CHARACTERISTICS OF CRIMES AGAINST THE INTERESTS OF SERVICE IN COMMERCIAL AND OTHER ORGANISATIONS IN RUSSIA AND GERMANY

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The comparative study focuses on corruption in commercial organisations, which has received considerable attention in both Russia and Germany in recent years. In both countries anti-corruption law has been harmonised by several international conventions to reflect the growing importance of world trade and increasing globalisation. The authors analyse the current criminal offences and the criminological characteristics in both countries. Whereas in Russia special criminal provisions were created under Chapter 23 (Articles 201, 202, 203, 204, 204.1 and 204.2 of the Criminal Code of the Russian Federation), in Germany the relevant corrupt conduct is covered by the traditional general criminal offence of embezzlement (§ 266 of the German Criminal Code (StGB)) and by newly created special corruption offences (§§ 299, 300 and 301 StGB). The authors show that in each of the two countries, Russia and Germany, corruption in commercial organisations is now considered a grave form of corruption, so that the international conventions are taken into account to some extent. In Germany, however, not only are the sanctions foreseen for corruption in commercial organisations considerably lower than those for corruption in the public sector, but the offences are only prosecuted on criminal complaint. In the practice of German criminal prosecution, these types of bribery offences have therefore so far had little significance. Nevertheless, a high number of undetected cases and large economic losses can be expected. Furthermore, the comparative legal study shows that there are not only considerable differences in the design of the criminal provisions as well as in the legal reality, but that there are also several common elements in Russia and Germany.

Keywords: crimes against the interests of service in commercial and other organisations; commercial corruption; criminal offences for commercial bribery; embezzlement; taking and giving bribes in commercial practice.

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The problem of countering corruption in the private sector is given considerable attention in Russia as well as in Germany. At the same time, the countries have different approaches in terms of the system behind crimes against interests of service in commercial and other organisations, the assessment of the threat these pose to the public and the practice of implementing the relevant criminal laws.

1. Characteristics of the Provisions of the Criminal Code of the Russian Federation

Chapter 23 "Crimes Against the Interests of Service in Commercial and Other Organisations" was a novelty of the current Criminal Code of the Russian Federation (CCRF) compared to the former Criminal Code of the RSFSR of 1960. In criminal jurisprudence, there were differing views on its allocation as a separate chapter under Section VIII. In particular, B.V. Volzhenkin believed that the existence of Chapter 23 was unjustified due to the absence of a special legally protected object.[1] In N.A. Egorova's opinion, it is necessary to combine Chapters 23 and 30 into a single section: "Crimes Against the Interests of Service," as there are no reasons to attribute these crimes to different chapters.[2]

The original version of Chapter 23 included only 4 articles establishing liability for abuse of authority (Art. 201 CCRF), abuse of authority by private notaries and auditors (Art. 202 CCRF), abuse of authority by employees of private security or detective services (Art. 203 CCRF) and commercial bribery (Art. 204 CCRF).

For a long period of time, no significant changes were made to Chapter 23. It seems that this is primarily due to the fact that the legislator, in the context of criminal

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[1] *Волженкин Б.В.* Уголовный кодекс РФ. Комментарий / *Волженкин Б.В.* Избранные труды по уголовному праву и криминологии [Boris V. Volzhenkin, *Criminal Code of the Russian Federation: The Comment* in Boris V. Volzhenkin, *Selected Proceedings in Criminal Law and Criminology*] 478 (St. Petersburg: Iuridicheskii tsentr Press, 2008).

