



Fight Against Corruption – Short and Long Term Effects on Criminal Law and Criminal Procedure

- Introduction
- Corruption control in the public sector
- Corruption control in the private (commercial) sector
- Political trends – legal problems
- Siemens – a concrete example: *who is the victim?*
- Conclusions

Introduction

- Corruption control has been a traditional area of criminal law in most Western jurisdictions
- For a long time, it had its focus on (and was limited to) the public sector
 - » constitutes the traditional understanding of corruption
 - » defines the traditional scope of penal corruption control
 - » and represents, to a great extent still today, the public image and perception of corruption
- Then it became, besides money laundering, one of the most extensively regulated issues on the international level
- Since 1980s extended to the private business sector
 - » reaction on developments of privatization of public functions
 - » politicization on international level (OECD, GRECO, etc.)
 - » problem: these bodies lack of democratic legitimacy

- Corruption became a kind of 'catch-all' phrase for all kinds of undue or problematic behavior
- Can the different sectors be regulated according to uniform principles?
- Should they be?

- Similar patterns, different contexts: public sector (administration), *political sector*, private sector
 - Phenomenology
 - Situational/criminological characteristics
 - » victimless crime
 - » control crime
 - Legal background/legal context
 - Legally protected values?
 - » public sector: integrity of public administration
→ claimants have explicit formal rights
 - » *political sector: legitimacy of the political (democratic) system*
 - » private sector: competition, free markets, financial interests of competitors (controversial)
→ do claimants have comparable formal rights?

- Problem: contractual liberty
 - Freedom to select business/contract partners
 - Economic incentives are an essential part of commercial life
 - Commission premium
 - Discount
 - Other economic advantages
 - Even for private consumers
 - » discount cards
 - » corporate debit cards
 - » Special offers ("buy two – get one for free")
 - » airline and other bonus programs (e.g., Miles & More, Amex Membership Rewards, Asia Miles, Payback, Ikea Family, etc.)

→ *What makes the difference between a flight award and a 'useful expenditure'?*

Corruption control in the public sector

- Intensified penal control
 - Cutback of legal limitations
 - Wrongful agreement as objective element of the crime omitted
 - Extension of prohibited activities
 - Includes now any unspecified advantage
 - "preparing the ground", "feeding-on", "climate care", "good relationship", "courtesy", "general goodwill", etc.
 - Consequence: boundaries between legal and illegal practices become blurred (for example: sponsoring)
- In recent years, corruption control was further intensified through its incorporation into the money laundering control system
 - Corruption as predicate offense to money laundering
 - Increased money laundering control ('PEPs', extra rules for intensified supervision)

**DIRECTIVE 2005/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 26 October 2005**

**on the prevention of the use of the financial system for the purpose of money laundering and
terrorist financing**

- (24) Equally, Community legislation should recognise that certain situations present a greater risk of money laundering or terrorist financing. Although the identity and business profile of all customers should be established, there are cases where particularly rigorous customer identification and verification procedures are required.
- (25) This is particularly true of business relationships with individuals holding, or having held, important public positions, particularly those from countries where corruption is widespread. Such relationships may expose the financial sector in particular to significant reputational and/or legal risks. The international effort to combat corruption also justifies the need to pay special attention to such cases and to apply the complete normal customer due diligence measures in respect of domestic politically exposed persons or enhanced customer due diligence measures in respect of politically exposed persons residing in another Member State or in a third country.

DIRECTIVE 2005/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 October 2005

on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

Article 3

For the purposes of this Directive the following definitions shall apply:

- (8) 'politically exposed persons' means natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons;

Enhanced customer due diligence

Article 13

4. In respect of transactions or business relationships with politically exposed persons residing in another Member State or in a third country, Member States shall require those institutions and persons covered by this Directive to:

- (a) have appropriate risk-based procedures to determine whether the customer is a politically exposed person;
- (b) have senior management approval for establishing business relationships with such customers;
- (c) take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction;
- (d) conduct enhanced ongoing monitoring of the business relationship.

