GLI GLOBAL LEGAL INSIGHTS

Bribery & Corruption

2021

Eighth Edition

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glg global legal group

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Germany

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Brief overview of the law and enforcement regime

In 2019, Germany took the ninth rank in Transparency International's Corruption Perception Index (CPI) which is two ranks ahead of the previous year. With 80 points, Germany's overall rating on the scale of 100 points remained the same as in the previous year.

German law features a strong legal anti-corruption framework. Giving, offering or promising as well as taking, demanding or accepting the promise of bribes all constitute criminal offences. Facilitation payments are also prohibited. Even small-value gifts and hospitality for public officials may constitute a criminal offence depending on the specific circumstances of the case, the benefit's value and the intention of the provider.

Enforcement of bribery abroad has increased significantly in recent years, and a large number of prominent German companies and their representatives have been successfully prosecuted. Corporates can be held liable for corruption offences committed by their representatives under the German Act on Administrative Offences (*Ordnungswidrigkeitengesetz* – OWiG) with fines up to EUR 10 million and confiscation of all economic benefits obtained through bribery. In the near future, a new bill is expected, providing for maximum fines of up to 10% of the annual turnover of the group in case of a concurrence of criminal offences committed by staff or of up to 20% in case of a multiplicity of offences (for details, see below).

Most of the relevant provisions regarding bribery are part of the German Criminal Code (*Strafgesetzbuch* – StGB). The key provisions are: (1) *taking and giving bribes in commercial practice* (Sec. 299 StGB); (2) *taking and giving bribes in the public health sector* (Secs 299a *et seq*. StGB); (3) *taking and giving bribes in the public service sector* (Secs 331 *et seq*. StGB); and (4) *bribing delegates* (Sec. 108e StGB). In addition, there are further provisions forbidding bribery, *e.g.*, Sec. 108b StGB (*bribing voters*) and Sec. 119 of the German Works Constitution Act (*Betriebsverfassungsgesetz*) (*interfering with an election of the works council*).

The German anti-bribery laws provide for criminal liability of both the giving and the receiving party of bribes. Other criminal offences that are regularly associated with corruption, such as embezzlement and tax evasion, are also regularly prosecuted in parallel.

The StGB is applicable with regard to criminal offences committed, at least in part, in Germany. Criminal offences committed solely abroad fall within its reach under particular circumstances. As a rule, this requires that individuals with German nationality are involved.

The most relevant provisions dealing with bribery are outlined below.

Taking and giving bribes in commercial practice

Sec. 299 StGB prohibits giving and taking bribes in commercial practice.

It is forbidden to offer, promise or grant a benefit to an employee and/or to an agent of a business as consideration for an unfair preference with regard to the purchase of goods or services in Germany or abroad. The same applies if the benefit is granted in exchange for actions in connection with the purchase of goods and services that constitute a violation of the employee's or agent's duties incumbent on them *vis-à-vis* the business. Inversely, an employee or an agent of a business commits a criminal offence if he or she demands, accepts a promise of, or accepts a benefit in exchange for, an unfair preference with regard to the purchase of goods or services or if the benefit is demanded or accepted in exchange for actions that constitute a violation of his or her duties incumbent on him or her *vis-à-vis* the business.

The scope of the term "benefit" is very broad and includes any direct or indirect benefit that the receiving party is not entitled to and by which he or she gains a better position than he or she was in before. Benefits can be, *inter alia*, invitations for lunch/dinner or to a concert, cash payments, discounts, commissions or special premiums, gifts, granting a loan or concluding a contract, of which the respective party is not entitled to claim.

The benefit must be granted to an employee or an agent of the corporate. An "agent" is any person who is legally or factually entitled to act on behalf of the corporate and who can influence the corporate's decisions, *e.g.*, managing partners, members of the executive and supervisory board, or management consultants who act as intermediary for services of third parties.

