this movement.

There is evidence that guidelines for vicarious liability of companies and for imposing sentence on crimes of bribery have taken or will take into account whether the company has an effective code of conduct or has otherwise taken all "reasonable organizational measures" to prevent acts of bribery. These are encouraging signs, but they are not yet the general rule in the thirteen countries surveyed, some of which (ex-state-run economies) have not introduced self-regulatory measures. Self-regulation, to be effective, should rest on a clear legislative condemnation of private-sector bribery to give impetus and substance to the adoption of corporate codes of conduct.

Conclusion

With the study as background, the ICC Commission on Anti-Corruption faced the task of reporting to OECD on its findings. An informal consultation between OECD, ICC and other stakeholders, took place on 23 April 2003 for this purpose. Backed by the country and international reports, which follow, the Commission, after much discussion, decided to formulate and offer to OECD the Commission's observations based on the study and to urge the Working Group to create a task force of its own members to draw appropriate conclusions. ICC's Commission on Anti-Corruption has volunteered to assist OECD in its deliberations as a group of experts on the subject.

Any subject as broad as private-sector bribery in international transactions is sure to be difficult to systematize, especially where legal systems are different and derive from diverse traditions. The problems of doing so leap out of the study conducted.

Similar problems beset the criminalization of bribery of public officials in international transactions, and yet the political will to achieve this condemnation was patiently forged by the leadership of the OECD Working Group. Although the political will to act on private-sector bribery may not be present today, owing to lack of knowledge of the extent of the problem or choice of other priorities by the Working Group, there is likely over time to be a growing recognition that private-sector bribery is the twin of bribery of public officials and that its condemnation is the natural next step of the OECD Working Group.

The ICC Task Force on Private Sector Bribery, which I have had the honour to chair, could not have produced its reports nor kept to its rigorous schedule without the helpful comments and drafting skills of members of the ICC Commission on Anti-Corruption. I would like to single out for mention *François Vincke* (Chair of the Commission on Anti-Corruption), *Andrew Berkley*, *Michael Davies*, *Fritz Heimann*, *Thomas Pletscher*, and *Stephen Walzer*. Thanks also are due to Dr. *Barbara Huber* for managing and making this publication possible.

Comparative Analysis

By Günter Heine, University of Berne

A. Introduction

International and supranational instruments and incentives seem to reveal the need for substantial improvement in the law for combating private commercial bribery. The increasing privatization of governmental services, the blurring of the separation between private and public functions, and the growth of international business transactions have, among other consequences, increased the importance of clarification in the laws combating private-sector bribery. Even opinions that clearly regard mere self-regulation as the best way to reduce private-sector bribery seem to concede that it is incumbent upon the law to guarantee a consistent framework.

In this study we have examined the legal situation in 13 countries, as well as the rules set forth in supranational instruments, to obtain a more detailed view of the criminal, civil, and administrative laws regarding private commercial bribery and extortion. Any subject as broad as private commercial bribery is sure to be difficult to systematize, especially where the legal systems involved are very different from one another, having derived from diverse traditions. In examining the criminal laws of these 13 countries, we focused on whether and to what extent they addressed private-sector bribery. Moreover, we examined the policy values the laws served and the models used to carry out the policies. On the civil law side, the studies inquired into the availability of remedies for damages resulting from private bribery. Finally, the authors analyzed emerging tools used by business to reduce private-sector corruption.

B. Role and Function of Criminal Law

I. General Trends - Policy Goals

Combating private (commercial) bribery by criminal law seems to have high priority in most of the countries investigated - when relying upon the official statements of governments and activities of legislatures as a measure. Reputedly, in most countries companies frequently (or, at least, not infrequently) engage in some type of corrupt payments. This is especially true for the Czech Republic, Italy, Japan, Korea, England/Wales, Poland, and Switzerland. The reasons for this differ: In East European countries of the post-communist era the rapid social changes accompanied by a philosophy of establishing market economies at any price, misplaced values and priorities, and low moral awareness caused by weak control systems, open the road to corrupt business practices. In Western and Asian

countries bribery is linked to the dramatic liberalization of commercial laws, growing professionalism in marketing, competitive markets, increasing anonymity, and decreasing ethical standards. As a result, in Korea, for example, corruption is considered one of the main causes of the recent economic crisis. Some types of "grease payments" often appear to an accepted part of the functioning of modern societies. For example, in Switzerland it seems to be acknowledged that ordinary life is determined by a net of favors and acquaintances. Similarly, in Japanese society the giving of some benefits by profit-seeking enterprises is generally accepted.

