PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY

March 2011

This Phase 3 Report on Germany by the OECD Working Group on Bribery evaluates and makes recommendations on Germany's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 17 March 2011.

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EXECUTIVE SUMMARY

1. The Phase 3 report on Germany by the OECD Working Group on Bribery evaluates and makes recommendations on Germany's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. It focuses on horizontal issues, which concern the Working Group as a whole, particularly enforcement, and also considers country-specific (vertical) issues arising from progress made since Germany's Phase 2 evaluation in 2003, or issues raised, for instance in the domestic legislation or institutional framework of Germany.

2. Since Phase 2, Germany's enforcement has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in foreign bribery-related cases against individuals. The Working Group is particularly encouraged by Germany's recent enforcement efforts against legal persons since 2007 and recommends that Germany take further measures to ensure the effectiveness of the liability of legal persons, including through sanctions that are effective, proportionate and dissuasive. It also welcomes legislative measures and jurisprudence resulting in increased reporting of suspicions of foreign bribery by tax auditors.

3. Increased enforcement against natural persons was enabled by Germany's pragmatic approach to prosecute and sanction foreign bribery with a range of criminal offences other than the foreign bribery offence, where it was not possible to establish all the elements of proof required to charge the person with the foreign bribery offence. The Working Group nonetheless recommends that Germany ensure that the criteria in the Convention and its Commentaries defining a foreign public official are interpreted broadly, and that no element of proof beyond those contemplated in Article 1 of the Convention is required. The report notes the ambiguity surrounding facilitation payments and the Working Group hence recommends that Germany review its policy and approach on this implicit exception. The report also notes that Germany's increased enforcement was also enabled by its commendable level of international cooperation with other Parties to the Convention. The use of arrangements under section 153a of the Code of Criminal Procedure has also permitted numerous monetary sanctions against individuals, but the Working Group recommends that Germany should increase the transparency of its use of those arrangements.

4. However, the report highlights that sanctions imposed to date against individuals have generally been within the lower range of available sanctions and that most prison sentences have been suspended. The Working Group is concerned that these sanctions may not always be fully effective, proportionate and dissuasive, including in cases involving solicitation. Regarding legal persons, the Working Group is concerned that the maximum level of the punitive component of the administrative fine available in the law is too low, especially for large companies, as was already stressed by the Working Group during Phase 2, and that the confiscatory component, even when covering large amounts of money, only disgorges ill-gotten gains. The Working Group therefore reiterates the recommendation that Germany increase this statutory maximum. In addition, the report highlights the continuing limited availability of data, already noted in Phase 2, and encourages Germany to strengthen its efforts to compile at the federal level, for future assessment, information and statistics relevant to monitoring and follow-up the approach to enforcement of German legislation implementing the Convention.

5. The Working Group is also encouraged by the efforts made by Germany to raise awareness both within the public and the private sector about the foreign bribery offence and to provide training to judges, prosecutors, the police and other relevant public officials to better address cases of foreign bribery. The Working Group recommends that Germany continue its awareness-raising efforts, especially among SMEs, and strengthen the role of German missions abroad in providing advice on and dealing with suspicions of foreign bribery. The Working Group welcomes the growing specialisation and coordination of the prosecuting and police offices. It also recommends that Germany strengthen existing mechanisms to enable company employees to report foreign bribery, through any appropriate means, *e.g.* by codifying the protection identified by jurisprudence and disseminating information on such protection.

6. The report highlights the effectiveness of the requirement for tax auditors to report suspected acts of foreign bribery to the prosecuting authorities. The Working Group recommends that Germany consider enhancing the role of external auditors in reporting suspected acts of foreign bribery. The report notes that Germany has made progress in limiting access to public advantages of companies convicted for foreign bribery, in particular as regards export credits. The Working Group recommends that Germany take additional measures, such as guidelines to procurement authorities and that it consider the establishment of a central registry of unreliable companies.

7. The report and its recommendations reflect findings of experts from Japan and New Zealand and were adopted by the OECD Working Group on Bribery. Within one year of the Group's approval of the report, Germany will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report within two years. The report is based on the laws, regulations and other materials supplied by Germany, and information obtained by the evaluation team during its 4-day on-site visit to Munich and Berlin on 21 to 24 September 2010, during which the team met with representatives from Germany's public administration, private sector and civil society.

A. INTRODUCTION

1. The on-site visit

8. From 21 to 24 September 2010, a team from the OECD Working Group on Bribery in International Business Transactions (the Working Group) visited Munich and Berlin as part of the Phase 3 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation). The purpose of the visit was to evaluate the implementation and enforcement by Germany of the Convention and the 2009 Recommendations.

9. The evaluation team was composed of lead examiners from Japan and New Zealand as well as members of the OECD Secretariat.[1] Prior to the visit, Germany responded to the Phase 3 questionnaires

[1] Japan was represented by: Professor Takeyoshi Imai, School of Law, Hosei University; Shintaro Sekiguchi, Attorney, International Affairs Division, Criminal Affairs Bureau, Ministry of Justice; and Yoshitaka Tsunoda, Deputy Director, International Economic Division, Economic Affairs Bureau, Ministry of

and supplementary questions. It also provided translations of relevant legislation, documents and case law. During the visit, the evaluation team met representatives of the German public and private sectors and civil society.[2] The on-site visit was generally well attended by German officials, and the evaluation team was grateful for the time taken by a number of high ranking officials from the Federal Ministry of Justice (MOJ), the Federal Ministry of Economics and Technology and the Bavarian Ministry of Justice to meet with the examiners. However, the evaluation team was disappointed with the low level of participation by civil society and noted the extremely limited level of participation of media representative despite efforts made by Germany's authorities. The evaluation team notes that German officials decided to attend panels with the business sector, civil society, and lawyers and academics. In line with the Phase 3 procedures, the officials did not intervene and participants did not object to their presence.[3] The evaluation team expresses its appreciation of Germany's cooperation throughout the evaluation process and is grateful to all the participants at the on-site visit for their cooperation and openness during the discussions and in particular to the judges and prosecutors who had been involved in recent prominent foreign bribery cases and who dedicated a significant amount of time sharing their experience with the evaluation team. They all underlined the overall positive achievements Germany has made in the fight against foreign bribery throughout the last decade for which the Working Group commends Germany.

2. Outline and methodology of the report

10. This report is structured as follows: Part B examines Germany's efforts to implement and enforce the Convention and the 2009 Recommendations having regard to Group-wide (horizontal) issues for evaluation in Phase 3, with particular attention on enforcement efforts and results, as well as country specific (vertical) issues arising from progress made by Germany and on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Germany. Part C sets out the Working Group's recommendations and issues for follow-up.

11. The report draws on the responses provided by Germany to the Phase 3 questionnaires, and additional material requested by the evaluation team during and after the on-site visit, as well as inputs from panellists met during the on-site visit. In coordination with the German authorities, the evaluation team began consulting early with German accounting and auditing representatives by sending them a list of issues for discussion on which they provided input after the on-site visit. These include a written submission by auditors and accountants in response to selected questions by the evaluation team.

12. A key part of the analysis is based on i) case summaries included in Germany's replies to the Phase 3 questionnaires and in Annual reports to the Working Group annexed to Germany's replies; and ii) excerpts of selected court decisions requested by the evaluation team and provided by Germany after the on-site visit. The examiners are grateful for Germany's extensive efforts to provide the lead examiners, with translation of this supporting material within the agreed standard evaluation schedule (a particularly cumbersome work for a non-Anglophone country). Germany provided available statistics on concluded enforcement actions (court decisions). These statistics were supplemented by the examiners on the basis of the above mentioned supporting material.

Foreign Affairs. New Zealand was represented by: Jeffrey Clarke, Advisor; New Zealand delegation to the OECD; and Matthew Prince, Acting Manager of Investigations, Auckland branch of Inland Revenue. The OECD Secretariat was represented by: Sandrine Hannedouche-Leric, Senior Legal Analyst, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; Cristina Tébar Less, Senior Policy Analyst, Investment Division; and Anne Conestabile, Legal Analyst, Anti-Corruption Division.

2 See Annex 2 for a list of participants.

3 See paragraph 26 of the Phase 3 Procedure, which provides that an evaluated country may attend, but should not intervene, during the course of non-government panels.

13. The material regarding ongoing cases and court decisions was provided in an anonymised manner that did not allow the evaluation team to identify the defendant or any other person (including both natural and legal persons) involved in a case. Germany explained that Justice is rendered in open camera (Court Constitution Act, Title XIV) and that court decisions are in principle available for the public but never disclose the names of the parties involved. They indicated that a decision of the German Federal Administrative Court[4] implicitly confirmed the practice of anonymising published court rulings based on the principles of privacy and data protection. According to the German authorities, courts have the competence to decide to delete all information allowing for the identification of the defendants and witnesses. Moreover, approximately half of the cases were terminated through settlement agreements between defendants and prosecutors, which are, in principle, not made public and were thus not available to the evaluation team.

14. The evaluation team sought to review and understand the many (close to 70) German decisions and ongoing cases. While anonymisation may not be a problem in itself, given that these cases are often interrelated and involve employees from the same company, the manner in which the anonymisation of the summaries and decisions was done, in particular the deletion of a number of factual elements, made it difficult for the evaluation team to analyse and reconcile the various pieces of information.

15. At Germany's request pursuant to domestic data protection law, this report does not name the defendants in concluded foreign bribery cases, with the exception of the names of two large, well-known German companies, whose cases were highly publicised in the media and in the literature (Siemens and MAN).

3. Brief overview of Germany's Economy

16. Germany is the largest economy in Europe and the fourth largest in the world in nominal terms (fifth largest when measured in USD PPP), with a gross domestic product of EUR 2.4 trillion in 2009. According to *Bundesbank* statistics, in 2008, the stock of German FDI abroad was EUR 945 billion and the flow of German foreign direct investment (FDI) abroad was EUR 233 billion accounting for 7.8% of total world foreign direct investment outflows, making Germany the third-largest investor (in terms of FDI) in the world after the United States and France. Thirty-seven of the world's 500 largest stock market listed companies measured by revenue are headquartered in Germany, the ten biggest being Daimler, Volkswagen, Allianz, Siemens, Deutsche Bank, E.ON, Deutsche Post, Deutsche Telekom, Metro, and BASF.[5] Germany has four trans-national companies (TNCs) among the world's top 50,[6] and German companies rank among the top three of foreign investors.[7]

17. Most of the large companies in various sectors are operating worldwide. For example, the manufacturing sector, notably car production, chemicals and machinery and equipment, accounts for around a quarter of German foreign direct investments. About half of these are located in EU countries; although most investments are located in the United Kingdom and in France, recent growth has been strongest in the new EU countries like Poland, Romania and the Slovak Republic. Foreign investments by

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4 Federal Administrative Court (Bundesverwaltungsgericht), decision of 26 February 1997, doc. Nr. 6 C 3/96, published in: Neue Juristische Wochenschrift (NJW), 1997, p. 2694.

5 The evaluation team is also grateful with the German Institute of Auditors (IDW) for taking the time to answer specific questions in writing, for its excellent coordination and for making all relevant instruments available in English to the examiners.

6 United Nations Conference on Trade and Development (UNCTAD): World Investment Report (2010).

7 As measured by the value of their OFDI stock by the end of 2008. UNCTAD, World Investment Report (2009).

financial institutions account for around one-fifth of the overall FDI stock, concentrated in Europe and the United States[8]

18. In 2009, exports totalled EUR 977 billion in value terms, accounting for around 9% of world exports.[9] Germany is the world's second-largest exporter of merchandise trade, the largest exporting OECD member and the third largest exporter of commercial services.[10] Exports of goods and services were 41% of Germany's GDP in 2009, of which the main exports are machinery and transport equipment (46% of total merchandise exports), manufactured items (24%), and chemicals and related products (16%).[11] Imports of goods and services were EUR 859 billion in 2009 or 36% of GDP for that year,[12] of which machinery and transport equipment were the main items (32%).[13] More recently, the German authorities have taken various measures to support exports in the sector of renewable energy technology.[14] The first country of destination for German exports in 2009 was France, followed by the Netherlands and the United States (see table below). Trade links have been growing strongly with China, India and the Russian Federation. Countries with which Germany does the most business include:[15]

Rank	Import Country of origin	Million Euro	Export Country of destination	Million Euro
1	Netherlands	58 044.2	France	81 941.1
2	China, People's Republic of	55 447.5	Netherlands	54 142.2
3	France	54 559.5	United States	53 834.6
4	United States	39 914.8	United Kingdom	53 156.2
5	Italy	39 683.5	Italy	51 050.1
6	United Kingdom	33 174.2	Austria	48 235.1
7	Belgium	29 242.3	Belgium	42 155.8
8	Austria	29 083.7	China, People's Republic of	36 459.9
9	Switzerland	28 071.4	Switzerland	35 323.6
10	Czech Republic	24 908.8	Poland	31 626.0

4. Cases involving the bribery of foreign public officials

19. Germany has investigated and prosecuted a high number of foreign bribery cases especially over the past 6 years, hence demonstrating a substantial enforcement of the Anti-Bribery Convention and placing itself in a leading position in this regard. The Working Group commends Germany for this steady increase since Phase 2. From 2005 to end 2010, 69 individuals were sanctioned, of which 30 were criminally convicted, 35 were sanctioned under an arrangement under section 153a of the Criminal Code of Procedure (hereinafter "CCP") and 4 were found liable in administrative proceedings. Since 2007, six legal persons have been found liable, with each case leading to the disgorgement of ill-gotten gains.

20. There is a prominent trend to prosecute and sanction foreign bribery with a range of other types of offences. Among the 30 criminally convicted individuals, only 10 were convicted of bribery of foreign

8 Data refer to 2007, Source: Deutsche Bundesbank.

9 Exports of goods and services by volume. OECD Economic Outlook 88 (November 2010).

10 WTO Export Statistics. In 2009 Germany was overtaken by China as the world's leading merchandise exporter. www.wto.org/english/news_e/pres10_e/pr598_e.htm.

11 Federal Statistical Office (*Statistisches Bundesamt*) Annual Yearbook 2010. www.destatis.de.

12 Imports of goods and services. OECD Economic Outlook 88 (November 2010).

13 Federal Statistical Office Annual Yearbook 2010.

14 More info can be found on this website maintained by the Ministry of Economy: www.efficiency-from-germany.info

15 Federal Statistical Office Annual Yearbook 2010.

public officials. Ten of the remaining individuals were convicted of commercial bribery and 10 of breach of trust. The sanctions against individuals were generally within the lower range of sanctions available although the German authorities underlined that they are in line with the level of sanctions for other economic crimes in Germany. Out of the 30 convicted individuals, 23 received suspended prison sentences and 4 served time in prison. The other individuals sanctioned under section 153a CCP and in administrative proceedings were only sanctioned to paying fines. The amounts of fines were, in a majority of cases, within the lower range of fines available except for a few particularly aggravated cases involving senior executives. The situation is also extremely varied in terms of the number of cases among the *Länder*, offences applied, and levels of sanctions. The German authorities underline that these findings are based on the fact that the strength of the economy differs extremely between the *Länder* and, therefore, not all *Länder* host considerable numbers of companies being active abroad. The sanctions in the cases with high media-profile do not fully reflect enforcement efforts in Germany. For instance, the size of fines ranges from EUR 1 800 to a record amount of EUR 2.16 million. In the latter, the defendant, a former managing director of a haulage company, was convicted of two counts of foreign bribery but also 600 counts of other offences that were characterised in the media as corruption-related. He also received a 5-year prison sentence and his former employer received a EUR 8.5 million confiscation order.

21. The 6 decisions finding legal persons liable led to significant amounts of illicit gains being confiscated (as part of the confiscatory component of the fine). This includes two decisions ordering confiscation of nearly EUR 600 million against Siemens, a conglomerate involved in one of the most prominent multijurisdictional cases of foreign bribery. The proceedings in Germany were coordinated with another Party to the Convention in a commendable manner. In another high profile case (MAN), EUR 150 million of illicit gains were disgorged from two business units of the company. These six decisions significantly raised the awareness of foreign bribery among companies and the public at large. In addition to confiscation, these legal persons were subject to punitive fines. However, particularly when viewed against the scale of the offending, these fines were generally low, reaching the available maximum of EUR 1 million in one case and averaging EUR 200 000 in the five others.

B. IMPLEMENTATION AND APPLICATION BY GERMANY OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

22. This part of the report considers the approach Germany has undertaken to key Group-wide cross-cutting issues identified by the Working Group for all Phase 3 evaluations (horizontal issues). Where applicable, consideration is also given to country-specific issues (vertical issues) arising from progress made by Germany on weaknesses identified in Phase 2, or issues raised by changes in Germany's domestic legislation or institutional framework. The Phase 2 evaluation report of Germany was adopted by the Working Group in June 2003. The Phase 2 recommendations and issues for follow up are set out in Annex 1 of this report. Germany's written follow up report to Phase 2 was considered by the Working Group in December 2005. The Group at the time concluded that of the 8 recommendations in Phase 2, recommendations 2, 4, 5(1) and 6 had been implemented satisfactorily or dealt with in a satisfactory manner; that recommendation 8 had been implemented as requested; that recommendations 1 and 5(2) had been partially implemented, and that recommendations 3 and 7 had not been implemented.[16]

[16] When setting out the recommendations in Phase 2, Annex 1 includes a notation of the conclusions of the Working Group following Germany's written follow up report.

1. Foreign bribery offence

(a) Legislative developments

(i) Legislation unchanged in respect of the foreign bribery offence

23. Since Germany's Phase 2 evaluation, the provisions implementing Article 1 of the Convention have not been amended. The relevant legal framework is provided by the Criminal Code (*Strafgesetzbuch*, StGB, hereinafter "CC"), as well as separate pieces of legislation (which refer to the CC).[17] In 1998, Germany passed the Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung* – hereinafter *"IntBestG"*) in order to implement the Convention.

24. The general approach of the *IntBestG* is to provide for the equal treatment of the offences of bribing domestic and foreign public officials and parliamentarians. Bribery of domestic public officials is punishable in Germany under sections 334 to 338 of the Criminal Code which, pursuant to the *IntBestG*, also apply to the bribery of foreign public officials. This Act also includes a separate offence for the bribery of foreign Members of Parliament and Members of parliamentary assemblies of international organisations (article 2, section 2). The main provision in section 334(1) CC provides that:

> "Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces, for that person or a third person, in return for the fact that he performed or would in the future perform an official act and thereby violates or would violate his official duties, shall be punished with imprisonment from three months to five years. In less serious cases the punishment shall be imprisonment for not more than two years or a fine."

(ii) A draft new Act to Combat Corruption still not re-submitted to Parliament

25. In June 2006, in the context of their oral follow-up report, the German authorities reported on legislative measures including the preparation of a Second Act to Combat Corruption. This draft Act pursued two objectives. First, it was aimed at implementing binding international anti-corruption instruments, including the Criminal Law Convention on Corruption of the Council of Europe and the Additional Protocol to this Convention and the United Nations Convention Against Corruption, all of which Germany has signed (the latter in December 2003), but not yet ratified.[18] Second, this draft Act provided for: (i) the inclusion of the bribery of foreign and international Members of Parliament in the catalogue of predicate offences to money laundering; and (ii) the incorporation in the Criminal Code of the provisions on the implementation of the OECD Anti-Bribery Convention, currently in the *IntBestG* and of the corruption offences set forth under the EU Bribery Act. The German authorities explained at the time that the grouping of these corruption offences under a core criminal law would create a uniform and compact body of rules for the criminal prosecution of domestic and foreign corruption.

26. In 2007, the Ministry of Justice submitted to Parliament a draft Act Amending the Criminal Law (Federal Parliament printed paper 16/6558), which was expected to be adopted in 2008. Although the higher chamber (the *Bundesrat*) made no reservations to the draft, the *Bundestag* did not adopt it before the end of the legislature in the summer of 2009. A new text prepared by the Federal Ministry of Justice was to

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17 For instance, the Military Penal Law (Wehrstrafgesetz – WStG) and the NATO Troop Protection Act (NATO-Truppenschutzgesetz deal with corruption involving soldiers. Similarly the *IntBestG* and the EU bribery Act (EU-Bestechungsgesetz – EUBestG) of 1998 deal with corruption with a foreign/international dimension.

18 The Council of Europe Criminal Law Convention on Corruption of 27 January 1999, the Additional Protocol to the Criminal Law Convention on Corruption of 15 May 2003, the EU Framework Decision on Combating Corruption in the Private Sector 2003/568/JHA of 22 July 2003, and the UN Convention against Corruption.

be submitted to the newly elected parliament in September 2009. During the on-site visit, the German authorities informed the evaluation team that the new Act to Combat Corruption, had been on hold since then, notably due to difficulties surrounding the introduction within this new act of an offence of bribery of domestic Members of Parliament. At the time, they were not in a position to specify when the German government would re-submit a similar Act again.

(iii) Coverage by the IntBestG of the public official's act/omission in relation to the official's duties, whether or not within his/her authorised competence

27. An issue that held the Working Group's attention in Phase 2 concerned the nature of the official's act, *i.e.* that the element of "future judicial or official act" under section 334 CC may be narrower than the Convention, which covers any use of the public official's position whether or not within the official's authorised competence (*see Article 1.4 c of the Convention and commentary 19*).

28. The extension of the Criminal Code provisions to foreign public officials through the *IntBestG* applies to the offences of offering a benefit under section 334 CC but does not apply to the offences of section 333 CC. Section 334 CC refers to the execution of an "official act" or "judicial act" i) in breach of duty (*i.e.* an act that violates or would violate official duties of the public official involved) or ii) in the discretion of the public official or judge. In contrast, section 333(1) CC relates to a (lawful) "official activity" on the part of the public official (*i.e.* where the bribery is intended to induce the official to perform a lawful act). In the domestic arena, section 333 is sometimes used as the legal "safety net" which allows for dealing with cases that cannot be prosecuted under section 334 CC because of the evidential requirements (*i.e.* the link between the bribery act and a breach of duties).[19] Judges and prosecutors met on-site contended that section 334 CC is broad enough to encompass any official act whether lawful or unlawful where it is applied to foreign bribery in international business transactions. However, the Working Group notes that two distinct provisions (sections 333 and 334 CC) are necessary to cover all situations involving domestic bribery and also notes that according to the Convention (Article 1 and Commentaries 10 to 19), bribery of domestic and foreign officials should be treated in a similar way.

29. Germany hold the view that this approach is in line with Commentary 3 on the Convention which provides that "a statute which defines the offence in terms of payments 'to induce a breach of the official's duty' could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially (…)." In Phase 2, the Working Group was satisfied that any public official's act/omission in relation to the official's duties, whether or not within his/her authorised competence would be adequately covered by the *IntBestG*. However, this was based, at the time, on three cases of domestic bribery, thus logically including section 333(1) CC. During the on-site visit, the examiners tried to assess the reasons why section 333(1) CC was not included in the *IntBestG* – and the consequences for not including 333(1) CC in this act. Prosecutors and judges stressed that any improper influence of a foreign official's discretion represents a breach of duty under section 334(3) CC and therefore would fall under section 334 CC (see Commentary 3 to the Convention). Defence lawyers met during the on-site visit informed the evaluation team that they systematically seek to identify whether the foreign official was paid to induce a lawful act and that they would most likely plead this before a court as falling outside the scope of the *IntBestG*. However they were not able to point the evaluation team to a specific case where the argument had been successfully pleaded. Civil society representatives also expressed the view that it would be easier to sanction bribery cases should section 333(1) CC apply to foreign bribery.

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[19] The latest GRECO report on Germany details the reasons why section 333 is conceived as a safety net in the domestic arena. See Third round compliance Report on Germany on Incriminations adopted by GRECO at its 45th Plenary Meeting (Strasbourg, 30 November – 4 December 2009), paragraphs 26, 99 and 109, www.coe.int.

Commentary:

The examiners encourage the German authorities to take the necessary steps to re-submit a new Act to Combat Corruption to Parliament in order i) to ratify and implement the United Nations Convention Against Corruption (UNCAC) with a view to support a comprehensive approach to combating the bribery of foreign public officials in international business transactions (as recognised in the preamble to the 2009 Recommendation); and ii) to create a uniform and compact body of rules for the criminal prosecution of domestic and foreign corruption thereby simplifying the access to the legislation on the foreign bribery offence.

(b) Definition of foreign public official

(i) Need to prove that the recipient of the bribe is a public official

30. In Phase 2, the Working Group viewed the definition of foreign public official as critical to the effectiveness of the foreign bribery offence. The need to prove that the recipient of a bribe is a public official, as reflected in the Annual reports (provided by Germany) on the investigation proceedings and cases settled in Germany, is *prima facie* in line with the requirements of the Convention. However, the German Annual reports show that in a number of cases, it has not been possible to demonstrate that the recipient of a bribe was a foreign public official. As a result, the investigations were either dropped[20] or the offenders were charged with an offence other than foreign bribery (section 334 CC).[21] This is notably illustrated by the "Siemens (Enel)" case,[22] which was widely and consistently reported in the press as a case of foreign bribery. In this case, individuals were actually sentenced for breach of trust (provided under section 266(1) CC) precisely because the Court was not satisfied that the recipients of the bribes were foreign public officials. In this context, the examiners deemed it necessary to closely examine with the law enforcement authorities how the foreign public official definition applies in practice and what criteria have been applied to charge someone with that offence.

31. Prosecutors met during the on-site visit explained that this requirement does not go as far as requiring the identification of the foreign public official who received the bribe. However, in their experience, it is often difficult to prove that the recipient of a bribe is a public official in a foreign country and that obtaining such evidence raises practical enquiry problems. This particular difficulty was identified by prosecutors, judges and representatives from the legal profession as i) the main weakness of the foreign bribery offence in practice (although, in their view, this does not derive from a weakness in the German law but rather from the definition of the offence in the Convention itself) and ii) the main reason why a majority of cases are not prosecuted for bribery of foreign public officials, but rather for other offences.

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20 See for instance Annual report 2009 Hesse e).

21 See for instance Annual reports: 2006/2007 Bavaria d), Hesse a) and Rhineland-Palatinate a), 2007/2008 Bavaria e) and Hesse f) (leading case of the federal Supreme Court of Justice on the autonomy of the offence, see infra), 2008 Hesse g) and 2009 Hesse e).

22 The Siemens case was divided into several parts that gave rise to distinct decisions. While a large part of this case was handled by the Munich Prosecutors and Munich I Regional Court, another part was handled by the Regional Court of Darmstadt. The latter deals with individuals charged with having paid bribes in connection with the award of several contracts totalling approximately EUR 336 million within the context of an EU-wide call for tenders in the power generation sector issued by the Italian ENEL Group. See Judgement of 14 May 2007, Landgericht Darmstadt (Darmstadt regional court) [*Power Generation unit of Siemens for activities in Italy in relation to Enel*], hereinafter referred to as case **"Siemens (Enel)"**. This case also gave rise to a decision by the Federal Court of Justice (Bundesgerichtshof, BGH) of 29 August 2008 (reference: 2 StR 587/07; published in Neue Juristische Wochenschrift (New Judicial Weekly Journal, NJW) 2009, p. 89), decision by the Darmstadt Court of 23 November 2010

(ii) Autonomy of the offence with regard to the definition of foreign public official

32. A source of difficulty sometimes encountered in some countries in Phase 2 is the lack of autonomy of the offence, a requirement of the Convention developed in Commentary 3. The Federal Court of Justice, clarified in its judgment of 29 August 2008,[23] in the "Siemens (Enel)" case, that "the term 'public official' in accordance with Article 2 *IntBestG* is not to be interpreted within the meaning of the respective national legal system, but autonomously on the basis of the [Convention]." Consequently, a lack of autonomy of the offence does not provide an explanation for the difficulties faced by the German tribunals to substantiate all the elements required to charge someone with the offence of bribery of foreign public official.

33. While the clarification brought by the Federal Court about the autonomy of the offence is, in itself, a positive step most welcomed by the Working Group, it led to a somewhat paradoxical conclusion in this case, as the Court decided on this basis that the recipients of the bribe "were not 'officials of a foreign government' in the sense of article 2 (…) of the *IntBestG*, although both of them had been recognised as officials ('*pubblico ufficiale'*) in the sense of Article 357 of the Italian Criminal Code" by the Italian authorities prosecuting the offences on the passive side. [24] The Working Group underlines that it is crucial not to lose sight of the objective and purpose of the principle of autonomy of the offence, *i.e.* that a legal system should not "require proof of elements beyond those which would be required to be proved if the offence were defined as in Article 1 of the Convention" (Commentary 3) . The purpose of this principle is to avoid relying on obtaining information from a foreign country to be able to prove the elements of the offence, thus allowing for the broadest and most accessible definition possible. However, where information from a foreign country is readily available (in this case, the finding that the recipient were considered public officials in Italy) it is not clear that the principle of "autonomy of the offence" should be relied upon in support of reaching a different finding of fact.

(iii) Employees of state-owned or state-controlled enterprises

34. The Working Group is concerned that the prominence given by German courts to certain criteria applied to determining who is a foreign public official "exercising a public function for a public agency or public enterprise" within the meaning of Article 1 of the Convention may raise practical difficulties and narrow in practice the scope of the foreign bribery offence. Commentary 12 on the Convention provides that "'public function' includes 'any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement'. In the "Siemens (Enel)" case, the Italian court[25] upheld that the Italian companies were not only state-controlled but also exercised "public functions" because they were acting in the strategic energy sector[26] and were thus subject to "public procurement rules" (implementing the EU directives on the awarding of work, supplies and services in the "excluded sectors").[27] The German Federal Court of Justice reached a different conclusion, confirming the ruling of the lower court[28] and ruling that the Italian state-controlled companies had not been asked to exercise "public functions" in the meaning of Commentary 12. In addition, the Court

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23 *Ref. Supra*

24 See decision of 14 may 2007 of the Regional Court of Darmstadt (which was then appealed and gave rise to the above mentioned decision of the Federal Court of Justice on the autonomy of the offence).

25 As reflected in the decision of the Regional Court of Darmstadt.

26 *i.e.* an "activity in the public interest delegated by a foreign country" within the meaning of Commentary 12 on the Convention.

