

# BRIEF OVERVIEW OF THE GERMAN CRIMINAL JUSTICE SYSTEM: THE GERMAN LEGISLATIVE RESPONSE TO CORRUPTION CRIME

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## I. BRIEF OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM IN GERMANY

Germany is a federal republic consisting of sixteen federal states (German: “Länder”). Since today’s Germany was formed from an earlier collection of several states, it has a federal constitution, and the constituent states retain a measure of sovereignty.



### A. The Organization of the Judiciary

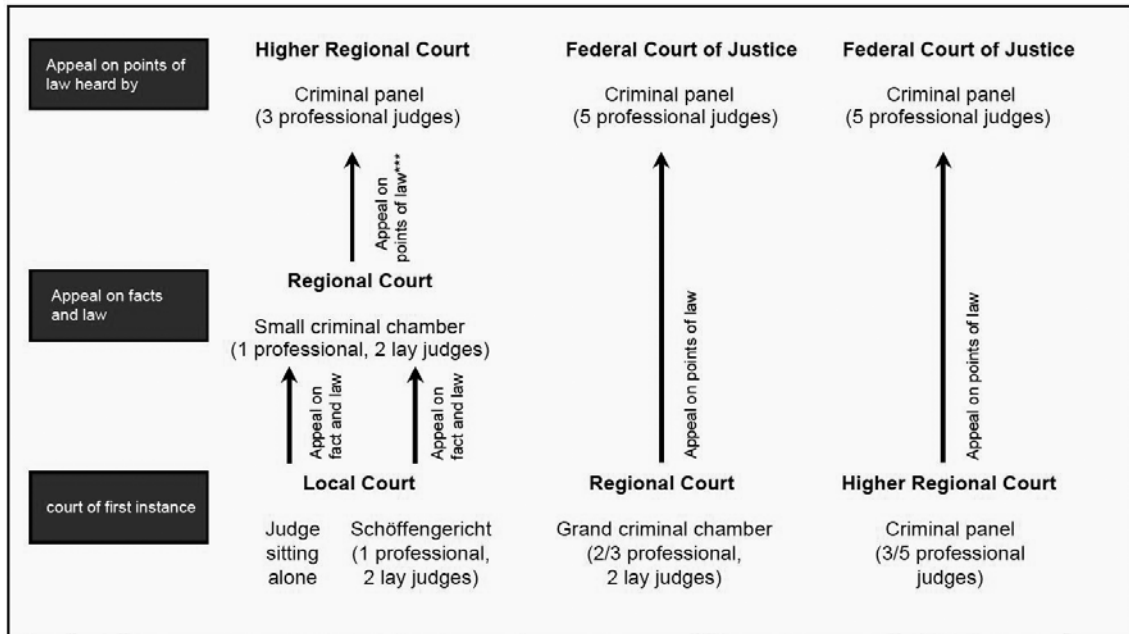
The judicial system is established and governed by part IX of the constitution. Article 92 of the constitution establishes the courts and states that the judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts, and by the courts of the federal states (“Länder”).

Because of the federal order of the Republic, jurisdiction is exercised by federal courts and by the courts of the 16 federal states. The administration of justice lies chiefly with the federal states. The German court system is divided into five specialised branches or jurisdictions: ordinary, labour, general administrative, fiscal and social. In addition, there is the constitutional jurisdiction, i.e., the Federal Constitutional Court and the constitutional courts of the federal states.

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The highest ordinary court is the Federal Court of Justice. At the regional level there are Local Courts (Amtsgerichte) and Regional Courts (Landgerichte), which are the first or the second instance courts depending on the character of the case, and Higher Regional Courts (Oberlandesgerichte).<sup>1</sup>



Judgments are delivered by professional judges, who belong to a single professional group but may specialise in different fields due to their appointment to different court branches. In some proceedings, professional judges are joined by lay judges (honorary judges) and judgments are delivered jointly. The lay judges for the criminal courts (Local and Regional Courts) are elected for a period of five years, on the basis of lists of nominees, by a committee at the Local Court by a two-thirds majority vote.

During the main hearing, lay judges in criminal proceedings exercise judicial office in full and with the same voting rights as their professional counterparts. All decisions made outside the main hearing are made solely by the professional judge.

At the end of 2012, a total of 459 professional judges were working in the federal courts (Federal Constitutional Court, ordinary jurisdiction, administrative jurisdiction, fiscal jurisdiction, labour jurisdiction, social jurisdiction, patent jurisdiction and military service courts). At the same time, a total of 19,923 professional judges were working in the *Länder*, of whom 1,970 were probationary judges. 121 (40.16%) of all professional judges were female. In 2009, 36,956 lay judges were sitting in the criminal courts; of those 19,183 (51.9%) were male and 17,773 (48.1%) female<sup>2</sup>.

The principle of independence of the judiciary is enshrined in the constitution. In accordance with article 97(1), “judges shall be independent and subject only to the law.” Section 1 GVG states that “judicial power shall be exercised by independent courts that are subject only to the law.” As a fundamental principle of German constitutional law, judicial independence implies that when exercising judicial power, judges may not be given any instructions. The executive branch and, in particular, the court administration are not allowed to influence judicial decisions by giving instructions on a specific case, through administrative provisions or in any other way. The legislature is also prevented from directly influencing case-related decisions in ongoing proceedings. The courts of a higher instance are also not allowed to prompt a

<sup>1</sup>Diagram taken from: German Federal Ministry of Justice, Criminal Justice in Germany Facts and Figures by Jörg-Martin Jehle 2009.

<sup>2</sup>Statistic data taken from: <[https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?__blob=publicationFile&v=5)>.

judge to make a certain decision.

## **B. The Organization of the Prosecution Service**

The public prosecution offices are part of the executive branch, despite their integration in organisational terms into the judicial branch. Within the field of criminal justice, the public prosecution offices share the task, on an equal footing with the courts, of providing access to justice and form a distinct judicial body of the judiciary.

Again as a consequence of the organization as a federal state the responsibility for the prosecution service lies with the federal states. In the federal states, there are a total of 116 public prosecution offices at the Regional Courts. They are subordinate to the Offices of the Public Prosecutors General ("*Generalstaatsanwaltschaften*") located at each of the Higher Regional Courts. There are a total of 25 Public Prosecutors General in the federal states. The Offices of the Public Prosecutors General are subordinate to their respective State Justice Ministries.

At the federal level and parallel to the Federal Court of Justice, there is the "Office of the Federal Prosecutor General at the Federal Court of Justice". The Office of the Federal Prosecutor General performs the tasks of a classic public prosecution office at the Federal Court of Justice. It represents the prosecution in all proceedings before the federal court (e.g. appeals on points of law). The federal prosecutor also acts in the capacity of a public prosecution office in criminal offences affecting the internal and external security of the Federal Republic of Germany, i.e., treason, terrorist acts of violence and so on).

The public prosecution offices are structured hierarchically. They are headed by "superior officials". Public prosecution offices are not autonomous institutions. They are subject to administrative and professional supervision by the relevant superior official of the public prosecution office. The Federal Prosecutor General at the Federal Court of Justice is subject to supervision by the Federal Ministry of Justice and the public prosecutors of the federal states are subject to the supervision by the Justice Ministries of the federal states, who have the right to issue instructions.

