The Legal 500 Country Comparative Guides

Germany: Bribery & Corruption

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

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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 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. In several federal states, a focal department in the prosecutor’s office to prosecute corruption offences have been established. 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 – 337 of the Criminal Code), voters and delegates (sections 108b and 108e of the Criminal Code) and the sports sector (sections 265c– 265e 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 and the functioning and incorruptibility of the state administration. 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 (sections 331 – 337 of the Criminal Code), of voters and delegates (sections 108b and 108e of the Criminal Code), in relation to the sports sector (sections 265c – 265e of the Criminal Code) as well as offering and receiving bribes in business transactions, which includes the public health sector (sections 299 – 301 of the Criminal Code). Furthermore the Criminal Code differentiates in sections 331 – 337 of the Criminal Code 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 (1) 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”.

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

Under civil law (sections 134 and 138 of the Civil Law Code (BGB)), 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 and 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 (AktG) and section 43 (2) Limited Liability Companies Act (GmbHG)) responsible for the act committed.

According to section 6a (2) No. 7 of the German Construction Contract Procedures (VOB/A, 2019) 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) and 130 of the Administrative Offences Act, allow the imposition of a fine to a corporate entity, if the owners and management did not take appropriate measures to prevent criminal offences.

According to section 130 (3) sentence 2 in conjunction with section 30 (2) sentence 3 of the Administrative Offences Act the maximum fine is EUR 5 or 10 million for each criminal offence, depending i.a. 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, because the fine is intended to remove the economic benefit of an administrative offence (cf. section 30 (3) and 17 (4) sentence 2 of the Administrative Offences Act).

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 small gifts below EUR 10 – 20 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, therefore they are forbidden. 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 (campaign) contributions, sections 331 and 333 of the Criminal Code will apply. In accepting election campaign donations, the limit for the criminal acceptance of an advantage is only exceeded if the official is prepared to make or influence a concrete decision that is beneficial to the interests of the benefactor in return for election campaign support. According to the Federal Court of Justice (Bundesgerichtshof), BGH 3 StR 301/03, 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 i.a. in certain cases regarding the party’s income or contributions it receives, if somebody is trying to conceal the funds or assets of the party or the public accountability.

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. The Federal Court of Justice, 1 StR 265/16, pointed out that the assessment of the fine imposed on the company depends on the extent to which the company has fulfilled its obligation to prevent infringements of rights from the sphere of the company and has installed an efficient compliance management system. The compliance management system must be designed to prevent legal violations. In the opinion of the Court, it could also play a role whether the company had optimised corresponding regulations as a result of the administrative offence proceedings and had designed its internal processes in such a way that comparable violations of the law would in any case be made considerably more difficult in future.

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

Since March 2020 the latest draft bill of the association sanctions act has been available (so called “Verbandssanktionengesetz”). The government agreed on final amendments to the draft, therefore it is very likely that the association sanctions act will actually come into force and will establish a system where corporate entities may be held liable for bribery.

The draft uses the wording “sanctions” instead of “penalty” and covers association which include legal persons and associations of person. What is new is that, according to the draft, public prosecution offices will be obliged to investigate if there is an initial suspicion of a crime committed from within a company. Whereas the fine under the Act on Regulatory Offences previously amounted to not more than ten million euros, the amount of sanction is now based on the company’s annual turnover. For large commercial enterprises with an annual turnover of more than 100 million euros, the monetary sanctions can amount to up to ten percent of turnover. For small companies, the previous sanction framework will remain in place and will not exceed 10 million euros.

So far, 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. Therefore the further development of the association sanctions act will be interesting.

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?

The Law on protection of trade secrets (“Gesetz zum Schutz von Geschäftsgeheimnissen”) came into force on 26th April 2019 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.

On 16th December 2019 the EU-Directive 2019/1937, also called “whistle-blower”-Directive,
came into force. The main objective of the directive is to improve the protection of whistle-blowers who report infringements of EU law. The national legislator must implement the directive by 17th December 2021. The protection of whistle-blowers is subject to certain requirements, e.g. that the person had reasonable grounds to believe that the information reported on infringements was true at the time of reporting and that this information fell in the scope of the directive.

Due to the directive companies with more than 50 employees and any company in the financial services industry must set up an internal whistleblowing system. Furthermore, the whistle-blower should be protected against any reprisals. Reprisals are for example employment measures like termination, salary cuts, discrimination or bullying.

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 (WpHG) and Section 25a (1) sentence 6, No. 3 Banking Act (KWG).

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 (e.g. Section 4d (3)).

Moreover, 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 2019, criminal offences in relation to bribery registered by the police lightly increased compared to the previous year (2018), it increased by 4.5%. The numbers increased from approximately 3,970 in 2018 to 4,147 investigated cases in 2019. The police crime statistic stated that the dark field in this area of crime is estimated to be many times higher. Also because the number of cases - as in white-collar crime, among others - can be influenced by larger investigation complexes with many individual cases and longer periods of time, this development should not be used to draw conclusions about a meaningful trend.

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.

In addition, section 100a of the Criminal Procedure Code has also been expanded. According
to this, it is permitted to carry out a so-called “source telecommunication surveillance”. This is done by secretly installing a state Trojan on the accused’s PC in order to intercept the communication and forward it to the investigating authorities.

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, BGH GSSt 2/11. 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.

The draft of the association sanctions act has led to many discussions concerning the liability of corporations. It remains to be seen when the new law will come into force.

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 on combating corruption in the private sector;
- Organisation for Economic Cooperation and Development Convention on the Bribery of Foreign Public Officials in International Business Transactions;
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.**

The draft bill of the association sanctions act foresees requirements for internal investigations. Accordingly, internal investigations conducted after an incident should lead to a mitigation of the sanction, if some requirements are fulfilled. The draft bill also contains information on how to imagine a properly conducted investigation. For example, the person conducting an internal investigation should not at the same time be the company’s defence counsels or the defence counsel of the person who committed the company-related crime. Internal investigations and defence should be clearly separated. Furthermore a full cooperation with the prosecuting authorities without interruption is necessary.

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), 2 BvR 1780/17, 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 27th 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.

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. The government tries to increase company compliance awareness and legal or administrative activities related to compliance will be subject to current discussions in future due to the draft bill of the association sanctions act (“Verbandssanktionengesetz”) and its meanings for the companies.

According to Transparency International, Germany is ranked as 9th out of 180 in the Corruption Perceptions Index for the year 2019 after being ranked as 11th for the year 2018 and 11th for the year 2017. The index measures of the perceived corruption in politics and administration are 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. Therefore, companies are investing in the personnel and organisational structures of their compliance departments.

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, it will be challenging how Germany will implement the above mentioned “whistle-blower”-Directive in national law.

Besides to that the draft bill of the association sanctions act (“Verbandssanktionengesetz”) stipulates changes regarding the maximum amount for monetary sanctions and requirements for internal investigations. The practical implications when the law comes into force will be interesting and challenging for companies and defence lawyers.

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.