THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

SEVENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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CONTENTS

PREFACE

Anti-corruption enforcement continues to be an increasingly global endeavour and this seventh edition of *The Anti-Bribery and Anti-Corruption Review* is no exception. It presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Canada, Israel and Korea.

Given the exceptionally large penalties levied last year against Odebrecht SA and Braskem SA, as well as those against Rolls-Royce Plc, Telia Company AB, and VimpelCom Limited, the size of the fines in global enforcement actions have declined somewhat year-on-year, but multinational cooperation in global enforcement has remained robust. For example, the September 2018 conclusion in the United States of an US$853.2 million settlement with Petróleo Brasileiro SA (Petrobras) entailed cooperation between Brazil's Federal Public Ministry (MPF), the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC). Under the non-prosecution agreement with Petrobras, the DOJ and SEC will credit the amount the company pays to the MPF, with Brazil receiving 80 per cent (US$682,560,000) of the penalty. Likewise, the conclusion of an enforcement action against SBM Offshore NV, a Netherlands-based oil services company, and its US subsidiary entailed the participation of the MPF, the Netherlands Public Prosecution Service and the DOJ, each of which shared a combined worldwide criminal penalty in excess of US$478 million. Similarly, Keppel Offshore & Marine, Ltd, a Singapore-based shipping services company, and its US subsidiary entered into coordinated settlement agreements with the DOJ, MPF and Singapore's Corrupt Practices Investigation Bureau. In an enforcement action against Paris-based Société Générale SA and its wholly owned subsidiary, the DOJ credited half the penalty assessed in connection with the bribery charges (over US$292 million) for payments to the French National Financial Prosecutor's Office. In a related enforcement action against Maryland-based Legg Mason, Inc, the DOJ also credited amounts paid to other law enforcement authorities.

Crediting fines in this way is in keeping with the DOJ's policy, announced in May 2018, of discouraging 'piling on', and encouraging coordination with other enforcement agencies in an attempt to avoid multiple penalties for the same conduct. In the FCPA context, the new policy arguably goes further than Article 4 of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory states with shared jurisdiction over a foreign bribery case merely to consult with each other 'with a view to determining the most appropriate jurisdiction for prosecution'. For example, notwithstanding evidence of violations of the US Foreign Corrupt Practices Act, the DOJ closed its investigation of Güralp Systems Ltd, a UK-based manufacturer of broadband seismic instrumentation and

monitoring systems, in part owing to a parallel investigation and subsequent charges brought by the UK Serious Fraud Office (SFO).

Large-scale multinational coordination has also continued in connection with ongoing efforts to prosecute corruption in international football. Since May 2015, approximately 45 individuals have been charged in the United States alone. Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhard (1MDB), including the arrest of former Malaysian prime minister Najib Razak, who was charged with money laundering and various other offences, and eight former officers of the Malaysian External Intelligence Organisation, including its former chief. Hundreds of millions of dollars in assets have been seized. Following a formal request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a US$250 million luxury yacht belonging to Low Taek Jho, the Malaysian financier at the centre of the 1MDB scandal.

At an even more fundamental level, and in concert with the growing trend towards multinational cooperation in global enforcement, this past year, around the world, countries have adopted important enhancements to their anti-corruption laws. Argentina established criminal liability for domestic and foreign companies and imposed strict liability for various offences, including active domestic bribery, transnational bribery and participating in the offence of illicit enrichment of public officials. Canada implemented legislation outlawing 'facilitation payments', which are made to government officials to facilitate routine transactions, such as permits. In China, the Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law that specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. India passed the Prevention of Corruption (Amendment) Act, which criminalises giving an 'undue advantage' to a public official, establishes criminal liability for corporations and creates a specific offence penalising corporate management. Furthermore, Italy announced a new law aimed at strengthening protection for whistle-blowers, while Peru passed a law imposing criminal liability on domestic and foreign corporations.