27 See notably Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

referred to Commentary 15 on the Convention to put forward that the companies had been operating "on a normal commercial basis" without preferential subsidies or other privileges since April 1999 when the concession system was abolished and the power generation market was liberalised.

(c) Other elements of the offence which appear to be required in practice

(i) Need for an "agreement" or corruption pact?

35. Another issue that emerges from the Annual reports on cases provided by Germany concerns the requirement for an "agreement" between the briber and the foreign public official. The impossibility to prove an "illegal agreement in the meaning of section 334 CC" is mentioned in these reports as a reason for terminating cases. Three cases (of which two involving at least two court decisions each) illustrate this.[29] This requirement to be able to prove the purpose of the payment made to the foreign public official was not discussed in Phase 1 or 2 as it is not required in the *IntBestG* or the related articles of the Criminal Code. During the on-site visit, the examiners explored with panellists the coverage of this requirement for an agreement with a view to assess whether it is in compliance with Article 1 of the Convention, which covers offering and giving any undue pecuniary or other advantage regardless of the presence (not to mention the proof of the existence) of an agreement between the briber and the foreign public official and even regardless of the awareness or involvement of the foreign public official (*i.e.* even if he/she is aware of, accepts or rejects the offer, promise or gift). The examiners welcomed reassurances provided by the different panellists that the English term "agreement" is an imprecise translation for the relevant German word "*Unrechtsvereinbarung*", which could include a unilateral offer of a bribe. This is also confirmed by the analysis provided under the GRECO third round evaluation of Germany compliance Report on Germany on Incriminations. [30]

(ii) Need to prove that the money involved did actually reach the public officials in their country?

36. The mere offer or promise of a bribe is covered under section 334 CC and although it remains untested in practice so far, prosecutors met during the on-site visit confirmed that a mere offer to bribe a foreign public official is a crime. Nonetheless, in several cases reported in the Annual reports provided by Germany, the impossibility to prove whether the money involved did actually reach public officials in their country is presented as another requirement in the absence of which cases had to be dropped. An example can be found in the case of suspected bribery of senior staff of a North African oil company where the subsidiary of a major German energy company allegedly promised substantial sums of money in connection with the award of exploration and extraction rights. In this case, it was reported that the investigations needed to clarify whether the money involved "did actually reach public officials" of the North African country.[31] The view was broadly shared among prosecutors that in practice unless the trail of the money can be followed all the way to the hands of a foreign public official, the foreign bribery offence is very difficult to establish. According to one prosecutor, in the Siemens case, even with massive internal enquiry and the company's cooperation, it had not been possible to trail the money. According to panellists, this reflects not a legal requirement to follow the trail of the money to its ultimate recipient, but a reflection of the significant evidentiary difficulties (noted above) associated with the need to prove that the recipient (or intended recipient) of the bribe is a foreign public official.

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29 See Annual reports 2005/2006 Bavaria a), 2007/2008 Bavaria a), and 2005/2006 Hesse c), 2006/2007 Hesse c), 2008 Baden Württemberg a).

30 See GRECO Third round compliance Report on Germany on Incriminations (ETS 173 and 191, GPC 2) (Theme I), Adopted by GRECO at its 45th Plenary Meeting, paragraph 101.

31 See Annual reports 2008 Hamburg a) and 2009 Hamburg b).

Commentary:

The examiners are encouraged to hear that in most cases where it has been impossible to prove all the elements of the offence of bribery of a foreign public official, other offences where used to prosecute and sanction foreign bribery cases as further examined below. However, the examiners remind that the reason for using these other offences should not be that the offence of foreign bribery under section 334 CC in practice requires the proof of additional elements beyond those that would be required to be proved if the offence were defined as in Article 1, paragraph 1 of the Convention.

In the context of the periodic review that Member countries are recommended to undertake of their "approach to enforcement in order to effectively combat international bribery of foreign public officials" (Recommendation V of the 2009 Recommendation), the lead examiners recommend that Germany take any appropriate steps to clarify, that i) the criteria in the Convention and its Commentaries defining a foreign public official are to be interpreted broadly, ii) and that no element of proof beyond those contemplated in Article 1 of the Convention is required.

With regard to the definition of a foreign public official "exercising a public function for a public agency or public enterprise", the lead examiners recommend that Germany take any appropriate steps to clarify that its interpretation of a foreign public official fully implements Article 1 of the Convention (Article 1, paragraph 4 a) and Commentaries 12, 14 and 15) and that, in determining whether a public function was being exercised by a person, elements of information available from foreign authorities are given due consideration. This may also be a horizontal issue for the Working Group particularly in Phase 3 with the development of case law in a number of Parties to the Convention.

(d) Prosecution for charges other than foreign bribery

37. A prominent feature of Germany's enforcement of the Convention is the trend of prosecuting and sanctioning foreign bribery acts as commercial bribery offences (section 299 CC) or breach of trust (section 266 CC) rather than the offence of bribing a foreign public official (section 334 CC). The prosecution of foreign bribery acts for these alternative offences is also briefly discussed below under section 5. The impact that this choice may have on the level of sanctions is also further discussed below under section 3.

38. The best illustration of this feature is that the Siemens case, that is regularly cited in the media and was also described by all panellists during the on-site visit, as the most striking example of foreign bribery that was, for the most part, prosecuted and sanctioned in Germany for breach of trust (section 266(1) CC) on the basis of the existence and functioning of a slush fund – and not for a violation of section 334 CC. Prosecutors met during the on-site visit predicted that this trend to indict for the offence of breach of trust (section 266 CC) will grow in the future, especially with the recent confirmation by the Federal Constitutional Court that the creation of a slush fund constitutes a breach of trust in terms of section 266 CC.[32]

(i) Proportion of cases prosecuted and sanctioned under the foreign bribery offence - section 334 CC

39. The magnitude of the above-described phenomenon caught the particular attention of the evaluation team. It stems from the information provided by Germany on cases having involved foreign bribery allegations since 2005[33] that out of the subsequent 30 convictions of individuals pronounced by the

32 Federal Constitutional Court (*Bundesverfassungsgericht)*. Decision of 23.6.2010 (BVerfG, 2 BvR 2559/08).

33 This information derives from the German replies to the Phase 3 questionnaires, their Annual reports on cases from 2005 to 2010 and the Court decisions provided by Germany after the on-site visit.

courts, only 10 were for the criminal offence of foreign bribery (section 334 CC).[34] This accounts for a third of the convictions involving foreign bribery allegations. Concerning the other convictions, 10, were for the criminal offence of commercial bribery (section 299 CC),[35] 10 were for the criminal offence of breach of trust (section 266 CC).[36] Additionally, 4 were sanctioned for the administrative offence of breach of supervisory duties (section 130 of the Administrative Offences Act, *Gesetz über Ordnungswidrigkeiten*, hereinafter, "OWiG")[37] and 35 additional individuals agreed to arrangements under section 153a of the Criminal Code of Procedure (further discussed in the sub-section below), 24 of which (over two thirds) pertained to the Siemens case.[38] As these arrangements are, in principle, not published**,** no conclusion could be drawn by the evaluation team as to the possible underlying offence alleged by the prosecuting authorities (as also approved by the court).

(ii) Commercial bribery (section 299 CC)

40. As indicated above, the offence of commercial bribery under section 299 CC *et seq.* is used in a third of the cases because that offence can be substantiated without mutual legal assistance from other countries thus allowing courts to settle cases within a timeframe that is in line with the basic rights of the accused in Germany. For instance, Germany notes in the comment on one case in its Annual report 2007/2008 that "since it was not possible to demonstrate that the defendant had the capacity of a public official, the competent prosecution authority has preferred charges against him on the grounds of a particularly serious case of suspected corruptibility in business transaction."[39]

41. Sections 299 CC *et seq.* cover offences committed in the course of business activity, including abroad. They broadly cover any activity pursuing an economic purpose in which participation in competition is involved. These offences correspond notably, in the context of competition, to those criminalising bribery of public officials with respect to such elements as "offering, promising and granting" (active bribery), "advantage" and the coverage of advantages granted to third persons (it also covers passive bribery). Given the broad interpretation of the various elements of the offence (as also underlined by the GRECO[40]), this may encompass a broader range of situations than those contemplated in the *IntBestG,* including situations where it was not possible to prove the involvement of a foreign public official.

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34 See Annual reports 2006-2007, Bavaria (a) [1 individual] ; 2007-2008, Bavaria (a) [2 individuals]; 2008, Baden-Württemberg (c) [3 individuals]; 2008, Saarland [3 individuals]; 2008, Hamburg (b) [1 individual].

35 See Annual reports 2007-2008, Bavaria (a) [2 individuals]; 2009, Bavaria (b) [2 individuals]; Germany's list of cases in their replies to the Phase 3 questionnaires, Hamburg (bb) [1 individual]; Annual reports 2009, Baden-Württemberg (h) [2 individuals]; 2008, Hesse (i) [2 individuals]; Judgement MAN of 28 June 2010, Landgericht München I [1 individual].

36 See Annual reports 2006-2007, Hesse (c) [3 individuals]; Judgement of 28 July 2008, Landgericht München I [1 individual]; Judgement of 19 November 2008, Landgericht München I [2 individuals]; Judgement of 19 December 2009, Landgericht München I [1 individual]; Judgement of 20 April 2010, Landgericht München I [2 individuals]; Judgement of 23 November 2010, Landgericht Darmstadt [1 individual].

37 See Annual reports 2009, Bavaria (a) [2 individuals]; Decision of the Munich Prosecutor of 8 February 2010 [1 individual]; Decision of the Munich Prosecutor of 2 March 2010 [1 individual].

38 See Annual reports 2007-2008, case Hambourg (c) [1 individual] ; 2009, Bavaria (a)(5), completed by information provided by prosecutors of Munich during the on-site visit [23 individuals] ; 2009, Baden-Württemberg (g) [2 individuals] ; 2009, Hesse (a) [1 individual] ; Judgment of 26 June 2009 of the Hildesheim Court [3 individuals] ; 2009, North Rhine-Westphalia (a) [3 individuals]; Arrangement of 26 October 2010 [1 individual].

39 See Annual report 2007-2008, Bavaria e)

40 Ref. *Supra.*

(iii) Breach of trust – Section 266(1) CC

42. As reflected above, another third of the individuals sanctioned in cases involving allegations of foreign bribery were sentenced for breach of trust (section 266 CC) - again due to the relative ease of substantiating the offence without mutual legal assistance from other countries. The increasing trend of using the breach of trust offence in such cases was underlined by many panellists and can also be illustrated by 6 court decisions in the Siemens case where it was the only offence applied in respect of the alleged bribery acts.[41]

43. In this case, the Federal Constitutional Court ruled that in situations where considerable assets are placed in "concealed funds" in an enterprise and are used to create advantages for the enterprise by bribery or by purchasing influence, the act of removing and keeping the assets in reserve is punishable as a breach of trust towards the enterprise (section 266 paragraph 1 CC). The offence is deemed committed regardless of whether the money is actually used. The intention of using the money in the economic interest of the enterprise is not a mitigating factor. [42] The Constitutional Court concurred with the approach taken by the Federal Court of Justice[43] in a decision regarding Siemens. Interestingly, while the judges applied the offence of breach of trust (section 266 CC), they i) confirmed that the offence of foreign bribery (section 334 CC) could not apply and ii) lifted the convictions for commercial bribery (section 299 CC) initially pronounced against the two managers of the company by the Regional Court of Darmstadt.[44] In finding a breach of trust in the creation and use of a slush fund, the Constitutional Court apparently broke a line of precedents.

(iv) Section 130 OWiG- Administrative offence of lack of supervision

44. Foreign bribery allegations have also been prosecuted for the administrative offence of "lack of supervision" (including by negligence) under section 130 "OWiG". This administrative offence was applied against 4 former executives in the Siemens case. At the moment of drafting this report, according to media reports, a fifth individual was being tried for an administrative offence as well. This administrative offence allows to sanction a person in a managerial position who violated his duty to supervise and prevent another person in a non-managerial position to committing a crime (in two of the above mentioned cases, the predicate criminal offence was a breach of trust under section 266 CC). This administrative offence is, however, not an alternative to the foreign bribery offence in terms of the Convention, as article 1 of the Convention clearly requires that each Party establish that foreign bribery is a criminal offence.

(v) Impact of the use of charges other than foreign bribery

45. The Working Group is concerned that the use of these alternative offences may be the symptom of a practical impediment to the prosecution of the offence of foreign bribery, resulting from the need, developed with practice, to prove elements of the offence going beyond the requirements in Article 1 of the Convention (as discussed in detail above) and thus requiring extensive cooperation from the foreign public official's country to establish these various elements. These evidentiary difficulties were emphasised by all

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41 See *Supra* for details on decisions and number of individuals sanctioned. See also as an example decision taken by a Munich Court, as summarised in the German Annual report 2008, Bavaria b) and 2009 Bavaria a) for which extracts of a judgement were also provided after the on-site visit, *i.e.* Decision of the Regional Court of Munich (Landgericht München I) of December 19, 2009.

42 Federal Constitutional Court, Second Senate, June 23, 2010, Doc. Nos. 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09

43 Federal Court of Justice, decision of 29 August 2008 See S*upra*.

44 The offence of commercial bribery (section 299 CC) was also rejected on the basis that before 2002, commercial bribery was only a crime if it could harm competition between companies in Germany.

prosecutors and judges met on-site especially with regard to the necessity to determine that the recipient of the suspicious payments is a foreign public official. As a result, they were relatively sceptical about the effectiveness of the offence of bribing foreign public officials. They explained that the necessity to achieve a quick solution for both economic reasons (the cost of justice should be kept as low as possible in achieving a comparable result) and human rights reasons (article 6 of the European Convention on Human Rights and the right to a "fair and public hearing within a reasonable time") often leads to choosing charges that require a lower level of evidence.

46. The Working Group recognises the merits of such a pragmatic approach and notes the important role of the "safety net" that the offences of commercial bribery and breach of trust are playing in cases of foreign bribery -- the whole range of available offences in this field contributing to a degree to an effective anti-corruption policy. It commends the German judiciary for finding this approach in order to overcome the obstacles that have arisen in practice. It casts no doubt that without these offences the number of convictions obtained in Germany would not reflect the whole picture of the country's anti-corruption efforts in the criminal field. The application of these alternative offences *prima facie* satisfies the principle of functional equivalence which, according to commentary 3, allows a Party to use various approaches to fulfil its obligations, "provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in [Article 1, paragraph 1 of the Convention]."

47. However, while the use of the offences of commercial bribery and breach of trust as alternatives to the offence of foreign bribery would not necessarily raise particular problems in itself, the fact that altogether, these provisions are now used as the main basis for the prosecution of foreign bribery cases may be a concern. In particular, the Working Group fears that sanctioning foreign bribery acts under these offences would not reveal the whole spectrum of offenders and modus operandi of the crime and that it would leave certain criminal acts out of the reach of criminal justice. This is particularly true of the offence of breach of trust which is much narrower in scope and may not, by definition, reflect the full liability of the company, as it is an offence of an individual against the company (although the liability of the company may be established in separate proceedings for the administrative offence provided in section 30 OWiG triggered by a lack of supervision under section 130 OWiG as further discussed below). Germany contends that the only difference in terms of requirement of proof between the two offences here is the absence of requirement to prove that the recipient of the bribe is a foreign public official when applying section 299 CC.

Commentary

The lead examiners commend Germany for its pragmatic approach to the prosecution and sanction of foreign bribery cases through the application of other related offences where it is not possible to establish all the elements of the proof required to apply the offence of bribery of a foreign public official under section 334 CC. They recommend that the trend in the German legal system to prosecute and sanction foreign bribery through the offences of commercial bribery (section 299 CC) and breach of trust (section 266 CC) rather than through the offence of foreign bribery (section 334 CC) be reviewed as case law develops, in order to ensure that functional equivalence is achieved through these means, in particular as it relates to the level of sanction applied for these alternative offences (as further discussed under section 3).

(e) Bribery through intermediaries

48. As explained in Phase 2,[45] the domestic and foreign bribery statutes do not expressly apply to bribes through intermediaries. Instead, Germany relies on a general provision of the Criminal Code

[45] Para. 145.

(section 25), which states that "anyone who commits an offence himself, or through another person, is liable to be punished as an offender". The lead examiners stated in their related Phase 2 commentary that they were satisfied that although the foreign bribery offences do not expressly cover the case where a bribe is made through an intermediary, section 25 CC can adequately cover this situation. The German authorities did not point to relevant case law involving individuals. The use of intermediaries, including subsidiaries, is more extensively discussed below under the section on the liability of legal persons.

(f) Seriousness of the offence and misdemeanours or felonies

(i) Serious, "Less serious" and "Especially serious" cases

49. During the on-site visit, the examiners sought clarification as to the scope of the "especially serious cases" (section 335 CC) that provides higher sanctions than those applicable to the serious cases[46] and obviously the "less serious cases" (section 334 CC). Pursuant to subsection 335(2) CC, an "especially serious" case "shall be deemed to exist where: (1) the offence relates to an advantage on a large scale; (2) there have been recurrent acts; or (3) "the perpetrator acts commercially or as a member of a gang that has come together for recurrent commissions of the offence".

50. At the time of the on-site visit, representatives of the Ministry of Justice indicated that foreign bribery would, by definition, always be deemed a "serious" or an "especially serious" case. No case law or guidelines are currently available on the more specific characteristics that would render an act of bribery "less serious", serious or "especially serious". However, an analysis of the information provided by Germany on court decisions to date (in the Annual reports) confirm this view. Out of the 5 cases where the offence of bribery of a foreign public official was used,[47] none were considered by the courts as "less serious" and 2 were even considered as "especially serious".

51. Where allegations of foreign bribery are instead prosecuted under sections other than section 334 CC, the situation with regard to the "seriousness of the offence" is as follows. The commercial bribery offences tend to be categorized as "especially serious" (section 300 CC) by German courts. The offence of breach of trust (section 266 CC) may also give rise to such qualification as section 263(3) in conjunction with section 266(2) CC provides the possibility to qualify a breach of trust as "especially serious". The impact of these categories is further discussed under section 3 below on sanctions.

(ii) Misdemeanours and felonies

52. The German Criminal code also distinguishes "misdemeanours" and "felonies" (*Vergehen* and *Verbrechen*) according to the level of statutory prison sentence (a minimum term of less or more than one year) provided for a given offence as set out in section 12 CC. Pursuant to this rule, foreign bribery, commercial bribery and breach of trust are misdemeanours. The main effect of the classification as a misdemeanour (rather than a felony) is to provide for the availability of a prosecutorial arrangement under section 153a CCP or a "penal order" under section 407 CCP, *i.e.* a written judgement drafted by the prosecutor and issued by the Court without a hearing (as further discussed under section 5 below).

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46 The term "serious" does not appear as such under section 334. It is simply used here for ease of reference in contrast with the "less serious" and the "especially serious" cases.

47 See Annual reports 2006-2007, Bavaria (a) [1 individual]; 2007-2008, Bavaria (a) [2 individuals]; 2008, Baden-Württemberg (c) [3 individuals]; 2008, Saarland [3 individuals]; 2008, Hamburg (b) [1 individual].

(g) Small facilitation payments

53. While Germany has not expressly established an exception for facilitation payments, such an exception exists in practice because the foreign bribery offence is limited to official acts in violation of official duties (unlawful acts covered by section 334 CC) to the exclusion of lawful acts. Comments in this section of the report do not relate to compliance with the Convention, which does not require the criminalisation of small facilitation payments and rather focus on the definition of such payments and guidance provided in this regard (non-criminal aspects of facilitation payments are also discussed in section 7 of this report on accounting requirements, external audit, and company compliance and ethics programmes, and in section 8 on tax measures for combating bribery).

54. The issue of small facilitation payments was not examined in the context of the Phase 1 or 2 evaluations and the German authorities' stated in their replies to the Phase 3 questionnaires that "exceptions for small facilitation payments do not exist in Germany". However, in the course of the panel discussions with the private sector the evaluation team came across the availability of a *de facto* exception for facilitation payments under German legislation. While representatives from the business community and the companies involved in the panel discussions were aware that "small bribes" are not allowed, they seemed unanimously of the view that small facilitation payments are not covered by the *IntBestG* and are thus allowed under German legislation. This is the direct consequence of the non inclusion of section 333 CC, that covers bribes paid to induce the official to perform a lawful act, in the *IntBestG* (as discussed above under section B (1) a) iii)).They stated that "trade facilitation in foreign countries is not a bribe in Germany" and they defined these payments as "money paid to get a legal act that you are entitled to get". Not only does this exception appear to exist, but small facilitation payments are also, according to some panellists, tax deductible (as further discussed under Section 8).

55. The availability of this exception is, *prima facie*, in line with Commentary 9 except that this exception does not explicitly require that the payment be "small". The German authorities were unable to point to prosecutorial guidelines or case law addressing small facilitation payments and their scope and characteristics, in particular with regard to their size or their tax deductibility. The particularly varied level of awareness among panellists as to the existence of this exception reveals, in itself, a pressing need for more explicit guidance and control by the German authorities. After the on-site visit, the German authorities indicated that as part of their awareness raising efforts, they called upon the industry not to make facilitation payments. The fact that no panellists from the private sector called for further guidance concerning the scope of the exception for facilitation payments (as has been the case in other Phase 3 evaluations undertaken around the same time as Germany's evaluation) may be an indication that the absence of official recognition of the existence of this implicit exception has created a knowledge vacuum (also described by private sector representatives as a "grey area") where no control is exercised. In this context, the Working Group is concerned that the vague outline of the exception for facilitation payments may in practice encompass certain types of payments that would not necessarily qualify as small facilitation payments in terms of the Convention and its Commentary 9, particularly in the absence of requirement that such payments be "small".

56. Another issue that was repeatedly raised by private sector representatives was the continued high level of demand for facilitation payments by foreign officials, especially customs officers and for the implementation of operating and maintenance contracts. They also cited a lack of enforcement of foreign laws that prohibit the solicitation of such payments as a major problem. In this context, several panellists expressed the view that making such payments is "an issue of survival" for companies, in particular for small and medium-sized enterprises (hereinafter "SMEs").

Commentary:

In view of the corrosive effect of small facilitation payments, that was recognised by the Parties to the Convention in the context of the 2009 Recommendation, and given the ambiguity surrounding the operation of this implicit exception in Germany, the lead examiners encourage Germany to:

a) Review, as a matter of priority, its policies and approach on facilitation payments, in line with the Recommendation VI. i. of the 2009 Recommendation to ensure that the legal treatment of facilitation payments is clearly defined and that it complies with the requirement of Commentary 9 that such payments be "small". One avenue might be to consider covering the active bribery offence more broadly by including section 333 CC into the IntBestG as discussed under section (1)(a)(iii) of this report; and

b) Encourage companies to prohibit or discourage the use of facilitation payments.

Furthermore, as stated in another recent Phase 3 evaluation, the lead examiners consider that the extensive concerns of the private sector and civil society about continuing demands for facilitation payments by foreign public officials is a horizontal issue affecting all Parties to the Convention.

2. Responsibility of legal persons

57. Germany establishes the liability of legal persons, including liability for the foreign bribery offence, under the Administrative Offences Act (hereinafter, "OWiG").[48] The fact that Germany opted for a non-criminal form of responsibility for its legal persons was the focus of most of the attention during the Phase 2 on-site visit. The Working Group concluded at the time that, as the practice in some jurisdiction demonstrates, legal persons have been effectively prosecuted and sanctioned for bribery offences (although not for foreign bribery). However, the WGB also noted that some questions affecting the effective application of liability of legal persons remained, including the use of prosecutorial discretion. At the time, it could not be conclusively determined, in light of the available information that, in accordance with Article 3.2 of the Convention, legal persons (and in particular large transnational corporations) were subject to effective, proportionate and dissuasive non-criminal sanctions for the bribery of foreign public officials (the latter point is discussed below under section 3).

58. Six years later, with the development of case law and more generally the new enforcement trend in Germany, the examiners sought to ascertain how "vigorous and comprehensive" the implementation of Article 2 of the Convention is in Germany (see Recommendation IV. of the 2009 Recommendation), and whether it follows the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, approved by the Parties to the Convention in this regard (Annex 1 to the 2009 Recommendation). Germany's responses to the Phase 3 questionnaires do not provide any specific information on legal persons (except, indirectly through the reference to anomymised cases in their Annual reports). The present analysis is therefore mostly based on the evaluation team's analysis of case law, *i.e.* the 6 cases[49] where a legal person was

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48 The Act establishes not only administrative fines for legal persons but also sanctions for administrative offences committed by natural persons.

49 **i)** Decision of the **Munich** I Regional Court of 4 October 2007 pursuant to section 30 OWiG in conjunction with section 334 CC - against the telecommunication unit of Siemens – fine of EUR 201 million *(see also Annual reports 2006-2007 and 2007-2008 Bavaria (i) and Germany's reply to Phase 3 questionnaires),* hereinafter **Case "Telecommunications Unit of Siemens"; ii)** Decision of the **Munich** I Public Prosecution office of 15 December 2008 pursuant to sections 130 and 30 OWiG - against Siemens – Fine of EUR 395 million *(see all Annual reports, about a « Hesse based Company » and related decision of the Federal Court of Justice of 28 August 2008 - Ref. Supra.),* hereinafter **Case "Siemens (except Telecommunications Unit)"**, **iii)** Decision of the **Hamburg** Regional Court of 17 July 2008 pursuant to section 30 OWiG in conjunction with sections 299 and 300 CC- against a Hamburg based shipping company – Fine of EUR 30 000 *(see Germany's reply to Phase 3 questionnaires and Germany's reply to Phase 3 questionnaires Hamburg bb – decision provided only in German),* hereinafter **Case "Hamburg based shipping Company"**; **iv)** Decision of **Munich** I Public Prosecution office of 10 December 2009 pursuant to sections

found liable in connection with foreign bribery to date, and panel discussions with a wide range of participants during the on-site visit.

(a) Standard of Administrative Liability

59. Pursuant to section 30 OWiG, the liability of legal persons is triggered where any "responsible person" (which includes a broad range of senior managerial stakeholders and not only an authorised representative or manager), acting for the management of the entity commits i) a criminal offence including bribery; or ii**)** an administrative offence including a violation of supervisory duties which either violates duties of the legal entity, or by which the legal entity gained or was supposed to gain a "profit". In other words, Germany enables corporations to be imputed with offences i) by senior managers, and, somewhat indirectly, ii) with offences by lower level personnel which result from a failure by a senior corporate figure to faithfully discharge his/her duties of supervision. The standard of administrative liability thus covers in principle both legal theories known as the identification and the vicarious liability theories. The examiners have tried to assess how this section applies in practice in order to assess whether Germany's liability of legal persons for the bribery of foreign public officials does not in practice "restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted", in line with Annex 1 to the 2009 Recommendation.

(i) Liability in connection with a criminal offence

60. In the first situation provided under section 30 OWiG, once it is demonstrated that a person acting in one of the capacities listed under section 30 OWiG has committed a criminal offence (including under sections 334, 335 or 299-300 CC) the prosecutor must demonstrate either that the entity's duties were violated through the commission of the offence or that the entity was enriched or should have been enriched. Regarding the scope of the term "enrichment" or profit, case law confirms the German authorities' statements in Phase 2 that it covers any more favourable structuring of the legal person's assets (*i.e.* any increase in the economic value of the assets of the legal person or association of people resulting from the offence in question), including an indirect advantage such as an improved competitive situation resulting from bribery.[50]

61. Since 2007 (year of the first sanction of a company for bribery of a foreign official), 4 companies have been held liable pursuant to section 30 OWiG as a result of the criminal offence of an individual under sections 334, 335 or 299 and 300 CC, *i.e.* for the offence of bribery of a foreign public official or the offence of commercial bribery.[51] In 2 cases, proceedings had been discontinued against the individuals pursuant to section 154(1) CCP (see also the subsection below on proceedings) thus confirming that while the corporate sanction is an "incidental consequence" of an offence by the natural person, the conviction of an individual is not *per se* the main criterion of the corporation's liability. For instance, in one of the Siemens cases, Germany indicates that only the legal person was convicted for the bribery offence while the natural person was convicted for breach of trust, *i.e.* for the establishment of slush funds to prepare bribery offences. In other words, as highlighted by prosecutors met on-site, in this situation, there is one

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130 and 30 OWiG - against the Trucks unit of MAN – Fine of EUR 75.3 million *(see Annual report 2009 Bavaria (d) and Germany's reply to Phase 3 questionnaires),* hereinafter **Case "Trucks Unit of MAN"**; **v)** Decision of a **Munich** I Regional Court of 10 December 2009 pursuant to section 30 OWiG in conjunction with sections 334 and 299 CC - against the Turbo engines Unit of MAN - Fine of EUR 75.3 million, hereinafter **Case "Turbo engines Unit of MAN."**; **vi)** Decision of **Hildesheim** Regional Court of 26 June 2009 pursuant to section 30 OWiG in conjunction with sections 334 and 335CC - against Company P. specialised in cleaning pipes – Fine of EUR 200 000 *(see Annual reports 2007-2008 and 2009 Lower Saxony (a) and Germany's reply to Phase 3 questionnaires),* hereinafter **Case "Company P"**.

50 See Case "Siemens (except Telecommunications Unit)", *ref. Supra*.

51 See Cases "Siemens. (except Telecommunications Unit)", "Hamburg based shipping Company", "Turbo engines Unit of MAN" and "Company P", *ref. Supra*.

single offence for which there may be two separate consequences i) for the natural and ii) for the legal persons.

(ii) Liability in connection with an administrative (regulatory) offence

62. In the second situation provided under section 30 in conjunction with section 130 OWiG, a corporation may be punished for any breach of corporate duties when such a breach resulted from a failure by a corporate representative to faithfully discharge his/her duties of supervision. In this second provision, the corporation is not made liable for the breach *per se* but for a natural person's intentional or negligent failure to carry out his/her supervisory duties – this failure having led to the breach. In this case, the criminal liability of an individual at a lower level may have triggered the administrative liability of lack of supervision, itself triggering the liability of the company. However, as confirmed by prosecutors met on-site, a conviction for the original criminal offence of an individual is not a criterion or a condition to establishing the administrative liability of the legal person.

