



IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



PHASE 4 REPORT: **Germany**

This Phase 4 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 OECD Working Group on Bribery on 14 June 2018.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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EXECUTIVE SUMMARY

This Phase 4 report 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. This report details Germany's particular achievements and challenges in this regard, including with respect to enforcement of its foreign bribery laws, as well as the progress Germany has made since its Phase 3 evaluation in 2011.

With a total of 67 cases resulting in 328 individuals and 18 legal persons sanctioned in 17 cases in foreign bribery cases since 1999, Germany is among the highest enforcers of the Anti-Bribery Convention. This has been achieved through the continued pragmatic approach in using alternative offences to sanction cases within the foreign bribery sphere and through the use of a range of proceedings, including conditional resolutions with individuals. The Working Group commends Germany for its focus on holding culpable individuals liable. However, with companies held liable in only a quarter of the concluded foreign bribery cases, there are concerns that there is insufficient enforcement against legal persons. The Working Group is concerned that Germany has not given full effect to the large possibilities available in its law to trigger corporate liability. Introducing a system of conditional resolution for legal persons and clear and transparent rules attached to self-reporting by companies should contribute to increase enforcement against legal persons. The Working Group welcomes the 2018 coalition agreement commitment to tie the punitive fine available against legal persons more closely to the company's turnover. If implemented, this, together with the in-depth revision of its confiscation regime, and the creation of a Federal Debarment Register for companies should contribute to making sanctions, particularly against large companies, more effective, proportionate and dissuasive.

German investigators appear to be making a broad use in actual foreign bribery cases of the range of investigative techniques and tools at their disposal, including Mutual Legal Assistance, coordinated investigations with tax authorities and Joint Investigative Teams in multi-jurisdiction investigations. Germany needs to ensure that the Public Prosecutor's Office discretion to prosecute and sanction legal persons is either removed or exercised independently of the executive in order to guarantee that investigations and prosecutions in cases of foreign bribery are not influenced by factors prohibited by Article 5 of the Convention. The lack of statistics collected at Federal and *Länder* level has been an obstacle in assessing Germany's enforcement efforts. With over two thirds of the sanctions imposed in foreign bribery cases decided through conditional exemptions and terminations of prosecution, it has also become urgent that Germany add accountability, raise awareness, and enhance public confidence in these resolution tools.

Germany has demonstrated its ability to detect foreign bribery allegations via a range of sources. Germany is one of the few Parties to the Convention to have regularly uncovered foreign bribery cases through its tax authorities who play a pivotal role in this regard. A significant number of cases have also been detected through Mutual Legal Assistance and self-reporting by companies. Nevertheless, a number of potential sources of foreign bribery allegations remain under-utilised. A longstanding concern is the lack of a comprehensive framework for whistleblower protection which may hamper detection efforts.

The report and its recommendations reflect the findings of experts from Japan and the Russian Federation and were adopted by the Working Group on 14 June 2018. The report is based on legislation, data and other materials provided by Germany and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its on-site visit to Germany in January 2018, during which the team met representatives of Germany's public and private sectors, media, and civil society. Germany will submit a written report to the Working Group in two years on the implementation of all recommendations and its enforcement efforts.

INTRODUCTION

1. In June 2018, the Working Group on Bribery (Working Group) completed its fourth evaluation of Germany's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation), and related instruments.

Previous Evaluations of Germany by the Working Group on Bribery

2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2) including meetings with non-government actors. The evaluated country has no right to veto the final report or recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are systematically published on the OECD website.

3. Germany's last full evaluation - Phase 3 - dates back to March 2011. The Working Group first evaluated Germany's implementation of its Phase 3 recommendations in 2013. At that time, the Working Group concluded that 13 of Germany's 25 Phase 3 recommendations had been implemented, 4 were partially implemented, and 8 were not implemented (see Figure 1 and Annex 2).

Box 1. Previous Working Group on Bribery Evaluations of Germany

2014: Additional report

2013: [Follow-up to Phase 3 Report](#)

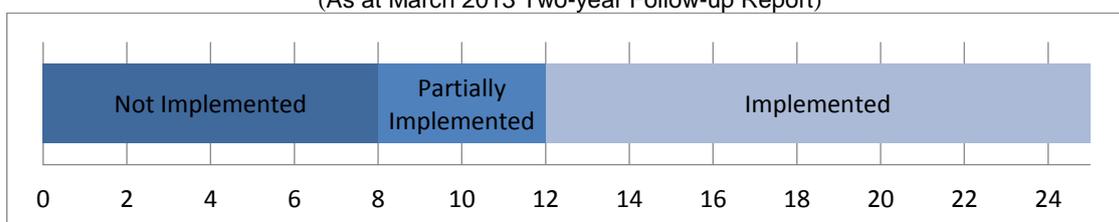
2011: [Phase 3 Report](#)

2005: [Follow-up to Phase 2 Report](#)

2003: [Phase 2 Report](#)

1999: [Phase 1 Report](#)

Figure 1. Germany's Implementation of Phase 3 Recommendations
(As at March 2013 Two-year Follow-up Report)



Phase 4 Process and on-Site Visit

4. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection, and corporate liability. They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework.¹ Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and reflecting positive achievements and good practices. For this reason, issues which were not deemed problematic in previous phases or which have not arisen as such in the course of this evaluation may not have been fully re-assessed at the on-site visit and may thus not be reflected in this report.

¹ See [Phase 4 Evaluation Procedures](#).

5. The evaluation team for Germany's Phase 4 evaluation was composed of lead examiners from Japan and the Russian Federation, as well as members of the OECD Anti-Corruption Division.² Pursuant to the Working Group's Phase 4 evaluation procedures, after receiving Germany's responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Berlin on 15-19 January 2018. The team met with representatives of the German public sector both at Federal and *Länder* levels, including government agencies, law enforcement authorities and the judiciary; the private sector, including business organisations, companies and lawyers; and civil society, including non-governmental organisations, academia and the media.³ The evaluation team expresses its appreciation to these participants, in particular, for their openness during discussions. The evaluation team also welcomes the contribution of Transparency International Germany which prepared comments on the standard and supplemental questionnaire Phase 4 Evaluation of Germany that had been shared to a large extent with civil society panellists by Germany.⁴ The evaluation team is also grateful to the German Government, particularly the Federal Ministry for Economic Affairs and Energy (MOE) and the Federal Ministry of Justice and Consumer Protection (MOJ), for their level of engagement, including at the highest political level during the visit and their cooperation throughout the evaluation, the organisation of a well-attended on-site visit, and the provision of additional information following the on-site visit.

Germany's Foreign Bribery Risks in Light of its Economic Situation and Trade Profile

A key actor in the global economy

6. Germany is the 4th largest economy in the world, accounting for 7.85% of the world's exports in 2016 and the largest European economy.⁵ In 2016, Germany ranked 3rd among Working Group members in term of real gross domestic product (GDP of USD 3.4 trillion), 2nd in terms of exports (at current prices), and 4th in terms of outward foreign direct investment (FDI stock at current prices).⁶ Germany's economy grew by 2.2% in 2017 - which is the highest rate since 2011 - and is expected to record its ninth consecutive year of growth with an estimated 2.3% increase in 2018.⁷ The German economy is strongly export-oriented: exports of goods and services accounted for almost half of Germany's GDP in 2016 (*i.e.* 46% of GDP).⁸

7. The total value of Germany's outward FDI stocks was USD 1 365 billion in 2016. The United States, the United Kingdom, Luxembourg and the Netherlands are the four largest destinations for German outward investment, accounting for 47% of the total FDI.⁹ In particular, German companies have expanded their production abroad through both mergers and acquisitions and greenfield

² Japan was represented by Professor Takeyoshi Imai, School of Law, Hosei University; Mr. Akira Irie, Attorney, from the Ministry of Justice and Mr. Hiroshi Ochiai, from the Ministry for Foreign Affairs. The Russian Federation was represented by Mr. Mikhail Vinogradov, Director, and Mr. Vadim Tarkin, Head of Legal Protection Division both from the Department of International Law and Cooperation of the Ministry of Justice. The OECD was represented by Ms. Sandrine Hannedouche-Leric, Coordinator of the Phase 4 Evaluation of Germany and Senior Legal Analyst; Mr. Nigel Hamilton, Legal Analyst; and Ms. Lise Née, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

³ See Annex 4 for a list of participants.

⁴ TI Germany Written submission: Comments on the standard and supplemental questionnaire Phase 4 Evaluation of Germany.

⁵ OECD, (2017), [Data on enforcement of the Anti-Bribery Convention](#), 2016. [World Bank data](#) (2016)

⁶ Source: UNCTAD

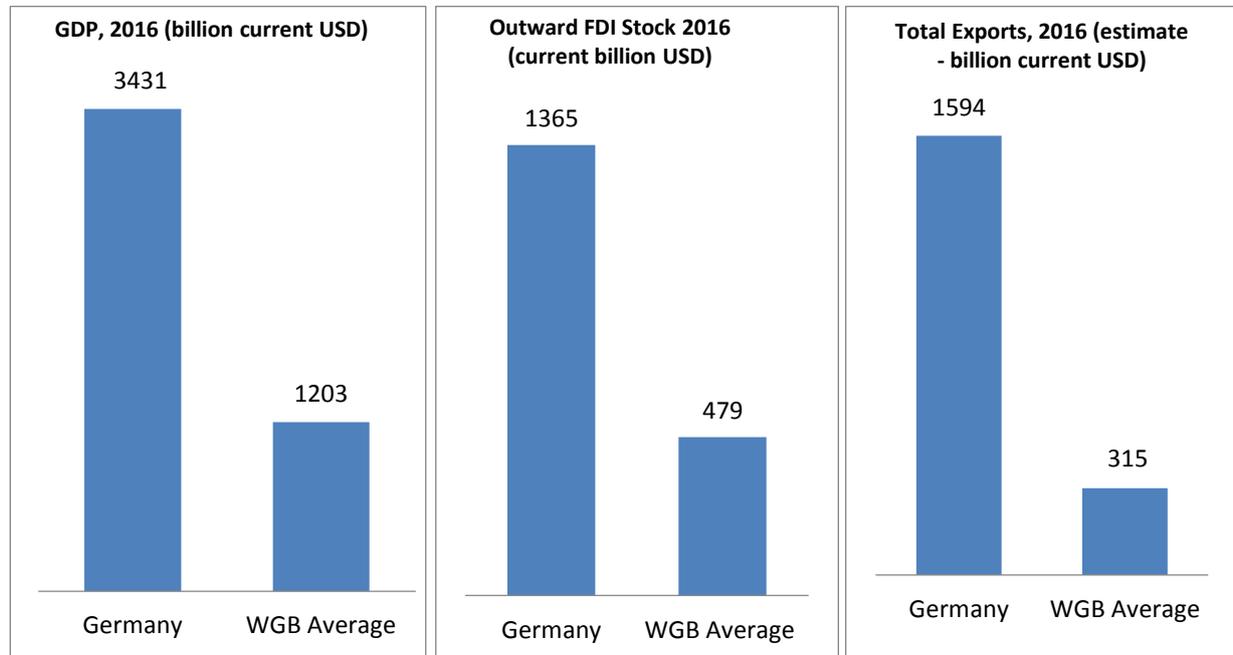
⁷ European Commission (2018), [Economic forecast for Germany](#); Financial Times (January 2018), "[Rapid German expansion fuels overheating fears](#)"

⁸ World Bank (2016), [Germany Country Profile](#).

⁹ [OECD FDI stocks statistics](#).

investments. Most of these foreign direct investments took place in Europe, including through the building of supply chains in Central Eastern and South-Eastern Europe.¹⁰ A number of the foreign bribery allegations involving German companies and nationals relate to projects in these regions.

Figure 2. Comparison of Germany's Economic Data against Working Group Average



Sources: UNCTAD

Increasing development of economic ties with non-EU trading partners

8. Although most of Germany's trade and investments are with European Union countries and the United States, Germany's trading relations with China have substantially increased in recent years culminating in 2016 when China became Germany's most important trading partner after the European Union and the United States. German imports from and exports to China rose to USD180 billion in 2016 and German foreign direct investments reportedly increased by 10% in the first half of 2017.¹¹ In turn, Germany became the world's largest recipient of Chinese foreign direct investment projects in 2017, reaching a total of EUR 12.1 billion.¹² In parallel, Germany's trading relations with the Russian Federation have risen. In 2016, Germany doubled its investment and was the second largest investor in

¹⁰ IMF (2017) [Germany Selected Issues](#).

¹¹ South China Morning Post (January 2018) "[Censorship, market access and forced tech transfer: the tricky business in Germany's trade ties with China](#)"; Express (July 2017) "[Angela Merkel agrees free trade deal with China as German Chancellor pushes for speed](#)"; Reuters, (February 2017), "[China steams past U.S., France to be Germany's biggest trading partner](#)". WTO (2015), [Germany Country Profile](#). EU countries accounts for 58% of Germany's total exports;

¹² Express, (January 2018), "[Germany leads charge to monitor foreign investments in EU amid fears of China buying spree](#)"; Germany Trade and Investment (GTAI) data available here: <https://www.gtai.de/FDI>; CNBC (September 2017), "[Germany is trying to stop China from gobbling up its companies — but there may be a downside](#)"; Handelsblatt (March 2012) "[Industrie investiert kräftig im Ausland](#)"

the Russian Federation after the United Kingdom. The German Bundesbank estimated that German firms made USD 1.88 billion (EUR 1.73 billion) of direct investment in Russia during the first half of 2016.¹³

An export oriented economy: from the largest multinational companies to the Mittelstand

9. The German business sector is diverse. It includes extremely large multinational enterprises. Twenty-nine of the world's 500 largest stock market listed companies were headquartered in Germany in 2017.¹⁴ The *Mittelstand* companies (i.e. small and medium and even larger sized family owned enterprises) are the key pillars of the German economy. Some *Mittelstand* companies have been referred as “hidden champions” because of their strong international competitiveness in niche products and role in supporting Germany's exports.¹⁵ Small and medium-sized enterprises account for over 17% of German export volume.¹⁶ German state-owned enterprises (SOEs) are also active in sectors known to be vulnerable to foreign bribery such as telecommunications (Deutsche Telekom), transport and infrastructure (Deutsche Bahn), and Energy (RWE, EON). In total, 75 German companies are wholly or partially government owned at the Federal and *Länder* level.¹⁷ Family-owned companies also play a large role in the German economy and have seen their economic importance grow significantly over the past decade.¹⁸

Germany's significant economic weight in sectors known to be at risk of bribery

10. Germany faces a relatively high exposure to the risk of bribery of a foreign public official. The German economy is largely dependent on exports, and German companies trade with high-risk jurisdictions in sectors at risk of bribery. Germany has a longstanding comparative advantage in sectors known to be at risk of bribery, including chemicals and pharmaceuticals, mechanical and plant engineering and the automotive industry. The automotive industry is the largest industrial sector in Germany followed by the mechanical and plant engineering industry. The automotive industry alone generated a turnover of EUR 404 billion (i.e. around 20 percent of total German industry revenue) in 2016.¹⁹

11. In 2016, the machinery and equipment sector accounted for over one quarter of Germany's total exports and for over 16 % of machinery traded worldwide, making Germany the world's leader in the field, followed by China and the United States.²⁰ Germany is also the 3rd largest chemical exporter

¹³ Ernst & Young, (2017), “[European Attractiveness Survey 2017 Russia findings](#)”, pp.1 and 8; Der Spiegel (October 2016) “[Deutsche Firmen haben Lust auf Russland](#)” Sputnik (October 2016) “[German Firms Double Investment in Russia Despite Sanctions](#)”.

¹⁴ 29 of the world's 500 largest stock market listed companies are headquartered in Germany in 2017. <http://fortune.com/global500/list/filtered?hqcountry=Germany>.

¹⁵ Federal Ministry for Economic Affairs and Energy SME Policy: “[The German Mittelstand as a model for success](#)”; ZEW (2015) “[1,500 Hidden Champions in Germany: Global Market Leaders' Secret of Success](#)” and FT (2007), “[Germany's hidden champions](#)”.

¹⁶ Institut für Mittelstandsforschung, Bonn, based on Data of the Federal Statistical Office

¹⁷ OECD, (2017), [State-Owned Enterprises: An Overview of Their Size and Sectoral Distribution in OECD and Partner Countries](#). See Table 19. The 75 enterprises consist of: 70 majority government-owned non-listed enterprises, 4 minority government-owned listed entities, and 1 state-owned quasi corporation. OECD [Glossary of Statistical Terms](#).

¹⁸ Handelsblatt (March 2017), “[Study: Family-Owned Companies Most Important Employers in Germany](#)”; Family Capital (January 2017), “[The 10 fastest growing family businesses in Germany](#)”.

¹⁹ OECD (2016), [OECD Economic Survey of Germany](#), p. 17; Germany industry profiles available on GTAI: <http://www.gtai.de/GTAI/Navigation/EN/Invest/Industries/Mobility/automotive.html>.

²⁰ VDMA (May 2016), FDI markets January 2016, GTAI research, available on the [webpage](#) of the Federal Ministry of Economic Affairs and Energy and the Federal Ministry of Labour and Social Affairs); and GTAI Industry Overview 2017/2018 “[The machinery and equipment industry in Germany](#)”.

worldwide after China and the United States.²¹ The German pharmaceutical industry is the largest in Europe and the fourth largest in the world. Germany also plays a key role in the global aerospace industry supply chain.²²

12. Germany is amongst the largest defence exporting countries and ranked 4th for the period 2013-2017 in the index of the Stockholm International Peace Research Institute (SIPRI) despite a 14% decrease in military spending compared to 2008-2012.²³ Three major German companies are listed in the SIPRI world's top 100 arms dealers in 2016, with combined sales of USD 6 billion and representing 1.6% of world arms sales. Rheinmetall is the highest ranking German company. The trans-European Airbus Group (former European civil and military aerospace company EADS) ranks seventh with arms sales totalling USD 12.5 billion in 2016. One feature of the German defence industry is the absence of SOEs in the sector which exclusively comprises of privately owned defence companies. A significant number of *Mittelstand* companies (German small and medium-sized companies (SME's)), are also involved in the German defence industry, particularly in the international supply chain. The global defence sector is known to be at risk of bribery, in particular due to the high value of defence contracts resulting from factors such as foreign procurement, the limited level of transparency surrounding tender processes, and the use of offset agreements. Several cases involving German defence companies have surfaced and been investigated by the *Länder*. Pursuant to a media report in 2014, "nearly every major German defence contractor is currently facing some investigation into corruption allegations".²⁴

13. In practice, the foreign bribery cases reported by the *Länder* have occurred mainly in the defence sector, the healthcare and pharmaceutical industry, the construction and energy sectors, including nuclear, oil and gas and renewable energies.

Foreign Bribery Cases in Germany

Availability of data and statistics in foreign bribery cases and methodology of the report

14. The case information and subsequent analysis contained in this report is based on the evaluation team's analysis of information provided in Germany's responses to the Phase 4 questionnaire, translated excerpts of selected court decisions requested by the evaluation team, and independent research. Germany also provided data on 121 cases (ongoing prosecutions and court decisions) and anonymised information on cases compiled annually by the *Länder*. The information has been provided on an annual basis since Germany's Phase 3 evaluation. It covers a time period from 1 January 2011 to 31 December 2017 based on the official data provided by the *Länder*. Where possible, the evaluation team has completed the anonymised information on cases provided in the *Länder* annual reports with publicly available information in turn supplemented in some regards by Germany. Contrary to practice followed in former reports, where enforcement information is up-to the date of approval of the report, Germany was able to provide only some information beyond 31 December 2017.²⁵ The report hence punctually refers to cases developments that occurred post December 2017 mainly based on publicly available information, in particular the case concluded against Airbus Defence and Space GmbH in February 2018.

²¹ Germany Trade & Invest: [Germany's Chemical Industry](#) (Source: VCI, Chemiewirtschaft in Zahlen 2017).

²² GTAI Industry Overview 2017/2018 "[The Aerospace Industry in Germany](#)".

²³ Stockholm International Peace Research Institute (SIPRI), (December 2017); "[The SIPRI Top 100 arms producing and military services companies, 2016.](#)" SIPRI was set up in 1996 by the Swedish Parliament and monitors military spending.

²⁴ DW (December 2014) "[Germany probes defence giant Airbus for bribery](#)".

²⁵ In 2017, the *Länder* had to report twice to the Federal Ministry of Justice and Consumer Protection due to the Phase 4-evaluation.

15. In Phase 3, the Working Group was concerned about the anonymised treatment of cases and the lack of available statistics (recommendation 4b). Since Phase 3, while continuing to anonymise cases, Germany has improved the description and tracking of cases in the *Länder* annual reports, hence allowing a better follow-up of cases enforcement progress. In addition, more information was provided and as a result, whereas only convictions (and not resolutions) could be counted in Phase 3, both convictions and resolutions are counted in this report.

16. Nevertheless, as also emphasised by civil society, a number of key pieces of information are still missing. This has complicated the evaluation team's assessment of Germany's enforcement of its foreign bribery offence to a challenging extent. Although more detailed information was provided in Phase 4, differences remain between *Länder* in the way case information is tracked. Key information is not always consistently collected. Missing information includes in some cases a comprehensive description of the key facts of the case including the sector of activity of the bribe payer (natural and/or legal person), the amount of the bribe payment and the value of the contract or benefit awarded through bribery including the proceeds of the contract; the country or at least the region of the foreign public official; and his/her position, the source of detection of the case and the investigative measures taken. In the large proportion of cases settled under section 153a of the German Code of Criminal Procedure ("*Strafprozessordnung, StPO*", CCP), key information is missing regarding the underlying offence(s),²⁶ at what stage of the proceedings was the resolution concluded, on what grounds and in many cases even the amount of the sanctions imposed. When cases have been adjudicated in court, the *Länder* do not include the name and level of the court adjudicating the case (*i.e.* local or regional court) and the date of court decisions. The need for this information is also stressed by Transparency International which lists access to the file number as another element that should be provided.²⁷

17. Germany states that the anonymised information on cases is not specific to the foreign bribery offence and is due to its national and constitutional rules on data protection. However, overall and as in Phase 3, this anonymised treatment of cases made it difficult for the evaluation team to reconcile the various pieces of information and limited the discussion of actual foreign bribery cases during the on-site visit. The difficulties reconciling pieces of information provided by Germany (not to mention those from other sources) have limited the assessment of Germany's approach to fighting foreign bribery in a number of regards. The anonymisation of cases largely prevented the evaluation team from reconciling case information provided by Germany with allegations that have surfaced in the press. A number of statistics are still not maintained on the number of proceedings initiated and dropped against legal persons, the number of criminal proceedings against individuals dropped, sanctions and confiscation imposed, enforcement of the money laundering offence predicated on foreign bribery, and Mutual Legal Assistance. Key pieces of information were even sometimes provided "from memory" as noted in Germany's questionnaire answers. As the *Länder* have not adopted a systematic approach to collecting relevant data in foreign bribery cases, recommendation 4(b) remains only partially implemented.

Commentary

The lead examiners note the efforts made by Germany in Phase 4 both at Federal and Länder level to provide the evaluation team with case information. However, they are concerned that a number of key pieces of information are still lacking or provided inconsistently. They note that this information is gathered post-facto by the prosecutors themselves. They are concerned that Germany's efforts to

²⁶ The underlying offence is unknown with regard to 87 of the individuals sanctioned since the entry into force of the Convention.

²⁷ See TI Germany Written submission.

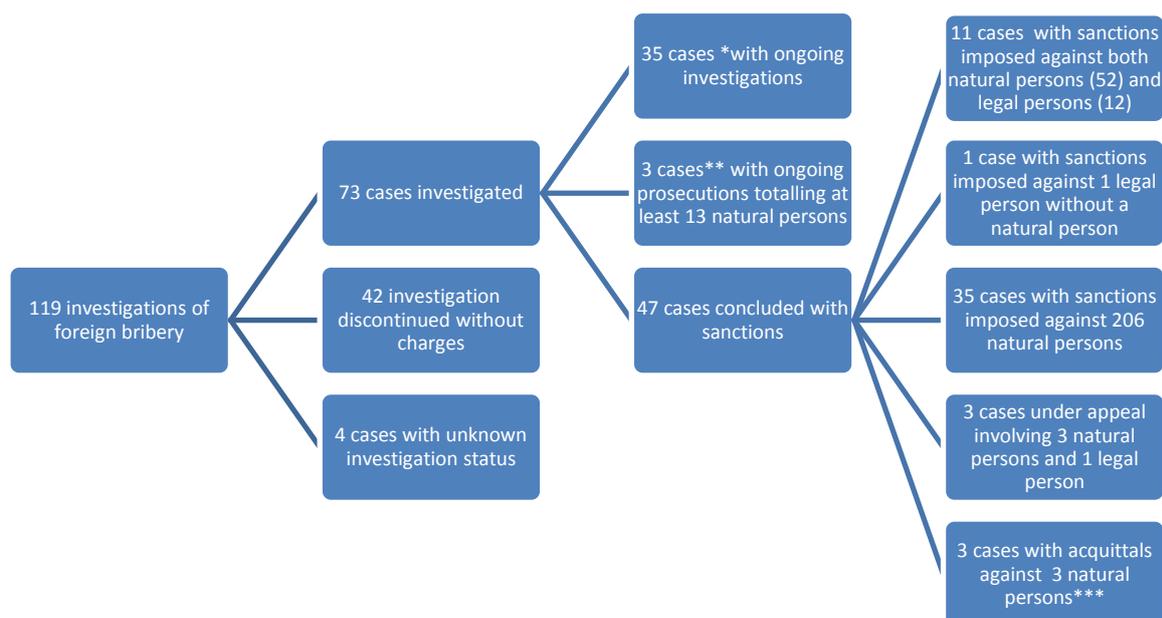
demonstrate its level of enforcement remain largely hampered by the lack of modern data collection tools at both Länder and Federal level.

The lack of statistics available on enforcement efforts and results in foreign bribery cases has been one of the main obstacles in assessing Germany's enforcement efforts. The collection of statistics in key areas would not only benefit the Working Group evaluations, it would assist Germany in monitoring its own implementation of the Convention as provided under Article 12 of the Convention. Therefore, they reiterate Phase 3 recommendation 4b and urge Germany to compile at Federal level, or ensure consistent compilation at Länder level of information and statistics relevant to the monitoring and follow-up of the enforcement of the German legislation implementing the Convention.

Investigation and prosecution of foreign bribery cases

18. Since Germany's Phase 3 evaluation and as of December 2017, a total of 121 foreign bribery cases have been investigated. Of these 121 cases, 35 cases are still under investigation, and 42 cases have since been terminated including for lack of grounds. The status of 4 cases is unknown. Forty-seven cases have resulted in sanctions imposed on individuals and/or legal persons, and formal charges are pending in 3 cases against 13 individuals.

Figure 3. Germany's foreign bribery cases since Phase 3 and as of December 2017



Note: *Some cases are still ongoing with regard to some of the defendants while having already led to sanctions for other defendants. **Only cases where a court formally admitted the indictment were counted. ***Two of the decisions are subject to an appeal and are therefore not final.

Concluded cases to date

19. In total, since the entry into force of the Convention in 1999, 67 foreign bribery cases (i.e. “cases pertaining to the foreign bribery sphere” - see definition at para. 28 below) have resulted in a total of 328 individuals sanctioned and 18 legal persons held liable.²⁸ Germany’s enforcement actions since Phase 3 and as of December 2017 are detailed in Annex 1. More detailed figures and analysis are provided under relevant sections of this report.

20. Since Phase 3, enforcement has significantly increased with proportionately more persons (whether natural or legal) sanctioned in the past 5 years than in the former 10 years. At the time of Phase 3, 69 individuals had been sanctioned in 20 foreign bribery cases, with a large number of individuals sanctioned in the Siemens case. Since Phase 3, 259 additional individuals have been sanctioned in 47 cases, 72 of these individuals being sanctioned in one case,²⁹ and 3 individuals have been acquitted.³⁰ An appeal is currently pending for two of these acquittals.³¹ The sanctions imposed against three natural persons in two cases are currently under appeal. At the time of Phase 3, 6 legal persons had been held liable for foreign bribery in 6 cases. Since Phase 3, 12 additional legal persons have been held liable in 11 cases – 2 persons being sanctioned in 1 case. One additional legal person was held liable in the Airbus Defence and Space GmbH case in February 2018. One additional case involving one legal person is currently under appeal.³²

21. Finally, the data provided by Germany shows an increasing use of the possibility to disgorge illicit profits without holding the legal person liable and imposing a fine. Eleven legal persons have received administrative forfeiture orders pursuant to section 29a OWiG without been held liable and receiving a fine in nine cases and two legal persons received criminal confiscation measures only pursuant to section 73(3) of the German Criminal Code (*Strafgesetzbuches, StGB, CC*) in one case currently under appeal.

High level of enforcement against natural persons

22. Of the 328 individuals sanctioned in the 67 cases that Germany considers as “pertaining to the foreign bribery sphere” (see definition in para. 28 below), 83 individuals have been sanctioned for the offence of bribing a foreign public official in 21 cases.³³ The 245 other individuals have been sanctioned for other offences.

23. Of the 83 individuals sanctioned for foreign bribery, 40 individuals were criminally convicted either following a full trial proceeding, including following a negotiated sentencing agreement (28

²⁸ The regulatory fine imposed against one additional legal person and the convictions of two individuals are currently under appeal and are therefore recorded separately.

²⁹ Case Bav (old) 2011/2.

³⁰ In one case, (case Bav. Old 2011/1) the information regarding the number of persons sanctioned could not be provided by Germany. Germany indicated in its revisions of the table on cases concluded since Phase 3 that the information was not known by the MoJ.

³¹ Case Bav (old) 2011/6; case BW (old) 2011/5; and case Bav 2011/3.

³² The legal person was found liable in first instance.

