

GERMANY

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

The Federal Republic of Germany signed the Convention on 17 December 1997. It was transposed into national law through the Act on Combating Bribery of Foreign Public Officials in International Business Transactions (Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr – IntBestG) dated 10 September 1998 (Federal Law Gazette [Bundesgesetzblatt] Part II p. 2327, Annex 1). This Act entered into force on 15 February 1999 (date of entry into force of the Convention). According to the German authorities, no further implementing legislation was necessary. Germany deposited its ratification document on 10 November 1998.

The Convention as a whole

Under German law, criminal offences and related sanctions are dealt with in various legal statutes. The central piece of legislation is the Criminal Code (Strafgesetzbuch). In addition to the Criminal Code, criminal offences can be created in other laws. The Act on Combating International Bribery is part of this supplementary legislation.

Besides the criminal law, German law includes administrative regulatory offences. These are violations of the law that are not regarded as criminal, although certain legal values protected by the law are injured or endangered by them. The most important legislation in this field is the Administrative Offences Act (Gesetz über Ordnungswidrigkeiten). It contains, inter alia, the provisions on the liability of legal persons. The sanction for a breach of an administrative regulation is a non-criminal fine. In addition, secondary measures can be ordered, for example the confiscation of certain objects.

Bribery of domestic public officials is punishable in Germany by virtue of sections 334 to 338 of the Criminal Code. Germany passed the Act on Combating International Bribery (“ACIB”) in order to implement the Convention. The general approach of this Act is to provide for the equal treatment of the offences of bribing domestic and foreign public officials and parliamentarians. Prior to the new legislation, only bribery of domestic public officials and parliamentarians was punishable.

A separate offence has been created for the bribery of foreign Members of Parliament and members of parliamentary assemblies of international organisations in section 2 of Article 2 of the ACIB.

No further implementing legislation has been necessary as the other provisions of the Convention are already part of existing laws in Germany.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

1.1 Elements of the Offence

1.1.1 any person

Under current German law, criminal punishment may only be imposed on a natural person, which Germany states includes a non-national who commits the offence within the German territory.

1.1.2 intentionally

German law conditions the offence of bribery, both in respect of domestic and foreign officials, to intentional action (Section 15 of the Criminal Code). The attitude of the offender must be such that he/she is aware of, desires or at least accepts all the statutory elements of the offence.

1.1.3 to offer, promise, or give

Both section 334 of the Criminal Code and section 2 of Article 2 of the ACIB include the “offering”, “promising” and “granting” of a bribe as offences.

1.1.4 any undue pecuniary or other advantage

Section 334 of the Criminal Code and the ACIB cover all material or non-material benefits to which public officials have no legal entitlement and that place them in a better position in economic, legal or even only personal terms. In addition, Germany explains that the *de minimis* rule is in general not applicable under section 334 of the Criminal Code, because where there is a breach of duty, there is no possibility of excluding small gifts. There is no case law on this issue.

1.1.5 whether directly or through intermediaries

Under section 25 of the German Criminal Code, anyone who commits the offence himself, or through another person, is liable to be punished as an offender.

1.1.6 to a foreign public official

domestic officials

Under German law, a public official is anyone who is a civil servant or a judge, or exercises some other official capacity under public law or has otherwise been appointed to fulfil functions of public administration with an authority or any other agency or upon its behalf, irrespective of the organisational form selected to carry out the functions [paragraph 11(1)2 of the Criminal Code].

foreign officials

The foreign public official who is afforded “equal” treatment with German public officials, is described in greater detail in section 1 of Article 2 of the ACIB:

1. a judge of a foreign state or at an international court;
2. a) a public official of a foreign state or
b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state, or

c) a public official or other member of the staff of an international organisation or a person entrusted with carrying out its functions;

3. a soldier of a foreign state or a soldier who is entrusted to exercise functions of an international organisation.

Germany explains that the definition of foreign public official in the ACIB is, in certain cases, broader than the definition of domestic public official. As German authorities cannot presume that domestic requirements regarding the appointment of public servants apply abroad, section 1 of Article 2 provides as a minimum requirement only that they must be entrusted to exercise public functions for a foreign state. Germany adds that the definition covers an NGO official implementing a programme funded by an international organisation, where he/she is entrusted with carrying out the function of a (public) international organisation.

With respect to the reference to “a public enterprise with headquarters abroad” in paragraph 2(b), Germany clarifies that a person performing a public function for a foreign public enterprise with headquarters within German territory would also be covered by the umbrella clause at the end of paragraph 2(b). Germany adds that the umbrella clause covers everybody entrusted to exercise a public function, including a private person.

Members of foreign Parliaments

Under the German legal system, Members of Parliament are not regarded as public officials. The bribing of a Member of Parliament is therefore covered by a separate provision that only prohibits the buying or selling of votes for an election in a German or the European Parliament [section 108 e of the Criminal Code]. Members of Parliaments of foreign states and international organisations are thus covered in a separate article that is broader than that applying to domestic members of Parliament [section 2 of Article 2 of the ACIB]. In certain cases both provisions will apply to the bribery of members of the European Parliament.

Finally, the term “state” covers under German law all levels and sub-levels of state activity.

