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Anti-Corruption 2022

Germany: Law & Practice
and
Gremany: Trends & Developments

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GERMANY

Law and Practice

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1. LEGAL FRAMEWORK FOR OFFENCES

1.1 International Conventions

Germany has signed and ratified the following international conventions:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed on 17 December 1997 and entered into force in Germany on 15 February 1999;
- the EU Convention on the protection of the European Communities' financial interests dated 26 July 1995 entered into force on 17 October 2002;
- the United Nations Convention against Transnational Organized Crime dated 15 November 2000 entered into force on 29 September 2003;
- the EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union dated 26 May 1997 entered into force on 28 September 2005;
- the UN Convention against Corruption (UNCAC) dated 31 October 2003 entered into force on 12 November 2014;
- the Council of Europe's Criminal Law Convention on Corruption dated 27 January 1999 entered into force on 1 September 2017; and
- the Council of Europe's Civil Law Convention on Corruption dated 4 November 1999 entered into force on 1 September 2017.

Germany is one of currently 50 members of the Council of Europe's Group of States against Corruption (GRECO) since the founding date 1 May 1999.

1.2 National Legislation

Fighting both, active and passive Corruption, is mainly dealt with in several sections of the German Criminal Code (GCC or *Strafgesetzbuch — StGB*) which operates on the basic principle of individual culpability.

While at present there is no corporate criminal liability as such, legal entities of all legal formats must face significant corporate fines and disgorgement of profits derived from white collar crime under the German Act on Regulatory Offences (GARO or *Ordnungswidrigkeitengesetz – OWiG*). Section 30 GARO governs the regulatory fines to be imposed on legal persons and on associations of persons limited to a maximum amount up to 10 million Euros in the case of a criminal offence committed with intent. In the case of a crime offence committed negligently the fines are limited to a maximum of 5 million Euros. Section 29a GARO, however, provides the legal basis for confiscating the value of the proceeds of an offence following the gross-principle without limitation. Section 130 GARO requires a violation of obligatory supervision in operations and enterprises, ie, a breach of corporate duties in preventing individual misconduct.

Such individual misconduct in a business context can be triggered by a variety of GCC sections comprising, but not limited to the criminal offences of:

- taking and giving bribes in commercial practice under Section 299 of the GCC;
- taking bribes in the healthcare sector under Section 299a of the GCC;
- giving bribes in the healthcare sector under Section 299b of the GCC;
- accepting benefits by public officials under Section 331 of the GCC;
- taking bribes by public officials under Section 332 of the GCC;
- granting benefits to public officials under Section 333 of the GCC;
- giving bribes to public officials under Section 334 of the GCC;

- bribing voters under Section 108b of the GCC; and
- taking of bribes by and giving of bribes to elected officials under Section 108e of the GCC.

In white collar crime situations, the following criminal offences laid out in the GCC are frequently committed in conjunction with corruptive behaviour:

- fraud under Section 263 of the GCC; and
- embezzlement or breaches of fiduciary trust under Section 266 of the GCC.

In addition, violations of further criminal sections outside the main body of the core criminal law provided by the GCC can also trigger bribery-related corporate fines including, but not limited to:

- offering or promising benefits to influence works council elections under Section 119 of the German Works Council Constitution Act (GWCCA or *Betriebsverfassungsgesetz – BetrVG*);
- tax fraud by deduction of bribery-related expenses under Section 370 of the German Fiscal Code ("GFC" or *Abgabenordnung – AO*);
- money laundering under the provisions of the German Anti Money Laundering Act ("GAML" or *Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – GWG*); and
- violations of pandemic prevention rules under Sections 74 to 77 of the German Code on Prevention and Combating of Infectious Diseases ("GCPCID" - *Infektionsschutzgesetz – IFSG*).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are at present no legally binding nationwide guidelines on interpretation and enforcement of corporate crime, let alone specific benchmark values on defence values or mitigation effects of certain compliance management measures.

While the German Code of Criminal Procedure (GCCP or *Strafprozessordnung – StPO*) governs all criminal proceedings, public investigations and prosecution of criminal offences before all German courts and by all public prosecutors, it must be considered that there is no centralised enforcement agency with a nationwide competency for commencing public investigations on the grounds of allegations of corporate crime. Whereas legal action must be brought under the legality principle in individual cases of bribery, the public prosecution offices attached to the currently 115 district courts (*Landgerichte*) in the various cities of the 16 federal countries (*Bundesländer*) have to decide according to the opportunity principle under the GCCP whether or not to initiate public investigations against a company on a case-by-case basis.

In consequence, there is a significant North-South divide regarding the actual enforcement of corporate crime. In Bavaria for instance there are presently eight specialised public prosecution offices for corporate crime (*Schwerpunktstaatsanwaltschaften für Wirtschaftskriminalität*). The public prosecution office "Munich I" has in addition established a dedicated anti-corruption unit. In the wake of recent corporate compliance challenges further public prosecution offices in Frankfurt, Stuttgart or Braunschweig have been following the Munich example.

It should also be noticed that public tax inspectors in Bavaria and other federal countries are required by internal guidelines to promptly inform the competent public prosecution office whenever identifying suspicions of bribery-related Tax Fraud – especially around dubious

business partner contracts in high-risk countries - during tax audits.

1.4 Recent Key Amendments to National Legislation

The following key amendments to anti-corruption related legislation were issued in Germany in 2021:

Taking of Bribes by and Giving of Bribes to Elected Officials under Section 108e GCC amended on 19 October 2021

Members of the German Federal Parliament (*Bundestag*), of one of the Federal Country Parliaments (*Landtag*) or elected members of local administrative body or at the municipal levels (or *Stadt*- or *Gemeinderat*) have now to face a fine or penalty of imprisonment for a term of up to ten years as opposed to maximum five years in the previous version of this criminal offence.

