Germany: Bribery & Corruption

This country-specific Q&A provides an overview to bribery & corruption laws and regulations that may occur in Germany.

For a full list of jurisdictional Q&As visit here
1. **What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?**

   In German law corruption is not legally defined. German law uses the term bribery and can be generally defined as the abuse of entrusted power for private or political gain. German anti-corruption provisions are included in different legislations such as the Criminal Code (StGB), the Administrative Offences Act (OWiG), the Law on Fighting Corruption (Gesetz zur Bekämpfung von Korruption), the Law on Fighting International Bribery (IntBestG) and the EU Anti Bribery Act (EUBestG).

   In 2015 the new German Law on Fighting Corruption entered into force to meet the international standards on commercial bribery by implementing both European legislation and the Criminal Law Convention of the Council of Europe. The provisions on corruption in business transactions were expanded, as was the criminal liability of active and passive corruption of foreign public officials. The concept of German Criminal Law only provides for the criminal liability of an individual. It does not provide for the criminal responsibility of a corporate entity. Although German Law follows the concept of individual responsibility, the Administrative Offences Act allows the imposition of a fine to the legal entity. In certain cases the owners and management can also be held responsible for not supervising the necessary measures for preventing criminal offences.

2. **Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?**

   The public prosecutors’ offices are responsible for the investigation and prosecution of bribery and corruption. They are regularly supported by the criminal police and tax investigators in tax-related cases.

3. **How is bribery defined?**

   Firstly, the Criminal Code does not define the term bribery. The Criminal Code differentiates between offering and receiving a bribe, both in relation to business transactions (section 299 – 301 of the Criminal Code), officials (section 331 – 336 of the Criminal Code), voters and delegates (sections 108b and 108e of the Criminal Code) and the sports sector (sections 265c and 265d of the Criminal Code). Hence, there is no explicit or uniform definition of bribery in the Criminal Code.

   Bribery of officials and within business transactions are commonplace. When a bribe takes place as part of a business transaction (sections 299 – 301 of the Criminal Code), it requires certain persons to demand a benefit and/or promise an employee or agent of business, a benefit. However, the owner of a corporate entity is excluded from criminal liability. These sections should protect free competition from undue influence.

   Under sections 331 and 332 of the Criminal Code, a criminal offence in relation to receiving...
bribes, requires persons in exposed public positions to demand a benefit for violation of an official duty. The law aims at maintaining public trust and faith in the integrity of public officials. Therefore, sections 333 and 334 of the Criminal Code penalise offering bribes if the offender promises a benefit to persons in exposed public positions for the above mentioned reasons.

Bribery and corruption are often accompanied by other crimes such as fraud, tax evasion, money laundering, embezzlement and abuse of trust.

4. **Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is ‘public official’ defined? Are there different definitions for bribery of a public official and bribery of a private person?**

   German criminal law distinguishes between offering and receiving bribes of public officials (section 331 – 336 of the Criminal Code), of voters and delegates (sections 108b and 108e of the Criminal Code), in relation to the sports sector (sections 265c and 265d of the Criminal Code) as well as offering and receiving bribes in business transactions, which includes the public health sector (section 299 – 301 of the Criminal Code). Furthermore the Criminal Code differentiates between “public officials”, “European officials” and “persons entrusted with special public service functions”. Each term is defined in section 11 of the Criminal Code. According to section 11 No. 2 of the Criminal Code a “public official” is a person who, under German law, is a civil servant or judge, and otherwise carries out public official functions or has otherwise been appointed to serve with a public authority or other agency or has been commissioned to perform public administrative services regardless of the organisational form chosen to fulfil such duties. As shown in the “Ecclestone-case”, it can be controversial on the definition of a “public official”.

   The Criminal Code defines bribery of public officials and bribery in business transactions differently (see question 3).

5. **What are the civil consequences of bribery in your jurisdiction?**

   Under civil law (sections 134, 138 (1) Civil Law Code), contracts proven to be connected with a bribe are null and void, payment of damages or rescission of the contract are possible consequences.