In concurrence with international and supranational activities, national legislatures have reacted or are reacting to the growing impact of bribery on society through the improvement of criminal laws. At the peak of the criminal law level is Korea, followed by the USA. Since 1998, the Korean government, the prosecution office, and the courts have taken strong measures against corruption by establishing anti-corruption commissions and anti-corruption investigation departments supported by broad anti-bribery criminal legislation. In the USA, a variety of specific laws, including not only bribery, but fraud, economic espionage, witness bribery, television game show bribery, and sports bribery, etc., have been enacted. Legal reforms or amendments to statutes have been enacted or are under discussion in Germany (reform 1998, 2002), Poland (draft law 1999), Switzerland (draft law 1999), and Italy (draft law 2001). In many countries, courts, as a rule, are willing to extend criminal responsibility, meaning that older provisions are being accommodated to fulfill actual current needs. For example, in the Kim Hyun-Chul case (Korea), the accused person, son of the former President, was sentenced for committing the crime of "good-office bribery" (1997), although he did not possess the status of public official, which until then was a prerequisite of such crime. As a rule, public and commercial bribery are often seen as twins. Therefore, a broad interpretation of "matters of public interest" that are covered by criminal provisions is favored in the Czech Republic and Poland, even though Poland belongs to those countries that lack clear criminal prohibitions against commercial bribery.

Nevertheless, despite international and national tendencies towards combating commercial bribery by means of criminal law, some payments/benefits for facilitating the conduct of business are still tolerated, as noted above and as discussed more fully in some of the individual country reports.

In general, the policy goals pursued by the jurisdictions criminalizing commercial bribery are: deterrence or - perhaps more precisely - the strengthening of public awareness regarding the giving or accepting of illegal benefits in business matters; changing social behavior partly by symbolic acts and partly by repression; and the sharpening of social consciousness to understand that corruption is not only ethically unacceptable but also counter-productive.

Further, a variety of different public goals are involved, such as guaranteeing the integrity of the relationship between employer and employee, integrity of the property and assets of corporations, proper decision-making, avoiding distortions of competition, development of economic competition and maintaining well-functioning of free competition.

II. *Sources and Techniques*

Some of the countries reviewed established criminal provisions against bribery in their *Penal Code*: This is the case in Germany (1998), Korea (1953, accompanied by special laws), the Netherlands (1967), and Sweden (1977). Italy included provisions in 2002 in the *Codice Civile* (Art. 2635, Disloyalty caused by gift or promise of anything of value), however, this is not as significant as it may appear since Italy's Civil Code traditionally incorporates both civil and penal regulations regarding commercial companies.

Other countries have enacted criminal provisions in special laws, such as *commercial codes* (Korea - with overlapping provisions in the Penal Code, Japan, the Czech Republic, Switzerland), the Prevention of Corruption Act (England/Wales, 1906), the Labor Code (France), and a variety of laws that address not only with commercial bribery, but fraud, economic espionage, witness bribery, television game show bribery, and sports bribery (USA; as to several relevant acts, see also report Korea). The Czech Republic links regulations in the Commercial Code (definition of "bribe") with the Penal Code (criminal provisions on unfair competition and breaches of mandatory rules).

Still other countries have criminal provisions referring to public officials (corresponding to the EU-Convention on the fight against corruption involving officials of the EU or officials of Member States of the EU), but in regard to commercial bribery still adhere to classical crimes, such as fraud management, misappropriation, fraudulent administration, or forgery of documents (Spain, Poland, Switzerland). However, in Switzerland and Poland drafts are under debate that deal with private-sector bribery.

Spain seems to be a bit resistant to the European measures. It has signed but not yet ratified the European Council's Criminal Law Convention on Corruption of January 27, 1999. Moreover, no reform activities are envisaged in respect of the Joint Action of December 22, 1998. According to the Spanish author, what is needed in Spain is for the penal system to be provided with the personal and material means that it now so drastically lacks in order to allow it pursue the fight against crime in business.