The benefit must be given as consideration for an unfair preference with regard to the purchase of goods or services. Whether the benefit granted is suitable to unfairly influence the receiving party when making his or her business decision depends on the circumstances of the specific case. Benefits that are considered to be "socially adequate" may be granted without this being a violation of Sec. 299 StGB. This includes, *e.g.*, small tips, a small present for a birthday or anniversary, and invitations for lunch/dinner in a standard restaurant. German law does not provide for a specific threshold. However, amounts of EUR 40–60 are usually considered socially adequate (depending on the circumstances of the specific case).

Taking and giving bribes in the public health sector

Taking and giving bribes in the public health sector is prohibited according to Secs 299a and 299b StGB.

These provisions are applicable to healthcare professionals including, *inter alia*, doctors, veterinarians, psychotherapists, pharmacists and physiotherapists. Similar to taking and giving bribes in commercial practice, it is forbidden to offer, promise or grant a benefit to healthcare professionals as consideration for an unfair preference when prescribing or purchasing drugs, health aids or medical devices, or when referring patients or diagnostic material (both in Germany and abroad). In addition to the person granting the benefit, the healthcare professional demanding, accepting a promise of, or accepting, the benefit is also subject to criminal liability.

Secs 299a and 299b StGB are, *inter alia*, particularly relevant with regard to healthcare professionals working in medical centres. Medical centres are places where several healthcare professionals are working in close proximity, *e.g.*, an orthopaedist, an apothecary, a physiotherapist and a manufacturer of orthopaedic devices sharing the same premises. This constellation, while generally admissible, poses a high risk that, *e.g.*, benefits are being granted to the orthopaedist for the referral of patients to other healthcare professionals working in the same medical centre. In addition to risks arising from Secs 299a and 299b StGB, the respective professional laws concerning healthcare professionals set out rigid standards that have to be respected when running a medical centre.

Taking and giving bribes in the public service sector

With regard to bribery in the public service sector, the StGB differentiates between so-called granting/accepting "benefits" and so-called granting/accepting "bribes". The latter involves granting/accepting a benefit in consideration for an *unlawful* act and the sanction is (thus) higher.

In both cases, not only the person granting the benefit (see Sec. 333 StGB and Sec. 334 StGB, respectively) but also the public official or the person entrusted with special public service functions taking the benefit is criminally liable (see Sec. 331 StGB and Sec. 332 StGB, respectively). The summary below describes the offences from the provider's perspective party since this is the one relevant for corporates and their representatives.

Sec. 333 StGB (*granting of benefits*) prohibits the offer, promise or grant of a benefit to a German or European public official or to a person entrusted with special public service functions in consideration *for the exercise of his or her duties*. Public officials are, *inter alia*, civil servants, judges, persons who otherwise carry out public official functions, and persons who have otherwise been appointed to serve with the public authority in Germany or in the European Union (EU). The criterion "for the exercise of duties" is subject to a very broad interpretation and shall also include donations made to them with the intention to create a "positive climate" and without aiming at the exercise of a specific (lawful) act or duty. Benefits that are considered to be socially adequate may be granted. This may include – depending on the specific case and the specific function of the receiver – *e.g.*, a small present for a birthday or anniversary and invitations for lunch in a standard restaurant. German law does not provide for a specific threshold; however, depending on the specific case, amounts up to a maximum of EUR 20–30 may be considered socially adequate. Nevertheless, it is advisable not to offer or grant any benefit to public officials at all and especially not to those entitled to exercise state authority, since Secs 331 *et seq*. StGB aim to avoid already the *impression* of venality with regard to public officials' decisions. Thus, the requirements for benefits to be considered socially adequate are very strict.

The offence shall not be punishable if the competent public authority authorises the acceptance of the benefit by the recipient either in advance or upon prompt report by the recipient. For civil servants, the superior administrative authority (*oberste Dienstbehörde*) would be the competent authority and, for persons employed in the public sector, their boss. The acceptance of a benefit by a judge cannot be authorised.

