

Overview on anti-corruption rules and regulations in GERMANY

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I. What is the anti-corruption legal framework in your country (including brief overview on active / passive bribery, bribery of foreign officials, and commercial bribery)?

1. Bribery in the public sector

Germany ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1998, by passing the Act on Combating International Bribery (*IntBestG*)¹, which came into force on 15/02/1999). This Act complemented the provisions in the German Penal Code on bribery in the public sector until late last year, when through a new Anti-Corruption law, the Act to Combat Corruption of 20 November 2015, the special regulations regarding both foreign and European public officials were intergrated into the general criminal law provisions on corruption.² The new Act came into effect on 26 November 2015.³

The Criminal Code⁴ provides four types of offences of bribery:

- (1) Passive bribery (taking bribes) in fulfilling one's public duty;⁵
- (2) Passive bribery (taking bribes) as incentive for violating one's duties;⁶
- (3) Active bribery (giving bribes) in fulfilling one's public duty;⁷

¹ Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr, *IntBestG*, German Official Gazette (Bundesgesetzblatt, BGBl.) of 1998, part II, p. 2327.

² Section 331-335 German Criminal Code.

³ Gesetz zur Bekämpfung der Korruption, BGBl. of 2015, part 1, p. 2025 ff.

⁴ Strafgesetzbuch, StGB. An English version of the Code as well as other statutory law is available online at the site of the German Ministry of Justice at http://www.gesetze-im-internet.de/Teilliste_translations.html.

⁵ Section 331 of the German Criminal Code.

⁶ Section 332, German Criminal Code.

⁷ Section 333, German Criminal Code.

(4) Active bribery (giving bribes) as incentive for violating of one's duties.⁸

While (2) and (4) require a violation of an official duty of the bribed person, (1) and (3) refer to a situation where the bribed person performs in accordance with his or her duties.

Recipient of the bribe may be

- a public official⁹
- a European public official
- persons entrusted with special public service functions¹⁰
- or a soldier
- a German judge or a judge of a EU court, of the International Criminal Court¹¹, or an arbitrator¹²
- a public servant of the International Criminal Court¹³.

Further, *only* with regards to active and passive bribery for violating one's duties, also foreign public officials and judges of the International Criminal Court are covered,¹⁴ provided that the bribe is given for a *future* official act. Thus, if the official act of a foreign public official is conformity with one's duties, this is not punishable.

Art. 2§2 of the Act on Combating International Bribery, **foreign members of parliament** are also included. In this case, German law applies if a German national has bribed the foreign member of parliament in the context of international business transactions, independently of where the act has been committed.¹⁵ Interestingly enough, corruption of German members of parliament was, until 31 August 2014, only a criminal offence in Germany in the event that someone undertakes to buy or sell votes (Section 108e of the Criminal Code). In 2012, this led to only fifteen police investigations based on this offence (as compared to a total of 8,175 investigations on corruption offences in Germany).¹⁶ Since September 2014, bribing members of parliament

⁸ Section 334, German Criminal Code.

⁹ A public official is defined under s. 11 of the German Criminal Code as persons who are (a) civil servants or judges; (b) otherwise carry out public official functions; or (c) have otherwise been appointed to serve with a public authority or other agency or have been commissioned to perform public administrative services regardless of the organisational form chosen to fulfil such duties. Moreover, a European public official

¹⁰ I.e. any person who, without being a public official, is employed by, or is acting for a public authority or other agency, which performs public administrative services; or an association or other union, business or enterprise, which carries out public administrative services for a public authority or other agency, and who is formally required by law to fulfil their duties with due diligence.

¹¹ Section 335a (2), German Criminal Code (not yet contained in official English translation of the Code).

¹² Section 334(2), German Criminal Code.

¹³ Section 335a (2), German Criminal Code.

¹⁴ The legal basis was, until 26 November 2015, the Act on Combating International Bribery, read in conjunction with sections 332 and 334 of the Criminal Code, and, as of 26 November 2015, has become section 335a of the German Criminal Code.

¹⁵ Art. 2 § 3 of the Act on Combatting International Bribery.

¹⁶ Bundeskriminalamt, 'Korruption, Bundeslagebild 2012', p. 4, www.bka.de, online available at http://www.bka.de/nn_193360/DE/Publikationen/JahresberichteUndLagebilder/Korruption/korruption_node.html?_nn=true.

with ‘unjustified advantages’ (or being bribed) has become an offence.¹⁷ However, it is not an unjustified advantage if the receiving of the advantage is in accordance with the legal provisions applicable to the recipient, *e.g.* a political mandate or a political function is not considered an unjustified advantage. Due to these and some other limitations, the new law has been harshly criticized as being too narrow and lacking substance.¹⁸

2. Commercial bribery

Section 299 of the German Criminal Code prohibits both active and passive bribery in the private sector regarding employees or agents of a company as recipients of an undue advantage (‘for according an unfair preference to another in the competitive purchase of goods or commercial services’). From 30 August 2002 until 25 November 2015, para. 3 of the same provision provided that the offence also applied to commercial bribery carried out abroad (i.e. influencing foreign markets). As of 26 November 2015, the provision has been extended, now also covering the case where an agent or employee of a company, without the consent of his company, performs an act in violation of his duties in the competitive purchase of goods or commercial services. The provision applies equally to the competitive situation both locally and abroad.