At first glance, for the regulation of commercial conduct through legislation it would seem preferable to enact prohibitions that take into regard specific social circumstances instead of incorporating one broad prohibition into the Penal Code, because, for example, such legislation has caused uncertainty as to the meaning of "corruptly." Countries that have done so (the USA, and, with some reservations, Korea) document intensive overlapping among such provisions. On the basis of specific procedural conditions (including prosecutorial discretion), this approach encourages policies to intensify pressure on defendants by so-called over-charging by the public prosecutor (USA), a phenomenon that is alien to most European criminal procedure systems.

III. Approaches of the Provisions - Protected Interests

It is important to clarify the type of legal approach underlining criminal provisions, viz, which legal interests are protected by criminal law. However, it seems to be an unspoken rule that legislation avoids fixing distinct interests. A reason for this may be to allow for flexibility in the interpretation and scope of the provision. Nevertheless, *cum grano salis*, analyzing commercial bribery from the viewpoint of *three basic models* may help to clarify the theoretical and practical meaning of different legislation. As to the elements and scope of the offense, it is important to note the interests to be protected or, on the other hand, to note which policy concerns underpin the laws criminalizing bribery in private-sector businesses. The variety of approaches in the different legislation schemes allows subcategories meaning that soft transmissions and overlappings between the three models are inevitable.

The classical interest underlying private-sector bribery is condemnation of practices that adversely affect *corporate assets*, shareholder interests, or *property interests* (first model).

Under the second model, private-sector bribery is criminalized because it endangers or violates employment relationships, in particular the bonds of duty and loyalty owned by an employee towards his employer (*breach of trust*).

The broadest policy justification, *promotion of competition* (third model), aims at protecting free or fair competition and the functioning conditions of the market. Commercial bribery is seen as a factor that distorts or prevents fair competition and, thus, the proper functioning of the market.

It is of interest, for example, that the consent of a person to the bribe may justify the violation if the consenting person is empowered to dispose of the protected interest. This may be the case in the individual fiduciary relationship between employer and employee. On the other hand, general interests such as the function-

ing of free competition, may hinder a justification. Vice versa the protection of the free market may focus on the national market, therefore jurisdiction may be limited.

When it comes to defining the crime, the variety of approaches taken by the different national systems cause substantial differences in the range of application of the laws.

1. First Model: Property and Assets of Enterprises

The classical approach intends to protect the property and assets of the enterprise involved. The typical offense is fraudulent management, which is generally the breach of a duty to manage or supervise the management of entrepreneurial property (see Art. 646 PC Italy, Art. 158 PC Switzerland, Art. 295 PC Spain).

In Spain proof of harm to the enterprise is an element of the crime, whereas in Switzerland failure to increase wealth is sufficient. This model principally encompasses genuine bribery offenses. In Italy, Art. 646 PC has been widely applied with respect to company directors who have furtively built up off-balance sheet funds and misappropriated them in favor of third parties for aims that are unlawful and outside of the company's corporate object. The new Polish draft law (1999) makes it a bribery offense to accept or give a personal benefit in exchange for behavior that may cause significant damage to his enterprise (Art. 296bis Polish draft law). The Polish draft law avoids problems of proving a breach of duty (see below 2) or damage to the property of the enterprise (so-called "potential endangerment of property" crime).

However, one critical point regarding this model is the question whether the prohibition clearly distinguishes between illegal and legal conduct. The other issue concerns the matter of justification by informed consent. This approach, in general, may provide for approval of a tacit agreement in cases where the board of the enterprise impliedly consents to the endangerment or harming of corporate property and may be on the verge of tolerating corporate climates that encourage bribery.

2. Second Model: Breach of Trust, Loyalty in Employment Relationship

In the field of private bribery, many countries favor protecting the employment relationship. Within this scope one finds different emphases, such as breach of loyalty (England/Wales - clandestine abuse of a position of trust; France), integrity of the labor relationship between employee and employer (the Netherlands), integrity of duties in business matters (Japan for the receiver of a bribe), or integrity of fiduciary relationships (USA - Clayton Anti-Trust and Robinson-Patman

Acts). Other countries relax the aspect of relationship by focusing on "proper" decision-making, namely, decisions made in accordance with ordinary business rules (Korea - integrity of commercial transactions; Sweden - autonomous decision-making).