Corporate Due Diligence in Supply Chains Act dated 16 July 2021

From 1 January 2023 the new German Corporate Due Diligence in Supply Chains Act (GCDDSCA or *Lieferkettensorgfaltspflichtengesetz – LkSG*) will require German-based corporations of all legal formats with more than 3000 employees based in Germany and including international delegates and foreign corporations with more than 3000 employees in Germany (with 1000 employees each after 1 January 2024) to comply with a detailed catalogue of corporate duties to protect human rights and the environment. The obvious risk around "greenwashing" or "label-cheating", etc, can spur corruption-related misconduct.

Law to Strengthen Integrity in Financial Markets dated 3 June 2021

The new German Law to Strengthen Integrity of Financial Markets (GLSIFM or *Gesetz zur Stärkung der Finanzmarktintegrität - FISG*) is widely considered as a response to the still looming of the so called Wirecard scandal. The federal legislator's intention is to restore trust in German financial market(s). For this end, stock-listed corporations in Germany will in future be required to comply with new legal obligations, which will include:

- designing and implementing an appropriate and effective Internal Controls System (ICS);
- designing and implementing an equally appropriate and effective Risk Management System (RMS); and
- setting-up an obligatory Audit Committee (AC) within the supervisory boards of "companies of public interest".

There are, however, no explicit requirements regarding the obligatory design and implementation of a compliance management system (CMS) in order to prevent, detect and respond to corporate crime comprising corruption as such. Further, there are no necessities regarding any Whistleblowing (WBL) in particular. What the new law does provide are further corporate obligations regarding:

- more individual expertise on audit and accounting in companies "of public interest" (ie, capital-market oriented corporations, certain banks or insurance companies). If there is, eg, a three-person supervisory board in a German Stock Corporation (GSC or *Aktiengesellschaft – AG*), at least one member must personally have special expertise in accounting and one further in financial audit;
- more individual rights of information for supervisory board members in order to directly approach certain corporate functions, ie, the heads of accounting, audit, risk management, most likely compliance and the head of legal;
- faster external auditor rotation – which means that the "responsible audit partners" will have

to rotate now after a maximum term of five years;
- shorter maximum time span of external audit – which is now capped at ten years for audit firms. The old possibility of a prolongation up to 24 years has been abandoned; and
- stricter separation of audit- and non-audit services – no longer freedom to choose up to certain fee caps.

Further important legal initiatives such as on the protection of whistleblowers or on the introduction of corporate liability could however not be passed in the so-called "super election year" 2021 (see the **Germany Trends & Developments** chapter in this guide).

2. CLASSIFICATION AND CONSTITUENT ELEMENTS

2.1 Bribery

Public Corruption

Corruption offences committed in public office are governed by Chapter 30 of the GCC including:

- accepting benefits by public officials under Section 331 of the GCC;
- taking bribes by public officials under Section 332 of the GCC;
- granting benefits to public officials under Section 333 of the GCC; and
- giving bribes to public officials under Section 334 of the GCC.

These criminal offences require offering, promising or actually giving anything of value – regardless if of material or immaterial value. The GCC does not provide any monetary value threshold for benefits or bribes laid out in written law, therefore, social adequacy, frequency and the particular context become equally or even more important compliance risk drivers than the mere monetary value of an advantage or benefit.

The sanctions for individual offenders are imprisonment of up to three years and/or a monetary fine. In cases where the public official has violated their official duties, the prison term can be up to five years and in especially serious cases up to ten years. An attempt to commit these corruption offences warrants such punishment.

Public officials

Section 11 Subsection 1 No 2 GCC defines public officials as German civil servants and judges, persons carrying out other public official functions or who have otherwise been appointed to serve with an authority or other agency or have been commissioned to perform public administrative services, regardless of the organisational form chosen to perform such duties.

In consequence, directors, executives or even employees of state-owned or state-controlled corporations could also be qualified as public officials. It should not go unnoticed in this context that Germany traditionally keeps operating with a significant state-amount in otherwise rather commercial or private business environments including, but not limited to municipal utility providers or health-care institutions and hospitals. This quota has arguably even risen lately in the wake of state-support emergency relief for pandemic-stricken companies thus even driving the compliance risk of triggering investigations on the grounds of corruption offences committed in public office.

European officials

Section 11 Subsection 1 No 2a of the GCC defines European officials as members of the European Commission, the European Central Bank, the European Court of Auditors or any court of the European Union (EU) as well as civil servants or other members of staff of the EU or

of an institution established by EU law or persons tasked with carrying out the tasks of the EU or the tasks of an institution established by EU law.

Further examples of "public" corruption in an electoral context are being dealt with in yet again different sections of the GCC. Whereas, bribing voters according to Section 108b of the GCC requires offers, promises or grants of gifts or other benefits to voters in exchange for not voting or for voting in a particular manner incurring imprisonment of up to five years or a fine. The taking of bribes by and giving of bribes to elected officials under Section 108e of the GCC requires active or passive corruption of members of parliament at all democratic levels, ie, the municipal, state or federal level. Buying votes in elections or offering, promising or actually providing undue advantages in return for performing or refraining from performing an act, upon request or instruction in the exercise of their mandate, triggers individual criminal liability.

However, political donations and contributions according to special parliamentary regulation are explicitly exempt and remain therefore admissible. In this context it should not go unnoticed that media and non-governmental organizations (NGOs) keep criticising structural deficits in national legislation regarding political party financing as well as the continued lack of an obligatory lobby register.

