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Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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National Report of Germany

Dr. Alexander Von Saucken

Roxin Rechtsanwalte LLP
Brienner Stasse 9 / Amiraplatz
D - 80333 Munchen
+49 89/ 244 43 86 00

saucken@roxin.de

General Reporters:

Lina MROUEH-LEFEVRE Gutkès Avocats 40 rue Vignon – F- Paris, 75009 FRANCE	Aaron STEPHENS Berwin Leighton Paisner LLP Adelaide House London Bridge London EC4R 9HA UNITED KINGDOM

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1. The Legal Framework

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

a. a brief summary of the offences;

Criminal: The offences can be found in the German Criminal Code (Strafgesetzbuch, StGB). The main focus lies on ss 266, 299 and 331 ff.

The actus reus of **section 266 [Embezzlement and abuse of trust]** is split into two. The first actus reus is defined as an agent's *misuse* of power which has been granted either by statute, holding a public office (or being tasked by one such holder) or through a contract to act on behalf of a principal in pecuniary matters. The second concerns itself with *breaching* the same agent's obligations as above (with the addition of trust-like constructions). The latter alternative is broader than the former and does not limit itself to formal appearances. A factual degree of influence over someone's pecuniary interests suffices as long as it is somewhat elevated over what can be seen as common obligations (e.g. the obligation to pay damages when damaging someone's property while carrying out a contract for him). In both cases the principal has to suffer a financial loss, although this term has been extended to include scenarios where a threat to the asset has materialised to such an extent that it is only a matter of chance whether or not the loss is actually suffered.

Section 299 [Accepting and offering bribes in commercial practice] penalises private corrupt practices for both the active and passive party. The actus reus in paragraph (1) criminalises the act of demanding, having another promise or accepting a (personal) gain in exchange for giving the other party undue preference within a competition situation. (2) is the mirror image for the active part. A reform will likely change the model of a competition-centric view to a system that will work akin to the system s. 266 puts in place (principal model, "Geschäftsherrenmodell").

Sections 331 ff. [Accepting and offering bribes in violation of official duties]concerns the subject of public corrupt practices. Section 331 lays down the basic offence on the passive part of requesting, agreeing to receive or accepting a (personal) gain as a public servant (or while being tasked by one) in exchange for acts/omissions while exercising the function as public offical. Paragraph (3) sanctions the official's concudct should the public body agree to the acceptance of the financial gain either ex ante or ex post.

Section 332 qualifies s. 331 if the holder of the public office did so knowing that his conduct would breach his official duties. Likewise, s. 333 mirrors s. 331 for the active party (offering, promising or giving) while s. 334, again, qualifies the former in the same way.

Civil: Most notably a recent judgment of the highest federal court in civil matters (Bundesgerichtshof, BGH) dated August 1st, 2013 – VII ZR 6/13 stated that tax fraud by means of black market labour agreements renders the underlying "contract" null and void, ss. 134, 138 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). Similarly, the payment of illegally rendered services can also amount to embezzlement / abuse of trust, BGH 10th October, 2012 – 2 StR 591/11. Finally, it has been held that contracts influenced by the payment of bribes may be null and void, if the principal does not authorize the contract.

Administrative: Two sections, 30 and 130 of the Administrative Offences Act (Ordnungswidrigkeitengesetz, OWiG), are setting the tone in this area. A decisive distiction and point of criticism has been the fact that where offences of the Criminal Code are concerned the prosecution authorities are under a legal duty to investigate and charge the culprit (for when sufficient evidence has been uncovered), whereas in the Administrative Offences Act the investigation and charging lies at the authority's discretion.

Section 30 holds the corporate enitity itself liable for violations of either the Criminal Code or other offences comprised in the Administrative Offences Act perpetrated by company officers.

Section 130 tasks company officers with a duty to supervise regular employees. Should the latter commit a crime or administrative offence and the officers have failed to duly supervise, they themselves are liable for undue supervision. At the same time a violation of the duty to supervise is a violation of the Administrative Offences Act, meaning that s. 30 applies in these cases as well.

b. any affirmative defences that are available

No, there are not. "Adequate procedures" as introduced in the UK Bribery Act 2010 or "facilitation payments" as mentioned in the FCPA *can* be considered a ground of justification to the effect that the act, although qualifying as criminal under the statutory law, will be legal.

c. the penalties that may be imposed upon offenders.

Criminal: Sections 299, 331 and 333 allow for up to three years prison and/or a fine (determined by the culprit's annual income). Sections 332, 334 and 266 go up to five years prison.

For all applicable criminal cases ss. 73 ff. allow for the confiscation of proceeds and ss. 74 ff. regulate the deprivation of assets used for committing the crime.

