

Global Litigator

GERMANY'S INCREASINGLY ROBUST ANTICORRUPTION EFFORTS

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Germany has assumed a “leading position” in the investigation and prosecution of foreign bribery cases, according to a March 2011 report by the Organisation for Economic Co-operation and Development’s (OECD’s) Working Group on Bribery. “Germany’s enforcement has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in foreign bribery-related cases against individuals,” the OECD stated. Similarly, Transparency International rates Germany as having “active enforcement” of the OECD’s Anti-Bribery Convention.

Indeed, in recent years, Germany has been second only to the United States in the number of foreign bribery cases being tried, and third to the United States and United Kingdom in cases charged. Accordingly, companies doing business in Germany or with German companies are well advised to make themselves familiar with Germany’s anticorruption laws.

Unsurprisingly, corruption is a criminal offense in Germany. German public officials may not accept gifts or rewards.

Germany, in fact, has enacted numerous laws and international treaties to combat active and passive bribery. (Generally, “active bribery” refers to offering or paying a bribe, while “passive bribery” refers to receiving a bribe.) In contrast to the United States’ Foreign Corrupt Practices Act (FCPA), which does not outlaw the receipt of a bribe, German law specifies that accepting or granting an advantage and offering or receiving a bribe are all punishable.

The German Criminal Code

As a matter of substantive reach, the German Criminal Code, much like the broad UK Bribery Act of 2010, prohibits active and passive bribery involving German public officials; bribery of German parliamentarians; and, most relevant here, both active and passive bribery in domestic or international business transactions. In terms of jurisdiction, German criminal law generally applies to offenses committed in Germany,

offenses committed abroad against a German, and offenses committed abroad by a German individual.

Jurisdiction does not, however, extend to companies or other “legal entities.” Germany, in fact, has rejected wholesale the notion (or, from the German perspective, “fiction”) of corporate criminal liability. In Germany, unlike in the United States, only individuals can be subject to criminal prosecutions.

Although companies cannot be criminally prosecuted under German law, a company can be held liable under Germany’s Administrative Offenses Act (OWiG) for an act of corruption committed by a person with managerial responsibility for the company if, as a result of the offense, duties of the company were violated or the company was enriched or intended to be enriched. A company may also be held liable for failure to take reasonable supervisory measures to prevent bribery by its employees. Generally, a company’s responsibility exists independently of whether or not an individual person is held criminally liable. Companies can be fined up to €1 million, but stand to lose much more through confiscation or disgorgement of any economic advantage gained through the bribes.

The European Union Anti-Corruption Act (EUBestG), which Germany enacted in 1998, implemented two EU anti-corruption provisions: the First Protocol to the Convention on the Protection of the European Communities’ Financial Interests, and the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union. Also in 1998, Germany passed the Act on Combating International Bribery (IntBestG), which implemented the OECD’s Anti-Bribery Convention, formally called the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.



Taken together, the EUBestG and IntBestG, as well as more recent amendments to the German Criminal Code, greatly expanded Germany's anticorruption focus. Prior to the EUBestG and IntBestG, only bribery of domestic public officials and parliamentarians was punishable under German law. The EUBestG extended the offenses of active and passive bribery to public officials and judges of the European Communities and EU member states. It deals with both active and passive bribery, but it is limited to the territory of the European Union. Meanwhile, the goal of the IntBestG was to prohibit equally the bribing of domestic and foreign public officials and parliamentarians.

Under the IntBestG, bribery of foreign public officials, judges, and soldiers, including public officials who work for international organizations (for example, the United Nations or the European Community), is punishable if

made for the purpose of obtaining business or an improper advantage in international business transactions. Unlike the EUBestG, the IntBestG applies to all international business relations and is not geographically limited to the European Union. The IntBestG, however, prohibits only active bribery in connection with international business transactions. The IntBestG also includes a separate offense for the bribery of foreign members of parliament and members of parliamentary assemblies of international organizations.

In addition, the German Criminal Code was amended in 2002 to extend the prohibition of active and passive bribery involving domestic public officials or judges and officials of the International Criminal Court, and to expand the criminal offense of bribery in business transactions to apply to bribery affecting international business transactions. Under German law, such acts of domestic or foreign bribery can be punished with

substantial fines or up to 5 years of imprisonment, or up to 10 years for especially serious cases.

Recent Enforcement Efforts

The OECD's 2011 report heaped effusive praise on Germany's recent efforts to investigate and prosecute corruption. Those enforcement efforts have, indeed, been impressive.

For example, between 2005 and 2010, some 69 individuals were sanctioned for corruption-related offenses, including 30 who were first tried criminally (for better or worse, a record-setting total). As the OECD noted, "Increased enforcement against natural persons was enabled by Germany's pragmatic approach to prosecute and sanction foreign bribery with a range of criminal offense other than the foreign bribery offense." Of the 30 individuals who were criminally convicted, only 10 were convicted of bribery of foreign officials, while the others were convicted of commercial bribery or breach of trust.