[2] *Егорова Н.А.* Уголовно-правовые формы борьбы с коррупцией в новых экономических условиях: автореф. дис. … канд. юрид. наук [Natalya A. Egorova, *Criminal Legal Forms of the Fight Against Corruption in the New Economic Environment: Synopsis of a Thesis for a Candidate Degree in Law Sciences*] 7 (Saratov, 1996).

law regulation, paid increased attention to the fight against corruption in the public sector, as opposed to in the corporate one. The paradox is that not all scholars even consider these crimes in the corporate sector to constitute fully-fledged crimes of corruption (corruption-related crimes).[3] However, this approach is fundamentally wrong. Aside from the fact that, according to paragraphs 2 and 3.3 of Annex 23 to the Instructions of the Prosecutor General of the Russian Federation,[4] practically all the crimes provided for in Chapter 23 are crimes of a corrupt nature (except for the crime provided for in Article 203 CCRF). They are also based on the legal definition of corruption, under which abuse of authority and commercial bribery are defined as manifestations of this socially negative phenomenon.[5]

The adoption of the Federal Law "On Combating Corruption" provided a certain impulse, which resulted in Chapter 23 beginning to undergo significant changes. Nevertheless, these changes did not occur immediately.

First, the danger of criminal acts in the field of anti-corruption compliance to the public, in particular commercial bribery, has been gradually reassessed. Initially, the scale of criminal prosecution of basic crimes of corruption in the public sector, such as giving and receiving bribes, was much more significant. In this regard, O.N. Bibik pointed out that part 6 of Article 290 CCRF provides for up to 15 years of imprisonment for taking a bribe on a particularly large scale, although this act is undoubtedly less dangerous than murder (pt. 1 of Art. 105 CCRF). This was proven by both foreign researchers and the data of his survey[6]. The explanation for this is simple – the fight against corruption has not been successful. Therefore, the non-binding nature of laws should be compensated by increasing the severity of the punishment.[7]

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[3] For more information on this, *see, e.g.*, *Шаймуллин Р.К.* Преступления против интересов службы: содержание и структурный анализ // Вестник Оренбургского государственного университета. 2012. № 3(139). С. 245 [Rustam K. Shaimullin, *Crimes Against the Interests of the Service: Content and Structural Analysis*, 3(139) Bulletin of Orenburg State University 245 (2012)].

[4] Указание Генпрокуратуры России № 35/11, МВД России № 1 от 24 января 2020 г. «О введении в действие перечней статей Уголовного кодекса Российской Федерации, используемых при формировании статистической отчетности» // Документ официально опубликован не был [Instructions the Prosecutor General of the Russian Federation No. 35/11, Ministry of Internal Affairs of the Russian Federation No. 1 of 24 January 2020. On the Enactment of the Lists of Articles of the Criminal Code of the Russian Federation, Used in the Formation of Statistical Reporting, The document was not officially published].

[5] *See* Федеральный закон от 25 декабря 2008 г. № 273-ФЗ «О противодействии коррупции» // Собрание законодательства РФ. 2008. № 52 (ч. 1). Ст. 6228 [Federal Law No. 273-FZ of 25 December 2008. On Countering Corruption, Legislation Bulletin of the Russian Federation, 2008, No. 52 (Part 1), Art. 6228], Art. 1, pt. 1.

[6] *Бибик О.Н.* Культурное измерение уголовно-правовых и криминологических исследований: теоретические и практические аспекты: дис. … докт. юрид. наук [Oleg N. Bibik, *The Cultural Dimension of Criminal Law and Criminological Research: Theoretical and Practical Aspects: Thesis for a Doctor Degree in Law Sciences*] 192–194, 519 (Omsk, 2015).

[7] *Бибик О.Н.* Рынок преступлений и наказаний [Oleg N. Bibik, *The Market of Crime and Punishment*] 95 (St. Petersburg: Iuridicheskii tsentr Press, 2017).

In this context, it should be noted that the legislator was aware of the fact that the fight against corruption in the public sector has been unsuccessful from the outset and most likely will remain so. On the other hand, the awareness that the fight against corruption in the corporate sector will remain unsuccessful has probably only recently emerged. In this respect, it is interesting to note that the maximum prison sentence for commercial bribery has long been significantly lower than that for bribery in the public sector. The original version of the Criminal Code provided for a maximum penalty of seven to *twelve years* imprisonment for a particularly serious act of bribery (pt. 4 of Art. 290 CCRF) and up to *eight years* imprisonment for a serious act of bribery (pt. 2 of Art. 291 CCRF). In contrast, the maximum penalty originally provided for a particularly serious commercial bribery was imprisonment of up to *five years* (pt. 4 of Art. 204 CCRF) and imprisonment of up to *four years* for a serious form of commercial bribery (pt. 2 of Art. 204 CCRF). Thus, the maximum penalty originally differed by a factor of 2 to 2.4.