1.1.7 for that official or for a third party

In accordance with section 334 of the Criminal Code and section 2 of Article 2 of the ACIB, the recipient of the bribe may be either the public official, Member of Parliament or a third person.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Section 334 of the Criminal Code applies to the performance of “an official act” so that the public official “has violated or would violate his official duties”. Germany explains that an “official act” has been interpreted broadly by the courts. The traditional formula has been that it must be an act that by its nature does not only have a loose connection to the public official’s service or the performance of his/her service. Moreover, in interpreting Article 2, section 2 of the ACIB the courts will take into consideration the explanations given in the Government Draft, which includes the Commentaries to the Convention. In addition, pursuant to subsections 334(1) and (3) there must be an attempt to violate “official duties” or an attempt to influence discretion. In accordance with paragraph 334(3)1, it is sufficient for the briber to attempt to bring about a breach of duty in respect of a future official act. A duty has already been breached if the decision is influenced by the bribe although the result itself might not be legally objectionable.

As far as bribery of a foreign parliamentarian is concerned, Article 2, section 2 of the ACIB does not refer to a breach of official duties as such duties are difficult to define for the parliamentary process.

With regard to public officials and judges, section 336 of the Criminal Code explicitly states that omission of an official act is equal to perpetration. The same applies with regard to members of a foreign parliament (section 2 of the ACIB).

1.1.9 in order to obtain or retain business or other improper advantage

The Convention prohibits bribes to foreign officials not only to “obtain or retain business” but also to secure any “other improper advantage”.

The English translation of the German Act (ACIB) uses the term “unfair” advantage, which according to the German authorities has been incorrectly translated from the German word “unbillig”, which means “improper”.

1.1.10 in the conduct of international business

The ACIB uses the term “international business transactions”. The German authorities have pointed out that the term “business transaction” is also used in the domestic Act Against Unfair Competition¹, where it is given a broad interpretation (mostly in civil law cases). The ACIB Draft clearly indicates that it is the intention that the same broad interpretation be extended to international business transactions in the ACIB. Additionally, it can be understood that the conduct of international business necessarily involves a business transaction.

1.2. Complicity

Article 1(2) of the Convention requires Parties to take the steps necessary to criminalise complicity, including incitement, aiding or authorisation of an act of bribery of a foreign public official.

German Criminal Law has general provisions for participation in a criminal offence. They relate to, in particular, joint participation in accordance with subsection 25(2) of the Criminal Code, incitement in accordance with section 26 of the Criminal Code, and aiding in accordance with section 27 of the Criminal Code. Participation in the bribery of a foreign public official is covered by these general rules.

Germany clarifies that “aiding” under section 27 of the Criminal Code is interpreted in a very broad sense, and includes the concept of abetting in the sense that it means, “encouraging”. It further clarifies that, depending on the circumstances, section 26 on “incitement” or section 27 on “aiding” covers the concept of authorisation.

1.3. Attempt and Conspiracy

According to the Convention attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Attempted bribery of a domestic or foreign public official for a violation of duties does not incur criminal liability under subsection 334(3) of the Criminal Code; attempted bribery of a judge for a violation of duties is punishable under subsection 334(2) of the Criminal Code; and attempted bribery of a member of Parliament is punishable under Article 2, subsection 2(2) of the ACIB. Germany

¹. Gesetz über den unlauteren Wettbewerb

explains that in keeping with the requirements of the Convention in this regard, existing provisions on attempt concerning the bribing of domestic officials have been extended to relation to foreign public officials. As far as an attempt is not punishable in relation to domestic officials, it has not been extended to foreign officials. However, Germany points out that offering and promising are elements of the offence.

According to the German authorities, conspiracy to bribe is not punishable under German law. The provision on conspiracy in the Criminal Code [subsection 30(2)] only applies to “major criminal offences” [defined in subsection 12(1) of the Criminal Code], which do not include the offences of active bribery.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

German law does not establish criminal responsibility of legal persons. However, legal persons can be held responsible under the German Administrative Offences Act, which imposes non-criminal fines. Germany adds that it is currently reviewing the possibility of introducing the concept of criminal responsibility of legal persons, and that a commission has been set up to study the issue.

According to section 30 of the Administrative Offences Act, legal entities (or associations or partnerships without legal capacity) can be liable for fines if “a person” has committed a crime or an administrative offence by means of which duties incumbent upon the legal entity or association have been violated or the legal entity or the association has gained, or was supposed to have gained, a profit.

The acting “person” must be the authorised organ of a legal person or a member of such an organ or a fully authorised representative, or have acted in a leading position as a procura holder or a general agent of the legal person. In the case of an association without legal capacity, it is required that the person is a member of the board of that association. In the case of a partnership, the person needs to be an authorised partner.

In addition, Germany explains that if pursuant to section 130 and section 9 of the Administrative Offences Act² a non-leading person commits bribery, the legal person is responsible if he/she “wilfully or negligently” failed to take “supervisory measures required to prevent” the act.

To the extent that these entities are based on private law, it does not matter whether they are privately owned or state-owned or state-controlled. It is also possible to establish a legal person under public law. There is a debate whether in this case, section 30 of the Administrative Offences Act would likewise apply. The German authorities report that the prevalent opinion favours this application, and that this is supported by case law.

Pursuant to subsection 30(4) of the Administrative Offences Act, a fine may be imposed separately on the legal person if criminal or administrative proceedings have not been initiated in respect of the person acting or have been discontinued or if punishment is not imposed. “Separate assessment of a fine on the legal entity or association shall however be ruled out if the criminal or administrative offence cannot be prosecuted for legal reasons”. Germany indicates that “legal reasons” means impediments to prosecution and the main example of this is the expiration of the statute of limitations.

