

Anti-Corruption Regulation 2018

Contributing editor
Homer E Moyer Jr



2018

GETTING THE
DEAL THROUGH

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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3780 4147
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No photocopying without a CLA licence.
First published 2007
Twelfth edition
ISBN 978-1-912377-49-7

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Anti-Corruption Regulation 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Germany

Sabine Stetter and Stephan Ludwig

stetter Rechtsanwälte

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

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:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations Convention against Corruption;
- the Convention on the protection of the European Communities' financial interests;
- the Council of Europe's Civil Law Convention on Corruption (awaiting ratification); and
- the Council of Europe's Criminal Law Convention on Corruption (entry into force 1 September 2017).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The German Criminal Code (StGB) addresses bribery of domestic as well as foreign public officials in sections 331 to 335a. These provisions cover active and passive bribery at the same time and do not distinguish between a German or European public official in terms of the severity of penalties. Furthermore, section 335a StGB widens the scope to non-European public officials.

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. Generally speaking, there is very little tolerance regarding the actions of public officials so that even hospitality of low value may incur criminal liability.

Section 108e StGB holds a special provision regarding 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 an international organisation, and to influence a member to vote for or against or abstain on a measure.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

As stated in sections 333 and 334 of the German Criminal Code, the offering, promising or granting of a benefit to a public official is, of course, the central element of bribery. In addition, there has to be an expressed or implied agreement between the 'parties' connecting the benefit to the act performed by the public official (*Unrechtsvereinbarung*). The act in question always relates to the scope of official powers held by the public official.

Penalties increase, if the benefit exceeds a value of €50,000 or if the criminal connection continues over a longer period of time. Furthermore, the bribed public official faces more severe punishment for his wrongdoing than the briber and also risks his status as public official itself as well as pension entitlements.

The above-mentioned provisions apply regardless of whether the offence or crime was committed by a domestic or a foreign public official.

4 Definition of a foreign public official

How does your law define a foreign public official?

The German Criminal Code does not provide a general definition of a foreign public official. However, there is a stipulation defining the European public official. As stated by section 11 (1) No. 2 of the German Criminal Code, a European public official is, for example, a member of the European Commission, the European Central Bank, or a judge of a European court. Furthermore, employees of European institutions or of bodies mandated to perform tasks on behalf of the European Union qualify as European public officials as well.

Section 335a of the German Criminal Code widens the scope of application of sections 332 and 334 and, at least, explicitly refers to foreign public officials. The referral suggests that non-European foreign public officials are qualified according to very similar criteria to the domestic or European public officials. Therefore, it is fair to say that the term 'foreign public official' generally includes everyone who acts as an extended arm of a foreign state.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

It is generally forbidden for every public official to accept material or non-material advantages, except for socially accepted advantages of very low value. It is essentially a judgement call whether something is considered to be socially acceptable in a specific situation. The higher the amount, the more important are the specific circumstances that will be thoroughly analysed by prosecutors and courts.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitating or grease payments qualify as illegal advantages under German law. Thus, it is forbidden to grant such payments to public officials.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments through intermediaries or third parties are forbidden, as long as there is a connection between the purpose of the payment and the behaviour of the public official. The decisive factor is the *Unrechtsvereinbarung*, which is an explicit or implied agreement

between the briber and the public official concerning his discharge of duty. These criteria are also met if intermediaries or third parties are used for correspondence or payment transactions.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

As yet, the principle of corporate criminal liability does not exist under German law. Corporate liability is governed by administrative law rather than criminal law. This is constituted under the Act on Regulatory Offences (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). Fines can be significant and assets can be seized.