Private Corruption

The criminal offence of taking and giving bribes in commercial practice under Section 299 of the GCC was introduced only comparably late just two decades ago and rather interestingly belongs to the GCC chapter dealing with offences against competition. Company employees or agents of a business – which constitutes a rare example of codified third-party liability in German criminal law – who demand, allow to be promised or accept a benefit for themselves or another third party in return for providing an unfair preference in the competitive purchase of goods or services in Germany or abroad will be punished by a prison term of up to three years or a fine according to Section 299 Subsection 1 of the GCC.

In an even more multi-facetted way Subsection 2 of this already fairly complex criminal section provides that the same will apply when an offender will demand or accept a benefit without the permission of the business for performing or refraining from performing an act in the competitive purchase of goods or services thereby breaching the duty incumbent on them towards the business.

In essence, compliance with a company's Code of Conduct and internal Anti-Corruption Policies must hence be considered with more scrutiny than before by companies and prosecutors alike. Furthermore, it should not go unnoticed that an individual advantage of the offender is not required. It suffices under both variations of Section 299 of the GCC that benefits for the employing corporation or the principal can trigger criminal liability for corruption in commercial practice.

Healthcare Corruption

The two industry-specific statutes on taking and giving bribes in the healthcare sector under Sections 299a and 299b of the GCC were introduced half a decade ago in an attempt to combat a widespread lack of transparency in and around the pharma industry by closing a long-time statutory lack of individual culpability of private medical practitioners.

Ever since, members of a healing profession requiring state-regulated training to exercise such profession or to use a professional title who demand or accept a benefit for themselves or

another in connection with the exercise of their profession in return for prescribing medication, remedies or health aids or medical devices, procuring medication or health aids or medical devices which are designed for direct use by the member of the profession or one of their professional assistants or supplying patients or samples and diagnostic data and thereby provide an unfair competitive advantage to another in Germany or abroad will have to face a prison term of up to three years or a fine.

2.2 Influence-Peddling

There is currently no section in the main body of codified German criminal law, ie, the GCC, that explicitly uses the term "influence-peddling." As noted, illicit behaviour around the improper use (or rather abuse) of official authority can be construed as offering or accepting undue advantages according to the German criminal law statutes, primarily:

- accepting benefits by public officials under Section 331 of the GCC; or
- granting benefits to public officials under Section 333 of the GCC.

The more general requirements of deception for personal enrichment, ie, fraud under Section 263 of the GCC, must typically be considered as well.

According to Section 11 of the GCC, criminal misconduct involving foreign public officials will expressly have to be considered in the context of a wide range of certain European officials, too, ie, various forms of civil servants under EU Law, see **2.1 Bribery** (Public Corruption).

In a special federal statute, interference with judicature under Section 37 the German Military Criminal Code (GMCC or *Wehrstrafgesetzbuch – WStGB*) penalises the abuse of military rank or function in order to unduly influence soldiers who are acting as organs of judicature – ie, as jurors – with imprisonment for up to five years.

2.3 Financial Record-Keeping

Inaccurate books and records or the dissemination of false information are not criminal offences under the German Criminal Code, but are sanctioned under certain circumstances in several other sources of codified German law such as the German Stock Corporation Act (GSCA or *Aktiengesetz – AktG*) or the German Code of Commercial Law (GCL or *Handelsgesetzbuch – HGB*). For example:

- False information under Section 399 of the GSCA sanctions management, supervisory board members or a liquidator providing false information or concealing significant circumstances with up to three years imprisonment or a monetary fine in cases under certain preconditions; for instance, issuing or registering new shares or publishing formation reports.
- False representation of facts under Section 400 of the GSCA is another criminal offence with the same sanctions for cases when presenting certain information to the annual general meeting (AGM) or providing financial information to the public auditors. Likewise, any founder or stockholder who provides false information or conceals significant circumstances in any clarification statements or proof to be provided to a formation or any other auditor (see Section 400, paragraph 2 of the GSCA).
- The GCL contains further criminal offences regarding books and records provisions for the executives of German corporations set-up in various legal formats.
- Misrepresentation under Section 331 of the GCL sanctions executive management or supervisory boards with up to three years of imprisonment or a monetary fine for misstating or concealing financial facts in opening balance sheets or annual accounts.

Further criminal offences under the GCL relating to financial record keeping include:

- false certification under Section 331a of the GCL – up to five years imprisonment for management or supervisory board members;
- violation of reporting obligations under Section 332 of the GCL – up to three years imprisonment for public auditors or their assistants; and
- violation of obligations during annual audits under Section 333a of the GCL – up to one year imprisonment for members of supervisory board audit committees.

2.4 Public Officials

Within the main body of core criminal law, embezzlement under Section 266 of the GCC also covers embezzlement in office of public funds. Offenders must either breach a fiduciary duty under civil law or abuse a public office causing a damage to the beneficiary of such fiduciary duty and will have to face a prison term up to five years or a monetary fine.

In addition, public officials in Germany – both at a federal- and state-level – must face personal administrative law sanctions under the respective specific codifications of professional duties of the German Federal Disciplinary Act (GFDA or *Bundesdisziplinargesetz – BDG*) or the respective State Disciplinary Acts of the 16 federal states. Soldiers are subjects to the parallel regulations of the German Military Disciplinary Ordinance (GMDO or *Wehrdisziplinarordnung – WDO*).

2.5 Intermediaries

In a rare exception in codified criminal law in Germany, taking and giving bribes in commercial practice under Section 299 of the GCC explicitly names both employees as well as agents of a business as potential offenders. Other than that, third parties, business partners or other categories of intermediaries are not dealt with expressis verbis and require the application of the general rules of the commission of an offence under Section 25 of the GCC, abetting under Section 26 of the GCC and aiding under Section 27 of the GCC.