³³ i) See 2006-2007 Annual report, Bavaria (a) [1 individual]; ii) 2007-2008 Annual report, Bavaria (a) [2 individuals]; iii) 2008 Annual report, Baden-Württemberg (c) [3 individuals], iv) Saarland [3 individuals], v) Hamburg (b) [1 individual]; vi) case Bav (Old) 2011/1 [4 individuals], vii) case Bav (old) 2011/2 [9 individuals]; viii) case Bav (old) 2011/5 [10 individuals]; ix) case Bav (old) 2011/6 [8 individuals]; x) case Bav 2011/3 [7 individuals]; xi) case Bav 2014/4 [1 individual]; xii) case LS 2011/1 [1 individual]; xiii) case Thu (old) 2011/1 [1 individual]; xiv) case Thu (old) 2011/2 [6 individuals]; xv) case Hes (old) 2011/3 [8 individuals]; xvi) case Hes (old) 2011/9 [10 individuals]; xvii) case BW (old) 2011/5 [1 individual]; xviii) case BW (old) 2007/3 [1 individual]; xix) case BW 2011/7 [2 individuals]; xx) case BW 2012/1 [1 individual]; xxi) case BW (old) 2011/1 [2 individuals].

individuals) or following a penal order (12 individuals). Forty-three individuals had their case settled without criminal conviction.

Enforcement against legal persons in only a quarter of the cases

24. Of the 18 legal persons that were found liable in 17 foreign bribery cases, 8 legal persons were found liable in connection with foreign bribery in 7 cases. The 10 other legal persons were found liable in connection with other offences, including administrative offences. The evaluation team notes Germany's view that there are cases where a large number of individuals have been sanctioned in the same prominent cases, thus explaining that the seemingly low level of enforcement against legal persons is due to the way cases are counted. For instance, in the case involving Ferrostaal,³⁴ 10 natural persons were sanctioned while only one legal person was found liable. However, in other cases, while a large number of individuals have been sanctioned, no legal person was found liable. In total, 50 of the 67 cases concluded to date have resulted in sanctioning natural persons only. Legal persons were hence held liable in only 17 of the 67 foreign bribery cases concluded since 1999 (*i.e.* 25 % of the cases). A similar ratio applies to corporate enforcement since Phase 3 with only 11 of the 47 cases concluded resulting in corporate liability.

25. Both the number and prominence of the cases where only natural persons were sanctioned raise concerns regarding whether due consideration is given to enforcing corporate liability in foreign bribery cases. In a number of cases, it is unclear why Germany's corporate liability regime was not enforced, in particular where the prosecutors have established the liability of corporate representatives. While over a hundred allegations involving German companies have surfaced to date, no information was provided on the number of proceedings initiated against legal persons and the number of criminal proceedings dropped. This prevented the evaluation team from fully assessing the impediments to initiating proceedings and holding legal persons liable.

Use of alternative offences in cases pertaining to the foreign bribery sphere

26. In Phase 3, the Working Group noted that one prominent feature of Germany's enforcement of the Convention is the trend of sanctioning foreign bribery cases for alternative offences to foreign bribery. Since Phase 3, the trend has increased with only a quarter of the cases concluded for a foreign bribery offence.

27. During the on-site visit, a representative of the MOJ explained that cases were included by Germany in the *Länder's* reports when there were "reasonable grounds to believe that they pertain to the foreign bribery sphere". The grounds for including these cases investigated, prosecuted and/or sanctioned for alternative offences in the general scope of foreign bribery cases could not be verified by the lead examiners beyond the (sometimes succinct) description of the facts in the anonymised *Länder's* reports on cases. The data information in this report is thus based on the assessment made by the MOJ using this "foreign bribery sphere criteria". Where relevant to this evaluation, separate data are provided on the cases sanctioned for foreign bribery and the cases sanctioned for alternative offences.

28. Since Phase 3, three-quarter of the individuals were sanctioned for alternative offences, with 110 individuals sanctioned for commercial bribery, 23 individuals for breach of trust, 6 individuals for the administrative offence of violation of supervisory duties and 2 individuals for a tax offence. Only 73 individuals were sanctioned for foreign bribery *per se*. The underlying offence is unknown with regard to 45 of the individuals sanctioned since Phase 3.

³⁴ Case Bav (old) 2011/6.

Uneven concluded enforcement action across Länder

29. As in Phase 3, the number of concluded cases has continued to be uneven across *Länder*. Bavaria remains the most active *Land*, followed by Hesse, Baden-Württemberg (BW) and Hamburg. While the lead examiners note Germany's point that the level of economic activity varies from one *Länder* to another, differences in enforcement results are not always proportionate to the *Länder* economic activity. This is particularly true in *Länder* like Bremen and North Rhine-Westphalia where a number of large companies have their headquarters. Transparency International stresses this difference and notes that "the success of prosecution may depend on which *Land*'s prosecutors take charges".³⁵

Commentary

The lead examiners commend Germany for its leading role in enforcing the Convention. Since Phase 3, Germany has continued to demonstrate sustained efforts in investigating, prosecuting and sanctioning natural persons and, to a lesser extent, legal persons in foreign bribery cases. In particular, the lead examiners welcome the considerable increase in concluded enforcement actions, which results in part from the continued use of alternative offences to sanction natural persons in foreign bribery cases. This pragmatic approach, together with the use of a range of proceedings, including different types of resolutions, has contributed to increased sanctioning of individuals. As a result, a total of 328 individuals and 18 legal persons have been sanctioned in foreign bribery cases as of December 2017. This places Germany among the leading enforcers of the Anti-Bribery Convention. This remains true even if only counting the 83 natural and 8 legal persons sanctioned for the offence of foreign bribery per se.

Yet, uneven enforcement results are to be noted between the different Länder. Of particular concern is the discrepancy in the prosecutorial approach to holding natural persons liable as opposed to legal persons. Enforcement of corporate liability remains comparatively low in regard of Germany's prominent weight in the global economy, its level of exports and German companies' exposure to high risks of foreign bribery – both in term of economic sectors and countries. The lead examiners are concerned that almost twenty years after the entry into force of the Convention, Germany has not given full effect to its corporate liability regime. This report endeavours to identify the reasons for this state of facts and make recommendations to address this concern.

The lead examiners encourage Germany to implement these recommendations, and to continue to steadily investigate and prosecute foreign bribery offences against both natural and legal persons.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

30. Germany actively uses a range of sources to detect foreign bribery, the most prominent being the reports sent to prosecutors by tax authorities as a result of corporate tax audits. Germany is one of the few countries that have successfully detected cases through its tax authorities. In its questionnaire responses, Germany indicates that a large number of investigations are also initiated following requests for mutual legal assistance and from anonymous reports.

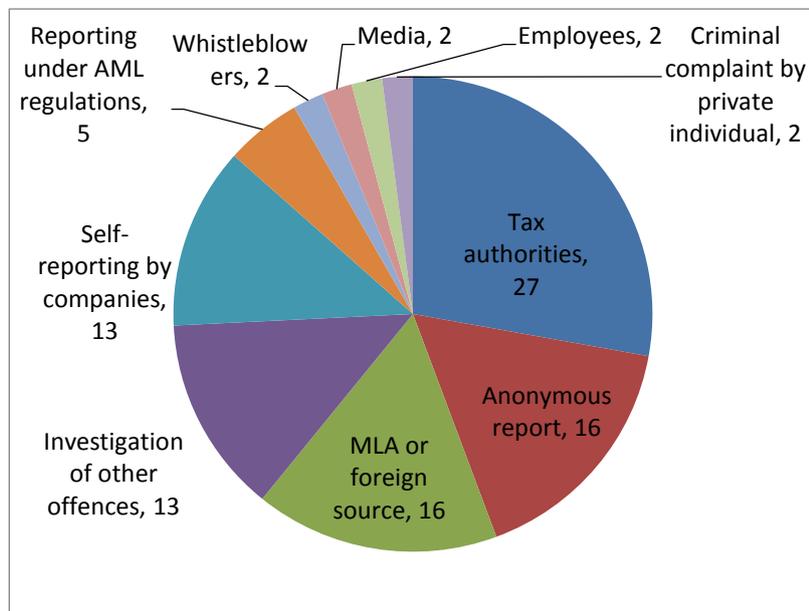
31. Germany was able to provide information on the detection method for 95 allegations of foreign bribery. Some of the cases were detected through more than one source. Additionally, Germany provided detection information for investigations initiated up to 31 December 2016. The data and description below are therefore illustrative and not exhaustive. Civil society pointed to two main challenges in the detection of bribery cases in Germany: the use of intermediaries and offshore companies.³⁶ These

³⁵ TI Germany Written submission

³⁶ See TI Germany Written submission.

challenges are not particular to Germany and constitute a horizontal issue among Parties to the Convention.

Figure 4. Source of Germany's Foreign Bribery Cases



A.1. Self-reporting by companies

32. Self-reporting (or voluntary disclosure) by German companies is one of the sources of foreign bribery investigations. Despite the absence of legal provisions governing self-reporting foreign bribery or related offences, Germany identified 13 foreign bribery cases that were brought to the attention of German law enforcement authorities via corporate self-reporting since Phase 3. Such legal provisions exist, however, with regard to tax offences for which self-reporting may even lead to impunity.³⁷ In some instances, corporate self-reporting was triggered directly by an anonymous report or an employee within the company. Corporate self-reporting has also been triggered indirectly by media reporting. In Baden-Württemberg, media reports led one company to initiate an internal investigation and self-report to German prosecutors.

33. In total, seven *Länder* reported having initiated foreign bribery proceedings after a company had voluntarily disclosed the alleged bribery. The two most experienced *Länder* in this regard are Bavaria and Hesse, with 3 cases each, followed by Bremen and North Rhine-Westphalia, with 2 cases each. In turn, Baden-Württemberg, Thuringia and Hamburg reported having received one report each. In the questionnaire responses, Hesse prosecutors indicated that they are encouraging companies to come forward and disclose at an early stage, any suspicion of corruption and other economic crimes.

34. Prosecutors from Bavaria explained that they have seen an increase in the number of companies that voluntarily disclosed misconduct to prosecuting authorities and stated that “past bribery investigations (e.g. Siemens case) have had a considerable deterrent effect” which may have pushed companies to self-report. One incentive in their view is the companies’ hope that the prosecutor to whom

³⁷ See Sections 371 and 398a of the German Fiscal Code (*Abgabenordnung, AO*); however, criminal tax investigations are always initiated to verify whether legal requirements for impunity after self-reporting are met.

they report will be more inclined to rely on the company's own investigation and cooperation and that any publicly visible investigative measures can be avoided.

35. However more recently, one prosecutor noted a marked decrease in companies' willingness to self-report misconduct. The questionnaire responses indicate that this decrease might notably be explained by the fear of exposing themselves to parallel proceedings by foreign authorities. During the on-site visit, prosecutors further stated that "confessions made to German authorities have in the past proven to be fraught with negative consequences for the accused persons, for example in the Siemens proceedings". As a result, "experienced defence counsel would advise companies about this risk."

36. Prosecutors, private sector representatives and lawyers indicated at the on-site visit that self-reporting foreign bribery can in practice be taken into account as a mitigating factor to reduce the level of a fine, or as a ground for dispensing with prosecution and entering into a resolution with natural persons under section 153a CCP. In practice, Germany reported that 2 of the 11 legal persons held liable since Phase 3 had self-reported foreign bribery to the prosecutors, a reason why the fines imposed were within the lower range of available sanctions.³⁸

37. Self-reporting has been used as a ground for fully dispensing with both prosecution and penalties. In the Atlas Elektronik case,³⁹ the prosecutor stated that one of the elements taken into consideration in the decision not to hold the company liable was the fact that it had self-reported the matter.⁴⁰ Instead, the prosecution imposed a forfeiture order under section 29a OWiG, which, as discussed under section C.1.d. is not tantamount to holding a legal person liable.

38. No guidelines have been developed on how to deal with corporate self-reporting either at Federal or *Länder* level or for companies. As a result, the *Länder* have had different approaches to corporate self-reporting. Private sector panellists stressed that Bavaria prosecutors are more open to self-reporting than other *Länder*, illustrating in this regard as well the heterogeneous approach to corporate enforcement across *Länder*. These panellists expressed a need for standard and uniform rules on self-reporting. They stressed that in the absence of such rules, there is little incentive for companies to self-report. Private sector lawyers echoed this request for clarity and the related need for clear rules and guidelines on self-reporting. Against this background, the Coalition Agreement for the current legislative term signed on 7 February 2018 (thereafter the 2018 Coalition Agreement) expressed its intention to create legislative standards and incentives for self-reporting and cooperation by companies.

Commentary

The lead examiners note that incentives to self-report may be further bolstered through the introduction of a clear framework for settling cases.

In line with the intention expressed in the 2018 Coalition Agreement, they recommend that Germany introduce clear and transparent guidance on the procedures and criteria attached to self-reporting by companies, when concluding a foreign bribery case, including the nature and degree of co-operation expected from the company, the sharing of the results of companies' internal investigations, considerations of anti-corruption compliance, remedies and monitoring requirements, with a view to

³⁸ In the case Bav 2013/2 and case NRP 2013/2.

³⁹ Case Bremen 2013/2.

⁴⁰ In this case the prosecution also took into account, *inter alia*, that the company cooperated in a very extensive way, had "taken intensive and extensive compliance measures in recent years and had sustainably improved the undertaking's compliance culture" including a new structure of the compliance offices. Additionally, the prosecution also took into account that the company came to an agreement with the tax office and as a result, a total sum of EURO 20 000 000 had been classified as non-tax-deductible operating expenses.

ensuring a consistent exercise of discretion by the prosecutors across Länder. [2009 Recommendation III.iv and Annex I.D]

Finally, they note that the fear of facing multiple proceedings in various countries may create a disincentive for self-reporting to German enforcement authorities and that this is a horizontal issue among Parties to the Convention.

A.2. Reports of Foreign Bribery from Whistleblowers and the Adequacy of Germany's Whistleblower Protections

39. In Phase 3, The Working Group recommended that Germany enhance whistleblower protection through any appropriate means, such as codifying existing protections (recommendation 6). Germany explained that while whistleblower protection was not explicitly regulated, protections existed through general labour laws which had been further defined by the courts.⁴¹ A decision of the Federal Labour Court of 2003 stated that whistleblowers who report allegations in good faith cannot be dismissed, but it added the important caveat that making an external report must be “proportionate”.⁴² Overall, it has to be decided in court and on a case by case basis if the requirements for protection are met.

40. As in Phase 3, existing protection has not been codified or enhanced through other means, leaving the recommendation unimplemented. The concern expressed with the recommendation is further reinforced as, since Phase 3, only two foreign bribery investigations have arisen from a whistleblower’s report, even if Germany emphasises that there were also some anonymous complaints. In its written submission, Transparency International indicated that it considers the lack of legislation protecting whistleblowers as one of the main weaknesses in German anti-bribery laws. Other civil society open sources and media reports list a number of high-profile instances in Germany where whistleblowers who reported serious suspicions of misconduct to the prosecution authorities have been dismissed from their employment, even where the information disclosed appeared to have been disclosed in good faith and on reasonable grounds.⁴³

41. The former Coalition Agreement (2013-2017) included a duty to examine whether whistleblower protection in German law met international standards. During the on-site visit, the evaluation team was informed that an internal report commissioned by the Federal Ministry for Labour and Social Affairs had concluded that based on European and International standards there was no obligation for Germany to introduce whistleblower protection legislation. It also concluded that German law, through case law, protects employees from repressive measures from employers. This report, so far, has not been published.

42. Germany continues to rely on labour law, as well as constitutional requirements, and the relevant case law to afford protection to whistleblowers. German case law has been complemented by a 2011 decision from the European Court of Human Rights which restates the principle that an employee can, as a last resort, disclose information to a third party when it is clearly impracticable to report the matter internally.⁴⁴ The decision also confirmed that the right to freedom of expression of the employee has to be balanced against the right of the employer to expect loyalty and avoid damage to its reputation. If a dispute arises, a court will decide the issue where an employer takes a decision that negatively affects the employees' interests, e.g. by terminating their employment. The protection against repressive

⁴¹ Section 626 Civil Code, section 1, Protection against Unfair Dismissal Act, Article 2, para 1 of the Basic Law on personal freedom.

⁴² Federal Labour Court, Bundesarbeitsgericht, decision of 3 July 2003 – 2 AZR 235/02

⁴³ See summary at [Blueprint for free speech - Germany briefing \[2018\]](#) and example media report, Deutsche Welle [undated]” [Germany's dire record on protecting whistleblowers](#)”

⁴⁴ *Heinisch v Germany*, decision no. 28274/08, ECtHR (Fifth Section)

measures by the employer is guaranteed by the aforementioned laws as they have been shaped by the courts. However, due to fundamental principles, a court may have to decide whether the protection offered by the law applies in a concrete case. However, Transparency International, in its written submission, considered the lack of codified whistleblower protection in Germany as one of the two main issues in Germany's anti-bribery framework (the other one being corporate liability). The protection of a whistleblower is subject to a decision of a court, which will have to balance considerations based on criteria that are still to be clearly set. Importantly, reliance on the Labour courts offers a whistleblower protection only *after* an employer takes a decision adverse to their interests, such as dismissing them. It is thus not in line with the protection recommended under paragraph IX iii) of the 2009 Recommendation.

43. In the public sector, since 2009, Federal civil servants have enjoyed specific protection under the law when reporting bribery (section 331-337 CC).⁴⁵ This forms a statutory exception to the secrecy laws which normally prevent civil servants from reporting to a third party. This protection was deemed satisfying by the civil servants at the on-site visit. However this law limits the protection thus granted to the right to report directly to the law enforcement authorities but does not provide any additional protection to whistleblowers from internal discrimination.

44. While not directly affecting the *protection* of whistleblowers, initiatives have also been taken within some *Länder* where web-based anonymous reporting channels have been set up for the reporting of corruption allegations directly to the State Criminal Police Office.⁴⁶ If information concerning another *Land* is received through such reporting channels, it will be forwarded to the respective authorities. A case of foreign bribery was detected by the prosecution authorities following a report through this channel.⁴⁷ A number of federal, state and local authorities as well as State Owned Enterprises have also put in place reporting systems including the use of external ombudsmen to whom complaints can be made.⁴⁸

45. Improvements for certain categories of private sector employees have also occurred since Phase 3. A revision to the German Corporate Governance Code ("the Code") in April 2017 recommends that any publicly listed company should give employees the opportunity to report "in a protected manner" suspected breaches of the law within the company.⁴⁹ The provision is not mandatory, but if a company does not implement the recommendation, it must publish in its annual declaration the reasons for its lack of action (a principle known as "comply or explain").

46. Large companies' representatives explained during the on-site visit that the change made little difference in practice as they already had put into place whistleblowers' reporting channels, and in some cases, rules protecting whistleblowers. For example, one large company's internal rule provides that employees making allegations in good faith cannot be sanctioned.⁵⁰ However the Code does not define further what the term "in a protected manner" means in practice. Whether the Code would prevent a company from dismissing an employee would depend on the company's interpretation of that term. By contrast to the views expressed by large companies, a medium-sized public company described this development as "soft law". This new recommendation also does not apply to the vast majority of German companies which are not publicly owned. Employees of these companies, well over 50% of the

⁴⁵ Section 67(2) Act on Federal Civil Servants, where the rules on professional secrecy are explicitly abrogated.

⁴⁶ E.g. [Berlin "hinweisgebersystem"](#)

⁴⁷ Case Hes 2013/1i, detected through the web-based Business Keeper Monitoring System

⁴⁸ E.g. [Deutsche Bahn whistleblowing system](#)

⁴⁹ Section 4.1.3 Corporate Governance Code

⁵⁰ E.g. [Siemens reporting channels](#)

workforce, are thus still restricted to the general case law protections, which were deemed insufficient in Phase 3.⁵¹

47. There is little justification for laws which provide higher levels of protection for some categories of employees and less for the majority. Progress has been achieved in certain areas, but remains partial in scope and specific to employees of certain entities.

Commentary

The lead examiners are concerned that Germany's existing law provides insufficient safeguards to protect whistleblowers who report foreign bribery allegations in good faith and on reasonable grounds from discriminatory actions. They recommend that Germany urgently amend its legislation to provide clear, comprehensive protections for whistleblowers, for example, by enacting a dedicated whistleblower protection law which applies across the public and private sectors. [2009 Recommendation IX.iii; Phase 3 recommendation 6]

A.3. The Ability of the Ministry of Foreign Affairs to Detect and Report Foreign Bribery

48. In spite of Germany's efforts since Phase 3 to raise awareness of foreign bribery in German missions abroad, no foreign bribery cases have been detected by either the Ministry of Foreign Affairs (MFA) or embassies. Germany stated in its questionnaire responses that its embassies are obliged to point out to companies that bribery of foreign public officials is illegal under German law. It explained that individual embassies decide, based on the local situation, whether to undertake further awareness raising activities or provide advice on compliance issues. A panellist indicated for instance that the German Embassy in Brazil had produced a brochure on bribery risks. Companies indicated that embassies could play an important part in detecting and preventing bribery, particularly in cases of solicitation towards smaller companies. A recent meeting in Berlin between business representatives and the Ministry of Foreign Affairs asked embassies to take a more active role. The MFA, in co-operation with the MOJ and MOE offered specific training to diplomats before taking up new posts abroad to further inform them, for example, on compliance issues and reporting channels. This training took place on 5 June 2018.

49. The Ministry of Foreign Affairs is currently revising its circular on foreign bribery that has been sent out to embassies for several years. Germany states that internet sites of embassies and brochures published by the MOE provide additional guidance abroad. However the evaluation team found that internet sites in high risk destinations had very limited information. Germany indicates that the MOE and the MOJ also plan to update information on foreign bribery in a brochure for companies that will be made available to embassies with the circular or through other channels.

50. During the on-site visit, representatives from the Ministry of Foreign Affairs indicated that Germany has issued "general instructions to embassies" to report foreign bribery suspicions. After the on-site visit, Germany also stated that the MOE is in the process of introducing formal reporting mechanisms for embassies. However no formal reporting mechanism to prosecutors had yet been established, nor were there any guidelines explaining how to deal with bribery allegations in local media. Instead it was "hoped that embassies would react and report knowledge to the Ministry". No reporting by the Ministry to prosecutors is provided, but panellists stated that this would be done if a "serious case" were to arise. Germany states that the information on foreign bribery allegations reported internally so far was not of sufficient substance to justify reporting to the German public prosecutors' office. However,

⁵¹ Statistics from: ["Stiftung familienuntemehmen" \[2018\]](#)

the fact that no foreign bribery case has been reported through these channels suggests that the reporting mechanism needs to be clarified and improved.

Commentary

The lead examiners are concerned that the current reporting mechanism in place in German embassies lacks clarity and is hence unlikely to generate reports to the appropriate authorities. They recommend that Germany ensure that the MFA develops guidelines for all officials posted abroad to require the reporting of foreign bribery, explain the reporting channels, and provide advice on how to detect foreign bribery, e.g. through enhanced media monitoring and alerts. [2009 Recommendation III.iv and IX.ii]

A.4. Germany's Capacity to Detect Foreign Bribery through its Anti-Money Laundering (AML) Framework

51. Germany's Financial Intelligence Unit (FIU) was, until June 2017, located within the Federal Criminal Police Office (BKU) in Wiesbaden. The new Money Laundering Act (*Geldwäschegesetz, GwG*) altered this and a new unit is now based within the Central Customs authority (GZD) in Cologne, under the remit of the Federal Ministry of Finance, and organised along administrative lines.⁵²

52. Germany indicated in its questionnaire responses that section 4a of the Financial Services Supervision Act (*Finanzdienstleistungsaufsichtsgesetz, FinDAG*) and Section 53 *GwG* provide that supervisory authorities have to establish reporting mechanisms for alleged violations of, for example, the Money Laundering Act.⁵³ Reports can be made by anyone and anonymously. Except for cases of intentional or grossly negligent misinformation persons who submit reports on potential or actual breaches are protected against consequences under criminal law or labour law regarding these reports. The reporting mechanism established by the Federal Financial Supervisory Authority (BaFin) pursuant to Section 4a *FinDAG* has, according to the BaFin's written responses, been well received and generates substantial information for supervision. The evaluation could not discuss these mechanisms in detail during the on-site visit as no BaFin representatives attended. For the other supervisory authorities which had to establish reporting mechanisms pursuant to the Money Laundering Act, Germany stated that it is too early to make an assessment of their effectiveness, as they have been put in place only four months ago.

53. The questionnaire responses also indicate that the FIU is now being given access to more data than before, in order to support its analytical activities; its powers to request information and data from law enforcement, revenue and administrative authorities are now enshrined in law. This allows the FIU to analyse a suspicious transaction report (STR) in a targeted way and to perform a "filter" function. Hence, only the genuinely substantial cases are forwarded to the competent law enforcement authorities. If the FIU has indications that a transaction is related to money laundering, it also possesses the authority to prevent the transaction from being executed during a period of up to one month in order to further analyse available information.

54. Co-operation with domestic authorities responsible for the prevention, investigation and prosecution of money laundering has also been enhanced. For example, pursuant to section 31b of the Fiscal Code (*Abgabenordnung, AO*) the tax authorities and other authorities who, pursuant to section 44 *GwG* obtain knowledge of a suspicious transaction or asset must submit a report to the FIU. Conversely, the FIU will also pass on findings from the evaluation of STRs to other domestic authorities, to the extent

⁵² The new Money Laundering Act (*Geldwäschegesetz, GwG*), came into force on 26 June 2017.

⁵³ The provisions transpose European law (e.g. the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering

that their competences are affected (section 32 *GwG*). The Money Laundering Act overrides under certain conditions financial secrecy obligations of certain professions e.g. auditors who are now obliged to provide STRs to the FIU.

55. Germany also states that international co-operation between FIU units has been simplified and intensified (section 33 *et seq.* *GwG*). However, while the legislation has been amended to ensure that the FIU provides information to other domestic authorities, participants in the on-site visit indicated that in practice, the unit is extremely new and not yet operating at its full capacity. This did not allow the evaluation team to assess the performance of the Unit in detecting foreign bribery nor to assess the awareness raising activities it may conduct. It was not either possible for Germany to provide any statistics to the evaluation team on the new set-up.

56. While there is no official list of "politically exposed person" (PEPs), the reporting entities use lists obtained from commercial providers to manage their own risk and customer due diligence. The FIU also has access to such PEPs-lists, which are matched with data received from the reporting entities, which have occasionally reported on PEPs. The Anti Money Laundering Act contains specific provisions dedicated to PEPs,⁵⁴ which will be reflected in the official guidelines that are currently being updated.

57. Five cases of foreign bribery had previously been detected either through the FIU, or via a suspicious transaction report (STR) from a bank. No cases had been detected via communications with foreign FIU's. Given German companies' exposure to high risks of foreign bribery, the number of cases detected through the FIU is strikingly low. The new unit organisation could therefore be seen as an opportunity for improvement. However, particularly in the absence of statistics or even qualitative information, it is not possible for the evaluation team to assess the likely impact on Germany's detection of foreign bribery cases through this source.

Commentary

The lead examiners recommend that the Working Group follow up the ability of Germany's new FIU (i) to detect foreign bribery through information received by the FIU including suspicious transaction reports, information from law enforcement agencies and co-operation with international counterparts; and (ii) to effectively disseminate relevant information to law enforcement agencies.

A.5. The Ability of German Accountants and Auditors to Detect and Report Foreign Bribery

58. The *Länder* reports do not mention any cases of foreign bribery that were reported by accountants or auditors. Germany emphasises that such cases may nevertheless have been reported to the company's management or supervisory board. As examiners of companies' financial records, accountants and auditors are also uniquely placed to detect and report foreign bribery. The fact that this has never reportedly occurred to date in Germany, in spite of German companies' high risk of foreign bribery and the good level of detection in contrast demonstrated by the tax authorities, may be a motivation for reassessing the question. Germany stresses that professional secrecy is a key pillar of the auditors' responsibilities under German Law.⁵⁵ German accounting law and audit requirements meet EU and International standards, and were updated in domestic law in 2016 when Germany implemented the 2014 EU Audit reforms.⁵⁶ Accounting firms and national bodies, such as the German Institute for

⁵⁴ See e.g. Section 1 para 12 *et seq.*, and section 15 Anti Money Laundering Act.

⁵⁵ Section 323 Commercial Code, Section 43 Act on profession of auditors

⁵⁶ EU Audit Reform (EAR) – Directive 2014/56/EC and Regulation 537/2014

Auditors (IDW) or the German Chamber of Auditors (WPK), regularly communicate to their members' information relevant to identifying corruption.⁵⁷

59. International Standards on Auditing (ISA) are not mandatory in Germany, but the IDW sets its own standards which are based on ISA unless German law contains a different requirement.⁵⁸ An equivalent provision to ISA 240 and 250 regarding reporting of bribery to company management is enshrined in IDW PS 210. As in Phase 3, auditors in Germany have a duty to inform a company's management and supervisory board of suspected foreign bribery.⁵⁹ The additional report to the supervisory board is an instrument to convey confidential information, for example, on significant violations by statutory representatives of the company. However, they are bound by laws of professional secrecy which prevent them from reporting irregularities, including foreign bribery, to the law enforcement authorities.⁶⁰ German law also provides for specific reporting requirements.⁶¹ In Phase 3, a recommendation was made that Germany consider extending the exceptions to include the reporting of suspicions of foreign bribery (recommendation 8). After consideration, Germany decided not to amend the law based notably on the changes on EU level.

60. Under EU Regulation 537/2014, which is directly applicable in German law, auditors are required to inform the competent authorities if the management board fails to investigate an auditor's report. This forms one of the exceptions to laws on professional secrecy. But there is no guidance in respect of how extensive this investigation needs to be. Given that a breach of professional secrecy is a criminal offence, an auditor is very unlikely to decide that there has been a failure to investigate, unless clear criteria and guidance is provided with regard to standards of internal investigations and remedial action required. Germany states that as this regulation is directly applicable in all EU member states, it would be advisable if on a European level guidance is developed to help auditors apply this provision.