According to sections 331 to 335a of the German Criminal Code, individuals face criminal consequences ranging from financial penalties to imprisonment up to five years or even up to 10 years in particularly serious cases.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

As stated in section 30(2a) of the Act on Regulatory Offences, it is possible to fine the legal successors for a wrongdoing that took place before the succession transaction. This provision presupposes that there was a complete universal succession or a partial universal succession in the form of a split-up pursuant to section 123 of the Reorganisation Act. According to the established jurisprudence of the Federal Supreme Court, it is also necessary that the former and the new entity are identical from an economic point of view (BGH, 16. December 2014 – KRB 47/13).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Civil enforcement in Germany is not comparable to the measures existing in the United States or the United Kingdom. Particularly, punitive damages are unknown in German Law. Foreign bribery laws are first and foremost enforced by criminal law.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Criminal enforcement of Germany's foreign bribery laws is predominantly handled by the German regional prosecution offices that sometimes have instituted units with a focus on white-collar crime. However, depending on operational competence, bribery laws will also be enforced by or in cooperation with European agencies such as Europol, Eurojust or the European Anti-Fraud Office, the last of which is also competent to combat corruption within EU institutions.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Usually, there is no such thing as a fixed reduction on penalties for violation disclosure. One corruption-related example, though, is the exemption from punishment in case of a self-revealing cartel member. However, prosecutors as well as judges are very likely to take the level of cooperation into consideration. The disclosure of violations by companies and full cooperation during the investigation is likely to effectively result in a reduced penalty. After all, criminal investigation authorities are reliant on company's whistle-blowing and other compliance systems. For example, according to the German Federal Criminal Police Office, about half of all corruption-related investigations are initiated because of respective external information.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

In comparison to the United States for example, the possibilities to settle enforcement procedures are very limited in Germany. Without the consent of a judge, public prosecutors may only abandon further investigation in cases involving minor misdemeanours (section 153(1-1) of the German Code of Criminal Procedure). As this is not the case with serious corruption, the pursued can seek an agreement with the prosecutor's office and the competent court before the start of the trial (section 153a (1)), which typically includes a significant 'fine'. This provision is restricted to cases where the degree of guilt does not present an obstacle and where there is no overwhelming public interest in the prosecution.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Prosecution authorities have tended to pursue transgressions more frequently and have adopted a tougher stance. The legislation has expanded and widened the criminal liability for corruption, which has considerably increased the pressure on all parties involved, especially on public prosecutors. In addition, the internationalisation of business calls for a steady increase of cross-border cooperation.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

German law does not know any criminal liability of companies. But such entities face administrative fines and disgorgement in foreign bribery cases as described above (see No. 8) if, according to sections 3 to 7 of the German Criminal Code and section 5 of the Act on Regulatory Offences, German Criminal Law is applicable and provided that there is a typologically comparable equivalent to the foreign legal entity according to German Corporate Law.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Sanctions for individuals range from fines up to 10 years of imprisonment. Besides additional civil liability, individuals may be banned from a profession or suffer from a negative entry into the commercial central register. Companies can be fined up to €10 million or alternatively gains from illegal activities will be skimmed off (disgorgement). Furthermore, companies are disqualified for public procurement procedures and a new competition register will list corruption offenders. Public contractors are obliged to check the register and consider entries before entering into contracts valued at more than €30,000.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

The corruption affair at Siemens is still one of the most talked about foreign corruption cases. The charge was that Siemens representatives set up a global system of illegal funds that appeared to be used to finance bribery of public officials in order to obtain lucrative contracts. Although the cases date back to the period from 2001 to 2007, the implications are still perceptible today. The *Siemens* affair led to many landmark decisions that shape jurisprudence and legislation until today. This does not surprise considering the scale of the affair: altogether Siemens had to pay about €2.9 billion in fines, tax payments and consulting fees.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Sections 238 to 330 of the German Commercial Code essentially regulate these issues. In addition, sections 193 and 200 of the Fiscal Code of Germany empower the tax authorities to enforce these rules by carrying out thorough investigations.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There are no specific rules that force companies to disclose such violations or irregularities. Therefore, it is the decision of the company whether it wants to disclose certain issues or not. Depending on the circumstances, it might be advisable to do so in order to minimise fines, prevent the reputation of the company from being damaged or even achieve exemption from punishment in certain cases (see question 12).