Sec. 334 StGB (*granting of bribes*) prohibits the offer, promise or grant of a benefit to a public official in consideration for *having performed* or *performing a (specific) official act in the future and thereby violating his or her official duties*. The official duty that the public official is violating can result from general laws and regulations. Further, the violation of internal rules of procedure or of instructions of the public official's superior can be sufficient.

With regard to the granting of benefits to public officials abroad, a criminal liability is limited to the performance of an official act *in the future* (Sec. 335a StGB).

Bribing delegates

According to Sec. 108e (2), (3) StGB, it is forbidden to offer, promise or grant an unlawful benefit to a member of, *inter alia*, a federal or state parliament or the parliament of the EU in return for that member performing, or refraining from performing, an act, upon request or instruction in the exercise of their mandate. Inversely, the delegate taking the benefit as consideration for the performance of duties resulting from his or her mandate is criminally liable, too (Sec. 108e (1), (3) StGB).

The benefit is not unlawful if it has been given in compliance with the rules applicable to the person taking it or in compliance with recognised parliamentary practices (*anerkannte parlamentarische Gepflogenheiten*). Relevant provisions are stipulated, *inter alia*, in the German Act of the Members of the Bundestag (*Abgeordnetengesetz*) or in the German Law on Political Parties (*Parteiengesetz*). Benefits given by political interest groups to delegates for them representing certain political ideas in a *general* way do not fall within the reach of Sec. 108e StGB. However, the *explicit* offering, promising or granting of money *for a specific vote* of the delegate (*Stimmenkauf*) is considered bribery.

Sanctions

Taking and giving bribes in commercial practice (Sec. 299 StGB) and taking and giving bribes in the public health sector (Secs 299a, 299b StGB) shall be punished with a fine or imprisonment not exceeding three years. In especially severe cases, the punishment can be imprisonment from three months up to five years, *e.g.*, if the offence is related to a benefit of high value or if the offender is acting commercially or as a member of a gang (Sec. 300 StGB). Whether the benefit is considered to be of high value depends on the specific case, and the amounts mentioned by legal scholars vary from EUR 25,000 to EUR 50,000.

Taking and giving benefits in the public service sector with regard to the exercise of official duties (Secs 331, 333 StGB) shall be punished with a fine or imprisonment not exceeding three years.

Taking and giving bribes in the public service sector with regard to the violation of official duties (Secs 332, 334 StGB) shall be punished with a fine or imprisonment not exceeding five years. In especially severe cases, the punishment can be imprisonment of up to 10 years, *e.g.*, if the offence is related to a benefit of high value or if the offender is acting commercially or as a member of a gang (Sec. 335 StGB). Whether the benefit is considered high value depends on the specific case, and the amounts mentioned by legal scholars vary from EUR 25,000 to EUR 50,000.

Convictions for bribery that are related to companies or their representatives shall be registered in the competition register and may result in the company being excluded from public procurement tenders. The register is not open to the public, and entries in the register shall be regularly deleted after five years (Secs 2, 6 and 7 of the Competition Register Act; *Wettbewerbsregistergesetz*).

Investigation and proceedings

In Germany, there is no central federal investigation authority dealing with bribery matters. Rather, there are about 120 public prosecutors' offices spread regionally over the whole country. These are competent to investigate criminal offences (including bribery) that have been committed in their regional area of responsibility.

There are a few bigger public prosecutors' offices that have established specialised departments dealing with bribery matters and/or handling complex white-collar investigations. Further, there are some public prosecutors' offices that have a special competence to investigate bribery and/or white-collar-related offences committed within the area of other (mostly smaller) public prosecutors' offices in their region.

In many bribery cases, there is also the suspicion of tax evasion. Consequently, the tax authorities are involved in the investigation in addition to the public prosecutors' office. The period of limitation for bribery is three or five years depending on the relevant offence. The limitation period for tax evasion is five years. However, if, *inter alia*, a large amount of taxes has been evaded, the limitation period is extended to 10 years. According to decisions

of the German Federal Criminal Court, amounts exceeding EUR 50,000 are considered to be large amounts in this context.

