

# **Q&A IN RELATION TO BRIBERY OFFENCES IN GERMANY**

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## 1 Q&A In Relation to bribery offences in Germany

# 1. Legal Framework

### What is the legal framework governing bribery in Germany?

- The German Criminal Code (GCC).

## 2. What Constitutes a Bribe?

### What constitutes a bribe?

- German criminal law differentiates between bribery in commercial practice (section 299 GCC) and bribery in connection with public officials (sections 331 ff. GCC).
- Pursuant to section 299 of the GCC, the following acts qualify as bribery in commercial practice:
  - demanding, allowing himself/herself to be promised or accepting as an employee or agent of business a benefit for himself/herself or another in a business transaction as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services (section 299 para. 1 no. 1);
  - for competitive purposes offering, promising or granting an employee or agent of a business a benefit for himself/herself or for a third person in a business transaction as consideration for such employee's or agent's according him/her or another an unfair preference in the purchase of goods or commercial services (section 299 para. 2 no. 1);
  - obtaining, being promised or accepting as an employee or agent of business a benefit for himself/herself or for a third party without the consent of the company as consideration for goods or services and thereby breaching his/her obligations vis-à-vis the company by performing or refraining from performing any act in relation to such goods or services (section 299 para. 1 no. 2); or
  - offering, promising or granting to an employee or agent of a business without the consent of the company, a benefit to that company or to a third party as consideration for performing or refraining from performing any act in relation to the purchase of goods or services, and thereby failing to fulfill its obligations vis-à-vis the company (section 299 para. 2 no. 2).
- Further, pursuant to sections 331 ff. GCC, it is qualified as bribery in connection with public officials if the relevant offences (demanding, allowing himself/herself to be promised or accepting or alternatively offering, promising or granting a benefit) are related to an official duty by a (European) public official or a person entrusted with special public service functions.
- A benefit is any advantage which puts the perpetrator or a third party in a better economic, legal or personal position, material or immaterial, and which the perpetrator is not legally entitled to.

### What are the principal offences under this legal framework?

- Taking and giving bribes in commercial practice (section 299 GCC).
- Taking bribes as a (European) public official or a person entrusted with special public service functions (section 331 GCC).
- Taking bribes as a (European) public official or a person entrusted with special public service functions meant as an incentive to violating one's official duties (section 332 GCC).
- Giving bribes to a (European) public official or a person entrusted with special public service functions (section 333 GCC).

- Giving bribes to a (European) public official or a person entrusted with special public service functions as an incentive to the recipient violating their official duties (section 334 GCC).
- Bribery in relation to foreign and international officials (section 335a GCC).

### 3. Jurisdictional Reach

#### What is the jurisdictional reach of the legal framework?

- German criminal law applies to acts committed on German territory (section 3 GCC). Pursuant to section 9 GCC, an offence is deemed to have been committed in every place where the offender acted or, in the case of an omission, should have acted, or in which the result, if it is an element of the offence, occurs or should have occurred according to the intention of the offender.
- In addition, under certain circumstances, German criminal law may apply to offences committed abroad against domestic legal interest, regardless of the law applicable in the locality where the act was committed (section 5 GCC).
- Further, German criminal law shall apply to (section 7):
  - offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction;
  - other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:
    - was German at the time of the offence or became German after the commission; or
    - was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.

### 4. Who may be liable?

#### Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

- Private individuals and public officials concerned can be prosecuted for bribery offences under sections 299, 331, 332, 333, 334, 335a GCC.
- Since no corporate criminal law exists in Germany, legal entities may not be held criminally liable for bribery.
- Nevertheless, other sanctions may be imposed on legal entities, especially administrative fines (section 30 of the Act on Regulatory Offences) or a confiscation order (section 29a of the Act on Regulatory Offences or section 73 GCC).
  - According to section 30 of the Act on Regulatory Offences, an administrative fine up to EUR10 million may be imposed against the legal entity if someone acting on behalf of the legal entity has committed a criminal offence (e.g. bribery) or a regulatory offence as a result of which duties incumbent on the legal entity have been violated, or where the legal entity has been enriched or was intended to be enriched.
  - That fine shall exceed the financial benefit that the legal entity has obtained from commission of the offence and may therefore exceed the statutory maximum of EUR10 million.
  - Alternatively, if an unlawful act has been committed and the legal entity has acquired proceeds from it, the court shall order the confiscation of what was obtained.

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#### **Can a parent company be liable for its subsidiary's involvement in bribery?**

- It is disputed under German law whether and to what extent a parent company and its management may be held liable for a subsidiary's involvement in bribery. This must be assessed on a case-by-case-basis.

## **5. High Risk Areas**

#### **Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?**

- Yes, provided they meet the criteria, facilitation payments are considered bribes.

#### **Does the legal framework restrict political and charitable contributions?**

- Political or charitable contributions may be considered to be bribes and would fall to be assessed by reference to the provisions described in this note.

#### **Does the legal framework place restrictions on corporate hospitality?**

- Whether corporate hospitality given amounts to a bribe would be assessed on the case-by-case-basis.
- The GCC makes no express provisions with regard to corporate hospitality and any financial or other advantage given in that context would fall to be assessed by reference to the provisions described in this note.

## **6. Legal Defences**

#### **Are there any defenses for bribery offences?**

- There are no specific statutory defenses for bribery offences in Germany. However, according to a judgment of the German Federal Court of Justice, the quality and efficiency of a compliance management system is to be taken into account as a mitigating factor when calculating a potential administrative fine against a company. Further, the company's efforts to optimize an existing compliance management system after a violation has been exposed is to be considered.

## **7. Regulatory and Enforcement Bodies**

#### **What are the key regulatory or enforcement bodies with regard to bribery?**

- The Public Prosecution Office is the competent authority in Germany with regard to bribery.

## **8. Legal Consequences**

#### **What are the legal consequences of being found guilty of bribery offences?**

- Individuals face up to ten years' imprisonment and/or a fine on conviction (depending on the severity of the offence and depending on whether public officials are involved).
- If bribery has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained (section 73 GCC).
- No corporate criminal liability exists in Germany. However, an administrative fine or confiscation order may be imposed against a legal entity (section 29a and 30 of the Act on Regulatory Offences, see above 5.).
- Any person convicted of bribery or subject to an administrative fine may also face debarment from public

procurement contracts.

## 9. Deferred Prosecution Agreements

### Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

- In Germany there are no deferred prosecution agreements available. However, informal settlements with the Public Prosecutor's Office are possible.

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