## **C. Criminal Procedural Law**

German criminal procedural law is to be found in the Criminal Procedure Act (*Strafprozessordnung*, StPO).

The prosecution offices in Germany are in charge of the investigation as well as the prosecution of criminal offences. The prosecutors open investigations and will take part in the investigation process. After all the evidence is collected the prosecutors decide about the further proceedings. If they believe, that there is a sufficient probability of a conviction by the competent court, the prosecutor will indict the suspect. The prosecutor will appear in court, will present the indictment to the court and will take part in all of the court hearings.

The prosecution office is entitled to decide about the opening of the investigational proceedings under the condition of adequate suspicions of criminal activity against the suspect. The public prosecutor may start investigations with or without the report of an offence by a citizen. The relevant section of the criminal procedure code reads as follows<sup>3</sup>:

### ***"Section 152***

#### ***[Indicting Authority; Principle of Mandatory Prosecution]***

- (1) The public prosecution office shall have the authority to prefer public charges.*
- (2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications."*

The prosecutor has the duty to be objective and neutral. He is obliged to collect evidence both against and in favor of the suspect.

In cases of petty crimes the police perform the investigations on their own. In major and complex

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<sup>3</sup><[http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p1223](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1223)>.

cases, however, the investigations are led and controlled by the prosecution office.

If no suspect is found, if the act is not punishable or if there are other procedural impediments (e.g., the statute of limitations), the public prosecution office will discontinue the proceedings in accordance with section 170 paragraph 2 of the Criminal Procedure Act.

**Section 170**

***[Conclusion of the Investigation Proceedings]***

- (1) *If the investigations offer sufficient reason for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment to the competent court.*
- (2) *In all other cases the public prosecution office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification.*

The proceedings can also be terminated if the offender's guilt is of a minor nature and if there is no public interest in prosecution. This termination can involve the imposition of certain conditions, such as financial redress for the injury caused by the act, the payment of a fine or the undertaking of community service (section 153 and 153a of the Criminal Procedure Act).

Furthermore, the Public Prosecution Office can refrain from prosecution if the crimes involved are insignificant additional offences compared with the main crime with which the accused is charged (section 154 of the Criminal Procedure Act).

In the case of certain crimes (trespass, minor bodily injury, criminal damage, etc.), the Public Prosecution Office can advise that a private prosecution be pursued if there is no public interest in prosecution; the injured party must then bring a charge himself.

**D. The Criminal Trial**

For all cases with a punishment up to four years' imprisonment, the local court (*"Amtsgericht"*) is the court of first instance. The regional court (*"Landgericht"*) is responsible for serious cases with imprisonment of over four years or commitment to a psychiatric hospital, and the regional court hears all such cases. In case of crimes against the state (e.g., terrorism, espionage), the Higher Regional Court (*Oberlandesgericht*) is the competent court.

Once the indictment has been filed by the public prosecutor's office, the court checks whether there is sufficient reason to suspect the accused of the crime. If so, the main court proceedings will begin. The criminal trial is led by the judge. Public prosecutor and judge are independent from each other and from other governmental authorities. Judges do not have to follow any instructions.

The judge underlies the principle of authoritative investigations (*Amtsermittlungsgrundsatz*), i.e., his duty is to investigate and consider all facts and matters relevant to the case. The judge need not rely on the evidence brought forward by the prosecutor or the defence.

**Section 244**

***[Taking of Evidence]***

- (1) (···)
- (2) *In order to establish the truth, the court shall, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision.*

**E. The German Federal Police Statistics 2014**

In 2014 the German police recorded 6.082 million incidents.<sup>4</sup> The total clearance rate was 54.9 %.

The clearance rate for murder and manslaughter is particularly high at 96.5 %. The clearance rate for theft offences is particularly low, at 14.7 %.

<sup>4</sup> <[http://www.bka.de/DE/Publikationen/PolizeilicheKriminalstatistik/pks\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/DE/Publikationen/PolizeilicheKriminalstatistik/pks__node.html?__nnn=true)>.

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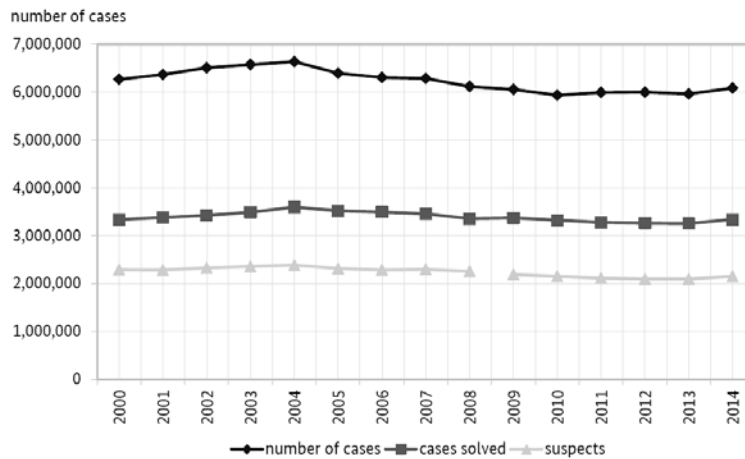
In 2014 the number of suspects rose to 2,149,504 (+2.6%), 552,263 of whom were female suspects (25.7%).

There were 63.194 cases of economic crime. The clearance rate was 90.7 %. However, this rate does not mean that all of these cases led to conviction in the courts.

The number of competition- and corruption-related offences and offences in public office was 6,571. The clearance rate was slightly lower: 82.3 %.

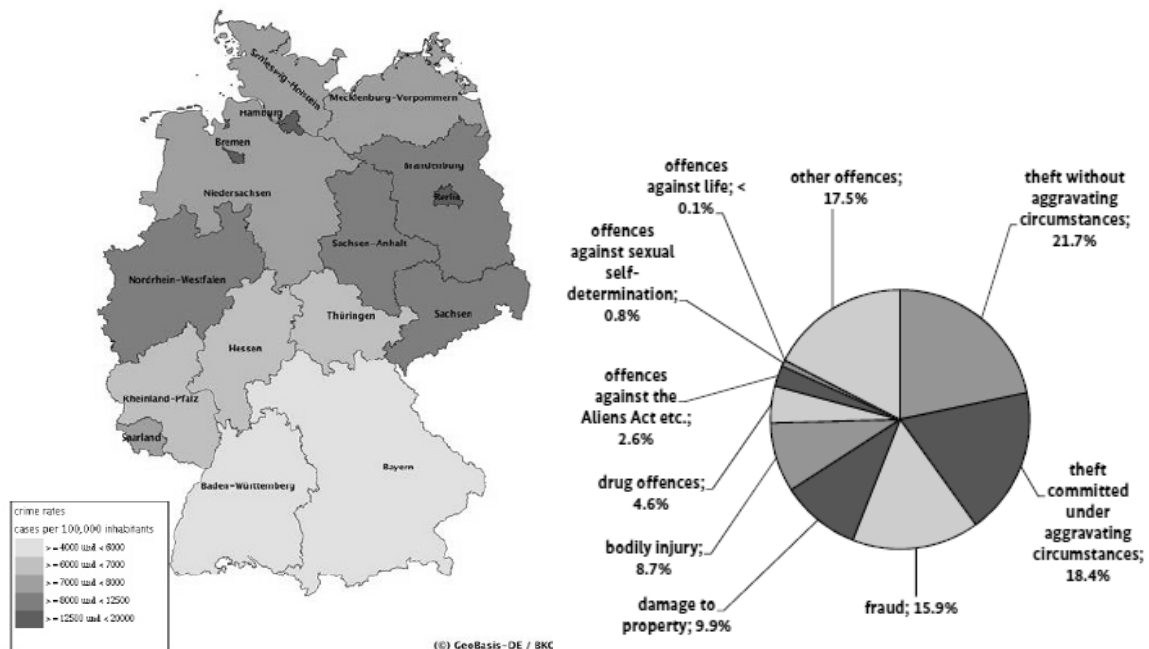
3.1.1 Development of total crime

3.1.1 - G01



Geographical distribution by offence rates

3.1.2 - K01



## II. THE GERMAN LEGISLATIVE RESPONSE TO CORRUPTION CRIME

### A. Overview

According to the German criminal code bribery in the public as well as in the private sector is a punishable crime (Public officials: sections 331- 338 and private employees: sections 299-301). Both passive and active bribery are criminalised in the criminal code.