Therefore, in some cases, the investigation authority is focusing more on the tax evasion caused by bribes unlawfully deducted as expenses from income than on the bribery offence itself. This is of particular relevance if the bribery offence has become time-barred but the tax evasion is still enforceable.

Overview of enforcement activity and policy during the last year

Cases

In Germany, criminal investigations are non-public, and investigation authorities usually do not issue media statements except for major or otherwise remarkable cases that attract the interest of the media. However, the media can attend public court hearings once the case has been transferred to the criminal courts and those hearings have been scheduled. In the following, we summarise major cases relating to bribery that have recently been discussed in the media:

In 2018, the Bremen public prosecutors' office conducted criminal investigations against the director of the German Federal Office of Migration with regard to the suspicion that up to 2,000 residence permits had been unlawfully granted to refugees in exchange for payments or other benefits. The criminal investigation is still ongoing and a decision of the criminal district court is expected for 2020.

According to media reports, a Siemens employee allegedly paid bribes to the ruling party in Russia in connection with the sale of medical devices to Russian customers. After seven years of investigation, the Augsburg public prosecutors' office dismissed the case against the payment of a EUR six-digit amount in 2019.

In 2019, the Stuttgart public prosecutors' office and the Stuttgart tax investigation department conducted criminal investigations against a member of the Stuttgart tax authority due to the suspicion that, during a tax audit, the public official disclosed secret information to the tax advisor of Porsche and, in return, accepted benefits. The criminal investigation is ongoing.

According to media reports from January 2020, the Frankfurt public prosecutors' office is conducting criminal investigations against two German politicians who are both members of the Parliamentary Assembly of the Council of Europe (PACE). They are said to have received money and gifts from Azerbaijani sources to represent the interests of Azerbaijan in the PACE and to make other PACE members speak positively about the Azerbaijani government.

In July 2020, a member of the Frankfurt general prosecutors' office was put in pre-trial detention over the allegation that he accepted kickbacks/bribes of about EUR 240,000 from a company in return for assigning the company to deliver expert opinions in criminal proceedings.

Focus

When investigating bribery cases, investigation authorities regularly investigate not only individuals who have potentially paid bribes, but also the corporate involved in the illegal conduct. In recent years, the focus of the investigation authorities on investigating corporates has increased, and high fines (including confiscation of profits) have been levied on them.

Often the focus is also on tax evasion committed in connection with bribery payments; one reason for this is that the limitation period is longer when it comes to tax evasion.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

So-called "facilitation payments" – payments of small amounts to public officials in order to induce them to perform their duties in a faster way (*e.g.*, custom clearance or visa matters) – made to German or European public officials are forbidden and would constitute a criminal offence for both the person taking and the person making the payment (Secs 331 and 333 StGB, respectively).

Facilitation payments made to foreign public officials (outside of the EU) are not punishable under German law as long as they are not made in order to obtain a future official act by which the foreign public official is violating his or her duties. However, it depends on the circumstances of the specific case as to whether or not accelerating the processing of an official act by the foreign public official constitutes a breach of the public official's duties. And it goes without saying that the payment can be punishable according to local laws in the foreign country.

Hospitality

Hospitality – in the sense of giving and taking gifts or invitations in order to maintain a "good relationship" – constitutes a benefit for the person receiving the hospitality and bears the risk of being considered bribery by investigation authorities. There are no specific provisions in Germany covering this topic, so the general provisions described above apply.

Whether hospitality is considered bribery depends on the circumstances of the specific case and, in particular, whether the hospitality can be considered to be "socially adequate". Especially if the hospitality has, or might be regarded as having, a direct or indirect link to a specific past, ongoing or future business decision, this could bear a risk of being considered bribery. Further, the higher the value of the hospitality, the higher the risk that the hospitality is considered to be socially inadequate – with the result that a suspicion of bribery can arise.

