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International Efforts to Combat Corruption

I. Introduction

For a long time Europeans have been wondering why the US have been so persistently seeking to internationalize their Foreign Corrupt Practices Act (FCPA). Of course they understood that US business was suffering from a competitive disadvantage especially in those regions of the world where corruption was endemic. Nobody, however, really seemed to try to understand, why the US have enacted the FCPA in the first place. From a European perspective it was considered either as an act of moralism or a kind of short term self mutilation in order to gain a long term advantage in competitiveness, by forcing companies to win contracts without bribes. Under all circumstances Europe was until 1994 entirely concerned with the more or less hidden hegemonial trade agenda behind the move.

Only after the opening of the East and the access to new markets as well as a new rapid technological development especially in telecommunications did the extent of the globalization of the world economy become apparent also to the general public in Europe. Suddenly corruption abroad no longer happened on a remote continent, far away from home. For one thing, Europeans had to realize that they themselves also were the actors and the theatre in the world of bribery. Furthermore, they now perceived corruption abroad as negatively influencing their own trade opportunities: Suddenly dictators like Mobutu or Suharto were recognized as irrational trade barriers blocking the access to interesting markets. Maybe the US legislator has simply

anticipated this development when the chance arose in the aftermath of the Watergate- and the Lockheed scandals. I believe, however, that always a sense of responsibility for the behaviour of ones own companies did play a role in the US policy on corruption. The world-wide change of perception especially in the industrialized countries was essential for the current broadening of the coalition against corruption, rapidly gaining ground also in Europe. Members to the coalition are international organizations, governments, multi-lateral development banks, the business community, trade unions and NGOs: Maybe most spectacular, however, is the rapid development of inter-governmental programs and standards in various fora in the second half of the nineties: They are enforcing a decided change in attitude in all sectors of business. All European countries are in the process of concurrently preparing legislation to ratify and implement between two and six instruments against corruption: The OECD Recommendation and Convention of 1997, the Council of Europe Convention of 1998 and – for those who are members of the European Union – the four relevant Treaties and Protocols of the European Union on the protection of financial interests of the community. Currently in the foreground are changes to criminal legislation, however, all fora are rapidly moving into new areas of administrative and civil preventive and repressive measures on the one hand and the entirely new topic of private to private corruption in commercial transactions on the other hand. The question is no longer, should action be taken, but how can one coordinate this inflation of prescriptive material and control the adequacy of the implementing texts: Do concepts fit into eachother or are we facing competitive action by agencies and possible legal chaos?

The following presentation intends to bring some order into the current picture by explaining the background, the different methodology and goals of the various efforts from a European perspective to a US-public:

I will concentrate on the instruments of the **OECD,** the **Council of Europe** and the **European Union** and mention the initiatives taken in the **OAS** and the **UN (II.). I** will in this text, however, not go into detail on the very essential work done be the Multilateral Development Banks and the International Chamber of Commerce. The

last part of my contribution will focus on the various criminalization treaties and discuss a sequence of more technical issues in a comparative way (III.).

II. Overview over new Instruments

Starting my overview with the earliest of the three initiatives, with the OECD-instruments, I will stick to the fundamentals in this first round.

1. OECD

a. OECD (as the economic organization of developed states representing 70% of exports and 90 % of direct foreign investments world-wide) has a **narrow remit** and only limited ambitions in this area: The approach is basically **supply-side oriented** – intending to reduce the influx of corrupt payments into relevant markets by sanctioning the **active** bribers and their accomplices as well as by providing for a preventive framework. This approach depends upon other action being taken from the ,,demand-side" and it is in a sense unilateral, **even if collectively unilateral:** The concepts apply also to the bribery of officials of **non-participant** countries. On the other hand the OECD takes care not to intrude into other countries sovereignty, so the behaviour of foreign officials itself is not a topic for the OECD.