Substantial changes to the sanctions for particularly serious commercial bribery (pt. 4 of Art. 204 CRC) were made pursuant to Federal Law of 25 December 2008 No. 280-FZ, to the effect that the maximum penalty was increased to *twelve years* of imprisonment.[8] While the maximum sentence was increased by a factor of 2.4, the minimum sentence was even increased by a factor of 14, to *seven years* imprisonment. At the same time, the elements of the crime, which are laid down in part 4 of Article 204 CCRF, have not been changed in practice. This considerable overestimation of the degree of public endangerment can be traced to the ratification of the international conventions mentioned in the title of the Federal Law of 25 December 2008 No. 280-FZ. It appears that the domestic legislator had not previously been aware of the public endangerment posed by commercial bribery.

The differentiation of responsibility for commercial bribery by including new criminal law elements (similar to those that qualify as criminal offences under Articles 290 and 291 CCRF) and the substantial changes made to the sanctions in part 4 of Article 204 CCRF regarding the increase in the maximum prison sentence of up to eight years, were made in accordance with the Federal Law of 3 July 2016 No. 324-FZ.[9] More than seven years had elapsed before the level of public endangerment

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[8] Федеральный закон от 25 декабря 2008 г. № 280-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации в связи с ратификацией Конвенции Организации Объединенных Наций против коррупции от 31 октября 2003 года и Конвенции об уголовной ответственности за коррупцию от 27 января 1999 года и принятием Федерального закона «О противодействии коррупции»» // Собрание законодательства РФ. 2008. № 52 (ч. 1). Ст. 6235 [Federal Law No. 280-FZ of 25 December 2008. On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Ratification of the United Nations Convention Against Corruption of 31 October 2003 and the Convention on Criminal Liability for Corruption of 27 January 1999 and the Adoption of the Federal Law "On Combating Corruption," Legislation Bulletin of the Russian Federation, 2008, No. 52 (Part 1), Art. 6235].

[9] Федеральный закон от 3 июля 2016 г. № 324-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и Уголовно-процессуальный кодекс Российской Федерации» // Собрание

through a particularly qualified part of illegal commercial bribery was significantly reassessed. In connection with the conclusions of O.N. Bibik, it should be noted that it was only at this point in time that the legislator finally recognised that the fight against corruption in the corporate sector was also unsuccessful. Chapter 23 was supplemented by two articles: 204.1 "Mediation in Commercial Bribery" and 204.2 "Small Commercial Bribery." In accordance with Federal Law of 29 December 2017 No. 469-FZ,[10] Article 201.1 "Abuse of Power in the Performance of State Defence Orders" was added. Thus, Chapter 23 currently consists of seven articles.

1.1. Crimes Against the Interests of the Service in Commercial and Other Organisations as the Basis of a Group of Crimes in the Field of Anti-Corruption Compliance

As mentioned, almost all crimes against the interests of service in commercial and other organisations are corruption-related. At the same time, the crimes provided for in the Articles 201.1, 204.1, 204.2 CCRF refer to such crimes without special conditions. Simultaneously, crimes against the interests of service in commercial and other organisations form the basis of crimes in the field of anti-corruption compliance ("crimes in the fight against corruption"). It should be noted that at the level of doctrine, not only is there currently no understanding of the system behind crimes in the field of anti-corruption compliance, but the corresponding concept is not even in use yet. In this respect, the legitimate question arises as to whether the concepts of "crimes of a corrupt nature" and "crimes in the field of anti-corruption compliance" (crimes in the fight against corruption) coincide and to what extent the systems of these crimes overlap.