It should however be noticed that the judicature of the German Federal Supreme Court as well as the verdicts of lower level courts has revealed since more than a decade that the international corruption pattern of (ab-) using contractual third-parties is well known and assessed accordingly by German judges.

Further, it needs to be taken into account that, from 1 January 2023, the new German Corporate Due Diligence in Supply Chains Act (GCDDSCA or *Lieferkettensorgfaltspflichtengesetz – LkSG*) enacted 16 July 2021 (see **1.4 Recent Key Amendments to National Legislation**) will create an unprecedented corporate duty of care to include company-external third-parties in compliance risk management efforts at least for direct contractual business partners along the entire value chain, ie, both down as well as upstream and in certain severe cases also down to the original source of material in order to combat human rights infringements and protect environmental damage.

3. SCOPE

3.1 Limitation Period

The statutory limitation period of corruption offences depends on the varying prison terms of the relevant GCC sections. Under Section 78 of the GCC, the limitation period will last ten years in the case of offences which are punishable by:

- a maximum sentence of imprisonment of more than five years but no more than ten years;

- five years for offences which are punishable by a maximum sentence of imprisonment of more than one year but no more than five years; and
- three years in the case of other offences.

3.2 Geographical Reach of Applicable Legislation

In General, German criminal law does not apply across national borders following the territoriality principle of Section 3 of the GCC. However, an extraterritorial applicability will be created whenever a German national commits a criminal offence under the GCC and/or criminal activities took place at least in part on German ground, for instance on German naval vessels or aircraft under Section 4 of the GCC. With the introduction of the private corruption offence under Section 299 of the GCC a very rare example of codified extension of German criminal law beyond national borders was created.

As Germany regularly investigates cross-border corruption, multijurisdictional co-operation is a continued enforcement trend. Joint and combined multinational investigation teams are being fielded together with other EU countries as well as with US enforcement agencies.

3.3 Corporate Liability

At present, the German legal system is based on the principle of individual criminal culpability. Strict corporate criminal liability is being discussed since many years and remains subject to the successful introduction of the highly controversial German Associations Sanctions Act (GASA or *Verbandssanktionenengesetz – VerSanG*) – a significant structural reform bill that could not be passed in this legislative term in June 2021 but might be enacted by the new German Government. The bill's title alone using for instance the broader terms of "associations" and "sanctions" reveals the fundamental issues with corporate criminal liability. However, despite the provisional end of the draft law, the draft of the ASA did contain promising approaches that further corporate compliance and sent a clear signal to companies to invest in integrity and risk-management (see the **Germany Trends & Developments** chapter in this guide).

4. DEFENCES AND EXCEPTIONS

4.1 Defences

Currently, German statutory law does not provide typical compliance defences as, ie, Section 7 of the UK Bribery Act 2010. However, in the mentioned draft of the Associations Sanctions Act, the rather generic term of "adequate measures to prevent associations deeds as in particular organisation, selection, direction and supervision" is included as well as the clear incentive for a separation between internal investigations and associations' defence of up to 50% of potential monetary fines that could amount for companies with annual revenues of more than EUR100 million in the case of an intentional association deed up to a maximum of 10% of their average annual turnover – essentially taking corporate fines into the multi-billion euro range for a first time ever.

4.2 Exceptions

There are no compliance defences available today in Germany de lege lata, hence there are equally no exceptions.

4.3 De Minimis Exceptions

There are no explicit de minimis exceptions for the mentioned offences as there are no fixed value or monetary thresholds in codified German Criminal Law either. In general, the principle of social adequacy must be observed on a case by case basis considering not only economic value of benefits such as invitations or hospitality, but also individual situation of the individuals offer-

ing and accepting, the frequency, customary practice, etc.

4.4 Exempt Sectors/Industries

There are no explicit exemptions of certain industry sectors from the described corruption offences.

In several corruption-related risk areas such as money-laundering, several industries have to operate under specific regulations such as for instance banks or insurances which are in scope of the German Banking Act (GBA or *Kreditwesengesetz – KWG*) essentially driving corporate responsibilities in terms of risk management and organisational duties.

4.5 Safe Harbour or Amnesty Programme

Amnesty or leniency programmes are not prescribed by statutory German law as of today but a well-known element of crisis response in internationally operating German corporations. As many of the larger companies have to comply with collective labour law rules and hence structure their corporate governance under the principle of co-determination with obligatory supervisory board members representing employees, works councils typically need to be involved early enough in creating special amnesty rules which must be limited in time and scope.

5. PENALTIES

5.1 Penalties on Conviction

In especially serious corruption cases, individual sanctions can be imprisonment of up to ten years and/or monetary fines.

Legal entities can currently be fined under the administrative law Act on Regulatory Offences up to a limit of EUR10 million under Sections 30 and 130 of the ARO – a point of continued criticism that would be changed significantly under a new Associations Sanctions Act. The current draft bill of this legal initiative would provide a new maximum threshold for monetary fines of 10% of corporate revenues for companies with more than EUR100 million in revenues on average over the last years.

Beyond the actual fines it needs however to be mentioned that Section 29a of the ARO provides the possibility to disgorge the entire ill-gotten corporate profits without any numerical threshold limitation.

5.2 Guidelines Applicable to the Assessment of Penalties

At present, there are no nationwide guidelines for prosecutors or judges to assess appropriate sanctions for corruption offences.

6. COMPLIANCE AND DISCLOSURE

6.1 National Legislation and Duties to Prevent Corruption

There are neither explicit corporate duties to prevent misconduct such as corruption nor a criminal offence like failure to prevent bribery in codified German law.

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

While individuals and corporations are required to report money-laundering suspicions to the competent public authorities – for non-regulated industry corporations the competent regional council – while observing tipping-off prohibitions under the German Anti-Money Laundering Act (GAMLA or *Geldwäschegesetz – GwG*), there are today no equivalent requirements to report corruption to the competent public prosecution offices.