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Poor records sometimes indicate illicit activities including bribery. Therefore, prosecution authorities tend to combine their efforts in this respect. Tax inspections by the revenue office or tax investigators might trigger a bribery prosecution or vice versa if there is a suspicion of bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Sections 331 to 335c of the German Commercial Code stipulate that violations of the accounting rules are punishable with a fine of up to €10 million for the company and individuals can be imprisoned for up to five years. The punishment is independent of whether the accounting rules are violated in connection with the payment of bribes or not.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

More than 30 years ago, German entrepreneurs were allowed to pay bribes (eg, to foreign public officials) in order to obtain public contracts. Consequently the bribe had to be considered as a deductible operating expense. However, jurisprudence and legislature have changed since then. For about two decades, section 4 (5) No. 10 of the German Income Tax Act has forbidden deduction of domestic as well as foreign bribery payments.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Sections 333 and 334 of the German Criminal Code prohibit bribery of public officials. Central elements of these provisions are the offering, promising or granting of any kind of benefit for a public official in exchange for a certain behaviour of the official. The most crucial element of these provisions is the *Unrechtsvereinbarung*, which is an explicit or implied agreement between the briber and the public official concerning his or her discharge of duty. This agreement may either be of a general kind or refer to a specific issue. It is important to stress the fact that bribery of public officials is punishable regardless of whether the official complies with his or her duties or abuses them.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. The receiving of a bribe by a public official is prohibited by sections 331 and 332 of the German Criminal Code while the paying of a bribe is governed by sections 333 and 334. If no public official is involved, the same applies for active and passive bribery according to sections 299, 299a and 299b.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Everybody who acts as an extended arm of the state is considered to be a public official (for further details see question 4). The decisive factor is whether a person fulfils a public duty and is effectively controlled by the state. Therefore, people working in state-owned or state-controlled companies, that are organised under private law, can also qualify as public officials.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Generally speaking, it is possible that a public official participates in commercial activities while serving the state. Depending on his position (eg, civil servant, politician or state-employed), there are different scopes of allowed or forbidden commercial activities.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

It is generally forbidden for every public official to accept material or non-material advantages, except for so-called socially accepted advantages of very low value (for details, see question 5).

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There are no specific types of gifts and gratuities that are generally permitted. However, benefits of very low value that are considered socially acceptable are not criminalised (for details, see question 5).

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. Section 299 of the German Criminal Code prohibits active and passive bribery in commercial practise. Also, since their introduction in June 2016, sections 299a and 299b provide a comprehensive set of rules against bribery of health professionals.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Individuals face a fine or imprisonment for up to three years. In particularly serious cases prison sentences can go up to five years in case of private commercial bribery or even up to 10 years in cases of bribery of public officials. Besides additional civil liability, there is a wide range of legal 'side-effects', for example, entry into the commercial central register, the ban from a profession, ending the process of obtaining citizenship and more.

Companies can be held liable in cases where their representatives commit bribery and face fines of up to €10 million in accordance with sections 30 and 130 of the Act on Regulatory Offences. In addition, companies can be excluded from public procurement procedures.

Update and trends

For a number of years it has been observed throughout Germany that prosecution authorities have tended to pursue transgressions more frequently and have adopted a tougher stance. The fight against corruption is an enormous task and the damages are significant. Given understaffed law enforcement authorities and the fact that structural corruption is very difficult to detect, the fight against corruption will probably go on for a long time. A noticeable trend is the gradual shift towards a privatisation of anti-corruption measures. Measures taken by private companies (eg, compliance management, internal investigations and self-disclosure) are becoming increasingly important. About half of all investigations in this field are initiated based on company-provided evidence. Therefore, self-regulation in the economic sector is becoming an extremely important pillar when it comes to triggering the prosecution of corruption.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

One of the most sensational and still most talked about cases is the prosecution of a former British Formula 1 racing official. Before an indictment his case got laid off by the payment of a record-breaking sum of about €85 million that created a great stir. It is not only the scale of the payment that has provoked a discussion on the limits of terminating proceedings but also the anomalies in justice that the procedure might create. A bank official who accepted a payment made by the accused was punished with a lengthy prison sentence. Even though the case was concluded more than three years ago it is still omnipresent and, in current discussions, serves as a prime example for concerns about the status quo.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes. Prosecution agencies consistently enforce bribery laws and facilitating or grease payments are no exception.

stetter
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