It seems that the system of crimes in the field of anti-corruption compliance, as an integral part of the system of corruption crimes, differs from the latter in both quantitative and qualitative characteristics. For example, not all cases of giving or taking a bribe should be classified as crimes in the field of anti-corruption compliance. At the same time, it is possible to do just that if certain criminogenic characteristics are present. In particular, where bribery is carried out on behalf of or in the interest of a legal entity by persons performing managerial functions in a commercial or other organisation, etc. The general approach may convey the impression that crimes in the field of anti-corruption compliance are always corruption-related crimes. This does not, however, seem to be quite correct. Let us give a few simple examples. The

законодательства РФ. 2016. № 27 (ч. 2). Ст. 4257 [Federal Law No. 324-FZ of 3 July 2016. On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation, Legislation Bulletin of the Russian Federation. 2016. No. 27 (Part 2), Art. 4257].

[10] Федеральный закон от 29 декабря 2017 г. № 469-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и статью 151 Уголовно-процессуального кодекса Российской Федерации» // Собрание законодательства РФ. 2018. № 1 (ч. 1). Ст. 53 [Federal Law No. 469-FZ of 29 December 2017. On Amendments to the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedural Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2018, No. 1 (Part 1), Art. 53].

objective reality corresponds to situations in which there is an abuse of a securities issue or market manipulation in the interest of a legal entity by persons performing management functions in a commercial or other organisation.

These actions may be performed in conjunction with commercial bribery or giving a bribe. Offences under Article 185 "Securities Issue Abuse" and Article 185.3 "Market Manipulation" of the CCRF are not crimes related to corruption, but certainly fall among the crimes in the field of anti-corruption compliance. Such crimes, in our opinion, include a significant part of economic crimes which are not corruption-related. Thus, crimes in the field of anti-corruption compliance are not always linked to crimes of a corrupt nature. At the same time, almost all crimes of a corrupt nature should be classified as crimes in the field of anti-corruption compliance, i.e. only when certain criminal elements are present.

It seems that in the process of identifying and investigating the system of crimes in the field of anti-corruption compliance, the specificities of their prevention and investigation will definitely contribute to improving the situation in the field of combating corruption in general.

1.2. Criminological Characteristics

In order to provide a general overview of the classification of crimes against service interests in commercial and other organisations within the general system of crimes of a corrupt nature, we will briefly summarise their criminological characteristics and discuss the state of these crimes and their dynamics over the past five years.

According to data from the Ministry of Internal Affairs, 1,763 crimes were registered in 2018 under Chapter 23 of the Criminal Code, which are simultaneously corruption-related crimes. Among them, 740 cases of commercial bribery and 730 cases of abuse of authority were registered. In 2018, the number of registered corruption-related crimes totalled at 30,495, or 1.53% of the total number of crimes registered in Russia. In 2019, 3,991 such crimes were registered, which constituted 1.53% of the total number of crimes registered that year.[11] Thus, in recent years, the number of registered corruption-related crimes in Russia, both in absolute and relative terms, has stabilised at just over 30,000, which is approximately 1.5% of the total number of crimes registered in the country. This indicates a certain success in the fight against corruption. In comparison, 49.513 and 42.506 corruption-related crimes were registered in 2012 and 2013 respectively, which constituted 2.15% and 1.93% of the total number of crimes registered in those years.

It should be noted that in 2019, as compared to 2018, the number of corruption offences has increased significantly: Commercial bribery + 33.8%, passive and active bribery + 14% and + 21.5% respectively. In contrast to this, the total number of registered crimes in Russia only increased by 1.6% between 2018 and 2019.

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[11] Состояние преступности // МВД России [State of crime in Russia for January–December 2009–2018, Ministry of Internal Affairs of Russia] (Jun. 11, 2020), available at https://мвд.рф/reports/1/.