A significant trend in legislative changes this past year was the widespread introduction of alternative forms of resolution for companies, short of criminal conviction and often referred to as deferred prosecution agreements (DPAs). Argentina, as part of its new law establishing criminal liability for domestic and foreign companies, introduced 'effective collaboration agreements', which allow for non- and deferred-prosecution agreements. Canada created a legal regime for 'remediation agreements' to resolve corporate offences under the Criminal Code and the Corruption of Foreign Public Officials Act. Singapore also introduced similar new legislation. Notably, these new DPA regimes, unlike non-prosecution agreements in the American regime, but in keeping with US DPAs and the regime in the United Kingdom, all require court approval of any proposed agreement. Additionally, in November 2017, France announced its first deferred prosecution agreement under the Sapin II Law with HSBC Private Bank (Suisse) SA, enacted in December 2016.

There have also been a number of significant developments in data protection laws that affect the conduct of international investigations, of which the EU General Data Protection Regulation (GDPR) is the most well known and impactful. In the first court ruling

concerning the application of the GDPR, a German court held that the Internet Corporation for Assigned Names and Numbers could no longer demand from a registrar of domain information data containing, among other things, the contact information for domain name registrants, administrators and technicians. Meanwhile, a number of developments affect the ability of law enforcement authorities to compel production of certain records from outside their national borders. For example, in the United States, Congress passed the Clarifying Lawful Overseas Use of Data Act (or CLOUD Act), which expressly requires email service providers to preserve and disclose to law enforcement electronic data within their possession, custody or control even when that data is located outside the United States. Following two decisions of the Court of Appeal of England and Wales, the SFO can compel production of documents held outside the United Kingdom by companies incorporated outside the United Kingdom, but the protections of 'litigation privilege' will still be accorded to documents produced in internal investigations. It will be interesting to see how courts and companies navigate these differing and evolving legal regimes in the year ahead.

The chapters in this book, which contain a wealth of learning about these significant developments around the world, will serve as a useful place to begin. They will help to guide practitioners and their clients when navigating the perils of corruption in the conduct of foreign and transnational business, and of related internal and government investigations. I wish to thank all the contributors for their support in producing this volume and for taking time from their practices to prepare these chapters.

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Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2018

Chapter 9

GERMANY

Sabine Stetter and Stephan Ludwig[1]

I INTRODUCTION

'Corruption is authority plus monopoly minus transparency' (Unknown). The perception that lies at the heart of this quote exposes corruption as a widespread, persistent and ever shifting challenge for society as a whole. Although the anti-corruption efforts undertaken by societies nationally are not accurately measurable, the general awareness of corruption is worth tracking. The Corruption Perceptions Index, published by Transparency International since 1995, shows that the corruption-free state is still considered a utopia. Germany, although it usually ranks remarkably well in comparison with some, has for the past 10 years scored only around 80 points out of a possible 100. In some respects, the fight against corruption can be likened to tilting at windmills, and we have observed that, in an effort to gain the upper hand, throughout Germany prosecution authorities have tended to pursue white-collar crime more frequently and have adopted a tougher stance. This is only logical, taking into account the huge damage that is suffered every year as a consequence of this crime. The International Monetary Fund estimates the damage resulting from bribery at up to US$2 trillion per year worldwide.[2] Given how understaffed law enforcement authorities are, the fight against corruption appears to be an uphill battle, but legislation has extended and increased the scope of criminal liability for corruption in the past few years. This has considerably intensified the pressure on all parties involved. Most recently, the criminalisation of data-protection-right infringements has received lots of attention, and this is very likely to improve data transparency within companies. Furthermore, a gradual privatisation of the criminal prosecution process (e.g., compliance management, internal investigations, self-disclosure) is taking place. Self-regulation in the economic sector is about to become the most important pillar when it comes to triggering the prosecution of white-collar crime.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Overview

Under German law, the German Criminal Code (StGB) categorises three different forms of bribery and corruption, which are addressed by the following anti-bribery provisions:

a Sections 299 to 302 – bribery in business dealings and the health sector;

1 Sabine Stetter is managing partner and Stephan Ludwig is managing legal assistant at stetter Rechtsanwälte.

2 IMF Staff Discussion Note, Corruption: Costs and Mitigation Strategies, May 2016, referring to a publication by Kaufmann.

b Sections 331 to 337 – bribery of public officials; and
c Sections 108b to 108e – bribery in connection with elections.

