

Germany

I. Brief Introduction to the Legal System of Germany

The German legal system is essentially based on the German constitution which constitutes fundamental rights and legal principles such as the rule of law, presumption of innocence, fair trial, separation of powers, and the federal structure of Germany. Germany is also a founding member of the European Community which has now merged into the European Union. Accordingly a complex regime of European law composed of treaties, regulations, and directives applies in Germany. Some provisions of European law apply directly, others apply indirectly in the sense that they have to be transposed into German law and that German law is subject to interpretation in the light of the European law.

Germany follows the tradition of the civil law legal system, and therefore German laws are generally based on codifications. However throughout the years, extensive case law has evolved with regard to the correct interpretation and application of codified law. As a federal country Germany's legal system is comprised of federal law (applying nationwide) as well as state law (applying only in each of Germany's 16 federal states). The legislative competences are distributed between federal and state level according to the constitution. In case of conflict federal law prevails.

II. Germany's Anticorruption laws

On the international level, Germany has signed but not yet ratified the United Nations Convention. The reason why Germany has not yet ratified the United Nations Convention is that the current German law prohibiting the bribing of delegates is not tight enough for the United Nations Convention. Currently section 108e of the German Penal Code ("Strafgesetzbuch"/"StGB") penalizes only "buying or selling" a vote for an election or ballot. This law rarely applies in practice, however, as more subtle ways of bribing delegates are currently not penalized. A draft law (applying to the active as well as to the passive party of the bribe) extending illegal bribing of delegates to "offering, promising or granting a benefit in return for taking or omitting an action in execution of the mandate by order of a third party"¹ has very recently not found a majority in the German parliament. Depending on the outcome of the German federal elections in September 2013 a new approach of bringing the German law in line with United Nations Convention may be expected within the next legislation period.

Germany has ratified the OECD Convention. On the federal level, accepting and offering bribes in return for lawful (i.e. "facilitating payments") as well as for unlawful acts are criminal offences according to sect. 331-334 (bribery in relation to "public officials") and sect.

¹ www.dip21.bundestag.de/dip21/btd/17/086/1708613.pdf.

299, 300 (bribery in commercial practice) of the German Penal Code (“Strafgesetzbuch”/“StGB”). § 108e StGB penalizes the bribery of delegates. German federal law thereby criminalizes both passive or demand side bribes, that is against the one asking for the bribe, as well as active or supply side bribes, against the offeror.

Anti-bribery laws

The German Act on Combating International Bribery², which transposes the OECD Convention into national law, equates foreign public officials with German public officials with regard to bribery in an international context. As a result, bribing foreign public officials in return for unlawful acts is a criminal offence under German law. German law makes a distinction between bribery for lawful acts and bribery for unlawful acts. Bribery in return for lawful official acts is defined in sections 331, 334 StGB as “offering, promising or granting a benefit for the discharge of a duty.” A facilitation payment would be an example. Bribery in return for unlawful official acts is defined section 332, 334 StGB as “offering, promising or granting a benefit in return for the fact that the bribed person performed or will in the future perform an official act and thereby violated or will violate his official duties.”

A public official is defined in section 331-334 StGB to be any of the following: if under German law (a) they are civil servants or judges; (b) otherwise carry out public official functions; or (c) have otherwise been appointed to serve with a public authority or other agency or have been commissioned to perform public administrative services regardless of the organizational form chosen to fulfil such duties. Section 331-334 StGB may also apply to officers acting as public officials in a part time capacity as well as to trainee public officials or public officials on approval. Sect. 331-334 StGB will, however, not apply if the person is not yet formally in office, such as when she is running for a public office. Officers of state owned companies may be considered as “public officials” and therefore be covered by anticorruption law if the company is considered to perform “public administrative services.” Courts have affirmed this position with regard to public savings banks and state owned heat supply, waste disposal, and public transport companies.