Commentary

The lead examiners recommend that Germany consider taking appropriate steps, including through encouraging guidance on EU level for the application of the new requirements under EU law for reporting to competent authorities in order to ensure more legal security for auditors when they report to external competent authorities, including law enforcement authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure auditors making such reports reasonably and in good faith are protected from legal action as appropriate. [2009 Recommendation III.iv, v, X.B iii, v]

A.6. Reporting Foreign Bribery by German Tax Authorities

61. In Germany, tax authorities have played an active role in uncovering foreign bribery and have been the most common source of foreign bribery investigations. Information referred by tax authorities is usually uncovered during the assessment of the tax returns, tax audits of companies or in the course of criminal tax investigations. The primary source of detection in Germany is corporate tax audits, through

⁵⁷ E.g. the evaluation team received a publication by Accountancy Europe "Fighting Financial Crime: Auditor's role in the fight against crime, corruption and money laundering", Dec 2017.

⁵⁸ See [IDW auditing standards \[2018\]](#)

⁵⁹ Section 321 Commercial Code

⁶⁰ Section 43(1) Act on profession of auditors and Section 333 Commercial Code

⁶¹ This is the case for money laundering offences but also in general under Article 7 of EU regulation 537/2014 for the statutory audit of public interest entities, where it is compulsory to report irregularities to the competent authorities if the entity does not investigate the matter. Further, there are specific information requirements under German banking and insurance law as well as under Article 12 of EU regulation 537/2014 for reports to supervisors of public interest companies.

which tax authorities access companies' accounts and records including information on the company's cash flows. This is all the more relevant given that several foreign bribery cases involving German companies have revealed the use of slush funds to conceal bribe payments to foreign public officials.

62. At the time of Phase 3, 15 cases of suspected bribery had been initiated in Germany following a report by tax authorities. In its questionnaire responses, Germany refers to 27 investigations opened based on a report from tax and revenue authorities. At least 19 of these investigations appear to have been initiated since Phase 3 in 7 *Länder*. Eight of these cases have led to sanctions, 6 have not proceeded past the investigative stage and the remaining cases are ongoing. The tax and revenue authorities in the *Länder* of Hamburg and Bavaria appear to be the most active in detecting foreign bribery. Prosecutors from Hamburg and Hesse also stated that they have seen an increase in the number of cases involving foreign bribery detected as a result of information provided by tax authorities.

63. The high level of detection through tax authorities in Germany is grounded on a clear statutory obligation for German tax and revenue authorities to report to law enforcement authorities,⁶² combined with a low threshold for reporting, and regular training on the basis of the Handbook on Combatting Corruption – Handbook for Auditors (as of 26 November 2014) as well as the OECD Bribery Awareness Handbook for Tax Examiners.⁶³ Tax and revenue authorities do not need to assess whether sufficient evidence exists to prove the offence when reporting to law enforcement authorities. Nor do they need to take investigative steps to determine whether the statutory period for prosecution has lapsed or whether the use of certain evidence may be prohibited. The suspicion is independent to any tax fraud and tax authorities have to report even if taxpayers are not claiming the suspicious expenses for tax deduction. The onus to prove the legality of the expense is on the taxpayers. The German tax authorities are hence in a strong position to request additional documentation to prove the legality of the expenses.⁶⁴ Large and medium size companies as well as private sector lawyers emphasised the deterrent role played by the high level of detection and reporting by tax authorities.

64. In some *Länder*, the role of tax authorities in detecting and reporting suspicions of foreign bribery to law enforcement is enhanced by the good level of cooperation they have with the public prosecution office and the police authorities. All prosecutors as well as police representatives attending the on-site visit commented positively on their level of cooperation with tax authorities. Private sector representatives also stated that, when bribes are identified, companies would systematically report to both tax and law enforcement authorities at the same time, hence prompting cooperation from the early stages of proceedings.

Commentary

The lead examiners commend Germany for the pivotal role played by the German tax authorities in uncovering foreign bribery. They note that Germany is one of the very few Parties to the Convention to have successfully detected foreign bribery cases through this channel. They recommend that the Working Group identify the combination of a strong and clear reporting obligation, low reporting threshold and specific training as a good practice which has proven to be effective in combating bribery of foreign public officials and enhancing enforcement in Germany.

⁶²Section 4(5) 1st sentence No.10 of the Income Tax Act (EStG).

⁶³OECD (2013) "[Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors](#)" (available in German).

⁶⁴See OECD (December 2017) "[The Detection of Foreign Bribery](#)".

A.7. Prevention and Detection of Foreign Bribery through Official Development Assistance (ODA) and Export Credits

a. *Some prevention measures but lack of detection through Official Development Assistance (ODA)*

65. In Phase 3, the Working Group recommended that Germany 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 (recommendation 11c). Germany's ODA is mainly provided through two implementing agencies: the KfW Development Bank (KfW), and the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ).

66. The amount of Germany's ODA has increased significantly in recent years. In meeting the UN target of 0.7% of GDP spent on aid, Germany's spending increased from USD 17.9 billion in 2015 to USD 24.7 billion in 2016.⁶⁵ This makes Germany the second largest provider of ODA behind the United States.

67. Both KfW and GIZ provided copies of their anti-corruption clauses which apply to partner contracts. Both make specific reference to bribery. In addition, KfW contracts include clauses concerning other criminal acts such as fraud and embezzlement. Agencies representatives explained that the contracts specifically obligate all recipients and contractors to comply with Germany's anti-corruption regulations. Business partners have to declare possible involvement in corruption and any past convictions. During the on-site visit, KfW and GIZ indicated that they verify that recipients and partners have not engaged in foreign bribery and are not on any UN/EU debarment lists. On this basis, the Phase 3 recommendation appears to be implemented.

68. Both KfW and GIZ have improved their general anti-corruption efforts in recent years. For instance both have set up a whistleblowing system which includes the opportunity for staff and external parties to report to an independent ombudsman.

69. Germany states that foreign bribery suspicions were reported through this system, but they were too vague to report to law enforcement authorities. However, other criminal offences have been reported. During the on-site visit, GIZ explained that its system tackles anti-corruption within the agency, with a main focus on the risk of GIZ staff receiving bribes. GIZ does not have a systematic policy regarding corrupt behaviour outside of the agency. GIZ representatives explained that they mainly provide technical expertise, not financial contributions to the public institutions of the partner country. They would hence be "less exposed" to active foreign bribery. GIZ never had to terminate a contract due to foreign bribery in recent years.

70. Germany stated after the on-site visit that GIZ undertakes audits of its contracts at least once a year. Additionally, it emphasises that if there is any indication of corrupt behaviour in the course of the project, GIZ would react immediately, investigating the matter in house and with external auditors. It was also stated that public prosecution offices would be informed where necessary. GIZ does not have any guidelines for sanctioning companies allowing suspension from contracting if a company is convicted of bribery outside of the project. A specific allegation of corruption that had arisen in the press was identified by the evaluation team and a related question asked in the questionnaire and at the on-site visit.⁶⁶ Little information was provided at the on-site visit but Germany later indicated that, in response to credible accusations of coordinated attempts to improperly use project resources and threats to the

⁶⁵ OECD, DAC – Development Aid at a Glance, (December 2017)

⁶⁶ Garowe Online (March 2018) "[Somalia: Corruption prompts suspension of EU funded road project in Puntland](#)" and Garowe Online (April 2018) "[Puntland president makes unannounced visit to Kenya](#)".

personal safety of project staff, project implementation had been suspended. A technical audit mission and political consultations were ongoing and future project implementation would depend upon their outcome.

71. However, GIZ explains that it has a comprehensive risk management system which deals with the risk of foreign bribery. During the on-site visit, the evaluation team noted that some uncertainty was expressed with respect to the scope of GIZ obligations to report corrupt behaviour. GIZ representatives emphasised that reporting locally could put staff at risk and it would only be in some cases that German law enforcement authorities would have jurisdiction.

b. Enhanced prevention but lack of detection through Export Credits

72. In Phase 3, the WGB commended Germany for its efforts in following the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits. This Recommendation is due to be updated shortly, but Germany generally meets the existing standards in the 2006 Recommendation. As in Phase 3, Euler Hermes, Germany's Export Credit Agency, ensures applicants sign a "no bribery" declaration. This declaration states that neither the applicants, nor anyone else on their behalf has paid any bribes in respect of the transaction. Signing the declaration is a condition of cover being granted. No automatic refusal of cover occurs if an applicant has previous convictions for bribery, but enhanced due diligence takes place, and the application is suspended until it is complete.

73. Since Phase 3, two significant changes have been made to the approval process. Since April 2016, applicants have been required to provide additional details regarding criminal investigations and international debarment lists. In November 2017, Euler Hermes introduced new due diligence processes which scrutinise high risk areas, in addition to any commission paid to third parties, including potential conflict of interest of the applicants' representatives, responsible for making the relevant decisions for the transaction, the tender process (if relevant) and any offset arrangements. During the on-site visit Euler Hermes representatives indicated that it is too early to monitor the impact of these changes. Yet, no case of foreign bribery has been detected by Euler Hermes. However, Germany indicates that when reliable information uncovers corrupt activities in connection with a covered transaction or policyholder, the relevant law enforcement authorities are promptly informed. This would have led to formal investigations into fraudulent practices in a number of cases.

74. Germany explained that at present, Euler Hermes does not have access to the newly created Federal Debarment Register ("*Wettbewerbsregister*" see further in section C.3a (ii)). The evaluation team were told that access to this "will be assessed". The same restriction applies to German development aid agencies. Direct access to the register would provide an effective due diligence tool for these agencies in their screening of applicants.

Commentary

The lead examiners note the implementation of anti-corruption policies to prevent foreign bribery by Germany's ODA agencies and the setting up of internal and external reporting mechanisms. However, they are concerned by the lack of prevention, detection and reporting of foreign bribery allegations to law enforcement authorities. The lead examiners recommend that Germany take steps to ensure that GIZ and KfW staff report suspicions of foreign bribery arising in the context of projects commissioned by the German Federal Government and involving German companies or individuals to German law enforcement authorities and issue guidelines to staff on the reporting procedure. [Convention Article 3(4), 2016 Recommendation for Development Cooperation Actors, 7, iii.]

The lead examiners welcome the changes implemented by Germany to its export credits regime. They recommend that export credit and official development assistance providers be granted access to the Federal Debarment Register [Convention, Articles 2 and 3.4 2009 Recommendation, XI.i, ii and XII]

A.8. Other Sources of Foreign Bribery Allegations including investigative journalism

a. Foreign Authorities

75. Germany has experience in initiating foreign bribery investigations based on information provided by foreign law enforcement authorities. In its questionnaire responses Germany indicates that 14 investigations in 9 *Länder* have been opened following a mutual legal assistance (MLA) request. In one of these cases, the information provided by foreign law enforcement authorities triggered the opening of a preliminary investigation; formal investigation proceedings were only opened following a report by the German tax authorities. In addition two investigations were initiated based respectively on a report from a North American liaison officer and on the basis of a report by the European Anti-Fraud Office (OLAF).

b. Investigative Journalism

76. In Germany, prosecutors can open an investigation based on a sole media report, or a preliminary investigation when the report does not contain corroborative facts sufficient to open a formal investigation. For instance, in a case where a CEO publicly commented in a daily newspaper on the need to pay bribes in order to secure business, the prosecutors were able to initiate an investigation based on media reports. In 2017, Germany ranked 16 out of 180 countries in Reporters without Borders World Press Freedom Index. This suggests that German investigative journalists operate in an environment conducive to the reporting of potential bribery allegations.

77. Monitoring of foreign bribery allegations in the media is reportedly done by the investigating authorities in the *Länder*. Bribery allegations are often reported in the media of the foreign countries where bribes have allegedly been paid. Germany stated that foreign media reports on German companies may have triggered self-reporting to law enforcement authorities by these companies. The use of media reports as a primary source of detection in Germany has hence been two-fold: Media reports have both directly led to the opening of investigations by law enforcement authorities, and incited German companies to self-report to law enforcement authorities leading to investigation proceedings.

78. Since Phase 3, only two *Länder* (Bavaria and North Rhine-Westphalia) have respectively reported one foreign bribery investigation based solely on media reports.⁶⁷ Three *Länder* have reported proceedings that were initiated based both on media reports and either an anonymous criminal complaint or a voluntary disclosure by the company.⁶⁸ This is low compared to the number of allegations involving German companies that have surfaced to date.⁶⁹ A large number of these allegations have also been referred to Germany by the Working Group on Bribery. The allegations are handled by the MOJ and information is referred, where appropriate, to the *Länder* and to the MOJ division in charge of mutual legal assistance. Yet German authorities indicated that information referred by the Working Group was never used as a primary source of detection. Germany indicates that recent media reports on prominent bribery allegations potentially involving German companies in Parties to the Convention have led in some cases to the opening of preliminary investigations.

⁶⁷ Case Krauss Maffei Wegmann [case *Bav* 2013/2,], and case *NRW* 2016/1.

⁶⁸ Case *BW* Old 2012/1, Case *Bav* 2014/2 and two cases in Hesse.

⁶⁹ For instance: DW (September 2017) "[Israeli police make six arrests over ThyssenKrupp 'Submarine Affair'](#)"; Reuters, (2015), "[Brazil comptroller says Germany's Bilfinger seeking leniency deal](#)"; GIR (2015) "[ThyssenKrupp and Ferrostaal dismiss new foreign bribery claims](#)"; Yahoo (2014) "[Romania to probe Microsoft reseller 'bribery' of ministers](#)"; Wall Street Journal (2010) "[H-P Executives Face Bribery Probes](#)"; The Daily Star (2006) "[Six former, serving PDB officials accused in ACC's first-ever case](#)".

Commentary

The lead examiners welcome the possibility available in Germany to initiate investigation proceedings based on a media report. To ensure that this possibility is used to its fullest extent, they recommend that the Working Group follow up whether existing sources of foreign bribery allegations (including the information referred to Germany by the Working Group) are properly used in due time by the competent authorities to ensure that Germany further detect and open investigations based on media reports.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B.1. The Foreign Bribery Offence and Alternative or Additional Offences

a. Germany's foreign bribery offence: A new Anti-Corruption Act

i. Incorporation of the foreign bribery offence into the Criminal Code

79. A new Anti-Corruption Act entered into force on 26 November 2015. It incorporates the foreign bribery offence, formerly in the separate Act on Combatting International Bribery ("*IntBestG*"), into the Criminal Code (CC) through a new section 335a CC. Pursuant to section 335a CC, the offence of bribery of domestic public officials under 334(1) CC also applies to the bribery of foreign public officials. Section 334(1) CC remains unchanged from Phase 3 except for the addition of "European Public Officials". Section 335a CC no longer requires a connection with international business transactions. As noted in other country reports, without posing any major problem, this amendment makes the offence both broader but also less specific.⁷⁰

80. Section 334(1) CC covers bribes paid to induce an act in breach of duty, (i.e. an act that violates or would violate official duties of the public official involved). The offence also covers bribes paid to influence a public official's discretion (section 334(3) CC). Doubts were cast over the extent of such coverage in Phase 3 as section 333 CC, which provides for a separate offence to cover bribes paid to induce a lawful act for domestic bribery, was not included amongst the criminal offences extended to foreign bribery. This is not the case with the new section 335a CC but Germany's questionnaire responses indicate that lawful acts would be covered under section 334(3)1 CC as it would be sufficient that the act of foreign bribery be within the public official's discretion.

81. Prosecutors at the on-site visit unanimously confirmed that the coverage of discretion is now strongly anchored not only in the wording of the foreign bribery offence, but also in case law. Germany provided two decisions of the Federal Court of Justice in support of this confirmation.⁷¹

ii. Coverage of the different types of foreign public officials in the Criminal Code

82. European Public Officials are now directly covered under section 334(1) CC as are domestic officials, judges and arbitrators. Foreign public officials, as well as officials of a public international organisation are also covered under section 334(1) CC through the new section 335a CC. Bribery of foreign members of parliament is covered by two provisions: section 108e CC (which was broadened in 2013) and the *IntBestG* which was maintained in respect of members of foreign and international parliaments. The unchanged *IntBestG* provision (Section 2) is, to an extent, wider than the amended section 108e CC, which applies to domestic, foreign and international members of parliament. It includes

⁷⁰ E.g. France Phase 3 report, para. 18.

⁷¹ See Federal Court of Justice decisions: BGH, 1 StR 541/01: No. 39, 43; and BGH, 5 St 323/06: No. 10-12.

criminalisation of attempted bribery and does not require that the bribe is given in return for performing or refraining from performing an act “upon assignment or instruction”.

83. As a result of the incorporation of the foreign bribery offence into the Criminal Code, all public officials are now covered under section 334 CC, either directly (domestic public officials, European Officials, arbitrators) or through section 335a CC. Members of parliament, both domestic, foreign and international, are covered under section 108e CC. Additionally, members of foreign and international parliaments continue to be covered by the *IntBestG*. With the exception of one case involving the bribery of EU officials, only section 334(1) CC has been enforced in foreign bribery cases (through the *IntBestG* and, since November 2015, through section 335a CC).⁷²

Commentary

The lead examiners welcome the incorporation of the foreign bribery offence, formerly in the separate Act on Combatting International Bribery (“IntBestG”), into the Criminal Code (CC). They are satisfied that the revisions afford a broad coverage of the offence generally in line with Article 1 of the Convention.

b. Interpretation of the definition of a foreign public official

i. The need to demonstrate that the recipient of the bribe is a public official

84. In Phase 3, the Working Group raised concerns about the evidentiary requirements in German case law to establish that the recipient of a bribe is a foreign public official (recommendation 1a.). At the time of Germany’s Phase 3 Written Follow-up, recommendation 1a was deemed partially implemented by the Working Group. This was based on the steps taken by Germany to raise awareness among *Länder* departments of Justice and prosecutors’ offices of the Working Group recommendation through a conference in Berlin, in November 2011. The evaluation team notes that no judges attended the conference.

85. Nonetheless, as in Phase 3, German Annual Reports continue to 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. Prosecutors, judges and representatives from the legal professions still emphasise that this has been the main impediment to using the foreign bribery offence. As a result, the investigations were either dropped or the offenders were charged with an offence other than foreign bribery (see discussion below on the preference for other charges). During the on-site visit, this was seen by the prosecutors and representatives of other legal professions as inherent to the offence in all parties to the Convention. No specific issue in the German offence or its enforcement was identified in this regard.

ii. Coverage of individuals “exercising a public function for a [...] public enterprise” as foreign public officials

86. In Phase 3, the Working Group agreed to follow up on Germany’s interpretation of the definition of a foreign public official “exercising a public function for a public agency or public enterprise” (i.e. employees of state-owned and state-controlled enterprises, hereafter SOEs) to ensure it fully implements Article 1 of the Convention (follow-up issue 12a). In the “Siemens (Enel)” case, the German Federal Court of Justice ruled that the Enel employees who received the bribe were not foreign public officials and did not agree with the Italian authorities prosecuting the offences on the passive side

⁷² Case Bav (old) 2011/5.

that both recipients of the bribe were public officials.⁷³ This was what the Group deemed at the time “a somewhat paradoxical conclusion”. While the recognition of the autonomy of the offence was, in itself, deemed “a positive step”, the Working Group underlined that it is crucial not to lose sight of the objective and purpose of the principle of autonomy of the offence and recommended that elements of information available from foreign authorities be given due consideration (recommendation 1a.).

87. In spite of the declared willingness of the prosecutor’s offices at *Länder* level to include clarifications in their annual reports regarding when the foreign public officials are exercising a public function for a public enterprise, no development has been noted.⁷⁴ The lead examiners could only identify one concluded case reported by the *Land* of Bavaria, where employees of a SOE were bribed.⁷⁵ While this may to an extent alleviate concerns, the situation should be briefly revisited under the new legislative framework.

88. Unlike previous Article 2 section 1 No. 2 of the *IntBestG*, the new section 335a (1) no. 1 CC does not explicitly mention “persons entrusted to exercise a public function for a public enterprise”. Instead, Germany will rely on the use of a broader term under section 335a to encompass employees of SOEs: the former reference to a “public official” (*Amtsträger*) has indeed been replaced with “public employees” (*Bedienstete*). Germany also points to the Anti-Corruption Act’s Explanatory Memorandum which provides that in order to determine the scope and definition of “persons tasked with performing public functions for a foreign state”, the Anti-Bribery Convention should be directly used by the courts. Such a Memorandum does not have the same legal value as the former express provision in the *IntBestG*, but the evaluation team notes that the coverage of employees of SOEs was not perceived as a concern by any panellist at the on-site visit.

Commentary

The lead examiners consider that recommendation 1a. has now been implemented and recommend that the Working Group continue to follow up as case law and practice develop 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.

c. Germany’s use of alternative or related offences in foreign bribery cases

89. The prosecution of foreign bribery acts for the alternative offences of 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) was a prominent feature of German enforcement in Phase 3. While the Working Group welcomed this pragmatic approach to the prosecution and sanctioning of foreign bribery, it considered that this approach should be reviewed as case law develops to ensure that functional equivalence was achieved through these means (follow-up issue 12b).

90. As shown in the Table below, at the time of Phase 3, only a third of the convictions involving foreign bribery allegations were pronounced for the criminal offence of foreign bribery.⁷⁶ Since Phase 3, this marked trend has been confirmed, and become more pronounced. In total, since the entry into force

⁷³ 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)”. Also see discussion under Phase 3 report, para. 34 and related commentary after para. 36.

⁷⁴ See phase 3 follow-up report, p. 30

⁷⁵ Case Bav 2014/4

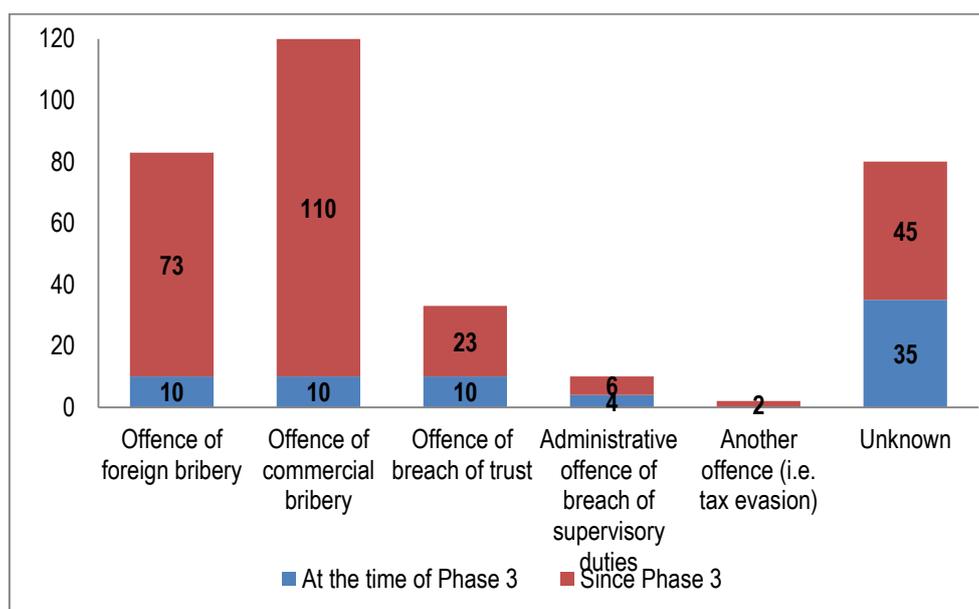
⁷⁶ See Annual reports 2006-2007, Bavaria (a) [1 individual] ; 2007-2008, Bavaria (a) [2 individuals]; 2008, Baden-Württemberg (c) [3 individuals]; 2008, Saarland [3 individuals]; 2008, Hamburg (b) [1 individual]. Please note that in Phase 3, only convictions (and not the resolutions) could be counted. This contrasts with the situation in Phase 4, where both convictions and resolutions are counted, hence the use of the term “sanction”, rather than “conviction”.

of the Convention in 1999, only a quarter of the individuals sanctioned in a foreign bribery case have been sanctioned for the offence of bribery of a foreign public official. The increasing trend of using the breach of trust offence noted in Phase 3 has not been confirmed. Instead the use of the offence of commercial bribery to sanction foreign bribery has steadily been confirmed with a marked preference to use this offence over any other. Whether, in these new proportions, this can still be considered as both functionally equivalent and deterrent from the perspective of the level of sanctions achieved is considered under Part B.2.b. below.

91. The table below also shows a constant but still relatively limited use of the administrative offence of lack of supervision (Section 130 OWiG). This offence allows the sanctioning of a person in a managerial position who violated his/her duty to supervise and prevent another person in a non-managerial position from committing a crime. Prosecutors at the on-site visit indicated that it is also used as a safety net in cases where the criminal offence could not be attributed to a specific employee. As noted in Phase 3, this administrative offence is however, not an alternative to the foreign bribery offence in terms of the Convention.⁷⁷

92. With the limited level of detail provided on the cases in the annual reports, it is impossible for the evaluation team to assess whether this may be revealing other issues either in the German legislative framework or in the way it is implemented, including the evidentiary requirements in foreign bribery cases. Panelists at the on-site visit, including prosecutors did not contribute to shed light on the issue.

Figure 5. Number of individuals sanctioned per offence in foreign bribery cases since 1999



Commentary

The lead examiners note that Germany's high level of enforcement has been partly achieved through the continued pragmatic approach in utilising alternative offences to prosecute cases within the foreign bribery sphere. They were unable to reach a conclusion with regard to whether functional equivalence is achieved through 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

⁷⁷ See Phase 3 report, para. 44.

through the offence of foreign bribery (section 334 CC). Phase 3 follow-up issue 12b is considered from the perspective of the level of sanctions achieved under Part B.2.b. below.

d. Small facilitation payments

93. In Phase 3, the Working Group raised concerns that the *de facto* exception for small 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 a requirement that such payments be “small” (recommendation 1b).

94. The Phase 3 report noted that while Germany has not expressly established an exception for facilitation payments, such an exception exists *de facto* 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. This was 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*. The new section 335a which incorporates the foreign bribery offence into the Criminal Code does not include section 333 CC amongst the criminal offences extended to foreign bribery. During the onsite visit, German prosecutors and academia explained that the current legislation does not allow for such *de facto* exceptions because it can be interpreted that there will always be a violation of official duties when public officials exercise discretion in conducting lawful acts as a result of being offered, promised or granted a bribe.

95. Germany also emphasised that payments made to foreign public officials exceeding an “insignificant payment” merely intended to speed up the execution of their tasks cannot be qualified as payments to induce a lawful act. It should instead in all circumstances be deemed to induce an official activity in breach of duty or in abuse of discretion and should thus be classified as bribery punishable under section 334 CC.

96. In spite of the unchanged legislative landscape, a drastic shift from the positions expressed in Phase 3 was observed by the evaluation team in respect of business and companies’ approach to the *de facto* exception. Representatives from the business community and the companies, including medium size companies met at the on-site visit, were unanimously of the view that clear policies have been developed in recent years to purely and simply forbid facilitation payments. One business representative brought some nuance by stating that in spite of the widely spread zero tolerance rules, clarity in this respect is still a challenge. Less certainty was expressed regarding the policy in place within smaller companies, none of whom attended the on-site visit. Germany stressed that the MOE and the MOJ published in 2009 a brochure, aimed mainly at SMEs focussing on export business, to raise awareness on foreign bribery, including small facilitation payments.⁷⁸ The brochure has just recently been revised entirely.

97. While this generally confirms the full implementation of Phase 3 recommendation 1c that Germany encourage companies to prohibit or discourage the use of facilitation payments, targeted efforts could continue to be directed towards SMEs.

Commentary

While the lead examiners regret that the opportunity of the legislative reform has not been seized to clarify the scope of the exception and implement recommendation 1b. they commend Germany and its private sector’s effort to banish small facilitation payments from their commercial practice.

⁷⁸ *Korruption vermeiden – Hinweise für deutsche Unternehmen, die im Ausland tätig sind*

B.2. Sanctions against Natural Persons for Foreign Bribery

a. Criminal and administrative sanctions for natural persons

i. Sanctions available in foreign bribery cases

98. As outlined in Table 1 below, under German Criminal Law, natural persons convicted of foreign bribery, commercial bribery or breach of trust, which are the three main criminal offences used to sanction individuals in foreign bribery cases, are subject to fines or sentences of imprisonment or, where an offender has enriched himself, or attempted to do so both fines and imprisonment (section 41 CC). Persons who are not perpetrators of the offence (or whose involvement cannot be proven) but facilitated the commission of the offence through their lack of supervision can be sanctioned under the administrative offence of violation of supervisory duties. However, as noted in Phase 3, it is not an alternative to the foreign bribery offence in terms of the Convention.⁷⁹ It is hence only mentioned here for the sake of completeness.

99. For the foreign bribery offence, a case is categorised as either “less serious”, “serious” (section 334(1) CC) or “especially serious” (section 335 CC). During the on-site, prosecutors confirmed that foreign bribery cases are always deemed “serious” (section 334 CC) or “especially serious” (section 335 CC) regardless of the offence applied (see discussion below on the different offences used). Commercial bribery and breach of trust have no “less serious” category but do have an “especially serious” category.⁸⁰

100. For the administrative offence of violation of supervisory duties, the maximum fine has been increased from Phase 3 in line with the increase applicable to legal persons. The maximum penalty available is now EUR 10 000 000 and EUR 5 000 000 in cases of negligence.

101. The maximum available sanctions for the foreign bribery offence, the alternative offences used, and the administrative offence are set out in the following table.