   The aggrieved company may be entitled to claim damages from the perpetrator or the company he/she is acting for, on the basis of a breach of competition law or sections 823, 826 of the Civil Law Code. The company may even sue its own employee for breach of contractual duties, and terminate the contract without notice. However, the corporate entity bribing someone may also be able to hold the perpetrator or management (section 93 (2) Stock Corporation Act and section 43 (2) Limited Liability Companies Act) responsible for the act committed.
According to section 6 (2) No. 3 of the German Construction Contract Procedures (VOB/A, 2016) a company's offer in relation to construction services could be excluded if the company was involved in a serious case of misconduct.

6. **What are the criminal consequences of bribery in your jurisdiction?**

   A person shall be liable to a fine or imprisonment not exceeding three years. In aggravated cases where a person is convicted of bribery offences in business transactions, the accused can face up to five years’ imprisonment.

   Offering or receiving a bribe in relation to a public official, a European official or a person entrusted with special public service functions, may lead to a fine or imprisonment of up to five years. In aggravated cases, it may lead to imprisonment of up to ten years.

   A person convicted of bribing delegates shall be liable to a fine or imprisonment not exceeding five years.

   Sections 30 (1), 130 of the Administrative Offences Act (Ordnungswidrigkeitengesetz), allow the imposition of a fine to a corporate entity, if the owners and management did not take appropriate measures to prevent criminal offences. The maximum fine is EUR 5 or 10 million for each criminal offence, depending on whether it was committed as a result of negligence or intentionally. However, if the company gained a financial advantage related to the criminal offence, the penalty can exceed those amounts without limitation.

7. **Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?**

   The law contains no restrictions on hospitality, travel and entertainment expenses. If case law does not apply, there is no statutory limit. Providing travel and entertainment expenses is not exempt from criminal liability. Notwithstanding this, case law exists which exclude socially adequate contributions from the statutory definition, as long as they are low in value and do not fall into a regular pattern.

   Civil service law is more restrictive and prohibits public officials and servants from accepting any gifts, gratifications or benefits from a third party. In general, federal and state authorities’ own guidelines apply to public officials of the respective federal state. These guidelines contain internal administrative regulations in the public service which usually allow gifts below EUR 10 per donor each year. Hospitality to public officials with a direct connection to their official duties leads to the assumption that the official acts are in accordance with the employer’s consent. In other cases an explicit permission is necessary.

   Attachment 1 section 4 of the Parliamentary Rules of Procedure (GO-BT), together with
section 44b of the Law on the Legal Relations of Members of the German Bundestag (AbgG) cover all types of contributions a Member of Parliament can receive and necessary guidelines regarding them.

Therefore, there are no specific regulations restricting such expenses for foreign public officials.

8. Are political contributions regulated?

In cases of political contributions, sections 331 and 333 of the Criminal Code will apply. According to the Federal Court of Justice (Bundesgerichtshof) political contributions in relation to an election campaign are legal as long as no specific official act in favour of the contributor is promised. Just promising to be willing to officiate in accordance with the contributor’s general economic and political view after the election is not a punishable offence.

Section 31d of the law on political parties (PartG) applies in certain cases regarding the party’s income or contributions it receives.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

Facilitation payments fall within the applicability of the Criminal Code. Therefore, the law contains no exemption from criminal liability for granting or receiving facilitation payments in relation to German or European public officials, German judges or arbitrators, international Criminal Court judges, members of an EU court or members of the German Federal Armed Forces according to sections 331, 333, 335a (2) and (3) of the Criminal Code.

The bribing of a non-European foreign public official is only punishable if the official violates an official duty, in addition to receiving a bribe (sections 332, 334 and 335a (1) of the Criminal Code). Therefore, if an official has not violated his duties, a punishable crime has not been committed.