Within these three areas, the law makes a distinction between active and passive bribery. The former is where the party supplies the payment or benefit, while the latter is the illegal receipt of the payment or benefit.

One important aspect of the StGB is the low threshold that is applied specifically to public officials, which increases the chances of criminal liability. This was put in place in an attempt to stop public officials being targeted for bribery. Nevertheless in all three areas cited above it is essential to prove that the parties agreed to enter into an illegal transaction.

A moot point is that the legislature has targeted anti-corruption in the public sector, but the exact scope of the term 'public official' is difficult to define. However, Section 11(1) No. 2 of the StGB attempts to include anyone who serves the state or can be defined as an extended arm of the state, so that state activities outsourced to companies can be governed by the code.

ii Gifts and gratuities

The StGB does not just apply to illegal financial inducements but extends to all forms of gifts, gratuities and invitations that the recipient is perceived to benefit from. Again, there is little tolerance regarding the actions of public officials (Sections 331 and 332 of the StGB) so that even hospitality of low value may incur criminal liability. The private sector is afforded some leniency in this respect.

In some cases, where gifts and gratuities are deemed socially acceptable, the law will take a slightly more relaxed stance. This causes some uncertainty as there is no official guideline that specifically addresses what constitutes 'socially acceptable' – €30 is seen as a threshold; beyond this, when inviting executives to cultural events, up to €100 is often considered adequate.[3] Invitations to international sports events, such as football matches or the Olympic Games, may justify even greater amounts. However, the higher the amount, the more important the specific circumstances that will be thoroughly analysed by the jurisdiction (e.g., invitations extended to politicians during the FIFA World Cup 2006 in Germany).[4] As this is, essentially, a judgement call that results in individual interpretation, many companies' compliance regulations err on the side of caution by establishing a blanket prohibition on the giving and receiving of small gratuities.

Following the recent legislative reform, even socially acceptable benefits may be considered to satisfy the specific requirements, provided there is a benefit-motivated breach of duty within the meaning of Section 299 Paragraph 1, No. 2 StGB. Therefore, setting a general zero-tolerance limit in internal compliance guidelines is advisable.

iii Electoral bribery

Section 108e of the StGB governs the corruption and bribery of members of parliament. In addition to buying and selling votes, it is a criminal offence to propose, promise or grant any benefit or inducement to any member of a parliamentary assembly, municipal council, European Parliament, legislature of a foreign country, or indeed an assembly of

3 Schefold, *Corporate Compliance Zeitschrift* 2017, pp. 180, 181.
4 Federal Supreme Court, *NJW* 2008, p. 3580.

an international organisation, and to influence a member to vote for or against or abstain on a measure. Section 108e also incorporates passive bribery, where a member accepts an illegal inducement. Critics claim that these regulations were introduced too late and are not practical, since it is particularly difficult to prove the fact of 'acting on behalf of or on the instructions of the benefactor'.[5] In fact, although introduced in autumn 2014, the regulation has yet to lead to a significant number of investigations or even conviction of high-ranking officials.

However, in constructing Section 108e it has been recognised that many aspects of legislative work may be inhibited, as parliamentary proceedings involve a certain 'trading' of support to achieve consensus. As a result, an important stipulation has been added to the Section: for criminal sanctions to be applied, any giving or receiving of a benefit must be deemed 'unjustified'. The Section accommodates recognised parliamentary custom and practice, as well as party donations that are permissible under administrative and electoral law.

With regard to donations for members of parliament and political parties, there are general limitations, such as the prohibition of anonymous donations of more than €500, the requirement of a notification to the President of the Bundestag in cases of donations of more than €5,000 and for publication of donations of more than €10,000.