Table 1. Maximum sanctions in foreign bribery cases

Offence	“Less Serious” case	“Serious” Case	“Especially serious” case
Foreign bribery (s.334/335 CC)	Imprisonment up to 2 years OR Fine up to €10.8m	Imprisonment 3 months – 5 years OR Fine up to €10.8m	Imprisonment 1-10 years Fine not available
Commercial bribery (s.299 /300 CC)	N/A (legislation does not provide for a “less serious case”).	Imprisonment up to 3 years OR Fine up to €10.8m	Imprisonment 3 months – 5 years OR Fine up to €10.8m
Breach of trust (s.266 CC)	N/A, (legislation does not provide for a “less serious case”).	Imprisonment up to 5 years OR Fine up to €10.8m	Imprisonment 6 months– 10 years Fine not available
Violation of supervisory duties (s.130 OWIG)	N/A	Regulatory fine of up to €10m. No imprisonment available.	N/A

102. Sentences of imprisonment can be imposed for foreign bribery, commercial bribery and breach of trust. Fines are available as an alternative for offences where the *minimum* sentence of imprisonment does not exceed one month. In “serious” cases of foreign bribery and “especially serious” cases of commercial bribery, fines alone cannot be imposed. . However under section 47 CC, all prison sentences of less than six months must be amended to a fine unless special circumstances exist. In “especially

⁷⁹ See Phase 3 report, para. 44.

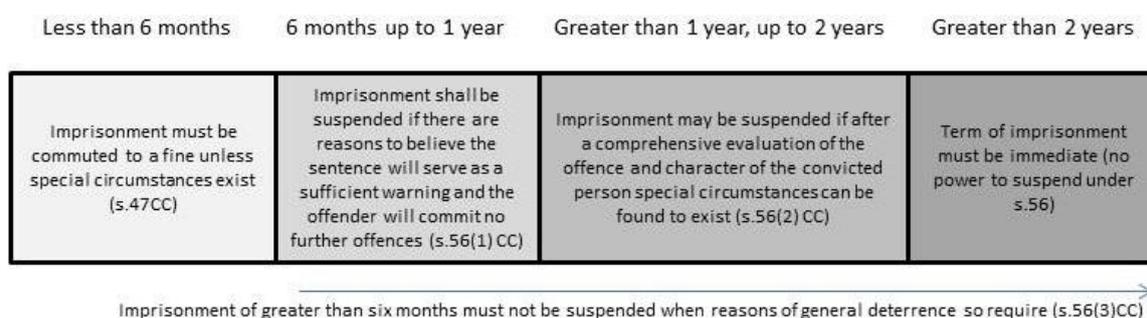
⁸⁰ Especially serious commercial bribery (s.300 CC), especially serious breach of trust (s.263(3) CC)

serious” cases of foreign bribery or breach of trust, fines alone cannot be imposed.. However suspended prison sentences (which are available in any case where the sentence does not exceed two years of imprisonment) can be conditional on the payment of a sum of money by the offender. Where imposed, fines are based on “day units” of between 5 and 360 days. The number of “day units” is determined by the seriousness of the offence and is multiplied by the net daily income of the offender. The maximum daily income is capped at EUR 30 000 which leads to a maximum fine available of EUR 10 800 000, as was the case in Phase 3. For fines of less than 180 day units, section 59 CC allows payment of the fine to be suspended. This suspension may also be conditional on the payment of a sum of money by the offender.

ii. *Suspension of prison sentences*

103. Prison sentences of up to and including two years in length can be suspended. This means that, in foreign bribery cases, a prison sentence can be suspended in all cases, including especially serious cases of foreign bribery. The legal test that the Court must apply varies depending on the length of the sentence, and is set out in the diagram below:

Figure 6. Legal tests for imposition of a suspended sentence



104. Where a sentence is suspended, it must be for a probationary period of between two and five years. The Court may also impose conditions, which can be: restitution, payment to charity, community service or payment to the treasury.⁸¹ Failure to abide by the conditions, or commission of a further offence during the probationary period, can cause the suspended sentence to take effect. A prison sentence cannot partly be suspended: either the whole sentence must be suspended, or an immediate prison term must be imposed (section 56(4) CC).

iii. *Alternative imprisonment or pecuniary sentence and possibilities to impose both*

105. A court has an option to impose a fine instead of a prison sentence in all cases except for especially serious cases of foreign bribery and breach of trust. However, it is possible to impose both an imprisonment and a pecuniary sentence for foreign bribery and for the alternative offences of breach of trust and commercial bribery where the offender has personally enriched himself or attempted to do so (section 41 CC). In addition, where a suspended prison sentence is imposed, the court can impose conditions including payment of a sum of money to the treasury or charitable organisation

⁸¹ Section 56b(2) CC. In addition “directions” can be imposed under section 56c in order to reduce the risk of offending (e.g. treatment for addiction, not carrying certain objects or reporting to an authority), and a supervision order under a probation officer can also be imposed under section 56d if it is necessary to prevent commission of further offences. It is thought unlikely any of these requirements would be imposed in a foreign bribery case.

(section 56b (2) 2, N°3 and 4 CC).⁸² Finally, in cases of multiple offences committed by multiple acts the court can impose a separate fine in addition to imprisonment (Section 53 (2) CC). In administrative offences of breach of administrative duties, only a fine is available.

iv. Sanctions imposed through resolutions

106. Three types of resolutions alternative to full trial proceedings are available to conclude foreign bribery cases in Germany: conditional exemption or termination of proceedings (section 153a CCP), penal orders (section 407 CCP) and judgements based on negotiated sentencing agreements (257c CCP). These proceedings are further discussed under section B.5.b. below. Under section 407 CCP a penal order is applied for by the prosecutor and pronounced by a court, which can convict the accused and impose a financial penalty or a suspended sentence of imprisonment up to a maximum of one year. An exemption or termination of proceedings under section 153a CCP does not convict the accused, but instead provides for a conditional exemption or termination of prosecution in return for payment of a sum of money, to either the treasury or a non-profit organisation.⁸³ Both procedures are available to foreign bribery offences (as well as commercial bribery or breach of trust) as they are classified as misdemeanours and not felonies. This is due to the minimum prison sentence for the basic offence being less than one year. The categorisation of a case as “especially serious” (for which a minimum prison sentence of one year applies) is irrelevant to the classification of an offence as a misdemeanour or a felony. Negotiated sentencing agreements under section 257c CCP can be achieved between the court and the defendant and result in a judgement by which the accused is convicted but the sanction can be mitigated. The sanctions available under Section 257c CCP are identical to those available after a full trial. However, prior to the conviction, the court will indicate the minimum and maximum sentences it would impose were an agreement to be reached.

Commentary

The lead examiners consider that Germany’s legal system allows flexibility in imposing sanctions on natural persons, including the possibility to provide for both a fine and a prison sentence in appropriate cases. The availability of suspended prison sentences or fines coupled with a monetary payment, and the various options to resolve appropriate cases without full trial proceedings, further enhances this flexibility.

b. Sanctions imposed on natural persons in practice

i. Lack of statistical information on sanctions imposed

107. In Phase 3, the Working Group recommended that Germany compile statistical information on sanctions in a manner that differentiated between sanctions imposed for foreign bribery and other offences, and procedures applied (recommendation 3b).

108. Germany was not able to provide detailed statistical information on sanctioning and this recommendation, that was deemed partially implemented at the time of Germany Written Follow-up report, has hence proven to remain a serious challenge. The methodology used by the evaluation team was to compile, tabulate and analyse the information provided in the *Länder* reports to come to meaningful conclusions. The only statistics in this area provided by Germany (on request after the on-site visit) are for general economic crime and these do not differentiate between, for example, foreign and domestic bribery. The information in the *Länder* reports has its limitations, particularly when alternative

⁸² Restitution to the victim is also available (Section 56b(2)1.CC) and performance of community service

⁸³ There are alternatives available in law including compensation to the victim and a requirement to undertake public service. However none have been used in a foreign bribery case to date.

offences were used in place of the foreign bribery offence. It is often not possible to identify the monetary amounts imposed in resolutions under section 153a CCP, whether a penal order provided for a fine or prison sentence, and even the offence for which an offender was sanctioned. While there have been improvements to the quality of information in the *Länder* reports since Phase 3, significant problems remain. For example, since Phase 3, the amount of the penalty imposed was provided for only 17 of the 43 individuals sanctioned for bribery of a foreign public official resolved under section 153a CCP and even less so for commercial bribery, where it was only provided for 11 of the 88 individuals sanctioned under this procedure. There were also discrepancies between the sanctions shown in the annual reports, the figures provided by Germany in an annexe to the questionnaire, and copies of translated decisions provided by Germany. The analysis of sanctions has therefore been based on the sample of cases for which sufficient data is available.

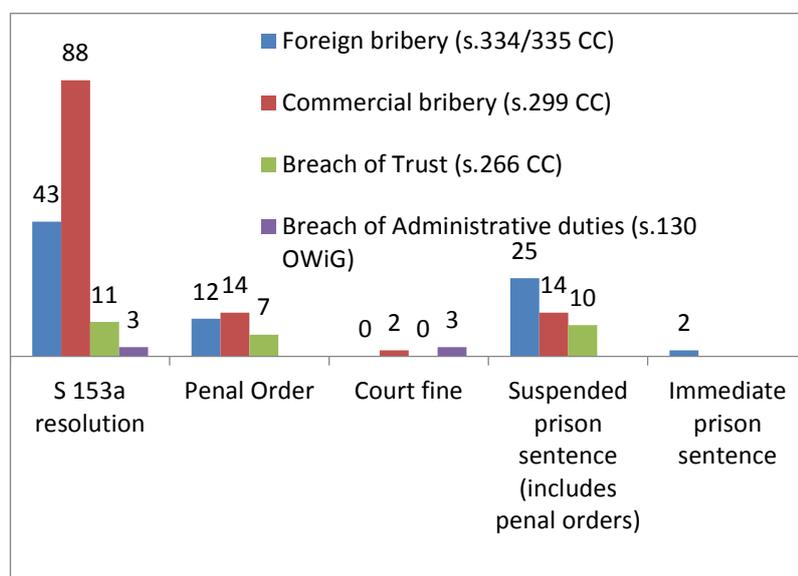
Commentary

The lead examiners recommend that Germany 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; and (ii) procedures applied (court decision with a full hearing, negotiated sentencing agreement under section 257c CCP, penal order under section 407 CCP, resolution under section 153a CCP).

ii. Sanctions imposed for foreign bribery and alternative offences

109. Since Phase 3, 73 individuals have received a sanction for the foreign bribery offence (section 334 and 335 CC). Fifteen of these individuals were convicted following a full court trial, and three through a negotiated sentencing agreement (section 257c CCP). Twelve individuals received a conviction through the penal order procedure.⁸⁴ A further 43 individuals had their cases settled under section 153a CCP, of which the sanction imposed is only known in 17 cases.

Figure 7. Sanctions imposed by offence since Phase 3



110. Since Phase 3, commercial bribery has become the main alternative offence used in foreign bribery cases with 110 individuals sanctioned for this offence. Four of these individuals were convicted following a full court trial, 14 received a penal order, and 88 had their cases settled under section 153a CCP (the sanction is only known in 11 of these cases). Additionally, four individuals (in one case) received solely confiscation measures.

111. For the offence of breach of trust, 23 individuals were sanctioned. Two individuals were

sanctioned through a full court trial and one through a negotiated sentencing agreement. Seven

⁸⁴ One individual received a suspended fine under section 59 CC through the penal order procedure.

individuals received penal orders, and the remaining 13 individuals had their cases settled under section 153a CCP (of which the penalty is known in 4 cases).

iii. Sanctions imposed through resolutions

112. A significant proportion of foreign bribery cases are concluded with resolutions under section 153a CCP. These resolutions involve no criminal conviction but the payment of a monetary penalty, akin to a fine. Since Phase 3, 43 of the 73 individuals (59%) sanctioned for the foreign bribery offence had their case resolved under this procedure. The proportion is higher for commercial bribery (80%) and slightly lower for breach of trust (56%). In the absence of statistical information available on the level of sanctions imposed in practice, the evaluation team was prevented from fully considering whether penalties imposed under section 153a CCP are effective, proportionate and dissuasive.

113. For foreign bribery, the level of penalty is known for only 17 sentences. The lowest penalty imposed is EUR 6 000 and the highest is EUR 440 000. In eleven of the sentences (64%), the amount imposed is EUR 25 000 or less and in the remaining six sentences (36%), it is higher than EUR 25 000. While significant amounts have been imposed through this procedure, with sentences of EUR 150 000 or more imposed against 5 individuals, the majority of the sanctions are still within the lower range of available penalties.

114. For commercial bribery, the penalty is unknown in the vast majority of resolutions under 153a CCP (77 of the 88 resolutions with individuals). In the eleven sentences where the penalty is known, the sanctions imposed range from EUR 3 500 to EUR 100 000. The penalty is only over EUR 25 000 for three individuals, and of EUR 10 000 or less for eight individuals (73%). For breach of trust, in the six cases where the penalty is known, the sanctions imposed range from EUR 10 000 to EUR 500 000, with three of the penalties of EUR 25 000 or less (50%) and three over EUR 25 000 (50%). For the administrative offence of violation of supervisory duties two individuals had their case resolved with a financial penalty of EUR 25 000 or less and one with a higher penalty of EUR 175 000.

115. Penal orders (section 407 CCP) were imposed on 12 individuals for the offence of foreign bribery. Of these 12 individuals, 4 were fined, 1 received a suspended fine and 7 individuals received a suspended prison sentence of 1 year or less. Fines imposed ranged from EUR 1 800 to EUR 32 000. The 7 individuals who received a suspended prison sentence on probation, also paid an amount as a condition of the probation ranging from EUR 5 000 to EUR 38 400. The information provided indicates that two of these individuals also received a separate fine pursuant to section 41 CC which provides for the possibility to impose a fine in addition to imprisonment “if the offender through the commission of the offence enriched or tried to enrich himself”.

116. For the offence of commercial bribery, 14 penal orders were imposed of which twelve resulted in a suspended prison sentence of one year or less on probation (one in the amount of EUR 75 000) and two in a fine (one of EUR 18 000).

117. For breach of trust, penal orders were imposed on seven individuals. Six resulted in a suspended prison sentence of one year or less on probation and one in a fine (of EUR 18 000). The amount paid as a condition for probation is only known for two individuals who respectively paid EUR 8 000 and EUR 18 000.

118. Only four individuals were convicted through a negotiated sentencing agreement, three for foreign bribery and one for breach of trust. The sanctions imposed do not appear significantly lower than those imposed following a full trial proceeding.

iv. Few stand-alone financial penalties imposed in full court proceedings

119. Only a small number of fines have been imposed by courts following a full court proceeding. Since Phase 3, courts have not imposed any financial penalties after trial for the offence of foreign bribery, unless a suspended prison sentence was also imposed. Such prison sentences were never below 6 months. For commercial bribery, two stand-alone fines were imposed in the amounts of EUR 21 600 and EUR 64 800 respectively. No fine was imposed for breach of trust. For the administrative offence of violation of supervisory duties, for which imprisonment is not available, on average, fines tend to be higher. The minimum fine imposed for this offence was EUR 17 050, two of the three fines were EUR 25 000 or more and one fine reached EUR 400 000.

v. Sentences of imprisonment for foreign bribery are almost always suspended

120. At the time of Phase 3, a high proportion of prison sentences were suspended on probation.⁸⁵ Since Phase 3, 23 out of the 25 individuals (92%) who received a prison sentence for foreign bribery had their sentence suspended.⁸⁶ The power to suspend a sentence only arises if the appropriate length of sentence is two years or less. The two immediate prison sentences imposed had a term greater than two years. Therefore, where the Court had the power to suspend the sentence, it did so in every case. For commercial bribery and breach of trust, every one of the 23 prison sentences imposed was suspended, hence confirming the trend identified in Phase 3.

121. This raises the question whether the sanctions imposed in practice are sufficiently effective, proportionate and dissuasive. Panellists at the on-site visit explained that the sentences imposed for bribery of a foreign public official were “high by German standards, including for wider economic crimes”. Similar arguments had been made in Phase 3, although without supporting data. In Phase 4, Germany provided data for wider economic crimes. The data shows that prison sentences for economic crimes are relatively rare. When imposed, on average around 80-85% of prison sentences are suspended. Therefore, an offender convicted of foreign bribery or a related offence is more likely to receive a prison sentence but is in turn more likely to have this sentence suspended.

vi. Prison sentences imposed are longer for the offence of foreign bribery

122. One of the factors analysed in Phase 3 was the length of prison sentences imposed for foreign bribery compared to commercial bribery and breach of trust. The conclusion reached was that sentences for bribery of a foreign public official were notably longer than those imposed for commercial bribery or breach of trust.

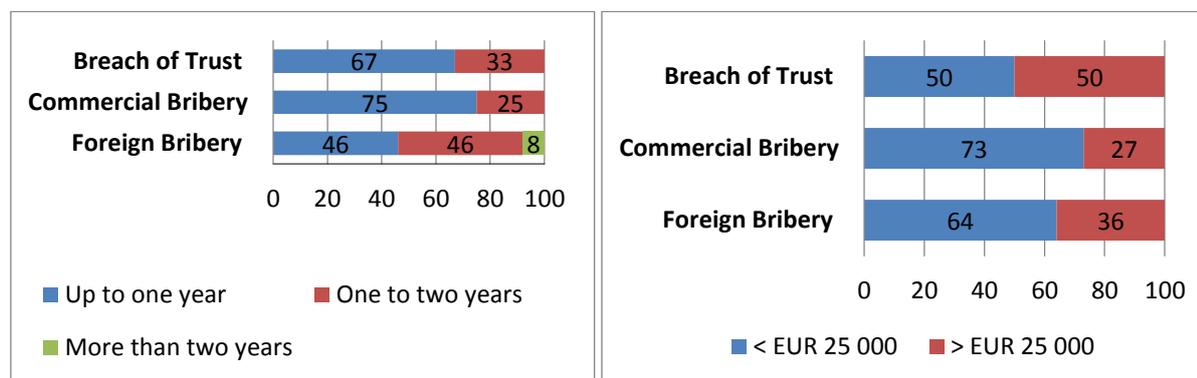
123. This trend has continued into Phase 4. For foreign bribery, of the 24 prison sentences imposed where the length is known, 11 (46%) were for a period of one year or less, 11 (46%) for a period of over one up to two years and 2 (8%) sentences of over two years.⁸⁷ Of those imposed for commercial bribery, 3 of 4 sentences (75%) were up to one year and 1 (25%) more than one up to two years. The length of the sentence was unknown for ten individuals. Finally, for cases of breach of trust, 6 out of 9 sentences (67%) were of up to one year, and 3 (33%) were of more than one to two years.

⁸⁵ 5 of the 9 sentences imposed for bribery of a foreign public official, and all 18 sentences for commercial bribery and breach of trust were suspended.

⁸⁶ 16 sentences imposed by a court after a full trial and 7 sentences imposed by way of a penal order were suspended, while 1 sentence imposed by a court after a full trial and 1 sentence imposed through a negotiated sentencing agreement were of immediate imprisonment.

⁸⁷ All figures include sentences imposed under a penal order or negotiated sentencing arrangement.

Figure 8. Length of prison sentences and monetary penalties imposed per offences (*in percentages*)



vii. *Sanctions for commercial bribery not fully functionally equivalent to sanctions for foreign bribery.*

124. The Phase 3 report noted that a trend was emerging to sanction individuals for the offences of commercial bribery and breach of trust instead of the offence of bribery of foreign public officials. At the time, the Working Group deemed that the application of these two alternative offences *prima facie* satisfied the principle of functional equivalence. However, the Working Group noted that the sanctions appeared to be higher when a Court sentenced for the foreign bribery offence, and decided to continue to monitor the level of sanctions imposed for these alternative offences to ensure that functional equivalence is achieved through these means (follow-up issue 12b). As discussed in section B.1.c. the trend to use alternative offences has confirmed since Phase 3 with 73 persons sanctioned for foreign bribery, i.e. only a quarter of the individuals sanctioned.

125. The assessment of functional equivalence was limited by the lack of data for commercial bribery in particular. However, the sample of data provided shows notable differences between the sanctions imposed for foreign and commercial bribery. For commercial bribery, courts have mainly imposed shorter prison sentences or fines. A significantly higher percentage of individuals had their case settled under section 153a CCP and under this procedure, the monetary penalties imposed have also been lower. For breach of trust, while shorter prison sentences than for foreign bribery are generally imposed, a similar proportion of cases were settled under section 153a CCP and broadly similar financial penalties imposed.

viii. *Mitigating factors used in practice*

126. Under section 46b CC, if an individual provides assistance to the prosecution, the sentence imposed can be reduced. The evaluation team has not been informed of any occasions where Courts have applied this statutory mitigating factor. Other mitigating factors were developed by the Courts. Germany provided the evaluation team with excerpts of a number of Court decisions which include the mitigating factors the Courts took into account.

127. Courts took into regard a very wide range of mitigating factors. Most common amongst the small sample of cases were the accused's lack of previous convictions, and the length of time since the offences occurred. Other common mitigating factors included a comprehensive confession, the age and health of the offender, and an early acknowledgment of guilt. On several occasions, however, more controversial mitigating factors were taken into account by Courts including the lack of personal enrichment,⁸⁸ and that bribery was a business practice going back many years to a time when it was not

⁸⁸ E.g. Case NRW 2014/1

an offence in Germany to bribe a foreign public official.⁸⁹ Other factors taken into account in reducing the sanction included the loss of employment due to the offences.⁹⁰ On one occasion, the potential difficulty in determining the amount of the corporate administrative fine was considered by a judge to be an additional factor in agreeing to resolve the case for the natural persons under section 153a CC.⁹¹

128. In Phase 3, the Working Group was concerned by the number of times solicitation had been taken into account by the courts as a mitigating factor. In this evaluation, within the range of decisions provided by Germany, solicitation was only taken into account once. The decisions provided included a sample of cases from across *Länder* and included decisions specifically requested by the evaluation team. It is therefore considered that Courts are no longer regularly taking this factor into account.

129. During the on-site visit, a range of panellists mentioned that first time offenders are treated more leniently by the Courts. As with many other mitigating factors, it is relevant to the length of the sentence imposed, but it is also relevant to whether the sentence is suspended. Panellists commented that suspended sentences tend to be imposed for economic crime unless the offender has personally enriched himself through his offending. However, in two foreign bribery cases where personal enrichment occurred, the offenders still had their prison sentences suspended although an additional fine was imposed (section 41 CC).⁹²

130. A federal court judge explained that the closer a sentence is to the two year mark (beyond which a sentence cannot be suspended) the more persuasive the mitigating factors need to be.⁹³ This is in addition to the different legal tests to suspend a sentence depending on its length shown in the earlier diagram. The effect of this case law in practice cannot however be confirmed by the sentences imposed in cases within the foreign bribery sphere as the court suspended every sentence that it had the power to suspend.

Commentary

Germany's pragmatic approach to the prosecution and sanctioning of foreign bribery through the application of related criminal offences has resulted in high levels of enforcement and should continue to be commended by the Working Group. However, functional equivalence may not always be fully achieved with regard to the level of sanctions applied for these alternative offences, particularly the offence of commercial bribery, which carries a lower level of imprisonment and has resulted in shorter prison sentences and lower monetary penalties in practice.

They hence recommend that Germany: (a) Take steps to continue to achieve functional equivalence, in particular through ensuring that foreign bribery cases result in effective, proportionate and dissuasive sanctions including when alternative offences to foreign bribery, in particular commercial bribery, are applied and when cases are resolved through a resolution under section 153a CCP; and (b) Raise awareness among prosecuting authorities on the importance of making full use of the range of criminal sanctions available in law.

c. A revised confiscation regime available for both natural and legal persons

131. In Phase 3, the Working Group decided to follow up on the confiscation of the instrument of the bribe and the proceeds of foreign bribery from both individuals and legal persons. In practice, the power to confiscate bribes has never been used against natural persons and the power to confiscate the

⁸⁹ E.g. Case Ham 2014/1

⁹⁰ E.g. Case NRW 2014/1

⁹¹ Case Ham 2014/1

⁹² Bav 2011/6 and Hes 2011/3

⁹³ From the decision [BGH 4 StR 415/16](#) (para 25 et seq.)

proceeds has rarely been used against natural persons, except where there was a clearly demonstrable financial benefit to the individual. Since Phase 3, only one case has resulted in sums of money being confiscated from natural persons. The use of confiscation in practice against legal persons (where confiscation has been more systematically utilised) is discussed below under section C.3b.

132. Since Phase 3, Germany has comprehensively reformed its confiscation regime by the adoption of the new Act to Reform Criminal Law on the Proceeds of Crime which entered into force on 1 July 2017.⁹⁴ The new regime (section 73 to 76a CC) applies to both natural and legal persons. It applies retroactively to acts that have occurred before its entry into force. It removes the previous distinction between forfeiture (of instrumentalities) and confiscation (of proceeds), with all acts under the new procedure defined as “confiscation”.

133. While confiscation was previously in some parts discretionary, under the new regime it is obligatory.⁹⁵ It can be pursued independently of any criminal proceedings and even applies when prosecution is barred by the statute of limitations: an extended period of 30 years now applies to confiscation.⁹⁶ This extended limitation period will be available in the large proportion of cases that may continue to be settled under section 153a CCP.

134. Another major change is to the regime on third party confiscation. Previously, if a third party had a claim, or potential claim, against the assets, the state could not confiscate those assets. Formerly, this led to the situation where assets often remained in the hands of the offender. The new legislation allows the prosecution to confiscate the assets held by an offender and to then return them to injured parties.⁹⁷ This removes what was a major impediment to confiscation. The power to confiscate assets transferred *to* third parties is also extended to all crimes.⁹⁸ Previously this power was only available for certain serious crimes that did not include foreign bribery.

135. During the on-site visit, MOJ representatives indicated that, in conjunction with the adoption of the new legislation, significant training of prosecutors and judges was taking place to ensure awareness and enforcement of the new confiscation power.⁹⁹ In some *Länder*, a portion of the confiscated assets could be used by the law enforcement authorities towards costs. The *Land* of Lower Saxony has produced a manual containing comprehensive instructions and guidelines on confiscation which were utilised in other *Länder*. Germany indicated that a number of other *Länder* are in the process of developing their own guidelines, and that a circular on confiscation was provided at the Federal level by the Attorney-General. Prosecution authorities across *Länder* were undertaking recruitment of more individuals to deal with the expected increase in work that the new confiscation regime would require.

136. As the revised confiscation regime had only been in force for six months at the time of the on-site visit, it is not yet possible to review the effect it has had in practice. The majority of participants at the on-site visit considered that significantly more confiscation would take place. German authorities explained that previously, confiscation would not take place in cases that had already taken “too long”. Separating confiscation from the main criminal hearing opens a broader range of possibilities to undertake confiscation at different stages of the proceedings. This would include assessment of any benefit gained by natural persons. Representatives from academia and civil society were generally

⁹⁴Implementing EU directive 2014/42/EU (Freezing and Confiscation of Instrumentalities and the Proceeds of Crime).

⁹⁵Section 73 CC.

⁹⁶Section 76a(1) and (2) CC.

⁹⁷The new legislation amends section 73 CC.

⁹⁸Section 73b CC

⁹⁹The power also exists to revisit confiscation if, in error, it was not dealt with at the time.

positive about the new changes but noted there was still uncertainty with respect to how they would be applied.

Commentary

The lead examiners welcome Germany's in-depth revision of its confiscation regime and the broadening of the possibilities to use it in practice. They are also encouraged by the positive perception that many practitioners appear to have on the new legislation on confiscation. They commend Germany's efforts to increase the use of this important element of an effective sanctioning regime, including training and guidance provided to judges and prosecutors. The effect of the new Act to Reform Criminal Law on the Proceeds of Crime should be followed up in practice as case law develops.

B.3. Investigative and Prosecutorial Framework

a. Overview of investigative and prosecutorial authorities in charge of foreign bribery enforcement

137. As in Phase 3, the foreign bribery offence is investigated primarily by the public prosecution offices allocated to each *Land*. Several *Länder* have dedicated public prosecution offices or special divisions within a public prosecutor's office which specialise in investigating corruption offences and/or economic crimes throughout the *Land*.

138. The police forces of the *Länder*, for their part, have established special directorates for economic offences and, in some instances, specifically for corruption offences. Case-based special investigation teams can also be set up. The Federal Criminal Police Office (*Bundeskriminalamt* - BKA) supports the Federal police and the police of the *Länder* (LKA) in the prevention and prosecution of criminal offences with "international, transnational or considerable importance", such as foreign bribery.¹⁰⁰ The 16 *Länder* enjoy a high level of autonomy in the actual investigation and prosecution of foreign bribery (as for almost all criminal offences) with the corresponding challenges it entails for the Federal Government in monitoring the implementation of Federal legislation including the foreign bribery offence.

b. Resources, training and guidance

i. Sufficient and swiftly adaptable prosecution resources

139. As in Phase 3, during the on-site visit, all panellists concurred with the view that sufficient resources are allocated for the investigation and prosecution of foreign corruption cases. The German authorities, prosecutors and police representatives specified that insofar as major proceedings require the capacity of a given prosecutor's or police's unit to be expanded, staffing adjustments are made swiftly. This can be done through shifting resources from other units, employing additional staff or accessing competent specialists, e.g. from the police or other agencies. While there have been no significant changes since Phase 3 in this regard, this confirmed flexibility could be identified as a good practice.

ii. Training largely varies from one Land to another and from Prosecutors to the Police

140. Germany's training of judges and prosecutors is founded on two pillars: the German Judicial Academy curriculum that ensures nationwide equal training standards; and each *Land's* tailor-made

¹⁰⁰ These tasks are assigned to the BKA mainly under section 2 and 4 of the Federal Criminal Police Office Act (*Bundeskriminalamtgesetz*, BKAG)

courses. Germany did not provide specific documents but reported about judicial, prosecutorial and interdisciplinary trainings with police and tax authorities. For example, public prosecution offices specialised in economic crimes meet annually to discuss their experiences in the anti-corruption area. Their May 2017 meeting included a presentation on the 2015 anti-corruption Act and the practical changes it involves. In the *Länder*, the offers of the German Judicial Academy are supplemented with training and workshops. This training varies from one *Land* to the other. Germany notably reported about special training in Hesse, North Rhine-Westphalia and Bavaria. The German judges and prosecutors also have the possibility to join training events at the Academy of European Law, for example the “Annual Forum on Combating Corruption in the EU 2017” that took place in September 2017, and take part in seminars of the European Judicial Training Network (EJTN). For example German prosecutors attended the EJTN seminar “Corruption, Detection, Prevention, Suppression” in Paris in November 2015.

