

German Law on Fighting Corruption – strengthening criminal anti-corruption law and criminal anti-money laundering law – has entered into effect

On 26 November 2015, the German Law on Fighting Corruption (*Gesetz zur Bekämpfung der Korruption*) entered into effect. Its key elements are the extension of the criminal offence of taking and giving bribes in commercial practice (section 299 German Criminal Act [*Strafgesetzbuch*, "**StGB**"]) to acts beyond competition (implementation of a so-called "employer model" [*Geschäftsherrenmodell*]) and the expansion of the criminal offences of bribing public officials (sections 331 *et seqq.* StGB) and their extraterritorial applicability. In addition, criminal liability for money laundering has been strengthened in several respects. The law aims at implementing international regulations on fighting corruption into German law. It shall also help to clarify anti-corruption legislation by including a number of criminal offences of international corruption in the StGB which were previously set out in the Law on Combating International Bribery (*Internationales Bestechungsgesetz*, "**IntBestG**") and in the EU Anti-Corruption Act (*EU-Bestechungsgesetz*, "**EUBestG**").

The changes to the German criminal anti-corruption and anti-money laundering legislation associated with the new Law will affect companies' compliance systems and present new challenges for compliance and legal departments.

Extension of the criminal offence of taking and giving bribes in commercial practice (section 299 StGB)

Under the previous legislation, a person was criminally liable for the offence of taking and giving bribes in commercial practice (*Bestechlichkeit und Bestechung im geschäftlichen Verkehr*) under section 299 StGB if the

offender (as "receiver") allowed himself to be promised, demanded or accepted, or if he (as "donor") offered, promised or granted a benefit in return for obtaining an unfair advantage (*unlautere Bevorzugung*) in competition (the "competition model" [*Wettbewerbsmodell*]). Thus, section 299 StGB covered, for example, cases where an employee in the procurement department selected a service supplier which had not submitted the most economically advantageous offer compared to competitors, but which had given the employee in the procurement department a personal benefit (such as presents or hospitality exceeding a 'social-adequate' level) in return for his selecting that supplier.

2 German Law on Fighting Corruption – strengthening criminal anti-corruption law and criminal anti-money laundering law – has entered into effect

Since 26 November 2015, the criminal offence also covers benefits given – on the basis of an agreement of wrongdoing (*Unrechtsvereinbarung*) – to an employee or agent of a company, without the consent of the company, in return for a breach of a duty to that company (the "employer model" [*Geschäftsherrenmodell*]). According to the explanatory notes to the new Law, the relevant duty to the company can arise, in particular, as a result either of law or contract (for example, from additional employment regulations in the form of internal company guidelines). However, not every breach of duty to the company will give rise to the offence; the duty being breached must relate to the receipt of goods or services. Therefore, the mere acceptance by an employee of a benefit of a value more than that permitted by the company's internal rules will not be sufficient. However, an actual breach of duty is not required for criminal liability in the same way as no actual unfair advantage in competition was required already under the previous version of section 299 StGB. Accordingly, under the new Law, an employee of a company could potentially be exposed to criminal charges of taking bribes if he, for instance, in breach of internal procurement guidelines, were to place an order without inviting an offer from a

competitor for comparison, in return for a personal benefit, whether or not the offer from the competitor would have actually been more economically advantageous.

According to the explanatory notes to the Law, the new version of section 299 StGB aims at protecting the employer's interests in the loyal and unbiased performance of duties by its employees and agents. Therefore, the Law provides an exception from criminal liability under section 299 StGB arising from a breach of duties to companies where the company has consented in advance (though this exception does not apply to liability under section 299 para 1 no 1, para 2 no 1 StGB [obtaining an unfair advantage]). This aims at providing greater legal certainty for employees and agents. However, for the consent to be effective the company must have consented in advance to both the accepting (demanding or allowing oneself to be promised) and granting (offering or promising) of the benefit, and to the connection of the benefit with the employee's or agent's breach of duty on the basis of an agreement of wrongdoing (*Unrechtsvereinbarung*).

The extension of the criminal offence of taking and giving bribes in commercial practice to breaches of duties to the company has been criticised for giving companies the ability to impose duties on their employees under internal rules which could form the basis of criminal liability. Others complain about a violation of the principle of legal certainty (*Bestimmtheitsgrundsatz*) (article 103 para 2 German Constitution [*Grundgesetz*]), in particular, because of the difficulties for third parties in understanding the duties of the company's employees.

However, the risk of corruption investigations against employees and contractual partners of companies is mitigated by the fact that violations of section 299 StGB arising from a breach of duties to companies may only be prosecuted upon a formal demand (*Strafantrag*) of the company, unless the public prosecution authority exceptionally considers prosecution necessary due to a special public interest. As regards violations of section 299 StGB due to obtaining an unfair advantage in competition, the position remains the same as under the previous legislation, i.e. a formal demand for prosecution may be filed by competitors of the "donor" as well as by the company of the "receiver".

The most important amendments at a glance

- Extension of the criminal offence of taking and giving bribes in commercial practice (section 299 StGB) to acts beyond competition
- Expansion of the criminal offences of granting and accepting bribes regarding foreign and international public officials
- Inclusion of the criminal offence of taking and giving bribes in commercial practice (section 299 StGB) on the list of predicate offences for money laundering (section 261 StGB)
- Implementation of criminal liability for self-money laundering

Extension of the criminal offences of bribing public officials (sections 331 *et seqq.* StGB) and extraterritorial applicability

Under the new Law, in addition to "public officials" ("*Amtsträger*"), "European public officials" ("*Europäische Amtsträger*") are explicitly included in the criminal offences of bribing public officials under sections 331 to 334 StGB. Furthermore, section 11 para 1 no 2a StGB now contains a legal definition of the term "European public officials" which includes, in addition to members of institutions and bodies of the European Union (and others), officials or other servants of the European Union and individuals mandated to execute tasks for the European Union.

