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Regional Risk Spotlight: Recent Developments in German Anti-Corruption Law

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Over the past several years, Germany has continuously enhanced its anti-corruption legislation, focusing on fighting specific forms of corruption. Major developments concern healthcare-industry-related conduct as well as the bribery of political representatives. Additional changes were implemented in light of international agreements aiming at the harmonization of anti-corruption standards. Some of these propositions were accompanied by major political debates in the country, still demonstrating conflicting interests of the stakeholders. Through several high-level German corruption enforcement cases in the aftermath of the Siemens matter that resulted in multi-million U.S. dollar fines, German prosecutors and courts have demonstrated that Germany has become an active enforcer of anti-corruption legislation.

German Domestic Anti-Corruption Legislation

Germany's domestic anti-corruption legislation is part of the German Penal Code (Strafgesetzbuch or StGB).

The StGB distinguishes between corruption with regard to "public officials" (Sec. 331 StGB et seq.) and corruption in the private sector (Sec. 299 StGB et seq.). Additional key provisions are Sec. 108b and Sec. 108e, which prohibit the giving of bribes to either those who are entitled to vote in elections or members of parliament.

There are several other criminal offences that go along with bribery but the proscription of which is not primarily intended to fight corruption. Such offences include unlawful appropriation (Section 246 StGB), money laundering (Sec. 261 StGB), fraud (Sec. 263 StGB), embezzlement and abuse of trust (Sec. 266 StGB), forgery (Sec. 267 StGB et seq.), restricting competition through agreements in the context of public bids (Sec. 298 StGB) and tax evasion (Sec. 370 German Fiscal Code (Abgabenordnung or AO)).

Bribery of "Public Officials"

Sec. 331 StGB et seq. address corruption in the public sector. These provisions only relate to the corruption of "public officials" and "persons under a special obligation in respect of public service."

According to the law, "public officials" are people who are civil servants or judges, or have otherwise been appointed to carry out functions of public administration with its authority or other agency, or on its behalf, irrespective of the organizational form selected to carry out the functions.

"Persons specially entrusted with public service functions" are those who, without being public officials, are formally obliged by statute to fulfill their duties conscientiously and are employed by, or work for, a) an authority or other agency exercising functions of public administration or b) an organization or other association, operating unit or enterprise carrying out functions of public administration for an authority or other agency.

The provisions of the StGB distinguish between active bribery (offering or granting a bribe or advantage) and passive bribery (demanding or accepting an advantage or bribe). The active bribery provisions apply to every person, regardless of his or her role, who offers or grants a bribe or advantage to a public official. Committing passive bribery, however, is limited to public officials who demand or accept

an advantage or bribe. Thus, active and passive bribery usually go hand in hand.

A further distinction is made depending on whether the bribe relates to an act or omission that either does or does not violate the public official's duties. If the bribe does not induce the public official to violate official duties, such as in the case of accepting facilitation payments, criminal liability under Sec. 331 StGB for demanding or accepting an advantage and Sec. 333 StGB for offering or granting an advantage applies. If the bribe induces the public official to violate official duties, criminal liability under Sec. 332 StGB for demanding or accepting a bribe and Sec. 334 StGB for offering or granting a bribe applies.

	Performance in accordance with official duties "Advantage"	Performance in violation of an official duty "Bribe"
Passive bribing	Sec. 331 StGB	Sec. 332 StGB
Active bribing	Sec. 333 StGB	Sec. 334 StGB

Certain small gifts or acts of hospitality – referred to as "socially adequate behavior" – are exempt from criminal prosecution, but such exemption is to be interpreted very narrowly. Many public institutions issue guidance specifying the maximum value gifts or of hospitality extended that would be considered "socially adequate." These are often as low as €10.00 or not allowed at all.

See "*Who Is a Foreign Official?*" (Sep. 11, 2013).