63. To date, there are only two cases where a company was held liable under section 30 in conjunction with section 130 OWiG.[52] These incidentally correspond to the two most prominent cases of foreign bribery in Germany and were rendered by the same Public Prosecution Office, Munich I. In the first case ("Siemens (except Telecommunications Unit)"), a reference was made to the existence of a slush fund and the second case ("Trucks Unit of MAN.") referred to *"Bribes (…) paid to important decision-makers with customers in numerous instances in order to obtain major contracts, and in some cases to officials"*. Section 130 OWiG appears to be used by the prosecuting authorities as a safety net (prosecutors met in Munich referred to it as "a fall-back position") in those cases where the natural perpetrator of the criminal offence cannot be identified and prosecuted or is not in a managerial position.

(iii) Impact of the establishment of a monitoring system or in-house regulations

64. As also illustrated by case law, the standards for a violation of supervisory duties include consideration of factors such as whether the company has in place a monitoring system or in-house regulations for employees. In the Siemens case (except Telecommunications Unit)", [53] the Public prosecution indicated that "concurrently the Managing Board failed to put in place any fundamental improvements of the recognisably insufficient compliance system." In the "Trucks Unit of MAN" case,[54] the Court, after a detailed examination of the compliance system, noted that *"the compliance structure (…) was not suited to prevent bribes from being paid"*. However, whether such measures are in place within a company does not appear to go as far as constituting a defence thus preventing the establishment of the company's liability. It may nevertheless be a factor for the discontinuation of the proceedings against the natural "responsible person" under section 130 OWiG, thus illustrating that, in this situation as well, the liability of the legal person does not necessarily depend on the conviction of a related natural person.

(b) Separate or Joint Proceedings

65. Administrative fines against legal persons for bribery are in principle imposed in the course of the criminal proceedings against natural persons (section 444 CCP). However, where the natural person is not prosecuted due, for example, to the exercise of prosecutorial discretion or because he/she has died or cannot be identified, it is possible to sanction the legal person in separate proceedings, which are either of a criminal nature (where there is an underlying criminal offence of a natural person) or of an administrative nature (in application of section 130 OWiG). In the two cases where the liability of the legal person was

52 Ref. *Supra*.

53 Ref. *Supra*.

54 *Ibid*.

established as a result of the administrative offence of lack of supervision of the "responsible" individual (section 130 OWiG), the decision was taken by the public prosecution office, as prosecutors have the power to pronounce on administrative offences (section 88 OWiG)**.** Deferred proceedings (*e.g.* 153a CCP discussed below under section 5) do not apply to legal persons (section 47 OWiG). Case law on the liability of legal persons shows that out of the current 6 cases where the liability of a legal person was established in connection with foreign bribery, 4 were handled through separate proceedings because the proceedings against the natural person had been discontinued.[55] The German *Guidelines for Criminal Proceedings* (introduced in 2006) provide guidance as to how to assess the fines in independent proceedings (pursuant to section 30(4) OWiG and section 444 CCP).

(c) Number of Cases

(i) Limited number of legal persons prosecuted in comparison with the number of natural persons

66. A recent trend to more actively prosecute and sanction legal persons for foreign bribery offences has emerged since 2007 in Germany where the first conviction for foreign bribery was found against a legal person (as a matter of comparison, the first sanctions against natural persons for foreign bribery were pronounced in 2005). Since then, there has been a slight increase in the number of criminal proceedings commenced each year against legal persons. The Working Group welcomes this new trend even if the number of legal persons convicted and sanctioned is still relatively limited at this stage.

67. To date, since the entry into force of the Convention, and as indicated above, only 6 legal persons[56] have been convicted for foreign bribery compared to 69 individuals.[57] In this regard, prosecutors met on-site explained that the same case may encompass the liability of several individuals working in one single corporation thus leading to the conviction of several individuals while only one legal person would be convicted. However, Germany did not provide information as to the reason why, in at least 11 cases, individuals where convicted but not their company.[58] The Working Group suggests that this be followed up as case law develops to ensure that, where the facts merit it, prosecutions against legal persons are considered and commenced as vigorously as are prosecutions against individuals.

(ii) Availability of data

68. In order to be able to assess whether Germany's legal system effectively establishes liability of legal persons for foreign bribery, and to put these conviction figures within a broader context, the examiners asked Germany to provide more data. This request included statistics on the application of the relevant provisions on the liability of legal persons showing the number of convictions and acquittals using section 30 and, when applicable, section 130 OWiG, the sanctions applied, the related individuals sanctioned (or not) and the underlying offences (including foreign bribery but also other types of economic

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55 See Cases "Hamburg based shipping Company" and "Company P".

56 Ref. *Supra*.

57 Including the 35 individuals who reached an agreement with the prosecutorial authorities in application of section 153a CCP and being understood that these figures cover sanctions for the offence of bribery of foreign public officials, commercial bribery, breach of trust and even, in 4 cases, the administrative offence of breach of supervisory duties.

58 See Annual 2006-2007 Report, Bavaria (a) [1 individual] ; 2006-2007 Annual report, Hesse (c)[3 individuals] ; 2007-2008 Annual report, Bavaria (a) [2 individuals]; 2007-2008 Annual report, Bavaria (e) and 2009 Annual report, Bavaria (b) [4 individuals]; 2008 Annual report, Saarland [3 individuals]; 2008 Annual report, Hamburg (b) [1 individual]; 2009 Annual report, Baden-Württemberg (h) [2 individuals]; 2008 Annual report, Hesse (i) [2 individuals]; 2009 Annual report, Baden-Württemberg (g) [3 individuals]; 2009 Annual report, Hesse (a)[1 individual] ; and 2009 Annual report, North-Rhine Westphalia (a) [3 individuals].

crimes such as domestic bribery, extortion, fraud, money laundering, breach of trust etc.). Germany indicated that such data is not available. In its responses to the Phase 3 questionnaires, Germany indicated that while no legal person has been recorded as having been acquitted, no information was available with regard to the number of prosecutions against legal persons that have been dropped or terminated without sanctions. The German authorities further indicated that there is no central register of data on criminal convictions as this falls into the responsibility of the *Länder*. It was therefore impossible for the examiners to assess how many cases have been dropped at the prosecution stage. This information would have been particularly relevant because prosecutors have discretion whether or not to proceed against legal persons (as further discussed in the subsection below). The issue of the availability of data is also discussed from a more general point of view below under section 5 on Investigation and Prosecution.

(iii) Differences amongst the Länder

69. In substance, at the time of the phase 2 evaluation, the lead examiners found that the small number of cases against legal persons for domestic bribery offences, at least in two of the most important *Länder* in Germany in terms of the economy − Berlin, the capital of the State, and Frankfurt, the financial centre of Germany − raised a question about whether the existing system for the liability of legal persons was effective in practice. Germany emphasise that Berlin is far from being a major economic centre and that Munich has many more prosecutions of legal persons because Bavaria is the most important economic region in Germany and is home to a number of companies doing international business.

70. Out of the 6 administrative fines applied to legal persons for foreign bribery to date, 4 were applied by the Regional Court or the Public Prosecution office of Munich, the capital of Bavaria. In 2 of these 4 cases the liability of the company was triggered by the administrative offence of lack of supervision under section 130 OWiG. No other jurisdiction made use of this administrative offence to trigger the liability of a legal person in a case of foreign bribery. The 6 administrative fines applied to legal persons in two *Länder* is a clear confirmation that legal persons are sanctioned for foreign bribery in Germany. However, given the size of the German economy and its leading role in international trade, there is not yet enough data on which to form an opinion on the effectiveness, across all *Länder*, of the system of liability of legal persons for foreign bribery.

(d) Impact of prosecutorial discretion for legal persons

71. In Germany, while the principle of mandatory prosecution applies to natural persons for criminal offences (with the exceptions discussed under section 5. b)), the principle of discretionary prosecution applies to legal persons (See also the discussion below under section 5 on principles of prosecution in general). This distinction stems from the administrative law basis for the liability of legal persons, which generally provides for prosecutorial discretion. A decision of a prosecutor not to prosecute the legal person is not appealable. As to whether the prosecution of a foreign bribery offence in Germany could be influenced by considerations of national economic interest, contrary to prescriptions under Article 5 of the Convention, the German authorities stated in Phase 2 that, in exercising discretion, it would be contrary to the law if a prosecution were waived on account of the company's market position or for political reasons. This was unanimously confirmed by panellists in Phase 3. Representatives of the Ministry of Justice also contended that Article 5 of the Convention is directly applicable under German law. This is further discussed below under section 5.

72. At the time of the on-site visit, a number of prosecutors interviewed by the lead examiners stated that, in the field of corruption, legal persons are prosecuted only as a secondary option, indicating a very wide use of this discretion. In addition, representatives from civil society met on-site expressed the view that prosecutorial discretion is one of the factors limiting the effectiveness of administrative liability. In its Phase 2 recommendation 7, the Working Group recommended that Germany: *"Take measures to ensure*

the effectiveness of the liability of legal persons which could include providing guidelines on the use of prosecutorial discretion (…). At the time of the written follow up to the Phase 2 evaluation, the recommendation was identified by the Working Group as not implemented.

73. However, at the time of Germany's Phase 2 oral follow-up report, in June 2006, an *Amendment to the Guidelines for Criminal Proceedings and Administrative Fines Proceedings (RiStBV)* had been adopted and was to enter into force nationwide on 1 August 2006. This text does in fact only deal with "*Proceedings to assess a fine against a legal entity (…)*" and therefore does not address the more general concern, expressed in Phase 2, recommendation 7. No corporate liability case law has so far clarified the conditions for the exercise of discretion not to prosecute or to drop prosecution for corporate liability for foreign bribery.

(e) Liability of the legal person for acts committed by intermediaries, including related persons

74. The 2009 Recommendation on further combating bribery provides that "Member Countries should ensure that, in accordance with Article 1 [of the Convention], and the principle of functional equivalence in commentary 2 to [the Convention], a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf." The role of intermediaries was notably recognised in the MAN case.[59] In this case, the Regional Court of Munich I noted that "by way of concealing the bribes, they were settled via interim recipients, primarily 'consultants', 'door openers' or 'representatives'" and that in some instances the bribes were transferred to 'letter box companies' which seems to cover a large range of possible intermediaries. In a case concerning the liability of the telecommunications unit of Siemens that gave rise to a fine of EUR 201 million, the Regional Court of Munich I also acknowledged the role of numerous intermediaries while still holding the company liable.[60] This is also illustrated by a decision of the Public Prosecution Office in Munich against Siemens, in separate proceedings, to an administrative fine including the confiscation of profits totalling EUR 395 million.[61] This decision recognises that *"slush funds (…) were formed (…) by means of concluding fictitious consultancy agreements, while acts of bribery were committed in order to obtain contracts abroad. It also refers to the intermediary companies involved for the purpose of concealment, these companies being scattered across practically all the word's traditional tax havens"*. The liability of legal persons for acts committed by intermediaries does therefore not seem to present specific difficulties.

(f) Liability of State-owned and State-controlled corporations (SOEs)

75. Sections 30 and 130 OWiG do not specifically provide that corporate liability offences apply to state-owned or state-controlled enterprises but the German authorities underline that these sections cover totally private companies; public enterprises (see section 130 para. 2 OWiG) and legal persons established under public law. This issue was not examined in Phase 2. Germany indicated that no specific provisions in the law prevent the relevant provisions of the OWiG from operating or would grant immunity to SOEs from prosecution for bribery offences. No specific rules on bribery apply to these entities either. However, the liability of such companies for acts of foreign bribery remains untested in Germany over the ten years since the entry into force of the Convention. Germany underline that this is due to the limited number of SOEs in Germany and point to recent investigations for other offences that were broadly reported in the press against SOEs in the domain of public transports and telecoms.

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59 See Case "Turbo engines Unit of MAN", *Ref. Supra*.

60 See Case "Telecommunications Unit of Siemens"; *Ref. Supra.*

61 See Case "Siemens (except Telecommunications Unit)", *Ref. Supra.*

Commentary

The lead examiners are satisfied with the large range of possibilities that appear to be available under the German law for administrative liability of legal persons. This reflects a pragmatic and flexible approach that should allow for the coverage of the wide variety of decision making systems in legal persons. The lead examiners therefore, commend Germany for this approach that is generally in line with the good practice guidance in Annex 1 to the 2009 Recommendation.

The examiners commend Germany for its efforts and the trend to prosecute and sanction legal persons for foreign bribery more proactively since 2007, notably in prominent multi jurisdiction cases. However, the examiners have some concerns that the prosecutorial discretion to prosecute legal persons for foreign bribery may have been exercised conservatively since the entry into force of the Convention in Germany.

In these circumstances and considering that prosecutorial discretion has been identified as a horizontal issue by the Working Group, the lead examiners recommend that Germany take steps to implement Phase 2 recommendation 7 i.e. to take measures to ensure the effectiveness of the liability of legal persons. The lead examiners further recommend that Germany take steps to ensure the consistent implementation of this recommendation in all Länder, including through raising awareness among the prosecuting authorities at the Länder level to ensure that the large range of possibilities, available in the law, to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently in all Länder.

3. Sanctions

(a) Natural persons

(i) Significant number of cases having led to sanctions against individuals since 2005

76. During Germany's Phase 2 evaluation, the Working Group concluded that, in the absence of case law, the question of whether, in practice, the sanctions against natural persons for the foreign bribery offence are effective, proportionate and dissuasive would be an issue for follow-up. Since 2005, a significant number of individuals have been sanctioned in foreign bribery-related cases. According to Germany's Annual reports to the Working Group and the decisions provided by the German authorities to the evaluation team, nearly 70 individuals have been sanctioned since 2005 (roughly half of them after a court conviction or a decision of a prosecutor, and the other half after an arrangement under section 153a CCP, as further discussed under section 5 on prosecution). The German authorities indicate that this compares to the level of enforcement for other economic crimes. No statistics were made available to the evaluation team in support of this indication.

(ii) Changes in legislation since Phase 2

77. Since Germany's Phase 2 review, the maximum amount of criminal fines that may be ordered against individuals has been significantly raised. An amendment of 29 June 2009[62] raised the maximum amount of "daily units" from EUR 5 000 (at the time of Phase 2) to EUR 30 000. The maximum number of daily units being 360, the fine for an individual could therefore reach a maximum amount of EUR 10.8 million, which is over ten times higher than the maximum punitive component of administrative

62 Zweiundvierzigstes Gesetz zur Änderung des Strafgesetzbuches (42. StrÄG) from June 29, 2009, Federal Law Gazette I 2009, p. 1658, in force since July 4, 2009.

fines available against companies (*i.e.* EUR 1 million, as further discussed below in the subsection on sanctions against legal persons).

(iii) Criminal sanctions available for bribery of foreign public officials and other relevant offences

78. As already discussed in section 1 above, of the cases involving foreign bribery allegations provided by Germany that have resulted in criminal convictions, less than one third of the convictions were for bribery of foreign public officials (Article 2 section 1 *IntBestG* in conjunction with sections 334 and 335 CC). The remaining convictions were for commercial bribery (sections 299 and 300 CC) and breach of trust (section 266 CC). The impact that the use of these alternative offences may have on the level of sanctions was given full consideration by the evaluation team.

79. With respect to the foreign bribery offence, the available duration of imprisonment ranges from 3 months to 5 years[63] and rises from 1 to 10 years in "especially serious" cases of foreign bribery (section 335 CC).[64] The possibility of applying a fine in lieu of imprisonment is, in principle, available in all cases of foreign bribery under section 334 CC and of bribery of foreign members of parliaments under article 2, section2 *IntBestG*... This derives from section 47 CC that broadens the possibility of applying a fine in lieu of imprisonment otherwise contemplated in the law on the offence (in this case section 334 CC and article 2, section2 *IntBestG*).[65] The latter section even makes it mandatory for the court to impose a criminal fine in lieu of imprisonment where imprisonment would be of less than 6 months, In contrast, "especially serious cases of bribery of foreign public officials are punishable with imprisonment only.

80. With respect to the commercial bribery offence under sections 299 and 300 CC, the available duration of imprisonment for "especially serious" cases of commercial bribery (and all foreign bribery cases resolved with the commercial bribery offence were so far deemed "especially serious" as reflected in case law) ranges from 3 months to 5 years. The possibility to apply a criminal fine up to EUR 10.8 million in lieu of prison is, in principle, available in all cases of commercial bribery pursuant to section 47 CC (as described above).

81. With regard to breach of trust under section 266 (1) and (2) CC, the available duration of imprisonment ranges from 1 month to 5 years and rises from 6 months to 10 years in "especially serious" cases. The possibility to apply a criminal fine in lieu of prison is limited to cases that are not "especially serious" (sections 266(2) CC and 47 CC). "Especially serious cases" (section 263 CC) are punishable by imprisonment only.

82. However, a misdemeanour (*i.e.* all cases of foreign bribery, commercial bribery and breach of trust, including "especially serious" cases as discussed above under section 1), can be adjudicated through a "penal order" (section 407 CCP), a written procedure (described below under section 5. d) (iv)) that may be applied upon request of the public prosecutor's office if it does not consider a main hearing to be necessary given the outcome of the investigation. Sanctions available under this procedure include, in particular, a criminal fine up to EUR 10.8 million, (even in cases where pursuant to the law on the offence only imprisonment is provided, *i.e.* in especially serious cases of foreign bribery and of breach of trust) or a prison sentence of not more than one year provided that it is suspended on probation (even in cases where

63 Except in cases of bribery of judges from foreign states or judges at international courts, where the minimum rises to six months, and in cases of bribery of foreign members of parliament and in "less serious" cases of foreign bribery, where the minimum is one month (section 2 *IntBestG*).

64 Cases of bribery of foreign public officials, which fall under the scope of the Convention, never constitute "less serious" cases under section 334 CC.

65 Section 334 CC and Article 2, Section 2 *IntBestG* provide the possibility of applying a fine in lieu of imprisonment only for "less serious cases" of foreign bribery and bribery of foreign members of parliament.

pursuant to the law on the offence a longer prison term is provided). According to 407 CCP, a penal order may lead to dispensing with punishment. However the German authorities explained that such dispensation would not apply to foreign bribery cases. The 6 penal order case provided by Germany appear to confirm that sanctions applied to foreign bribery cases in the context of this procedure are lower than those provided under the law for the offence considered. The extent to which this penal order procedure has so far been applied to foreign bribery offences is however unclear to the lead examiners who recommend that the application of this procedure be followed up as case law develops.

83. It follows that putting aside the penal order procedure, criminal fines in lieu of prison are available for the offences of bribery of foreign public officials and breach of trust except in "especially serious" cases. Criminal fines in lieu of prison are also available for all cases of commercial bribery. The harshest prison sentences available are those applicable in cases of "especially serious" bribery of foreign public officials (section 335 CC) and in cases of "especially serious" breach of trust. In these cases prison sentences can be as long as ten years. The other available prison sentences are, irrespective of the offence concerned, of a comparable level: the maximum duration is usually five years and the minimum one or three months.

84. Pursuant to section 41 CC that may apply to all criminal offences, one particular circumstance, personal enrichment (or attempt thereof) through the offence, is, by law, an aggravating factor that allows the judge to impose a fine of up to EUR 10.8 million in addition to imprisonment. This factor was only applied once in all of Germany's foreign bribery-related cases and decisions provided to the evaluation team.[66]

(iv) Level of criminal sanctions applied by courts

85. During the on-site visit, the lead examiners asked panellists whether the use of criminal offences other than the offence of bribery of foreign public officials in foreign bribery-related cases lowers the level of sanctions actually imposed. Prosecutors unanimously assured the lead examiners that this is not the case. Defence lawyers on the other hand stated that sanctions are harsher when the offence prosecuted is bribery of foreign public officials, and available case law seems to support this view.

86. In the cases mentioned in the Annual reports and the decisions provided by the German authorities, ten individuals were convicted for the criminal offence of bribery of foreign public officials (section 334 CC).[67] Nine of them received prison sentences, one individual was sentenced to pay a fine only, following a penal order procedure (EUR 20 000).[68] Five of the nine prison sentences were suspended, four of which concerned individuals convicted for "especially serious" cases of bribery of foreign public officials.[69] The average length of the prison sentences was 2 years and 3 months. The longest sentence was five years coupled with a EUR 2.16 million fine, though the defendant, who was convicted on two counts of foreign bribery, was also convicted on over 600 counts of other offences.[70]

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66 See Case "H. and K., former executives of Siemens", *Ref. Supra*.

67 See 2006-2007 Annual report, Bavaria (a) [1 individual] ; 2007-2008 Annual report, Bavaria (a) [2 individuals]; 2008 Annual report, Baden-Württemberg (c) [3 individuals], Saarland [3 individuals], Hamburg (b) [1 individual].

68 See 2008 Annual report, Hamburg (b).

69 See Penal order of 14 April 2005, Amtsgericht München (Munich court) [1 individual] ; judgment of 27 February 2008, Landgericht München I (Munich regional court) [1 individual] ; and judgment of 17 March 2008, Landgericht Stuttgart (Stuttgart regional court) [3 individuals – one sentenced to non suspended imprisonment], hereinafter referred to as **Case "Company WB and three former executives"**.

70 See Case "Company WB and three former executives", *Ref. Supra*.

87. Ten other individuals were convicted for commercial bribery,[71] all in "especially serious" cases (section 300 CC). None of them was incarcerated. Two were only sentenced to a fine (not exceeding EUR 20 000) following a penal order procedure. Eight received suspended prison sentences averaging 1 year and 6 months, coupled in five cases with fines. The latter amounted to EUR 100 000 in one case involving the former head of a leading transport-related engineering company[72] and between EUR 1 800 and EUR 21 600 in the other cases.

88. Ten individuals identified in the cases and decisions mentioned above as having been sanctioned for breach of trust (section 266 CC)[73] received suspended prison sentences averaging 1 year and 6 months, and some were additionally ordered to pay a fine. In one case the fine was of EUR 150 000,[74] in the other cases the fines averaged EUR 27 000.[75]

89. To summarise, convictions for the offence of bribery of foreign public officials resulted in actual incarcerations and suspended prison sentences that were almost twice as long as the sentences ordered on the basis of commercial bribery or breach of trust. Unlike convictions for foreign bribery, convictions for commercial bribery and breach of trust did not lead to any incarceration and led to shorter suspended sentences and generally light fines (except in particularly aggravated cases involving senior executives). The lead examiners also noted a tendency to impose sentences that are generally in the middle or lower range of available sentences provided under sections 334 and 335 CC, *i.e.* respectively 5 and 10 years depending on the seriousness of the offence. The German authorities pointed out that this is in line with sentences applied in other economic offences, although they did not provide any statistics in support of this view.

90. In addition, a conviction for breach of trust resulting in a prison sentence of one year or more triggers an automatic five-year prohibition against being a manager or a board member of a company.[76] Upon a conviction for foreign bribery or commercial bribery, a court may also prohibit an individual from engaging in a specific profession or business (section 70 CC), though such a prohibition was not imposed in any of the decisions provided to the evaluation team. In most regulated professions (*i.e.* the banking[77] and legal professions for example) an automatic exclusion from the profession is provided in case of criminal conviction.

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71 See 2007-2008 Annual report, Bavaria (a) [2 individuals]; 2008 Annual report, Hesse (i) [2 individuals]; 2009 Annual report, Bavaria (b) [2 individuals], Baden-Württemberg (h) [2 individuals]; List of Cases in Germany's Responses to the Phase 3 Questionnaires, Hamburg (bb) [1 individual]; Judgement of 28 June 2010, Landgericht München I (Munich regional court) [1 individual].

72 See Judgement of 28 June 2010, Landgericht München I (Munich Regional Court).

73 See 2006-2007 Annual report, Hesse (c) [3 individuals] ; Judgement of 28 July 2008, Landgericht München I (Munich regional court) [1 individual], hereinafter referred to as **Case "Siemens, former executive of Siemens."**; Judgement of 19 November 2008, Landgericht München I (Munich regional court) [2 individuals], hereinafter referred to as **Case "H. and K., former executives of Siemens"**; Judgement of 19 December 2009, Landgericht München I (Munich regional court) [1 individual] ; Judgement of 28 April 2010, Landgericht München I (Munich regional court) [2 individuals], hereinafter referred to as **Case "RW and KH, former executives of Siemens"**; Judgement of 23 November 2010, Landgericht Darmstadt [1 individual], hereinafter referred to as **Case "K, former executive of Siemens"**.

74 See Case "K., former executive of Siemens", *Ref. Supra*.

75 See Case "Siemens, former executive of Siemens" and Case "RW and KH, former executives of Siemens", *Ref. Supra*.

76 See Section 6 para. 2, subpara 3(e) of the Limited Liability Company Act and Section 76 para. 3, subpara 3(e) of the Stock Corporation Act.

77 Section 35 in conjunction with section 33 para. 1, n°1-8 or section 33 para. 3 n°1-3 of the Bank Regulatory Act (KWG)

(v) Suspension of prison sentences

91. Pursuant to sections 56 CC, courts may decide to suspend prison sentences that do not exceed two years "*if there are reasons to believe that the sentence will serve as a sufficient warning to the convicted person and that he will commit no further offences without having to serve the sentence*". This possibility has been widely used in practice as 23 of the 27 prison sentences ordered since 2005 were suspended (*i.e.* all 18 prison sentences ordered for commercial bribery and breach of trust, and 5 of the 9 prison sentences ordered for bribery of foreign public officials). This again reflects the fact already stressed above that sanctions pronounced for the offence of foreign bribery are harsher than for other foreign bribery related offences. During the on-site visit, the very broad application of suspension of prison sentences to foreign bribery cases in general was subject of much discussion with a range of legal practitioners. Academics and prosecutors in particular explained that this trend is not specific to foreign bribery, and exists also for other economic crimes. The German authorities did not provide data in support of this view, but explained that this results from a general approach taken by German courts. Based on the above mentioned figures, the Working Group is nonetheless concerned that sentences upheld to date in foreign bribery related cases reflect a conservative use of the broad range of sanctions available in German law.

(vi) Mitigating factors provided by law

92. When deciding the level of sanction, judges are required to weigh the circumstances in favour of and against the defendant according to a number of considerations listed under section 46 CC. As further discussed under section 5 below, according to a recently introduced provision of the Criminal Code (section 46b) courts may also mitigate the sentence if the defendant cooperates with the prosecution in establishing the facts or in preventing further criminal offences.

(vii) Mitigating factors developed by courts

Solicitation

93. During the on-site visit, prosecutors and representatives of the private sector underlined that solicitation (or the general expectation of bribes) is to be taken into account when establishing the level of guilt of the defendant and setting the appropriate level of the penalty. This is reflected in three decisions (two against individuals and one against a company) provided by Germany.[78] In one decision, the court stated that "*it is generally known that in numerous countries, and in particular in the region for which the defendant was responsible, contracts are not awarded unless a bribe is paid*".[79] Such statement departs, at

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78 See Judgement of 27 February 2008, Landgericht München I (Munich regional Court) and Decision by the Landgericht Munich of 19 December 2009 (page 24, section III) where it is stated that *"Moreover, there are special circumstances given in the defendant's person and in the deed that justify suspending the punishment on probation (section 56(2) of the Criminal Code (StGB). The offences are connected to the employer at the time for whom the defendant is no longer working. It was not possible to obtain contracts without expending funds on bribes. (In German: Die Auftragserlangung war ohne Bestechungsgelder nicht möglich)* ". See also Decision by the Landgericht Hildesheim of 4 August 2009 (Company P. heating systems) where it is stated that: "*The so-called penalty component of only € 20,000 is relatively small because it has to be conceded to the secondary party that, during the period in which the offences were committed, it is possible that without monetary payments to the parties responsible in Romania no business relationship would have arisen or the transactions would have "dragged on" to the financial detriment of the secondary party. (In German: Der sog. Sanktionsanteil ist mit lediglich 20 000 € relative gering ausgefallen, weil der Nebenbeteiligten zuzugestehen ist, dass im Tatzeitraum ohne Geldzahlungen and die Verantwortliche in Rumänien ggfs. keine Geschäftsbeziehung entstanden wäre oder der Ablauf der Geschäfte sich zum wirtschaftlichen Nachteil der Nebenbeteiligten "hingezogen" hätte.)*

79 See Case "GK, former executive of Siemens.", *Ref. Supra*. In this case, the individual was found guilty on four counts of breach of trust and sentenced to a suspended prison sentence of two years.

least in its spirit, from Commentary 7 on the Convention which provides that foreign bribery is an offence irrespective of the perception of local custom and the alleged necessity of the payment in order to obtain or retain business. Annex I to the 2009 Recommendation[80] further specifies that "*Article 1 of the Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe*." Such a defence is not contemplated in the German offence of foreign bribery, and was not upheld in the above mentioned court decision. However, the Working Group is concerned by the extent to which solicitations are taken into account to determine the level of guilt and to mitigate the sentence. While taking solicitations into account may not in itself be in contravention of the Convention, the weight given to this mitigating factor may become an issue should it lead to the application of sanctions that are not sufficiently effective, proportionate and dissuasive (as required under Article 3 of the Convention). This should be followed up by the Working Group as case law develops.

Other mitigating factors

94. It is evident from the cases in the Annual reports and the decisions provided to the evaluation team, that circumstances such as the fact that the defendant left the company after the offence was discovered, did not aim at personal enrichment and merely acted in the interest of his company, or was a first time offender, are regularly taken into consideration to establish the level of guilt and mitigate the sentences. The cooperation of the defendant with the authorities, his or her confession and the fact that he "*did not try to shift the responsibility to subordinates*"[81] are also considered as mitigating factors in several decisions. Several decisions to sanction by criminal courts also took into account civil settlements concluded between individuals and the company, such as those settled between Siemens and Siemens employees who agreed to compensate the company with their own funds.[82] While some of these mitigating factors are common to many countries and/or may appear warranted in certain circumstances, their use and impact on the overall effectiveness of the level of sanctions should be followed up as practice develops. More specifically, the lead examiners paid special attention to the fact that lack of personal enrichment and the fact that the offender acted in the interest of the company could be considered mitigating factors, as these factors are typical to the offence of foreign bribery and could potentially be applied to mitigate almost all sentences of foreign bribery, hence systematically lowering in practice the level of sanction available in law.