The new Art. 2635 CC in Italy criminalizes "Disloyalty caused by gift or promise of anything of value" and covers (in respect of passive bribery) directors, general managers, etc., who, based upon the gift or promise of a thing of value and in violation of the duties of their office, commit or omit to perform an act, thereby causing harm to the company. Thus, the Italian approach combines elements of model 1 and model 2.

The legal approach focused on "protecting the employment relationship" incorporates acceptance of defenses resulting from the employer's or superior's knowledge or agreement. Often the core of the "wrongdoing" is seen as the act of secretly keeping the gift (in particular, the Netherlands). The Swedish Skane and Blekinge Court of Appeal pointed out (1997) that when an employee in the private sector accepts a bribe with the knowledge or consent of his superior it may be lawful. The Korean Supreme Court follows a similar view (judgment of January 29, 1999, and of June 14, 1996), as does the leading opinion in France. However, courts are usually not willing to simply accept these defenses without exception. They try to expand the concept of the relationship (breach of loyalty between employee and employer) or the interpretation of "improper" benefit with the result that acquiescence by the employer to the bribery "does not necessarily exclude the offense" (Korean Supreme Court, *ibid.*; compare also Swedish Court of Appeal, *ibid.*). This backdoor is opened by emphasizing that it is the general public that is protected; however, the approach of the second model has been abandoned.

This approach targets persons who administrate the business of others. The typical addressee is any employee, worker, or agent (genuine crime of personal status). One resulting question concerns the responsibility of *employers*. They sometimes are strictly excluded from direct criminal responsibility by legal definitions that definitively enumerate the responsible persons. Committing a crime of complicity, for example, is generally possible, although, whether the employers' conduct justifies the bribe by consent (e.g., Korea, Sweden) must be proved.

Other provisions leave room to encompass employers as main actors. These provisions do not refer to the employee/employer relationship but to that between "any person employed by or acting for another" (sect. 1 Prevention of Corruption Act England/Wales) in business matters. This scope, moreover, allows for corporate criminal liability on the basis of the identification theory or by attributing acts/omissions of persons in charge to the legal person (England/Wales, USA).

3. *Third Model: Free Competition*

The broadest approach aims at protecting free or fair competition and the proper functioning of the market. This concept was adopted in European supranational measures (even when they encompass or leave room open for all three types). It is further incorporated into the laws of several jurisdictions, including Art. 299 PC Germany, Art. 4b UCL (Commercial Law) Switzerland, Arts. 170-172 Royal Decree no. 1265/1934 Italy (pharmaceutical bribery), sect. 149 PC (with reservations) and sect. 49 Commercial Code Czech Republic, and sect. 1 Prevention of Corruption Act England/Wales. As we have seen, some other countries refer to this approach by expanding model 2. Indeed, consent by persons in charge cannot justify the offense because violations of collective interests cannot be approved by individual citizens. Furthermore, to convict a company (if corporate liability is provided for by national legislation) one would have to prove that the chief executive or an executive with plenary authority in the relevant sphere of corporate activity authorized (or, at least, was aware of) conduct on behalf of the company that fell within the parameters of the offense.

From the outset of this approach no harm or breach of special duties (of loyalty) must be proved. Therefore, the decisive point seems to refer to the definition of "improper benefits," meaning endangering free competition. The Swedish Institute to Combat Corruptive Practices (*Instituted Mot Mutor*), in order to provide guidance for business, developed special guiding principles in 1998 concerning "the use of benefits to promote business contacts and relationships." Even if these rules of conduct are primarily intended to promote self-regulation by the business community, courts and authorities can use them as indicators. Indeed, the interpretation of "improper benefits" seems to be an *open matter*. Questions arise in this context regarding endangerment to free competition: Does it constitute a crime of bribery to accept kinds of gifts if in other social spheres gifts are socially accepted? How should benefits traditionally used in certain social areas such as expensive dinners be addressed? Is it a task of criminal law to stigmatize traditional social behavior? In the Czech Republic, the legislature seeks to provide more precise rules. Sect. 149 PC requires the jeopardizing "of operation or development of a competitor's company by conduct contrary to the rules of economic competition or contrary to the practices of competition" and bribery by legal definition is contrary to fair competition (sect. 44 para. 2 Commercial Code).