In this context, it is also of interest to consider the relationship between corruption in the commercial and public sectors, i.e. active and passive bribery in commercial transactions (Art. 204 CCRF, the main offence in Chapter 23) and active (Art. 291 CCRF) and passive bribery in the public sector (Art. 290 CCRF). In 2019, 990 cases were registered in the commercial sector and 7,162 cases in the public sector. The difference is significant, approximately 1 to 7.23. In previous years this ratio had been different. The largest difference between the number of registered crimes in the commercial sector on the one hand and in the public sector on the other hand was registered in 1997: 1 to 11.93. However, it should be noted that this was the first year in which Article 204 RF applied. The smallest difference between the number of offences in the commercial sector, as compared to the public sector was registered in 2002: 1 to 2.63.

2. Characteristics of the Provisions of the Criminal Code of the Federal Republic of Germany

In Germany, the offences regulated in Chapter 23 of the Criminal Code of the Russian Federation are regulated in various sections of the German Criminal Code (StGB).

2.1. The Criminal Provision of Embezzlement

In Germany, there is no offence that would only criminalise the abuse of powers in the commercial sector. German law only recognises the criminal provision of embezzlement (§ 266 StGB), which generally covers the abuse of an asset management obligation by decision-makers, both in the commercial and the public sector. § 266 StGB is a central criminal provision of German commercial criminal law, which protects against the damage to other people's assets through the breach of a special relationship of trust. The criminal provision takes particular account of the principal-agent conflict, which consists in the fact that a person who acts in the interest of another and is not sufficiently supervised tends to act for their own economic benefit.[12]

Embezzlement is not a crime of corruption, but a property offence, which presupposes the occurrence of financial loss. If the *EU Commission* understands corruption as an abuse of power or improper action or omission in a decision-making process as a result of undue influence or the granting or acceptance of an advantage,[13] then embezzlement lacks a third party's action. On the other hand, according to the broad understanding of the organisation *Transparency International (TI)*, which defines corruption as "an abuse of entrusted power for private benefit

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[12] Martin Paul Wassmer, in: *Wirtschafts- und Steuerstrafrecht* [*Economic and Tax Criminal Law*] (J.P. Graf et al. (eds.), 2nd ed., Munich: C.H. Beck, 2017), § 266 marginal no. 15.

[13] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on a Union Policy against corruption, COM(97) 192 final, at 4.

or advantage,"[14] embezzlement would be classified as a corruption offence. In any case, embezzlement is a typical accompanying offence that is often committed to enable or conceal corruption crimes.

The criminal provision of embezzlement (§ 266 StGB) is considered a "universal weapon"[15] in the fight against white-collar crime. This is due to its extremely broad, general-clause version, which dates back to the time of National Socialism. The law amending criminal law provisions of 26 May 1933[16] replaced the previous, much narrower definition of the offence; "in the fight against racketeering and corruption." The aim was to ensure complete protection of assets. The contouring of the facts of the case was left to case law and criminal jurisprudence. § 266 StGB raises complex legal questions and has been subject to the accusation of vagueness and instrumentalisation from the outset. The main problems are the concretisation of the asset management obligation and the determination of the disadvantage.

The existence of an asset management obligation presupposes the existence of a fiduciary relationship of an elevated nature with obligations of some weight, in the fulfilment of which the obligor is granted a certain latitude, a certain independence and freedom of movement, while at the same time the matter must be of some economic importance.[17] The circle of perpetrators is thus not – as in Article 201 CCRF – limited to the management personnel of commercial and non-governmental organisations, but generally includes all decision-makers in business and society. Thus the scope of the criminal provision is extraordinarily broad. With regard to damages, case law follows a broad economic concept of property, according to which property is the sum of monetary assets that a person can actually dispose of.[18] Thus, any economic property that has a market value is included, regardless of its legal classification. But unlike Article 201 CCRF, the criminal provision of embezzlement offers protection only against material, not immaterial damages. On the other hand, § 266 StGB does not presuppose "substantial damage," but any damage, however small, as to being sufficient.