95. Another mitigating factor that was recognised in several decisions against former employees of Siemens was the fact that none of them had been directly involved in the development of the development of the system of bribery and slush funds. These individuals were hired after the system and slush funds were created.[83] This circumstance, associated with the fact that, according to the court, they "*would not have been able to evade [it] without suffering considerable disadvantages to [their] career[s]*" and that "*it was easy*" for them to commit the offences because there were no adequate controls within the company, led to low sanctions being imposed on the individuals.

(viii) Administrative sanctions against individuals for breach of supervisory duties

96. Article 1 of the Convention requires that each Party establish a criminal offence of foreign bribery and Article 3 that individuals be punishable by criminal penalties. The evaluation team noted that

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80 Annex I: Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

81 See for example judgement of 28 June 2010, Landgericht München I (Munich Regional Court).

82 See Case "H. and K., former executives of Siemens", *Ref. Supra*.

83 See for example Case "GK, former executive of Siemens", *Ref. Supra*, convicted to a two year suspended prison sentence..

at least four former executives of Siemens were not held criminally liable, but were exclusively sanctioned administratively for breach of supervisory duties (section 130 OWiG).[84] According to prosecutors met on-site, administrative sanctions are used as a safety net where it is impossible to prove a criminal offence.

97. Prosecutors may impose an administrative fine against a person in a leadership position in a company for failure to take necessary supervisory measures to prevent a lower level employee from committing criminal or administrative offences[85] (as further discussed under section 2 on legal persons). Such decisions taken by prosecutors on the basis of section 130 OWiG are not public when the sanction is determined outside of the court hearing. The person in a leadership position is punishable by a EUR 500 000 administrative fine in case of negligence, and EUR 1 million in case of intent. This maximum administrative fine for individuals is over ten times lower than the maximum amount of criminal fines for individuals.[86] Amongst the four former executives of Siemens, two were found liable of negligence and respectively fined with EUR 150 000 and EUR 250 000,[87] which does not reach the maximum administrative fine amount. Both were members of the managing board and both had agreed to compensate the company through a civil settlement (in one case for EUR 3 million), an element that was taken into account to determine the amount of the administrative fine. The evaluation team was not provided with information on the sanctions imposed against the other two former executives. The Working Group notes the existence of this safety net and the pragmatic approach taken by prosecutors to help ensure that individuals are held administratively liable in the absence of the necessary evidence to hold them criminally liable, and the use that is made of it to trigger the liability of legal persons (as further discussed under section 2).

(ix) Agreed sanctions in the context of the arrangements under section 153a CCP

98. Since 2005, according to the Annual reports and the decisions provided by the German authorities, 35 individuals, more than half of the individuals sanctioned for foreign bribery related offences, were sanctioned through the procedure provided under section 153a CCP.[88] According to this procedure, individuals may be sanctioned in the context of the conditional exemption from prosecution by the public prosecutor (as further discussed under section 5 on prosecutions). The condition for the exemption, which must be agreed by both the court and the individual, may consist of the payment of a sum of money to the treasury or to a non-profit organisation. Although some of these arrangements received media coverage because the individuals concerned were former employees of Siemens, the existence and details of these arrangements are, in principle, not made public and thus remain confidential (they are not accessible to third parties, including the German authorities). The German authorities explained that sometimes these arrangements take place in court hearings that are public. This principle contrasts with the public availability of court decisions (although, as discussed above in the Introduction, this publicity is limited as the names of the parties and certain elements of facts are not publicly disclosed).

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84 See 2009 Annual report, Bavaria (a) [two individuals] ; decision of 8 February 2010 of the Staatsanwaltschaft München I (Munich prosecutor) [one individual], hereinafter referred to as **Case "R, former executive of Siemens"**; decision of 2 March 2010 of the Staatsanwaltschaft München I (Munich prosecutor) [one individual], hereinafter referred to as **Case "P, former executive of Siemens"**

85 See sections 42 and 130 OWiG.

86 This maximum is applicable to individuals with a monthly revenue of EUR 1 million and above (section 40 CC).

87 See Case "R, former executive of Siemens." and Case "P, former executive of Siemens", *Ref. Supra*.

88 See Annual 2007-2008 Report, Hamburg (c) [1 individual] ; 2009 Annual report, Bavaria (a)(5), completed by information provided by prosecutors of Munich during the on-site visit [23 individuals, all involved in the same predominant case of foreign bribery], Baden-Württemberg (g) [3 individuals], Hesse (a) [1 individual], and North Rhine-Westphalia (a) [3 individuals] ; Judgment of 26 June 2009, Landgericht Hildesheim (Hildesheim Court) [3 individuals]; Case "K., former executive of Siemens" [1 individual].

99. During the on-site visit, a judge explained that the amount that prosecutors and judges usually aim for in the context of these arrangements corresponds to twice the amount of the profit or of the bribe. All 35 individuals mentioned above agreed to pay a sum of money as a condition for the withdrawal of the charges. The amount was disclosed in the Annual reports with respect to only 11 individuals. For these individuals, it ranged from EUR 600 to EUR 50 000.

Commentary

The lead examiners commend Germany for its substantial enforcement, which has developed steadily since Phase 2 and resulted in a significant number of sanctions imposed in foreign bribery-related cases against individuals. However, while noting the statements made by the German authorities that penalties for foreign bribery are comparable to those for other economic crimes, the lead examiners are concerned that the sanctions actually imposed to date may not be fully effective, dissuasive and proportionate.

They consider that the level of imprisonment and fines imposed in practice generally appears to be low with respect to the available maxima and particularly note the fact that most prison sentences imposed to date have been suspended. The lead examiners also note with some concerns the apparent weight given by courts to certain circumstances to mitigate sentences, in particular solicitation. Also, while recognising that the pragmatic approach adopted by German prosecutors and courts in using criminal offences other than the offence of bribery of foreign public officials has undoubtedly contributed to a large extent to the high level of enforcement in Germany, they note that generally a lower level of sanctions has been imposed in respect of such other offences than has been imposed in respect of the offence of bribery of a foreign public official. They are also concerned by the impact on the level of sanctions of the use of prosecutorial discretion in specific procedures (further discussed below under section 5), i.e. arrangements under section 153a CCP, penal orders (section 407 CCP) and negotiated sentencing agreements (section 257c CCP).

Therefore the lead examiners recommend that Germany:

(a) raise awareness among prosecuting authorities on the importance of (i) requiring sanctions which are effective, proportionate and dissuasive on natural persons convicted for foreign bribery offences, including in cases of solicitation, (ii) making full use of the range of criminal sanctions available in law, and encourage prosecuting authorities to lodge appeals provided for under the law should the decisions handed down be too lenient, and (iii) ensuring that the use of criminal offences other than the offence of bribery of foreign public officials does not lead to imposing a lower level of sanctions.

(b) compile statistical information on sanctions imposed in prosecutions of foreign bribery-related cases in a manner that differentiates between (i) sanctions imposed for the offence of foreign bribery and for other criminal offences, in particular commercial bribery and breach of trust, and (ii) the procedure applied (court decision with a full hearing, arrangement under section 153a CCP, penal order under section 407 CCP, or negotiated sentencing agreement under section 257c CCP), with a view to monitoring the level of sanctions in all German Länder.

They also recommend that the application of mitigation factors by courts, in particular solicitation, be followed up by the Working Group. This may be treated by the Working Group as a horizontal issue.

The lead examiners note that the use of section 153a CCP has permitted numerous monetary sanctions against individuals, thus contributing to a high level of enforcement. They note however the lack of transparency of these arrangements and recommend that Germany, make public, where appropriate and

in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements, such as the reasons why they were used in a specific case and the arrangement's terms (in particular the amount agreed to be paid) as this would add accountability, raise awareness, and enhance public confidence in the enforcement of the anti-corruption legislation in Germany.

(b) Legal persons

(i) Legislation unchanged – available administrative sanctions

100. During its Phase 2 evaluation, the Working Group recommended that Germany "take measures to ensure the effectiveness of the liability of legal persons which could include providing guidelines on the use of prosecutorial discretion and further increasing the maximum level of monetary sanctions" (recommendation 7). At the time of its Phase 2 written follow-up report the issue of a further increase of the monetary sanctions had recently been re-examined by the German authorities who had concluded that the statutory maximum of EUR 1 million is sufficient and proportionate. Furthermore, Germany noted that, in practice, the pecuniary sanction could exceed the statutory maximum of EUR 1 million in cases where prosecutors and courts could establish the "skimming off" of the benefits of offences exceeding this amount. The Working Group concluded that recommendation 7 had not been implemented.

101. Under sections 30 and 130 OWiG, where a person in a leadership position commits a crime (*e.g.* bribery of a foreign public official or commercial bribery) or commits the administrative offence of breach of supervisory duties, by failing to take the measures necessary to prevent the commission of a crime by a lower level employee, the maximum amount of the administrative fine incurred by the legal person is EUR 1 million if this crime was committed with intent (which is always the case with bribery of foreign public officials and commercial bribery, and EUR 500 000 if it was committed negligently.

102. Section 17(4) OWiG provides that the administrative fine ordered against a legal person must exceed the financial benefit gained from the underlying offence. An administrative fine has two components, a punitive one and a confiscatory one (the fine in respect of the benefit, also referred to as "skimming-off of profits"). If the financial benefit is higher than the statutory maximum fine (*i.e.* EUR 1 million or EUR 500 000), the total amount of the administrative fine must include an amount equal to the benefit gained (the confiscatory component of the fine), and be increased by an amount that may be a maximum of EUR 1 million or EUR 500 000 (the punitive component of the fine).[89]

(ii) Recent increase in the number of legal persons sanctioned

103. During Germany's Phase 2 evaluation, the Working Group concluded that, in the absence of case law, the question of whether, in practice, the sanctions against legal persons for the foreign bribery offence are effective, proportionate and dissuasive would be for follow-up. Since 2007, 6 sanctions have been ordered against legal persons.[90] One additional decision[91] (further discussed under section 4 on confiscation) led to the confiscation of illegal profits against a legal person without finding it liable (only the individuals were found liable).

104. The trend to more actively prosecute and sanction legal persons may coincide with an amendment to the Guidelines for Criminal Proceedings and Administrative Fines (section 180 a *RiStBV*),

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89 See Case "Telecommunications Unit of Siemens", *Ref. Supra*.

90 See Cases "Telecommunications Unit of Siemens", "Siemens (except Telecommunications Unit)", "Hamburg based shipping Company", "Trucks Unit of MAN.", "Turbo engines Unit of MAN", and "Company P", *Ref. Supra.*

91 See Case "Company WB and three former executives" and Case "Siemens (Enel)", *Ref. Supra*.

in August 2006, which explicitly requires the Public Prosecution Office to examine whether a fine should also be imposed on a company when an individual accused in criminal proceedings is part of the upper management of the company. However, the evaluation team was not provided with statistics showing the number of sanctions against legal persons for other economic crimes and is therefore not in a position to make comparisons (also discussed above under section 2 on the responsibility of legal persons).

(iii) The quantum of the punitive component of fines actually imposed

105. As with natural persons, German courts take into account various aggravating and mitigating circumstances when assessing the size of the punitive component of administrative fines against legal persons. Case law shows that these factors include: the seriousness of the offence, the economic situation of the parties involved, the amount of the bribes paid, whether bribery took place over an extended period of time, the success of the criminal scheme, whether the bribery was the company's "*usual practice*" or "*an accepted part of corporate strategy*",[92] and the seniority in the company of the natural persons involved. Courts have also considered the degree of the company's co-operation with the authorities in the investigation,[93] such as voluntary disclosure of information and releasing the company's employees from their confidentiality obligations in order to assist the authorities.[94] Another mitigating factor is whether the company has taken measures to prevent foreign bribery in the future, such as by setting comprehensive compliance programmes[95] (as also discussed under section 5 on prosecutions and section 7 on company compliance and audit programmes). The punitive fine may also be reduced if the company has been or will be punished in another jurisdiction for the same offence.[96]

106. Solicitation or the general awareness that bribes are required may also be considered a mitigating factor, thus raising the same concerns as those described above concerning individuals. In at least one case, this factor led to a significantly lower fine[97] as the court stated that "*the so-called penalty component of only EUR 20 000 is relatively small because it has to be conceded (…) that, during the period in which the offences were committed, it is possible that without monetary payments to the parties responsible in Romania no business relationship would have arisen."*

107. In practice, the punitive component of administrative fines rarely reaches the statutory maximum, though it is often coupled with a significant confiscatory component. Since 2005, the maximum available punitive fine of EUR 1 million was imposed in only one case (in addition to a EUR 200 million fine confiscating the illicit profits).[98] Another case resulted in a punitive fine of EUR 300 000 (in addition to a EUR 75 million fine confiscating the illicit profits).[99] In a third case, a punitive fine of EUR 20 000 was

92 See Case "Trucks Unit of MAN." and Case "Siemens. (except Telecommunications Unit)", *Ref. Supra*.

93 See for example Case "Siemens (except Telecommunications Unit)", *Ref. Supra*.

94 See Case "Trucks Unit of MAN.", *Ref. Supra*. The same circumstance was applied in the Case "Turbo engines Unit of MAN", *Ref. Supra*.

95 See Case "Trucks Unit of MAN.", *Ref. Supra*. This circumstance was also taken into account in the Case "Siemens (except Telecommunications Unit)", *Ref. Supra.*

96 See Case "Siemens (except Telecommunications Unit)", *Ref. Supra*.

97 See Case "Company P", *Ref. Supra*.

98 See Case "Telecommunications Unit of Siemens", *Ref. Supra*.

99 See Case "Turbo engines Unit of MAN.", *Ref. Supra*.

imposed (in addition to EUR 180 000 confiscating the illicit profits).[100] A total fine of EUR 30 000 was imposed in the fourth case, but it is unclear how much of this amount represented the punitive fine.[101]

108. The same trend may be noted in cases of negligence. Two legal persons were fined because a person in a leadership position negligently failed to prevent lower-level employees from paying bribes. Neither company received the statutory maximum punitive fine of EUR 500 000. The courts instead imposed punitive fines of EUR 250 000 (plus EUR 394 750 000 equivalent to illicit profits)[102] and EUR 300 000 (plus EUR 75 million equivalent to illicit profits).[103]

109. During the on-site visit, representatives of the private sector, when asked whether they thought sanctions against legal persons were deterrent, unanimously answered that they view the system as deterrent. However, when asked what companies fear the most, the answers mainly focussed on the loss of reputation.

(iv) The quantum of the confiscatory component of fines ("skimming off")

110. The confiscatory component of administrative fines aims to disgorge the financial benefit acquired by the legal person through an illegal act. The term "financial benefit" is not defined in statute or prosecutorial guidelines. It is however defined broadly in some decisions: the financial benefit covers "*profits achieved*" directly by the offence and "*indirect benefits* […] *to the extent they can be measured and have been realised* […] *such as competitive advantages on the market*" or "*follow-up contracts*".[104] Furthermore, a prosecutor explained, referring to case law,[105] that when a contract results in more expenses than gains, it is still considered to have generated profits as it allows the company to continue employing its staff, obtain new contracts and improve its market position "*by running competitors out of the market*". The German authorities provided case law in support to this explanation. In terms of the quantification of this "financial benefit" by courts and prosecutors, it remains contingent on available evidence and may vary from one case to the other (it may also be "estimated" in certain circumstances). Case law reflects various approaches that may benefit from more specific guidelines to ensure a more coherent approach amongst prosecutors, courts and *Länder*.

(v) Tax treatment of the confiscatory and punitive components of administrative fines

111. The punitive and confiscatory components of administrative fines are treated differently under tax law.[106] The punitive component is not eligible for tax deduction, while the amount of the fine corresponding to the confiscatory component may be deducted from the profit subject to income taxes.[107] The latter tax treatment also applies to confiscations ordered pursuant to section 73(3) CC (further discussed under section 4 on confiscation).[108] The Working Group notes that the different tax treatment

100 See Case "Company P", *Ref. Supra*.

101 See Case "Hamburg based shipping Company", *Ref. Supra*.

102 See Case "Siemens. (except Telecommunications Unit)", *Ref. Supra*.

103 See Case "Trucks Unit of MAN.", *Ref. Supra*.

104 See Case "Telecommunications Unit of Siemens", *Ref. Supra*, Case "Siemens. (except Telecommunications Unit)", *Ref. Supra*, and Case "Trucks Unit of MAN.", *Ref. Supra*.

105 See Judgement of the Federal Court of Justice (BGH) of 2 December 2005, ref. 5 StR 119/05.

106 See section 4(5) of the Income Tax Act (EStG), para. 8.

107 This is explained in a decision of the Federal Court of Justice (BGH) of 21 March 2002, ref. 5 StR 138/01.

108 See the decision of the Federal Court of Justice (BGH) of 21 March 2002, ref. 5 StR 138/01.

granted to the confiscatory and the punitive component of administrative fines further underlines the difference in nature and purpose of these two elements.

(vi) Additional sanctions

112. In Germany there are no additional sanctions that the courts or prosecutors may order against legal persons. There are however means at the disposal of different government bodies that may produce similar effects. For example, debarment from public procurement may be a consequence of an administrative decision finding a company liable (as further discussed below under section 11 on public advantages). However, the evaluation team notes that Siemens that was sanctioned with a record administrative fine was not debarred in Germany. During the on-site visit, a representative of the private sector explained that the reason is that all executives involved in the scheme had left the company where, in addition, an effective compliance system had been put in place. The German authorities underlined that the decision not to debar Siemens was based on its effective compliance system, which was subject to extensive verifications in the context of the procedures applied to grant public contracts and export credit guarantees in Germany.

Commentary

The lead examiners welcome Germany's enforcement efforts that have resulted in monetary sanctions imposed on companies since 2007.

As in Phase 2, the lead examiners are concerned that the punitive component of the administrative fines that have been imposed against legal persons only exceptionally approached the maximum available in the statute (i.e. EUR 1 million or EUR 500 000), which was itself already deemed too low by the Working Group during Phase 2, especially for large companies.

The confiscatory component, even when covering large amounts of money, only disgorges ill-gotten gains. The legal person is thus merely returned to the same financial position as if the crime had not been committed. The lead examiners note that fear of reputational damage may have a serious deterrent value. They stress however that the possibility of a significant additional punitive fine is likely to dissuade more effectively a legal person from committing foreign bribery.

The lead examiners therefore recommend that Germany increase the maximum level of the punitive component of administrative fines for legal persons.

The lead examiners also recommend that Germany consider making available to courts additional sanctions for legal persons, such as those mentioned as examples in the Commentary to Article 3(4) of the Convention to ensure effective deterrence.

4. Confiscation of the bribe and the proceeds of bribery

113. There have been no changes in the legislation providing for confiscation (also referred to as "forfeiture") of the bribe and the proceeds of bribery. The bribe is subject to "deprivation" (section 74 CC) when it is still in the possession of the briber (this will be the case if the bribe has either not been handed over or has been rejected by the person to be bribed), and to "confiscation" (sections 73 to 73e CC) that applies to the offender's gains from the offence. Confiscation may be ordered against a third person, for example the company employing the defendant if he/she acted for it or if the company "*acquired anything thereby*". As noted above, illicit profits gained by a legal person may also be confiscated (or "skimmed off") as part as an administrative fine, but pursuant to section 30(5) OWiG, these two confiscation procedures cannot be cumulated.

114. Germany provided two examples of confiscations ordered against legal persons pursuant to section 73(3) CC. In one case involving bribery to obtain operating licenses,[109] the court ordered the confiscation of EUR 8.5 million from the briber. In this case, the court determined that the value of the licences acquired corresponded, in the absence of any specific data available, at least to the price that the company was willing to pay in acquiring them. The court deemed this price to be essentially equivalent to the costs related to the operations of two subsidiaries set up by the briber in two foreign countries with the primary objective of acquiring licences. In the second case,[110] the court ordered the confiscation of EUR 38 million, corresponding to the profits derived from two contracts obtained through bribery, less the amount confiscated in a foreign jurisdiction and the amount paid by the company as part of a settlement.

Commentary

As consistently noted by the Working Group in former evaluations, confiscation is an important element of an effective sanctions regime for foreign bribery. Through the confiscatory component of administrative fines, German courts and prosecutors have obtained confiscation of bribery proceeds, i.e. profits, in all cases where a legal person was found liable. The Working Group commends Germany for the effectiveness of confiscations in the context of administrative fines. On the other hand, in those cases where the legal person has not been sanctioned, the lead examiners note that confiscation of proceeds of bribery in criminal proceedings pursuant to section 73 CC was so far ordered in only two cases, both against the legal person that benefited from the criminal offence. They therefore urge Germany to remain alert to the need for prosecutors to be proactive in requesting, and thus to obtain court orders, wherever practicable, to confiscate in foreign bribery cases.

5. Investigation and prosecution of the foreign bribery offence

(a) Principles of investigation and prosecution, resources and coordination

(i) German federal system

115. The actual investigation and prosecution of the majority of all criminal offences, including domestic and foreign bribery, is conducted by the governments of the 16 *Länder*. Each Land is responsible for funding and administering the criminal justice system, including the police and prosecutors. The police function (public safety and crime prevention) is generally within the jurisdiction of the Land Minister of Interior, and the prosecutorial function (including police criminal investigations) is generally within the jurisdiction of the Land Minister of Justice. The Federal Ministry of Justice takes part in discussions between Land ministries of justice or other Land authorities that may have an impact on federal legislation. The Working Group notes the high level of autonomy enjoyed by the *Länder* in these domains and the corresponding challenges it may entail for the Federal Government in monitoring the implementation of Federal legislation and in particular the foreign bribery offence.

(ii) Specialisation of the police and prosecutors

116. The criminal offence of bribery of foreign public officials is investigated primarily by the public prosecution offices. These prosecution offices are organisationally allocated to the individual *Länder*. In some of them, the public prosecution offices are organised by districts (insofar as a Land has more than one regional court (*Landgericht*)). The public prosecution offices are under the obligation to examine any suspicious facts indicating a potential criminal offence and, if applicable, to initiate an investigation (mandatory prosecution principle, *Legalitätsprinzip*). Centralised agencies accepting reports concerning

[109] See Case "Company WB and three former executives", *Ref. Supra*.

[110] See Case "Siemens (Enel)", *Ref. Supra*.

suspected acts of corruption have been instituted with the Federal Police Office (BKA), the Police Offices at the Land level (LKA) and the public prosecution offices.

117. Several *Länder* have dedicated public prosecution offices which specialise in investigating corruption offences and/or economic crimes throughout the *Land*. The larger public prosecution offices have their own special anti-corruption units. The police forces of the *Länder*, for their part, have established special directorates for economic offences and, in some instances, specifically for corruption offences. Corruption offences are processed by special directorates responsible for the prevention of economic offences and offences against property, as well as – depending on the case – by inspectorates of the criminal police responsible for centralised tasks. However, during the on-site visit, prosecutors from *Länder* where the experience of prosecuting foreign bribery cases is not as high as in other *Länder*, indicated that given the complexity of foreign bribery they need more information and training on the offence. The lead examiners noted a significant difference in terms of awareness, specialisation and experience in foreign bribery matters among the prosecutors from different *Länder* met during the on-site visit. This difference was also noted by representatives from the civil society.

(iii) Prosecution resources

118. Recommendation 2 from Phase 2, stated: "With respect to the police and the prosecutorial authorities, the Working Group recommends that Germany: […] evaluate whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases." This recommendation was considered implemented at the time of the written follow up (Germany indicated in its written assessment that "None of the *Länder* has reported that insufficient resources were allocated for the investigation and prosecution of foreign corruption cases."). In its responses to the Phase 3 questionnaires, Germany reiterated that there is no problem of resources. This was unanimously confirmed by panellists met on-site. The German authorities also specify that insofar as major proceedings require the capacity of a given corruption/economic crime unit to be expanded, staffing adjustments are made swiftly. Bavarian prosecutors even emphasised that any legitimate request from a corruption unit is complied with immediately, as was recently demonstrated in the resource-intensive case against Siemens In this instance, all public prosecution offices designate contact partners for external enquiries concerning corruption, e.g. from the police or other agencies. Capacity to adapt to the specific needs of a particular case was also underlined by representatives from the police met during the on-site visit. As an example, 30 additional officers from other police offices joined the police team at the time of the investigation in the above mentioned case in Bavaria. The specialisation in economic crime of a growing number of officers was also emphasised.

(iv) Principles of investigation

119. There are no special statutory provisions in Germany relating to investigation proceedings for bribery. In the case of natural persons, the principle of mandatory prosecution applies in cases of suspicion of commission of bribery-related crimes, as in the case of suspicion of other crimes. This means that the office of the public prosecutor is obliged to examine any suspicious facts indicating a potential criminal offence and, if applicable, initiate an investigation in order to decide whether public charges are to be filed.[111] This remains unchanged since Phase 2.

120. In contrast, the principle of discretionary prosecution applies to legal persons (see also the discussion under section 2 on the responsibility of legal persons). This derives from the administrative law basis for the liability of legal persons, which generally provides for prosecutorial discretion. A decision of a prosecutor not to prosecute the legal person is not appealable. Despite the absence of express reference to

111. Subsection 160(1) CCP.

that effect in the law, practitioners and academics[112] met in Phase 2 unanimously stated that the criminal nature of the proceedings in respect of legal persons allows for the full use of investigative powers in Germany, including coercive measures. They also stated that the same powers would be available if an investigation were directed exclusively at the legal person. The German authorities explained that such powers are available due to the principle that administrative fines for legal persons under the OWiG are an "incidental consequence" of a criminal offence committed by the natural person.

(v) Cooperation

121. According to law enforcement representatives met during the on-site visit, pre-investigations can be initiated by the police but as suspicions materialise, the prosecuting authorities must be informed and take the lead. Cooperation among prosecutors and the police was described as very close, with the prosecutors providing the legal framework and relying on police "manpower". According to law enforcement authorities, the same data bases are used by the police, the prosecutors and the Financial Intelligence Unit (FIU) at the land and federal level. According to panellists, cooperation among *Länder*, notably to determine who should be taking the lead on a specific case, is working very well in practice.

(vi) Availability of data

122. In Phase 2, the Working Group recommended (recommendation 6) that Germany compile at the federal level information on investigations of the foreign bribery offence for both natural and legal persons, as well as on sanctions of the foreign bribery offence for both natural and legal persons, for future assessment. This recommendation was considered to have been implemented at the time of the written follow up to the Phase 2 evaluation. However, Germany's responses to the Phase 3 questionnaires illustrate the continuing limited availability of data (which, as Germany emphasises, is not specific to foreign bribery cases). While Germany provided information on the number of on-going investigations for natural persons, such figures were only available as of 2009 with respect to legal persons. Moreover, for both natural and legal persons, "no statistically comparable information" could be provided on the number of investigations commenced each year. There was also no information available on the number of on-going criminal proceedings nor was there "substantial information" available concerning either additional administrative or civil proceedings. Similarly, in its responses to the Phase 3 questionnaires, Germany indicated that no information was available on the number of prosecutions against legal persons that have been dropped or terminated without sanctions. Germany also indicated that no substantial information could be provided on the number of persons that may have been convicted as a result of a discontinued investigation. The Working Group is concerned that this lack of data may hamper the effective monitoring of the implementation of the Convention by Germany.

Commentary

The lead examiners welcome the growing specialisation and coordination of the prosecuting and police offices that was reported by practitioners during the on-site visit. They commend Germany for the adaptability and cooperation of its law enforcement resources, which appear to be available in a particularly swift manner in order to meet unexpected needs linked to a given enquiry, as was recently demonstrated in a particularly prominent case. Coordination seems also to be an asset. However, they recommend that Germany further ensure that judges and prosecutors in those Länder with less experience in foreign bribery cases are offered specific training with regard to the technicalities linked to the complexity of the foreign bribery offence in Germany for both natural and legal persons.

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112 See notably Martin Böse « *Corporate Criminal liability in Germany* », German National Reports to the 18th International Congress of Comparative Law. Washington 2010.

With regard to the availability of data, as already indicated above with regard to legal persons, the examiners encourage Germany to strengthen its efforts to compile at the federal level for future assessment information on investigations of the foreign bribery offence for both natural and legal persons, and sanctions of the foreign bribery offence for both natural and legal persons in order to allow Germany to effectively undertake to periodically review its laws implementing the Convention and its approach to enforcement, as recommended under Recommendation V in the 2009 Recommendation.

(b) Investigation tools and challenges in the investigation of foreign bribery

(i) Interception of telecommunications in the event of criminal corruption offences

123. The Law on the Revision of Telecommunications Monitoring and other Covert Investigation Measures and implementing Directive 2006/24/EC[113] of 21 December 2007[114], which entered into force on January 2008, allows the interception of the telecommunications of suspects in case of criminal offences listed in section 100a (2) CC, including particularly severe cases of taking and giving bribes in commercial practice (sections 299 and 300 CC, second sentence) as well as taking and giving bribes (sections 332 and 334 CC). The German authorities explain that accordingly, it is now possible to intercept telecommunications wherever offences entail the bribery of foreign public officials in international business transactions.

(ii) General provision regarding witnesses for the prosecution

124. On 1 September 2009, the "general provision regarding witnesses for the prosecution" entered into force (section 46b CC). This provision is intended to offer an incentive to offenders who are willing to cooperate with the prosecution in establishing the facts of a matter and in preventing further criminal offences by allowing for the range of punishment in terms of the law to be modified (section 49 (1) CC on the mitigation of sentence). Section 46b CC even offers the option of refraining from imposing a punishment in certain circumstances. However, the German authorities point to the explicit duty of the courts to allow mitigation of a sentence only in particular regard to the gravity of the offence and the degree of guilt of the offender (section 46b (2) No 2 CC). They also underline that although such a decision may be proposed by the prosecuting authorities, the final decision rests with the Court. Criminal bribery offences will be eligible for such treatment without exception (since because bribery is punishable by a statutory minimum term of imprisonment of one or three months), pursuant to sections 334 and 335 CC in conjunction with article 2 section 1 of the *IntBestG*.