In the private sector, hospitality is treated less restrictively than in the public sector. Standard invitations to business lunches and other kinds of hospitality are admissible if they are adequate and relate to business purposes, *e.g.*, a meeting to discuss a project's progress or the introduction of a new product. If public officials are involved, specific diligence is required to avoid any indication of potential bribery, *e.g.*, by offering only hospitality of low value.

Key issues relating to investigation, decision-making and enforcement procedures

Self-reporting

German law does not provide for an obligation of individuals or corporates to (self-)report possible bribery offences to the investigation authorities.

However, if bribery payments have been included as expenses in tax declarations, tax laws require the filing of a correction notification with the competent tax authority (Sec. 153 of the German Tax Code; *Abgabenordnung*). Not filing the correction notification (if required) can cause an additional criminal liability for tax evasion. Filing the correction notification, however, bears a significant risk that criminal proceedings will be initiated because the tax office is obliged to report to the public prosecutors' office if there is any suspicion of bribery; usually when filing correction notifications it is quite transparent to the tax authority that potential bribery payments are the reason for making the tax correction.

Discretionary termination and settlements

There are several ways by which the public prosecutors' office and/or the criminal court can terminate criminal proceedings for discretionary reasons.

According to Sec. 153 of the German Code of Criminal Procedure (*Strafprozessordnung* – StPO), criminal proceedings can be terminated in case the offender's guilt is considered minor. However, in bribery cases, this is rarely the outcome of an investigation. The criminal proceedings can also be dismissed in return for, *e.g.*, a payment of a certain amount by the defendant (Sec. 153a StPO). The decision on whether or not to do so, and on the amount, lies at the discretion of the public prosecutors' office and/or the criminal court and requires the offender's consent. Moreover, the offender's guilt may not be major.

With regard to corporates, the StPO does not provide for specific rules setting out requirements to be fulfilled for a "settlement" with the public prosecutors' office. However, it is possible to conclude an informal agreement on the amount to be paid as a fine and on the commitment not to file an appeal against the fine order. Whether such a "settlement" can be reached depends on the prosecutor handling the case and on the circumstances of the specific case. As there is no centralised agency competent for investigating bribery cases (see above), the results can vary significantly.

Whistleblowing

In April 2019, the EU adopted the Whistleblowing Directive, which applies to the public and private sectors and aims to protect whistleblowers reporting infringements of EU law. The directive came into force in December 2019 and has until December 2021 to be transferred into national law. Germany has not yet transferred the directive into national law.

The goal of the directive is to strengthen the protection of whistleblowers by allowing them to report fraud, corruption, tax evasion or environmental destruction more safely. In particular, whistleblowers shall be protected against retaliatory measures in connection with their whistleblowing activities, such as dismissals, downgrades or other reprisals.

Cross-border investigations

In the EU, investigation authorities of Member States closely cooperate with regard to cross-border investigations. The willingness of national investigation authorities to cooperate with foreign investigation authorities is also increasing. For example, during witness interviews conducted by the Munich public prosecutors' office with regard to the Diesel matter, members of the US Department of Justice were attending. The European laws on mutual legal assistance in criminal matters (MLAT) and/or respective bilateral treaties with countries abroad provide for specific types of cross-border investigation measures and the requirements to be fulfilled for them, *e.g.*, for summoning a witness and/or conducting a dawn raid.

Corporate liability for bribery and corruption offences

In Germany, corporates cannot be held criminally liable, but criminal and administrative offences committed by managers or other responsible decision-makers can be attributed to the corporate, with the result that an administrative fine can be imposed on the corporate itself (Sec. 30 OWiG). In addition, any profits generated by the offence can be confiscated.

In the case that the offence is committed by staff, the investigation authorities usually also investigate the corporate's managers or other responsible persons with regard to the suspicion of a breach of supervisory duties (Sec. 130 OWiG). Failure to prevent or impede staff from committing business-related offences (such as bribery) constitutes a separate administrative offence for the responsible manager, which can be sanctioned with a fine and can also lead to a fine being imposed on the corporate according to Sec. 30 OWiG.