Of course, such an approach allows various restrictions in the application of the law. For example, regarding potential defendants German legislation - in contrast to England/Wales - restricts the range of application to employees or agents of a business entity. Another example is Art. 4b UCL Switzerland: The improper benefit is defined by law as an undue advantage that is apt to seduce persons into acting contrary to their duties. This legal prerequisite opens the possibility to a

defense that the employer knew of or accepted the bribe. Therefore, the Swiss legislature combines model 2 and 3 in contrast to Germany and (with reservation) England/Wales.

The *Joint Action* of the European Union of December 22, 1998 on corruption in the private sector requires the enactment of provisions creating a criminal offense covering conduct that could involve distortion of competition, "as a minimum within the common market" (Art. 2 para. 2). Thus, model 3 is particularly suited to a widening of national jurisdiction. However, for example, in Germany the leading opinion still adhered to the protection of the national market, which includes general principles of jurisdiction (active, passive principle of personality, etc.). In 2002 the legislature broadened the extraterritorial application of § 299 PC Germany to acts affecting foreign competition.

IV. *Criminal Law in Practice*

Cum grano salis, three categories can be addressed. The first group covers legislation in which criminal law does not play a role in combating bribery, taking police investigation cases and accused or sentenced persons as a measure. The second group involves most countries, where criminal law seems to have little significance or a subsidiary role. In the third group, consisting in particular of Korea, prosecution of private bribery plays an important role.

The *Czech Republic, Poland, Spain, and Switzerland* (as to Art. 4b UCL) belong to the first group. In *Switzerland*, however, some important cases in which the court imposed sentences were prosecuted under management fraud.

In the second group, where criminal law has a minor role, the following tendencies can be noted:

In *England/Wales*, the total number of prosecutions is small. To date, there is no standard practice concerning extraterritorial cases of corruption. The investigation of corruption is not within the first ten priorities set nationally for police forces. The typical sentence following conviction is a custodial sentence. It seems to be true for most of the countries that, by their nature, most offenses do not come to light. Even when they do, the behavior typically results in the employee's dismissal rather than the involvement of law enforcement agencies - as most authors have stated.

In *France and Japan*, the bribery provisions are seldom used. In *France* imprisonment is not imposed for the crime of bribery. In *Germany*, there were 63 cases registered by the police in 1999, although there is no data available on how many, if any, resulted in court sentences. In the *Netherlands*, between 1981 and 1990, 34 cases were reported to the prosecution service, although in only two of the cases

was a verdict issued. Transaction seems to play a role in the development of these statistics. Rather than prosecute, the public prosecutor can settle a case by transaction, which is a form of diversion whereby the offender voluntarily pays a sum of money to the Treasury, or fulfills financial conditions in order to avoid further criminal prosecution and a public trial.

In *Sweden*, about 200 judgments have been registered (1978-2000). The majority of these cases were settled in the courts of first instance. Many cases did not lead to prosecution. Mostly, persons in a position of trust working in the private sector are involved. However, most cases are of low caliber, the benefit of the offense is fairly unimportant. In the *USA*, there are relatively few prosecutions and a dearth of information related to private bribery as compared with public bribery. In 1999 only about 0.05 % (251 cases of 50,353) of the total number of federal cases prosecuted in court related to the crime of bribery. The average length of sentence imposed was approximately 20 months, and 40 % of the cases brought involved civil fines or restitution (averaging \$ 5,000 each). Some other tendencies can be registered at the state level. New York State has brought a relatively large number of cases related to private commercial bribery. Nevertheless, the paucity of cases (in general) is attributed to the fact that bribery cases are extremely difficult to prove in court. Thus, it is no surprise that prosecutors often prosecute defendants for related crimes, such as fraud or conspiracy, which are generally easier to prove legally.