125. The German authorities believe that this provision gives investigating authorities a transparent and predictable tool for establishing the facts of severe economic crimes, where prosecution often faces isolated and opaque organisational structures. Moreover, the German authorities are of the view that this new provision will have deterrent effects, since potential offenders will fear that they will be revealed by those having secret knowledge of their crimes. Because of the short time that has lapsed since this provision was introduced into law in September 2009 prosecutors met on-site were not in a position to assess the impact of this new tool. The Working Group believes that the implementation of this new provision should be followed up as practice develops with a view to ensuring that it follows the principles of predictability, transparency and accountability.

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113 *Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmassnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG*.

114 Federal Law Gazette (Bundesgesetzblatt, BGBl.) I p. 3196.

(iii) Other tools used in recent cases by the prosecuting authorities.

126. According to prosecutors and representatives from the police met in Munich during the visit, undercover investigations can be used in prominent cases. They indicated that in the Siemens case, undercover agents were used in the course of the investigation. They also underlined that without the development of particularly efficient and adapted information technology tools, such as research software, it would not have been possible to search through the enormous number of emails involved in the investigation of this case.

127. The cooperation of the companies prosecuted for foreign bribery was also cited as an essential tool for prosecuting authorities. In the Siemens case, the external law firm hired by the company to carry out the internal enquiry was instrumental to the success of the investigations both in Germany and in the United States. The size of the investigative team (400 persons) appointed by the company for the purpose of this internal enquiry was unprecedented and, as such, was largely reported in the press. According to the prosecutors met on-site, the information was passed on by the company through a legal counsel who was appointed as Siemens permanent contact point. In parallel, an amnesty program, limited in time, had been launched by the company relating to possible violations of anti-corruption company rules in order to expedite the independent investigation. Under the amnesty, the company guaranteed that it would not make claims for damages or unilaterally terminate employee relationships. However, the company reserved the right to impose lesser disciplinary measures. The program allowed for a large number of people to come forward with information that proved extremely useful for the investigation.

Commentary

The examiners welcome the development and use of new investigation tools and commend Germany for the new steps taken in this domain. They also welcome the introduction of new general provision regarding witnesses for the prosecution (section 46b CC) and recommend that its use be followed up as case law develops.

(c) Marked trend of prosecuting foreign bribery with alternative offences

128. A prominent feature of Germany's enforcement of the Convention is the prevailing trend to prosecute and sanction foreign bribery acts by applying commercial bribery offences (section 299 CC) or breach of trust (section 266 CC) rather than the offence of bribing a foreign public official (section 334 CC). Prosecutors and judges met on-site explained that this is due to the complexity of the inquiries and the difficulties of gathering information and evidence, which often require international cooperation. They further explained that the necessity to achieve a quick solution for both economic reasons and human rights reasons often leads to the use of charges that require a lower level of evidence. Prosecutors also emphasized that, even in cases where the prosecution brings a case to court on the basis of a foreign bribery offence, the court "very often" decides to charge the offender for another offence for the sake of rapidity and efficiency. The impact of charging for these alternative offences on the implementation of the Convention and effectiveness of the German system in this regard is discussed in detail above in section 1 and, with regard to the level of sanctions, in section 3 of this report.

(d) Prosecutorial discretion, public interest and reasons for termination of investigations and declination of prosecution

(i) A horizontal and a vertical issue identified in former evaluation

129. In Germany, the principle of mandatory prosecution prevails (*Legalitätsprinzip*). However, under the Code of Criminal Procedure, certain circumstances allow for dispensing with prosecutions at the discretion of the public prosecution office and the courts (*Opportunitätsvorschriften)*, as provided for by

sections 153a and 153c CCP. These exceptions may apply to all misdemeanours (including foreign bribery, commercial bribery and breach of trust). In Phase 2, the Working Group recommended that Germany: "As concerns the prosecution of natural persons, […] consider issuing guidelines which could help provide a uniform application of sections 153a and 153c CCP, as well as a uniform exercise of discretion between domestic and foreign bribery cases" (recommendation 8, see Annex 1).

130. Germany had not issued any guidelines for the uniform application of sections 153a and 153c CCP on dismissal of charges but the Working Group recognised that "*Germany had considered this issue, as requested*".[115] However, the Working Group still indicated that it believed that *"guidelines can help provide that prosecutorial discretion is applied impartially*".[116] The German authorities confirmed in Phase 3 that no support manuals or directives exist. In these circumstances and considering that prosecutorial discretion has been identified as a horizontal issue by the Working Group, the examiners sought clarification as to the scope and implementation of sections 153a and 153c CCP and possible other procedures available to terminate a case.

(ii). Grounds for dispensing with prosecution under section 153c(3) CCP and the notion of "predominant public interests"

131. Subsection 153c(3) CCP[117] provides grounds for dispensing with prosecution where the offence was committed "within (the territorial scope of this statute), but through an act committed outside (of Germany), […] if the conduct of proceedings would pose a risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution". The application of subsection 153c(3) CCP was identified as an issue in the Phase 1. However, the German authorities stated in Phase 2 that this subsection is not relevant to bribery offences, as it normally applies to offences relating to national security, defence, etc. and that, in cases of corruption, it can usually be assumed that there is a public interest in a criminal prosecution. This appears to be confirmed in practice as the German authorities state in their Phase 3 replies that "as far as (they) are aware, there is no instance in which prosecution of an offence of bribery in international business transactions was withdrawn in accordance with section 153c(3) CCP". A similar statement was made by the prosecutors met during the on-site visit.

132. The examiners questioned whether the notion of "predominant public interest" could include the considerations of national economic interest, contrary to Article 5 of the Convention. The Government authorities replied that Article 5 of the Convention is directly applicable under German law. They referred to Article 25 of the Basic Law for the Federal Republic of Germany, which provides that "the general rules of international law shall be an integral part of federal law" and that "they shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." However "the general rules of international law", pursuant to public international law, cover those customary laws in principle binding upon all States.[118] In contrast, the Convention provides "special rules" (which are only binding on the countries that adhered to it). These are rather covered under Article 59 of the Basic Law which deals with treaties that relate to subjects of federal legislation and are <u>not</u> directly applicable under German Law.

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115 This is the only time that a recommendation received this type of assessment from the WGB instead of the usual "implemented satisfactorily", "partially implemented" or "not implemented".

116 See Phase 2 Written Follow-up Report - Summary and Conclusions by the Working Group – para. 7.

117. Current subsection 153c(3) is referred to in the Phase 1 review (prior to an amendment to the statute) as subsection 153c(2).

118 The notion is generally recognised as arising from Article 38 of the Statute of the International Court of Justice which sets out that one source of the law the Court needs to have regard to when deciding disputes is the "general principles of law recognised by civilised nations".

However, the German authorities pointed to a decision of the Federal Constitutional Court[119] where the Court ruled that a provision of an international treaty is recognised as part of federal law once the treaty is ratified. This decision alleviates Working Group concerns to an extent but the Group also notes that the decision specifically addressed an issue that was relevant to basic rights. Germany contends that the standards laid down in this ruling apply to all international treaties that have been ratified by the German Parliament and, therefore, they also apply to the Anti-Bribery Convention. Whether an obligation in the economic sphere would give rise to a similar decision should be followed up.

133. While the Working Group is reassured to see that subsection 153c(3) CCP has not been applied so far to cases of foreign bribery, the interpretation of what may constitute a "predominant public interest" remains a concern and Germany is encouraged to clarify the scope of subsection 153c(3) CCP to ensure either that it does not apply to foreign bribery or that it could not include factors contrary to Article 5 of the Convention such as the national economic interest. (The issue of Article 5 is also discussed above under section 2 about the prosecutorial discretion for legal persons.)

(iii) Grounds for dispensing with prosecution under section 153a CCP and notion of "public interest"

134. Pursuant to section 153a CCP, the offender may be provisionally exempted from prosecution where the "public interest" no longer requires the prosecution of the case. The offender, who must consent to the procedure, becomes subject to certain obligations *e.g.* compensating for the damage, paying a certain amount of money to the Treasury ("informal fine") or to a charitable organisation etc. Germany underlines that these obligations are tantamount to sanctions.

135. The lead examiners paid special attention to the conditions under which section 153a CCP can be applied, due to its frequent use in the settlement of cases in Germany since Phase 2. According to data provided by the German authorities, it emerges that between 2006 and 2010, it was used in 35 cases out of 69, *i.e.* in over 50% of cases. While such settlements are theoretically only available where the "public interest" no longer requires the prosecution of the case, this high proportion illustrates that the notion of "public interest" in prosecution can be mitigated by a number of factors in particular as it applies to foreign bribery. The statement made by the German authorities in Phase 2 that, in cases of corruption, it can usually be assumed that there is a public interest in a criminal prosecution, has therefore to be nuanced (also see discussion above under section 2).

136. In Phase 2, prosecutors indicated that the public interest could be mitigated in cases that are not particularly serious but are difficult or complex, necessitating excessive lengthy proceedings. The degree of the offender's guilt is another relevant factor in this regard. Concerning the seriousness of the case, contradictory information was received by the evaluation team. The German replies indicated that section 153a CCP would more typically apply to property and assets offences while some prosecutors indicated during the on-site that it could apply to corruption but only for minor cases. These indications do not seem to reflect the extent to which this type of settlement has been used in Germany in cases of foreign bribery (as the above figures demonstrate) nor the size of these cases (*e.g.* a case involving the payment to public officials of a Middle Eastern country of bribes totalling EUR 750 000 in return for ordering a money testing machine,[120] a case involving the payment of bribes amounting to approximately EUR 2.3 million to public officials of an Eastern European country and members of their families for a project of equipping a clinic)[121]. This procedure also applied to over 20 individuals involved in the Siemens case although

119 Federal Constitutional Court, Second Senate, 14 October 2010, 2 BvR 1481/04.

120 See 2005-2006 Annual report, Hamburg (d); 2007-2008 Annual report, Hamburg (c).

121 See 2009 Annual report, Baden-Württemberg (g) ; 2008 Annual report, Baden-Württemberg (i) ; 2007-2008 Annual report, Baden-Württemberg (j).

prosecutors explained during the on-site visit that, in this case, this procedure was applied because these individuals had no criminal record and their level of guilt was very low. According to the German authorities and prosecutors met on-site, section 153a CCP does not apply to legal persons.

(iv) Other procedures available to terminate a case

Penal orders (section 407 CCP)

137. Prosecutors can also use their discretion to decide to settle a case through a "penal order" *(Strafbefehl)*. According to Germany, there are no general criteria for exercising this discretion. This procedure, designed to dispose of criminal cases by consent, may be applied to misdemeanours (*e.g.* foreign bribery except "especially serious" cases (felonies), commercial bribery and breach of trust). The defendant's prior consent is not required (although the choice of this procedure can be appealed) but negotiations with the defence can occur in the context of preparing the order. Courts have the authority to reject a penal order.

Negotiated sentencing agreements (section 257c CCP)

138. During the on-site visit, the evaluation team discovered through the discussions with prosecutors and judges that a new procedure was recently introduced into the CCP (new section 257c), which provides that a negotiated sentencing agreement between the court and the defendant can be achieved either in advance of a contested trial or even when the trial has progressed to some extent with a view to finding an amicable settlement finally ordered by the court. The terms of the bargaining agreement may also be reviewed by the court. Germany underlines that generally, the defendant must admit the crime. Civil society representatives also brought the attention of the examiners to this new procedure and indicated that they are monitoring it with great concern. Judges and prosecutors met on-site had varying opinions about the usefulness and effectiveness of this procedure. A lack of practice and experience with the implementation of this new procedure does not allow the Working Group to comment on this new type of arrangement at this stage but its implementations should be followed up as case law develops with a view to ensuring that it follows the principles of predictability, transparency and accountability and in particular that the grounds for mitigating a sentence under this new provision of section 257 CCP are publicly available as for other types of agreements.

Commentary:

The examiners recognise the value and flexibility provided by the use of alternatives to prosecution that have enabled Germany to sanction a number of individuals in foreign bribery cases.

The examiners noted some lack of consistency of the information and explanations provided as to the scope, purpose and criteria for applying section 153a CCP. They believe that the extent to which these settlements have been used since Phase 2 should benefit from enhanced scrutiny by the German authorities, notably in the context of the periodic review that Member countries should undertake of their "approach to enforcement in order to effectively combat international bribery of foreign public officials." (Recommendation V of the 2009 Recommendation).

In addition, in view of the lack of clarity of the criteria for the implementation of section 153a CCP, the lead examiners urge Germany to issue guidelines to prosecutors which could help provide a uniform application of section 153a CCP (as was notably recommended by the Working Group under its Phase 2 recommendation 8).

With regard to subsection 153c(3) which provides grounds for dispensing with prosecution, the examiners note that, according to the German authorities it should not apply and has not been applied

to date for allegations of foreign bribery. However, the examiners encourage Germany to clarify that "predominant public interest" does not include factors contrary to Article 5 of the Convention such as the national economic interest.

The examiners also recommend that the possibility (i) to negotiate the terms of a "penal order" with the prosecutors (section 407 CCP) or (ii) to enter into negotiated sentencing agreements with the courts (section 257c CCP) be followed up by the Working Group as case law develops with a view to ensure that it follows the principles of predictability, transparency and accountability.

(e) Parallel investigations or proceedings in other jurisdictions

139. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution. The Working Group identified as a horizontal issue the practical challenge met by some Parties where the circumstances surrounding the offence are the subject of an ongoing investigation in another country, or have been investigated and concluded in another country. In their responses to the Phase 3 questionnaires, the German authorities did not comment on whether this may be a challenge in Germany. The success and coordination of the prosecution and sanction of the most prominent case to date in Germany demonstrated an excellent level of coordination between Germany and the other countries involved. The coordination with one of these countries went as far as announcing simultaneously the sentences and levels of sanctions achieved by the respective authorities of both countries.

Commentary:

The examiners commend Germany for the recent achievements in terms of cooperation with other jurisdictions in cases of parallel investigations and proceedings in the context of a prominent foreign bribery case involving the large German conglomerate Siemens.

(f) Statute of limitations

140. The issue of the adequacy of statutes of limitations for the offence of foreign bribery (Convention, Article 6) has been identified as a horizontal issue for implementation in States Parties to the Convention. In the Phase 2 evaluation of Germany, this issue was listed as an issue for follow-up (recommendation 6 e)). In their replies to the Phase 3 questionnaires the German authorities indicated that no legislative change was deemed necessary and that no change has therefore been made in this domain since Phase 2.

(i) Normal term, suspension, interruption and absolute lapse

141. The statute of limitations for the foreign bribery offences, as well as for the domestic bribery offences, is five years (section 78(3)4 CC). Since section 334 CC provides for punishment by a prison sentence of up to five years, where the basic facts of a case indicate that a public official has been bribed, the limitation period amounts to five years as well. The limitation period begins with the completion of the offence. The period of limitation regarding advantages that are granted in parts or in instalments based on one and the same unlawful contract will commence only upon acceptance of the last part or instalment. The limitation period will be suspended whenever, and prior to its expiry, a ruling has been handed down by a court of first instance (section 78b (3) CC). In these cases, the limitation period will not continue before the proceedings have been concluded finally and conclusively.

142. In contrast to suspensions, interruption of the statute of limitation will cause that part of a limitation period that has already lapsed to be cancelled by certain procedural actions. In these cases, the limitation period will commence anew and in full. The statute of limitations shall be interrupted by facts

enumerated in subsection 78c(1) CC.[122] The limitations period is renewed after each interruption. However, the prosecution is barred by the absolute lapse of ten years for the domestic and foreign bribery offences.

(ii) Legal persons

143. In accordance with a *decision of the Federal Court of Justice*[123], the same limitations period applies to legal persons (instead of the three-year limitations period for administrative offences under the OWiG) where the related natural person committed a criminal offence, including bribery. This means that an interruption of the limitation period against a natural person will be effective also against a legal person if no separate proceedings are being pursued against that person. Where separate proceedings are concerned regarding the assessment of a fine against a legal person, the limitation period is interrupted by actions that correspond to those actions serving to interrupt the limitation period for natural persons (section 31(1) OWiG second sentence). In the field of bribery offences, search warrants issued by prosecutors/and/or judges or an order to examine the accused party are the most frequent procedural actions that interrupt the limitation period.

(iii) Adequacy of the Statute of limitations

144. The Working Group notes that, as in Phase 2, no statistical information has been made available about the cases of domestic bribery or other comparable economic crimes where a natural and/or legal person could not be prosecuted due to the expiration of the limitations period. However, the German authorities and the prosecutors met on-site were not aware of a case of foreign bribery that was barred on account of the expiration of the limitations period with respect to economic crimes. They indicated that, in their view, the German statute of limitations is adequate for the needs of an investigation in a foreign bribery case, especially given the possibilities for suspension and interruptions, which can extend the limitation period to 10 years. They even underlined that long periods of limitations may also have an adverse effect as gathering evidences in complex cases may require to act within a de facto limited timeframe.

Commentary:

As noted in Phase 2, due to the absence of information for the foreign bribery offence, the lead examiners are unable to comment on the adequacy of the statute of limitations in practice. However, they note that the German law provides for possibilities to extend the statute of limitation up to ten years which was deemed adequate by all prosecutors met during the on-site visit. The examiners believe that given the importance of this horizontal issue for the Working Group, it should however be revisited as case law develops.

6. Money laundering

(a) Changes in the offence and/or AML mechanisms and implementation of AML legislation

145. The legal basis for prosecuting money laundering in Germany is the Act on the Detection of Proceeds from Serious Crimes (Money Laundering Act of 15 August 2002, hereinafter "GwG"). The Act

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122 Subsection 78c(1)CC includes: the first interrogation of the accused, the notice of the initiation of investigation against him/her or an order of such an interrogation or notice, a judicial interrogation of the accused or an order thereof, a commissioning of an expert after the first interrogation of the accused/notice of the initiation of proceedings, a judicial order of search and seizure, an arrest warrant, a public indictment, the institution of trial proceedings, and a judicial request of an investigative act abroad

123 See BGHSt 46, p. 207 and p. 208.

was amended in August 2008, primarily to implement the provisions of the 2005 Third EU Money Laundering Directive.

146. In February 2010, the Financial Action Task Force (FATF) adopted its Mutual Evaluation Report on Anti-Money Laundering and the Financing of Terrorism in Germany.[124] According to the Report, Germany has made a clear commitment to further strengthen the national system for the prevention, detection and suppression of money laundering and terrorist financing. It has generated a relatively large number of prosecutions for money laundering and of orders to confiscate assets. On the other hand, the Report mentions weaknesses in the legal framework and in sanctioning for non-compliance with anti-money laundering and counter-terrorist financing requirements. One of these weaknesses is the impossibility to sanction a person for both the commission of the predicate offence and for money laundering (see discussion below).

(b) Application of AML legislation to the predicate offence of foreign bribery

147. In Phase 2, the Working Group agreed to follow up on three issues relating to anti-money laundering legislation in Germany. One of them was "the application of sanctions under the legislation implementing the Convention (*i.e.* the foreign bribery, money laundering and accounting offences)". The German authorities have confirmed that the offence of bribing foreign public officials is classified as a predicate offence to money laundering in accordance with section 261(1) CC and section 4 *IntBestG*. However, one issue of concern, noted in the FATF report, is that, pursuant to paragraph 9 of section 261(1) CC a person who has been punished for the commission of the predicate offence may not be punished for money laundering as well.

148. According to the FATF report the German authorities confirmed that there can be no conviction for money laundering if the alleged offender is criminally convicted as a perpetrator of, or aider to, the predicate offense, and that this derives from fundamental principles of German domestic law.[125] This did not convince the FATF assessors, who expressed concern regarding the autonomy of the money laundering offense under German law. They also considered it was not sufficiently established that the impossibility to apply the money laundering offense to persons who commit and are convicted of the predicate offense is supported by principles that amount to fundamental principles under the FATF's standards. A decision by the Federal Court of Justice of 2008 confirms that section 261(9) CC excludes the possibility to hold a person simultaneously liable for money laundering and foreign bribery. However, it also states that, if the person is convicted of bribery in another State, there is no legal obstacle for convicting that person of money laundering in Germany.[126] *A contrario*, it is likely that, had both offences taken place in Germany, the conviction would have been for only one of the offences.[127] The Working Group shares the concerns of

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124 FATF/OECD and IMF (2010), "Anti-Money Laundering and Combating the Financing of Terrorism, Germany" www.fatf-gafi.org.

125 According to the FATF report, this includes the general principle of express immunity from criminal proceedings for instances in which perpetrators assist themselves after the fact *(Selbstbegünstigungsprinzip)*), which is granted by section 257 and 258 of the CC. According to this principle, an offender (*i.e.* the one having committed the predicate offense) cannot be additionally and separately punished for a ―post-offense behaviour that relates to the proceeds of his or her own crime. This implies that one punishable act (the predicate offense) includes another concurring act (the concealing or disguising of property items that derive from the predicate offense's perpetrator) and that the penalty set forth for the punishable act is deemed to cover the entire unlawfulness of the offenders' act.

126 Ruling of 18 February 2009 by the Federal Court of Justice (BGH), [1StR 4/09].

127 The managers of the German company involved in this bribery case were prosecuted in Germany for foreign bribery under paragraphs 30 OWiG, 334 StGB and 2.1.2 *IntBestG* and the company was fined EUR 8.5 million (confiscation of profits). Decision by Landgericht Stuttgart of 17 March 2008. As mentioned in the Ruling by the Federal Court of Justice of 18 February 2009, the Georgian official was prosecuted in Georgia for accepting bribes, while his sister was held liable for complicity in Georgia, and prosecuted for money laundering in Germany, where she resided and made her bank account available to "launder" the bribes.

the FATF assessors and considers that the impossibility to convict a person both for bribery and money laundering can seriously weaken the effective punishment of the foreign bribery offence. It also notes the recommendation by the FATF assessors that Germany "should allow for the concurrent prosecution of and sanctioning for self laundering and for the commission of the predicate offence."

149. Another issue for follow-up related to "the effectiveness of the operation of the new financial intelligence unit within the BKA under the new Money Laundering Act in practice".[128] The Money Laundering Act imposes customer due diligence (CDD) obligations on a wide range of financial institutions, and requires them to submit suspicious transaction reports to the competent authorities. In its responses to the Phase 3 questionnaires, Germany indicated that according to the FATF Report, the German FIU is "largely compliant with the FATF's recommendations".

150. A further follow-up issue was "the impact of the exception of the money laundering offence where the predicate offence is bribery of a foreign MP". According to the Phase 2 follow-up report, Germany did not consider that this had any negative consequences for the effective uncovering of cases of foreign bribery. Nevertheless it was to modify this situation by including bribery of national, foreign and international members of parliament in the catalogue of the predicate offences of money laundering. This modification has not yet been made.

Commentary:

The lead examiners note that no cases of foreign bribery have been detected through investigations into money laundering. They also note that section 261(9) of the Criminal Code precludes the simultaneous conviction of a person for money laundering and foreign bribery. This limitation, which risks weakening the effective application of foreign bribery legislation, does not seem justified by fundamental principles of law. The lead examiners therefore urge Germany to amend this provision.

The lead examiners note that Germany has not amended its money laundering legislation to include the bribery of foreign and international MPs in the list of predicate offences to money laundering and recommend that Germany report back to the Working Group of progress on this matter within one year.

7. Accounting requirements, external audit, and company compliance and ethics programmes

(a) Accounting and auditing requirements

(i) Key accounting and auditing standards[129]

151. The German Generally Accepted Accounting Principles (GAAP) are set out in the Commercial Code (ComC) and comply with the European Accounting Directives 78/660/EEC and 83/349/EEC.[130] According to European Regulation (EC) No. 1606/2002, listed companies are required to use International Financial Reporting Standards (IFRS) in their consolidated accounts. Germany permits the application of IFRS in the annual and consolidated accounts of all types of companies; however, application of IFRS in annual accounts is for information purposes only. Therefore, companies are required to prepare annual financial statements in accordance with national accounting law for purposes of profit distribution, taxation, and financial services supervision. Statutory audits are also regulated in the ComC and additional German

128 The BKA is the Federal Office of Criminal Investigation (Bundeskriminalamt).

129 Unless otherwise provided, this section draws on the written responses provided by representatives of the German accounting and auditing profession to a list of issues submitted by the Secretariat in preparation of the on-site visit.

130 Hartmann and Lappe (2009): "*New Accounting Legislation in Germany*", www.klgates.com/newstand

auditing standards are issued by the Institute of Public Auditors (IDW).[131] Therefore, the requirements for the conduct of audits of financial statements encompass both legal requirements and professional auditing standards which are explained in detail in IDW Auditing Standard 201.[132] They contain Generally Accepted Standards on Auditing, which transpose International Standards on Auditing (ISA).

(ii) Accounting offences

152. The Transparency Directive Implementation Act of 5 January 2007 modified the criminal offence on false accounting, including the falsification of accounting documents.[133] Under the revised offence (section 331 ComC), false statements regarding bookkeeping and accounting are now subject to punishment of up to three years or a monetary fine. A similar fine applies to auditors making false statements or issuing a substantially false auditor's report on the financial statements.

153. A 2005 reform of German auditing standards reinforced the responsibilities of auditors for detecting material misstatements due to fraud and communicating identified fraud or indications of fraud to management and those charged with governance on a timely basis.[134] Auditors must reflect how the supervisory body carries out the monitoring of the management processes for identifying and dealing with risks of fraud and must make inquiries to the supervisory body to determine whether members have knowledge of any actual, suspected or alleged fraud affecting the entity. If the auditor has identified or suspects fraud involving management, she or he must communicate these suspicions to those charged with governance without delay. The same applies if the auditor has identified or suspects fraud involving employees who have significant roles in internal control.[135]

(iii) Key changes in accounting and auditing rules since Phase 2

154. In 2009, Germany adopted the Accounting Law Modernisation Act (BilMoG), which constitutes the most extensive reform of accounting law in the country since the German Accounting Directives Act of 1985.[136] The law was implemented, *inter alia*, to achieve more convergence of German GAAP with IFRS and US GAAP and to implement some outstanding requirements of the European Statutory Audit Directive. According to the German authorities, German accounting law is fully in line with European Accounting and Auditing Directives and the European IAS Regulation. [137]

155. Under the BilMoG, publicly traded companies must include in their management reports the main features of the internal control and risks management system that are of relevance for the accounting process. However, the Law does not include any detailed provision requiring the development of internal

131 Institute of Public Auditors in Germany (*Institut der Wirtschaftsprüfer in Deutschland* e.V. IDW, www.idw.de.

132 See IDW Auditing Standard 201, para 24 et seq.

133 Accounting offences (criminal or administrative) are covered under the Criminal Code (section 283b), the Commercial Code (sections 331, 332 and 334), the Stock Corporation Act (sections 400 and 403), the Act on GmbHs (section 82), the Act on Co-operatives (sections 147 and 150) and the Disclosure Act (sections 17 and 18). For more detail, see Paragraph 89 of the Phase 2 report.

134 See German Auditing Standard IDW 210 "Detecting Irregularities in an Audit of Financial Statements".

135 ISA 240 and the corresponding German Auditing Standard (PS 210.64) specifies that all incidences of fraud or evidence of a possible instance of fraud discovered by the auditor have to be communicated to the responsible level of management and, if necessary, the supervisory board – even when the potential effect on the financial statements and management report is not material.

136 BDI, Ernst & Young (2009) "*German Accounting Law Modernization Act (BilMog), Overview of the main changes*". www.ey.com.

137 Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council

controls and risk management systems[138], nor does it prescribe their content. Likewise, auditors are not required to audit internal control systems, but they must intervene if a description of the internal control and risk management system in the management report is wrong or misleading and, where such system is absent, this must be mentioned in the management report.[139]

156. Publicly listed corporations must issue a declaration on corporate governance in the management report or on their website. The report must include three components: a declaration of compliance with the recommendations of the German Corporate Governance Code and explanations of any deviations from it, relevant disclosures on corporate governance practice that go beyond legal requirements; and a description of the management and supervisory boards' rules of procedure.[140]Another important clarification under the BilMoG is the possibility to establish audit committees in all listed entities. Listed companies who have no supervisory body, are required to establish an audit committee. At least one member of the audit committee or the supervisory body has to be an independent financial expert. One of the legal duties of audit committees is the supervision of the company's internal control and internal risk management systems and compliance programmes. In practice, the appointment of an audit committee has become the norm in large publicly traded German companies, in line with the recommendations of the German Corporate Governance Code.

157. Corporations are classified as small, medium-sized or large, based on three criteria that measure the corporation's assets, turnover and average number of employees. Depending on the size of the company, the ComC provides for different requirements with regards to the preparation, the audit and the disclosure of the annual financial statements and the management report. Small companies are subject to simplified accounting requirements and are exempted from external audit requirements to minimise the burden on their more limited resources. The BilMoG raised the thresholds that classify companies as small- and medium-sized companies. As a result, a larger number of enterprises (about 20%) than before will be able to enjoy the relief already afforded to small companies and will have fewer reporting obligations under German accounting law.[141] According to the German authorities, these "simplified" requirements do only refer to the subject of the audit as the companies in question are not required to submit a report on their economic position and are subject to certain exemptions regarding the rendering of their accounts. However, they consider that this does not affect the audits' basic approach which is as serious as with large stock corporations. During the on-site visit, neither the governments nor representatives from the accounting and auditing profession expressed concern that the extension of simplified accounting and auditing requirements to a larger number of companies could entail any negative consequences for the detection of bribery-related payments.

158. According to the accounting and auditing professionals met during the on-site visit, the changes to accounting and auditing requirements made through the BilMoG will be helpful in the fight against corruption. They considered that there has been a very important change in mindset among companies regarding bribery, triggered mainly by highly publicised corruption cases, and that the changes in accounting and auditing rules under the new law would help auditors "push the message further" on the importance of developing and implementing strong internal financial controls.

