THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

EIGHTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

The eighth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including new chapters covering Argentina, Brazil, Chile, Colombia, Mexico, Peru and Venezuela. The comprehensive scope of this edition of the Review mirrors the scope of global anti-corruption activity and developments.

Over the past year, countries across the globe continued to bolster their domestic anti-bribery and anti-corruption laws, but shifting international relations and global economic competition may be undermining international cooperation. This is most clearly reflected in tensions between China and the United States and in recent comments by the chairman of the US Securities and Exchange Commission (SEC) that called into question the extent to which international cooperation is real or perceived, and whether deliberately asymmetric enforcement is disadvantaging US companies.

In China there were several notable legislative developments that affect anti-bribery and anti-corruption enforcement. The Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law, which came into force in January 2018. The amendments specify the range of prohibited recipients of bribes, expand the definition of prohibited bribery to include bribery for the purpose of obtaining a competitive advantage, impose, with limited exceptions, vicarious liability on employers for bribery committed by employees and provide for increased penalties. China also amended its Criminal Procedure Law to codify rules encouraging cooperation in government investigations and to permit trials in absentia, including for bribery and corruption. The new Chinese Supervision Law creates commissions with authority to supervise public functionaries and to detain suspects for prolonged periods while investigating corruption cases.

India and Japan also passed legislation bolstering their anti-corruption laws. The Indian Prevention of Corruption (Amendment) Act criminalises giving an 'undue advantage' to a public official, establishes criminal liability for companies and creates a specific offence penalising corporate management. The Japanese government has introduced a plea bargaining system, which allows individuals and companies to negotiate reduced criminal sentences in exchange for providing information regarding third parties suspected of or charged with enumerated offences, including crimes of corruption.

In Europe, the Italian parliament approved what is known as the 'bribe destroyer' law aimed at combating corruption in Italy's public sector. Among other things, the law increases the powers of prosecutors to investigate allegations of bribery, provides for increased penalties for individuals and increased sanctions for companies convicted for corruption and eases the statute of limitations for corruption cases. In Ukraine, as part of a US$3.9 billion loan programme with the International Monetary Fund aimed at prosecuting corruption

and insulating court decisions from political pressure or bribery, former President Petro Poroshenko announced the launch of a special court to try corruption cases. The United Kingdom's Serious Fraud Office published guidance on corporate cooperation describing the steps a company can take if it wants to cooperate with prosecutors in an investigation, but the guidance is silent on the specific benefits of cooperation and does not guarantee any leniency for cooperative conduct. In addition, the European Parliament adopted a proposal for a Europe-wide whistle-blower directive aimed at defining the areas of EU law eligible for whistle-blowing and who qualifies for whistle-blower protections.

Despite these significant developments in national legislation around the world, SEC Chair Jay Clayton recently lamented that, although the SEC has 'vigorously enforced' the FCPA, it has done so 'largely alone' and 'other countries may be incentivized to play, and . . . are in fact playing, strategies that take advantage of [the SEC's] laudable efforts'. Similar sentiments may be behind the Foreign Extortion Prevention Act, proposed legislation introduced in the US Congress that would allow the DOJ to indict officials for demanding bribes to fulfil, neglect or violate their official duties.

Separately, on 1 November 2018, then-US Attorney General Jeff Sessions announced a new 'China Initiative,' to counter perceived national security threats to the United States from China. The China Initiative specifies 10 goals, including identifying FCPA cases involving Chinese companies that compete with American businesses. Prior to the announcement of the China Initiative, China adopted the Law on International Criminal Judicial Assistance, which prohibits individuals and entities in China from assisting foreign countries in criminal investigations absent governmental authorisation.

Notwithstanding Chairman Clayton's remarks and the DOJ's China Initiative, senior DOJ officials have continued to affirm their commitment to international cooperation. The significant resolution, announced in March 2019, of the DOJ and SEC enforcement actions against Mobile TeleSystems PJSC, the Russian telecommunications provider, for grand corruption in Uzbekistan, relied on extensive international cooperation between US enforcement agencies and authorities in 13 different European countries, though notably not Russia or Uzbekistan. Likewise, the announcement this past June of a resolution with Technip FMC PLC, a London-headquartered provider of oil and gas technology services, relied on cooperation between the DOJ and Brazilian authorities, along with six European countries. Admittedly, however, both settlements have been years in the making and may not be an indication of the DOJ's current views on international cooperation. Even so, elsewhere in the world, most notably in the prosecution of bribery throughout Latin America, international cooperation remains a central feature of anti-corruption enforcement.

Given the numerous recent changes in domestic legal regimes, and the uncertainty in international relations, this book and the wealth of learning that it contains from around the world, will help guide practitioners and their clients when navigating the perils of corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

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Washington, DC
October 2019

Chapter 10

GERMANY

Sabine Stetter and Christopher Reichelt[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[2], 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.[3] 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:

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1 Sabine Stetter is a managing partner and Christopher Reichelt is a research assistant at stetter Rechtsanwälte.

2 https://www.transparency.org/cpi2018.

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

a Sections 299 to 302 – bribery in business dealings and the health sector;
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, even if this agreement was concluded informally.

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.[4] 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).[5] 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.

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

iii Electoral bribery

Section 108e of the StGB governs the corruption and bribery of members of parliament at state and federal level. 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 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'.[6] In fact, although introduced in autumn 2014, the regulation has yet to lead to a significant number of convictions or even investigation of high-ranking officials.

However, in constructing Section 108e of the StGB 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 by private individuals and legal entities to members of parliament and political parties, there are general limitations, such as the prohibition of anonymous donations of more than €500, the requirement to list donations of more than €10,000 in an accountability report with the name and address of the donor and the exact amount of money, and a notification to the President of the Bundestag with immediate publication of donations of more than €50,000.[7]

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. To date, only 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.