² Section 9 of the Administrative Offences Act extends liability under section 130 (s. 130 just covers the owner of a firm or an enterprise) to all possible persons to whom this duty of supervision can be delegated.

A question has been raised about the liability of a German company for bribery committed by a non-German agent abroad. Germany responds that in this case fines could be imposed on the company for the act of bribery committed abroad where the offender is found in Germany (in absentia proceedings do not exist in Germany) and his/her extradition is not requested, is refused or cannot be executed.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject non-natural persons (e.g. corporations) to criminalise responsibility, the Convention requires the Party to ensure that legal persons are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions.” The Convention also mandates that for natural persons, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. In any case, the Convention requires each party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions

3.1 Criminal Penalties for Bribery of a Domestic Official

Subsection 334(1) of the German Criminal Code provides for imprisonment of between three months to up to five years for the bribery of domestic public officials, persons specially entrusted with public service functions and soldiers of the Federal Armed Forces. In less serious cases, the punishment is imprisonment of up to two years or a fine (5 to 360 daily rates of between DM 2 and 10,000, section 40 of the Criminal Code). For bribery of judges relating to future judicial acts, the minimum punishment has been increased to six months. If the offender acts as a member of a gang formed for recurrent commission of such offences, in addition to imprisonment of more than two years, a property fine within the meaning of section 43 a of the Criminal Code can be imposed (section 338 of the Criminal Code).

In particularly serious cases of bribery, section 335 of the Criminal Code provides for a sentence of imprisonment from one to ten years. Pursuant to subsection 335(2), a particularly serious case “ shall be deemed to exist” where the offence relates to an advantage on a large scale; there have been recurrent acts; or the perpetrator acts commercially or as a member of a gang that has come together for recurrent commissions of the offence. Germany explains that there has been a tradition in this century to give more guidance to judges for the imposition of larger terms of imprisonment. It emphasises that the rules in section 335 are just meant to give guidance and that counter arguments may be given.

As far as bribery of German Members of Parliament is concerned, section 108e of the Criminal Code provides for a punishment of up to five years' imprisonment. The minimum would be one month imprisonment in accordance with subsection 38(2) of the Criminal Code or a fine (5 to 360 daily rates, section 40 of the Criminal Code). As has been explained above, these provisions only cover the buying or selling of votes in elections or ballots.

3.2 Criminal Penalties for Bribery of a Foreign Official

The same penalties applying to bribery of domestic officials apply to bribery of foreign officials. Thus, in accordance with section 1 of Article 2 of the ACIB, the punishments under sections 334, 335 and 338 of the Criminal Code also apply to bribery of foreign public officials in international business transactions. Concerning bribery of foreign Members of Parliament, section 1 of Article 2 of the ACIB provides for imprisonment of up to five years [minimum of one month in accordance with subsection 38(2) of the Criminal Code] or a fine [5 to 360 daily rates, subsection 40(1) of the Criminal Code].

In accordance with German law, these criminal penalties apply only to natural persons. As far as legal persons are concerned, fines can be imposed in accordance with section 30 of the Administrative Offences Act (see above at 2 and on amounts at 3.5).

Domestic		Foreign	
Public Official	Member of Parliament (Buying or selling of votes)	Public Official	Member of Parliament
<i>Imprisonment</i> 3 months up to 5 years (Sec. 334(1))	<i>Imprisonment</i> 1 month up to 5 years or <i>Fine</i> 5 full day fines up to 360 full day fines (Sec. 108e(1))	<i>Imprisonment</i> 3 months up to 5 years (Sec. 334(1))	<i>Imprisonment</i> 1 month up to 5 years or <i>Fine</i> 5 full day fines up to 360 full day fines (Sec. 1, Art. 2 ACIB)
<u>Less serious cases</u> <i>Imprisonment</i> up to 2 years and a fine (Sec. 334(1))	<i>Fines</i> Full day fine up to 360	<u>Less serious cases</u> <i>Imprisonment</i> up to 2 years and a fine (Sec. 334(1))	
<u>Particularly serious cases of bribery</u> <i>Imprisonment</i> 1 year to 10 years (Sec. 335)		<u>Particularly serious cases of bribery</u> <i>Imprisonment</i> 1 year to 10 years (Sec. 335)	

3.3 Penalties and Mutual Legal Assistance

Under the German legal system, mutual legal assistance is rendered either on a treaty or a non-treaty basis in accordance with the Act on International Mutual Assistance in Criminal Matters³.

Treaty-based mutual legal assistance is governed by the European Convention on Mutual Assistance in Criminal Matters (20 April 1959), of which 32 countries are members (as of the end of 1998), and the supplementary Convention Applying the Schengen Agreement (19 June 1990). Moreover, Germany has concluded bilateral agreements concerning mutual legal assistance.

³. Gesetz über die internationale Rechtshilfe in Strafsachen dated 23 December 1982

Under these treaties, the rendering of mutual legal assistance is *not* conditional on the criminal offence in question being punishable by a measure entailing deprivation of liberty. In accordance with Article 1, section 1 of the afore-mentioned European Convention, the Contracting Parties are obliged to "afford ... mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party". Article 49 (a) of the Convention Applying the Schengen Agreement also covers administrative offences, provided that appeals procedures before a criminal court are permitted.

Germany adds that bilateral treaty-based mutual legal assistance does not differ in substance from the 1959 Convention, and is guaranteed effective here too.