CHAPTER III

Article 30

REPORTING OBLIGATIONS

CHAPTER IV

RECORD KEEPING AND STATISTICAL DATA

Member States shall require the institutions and persons covered by this Directive to keep the following documents and information for use in any investigation into, or analysis of, possible money laundering or terrorist financing by the FIU or by other competent authorities in accordance with national law:

- (a) in the case of the customer due diligence, a copy or the references of the evidence required, for a period of at least five years after the business relationship with their customer has ended;
- (b) in the case of business relationships and transactions, the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings under the applicable national legislation for a period of at least five years following the carrying-out of the transactions or the end of the business relationship.

Corruption in the private sector

- Multi track approach
 - Penal control
 - Non-penal measures and strategies

- Expansion of substantive and procedural control
 - Increase of negligent statutory offenses
 - Strict liability
 - Reporting obligations
 - Criminal liability of legal entities
 - catalogue of special, additional sanctions (see below)
 - Special measures of investigation, including financial investigations
 - *towards a further extension of sectional criminal procedures where special rules apply?*
 - Forfeiture/confiscation
 - Siemens case, see below

- Expansion of substantive and procedural control
 - Introduction of corruption in the private sector as an additional statutory offence has led to a double track system of corruption and embezzlement/breach of trust
 - Interrelation and concurrences of the two offenses not solved at all

- Embezzlement/breach of trust
 - 'Classical' statutory offense in continental European (civil law) jurisdictions for the definition of the criminally relevant area of occupational misconduct
 - Situational pattern: manager/employee acting against the (economic) interests of the employer (enterprise is the victim)
 - Problem: limited ("dissymmetric") accessory character of the offense: civil (internal) permission limits penal liability, but civil (internal) prohibition alone cannot define it
 - Problem: acting for the profit/interest of the employer (→ corruption?)

- Common criterion: social adequacy
- Different parameters than those for the public sector can apply
 - e.g. "climate care" and "good relationship" (lunch, dinner invitation) are not per se inadequate
 - Invitation to golf course?
- Problematic examples (German case law):
 - Sponsored computers for a school
 - Sports sponsoring
 - Extra bonus, special allowance, gratuity
 - 'signature bonus'
 - Hospitalization allowance
 - 'disproportionate' discount

- Problematic examples (cont'd):
 - Honorarium
 - Consultancy
 - Wide range of pharma marketing (free sample of pills → congress journey to Caribbean, Hawaii, etc.)

- Civil sanctions (punitive damages)
- Sanctions imposed by supervision authorities (e.g., *SEC*)
- Blacklisting
- Compliance and self control
 - Supervision
 - Internal revision
 - External accounting
 - Money laundering officers
 - Codes of Practice
 - Ethical Codes
 - Whistleblowing
- 'Soft' (reputational) sanctions
 - » German post case (search & seizure live on TV)

- Compliance
 - Additional track of control
 - Penal and other kinds of legislation
 - Internal codes of conduct and other rules
 - Takes (all) employees (at all levels) at risk
 - Traditional principle of "presumption of conformity" no longer applies
 - In case of contravention: disciplinary measures, other sanctions
 - Slight irregularities often sufficient to justify employees to be fired
 - Even in case of altruistic behavior (acting for the profit/interest of the employer – explicit or presumed) the risk goes with the employee (see Siemens case, below)
- *Today the compliance sections have the 'real' power in an enterprise*

Political trends – legal problems

- General trend: being tough on corruption
- Conflicting interests
 - Privacy and data protection (constitutionally protected basic right)
 - » data scandal at German Rail (DB)
 - » systematic computer screening of (known) bank account details and the names of all employees and their family members
 - » As a consequence of the tremendous public critique the whole compliance section was fired
 - Contractual liberty (leading principle of private law)
 - ...

- Europeanization, globalization
- Expansive application of US jurisdiction
 - Double investigations – double prosecution
 - Import of the extraordinary US standards in sentencing
 - » e.g., Foreign Corrupt Practices Act
 - Private investigations by international law and auditing firms
 - Loss of the monopoly of investigation of the domestic authorities (police, prosecution)
 - Import of conflicting standards of US law (substantive, procedural)
 - Loss of national protection standards for defense
 - Unclear interrelation between procedural standards of protection and civil compliance rules (contractual or provided by labor law)
 - High procedural cost
 - » Siemens

- Required by (binding) EU legislation for in certain areas: list of selected offenses as a minimum standard; corruption as a vehicle
- Two basic constellations
 - » Misconduct on the executive/management level (responsibility based on powers of decision-making, representation or control)
 - » Misconduct by staff (responsibility for lack of control)
- Additional requirement: profit made by the legal person
- This excludes:
 - » Cases of self-interest
 - » Cases with negative effects upon the legal person
- Parallel application of individual and corporate prosecution

**COUNCIL FRAMEWORK DECISION 2003/568/JHA
of 22 July 2003
on combating corruption in the private sector**

Article 5

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person;
or
 - (c) an authority to exercise control within the legal person.

