

New developments in German criminal anti-corruption legislation and their implications for companies

Germany has introduced new provisions making it a criminal offence to bribe members of the German Federal Parliament and members of the regional parliaments and making this a predicate offence for money laundering. There is also a new draft law on fighting corruption, which would, if implemented, expand the scope of the commercial bribery offence to acts beyond competition, make the new offence a predicate offence for money laundering and extend the jurisdictional reach of German courts in respect of bribery of public officials.

Expansion of the criminal offence of bribing delegates (section 108e StGB)

Giving bribes to foreign and international parliamentarians in international business dealings is an offence under the Law on Combating International Bribery (*Internationales Bestechungsgesetz*, "IntBestG"). However, according to section 108e German Criminal Act (*Strafgesetzbuch*, "StGB"), giving bribes to German delegates and members of the European Parliament was, in principle, only subject to criminal liability in connection with buying or selling votes for an election or ballot in the European Parliament or German Federal Parliament (*Bund*), or in the parliaments of the German federal states (*Länder*), municipalities or municipal.

Section 108e StGB has now been amended, as from 1 September 2014, to make the taking and giving of bribes to German delegates an offence; this implements requirements imposed by the Council of Europe Criminal Law Convention against Corruption 1999 and by the UN Convention against Corruption 2003. This gap in German anti-corruption legislation was identified, in particular, by the German Federal Court of Justice (*Bundesgerichtshof*) in its judgment dated 9 May 2006 in the so-

The most important changes which came into effect on 1 September 2014

- Expansion of criminal liability for bribing delegates (section 108e StGB)
- Inclusion of section 108e StGB (as amended) on the list of predicate offences for money laundering (section 261 StGB)

called "Wuppertal corruption scandal" (file reference: 5 StR 453/05). In that case, the court held that municipal delegates were not "public officials" for the purposes of the German criminal anti-corruption offences under sections 331 *et seq.*, unless entrusted with administrative tasks going beyond their mandate.

Expansion of section 108e StGB to taking and giving bribes to delegates (section 108e StGB [as amended])

According to the new wording of section 108e StGB (new official heading: "Taking and giving bribes to delegates") a person is criminally liable who

- (as "receiver") as a member of the German Federal Parliament (*Bund*) or parliaments of German federal states (*Länder*) demands, allows himself to be prom-

ised or accepts an unjustified benefit for himself or a third person in return for acting, or refraining from acting, in the exercise of his mandate, in accordance with an order or instruction [of the donor] (the so-called agreement of wrongdoing [*Unrechtsvereinbarung*]), (para. 1), or

- (as "donor") offers, promises or grants an unjustified benefit to a member of such a parliament, in return for acting, or refraining from acting, in the exercise of his mandate, in accordance with an order or instruction [of the donor] (para. 2).

According to the explanatory notes to the Act, the unjustified benefit must be granted (offered or promised) in pursuance of a specific agreement of wrongdoing in the sense that the delegate must act in a certain way in accordance with an order or instruction of the donor. Giving a benefit for an action that is motivated by the inner conviction of the delegate and, therefore, not affected by the granted benefit, will not be an offence.

The new provision does not apply to rewards for benefits agreed on past actions. However, it is sufficient that the delegate demands or allows himself to be promised a benefit prior to the performance of the act, even if he or she actually accepts it only after the performance of the act. An offence is also committed even if the delegate does not subsequently accept the benefit, or does not carry out the act he has agreed to carry out in the agreement of wrongdoing.

Under section 108e para. 4 StGB (as amended), an unjustified benefit is, in particular, not given, "if the acceptance of the benefit is in accordance with the relevant provisions concerning the legal status of delegates". This refers, in particular, to the German Parliamentary Act (*Abgeordnetengesetz*) and the Code of Conduct for Members of the German Federal Parliament (*Verhaltensregeln für Mitglieder des Deutschen Bundestags*). A "political mandate or a political function" and a "donation permitted by the German Political Parties Act (*Parteiengesetz*) or by respective laws" (section 108e section 4 sent. 2 StGB [as amended]) are also advantages in accordance with generally accepted parliamentary practices (*anerkannte parlamentarische Gepflogenheiten*) and, therefore, not unjustified benefits.

The legal position as regards members of the parliament of a German regional authority (*Gebietskörperschaft*), members of the German Federal Assembly (*Bundesversammlung*), members of the European Parliament, mem-

bers of a parliamentary assembly of an international organisation and members of a legislative body of a foreign country is the same as for members of the German Federal Parliament (*Bundestag*) and the German federal states (*Länder*) (section 108e para. 3 StGB [as amended]).

Giving benefits for the purpose of "grooming" (*Klimapflege*), subsequent rewards for a favourable voting behaviour or granting benefits to delegates motivated by inner conviction and not affected by the granted benefit, i.e. not by order or instruction, are not offences according to section 108e StGB (as amended).

Section 108e StGB (as amended) as predicate offence for money laundering (section 261 StGB)

Furthermore, the new law provides for the inclusion of the offence of taking and giving bribes to delegates (section 108e StGB [as amended]) on the list of predicate offences for money laundering (section 261 StGB).

Conclusion for business practice

Companies should assess to what extent their internal compliance regulations and compliance training need to be adapted to address the new criminal offence of taking and giving bribes to German delegates (section 108e StGB [as amended]) which became effective on 1 September 2014. It remains to be seen to what extent the new version of section 108e StGB will in fact lead to investigations or convictions for taking and giving bribes to delegates.