With respect to non-treaty mutual legal assistance, subsection 59(3) of the Act on International Mutual Assistance in Criminal matters permits the granting of mutual legal assistance if German courts could afford each other administrative assistance in similar cases. Like the treaty-based mutual legal assistance, non-treaty mutual legal assistance is therefore *not* conditional on whether the offence in question can be punished by a measure entailing deprivation of liberty.

3.4 Penalties and Extradition

Under treaty-based extradition, Article 2 paragraph 1 of the European Convention on Extradition (13 December 1957), of which 36 countries are members (as of the end of 1998), provides that extraditable offences are any offences "punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty". This means that extraditability always applies if the offence is punishable by deprivation of liberty the upper limit of the statutory range of punishment of which is not less than one year. According to the German authorities, the same definition of extraditable offences applies, in principle, to bilateral extradition treaties.

The situation with respect to bilateral treaty-based extradition is the same as with respect to bilateral treaty-based mutual legal assistance (see discussion under 3.3).

As far as non-treaty extradition is concerned, subsection 3(2) of the Act on International Mutual Assistance in Criminal Matters establishes as an extraditable offence any punishable act that can be sanctioned in accordance with German law with a maximum punishment of at least one year imprisonment.

3.5 Non-criminal sanctions applicable to legal persons for bribery of foreign public officials

In accordance with section 30 of the Administrative Offences Act, a fine can be imposed on a legal person. In cases of an intentional criminal offence committed by the acting person, as is the case with bribery of a domestic or foreign public official, the fine is up to DM 1 million, and in cases of a negligent offence committed by the acting person up to DM 500,000.

Where an administrative fine is imposed on the acting person and he/she has acquired an economic advantage that exceeds the maximum amount of the fine imposed for such an offence, pursuant to subsection 17(4) of the Administrative Offences Act, this amount may be exceeded to siphon off the advantage. Where no fine is imposed section 29a of the Administrative Offences Act permits the ordering of the "forfeiture of a sum of money up to the amount of what has been gained". Germany further explains that the courts have interpreted "economic advantage" in a wide sense, and that it would even include an improvement in market position.

The maximum amounts of administrative offences in specific statutes differ. The highest amount is DM 3,000,000 (Act on Trade in Securities, "Wertpapierhandelsgesetz"). The maximum amount for a violation of supervisory duty involving the commission of a criminal offence by a subordinate is DM 1,000,000 (being even higher in exceptional cases).

3.6 Seizure and Confiscation of the Bribe and of Its Proceeds

German law distinguishes between forfeiture (sections 73 et seq. of the Criminal Code), and confiscation (sections 74 et seq. of the Criminal Code). Forfeiture applies to what the offender or participant has gained for an offence or from it, and confiscation applies to the "producta et instrumenta sceleris" (products and instrumentalities of the offence).

If the person has already received the bribe, it is subject to *forfeiture* in accordance with section 73 of the Criminal Code. According to the German authorities, forfeiture is only possible if the person receiving the bribe is subject to German jurisdiction and the proceedings can also be carried out in Germany.

If the bribe is still in the possession of the person offering the bribe, against whom criminal proceedings are being carried out in Germany, it is subject to *confiscation* according to sections 74 et seq. of the Criminal Code. This will be the case if the bribe has either not been handed over or has been rejected by the person to be bribed.

According to the German authorities, *proceeds* from the bribery of a foreign public official are subject to forfeiture, provided that there is a direct link between the act of bribery and the proceeds. In accordance with subsection 73(2) second sentence or section 73a of the Criminal Code, *assets* the value of which corresponds to that of the proceeds of bribery are also subject to forfeiture, provided that the forfeiture of the actual proceeds was permissible, but in fact impossible. In this respect "proceeds" refers to "anything" that the offender or a participant has gained "for or from" the offence, and includes movable and immovable objects, and rights. If forfeiture of a particular item is not possible, "the court shall order the forfeiture of a sum of money equivalent in value" (s. 73a).

3.7 Additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official

At present, German law does not provide for specific "civil sanctions" against persons who are subject to criminal law sanctions in respect of the bribery of a foreign public official. However, Germany draws attention to section 826 of the German Civil Code, which provides for damages where a person intentionally injures another in such a way as to breach public morals, and states that section 826 should apply to the intentional bribery of a foreign public official. It also raises the possibility of the applicability of subsection 823(2) of the Civil Code, which provides for compensation where a person breaches a statute intended to protect others (e.g., Art. 2 of the ACIB).

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

According to section 3 of the Criminal Code, German criminal law applies to criminal offences committed on domestic territory. A place of commission can be any place where the offender or participant has acted or, in the case of an omission, ought to have acted. A place of commission can also be the place where there was a successful outcome of the offence or where the outcome was intended to be achieved (section 9 of the Criminal Code).

4.2 Nationality Jurisdiction

Article 2.3 of the ACIB establishes that German criminal law shall apply to the offence of bribing a foreign public official committed abroad by a German national, “regardless of the law of the place of commission”. This is broader than paragraph 7(2)1 of the Criminal Code, which limits extraterritorial jurisdiction to offences committed by a German only if the act is a criminal offence at the place of commission or if such place is not subject to any criminal jurisdiction.

In addition, paragraph 7(2)2 of the Criminal Code allows for the prosecution of a foreigner for an offence committed abroad, if the act is a criminal offence at the place of commission or if such place is not subject to any criminal jurisdiction, and he/she is not extradited because extradition was not requested, or was refused or cannot be executed.

Germany adds that Article 2.3 of the ACIB does not extend extraterritorial jurisdiction to the offence of bribing a foreign public official committed abroad by a non-German permanent resident of Germany.