III ENFORCEMENT: DOMESTIC BRIBERY

i Institutional framework

The federal law relating to bribery and corruption in Germany applies across all 16 states. This universal application has some quirks as the actual enforcement of the law is the responsibility of the organs of the individual states. As a result, there is a somewhat piecemeal approach to enforcement. Some federal states have instituted units that have a specific focus on issues relating to the prosecution of white-collar crime.

In recent times, since the legislative reform became effective, additional specialised prosecution departments have been formed in some federal states, to follow up criminal offences in the healthcare sector in particular and to intensify the fight against corruption in this field. There are 115 regional courts in Germany and each one has its own prosecution office, which means there is a degree of uncertainty in relation to bribery and corruption proceedings. Prosecutors' offices have divergent attitudes when it comes to what should be prosecuted and courts sometimes take conflicting views on the application of the law. It is therefore harder to make an objective assessment on the most likely outcome of a prosecution when considering all 16 states.

ii Plea-bargaining

German law does not have an established practice of plea-bargaining as such. Nonetheless, because of recent decisions emanating from the Federal Constitutional Court and the Federal Court of Justice, the practice of plea-bargaining has been put in the public eye. Owing to the occurrence of different negotiated bargains and the absence of a specific set of guidelines to regulate their establishment, the German government provided a set of rules in 2009 in Section 257c of the German Code of Criminal Procedure (StPO) to ensure the process has a degree of commonality.

5 LobbyControl, Lobbyreport 2017, p. 35.

Fundamental to the rules is the stipulation that the court must receive a proposal, on the basis of which an agreement will be settled between the court, prosecution and defence. This agreement avoids any reference to an admission of guilt or innocence. Rather, the emphasis of the agreement is upon the criminal sanction to be applied to the defendant and under such an agreement it is normal to obtain a confession from the defendant. Section 257c of the StPO states that all discussions and resulting negotiations are to be set down for the public record. However, a number of first instance courts have been ignoring this new requirement, causing the higher courts to rule that where the requisite transparency is missing a concluded plea bargain would be illegal even though it has been effectively agreed by all sides.[6] In its ruling of March 2013, the Constitutional Court further held that culpability or guilt is still not founded solely on confession. The confession is one part of the forensic process and has to be consistent with all other evidence placed before the court. Following that, in more recent rulings, the courts went to further lengths to clarify what constitutes a valid plea bargain under Section 257c of the StPO.[7]

To avoid the rather extensive stipulations of Section 257c of the StPO, the court at first instance has the option to take part in the procedure adopted under Section 153a of the StPO in agreement with the prosecutor and the accused. This is a special procedure where a case does not actually come to trial but rather is settled using other means, subject to the satisfaction of the authorities. This is usually in the form of restitution or payment of an agreed sum of money to the treasury or a non-profit organisation to conclude the proceedings. The latter is an established procedure, usually in relation to more minor offences, but it did acquire a certain notoriety when bribery proceedings against a British Formula 1 racing official were concluded in this way through the payment of an agreed sum. In this case it was quite a considerable amount (approximately €88 million), although this did not constitute a financial penalty or crime, or indeed judgment of criminal culpability. It is not only the scale of the payment that has provoked a discussion on the applicability of Section 153a, but also the anomalies in justice that the procedure might throw up. A bank official who accepted a payment made by the accused was punished with a lengthy prison sentence. Even though the court case was concluded more than four years ago it is still omnipresent and, in current discussions, serves as a prime example for concerns about this kind of arrangement during a trial.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

The scope of application of the German anti-bribery statutes was extended, especially on the European level, with effect from 26 November 2015. EU office holders, such as officials or civil servants of EU institutions, as well as other parties that carry out EU duties, are now explicitly covered under Section 11 paragraph 1, No. 2a StGB.

Substantial parts of the previously applicable EU Bribery Act and the Act on Combating International Bribery have to exist at the same time.