Please note that unlike public sector bribery, for which mandatory prosecution exists, in the commercial sector, the offence is only prosecutable if there is either a criminal complaint by an individual, or if the prosecution considers that the public interest at stake requires prosecution.

II. Does this framework also cover extra-territorial corruption?

Yes. According to sections 5, subsection 15, of the German Criminal Code, German criminal law applies to corruption of public officials committed abroad. Further, pursuant to ss. 3 ff of the German Criminal Code, German criminal law likewise applies if:

- The offence was committed on a German vessel or airplane (s. 4)
- The victim of the offence was German and the offence is punishable under the applicable local law (s. 7(1))
- the offender is German, or has become German after commission of the offence, and the offence is punishable under the applicable local law (s. 7(2)).

¹⁷ Section 108e of the German Criminal Code (new version, not yet contained in English official translation of the Code), introduced by the 48th amendment to the Criminal Code – extension of the offence of bribing members of parliament dated 23.4.2014 (Achtundvierzigste Strafrechtsänderungsgesetz - Erweiterung des Straftatbestandes der Abgeordnetenbestechung vom 23.04.2014), BGBl. Part I, p. 410), in force since 01.09.2014.

¹⁸ See T. Fischer, ‘Dieses Gesetz ist ein Witz!’, DIE ZEIT N° 27/2014, 10 July 2014, online available at: <http://www.zeit.de/2014/27/abgeordnetenbestechung-gesetz>; see also R. Francuski, ‘Die Neuregelung der Abgeordnetenbestechung (§ 108e StGB)’, Online Zeitschrift für Höchstgerichtliche Rechtsprechung zum Strafrecht (HRRS), 6/2014, 220 et seq.

Further, in case of aiding and abetting, German law may also apply to the relevant aiding or instigating act that has been committed in Germany (s. 9).

III. Is there a concept of corporate criminal liability?

No, according to current German law only natural persons can be punished as criminal offenders, even though the implementation of criminal liability of corporate entities has long been a topic of public debate in Germany. The discussion revived when the potential introduction of corporate criminal liability was mentioned in the coalition contract of the two governing parties, the CDU and the SPD. Further, a draft bill on criminal corporate liability was issued by the Federal State of North Rhine Westphalia by the end of 2013.¹⁹ It is still unclear whether this particular draft has any chance of being implemented. It had received much appraisal, but also attracted significant criticism by legal experts and one of the two governmental coalition blocks. Yet, the request for criminal enforcement on companies has been boosted by the recent VW-scandal and will likely remain a critical issue on the legislator's agenda.

IV. What are the penalties for legal entities (if applicable) and natural persons?

Natural persons can face a criminal sentence resulting in a financial penalty or imprisonment of up to five years. Further, measures of confiscation (Section 73 et seq., German Criminal Code) and deprivation (Section 74 et seq. of the Code) can be imposed. Confiscation pursuant to Section 73 et seq., German Criminal Code, aims to remove the proceeds of a criminal offence, i.e. both material objects obtained directly as a result of the act (bribe payments received in cases of passive bribery) as well as other advantages gained from the act, e.g. the value of a contract won by paying bribes. According to the gross principle, confiscation covers everything obtained from the unlawful act, without the deduction of any own expenses or consideration incurred.

As stated above, legal entities cannot receive a criminal sentence. Notwithstanding, confiscation measures can be ordered against a legal entity if it obtained a benefit from illegal acts which have been committed by natural persons acting on its behalf. Further, Section 30 of the German Administrative Offences Act [OWiG] allows an administrative fine to be imposed if a company's representatives or other persons in leading functions committed a criminal or an administrative offence as a result of which duties incumbent on the legal entity have been violated, or where the legal entity has been enriched or was intended to be enriched by the offence. Generally, the fine may amount to no more than 10 million Euros. However, if the economic advantages gained through commission of the offence surpass this threshold, the fine shall as well surpass this amount (s. 17(4) of the German Administrative Act [OWiG]). German authorities are, however, not obliged to sanction legal entities under Section 30 of the German Administrative Offences Act [OWiG]. It lies within the discretion of the prosecuting authorities whether or not a fine is to be imposed, as is the amount of a potential fine, even though the option has actually been used to issue substantial fines, e.g. in the Siemens case.²⁰

¹⁹ https://www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5_Gesetzentwurf.pdf (17.01.2016).