141. Regarding the police, the BKA holds an annual national conference to share knowledge and experience in the fight against corruption and on initiating joint coordinated investigations. The conference is attended by both Federal and *Länder* police representatives. In the *Länder*, training events vary from one *Land* to the other. Information provided by Germany in the questionnaire responses focusses on Hesse, North Rhine-Westphalia and Thuringia, where regular training courses on corruption and foreign bribery are provided to the police. These courses are run by the Criminal Police Office and the Hesse Police Academy. The speakers include experienced public prosecutors from the specialised public prosecution office in Frankfurt who are tasked with cases in this field. A joint workshop on corruption, including foreign bribery, takes place annually in the Criminal Police Office of North Rhine Westphalia. It attracts approximately 130 participants from the police, the judiciary and tax authorities from North Rhine-Westphalia, federal units and other *Länder*. In Bavaria, the police regularly offer a five-day seminar on fighting corruption that is aimed at the police units dealing with corruption cases. The seminar is to large parts held by prosecutors specialised on corruption cases. Lower Saxony offers a yearly seminar on corruption cases in its police academy. The Criminal Police Office shares its experiences in investigating national and international cases of corruption. The seminar is open to and attended by police representatives of other *Länder*.

iii. Specialised staff in certain prosecution offices

142. Detailed reports from the various *Länder* included in Germany’s responses show a limited increase in specialisation in some *Länder*. In Baden-Württemberg, the Stuttgart office has a single division with 3.5 public prosecutors focussing on corruption since 2002 and on bribery offences in business transactions since July 2017. Specialisation reported by most *Länder* is otherwise neither new (dating back from early the 2000’s) nor on foreign bribery or transnational crimes but rather on corruption in general. Specialists from a wide range of areas, including finance and accounting, are reportedly available.

143. Unsurprisingly, Munich I Public Prosecution Office is more specialised and staffed than the other Prosecution offices, followed by Hesse, Baden-Württemberg, Hamburg and North Rhine-Westphalia Public Prosecution Offices although their level of specialisation does not fully compare. The Munich office has a separate division that has been set up with a focus on bribery offences and is routinely dealing with foreign bribery offences. The division currently comprises one senior public prosecutor, two public prosecutors in team leader roles and eight public prosecutors as team members.

iv. Continued significant difference in awareness and experience among the prosecutors

144. In Phase 3, the lead examiners noted a significant difference in terms of awareness, specialisation and experience in foreign bribery matters among the prosecutors from different *Länder* present during the on-site visit. This difference was also noted by representatives from the civil society. The Working Group hence recommended that Germany ensure that judges and prosecutors in those

Länder with less experience in foreign bribery cases be offered specific training with regard to the technicalities linked to the complexity of the foreign bribery offence (recommendation 4a). This recommendation was deemed fully implemented in 2013.

145. Nonetheless, the same significant difference in terms of awareness, specialisation and experience in foreign bribery matters among the prosecutors from different *Länder* was still raised several times during the Phase 4 on-site visit by a range of panellists: prosecutors, lawyers, large companies' representatives and civil society. Germany provided detailed information about the cross *Länder* sharing of experience in the anti-corruption field. Practitioners specialised in economic crime from public prosecution offices from all *Länder* meet annually to discuss their experiences. Each year, another *Land* is responsible for organising the meeting. At the last meeting, organised by Sachsen-Anhalt, in May 2017, a presentation was given on the 2015 anti-corruption act including the new provisions on foreign bribery. This year's meeting is organized by Schleswig-Holstein and scheduled to take place on 28 to 30 May 2018 in Kiel; the agenda includes presentations by *Länder* practitioners on the liability of legal persons under section 30 OWiG and on the new asset recovery regimes.

Commentary

The lead examiners commend Germany for its capacity to swiftly expand its prosecutors' units in major foreign bribery proceedings. They recommend that the Working Group identify this as a good practice.

However they note with concern the persistence of a significant difference in terms of awareness, specialisation and experience in foreign bribery matters among the prosecutors from different Länder. They believe that, a more consistent approach to the complexity of the foreign bribery offence should be ensured amongst prosecution offices. This is particularly instrumental in a context where prosecutors are empowered to terminate foreign bribery cases through a range of non-trial resolutions, sometimes without the control of a judge.

Under these circumstances, the examiners recommend that Germany continue to ensure that prosecutors in those Länder with less experience in foreign bribery cases be offered guidance and specific training including by more experienced prosecutors from other Länder, with regard to the complexity of the foreign bribery offence and its investigation and prosecution for both natural and legal persons.

c. Coordination between relevant agencies

i. Good level of cooperation between the Public Prosecution and the Police

146. As in Phase 3, the prosecutor conducts the investigation, calling upon the police for assistance to the extent necessary (CCP, paras. 160, 161). A German prosecutor has formal responsibility for investigation, and the police are considered to be a subordinate agency providing support. 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. According to panellists, cooperation among *Länder*, notably to determine who should be taking the lead on a specific case, works very well in practice.

147. During the on-site visit, police representatives confirmed this good level of cooperation which may also materialise in joint investigations across *Länder* involving different prosecutors jointly deciding the workforce to be used and the investigative measures to be taken. For example, in Hamburg, the prosecutors and the police meet at least twice a year to discuss ways to make their investigations more efficient. In North Rhine-Westphalia and Lower Saxony representatives from the judicial branch, prosecutors, police and tax investigators dealing with corruption cases meet on an annual basis for conferences.

ii. *Sharing of Information within the Police and with other agencies*

148. The Federal Criminal Police Office (BKA) is involved in national and international information networks, monitors and analyses criminal data and develops crime-fighting policies. It is mainly tasked with ensuring cooperation and exchange of information between the police forces of the Federation and of the *Länder* as well as amongst *Länder* police forces. In practice, while *Länder* police forces are in charge of the actual investigations, they rely on the BKA international police liaison officers to exchange information with foreign police forces. The BKA is also systematically involved in the exchanges of information amongst *Länder*. Aside from this liaison role, the BKA provides technical support to the *Länder* police offices, e.g. on information and technology or translation needs. The BKA conducts an annual national workshop with representatives from all the *Länder*, the Customs Criminal Police Office and the Federal Police. The purpose of the workshop is the exchange of knowledge and experience as well as the discussion of current questions in the anti-bribery field.

149. Germany also reported that the specialised units of North Rhine-Westphalia (NRW) Criminal Police Office regularly exchange experiences with the criminal police offices of other *Länder*, the Federal Criminal Police Office and other units around Europe; these bodies assist one another on issues of national and international relevance. In addition to the specialised criminal police units in NRW, a special unit for financial administration – the Unit for the Investigation of Organised Crime and Tax Offences was set up within the Düsseldorf Revenue Authority at the beginning of 2015.¹⁰¹ The Unit is located on the premises of North Rhine-Westphalia Criminal Police Office, which enables tax investigators and criminal investigators to directly share information in accordance with their statutory authorisation to do so.

150. During the on-site visit, prosecutors and police representatives also emphasised the excellent cooperation with the tax authorities in other *Länder*, and in particular in Hamburg and Munich. They pointed to successful coordinated investigations starting very early in coordinating investigation plans and measures and materialising in successful joint searches. The *Länder* follow different approaches to foster cooperation with other *Länder*. For example, in Hamburg liaison officers from the tax authorities' office work in the centralised anti-corruption unit. In North Rhine-Westphalia, a division of the tax investigation office has its office on the premises of the Criminal Police Office.

Commentary

The lead examiners note the pivotal role played by the Federal Criminal Police Office (BKA) at both inter-Länder and international level in terms of exchanges of information and cooperation; as well as in the analysis of criminal data and the development of crime-fighting policies.

They also recommend that the Working Group identify as a good practice the strong cooperation and even integrated approach between the tax authorities, the prosecutors and the police in the investigation of foreign bribery cases as well as its materialisation in joint searches conducted to companies' premises, hence mutually reinforcing skills and competences.

B.4. Conducting a Foreign Bribery Investigation and Prosecution

a. *Mandatory investigation of natural persons and discretionary investigation of legal persons*

151. As detailed in Phase 3, based on the mandatory prosecution principle (*Legalitätsprinzip*), the prosecution offices are 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.¹⁰² In

¹⁰¹ *Sachgebiet Ermittlungen Organisierte Kriminalität und Steuerfahndung*

¹⁰² Subsection 160(1) CCP.

contrast, the principle of discretionary investigation applies to legal persons. This is discussed into detail under section C.2.b. on the responsibility of legal persons.

b. *Independence and Considerations Forbidden under Article 5 of the Convention*

152. In Germany, the prosecution services act under the supervision of the MOJ and the *Land* Justice Minister. The Ministers, at both Federal and *Länder* level, have the right to issue individual instructions in cases, including instruction not to prosecute cases. During the on-site visit, the prosecutors who participated in the panels indicated that to their knowledge this power to give instructions is not used. Germany stated that individual instructions are rarely used in practice and that the principle of mandatory prosecution, along with the guarantees surrounding the use of section 153a CCP, would limit the use of instructions for natural persons.

153. However, for legal persons, the mere fact that instructions can be issued in foreign bribery cases raises serious concerns as prosecutors have discretion to both start an investigation and decide whether to impose a fine or not. In light of the low number of legal persons sanctioned to date, the possibility to issue instructions is of particular interest to this review. The fact that major companies such as Siemens or Ferrostaal have been sanctioned in Germany may to an extent alleviate concerns. However, it remains that only forfeiture orders have been used against 11 legal persons in cases of magnitude, both in terms of scope of the alleged bribery scheme and amounts at stake and that only 18 legal persons have been sanctioned to date in 67 foreign bribery cases. Transparency International's Comments and Recommendations for Germany's review under UNCAC also note that "the fact that the Minister of Justice has the power to give instructions to the prosecutor makes the discretion [to initiate proceedings against a legal person] even less dissuasive".¹⁰³

154. This is a serious issue that has already been raised in other countries although it appears to have been overlooked in Germany Phase 2 and 3.¹⁰⁴ In spite of a 2014 GRECO recommendation to consider doing so, the possibility for the Minister of Justice, at either Federal or *Länder* level, to issue instructions has not been abolished. By way of a decree, the German authorities expressly instructed public prosecutor offices at *Länder* level that any instructions received from the MOJ must always be issued in written form and be communicated to the President of Parliament.¹⁰⁵ While deeming its recommendation implemented, the GRECO report indicates that "a large majority of the public prosecutors consulted [in the context of a study] would like to have the right of the Ministers of Justice to issue external instructions in individual cases abrogated".¹⁰⁶

155. In a written submission, Transparency International emphasised that only formal instructions would be covered by this obligation, and that "informal influencing of decisions would still be possible". In its 2014 report, the GRECO also stresses that "according to a number of interlocutors, (...) prosecution may be influenced by ministers in more subtle ways, e.g. through phone calls or regular meetings,

¹⁰³ UNCAC First Review Cycle (Chapters III and IW - Review of Germany Comments and Recommendations by Transparency International Germany prepared for the country visit (8-10 March 2016).

¹⁰⁴ Other WGB countries, including France, have received a recommendation to not issue individual instruction in foreign bribery cases. [Phase 3 report France](#), recommendation 4a, Argentina, recommendation 6b, Czech Republic recommendation 3, New Zealand, recommendation 5d.

¹⁰⁵ The decree entered into force in December 2016 and revised an existing decree of the Federal Ministry of Justice and Consumer Protection on the reporting obligations of the Federal Prosecutor General.

¹⁰⁶ GRECO (October 2014), "[Evaluation Report of Germany under the Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors](#)" paras. 197-205; and GRECO (24 March 2017) "[Compliance Report of Germany under the Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors](#)", pp. 8-10.

‘reports of intention’ to be submitted to the ministry in cases of primary importance.’ The report further notes that “such cases have been repeatedly reported in the media.”

Commentary

The lead examiners are concerned that, because of the principle of discretionary prosecution and sanctioning of legal persons, instructions by the executive might potentially have an impact on the number of legal persons held liable and sanctioned for foreign bribery. They hence recommend that if Germany does not implement recommendation 6.b. on removing the principle of prosecutorial discretion applicable to corporate liability, Germany alternatively ensure that the Public Prosecutor’s Office role in the instigation of investigations and prosecutions of legal persons, is exercised independently of the executive in order to guarantee that these investigations and prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention (i.e. considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved).

c. Investigative techniques and tools

156. The prosecutor’s office conducts the investigation and calls upon the police as relevant to perform certain investigative acts (sections 160, 161 CCP) such as internet research, register inquiries etc. These acts are limited to those not involving serious intrusions into citizens’ liberty or privacy such as searches and seizures or wiretaps which require judicial permission prior to their execution or, if exigent circumstances made immediate action necessary, subsequent authorisation by a magistrate.

157. The German Code of Criminal Procedure was extensively reviewed in 2017. In its questionnaire answers Germany indicates that the changes provide greater powers to authorities in investigating foreign bribery offences while only pointing to the introduction of a provision allowing for online or remote searches described below. The discussion below takes stock of both the newly available tools and those that were already available in Phase 3 but have now been confirmed as being used in foreign bribery cases by the investigators and prosecutors met at the Phase 4 on-site visit.

i. Special Investigative Techniques and Tools

- Online or remote searches and interception of telecommunications

158. Pursuant to the 2017 review of the CCP and a newly added section 100b CCP, online or remote searches are now permissible. Technical means may be used, even without the knowledge of the person concerned, to access an IT system used by him/her and to retrieve data from such a system (remote/online search) under a number of conditions, including suspicion of an especially serious offence of foreign bribery and unavailability of other means of establishing the facts.

159. Since January 2008, it has been possible to intercept telecommunications of suspects wherever offences entail the bribery of foreign public officials in international business transactions.¹⁰⁷ This law remains unchanged with the extensive review of the CCP in 2017. During the on-site visit, prosecutors indicated that this is not, by far the primary investigation tool to be used in foreign bribery investigations.

- Witnesses’ cooperation

160. A “general provision regarding principal witness” entered into force on 1 September 2009 (section 46b CC). This provision is intended to offer an incentive to offenders who are willing to

¹⁰⁷ Law on the Revision of Telecommunications Monitoring and other Covert Investigation Measures 2006/24/EG. Federal Law Gazette (Bundesgesetzblatt, BGBl.) I p. 3196.

cooperate with the prosecution in establishing the facts of a matter and in preventing further criminal offences by allowing for a lower punishment (section 49(1) CC on the mitigation of sentence). It also allows for refraining from imposing a punishment in certain circumstances. Serious cases of bribery are eligible for such treatment. In Phase 3, the Working Group believed 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 (follow up issue 12c). The ruling was repeatedly criticised as having a wide area of application. On 1 August 2013, a new law amending section 46b CC entered into force restricting its scope. Section 46b CC now only applies if the information provided by the state witness relates to an act which is connected to his/her own act, hence significantly reducing the scope and interest of this law. During the on-site visit, prosecutors pointed to the limited use of this provision in practice.

ii. Other investigation tools and techniques

161. As in Phase 3, prosecutors and representatives from the police met during the on-site visit confirmed that 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. Information technology tools, such as research software, have also enabled searches into large number of emails in the investigation of prominent foreign bribery cases. At the on-site visit, both prosecutors and investigators confirmed that there is no specific issue with regard to access to information, including with regard to bank information or tax information.

iii. Investigation tools available in respect of legal persons

162. Regarding legal persons, the Phase 3 report notes that despite the absence of express reference to that effect in the law, the criminal nature of the proceedings in respect of legal persons (section 46 OWiG) allows for the full use of investigative powers in Germany, including coercive measures. The same powers are also available if an investigation is directed exclusively at the legal person. 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.

163. The cooperation of the companies prosecuted for foreign bribery was also cited in Phase 3 as an essential tool for prosecuting authorities. The Phase 3 report describes in detail the important role that cooperation played in the Siemens case. However, a potential limitation to searches was recently imposed by Germany's Federal Constitutional Court through a provisional order.¹⁰⁸ This case is yet to be finally decided and prosecutors at the on-site visit deemed it premature to comment on it. Without discussing the merits of this provisional order in terms of protection of communications between lawyers and their clients in Germany, it shows the potential limits of relying on internal investigations with non-cooperative individuals and companies.

iv. Extent to which the large range of theoretically available tools are used in practice

164. Germany appears to be making a large use of all the range of investigative tools at its disposal, at least in the most active *Länder*. The large use of investigative tools was already noted in Phase 3 with regard to the two most prominent cases investigated at the time, i.e. Siemens and MAN.

165. In its questionnaire responses, Germany points to the regular use, besides Mutual Legal Assistance requests, of the following measures: search measures (domestic and business premises); requests to the Federal Central Tax Office; requests to the Federal Financial Supervisory Authority;

¹⁰⁸ GIR (July 2017) “[German Constitutional Court blocks prosecutors from using seized Jones Day documents Germany's Federal](#)”

hearing of witnesses; hearing of defendants; and surveillance of telecommunications systems. Germany's updates in the *Länder* annual reports further illustrate the use of a large range of investigative tools.

166. Searches of large companies' premises are also regularly reported in the German press and were described by prosecutors at the on-site visit as the first step they would routinely take in foreign bribery cases.

167. Germany specifically pointed to two cases in Bavaria where a large range of these investigative tools were used in the context of a Joint Investigative Team (European Union JITs).¹⁰⁹ In the first case, these tools included: a JIT with Austria, MLA requests to Italy, Isle of Man, Liechtenstein, Luxembourg, Malta, Romania, Switzerland, the UK, Greece and Cyprus (all answered), search of both private and business premises, the seizure of written documents and electronic data, the examinations of the accused and witnesses. Parallel investigative measures were also taken by Austrian law enforcement in Austria. On top of these two examples, the translated decisions of four cases investigated in Hesse, Hamburg and Baden-Württemberg also shows the large range of investigative steps taken and tools used, including in cases that were ultimately dropped.¹¹⁰

168. The evaluation team also selected a sample of prominent cases in order to assess how German law enforcement authorities have used investigative techniques in proceedings against legal persons. These cases also show the use of a large range of investigative techniques. A description of the investigative techniques used in these cases is reproduced in Annex 1D.¹¹¹

v. *Practical challenges in investigating foreign bribery and gathering evidence to meet evidentiary threshold*

169. Germany points to a number of challenges encountered in investigating foreign bribery. Some of these challenges are inherent to the transnational nature of foreign bribery and are common to many parties to the Convention. These include difficulties in proving payments to a decision-maker and qualifying them as bribes; tracking payment flows through a large number of foreign companies, the involvement of several middlemen (often consultants), monies transferred to accounts in various countries, payment flows via offshore companies; bribery payments concealed through fake invoices submitted by foreign companies.

170. Coordination of multi-jurisdiction investigations searches, without being specific to Germany is becoming a growing challenge as enforcement increases across the board. The *Land* of Bavaria points in particular to the difficulty of coordinating various searches simultaneously in different countries in order to preserve evidence.

171. Another emerging challenge which appears more specific to Germany lies with the increased tendency of companies to carry out their own internal investigations without coordinating these with the investigating authorities. The risk of losing evidence and influencing both co-defendants and witnesses was emphasized by Hesse.

172. During the on-site visit, prosecutors pointed out that, in spite of the provisions on witness cooperation under section 46b CC, the willingness to cooperate on the part of the accused persons has decreased radically in the past years. One prosecutor stated in Germany's questionnaire answers that there

¹⁰⁹ Cases Bav 2012/1, and Bav 2014/2

¹¹⁰ Case Hes 2011/4 – Biotest Russia; Case Hes 2011/5; Case BW 2011/1h; Case Ham 2011/3; Case Hes 2011/3(old).

¹¹¹ Case Hes 2011/4 - Biotest Russia; Case Hes 2011/5; Case Bav (old) 2011/6 - Ferrostaal; Case Bremen 2013/1 - Rheinmetall Defence Electronics and 2013/2 Atlas Elektronik.

are hardly any accused persons who voluntarily confess to the public prosecutor's office to get a more lenient sentence. This was confirmed by both prosecutors and lawyers at the on-site visit.

173. Finally Bavaria emphasised that, despite extensive investigations, the indictment must often be based upon circumstantial evidence. Investigators from Bavaria report that experienced defence counsel would attack that evidence at trial, and that they were very often successful in undermining one of the links in the chain of circumstantial evidence.

Commentary

The lead examiners commend Germany for the broad range of investigative techniques and tools available to investigators and for the use of these techniques and tools in actual foreign bribery cases. They also commend Germany for the use of Joint Investigative Teams (JIT) in multi-jurisdiction investigations.

They are of the view that companies' cooperation with the law enforcement authorities, in particular the coordination of their own internal investigations should be included in the rules that Germany should develop to encourage companies to self-report foreign bribery as discussed under section A.1.

d. Jurisdiction for foreign bribery incorporated into the Criminal Code

174. The legislation governing jurisdiction was amended by the Anti-Corruption Act of 2015.¹¹² It no longer vests in *IntBestG* but instead has been incorporated into the Criminal Code (section 5(15)) and extend extra-territorial jurisdiction to all offences involving a foreign public official. The provision remains however the same in substance and was deemed adequate by the Working Group in former phases. However, given that only sections 331-337 are mentioned under this new provision, it is unclear whether it applies to alternative offences as bribery in business transactions (section 299 CC) and breach of trust (section 266 CC).

Commentary

The lead examiners welcome the incorporation into the Criminal Code (section 5(15) of provisions formerly in a separate Act (IntBestG) and the extension of Germany's extra-territorial jurisdiction to all offences involving a foreign public official. They recommend that the Working Group follow up in practice whether the jurisdiction rules in Section 5(15) provide sufficient basis to apply to the alternative offences of commercial bribery or breach of trust.

e. Statute of limitations

175. At the time of Phase 3, no foreign bribery cases had been adversely affected by the statute of limitations and no recommendation was made in this regard. The basic statute of limitations remains at five years for the foreign bribery offence, regardless of whether the offence is treated as "serious", "less serious" or "especially serious".¹¹³ The period begins with the completion of the offence (section 78a CC). Various acts which suspend or interrupt the statute of limitations can prolong it, but an absolute bar is set at double the basic statute of limitations. For the foreign bribery offence, this is therefore 10 years. Due to the operation of the amended section 76b CC, there is now, additionally, an extended limitation period of 30 years in confiscation proceedings. These provisions apply equally to natural and legal persons. Section 78a CC, allows the limitation period to start to run from the date of the latest "result constituting an element of the offence". At the on-site visit, prosecutors explained that this section had been successfully used to prosecute "old" foreign bribery cases.

¹¹² In force 26 November 2015.

¹¹³ Section 78(4) CC, which provides that the limitation period is that which applies by law to the offence, regardless of mitigating or aggravating features in the general or special part.

176. The number of foreign bribery cases that have been statute barred remains limited and do not appear to have resulted from a lack of prosecutorial action. Since Phase 3, the statute of limitations has prevented prosecution for some offenders in four cases.¹¹⁴ However in two of these cases, other natural and/or legal persons were prosecuted. In the two remaining cases, the persons who could not be prosecuted for foreign bribery were prosecuted for other offences with a longer statute of limitations, such as tax fraud. Prosecutors at the on-site visit were of the unanimous view that the current statute of limitations is adequate in practice and explained that they would systematically attempt to pursue alternative offences if the limitation period had expired for the foreign bribery offence. Defence lawyers confirmed that this happens in practice.

Commentary

In light of the high level of enforcement in Germany, the lead examiners consider that the marginal number of cases affected in practice by the statute of limitations is not revealing a systemic issue requiring follow-up.

B.5. Concluding a Foreign Bribery Case

a. Judicial awareness, training and specialisation

i. Judicial awareness and training

177. In Phase 3, the Working Group was concerned that judges and prosecutors in those *Länder* with less experience in foreign bribery cases may lack awareness and specific training with regard to the technicalities linked to the complexity of the foreign bribery offence in Germany for both natural and legal persons.

178. After Phase 3, a conference was held with prosecutors and judges to follow up on Phase 3 recommendations but judges did not attend it. Training events were later held with judges but from the list of 10 events provided at the time, only half appeared to have addressed foreign bribery. After the Phase 4 on-site visit, Germany again provided a list of training programmes offered by the German Judicial Academy in 2018 in the fields of corruption, economic criminal law and mutual legal assistance, none of which covered foreign bribery or the liability of legal persons as a main topic.

179. Based on the evidentiary requirements or mitigating factors used by some courts in the translated decisions provided by Germany, it appears that training and guidance of certain judges is a continued concern which has not been fully addressed between the Phase 3 and Phase 4 evaluations.

180. As discussed below, the role played by lay judges, in particular in local courts, where a number of cases of foreign bribery have been allocated, is far from negligible. Given that these non-professional judges do not sit more than 12 days per year and cannot be trained on all types of offences, the issue of training of professional judges may no longer be fully relevant or at least sufficient.

ii. Specialised Courts for foreign bribery cases

181. Germany's increased enforcement shows that many foreign bribery cases are in practice heard in Local Courts (*Amtsgerichte*) which deal with the least serious criminal cases. Despite some recent changes, only half of the *Länder* currently have specialist economic crime Courts at this level. This is in

¹¹⁴ Case Bav 2013/2, Case Bav (new) 2014/1, Case Hes 2011/5(old) and Case Hes 2011/9.

contrast to the specialised economic chambers of Regional Courts (*Landgerichte*) which heard the major foreign bribery prosecutions such as Siemens in Phase 3 and two cases in Phase 4.¹¹⁵

182. Under the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG), the Regional Court will only have jurisdiction on a foreign bribery case in three circumstances: if the sentence for a natural person is *likely* to be over four years imprisonment,¹¹⁶ placement of the accused in preventive detention (*Sicherungsverwahrung*) is to be expected, or if the prosecution ask for the case to be heard at the regional court.¹¹⁷ The prosecution can do this where justified by “the particular scale or the special significance of the case”.¹¹⁸ In practice, of the 47 cases since Phase 3 where the case either was heard by a court, or the court approved the resolution under an alternative procedure, only 2 cases were dealt with by the regional court.

183. If the case is heard at the regional court, a specialist economic offences division can hear the case, although this is not automatic. If the case involves bribery in business transactions (section 299 CC) the case will always be heard in the specialist economic offences division.¹¹⁹ For foreign bribery, the economic division will only have jurisdiction over the case if the court concludes that “special knowledge of business operations and practices is required in order to judge the case”.¹²⁰ Local courts have Divisions specialised in economic offences in only half of the *Länder*.

184. There is little logic for regional court cases involving bribery in business transactions (section 299 CC) always being heard in the economic offences division at regional court and foreign bribery (by its nature involving an international business transaction) needing to meet a number of conditions to be heard by specialised judges.¹²¹

185. If a case is heard at a local court, either a single professional judge (where a sentence of not more than two years is expected) or a professional judge sitting with two lay judges¹²² (where the sentence is likely to be between two and four years) will hear the trial.¹²³ To decide on guilt, a two-thirds majority is needed.¹²⁴ This means the lay judges can outvote the professional judges in local court cases and appeals to the regional court (see Annex 7 on the appeals process).

186. While most serious offences can *only* be tried at a regional court,¹²⁵ due to the operation of section 24(3) GVG, many “especially serious” cases of foreign bribery involving both natural and legal persons could be heard at a local court. Similarly, when a prosecutors’ office imposes a regulatory fine on

¹¹⁵ Decision of Munich I Regional Court of 4 October 2007 - against the Telecommunication unit of Siemens (referred to in this report as Siemens Telecom Unit). Germany states the Phase 4 cases heard at regional court level are Bav 2014/4 and Ham 2014/1.

¹¹⁶ In the information provided by Germany, only two actual sentences in a foreign bribery case have been over four years, both involved aiding and abetting tax fraud and embezzlement, and are the subject of an appeal.

¹¹⁷ Section 74(1) GVG.

¹¹⁸ Section 24(3) GVG.

¹¹⁹ Section 74c(1)5a GVG.

¹²⁰ Section 74c(1)6 GVG. An example of where the case initially started before the “ordinary” criminal division of the Regional Court and was (after a year) transferred to the economic offences division is Hes 2011/8

¹²¹ Section 74c(1)6 GVG.

¹²² Lay judges are usually nominated by a local business or professional association, trade union, welfare or sports club. A lay judge is normally expected to sit for 12 days per year, and can apply to be removed if made to sit over 24 days per year.

¹²³ Under Section 29(2) GVG, the Prosecution can apply for a second professional judge to be added to the bench in the light of the scale of the matter.

¹²⁴ Section 263 CCP. This expressly includes decisions to increase, diminish or exclude criminal liability, but expressly excludes the statute of limitations.

¹²⁵ S74(2) GVG

a legal person (based on the administrative offence of violation of supervisory duties by a senior manager under section 130 OWiG), any appeal by the legal person of this purely administrative resolution would be to the local court. As half the *Länder* do not have specialist economic courts at local level, the risk is high that foreign bribery cases be dealt with by tribunals with no specialisation in the criminal economic offences field. No local court judge was available to meet the evaluation team which prevented further discussion of these issues.