Since February 1999 bribe payments to foreign public officials are a criminal offence (the Act on Combating International Bribery "*Gesetz zur Bekämpfung internationaler Bestechung*" – hereinafter "IntBestG"). The payments to foreign private employees are a punishable crime under section 299 paragraph 3 of the criminal code.

### B. Bribery of Domestic Public Officials

Bribery of German public officials is regulated in section 331 and following (et seq.) of the Criminal Code (CC), which incriminate two forms of corruption, namely bribery as such, but also a looser form of criminal behaviour. Passive bribery is criminalised in sections 331 and 332 CC, and active bribery in sections 333 and 334 CC. Sections 332 and 334 CC encompass offences where the advantage is awarded in return for an official act which is in breach of duty or which is at the discretion of the public official. Sections 331 and 333 CC each encompass offences where the benefit is awarded as an incentive. It is not necessary to prove that the official is violating his official duties. Section 335 CC contains a regulation on the assessment of punishment for especially serious cases of active and passive bribery.

#### 1. The Term "Domestic Public Official"

The terms "public officials", "individual with a special obligation for the public service" and "judge" are used in sections 331 et seq. of the criminal code, to describe the person receiving the benefit or bribe. These terms are given a statutory definition in section 11, paragraph 1, Nos. 2 to 4 of the criminal code. The definition section of the statute reads as follows:

#### **Section 11 Definitions**

*(1) For the purposes of this law*

1. (...)
2. *'public official' means 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 organisational form chosen to fulfil such duties;*
3. *'judge' means any person who under German law is either a professional or a lay judge;*
4. *'persons entrusted with special public service functions' means any person who, without being a public official, is employed by, or is acting for*
  - (a) a public authority or other agency, which performs public administrative services; or*
  - (b) an association or other union, business or enterprise, which carries out public administrative services for a public authority or other agency,*  
*and who is formally required by law to fulfil their duties with due diligence;*

Under section 11, paragraph 1, No. 2, the term "public official" covers all those who, under German law, are employed as civil servants or judges, those who are otherwise in an official duty-relationship under public law functions, and those who have been appointed to a public authority or other agency or have been commissioned to perform duties of public administration without prejudice to the organizational form chosen to fulfill such duties.

In addition to civil servants and judges, as well as to other individuals in an official relationship under public law, individuals in Germany appointed to carry out tasks of the public administration in an authority or in another agency or on its behalf also belong to public officials within the meaning as defined under criminal law (section 11, paragraph 1, No. 2 (c) Criminal code). These include employees in the public service who carry out public tasks, but who are not civil servants within the meaning under status law.



Furthermore, it covers individuals who carry out public tasks in agencies similar to authorities. These agencies also include facilities organised under private law which are subject to such state management in carrying out administrative tasks that, in an overall evaluation of the characteristics typifying them, nonetheless appear to be an extended arm of the State.

Section 11, paragraph 1, No. 4 of the criminal code also includes individuals who are not public officials, but who are under a special public service obligation. An obligation applies in particular to individuals who work in authorities, but do not carry out public tasks (e.g., employed cleaning staff), and to individuals who contribute as external contractors for an authority in carrying out public tasks.

2. The wording of the Relevant Provisions of the Criminal Code

**“CHAPTER THIRTY  
OFFENCES COMMITTED IN PUBLIC OFFICE**

**Section 331**

**Acceptance of a benefit**

- (1) *A public official or a person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of an official duty shall be liable to imprisonment not exceeding three years or a fine.*
- (2) *A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to imprisonment not exceeding five years or a fine. The attempt shall be punishable.*
- (3) *The offence shall not be punishable under subsection (1) above if the offender allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorises the acceptance or the offender promptly makes a report to it and it authorises the acceptance.*

**Section 332**

**Taking a bribe**

- (1) *A public official or person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from six months to five years. In less serious cases the penalty shall be imprisonment not exceeding three years or a fine. The attempt shall be punishable.*
- (2) *A judge or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform a judicial act and thereby violated or will violate his judicial duties shall be liable to imprisonment from one to ten years. In less serious cases the penalty shall be imprisonment from six months to five years.*
- (3) *If the offender demands, allows himself to be promised or accepts a benefit in return for a future act, subsections (1) and (2) above shall apply even if he has merely indicated to the other his willingness to*
  1. *violate his duties by the act; or*
  2. *to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.*

**Section 333**

**Granting a benefit**

- (1) *Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier in the Armed Forces for that person or a third person for the discharge of a duty shall be liable to imprisonment not exceeding three years or a fine.*
- (2) *Whosoever offers promises or grants a benefit to a judge or an arbitrator for that person or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to imprisonment not exceeding five years or a fine.*
- (3) *The offence shall not be punishable under subsection (1) above if the competent public authority, within the scope of its powers, either previously authorises the acceptance of the benefit by the recipient or authorises it upon prompt report by the recipient.*

**Section 334**  
**Offering a bribe**

- (1) *Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier of the Armed Forces for that person or a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from three months to five years. In less serious cases the penalty shall be imprisonment not exceeding two years or a fine.*
- (2) *Whosoever offers, promises or grants a benefit to a judge or an arbitrator for that person or a third person, in return for the fact that he*
  1. *performed a judicial act and thereby violated his judicial duties; or*
  2. *will in the future perform a judicial act and will thereby violate his judicial duties,**shall be liable in cases under No 1 above to imprisonment from three months to five years, in cases under No 2 above to imprisonment from six months to five years. The attempt shall be punishable.*
- (3) *If the offender offers, promises or grants the benefit in return for a future act, then subsections (1) and (2) above shall apply even if he merely attempts to induce the other to*
  1. *violate his duties by the act; or*
  2. *to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.*

**Section 335**  
**Especially serious cases**

- (1) *In especially serious cases*
  1. *of an offence under*
    - (a) *Section 332(1) 1st sentence, also in conjunction with (3); and*
    - (b) *Section 334(1) 1st sentence and (2), each also in conjunction with (3),**the penalty shall be imprisonment from one to ten years and*
  2. *of an offence under section 332(2), also in conjunction with (3),*  
*the penalty shall be imprisonment of not less than two years.*
- (2) *An especially serious case within the meaning of subsection (1) above typically occurs when*
  1. *the offence relates to a major benefit;*
  2. *the offender continuously accepts benefits demanded in return for the fact that he will perform an official act in the future; or*
  3. *the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.*

**Section 336**  
**Omission of an official act**

*The omission to act shall be equivalent to the performance of an official act or a judicial act within the meaning of sections 331 to 335.*

3. Undue Advantage

The term “undue advantage” covers material and immaterial advantages.