The more experience a public prosecution office has in white-collar crime investigations the higher the expectation to come forward with a complete account of corporate insight in potential misconduct in order to ensure co-operation.

In some federal countries tax inspectors are, however, obliged to report any suspicions pointing to corruption offences in the context of tax audits for instance on the basis of the review of dubious third-party contracts to the competent public prosecution office.

6.3 Protection Afforded to Whistle-Blowers

With the exception of special regulatory requirements for certain financial institutions, companies in non-regulated industries today are not obligated to provide whistleblowing systems to their employees and to ensure whistleblower protection accordingly. The attempt of passing the German Whistleblower Protection Act (GWPA or *Hinweisgeberschutzgesetz – HinSchG*) in June 2021 failed and it remains to be seen how the new German Government will be dealing with the imminent threat of a legal challenge by the EU – ie, an EU law infringement procedure – on the grounds of not introducing the EU whistleblower directive 1937/2019 into national law until latest 17 December 2021.

German companies of all sectors and legal formats with 250 or more employees must prepare for complying directly with these EU minimums standards of whistleblowing by end of 2021, companies with 50 or more employees must comply until 17 December 2023. The EU directive provides for sanctions, which means that companies that obstruct or attempt to obstruct whistleblowing must expect penalties. The same applies if companies do not keep the identity of the whistleblower confidential. Retaliation against whistleblowers will also be punished. How high these sanctions will be is a matter for national legislators.

Section 25a of the German Banking Act (GBA or *Kreditwesengesetz – KWG*) requires banks and financial service providers to adhere to particular organizational duties regarding risk-management and compliance measures. In this context it is a corporate obligation to provide a process enabling employees to report violations of certain sources of law, eg, of the European Market Abuse Regulation ("EU MAR"), the German Securities Trading Act (GSTA – *Wertpapierhandelsgesetz – WpHG*), the German Banking Act or of potential criminal misconduct within the corporation – which would include the aforementioned corruption offences (see **2. Classification and Constituent Elements**) – to appropriate corporate functions in a confidential manner.

6.4 Incentives for Whistle-Blowers

There are currently no incentives for whistleblowers who are reporting corruption in good faith in codified German law.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

There is currently no codified German law on whistle-blowing.

7. ENFORCEMENT

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

Corruption is prosecuted by local public prosecutors' offices in all 16 German federal states. Other than in the cases of enforcement in the context of terrorism there is at present no centralised nation-wide competent enforcement body as the US Department of Justice's Fraud Section ("US DoJ"), the UK Serious Fraud Office (SFO) or the French Agénce Anti-Corruption (AFA). Together with the significantly diverging

application of the German Act on Regulatory Offences this is creating a regional divide from North to South. In addition, the absence of non-trial resolution schemes or binding guidance on the frequently complex settlements like Anglo-Saxon-styled deferred- or non-prosecution agreements (DPAs or NPAs) or Consent Decrees (CDs) continues limiting the desirable evolution of nation-wide enforcement standards and creates challenges in cases of multijurisdictional cooperation. In civil law litigation, corruption can trigger corporate and individual damage claims.

For roughly a decade, the Business Judgment Rule, as embodied in Section 93 of the German Stock Corporation Act (GSCA or *Aktiengesetz – AktG*), has been applied by the competent civil law courts in order to determine failures to comply with the corporate and individual executives' duties to design, monitor and continuously develop a company-specific CMS in a risk-based and effectively implemented way.

7.2 Enforcement Body

There is no single or centralised enforcement body for criminal investigations of corruption offences in Germany. This competency lies with the local public prosecution offices attached to the currently 115 district courts in the various cities of the 16 federal countries. Some of them have established specialised public prosecution offices for corporate crime as for instance the public prosecution offices Munich, Stuttgart, Frankfurt or Braunschweig.

7.3 Process of Application for Documentation

The procedural rules of the German Code of Criminal Procedure (GCCP or *Strafprozessordnung – StPO*) are governing all criminal proceedings, public investigations and prosecution of criminal offences before all German courts and by all public prosecutors.

7.4 Discretion for Mitigation

There are no nation-wide rules for non-trial resolutions such as DPAs, NPAs or CDs between public prosecution offices and corporations (see **7.1 Enforcement of Anti-bribery and Anti-corruption Laws**). On a case-by-case basis, experienced public prosecution offices can and will apply discretion to offering credit to both individuals and corporations for timely and accurate cooperation.

7.5 Jurisdictional Reach of the Body/Bodies

Public prosecution offices in Germany must investigate ex officio or following the legality principle under the requirements as laid out under German material and procedural criminal law (see **3.2 Geographical Reach of Applicable Legislation**) essentially reducing their enforcement activities to those targeted at German nationals and German corporations in a corporate crime context.

In cases involving misconduct of individuals, non-prosecution of petty offences under Section 153 of the GCCP or non-prosecution subject to the imposition of conditions and directives under Section 153a of the GCPP can be applied with the court's consent.

In cases involving potential sanctions against corporations under the German Act on Regulatory Offences, the application of Sections 30 and 130 of the GARO attributing individual culpability for corruption to companies on the grounds of a violation of the obligatory supervision in operations and enterprises, lies in the discretion of the competent public prosecution office who may decide on the initiation of an investigation against a corporation.

7.6 Recent Landmark Investigations or Decisions involving Bribery or Corruption

Current landmark investigations of corruption cases in a corporate context include the Wirecard balance-sheet fraud resulting in the first-time ever insolvency of a DAX-30 corporation. In this context on-going public debates around effective public regulation and thorough oversight by competent agencies shall be named, continuing the aftermath of the "Dieselgate" complex involving several German Automotive OEMs and Tier-1 Suppliers or the "Cum-Ex" – and most recently "Cum-Cum" - tax evasion schemes around dubious individual purchases of company stock and the abuse of entailed state tax credits to name but the most prominent white-collar crime challenges in Germany at present.