Commercial Bribery

In the private sector, commercial bribery is penalized under Sec. 299 StGB et seq. Criminal behavior occurs, inter alia, if an employee or agent of a commercial enterprise, without the consent of the enterprise, demands or accepts any advantage for himself or a third person in return for an action in connection with the acquisition of goods or commercial services that violates his duties vis-à-vis the commercial enterprise. Both active and passive bribing are penalized under Sec. 299 StGB.

Sec. 299a and 299b StGB apply to all healthcare professionals whose profession requires a state-recognized vocational education and penalize corrupt conduct related to medical prescriptions, the supply of certain medical products and referral of patients, with imprisonment of up to three years or a fine.

See "*What to Expect From China's Revised Commercial Bribery Law*" (Dec. 21, 2016).

Germany's International Anti-Corruption Legislation

German penal law in general, and therefore also the domestic anti-corruption provisions relating to the corruption of German public officials, have an extra-territorial reach. That is, they may be enforced even if the offender is not located in Germany or the offence does not occur in Germany.

In order to also cover the corruption of foreign public officials, Germany has enacted statutes that specifically address international corruption. The German international anti-corruption legislation differs from the approach taken under the FCPA, which provides for a fully separate and stand-alone legal regime. In contrast, Germany's statutes regarding international bribery simply refer to the domestic anti-corruption regime and extend the criminal liability under the StGB to certain types of corruption of foreign officials.

Extraterritorial Reach of Domestic Anti-Corruption Provisions

Sec. 3 StGB provides for the general principle that German penal law applies to all offences committed in Germany (and, based on Sec. 4 StGB, on German vessels and aircraft), whether by German nationals or foreigners.

In addition, Sec. 5 StGB extends criminal liability of German public officials to all bribery offences committed abroad. Further, any acts committed by German nationals abroad may be subject to criminal liability in Germany under Sec. 7 StGB primarily if the offence also constitutes a crime under local laws.

Foreign nationals may be prosecuted for offences committed abroad if they are caught in Germany and are not subject to extradition. However, criminal liability under the general theory of extraterritorial reach of domestic anti-corruption provisions requires the corruption of German public officials (such as German embassy personnel in foreign countries) and does not arise from the corruption of foreign public officials.

Introduction of New Section 335a StGB to Clarify Corruption Offences

On November 26, 2015, the Act to Combat Corruption (Act) entered into force. The Act, which added Section 335a to the StGB, for the most part made foreign public officials, military personnel, judges and employees of international organizations legally equivalent to the respective German public officials. Section 335a thereby makes the anti-bribery offences regulated under Sections 331 StGB et seq. applicable to these foreign officials.

The new Act replaces most provisions of the Act on Combating International Bribery (IntBestG), the E.U. Anti-Corruption Act (EUBestG) and the Act for Equalization of Judges and Officials of the International Criminal Court (IStGHGG), which regulated most of these types of crimes until the introduction of the new Sec. 335a.

The integration of these provisions into the German Criminal Code is a strong signal that the government is further strengthening and enforcing a vigorous approach in the fight against international corruption.

Criminal Liability of Corporations

German criminal law does not provide for criminal liability of legal entities such as corporations. Only individual natural persons such as directors and employees are subject to criminal prosecution.

However, legal entities may be subject to forfeiture (complete disgorgement) under Sec. 73 StGB et seq. that allows for recovery of any enrichment obtained by reason of a criminal offence.

Alternatively, corporations can be liable under Sec. 130 of the Administrative Offences Act (OWiG) for violation of supervisory duties by members of management that enabled or facilitated criminal offences committed by its representatives and employees.

In these cases, a monetary sanction can be imposed under Sec. 30 OWiG. The maximum penalty under OWiG is €10 million for intentional conduct and €5 million for negligent conduct. However, the amount of such sanction shall exceed the economic benefit (any profits after the deduction of costs) that a corporation has achieved as a result of a criminal or administrative offence. If this requires exceeding the maximum amount as stipulated in the law, authorities may impose higher monetary sanctions under Sec. 17(4) OWiG. However, the fine cannot exceed the amount of profits by more than €10 million which is the aforementioned maximum penalty.