6 Federal Constitutional Court, judgment of 19 March 2013, 2 BvR 2628/10 et al.

7 Federal Constitutional Court, decisions of 25–26 August 2014, 2 BvR 2048/13, 2 BvR 2172/13, 2 BvR 2400/13; Federal Supreme Court, decision of 5 July 2018, 5 StR 180/18.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

As in all developed nations, Germany imposes stringent requirements for accounting and financial reporting, which have been set up to preserve the confidence and security of equity holders. Higher demands are made on publicly listed companies. Accounting checks and auditing are conducted on a more stringent basis by public authorities and commercial auditors. Section 200 of the German Fiscal Code empowers the tax authorities to carry out thorough investigations and compels taxpayers to keep accurate and reliable accounts of commercial transactions. Poor bookkeeping and inaccurate ledgers, as well as funds that appear to have been inappropriately allocated or potentially employed for the purposes of corruption, arouse suspicion. Section 266 of the StGB provides that illegal allocation, potential use or actual use of funds for the purposes of corruption is a breach of trust against the company and its shareholders.

The criminalisation of money laundering is governed by Section 261 of the StGB. Concealing the origin of payments or the location of money and other assets originating from another predicate offence is a criminal offence itself. The predicate offences are often felonies (i.e., offences that are punishable by a custodial sentence of more than one year); however, certain listed offences may constitute a predicate offence for the purposes of the provision, such as fraud and embezzlement, as long as these acts were performed commercially or were committed by a criminal organisation. Based on the recommendations of the Financial Action Task Force and the Organisation for Economic Co-operation and Development (OECD), and with effect from the end of 2015, Section 261 StGB was tightened to penalise self-laundering to an even greater extent.

Money laundering is punishable by a prison sentence of three months to five years. Only in special circumstances may a fine be imposed as the sanction. It should be noted that even gross negligence with regard to the knowledge or ignorance of where the money or object originated from is sufficient to satisfy the specific requirements of Section 261(5) of the StGB.

On 26 June 2017 the legislature implemented the Fourth European Money Laundering Directive. The practical consequences are immense: a crucial threshold was lowered from €15,000 to €10,000, leading to a significant increase in potential money laundering transactions. In addition, there is a new transparency register that discloses the economic beneficiaries of, for example, legal entities or trusts. Broader duties were established for companies and members of the liberal professions to maintain money laundering risk management. Accordingly, there now exists an independent central authority to cope with suspect notifications that can act quickly, prohibit transactions and freeze bank accounts at short notice. The number of money laundering notifications is expected to increase rapidly owing to the extended application of the law together with a low degree of suspicion triggering the obligation to notify. Moreover, companies receiving corrupt money into their payment accounts run the risk of contaminating the entire account, thus qualifying every account activity as a potential act of money laundering.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

It is a challenge to collect evidence for any bribery that has been committed on foreign soil. Likewise, when the keeping of proper records is lax it is difficult to defend against such a charge. In some developing countries only a bare minimum of record-keeping is

undertaken, and in those circumstances where sham invoices have been used or dubious service agreements concluded, the burden of proof is placed on defendants to validate their business purpose and to demonstrate the legitimacy of their transactions.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

As a member of the Group of States against Corruption that was set up by the Council of Europe in 1999, Germany is part of the international community that monitors states' compliance with anti-corruption standards. Furthermore, Germany is a signatory to the following international treaties on anti-corruption:

a the OECD Anti-Bribery Convention;
b the United Nations Convention against Corruption;
c the United Nations Convention against Transnational Organized Crime; and
d the Council of Europe Criminal Law Convention on Corruption.

At the European level, the European Anti-Fraud Office (OLAF) is of particular importance. This body, among other things, is responsible for combating corruption within EU institutions and offices, and has been highly successful. Between 2009 and 2017, it concluded more than 2,000 investigations. In 2017 alone, OLAF recommended the recovery of over €3 billion to the EU budget. At the same time, OLAF was able to reduce the average duration per case to only 17.6 months, the lowest figure since its establishment, which is remarkable given the complexity and cross-border nature of the investigations.