Commentary

The lead examiners note that specialist economic divisions exist in half of the Länder local courts. The lead examiners also note that while prosecutors can ask that the case be heard before a regional court, in practice this has only happened in a minority of cases since Phase 3. They are concerned that prosecutors in some Länder will present foreign bribery cases to a non-specialised division of a local or regional court. The lead examiners recommend that Germany align regional court jurisdiction for both foreign bribery and bribery in business transactions (section 299/300 CC).

b. Resolutions with Natural Persons: Conditional Exemption or Termination of Proceedings (section 153a CCP), Penal Orders (section 407 CCP) and Judgements based on Negotiated Sentencing Agreements (257c CCP)

187. As noted above, in Germany, the principle of mandatory prosecution prevails. However, under the Code of Criminal Procedure, certain circumstances allow for a conditional exemption from prosecution or termination of the prosecution (section 153a (1) and (2) CCP); or for declining prosecution (section 153c CCP) at the discretion of the public prosecution office and the courts. These exceptions may apply to all misdemeanours including foreign bribery, commercial bribery and breach of trust. Importantly, section 153a CCP does not apply to legal persons. The possibility (i) to dispose a criminal case by consent without a main hearing with a “penal order” imposed by a court upon written application by the prosecutors (section 407 CCP); or (ii) to enter into negotiated sentencing agreements with the courts (section 257c CCP) each provide for further possibilities to resolve a case with natural persons. They were examined for the first time in Phase 3, at a time where section 257c CCP was still new. All these proceedings involve a court decision but not all involve a conviction. Individuals have so far been sanctioned for foreign bribery either as result of one of these resolution possibilities or as a result of a full trial procedure.

i. Conditional exemption from prosecution or termination of prosecution on the ground of “public interest” (Section 153a(1) CCP)

- Main features of resolutions under 153a CCP

188. Pursuant to section 153a CCP, the offender may be conditionally exempted from prosecution where the “public interest” no longer requires the prosecution of the case. In Phase 3, prosecutors indicated that the public interest could be mitigated in misdemeanours 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. The conditional exemption from prosecution may consist *inter alia* of compensating for the damage, the payment of a sum of money to the treasury or to a non-profit organisation etc. It must be agreed by both the court and the individual and can be appealed. (See section B.2.b. on sanctions).

189. Foreign bribery proceedings against individuals can be conditionally terminated at the stage of the investigation (section 153a (1) CCP) or at the stage of the prosecution (section 153a (2) CCP). In both cases, the decision is taken by the prosecution with approval of the court. The same conditions may be imposed in either the exemption from or the termination of prosecution.

- Making public certain elements of resolutions under 153a CCP

190. Although in Phase 3, some of these arrangements had 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. In Phase 3, the Working Group noted with concern the lack of transparency of these arrangements and made a recommendation about making public certain elements of these arrangements (recommendation 3c). The implementation of this recommendation would add accountability, raise awareness, and enhance public confidence in the enforcement of anti-corruption legislation in Germany.

191. In Phase 4, Germany reiterated arguments already used in Phase 3.¹²⁶ When proceedings against individuals are conditionally terminated at the stage of the prosecution (section 153a (2) CCP), the resolution is decided in a ruling in the course of the main hearing. Because this hearing is held in public, Germany maintains that this ensures the required transparency. In “appropriate” cases the court also publishes press releases, in which the reasons for the termination of proceedings and the condition attached to the termination “are regularly listed”. One such press release was shared with the examiners at the time of the Phase 3 written follow-up report but it did not relate to foreign bribery. No other example was provided to the evaluation team in Phase 4. When proceedings against individuals are conditionally terminated at the stage of the investigation (section 153a (1) CCP), Germany reiterates that tighter constitutional and data protection limits the provision of information to the public. These arguments were assessed by the Working Group in Phase 3 and led to recommendation 3c. In the absence of steps taken since Phase 3 to implement this recommendation, it remains unimplemented.

- Clarifying the criteria for resolutions under 153a CCP

192. In Phase 3, the Working Group was concerned about the lack of consistency of the information and explanations provided as to the scope, purpose and criteria for applying section 153a CCP. The Working Group hence recommended that Germany clarify the criteria by which the prosecutors may dispense with prosecutions, with a view to ensuring uniform application of section 153a CCP (recommendation 4c). The recommendation that Germany clarifies these criteria dates back from Phase 2, in 2003, where it was seen by the Group as a way to ensure a uniform exercise of discretion by the prosecutors (Phase 2 recommendation 8). The German authorities confirmed in Phase 3, that no support manuals or directives existed. This recommendation was deemed implemented at the time of the Phase 3 written follow-up, mainly based on a conference involving the MOJ and the *Land* departments of justice which took place in Berlin in November 2011 and discussed Phase 3 recommendations. No progress has since been made to clarify criteria for applying section 153a CCP and the consequences attached to it. It appears all the more relevant to enhance transparency and predictability in this regard as over this period, the use of resolutions under section 153a steadily increased as enforcement figures below are showing (see sub-section iv).

193. During the on-site visit, the prosecutors indicated that cooperation is one of the main criteria but no clear standard is available regarding the expected level of such cooperation. In this regard, the Working Group notes that a decreased cooperation of defendants is pointed out by the prosecutors as one of the main prosecution challenges. Clarifying the criteria regarding the level of cooperation expected from defendants and the consequences attached to such cooperation could contribute to overcome this challenge.

¹²⁶ See both Phase 3 report, para. 98 and Written Follow-up report, p. 11-12.

ii. *Non-prosecution of offences committed abroad on the ground of “predominant public interest” (Subsection 153c(3) CCP) and Article 5 issues*

194. In Phase 3, the Working Group urged Germany to clarify that the “predominant public interest” provided under subsection 153c (3) CCP among the grounds for dispensing with prosecution without sanction does not include factors contrary to Article 5 of the Convention such as the national economic interest (recommendation 4d). Guidelines on Criminal Proceedings and Imposition of Fines” have since been amended to clarify that “in making a decision on whether an offence should be prosecuted, prosecutors have to comply with Article 5 of the Convention”, the latter being quoted in a footnote. The amendment entered into force in 2014, hence fully implementing recommendation 4d.

iii. *Deciding a case through a “penal order” (section 407 CCP) or a judgement based on a “negotiated sentencing agreement” with the court (section 257c CCP) and predictability, transparency and accountability*

195. Pursuant to section 407 CCP, prosecutors can also use their discretion to decide to conclude a case by applying to the court for a penal order to be imposed. This procedure, designed to dispose of criminal cases without a full trial, may be applied to misdemeanours (i.e. foreign bribery, commercial bribery and breach of trust cases). The defendant must be heard before the application for and the imposition of a penal order. However his/her prior consent is not required. The defendant can appeal the imposed penal order, which triggers a full trial. The defendant’s position will be taken into consideration by the prosecution in the context of preparing the order. If approved by a court, the accused may be sentenced to a fine and/or, if he/she is represented by defence counsel, to a suspended sentence of imprisonment of no more than one year.

196. Pursuant to section 257c CCP a negotiated sentencing agreement between the court and the defendant can be concluded. The negotiations aiming at such an agreement can take place 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.¹²⁷ The agreement itself has to be concluded in a main hearing where the presiding judge has to introduce the facts and the essential elements of negotiation including the grounds for mitigating a sentence. As a rule, a negotiated agreement has to include a confession on the part of the defendant.

197. Unlike a conditional exemption from prosecution under section 153a CCP, both a penal order under section 407 CCP and a judgement following a negotiated sentencing agreement under section 257c CCP have the consequence of convicting the accused. Both can be appealed.

- *Predictability, transparency and accountability*

198. In Phase 3 the Working Group decided to follow up on 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 (follow-up 12b). The lead examiners also pointed in their commentary to the need that the WGB ensure in particular that the grounds for mitigating a sentence under the new provision of section 257c CCP are publicly available as for other types of agreements.

199. Germany pointed to a Federal Constitutional Court decision of 19 March 2013, which found that the Act on Negotiated Agreements is sufficient to ensure compliance with constitutional law.¹²⁸ The

¹²⁷ Act on Negotiated Agreements (*Gesetz zur Regelung der Verständigung im Strafverfahren*) which entered into effect in 2009.

¹²⁸ File number: 2 BvR 2628/10.

decision does not appear to address the Working Group's specific concerns and does not cover penal orders under section 407 CCP or resolutions under section 153a CCP. However, the Federal court called upon lawmakers to continue to examine whether the protective measures provided for in the Act are sufficient to ensure legal certainty and transparency, and whether these measures are actually complied with in practice. Germany's questionnaire responses specify that "for this reason, an extensive empirical evaluation of negotiated agreements in Germany is to be carried out over the next two years." The review appears to still be at the planning stage and no more details were provided at the on-site visit about the scope and objectives of this review. Germany later indicated that the results of the study will be presented in 2020. The evaluation team note that the evaluation does not extend to conditional exemption from prosecution under section 153a CCP.

iv. Use of resolutions with individuals in practice

200. As outlined in Figure 9 below, since Phase 3, over two thirds (69%) of the sanctions were imposed under section 153a(1) and (2) CCP. Of both types of resolutions, termination at the stage of investigations under section 153a(1) CCP has been by far the most frequently used. Settling a case through a penal orders under section 407 CCP, has been the third most frequently used possibility, although it is equivalent to a conviction, unlike resolutions under section 153a CCP. The use of negotiated sentencing agreements under section 257c CCP remains an exception. The power not to prosecute offences committed abroad under section 153c CCP has not to date been used in a foreign bribery case.

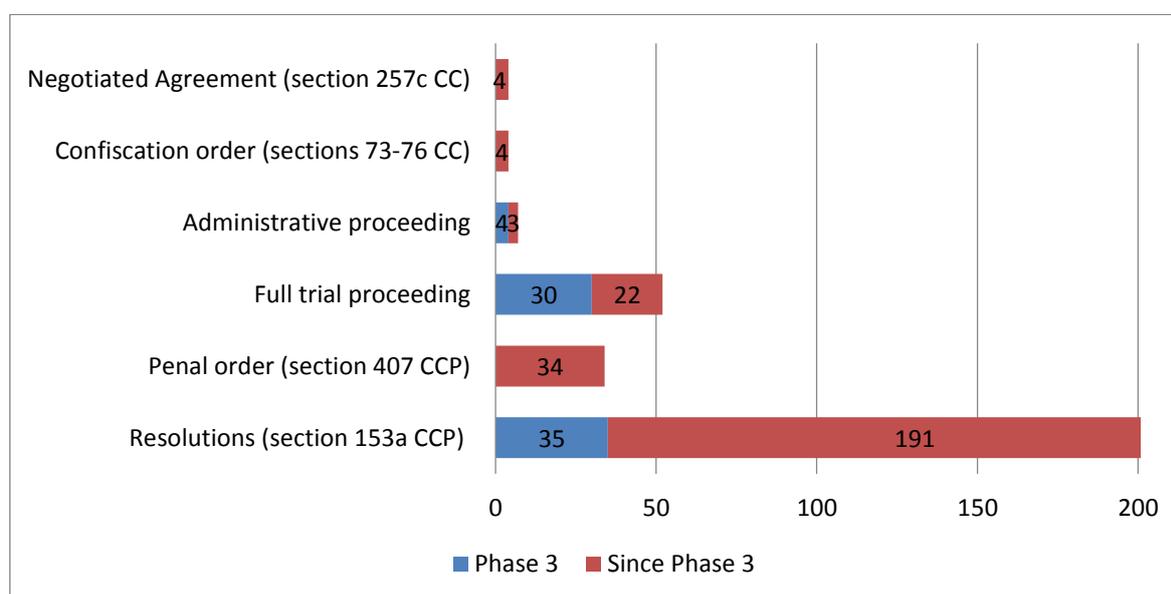
201. At the time of Phase 3, of the 69 individuals sanctioned in foreign bribery cases, 30 had been criminally convicted including through a penal order (section 407 CCP), 35 had been sanctioned under a resolution under section 153a(1) CCP, and 4 were found liable in administrative proceedings (section 130 OWiG).

202. Since Phase 3, of the 259 additional individuals sanctioned in foreign bribery cases, 60 were criminally convicted, including at least 4 individuals through a negotiated sentencing agreement under 257c CCP,¹²⁹ and 34 individuals with a penal order under section 407 CCP; 152 were sanctioned under a conditional resolution under section 153a (1) CCP, 39 were sanctioned under a conditional resolution under section 153a(2) CCP. In addition, 3 individuals were sanctioned in administrative proceedings and 4 individuals received a confiscation order only. Hence, almost three quarter of the sanctions were imposed under section 153a (1) and (2) CCP, which represents a significant increase compared to March 2011 where it had only been used in about half of the cases.

203. In total, since the entry into force of the Convention, out of the 328 individuals sanctioned, 90 were criminally convicted (less than a third) of which at least 34 individuals via a penal order (section 407 CCP) and 4 individuals through a negotiated sentencing agreement under section 257c CCP, 226 were sanctioned with a conditional exemption from prosecution under section 153a(1) or (2) CCP (over two thirds).

¹²⁹ In Case Bav (old) 2014/4: one natural person entered into a negotiated sentencing agreement under section 257 c CCP. In the Case Bav (old) 2011/1, the annual report from the *Länder* indicate that the conviction was based on an agreement – which may also refer to the procedure under section 257c CCP.

Figure 9. Number of individuals sanctioned in foreign bribery cases per procedure since 1999



204. In Phase 3, the size of the cases in which section 153a CCP was used, demonstrated that it was not reserved to cases that are “not particularly serious” as some prosecutors had mentioned. It was used for instance in 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,¹³⁰ and in another 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.¹³¹ This procedure also applied to over 20 individuals involved in the Siemens case although 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.

205. Since Phase 3, the prosecutors have used section 153a CCP in cases which size suggests that they would not be considered as “not particularly serious”. For instance, it was used in a case involving the payments of more than EUR 8 million in bribes to public officials at a Central Asian ministry responsible for awarding a contract to build a gas compressor station. In another case, section 153a CCP was used to resolve an allegation that more than EUR 8 million was paid to public officials by employees of a German company manufacturing printing machines from 2001 to 2007.¹³²

Commentary

The lead examiners note the large use of conditional exemption and termination from prosecution under sections 153a (1) and (2) CCP with over two thirds (almost 70%) of the sanctions imposed in foreign bribery cases through these proceedings since the entry into force of the Convention. The other third is mainly resolved through either full court trial proceedings or penal orders, both resulting in the conviction of the individual. This represents a significant increase in the use of the conditional exemptions from prosecution which in Phase 3 had been used in only half of the cases. However,

¹³⁰ See 2005-2006 Annual report, Hamburg (d); 2007-2008 Annual report, Hamburg (c).

¹³¹ See 2009 Annual report, Baden-Württemberg (g); 2008 Annual report, Baden-Württemberg (i) ; 2007-2008 Annual report, Baden-Württemberg (j).

¹³² In the case Bav 2011/3 and case Hes (old) 2011/9.

publication of elements of the resolutions under section 153a CCP has not increased correspondingly, hence leaving recommendation 3c unimplemented.

Given the prevalence acquired by conditional resolutions in Germany's foreign bribery enforcement landscape, the lead examiners are of the view that it has become urgent that Germany add accountability, raise awareness, and enhance public confidence in the enforcement of the anti-corruption legislation including through these means.

They hence recommend that Germany:

a) clarify, through any appropriate means, including building on the body of concluded foreign bribery cases, the criteria by which the prosecutors may dispense with prosecution, including the level of cooperation expected from the defendants throughout the investigation, with a view to ensuring a consistent exercise of discretion by the prosecutors across Länder and to enhance predictability and transparency regarding the application of section 153a CCP.

b) ensure, through any appropriate means, that certain elements of the resolutions under Section 153a CCP, such as the legal basis for the choice of procedure, the facts of the case, the natural persons sanctioned (anonymised if necessary), and the sanctions imposed are made public where appropriate and in line with Germany's data protection rules and the provisions of its Constitution.

c) proceed with the announced extensive empirical evaluation of negotiated agreements in Germany

The lead examiners recommend that the Working Group continue to follow up on 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.

The lead examiners welcome the implementation of Phase 3 recommendation 4d through the clarification introduced by Germany 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.

v. Availability of resolution proceedings for legal persons and impact of the use of resolutions with individuals on corporate proceedings

206. Under the current framework, legal persons do not have the possibility to enter into conditional non-prosecution resolutions. This was confirmed by Germany in its Phase 4 questionnaire answers, where it says that currently, the imposition of a regulatory fine for legal persons and associations is governed by the law on regulatory offences section 47 (3) of the OWiG), which, according to Germany, "rules out the possibility of using section 153a-style procedures and linking the discontinuation of the proceedings to a payment requirement".

207. However, the prosecution can hold a legal person liable without the involvement of a court. In Germany, no legal provision affords the possibility for a legal person to settle a case with the prosecution in a non-trial resolution *per se*. However, in practice a legal person can be held liable and sanctioned by the prosecution in a purely administrative resolution, without a conviction when corporate liability is triggered by the administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG). This is further discussed under section C.1.c. on the liability of legal persons. Legal persons can also enter into negotiated sentencing agreements with the courts (section 257c CCP).

Commentary

The lead examiners note that conditional non-prosecution agreements are not available to legal persons. They recommend that Germany consider introducing a system of resolution for legal persons as part of its efforts to increase enforcement against legal persons.

B.6. Mutual Legal Assistance and Extradition in Foreign Bribery Cases

208. In Phase 3, the Working Group praised Germany for the co-operation with other jurisdictions demonstrated in the Siemens case. MLA continues to be dealt with at *Länder* level and be rendered on a treaty or non-treaty basis in accordance with the Act on International Cooperation in Criminal Matters. The key change since Phase 3 is that the Act has been amended to incorporate the European Investigation Order (EIO).¹³³ This amendment has been in force since 22 May 2017 and facilitates MLA requests between EU Countries. In practice, some *Länder* have also made limited use of Eurojust in foreign bribery investigations, though from the information provided it appears it is far more common for MLA requests to be made bilaterally.

209. A number of other parties to the Convention described Germany's cooperation through MLA. Most reporting countries reported broadly positive experiences in dealing with Germany. Germany has administrative liability for legal persons, but the lack of dual criminality, which can affect a MLA request, does not appear to have been a problem in practice. During the on-site visit, a panellist from the MOJ explained that the vast majority of investigations are linked to the criminal prosecution of natural persons. However they agreed it could in theory pose a problem if Germany made a request for a search investigating a foreign subsidiary of a German company and there was no clear link to a natural person. Germany can provide MLA even if a conviction on the same facts has already occurred in Germany.¹³⁴ However, MLA may also be refused on a discretionary basis.¹³⁵

210. Germany does not collect statistics on MLA requests at either Federal or *Länder* level. The MOJ explained that German authorities deal with at least 25 000 MLA requests each year and emphasised the practical challenges it would face in gathering data at Federal level, including opposition from the *Länder* authorities and resource challenges. Despite this shortcoming, Germany has made considerable effort to provide information related to MLA requests mainly based on the case reports provided by the *Länder*. Some requests have been explained in detail while others are vague, such as a request made to a "European Country". In certain instances, information has also been provided by prosecutors "from memory". In the absence of statistics and consistent information across *Länder*, overall, Germany was able to provide extensive information both on in-coming and out-going MLA requests. However, the lack of complete statistics and data has been a challenge for the evaluation team to understand Germany's performance in seeking and providing MLA.

211. No changes have been made since Phase 3 regarding Germany's extradition framework. In contrast to MLA Germany gathers statistics on extradition although it does not differentiate between foreign bribery and corruption generally, Germany was able to provide data to show that 58 individuals have been extradited since 2010 for corruption offences (without distinction between offences). A Party to the Convention provided information on a positive practical experience in this regard; having previously made an unsuccessful extradition request to another European state, the Party's authorities became aware that the individual had travelled to Germany. An urgent request for a preliminary arrest was made, Germany responded rapidly, arresting the individual who was then extradited to the requesting country where he is now awaiting trial.

Commentary

The lead examiners note that those Working Group on Bribery members that responded to the evaluation team's questionnaire on MLA, gave positive feedback on Germany's ability to provide prompt and effective international cooperation.

¹³³ Directive 2014/41/EU.

¹³⁴ See for example Higher Regional Court of Stuttgart, decision of 30 July 2015, Case no. 1 Ausl 218/15.

¹³⁵ Section 91e (1) 2. Act on International Cooperation in Criminal Matters, for the European Investigation Order.

The lead examiners however note with concern that Germany does not have the necessary data to fully monitor its implementation of the Convention. The lead examiners recommend that Germany develop tools to collect data to measure MLA performance, to systematically gather information on the number of requests made and received, and the amount of time taken to execute incoming MLA requests and follow up on the status of outgoing MLA requests in relation to foreign bribery and related offences.

C. RESPONSIBILITY OF LEGAL PERSONS

Introduction

212. Corporate liability for foreign bribery is administrative in nature and is foreseen under section 30 of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*, “OWiG”). The same administrative regime applies to the related offences of money laundering predicated on foreign bribery and false accounting offences. Since Phase 3, Germany increased the maximum penalties available for legal persons in 2013, hence implementing a recommendation from the Working Group (recommendation 3d). Germany also introduced corporate successor liability through an amendment to section 30 OWiG.¹³⁶ Both changes are discussed below.

213. Since Phase 3, consideration to introducing a criminal corporate liability regime was given both at Federal and *Land* level. At Federal level, the former Coalition Agreement stated that consideration should be given to introducing criminal corporate liability for multinational companies. This did not materialise into a formal proposal. At *Land* level, the former government of North Rhine-Westphalia presented a draft bill on criminal corporate liability in December 2014. It has since been withdrawn. The Working Group on Bribery will continue to monitor possible developments in this area, noting that the Convention does not require corporate liability to be criminal.¹³⁷

C.1. Germany’s Approach to Corporate Liability for Foreign Bribery and Related Offences

a. Scope of Germany’s Administrative Corporate Liability Regime

i. A model of corporate liability in line with Annex I of the 2009 Recommendation

214. Pursuant to section 30 OWiG, corporate liability is triggered either (i) by a criminal offence committed by a senior manager (sections 334-335a or 299-300 CC); or (ii) by criminal offences by lower-level persons resulting in an administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG). Corporate liability is triggered by an offence committed by any “responsible person” acting for the management of the entity – the term responsible person applying broadly to senior managerial stakeholders and not only to an authorised representative or manager. A conviction for the original criminal offence of an individual is not a criterion or a condition to establishing the administrative liability of the senior manager and of the corporation. In Phase 3, the WGB was satisfied that this should allow for the coverage of the wide variety of decision making systems in legal persons. Germany’s approach to corporate liability hence corresponds to the second model in Annex I of the 2009 Recommendation. Germany enables corporations to be imputed with these

¹³⁶ Both changes were introduced under the 8th Amendment to the Act on Restraints of Competition.

¹³⁷ In the Federal Republic of Germany, Federal laws are adopted by the country’s parliament, the *Bundestag*. The interests of the *Länder* are considered – in the field of federal legislation – by the Federal Council (*Bundesrat*) which is also entitled to introduce bills in the *Bundestag*. The *Länder* also hold certain legislative powers and *Länder* laws are adopted by each *Land*’s parliament. Such laws would only apply in the *Land* in question.

offences when the commission of the offence by a natural person violated the legal entity's duties; or when the legal entity gained or was supposed to gain a "profit" through the commission of the offence. These criteria were also deemed in line with Annex I of the 2009 Recommendation.

ii. Successor Liability: a New Feature of the German Corporate Liability Regime

215. Successor liability including in foreign bribery cases was introduced in Germany in 2013 by the 8th Amendment of the German Act against Restraints of Competition. Section 30 (2a) OWiG now provides for successor liability in partial and universal successions for offences committed prior to the operation.¹³⁸ This liability provision also covers other forms of corporate restructuring including merger and acquisition, division and dissolution as a result of a merger or splitting. The amount of the regulatory fine imposed on the legal successor is capped to both the value of the assets of the predecessor assumed by the successor and the fine that would have been imposed on its predecessor. At the on-site visit, a prosecutor stated that prior to this amendment, it was "easy for companies to use corporate structure to avoid liability" and that there were "several cases where the court denied to allow proceedings against legal persons" as a result of corporate restructuring. Successor liability has since been applied against Airbus Defence and Space GmbH for the administrative offence of violation of supervisory duties under section 130 OWiG committed by EADS at the time.¹³⁹ (See Annex I.c for the description of the case).

Commentary

The lead examiners commend Germany for introducing successor liability provisions into its corporate liability legal framework. They welcome their coverage of a large range of forms of corporate restructuring and note that it should effectively prevent corporate entities from avoiding liability in foreign bribery cases.

b. Enforcement of Corporate Liability based on the different prerequisites

216. Eighteen legal persons have been held liable in 17 out of the 67 foreign bribery cases concluded since the entry into force of the Convention and up to December 2017. While no information was provided by the *Länder* for 2018, media reports (confirmed by the MOJ) show that one additional legal person was held liable in the Airbus Defence and Space GmbH case in February 2018. In practice, different offences committed by a natural person have triggered corporate liability. Detailed information on corporate enforcement actions is contained in Annex I.

217. Eight of the 18 legal persons sanctioned for foreign bribery as of December 2017 were held liable as a result of the criminal offence of foreign bribery by a natural person holding a managerial position (section 334-335a CC), *i.e.* in almost 50 % of the cases.¹⁴⁰ The *Land* of Bavaria remains the

¹³⁸ A mere name change does not affect the companies existence and subsequent liability.

¹³⁹ Munich Prosecutor Office (February 2018) "[Bußgeld über 81,25 Millionen Euro gegen die Airbus Defence and Space GmbH](#)".

¹⁴⁰ i) Decision of 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, hereinafter Case "**Siemens telecom unit**"; ii) Decision of 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.**"; iii) Decision of Hildesheim Regional Court of 26 June 2009 pursuant to section 30 OWiG in conjunction with sections 334 and 335CC - against Company P. – Fine of EUR 200 000, hereinafter Case "**Company P**"; iv) Decision of Munich I Regional Court of December 2011 pursuant to section 30 OWiG in conjunction with sections 334 CC against Ferrostaal –Fine of EUR 139.8 million, hereinafter "**Ferrostaal case**" (Bav (old) 2011/6; v) and vi) Decision of a Hessen Local Court pursuant to section 30 OWiG in conjunction with sections 334 CC in the case Hes (old) 2011/3 against **two companies** - Fine of EUR 600,000 and EUR 2.1 million; vii) Decision of Cologne Local Court pursuant to section 30 OWiG in conjunction

most active in enforcing corporate liability in conjunction with the foreign bribery offence, followed by North Rhine-Westphalia, Hesse and Lower Saxony.

218. Since the entry into force of the Convention, 5 of the 18 legal persons sanctioned in foreign bribery cases were held liable in conjunction with the administrative offence of violation of supervisory duties (section 130 OWiG), *i.e.* less than 25% of the concluded cases.¹⁴¹ Additionally, the administrative offence of violation of supervisory duties committed negligently was used in the recent bribery case concluded against Airbus Defence and Space GmbH. As in Phase 3, during the on-site visit, the prosecutors explained that this administrative offence is used as a safety net to hold a legal person liable in cases where the individual offender does not hold a managerial position or where managerial involvement in the offence cannot be proven.

219. Alternative criminal offences in cases pertaining to the foreign bribery sphere have triggered the liability of legal persons in less than 20% of the cases concluded against 5 legal persons. The criminal offence of commercial bribery by corporate representatives triggered corporate liability against 3 legal persons.¹⁴² In addition, other criminal tax offences committed by an individual triggered the liability of 2 additional legal persons.¹⁴³ In another on-going case one additional legal person was found liable for a tax offence because the foreign bribery offence was time-barred.¹⁴⁴ The rationale for preferring other charges than foreign bribery in these particular cases was not clarified during the on-site visit.

Commentary

The lead examiners note that the large scope of the offence of violation of supervisory duties, i.e. for not having implemented appropriate internal controls, ethics and compliance (section 130 OWiG) has allowed the German prosecutors to hold liable prominent German companies involved in high-profile foreign bribery cases. This approach has prevented foreign bribery cases from going unpunished.

with sections 334 CC against one unnamed company – Fine of EUR 100,000, hereinafter Case “**Consultant company of an aviation company**” (case NRP (old) 2013/2); and viii) Decision of Cologne Local Court pursuant to section 30 OWiG in conjunction with sections 334 CC against **DB Schenker** – Fines of EUR 2 million (case NRW 2014/1).

¹⁴¹ i) Decision of the Munich I Public Prosecutor of December 2008 pursuant to sections 130 and 30 OWiG against **Siemens AG** – Fine of EUR 395 million; ii) Decision of the Munich I Public Prosecutor of 10 December 2009 pursuant to sections 130 and 30 OWiG against **the truck unit of MAN** – Fine of EUR 75.3 million iii) Decision of the Munich I Public Prosecutor of 8 November 2011 pursuant to sections 130 and 30 OWiG against **MAN Ferrostaal** – Fine of EUR 10 million ; iv) Decision of the Bremen Public Prosecutor of 11 December 2014 pursuant to sections 130 and 30 OWiG against **Rheinmetall Defence Electronics GmbH** – Fine of EUR 37.07 million (see [the press release](#) issued by the Public Prosecutor Office); v) Decision of the Hesse Public Prosecutor in 2017 against an **unnamed company** – Fine of EUR 1.1 million and vi) Decision of the Munich I Public Prosecutor of 9 February 2018 against **Airbus Defence and Space GmbH**– Fine of EUR 81.25 million (see the [press release](#) issued by the Public Prosecutor Office).

¹⁴² i) Decision of the Hamburg Regional Court in July 2008 pursuant to section 30 OWiG in conjunction with sections 299 and 300 CC against **Hamburg based Maritime Shipping Company** – Fine of EUR 30,000; ii) Decision of a Munich Local Court on 23 November 2011 pursuant to section 30 OWiG in conjunction with section 299 CC against a **Technical Consultancy Company** – Fine of EUR 3.25 million; iii) Decision of a Duisburg Local Court in 2013 pursuant to section 30 OWiG in conjunction with section 299 CC against an **unnamed company** – Fine of EUR 950,000.