These amendments import previous provisions of the EUBestG regarding the equivalence of, in particular, officials and other servants of the European Union and public officials "under German law" into the StGB. However, these changes go beyond the EUBestG as such officials and other servants of the European Union are now subject not only to the qualified criminal offences of granting and accepting bribes (sections 334 and 332 StGB), but also to the basic criminal offences of granting and accepting (illegal) benefits (sections 333 and 331 StGB). The basic criminal offences only require a "benefit" to be given to or accepted by a public official without approval by the competent authority. In this context, presents or hospitality exceeding a 'social-adequate' level may, under certain circumstances, be considered a "benefit" in this sense under German case law. However, the qualified offences of granting and accepting bribes (sections 334 and 332 StGB) require that the benefit be granted or accepted on the basis of an – expressed or implied – agreement of wrongdoing that the public official, in return, has violated or will violate his official duties.

Furthermore, section 335a StGB, newly implemented by the Law on Fighting Corruption, contains an equivalence arrangement for "foreign and international public servants". According to this new provision, certain public officials of foreign states and international organisations are treated as public officials under German law in the context of the criminal offences of bribing public officials if the offence

concerns a future official act. The changes aim at importing former equivalence arrangements, especially of the Law on Combating International Bribery (IntBestG), into the StGB. However, these changes go beyond the IntBestG as well, as they not only apply to the criminal offence of granting bribes, but also to the criminal offence of accepting bribes. Accepting bribes is the criminal offence of the public official as "receiver", who demands, allows himself to be promised or accepts a benefit on the basis of an agreement of wrongdoing, whereas granting bribes is the crime of the "donor" in this arrangement. The IntBestG previously imposed criminal liability solely on the "donor". In addition, a connection with international business is – unlike under the IntBestG – no longer required.

As a result of these changes, non-German public officials may be prosecuted by German prosecution authorities if they accept a benefit in return for a violation of an official duty associated with a future official act. An example could be a Chinese customs officer who illegally gives preferential treatment to a shipment of a German company in return for a cash payment.

It remains to be seen to what extent German prosecution authorities can and will make use of this potentially far-reaching power.

Strengthening of criminal liability for money laundering (section 261 StGB)

In a further legislative change, also introduced on 26 November 2015, the criminal offence of taking and giving bribes in commercial practice has been added to the list of predicate offences for money laundering (section 261 StGB) in certain circumstances. Consequently, a person can now be held criminally liable for money laundering when obscuring the origin of a cash payment received by an employee of a company in return for an unfair advantage in competition or for a breach of a duty to the company. However, not every criminal offence of taking and giving bribes in commercial practice will be a predicate offence in this context. To be a predicate offence, it must have been committed on a commercial basis (*gewerbsmäßig*) or by a person as a member of gang (*bandenmäßig*); however, German investigating authorities and courts frequently assume that this requirement is met in cases involving companies.

Finally, the new Law has also introduced criminal liability for so-called self-money laundering. Under the previous legislation, an individual involved in the predicate offence could not also be charged with money laundering. Thus, for instance, a public official who had committed the criminal offence of accepting bribes and then infiltrated the proceeds of this offence into the financial system would not have been charged with money laundering. Under the new provision, certain specific money laundering activities of the predicate offender (*Vortäter*) aiming at retaining the illegally obtained benefit will remain unpunished, such as hiding illegal benefits obtained from offences. However, to the extent that money laundering activities have their own unlawful character beyond the unlawful character of the predicate offence, they can now be punished alongside the predicate offence. This will particularly apply to the predicate offender who infiltrates bribe money obtained from a corruption offence committed by him into the market and thereby hides its illegal origin.

Implications for companies

The changes outlined above are very much in line with the international trend of extending the applicability of national anti-corruption legislation to offences committed abroad. Companies should review the scope of their anti-corruption compliance programme, and evaluate to what extent their internal compliance guidelines need to be adapted and whether employees need to be provided with additional training.

In particular, existing guidelines should be reviewed to

ensure that they appropriately address the new provisions on giving benefits to foreign public officials, especially officials and other servants of the European Union. This will be of particular relevance to companies that engage in lobbying at the European Union level. Whether an individual is a public official or not may well give rise to difficult questions of legal interpretation (as it has in the past in purely domestic cases) and may, if at all, only be answered by determining the primary tasks of the individual. Therefore, companies would be prudent, in case of doubt, to get approval from the recipient's principal (*Dienstherrengenehmigung*) before giving any benefits especially to those likely to be considered officials or servants of the European Union. However, even approval from the public official's principal will only help to avoid the risk of criminal liability under the basic criminal offences of granting and accepting (illegal) benefits (sections 333 and 331 StGB), but will not eliminate the risk of criminal liability under the qualified criminal offences of granting and accepting bribes (sections 334 and 332 StGB).

Companies are also likely to want to provide training for employees on the risk of criminal liability for taking and giving bribes in commercial practice (section 299 StGB) in return for a breach of duty to the company. Furthermore, if companies seek to obtain the consent of companies, prior to giving benefits to employees of those companies, it has to be taken into account that it has to be ensured that the consent covers both the benefit and its connection with the employee's potential breach of duty. It is difficult to envisage many circumstances in which such consent would be forthcoming.

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