The OECD concept is clearly influenced by the fair trade-approach taken by the US since 1977. It does, however, not merely replicate the FCPA – this has become evident during the US-ratification procedure of the OECD criminalization Convention which did lead to significant adaptations to the FCPA: More essential, however, is the fact that the OECD-instruments create an international process, with follow-up mechanisms and outreach capability, a dimension reaching far beyond the traditional one nation-unilateralism.

Consistent with the principle rationale of creating a level playing field of commerce, it, however, attempts a homogenous – if you want – **autonomous** definition of the public official. Having said this, it becomes evident that the OECD so far is limiting its scope to active corruption of foreign **public** officials. Private to private corrup-

tion is under examination in a further stage of its work, but it is perceived as a quite different problem. Finally, the concepts concern themselves only with **„grand“** or at least straightforward corruption (in the sense of furthering illegal behaviour), excluding mere facilitation or grease payments. The OECD limits itself to **economically** relevant corruption.

b. Institutionally the OECD-Initiative is based on two main documents: The **„Revised Recommendation of May 1997**[1]. On the one hand – the mother-document containing those preventive and repressive measures, both criminal and non-criminal in nature. On the other hand the **„Convention of November 1997“**[2] picks up the **criminalization** issue and puts it into a legally binding framework.

The entire system depends on a strict political framework, a **timeschedule,** a systematic and serious **evaluation** both of implementation, legislation and practice as well as **an outreach** and networking procedure.

Turning briefly to the approaches by the EU and the Council of Europe, in order to highlight the main differences, I will start with the efforts in the EU-context.

2. European Union

a. One has to consider, that the Community itself has no powers to directly enact criminal law. According to the Maastricht Treaty it is developing its co-ordinated legislation in Justice and home affairs“ in a system of international treaties, which, however, have to be adopted and then ratified and implemented nationally (third pillar). The issue of corruption was approached by the EU so to say through the ,,backdoor“:

b. The 1995 Treaty on the Protection of Financial Interests of the Community of 1995[3] is the basis for a **First Protocol of 1996**[4] focussing for the first time in

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1 OECD-Revised Recommendation of the Council on Combating Bribery in International Business Transactions Adopted by the OECD Council on 23 May 1997.

2 OECD-Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference on 2 1 November 1997.

3 Treaty of the European Union on the Protection of Financial Interests of the Communities of 26 July 1995 (95/C 3 16/03).

Europe on criminalization of transnational bribery. It is, however, limited to the bribery endangering the community's economic interests and to the geographical area of the Union.

c. This Protocol has in turn been used as a stepping stone to go one step further, to drop the requirement of endangering the community's interests, in a 1997 **Convention on Bribery'.** These instruments are currently being ratified and implemented.

d. Meanwhile the Commission is trying to develop supranational law against corruption in the context of actual community law (First pillar) based on its competence outside criminal law. You will in its program find topics addressed already in the Foreign Corrupt Practices Act and in the OECD context, like the topics of tax treatment of bribes and rules on accounting and auditing. Most significant are new moves in the European Union to regulate private to private corruption in a commercial context.

e. Finally, reverting to the protection of the EU-budget for a moment, initiatives to actually unify criminal law, including transnational and supranational bribery in the context of the EU are well under way with the draft of a „**corpus iuris**", which has met great interest in the European Parliament. It could eventually develop into a unified core-criminal code for the European Union, however, it is early for any reliable prediction[6].

Summing up, interesting developments may be identified in the context of the European Union, they are however limited in geographic scope and may be seen as steps on the way to supranationality.

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4 First Protocol to the Treaty on the Protection of Financial Interests of the Communities of 27 September 1996 (96/C 313/01).

5 Convention of the European Union on the Fight Against Corruption of 26 May 1997 (97/C 195/01).

6 Delmas-Marty, Vers un espace judiciaire européenne. Corpus Iuris, portant dispositions pénales pour la protection d'intérêts financiers de l'Union Européenne, Paris 1996; The European Union and Penal Law, European Law Journal, March 1998, p. 87 ss.