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138 In case of publicly listed companies the board of directors is obliged to abide by special due diligence requirements (sec. 93 (1) AktG) which, in general, is seen as an obligation to put in place internal control and risks management systems.

139 See also text on a draft auditing standard on Compliance Management systems in chapter 10.

140 The German Corporate Governance Code is described in Chapter 10.

141 *Federal Ministry of Justice, 2009, "*New accounting law: billion scale financial relief for small and medium-sized enterprises in Germany" *www.bmj.bund.de.*

(b) External audit requirements

(i) Key features of external audits

159. One key feature of Germany's corporate governance is its two-tier system, with an executive board responsible for the company's day-to-day management, and a supervisory board with an oversight function. This function includes the examination and approval of financial statements. The Commercial Code requires companies to produce an auditor's report on the financial statements, which is filed with the commercial register and is publicly available. In addition, the Commercial Code requires the auditor to submit to the supervisory board, when that board engaged the auditor, or, when this is not the case, to the entity's officers, an additional, so-called "long-form audit report", detailing certain information relating to the audit. This long-form report summarises, in greater detail than the auditor's report, the subject, nature and scope of the findings and results of the audit, and serves to provide confidential information to the supervisory board.[142]

160. For all companies that are obliged to conduct an audit, the auditor must report to the executive board any misstatements or violations of legal requirements that are identified in the process of conducting the audit. The auditor is also obliged to report when she or he ascertains facts that indicate serious violations of the law by the legal representative or employees of the company, for example, in the payment or receipt of bribes.

161. Auditors must also include in the audit of the financial statements the audit of the accounting books and records, covering the accuracy of entries, timeliness, and the transparency of entries. In line with the Commercial Code, the audit has to be planned and performed such that misstatements due to fraud or error that materially affect the true and fair view of the financial statements will be detected. This means that the audit is not directed at detecting all non-material misstatements or non-compliance with laws and regulations that do not have any effect on the financial statements. The audit opinion does not include information about potential bribery issues if the figures in the financial statements are properly reported. During the on-site visit auditors commented that it is not their duty to detect and report cases of bribery.

162. The auditor presents the long-form audit report to the legal representative of the company, who must present it to the supervisory board. In addition the auditor must report orally to the supervisory board or the audit committee on the main results of the audit, especially on significant weaknesses in the internal control and the risk management systems with regard to the financial reporting process. The supervisory board also has to arrange for the auditor to report without delay on all facts and events of importance for the tasks of the supervisory board that arose during the performance of the audit (German Corporate Governance Code, Number 7.2.3). The executive and supervisory boards are required by law and by the rules of proper corporate management to undertake, within the limits of their power, the measures required to stop any violations of the law and to investigate any suspicions of breaches. However, they are not under a legal obligation to report violations to the authorities.

(ii) Auditor's obligation to report and duty of confidentiality

163. A key issue in Phase 2 was the confidentiality obligation of auditors. Auditors must notify the legal representative of the company and the supervisory board of any irregularities that constitute serious violations of the law (section 321 ComC). However, they are bound, by Law, by a duty of confidentiality that prevents them from disclosing information about fraud or significant violations of law to third parties,

[142] IDW Auditing Standard Generally Accepted Standards for the Issuance of Long-form Audit Reports for the Audits of Financial Statements (IDW AuS 450).

including shareholders, creditors or the prosecution authorities (section 333 ComC and section 43, para. 1 p. 1 of the Law Regulating the Profession of Auditors). In its response to the Phase 3 questionnaires, Germany reiterated that no changes to auditor confidentiality requirements are planned.

164. There are some legal exceptions to the confidentiality requirement. For example, in audits of financial institutions, such as banks or insurance companies, auditors must alert the Federal Financial Supervisory Authority (BaFin) whenever they become aware of certain facts such as non-adherence to regulatory requirements (section 29 German Banking Act (KWG), section 57 German Insurance Supervision Act (VAG). Another exception is embedded in the Money Laundering Act, which requires auditors to report a suspicious transaction when the facts indicate a money laundering activity or financing for terrorism. Such transactions must be reported to the German Chamber of Public Accountants[143], which must forward these matters to the Federal Office of Criminal Investigation (BKA).

165. In the Phase 2 report, the Working Group recommended that Germany, "consider clarifying the obligation to report suspicious transactions for auditors and tax consultants, for example by issuing guidelines" (Revised Recommendation I). In Germany's written follow-up report, Germany considered that "the auditor's duty to examine and report to the corporate management organs is sufficiently regulated by law and professional codes, and therefore did not "see the need to publish additional guidelines in this field".

166. In its response to the Phase 3 questionnaires, Germany declared that there have been no cases of detecting and prosecuting foreign bribery through the enforcement of books and records requirements, accounting standards, auditing standards, and financial statement disclosure requirements. During the on-site visit, auditors mentioned that it was very difficult for companies to take the step to report bribery detected within their company following an audit. One panellist from the auditing profession said that a way to bring out past cases of bribery and allow companies to "start anew" with a clean slate, especially among SMEs, would be to grant an amnesty for companies that voluntarily disclose having committed bribery and related violations of Germany's accounting law. A similar comment was made by the representative of a company. However, the German authorities said that an amnesty was not an option and would not be accepted by society, especially considering that foreign bribery has been a crime for over 10 years and companies have had enough time to move away from "old habits".

(iii) Training on bribery

167. Auditors reported that the profession's training institute (IDW *Akademie*) provides courses and technical conferences for its members, including courses that cover the detection of fraud-risk factors and potential fraud within a financial statement audit. However, there has been no specific training dedicated specifically to anti-bribery, or to detecting "red flags" for foreign bribery in companies' accounts.

Commentary

The lead examiners consider that the auditing profession in Germany is well aware of the offence of foreign bribery. The recent changes in German accounting and auditing legislation and standards are encouraging. Provisions such as strengthened corporate governance requirements, clarification of supervisory boards' responsibilities, and the possibility of establishing an audit committee are promising mechanisms and are likely to strengthen the role of auditors in detecting potential cases of foreign bribery.

143 German Chamber of Public Accountants (*Wirtschaftsprüferkammer*), www.wpk.de. The Chamber's webpage contains a section on bribery prevention, which includes the German version of Annex II of the 2009 Recommendation.

On the other hand, the lead examiners note that, with the changes of thresholds serving to define SMEs, a larger number of companies will benefit from simplified accounting methods and auditing requirements and may not be subject to the new accounting and auditing reporting requirements. The lead examiners encourage Germany to closely monitor implementation of this measure and ensure that any weaknesses resulting from the new rules in connection with the foreign bribery offence, and in particular, with regards to SMEs, be addressed.

The lead examiners consider that detection and reporting of possible cases of foreign bribery by auditors and accountants could be improved; in particular, given that exceptions to auditors' duty of confidentiality already exist, e.g., in cases of suspected money laundering, Germany should reconsider the benefits of extending such an exception to the detection of suspected acts of bribery.

The lead examiners also suggest that Germany encourage the auditing profession to provide specific bribery-related training to its members, in particular on detecting "red flags" for foreign bribery in companies' accounts.

(c) Internal controls, ethics and compliance programmes

168. There is no specific legal obligation for companies to put in place internal controls, ethics and compliance programmes. The German Corporate Governance Code provides that "the executive board ensures that all provisions of law and the enterprise's internal policies are abided by and works to achieve their compliance by group companies (compliance)", but does not specify further how to put this recommendation into practice.[144] In this regard, a recent decision by the public prosecutors' office of Munich I in a foreign bribery case has made an important step in defining the duties of executive boards in dealing with compliance.[145] According to the prosecutors, "as a member of the executive board the defendant was generally responsible for ensuring that the compliance structure in place prevented violations of the law by employees using means of the corporation to breach third-party legal interests. This is a central task of any corporate management as defined by section 76(1) of the Stock Corporation Act,[146] and includes the creation and maintenance of suitable and effective internal controls within the company to prevent offences to be committed." With regard to compliance officers the Federal Supreme Court in another case explicitly stated that they too have the responsibility to prevent criminal acts being committed from within a company.[147]

169. The decision further analyses the deficiencies of the internal control system of the company in question, which included: lack of clearly assigned responsibilities for compliance issues; lack of resources and trained staff; absence of controls and checks of payments (*e.g.* of commissions); failure to provide clear information to employees of what constituted bribery in commercial practice; absence of compliance training to staff; absence of an appropriate and suitable set of sanctions for violations of rules and laws; and failure to act on reported irregularities. By highlighting these deficiencies, the decision provides guidance on the elements an internal control system and compliance programme could contain.

170. The Phase 2 report of Germany indicated that a large number of companies have developed codes of conduct and, due to developments in capital markets and changes in perceptions of shareholder

144 A description of the German Code of Corporate Governance is provided in section 10.

145 Public Prosecution Office Munich I, Administrative Decision Imposing a Fine, 10 December 2009. The decision imposes a fine of EUR 75.3 million to the company for breach of its supervisory responsibilities pursuant to section 30(4) OWiG.

146 Section 76(1) of the Stock Corporation Act "*The management board shall have direct responsibility for the management of the company."*

147 Federal Supreme Court, Judgment of 17. July 2009, Ref. 5 StR 394/08.

protection, these codes were assuming growing importance. This trend has continued, and, over the last years, the number of cases of bribery involving some of the largest and best well-known companies in Germany has had a significant impact on companies' attitude toward preventing bribery and has shown the importance of putting adequate compliance mechanisms in place. According to the German authorities, many industrial enterprises are now equipped with compliance programmes and high-ranking compliance officers.[148] They also cited various efforts by SMEs to combat bribery of foreign officials. During the on-site visit, panellists mentioned several times the significant efforts and investments made by large German companies to put in place full-fledged compliance mechanisms. This trend is also described in recent literature.[149] On the other hand, the discussions with company representatives during the on-site visit confirmed that implementation of a full-fledged compliance mechanism remains a significant challenge for smaller companies. This was also reiterated by other participants, including representatives from business associations, auditors, lawyers and civil society. Due to the generally limited financial and human resources of SMEs this is a horizontal issue, which does not only affect companies in Germany.

Audit of Compliance Management Systems

171. According to the accounting and auditing profession, ensuring that clients are in compliance with Germany's anti-bribery legislation as such is not within the remit of a financial statement audit. However, representatives from the profession indicated during the on-site visit that their clients are increasingly seeking to establish internal compliance programs due to strengthened liability regimes regarding anti-bribery and other regulatory requirements. They also explained that, in response to this demand, the IDW was preparing an auditing standard on audits of compliance management systems.[150] Such audits are not required by law and are not part of the financial statement audit. The auditors' task is an assessment of the appropriateness and effectiveness of an entity's compliance management system or specific parts of such system. A specific part of the compliance management system could be, among others, anti-bribery measures within the company. The draft standard referred to a range of instruments that can serve as guidance to companies when designing compliance programmes. The lead examiners noted that Annex 2 of the 2009 OECD Recommendation was not listed among them. The German authorities later informed the lead examiners that the standard was adopted in March 2011, and that it included a reference to Annex 2 of the 2009 OECD Recommendation.

Commentary

The lead examiners welcome developments in the interpretation of legislation governing responsibilities of executive boards, which includes a finding that an executive board member was, by virtue of the role, required to ensure that suitable and effective internal controls were in place to prevent offences being committed.

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148 In the responses to the Phase 3 questionnaires, Germany cites some examples: ThyssenKrupp AG has enhanced its compliance programme and, in this process, created a position for a Chief Compliance Officer and ratified a far-reaching Compliance Commitment, and set up worldwide whistle-blower hotline; Daimler AG has created the job of Chief Compliance Officer, a position located directly under the management board level; Siemens, which spent millions of US dollars in setting up a sophisticated compliance system, was the first company in Germany to include compliance as one element in its senior management's bonus system

149 See *e.g.* Transparency International "*Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention*" and Sidhu, Karl (2010), "*Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*". According to a 2009 study by PriceWaterhouseCoopers, ("***Error! Hyperlink reference not valid.***, *www.pwh.de*) the number of large German companies which have implemented a compliance programme rose from 41% to 44% between 2007 and 2009. Out of the 56% which did not have a compliance programme in place, over half (57%) did not plan to implement one in the following two years.

150 Draft standard: "Generally Accepted Auditing Principles for Compliance Management Systems" (IDW EPS 980).

They believe that Germany has made significant efforts to make the Convention and the 2009 Recommendations, and in particular, Annex 2 of the 2009 Recommendation known among companies. They welcome that leading companies in Germany have developed and apply internal controls, ethics and compliance programmes and encourage those who have not taken such measures yet to consider putting in place such mechanisms. They recommend that Germany should continue its efforts to encourage companies, especially SMEs, according to their specific circumstances, to develop internal controls, ethics and compliance systems, where relevant, in cooperation with business associations.

The lead examiners welcome the initiative by the auditing profession to develop a standard to assess companies' compliance and internal control mechanisms.

8. Tax measures for combating bribery

(a) Non deductibilty of bribes

172. The German authorities report that, since the Phase 2 report, there has been no change in the tax treatment of bribes to foreign public officials. Section 4(5) 1st sentence No. 10 of the Income Tax Act (EStG) prohibits deduction of unlawful payments and any related benefits. This is in conformity with Recommendation I.1 of the 2009 Tax Recommendation. Facilitation payments to foreign officials are not tax deductible, when they are to be considered bribes, but deductible when they constitute legal payments, regardless of their amount. As discussed in other sections of this report, the lead examiners found that there is a certain level of confusion among companies between what constitutes a legal facilitation payment and a bribe.[151]

(b) Detection and reporting of suspicions of foreign bribery

173. In the Phase 2 report, the Working Group agreed to follow up on the effectiveness of the reporting of suspected bribery transactions by the tax authorities. According to Germany's responses to the Phase 3 questionnaires, the most common trigger for investigations for bribery offences are corporate audits performed by the tax and revenue authorities pursuant to section 4(5) 1st sentence No. 10 EStG, which establishes the obligation for tax authorities to report suspected cases of bribery.

174. The obligation to report suspected cases of corruption under the Income Tax Act has been reinforced by a circular issued by the Federal Ministry of Finance on 10 October 2002 and related Guidelines. A further step towards strengthening the effectiveness of tax audits in the detection and reporting of bribery was a 2008 ruling by the Federal Finance Court (BFH), the highest German court dealing with tax matters, establishing that in all cases involving expenditures or the granting of benefits as defined by section 4 (5) EStG, the relevant information must be forwarded to the prosecuting authorities.[152] This also includes bribes paid to foreign public officials. The BFH further ruled that when reporting the suspected offence the tax and revenue authorities do not need to assess whether sufficient evidence exists to prove the offence as this is a matter for the public prosecution offices.

175. According to the German authorities, this ruling has resulted in an increased number of reported cases by tax and revenue authorities, and numerous preliminary criminal investigations have been initiated since 2008 in connection with bribery offences detected through tax audits. For example, courts in Hamburg have seen a notable increase in the number of bribery-related proceedings initiated in response to mandatory reports of suspicious acts being filed by the tax and revenue authorities (5 cases in 2007, 7 in 2008 and 10 in 2009, covering both foreign and domestic bribery). In all *Länder* together, since 2006, 15

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151 See discussion of facilitation payments under sections 1 and 10.

152 Federal Finance Court (*Bundesfinanzhof)*, Decision of 14.July 2008, Ref. VII B 92/08.

cases of suspected foreign bribery offences were initiated by the report of the tax authorities. During the on-site visit, several participants, including auditors and business representatives highlighted that bribery cases arising out of reporting by tax and revenue authorities have had a significant deterrent effect on companies.

176. One of the Recommendations in Phase 2 was that "Germany undertake to reduce the time-lag with regard to the performance of tax audits of the largest companies". In 2006, the Federal Government and the *Länder* established minimum standards for the timely performance of tax audits of companies. Based on these standards, the individual *Länder* have since developed their own approaches to achieving "timely tax audits" and have tested them in practice. The Federal Ministry of Finance has taken stock of the timeliness of tax audits in practice and found that timely tax audits have been carried out on a large scale in the *Länder* since 2007, and not just in isolated cases or on a trial basis. This exercise has also shown the need for a uniform standard throughout Germany. This standard would have to provide the local tax offices with various options for working with companies to find individual and pragmatic solutions that would reduce the time lag for the audits. Work on this uniform standard is currently in progress, and is expected to be adopted in 2011 as a measure complementing the 2011 Tax Simplification Act.

(c) Guidance to taxpayers

177. Recommendation I(ii) of the 2009 Tax Recommendation recommends that Parties to the Convention should assess "whether adequate guidance is provided to taxpayers and tax authorities as to the type of expenses that are deemed to constitute bribes of foreign public officials". Germany has issued no guidance of this kind to taxpayers. The lead examiners note that several panellists expressed a desire for guidance from the Government in order to provide greater certainty as to what constitutes bribery and what does not. Observations were made by panellists that uncertainty around what is acceptable can be a barrier to conducting business.

178. Following the discussions with members of the private sector and civil society panels, the lead examiners noted that there was a high level of awareness of the non-deductibility of bribes. On the other hand, they also noted that some business representatives were convinced that facilitation payments for legal acts of foreign public officials made abroad are tax deductible. One participant commented that in case of doubt before making such facilitation payment, he consulted his tax office. This contrasts with the information provided by Germany in its responses to the Phase 3 questionnaires, which stated in connection with the non-deductibility of bribes that "no exceptions [to section 4(5) 1st sentence No. 10] are granted for small facilitation payments". In the written submission provided by the German accounting and auditing profession following the Phase 3 on-site visit, auditors said unambiguously that "facilitation payments are criminal offences under German law and treated as such."[153] In light of the above, the lead examiners conclude that ambiguity and confusion remains on what constitutes a legal facilitation payment to foreign public officials. There is also, therefore, confusion as to what types of payments are tax deductible, as well. The Working Group believes that the German authorities should clarify the confusion so that taxpayers and professionals clearly understand the Law.

179. Most *Länder* provide specialised professional training to judges, public prosecutors and police officers on issues relating to tax law. According to the German authorities this training has resulted in increased reporting of bribery offences, including cases concerning allegations of foreign bribery offences. The German authorities further report that the "Tax Auditor's Handbook on Bribery" is currently being revised. The Handbook provides guidelines to tax auditors responsible for external audits and field audits

153 An internal circular by the Federal Ministry of Finance of 10 October 2002 (*"Abzugsverbot für die Zuwendung von Vorteilen i.S. des § 4 Abs. 5 Satz 1 Nr. 10 EStG")* sets out detailed arrangements concerning the non-deductibility of payments.

on how to detect bribery and related criminal offences when auditing cases in which undue advantages have been granted. Among others, the revision will provide clearer guidance on when it is reasonable for a tax auditor to assume that an unlawful act within the meaning of the Criminal Code has been committed.

(d) Bilateral and multilateral tax treaties and the sharing of information by tax authorities

180. Since the revision of Article 26 of the OECD Model Tax Convention in 2005, the optional language in paragraph 12.3 of the Commentary (concerning the sharing of information by tax authorities if certain conditions are met) has been included in new bilateral tax treaties entered into by Germany. [154] This is in line with Recommendation I (iii) of the 2009 Tax Recommendation. Germany has signed, but not yet ratified the Convention on Mutual Administrative Assistance in Tax Matters and New Protocol, which has been open for signature since 1988 and provides for using tax information received for non tax purposes and in particular to combat bribery if certain conditions are met. Germany is completing the requirements to sign the Protocol, with a view to having the Convention and the Protocol ratified towards the end of 2011.

Commentary

The lead examiners commend Germany for developments in its legislation and jurisprudence which strengthen and clarify the obligation of tax authorities to report suspected acts of bribery, including foreign bribery, in line with Recommendation II of the 2009 Tax Recommendation. They note that this step has had a remarkable impact on the number of cases of bribery that have been detected and investigated in Germany. They also commend Germany for the extensive training provided to tax auditors, which has further enhanced their capacity to detect, report and investigate cases of foreign bribery. They note with satisfaction that these developments appear to have led to a deterrent effect on companies. In particular they note that many of the panellists stated that the prohibition on deduction and the mandatory reporting obligation was one of the most effective ways of combating bribery, including that of foreign officials.

The lead examiners note that the tax authorities consider there is sufficient legal authority to enable proper investigation where there has been deliberate mislabelling of bribery payments in tax accounts in order to hide their use. They note that German authorities have stated that since the Convention was adopted there is no evidence that cases of suspected bribery have not been pursued due to any time constraints. The lead examiners note that Germany has made some progress in assessing whether there is a time lag in the performance of tax audits of companies. In light of the apparent effectiveness of the tax investigations in identifying suspected bribery cases, together with the statute of limitations discussed in section 5 f) of this report, the lead examiners recommend that Germany complete this assessment and take measures, where necessary, to reduce any time lag.

The lead examiners consider that the issue of the legality of facilitation payments to foreign public officials for the performance of legal acts and the tax treatment of such payments is a source of confusion in both the public and private sector, and that Germany should ensure this confusion is clarified. They believe that the effectiveness of Germany's implementation of the 2009 Tax Recommendation could be enhanced by addressing uncertainty about how the tax authorities deal in practice with such facilitation payments for which tax deductions are claimed.

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154 These include the double tax agreements with Belgium (effective), Bulgaria (effective), Greece (signed), Great Britain (effective), Ireland (signed), Israel (signed), Luxembourg (signed), Malta (ratified), Austria (ratified), Slovenia (signed), Spain (signed), Hungary (signed), Tunisia (signed), Switzerland (ratified) and Cyprus (signed). Tax Information Exchange Agreements (TIEAs) according to paragraph 12.3 of the Commentary have also been concluded with a number of countries and jurisdictions.

The lead examiners encourage Germany to prohibit or discourage companies from making facilitation payments as recommended in Recommendation VI (ii) of the 2009 Recommendation.

9. International cooperation

181. The procedural aspects of mutual legal assistance (MLA) have not changed since Phase 2. Under the German legal system, MLA is rendered either on a treaty or a non-treaty basis in accordance with the Act on International Mutual Assistance in Criminal Matters. The Federal Foreign Office plays a predominant role in MLA. The Federal Office of Justice takes also a very active part in the MLA process.

182. Germany does not have, either at the Federal or the *Länder* level, available data on the origin or destination of MLA requests, nor on the offences in respect of which legal assistance requests are made or received. However, Germany has provided the examiners with a range of examples of requests dealing with foreign bribery offences. During the on-site visit, representatives of the Foreign Office indicated, that there has been a constant increase in the amount of incoming MLA requests in the recent years. Cooperation between Germany and other Parties in the Siemens case illustrate the efficiency and flexibility demonstrated by Germany in handling MLA requests.

183. The German authorities explained in their response to the Phase 3 questionnaires that incoming requests for mutual legal assistance dealing with foreign bribery offences are rejected only in exceptional cases. One example concerns a request filed by the World Bank, which was turned down because under German law the World Bank does not qualify as a "responsible entity of a foreign state" and could therefore not receive MLA from Germany. Other rejections concern cases where not all formal requirements under German law were met, which often occur, according to them, when the requests come from countries that are not Parties to the Convention. During the on-site visit, the German authorities explained that they have adopted a flexible approach to allow these requests to be answered to the largest possible extent, for example by making exceptions as to the language requirements. In these situations, they also usually inform the authorities of the jurisdiction concerned about the formal requirements using the diplomatic channels. A representative of the Federal Office of Justice explained that the Federal Office is in constant contact with the relevant authorities of the jurisdictions receiving the MLA requests from Germany and that it is current practice to send a draft of the MLA request to the relevant authorities in order to ensure that all requirements of the foreign jurisdiction are met. He also indicated that it is not unusual that he and his colleagues travel to the country concerned.

184. Representatives of the Federal Foreign Office asserted that the administrative liability of legal persons is not an obstacle to MLA.

Commentary

A major horizontal issue facing all Parties to the Convention is the challenge in obtaining international assistance and co-operation in foreign bribery cases. The German efforts to overcome these hurdles, as demonstrated in a recent prominent case where they successfully cooperated with other Parties to the Convention, are commendable. The lead examiners encourage Germany to continue its pro-active approach.

The lead examiners are unable to assess in detail Germany's practice of providing assistance, due to the lack of a mechanism by which the evaluation team could obtain information from other Parties to the Convention on their experiences in cooperation by Germany in response to MLA requests. This is a cross-cutting issue requiring further consideration by the Working Group.

10. Public awareness and the reporting of foreign bribery

(a) Awareness of the Convention and the offence of foreign bribery

185. In Phase 2, the Working Group recommended that Germany increase its efforts to raise the level of general awareness of the foreign bribery offence and encourage the continued development and adoption of adequate corporate compliance programmes, including for SMEs doing business internationally.

186. Public awareness of the bribery offence has heightened considerably in Germany over the last years, mainly due to extensive media coverage of exposed crimes and criminal proceedings against German companies and individuals. The German government reports that it has not changed its strategy on fighting corruption since the end of Phase 2, but rather, that it has intensified on-going efforts to prevent and prosecute foreign bribery and to raise public awareness of this crime among companies, public officials, and the public at large.

(i) Awareness-raising initiatives by the government

187. The Government has undertaken several measures to raise awareness on the foreign bribery offence. The Federal Ministry of Economics and Technology provides information in German on the OECD Convention, the 2009 Recommendations (together with a German translation of its Annex II), and the *IntBestG* on its homepage and a link to the OECD homepage on combating bribery.[155] In 2006, the Federal Ministry of Justice and the Federal Ministry of Economics and Technology jointly published a brochure with examples and practical recommendations on preventing corruption when doing business abroad.[156] The German authorities also highlighted their efforts to develop the National Plan of Action for Corporate Social Responsibility (CSR) in Germany, as well as to improve the German Corporate Governance Code. The Government notes that these efforts have been very useful in raising awareness and contributing to the prevention of bribery, including bribery of foreign public officials.

188. The National Plan of Action for CSR in Germany[157], adopted in 2010, was developed by the Federal Ministry of Labour and Social Affairs in consultation with the National CSR Forum, comprised of experts from the business sector, unions, non-governmental organisations and the political sector. It highlights the need to adopt corporate measures for preventing corruption in business, and to issue CSR reports. Implementation of internal controls and compliance and ethics programmes are integral to these CSR reports. The National Plan of Action for CSR also includes activities of the German government to step up its awareness-raising and information activities in order to increase knowledge of and compliance with internationally recognised CSR instruments, *e.g*. the OECD Guidelines for Multinational Enterprises and the UN Global Compact. The OECD Guidelines for Multinational Enterprises figure prominently on the website of the Ministry for Economics and Technology.[158]

189. The German Corporate Governance Code was adopted in 2002 by a Commission appointed by the Federal Minister of Justice and is updated annually. The latest version was adopted in May 2010.[159] Publicly listed companies subject to the Stock Corporation Act, as amended by the Transparency and

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155 Federal Ministry of Economic and Technology, www.bmwi.de ; See page on international bribery.

156 Federal Ministry of Economic and Technology, www.bmwi.de, "*Preventing Corruption - Information for German Companies Doing Business Abroad*"

157 National Plan of Action for CSR, www.csr-in-deutschland.de

158 German version of the OECD Guidelines for Multinational Enterprises,

159 German Corporate Governance Code, www.corporate-governance-code.de/eng.

Disclosure Law, must issue a declaration of conformity with the Code and indicate any deviations from it. Designed as a means of voluntary self-regulation by companies, the Corporate Governance Code contains some 50 recommendations aimed at improving company management and control, transparency and competition, and shareholder protection. The Code does not refer specifically to foreign bribery but addresses companies' responsibility of ensuring compliance with legal requirements in general. According to the German authorities, the business community and the public regard the Code as a fundamental tool for improving corporate governance. During the on-site visit, panellists commented that the "comply or explain" approach of the Code has put additional pressure on companies to establish compliance and internal control mechanisms and provide information on them.

190. To raise awareness among German officials abroad, the Federal Foreign Office provides information on the criminal offence of foreign bribery and explains the role of foreign missions in the fight against bribery in international business transactions in an official memorandum regularly issued to all staff, particularly those working in German missions abroad. The last version of the memorandum, from November 2005, is to be updated in 2011.[160] The Federal Foreign Office also explicitly calls on its staff to inform German companies abroad that bribery of foreign public officials constitutes a criminal offence punishable by law, to provide them with advice on this matter, and to make contact with headquarters if doubts or suspicions should arise. The German missions report possible offences committed by Germans in the host country to the Federal Foreign Office's legal department which conducts a legal analysis of the facts and, if the suspicion of an offence is substantiated, reports the issue to the public prosecutors.

(ii) Promotion of Annex 2 of the 2009 Recommendation

191. The Ministry of Economics and Technology has sent a German version of Annex 2 of the 2009 Recommendation, the "Good practice guidance on internal controls, ethics and compliance," to a large number of professional chambers and associations, businesses, and consultancies, as well as to representatives of institutions of higher learning and research, and has posted it on its website.[161] As in Germany all companies and sole entrepreneurs are, by law, affiliated to a business association, the lead examiners assume that a large majority of companies have been made aware of this instrument**.**

192. The German authorities consider that the guidance in Annex 2 of the 2009 Recommendation is already widely known among professionals. The evaluation team had the opportunity to confirm this during the on-site visit in its discussions with representatives from the legal and auditing professions. In their response to the Phase 3 questionnaires the German authorities indicated that government-issued public guidelines for the design of internal corporate codes of conduct (*e.g.* to ensure adequate internal controls) have not been issued and that the Federal government does not plan any initiatives to adopt official guidelines on this issue.

(iii) Foreign bribery training for public officials

193. In their response to the Phase 3 questionnaires, the German authorities have reported on an extensive array of training and awareness-raising events organised, both at Federal and *Länder* level, by public and private institutions, for judges and prosecutors, members of the police, tax authorities, auditors and lawyers**.** Training for judges and public prosecutors include regular events by the German Judicial Academy on "recognising and combating corruption in its various forms" and training in the field of "economic offences", which also covers corruption offences. Public prosecutors and judges from all

160 Auswärtiges Amt, RES 53-8. "*Rolle der Auslandsvertretungen in Kampf gegen Korruption im internationalen Geschäftsverkehr."*

161 The German Chamber of Accountants publishes the letter on its website, www.wpk.de. See also the page of the Ministry dealing with **Error! Hyperlink reference not valid.**www.bmwi.de.