The Federal Court of Justice has already ruled several times that the element “advantage” also encompasses immaterial advantages, including advantages of a symbolic nature (e.g., honorific titles and distinctions) as well as those which have an important value for the beneficiary himself. The federal court also ruled that sexual favors fall under the definition of “advantage”.

The criminal code does not contain a restriction according to which only unfair or inappropriate advantages would be covered. There is no provision for a value threshold. Low value advantages are also covered by the offences. This means that so called “facilitation payments” are also covered by the code and there is no exemption for these kinds of payments under German law.

The wording of the active and passive bribery offences involving a public official does not explicitly refer to indirect bribery, i.e., those cases where an intermediary is involved. But granting an advantage by an intermediary is a sufficient element for the offence to qualify as active bribery.



4. “For Himself or for Anyone Else”

The law also covers undue advantages for a third party beneficiary. Not only advantages are covered which for instance are granted to the spouse or to other close individuals. Advantages to third persons may also lie in advantages for groups of individuals or legal entities (clubs, enterprises, associations and parties), as well as advantages for the employing corporation of the public official, including sponsoring services and donations.

5. Active Bribery, Sections 333 and 334

German law contains the elements “offers, promises or grants”. The offence is completed as soon as the offender has formulated the proposal and the latter has reached the potential bribe taker, no matter what his reaction is. The offence is already deemed to have been committed if the action (demanding, allowing himself to be promised or accepting, as well as offering, promising or granting an advantage) relates to an official activity, official act or judicial act.

6. Passive Bribery, Sections 331 and 332

The law contains the elements “demands, allows himself to be promised or accepts” as a description of the act in sections 331 and 332 CC. The element “allows himself to be promised” encompasses the acceptance of offers and promises. The offence is already completed if the offender has formulated the proposal and the latter has reached the potential bribe-payer, no matter what his reaction is. Therefore, the attempt is prosecutable.

7. Section 332 and 334: Return for the Execution of an “Official Act” or “Judicial Act” in Breach of Duty or in the Discretion of the Public Official or Judge

For sections 332 and 334, the undue advantage needs to be a return for a specific official act of the public official. Official acts and official activity include all acts belonging to the official duties of the public official and which are carried out by him in his official capacity. They do not encompass offences relating to private acts on the part of the public official.

8. Sections 331 and 333 of the Criminal Code

Different from sections 332 and section 334, the offence here is already deemed to have been committed if the action (demanding, allowing himself to be promised or accepting, as well as offering, promising or granting a benefit) relates to an official activity, official act or judicial act. It covers, for example, a payment made to a public official a few days before Christmas without a connection to a specific project. The purpose of the payment is to increase his goodwill for any projects that might be awarded in the New Year.

Sections 331 and 333 cover cases in which the acceptance or granting of the benefit takes place prior to a specified official act, as well as those in which the acceptance or granting of the advantage follows the official act (subsequent granting, reward).

Sections 331 and 333 are sometimes used as the legal “safety net” which allows for dealing with cases that cannot be prosecuted under section 334 because of the evidential requirements (*i.e.*, the link between the bribery act and a breach of duties).

9. Criminal Sanctions

As regards criminal sanctions, section 331 provides for the following statutory ranges of punishment:

- accepting and granting a benefit by and to public officials (section 331, paragraph 1 and section 333, paragraph 1 CC): up to three years' imprisonment or a criminal fine (5 to 10,800,000 €);
- accepting and granting an advantage by and to judges and arbitrators (section 331, paragraph 2 and section 333, paragraph 2 CC): up to five years' imprisonment or a criminal fine (5 to 10,800,000 €)
- taking a bribe by public officials (section 332, paragraph 1 CC): from six months up to five years' imprisonment

- bribery of public officials (section 334, paragraph 1 CC): from three months' up to five years' imprisonment
- taking a bribe by judges and arbitrators (section 332, paragraph 2 CC): from one up to ten years' imprisonment
- bribery of judges and arbitrators (section 334, paragraph 2 CC): a) from three months' up to five years' imprisonment (when granted subsequently); b) from six months' up to five years' imprisonment (with granting for future acts)

In some instances, the above sanctions can be modulated both ways, depending on the circumstances of the concrete case. Section 335 foresees aggravated circumstances for particularly serious cases of bribery under sections 332 and 334 CC, i.e., where the bribe was of great magnitude, or the offence was committed repeatedly over a longer period of time, or it involved a gang or a commercial basis: the sanction is then one to ten years' imprisonment for regular officials, and a minimum of two years' imprisonment in the specific cases of bribery of judges and arbitrators (the upper limit is also increased to 15 years according to section 38 paragraph, 2 CC). Sections 332 and 334 CC also contain provisions on less serious cases which entail a lower statutory range of punishment. In cases where the act or omission sought from the public official or judge is unlawful (sections 332 and 334 CC) more serious/higher sanctions apply than in cases where the act or omission sought is lawful (sections 331 and 333 CC). For this reason, sections 331 and 333 CC do not contain provisions about less serious cases.

## **B. Bribery of Foreign Public Officials**

The Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung*) of 10 September 1998 is based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The convention is focused on the 'supply side' of the bribery transaction. According to this convention, all OECD are obliged to establish a foreign bribery offence:

### **“Article 1**

#### ***The Offence of Bribery of Foreign Public Officials***

1. *Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*
2. *Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.*  
(“...”)

The OECD convention focuses only on the active side of bribery. The act deems foreign public officials to be equal to domestic public officials with regard to the application of the offence of active bribery (section 334, as well as the complementary provisions of sections 335, 336 and 338, paragraph 2). These acts need to be related to future unlawful acts in the context of international business transactions.

The German law reads as follows:

### **“Act on Combating International Bribery – IntBestG (basis: OECD Convention)**

#### ***Article 2: Implementing Provisions***

##### ***Section 1 Equal treatment of foreign and domestic public officials in the event of acts of bribery***

*For the purpose of applying section 334 of the Criminal Code, also in conjunction with sections 335, 336 and 338 paragraph 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an improper advantage in international business transactions, the following shall be treated as equal:*

1. *to a judge:*

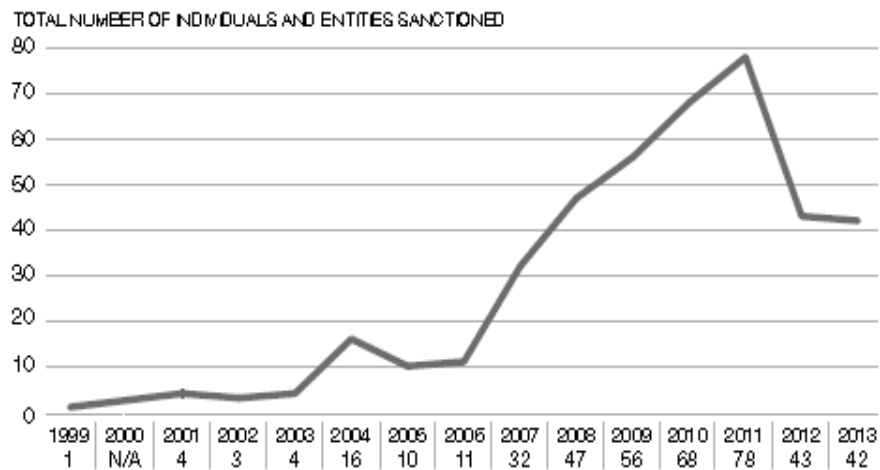
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- a) a judge of a foreign state,
- b) a judge at an international court;
2. to any other public official:
  - a) a public official of a foreign state,
  - b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state,
  - c) a public official and another member of the staff of an international organisation and a person entrusted with carrying out its functions;
3. to a soldier in the Federal Armed Forces (Bundeswehr):
  - a) a soldier of a foreign state,
  - b) a soldier who is entrusted to exercise functions of an international organisation.