VIII LEGISLATIVE DEVELOPMENTS

i Corruption in healthcare

The practice of pharmaceutical companies (particularly through their sales teams) of giving out complementary gifts and benefits to private practice doctors, by way of medical devices, junkets or other forms of award, has been under scrutiny for a considerable length of time. In March 2012, the Federal Supreme Court ruled that the provisions governing corruption did not extend to the aforementioned practice. The legislative authority, therefore, responded and introduced Sections 299a and 299b of the StGB, which have been in force since June 2016, governing bribery and corruption in the healthcare sector. The purposes of these are twofold: first, to provide regulations that will ensure fair competition in the healthcare sector, and second, to maintain patients' confidence in decisions made by medical practitioners. This involves not only private medical practitioners, but also other professional healthcare service providers, such as dentists, pharmacists, psychotherapists and nurses. Numerous cooperative practices – as used in the past by pharmaceutical companies and medical professionals, for example – became illegal with this change in the law. Consequently, the courts will have to determine where the exact borderline between legal and illegal cooperation can be drawn over the coming years. So far, there has been no decision by the Federal Supreme Court that further clarifies the new provisions. Nevertheless, several investigation proceedings are pending and might lead to higher court decisions. Investigations seem to develop slightly more slowly than other corruption investigations. One reason might be that phone tapping would be an unlawful determination method in view of the particular relationship of trust between doctor and patient.

ii 'Revolving doors'

Another issue that has been under scrutiny recently is the practice of politicians and senior public officials transferring to rewarding positions in the private sector. Although this occurs relatively infrequently in Germany, instances where top politicians and secretaries of state have moved into senior positions in business have been widely reported in the press and subsequently frowned upon. As a result, new legislation was introduced, which entered into force in July 2015. It stipulates a transition period of between 12 and 18 months before current and previous members of the government who wish to move out of public service can take up positions in the commercial or private sectors. Current or previous members are also obligated to notify the government about their intentions to move elsewhere. This provides the government with the option of disallowing the request, thereby leading to considerations of monetary compensation should an official be denied approval to take up a post.

The law provides that in the first instance an independent panel should review the position change and pass on its recommendation to the government. Recently, the former Federal Minister for Foreign Affairs Sigmar Gabriel made it into the headlines, because of his intention to become a member of the administrative board of a major European train manufacturer. The panel agreed to his plans on the understanding that he would adhere to the required grace period of 12 months. Critics argue that the period should be much longer, especially if, as in the case of former minister Gabriel, the duties of the former government official are related to the economic activities of the future employer.

iii Reform of private sector bribery offences

In the course of combating corruption in Germany an amendment entered into force on 26 November 2015, modifying the central provision for corruption (Section 299 StGB). By changing both the content and the scope of its application, the provision has been extended significantly. A key innovation was the introduction of the 'employer model', on the basis of which it is a criminal act to offer, promise or grant (and the same for passive bribery) an employee or agent of an enterprise a benefit for himself or herself or another 'for violating his duties vis-à-vis the enterprise' while procuring goods or commercial services.

The new approach is particularly relevant in terms of practical application in that now even socially acceptable gifts and invitations – which in itself provides a reasonable scope – can be criminally relevant, where offered or otherwise expressed to induce or in part motivate the carrying out of breaches of duty. Furthermore, lawmakers extended the area of applicability of German law with regard to the bribery and corruption of German and European officials. In this respect, German law can now apply, irrespective of the crime location and, under certain circumstances, irrespective of the nationality of the offender. Notably, by extending the application of Sections 331 and 333 StGB in relation to accepting or granting an advantage, the formerly unpunished payment of 'accelerated fees' or bribes to European officials is now punishable. In the light of these changes in the law, numerous companies and institutions have fundamentally revised their compliance policies.