German *Länder* also regularly take part in the seminars hosted by the Academy of European Law, which include (twice annually) events devoted to combating bribery. There are also training programs at the *Länder* level. The detectives deployed in the field of "combating corruption" regularly attend continuing professional training programmes. Several *Länder* also offer ongoing training for tax auditors and investigators. The lead examiners consider that Germany has followed up on the relevant Working Groups' recommendations in a satisfactory manner.

(iv) Awareness raising and information initiatives by industry

194. According to the German authorities, industry associations have played an important role in raising awareness and supporting their members in combating corruption. There are also a wide range of education programmes for businesses, associations, and consultants introducing corruption prevention and prosecution measures, as well as other compliance mechanisms. Examples of initiatives undertaken since Phase 2 include the publication by the Federation of German Industry of a brochure in 2009 aimed particularly at combating corruption in SMEs.[162] In its responses to the Phase 3 questionnaires Germany also describes a range of initiatives by sectoral business associations to raise awareness and provide guidance on addressing bribery. One noteworthy initiative is that of the members of the German Chamber of Commerce in Moscow, who, in 2010, signed an initiative committing to a joint fight against corruption in Russia.[163] An important contribution to the prevention of corruption in business has come from the companies themselves. Large corporations, in particular, have begun requiring their contractual partners to provide declarations that any transactions carried out with them are not affected by corruption, usually linking this requirement with the right of withdrawal from the contract or provisions on contractual penalties.

(v) Perception of foreign bribery by German companies

195. The above developments reflect a heightened awareness among companies and numerous efforts to increase awareness of the bribery offence. This was also apparent during the on-site visit, where discussions with business representatives reflected a high level of awareness of the bribery offence and of company's obligation to abide by the law. On the other hand there are also voices saying that "it is impossible to do business in certain countries without bribing," and that it is especially difficult for SMEs.[164] During the on-site visit, this argument was also made by one of the panellists. Representatives from the legal and auditing professions considered that the level of capacity to prevent bribery by SMEs is much more limited than for large enterprises. A representative from civil society considered that SMEs often cannot afford to have a compliance officer and are less well prepared to resist solicitations from foreign public officials. He also said that "traditional justifications" for engaging in foreign bribery are still present among some German SMEs, and that German embassies abroad are torn between upholding the anti-bribery laws and supporting export efforts by German companies in difficult markets. The fact that legal facilitation payments made abroad do not appear to be sanctioned also emerged as a source of confusion. The lead examiners consider that the ability of companies, in particular SMEs, to fight and prevent foreign bribery is a horizontal issue as companies from all States member to the OECD-Convention face these problems when doing business abroad. They came to the conclusion that further efforts are necessary to assist companies, in particular SMEs in putting in place measures to prevent foreign bribery and resist to solicitation of bribes.

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162 "Doing Safe Business? Economic Crime - Risks for Small and Medium-Sized Enterprises (*Sichere Geschäfte? Wirtschaftskriminalität – Risiken für mittelständische Unternehmen)*.

163 "Corporate Ethics Initiative for Business in the Russian Federation"; http://russland.ahk.de.

164 This was reflected, for example, in an interview with the manager of a German medium-sized company, who openly declared that bribes were part of business in certain regions of the world; Handelsblatt, 10. August 2010 Shortly after the publication of the interview the public prosecutors office of Hannover opened investigations and searched the manager's offices, Handelsblatt 20 August 2010, www.handelsblatt.com.

(b) Reporting suspected acts of foreign bribery

196. Under German criminal law, there is no formal requirement for individuals to report suspected offences, including that of bribery, to the police or public prosecutors. According to the principle of legality, prosecutors act also on the basis of anonymous reports. Recent changes to the law governing the public service sector now permit public officials to report suspected acts of bribery directly to prosecutors.[165] There is no information on whether this provision has already been used in practice. The Directive of the Federal Government on the Prevention of Corruption in the Federal Administrative Authorities and similar provisions at the Land level require heads of public offices to report any suspicions of bribery to the public prosecutors' offices. Some public servants are under an explicit statutory obligation to report suspicions of bribery to prosecutors, notably tax auditors must report any suspicion of bribery detected in the course of an audit to the public prosecutors.[166]

197. Managers, or where relevant, companies' supervisory boards, are not required by law to report any suspicion of bribery detected within the company.[167] In practice, companies have reported cases of bribery, e.g., when detected in the course of due diligence procedures in the framework of mergers and acquisitions.

(c) Whistleblower protection

198. In Phase 2, the German authorities stated "that regardless of the absence of specific legislative protection for whistleblowers, existing labour law provisions and the Constitution provide some protection." They also indicated that "the German government will be examining the issue of whether specific legislation is required in this regard". In the follow-up report to Phase 2, Germany said that there were plans to modify the Civil Code to introduce whistleblower protections for private-sector employees. However, as of today, the modifications have not been made. According to the German authorities, such specific legislation is not necessary as whistleblowers are granted sufficient protection.[168] They clarified that whistleblower protection is not explicitly regulated in German labour law but originates from general rules which have been further defined by the courts. Two rulings, one by the Federal Constitutional Court of 2 July 2001, and one by the Federal Labour Court of 3 July 2002, confirm that employees who report misconduct by the employer in good faith cannot be dismissed for this reason. On the other hand, during the on-site visit, representatives from civil society commented that legislation on whistleblower protection of employees could be improved.

199. Germany has not provided any specific guidance on existing whistleblower protection and has not encouraged companies to inform employees of such protection. In practice, according to the German authorities, many companies have created internal mechanisms allowing individuals to anonymously report breaches and/or to ask questions on legal matters. In order to allow whistleblowers to remain anonymous if desired, some companies have set up compliance hotlines and have appointed internal and external ombudsmen as contact persons. An interesting initiative is that of the *Land* Office of Criminal Investigation Lower Saxony, which maintains an internet-based whistleblowing system which allows the

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165 See Law on the Status of Civil Servants (*Beamtenstatusgesetz*), of 17 June 2008 (Section 37(2) N.3), and for public officials in the service of the federal government, the Federal Civil Service Act (*Bundesbeamtengesetz*) of 5 February 2009 (.Sec. 67 (2) No. 3).

166 See section 8 on Tax measures. Reporting obligations also apply under money laundering legislation, see chapter 6. This issue is described in detail in the Phase 2 report.

167 See section 7 on Accounting and auditing.

168 The German authorities refer specifically to Section 626 of the Civil Code and section 1 of the Protection Against Unfair Dismissal Act, as well as Article 2, paragraph 1 of the Basic Law on personal freedom, the legal principle of Article 20 paragraph 3 and Article 5, paragraph 1, on freedom of expression.

general public to report cases of corruption and other economic crimes.[169] The system is also open for reports from citizens outside of Lower Saxony. If necessary, the office forwards reports to other competent *Land* police offices. During the on-site visit, the lack of specific legislation granting whistleblower protection was noted by some participants, but was not raised as constituting a particular problem. According to the German authorities, the largest case of foreign bribery in Germany originated in the discovery of Siemens' slush funds system by a whistleblower.

Commentary:

The lead examiners are pleased to note that increased enforcement of anti-bribery legislation in Germany and high media coverage have been the most important factors in raising awareness and inducing a change of attitude among companies vis-à-vis the foreign bribery offence. They note the high level of anti-corruption awareness-raising and training initiatives deployed by Germany and its private sector, and encourages the relevant institutions and the business sector to maintain these efforts, and to ensure that special emphasis is put on the foreign bribery offence.

The lead examiners encourage Germany to continue its efforts to raise awareness about the foreign bribery offence to small- and medium-sized enterprises and to provide guidance to adequately prevent and combat it. They also encourage Germany to further strengthen the role of German missions abroad in raising awareness and reporting suspicions of foreign bribery.

The lead examiners consider that Germany could do more to enhance reporting of suspicions of bribery by company employees, for example, by codifying the protection identified by jurisprudence and disseminating information on such protection.

11. Public advantages

200. The various agencies in Germany that administer public contracts or other public advantages, including development assistance and export credits, have put measures in place to limit access to such funds by individuals and companies which have been convicted for bribery. Similarly, efforts have been made to strengthen requirements for companies participating in tenders for public procurement. However, these measures remain limited. For example, there is no centralised registry of companies (German or foreign) excluded from receiving public funds, nor is there a centralised mechanism in place to take into account debarment lists compiled by international development banks.

201. The Phase 2 follow-up report noted that "a Federal register of unreliable companies was to be established in 2006". However, no such register has been established. The discussion about establishing a central "corruption-register" has been put aside during the last reform of public procurement law. According to the German authorities, the discussion will be pursued in the future, but a timeline for this reform has not been set. On the other hand, some *Länder* (Bavaria, Baden-Wurttemberg, Berlin, Bremen, Hesse, North-Rhine-Westphalia and Rhineland-Palatia) maintain a register of "unreliable companies". However, there is no mechanism in place to share the information in these registers with authorities from other *Länder* or the federal authorities. According to the German authorities, an assessment is underway to determine the usefulness of *Länder*-level registers, and whether a federal register should be established.

202. The Federal Government has no information on whether any enterprise has been debarred from access to public advantages following a conviction for foreign bribery, as most awarding procedures are made at *Länder* or municipal level, and information thereon is not available to the Federal Government.

[169] Office of Criminal Investigation Lower Saxony (*LKA Niedersachsen*), www.lka.niedersachsen.de/index.php.

After the on-site visit, the German authorities reported that, at federal level, companies linked to allegations of foreign bribery were on many occasions subjected to enhanced due diligence procedures.

(a) Public procurement

203. In Germany's Phase 2 written follow up report, as well as in the oral follow-up report by Germany in 2006, Germany reported ongoing reforms of the law on public procurement, including measures to exclude enterprises from competing for public contracts if employees were found guilty of corruption, including bribery of foreign public officials. The Act on Modernising Public Procurement (2009) has supplemented the criteria for awarding public contracts contained in section 97(4) of the Act Against Restraints of Competition (GWB). Only companies that abide by German law qualify for the award of public contracts. A company is considered to be "not law abiding" and "not reliable" if one of its representatives has received a final sentence with regard to (foreign) bribery. To check the "reliability" of bidders the awarding authorities can request them to present a proof of suitability.

204. The responsibility to abide by the provisions on public procurement lies with each single awarding authority. In dealing with companies convicted for foreign bribery, the practice at the Federal level in assessing the eligibility for public contracts has been to request these companies to prove that they had put measures in place which could prevent acts of bribery being committed from within or on behalf of their companies in the future.

205. According to the regulations on awarding public supplies and services contracts and public works contracts (VOL/A and VOB/A), companies can be excluded from a bid on the grounds of "gross misconduct", although this remains a discretionary decision.[170] In general, "gross misconduct" is regarded by the awarding authority as any conduct of the bidder in regard to the procurement process in question that would cast serious doubt on his suitability to be awarded with the contract. Furthermore, under both regulations a company is to be excluded from participating in a tender if the principal is aware that a person whose conduct is to be attributed to the company was given a final sentence for the bribery of foreign public officials. Exclusion is also compulsory in cases where a company or individual was sentenced for bribery in another country. Awarding authorities can request bidders, in order to prove their reliability, to present extracts from the Central Federal Register which contains, among others, entries of all convictions of individuals for (foreign) bribery. The authorities can also request extracts from the Central Register of Trade and Industrial Offences which contains, among others, entries of all administrative fines above EUR 200 received by a company. Most *Länder* as well as the Federal government require awarding authorities to request extracts of the latter in awarding procedures where the total amount of the order is above EUR 30 000. Bidders making deliberately wrong statements regarding their reliability are to be excluded from the awarding procedure. Once awarded, the contract can be terminated under general contract law.

206. In addition to public procurement legislation, each public contracting authority has the possibility to formulate internal guidelines that go beyond the statutory requirements for award procedures. For example, the Federal Ministry for Economic Cooperation and Development added an anti-corruption clause to its tendering documents, allowing the Ministry to terminate a contract, impose penalties and claim damages in case a successful bidder incurs in criminal behaviour (including bribery). Where there are suspicions that a company applying for a contract has been involved in bribery, the Federal Ministry of Labour and Social Affairs can carry out a detailed investigation to assess the company's internal efforts to prevent corruption. The public contracts of the Federal Ministry of Finance and the German Customs

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170 Regulation on Contract Awards for Public Works *(Vergabe- und Vertragsordnung für Bauleistungen)* and Regulation on Contract Awards for Public Supplies and Services *(Vergabe- und Vertragsordnung für Leistungen).*

Administration contain an anti-corruption clause that makes reference to the Federal Government's guidelines on combating corruption.

207. Germany has also strengthened the requirement of transparency in tender procedures. For example, national announcements in internet portals have to be centrally traceable via the search function of the federal governments' internet portal.[171] Contract awards without competition are limited to exceptional cases: when a public call for tender has led to no economic result, or when the public call for tender would require an expense disproportionate to the advantage achieved or the value of the services.

(b) Official development assistance

208. The Federal Ministry for Economic Cooperation and Development does not directly issue calls for tender involving public development cooperation funds, but has its implementing agencies issue them. The implementing agencies are the Development Bank (KfW) and, until end 2010, the Association for Technical Cooperation (GTZ). In 2011, the latter was merged with two other development assistance agencies and has changed its name to Agency for International Co-operation (GIZ). GIZ is now responsible for implementing German technical cooperation, whereas KfW handles financial development cooperation. Both institutions are 100% state-owned and subject to public procurement law. Both the KfW and the GIZ must ensure that only companies complying with the Law, as provided in the Public procurement law are eligible to tender for contracts involving development assistance (ODA) funds.[172]

209. Companies tendering for ODA-funded contracts must make a declaration of compliance with the Law. According to information provided after the on-site visit, GIZ requires tendering companies to acknowledge in writing that they have full knowledge of the integrity rules and standards of GIZ and accept that any violation of these rules and standards will lead to exclusion in the tender process. All suppliers of works and services of GIZ are obliged under the general contract conditions to refrain from corrupt activities. Any violation will lead to claims for damages as well as contractual penalties. In addition, KfW and GIZ are required to check that selected companies have not been convicted. e.g., by verifying debarment lists of multilateral development banks.[173] Both the KfW and the GIZ have a code of conduct, which addresses, *inter alia*, bribery.[174] The KfW also has internal regulations to prevent corruption in the award of contracts to consultants and suppliers. In tenders concerning ODA-funded projects financed by KfW, applicants must submit an anti-corruption declaration. Firms debarred in the country of the recipient are not eligible for tendering. At present, there seems to be no evidence that any company has been excluded from tendering for ODA-funded contracts in relation to a conviction for foreign bribery.

(c) Officially supported export credits

210. Germany declared in its response to the Phase 3 questionnaires that, in granting export credit guarantees, it follows the OECD Council Recommendation on Bribery and Officially Supported Export Credits of 2006.[175] This is also reflected in the responses given by Germany in the 2006 Survey by the

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171 See the Federal Government's internet portal www.bund.de.

172 See references to German procurement regulation in the sub-section "Public procurement" of this chapter.

173 One example is the World Bank Group's debarment list, http://web.worldbank.org ("Projects & Operations" / "Procurement").

174 GTZ Code of Conduct www.gtz.de.

175 Federal export credit guarantees are managed on behalf of the Federal Government by a mandatory consortium of Euler Hermes Kreditversicherungs-AG and PricewaterhouseCoopers WPG AG.

OECD Working Party on Export Credits and Credit Guarantees and its update in 2009.[176] The German export credit agency, Euler Hermes, requires exporters and lenders to sign a "no bribery" declaration for the transaction as a condition to obtain coverage.[177] This is in line with Recommendations 1(a), (b), (d) and (e) of the 2006 OECD Recommendation. Euler Hermes also takes note of whether existing and potential clients are blacklisted by multilateral development banks (Recommendation 1(c)). It has formal guidelines concerning due diligence or enhanced due diligence (Recommendations 1(f), (g) and (j). Applicants (exporters and banks) who are subject to "enhanced due diligence" as referred to in the Recommendation are required to describe in detail their internal corporate compliance guidelines, programmes, and other activities. Procedures to disclose to law enforcement authorities instances of credible evidence of bribery are in place (Recommendations 1(h) and (i)). Should it become known that bribery was involved in a transaction for which export credit guarantees have already been granted, the government can invoke relief from liability, as a consequence of which the exporter may receive no compensation in the event of damage. If compensation has already been paid, measures for redress are possible (Recommendation 1 (k)).

211. Euler Hermes' Sustainability Department is in charge of programmes on combating bribery in German export guarantees through, *inter alia*, detailed bribery auditing and monitoring the measures undertaken in respect of the exporter's internal control system**.** This includes analysing the compliance programme and structures of the respective exporter. Wherever appropriate, meetings are held with the compliance team of the exporter to verify how compliance programmes/measures are implemented into business practice, especially with regard to sales activities. Euler Hermes also provides training both to new staff and exporters on issues covered by the OECD Recommendation and holds joint workshops with exporters. During the on site visit, some panellists commented on the stringency of the system in place to assess companies' internal compliance programmes, and indicated that "it is not sufficient any more to fill in questionnaires" - companies have to prove that they actually implement their compliance systems.[178] Where appropriate, the Department cooperates with the public prosecutor's office. In the past few years, Euler Hermes has conducted an increasing number of enhanced due diligence checks due to the growing number of companies which have been convicted for bribery. These companies are subject to enhanced due diligence checks for a period of 5 years.

Commentary:

The lead examiners note that Germany has put in place measures for agencies in Germany that administer public contracts or other public advantages to prevent, detect and report foreign bribery. They recommend that Germany consider establishing a federal register of non-reliable companies and improve co-ordination among Länder registers.

They also recommend that Germany issue guidelines to public procurement authorities to take the following measures, where they are not already in place: (i) take international debarment into consideration during the tender process; (ii) take such listing as a possible basis for enhanced due diligence of applications for public tenders; (iii) establish mechanisms for the verification, when necessary, of the accuracy of information provided by applicants; and (iv) include, within public

176 TD/ECG(2006)16/FINAL and TAD(ECG)(2009)9/FINAL.

177 "Declaration regarding Combating Bribery in Respect of Business Transactions covered by Federal Export Credit Guarantees". The export credit guarantees' web page also offers links to further information on the OECD Recommendation on Bribery and Export Credits, as well as links to a self-audit checklist on preventing bribery in companies http://agaportal.de.

178 This contrast with the views of Transparency International, which indicates that companies are required to make no-bribery commitments but "are not required to demonstrate robust compliance programmes for preventing and detecting bribery or to report on the use of agents" (Transparency International, Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention).).

procurement contracts, termination and suspension clauses in the event of the discovery by procurement units that information regarding compliance with foreign bribery legislation provided by the applicant was false, or by reason of the contractor subsequently engaging in foreign bribery during the course of the contract.

The lead examiners note the enhanced transparency measures applied to the award of contracts in tender processes with limited competition.

The lead examiners commend Germany for the measures put in place to implement the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits.

The lead examiners are encouraged by measures taken to apply due diligence prior to the granting of ODA-funded contracts. They recommend that Germany ensure that ODA-funded contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery and that this prohibition also apply to sub-contractors and contracted local agents.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

212. The Working Group on Bribery commends Germany for its visible and significant enforcement efforts that have increased steadily since Phase 2 enabled by the good practices developed within the German legal and policy framework. They were also assisted by the pragmatic approach taken by Germany to prosecute and sanction individuals in foreign bribery cases with a range of criminal offences other than the offence of foreign bribery where it was not possible to establish all the elements of proof required to apply the latter offence, the use of non-prosecution arrangements under 153a CCP and the commendable level of international cooperation shown with other Parties to the Convention. The Working Group remains however concerned that the level of sanctions applied to both legal and natural persons may not always be fully effective, proportionate and dissuasive, and that a limited number of legal persons have so far been held liable and sanctioned in cases of foreign bribery in Germany.

213. The Phase 2 evaluation report on Germany adopted in June 2003 included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented, at the time of Germany's written follow-up report, in December 2005, the Working Group concludes that: recommendation 3 has been partially implemented, recommendation 1 remains partially implemented and recommendation 7 remains not implemented. Of the recommendations that have been deemed "considered" at the time of the written follow-up, recommendation 5.1 has been partially implemented and recommendation 8 is partly not implemented and partly no longer relevant.[179]

214. In conclusion, based on the findings in this report, regarding implementation by Germany of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues

[179] See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

identified in Part II. The Working Group invites Germany to report orally on the implementation of recommendations 2, 4 c) and 6 within one year of this report (*i.e.* in March 2012). It further invites Germany to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in March 2013).

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. Regarding the foreign bribery offence, the Working Group recommends that Germany:

a) Take any appropriate measures to clarify (i) that the criteria in the Convention and its Commentaries defining a foreign public official are to be interpreted broadly, (ii) that no element of proof beyond those contemplated in Article 1 of the Convention is required and (iii) that, in determining whether a public function was being exercised by a person, elements of information available from foreign authorities are given due consideration [Convention, Article 1; 2009 Recommendation III. (ii) and V.].

b) Ensure, through any appropriate means, that its legal treatment of facilitation payments is clearly defined and that it complies with the requirement of Commentary 9 that such payments be "small" [Convention, Article 1; 2009 Recommendation III. (ii) and VI.(i) and (ii).];

c) Encourage companies to prohibit or discourage the use of facilitation payments.

2. Regarding the responsibility of legal persons, the Working Group recommends that Germany further increase the effectiveness of the liability of legal persons including through raising awareness among the prosecuting authorities at the *Länder* level to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently in all Länder [Convention, Article 2, Phase 2 Evaluation, recommendation 7].

3. Regarding sanctions, the Working Group recommends that Germany:

(a) Raise awareness among prosecuting authorities on the importance of (i) requiring sanctions against natural persons that are effective, proportionate and dissuasive, including in cases of solicitation, and (ii) making full use of the range of criminal sanctions available in law [Convention, Article 3];

(b) Compile statistical information on sanctions of natural persons in a manner that differentiates between (i) sanctions imposed for the offence of foreign bribery and for other criminal offences, in particular commercial bribery and breach of trust, (ii) procedures applied (court decision with a full hearing, arrangement under section 153a CCP, penal order under section 407 CCP, or negotiated sentencing agreement under section 257c CCP) [Convention, Article 3];

(c) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements under section 153a CCP, such as the reasons why they were used in a specific case and the arrangements' terms [Convention, Article 3];

(d) Increase the maximum level of the punitive component of administrative fines available in law for legal persons, to a level that is effective, proportionate and dissuasive [Convention, Articles 2 and 3; 2009 Recommendation V.; Phase 2 Evaluation, Recommendation 7];

(e) Consider making available to courts additional sanctions for legal persons to ensure effective deterrence [Convention, Articles 2 and 3; 2009 Recommendation III.(vii) and XI.(i)].

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Germany:

a) Further ensure that judges and prosecutors in those *Länder* with less experience in foreign bribery cases are offered specific training with regard to the technicalities linked to the complexity of the foreign bribery offence in Germany for both natural and legal persons [2009 Recommendation III.(ii) and V.];

b) Strengthen its efforts to compile at the federal level, for future assessment, information and statistics relevant to monitoring and follow-up of the enforcement of the German legislation implementing the Convention [Convention, Article 12; 2009 Recommendation III.(ii) and V];

c) Clarify the criteria by which the prosecutors may dispense with prosecutions, with a view to provide a uniform application of section 153a CCP [2009 Recommendation III. (ii) and V.; Phase 2 Evaluation, recommendation 8];

d) Clarify, through any appropriate means, that the "predominant public interest", provided under subsection 153c(3) among the grounds for dispensing with prosecution, does not include factors contrary to Article 5 of the Convention such as the national economic interest [Convention, Article 5].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding awareness-raising the Working Group recommends that Germany:

a) Continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence [2009 Recommendation X.C.];

b) Strengthen the role of German missions abroad in raising awareness and reporting suspicions of foreign bribery [2009 Recommendation IX (ii)].

6. Regarding whistleblower protection, the Working Group recommends that Germany enhance reporting of suspicions of foreign bribery by company employees, through any appropriate means, e.g. by codifying the protection identified by jurisprudence and disseminating information on such protection [2009 Recommendation, IX (iii) and X.C (v)].

7. Regarding money laundering,the Working Group recommends that Germany:

a) Amend section 261(9) of the Criminal Code which precludes the simultaneous conviction of a person for money laundering and foreign bribery [Convention, Article 7; 2009 Recommendation III.(ii)];

b) Amend its money laundering legislation to include the bribery of foreign and international MPs in the list of predicate offences to money laundering [Convention, Art.7; 2009 Recommendation III.(ii)].

8. Regarding accounting and auditing requirements, the Working Group recommends that Germany consider extending exceptions to auditors' duty of confidentiality to the reporting of suspected acts of

foreign bribery to law enforcement authorities [2009 Recommendation, III.(v) and X.B.(v); Phase 2 evaluation, recommendation 3].

9. Regarding internal controls, ethics, and compliance, the Working Group recommends that Germany continue encouraging companies, especially SMEs, to develop internal controls, ethics and compliance systems [2009 Recommendation, X.C.].

10. Regarding tax measures for combating foreign bribery, the Working Group recommends that Germany:

a) Clarify the policy on dealing with claims for tax deductions for facilitation payments [2009 Recommendation, VI(i) and VIII(i); 2009 Tax Recommendation I.(ii)];

b) Complete its assessment on whether there is a time lag in the performance of tax audits of companies, and take measures, where necessary, to reduce time lags [2009 Tax Recommendation I.(ii); Phase 2 evaluation, recommendation 3].

11. Regarding public advantages, the Working Group recommends that Germany

a) Consider establishing a federal register of unreliable companies and improve co-ordination among *Länder* registers [2009 Recommendation II. and XI.];

b) Issue guidelines to public procurement authorities to take the following measures, where they are not already in place: (i) take international debarment into consideration during the tender process; (ii) take debarment listings as a possible basis for enhanced due diligence of applications for public tenders; (iii) establish mechanisms for the verification, when necessary, of the accuracy of information provided by applicants; (iv) include, within public procurement contracts, termination and suspension clauses in the event of the discovery by procurement units that information regarding compliance with foreign bribery legislation provided by the applicant was false, or by reason of the contractor subsequently engaging in foreign bribery during the course of the contract [2009 Recommendation II. and XI.];

c) Ensure that ODA-funded contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery and that this prohibition also applies to sub-contractors and contracted local agents [2009 Recommendation XI.].

2. Follow-up by the Working Group

12. The Working Group will follow-up the issues below as case law and practice develop:

a) Germany's interpretation of the definition of a foreign public official "exercising a public function for a public agency or public enterprise" to ensure it fully implements Article 1 of the Convention [Articles 1 and 4 a)];

b) The trend to prosecute and sanction foreign bribery through the offences of commercial bribery (section 299 CC) and breach of trust (section 266 CC) rather than through the offence of foreign bribery (section 334 CC) to ensure that functional equivalence is achieved through these means, in particular with regard to the level of sanction applied for these alternative offences [Convention, Articles 1 and 3.];

c) The use of the new general provision regarding witnesses cooperation under section 46b CC [Convention, Article 5.];

d) The possibility for an individual (i) to negotiate the terms of a "penal order" with the prosecutors (section 407 CCP) or (ii) to enter into negotiated sentencing agreements with the courts (section 257c CCP) to ensure that it follows the principles of predictability, transparency and accountability [Convention, Article 3];

e) The confiscation of the instrument of the bribe and the proceeds of foreign bribery from both individuals and legal persons, including the quantification of the confiscatory component of administrative fines [Convention, Article 3].