The term “public official” is to be interpreted autonomously on the basis of the OECD Convention. The sanctions for taking a bribe and bribery of foreign public officials correspond to those applicable to domestic officials, including for particularly serious cases (sections 332, 334, 335).

The enforcement of the OECD convention has become more and more important over the recent years. The OECD report<sup>5</sup> shows an increase of foreign bribery cases:

**Figure 1.** Number of foreign bribery cases concluded per year



Source: OECD analysis of foreign bribery cases concluded between 15/02/1999 and 31/12/2013

<sup>5</sup>OECD Foreign Bribery Report 2014: An Analysis of the Crime of Bribery of Foreign Public Officials.

Germany is one of the countries with strong enforcement of the OECD convention:



### C. Bribery in the Private Sector

Section 299—and sections 300 to 302 CC for complementary provisions—appear under Chapter 26, which deals with crimes against competition. Active and passive bribery in the private sector under German law only cover bribery in situations of market competition.

*“Chapter Twenty-Six – Crimes against competition*

#### *Section 299 Taking and Offering a Bribe in Business Transactions*

- (1) *Whoever, as an employee or agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving an unfair preference to another in the competitive purchase of goods or commercial services, shall be punished by imprisonment for not more than three years or a fine.*
- (2) *Whoever, for competitive purposes, offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employee or agent giving him or another an unfair preference in the purchase of goods or commercial services, shall be similarly punished.*
- (3) *Paragraphs (1) and (2) shall also apply to acts performed in foreign competition.*

Possible offenders and recipients of advantages of the offence is “the employee or agent of a business”. The elements “employee” and “agent” are to be interpreted broadly. An “employee” is anyone who is in a service relationship with the proprietor of the business on the basis of a contract or de facto and is subject to his instructions. A permanent or paid activity is not required. De facto employees within the meaning of the offence also include individuals who are used as “go-betweens” to hide the acceptance and payment of bribes. Employed managers of legal persons (limited companies), as well as civil servants and employees of corporations under public law (owned or not by the State) taking part in business transactions, are also employees. An “agent” is whoever, without being an employee, acts with an empowerment for a business. The term “agent” is not to be determined in accordance with civil law standards; only the actual circum-

stances are material and there is no need for a contractual relationship.

Section 299 only covers offences committed in the course of business activity. This term is very broad and covers all measures serving to promote any business objective, i.e., any activity pursuing an economic purpose in which participation in competition is expressed.

The offences criminalizing bribery in the private sector correspond to those criminalising bribery of public officials. The service to be rendered in return constitutes unfair preferential treatment related to the acquisition of goods or services in the context of competition. The intended preference must consist of a future privilege. The beneficiary of the preference can be the advantage-giver or any third person; a third person does not need to be formally designated yet at the time of the offence.

Offences of active and passive bribery in accordance with section 299 are punished by up to three years' imprisonment or a criminal fine (5 to 10,800,000 €). In particularly serious cases, the term of imprisonment is three months to five years (section 300).

#### **D. Statute of Limitations**

The prosecution of these offences in most cases lapses after five years (section 78, paragraph 3, No. 4 Criminal Code). The statute of limitations does not start to run until the offence has ended. If the offender initially demands or permits himself to be promised an advantage and later accepts it, the offence has not ended until the complete acceptance of the advantage.

There are various actions that can interrupt the running of the statute of limitations. These interruptions can be very important for the success of a prosecution of a bribery case. The law reads as follows:

#### **“Section 78c Interruption**

(1) *The running of the statute of limitations shall be interrupted by:*

1. *the first interrogation of the accused, notice that investigative proceedings have been initiated against him, or the order for such interrogation or notice;*
2. *any judicial interrogation of the accused or the order thereof;*
3. *any commissioning of an expert by the judge or public prosecutor if the accused has previously been interrogated or he has been given notice of the initiation of investigative proceedings;*
4. *any judicial seizure or search order and judicial decisions which uphold them;*
5. *an arrest warrant, placement order, order to be brought before a judge for interrogation and judicial decisions which uphold them;*
6. *the preferment of a public indictment;*
7. *the institution of proceedings in the trial court;*
8. *any setting of a trial date;*
9. *a penal order or another decision equivalent to a judgment;*
10. *the provisional judicial dismissal of the proceedings due to the absence of the indicted accused as well as any order of the judge or public prosecutor which issues after such a dismissal of the proceedings or in proceedings in absentia to ascertain the whereabouts of the indicted accused or to secure evidence;*
11. *the provisional judicial dismissal of the proceedings due to the lack of capacity of the indicted accused to stand trial as well as any order of the judge or public prosecutor which issues after such a dismissal of the proceedings to review the fitness of the indicted accused to stand trial; or*
12. *any judicial request to undertake an investigative act abroad.*  
*In a preventive detention proceeding and in an independent proceeding, the running of the statute of limitations shall be interrupted by acts in the conduct of a preventive detention proceeding or an independent proceeding which correspond to those in sentence 1.*

(2) *The running of the statute of limitations shall be interrupted by a written order or decision at the time at which the order or decision is signed. If the document is not immediately processed after signing, then the time it is actually submitted for processing shall be decisive.*



(3) *After each interruption the statute of limitations shall commence to run anew. Prosecution shall be barred at the latest by the statute of limitations, however, when twice the statutory period of limitation has elapsed since the time indicated in Section 78a, or three years, if the period of limitation is shorter than three years. Section 78b shall remain unaffected.*

(4) (···)”

### **E. Liability of Legal Persons**

Germany establishes the liability of legal persons, including liability for the bribery offences, under the Administrative Offences Act (hereinafter, “OWiG”). Germany opted for a non-criminal form of responsibility for its legal persons. Reason for this concept is the German principle that the fundament of criminal liability is personal guilt of the defendant. Guilt is something individual and this is possible only for natural persons. Legal persons cannot be guilty, but they can be held responsible.