German law also criminalizes commercial bribery, which is defined in section 299, 300 StGB as “promising or granting a benefit in a business transaction as consideration for according an unfair preference in the purchase of goods or commercial services.” Because the “unfair preference” may extend to foreign as well as to domestic acts, this law applies to acts of international competition.

Sanctions

Under German law, companies are not subject to criminal laws. However, according to section 29a, 30 of the German Act on Regulatory Offences,³ a corruption offence committed by

² BGBl. 1998 II, 2327.

³ BGBl. 1987 I, 602.

an employee may under certain conditions result in forfeiture of the company's economic benefit or a regulatory fine against the company. In cases where a company's officers have been convicted of corruption offences, the company may be entered into a public corruption register. This can be a severe sanction because under German public procurement law and accordance with the relevant EU directives, cases of corruption committed by officers of a company may result in the exclusion of that company from award procedures. Individuals convicted of anticorruption crimes are subject to these sanctions:

- Taking and giving bribes in return for lawful official acts as well as bribery in private commercial practice is generally sanctioned with imprisonment up to 3 years or a fine. (Facilitation payments are defined as "benefit for the discharge of a duty", i.e. by definition the official act which the facilitation payment refers to is as such lawful, but the facilitation payment is unlawful for both parties.)
- Giving bribes in return for unlawful official acts (of domestic as well as foreign public officials) is generally sanctioned with imprisonment between 3 months and 5 years.
- Taking bribes for unlawful official acts is generally sanctioned with imprisonment between 6 months and 5 years.

III. Evaluation

Germany's anticorruption laws and their implementation have been reviewed by GRECO and the OECD. Germany joined GRECO in 1999 and has now been evaluated in each of GRECO's three rounds. In its third-round evaluation of Germany in December of 2009, GRECO found that the offences of active and passive bribery of foreign public officials are not regulated in a uniform manner. Germany received its third evaluation from the OECD Working Group in March of 2011. The Working group reported that "Germany's enforcement has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in foreign bribery-related cases against individuals" but recommended that "Germany take further measures to ensure the effectiveness of the liability of legal persons, including through sanctions that are effective, proportionate and dissuasive."⁴

Germany is currently ranked thirteenth on Transparency International's 2012 corruption perceptions index. A reason why Germany is currently not ranked higher may be because Germany has recently missed out on some legislative reforms in the field of anticorruption law. For example, Germany is one of the few countries that has not yet ratified the United Nations Convention against Corruption; the German Parliament has not yet passed a law relating to the offence of "bribery of delegates," a requirement necessary to adhere to the UN Convention.

The overall legal situation of different kinds Corruption Register Laws at the state level is piecemeal and rarely manageable in legal practice. There have been two legislative attempts

⁴ OECD Report dated March 17, 2011, at 4.

in 2002 and 2005 to implement a Federal Corruption Register. Both failed. There are serious doubts if the current practice of entering companies on state corruption registers when charges against the relevant employees have been dismissed complies with constitutional rights.

In the recent past some major international corruption cases involving German companies have been prosecuted by German and U.S. authorities, the most prominent of which was the *Siemens* case which was settled on the basis of fines amounting to a total of approx. €1.2 billion being paid to German authorities as well as to the U.S. Department of Justice and the U.S. Securities and Exchange Commission. In general it appears that these prominent corruption cases have brought forward a stronger corporate culture of compliance in Germany.

IV. Texts

- A. German Penal Code (in particular sect. 299, 300, 331-334) (English translation available under "www.gesetze-im-internet.de/englisch_stgb")
- B. Act on the Convention dated 17 December 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions (Act on Combating International Bribery dated 10. September 1998. (German original available under: "www.gesetze-im-internet.de/intbestg")
- C. Corruption Register Law of Berlin (German original available under: "www.gesetze.berlin.de/default.aspx?typ=reference&y=100&g=BlInKorRG")
- D. Regulation on Contract Awards for Public Supplies and Services- Part A (in particular sect. 6 EC) (English translation available under: www.bmwi.de/BMWi/Redaktion/PDF/V/vergabe-vertragsordnung-fuer-leistungen-vol-en)