3. Council of Europe

The approach of the **Council of Europe** follows yet a different pattern: The current role of this organization in Europe in the area of law is to act as a "thinktank" for legal harmonization and the protection of Human Rights on the one hand and to foster legal integration of Eastern Europe on the other hand. Following up on an initiative by Ministers of Justice of 1994 Heads of Sate have adopted **twenty "Guiding Principles"**[7] at their Strasbourg Summit in October 1997. The Council of Europe has also prepared a **criminalization convention*.** It has been adopted last November by the Committee of Ministers. Different from the criminalization initiatives discussed so far, it adopts a very broad notion of corruption, including active and passive domestic bribery of all sorts of officials, transnational bribes and the bribery of private persons in a commercial context as well as "trading in influence". It easily links up with previous work of the Council of Europe on mutual legal assistance and extradition as well as more recent work on money laundering and confiscation of assets. Apart from this broad notion of corruption a striking difference to the OECD approach to transnational bribery is its reference back to the law of the victim country for definitions of officials. Here the Council of Europe echoes the approach chosen in the quite different setting of the EU. Another feature of the Council of Europe's text is its far reaching formulations combined with just as far reaching opt-out-clauses (reservations), even if last minute efforts have achieved to limit the number of reservations. Instead of seeking the focussed and collective unilateralism of OECD, Council of Europe creates a **pattern for legal harmonization** of rules addressing both domestic and transnational corruption, foremost in order to enable **more efficient mutual legal assistance** within its geographical reach.

Furthermore, both the Council of Europe and the EU have developed elaborate follow-up mechanisms to their instruments.

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7 Resolution (97) 24 portant sur les 20 Principes directeurs pour la lutte contre la corruption adoptées par le Committé des Ministres lors de sa 10 1e session, Strasbourg, 6 novembre 1997.

8 Criminal Law Convention on Corruption adopted by the Committee of Ministers in its 1 03rd session, Strasbourg, 3 – 4 November, 1998 (CM[98] 18 1).

4. Other Initiatives

Merely to round off the terrain I will mention two further international initiatives establishing minimal standards for its Member States:

a. The aims of the OAS-Convention come rather close to those of the Council of Europe, even if the method applied is somewhat different. The **"Inter-American Convention Against Corruption"** of 1996 also applies a broad concept of bribery, it goes beyond traditional approaches by including "illicit enrichment", a kind of criminally sanctioned reversal of the responsibility of explanation for sudden increases in the officials assets. This instrument is a compromise between Latin-American interests in mutual legal assistance and extradition and the North-American agenda in criminalizing active transnational commercial bribery. So far this instrument does not have a follow-up mechanism attached, but OAS is currently developing a more comprehensive action against corruption, including non-criminal measures.

b. Finally, within the broadest geographic scope, the initiatives of the **United Nations** need to be mentioned. The UN have resumed work[9] on corruption with two general Assembly-Resolutions in 1996[10]. They basically pick up the items of other instruments and welcome the efforts without, however, wanting to interfere with this work. These policy statements will, however, serve as a basis for further work in integrating the corruption-issue into programs against organized crime. Currently ECOSOC is targeting the abuse of offshore resorts for purposes including the preparation and aftertreatment of bribery. The General Assembly has recently taken note of a study by the United Nations Office for Drug Control and Crime Prevention on financial havens'[11].

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9 An earlier draft anti-corruption convention in the United Nations failed 1979.

10 General Assembly Resolution 5 1/59 and 5 1/19 1.

11 Financial Havens, Banking Secrecy and Money Laundering, UNDCP, Study prepared by Bloom ed. Al., Bloom, 1998.

III. Specific Issues Relating to the criminalization of Transnational Bribery

In a third section of this talk I would like to focus on some of the key issues of criminal law as addressed in the Conventions mentioned above.