Section 30 of the Administrative Offences Act (“OWiG”) reads as follows:

#### **“Section 30: Fine imposed on legal entities and associations**

(1) *If a person*

1. *acting in the capacity of an agency authorised to represent a legal entity, or as a member of such an agency,*
2. *as the board of an association not having legal capacity, or as a member of such a board,*
3. *as a partner of a commercial partnership authorised to representation, or*
4. *as the fully authorised representative or in a leading position as a procura holder, or as general agent of a legal entity or of an association as specified in Nos. 2 or 3 has committed a criminal or administrative offence by means of which duties incumbent upon the legal entity or the association have been violated, or the legal entity or the association has gained or was supposed to gain a profit, a fine may be imposed on the latter.*

(2) *The fine shall be*

1. *up to ten Million Euro in cases of a willfully committed offence;*
2. *up to five Million Euro in cases of a negligently committed offence.*

(···)“

Pursuant to section 30 OWiG, the liability of legal persons is triggered where any “responsible person” (which includes a broad range of senior managerial stakeholders and not only an authorised representative or manager), acting for the management of the entity commits:

- i) a criminal offence including bribery; or
- ii) an administrative offence including a violation of supervisory duties (section 130 OWiG) which either violates duties of the legal entity, or by which the legal entity gained or was supposed to gain a “profit”.

Germany enables corporations to be imputed with offences i) by senior managers, and, somewhat indirectly, ii) with offences by lower level personnel which result from a failure by a senior corporate figure to faithfully discharge his duties of supervision.

Section 17(4) OWiG provides that the administrative fine ordered against a legal person must exceed the financial benefit gained from the underlying offence. An administrative fine has two components, a punitive one and a confiscatory one (the fine in respect of the benefit, also referred to as “skimming-off of profits”). If the financial benefit is higher than the statutory maximum fine (*i.e.* EUR 10 million or EUR 5 Million), the total amount of the administrative fine must include an amount equal to the benefit gained (the confiscatory component of the fine), and be increased by an amount that may be a maximum of EUR 10 million or EUR 5 Million (the punitive component of the fine).

As pointed out above, the underlying offence for the imposition of a fine pursuant to Sec. 30 OWiG must not necessarily be a criminal offence, but may also be an administrative offence, in particular an offence pursuant to Sec. 130 OWiG. This section refers to the owner of a legal entity or association who wilfully or

negligently fails to take the supervisory measures required to prevent the contravention of duties in the company which concern the owner in this capacity. In such a case, the owner shall be deemed to have committed an administrative offence, if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. Sec. 9 OWiG extends this duty to the company's legal representatives such as Board members or managing directors. Thus Sec. 130 OWiG—in addition to Sec. 9 and 30 OWiG—is part of a set of legal provisions that allows to combat the contravention of duties in legal entities and associations effectively and which is of particular importance since the mere failure to take supervisory measures is an administrative offence pursuant to Sec. 30 OWiG, providing for the imposition of an administrative fine against the legal entity or association itself.

## **APPENDIX**

### **English translation of the relevant German law**

#### **A. Criminal Code (“StBG“)**

##### **I. General provisions**

##### **Section 11 Definitions**

- (1) For the purposes of this law
  1. (···)
  2. 'public official' means 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 organisational form chosen to fulfil such duties;
  3. 'judge' means any person who under German law is either a professional or a lay judge;
  4. 'persons entrusted with special public service functions' means any person who, without being a public official, is employed by, or is acting for
    - (a) a public authority or other agency, which performs public administrative services; or
    - (b) an association or other union, business or enterprise, which carries out public administrative services for a public authority or other agency,and who is formally required by law to fulfil their duties with due diligence;

##### **Section 78 Limitation period**

- (1) The imposition of punishment and measures (section 11(1) No 8) shall be excluded on expiry of the limitation period. Section 76a(2) 1st sentence No 1 remains unaffected.
- (2) Felonies under section 211 (murder under specific aggravating circumstances) are not subject to the statute of limitations.
- (3) To the extent that prosecution is subject to the statute of limitations, the limitation period shall be
  1. thirty years in the case of offences punishable by imprisonment for life;
  2. twenty years in the case of offences punishable by a maximum term of imprisonment of more than ten years;
  3. ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years;
  4. five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years;
  5. three years in the case of other offences.
- (4) The period shall conform to the penalty provided for in the law defining the elements of the offence, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or of aggravated or privileged offences in the Special Part.

##### **Section 78a Commencement**

The limitation period shall commence to run as soon as the offence is completed. If a result constituting an element of the offence occurs later, the limitation period shall commence to run from that time.

##### **Section 78b Stay of limitation**

- (1) The limitation period shall be stayed

1. until the victim of an offence under sections 174 to 174c, 176 to 179, 225 and 226a has reached the age of twenty-one,
  2. as long as the prosecution may, according to the law, not be commenced or continued; this shall not apply if the act may not be prosecuted only because of the absence of a request or authorisation to prosecute or a request to prosecute by a foreign state.
- (2) If a prosecution is not feasible because the offender is a member of the Federal Parliament or a legislative body of a state, the stay of the limitation period shall only commence upon expiry of the day on which
1. the public prosecutor or a public authority or a police officer acquires knowledge of the offence and the identity of the offender; or
  2. a criminal complaint or a request to prosecute is filed against the offender (section 158 of the Code of Criminal Procedure).
- (3) If a judgment has been delivered in the proceedings at first instance before the expiry of the limitation period, the limitation period shall not expire before the time the proceedings have been finally concluded.
- (4) If the Special Part provides for a sentence of imprisonment of more than five years in aggravated cases and if the trial proceedings have been instituted in the District Court, the statute of limitations shall be stayed in cases under section 78 (3) No 4 from the admission of the indictment by the trial court, but no longer than for five years; subsection (3) above remains unaffected.
- (5) If the offender resides in a country abroad and if the competent authority makes a formal request for extradition to that state, the limitation period is stayed from the time the request is served on the foreign state,
1. until the surrender of the offender to the German authorities,
  2. until the offender otherwise leaves the territory of the foreign state,
  3. until the denial of the request by the foreign state is served on the German authorities or
  4. until the withdrawal of the request.

If the date of the service of the request upon the foreign state cannot be ascertained, the request shall be deemed to have been served one month after having been sent to the foreign state unless the requesting authority acquires knowledge of the fact that the request was in fact not served on the foreign state or only later. The 1st sentence of this subsection shall not apply to requests for surrender for which, in the requested state, a limitation period similar to section 83c of the Law on International Assistance in Criminal Matters exists, either based on the Framework Decision of the Council of 13 June 2002 on the European Arrest Warrant and the surrender agreements between the member states (OJ L 190, 18.7.2002, p 1), or based on an international treaty.

### **Section 78c Interruption**

- (1) The limitation period shall be interrupted by
1. the first interrogation of the accused, notice that investigations have been initiated against him, or the order for such an interrogation or notice thereof;
  2. any judicial interrogation of the accused or the order for that purpose;
  3. any commissioning of an expert by the judge or public prosecutor if the accused has previously been interrogated or has been given notice of the initiation of investigations;
  4. any judicial seizure or search warrant and judicial decisions upholding them;
  5. an arrest warrant, a provisional detention order, an order to be brought before a judge for interrogation and judicial decisions upholding them;
  6. the preferment of a public indictment;
  7. the admission of the indictment by the trial court;
  8. any setting of a trial date;
  9. a summary judgment order or another decision equivalent to a judgment;
  10. the provisional judicial dismissal of the proceedings due to the absence of the indicted accused as well as any order of the judge or public prosecutor issued after such a dismissal of the proceedings or in proceedings in absentia in order to ascertain the whereabouts of the indicted accused or to secure evidence;
  11. the provisional judicial dismissal of the proceedings due to the unfitness to plead of the indicted and any order of the judge or public prosecutor issued after such a dismissal of the proceedings for the purposes of reviewing the fitness of the indicted accused to plead; or
  12. any judicial request to undertake an investigative act abroad.