German Anti-Corruption Efforts Through the Lenses of International Watchdogs

In Transparency International's 2015 Corruption Perceptions Index (CPI), Germany ranked 10th and is in the top tier of countries with the lowest perceived level of corruption. OECD's Working Group gave Germany credit for its robust enforcement efforts and approach to implementing several OECD recommendations.

Nonetheless, OECD's Working Group criticized the fact that arrangements allowed under the German Criminal Procedural Code to settle enforcement procedures are not made publicly available and therefore do not provide the transparency that the Working Group would typically expect. Other recommendations by the Working Group, such as an increase in the punitive component of administrative fines, have been implemented through prompt amendments to the German OWiG.

See "*TI Finds That Companies in Emerging Markets Need to Improve Transparency*" (Sep. 14, 2016).

Noteworthy Precedents in 2016

German Federal Constitutional Court on Extradition to the United States

In March 2016, the court reversed and remanded a 2015 ruling by the Higher Regional Court of Frankfurt and thereby stopped the deportation by German authorities of a Swiss national to the United States.

The Federal Constitutional Court's ruling took issue with a 2015 decision by the U.S. Court of Appeals for the Second Circuit in United States v. Suarez regarding the contours of the Principle of Specialty under international law. For the sake of international comity, the Principle of Specialty generally requires a country seeking extradition to adhere to any limitations placed on prosecution by the surrendering country. However, in interpreting this principle, the Suarez court held that an extradited person lacks standing to challenge the requesting nation's adherence to the doctrine absent an official protest by the extraditing nation.

German law requires courts to assess whether a requesting nation adheres to the Principle of Specialty before extraditing a person in German custody to that nation. The Federal Constitutional Court deemed German constitutional protections with regard to the Principle of Specialty greater than those granted under Suarez to persons extradited to the United States and remanded the case for further consideration in light of its ruling.

Specifically, the Federal Constitutional Court held that the mere reference to the opportunity to ask the extraditing nation to raise an official protest generally violates the Right to Personal Freedom guaranteed by Article 2, Subsection 2 of the German Constitution and, in any case, violates the General Freedom of Action guaranteed by Article 2, Subsection 1. A decision on remand has not been issued.

Court Ruling on Seizure of Documents From Law Firms

A recent ruling by the District Court of Bochum may call into question important elements of companies' whistleblower protection programs insofar as they involve an independent lawyer acting as ombudsperson. Companies chose to install an ombudsperson as an intermediary between whistleblowers and their own compliance department. The ombudsperson is intended to protect the whistleblower's anonymity since incriminating information is recorded and assessed in the ombudsperson's law firm, outside the company, and typically not shared with the client. Such an approach also aims at encouraging individuals who are hesitating to directly share their concerns with the company to come forward with their allegations.

On March 16, 2016, the District Court of Bochum issued a notable ruling regarding the seizure of documents from a law firm (Landgericht Bochum, Order from March 16, 2016, file reference 6 Qs 1/16). According to Section 97, Subsection 1, Number 3 of the German Code of Criminal Procedure (Strafprozessordnung), objects are, among other things, not subject to seizure if they are covered by an attorney's right to refuse to testify. This right only applies to information that was entrusted to or became known to the attorney in his capacity as an attorney. The Bochum court ruled that this legal provision applies exclusively to the trusted relationship between a criminally accused person and someone who is granted the right to refuse to testify, meaning that it does not protect the relationship between someone who is not accused of a crime and any custodian of professional secrets, such as an attorney.

In the specific case, the court therefore found that a company's ombudsperson was not covered and documents in her possession could be seized, because the law did not protect the relationship between the non-accused, anonymous whistleblower and the ombudsperson (an attorney). The court noted that the attorney was acting on behalf of the company in her capacity as ombudsperson, which prevented the establishment of a privileged relationship between her and the whistleblower.

See "*Foreign Attorneys Share Insight on Data Privacy and Privilege in Multinational Investigations*" (Jun. 29, 2016).