²⁰ LG München I, 4.10.2007 - 5 KLS 563 Js 45994/07.

V. Which local authorities are competent for corruption investigations?

Germany is a federal state. However, the Criminal Code and the Code of Criminal Procedure (*Strafprozessordnung, StPO*) apply at both federal and state level. In general, police and prosecution of the respective state (*Land*) investigate the crimes committed there.

As a general principle, all crimes, including business crimes, are prosecuted by the public prosecutor's office and the competent police, who are supervised by the prosecutor, but, who in practice, effectively lead the investigations. Some prosecution offices and police departments have specialized units with a focus on white collar crime. Each federal state has its own judicial circuit with its own public prosecutor office.

VI. Are there whistle-blower regulations?

Very little protection is offered in Germany for whistleblowers. There are only a few criminal law obligations that deal with whistleblowing, for example:

- Section 138 of the Criminal Code, which criminalises the failure to bring the planning of serious offences to the attention of the authorities. This obligation applies to everybody.
- Section 11 of the Money Laundering Act [GwG], the reporting duty for suspicious transactions. This obligation applies to financial institutions, insurance companies, as well as to certain practitioners such as tax advisors, auditors, attorneys and notaries (for details, cf. s. 2 of the German Money Laundering Act [GwG]).

Under German labour law, employees have a duty to inform their superior (only) of any imminent risk for security or health. As a consequence, the employee should not face any disadvantages if his or her superior initially disregards his or her complaint and he or she decides to subsequently inform the competent authority (section 16(1) and 17(2), Labour Protection Act [ArbSchG]).

Even the decision of the European Court of Human Rights of 21 July 2011 provides only little protection. In this case, the court's basic ruling was that employees should normally first inform their superiors or other authorised persons of possible deplorable conditions or activities at work before informing the authorities or the general public (*sections 16(1) and 17(2), Labour Protection Law*). The option of informing the general public could only be justified in the event that first informing the "authorised persons" proved evidently impractical. Therefore, in whistleblowing cases the relevant question is whether the employee has some other effective option to put an end to the unlawful situation.

VII. Are there voluntary disclosure / self-reporting programmes and procedures?

There are no leniency or self-reporting programmes applicable to crimes of bribery in the public sector or commercial bribery. Generally, a natural person can expect the court to mitigate or abandon a sentence according to Section 46b of the German Criminal Code in case he or she helps to prosecute or even to prevent a crime that may be punished with a significant prison sentence by voluntarily disclosing information. It must,

however, be noted, that this provision does not apply to legal entities and it requires the information to exceed the contribution of the reporting person which means that mere self-reporting does not suffice.

However, voluntary self-disclosure by a company and or its representatives can be considered as a mitigating factor with regard to the assessment of a fine or sentence. As in other jurisdictions, it becomes more and more common practice for German companies to conduct internal investigations with the help of forensic investigators after or during which authorities are informed pro-actively. There are, however, no regulations, programmes or procedures governing the internal investigation itself or self-disclosure to the authorities.²¹

It should be mentioned, however, that active bribery usually coincides with the offence of tax evasion if the bribe payments have been accounted for as expenses and deducted from the taxable income. With regard to the specific offence of tax evasion, German Law acknowledges the possibility of voluntary self-disclosure. A valid self-disclosure requires that the tax authorities are made aware that previous reports were false or incomplete and that they are provided with the accurate figures at once so that the tax authorities are immediately able to issue corrected tax assessments. Further, all tax claims, including interest payments that result from the corrected tax assessment, need to be paid. If the tax evaded exceeds 25,000 euros per year, there will be no impunity, but criminal proceedings will only be terminated after an additional payment of 10 to 20 per cent of the evaded amount. However, such voluntary self-disclosure only affects the criminal liability of the natural person for participation in tax evasion offences. Criminal liability with regard to bribery is not affected by such a self-report. Rather, tax officials are required to report to the prosecutor if they become aware of circumstances indicating that bribery offences have been committed. This is why, in practice, both the tax authorities as well as the prosecutor are often approached simultaneously in case a company decides to self-report.

VIII. What are the consequences for assessment of guilt or admission of wrongdoing for future business, work, permits etc..?

If an offence was committed by somebody during the exercise of his or her profession, the court may issue a professional ban against this person, prohibiting him from exercising his profession for a certain time (1 to 5 years).