The fines to be imposed on the corporate in case of an intentional criminal offence can be up to EUR 10 million, and in case of a negligent criminal offence, up to EUR 5 million.

Proposed reforms / The year ahead

On October 21, 2020, the German Federal Government introduced to the German Federal Parliament a draft bill of the "Act to Reinforce Integrity in Business", which includes the "Act on Sanctions for Corporate Crimes" ("Corporate Sanctions Act"; *Verbandssanktionengesetz*). It is anticipated that the draft bill will be adopted very soon (maybe late 2020/early 2021); however, enforcement of the new provisions shall start later (about two or three years after the new law comes into force).

If enacted, the Corporate Sanctions Act will establish an independent legal basis for sanctioning corporates, with the result that the OWiG will no longer be applicable in the context of corporate crimes. The main purpose of the draft bill is to ensure that investigating corporates becomes mandatory and is no longer subject to the discretion of the public prosecutors' offices. Further, the draft bill aims to significantly increase the upper limit for corporate sanctions, reaching up to 10% of the average annual turnover of the group in the past three years in case of a concurrence of criminal offences committed by staff, or up to 20% in case of a multiplicity of offences.

On August 11, 2020, the German Federal Ministry for Justice and Consumer Protection published the draft bill on combatting money laundering by the means of criminal law, which aims to transform EU Directive 2018/1673 into national law. The draft bill, *inter alia*, proposes the reformulation of Sec. 261 StGB in a way that the object of the money laundering would no longer need to derive from specific criminal offences as listed in the current version of Sec. 261 (1) StGB. Instead, the object of the money laundering could derive from any criminal offence. Further, the draft version of Sec. 261 StGB incorporates a judgment of the German Federal Criminal Court into law, according to which a defence lawyer who accepts funds from his or her client for his or her service can be held criminally liable with regard to money laundering only if he or she knew that the funds were derived from unlawful assets.

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Thomas advises decision-makers and businesses in white-collar and administrative proceedings on both a national and an international level. He has more than a decade of experience and represents clients with respect to a wide variety of offences including lack of supervision, money-laundering, tax evasion, bribery and investment fraud. Thomas is specialised in internal investigations, white-collar defence, as well as in establishing and reviewing compliance management systems.

Thomas is listed as a "Frequently recommended Lawyer for Compliance Investigations" by JUVE, as a "Future Leader – Investigations" by *Who's Who Legal* and as "Top Lawyer 2020" for Compliance by *WirtschaftsWoche*. He has more than a decade of experience in handling white-collar matters, first as a prosecutor and then as a lawyer. Thomas regularly lectures and publishes on criminal law and criminal procedural law. He speaks German, English and French.

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Karl-Jörg advises and represents decision-makers and businesses from a diverse range of sectors in white-collar proceedings and related internal investigations, at both the national and international level.

Karl-Jörg is also frequently called upon to help companies assess criminal risks, and to deal with them appropriately – whether in the context of entrepreneurial risk decision-making, compliance audits for M&A transactions, or establishing and structuring compliance management systems. He also supports companies when criminal offences have been committed by employees or third parties.

His clients include banks, multinational companies and their decision-makers, and his experience in criminal law and criminal proceedings is usefully complemented by his in-depth knowledge of banking, corporate and tax law.

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Tine has been advising clients in white-collar criminal offences and tax offences, as well as regulatory/administrative offences, for more than 10 years. She regularly heads complex internal investigations and advises corporates and decision-makers on compliance issues with regard to liability risks and in connection with criminal and administrative investigation proceedings. She further focuses on reviewing and enforcing claims for damages against decision-makers and third parties related to matters that are potentially relevant under liability and criminal law aspects. In this context, she is able to draw on extensive experience and expertise gained in the fields of corporate law and D&O insurance law.

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