4.3 Consultation Procedures

In view of the German authorities, Article 21 of the European Convention on Mutual Assistance in Criminal Matters allows a state to request another Contracting Party to take over criminal prosecution. Although the wording of Article 21 only deals with the transmission of information, the “Explanatory report” related to the Convention states that “this provision enables any Contracting Party to request another Party to institute proceedings against an individual”. Furthermore, the German authorities are of the opinion that “in other respects” it is, in principle, possible to induce another state to take over criminal prosecution via diplomatic consultations or to file an extradition request. There exist no codified provisions in this regard.

4.4 Effectiveness of jurisdiction

According to the German authorities, the recently enacted ACIB is an effective and sufficient step to fight against the bribery of foreign public officials.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention demands that the investigation and prosecution of the bribery of a foreign public official be "subject to the applicable rules and principles of each Party". It also requires that each Party ensures that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles That Govern Investigation and Prosecution

There are no special statutory provisions in Germany relating to investigation proceedings in bribery. The so-called principle of mandatory prosecution applies in case of suspicion of commission of bribery-related crimes, as in the case of suspicion of other crimes. This means that the office of public prosecutor, as soon as there is a suspicion of a criminal offence, is obliged to investigate the facts of the case in order to decide whether a public charge is to be filed.⁴

4. Subsection 160(1) of Code of Criminal Procedure.

Unless otherwise provided by law, the office of public prosecutor is, in principle, obliged to intervene in respect of all prosecutable criminal offences if sufficient evidence exists.⁵ It can carry out any type of investigation and if there is sufficient evidence that the accused has committed a criminal offence, the office of public prosecutor files a charge with the responsible court.⁶ Otherwise, proceedings are discontinued and the accused informed thereof.⁷

The principle of mandatory prosecution and the duty to file charges where suspicion exists is limited in certain cases. Accordingly, the criminal prosecution authorities have discretion to abstain from prosecution in respect of cases of a minor crime.⁸

Furthermore, the office of public prosecutor may refrain from prosecuting criminal offences if, inter alia, these have been committed outside the territorial scope of the Code of Criminal Procedure (i.e. the place of commission and the place of success are not on domestic territory).⁹ If the actions are carried out abroad, but the successful outcome occurs on domestic territory, it is possible to refrain from prosecuting criminal offences if otherwise there would be the risk of a serious disadvantage for the Federal Republic of Germany or if other important public interests are against prosecution.¹⁰ In a given case, the question whether—for the application of section 153c of the Code of Criminal Procedure—an offence committed abroad with territorial links to Germany is considered a domestic offence (a “Distanz” offence) pursuant to subsection 153c(2) or an offence committed wholly outside German territory, can be assessed only according to the concrete circumstances involved.

In addition, Germany explains that because the Convention has become German domestic law, “danger of a serious disadvantage to the Federal Republic of Germany” and “other public interests” do not include the considerations listed in Article 5 of the Convention. It is only possible to discontinue proceedings in accordance with subsection 153c of the Code of Criminal Procedure in exceptional narrowly-defined circumstances requiring a “risk (danger) of a severe (serious) disadvantage for Germany” or “overriding public interests” against prosecution. These possibilities refer mainly to offences involving national security interests.

If a prosecutor or a court discontinues criminal proceedings on the basis of a discretionary decision based on the above-mentioned provisions in the Code of Criminal Procedure, a formal complaint (“Beschwerde”) leading to a review by a court is not possible. However, “aggrieved persons” may, pursuant to subsection 170(2), challenge the prosecutor’s decision by a formal complaint to the Public Prosecutor General, and afterwards to a court. The term “aggrieved persons” is broadly construed, and may, in the case of bribing a foreign public official, include the foreign authority affected and a competitor.

With respect to administrative proceedings taken against a legal person for the offence of bribing a foreign public official, the German authorities provide that according to the general interpretation of the principle of discretion under the Administrative Offences Act, any discontinuance of proceedings

5. Subsection 152(2) of Code of Criminal Procedure.

6. Subsection 170(1) of Code of Criminal Procedure.

7. Subsection 170(2) of Code of Criminal Procedure.

8. These are cases where a low minimum imprisonment of less than one year or a fine can be imposed, where the guilt of the offender is considered to be slight, and where, in principle, there is no public interest in prosecution.

9. Subsection 153c (1)1 of Code of Criminal Procedure.

10. Subsection 153c(2) of Code of Criminal Procedure.

must be based on professional motives—the identity of the natural or legal person and considerations of national economic interest—could not be considerations.

5.2 Political or Economic Considerations

According to the German authorities, general criminal proceedings, including those in respect of the bribery of a foreign public official, may only be discontinued under the conditions listed in the previous section. In the view of the German authorities, Article 5 of the Convention is directly relevant to the application of these provisions.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence.

6.1 Term of Statute

The statute of limitations for bribery of a foreign public official (and for domestic bribery) is five years if the limitation period is not interrupted [paragraph 78(1)4 and section 78a]. The statute begins to run as soon as the offence is completed. Absolute lapse occurs after ten years [paragraph 78(3)4; section 78a and section 78 c of the Criminal Code].

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where bribery of a Party's domestic public official is a predicate offence for the application of its money laundering legislation, it must do the same for bribery of a foreign public official, regardless of where the bribery occurred.