1. Methodology

First I have to indicate that the wording of the criminalization Convention of the OECD is not necessarily precise enough to meet the standards required for a self-executory international text. The aim has been from the outset – and this is highlighted in Commentary 2 of the OECD-Convention to establish **„functional equivalency".** The Convention does not attempt substantive unification, countries have the choice of means, the results have to be comparable. The respective texts of the Council of Europe and the EU are far more oriented towards actual harmonization or even **unification** of criminal law amongst countries with similar legal systems and standards.

2. Definition of Public Official

The differences may be less apparent in the definition of the offence, where a certain uniformity will be necessary, especially when defining the foreign public official. Whereas the Convention of the EU and the Council of Europe **refer back** to the "victim-country" for the definition of public official, it is in the logic of the OECD's unilateralism and its aim to create a level playing field of commerce to attempt an **autonomous** definition of public official, potentially using the same criteria on a world-wide basis. So even where different rules would apply locally not only persons holding a legislative, administrative or judicial office, whether appointed or elected, but also persons exercising a public function are included in this definition, no matter if state employees or privately contracted. Even if the **"functional official"** is a category known to many OECD-countries domestically, the OECD gives it its own meaning, explained in art. 1 section 4 and Commentary 12-

19. On the other hand, where public ownership overreaches the public function, where for instance a car-manufacturing plant is state owned merely for historical or fiscal reasons, but is in full competition with private enterprise without preferential treatment by state, its officials would be considered private operators. This is just one example how the OECD tries to bring light into the grey area between public and private. The instruments, however, still limit themselves to the corruption of public officials.

3. Definition of the Offence

A wider spectrum of differences in implementation is to be expected regarding the definition of the actual offence: Whether a country chooses to define the quid pro quo as an illegal bribe contract, as an exchange of a promise of undue advantage against – first alternative – the envisaged breach of duty or – second alternative – simply for acting or refraining from acting in the performance of official duties is in the OECD-context left to the domestic legislator of Party States. The first option might have the advantage that it filters out all kinds of grease payments without further ado, there will be no need for an exclusionary rule on facilitation payments and similars, the second option is less demanding in terms of proof. The bottom line is signaled in Commentary 3 : To prevent lengthy arguments about domestic definitions of duty of officials the autonomous definition of the Convention states that the partial use of discretion is regarded universally as a breach of duty (e.g. auctions of contracts amongst valid bidders for private benefit).

4. Responsibility of Legal Persons and Sanctions Against Companies

A brief look at all Conventions shows that they contain the principle of **corporate liability.** However, as for instance OECD art. 2+3 and Commentary 20 indicate, the sanctions could also be **administrative** in nature, the minimum requirement, however, is a **monetary** sanction meeting the standard of ,,effective, proportionate and dissuasive“ penalty.

You will find a similar approach both in the Council of Europe draft and the EU instruments. For the context of the protection of financial interests the EU has in 1997 enacted a Second Protocol to the Convention of Protection of Financial Interests of 1995 also applicable to corruption endangering the EU-budget. This instrument talks of vicarious responsibility and of necessary measures, however, evades direct reference to criminal responsibility or punishment (art. 3/4 Prot. II 1997).

The detailed texts on responsibility of legal persons in the Convention of the Council of Europe (art. 18/19) explicitly allow for non-penal sanctions.

Reverting to the OECD-context: The concept of "functional equivalency" even allows to fulfil the further requirement of **confiscation** of both, **bribes** and **benefits,** by way of "monetary sanctions of comparable effect". This might for some jurisdictions be a way out of the technical difficulty of calculating the proceeds of bribery, since a penalty would rather be governed by culpability than by provenance of crime and would allow for a wide discretion in fixing the amount of penalty.

You will easily detect what formidable difficulties the OECD-Working Group is facing in its follow-up process when having to evaluate the equivalency of such diverging concepts. To a lesser extent also the Council of Europe - and the EU-bodies will be faced with such problems of applied comparison of law.