iv Corporate criminal liability

As yet, the principle of corporate criminal liability does not exist under German law. German law provides for corporate liability from the aspect of administrative law rather than criminal law. This is constituted under the Administrative Offences Act (OWiG) and considers corporate liability upon company leadership for gross negligence or wilful misconduct if they disregard their duty to prevent their employees engaging in criminal activity (Sections 30 and

130 of the OWiG). Financial penalties can be significant, assets can be seized and accounts for profit made. For example, in the aftermath of 'Dieselgate', Volkswagen had to pay €1 billion to the federal state of Lower Saxony (this amount consisted of the maximum financial penalty of €5 million plus a confiscation amount of €995 million).

However, the options that German law currently provides are exploited differently by the public prosecutors responsible. In practice, there is a certain legal inequality throughout the country, which is therefore open to criticism. In the coalition agreement, the current administration states that regulation of corporate criminal liability is considered a priority for this legislative term. The sanctions are intended to be turnover-oriented and shall be accompanied by legislation governing internal investigations and public release of the investigation findings. This has stimulated debate and there is currently growing interest in drafts that already exist for such legislation.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

In the context of the implementation of the Fourth European Money Laundering Directive, EU Member States are required to introduce dedicated central authorities to control financial transactions. Germany has built up a Financial Intelligence Unit (FIU) reporting to the Ministry of Finance, which commenced operations on 1 July 2017. The Unit collects and analyses suspect notifications about financial transactions associated with money laundering or terrorist financing, but to date, the FIU has struggled to meet expectations, because of the very high number of cases, technical difficulties and limited staff.

In addition, on 1 July 2017 a law entered into force reforming the criminal rules on disgorgement. Disgorgement is designed to enable public authorities to effectively confiscate undue profits. As German law does not provide punitive damages, disgorgement is one of the major deterrents against white-collar crime. This law addresses gaps concerning disgorgement and aims at improving the authorities' abilities to act by reducing bureaucratic barriers.

X COMPLIANCE

i Corruption structures

The following two types of corruption are generally identified: situational corruption and structural corruption.[8] Situational corruption occurs primarily in single cases where the participants often do not know each other and where the benefits attained are of relatively low value. Often this type of corruption is not planned and does not repeat itself. However, structural corruption is distinguished by its planned method, high degree of organisation and occurrence on a repeat basis. Indeed, the development over a long period of corrupt relationships that ultimately include numerous companies and individuals is not uncommon.

In Germany, known cases almost exclusively concern structural corruption. According to the federal status index of the German Federal Office of Criminal Investigation, in 2016 about 20 per cent of criminal connections between givers and receivers lasted for more than two years.[9] In 66 per cent of all known cases receivers were public officials. Today,

8 See Bannenberg, *Handbuch des Wirtschafts- und Steuerstrafrechts* (2014), Chapter 14, point 7.

9 Bundeskriminalamt, 'Bundeslagebild Korruption 2016', p. 9 and following.

criminal investigation authorities are reliant on corporations' own compliance systems and whistle-blowing. In 2016, almost half of all legal proceedings in this regard were instigated on the basis of the receipt of such information.

ii Public enterprises

For publicly owned companies, compliance procedures are of particular importance, as they often operate in commercial areas in which there is little or no competition; for example, water supply, healthcare establishments and public transport companies. On the one hand, there is naturally a latent risk of abuse with types of monopoly position, while on the other hand, public companies can easily find themselves victims of price-fixing when the market for the services to be purchased is very small. Additionally, when there is a compliance offence then there is a further dimension of damage, namely the resultant political fallout. To take account of these risks, the Public Corporate Governance Codex (PCGK), which also contains compliance principles, was instituted in 2009. This Codex, containing a number of recommendations and proposals, was introduced at a federal level and reflects the current statutory position. Furthermore, while no new 'hard law' was actually introduced, the impact of these guidelines has been considerable. As is shown by the German Corporate Governance Code (which is the Code in the commercial sector that corresponds to the PCGK), most companies strive to follow the recommendations as this is a reflection of how a company sees itself, and the improved public image and fulfilment of these requirements constitute a form of quality seal. Additionally, the comply-or-explain principle applies to the Code regulations, so companies that do not follow the Code's recommendations must disclose their variances annually and justify them accordingly. The political dimension is particularly pertinent when public companies are found to be at fault, and the importance of the PCGK should not be underestimated. Equally, the juxtaposition of parallel codes generated at the federal, state and municipal levels merits important consideration, as these are often very different from each other and can vary greatly in detail.[10]