Civil: If sections 134 or 138 are applicable, the contract is null and void. No claims, neither for specific performance nor for damages / warranty, can brought against either party. "Equity" (s. 242 of the Civil Code) does not provide for any "out" either.

Administrative/Regulatory: For sections 30 the fines may go up to EUR 10,000,000; the maximum that can be issued under s. 130 is EUR 1,000,000.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Yes, both forms are outlawed. Section 299 penalises private bribery. This is achieved by aiming towards protecting free market competition. Some authors also voice alternative concerns / readings of the section, such as the pecuniary interests of competitors or those of the offender's employer / owner.

Sections 331 through 334, by contrast, demands that one party is acting in its official capacity. Abstract concepts, such as free market competition, are irrelevant for this purpose.

Most notably perhaps the system of the two offences means that payments issued in order to cultivate or facilitate business are criminal if one party is a public official, whereas they are not under s. 299.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

S. 299 (3) extends the reach of the section to foreign dominon. Paragraph 3 was introduced in 2002 after there had been a controversy as to whether the section did extend so much as to protect foreign competition and if that was a sensible goal at all.

The sections of the OECD Convention on Combating Birbery of Foreign Public Officials in International Business Transactions as well as the Convention on the protection of the European Communities' financial interests are applied by the prosecution pursuant to IntBestG (German law on international corruption) and EU-BestG (German law on corruption within the EU).. A new draft s. 355a StGB plans to have both laws carried over into the core German Criminal Law.

A lack of jurisdiction on part of the German authorities is a trial prerequisite that is duly checked by the court and thus does not give rise to a defence. If the court finds that it does not have jurisdiction it has to end the trial.

Aside from those special provisions, the ss. 3 – 9 StGB provide for general statutory law for extraterritoriality.

1.4 Are there any "safe harbours" or exemptions in relation to transactions that might otherwise be regarded as bribes, such as "facilitation payments", which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

With regard to private corrupt practices, the decisive criterion in s. 299 has been an implicit distortion of the market (by discarding the briber's competition), although this has never really provided for a solid defence. As for public bribery only such payments are exempted which do not cross the banality threshold (~ EUR 10) or those, as provided by the statute in section 331 (3), which are either accepted by the official's superior prior to receiving them or if the receiving official reports them without undue delay and they get accepted then. As mentioned under 1.1 b., above, cases of facilitation payments warrant no exception under the current law.

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

The supervisory aspect (with the exception of stock exchanges, which are under state supervision) is handled by BaFin (Federal Financial Supervisory Authority, Bundesanstalt für Finanzdienstleistungsaufsicht). For some aspects the powers of scrutiny and administration *also* lie with the Bundesbank (~ Bank of England, FED).

The central statute is the KWG (Kreditwesengesetz, Banking Act): In there, ss. 54 – 55b form crimininal law, s. 56 comprehensively lists the administrative sanctions (including European Regulations, art. 288 TFEU). The former fall to the prosecution authorities, the latter are applied (and publicly reported, s. 60b) by the BaFin.

The administrative sanctions are systematically (but not expressly or visually) subdivided into four categories: i) formation, ii) capital maintenance, iii) operational management, iv) operability of banking supervision. The distinction is important, since only violation within category ii) *can* simultaneously infringe s. 266 StGB or other criminal laws. The topic of bribery & corruption is thus not expressly adressed in the regulations, however, the findings of BaFin can naturally be used by the prosecution and thus count towards facilitating prosecuting those crimes. In addition, s. 33 of the Securities Trading Act is the only statutory provision that expressly demands that a compliance program be implemented in firms working in this sector.

A brief selection of offences:

- A criminal act would lie in operating an unauthorised banking service, contrary to s. 54 (1) ss. 1 and 2; while administrative sanctions can be found in ss. 32 (2), 36, 56 (1), (2) No. 1 – 4, (3) No. 1.
- s. 55 (1) and (2) stipulate the intentional and negligent omittal to disclose illiquidity or bankruptcy to incur criminal liability. Administrative sanctions, s 56 (2) No. 4, are incurred by holding equity capital as set out in s. 10 or the omittal to disclose a loss of equity capital of (more than) 25%.
- This category only knows administrative sanctions, for example in s. 56 (2) No. 5 for failing to disclose complete, correct accounting reports – the same applies to late and incomplete submissions-
- Criminal is, according to s. 55a, the use of disclosed details about loans exceeding the 1-million frontier that have been received pursuant to s. 14 (2); the Bundesbank can disclose its information about the credit worthiness of the debtee. Those loans have to be disclosed, ss. 14 and 22. Non-compliance incurs an administrative sanction, s. 56 (2) No. 4.