Korea belongs to the third group. In 1998 the Korean prosecutor's office ordered a crack-down on corruption in the public sector as well as in the private sector, which was accompanied by the creation of an anti-corruption investigation department. Between 1998 and 2000, approximately 9,700 suspected persons were registered by the public prosecutor (on suspicion of one of six criminal provisions [in total 31 provisions]). Around 60 % of these suspected persons will be or have been accused [sentencing quota ca. 30 %]. In this period more than 4,300 persons were arrested. Whistle-blowers play an important role in detecting corruption. To encourage internal actors to come forward, the prosecutor's office often reduces the punishment or grants them immunity. It is reported that the broad Korean criminal law approach is supported by the awareness of Korean people and Confucian tradition.

C. Main Aspects of Civil Laws

The Program of Action against Corruption, prepared by the Multidisciplinary Group on Corruption, set up under the joint responsibility of the European Committee on Crime Problems and the European Committee on Legal Cooperation, and adopted by the European Committee of Ministers at the end of 1996, indicates that when fighting corruption, "civil law is directly linked to criminal law [...]". If

an offence such as corruption is prohibited under criminal law, a claim for damages can be made which is based on the commission of the criminal act. Victims might find it easier to safeguard their interests under civil law than to use criminal law."

This direct linkage holds true only for common law jurisdictions, but not, however, for some continental jurisdictions under review, where we find a more or less sharp division between the two branches of law. Even so, it is reported that some courts tend to award damages (only) when a crime has been committed resulting in a conviction. Yet, we have seen that in many jurisdictions a criminal conviction in the sector of private bribery is seldom reached. This may be one explanation why in some countries civil law seems to be of marginal interest, in particular in Sweden, Poland, Switzerland, the Netherlands, the Czech Republic, and possibly in Germany. Furthermore, for a variety of reasons, it is often believed that businesses choose to handle business matters and employer/employee issues, which includes commercial bribery, outside the civil legal system. A trial ties up both financial and organizational resources, quite apart from the fact of the risk of having to pay the costs of proceedings in many countries. In Sweden, for example, one's own legal cost may easily exceed the amount of the damages that may be awarded if the claim is granted. Often authors emphasize that there are serious difficulties in proving the bribe, the amount of the damages, and a causal link (Germany, France, Switzerland, the Netherlands, Korea). Specific hurdles of law do exist in Sweden where the plaintiff must conduct litigation in two different courts: first an action must be brought for a trading injunction in the Market Court and then an action for damages must be instituted in a court of general jurisdiction.

Corrupt conduct can well give rise to a failure in the performance of contractual obligations, in particular breach of fiduciary duty. Additionally, under certain circumstances, tortious remedies, such as inducing a breach of contract, inducing a breach of fiduciary duty, interference with a trade or business by unlawful means, anti-trust violations, unfair trade practices, or even civil conspiracy (England/Wales) are available. It is not possible to make any reliable assessment of the extent of civil actions involving allegations of corrupt conduct either in general or regarding the approaches favored in practice. However, it must be stressed that in England/Wales there are many cases in the law reports involving claims associated with corrupt conduct. The response to bribery by the civil law in England/Wales - promulgated by some landmark cases - is substantially characterized by way of enforcement of fiduciary duties. In the USA, up until the 1990s, civil sanctions under state laws were the most frequently utilized legal recourse against private bribery and it would appear to remain the case today as well. Civil actions under state law are typically based upon common law principles such as breach of fiduciary duty or tortious misconduct. Similarly in Germany and Switzerland, ac-

tual cases of plaintiffs pursuing defendants under tort law or breach of duty of loyalty exist.

Bribery may also lead to an unlawful act (tort) in all countries, however, with differences in legal conditions and practice. The famous Dutch Cohen-Lindenbaum ruling has formulated the leading principle: A person who bribes an employee commits an unlawful act against the employer because he incited the employee to fail in performance of the obligation of the employee towards his employer. Indeed, in most countries it is said that private bribery constitutes a tort because bribery is an act that either violates a statutory duty (Czech Republic, Germany, Italy, Korea, the Netherlands, Poland, Switzerland) or is at least *contra bonos mores* (Spain). Corresponding to the broad approach of England/Wales on the basis of a breach of fiduciary duties, the tort law of many countries, such as France, Germany, Korea, the Netherlands, Poland, and Switzerland covers the briber and his accomplices, whereas complicity includes helping, aiding, and ordering.