7.1/

7.2 Bribery of a Domestic and Foreign Public Official

According to section 261 of the Criminal Code, bribery of a domestic public official is a predicate offence for the application of the criminal provision on money laundering. There are no additional requirements. Bribery committed abroad may also be a predicate offence to money laundering on condition that it is punishable also at the place where the offence is committed [subsection 261(8) of the Criminal Code]. Germany points out that the basic structure of the German money laundering offence is that the offender must have committed a predicate offence that is punishable under German law and, where committed abroad also under the law of the place of commission. Germany warns that in the absence of the proviso in relation to offences committed abroad, someone could be sentenced for money laundering in relation to a predicate offence that is not an offence at all. (e.g. If an advantage that is given to a foreign public official is permitted or required by the written law or regulation of the foreign public official's country.)

Article 2, section 1 of the ACIB affords equal treatment of the bribery of domestic and foreign public officials. According to the German authorities, bribery of foreign public officials is now also a predicate offence for application of the criminal provision on money laundering in accordance with section 261 of the Criminal Code (cf. section 4 of Article 2 of the ACIB).

In relation to the issue of whether there is, in fact, equal treatment of the bribery of domestic and foreign public officials, because of the requirement of dual criminality when the offence is committed abroad, Germany points out that it is not required by the notion of a predicate offence that in the

foreign country the bribery of a foreign public official is an offence. It is sufficient that the bribing of the domestic public official is an offence in the foreign country to trigger the money laundering offence in Germany.

In addition, Germany states that bribery of Foreign Members of Parliament is not a predicate offence for the application of section 26.

8. ARTICLE 8. ACCOUNTING

8.1 Maintenance of Books and Records, Financial Statement Disclosures, Accounting and Auditing Standards

According to the German authorities, German law prohibits for the purpose of bribing foreign public officials or of hiding such bribery

- the establishment of off-the-books accounts,
- the making of off-the-books or inadequately identified transactions,
- the recording of non-existent expenditures,
- the entry of liabilities with incorrect identification of their object,
- the use of false documents.

In view of the German authorities, it emerges from these provisions that an enterprise has to truthfully cover and record all its payments in its accounts, irrespective of whether they are legal or illegal.

8.2 Companies Subject to these Laws and Regulations

According to the German authorities, these laws and regulations apply to all enterprises that are active in trading and to be regarded as merchants. Thus they apply to companies limited by shares, and other legal entities if they act in the same way, such as foundations, associations, cooperatives, natural persons and sole traders.

8.3 Penalties for Omissions and Falsifications

Breaches of the relevant duties are sanctioned as follows:

Duties of managers and related sanctions

According to paragraph 283b(1)1 and 2 and section 14 of the of the Criminal Code, the board members of a company limited by shares, managing directors of a limited company, as well as the managing partner of a partnership may be punished with imprisonment of up to two years or with a fine if they fail to keep books of account, which they are obliged to keep by law, or alter or do away with, hide, destroy or damage them, and hence make it more difficult to gain a picture of the assets of the enterprise. However, a precondition of punishability is that the offender has ceased making payments or has opened up its assets to insolvency proceedings or the initiation application has been rejected because of insufficient assets. Where these acts take place in the case of over-indebtedness or of threatened or actual inability to pay, the offence is sanctioned by imprisonment of up to five years or a fine in accordance with paragraphs 283(1)1, 5 and 6 of the Criminal Code.

While it is true that sanctions pursuant to section 283b of the Criminal Code are conditional, the German authorities recall that Article 8 of the Convention makes clear that countries can provide effective, proportionate and dissuasive civil, administrative or criminal penalties for accounting

offences. Taking account of the general system of punishments and sanctions in Germany, the authorities are of the view that these sanctions are suitable and proportionate. This applies in particular to administrative offences pursuant to paragraph 334(1)1 of the Commercial Code.

According to the German authorities, a further sanction could be to restrict or refuse confirmation of the annual financial statements of those enterprises that are not subject to an audit, the reason being that accounts have not been kept properly [subsection 322(4) of the Commercial Code].

In accordance with section 331.1 of the Commercial Code, which applies to companies limited by shares, and section 17 of the Disclosure Act (Publizitätsgesetz), which applies to other enterprises that are a certain size, punishment of up to three years imprisonment or a fine is imposed on anyone who, as an authorised member of the organ or of its supervisory board, incorrectly portrays or hides the circumstances of the company in the opening balance sheet, in the annual financial statements or in the status report. This would include the omission to record a bribery payment, in the balance sheets.

Omitting to include bribery payments in the balance sheets of all other enterprises may constitute fraud pursuant to section 263 of the Criminal Code if falsified annual financial statements are submitted. Furthermore, in future a fiscal criminal offence pursuant to section 369 of the Fiscal Code may have been committed if bribes are claimed as deductible items in a tax declaration. On the basis of the new 1999/2000/2002 Tax Act (Steuergesetz) bribes may no longer be tax deducted in future. It should be pointed out that the sanctions under fiscal legislation apply to all taxpayers.

Duties of auditors and related sanctions

An auditor has to examine the annual financial statements of enterprises and make an audit report. According to the German authorities, this requirement applies to medium-sized and large companies limited by shares within the meaning of section 267 of the Commercial Code, financial institutions, financial service providers, as well as insurance companies and enterprises that are subject to section 6 of the Disclosure Act. The books of account are to be included in the audit. Furthermore, the audit of the annual financial statements and of the consolidated group accounts is to state whether the statutory provisions and the provisions that complement these in the articles of association or the statutes have been respected.

Germany states that the auditor is required to report breaches of the law when a punishable act has been committed, including the bribing of a foreign public official.