10. Are there any defences available?

Due to a lack of specific bribery defences in business transactions under German law, the general defences of the Criminal Code, such as self-defence will apply, even though none of them seem really suitable.

A specific defence only exists in case of bribery of public officials or servants with the exception of judges. According to sections 331 (3) and 333 (3) of the Criminal Code the offence shall not be punishable if the perpetrator acts with the consent of the competent public authority, unless the official act constitutes a breach of duty or another illegal act.
11. **Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?**

The existence of compliance programs is neither mandatory nor a defence. However, the existence of a compliance program can have a major impact on the sentencing of an individual person. In specific cases an effective compliance program can also eliminate a representative’s culpability for organisational fault. In addition, it may have a positive effect on the fine a company has to pay for bribery offences committed by their representatives according to sections 30 (1), 130, of the Administrative Offences Act (Ordnungswidrigkeitengesetz). If a fine can be imposed according to section 30, the significance and dimension of the offence has to be taken into account, especially any circumstances that may prove a company’s general criminal attitude or the lack of it. In this case it is important that the compliance program can provide helpful examples to outline the existence of a general criminal attitude.

12. **Who may be held liable for bribery? Only individuals, or also corporate entities?**

The German Criminal Code only holds individuals criminally liable for bribery offences. It does not provide for the criminal responsibility of a corporate entity. Nonetheless, the Administrative Offences Act allows fining a corporate entity for being legally responsible for bribery offences committed on behalf of the entity. For almost 20 years there have been discussions regarding the implementation of a corporate criminal law in Germany. For example, in 2013 the minister of justice of the State of North-Rhine Westphalia presented a bill that was not introduced in the Bundesrat. Most recently, German legal practitioners and professors published the so-called “Kölner Entwurf eines Verbandssanktiongesetzes” proposing legislation of a corporate criminal law. According to their coalition agreement, the present German government is considering implementing a corporate criminal law. Although there are many debates, an official legislation draft has not been published yet.

13. **Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?**

In 2001 the German Federal Minister of Justice introduced the commission “Deutscher Corporate Governance Kodex” to provide some guidance for German listed companies on corporate governance. The commission consists of representatives of German listed companies and their stakeholders who are appointed by the German Federal Minister of Justice. Under the current German Corporate Governance Code, transparency is of high importance. In order to achieve this, a significant part of the code’s regulations deals with the improvement of the annual general meeting of the German stakeholders, the strengthening of the minority stakeholder’s position, the increase of the management’s and supervisory board’s liability in certain situations and the introduction of independent auditors. According to section 161 of the German Stock Corporation Act, the management board and supervisory board of a listed company shall declare annually that the recommendations of the German Corporate Governance Codex have been and will be complied with, or declare which
recommendations have not been, or will not be applied and why. However, the German Corporate Governance Codex is a non-statutory guideline.

The Ministry of Interior has published an updated guideline on preventing corruption in the German Federal Administration. The “rules on integrity” describe specific steps for German authorities to prevent corruption like a dual control principle and allocation guidelines.

Lately, all the major companies have shown a strong commitment towards the establishment of an effective corporate compliance program.

14. **Does the law provide protection to whistle-blowers?**

In March 2019, the German Bundestag finally passed the Law on protection of trade secrets (Gesetz zum Schutz von Geschäftsgeheimnissen) and thereby finally incorporated the EU-Directive 2016/943 into national law. Instead of defining the term “whistle-blowing” the Law takes another approach and regulates the definition and protection of trade secrets between private objects. However, section 5 of the Law contains justifications for disclosure of trade secrets and therefore protects whistle-blowers from criminal conviction and civil liability if the conditions are met. According to that rule, the disclosure of trade secrets is among other reasons justified if the right of free speech covered it or it was necessary to disclose unlawful behavior. Nevertheless, many German legal practitioners criticize the recently published law because it does not contain a legal definition of the term “whistle-blowing” and because whistle-blowing stays an illegal act that cannot be punished in case of justification.