Lately, COVID-19 fraud cases featuring the corrupt activities of individual medical practitioners forging vaccinations and elected members of parliament leveraging their influence for illicit mask deals have been detected.

Structural deficiencies in the effective handling of money laundering suspicion cases have triggered a public prosecutor's dawn raid in a federal ministry.

7.7 Level of Sanctions Imposed

While long-term imprisonment for individual offenders remains an exception until today in corruption cases, multi-million euro fines have become a normalcy starting with the EUR395 million fine in the "Siemens corruption case" in 2007 imposed by the Public Prosecution Office Munich and the EUR1 billion fine against Volkswagen in the "Dieselgate complex" in 2018 imposed by the public prosecution office Braunschweig.

These sanction levels are still significantly differing from those imposed by especially US enforcement agencies. The ongoing discussions around the necessity of a new German Associations Sanctions Act are also fed by that discrepancy (see the **Germany Trends & Developments** chapter in this guide).

8. REVIEW

8.1 Assessment of the Applicable Enforced Legislation

The 44 members of the OECD Working Group on Bribery adopted on 14 June 2018 the Phase 4 Report on Germany evaluating the national implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (see **1.1 International Conventions**).

This report was part of the OECD Working Group on Bribery's fourth phase of monitoring which was launched in 2016 focusing on the evaluated countries' particular challenges and positive achievements and reviewing topics like detection, enforcement, corporate liability, international cooperation and unresolved issues from prior reports.

Germany was featured as one of the most active enforcers of the OECD Convention with 67 cases ultimately involving 328 natural persons and 18 legal persons to be sanctioned in 17 cases of foreign bribery since 1999. Whereas the OECD Working Group on Bribery lauded Germany for holding individuals criminally liable, concerns were expressed with companies being held liable in only a quarter of the concluded foreign bribery cases regarding sufficient enforcement against legal persons.

On 12 March 2021, Germany submitted the Phase 4 Two-Year Follow-Up Report covering the progress in implementing the altogether 35 recommendations made by the OECD Working Group on Bribery who concluded that ten recommendations were fully implemented, seven partially, 18 not implemented and 11 could eventually be covered by pending national legislative proposals – of which the above-mentioned German Associations Sanctions Act draft bill is playing a central role.

This second report once again displays the OECD Working Group on Bribery remaining concerns around Germany's perpetuated complexity in the prosecutorial approach to holding natural as opposed to legal persons liable across federal states and the fragmented investigation approach to "greatly hinder Germany's ability to hold companies liable in foreign bribery cases". Again, only 9% of the new cases (two out of 22) since the adoption of the Phase 4 Report in 2018 resulted in sanctions against legal persons.

8.2 Likely Changes to the Applicable Legislation of the Enforcement Body

With leading NGOs like Transparency International and LobbyControl continuing to advocate more transparency in the legislative process by for instance demanding a clear lobby footprint for all bills plus increasing transparency and citizens' participation in financing political parties in the context of this year's federal elections on 26 September 2021 legislative changes of these areas do not seem unlikely over the term of the new federal government.

The ongoing international criticism of Germany's lack of corporate criminal liability as well as the absence of clear non-trial resolution rules and the complex and fragmented federal enforcement keep the attention high on the near-term future of the new German Associations Sanctions Act which failed to pass parliament in June 2021 (see **3. Scope**).

The failure to introduce a German Whistleblower Protection Act duly following up on the EU whistle-blower directive 1937/2019 into national law until latest 17 December 2021 raises the probability that such legal initiative will have to be revisited at the earliest possible date after a new federal government has been formed, hopefully by the end of 2021.

It remains to be seen when the new federal government will eventually revisit the new German Corporate Due Diligence in Supply Chains Act, which was successfully passed in June 2021 prior to the federal elections in September 2021. With a surprising level of detail, risk management and compliance prevention measures are being regulated in this new codification introducing new corporate duties of care for human rights and the environment across the complete value chain. These new compliance obligations will have to be properly aligned with a new national whistle-blower codification as well as a new German Associations Sanctions Act.

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Trends and Developments

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Anti-Corruption, Corporate Compliance and the Unclosed Gap Between International Business Realities and National Legislative Priorities in Germany in 2022

Introduction and background

Germany has a remarkable history of adapting to discrepancies. While the biggest economy in the European Union (EU) has proven to be resilient by staying afloat even in the second year of an unprecedented pandemic – backed by the exporting strength of the huge German blue-chip corporations and the continued business acumen of hundreds of German small and medium enterprises (SMEs), many of which call themselves "hidden (world) champions" – German legal standards can take a long time to catch up with internationally well-established routines.

Only in 1999 was bribery outside Germany turned into a criminal offence and the associated tax privilege of deductible business expenses, eg, for dubious sales agent contracts, was abolished. Further, it was only in 2016 that the bribery of private medical practitioners became a crime in Germany, even though the German Supreme Court (*Bundesgerichtshof* or BGH) had long been admonishing the unusual sanction gap in codified criminal law.

These two examples illustrate that Germany is not a fast-mover when it comes to introducing new legal sanctions – let alone pioneering modern incentives – in the fight against corruption in a corporate context. And this combat is very often not a purely national affair. All the German companies that have had to master disruptive compliance and corruption challenges in recent years have experienced that no one can actually afford to ignore the traditional pace-making role of US – and increasingly UK and French – law enforcement authorities in cross-border investigations and the quintessential, and ultimately inevitable, new normalcy of multi-jurisdictional co-operation. And this is posing the question of actual interoperability of various legal systems as well as the question of the optimum organization of anti-corruption enforcement in a federal state.