Since 2007, six companies have been found liable under German law for corruption-related offenses. Each of these cases resulted in punitive fines and the disgorgement of ill-gotten gains. Most notable was Germany's case against Siemens, which resulted in two decisions that fined the industrial conglomerate almost €600 million (\$1.6 billion total, including U.S. enforcement efforts, mentioned below) for making bribes around the world to secure huge public-works contracts.

The OECD praised Germany's enforcement action against Siemens, calling it a "striking example" of how to prosecute a case based on "breach of trust" rather than outright bribery. (Individual defendants were convicted of breach of trust for establishing slush funds to be used for the bribes, while Siemens was found administratively liable for the bribery offenses.) Siemens also paid approximately \$800

Illustration by Lisa Haney

million in fines to the U.S. Department of Justice and the Securities and Exchange Commission to settle U.S. charges for the same misconduct.

In another prominent German case, the German truck maker MAN was fined €150 million for failing to prevent bribery. MAN paid bribes to win contracts, including bribes to foreign government officials in at least two cases. The actions were carried out with either the knowledge or participation of MAN's chief executive officer. The fine was explicitly set at a level to recoup the pretax profit gained from the tainted transactions.

The report also complimented Germany's use of non-prosecution agreements to obtain monetary settlements from individuals and tax audits to force cooperation from businesses. The OECD did, however, recommend increasing the sanctions imposed on violators, which have tended to be on the lower end of the available range. In addition, some commentators and activists have criticized the fact that Germany has signed but not yet ratified the UN Convention against Corruption.

U.S. Remains Standard Bearer

Although the OECD and others have praised Germany's recent anticorruption efforts, the United States remains the standard bearer for prosecuting corruption-related offenses. For example, in October 2010, the OECD commended the United States for "its visible and high level of support for the fight against the bribery of foreign public officials, including engagement with the private sector, substantial enforcement, and stated commitment by the highest echelons of the Government." U.S. enforcement of anti-bribery laws has increased steadily since 2002 and has resulted in significant prison sentences, monetary penalties, and disgorgement of ill-gotten profits.

The United States continues to lead the world in the number of foreign

bribery cases charged and tried. Vigorous enforcement and record penalties by the Department of Justice, Federal Bureau of Investigation, and Securities and Exchange Commission have resulted in U.S. companies implementing robust compliance programs. The OECD has encouraged the United States to lengthen the statute of limitations for foreign bribery crimes, to increase transparency regarding how and why corruption cases are resolved, and to enhance awareness of the Foreign Corrupt Practices Act's application and defenses among small businesses and the general public.

In addition, since its implementation of the UK Bribery Act, the United Kingdom has emerged as a recognized world leader in the fight against international corruption. The OECD, in fact, recently congratulated the United Kingdom publicly for enacting the Bribery Act, which it characterizes as a major improvement over the prior patchwork of UK bribery laws. The OECD also expressed satisfaction that the Bribery Act adopted several features of the OECD Anti-Bribery Convention. That said, the OECD did criticize specific perceived "shortfalls" in the act. For example, the OECD criticized the United Kingdom's continued reliance on the common-law identification theory for corporate liability and the lack of nationality jurisdiction to prosecute legal entities incorporated in crown dependencies and overseas territories for foreign bribery. The Bribery Act only recently went into effect, however. The OECD and others are eagerly waiting to see how the legislative scheme is enforced in practice.

Advice for U.S. Companies Doing Business in Germany

As with the Foreign Corrupt Practices Act and UK Bribery Act, companies doing business in Germany are well advised to consult with experienced counsel and

to establish a robust, meaningful internal compliance program:

Design and implement sound anticorruption compliance policies and procedures

- Put in place anticorruption policies, including policies covering gifts, charitable giving, and entertainment; international travel; and facilitation payments.
- Draft procedures for vetting and monitoring third-party intermediaries whose conduct may be imputed to the company, including drafting a questionnaire for third-party intermediaries.
- Draft procedures for performing anticorruption due diligence in connection with mergers and acquisitions.
- Assess accounting, controls, and monitoring compliance, and suggest possible areas for improvement.

Designate counsel to answer questions and address issues that arise in the course of business

- Although some questions can be answered in 15 minutes or less, have experienced counsel on call.
- Implement a reporting mechanism for individuals to make confidential reports of suspected violations.
- Emphasize the need to be proactive in investigating and addressing any potential corruption. Encourage employees to contact the designated counsel if they have any suspicions or questions.

The OECD Working Group on Bribery's March 2011 report on Germany can be found at www.oecd.org/dataoecd/5/45/47416623.pdf.

To view a chart summarizing global anti-bribery laws, please visit <http://bit.ly/Ort50E>. ■