In accordance with section 332 of the Commercial Code, imprisonment of up to three years or a fine is imposed on anyone who, as an auditor or agent of an auditor, reports incorrectly on the result of annual financial statements, a status report, consolidated group accounts or a group report of a company limited by shares, remains silent about relevant circumstances in the audit report or makes a confirmation that is incorrect in terms of content. In accordance with subsection 332(2) of the Commercial Code, the punishment is imprisonment of up to five years or a fine if the offender acts for a fee or with the intention to enrich itself or to damage another person.

Germany submits that the duties of German auditors correspond fully to the International Standards on Auditing (ISA) and ISA 240 in particular.

Moreover, small companies limited by shares and enterprises that do not fall under the Disclosure Act are not subject to the auditing requirement, but are generally required to submit audited statements to their banks.

Special duties of the auditor of an insurance company, a financial institute or a financial services provider

In accordance with subsection 57(1) of the Insurance Supervision Act (Versicherungsaufsichtsgesetz), the auditor of an insurance company also has to determine whether the enterprise has acted in breach of the obligations in accordance with section 15 of the Money Laundering Act (Geldwäsche-Gesetz). Additionally, on request the auditor has to inform the supervisory authority of other facts revealed in the audit that are in breach of proper accounting principles in carrying out the transactions of the insurance company.

In accordance with subsections 29(1) and (2) of the Banking Act (Kreditwesengesetz), the auditor of a financial institute or financial services provider has to examine, inter alia, whether the enterprise has met its obligations according to section 14 of the Money Laundering Act. If the auditor becomes aware of facts in the audit that reveal that the managers have committed serious breaches of the law, the statutes and the articles of association, it has to inform the Federal Banking Supervisory Office and the German Bundesbank without delay.

Administrative offence in accordance with section 379 of the Fiscal Code (minor tax fraud)

Under this provision, any taxpayer (and hence any enterprise) is punishable with a fine of up to DM 10,000 who intentionally or negligently

1. *issues documents which are factually incorrect, or*
2. *incorrectly posts or has posted in accordance with the law business events or transactions which are subjected to posting or recording*

and thereby makes it possible to reduce taxes or obtain unjustified fiscal advantages.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

9.1 Laws, Treaties, Arrangements Enabling Mutual Legal Assistance

The rendering of mutual legal assistance does not depend on whether the requesting party conducts investigations and proceedings against a *natural* or *legal* person. The relevant treaties are the following:

- the European Convention on Mutual Assistance in Criminal Matters (20 April 1959);
- the additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (17 March 1978);
- the Convention applying the Schengen Agreement (19 June 1990), and
- bilateral mutual legal assistance treaties (including bilateral supplements to the European Convention on Mutual Assistance in Criminal Matters).

As far as non-treaty mutual legal assistance in criminal matters is concerned, the provisions relating to other mutual legal assistance (sections 59 to 67a) of the Act on International Mutual Assistance in Criminal Matters apply.

Mutual legal assistance in non-criminal proceedings may be governed by the European Convention on the Service Abroad of Documents relating to Administrative Matters (24 November 1977).

9.2 Dual Criminality

According to the German authorities, the principle of dual criminality is not a precondition for meeting a request for mutual legal assistance in Germany. The situation is different with regard to extradition requests (see above 4.4).

An exception to this rule is non-treaty mutual legal assistance in accordance with paragraph 66(2)1 of the Act on International Mutual Assistance in Criminal Matters. This provision covers requests to transmit evidence. It is permissible only if the criminal offence in respect of which the transmission of evidence has been requested is also a criminal or administrative offence in accordance with German law. This precondition is met in respect of the offence of bribery under the present Convention.

A comparable provision is Article 5 para 1 (b) of the European Convention on Mutual Assistance in Criminal Matters. According to this provision, any contracting party may reserve the right to make the execution of letters rogatory for search or seizure of property dependent on, inter alia, the requirement that the offence on which the request is based be an extraditable offence in the requested country. Furthermore, Article 51 (a) of the Convention applying the Schengen Agreement specifies that requests for search and confiscation are only permissible if the offence on which the request is based is, in principle, punishable in both states by a measure of deprivation of liberty with a maximum term of at least six months' imprisonment.

The offence of bribery under the Convention is an extraditable criminal offence and meets the preconditions of both of the before-mentioned provisions (see above 4.4).

9.3 Bank Secrecy

According to the German authorities, it is not possible to refuse to render mutual legal assistance on the ground of bank secrecy.

10. ARTICLE 10. EXTRADITION

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it "may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official".

10.1 Extradition for Bribery of a Foreign Public Official

According to the German authorities, bribery of a foreign public official is deemed to be an extraditable offence both under German law and applicable extradition treaties (see above 4.4).

10.2 Convention as a Legal Basis for Extradition

The German authorities interpret Article 10 para 2 second sentence of the Convention as a basis under international law for extradition in respect of bribery of a foreign public official in cases where extradition is not covered by a multilateral or bilateral agreement. The German authorities point out,

however, that extradition in such cases would already be possible under sections 2 and 3 of the Act on International Mutual Assistance in Criminal Matters.

10.3 Extradition of Nationals

In accordance with Article 16 para 2 of the Basic Law of the Federal Republic of Germany (Grundgesetz), no German may be extradited to a foreign country.