5. Jurisdiction

One of the main concerns has been to reduce the loopholes between country jurisdictions in transnational corruption. **Territoriality** is to be interpreted broadly and additionally the Conventions advocate the **nationality** principle. They all, however, allow to opt out of nationality. The OECD as a minimum requires extradition of nationals as a, maybe imperfect, substitute.

Difficulties are to be expected where **foreign subsidiaries** through foreign operators engage in bribery. The parent company and its officials can be held responsible where they are in any way linked to the crime as accomplices (art. 1 section 2 OECD-Conv.), including through authorization. Where they have been caught un-

awares, the host-state of the parent company may have jurisdiction on the basis of nationality or depending upon the case and specific legislation based on a special corporate liability for negligent lack of control[12]. But here national laws diverges considerably.

6. Enforcement

Picking up a seemingly very technical point: The OECD-Convention respects the established domestic rules of prosecution (including traditional rules on prosecutorial discretion). It rules out, however, that decisions are influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved (art. 5). If you are in doubt how relevant this point is – you will maybe want to consider the arms-trade for a moment, where frequently we are faced with a government to government situation and protectionism is likely.

7. Money Laundering and Accounting Offences

The Conventions primarily deal with criminalization of the bribery of foreign public officials. However, they also contain ancillary provisions on money laundering and falsified accounts. Frequently the significance of these rules is underestimated[13].

Especially large scale and continuous corruption depends on long term money management. Slush funds have to be built up well beforehand. The payments have to be engineered in a way not to attract too much attention, both on the payment and the recipient side. The bribe and the newly forfeitable profits of transnational bribery will need to be hidden.

This issue has been acknowledged in all three fora I am discussing here. The Council of Europe has enacted its Convention 14 1, the EU its Protocol II to the Conven-

12 Cf. EU Prot. II art. 3 p. 2 Council of Europe art. 18 p. 2.

13 Cf. Paolo Bernasconi, Off-Shore Domizilgesellschaften als Instrument der Bestechung und der Geldwäscherei – Zehn Empfehlungen gegen den Missbrauch von Off-Shore Domizilgesellschaften, in: *Pieth/Eigen*: „Korruption im internationalen Geschaefisverkehr", Frankfurt/Basel, 1998.

tion on Protection of Financial Interests and the Convention of the OECD asks for criminalization of corruption-money laundering and forged, falsified and incomplete bookkeeping. However, the OECD-text on money laundering is less than satisfactory since it refers to the national treatment of bribery and proceeds. Here loopholes in the implementation are to be expected, especially in South-East Asia. However, other fora have developed rules going beyond this text and they have been accepted virtually by the same countries as the OECD-Convention (cf. the Revised Recommendation of the FATF of 1996). The OECD Working Group on Bribery has the mandate to explore whether further steps need to be taken against money laundering and the misuse of offshore-financial resorts.

The most difficult problem relating to money laundering is in my view -just as in the parallel topic of confiscation – the issue of **laundering of proceeds:** Are gains generated through corruption-affected contracts proceeds of crime? Can they be object of money laundering? Some will argue that these gains are the results of legitimate business, even if obtained through legal means. Others will hold that the bribe was not really causal for the awarding of the contract/for the gain, Yet others will want to deduct investments from the confiscated gains. And, the link between confiscation and money laundering is only really established where countries define money laundering as the obscuring of forfeitable funds.

IV. Conclusion

In **conclusion** I would like to repeat that none of the organizations discussed are interested in sending as many managers to prison as possible: The aim is to **motivate** namely corporations **to a change of attitude** and to introduce sound internal rules and controls, applied down to the operational level[14].

[14] Cf. John Brademas and Fritz Heimann, Tackling International Corruption, Foreign Affairs, September/October 1998 p. 22.