Noteworthy Enforcement Actions Published in 2016

A Bribe for Construction at the Berlin Airport

In connection with the construction of the new Berlin Brandenburg Airport, the District Court of Cottbus in October 2016 sentenced a former senior manager of the airport operator to three-and-a-half years in prison for the taking of a bribe in commercial practice. The court held him guilty of accepting a €150,000 payment in cash from a contractor who was facing financial difficulties in the end of 2012. In light of the fact that the construction of Berlin Brandenburg Airport experienced various difficulties, many contractors had outstanding accounts with the airport operator and were waiting for payments. In return for the €150,000, the senior manager influenced his employer's payment processes resulting in the transfer of more than €60 million to the contractor before the end of the year and without additional audits. With regard to the manager's appeal, the judgment is not final.

A Bribe to Overlook Security Issues

In January 2017, the District Court of Berlin sentenced a former public official who was acting as Head of Unit at the Berlin State Agency for Health and Social Affairs to two years and eight months in prison for taking bribes in public office. Until mid-2016, the agency was responsible for placing and accommodating foreign refugees seeking asylum in Berlin. For this purpose, the State of Berlin operates various accommodation facilities guarded by private security firms which, inter alia, were selected and commissioned by the Head of Unit. The court held him guilty of having accepted bribes in a total amount of €143,000 from one single commissioned security firm in return for not reporting the firm's systematic and longstanding illegal conduct. The Head of Unit was aware of the firm's large-scale illegal employment and evasion of both taxes and social security contributions, the court held.

Jail for a Real Estate Developer

In November 2015, the District Court of Frankfurt sentenced a well-known real estate developer to two years and eight months in prison for the giving of bribes in commercial practice in connection with an extension of Frankfurt Airport's cargo facilities. The real estate developer belonged to a group of investors promising to pay a total amount of €2.8 million in bribes to a subordinate employee of the Frankfurt Airport operator in return for prioritizing opportunities to purchase property from them. In fact, the employee only received an amount of €433,000. A fully involved broker falsely qualified the payments as commissions. The real estate developer's appeal is currently pending.

Looking Ahead

On July 13, 2016, the German federal government passed a draft bill to comprehensively reform the public recovery of criminal assets – Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung.

Under the new bill all types of asset recovery now regulated under the German Criminal Code would be consolidated under the term of "confiscation of proceeds from crimes" (Einziehung von Taterträgen), terminology aligned with the one used in the European context. Additionally, the bill would create one legal regime to confiscate assets implicated with criminal activity.

One of the draft bill's major changes is to abolish a victim's right to asset recovery under civil law that until now prevailed over the confiscation through a criminal court's order (See Sec. 73 Subsection 1 Sentence 2 StGB). Under the new draft bill, any kind of asset recovery would be conducted exclusively by state authorities.

The draft bill also suggests that assets of unclear origin may be confiscated without specific evidence if a court is convinced – in particular in view of an evident discrepancy between the value of the assets and the rightful earnings of the individual – that they were

obtained from an illegal activity and if the investigation relates to certain enumerated offenses such as organized crime and terrorism. The draft bill's grounds specifically reference the comparable U.S. concept of "non-conviction-based confiscation/forfeiture."

The draft bill also contains guidance for calculating illegal profits in the context of insider trading activities. Specifically, it provides that those convicted of insider trading cannot deduct the original purchase price of stock subject to confiscation (draft Section 73d Subsection 1 Sentence 2 of the German Criminal Code). This approach suggests that the recovery of assets is no longer a mere administrative measure but also includes a penalizing element.

The draft bill, which still needs to pass both German legislative bodies (Bundestag and Bundesrat) before entering into force, will implement the European Directive 2014/42/EU of April 3, 2014 into German domestic law, but exceeds the scope of the E.U. directive considerably.

See "*A Close Look at the DOJ's New Declination-Plus-Disgorgement Settlement Approach*" (Oct. 12, 2016).

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