In addition, new corporate compliance crises such as the 2020 balance-sheet fraud and subsequent first insolvency of a Dax-30 corporation in the "Wirecard" scandal, the "Cum-Ex" or "Cum-Cum" tax evasion schemes around individual stock purchases, repeatedly reported anti-money laundering enforcement deficiencies or the continuing aftermath of the "Dieselgate" complex involving several German automotive Original Equipment Manufacturers (OEMs) and Tier-1 suppliers continue shedding a light on the actual state of corporate compliance at large and the actual efforts in the combat against corruption in Germany.

Current developments

Transparency International Corruption Perception Index 2020

On 28 January 2021, Transparency International (TI) published the latest Corruption Perceptions Index (CPI) for the year 2020, once again covering 180 countries in the 26th TI CPI edition. As in the previous year, New Zealand and Denmark lead the Top Ten (each with 88 out of 100 points) closely followed by Finland, Singapore, Sweden, Switzerland, Norway and the Netherlands. Ger-

many scored 80 points as last year and moved up to rank 9 sharing it with evenly scored Luxembourg.

With this, the TI CPI Top Ten remain in identical sequence compared to the preceding 2019 edition. However, caution needs to be applied. As recent international bribery cases involving TI CPI Top Ten country-based corporations are indicating, the TI CPI does not fully reflect the "exported corruption" problem where companies from supposedly safe(r) home states are operating in distant high-risk regions with endemic corruption in the public sector.

The German chapter of TI once again emphasised the stagnating German results in the TI CPI 2020 and criticised at the beginning of the German "Super Election Year" 2021 structural deficits concerning party financing as well as the remaining lack of an obligatory lobby register. Furthermore, the un-changed high necessity for effective improvement of anti-money laundering enforcement especially in real estate transactions in Germany was highlighted another time.

OECD Working Group on Bribery Phase 4 Two-Year Follow-Up Report on Germany 2021

The OECD Working Group on Bribery had evaluated on 14 June 2018 in the Phase 4 Report on Germany the national implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. Germany had been commended as one of the most active enforcers of the OECD Convention with 67 cases involving 328 natural persons and 18 legal persons to be sanctioned in 17 cases of foreign bribery since 1999. However, these numbers reveal a clear pattern: only 25% of the concluded foreign bribery cases involved enforcement against legal persons.

This general discrepancy was not only maintained, but even furthered with Germany's submission of the Phase 4 Two-Year Follow-Up Report on 12 March 2021. Again, only 9% of the new cases (two out of 22) since the adoption of the Phase 4 Report in 2018 resulted in sanctions against legal persons. From the 35 recommendations in the 2018 Phase 4 Report, the OECD Working Group on Bribery who concluded that ten recommendations were fully implemented, seven partially, 18 not implemented and 11 could eventually be covered by pending national legislative proposals – of which the German Associations Sanctions Act draft bill (*Regierungsentwurf Verbandssanktionengesetz – VerSanG-E*) from June 2021 is playing a central role by introducing a German variant of corporate criminal liability.

Federal Situation Report on Corruption 2020

The German Federal Criminal Police Office (Bundeskriminalamt – BKA) is publishing since 2001 the biannual Federal Situation Report on Corruption (*Bundeslagebild Korruption*). The most recent 2020 edition was published on 29 September 2021 and revealed with the amount of 5510 cases a plus of 1.5% of criminal corruption offences against the last report of 2018. The number of suspects declined by 14.5%, but is revealing telling patterns: from a total of 2171 suspects, 1191 were alleged of active bribery and 980 of passive bribery. From the latter, 71% were public officials clearly indicating that "public" corruption is not an exclusive affair of non-European countries. Even more worrying is the reported increase in monetary damages assessed, with a plus of 72.3% against the 2018 report to EUR81.2 million. While no attempt is made to verify the accuracy of this total amount of damage caused by corruption, this does already display the interesting pattern that less suspects can obviously cause significantly more damage through corruption in the largest economy of the EU.

Major legislative activities in the "Super Election Year 2021"

The year 2021 was dubbed a "Super Election Year" for two reasons. Firstly, because of the unusual high number of elections in just one calendar year. German voters were called to the polls altogether seven times. Six federal states elected their regional parliaments or Landtage, namely in Baden-Württemberg, Rhineland-Palatinate, Thuringia, Saxony-Anhalt, Berlin and Mecklenburg-Western Pomerania. In addition, the federal elections for the 20th German federal parliament or Bundestag took place on 26 September 2021, which not only elected a record number of 736 members of parliament into the Bundestag, but also ending an incessant 16-year term of Chancellor Angela Merkel – which is sometimes used as a second explanation for the term "Super Election Year".

It is also noteworthy that for a first time in German parliamentary history, voters elected a three-party coalition to office. The Social Democrats (SPD), Alliance 90/The Greens (*Grüne*) and the Liberal Democrats (FDP) have entered into three-party coalition negotiations on 27 October 2021 and have announced striving to conclude these negotiations by 10 November 2021. If this plan will prove to be feasible, the new German Chancellor could be announced in the first week of December 2021. Whereas no one has a crystal ball and three-party negotiations might either become significantly protracted or eventually fail completely, the consequences for law-making at the competent federal level in Germany could be significant.