**COUNCIL FRAMEWORK DECISION 2003/568/JHA
of 22 July 2003
on combating corruption in the private sector**

Article 5

Liability of legal persons

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in an offence of the type referred to in Articles 2 and 3.

**COUNCIL FRAMEWORK DECISION 2003/568/JHA
of 22 July 2003
on combating corruption in the private sector**

Article 6

Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision; or
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

Arguments pro:

- Problems to establish individual *responsibility* in the modern, complex organizational structures of corporations
- Problems to produce sufficient *evidence* under such organizational structures
- Lack of deterrent effects of individual sanctions
- Lack of deterrent effects of non-penal sanctions

Arguments contra:

- Incompatibel with the principle of guild (*societas delinquere non potest*)
- Strictly personal character of penal sanctions
- Unjustifiable responsabilization of the legal entity for individual misconduct of its personnel
- Double jeopardy (with regard to personnel involved)
- Punishing (at least indirectly) of innocent personnel (other personnel not involved)
- Possible negative effects on the financial interests of innocent third parties (shareholders)

A concrete example: Siemens

- Siemens – first corruption complex (Italy power plants), (2007/2008 trials)
 - Prosecution strategy as an indicator of the increased importance of confiscation for police and public prosecutor
 - Amount of bribes paid: **€ 5,000,000**
 - Primary aim of charge: conviction of the two responsible Siemens managers for corruption
 - Secondary aim: (corporate) confiscation of profits earned by Siemens:
 - » indictment: confiscation of the gross value of the contracts: **€ 338,100,000** (gross principle: "any advantage obtained from a criminal offense")
 - » demand in final plea: **€ 97,000,000** (net profit)
 - Judgement 1st instance: confiscation of **€ 38,000,000** (net profit)

- Problem: calculating confiscation according to the gross principle in cases of corruption?
 - Inconsistent case law
 - Constitutional Court allows application of the gross principle
 - Federal Court of Appeals (first division, responsible for general crimes): applies gross principle strictly, costs cannot reduce profits liable for confiscation
 - Federal Court of Appeals (fifth division, responsible for economic crime and business corruption):
 - Business sector requires economic calculation of assets liable for confiscation
 - In cases of corruption only the contract as such constitutes the advantage obtained from the offense, not the money used for contractor's labor and materials
 - Therefore, only the net profit is relevant, not the value of the contract

- Siemens – first corruption complex (Italy power plants), (2007/2008 trials)
 - Motion of appeal by Siemens: managers should be acquitted because commercial corruption was not punishable in Italy
 - Federal Court of Appeals: corruption acquittal, but conviction for embezzlement/breach of trust
 - As a consequence:
 - » **no corporate confiscation**

→ Who is the victim?

- Commercial corruption: the enterprise has made the profit, i.e., it cannot be considered to be the victim
 - what can justify its exemption from confiscation (and punishment)?
- Embezzlement/breach of trust: the regular pattern of the crime considers the enterprise to be the victim of a criminally relevant infringement of its economic interests induced by malicious activity of staff
- However: in contradiction to the basic pattern of the crime Siemens has made huge profit here
 - what can justify the punishment of the employee?
- Employee as victim of loss of occupational protection?
- Enterprise as victim of individual misconduct?

→ Who is the victim?

- How could parallel prosecution (corporate plus individual according to Art. 5 (3) Framework Decision 2003/568/JHA) be justified? Punishing the victim?
- Other victims?

More questions

→ In conclusion:

Are we on the road towards a boundless internationalized criminal law for businesses?

Thank you.

Dr. Michael Kilchling
Max Planck Institute for Foreign and International Criminal Law
Günterstalstr. 73
79100 Freiburg i.Br.
Germany
Tel.: +49-761-7081-230
Fax: +49-761-7081-294
m.kilchling@mpicc.de

www.mpicc.de