The issue at stake concerns the proof of *causal link and damage*. It seems that in all of the countries surveyed difficulties arise with this issue. It is often difficult to prove causation from the bribe when the bribes are used as lubricant to book orders. The plaintiff must introduce evidence that, say, the order would have been booked regardless of the bribery, and that, for example, the booked order was less profitable than the order would have been without a bribe. However, according to the Czech Commercial Code (sect. 49) a causal link between the act of bribery and the damage is not required.

Class action lawsuits, which allow persons who suffer damage to bring a claim on behalf of all similarly situated persons, seem to occur more frequently, especially in the USA.

Punitive sanctions or sanctions based on extraordinary punishable elements, are well established only in the USA and, as to the latter, in England/Wales. A plea for the introduction of punitive damages was recently discussed in the Netherlands.

If the civil case seeking a civil remedy for private bribery has international elements, the international trends seem to be in favor of broadening national jurisdiction. This is in particular true for England/Wales. Furthermore, in some contrast to most of the other countries, the author of the England/Wales report emphasizes the robustness of English civil law, which is seen as a flexible and effective way of stripping the profits of corruption and undoing transactions influenced by bribery.

D. New Preventive Measures and Reform Tendencies

The scope of new preventive measures and reform tendencies in the field of combating commercial bribery varies a lot among the countries surveyed, corresponding to differences in legal and social culture and the status quo. In a few countries, in particular in Poland and the Czech Republic, even the subject "leaving a matter to the business community to police through self-regulation" seems to be alien. Topic one of the policy agenda, especially in Poland, requires creating an independent and effective administration of justice. In the Czech Republic, the quality of public administration has been addressed as problematic. However, even in legal systems traditionally based on well-functioning justice and administration systems, it is noted that there is not much new active law enforcement as far as private bribery is concerned (e.g., the Netherlands). In contrast to this, though, is Korea. Some jurisdictions have significant experience in the field of corporate codes of conduct (USA), while other countries, influenced by globalization of market structures, are still at the beginning stage (Korea) or (at most) more or less in the phase of testing and establishing forms of self-regulation step by step, where the meaning and consequences of complying with internal corporate programs are open questions. Therefore, the points of departure in respect of new measures and reforms vary to a large extent. Although private enterprises may favor self-regulation as the most effective way to curb private-sector bribery, the development of measures by companies to control internal bribery is proceeding at different rates in the countries surveyed.

E. General Observations

The reports of the 13 countries surveyed and the report on supranational measures produced a vast tapestry of valuable information. However, no country could provide a full picture in respect to combating private-sector bribery, nor provide sufficient empirical insight as to judicial reactions. The reports show, not surprisingly, wide differences among legal approaches and disparities within the traditional categories of the law. Therefore, the points of departure in policies combating or controlling private-sector bribery in fulfillment of supranational measures differ quite a lot. Nevertheless, certain trends can be observed.

Most of the jurisdictions provide *legal statutes or measures* to restrain private-sector bribery. Former assumptions - that private persons should deal with commercial bribery only by civil remedies or self-regulation - have mostly been abandoned. It is often said that, for several reasons, businesses choose to handle business matters outside of the civil legal system. Moreover, private and public-sector bribery, with only the latter traditionally treated as a crime, are often seen as twin evils that cannot be meaningfully distinguished, taking into regard the blurring of

the separation between private and public functions and the increasing privatization of governmental services.

All countries have criminal provisions dealing with bribery, though under different statutory schemes, for different purposes, and with different severity of punishments. Eleven of the countries surveyed have established specific criminal provisions, while the others adhere to classical crimes such as management fraud or fraudulent administration. The conditions of EU measures have not been fully realized by some of the countries concerned.

When it comes to defining the crime, a variety of different approaches must be taken into account, revealing dissension about the policy goals that private-sector bribery prohibitions should vindicate. Many of the countries covered by the study have a law that condemns it as an unfair competition. Other countries criminalize private-sector bribery on the grounds that it violates the bonds of duty and loyalty owed by an employee to his employer. A classical theme is the condemnation of practices that violate or endanger corporate assets or shareholder interests. Frequently a plurality of purposes is underlined to guarantee flexibility in implementation of law, undermining, however, the rule of the law and causing serious problems in structures of procedural laws.