Since the Law for the protection of trade secrets has only recently been passed, there are still many uncertainties regarding the range of protection provided for whistle-blowers. This can only be solved by future practical application. Now a whistle-blower can still be faced with retributive measures or termination of his or her employment contract if his or her suspicion turns out to be unfounded.

In addition, German law provides for certain regulations in different areas of law to establish the process of communication between the employees and/or third parties that preserves the confidentiality of personal data, e.g. in case of securities services providers, Section 80 (1) Securities Trading Act and Section 25 a (1) sentence 6, No. 3 Banking Act.

Furthermore, the regulations of the Federal Financial Supervisory Authority Code (FinDAG) protect whistle-blowers who provide information on violations of regulations, which are under the supervision of the Federal Financial Supervisory Authority.

In addition, the state criminal police of Lower Saxony has implemented an online system for whistle-blowers to contact and communicate with the legal authorities while remaining anonymous.
15. **How common are government authority investigations into allegations of bribery?**

According to police crime statistics for the year 2017, criminal offences in relation to bribery registered by the police decreased compared to 2016 by roughly 25 percent. In summary, according to police crime statistics in 2017 the lowest corruption rate in 5 years was reported. The numbers dropped from approximately 6,500 in 2016 to 4,890 investigated cases in 2017. In contrast, the damages caused by those crimes have increased substantially.

16. **What are the recent trends in investigations and enforcement in your jurisdiction?**

Since the introduction of section 100b of the Criminal Procedure Code in August 2017 government authorities are able to secretly monitor IT-systems. This new regulation allows prosecutors to monitor corporate structures and gather evidence without being detected.

Furthermore, the number of internal investigations led by third parties have been increasing. Companies initiate internal investigations to prevent search and seizures, severe penalties and bad press.

17. **Is there a process of judicial review for challenging government authority action and decisions?**

There are no specific challenges or judicial remedies related to corruption or bribery.

18. **Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?**

Currently, there are no specific developments planned since there has recently been a significant change of laws as a result of a heated public debate in recent years. In 2016, sections 299a and 299b of the Criminal Code were introduced following a judgment by the Federal Court of Justice (Bundesgerichtshof). The goal of these changes is to prevent doctors being bribed in relation to the prescription of medicines. There have been occurrences in the past of some pharmaceutical companies offering doctors ‘bonuses’ for prescribing a certain amount of their medicines. As a result, the scope of section 299 of the Criminal Code was extended.

In 2017 sections 265c and 265d regarding sports-related betting and the manipulation of professional sports competitions were added to the Criminal Code. Section 331 was extended to regulate the offering and receiving of bribes in relation to EU delegates.

In the past there have been futile talks regarding the introduction of a Criminal Code for corporate entities. First drafts have been presented, discussions have ensued and as a result, a German Criminal Code for corporate entities could be passed in the next couple of years.
19. **To which international anti-corruption conventions is your country party?**

Various anti-corruption conventions apply in Germany, such as:

- UN Convention against Corruption;
- UN Convention against Transnational Organised Crime;
- EU Convention on the Fight against Corruption involving Officials of the European Communities/Member States of the EU;
- EU Council Framework decision 2003/568/JHA;
- Organisation for Economic Cooperation and Development Convention on the Bribery of Foreign Public Officials in International Business Transactions;
- Resolution (99) 5 of the Committee of Ministers of the Council of Europe; and
- Resolution (97) 24 of the Council of Europe.

20. **Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.**

Currently, the German law contains no provisions to determine lawyer-led investigations. Since the client-attorney privilege only applies in certain cases (section 97 (1) No. 1, 148 Criminal Procedure Code), it is unclear if the connection between an internal investigator and a client is legally protected.