In separate proceedings for measures of rehabilitation and incapacitation and in an independent proceeding for deprivation or confiscation, the limitation period shall be interrupted by acts in these proceedings corresponding to those in the 1st sentence of this subsection.

- (2) The limitation period shall be interrupted by a written order or decision at the time at which the order or decision is signed. If the document is not immediately processed after signing the time it is actually submitted for processing shall be dispositive.
- (3) After each interruption the limitation period shall commence to run anew. The prosecution shall be barred by limitation once twice the statutory limitation period has elapsed since the time indicated in section 78a, or three years if the limitation period is shorter than three years. Section 78b shall remain unaffected.
- (4) The interruption shall have effect only for the person in relation to whom the interrupting act is done.
- (5) If a law which applies at the time the offence is completed is amended before a decision and the limitation period is thereby shortened, acts leading to an interruption which have been undertaken before the entry into force of the new law shall retain their effect, notwithstanding that at the time of the interruption the prosecution would have been barred by the statute of limitations under the amended law.

## **II. Bribery in the Private Sector**

### **Section 299 Taking and Offering a Bribe in Business Transactions**

- (5) Whoever, as an employee or agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving an unfair preference to another in the competitive purchase of goods or commercial services, shall be punished by imprisonment for not more than three years or a fine.
- (2) Whoever, for competitive purposes, offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employee or agent giving him or another an unfair preference in the purchase of goods or commercial services, shall be similarly punished.
- (3) Paragraphs (1) and (2) shall also apply to acts performed in foreign competition.

### **Section 300**

#### **Aggravated cases of taking and giving bribes in commercial practice**

In especially serious cases an offender under section 299 shall be liable to imprisonment from three months to five years. An especially serious case typically occurs if

1. the offence relates to a major benefit or
2. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

### **Section 301 Request to prosecute**

- (1) The offence of taking and giving bribes in commercial practice under section 299 may only be prosecuted upon request unless the prosecuting authority considers *proprio motu* that prosecution is required because of special public interest.
- (2) The right to file the request under subsection (1) above belongs, in addition to the victim, to all of the business persons, associations and chambers indicated in section 8(3) Nos 1, 2, and 4 of the Restrictive Practices Act.

## **III. Bribery of Public Officials**

### **Section 331 Acceptance of a benefit**

- (1) A public official or a person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of an official duty shall be liable to imprisonment not exceeding three years or a fine.
- (2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to imprisonment not exceeding five years or a fine. The attempt shall be punishable.
- (3) The offence shall not be punishable under subsection (1) above if the offender allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorises the acceptance or the offender promptly makes a report to it and it authorises the acceptance.

**Section 332 Taking a bribe**

- (1) A public official or person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from six months to five years. In less serious cases the penalty shall be imprisonment not exceeding three years or a fine. The attempt shall be punishable.
- (2) A judge or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform a judicial act and thereby violated or will violate his judicial duties shall be liable to imprisonment from one to ten years. In less serious cases the penalty shall be imprisonment from six months to five years.
- (3) If the offender demands, allows himself to be promised or accepts a benefit in return for a future act, subsections (1) and (2) above shall apply even if he has merely indicated to the other his willingness to
  1. violate his duties by the act; or
  2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

**Section 333 Granting a benefit**

- (1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier in the Armed Forces for that person or a third person for the discharge of a duty shall be liable to imprisonment not exceeding three years or a fine.
- (2) Whosoever offers promises or grants a benefit to a judge or an arbitrator for that person or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to imprisonment not exceeding five years or a fine.
- (3) The offence shall not be punishable under subsection (1) above if the competent public authority, within the scope of its powers, either previously authorises the acceptance of the benefit by the recipient or authorises it upon prompt report by the recipient.

**Section 334 Offering a bribe**

- (1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier of the Armed Forces for that person or a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from three months to five years. In less serious cases the penalty shall be imprisonment not exceeding two years or a fine.
- (2) Whosoever offers, promises or grants a benefit to a judge or an arbitrator for that person or a third person, in return for the fact that he
  1. performed a judicial act and thereby violated his judicial duties; or
  2. will in the future perform a judicial act and will thereby violate his judicial duties,shall be liable in cases under No 1 above to imprisonment from three months to five years, in cases under No 2 above to imprisonment from six months to five years. The attempt shall be punishable.
- (3) If the offender offers, promises or grants the benefit in return for a future act, then subsections (1) and (2) above shall apply even if he merely attempts to induce the other to
  1. violate his duties by the act; or
  2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

**Section 335 Especially serious cases**

- (1) In especially serious cases
  1. of an offence under
    - (a) Section 332(1) 1st sentence, also in conjunction with (3); and
    - (b) Section 334(1) 1st sentence and (2), each also in conjunction with (3),the penalty shall be imprisonment from one to ten years and
  2. of an offence under section 332(2), also in conjunction with (3), the penalty shall be imprisonment of not less than two years.
- (2) An especially serious case within the meaning of subsection (1) above typically occurs when
  1. the offence relates to a major benefit;
  2. the offender continuously accepts benefits demanded in return for the fact that he will perform an official act in the future; or



3. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

### **Section 336 Omission of an official act**

The omission to act shall be equivalent to the performance of an official act or a judicial act within the meaning of sections 331 to 335.

## **B. Act on Combating International Bribery (“IntBestG”)**

### **Article 2: Implementing Provisions**

Section 1 Equal treatment of foreign and domestic public officials in the event of acts of bribery

For the purpose of applying section 334 of the Criminal Code, also in conjunction with sections 335, 336 and 338 paragraph 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an improper advantage in international business transactions, the following shall be treated as equal:

1. to a judge:
  - a) a judge of a foreign state,
  - b) a judge at an international court;
2. to any other public official:
  - a) a public official of a foreign state,
  - b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state,
  - c) a public official and another member of the staff of an international organisation and a person entrusted with carrying out its functions;
3. to a soldier in the Federal Armed Forces (Bundeswehr):
  - a) a soldier of a foreign state,
  - b) a soldier who is entrusted to exercise functions of an international organisation.”

## **C. Administrative Offences Act (“OWiG”)**

### **Section 30: Fine imposed on legal entities and associations**

- (1) If a person
    1. acting in the capacity of an agency authorised to represent a legal entity, or as a member of such an agency,
    2. as the board of an association not having legal capacity, or as a member of such a board,
    3. as a partner of a commercial partnership authorised to representation, or
    4. as the fully authorised representative or in a leading position as a procura holder, or as general agent of a legal entity or of an association as specified in Nos. 2 or 3 has committed a criminal or administrative offence by means of which duties incumbent upon the legal entity or the association have been violated, or the legal entity or the association has gained or was supposed to gain a profit, a fine may be imposed on the latter.
  - (2) The fine shall be
    1. up to ten Million Euro in cases of a willfully committed offence;
    2. up to five Million Euro in cases of a negligently committed offence.
- (...“

## **D. Criminal procedure code (“StPO”)**

### **Section 100a**

#### **[Conditions Regarding Interception of Telecommunications]**

- (1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if
  1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an

- offence by committing a criminal offence; and
  - 2. the offence is one of particular gravity in the individual case as well; and
  - 3. other means of establishing the facts or determining the accused's whereabouts would be much more difficult or offer no prospect of success.
- (2) Serious criminal offences for the purposes of subsection (1), number 1, shall be:
- 1. pursuant to the Criminal Code:
    - a) (…)
    - r) crimes against competition pursuant to section 298 and, subject to the conditions set out in section 300, second sentence, pursuant to section 299;
    - (…)
    - t) taking and offering a bribe pursuant to sections 332 and 334;
- (3) Such order may be made only against the accused or against persons in respect of whom it may be assumed, on the basis of certain facts, that they are receiving or transmitting messages intended for, or transmitted by, the accused, or that the accused is using their telephone connection.
- (4) If there are factual indications for assuming that only information concerning the core area of the private conduct of life would be acquired through a measure pursuant to subsection (1), the measure shall be inadmissible. Information concerning the core area of the private conduct of life which is acquired during a measure pursuant to subsection (1) shall not be used. Any records thereof shall be deleted without delay. The fact that they were obtained and deleted shall be documented.