10.5. Dual criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of Article 1 of the Convention.

In Germany, extradition is always conditional on dual criminality. The relevant provisions are subsection 3(1) of the Act on International Mutual Assistance in Criminal Matters in respect of non-treaty extradition, and Article 2 para 1 of the European Convention on Extradition and the relevant provisions in bilateral extradition agreements in respect of treaty-based extradition. The German authorities are of the opinion that the principle of reciprocity is deemed to be met if the punishable act falls under Article 1 of the Convention. In this respect, the German authorities point out to the fact that Germany has already implemented the Convention into domestic law to the effect that bribery of a foreign public official has become an extraditable offence. The German authorities assume dual criminality in view of the corresponding obligations of the other Parties to the Convention.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

On depositing the ratification document, Germany has notified to the Secretary-General that the Federal Ministry of Justice is the German authority responsible for making and receiving any requests in respect of the Convention.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION¹¹

3. TAX DEDUCTIBILITY

The 1999/2000/2002 Tax Alleviation Act (Steuerentlastungsgesetz) dated 9 November 1998 (Federal Parliament Publication 14/23¹², a) provides for a general prohibition to deduct bribes from tax. The prohibition of tax deductibility will no longer depend on punishment in respect of such crimes. The prohibition of deductibility also covers benefits to foreign recipients to the extent that the ACIB provides for equal treatment of foreign and domestic public officials.

¹¹ See German reply to the questionnaire for more detailed answers relating to measures implementing the Recommendation.

¹² Federal Law Gazette (Bundesgesetzblatt) Part 1 No 15 of 31 March 1999 p. 402.

EVALUATION OF GERMANY

General Remarks

The Working Group complimented the German authorities for the rapid implementation of the Convention into German legislation. The Working Group appreciated the recent measures taken to deny tax deductibility of bribes without procedural pre-conditions, e.g. a prior criminal conviction. Delegates thanked the German authorities for their co-operation in the evaluation process, including the speedy translation of relevant legal material.

The Working Group identified the following specific issues, which require clarification:

Specific Issues

1. Performance of official duties

Article 1 of the Convention requires that the offender bribe “in order that the official act or refrain from acting in relation to the performance of official duties”. Section 334 of the German Criminal Code covers bribery concerning a “future judicial or official act” and Article 2 section 2(1) of the Act on Combating International Bribery (ACIB) applies to a future act or omission of a foreign Member of Parliament in connection with his/her mandate or functions.

The issue has been raised whether the German legislation may be narrower than the Convention. The German authorities confirmed that as Article 2 of the ACIB implements the Convention, it would have to be interpreted in conformity with Article 1.4.c of the Convention and the commentaries. This means that the term “official act” would cover any activity linked to the performance of an official’s functions, not just an official’s specific responsibilities.

2. Responsibility of legal person

The German law does not establish criminal responsibility of legal persons. However, legal persons can be held responsible under the German Administrative Offences Act -- which imposes non-criminal fines.

The German authorities explained that pursuant to section 30 of the Administrative Offences Act, the legal person can be held liable if a natural person who holds a leading position in the company commits bribery. In addition, in the case where a subordinate commits bribery, the legal person can also be liable if an employee in a leading position has violated his/her supervisory duties. Section 9 of the Act extends liability under section 130 to all possible persons to whom the duty of supervision can be delegated.

The concern was raised that corporate liability would not apply if the natural person acting for a company could not be prosecuted himself/herself for “legal reasons”. Germany pointed out that the term “legal reasons” was understood to include procedural impediments, such as the expiration of the statute of limitations.

A question was raised about the liability of a German company for bribery committed by a non-German agent abroad. Germany responded that this is not the type of situation that falls under the notion of “legal reasons” creating impediments to prosecution of the legal person. This is a case where the legal person is not liable because there is no punishable offence in Germany. However, Germany provided that prosecution would be possible if the non-German agent were found in Germany, the act were considered a criminal offence at the place of commission and the act were

extraditable under the Extradition Act (although extradition had not been requested, had been refused or could not be executed). The German courts would also have jurisdiction if somebody in Germany who had a supervisory duty violated that duty. The Working Group agreed that the liability of legal persons for bribery committed by non-German agents abroad was an issue it needs to pursue further.

The Working Group welcomed the statement by the German authorities that the question of introducing criminal or other sanctions against legal persons is being considered.

3. Enforcement

According to section 153c subsection 2 of the German Code of Criminal Procedure (CCP), the office of public prosecutor may refrain from prosecuting criminal acts within the purview of this law, but committed outside the territorial scope of this law, if prosecution would create the risk of a serious disadvantage for Germany or is predominantly opposed to other public interests. On the other hand, Article 5 of the Convention requires that enforcement procedures shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved.

The German authorities affirmed that section 153c subsection 2 could only be invoked in exceptional circumstances, such as a threat to national security interests. They also stated that Article 5 of the Convention, being incorporated into German legislation by the ratification of the Convention, provides the relevant standard for prosecution of international bribery notwithstanding section 153c of the CCP.

4. Statute of limitations

Germany has a statute of limitations for bribery of a foreign public official of five years, provided that the limitation period is not interrupted. Absolute lapse occurs after ten years (sections 78 subsection 3 No. 4; 78a and 78c of the Criminal Code). Article 6 of the Convention requires an adequate period of time for investigation and prosecution. The Working Group agrees that this is a general issue for a comparative analysis of the legal situation in member states, and that it should therefore be taken up again at a later stage.

Conclusion

The Working Group considered in light of the available documentation and explanations given by the German authorities that the German legislation conforms to the standards of the Convention.