In comparison with Article 201 CCRF, the penalties are mild. In the case of the basic offence (§ 266 para. 1 StGB), a prison sentence of up to five years or a fine can be imposed. In particularly serious cases, the prison sentence ranges from six months

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14 *See* Was ist Korruption? [What Is Corruption], Transparency International Deutschland e.V. (Jun. 11, 2020), available at https://www.transparency.de/ueber-uns/was-ist-korruption.

15 Walter Perron, *Probleme und Perspektiven des Untreuetatbestandes* [*Problems and Perspectives of the Offence of Embezzlement*], Goltdammer's Archiv für Strafrecht (GA) 219, 222 (2009).

16 Reichsgesetzblatt [Reich Law Gazette] I 1933, p. 295.

17 Reichsgericht, Entscheidungen des Reichsgerichts in Strafsachen [Decisions of the Imperial Court in criminal matters], Vol. 69, p. 58, 61 et seq.; Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Strafsachen [Decisions of the Federal Supreme Court in criminal matters], Vol. 1, p. 186, 188 et seq.

18 Reichsgericht, Entscheidungen des Reichsgerichts in Strafsachen [Decisions of the Imperial Court in criminal matters], Vol. 71, at 333, 334; Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Strafsachen [Decisions of the Federal Supreme Court in criminal matters], Vol. 15, p. 342, 344.

to ten years (§ 266, para. 2 in conjunction with § 263, para. 3 StGB). Various cases are covered: The perpetrator acts commercially or as a member of a gang (No. 1); he causes a large loss of assets (over 50.000€)[19] or acts with the intention of putting a large number of people at risk of losing assets by continuing to commit the offence (No. 2); he puts another person in economic distress (No. 3); he abuses his powers or his position as a public official or European official (No. 4). If the perpetrator acts both professionally and as a member of a gang, the crime is punishable by imprisonment from one year to ten years.

2.2. Taking and Giving Bribes in Commercial Practice

The criminal offences of §§ 299 ff. StGB, which cover corruption in the commercial sector, were inserted into the StGB as "offences against competition" by the "Law on Combating Corruption" of 13 August 1997.[20] They replaced the former criminal provision of § 12 of the Unfair Competition Act (UWG). By integrating the criminal provisions into the core criminal law, the legislature wanted to raise public awareness that corruption in commercial practice is also a form of crime that is an expression of socially ethically disapproved behaviour.[21] The "Law on Combating Corruption" of 20 November 2015[22] led to considerable expansion, placing the "principal model" alongside the previous "competition model" in order to implement the provisions of the Council of Europe Criminal Law Convention on Corruption of 27 January 1999 and the European Union Framework Decision 2003/568/JHA on Combating Bribery in the Private Sector.[23] These legal instruments are also designed to address breaches of duty towards the principal, whereas previously the only decisive factor was the existence of unfair advantage in competition. The extension is similar to the existing German penal provision on embezzlement (§ 266 StGB), which raises questions of legal distinction. This extension deviates from the previous protection of competition. This novelty was sharply criticised in the jurisprudential community.[24] In addition, the Anti-Corruption Act has greatly extended the scope of application to crimes committed abroad. However, it remains to be seen what consequences this will have in legal practice.

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19 Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Strafsachen [Decisions of the Federal Supreme Court in criminal matters], Vol. 48, p. 360.

20 Bundesgesetzblatt [Federal Law Gazette] I 1997, p. 2038.

21 Bundestagsdrucksache [Bundestag paper] 13/5584, p. 15.

22 Bundesgesetzblatt [Federal Law Gazette] I 2015, p. 2025.

23 Bundestagsdrucksache [Bundestag paper] 18/4350, p. 13.

24 Matthias Dann, *Und immer ein Stück weiter – Die Reform des deutschen Korruptionsstrafrechts* [*And Always a Step Further – The Reform of the German Criminal Law on Corruption*], Neue Juristische Wochenschrift (NJW) 203, 204 et seq. (2016); Bernd Schünemann, *Der Gesetzentwurf zur Bekämpfung der Korruption – überflüssige Etappe auf dem Niedergang der Strafrechtskultur* [*The Draft Law on Combating Corruption – A Superfluous Episode in the Decline of the Criminal Justice Culture*], Zeitschrift für Rechtspolitik (ZRP) 68 et seqq. (2015).