Recently, the extent of the client-attorney privilege was brought to light in a decision by the Federal Constitutional Court (Bundesverfassungsgericht) when the public prosecutor searched the offices of the law firm Jones Day in Munich and secured documents related to the internal investigation at Volkswagen, led by Jones Day. The Federal Constitutional Court preliminary granted an injunction in favour of Jones Day and prohibited the use of the secured documents until a final decision was reached. The court’s final and eagerly anticipated decision was given on 26 June 2018. Pursuant to the decision, searching a law firm and maintaining the securing of documents prepared in the course of internal investigations and for the purpose of the investigations do not constitute a violation of constitutional law. The securing of the documents neither constituted a violation of Volkswagen AG’s right to informal self-determination nor its right to a fair trial. In addition, as an America-based law firm, Jones Day as well as their lawyers were not seen as a holder of fundamental rights and, therefore did not have standing to lodge a constitutional complaint.

Although internal investigations in Germany have become more frequent, German law does not determine the terms and conditions of internal investigations. Furthermore, according to their coalition agreement and as a consequence of the judgement of the Federal Constitutional Court, the present German government intends to adopt legal regulations for internal investigations.

However, the legal privilege applies to the lawyer’s communication with the client and is based on the effective right of defence (Art. 6 (3) of the European Convention on Human
Rights and Art. 2 (1), 20 (3) of the German Constitution) and the right to refuse testimony (section 53 (1) No. 1 and 2 of the Criminal Procedure Code).

21. **How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction’s approach to anti-bribery and corruption compares on an international scale?**

Compliance is a major issue in Germany at the moment. Company compliance awareness is growing and leading to increased expenses for compliance-related subjects. According to Art. 4.1.3 of the German Corporate Governance Kodex, the board of a stock corporation shall install reliable compliance systems. Therefore, many companies are committed to improving or introducing a corporate compliance program. However, the requirements for such a program are not defined. Although the government tries to increase company compliance awareness, legal or administrative activities related to compliance are not subject to current discussions in the field of law.

According to Transparency International, Germany is ranked as 11th out of 180 in the Corruption Perceptions Index for the year 2018 after being ranked as 12th for the year 2017 and 10th for the year 2016. The index measures the perceived corruption in politics and administration based on expert opinions. According to the index, Germany has not made any progress in recent years.

22. **Generally how serious are organisations in your country about preventing bribery and corruption?**

Preventing bribery and corruption has recently become a major issue for both the government and corporate entities. Companies and their legal representatives do not want to be held responsible under the Administrative Offences Act (OWiG). Therefore, companies are investing in the personnel and organisational structures of their compliance departments. Due to the introduction and improvement of compliance systems over the last few years, the amount of criminal offences in relation to corruption registered by the police has drastically decreased in the past three years.

23. **What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?**

It is a general problem that the public prosecutor’s offices are often poorly equipped. Their personnel capacities are often not sufficient to manage extensive cases of bribery and corruption. Enforcement agencies need specialized knowledge to uncover and recognize the generally well-hidden structures of complicated corruption and bribery cases. As a consequence, major difficulties arise for enforcement agencies while investigating, gathering evidence and prosecuting.
24. **What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?**

The German legislator has just recently implemented the EU Directive 2016/943 and passed the Law on protection of trade secrets (Gesetz zum Schutz von Geschäftsgeheimnissen). It will be very important to see how that law will affect the legal behaviour of corporate entities, public prosecutors and national courts. It will also be interesting to see how the courts will apply the newly introduced sections of the Criminal Code regarding bribery related to sports (sections 265c and 265d) and the public health care sector (sections 299a and 299b). It will also be challenging to raise even more awareness in business transactions.

Furthermore, there might be substantial changes if the German government adopts legal regulations for internal investigations that will probably also regulate which documents produced in internal investigations can be secured and which ones are protected from being secured by the public prosecutor.

25. **How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?**

Additional regulations regarding increased transparency when it comes to financing in business transactions would be helpful, as well as some changes in the Criminal Procedure Code in order to allow the law enforcement authorities to be more effective. Law enforcement needs highly specialized and centralized units responsible for the investigation of bribery and corruption.