¹⁴³ i) Decision of a Hessen Local Court in 2016 pursuant to section 30 OWiG in conjunction with section 266 CC and section 370 of the Fiscal Code against **Biotest** – Fine of EUR 1 million; and ii) Decision of a Lower Saxony local Court in 2011 pursuant to section 30 OWiG in conjunction with section 370 of the Fiscal Code against an **unnamed company** – Fine of EUR 400,000.

¹⁴⁴ Case Bav 2013/2; Decision of the Munich I Regional Court in 2015 pursuant to section 30 OWiG in conjunction with tax evasion and money laundering against **Krauss Maffei Wegmann** – Fine of EUR 175,000. The legal person appealed the decision and the regulatory fine is therefore not final and binding.

They also note that the large range of possibilities available in Germany to hold legal persons liable further reinforces the relevance of the question why corporate liability has only been applied in a quarter of the foreign bribery cases concluded to date.

c. Proceedings to Establish Legal Persons Liability

i. The possibility to hold legal persons liable in joint or separate criminal proceedings

220. Proceedings to assess a fine against a legal person are foreseen in the Guidelines for Criminal Proceedings and Administrative Fines Proceedings (*RiStBV*).¹⁴⁵ Legal persons are held liable in the course of criminal proceedings against natural persons pursuant to section 444 CCP. The prosecution makes an application to declare the legal person additionally involved in the criminal proceedings against the natural persons.¹⁴⁶ Alternatively, legal persons can also be held liable in the course of independent fine proceedings pursuant to section 30(4) OWiG. This would happen, for instance, when the natural person settled his/her case under section 153a CCP. Such proceedings are also criminal in nature, provided that there is an underlying criminal offence committed by the natural person.¹⁴⁷ In this scenario, the legal person would also undergo a full court proceeding. Germany was not able to indicate how many of the 18 legal persons held liable since the entry into force of the Convention were held liable in joint criminal proceedings and in the course of independent fine proceedings.

221. At the time of finalising this report, Germany indicated that where an individual agrees to enter into a negotiated sentencing agreement under section 257c CCP, the same procedure may extend to a related legal person in joint proceedings pursuant to sections 71 and 46 OWiG.¹⁴⁸ In this case, the legal person enters into an agreement with the court and the prosecutor's office, independently from the agreement reached with an individual in the same court proceeding. Since Phase 3, at least one company entered into such a negotiated agreement (see *Ferrostaal* case) while two former company managers were convicted through a separate agreement under section 257c CCP.¹⁴⁹

ii. The possibility to enter into a purely administrative resolution with the prosecution

222. While no legal provision affords the possibility for a legal person to resolve a case with the prosecution in a non-trial resolution *per se*, a legal person can be held liable and sanctioned by the prosecution, without a conviction. This is based on the right for legal persons to be heard and applies when corporate liability under section 30 OWiG is triggered by the administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG). This administrative procedure was used to sanction Siemens AG and MAN (truck unit) at the time of Phase 3. It has since been used in 3 cases, including against MAN Ferrostaal and Rheinmetall Defence Electronics. The same procedure was also used in February 2018 against Airbus Defence and Space GmbH.

¹⁴⁵ Guidelines for criminal proceedings and Administrative Fines Proceedings (*RiStBV*). (2006) No. 180a.

¹⁴⁶ See Section. 180a RiStBV.

¹⁴⁷ Germany Phase 2 Report, para. 112.

¹⁴⁸ Section 46 OWiG provides that “the provisions of general statutes concerning criminal proceedings (...) shall apply *mutatis mutandis* to the regulatory fining proceedings”. The explanatory memorandum to the government bill introducing sections 257c CCP also indicates that “the use of negotiated sentencing agreements could also be appropriate in administrative fine proceedings”.

¹⁴⁹ Case Bav (old) 2011/6. See Ferrostaal Press Release (October 2011), “[Ferrostaal is prepared to agree to a settlement with the public prosecutor's office](#)” and Arabian Business (December 2011) “[Ferrostaal fined \\$183m for bribery by Munich court](#)”

223. During the on-site visit, private sector representatives claimed that, under this procedure, the amount of the confiscatory component of the regulatory fine is assessed based on estimates provided by the company to the prosecutor. This amount constitutes by far the largest component of the regulatory fines imposed in the cases reported to date. The amount of the punitive component would, according to the private sector panellists, give rise to less discussion with the prosecutor. The amount of the regulatory fine imposed in a resolution is subject to a judicial review if the legal person appeals it. This has never happened and is unlikely to occur in practice given that this procedure is based on discussions between the company representatives and the prosecutor.

Commentary

The lead examiners welcome the possibility for the prosecutors to enter into purely administrative resolutions with legal persons, under section 30 in conjunction with section 130 OWiG, in foreign bribery cases. In the Länder where this was used, this has allowed prosecutors to hold legal persons responsible in prominent foreign bribery cases where no other possibilities existed. In order to ensure a broader and consistent use of this purely administrative resolution, the lead examiners recommend that this approach to holding legal persons liable be shared with less experienced prosecutor's offices.

d. Legal persons as third parties in foreign bribery case: the use of forfeiture orders

i. The use of forfeiture orders in lieu of holding legal persons liable

224. A new feature of Germany's corporate liability enforcement action since Phase 3 is the use of forfeiture orders against a company without holding a legal person liable under section 30 OWiG and imposing a regulatory fine. Pursuant to section 29a OWiG, the prosecutors can decide to impose a forfeiture order against a legal person based on the administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG) without having to establish corporate liability. The application of section 29a OWiG precludes the cumulative imposition of a regulatory fine.¹⁵⁰ The legal persons are hence considered as third parties and the order is not tantamount to a conviction. As a consequence, the legal person will not be listed in the newly adopted Federal Debarment Register and is not subject to mandatory debarment from public procurement processes. However, Germany indicates that should procurement authorities become aware of the imposition of a forfeiture order, they would assess whether exclusion should be considered. Germany stresses that when a natural person will be convicted, the related legal person will be included in the Register, irrespective of whether it received a regulatory fine under section 30 OWiG or a forfeiture order under section 29 OWiG (see under section C.3.a). The administrative order to impose forfeiture is issued directly by the Public Prosecutor's Offices and is subject to judicial review. Germany indicates that a court cannot itself impose a forfeiture order pursuant to section 29a OWiG.

225. One prosecutor indicated that while "forfeiture is not a punishment, third party forfeiture are easier" to secure. Another prosecutor confirmed the use of section 29a OWiG as an alternative to holding a legal person liable and explained that forfeiture orders would be preferred if the prosecutor could not prove that an offence was committed by senior management. An academic stated that the prosecutors' workload led them to resort to section 29a OWiG, especially in a context where prosecution is not mandatory.

226. In Phase 2, the Working Group had already expressed concerns about this approach and stated that the practice to sanction legal persons for bribery only through forfeiture could impede the

¹⁵⁰ The regulatory fine includes a confiscatory component; therefore the imposition of both a regulatory fine and forfeiture order would result in a double confiscation.

effectiveness of the system as a whole.¹⁵¹ At the time, this procedure had yet to be used in foreign bribery cases. As formerly assessed by the Working Group, confiscation measures applicable to legal persons in the absence of corporate liability is not tantamount to corporate liability for foreign bribery as per Article 2 and Commentary 20 of the Anti-Bribery Convention.¹⁵²

ii. *Lack of transparency and clear framework in relation to the use of forfeiture orders*

227. Section 29a OWiG has been used increasingly to conclude cases against legal persons. In total, 11 legal persons received forfeiture orders in the course of administrative forfeiture proceedings, mainly in Bavaria, BW and Hesse.¹⁵³ In addition, confiscation measures were ordered against three legal persons under section 73(3) CC.

228. The identity of all but one of the ten legal persons that entered into a forfeiture order is unknown. German authorities indicated that “the media did not report about these cases so [they] cannot provide more details about the companies” since those are not publicly available. This raises concerns in a context where the media have in turn raised concerns that “in Germany, the majority of corporate settlements with prosecutors, including those demanding multi-million-euro fines, are never disclosed to the public” and have referred to these as “confidential resolutions” used to resolve cases “quickly and in secret”.¹⁵⁴ One case was eventually revealed following sanctions later imposed by foreign authorities against the same German company.¹⁵⁵

229. These procedures are, however, not limited to minor cases. Forfeiture orders have been imposed in cases whose magnitude, both in terms of scope of the alleged bribery scheme and amounts at stake, may raise questions as to the appropriateness of these measures, even if the amounts forfeited were themselves non-negligible. In the only case where the identity of the legal person is known involving Atlas Elektronik, the Bremen Public prosecutor's office imposed a forfeiture notice of EUR 48 million to the company. The forfeiture order stresses that the Bremen Public Prosecution Office used its discretionary power not to initiate separate regulatory fine proceedings against the secondary party (Section 30 (5) OWiG). In particular, Germany indicates that the prosecutor took into account, *inter alia*, that the company extensively cooperated in the investigation, undertook extensive compliance measures in recent years and sustainably improved its corporate compliance culture. The prosecutors also took into account the fact that the company reached an agreement with the tax authorities regarding a total sum of EUR 20 million that was identified as non-tax-deductible operating expenses.

230. During the on-site visit, the decision to issue a forfeiture order in lieu of holding the legal person liable was justified by the fact that the company self-disclosed the alleged bribery. This does not appear to be an isolated case but rather an undisclosed policy followed by prosecutors in certain *Länder*.

¹⁵¹ [Germany Phase 2 Report](#), para. 107.

¹⁵² See for instance, [Slovak Republic Phase 3 report](#), para. 38.

¹⁵³ i) Case Bav 2011/2, forfeiture order of EUR 35 million imposed by Munich I public prosecution office (June 2011); ii) Case Bav 2011/5, forfeiture order of EUR 16,5 million; iii) Case Bav (old) 2013/1, forfeiture order of EUR 2 million; iv) Case BW (old) 2007/3, forfeiture order of EUR 12.5 million; v) Case BW (old) 2011/2, forfeiture order of tens of millions euros; vi) Case Bremen 2013/2, forfeiture order of EUR 48 million imposed by Bremen Prosecutor against Atlas Elektronik (June 2017); vii) Case LS (old) 2012/1, forfeiture order of EUR 500,000; viii) Case Hes (old) 2011/2, forfeiture order of EUR 3 million against G GmbH; ix) Case Hes (old) 2011/2, forfeiture order of EUR 550,000 against S GmbH ; x) Case Bremen 2017/1, forfeiture order of EUR 4.4 million and xi) Case Ham 2011/5, forfeiture order (amount unknown) imposed by Hamburg Prosecutors. In one additional case, LS 2013/1, a forfeiture order was imposed in connection with an individual's tax fraud that was, according to Germany, preferred over a foreign bribery offence. This case was not counted with the foreign bribery cases.

¹⁵⁴ GIR (September 2015), “[On the OT: keeping German settlements out of the press](#)”

¹⁵⁵ *Ibid.*

Private sector panellists explained that in cases where they would self-disclose acts of foreign bribery, and provided that they know to which prosecutor to turn, they would expect that in return their case would be closed with a forfeiture order only.

231. The forfeiture would be of an amount corresponding to the disgorgement of illicit profits. This amount would be assessed by the company itself which would then come up with a figure on the basis of which negotiation with the prosecutor would start. No rule or guidance is available in Germany with respect to the conditions (e.g. requirements in terms of level of cooperation expected) under which such an agreement can be reached and forfeiture under section 29 OWiG be applied in lieu of a regulatory fine under section 30 OWiG.

Commentary

The lead examiners note the growing use in certain Länder of forfeiture orders against companies in foreign bribery cases. While forfeiture orders have the effect of disgorging illicit gains, they are not an alternative to holding a legal person liable and do not fulfil the characteristics of a regime of corporate liability as required under Article 2 of the Convention.

The lead examiners are also concerned by the lack of transparency surrounding the use of forfeiture orders including when used as a result of a self-disclosure by a company. They deem this of particular concern in the absence of a clear policy and guidance to prosecutors and companies regarding the consequences of self-disclosure and conditions to benefit from these orders without being held liable.

The lead examiners recommend that Germany ensure that in a foreign bribery case, an independent forfeiture order is not used as a mean to dispose of cases when all possible measures to hold a company liable have not been explored, in particular in the absence of clear policy regarding self-reporting.

C.2. A Conservative Approach to Holding Legal Persons Liable Resulting in a Low Corporate Enforcement Rate

a. Low corporate liability enforcement

232. The main feature of Germany's enforcement actions is the limited number of legal entities held liable in the 67 concluded foreign bribery cases since 1999. While 328 individuals were sanctioned in these cases, only 18 legal persons had their liability triggered. The Munich I Prosecutor Office announced that an additional legal person was held liable in the Airbus Defence and Space GmbH case in February 2018. No legal person has ever been held liable for money laundering predicated on foreign bribery or for false accounting offences. In Phase 3, six legal persons had been held liable and at least 11 cases had been concluded with only individuals sanctioned but not their company. While 12 additional legal persons have been held liable since Phase 3, corporate liability was not pursued in more than 70 % of the concluded cases. This is a low corporate enforcement rate which has prompted comments by an academic in the media, urging the new coalition government to "face up to Germany's blind spot on corporate corruption".¹⁵⁶ In addition, Germany indicated that only one German State Owned Enterprise (SOE) has been held liable for foreign bribery even though a number of such companies operate in high risk sectors including in the telecommunication and transport industries.¹⁵⁷

¹⁵⁶ GIR (September 2017), "[Merkel and Schulz must face up to Germany's blind spot on corporate corruption](#)".

¹⁵⁷ Case Hes (old) 2011/3.

Commentary

The lead examiners are concerned by the low corporate enforcement rate in Germany. Corporate liability has only been established in a quarter of the concluded foreign bribery cases. The contrasting approach taken to holding individuals liable in similar cases further highlights the difference in treatment between individual and corporate liability. The Working Group commends Germany for its focus on holding culpable individuals liable. However, with companies held liable in only a quarter of the concluded foreign bribery cases, there are concerns that there is insufficient enforcement against legal persons.

b. A wide use of prosecutorial discretion to initiate proceedings against legal persons

233. Contrary to the principle of mandatory prosecution which applies to criminal offences committed by natural persons, the principle of discretionary prosecution applies to initiate proceedings against legal persons including in foreign bribery cases. Discretionary prosecution is the overarching principle for administrative offences. A decision of a prosecutor not to prosecute the legal person is not appealable. At the time of Phase 3, the Working Group had some concerns that discretion to prosecute legal persons for foreign bribery may have been exercised conservatively. The availability of the principle of discretionary prosecution may also partly explain the difference in enforcement between *Länder*, including those with a high level of economic activity.

234. Since Phase 3, no guidance has been developed on how to apply prosecutorial discretion in the decision to initiate proceedings against legal persons to ensure that a consistent and systematic approach is taken across *Länder*. The very scarce information provided by Germany on consideration given to investigate and prosecute the legal persons prevented the evaluation team from fully assessing the use of prosecutorial discretion.

235. In May 2016, following the UK Anti-Corruption Summit, Germany committed to “strengthening the liability of legal persons for criminal offences such as corruption”.¹⁵⁸ In February 2018, the new Coalition Agreement included a statement that “companies that benefit from misconduct by employees [should be] also sanctioned in principle” and the related need to turn away from the opportunity principle applying to legal persons “in order to ensure nationwide uniform application of the law” and to increase legal certainty for companies.¹⁵⁹ In its written submission to the evaluation team, Transparency International advocates for the 2018 Coalition Agreement to put an end to this exception to the mandatory prosecution principle.

Commentary

Given the limited number of legal persons sanctioned to date in foreign bribery cases and recognising that this was notably enabled by the principle of discretionary investigation that applies to legal persons, the lead examiners recommend that Germany review its overall approach to enforcement of corporate liability in order to effectively combat foreign bribery and proceed with the 2018 Coalition Agreement to remove the principle of prosecutorial discretion applicable to corporate liability.

c. A lack of a consistent approach to corporate liability across Länder

236. Since Phase 3, more *Länder* have actively pursued corporate liability but great contrasts remain between *Länder* in the enforcement of corporate liability. As in Phase 3, the *Land* of Bavaria is the most active in prosecuting foreign bribery and accounts for half of the legal persons held liable (*i.e.* 7 legal persons). The recent enforcement action concluded against Airbus Defence and Space GmbH also took

¹⁵⁸UK Anti-Corruption Summit 2016, [Country Commitment Germany](#) .

¹⁵⁹ Rn 5915 ff.

place in Bavaria. The remaining half is split between the *Länder* of Hesse (*i.e.* 4 legal persons) and North Rhine-Westphalia, (*i.e.* 3 legal persons) followed by Lower Saxony (2 legal persons) and Hamburg (1 legal person). Bremen held one company liable in 2014. The Munich I Prosecutor's office has played a leading and innovative role in enforcing corporate liability in foreign bribery cases. The office was the first to hold legal persons liable including in the landmark Siemens case in 2008 and has developed expertise in prosecuting foreign bribery cases. This expertise has been, and continues to be, shared with prosecutors from other *Länder* both through bilateral contacts and training courses.

237. During the on-site visit, explanations were proposed to justify the uneven number of legal persons held liable in the different *Länder*. The main reason advanced by the German authorities is that the economic weight of the *Länder* varies and by the same token the number of legal persons subject to their jurisdiction. However, according to the prosecutors, a variety of approaches are taken to hold legal persons liable depending on the *Länder* prosecutor's offices. These range from the decision to initiate proceedings against a legal person, to the decision to enter into an administrative resolution as well as to the possibility to impose a forfeiture order in lieu of a regulatory fine. This variety of approaches was also confirmed by representatives of the private sector, who stated that a company willing to self-report needs to know with which prosecutor this is likely to succeed.

Commentary

The lead examiners are concerned by the lack of a consistent approach to corporate liability across Länder. While more Länder have pursued corporate liability than at the time of Phase 3, there remain discrepancies in whether and how they would consider holding legal persons liable in foreign bribery cases.

The lead examiners believe that it is instrumental that the possibilities available in the law to trigger corporate liability be known and applied consistently by all prosecutors across Länder. The lead examiners therefore recommend that Germany strengthen training programs available for prosecutors on corporate liability in foreign bribery cases, and further facilitate the sharing of expertise across Länder prosecutors' offices as appropriate.

d. A fragmented approach to prosecuting foreign bribery cases

238. In Phase 3, prosecutors indicated that because corporate liability derives from an offence committed by a natural person, the prosecution consider holding legal persons liable only as a secondary option. During the Phase 4 on-site visit, panellists stressed that since then, things have changed considerably and especially in the aftermath of the Siemens and other prominent cases, awareness for corporate liability among prosecutors has substantially increased. However, during the on-site visit, when asked for the reasons of Germany's limited enforcement actions against legal persons, an academic stressed that there is a fundamental difference in the prosecution of natural and legal persons and that the fact that the second derives from the first in practice hinders the use of corporate liability.

239. In practice, consideration to initiating proceedings against legal persons is taken at a later stage of the proceedings against the natural persons. This leads to what may be perceived as a fragmented approach to investigating and prosecuting natural and legal persons in foreign bribery cases. Foreign bribery cases appear to have often progressed at a different pace between the natural persons and the legal persons involved and even sometimes between the different natural persons. While this could be explained by the complexity of some of the cases and the involvement of a large number of accused persons, the lead examiners were not able to fully assess the impact of this perceived fragmented approach on evidence gathering against legal persons in the absence of information provided by Germany on investigations or prosecution dropped against legal persons.

240. The consideration given to initiating proceedings against legal persons may be an even more serious issue in the cases where the individual's liability likely to trigger the liability of a legal person

was established for an alternative offence. Three-quarters of the individuals sanctioned in foreign bribery cases have been sanctioned for alternative offences. In contrast, the liability of legal persons has been established based on alternative criminal offences in less than 20% (i.e. in 3 cases).¹⁶⁰ This may indicate that the liability of legal persons may be sought even less frequently in these cases or that it is even more difficult to establish when in connection to another offence than foreign bribery *per se*.

Commentary

The lead examiners recommend that Germany prioritise the prosecution of legal persons involved in foreign bribery cases and prosecute both natural and legal persons in a foreign bribery case whenever appropriate and even when based on the conviction of an individual for an alternative offence to foreign bribery.

C.3. Sanctions Available for Legal Persons for Foreign Bribery

a. Changes since Phase 3 to sanctions for legal persons

241. In Phase 3, the maximum amount of the administrative fine incurred by a legal person was EUR 1 000 000 if the offence by an individual (which triggered the liability of the legal person) was committed with intent, and EUR 500 000 if the offence was committed negligently. The Phase 3 report noted that an administrative fine has two components referred to as a “punitive” component and a “confiscatory” component. If the financial benefit gained from the offence is higher than the statutory maximum fine, the total amount of the administrative fine must include an amount equal to the benefit gained and be increased by an amount that may exceed the maximum fine available, i.e. the punitive component of the fine.

242. In Phase 3, the Working Group was concerned that the punitive component of the fine was too low given the high turnover and profit of many German enterprises (recommendation 3d). At the time of Germany’s Written Follow-up to Phase 3, a bill aiming at increasing by ten times the level of administrative sanctions available for legal persons was under discussion in Parliament. The Working Group deemed that if passed into law, it would implement recommendation 3d. Pursuant to the hence amended section 30 OWiG, the new maximum punitive fine applies to offences committed after 30 June 2013. For an offence committed with intent, the maximum fine is now EUR 10 000 000, and for an offence committed negligently, the maximum is now EUR 5 000 000. The power to increase the “confiscatory” component of the fine remains unchanged.

243. During the on-site visit academics and civil society expressed concern that the increased maximum punitive fine is still too low to be sufficiently dissuasive for large businesses. One academic, describing the original maximum punitive fine as “a joke”, explained the punitive component of the fine should not be limited to EUR 10 000 000 but should be related in some way to the company’s profits.

244. The 2018 Coalition Agreement indicates that the German Government is considering important changes to corporate sanctions including an increase the maximum punitive fine to 10% of the company’s turnover, and the creation of “concrete and comprehensible rules for measuring company monetary sanctions.”

Commentary

The lead examiners welcome the amendment to section 30 OWiG that has increased to EUR 10 000 000 the maximum punitive fine available to sanction legal persons for foreign bribery offences committed after 30 June 2013. Nonetheless, they encourage Germany to proceed with the

¹⁶⁰ Corporate liability was also established based on alternative criminal offence in one additional case under appeal.

intention stated in the 2018 Coalition Agreement to introduce the possibility of an administrative fine of up to 10% of a company's turnover to ensure that sanctions are effective, proportionate and dissuasive including for large companies.

b. Sanctions imposed in practice

i. A comparatively low punitive component

245. In Phase 3, the maximum punitive fine of one million euros, at the time, was only imposed in the case of Siemens AG (where the total fine was EUR 395 000 000) although not based on the foreign bribery offence of an individual. In the other cases, the fines imposed were within the lower range of sanctions available.

246. This trend has continued in Phase 4. None of the companies sanctioned by a court for the foreign bribery offence received the maximum punitive fine. So far, all the cases in which legal persons have been sanctioned involved acts taking place before the maximum fine was increased in June 2013. In the majority of cases the confiscatory component far exceeded the level of the punitive fine. In one case involving two companies, one company received an overall fine of EUR 600 000 of which the punitive component was EUR 200 000.¹⁶¹ The other company received an overall fine of EUR 2 100 000 of which the punitive component was only EUR 500 000.¹⁶² In the DB Schenker case, an overall fine of EUR 2 million was imposed, of which the punitive component was EUR 300 000.¹⁶³ The highest overall fine for the foreign bribery offence was a total of EUR 139.8 million imposed on Ferrostaal where the punitive component was only EUR 500 000. Finally a company received an overall fine of EUR 100 000 but no data was provided to distinguish between the punitive and confiscatory components.¹⁶⁴ Since Phase 3, the maximum punitive fine (at the time) of EUR 1 million was only imposed in one case, against Biotest AG, but for a tax crime.¹⁶⁵ The court did not impose confiscation in this case. As a result, there is a continued concern with the proportionate, effective and dissuasive nature of the punitive component of the fine which is unlikely to be deterrent, even where accompanied by confiscation as further discussed below.

247. Mitigating factors taken into account to reduce the level of the punitive component of the fine include self-reporting and/or co-operation with prosecuting authorities, a change of management since the conduct occurred, and the existence (either before the offence or afterwards) of a compliance system. Since Phase 3, in the four cases where legal persons were sanctioned for the foreign bribery offence, the mitigating factors have mainly been the introduction of preventive measures by the company and cooperation of the legal person in the investigation proceedings. While these factors appear to have been consistently applied in at least two *Länder*, it is not clear by how much these factors have reduced the level of the punitive fine.

248. No guidance or rules are available to prosecutors and courts, including in the *RiSBTV*, to assess the amount of the punitive component of the fine and ensure that it is effective, proportionate and dissuasive. The 2018 Coalition Agreement includes a proposal to “create concrete and comprehensible rules for measuring company monetary sanctions”.

¹⁶¹ Case Hes (old) 2011/3

¹⁶² Case Hes 2011/3

¹⁶³ Case NRW 2014/1

¹⁶⁴ Case NRP (old) 2013/2

¹⁶⁵ Case Hes 2011/4

ii. *Regulatory fines imposed by the prosecution in resolutions*

249. Where the prosecution decide to proceed against the legal person based on the sole administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG), the prosecution office imposes the fine directly without the involvement of a court. Similarly to fines imposed by courts, the punitive component of fines decided through resolutions with prosecutors have been, with one exception (see below), within the lower range of sanctions available. In the Rheinmetall Defence Electronics case, a punitive component of EUR 300 000 was issued as part of an overall fine of EUR 37 million against the company to settle allegations that a bribe amounting to over EUR 20 million had been paid to Greek officials in connection with arms sales.¹⁶⁶ In a recent prominent case, a punitive component of EUR 250 000 was issued alongside a confiscatory component of EUR 81 million against Airbus Defence and Space GmbH to settle bribery allegations in a EUR 2 billion sale of Eurofighter jets to the Austrian government in 2003.¹⁶⁷ The maximum available punitive fine was imposed once against MAN Ferrostaal for negligent violation of supervisory duties by a senior manager and amounted to EUR 500 000, as part of an overall fine of EUR 10 million to settle allegations that bribe payments amounting to EUR 8 million had been made to secure the awarding of a contract to build a gas compressor station in Central Asia.¹⁶⁸

250. The fine cannot be negotiated by the legal person, but the overall level of the fine can be appealed to the local court. In practice this has not yet happened. Companies and defence lawyers explained at the on-site visit that the largest part of the overall fine, the confiscatory component, is in practice, negotiated. With the increase in the maximum punitive fine, however, the prospect of such appeals, potentially to a tribunal with little expertise in foreign bribery cases, may increase.

iii. *Determination of the confiscatory component of the fine often made by companies*

251. The confiscatory component aims to disgorge the financial benefit, or proceeds, gained by the legal person from the offence (also known as “skimming off” the profits). In Phase 3, it was noted that financial benefit was not defined in statute or prosecutorial guidelines. It could be estimated, and this was not limited to the profit generated by the contract, but could include, for example, the effect on competitors and follow-up contracts. The Working Group made no recommendation but noted the various approaches across prosecutors, courts and *Länder* which “may benefit from more specific guidelines”.

252. Case law suggests that the size of the advantage obtained is also a significant factor in setting the level of the punitive fine. While the questionnaire responses indicate the overall value of the contracts, the proceeds deriving from the contracts were not provided in most of the cases. The evaluation team was hence prevented from fully assessing whether the confiscatory components of the fines imposed were in proportion to the advantages obtained through bribery. However, in the Ferrostaal case where the German authorities were able to provide information, the value of profit gained from the Greek contract alone was over EUR 173 million.¹⁶⁹ The profit for the Portugal contract is not available.

¹⁶⁶ Case Bremen 2013/1, Bremen Public Prosecutor Office Press Release (December 2014) “[Staatsanwaltschaft verhängt Geldbuße in Höhe von über 37 Millionen Euro gegen die Rheinmetall Defence Electronics GmbH](#)”; FCPA Blog (2014) “[German prosecutor fines Rheinmetall \\$46 million for Greek bribes](#)”.

¹⁶⁷ Case Bav 2012/1; Munich I Prosecutor Office Press Release (February 2018) “[Bußgeld über 81,25 Millionen Euro gegen die Airbus Defence and Space GmbH](#)”; GIR (2018) “[Airbus and Munich prosecutors negotiating settlement](#)”; Handelsblatt Global (2018) “[Unraveling Airbus’ murky offset deals in Austria](#)”; Reuters (2017) “[Munich prosecutors say nearing end of Austrian Eurofighter probe](#)”

¹⁶⁸ Case Bav 2011/2j, Case Bav 2011/3 in 2011 *Länder* Annual Report

¹⁶⁹ Case Bav 2011/6. The profit figure was calculated as total proceeds less costs of production, interest costs, costs of marketing and distribution, costs for guarantee.

However the company paid an agreed confiscatory component of only EUR 139.3 million, in addition to a punitive fine of EUR 500 000. This figure suggests that, when compared to the known profit made in only one of the two contracts, the sanction imposed did not disgorge the entire financial advantage obtained by the company.

253. The confiscatory component is closely related to, and therefore affected by, the changes to the law on confiscation (section 73 to 76 CC) which came into force on 1 July 2017. The successful implementation of these changes will largely depend on the development of guidance and training for prosecutors and judges which Germany states is currently ongoing, and extensive.