Draft law for further strengthening of German criminal anti-corruption law

The current draft law of the German Ministry of Justice on section 299 StGB is identical to the "Draft of a Criminal Law Amending Act" of the German Federal Government (*Bundesregierung*) submitted to the German Federal Parliament (*Bundestag*) in 2007. The previous draft became obsolete according to the discontinuity principle, after no agreement could be reached in the 16th parliamentary term following considerable criticism.

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

Under the current legislation, criminal liability for taking and giving bribes in commercial practice (*Bestechlichkeit und Bestechung im geschäftlichen Verkehr*) (section 299 StGB) requires (in accordance with the "competition model" [*Wettbewerbsmodell*]) that the offender (as "receiver") allows himself to be promised, demands or accepts, or that he (as "donor") offers, promises or grants a benefit for himself or a third person in a business transaction in return for obtaining an unfair advantage (*unlautere Bevorzugung*) in competition. In the future, according to the draft law, the criminal offence will also cover (according to the "employer model" [*Geschäftsherrenmodell*]) benefits given to an employee or an agent of a company – on the basis of an agreement of wrongdoing (*Unrechtsvereinbarung*) – in a business transaction in return for a breach of a duty to this company. In accordance with the explanatory notes to the Act, relevant duties to companies can arise from law or contract. However, an actual breach of duty will not be required (in the same way as no actual unfair advantage in competition is required under the current version of section 299 StGB).

Extension of the definitions of corruption offences in the public sector (sections 331 et seqq. StGB) and extritorial applicability

The draft law provides for the inclusion of "European public officials" ("*Europäische Amtsträger*") in addition to "public officials" ("*Amtsträger*") (in the current text) into the elements of the anti-corruption offences in the public sector under sections 331 to 334 StGB. A definition of the term "European public official" will also be included. These changes intend to transfer to the StGB the relevant provisions of the EU Anti-Corruption Act (*Europäisches Bestechungsgesetz*, "EUBestG") regarding the equivalence of public officials of other member states of the European Union and public officials "under German law". However, the proposed changes go beyond the EUBestG as they are not only supposed to apply to the qualified criminal offences of granting and accepting bribes (sections 332 and 334 StGB), but also to the basic criminal offences of granting and accepting (illegal) benefits (sections 331 and 333 StGB). These basic criminal offences only require that a "benefit" be granted to or accepted by a public official without approval by the authority. For example, even hospitality or a Christmas present may, under certain circumstances, be considered a "benefit" in this sense under German case law. The qualified of-

fences require, in addition, that the benefit be granted or accepted on the basis of an – expressed or implied – agreement of wrongdoing that the public official will, in return, perform an official act and thereby violate his official duties.

Furthermore, the draft provides for an equivalence arrangement for "foreign and international public servants" under a new section 335a StGB. According to this new provision, certain public officials of foreign states and international organisations would be treated as public officials under German law for criminal offences committed in public offices, if the offence concerns a future official act. The planned changes aim at transferring the current equivalence arrangements of the IntBestG into the StGB. However, these proposed new regulations exceed the IntBestG as well, because they are not only supposed to 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 an advantage for himself or for a third person on the basis of a corrupt pact, whereas granting bribes is the crime of the "donor" in this constellation. The IntBestG currently constitutes only the criminal liability of the "donor".

Section 299 StGB as predicate offence for money laundering (section 261 StGB)

The draft law proposes that the criminal offence of taking and giving bribes in commercial practice be included as

The most important suggested new provisions at a glance

- Expansion of the criminal offence of taking and giving bribes in commercial practice (section 299 StGB) to acts beyond competition
- Extension of the criminal offence of giving 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)

predicate offence for money laundering (section 261 StGB). Specifically, it is proposed that the list of predicate offences for money laundering will include the criminal offence of taking and giving bribes in commercial practice, when committed on a commercial basis (*gewerbsmäßig*) or as a member of gang (*bandenmäßig*).

Conclusion for corporate practice

The changes proposed within the draft law are very much in line with the international trend of extending the appli-

cability of national anti-corruption legislation to offences committed abroad, as exemplified, for example, by the UK Bribery Act in 2011. In the event that the current draft law were to come into force, companies should, specifically, also evaluate the extent to which they need to adapt their internal compliance programme and to provide suitable training for employees.

Contact



Dr. Heiner Hugger LL.M.
Partner

E: Heiner.Hugger@cliffordchance.com



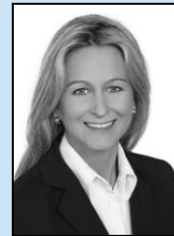
Dr. Jochen Pörtge
Counsel

E: Jochen.Pörtge@cliffordchance.com



Dr. David Pasewaldt
Senior Associate

E: David.Pasewaldt@cliffordchance.com



Ann-Kristin Cahnbley LL.M.
Associate

E: Ann-Kristin.Cahnbley@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. If you would like to know more about the subjects covered in this publication or our services, please contact the authors or your usual contact at Clifford Chance.

Clifford Chance, Mainzer Landstraße 46, 60325 Frankfurt am Main, Germany
© Clifford Chance 2014

Clifford Chance Deutschland LLP is a limited liability partnership with registered office at 10 Upper Bank Street, London E14 5JJ, registered in England and Wales under OC393460. A branch office of the firm is registered in the Partnership Register at Frankfurt am Main Local Court under PR 2189.

Regulatory information pursuant to Sec. 5 TMG and 2, 3 DL-InfoV:
www.cliffordchance.com/deuregulatory

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.