This is because the detection and investigation of crimes committed abroad regularly causes great difficulties for the German criminal prosecution authorities, as they are dependent on legal assistance from other states.

§ 299 StGB criminalises passive and active bribery in commercial practice. It covers not only unlawful agreements aimed at eliminating competition, but also unlawful agreements which are to be understood as breaches of duty towards the company as the principal. § 299 StGB thus protects free competition from unfair influence.[25] The financial interests of domestic and foreign competitors are also protected.[26]

Passive bribery can only be carried out by employees or agents of a business. The principal himself cannot be the perpetrator, so that he may accept donations. Active bribery presupposes that the perpetrator is a competitor or acts on behalf of a competitor. Private individuals acting without any connection to competition are not included in this scope. The term "business" is to be understood broadly and includes any organisational unit in which a commercial or self-employed professional activity is carried out.[27] The intention to make a profit is not required, so that non-profit, cultural and social institutions are also covered. The activity must relate to "commercial practice." This term must also be interpreted very broadly and includes any activity that serves the pursuit of economic ends.[28]

§ 299 StGB is a typical offence of corruption. A qualified agreement on injustice is required. This means that an advantage is demanded, promised or accepted by the employee or agent for a concrete unfair preference or breach of duty (passive bribery) or – mirrored – offered, promised or granted to the employee or agent (active bribery). This does not include grants to achieve the general "good will" of a future client. The same applies to a subsequent benefit ("thank you"). Action is always required when purchasing goods or services. "Unfairness" is preferential treatment if it is likely to harm competitors, either by circumventing the competition rules or by eliminating competitors.[29]

Offences under § 299 StGB are punishable by imprisonment for up to three years or a fine. In particularly serious cases the imprisonment ranges from three months to five years. Particularly serious cases are those in which the offence relates to a benefit of great magnitude or the offender acts professionally or as a member of a gang. The threat of punishment is thus considerably lower than for active and passive bribery in the public sector. In the public sector, active bribery is punishable by imprisonment

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25 Bundestagsdrucksache [Bundestag paper] 13/5584, p. 12; Bundesgerichtshof [Federal Supreme Court], Neue Juristische Wochenschrift (NJW) 2006, p. 3290, 3298.

26 Bundestagsdrucksache [Bundestag paper] 14/8998, p. 11.

27 Martin Paul Wassmer, in: *Korruptionsprävention in der öffentlichen Verwaltung* [*Prevention of Corruption in Public Administration*] (J. Louis et al. (eds.), Stuttgart: R. Boorberg, 2020), marginal no. 619.

28 *Id.* marginal no. 623.

29 *Id.* marginal no. 628.

from three months to five years (§ 334 StGB), passive bribery by imprisonment from six months to five years (§ 332 StGB). This reflects the fact that very high priority is given to the complex protection afforded to bribery offences in the public sector. Not only is the integrity of the public service protected and the general trust in the objectivity, impartiality and incorruptibility of state decisions,[30] but also the functioning of the public service and the trust in it.[31] In addition, according to § 299 StGB, bribery in commercial practice is generally only prosecuted upon criminal complaint, unless the prosecuting authority considers it necessary to intervene ex officio because of the special public interest in prosecution. In addition to the injured party, i.e. a competitor or the owner of the business, certain associations and chambers (e.g. bar associations, chambers of industry, commerce and handicrafts) also have the right to file an application.

2.3. Criminological Characteristics

According to the police crime statistics, 6,155 cases of embezzlement (§ 266 StGB) were registered in 2019, which represents a sharp decline of 6.9% compared to 2018, when 6,611 cases were registered.[32] In contrast, in Germany the total number of all registered crimes in 2019 only decreased by 2.1% compared to 2018.[33] The detection rate was 97.4% (2018: 97.8%), which was extraordinarily high. The registered amount of damages reached EUR 464.1 million, meaning that embezzlement accounts for a high percentage of 15.6 % of the total registered losses from economic crime of EUR 2,973 million.[34] It must be assumed, however, that there is a high number of unreported cases, because many cases are unlikely to become known to the authorities.