6 LobbyControl, Lobbyreport 2017, p. 35.

7 See Section 25(3) of the Law on Political Parties (PartG).

ii Plea-bargaining

Until 2009, German law did not contain any legal provisions on plea-bargaining. 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) together with additional legal provisions to ensure the process has a degree of commonality.

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 273(1a) 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.[8] 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 and to what extent this has to be documented in public court records.[9]

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 discussion on the applicability of Section 153a of the StPO, 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.

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

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

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(1) No. 2a of the StGB. In addition, the provisions regarding bribery of public officials also apply to public officials and other employees of the International Criminal Court (ICC) as well as – since 2015 – the members of certain courts at the European level specialised in these matters.

Substantial parts of the previously applicable EU Bribery Act and the Act on Combating International Bribery have to exist at the same time. The provision in Section 11(1) No. 2a of the StGB goes beyond the previous EU legal framework.

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 (AO) 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, unless they are made with the consent of the person entitled to them.

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 (FATF) 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. Furthermore, this could have a significant impact on the confiscation of incriminated assets.

Continuing along this path, the EU adopted the Fifth Money Laundering Directive in May 2018. Among other things, it strengthens transparency measures, leads to improvements in financial intelligence unit (FIUs) due to better access to information through centralised bank accounts, combats risks of terrorist financing through anonymous use of virtual currencies and pre-paid instruments, and implements stronger cooperation and exchange of information between anti-money laundering supervisors and the European Central Bank.[10]

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.

However, the EU has also been active in this area with the proposal for a regulation on European production and preservation orders for electronic evidence in criminal matters (the E-Evidence Regulation) and an accompanying directive. Once Parliament has approved the Commission's proposal and the procedure has been completed in the coming months, direct access to e-evidence will be created without the need for a traditional request for mutual legal assistance. In this respect, negotiations are already underway with the United States on the corresponding exchange of data. In addition, European Criminal Records (ECRIS) and ECRIS-TCN (with third-country nationals) provide a tool for taking into account criminal records from other EU Member States or third countries when reaching a decision in court. Reference should also be made to cross-border investigation teams and Eurojust, which can coordinate the investigations.

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 European and international treaties on anti-corruption:

a the OECD Anti-Bribery Convention;

b the United Nations Convention against Corruption;

10 Finally, reference should be made to the EU Policy on High-Risk Third Countries. In this context, the EU is currently working on a list of countries where there is increased concern about money laundering risks. This list is likely to have further implications for payments to these countries.

c the United Nations Convention against Transnational Organized Crime;
d the Council of Europe Criminal Law Convention on Corruption; and
e the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

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.

From 2020, the European Public Prosecutor's Office (EPPO), supported by 22 Member States (including Germany), will have the power to investigate, prosecute and bring to court crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. This will entail a new type of investigation and will require new approaches to criminal justice counselling with appropriate expertise.

VIII LEGISLATIVE DEVELOPMENTS

i Corruption in healthcare

The practice of pharmaceutical companies (particularly through their sales teams) of giving out complimentary 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 lucrative 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 can be criminally relevant, where offered or otherwise expressed to induce or in part motivate the carrying out of breaches of duty. Furthermore, lawmakers have 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 built up an FIU in 2001 under control of the Federal Criminal Police Office (BKA). Since 2017, the FIU reports to the Ministry of Finance. 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. For information on the adoption and consequences of the Fifth Money Laundering Directive, see above.

In addition, on 1 July 2017 a law,[11] which transposed the EU Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime (2014/42/EU) into German law, entered into force reforming the criminal rules on disgorgement and confiscation.[12] Disgorgement and confiscation are designed to enable public authorities to effectively confiscate undue profits. As German law does not provide punitive damages, disgorgement and confiscation 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.[13] 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. Structural corruption, however, 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.

11 Federal Law Gazette I, p. 872.

12 This approach is further strengthened by the Regulation (EU) 2018/1805 publicised on 28 November 2018 on the mutual recognition of freezing orders and confiscation orders. The Regulation sets clear and short deadlines for the mutual recognition and execution of freezing orders. It improves the victims' right to get compensation for damage inflicted on their assets and provides safeguards to ensure that mutual recognition of freezing or confiscation orders are in line with the EU Charter of Fundamental Rights and the European Convention on Human Rights.

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

In Germany, known cases almost exclusively concern structural corruption. According to the federal status index of the German Federal Criminal Police Office (BKA), in 2016 about 20 per cent of criminal connections between givers and receivers lasted for more than two years.[14] In 66 per cent of all known cases receivers were public officials. Today, 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. In this respect, the exceptions in Section 5 of the Law on the Protection of Trade Secrets from criminal liability for betraying trade secrets are also of high interest and relevance.

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.[15]

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

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

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

fight against corruption as one of the main purposes of their CMS.[16] This surely is in the best interest of the company, and particularly so as the Federal Court of Justice has ruled that the implementation and effectiveness of a CMS can be lent weight by courts, leading to harsher or reduced sentences.[17] Of course, companies and law enforcement authorities have to ask themselves how, for example, a scandal such as Dieselgate could remain undetected for so long despite the existence of compliance programmes concerned with internal technical auditing and encouraging whistle-blowers to contact ombudspersons. 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. Here too, the effects of the new General Data Protection Regulation (GDPR) on the European and US legal area are not to be underestimated.[18] 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.

16 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.

17 Federal Court of Justice, decision of 9 May 2017, 1 StR 265/16.

18 In Germany, Sections 41, 42 and 43 of the Federal Data Protection Act (BDSG) must also be kept in mind.

Appendix 1

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