**Section 100b**

**[Order to Intercept Telecommunications]**

- (1) Measures pursuant to Section 100a may be ordered by the court only upon application by the public prosecution office. In exigent circumstances, the public prosecution office may also issue an order. An order issued by the public prosecution office shall become ineffective if it is not confirmed by the court within three working days. The order shall be limited to a maximum duration of three months. An extension by not more than three months each time shall be admissible if the conditions for the order continue to exist, taking into account the information acquired during the investigation.
- (…)

**Section 102**

**[Search in Respect of the Suspect]**

A body search, a search of the property and of the private and other premises of a person who, as a perpetrator or as an inciter or accessory before the fact, is suspected of committing a criminal offence, or is suspected of accessoryship after the fact or of obstruction of justice or of handling stolen goods, may be made for the purpose of his apprehension, as well as in cases where it may be presumed that the search will lead to the discovery of evidence.

**Section 103**

**[Searches in Respect of Other Persons]**

- (1) Searches in respect of other persons shall be admissible only for the purpose of apprehending the accused or to follow up the traces of a criminal offence or to seize certain objects, and only if certain facts support the conclusion that the person, trace, or object sought is located on the premises to be searched. For the purposes of apprehending an accused who is strongly suspected of having committed a criminal offence pursuant to section 89a of the Criminal Code or pursuant to section 129a, also in conjunction with section 129b subsection (1), of the Criminal Code, or one of the criminal offences designated in this provision, a search of private and other premises shall also be admissible if they are located in a building in which it may be assumed, on the basis of certain facts, that the accused is located.
- (2) The restrictions of subsection (1), first sentence, shall not apply to premises where the accused was apprehended or which he entered during the pursuit.

**Section 105**

**[Search Order; Execution]**

- (1) Searches may be ordered only by the judge and, in exigent circumstances, also by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act). Searches pursuant to Section 103 subsection (1), second sentence, shall be ordered by the judge; in exigent circumstances the public prosecution office shall be authorized to order such searches.

161ST INTERNATIONAL TRAINING COURSE  
VISITING EXPERT'S PAPER

- (2) Where private premises, business premises, or enclosed property are to be searched in the absence of the judge or the public prosecutor, a municipal official or two members of the community in the district of which the search is carried out shall be called in, if possible, to assist. The persons called in as members of the community may not be police officers or officials assisting the public prosecution office.
- (3) If it is necessary to carry out a search in an official building or in an installation or establishment of the Federal Armed Forces which is not open to the general public, the superior official agency of the Federal Armed Forces shall be requested to carry out such search. The requesting agency shall be entitled to participate. No such request shall be necessary if the search is to be carried out on premises which are inhabited exclusively by persons other than members of the Federal Armed Forces.

## **Section 112**

### **[Admissibility of Remand Detention; Grounds for Arrest]**

- (1) Remand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest. It may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed.
- (2) A ground for arrest shall exist if, on the basis of certain facts,
  1. it is established that the accused has fled or is hiding;
  2. considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight); or
  3. the accused's conduct gives rise to the strong suspicion that he will
    - a) destroy, alter, remove, suppress, or falsify evidence,
    - b) improperly influence the co-accused, witnesses, or experts, or
    - c) cause others to do so,and if, therefore, the danger exists that establishment of the truth will be made more difficult (risk of tampering with evidence).

(6) Remand detention may also be ordered against an accused strongly suspected pursuant to section 308 subsections (1) to (3) of the Criminal Code, of having committed a criminal offence pursuant to section 6 subsection (1), number 1, of the Code of Crimes against International Law or section 129a subsections (1) or (2), also in conjunction with section 129b subsection (1), or pursuant to sections 211, 212, 226, 306b or 306c of the Criminal Code, or insofar as life and limb of another have been endangered by the offence, even if there are no grounds for arrest pursuant to subsection (2).

## **Section 257c**

### **[Negotiated Agreement]**

- (1) In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. Section 244 subsection (2) shall remain unaffected.
- (2) The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.
- (3) The court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal.
- (4) The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. The defendant's confession may not be used in such cases. The court shall notify any deviation without delay.
- (5) The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4).

## **ACT ON INTERNATIONAL COOPERATION IN CRIMINAL MATTERS**

### **European arrest warrant:**

#### **Section 83a**

##### **Extradition Documents**

- (1) Extradition shall not be admissible unless the documentation mentioned in s. 10 or a European arrest warrant containing the following information have been transmitted:
1. the identity of the person sought as defined in the Annex to the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, and his citizenship,
  2. name and address of the requesting justice authority,
  3. the declaration of whether an enforceable judgment, an arrest warrant or another enforceable judicial decision with equal legal effect exists,
  4. the nature and legal characterisation of the offence, including the provisions applied,
  5. a description of the circumstances in which the offence was committed, including the time and place of its commission and the mode of participation by the person sought and
  6. the maximum term provided for under the law of the requesting Member State for the pertinent offence or in the case of a final judgment the actual sentence imposed.
- (2) Listings for arrest for the purposes of extradition under the Schengen Agreement containing the information under subsection (1) nos. 1 to 6 above or to which this information has subsequently been attached shall be treated as an European arrest warrant.

#### **Section 83b**

##### **Obstacles to Granting an Application**

- (1) Extradition may be refused
- a) if criminal proceedings are pending against the person sought in Germany for the same offence as the one on which the request is based,
  - b) if criminal proceedings against the person sought for the same offence as the one on which the request is based, have either not been instituted or if initiated have been closed,
  - c) if a request for extradition by a third State shall be given precedence,
  - d) unless on the basis of the duty to surrender under the Council Framework Decision of 13 June 2002 (OJ L 190/1) on the European Arrest Warrant and the surrender procedures between the Member States, on the basis of an assurance by the requesting State or based on other reasons it can be expected that the requesting State would honour a similar German request.
- (2) Extradition of a foreign citizen normally living on German territory may further be refused
- a) if in the case of an extradition for the purpose of prosecution the extradition of a German citizen would be inadmissible under s. 80(1) and (2),
  - b) if in the case of an extradition for the purpose of enforcement, after being judicially warned, the person sought does not consent on the record of the court and his interest in an enforcement in Germany prevails; s. 41(3) and (4) shall apply mutatis mutandis.
- S. 80(4) shall apply mutatis mutandis.