2. Corporate Criminal Liability

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

Not in the strict sense of the phrase. The Administratice Sanctions Act (OWiG) in ss. 30, 130 does allow for a company to be fined up to EUR 10,000,000.00. It has, however, been pointed out that other countries do not follow the strict separation of Criminal Law and Administrative Sanction Law that is in place in Germany.

2.2 If the answer to 2.1 above is "yes", please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

n/a

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

There currently is a lot of discussion about a draft of a Corporate Criminal Code which has had a preliminiary reading the the "Upper" Chamber of the federal parliament. Its predecessor in 1998 did not make it through this stage in the process and the draft hasn't been formally introduced to parliament. There have also been counter proposal by some interest groups (they

aim at incentivising compliance programs more prominently). Since September 2013, the status of the draft has not changed, as the discussion both on the political frontier and within the academic community is still on-going.

The draft envisages two offences in s. 2: One, for when a decision maker [as defined in s. 1], while tending to a corporate matter, commits a violation in relation to the corporation with intent or through his negligence, the corporation will incur a sanction. Two, for when an act of s. 2(1) has been perpetrated and a decision maker has omitted, either with intent or through negligence, to implement reasonable supervisory steps, of a technical, organisational or HR nature, which would have prevented or significantly hindered said act. In doing so, the draft follows the Second Protocol to the Convention on the protection of the European Community's financial interests from 1997.

3. Mutual Legal Assistance / Co-operation

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

German authorities do work together with INTERPOL, EUROJUST and EUROPOL on these matters.

Aside from that Germany ratified several treaties on such forms of cooperation the European Union has negotiated with other countries.

In cooperation with other countries the Act on International Cooperation in Criminal Matters (IRG, Internationales Rechtshilfegesetz) has been established to formalise and standardise the issues with the exchange of official documentation with foreign prosecution.

3.2 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

Most notably and recently perhaps, and especially on the topic of subsidy fraud the German prosecution authorities will initiate the EPPO (European Public Prosecutor's Office) project along with ten other European Union Members. In this regard at least one national prosecutor will be the new European office's liaison and coordinate for the European office.

The European Prosecutor is designed to be an independent body from the Commission or Council. The office will not have it's own Criminal Proceedings Act, but instead, *all* European

statues (of the participating countries at least) will be amalgamated into one. Individual complaints will be governed by the laws of the country in which the prosecution will have acted.

The reason stems from the background that it is estimated that subsidy fraud is draining the European yearly budget for more than one billion Euros every year.

4. Cases

4.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

a. your jurisdiction's law(s) were enforced on an extra-territorial basis;

Rheinmetall: Most recently the company has been investigated for corrupt practices in the course of bids for publicly funded modernisation of the Greek Naval Forces. The company is reported to have accepted a fine of the prosecution in the city of Bremen in the amount of EUR 30,000,000 for allegedly having funneled bribes through a Greek intermediary to public officials. The reports further indicate that the parallel investigations into similar practices for the purchase of modern tanks have been discontinued.

b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or

Siemens: The most prominent example is the Siemens also the Siemens case, see below.

c. penalities were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

Siemens: The defendant t held the position of a so-called sub-CEO for the department of "Power Generation", meaning he reported directly to the board of directors. He was responsible for the management of the department (encompassing corporate control, HR and business aspects). Furthermore, for internal matters he possessed the power of proxy to order payments for any amount on his sole command. In addition, he was entrusted with the compliance program which forbade private corruptive practices even below the threshold of the criminally actionable. Neverthreless, and with knowledge of the central dicrectors, a coordinated system had been put into place to distribute bribes ("useful expenses") via a complex system of Liechtenstein companies and accounts. The funds were formed of leftovers of previous official projects and had subsequently not found their way back into the regular company accounts. Further details came to light during discovery with the focal point of the case at hand being on payments in the course of business with an Itialian electricty provider. In the end the case provided landmark

guidance towards the reading of statutory provisions for international bribery and criminal offences, especially section 266. In Germany the prosecution fined the company EUR 395 million (250 fine, s. 30 Adminstrative Offences Act combined with the confiscation of profits (forfeiture) in the amount of EUR 394,750,000). In the US the DOJ fined Siemens USD 450 million (§ 3553 (b) (1) 18. USC allowed for the recognition of mitigating circumstances which lowered the fine from the origianl bandwidth of USD 1,35 to 2,7 billion) in addition to the SEC confiscationg profits in the amount of USD 350 million. Previously the US company Baker Hughes had had to pay the highest fine, USD 44 million – having made Siemens the highest fine up to this point and one of the highest fines in the history of the FCPA. The total cost of the scandal for Siemens is rumoured to have amounted to ca. EUR 3,5 billion. It has been reported (and criticised) that the German prosecution purposefully demanded less than it could have because the US sanctions were expected to be very harsh.

These cases will be discussed in greater detail during the workshop in London.