The variety of legally protected interests causes substantial differences in the definitions of the criminal act. There is no uniform definition of the crime of private-sector bribery. Therefore, different answers are given by the legislatures and courts to the following issues: whether harm to a competitor or loss to the bribed company is required to produce a conviction; the type of bribes covered by criminal law; the effect of employer/board of the company/shareholders' knowledge of or consent to the bribe; whether an illegal contract/pact must be proved; whether the promise of an illegal advantage *ex post facto* is actionable; whether specific duties must be violated; whether legal persons can be held criminally liable.

Problems regarding the enforcement of existing law in an extraterritorial context arise in all of the country reports. It seems that territorial jurisdiction, the traditional basis, is insufficient for addressing the new international dimension of private-sector bribery. Cases with an international element are only rarely prosecuted. However, there is a growing trend toward widening the national territorial approach. Notable recent examples of this are the UK and Germany, and the EU Joint Action gives further impetus to this trend.

On the basis of available information, in most countries criminal legislation regarding private-sector bribery appears to have a limited impact on prosecutions and convictions with only a few exceptions, such as Korea. However, it is a new subject for many legislators and courts seeking to formulate effective and ade-

quate methods for combating bribery in business matters. Therefore, it would be short-sighted to marginalize these prohibitions as having only a symbolic function.

In the field of *civil law remedies* a disparity appears to exist between the weapons provided by statutory law and the reality of practical results regarding private-sector bribery. In a few countries, such as the USA, case law demonstrates the usefulness of compensatory and punitive damages. In other jurisdictions the authors cannot point to case law enforcing civil law remedies as to private-sector bribery. This limited use of civil remedies appears to result from a combination of factors in law and society. For example, bringing actions to civil court may be hindered by the concern of victims to avoid adverse publicity and trouble; damage seems to be difficult to prove and it may not always be adequately compensated for in relation to the costs of pursuing such compensation; legal obstacles restrict the plaintiff's claim (in Sweden, for example, there is a legal requirement that prior to a lawsuit the briber must have violated the terms of a prior injunction); and class actions are still alien in some jurisdictions. Only in a small number of jurisdictions is the plaintiff able to assert a damage claim in a criminal case. When it comes to extraterritorial matters, the authors emphasize increasing difficulties in proving evidence of damage and a causal link between bribery and disadvantage. It appears that these problems decrease in jurisdictions without any strict separation between criminal and civil process for the same misconduct as well as in jurisdictions where civil law is easily adapted to new measures.

The significance and enforcement of *forms of self-regulation* differ quite a lot among the countries surveyed. In highly industrialized countries large multinational companies have adopted corporate codes of conduct and many firms with an American mother follow these examples. Codes of conduct, as well as compliance programs, training, and education about ethical matters are widely used in some countries (particularly in the USA and the UK, but also in Germany, Sweden, Switzerland, Italy, the Netherlands, Japan, and Korea), but are nearly absent in others. Some authors express doubt about the usefulness of these measures, while others emphasize that to be effective self-regulation must be based on a clear and homogenous legislative framework. This includes the non-tax deductibility of private-sector bribery, which is not guaranteed in all of the jurisdictions surveyed. Furthermore, the legal meaning of private codes of conduct in a network of legal statutes is not clear. In the USA, sentencing guidelines have been established for reducing penalties for crimes if a company has adopted and enforced a code of conduct and compliance program. The Council of Europe Convention (Art. 7) appears to support such tendencies - for there to be liability based upon a violation of duties, a violation of a code of conduct may be sufficient. In most of the other countries, the status of private codes of conduct in this regard is uncertain. In Italy, however, serious breaches of certain forms of codes of conduct

set by the professional associations foresee professional restrictions as a consequence of such action. These sanctions are reinforced by the criminal law.

Some Western European countries have strengthened the role of auditors to assure the accuracy of accounts and, thus, the absence of corrupt practices. Encouraging and protecting whistle-blowers is a legal technique favored in the UK, USA, the Netherlands, Korea, and, more recently, Japan.

The country and supranational measures surveys do not reveal a golden path that can be followed for combating private-sector bribery. What the surveys clearly show, though, is that it will remain an ongoing task for all jurisdictions to strengthen and clarify the instruments of law in combination with instruments of self-regulation to successfully combat private bribery.

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