While the former "Grand Coalition" consisting of the conservative parties (CDU and CSU) and the Social Semocrats (SPD) was able to see the new German Corporate Due Diligence in Supply Chains Act (*Lieferkettensorgfaltspflichtengesetz – LkSG*) through parliament in June 2021 prior to the parliamentary summer break, the equally important draft bills of the Whistleblower Protection Act (*Hinweisgeberschutzgesetz – HinSchG*) and the Associations Sanctions Act (*Verbandssanktionengsetz – VerSanG*) could not be passed amidst heated debates and fierce criticism, mainly from conservative supporters, claiming that too burdensome bureaucracy would hinder German businesses particularly in times of pandemic emergency.

Outlook

The current situation at hand in Germany requires following up on urgent necessities. Corporations, regardless of size and industry sector, need clarity and reliability in both law-making and consistent enforcement. As has been shown time and again, corruption can rarely be confined within national borders. This is particularly important for the largest economy within the European Union depending like no other nation on export activities.

Genuinely burdensome new regulation can have a detrimental effect on small and medium-sized enterprises in particular. On the other hand, clear rules with thorough nation-wide application and internationally aligned advocacy for the risk mitigation effectiveness of appropriate compliance management systems can and will incentivise behavioural change.

Filling legislation gaps

The most pressing priority for the new German federal government will be filling the yawning gaps in compliance-related legislation as soon as possible.

With the clear order of the Whistleblowing Directive of the European Union 1937/2019 to introduce minimum standards for the obligatory provision of whistleblowing channels and the protection of whistle-blowers against retaliation in all EU member states latest by 17 December 2021 Germany must deal with a potential EU law

infringement procedure and companies should prepare to start implementing hotlines and policies well in time – and not wait and loose precious piloting and testing time.

The international comparison as such and the unambiguous and recent OECD Working Group on Bribery comments in the Phase 4 Follow-Up Report in particular are pointing towards the next necessity which is arguably the rather historic German approach to corporate criminal liability. Even if the provisionally failed Associations Sanctions Act would have constituted a compromise, it would have provided important triggers for a nation-wide uniform treatment of corruption in a corporate context and spelled out in legal wording for companies of all sectors that it would indeed pay off to invest in effective compliance measures and in the in-house capabilities to perform in-house investigations.

And with a record number of members of parliament, obvious passive corruption patterns evidenced in the latest Federal Criminal Police Office's Situation Report Corruption, several incidents of influence peddling by elected members of parliament involving COVID-19 fraud and continued criticism by leading NGOs such as TI the next German government should tackle the open spots regarding lobby registers and party financing.

Enhancing consistency of compliance regulation

Next, existing law must be better synchronised than it is today. A brief glance at the existing regulation on whistleblowing in Section 25a of the German Banking Act (*Kreditwesengesetz – KWG*) compared to the wording of the EU Directive 1937/2019 shows the necessity of streamlining the scope of law to trigger a whistleblower's report of an alleged breach or required minimum standards of confidentiality.

Another example is the strikingly detailed definition of required risk management and due diligence activities to identify compliance risks regarding human rights violations or environmental damages across actually the entire value chain – including external contractual business partners – in the new German Corporate Due Diligence in Supply Chains Act which could be passed in June 2021 and will come into force for companies with 3000 and more employees on 1 January 2023.

The draft bill of the Associations Sanctions Act is currently just mentioning the rather unspecified term of "compliance measures" as mitigating circumstances. The same draft is only describing "internal investigations" as an internationally adopted best practice in compliance management in more detail, but remains completely silent on required minimum standards of whistle-blowing systems. That again is not mentioned explicitly either in the forthcoming Corporate Due Diligence in Supply Chains Act, but very much so in an implicit way by prescribing the new corporate obligation to provide a "complaints process" that needs to be open to both inhouse employees as well as to external individuals working for business partners essentially across the entire value chain of a company – which will require creating commonality in the legislative expectations towards whistle-blowing across various compliance risk dimensions comprising human rights, environmental law, but also employment law, anti-money laundering regulation and of course corruption.

Improving nationwide enforcement of corporate crime

After the Siemens corruption scandal in 2007, more and more courts have embraced the internationally adopted standard to honour corporate achievements in effective compliance management. Since the "Neubürger"-decision of the District Court Munich I in late 2013, it is no

longer disputed in Germany that deficiencies in setting-up and continuously developing appropriate compliance management systems which are effectively reducing corruption risks also outside Germany will trigger individual responsibility of board members for civil damages consequently applying the business judgment rule concept embodied in the German Stock Corporation Act. Further landmark cases comprise the 2017 German Supreme Court's "Kraus-Maffei" decision on a foreign corruption case. For a first time ever, it was acknowledged that compliance management system build-up efforts can have a mitigation effect even though they had only been initiated at the time when the active bribery of foreign public officials via external sales-agents was uncovered by a tax audit.

Nevertheless, a clear and nation-wide applicable codified approach as envisaged by the Associations Sanctions Act accompanied by well-defined internationally proven compliance management standards either in a future material law or on specific compliance guidance for prosecutors or judges would help enormously to bring clarity and accountability to corporations who had not yet been exposed to the extensive and continuously updated US guidance.

Due to the inherent complexities of a federal state organisation as such, the intricacies of an unevenly applied administrative law source required for corporate sanctions plus the typical sophistication of investigating white-collar crime in large commercial organizations, the current organization of public prosecution on a city level should be reconsidered and the international models of successfully centralised enforcement agencies carefully analysed.

Last, but by no means the least, Germany should not only focus on overdue nation-wide improvement of enforcement of white-collar crime by changes of material law only. Countries actively enforcing white-collar crime keep using well-stocked arsenals of structured non-trial resolution mechanisms including deferred or non-prosecution agreements and consent decree settlement alternatives. These procedural tools are not only benefitting prosecutors and judges, but can very often also create predictability and therefore reliability for corporations which very frequently must undertake all possible measure to safeguard reputation and strive for a timely closing of otherwise protracted litigation.

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