Individual criminal verdicts and employment bans are registered in the Federal Register of Criminal and Court Records.²² Further, the Federal Office of Justice (*Bundesamt für Justiz*), subordinated to the German Ministry of Justice, keeps a Central Industrial Register in which final administrative decisions that prohibit the conduct of business activities are registered.²³ Both registers can be consulted by authorities for administrative decisions based on an assessment of the “reliability” or “unreliability” of a person conducting a business.²⁴ According to

²¹ The introduction of a leniency or self-reporting programme is, however, foreseen in the draft on corporate criminal liability draft bill on criminal corporate liability has been issued by the Federal State of North Rhine Westphalia mentioned above, at III.

²² Section 4, 10(2) of the Act on the Federal Central Register of Criminal and Court Records (Bundeszentralregister, BZRG).

²³ Section 149 of the German Industrial Code.

²⁴ Section 97 (4) of the German Anti-Cartel Code Gesetz gegen Wettbewerbsbeschränkungen, GWB.

Section 35 of the German Industrial Code²⁵, the competent authority prohibits the conduct of business activities if there are facts that establish the unreliability of the business owner or a person engaged in the management of the business, as far as the prohibition is necessary for the protection of the general public or the employees of the business. A criminal conviction for corruption may lead to such “unreliability”.

Further, companies can be barred from public procurement because of bribery. Even though a so-called ‘Corruption Register’ for the Federal Republic of Germany has not yet been implemented at a national level, the ministers of justice of the German federal states agreed that such a federal corruption register should be established on their joint conference in June 2014.²⁶ Further, certain federal states already maintain specific anti-corruption registers. For instance, North-Rhine-Westphalia has introduced an Anti-Corruption Act on 16 December 2004²⁷ under which corrupt companies can be registered and barred from public procurement. The state of Berlin introduced a similar register in 2006,²⁸ as did Hamburg.²⁹

IX. What are the latest developments in anti-corruption in your jurisdiction?

Anti-Corruption compliance and investigations keep playing a prominent role both in the public debate and on the corporate agenda. After the revision of criminal bribery provisions came into force last November 2015, the German Parliament will have to decide on a new draft legislation specifically aimed to combat corruption in the healthcare sector. The draft provides a newly defined criminal offence aiming to sanction active and passive bribery of a wide range of healthcare professionals.

Moreover, the Government is currently preparing another draft bill on forfeiture and confiscation aiming to make it easier for authorities to confiscate and recover the profits from illegal behavior. The work on this draft is intended implement Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, 29 April 2014, as well as another aspect on which the two governmental parties agreed in their coalition contract.³⁰

Further, it remains to be seen whether and how the legislator will tackle the issue of corporate criminal liability during the remaining term of the current government and when a ‘Corruption Register’ will actually be implemented.

²⁵ German Industrial Code Gewerbeordnung, GewO.

²⁶ http://www.justiz.bayern.de/media/pdf/jumiko_2014/fruehjahr/top_i_10.pdf.

²⁷ Gesetz zur Verbesserung der Korruptionsbekämpfung und zur Errichtung und Führung eines Vergaberegisters in Nordrhein-Westfalen, Gesetz- und Verordnungsblatt für das Land Nordrhein-Westfalen - Nr. 1 vom 4. Januar 2005.

²⁸ Gesetz über die Einrichtung und Führung eines Registers über korruptionsauffällige Unternehmen in Berlin – Korruptionsregistergesetz vom 19. April 2006, Gesetz- und Verordnungsblatt für Berlin, Ausgabe Nr. 16/2006, p. 358.

²⁹ Hamburgisches Gesetz zur Einrichtung und Führung eines Korruptionsregisters, HmbGVBl. Nr. 12, 98 (repealed).

³⁰ See <https://s3.kleine-anfragen.de/ka-prod/be/17/16815.pdf>.

X. The Autor

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Anna attended the universities of Trier and Alcalá de Henares (Spain) and obtained a Juris Doctorate (International and Comparative Criminal Law) from Leiden University in The Netherlands.

She completed a legal clerkship at the International Criminal Court in The Hague and a traineeship with Europol in the same city. She spent parts of her practical training period at a Belgian criminal defense law office and held a placement at the German Foreign Ministry.

During subsequent years, Anna worked as a research fellow at the Center for Criminology in Wiesbaden, the National Agency for the Prevention of Torture in Wiesbaden and at the Justus-Liebig-University of Gießen at the chair for international and economic criminal law (Department chaired by Prof. Dr. Thomas Rotsch).

Concomitantly to her research activities, Anna has worked with Knierim | Huber Rechtsanwälte since October 2011; she has practiced law for the firm since August 2012.

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Anna has published on various issues in the field of domestic, European and international criminal law, including, e.g., "Negotiated Settlements for Corruption Offences: Position in Germany" in: Abiola Makinwa (ed.), Negotiated Settlements for Corruption Offence: A European Perspective, 2015.

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