With regard to active and passive bribery in commercial practice (§§ 299, 300 StGB), only 274 cases were registered in 2019, which represents an increase of 19.1% compared to the 2018 figure of 230 cases; here too, the detection rate was an exceptionally high 96.0%.[35] In the practice of criminal prosecution, these types of bribery offences have so far hardly gained any significance. The main reason for this probably being the requirement to file a criminal complaint. However, in this area, too, a high number of undetected cases and major economic damage can be assumed. By contrast,

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30 *See* Bundestagsdrucksache [Bundestag paper] 7/550, p. 269; Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Strafsachen [Decisions of the Federal Supreme Court in criminal matters], Vol. 15, p. 88, 96 et seq. and Vol. 30, p. 46, 48.

31 Bernd Hecker, in: *Schönke/Schröder, StGB Kommentar* [*Commentary to the Criminal Code*] (30th ed., Munich: C.H. Beck, 2019), § 11 marginal no. 3.

32 *Polizeiliche Kriminalstatistik. Bd. 4* [*Police Crime Statistics. Vol. 4*] 116 (Wiesbaden: Federal Criminal Police Office, 2019).

33 *Polizeiliche Kriminalstatistik. Bd. 1* [*Police Crime Statistics. Vol. 1*] 11 (Wiesbaden: Federal Criminal Police Office, 2019).

34 *Police Crime Statistics. Vol. 4*, *supra* note 32, at 121, 177.

35 *Id.* at 143.

the number of registered corruption offences in the public sector is – as in Russia – significantly higher. With regard to passive corruption offences (§§ 331, 332, 335 StGB), 333 cases were registered in 2019 (2018; 591 cases), with regard to active corruption offences (§§ 333, 334, 335 StGB) 580 cases (2018: 351 cases).[36] Here, too, the detection rate was exceptionally high at 91.3% and 96.4% respectively. The public sector thus registered 3.33 times more cases than the private sector.

Conclusion

The approach of the Russian and German legislators differs significantly with regard to the recording of crimes against the interests of service in commercial operations. Whereas in Russia special criminal provisions were created in 1997 under Chapter 23, penalising the abuse of powers by executives, covering commercial operations (Arts. 201, 202 and 203 CCRF), in German criminal law the act of embezzlement (§ 266 StGB) has long since provided a broadly defined general provision. This clause makes the violation of duties of care of property by decision-makers in all areas of the economy and society a punishable offence and thus goes considerably further.

However, both countries have specific criminal offences. In Russia, Articles 204, 204.1 and 204.2 CCRF apply, in Germany, §§ 299, 300 and 301 StGB. These criminal offences differ in their concrete form, but also show parallels. This is probably also due to the fact that in both states anti-corruption law has been harmonised by international conventions. The Council of Europe Criminal Law Convention on Corruption of 27 January 1999, the United Nations Convention against Corruption of 31 October 2003 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997 should be mentioned in this context.

In Russia, corruption in commercial activities is now also considered a very serious form of corruption, which is why the penalties imposed have been significantly increased. In Germany, however, the sanctions foreseen for taking and giving bribes in commercial practice remain considerably lower than those for public sector corruption. Moreover, commercial bribery is an offence against which a criminal complaint must be filed.

Finally, parallels can be found between the crime statistics. In both Russia and Germany, significantly fewer corruption crimes are registered in the commercial sector compared to the public sector. In Germany, this is mainly due to the fact that an injured competitor in particular is required to file a criminal complaint. With regard to the abuse of powers, on the other hand, a comparison of the legal systems is hardly possible, since the German criminal provision of embezzlement goes much further, resulting in a much higher number of offences.

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[36] *Police Crime Statistics. Vol. 4*, *supra* note 32, at 143.

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