ANNEX 1: PHASE 2 RECOMMENDATIONS OF THE WORKING GROUP, AND ISSUES FOR FOLLOW-UP

Recommendations in Phase 2		***Written follow-up****
Recommendations for ensuring effective measures for preventing and detecting foreign bribery The Working Group recommends that Germany:		
1.	Increase its efforts to raise the level of general awareness of the foreign bribery offence and the Convention. With respect to the private sector, the Working Group recommends that Germany encourage the continued development and adoption of adequate corporate compliance programmes including for small and medium sized enterprises doing business internationally [Revised Recommendation, Articles I and V.C(i)].	*Partially implemented*
With respect to the police and the prosecutorial authorities, the Working Group recommends that Germany:		
2a.	Ensure that the issue of foreign bribery is adequately addressed within training programmes (Revised Recommendation, Article I).	*Satisfactorily implemented*
2b.	Evaluate whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases (Commentary, 27; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6).	*Satisfactorily implemented*
With respect to the tax authorities, the Working Group recommends that Germany:		
3.	Undertake to reduce the time-lag with regard to the performance of tax audits of the largest companies (Revised Recommendation, Articles I and IV).	*Not implemented*
The Working Group recommends that Germany:		
4.	Continue to keep under review whether the existing mechanisms for the inter-Land communication and co-operation for criminal investigations and prosecutions are effective, including the sharing of experience in prosecuting foreign bribery cases (Revised Recommendation, Article I).	*Satisfactorily implemented*
With respect to the reporting of suspected bribery or money laundering to the appropriate authorities, the Working Group recommends that Germany:		
5.1	Consider clarifying the obligation to report suspicious transactions for auditors and tax consultants, for example, by issuing guidelines (Revised	*Considered*

	Recommendation, Article I);	
5.2	Consider the establishment of mechanisms such as an Ombudsman, anti-corruption unit or hotline in order to facilitate reporting of suspicion of bribery by members of public administration (Revised Recommendation, Article I).	*Satisfactorily implemented*
Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences The Working Group recommends that Germany:		
6.	Compile at the federal level for future assessment information on investigations of the foreign bribery offence for both natural and legal persons, and sanctions of the foreign bribery offence for both natural and legal persons (Convention, Article 3; Phase 1 Evaluation, section 2).	*Satisfactorily implemented*
7.	Take measures to ensure the effectiveness of the liability of legal persons which could include providing guidelines on the use of prosecutorial discretion, and further increasing the maximum levels of monetary sanctions (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).	*Not implemented*
The Working Group recommends that, as concerns the prosecution of natural persons, Germany:		
8.	Consider issuing guidelines which could help provide a uniform application of sections 153a and 153c of the Code of Criminal Procedure, as well as a uniform exercise of discretion between domestic and foreign bribery cases (Convention, Article 5; Commentary, 27; Phase 1 Evaluation, section 3).	*Considered*

** The right-hand column sets out the findings of the Working Group on Bribery on Germany's written follow-up report to Phase 2, considered by the Working Group in December 2005.*

ANNEX 2 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Federal Ministry of Justice
  - BRAHMS, Katrin, Dr., Head of, Division for International Criminal Law
  - DITTMANN, Thomas, Director General Criminal Law
  - DÖRRBECKER, Alexander, Dr., Division Economic Crime and Corruption-Related-Crime
  - GÜNTHER, Andreas, Dr., Division for Accounting, Publicity and Auditing
  - KORTE, Matthias, Dr., Head of Division Economic Crime and Corruption-Related-Crime
  - MOLSBERGER, Philip, Dr., Division Criminal Procedure Law
  - ROTH, Alexander, Dr., Division Criminal Code – General Part
- Federal Ministry of Economics and Technology
  - BRUMMER, Alexandra, Dr., Division for Public Procurement Law
  - MAUER, Michael, Head of Legal Division
  - MAURER, Markus, Dr., Deputy Director General of the central department
  - SOLBACH, Thomas, Dr., Division for Export Credits
  - STAMMLER, Philipp, Dr., Legal Division
- Federal Ministry of Finance
  - LAGAST, Dominique, Division for Exchange of Information and Administration
  - MAUCH, Eva Maria, Division for Law of Tax Procedures/External Audit
  - POLTOREK, Lars, Division for Law of Tax Procedures/External Audits
  - WOGATZKI, Kristina, Division Combating Money-Laundering

• Federal Financial Supervisory Authority (BaFin)	• TRAUZETTEL, Golo
• Federal Ministry of Labour and Social Affairs	• BREHMER, Antje, Task Force for Corporate Social Responsibility • SCHEDDLER, Albrecht, Division Labor Law
• Foreign Office	• BRETH, Ralf, Head of Division for Criminal Law
• Federal Office of Justice	• KARITZKY, Holger, Dr., Division for Extradition, Transfer of Prisoners, Mutual Legal Assistance • SPITZ, Natalia, Division for Extradition, Transfer of Prisoners, Mutual Legal Assistance
• Bavarian Ministry of Justice and Consumer Protection	• GRAUEL, Michael, Deputy Director General Criminal Law and Head of Division Economic Crime • SEITZ, Helmut, Dr, Director General for Criminal Law

Public Prosecutor Offices

• Office of the Attorney General of Germany	• SCHMIDT, Wilhelm, Dr., Federal Prosecutor (Generalbundesanwalt)
• Public Prosecutor's Office Bochum, North Rhine- Westphalia	• ECKERMANN-MEIER, Marie-Luise, Senior Public Prosecutor, Public Prosecutor's Office Bochum, North Rhine-Westphalia
• Public Prosecutor's Office, Frankfurt/Main	• LOER, Michael, Public Prosecutor
• Public Prosecutor's Office Hamburg	• GAEDIGK, Cornelia, Senior Public Prosecutor
• Public Prosecutor's Office, Hannover	• GUNDLACH, Rainer, Senior Public Prosecutor
• Public Prosecutor's Office Munich I	• BAUER, Martin, Dr. (Department IX) • BÄUMLER-HÖSL, Hildegard (Head of Department IX) • BRONNEN, Florian (Department XII) • DÖTTERL, Sebastian, Dr. (Department XII) • FINDL, Richard (Department XII) • HOMFELD, Nuria (Department XII) • KLUNKER, Nina, Dr. (Department XII) • KURZ, Claudia (Department IX)

	• NÖTZEL, Manfred (Head of Office)
	• SCHLOSSER, Florian (Mutual Legal Assistance)
	• SCHROEDER, Brigitte (Head of Department XII)
	• SCHWAGER, Elke, Dr. (Department XII)
	• STRÖTZ, Christoph, Dr, General Prosecutor
	• STUHLFELDER, Juliette (Department IX)
• Public Prosecutor Office Nürnberg-Furth	• WERNER, Claas (Department 5 a, Economic Crime Proceedings and Corruption)
Police	
• Federal Police (BKA)	• MÜLLER, Hugo, first detective chief superintendent, Division Economic Crime/Corruption
	• RASCH, detective chief superintendent, Division Money Laundering/FIU
• Bavarian Criminal Police (Bayerisches LKA)	• BAUER, Robert, Money Laundering/Profit Skimming
	• HUBER, Mario, Organised Crime
	• PACHOLLEK, Achim, Anti-Corruption
	• SÜTTMANN, Mrs.
• Munich Police Office	• TEICHMANN, Andreas
Courts	
• Federal Supreme Court	• SOST-SCHEIBLE, Beate, Judge
• Higher Regional Court Munich (OLG München)	• KNÖRINGER, Huberta (Presiding Judge at the OLG)
• District Court Munich I (LG Munchen I)	• ECKERT, Joachim (Presiding Judge at the LG)
	• NOLL, Peter (Presiding Judge at the LG)
• District Court Stuttgart (LG Stuttgart)	• SCHWARZ, Wolfgang, Judge
<u>Government-Funded Bodies</u>	
• PWC/ Euler Hermes (Export Credit Agency)	• JUNKER, Ingo, Dr., PWC/EulerHermes mandatary consortium
• Society for technical Co-operation (GTZ) (Overseas Development Assistance Agency)	• HUSTAEDT, Ernst, Society for Technical Co-operation (GTZ), Head of Division, Contracting – Procurement – Logistics
	• WYSLUCH, Johanna Beate, Division Anti-

	corruption and Integrity
• KfW Bank Group (ownership of the Federal Republic and the *Länder*)	• WALD, Albrecht

Private Sector

Private enterprises

BASF AG	SÜNNER, Eckart, Dr., President and Chief Compliance Officer
Bilfinger Berger	LEIFERT, Werner, Dr., Chief Compliance Officer
Coca-Cola Erfrischungsgetranke AG	RUEHL, Ralf, Dr., General Legal Counsel
Deutshe Bank	BORN, Andreas, Head Department Group Anti-Money Laundering
Ferostaal AG	MERAN, Josef, Compliance/Legal
Siemens AG	BERTOLLI, Flavio, Senior Legal Counsel / Compliance Legal

Business associations

• International Chamber of Commerce (ICC)	• POHLENZ, Angelika, Secretary-General
• Council for Values Management	• SÜNNER, Eckart, Dr., President and Chief Compliance Officer, BASF AG
• Association of German Banks (BdB)	• KOEHLING, Lambert, Dr., Department of Legal Affairs • RÖSSLER, Gernot, Dr., Department of Legal Affairs
• Federation of German Industries (BDI)	• SCHREINER, Manja, Dr. LL.M., Legal Department
• Association of German Chhambers of Industry and Commerce (DIHK)	• WERNICKE, Stephan, Prof. Dr., Head Legal Department
• Association of the German Construction Industry (HBD)	• LEIFERT, Werner, Dr., Chief Compliance Officer, Bilfinger Berger (representing the Association of the German Construction Industry (HDB))

Legal profession

• Criminal Law Committee of the German Bar Association (DAV)	• KEMPF, Eberhard, Attorney, partner in the law firm Kempf & Dannenfeldt, Frankfurt/Main
• Criminal Law Group of the German Federal Bar (BRAK)	• MATT, Holger, Prof. Dr., Attorney, law firm Prof. Dr. Holger Matt, Frankfurt/Main

• Association for Economic Crime	• DANN, Matthias, Dr., Attorney, law firm Wessing, Düsseldorf
Accounting and auditing profession	
• Institute of Public Auditors in Germany (IDW)	• SCHNEISS, Ulrich
• Chamber of Public Accountants (WPK)	• SCHNEPEL, Volker, Dr.
• Association of Medium-Sized Accountant's Bureaus (wp-net)	• VON WALDTHAUSEN, Johannes, Dr.
• Ernst & Young, Dusseldorf	• HEISSNER, Stefan, Dr.
• Ernst & Young, Stuttgart	• WOLLMERT, Peter, Prof. Dr.
• PwC, Frankfurt	• LEPPIN, Jennifer, PwC
• KPMG, Munich	• WELLER, Frank, Dr.
• Deloitte & Touche, Dusseldorf	• FISCHER, Klaus
• BDO AG, Hamburg	• BRINKMANN, Markus
Academics	
• Bucerius Law School, Hamburg	• RÖNNAU, Thomas, Prof. Dr.
• Humboldt University, Berlin	• HEINRICH, Bernd, Prof. Dr.
Civil Society	
• Transparency International, German Chapter	• HUMBORG, Christian, Dr. • WIEHEN, Michael, Dr. • WOLF, Sebastian, Dr.
Media	
• Der Spiegel	• SCHMITT, Jörg

ANNEX 3 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AktG	Stock Corporations Act (*Aktiengesetz*)
AO	Fiscal Code (*Abgabenordnung*)
BeamStG	Act on the Civil Service (*Beamtentstatusgesetz*)
BilMoG	Accounting Law Modernization Act (*Bilanzrechtsmodernisierungsgesetz)*
CC	Criminal Code (*Strafgesetzbuch*, StGB)
CCP	Code of Criminal Procedure (*Strafprozeßordnung*, StPO)
CCom	Commercial Code (*Handelsgesetzbuch*, HGB)
EStG	Income Tax Act (*Einkommensteuergesetz*)
GG	Basic Law for the Federal Republic of Germany (*Grundgesetz*)
GmbHG	Limited Liability Companies' Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung)*
GWB	Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*)
GwG	Money Laundering Act (*Geldwäschegesetz)*
IntBestG	Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung,*
OWiG	Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*)
RiStBV	Guidelines for Criminal Proceedings and Administrative Fines *(Richtlinien für das Strafverfahren und das Bußgeldverfahren)*
SME	Small and Medium Sized Enterprise
VgV	Ordinance on Public Procurement (*Vergabeverordnung*)
VOB/A	Regulation on Contract Awards for Public Works, Part *A (Vergabe- und Vertragsordnung für Bauleistungen)*
VOL/A	Regulation on Contract Awards for Public Supplies and Services, Part A *(Vergabe- und Vertragsordnung für Leistungen)*

ANNEX 4 RELEVANT LEGISLATIVE EXTRACTS

Section 1 to 5 of the Report

Act on Combating Bribery of Foreign Public Officials In International Business Transactions (IntBestG)

Article 2: Implementing Provisions
Section 1 - Equal treatment of foreign and domestic public officials in the event of acts of bribery
For the purpose of applying section 334 of the Criminal Code, also in conjunction with sections 335, 336 and 338 subsection 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions, the following shall be treated as equal:
1. to a judge:
a) a judge of a foreign state,
b) a judge at an international court;
2. to any other public official:
a) a public official of a foreign state,
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,
c) a public official and other member of the staff of an international organisation and a person entrusted with carrying out its functions;
3. to a soldier in the Federal Armed Forces (Bundeswehr):
a) a soldier of a foreign state,
b) a soldier who is entrusted to exercise functions of an international organisation.

Section 2 - Bribery of foreign Members of Parliament in connection with international business transactions
(1) Anyone who offers, promises or grants to a Member of a legislative body of a foreign state or to a Member of a parliamentary assembly of an international organisation an advantage for that Member or for a third party in order to obtain or retain for him/herself or a third party business or an unfair advantage in international business transactions, in return for the Member's committing an act or omission in future in connection with his/her mandate or functions, shall be punished by imprisonment not exceeding five years or by a fine.
(2) The attempt shall incur criminal liability.

Section 3 - Acts committed abroad

Regardless of the law of the place of commission, German criminal law shall apply to the following offences committed abroad by a German:
1. Bribery of foreign public officials in connection with international business transactions (sections 334 to 336 of the Criminal Code in conjunction with section 1);
2. Bribery of foreign Members of Parliament in connection with international business transactions (section 2).

Criminal Code

Section 12 -Felonies and misdemeanours
(1) Felonies are unlawful acts punishable by a minimum sentence of one years imprisonment.
(2) Misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.
(3) Aggravations or mitigations provided for under the provisions of the General Part, or under especially serious or less serious cases in the Special Part, shall be irrelevant to this classification.

Section 41 - Fines in addition to imprisonment

If the offender through the commission of the offence enriched or tried to enrich himself, a fine which otherwise would not have been provided for or only in the alternative may be imposed in addition to imprisonment if this appears appropriate taking into consideration the personal and financial circumstances of the offender. This does not apply if the court imposes an order pursuant to section 43a.

Section 46b - Contributing to the discovery or prevention of serious offences

(1) If the perpetrator of an offence punishable by an increased minimum sentence of imprisonment or a sentence of life imprisonment,

1. has contributed to the discovery of an offence under section 100a(2) of the Code of Criminal Procedure by voluntarily disclosing his knowledge, or
2. voluntarily discloses his knowledge to an official authority in time for the completion of an offence under section 100a(2) of the Code of Criminal Procedure, the planning of which he is aware of, to be averted,

the court may mitigate the sentence under section 49(1); a sentence of life imprisonment shall be replaced with a term of imprisonment over ten years. In order to determine whether an offence is punishable by an increased minimum sentence of imprisonment, only aggravations for especially serious cases but no mitigations shall be taken into account. If the offender participated in the offence, his contribution to its discovery must exceed his own contribution. Instead of a reduction in sentence the court may order a discharge if the offence is punishable by a fixed-term sentence of imprisonment only and the offender would not be sentenced to a term of more than three years.

(2) In arriving at its decision under subsection (1) above the court shall have particular regard to:

1. the nature and scope of the disclosed facts and their relevance to the discovery or prevention of the offence, the time of disclosure, the degree of support given to the prosecuting authorities by the offender and the gravity of the offence to which his disclosure relates, as well as
2. the relationship of the circumstances mentioned in No. 1 above to the gravity of the offence committed by and the degree of guilt of the offender.

(3) A mitigation of sentence or a discharge under subsection (1) above shall be excluded if the offender discloses his knowledge only after the indictment against him has been admitted by the trial court (section 207 of the Code of Criminal Procedure).

Section 47 - Short terms of imprisonment as the exception

(1) The court shall not impose a term of imprisonment of less than six months unless special circumstances exist, either in the offence or the person of the offender, that strictly require the imposition of imprisonment either for the purpose of reform of the offender or for reasons of general deterrence.

(2) If the law does not provide for a fine and a term of imprisonment of six months or more is not to be imposed, the court shall impose a fine unless the imposition of a sentence of imprisonment is strictly required pursuant to subsection (1) above. If the law provides for an increased minimum term of imprisonment, the minimum fine in cases covered by the 1st sentence of this subsection shall be determined by the minimum term of imprisonment; thirty daily units shall correspond to one months imprisonment.

Section 56- Power of court to suspend sentence

(1) If a person is sentenced to a term of imprisonment not exceeding one year the court shall suspend the enforcement of the sentence for a probationary period if there are reasons to believe that the sentence will serve as s sufficient warning to the convicted person and that he will commit no further offences without having to serve the sentence. The court shall particularly take into account the character of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his circumstances and the effects to be expected from the suspension.

(2) The court may, under the conditions of subsection (1) above suspend the enforcement of a term of imprisonment not exceeding two years for a probationary period, if after a comprehensive evaluation of the offence and character of the convicted person special circumstances can be found to exist. In making its decision, the court shall particularly take into account any efforts by the convicted person to make restitution for the harm caused by the offence.

(3) The enforcement of a sentence of imprisonment exceeding six months shall not be suspended when reasons of general deterrence so require.

(4) The suspension must not be limited to a part of the sentence. It shall not be excluded by any crediting of time served in custody on remand or any other form of detention

Section 73 - Conditions of confiscation

(1) If an unlawful act 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. This shall not

apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.
(2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.
(3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of confiscation under subsections (1) and (2) above shall be made against him.
(4) The confiscation of an object shall also be ordered if it is owned or subject to a right by a third party, who furnished it to support the act or with knowledge of the circumstances of the act.
http://www.gesetze-im-internet.de/englisch_stgb/index.html - Section73a

Section 74 -Conditions of deprivation
(1) If an intentional offence has been committed objects generated by or used or intended for use in its commission or preparation, the court may make a deprivation order.
(2) A deprivation order shall not be admissible unless
1. the principal or secondary participant owns or has a right to the objects at the time of the decision; or
2. the objects, due to their nature and the circumstances, pose a danger to the general public or if there is reason to believe that they will be used for the commission of unlawful acts.

(3) Under the provisions of subsection (2) No 2 above the deprivation of objects shall also be admissible if the offender acted without guilt.
(4) If deprivation is prescribed or permitted by a special provision apart from subsection (1) above, subsections (2) and (3) above shall apply mutatis mutandis.

Section 78 -Limitation period
(1) The imposition of punishment and measures (section 11 (1) No 8) shall be excluded on expiry of the limitation period. Section 76a (2) 1st sentence No 1 remains unaffected.
(2) Felonies under section 211 (murder under specific aggravating circumstances) are not subject to the statute of limitations.
(3) To the extent that prosecution is subject to the statute of limitations, the limitation period shall be […]
4. five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years; […]

Section 263 -Fraud
[…]
(3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender
1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;
2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;
3. places another person in financial hardship;
4. abuses his powers or his position as a public official; or
5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship. […]

Section 266 - Embezzlement and abuse of trust
(1) Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment of not more than five years or a fine.
(2) Section 243 (2), section 247, section 248a and section 263 (3) shall apply mutatis mutandis.

Section 299 - Taking and giving bribes in commercial practice
(1) Whosoever as an employee or agent of a business, demands, allows himself to be promised or accepts a benefit for himself or another in a business transaction as consideration for according an unfair preference to another in the

competitive purchase of goods or commercial services shall be liable to imprisonment of not more than three years or a fine.
(2) Whosoever for competitive purposes offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employees or agents according him or another an unfair preference in the purchase of goods or commercial services shall incur the same penalty.
(3) Subsections (1) and (2) above shall also apply to acts in competition abroad.

Section 300 - Aggravated cases of taking and giving bribes in commercial practice
In especially serious cases an offender under section 299 shall be liable to imprisonment from three months to five years. An especially serious case typically occurs if
1. the offence relates to a major benefit or
2. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

Section 333 - Giving bribes
(1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier in the Armed Forces for that person or a third person for the discharge of a duty shall be liable to imprisonment not exceeding three years or a fine.
(2) Whosoever offers promises or grants a benefit to a judge or an arbitrator for that person or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to imprisonment not exceeding five years or a fine.
(3) The offence shall not be punishable under subsection (1) above if the competent public authority, within the scope of its powers, either previously authorises the acceptance of the benefit by the recipient or authorises it upon prompt report by the recipient.

Section 334 - Giving bribes as an incentive to the recipients violating his official duties
(1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier of the Armed Forces for that person or a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from three months to five years. In less serious cases the penalty shall be imprisonment not exceeding two years or a fine.
(2) Whosoever offers, promises or grants a benefit to a judge or an arbitrator for that person or a third person, in return for the fact that he
1. performed a judicial act and thereby violated his judicial duties; or
2. will in the future perform a judicial act and will thereby violate his judicial duties,

shall be liable in cases under No 1 above to imprisonment from three months to five years, in cases under No 2 above to imprisonment from six months to five years. The attempt shall be punishable.
(3) If the offender offers, promises or grants the benefit in return for a future act, then subsections (1) and (2) above shall apply even if he merely attempts to induce the other to
1. violate his duties by the act; or
2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

Section 335 - Aggravated cases
(1) In especially serious cases
1. of an offence under
   (a) Section 332 (1) 1st sentence, also in conjunction with (3); and
   (b) Section 334 (1) 1st sentence and (2), each also in conjunction with (3),
   the penalty shall be imprisonment from one to ten years and
2. of an offence under section 332 (2), also in conjunction with (3),
   the penalty shall be imprisonment of not less than two years.

(2) An especially serious case within the meaning of subsection (1) above typically occurs when
1. the offence relates to a major benefit;
2. the offender continuously accepts benefits demanded in return for the fact that he will perform an official act in the future; or

3. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

Code of Criminal Procedure

Section 153a - Provisional Dispensing with Court Action; Provisional Termination of Proceedings

(1) In a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the following conditions and instructions may be applied:

1. to perform a specified service in order to make reparations for damage caused by the offence,
2. to pay a sum of money to a non-profit-making institution or to the Treasury,
3. to perform some other service of a non-profit-making nature,
4. to comply with duties to pay a specified amount in maintenance,
5. to make a serious attempt to reach a mediated agreement with the aggrieved person (perpetrator-victim mediation) thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefore, or
6. to participate in a course pursuant to section 2b subsection (2), second sentence, or section 4 subsection (8), fourth sentence, of the Road Traffic Act.

The public prosecution office shall set a time limit within which the accused is to comply with the conditions and instructions, and which, in the cases referred to in numbers 1 to 3, 5 and 6 of the second sentence, shall be a maximum of six months and, in the cases referred to in number 4 of the second sentence, a maximum of one year. The public prosecution office may subsequently revoke the conditions and instructions and may extend the time limit once for a period of three months; with the consent of the accused it may subsequently impose or change conditions and instructions. If the accused complies with the conditions and instructions, the offence can no longer be prosecuted as a misdemeanour. If the accused fails to comply with the conditions and instructions, no compensation shall be given for any contribution made towards compliance. Section 153 subsection (1), second sentence, shall apply *mutatis mutandis* in the cases referred to in the second sentence, numbers 1 to 5.

(2) If public charges have already been preferred, the court may, with the approval of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second sentences, on the indicted accused. Subsection (1), third to sixth sentences, shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be given in a ruling. The ruling shall not be contestable. The fourth sentence shall also apply to a finding that conditions and instructions imposed pursuant to the first sentence have been met.

(3) The running of the period of limitation shall be suspended for the duration of the time limit set for compliance with the conditions and instructions.

Section 153c - Non-Prosecution of Offences Committed Abroad

(1) The public prosecution office may dispense with prosecuting criminal offences:

1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
2. which a foreigner committed in Germany on a foreign ship or aircraft;
3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.

(2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence.

(3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of

serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution.
(4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.
(5) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General.

Section 407 - Admissibility
(1) In proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offence may, in the case of misdemeanours, be imposed, upon written application by the public prosecution office, in a written penal order without a main hearing. The public prosecution office shall file such application if it does not consider a main hearing to be necessary given the outcome of the investigations. The application shall refer to specific legal consequences. The application shall constitute preferment of the public charges.
(2) A penal order may impose only the following legal consequences of the offence, either on their own or in combination:
1. fine, warning with sentence reserved, driving ban, forfeiture, confiscation, destruction, making something unusable, announcement of the decision, and imposition of a regulatory fine against a legal person or an association,
2. withdrawal of permission to drive, where the bar does not exceed two years, as well as
3. dispensing with punishment.

Where the indicted accused has defence counsel, imprisonment not exceeding one year may also be imposed, provided its execution is suspended on probation.
(3) The court shall not be required to give the indicted accused a prior hearing (Section 33 subsection (3)).

Act on Administrative offences

Section 17 - Amount of Regulatory Fine
(1) The amount of the regulatory fine shall not be less than five Euros and unless otherwise provided by statute shall not exceed one thousand Euros.
(2) If the law threatens to impose a regulatory fine for intentional and negligent action without distinction as to the maximum regulatory fine, the maximum sanction for a negligent action shall not exceed half of the maximum regulatory fine imposable.
(3) The significance of the regulatory offence and the charge faced by the perpetrator shall form the basis for the assessment of the regulatory fine. The perpetrator's financial circumstances shall also be taken into account; however, they shall, as a rule, be disregarded in cases involving negligible regulatory offences.
(4) The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the regulatory offence. If the statutory maximum does not suffice for that purpose, it may be exceeded.

Section 30 - Regulatory Fine Imposed on Legal Persons and on Associations of Persons
(1) Where someone acting
1. as an entity authorised to represent a legal person or as a member of such an entity,
2. as chairman of the executive committee of an association without legal capacity or as a member of such committee,
3. as a partner authorised to represent a partnership with legal capacity, or
4. as the fully authorised representative or as an officer having full commercial power of attorney (*Prokurist*) or as an authorised agent of a legal person or of an association of persons referred to in numbers 2 or 3,
5. as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person, or of an association of persons referred to in numbers 2 or 3, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position,

has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.
(2.) The regulatory fine shall amount

1. in the case of a criminal offence committed with intent, to not more than one million Euros,
2. in the case of a criminal offence committed negligently, to not more than five hundred thousand Euros.
Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.
(3) Section 17 subsection 4 and section 18 shall apply mutatis mutandis.
(4) If criminal proceedings or regulatory fining proceedings are not commenced on account of the criminal offence or of the regulatory offence, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with, the regulatory fine may be assessed independently. Statutory provision may be made to the effect that a regulatory fine may be imposed in its own right in further cases as well. Independent assessment of a regulatory fine against the legal person or association of persons shall however be precluded where the criminal offence or the regulatory offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.
(5) Assessment of a regulatory fine incurred by the legal person or association of persons shall, in respect of one and the same offence, preclude a forfeiture order, pursuant to sections 73 or 73a of the Penal Code or pursuant to section 29a, against such person or association of persons.

Section 130 - Violation of obligatory supervision in firms and enterprises
(1) Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.
(2) An operation or undertaking within the meaning of subsection 1 shall include a public enterprise.
(3) Where the breach of duty carries a criminal penalty, the regulatory offence may carry a regulatory fine not exceeding one million Euros. Where the breach of duty carries a regulatory fine, the maximum regulatory fine for breach of the duty of supervision shall be determined by the maximum regulatory fine imposable for the breach of duty. The second sentence shall also apply in the case of a breach of duty carrying simultaneously a criminal penalty and a regulatory fine, provided that the maximum regulatory fine imposable for the breach of duty exceeds the maximum pursuant to the first sentence.

***Limited Liability Company Act* - Section 6 - Managing directors**
[…]
(2) Only a natural person with full legal capacity may be managing director. A managing director cannot be an individual who, […]
3. has been convicted of one or more intentionally committed criminal offenses […]
e) pursuant to sec. 263 to 264a or sec. 265b to 266a of the Criminal Code resulting in a prison sentence of one year or longer; this exclusion shall apply for five years from when the conviction has become res judicata excluding the period of time during which the offender was confined to an institution by official order. 3Sentence 2 no. 3 shall apply accordingly in the case of a conviction abroad of an offense which is comparable to the offenses mentioned in sentence 2 no. 3.

***Stock Corporation Act* - Section 76 - Management of the stock corporation**
(1) The management board shall manage the company under its own responsibility.[…]
(3) Only a natural person of full le-gal capacity may be a member of the management board. A member of the management board may not be someone who,[…]
3. has been convicted of one or more intentionally committed criminal offenses […]
e) pursuant to sec. 263 to 264a or sec. 265b to 266a of the Criminal Code resulting in a prison sentence of one year or longer;
this exclusion applies for five years from when the conviction has become res judicata, excluding the period of time during which the offender was confined to an institution by official order.[…]

Section 6 of the Report: Money laundering

IntBestG - Section 4 - Application of section 261 of the Criminal Code
In cases failing under section 261 subsection 1 second sentence No. 2 (a) of the Criminal Code, section 334 of the Criminal Code shall also be applied in conjunction with section 1.

Criminal Code - Section 261 - Money laundering; hiding unlawfully obtained financial benefits
(1) Whosoever hides an object which is a proceed of an unlawful act listed in the 2nd sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years. Unlawful acts within the meaning of the 1st sentence shall be
1. felonies;
2. misdemeanours under
(a) Section 332 (1), also in conjunction with subsection (3), and section 334; (…)
(9) Whosoever
1. voluntarily reports the offence to the competent public authority or voluntarily causes such a report to be made, unless the act had already been discovered in whole or in part at the time and the offender knew this or could reasonably have known and
2. in cases under subsections (1) or (2) above under the conditions named in No 1 above causes the object to which the offence relates to be officially secured

shall not be liable under subsections (1) to (5) above.
Whosoever is liable because of his participation in the antecedent act shall not be liable under subsections (1) to (5) above, either.

Section 11 of the report: Public advantages

Regulation on Contract Awards for Public Supplies and Services (VOL/A) [180]
"An enterprise has to be excluded from participation in an award procedure on the grounds of unreliability, if the contracting authority has knowledge that a person whose conduct is attributable to the enterprise, has been legally convicted under: (…)
Section 334 CC (Offering a Bribe), also in conjunction with Article 2 of the EU Anti-Corruption Act, Section 1 of Article 2 of the Act Against International Corruption, Article 7(2.10) of the Fourth Criminal Code Amendment Act and Article 2 of the Act on Suspending the Statute of Limitation and Equal Treatment of Judges and Employees of the International Criminal Court,
Section 2 of Article 2 of the Act on Combating International Bribery (Bribery of Foreign Public Officials in International Business Transactions) or
A violation of these provisions shall be treated as equivalent to violations of penal provisions in other states. The conduct of a legally convicted person shall be attributed to an enterprise if he acted responsibly in conducting business on behalf of the enterprise or if supervisory or organisational fault under Article 130 of the Code of Administrative Offences (OWiG) lies with a person in connection with the conduct of another legally convicted person acting on behalf of the enterprise."

Trade Regulation Act (Gewerbeordnung – GewO):

Section 149 – Establishment of a Central Trade and Industry Register
(1) The Federal Office of Justice (registry authority) shall keep a central trade and industry register.
(2) The register shall contain (…)
3. final and absolute decisions on fines, and particularly those relating to a tax offence which has been committed
a)in the course of or in the context of the exercise of an occupation or the operation of another commercial enterprise or
b) in the course of activity in an occupation or other commercial enterprise by a representative or commissioner within the meaning of Section 9 of the Act on Administrative Offences or by a person who is expressly designated a responsible person in a statutory provision,
if the fine amounts to more than € 200.

[180] A similar provision is contained in the Regulation on Contract Awards for Public Works Part *A (VOB)*