XI OUTLOOK AND CONCLUSIONS

Corruption is difficult to pin down, especially when it comes to hard facts about improvement or deterioration, but in terms of efforts undertaken to fight corruption, the trend appears to be very positive. To date, 97 per cent of companies with more than 10,000 employees have implemented a compliance management system (CMS), and most companies identify the fight against corruption as one of the main purposes of their CMS.[11] This surely is in the best interest of the company, and particularly so as the Federal Supreme Court has ruled that the implementation and effectiveness of a CMS can be lent weight by courts, leading to harsher or reduced sentences.[12] Of course, companies and law enforcement authorities have to ask themselves how, for example, a scandal such as Dieselgate could remain undetected for

10 https://publicgovernance.de/media/PG_Winter_2012.pdf; https://publicgovernance.de/media/PG_Winter_2012_Schwerpunkt_Public_Corporate_Governance_Kodizes_im_Vergleich.pdf.

11 Study by Martin-Luther-University Halle-Wittenberg and PriceWaterhouseCoopers, Wirtschaftskriminalität 2018, Mehrwert von Compliance – forensische Erfahrungen, www.pwc.de/wirtschaftskriminalitaet_2018, pp. 4, 24, 25.

12 Federal Supreme Court, decision of 9 May 2017, 1 StR 265/16.

so long despite the existence of compliance programmes concerned with internal technical auditing and encouraging whistle-blowers to contact ombudspersons, and there is certainly room for improvement.

The importance of data protection as part of a company's CMS has also grown and is still growing rapidly. Data protection has to be taken very seriously and treated like every other aspect of compliance to avoid substantial fines. In one further sign of the notable trend towards the privatisation of criminal prosecutions, regular 'employee screenings' are becoming standard in those business areas susceptible to corruption. Today, we have probably already arrived at the point where legislators, prosecutors and companies share equal responsibility for getting to the bottom of structural corruption.

Appendix 1

ABOUT THE AUTHORS

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Dr Sabine Stetter is managing partner at stetter Rechtsanwälte. She studied law at the Ludwig-Maximilian University in Munich and at the London School of Economics. From 2000 to 2003 she worked in criminal appeal proceedings before the Federal Court of Justice, Germany's highest court of civil and criminal jurisdiction, in Karlsruhe. For nearly 20 years she has devoted herself exclusively to criminal business and criminal tax law, and she founded stetter Rechtsanwälte in 2010. Dr Stetter's doctorate in criminal tax law provided a comparative evaluation of the German and American law systems in this area of practice. Furthermore, Dr Stetter is one of the co-authors of the *Münchener Anwaltshandbuch Strafverteidigung* (a standard reference work for German defence counsel) and the *Handbuch Arbeitsstrafrecht* (a comprehensive practical guide to the responsibility of company personnel in respect of labour criminal liability risk). She is a member and speaker of the International Bar Association, the American Bar Association and the American Chamber of Commerce in Germany.

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Stephan Ludwig has been a managing legal assistant at stetter Rechtsanwälte since 2015. He studied law at Heidelberg University and at Ludwig-Maximilian University in Munich. In parallel with his studies, he gained experience in different fields of law in a number of renowned law firms. Following his interest in international corporate law and white-collar crime, Stephan Ludwig completed internships in Malaysia and France. Furthermore, he published an article about management liability in Germany and France from a comparative law perspective and, since 2015, he has been working on his doctorate, focusing on management liability in the context of white-collar crime and international corporate law.

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