254. Prior to this change, a number of decisions provided by Germany, and the answers to the questionnaire, demonstrate difficulties in accurately calculating the proceeds of the bribe. As in Phase 3, the approaches to calculating the proceeds of the bribe still largely vary across *Länder*. A prosecutor explained at the on-site visit that not only would any profit from the contract be calculated, but other advantages such as entry into a new market would be estimated. One *Land* explained in the questionnaire responses that determination of the proceeds is made on the assumption that the company received a material advantage of at least the total amount of the bribe payments. This approach was demonstrated in two cases where the amount of the bribe was applied as the confiscatory component. No additional calculations of profits that may have been made were undertaken by prosecutors.¹⁷⁰ The amount of the bribe appears to be a low bar, given that the bribe is often a low percentage of the transaction value. In most cases where a profit was made, this approach would also not be compatible with Article 3 of the Convention which requires that the bribe and its proceeds be subject to confiscation.

255. Defence lawyers and companies attending the on-site visit explained that the level of the confiscatory component is the subject of negotiations in every case. A range of participants, including from academia, explained that the basis for such negotiations is not clear, either in law or in the calculation of the amounts negotiated. One private sector lawyer described the experience of such a calculation as “rather like a Turkish bazaar” thus emphasising the importance of negotiation in this context. The answers to the questionnaires and during the on-site visit revealed differing resources and experience available across *Länder*, and even individual courts and prosecutors’ offices. Private sector representatives from large companies asserted that the assessment is mainly performed by the companies and their lawyers and provided to the prosecutors who generally have no resources to make further verifications and assessment.

iv. A new regime of confiscation against legal persons where there is no regulatory fine imposed

256. As explained above, the regulatory fine procedure under section 30 OWiG has historically allowed confiscation to take place as part of the assessment of the overall penalty. Where no regulatory fine is imposed, the newly reformed confiscation regime under section 29a OWiG and section 73-76 CC can apply to legal persons. Cases heard from 1 July 2017 (including those where the conduct took place earlier) will be dealt with under the new regime. As part of the changes, the statute of limitations for confiscation proceedings has been increased to 30 years. As a result confiscation may be used where it is no longer possible to prosecute the legal person for the offence. The use of orders under section 29a OWiG or sections 73-76 CC is discussed in section C.2.d.

Commentary

As in Phase 3, the lead examiners are in particular concerned that the level of punitive fines imposed in practice generally remains within the lower range of sanctions available for legal persons. Clear guidance is needed for courts and prosecutors’ offices to ensure they impose sanctions that are

¹⁷⁰ NRP (old) 2013/2 and NRW 2014/1 – DB Schenker

effective, proportionate and dissuasive and provide companies with more clarity as to the likely penalty in a given case. Clarifying the mitigating factors and their impact on the level of the fine should both increase the level of detection through self-reporting and co-operation in investigations.

The assessment of the confiscatory component shows a wide divergence in practice, and in some cases mainly relies on companies and their lawyers. Furthermore, the lead examiners are concerned by the use of proceedings, such as under section 29a OWiG against legal persons which do not involve the imposition of a punitive fine.

They hence encourage Germany to proceed with the intention stated in the 2018 Coalition Agreement to develop and make available to prosecutors, judges and companies rules and guidance on the aggravating and mitigating factors and the possible impact each factor has on the effective, proportionate and dissuasive nature of sanctions. They also recommend that Germany regularly provide detailed written information and training to investigators and prosecutors on how to quantify the proceeds of bribery for the purpose of calculating the confiscatory component of the fine; and ensure that independent forfeiture orders are not used instead of imposing a regulatory fine which includes a punitive component.

c. Tax treatment of sanctions and confiscation imposed on legal persons

257. The tax treatment of sanctions and confiscation imposed on legal persons has an impact on the deterrent effect of both fines and confiscation on foreign bribery cases. Fines and confiscation measures are treated differently for the calculation of the taxable income base. Under section 4(5) para.8 of the Income Tax Act (EStG), confiscation measures can be deducted from the taxable income base (company's profit subject to income taxes). Such tax treatment applies to confiscation measures imposed pursuant to section 73(3) CC, the amounts forfeited pursuant to section 29a OWiG, and the confiscatory component of regulatory fines imposed under section 30 OWiG. The punitive component of the fine however, cannot be deducted from the taxable income base.¹⁷¹ Panellists clarified that the punitive component of a corporate regulatory fine cannot either ultimately be deducted from the taxes owed to the German Treasury. This appears to be in line with the tax treatment of both fines and confiscation in most countries.

258. In light of the quantum of the punitive and the confiscatory components in the regulatory fines imposed to date, the deductibility from the taxable income base of the amounts corresponding to the confiscatory component are likely to limit the deterrent effect of the regulatory fine imposed to legal persons in foreign bribery cases. For instance, in the case involving Airbus Defence and Space GmbH, a regulatory fine of EUR 81.25 million was imposed of which EUR 250 000 corresponds to the punitive component and EUR 81 million to the confiscatory component. The quantum of the confiscatory component in that case far exceeded the quantum of the punitive component. The same reasoning applies to the sums confiscated through forfeiture orders imposed in lieu of a regulatory fine.

Commentary

In light of the tax treatment of confiscation measures, the large amount corresponding to the confiscatory component of regulatory fines and the use of forfeiture orders in lieu of regulatory fines, the lead examiners recommend that Germany ensure that sanctions imposed on legal persons are effective, proportionate and dissuasive, including when taking into account the tax treatment of confiscation in Germany.

¹⁷¹ This was clarified in a ruling of the Federal Court of Justice dating back from 2002 (see Germany Phase 3 report para.111).

d. Federal Debarment Register

259. In July 2017, a Federal Debarment Register was created. The register is not yet running and will be operational in 2020, at the latest. The new register will be managed by the Federal Cartel Office (“*Bundeskartellamt*”) and will ultimately replace the registers maintained at *Länder* level. Companies that are held liable in foreign bribery, commercial bribery and other cases of corruption will be included in the register and subject to mandatory exclusion from public procurement procedures. Contracting authorities will be bound to inquire whether bidders are listed in the register before deciding whether a company is to be awarded public contracts.

260. Law enforcement authorities will be under the obligation to report final convictions to the register. The inclusion in the register is grounded on a criminal conviction. For companies, the inclusion will be triggered by their liability under section 30 OWiG in conjunction with the criminal offence of a senior manager. Even in the absence of established liability of a company and the imposition of a corporate regulatory fine, inclusion in the register will be triggered by the conviction of at least one of the company’s managers for an economic crime.¹⁷²

261. A company liable under section 30 OWiG in conjunction with the administrative offence of an employee under section 130 OWiG, will be included in the register if a fine is imposed on the company according to section 30 OWiG. By contrast, a forfeiture order against legal persons pursuant to section 29a OWiG will not lead to the inclusion in the register. Company’s managers liable of an economic crime but who settled their case under section 153a CCP will not trigger the inclusion of the company in the register.

262. In case of successor liability, the legal predecessor will remain listed in the register but the successor will not be listed. This is a loophole that leaves open the possibility for companies to use corporate restructuring to be able to take part in public procurement procedures following the imposition of a regulatory fine.

263. There will be two possibilities for companies to be removed from the register. First, entries in the register will be automatically deleted five years after the date of the individuals’ final conviction (in foreign bribery cases). Second, the company can demonstrate that it took adequate “self-cleaning” measures. This can happen at any point during the five year debarment period. Germany states that “self-cleaning” measures include an active cooperation with the law enforcement authorities to clarify the facts of the case, the dismissal of employees involved in the offences, the compensation of damages and the implementation of adequate corporate compliance measures. The onus to prove the adequacy of self-cleaning measures is on the company and the decision is ultimately taken by the contracting authority or by the Federal Cartel Office. This decision will involve close cooperation between the contracting authority or the Federal Cartel Office and the law enforcement authorities. A decision denying removal from the register will be appealable. The Federal Cartel Office indicated at the on-site visit that they will issue guidelines on the necessary requirements for companies to prove that measures have been taken to remediate foreign bribery risks as well as on the procedure to remove the company’s record from the register.

¹⁷² Convictions against an individual pronounced through a penal order under section 407 CCP and negotiated sentencing under section 257c CCP will also generate inclusion of the in the register.

Commentary

The lead examiners commend Germany for the creation of a Federal Debarment Register with mandatory debarment from public procurement.

The lead examiners recommend that Germany clarify the grounds for inclusion on the Register to ensure that legal entities cannot avoid being listed therein by resorting to corporate restructuring and the rules providing for the non-inclusion of successor companies in the Register. With regard to the removal from the Register, they recommend that Germany proceed with its intention to issue guidelines on the necessary requirements for companies to prove that measures have been taken to remediate foreign bribery risks.

C.4. Engagement with the Private Sector

264. During the on-site visit, the evaluation team met with a range of business organisations (to one of whom all German companies must belong by law), representatives of 16 companies with transnational operations and 2 state owned enterprises across a range of sectors. The panels organised with companies included representatives from compliance departments of large businesses and a separate panel where a number of (mainly larger) SME's were present.

265. Since Phase 3, some government-led awareness raising initiatives have been taken, often in partnership with the private sector. However, panellists indicated that awareness of foreign bribery risks within companies is at an all-time high. Previous government efforts have been complemented by active engagement by business organisations and significant media coverage of enforcement actions.

266. Panellists, particularly amongst larger businesses, commented on a significant shift in the past 10 years to a culture of compliance. Compliance programmes are now standard practice in all large companies and many smaller ones. Business has been instrumental in issuing industry guidelines and standards to limit grey areas. For example despite the unclear exception in the law regarding small facilitation payments, no company present at the visit allowed such payments to be made any longer. This is a marked difference from the situation noted in the Phase 3 report.

267. Business organisations, such as the International Chambers of Commerce, the Association of German Chambers of Commerce and Industry (DIHK), the *Deutsches Institut für Compliance* (DICO) and the German Association for Small and Medium-sized Businesses (BVMW) explained the autonomous awareness-raising efforts they have undertaken. These included a number of anti-corruption publications with specific reference to foreign bribery. Some of these initiatives have been in conjunction with, or funded by, government agencies. A key example, noted by a number of participants, is the Alliance For Integrity, which has offices in five countries.¹⁷³ This initiative was created by the Federal Ministry for Economic Co-Operation and Development (BMZ), and implemented by GIZ. It is a multi-stakeholder initiative, bringing together business, civil society, international organisations and the public sector to promote transparency and integrity within the economic system. Germany's chambers of commerce and German Trade and Invest (GTAI) have also bilaterally undertaken awareness raising activities including regular publications and anti-corruption training courses.¹⁷⁴ A joint MOE/MOJ publication specifically targeted at export-orientated companies, first published in 2009, used by MFA and sent out with a circular on foreign bribery to embassies, has been updated and is due to be circulated in June 2018.¹⁷⁵

¹⁷³ www.allianceforintegrity.org/en/alliance-for-integrity/about-us

¹⁷⁴ e.g. "De Empresas para Empresas" programme of German bilateral chambers of commerce in the Mercosur region.

¹⁷⁵ *Korruption vermeiden – Hinweise für deutsche Unternehmen, die im Ausland tätig sind*

268. A representative of a business organisation told the evaluation team that regarding foreign bribery in Germany, there is no problem of awareness and knowledge, but a problem of execution.

269. A particular problem was noted with regard to the risk of bribery for SMEs, which often lack the compliance systems in place in larger organisations. One representative of an SME explained the resource issue this involves, describing compliance as “something that is done on top of the main business”. All SME representatives had good knowledge of the Convention and the risks of bribes being solicited overseas. They reportedly had to invoke anti-corruption or anti-bribery clauses in their overseas contracts. A business organisation stated that a particular difficulty for SMEs is to identify the level of depth to which a company has to scrutinise overseas agents and third party payments.

270. Initiatives specifically targeting SMEs have been taken at government level, for example an initiative of the Ministry of Education and Research with the BVMW in identifying bribery “red flags”. The BVMW also has a compliance hotline open to its members where advice is provided. Various examples of training were cited. Larger companies play an important role, as they often require contracting partners and suppliers to implement compliance systems. All panellists agreed that there is a need to provide further support to SME’s.

Commentary

The lead examiners positively note the efforts of German companies to instil a culture of compliance in their organisations, and the autonomous initiatives undertaken by companies and business organisations. Awareness of foreign bribery risks is high, in part due to past efforts by government, business organisations and companies.

C.5. Foreign bribery risks in the defence sector

271. Although this topic was not analysed in Germany’s Phase 3 evaluation, it was in other countries with large defence exports. SIPRI ranked Germany as the 4th largest defence exporting country for the period 2013-2017.¹⁷⁶ Germany is unusual amongst large defence exporters in that there are no state-owned enterprises in the defence industry. However, the German authorities exercise control over exports in the defence sector, including over weapons, where an export licence is required.

272. The Office for Export Controls at the MOE is responsible for the granting of licences for war weapons and oversees the licensing process for other conventional arms, drawing where necessary on the expertise of the Ministry of Defence and the Ministry of Foreign Affairs. All potential exports of conventional arms are subject to a risk assessment. This includes the destination of the exports and takes into account criminal convictions including for foreign bribery. If criminal proceedings are ongoing, the German export control authorities are able to suspend, modify or revoke the licence, or prolong the licencing process. A Ministry representative explained during the on-site visit that licensing requests relating to war weapons undergo a “very thorough” assessment for first time applicants.

273. After the on-site visit, Germany provided the “Federal Government’s principles for vetting exporters of weapons of war and arms-related goods”. This sets out the principle of mandatory denial where the applicant is “unreliable”. The principles however date back from 2001 and in referring to specific legislation, do not mention any foreign bribery instruments. Germany emphasises that they have a different focus. According to a Ministry representative, the risk of foreign bribery in the transaction would be part of the assessment of reliability. Suspicions of foreign bribery can be a risk indicator. However, export licences are denied, suspended or revoked on the basis of foreign policy considerations or due to a perceived risk of diversion, i.e. they would normally not be based specifically on foreign

¹⁷⁶Stockholm International Peace Research Institute (SIPRI) (March 2018) “[Trends in International Arms Transfers](#)”

bribery. Individuals in the company will also be appraised. An example was provided of a case where a company's licence application was suspended based on the accusation of fraud of a board member. Despite a number of major German defence companies being sanctioned for foreign bribery, the Ministry representative could not recall a case in which a licence denial was based solely on foreign bribery allegations.¹⁷⁷

274. The Ministry representative also explained that the Ministry main focus is on the risk of war weapons being diverted from their intended recipient. As part of this assessment, the export control authorities would rely on intelligence and media reports. This may include media reports regarding foreign bribery although this is mainly viewed as a matter for law enforcement under the competence of the *Länder*. The Ministry representative also did not indicate that applicants for export control-related licenses would be checked against international debarment lists or that any corruption-related compliance programmes the company had in place would be reviewed. Germany emphasises that the export control community worldwide focusses on its own set of internationally agreed debarment or sanctions lists, and requirements concerning internal compliance programmes focus on the ability of companies to comply with export control regulations. It appears that a conviction would be necessary for any action to be taken. Even then, the Ministry representative indicated that foreign bribery was not *per se* a reason for not granting a licence, although an application may be suspended. The representative referred to instances where foreign bribery suspicions have delayed the granting of the licence, as they may be an indicator for the existence of other denial reasons, but could not point to specific cases.

275. The information regarding criminal convictions is obtained from the relevant *Länder*. It was confirmed that individual's resolutions under section 153a CCP would not form part of the criminal record, nor would confiscation orders imposed on a company where they were not held liable. Following the on-site visit, the Ministry confirmed that it is "currently in the process of revising internal procedures" for the vetting process of licence applicants in the area of war weapons including "gaining a better understanding" of checks undertaken by the *Länder* of their own registers.

Commentary

The lead examiners welcome the efforts made by the German authorities to take into consideration sanctions for corruption when granting export licences to defence companies. They welcome the revision of internal procedures currently being undertaken and recommend that Germany: (a.) examine possibilities to take steps to establish formal guidelines on the conduct of due diligence in the granting of defence export and marketing licences, including the consultation of international debarment lists and confirmation and verification of a company's corruption-related compliance programme; (b.) ensure by any appropriate means that the application of the Federal Government's principles for vetting exporters of weapons of war and arms related goods includes due consideration of foreign bribery legislation; and (c.) train relevant Office of Export Control staff on these principles and foreign bribery risks and red flags.

¹⁷⁷ E.g. cases Bre 2013/1 (Rheinmetall Defence Electronics), Bav 2013/2 (Krauss Maffei Wegmann).

D. OTHER ISSUES

D.1. Money laundering

276. In Phase 3, the WGB made two recommendations, neither of which had been implemented by the time of the Written Follow-Up Report. A 2010 FATF report had identified similar weaknesses in Germany's legal framework.¹⁷⁸

277. The first recommendation was that Germany amend section 261(9) CC which prevented the simultaneous conviction of a person for money laundering and foreign bribery (recommendation 7a). At the time of Phase 3, Germany argued that it was prevented from criminalising some aspects of self-laundering, being the possession and use of the proceeds of crime, under its fundamental principles. Such acts would already be punishable under the predicate offence and its law precludes punishment twice for the same act. Section 261(9) CC has since been amended by the new Anti-Corruption Act that entered into force on 26 November 2015 (which also revised the foreign bribery offence). The amendment did not remove the exception, but did limit it, by making self-laundering punishable where the perpetrator of, or accomplice to the predicate offence “brings into circulation” an object which is a proceed of the predicate offence and when doing so conceals its unlawful origin. No FATF analysis of Germany's amended legal framework has been made since June 2014.¹⁷⁹ However, an IMF technical note, analysing the new provision, notes that self-laundering is now a punishable offence under certain circumstances and concludes that the amended provision “appears to be in line with [its] standard”.¹⁸⁰ Without prejudice to the FATF experts' next assessment, the amendment thus appears to be generally addressing the self-laundering deficiency and, Phase 3 recommendation 7a can hence be deemed implemented.

278. The second recommendation was that Germany amend its money laundering legislation to include the bribery of foreign and international MP's in the list of predicate offences to money laundering (recommendation 7b). The 2017 Money Laundering Act includes the new section 335a CC and an amended section 108e CC (bribery of mandate holders) in the list of predicate offences. Germany contends that the bribery of foreign MP's as a predicate offence should therefore be covered through these provisions. The list of predicate offences does not however include the *IntBestG* which regulates the offence of bribery of foreign members of parliament in connection with international business transactions. The *IntBestG* offence is, to a certain extent, wider than the amended section 108e CC: It includes criminalisation of attempted bribery and does not require that the bribe is given in return for performing or refraining from performing an act “upon assignment or instruction”. In spite of Germany's efforts to implement the Phase 3 recommendation, the issue remains that section 261 does not refer to the *IntBestG* and that the broader offence which better aligns with the standards in the Convention is not covered as a predicate offence to money laundering.

Commentary

The lead examiners welcome Germany's efforts to improve its anti-money laundering legislation as recommended in Phase 3 and welcome Germany's amendment of Section 261(9) of the Criminal Code which allows the simultaneous conviction of a person for money laundering and foreign bribery in a number of circumstances. This hence implements recommendation 7a.

¹⁷⁸ FATF/OECD and IMF (2010) “Anti-Money Laundering and Combatting the Financing of Terrorism, Germany”. www.fatf-gafi.org

¹⁷⁹ FATF Mutual Evaluation of Germany - Third round follow-up process - <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Germany-2014.pdf>

¹⁸⁰ IMF Technical note on Anti-Money Laundering and Combatting the Financing of Terrorism in Germany, June 2016, <https://www.imf.org/external/pubs/ft/scr/2016/cr16190.pdf>

They recommend that the Working Group follow-up whether the bribery of foreign and international MP's is, in practice, available as a predicate offence for money laundering, making sure that this predicate offence is aligned with the standards in the Convention.

D.2. Tax measures for combating bribery

a. Tax deductibility of facilitation payments

279. In Phase 3, the Working Group was concerned that there was no clear policy on the tax deductibility of facilitation payments (recommendation 10a). While there was a high level of awareness of the non-deductibility of bribes in the private sector, the Working Group was concerned by the absence of clear scope for the exception of facilitation payments and the lack of a requirement that these payments be small. As in Phase 3, unlawful payments and related benefits are not tax deductible.¹⁸¹

280. During the on-site visit, conversely to what was stated in Phase 3, tax authority representatives were unanimous to state that both facilitation payments to induce a lawful official act and bribe payments are similarly **not** tax deductible. Germany states that no specific guidance on the tax treatment of facilitation payments exists and that the general guidance for tax authorities applies.

b. Enforcement of the non-tax deductibility of bribe payments

281. If a taxpayer is sanctioned in a foreign bribery case, the tax authorities should re-examine the tax returns for the relevant years to determine whether the bribes had been deducted. This point was not looked at in detail in previous reports and is considered in Phase 4 in light of the number of concluded cases since Phase 3.

282. Law enforcement authorities must share information with tax authorities in the course of foreign bribery proceedings and notify the tax authorities of the outcome of the criminal proceedings.¹⁸² After a tax return has been filed, the tax authorities have four years to re-open and re-examine the tax return and up to ten years for tax evasion.

283. Tax authorities stated that they would re-assess the tax returns of companies that have not been convicted but had imposed a confiscation measure in a foreign bribery case. Similarly, they would re-assess tax returns of companies whose employees have been sanctioned for foreign bribery through a conviction or any other mean to settle a case. In practice, Germany stated that the tax returns of the legal persons held liable in foreign bribery cases have been re-assessed by tax authorities. This information could not be verified by the evaluation team.

Commentary

The lead examiners recommend that the Working Group follow-up on whether tax authorities systematically re-examine the tax returns of taxpayers convicted of foreign bribery to determine whether bribes have been deducted.

¹⁸¹ Section 4(5) 1st sentence No. 10 of the Income Tax Act (EStG).

¹⁸² (Section 4(5) EStG).

D.3. Public advantages

a. *Official Development Assistance (ODA)*

284. In 2016, the OECD Council Recommendation for Development Co-operation Actors on Managing Risks of Corruption replaced the 1996 DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement (the 2016 Recommendation).

285. Germany is now by some margin the second largest donor of overseas aid, behind the United States and ahead of the U.K. In 2016 the total gross overseas aid rose significantly, from USD 17.9bn to USD 24.7bn. For the first time, in 2016, Germany met the UN's target of spending 0.7% of Gross National Income towards ODA. Germany provides five times the gross value of ODA to China than the next largest contributor. For more information see "Germany's ODA at a glance" in Annex 6.

i. *Organisations involved in ODA policy and distribution*

286. The Federal Ministry for Economic Co-operation and Development (Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, hereinafter BMZ) is responsible for the setting of development aid policy. German aid is mainly provided by state-owned implementation agencies. The two most important ODA agencies are GIZ and the KfW group.

ii. *The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)*

287. In 2011, the agency for technical co-operation (GTZ) was merged with two other agencies to form GIZ. By the end of 2016, GIZ had over 18 000 staff in 130 Countries (80% of whom work outside Germany). Its legal form is a limited company (GmbH), but wholly state-owned. It receives 92% of its income from the German government, 80% of the total being from the Ministry for Economic Co-operation and Development (BMZ) and 12% from other government ministries. The remaining 8% comes from its commercial arm, where GIZ markets itself as a provider of aid-based projects. Through this, it is involved in implementing aid projects for other national governments, the UN, the EU, and the private sector.

It has a wide ranging remit across countries and sectors, including those at high risk of foreign bribery. Examples of the way it operates in developing countries are described on its website. It includes placing German experts with local employers abroad, providing them with support and advisory services to improve their business practices and productivity. It describes its work as that of an intermediary, utilising its local knowledge and years of experience in the field to "foster successful interaction between development policy and other policy fields and areas of activity." iii. KfW group

288. KfW is a state-owned banking group comprising of a development bank and the international development finance arm of the German government, which provides loans and credit to local and international projects at favourable rates. KfW markets itself as "one of the largest promotional banks in the world". Development aid is one of its key areas (it also provides low-rate financing to SME's, German export companies and housing). With regard to ODA, utilising German federal budget funds and KfW's own funds, KfW finances investments and reform programmes in a range of sectors including environmental protection/ climate change, health, education, water supply, energy, rural development and financial system development. Projects and programmes supported by KfW vary significantly, depending on local needs and the general conditions in place. KfW does this through grants as well as loans, some at close to market rates, and some heavily subsidised by the Federal government. It also partners with other national and international development banks, for example USD 1bn of aid has been jointly financed by KfW and the French development bank AfD. In terms of German aid, KfW broadly provides the "financial co-operation" while GIZ provides the "technical co-operation".

iii. Analysis of compliance with the 2016 Recommendation

289. This is the first time in Phase 4 that the Working Group will consider whether Germany's system of ODA is in line with the 2016 Recommendation, and in particular sections 6-8 and 10 which more directly pertain to foreign bribery.

290. Both GIZ and KfW voluntarily publish their anti-corruption programmes on their websites. Both organisations have improved their anti-corruption efforts in recent years. GIZ set up a specific compliance and integrity unit in 2015 which has 8.3 full time staff. KfW began in 2008 setting up a specific compliance organisation and has since implemented a compliance management system consisting of 89 employees. Both agencies have set up whistleblowing structures, including the ability to submit anonymous complaints and the use of an external ombudsman. However, no panellist considered that it could be used to report foreign bribery. No cases of foreign bribery have been detected through these structures whereas it revealed cases of fraud, financial misconduct or manipulation of tenders through persons involved in the project. No instructions have been given to staff regarding reporting allegations of foreign bribery as appropriate to law enforcement authorities but staff is obliged to report cases and suspicions of bribery within the company. The evaluation team was told that reporting to prosecutors is done on a "case by case basis" as this depends on the context of the case and the respective country. As no allegations of foreign bribery have been reported to prosecuting authorities, it is difficult to analyse what would be done if credible allegations were uncovered.

291. Both GIZ and KfW provided the evaluation team with details of their anti-corruption clauses. They appear to comply with Recommendation 6, and implement the outstanding recommendation from Phase 3 in that they oblige their partners and subcontractors to comply with anti-corruption rules. Both GIZ and KfW check applicants against EU, UN and United States debarment lists and require the disclosure of criminal convictions as well as ongoing cases. GIZ explains that for financial contracts it operates a "two-stage" due diligence check to determine eligibility, including integrity, transparency and anti-corruption. GIZ also indicated that it may use third-party information, auditors or field visits to verify the information provided. With regard to information sharing, after the on-site visit, Germany explained that KfW and GIZ are sharing information.

292. Recommendation 8 recommends that ODA contracts provide for termination, suspension or reimbursement clauses when the information provided by applicants to ODA was false, or when the implementing partner subsequently engaged in corruption during the course of the contract. KfW is contractually entitled to stop or suspend projects. GIZ can also impose the same sanctions when corruption occurs in the course of the implementation of the contract with the partner inside the contract. The clauses do not enable termination if the practices happen outside of the contract with the partner. After the on-site visit, Germany clarified that in both GIZ and KfW, all known suspected cases are subject to investigation by the relevant compliance organisations and, based on the results of the individual cases, to necessary measures, such as: termination and/or recovery of funds as well as a report to the competent German and/or local investigative/prosecution authorities takes place. Based on the information provided by Germany after the on-site visit, both agencies appear to have put into place advanced systems of due diligence, auditing and a contractual sanctioning regime.

293. Recommendation 10 considers the risks of the environment of operation. By its nature, ODA operates in geographical areas and sectors which are at high risk of corruption. GIZ in technical cooperation as well as KfW in financial cooperation has a primary role in implementing aid projects, including the distribution of funds and awarding of contracts. GIZ staff receives online anti-corruption training within the first 100 days of taking up duties and training on the code of conduct along with additional mandatory training. There is no specific training for high risk areas or roles and, GIZ relies on the "general integrity of staff" as it sees it not within the mandatory obligations scope of its staff to tackle criminal behaviour outside the agency's sphere. GIZ emphasises that employees may risk their personal security if they were to address criminal behaviour in partner countries. KfW, by contrast, trains all

employees in “high-risk positions” on the prevention of corruption. These workshop-based courses are given to all project staff and employees in partner countries, including local staff.

Commentary

The lead examiners commend the efforts made by Germany’s ODA implementation agencies to combat corruption. They consider however there is room for improvement and recommend that Germany: (a). improves the sharing of information between GIZ and KfW on corruption, investigations, findings and/or sanctions within the limits of confidentiality and/or legal requirements; [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 9.vi] (b.) ensure that GIZ put in place a sanctioning regime that is effective, proportionate and dissuasive and includes clear and impartial processes and criteria for sanctioning; and (c.) ensure that GIZ provide additional training on the risks of foreign bribery for staff in high risk areas.

b. Guidelines for public procurement authorities

294. In Phase 3, the Working Group was concerned that a number of measures to prevent public procurement authorities from contracting with bidders convicted of bribery were not in place and asked that Germany issue guidelines on the conduct of due diligence of applicants addressing the need to take into account international debarment lists; establish mechanisms to verify the accuracy of information provided by applicants and include termination and suspension clauses within public procurement contracts (recommendation 11b). Such measures are all the more important given that public procurement is decentralised in Germany and lies with each *Länder* contracting authority. Since 2016, the Law against Restraints of Competition expressly states the obligation of contracting authorities to screen applicants and to verify the existence of exclusion grounds. The setting up of the new Federal Register will assist contracting authorities to effectively screen applicants in practice.

295. Germany indicates in its questionnaire responses that the contracting authorities can also take international debarment lists into consideration during the tender process because the new Federal register of unreliable companies does not exclude the possibility to rely on other sources of information. However, no step has been taken to raise awareness amongst procuring authorities of the mere existence of such debarment lists. Germany stated its intention to raise awareness amongst contracting authorities of the need to take such lists into consideration, in particular when deciding to perform due diligence measures of applicants participating in a tendering process in Germany.

296. The Law against Restraints of Competition also explicitly provides for a right to exclude bidders from tendering processes or to terminate contracts should a mandatory exclusion ground – including foreign bribery - materialise at any point during the tendering process or after the contract was awarded. The Guideline on the Prevention of Corruption of the Federal Government states that anti-corruption clauses are included in public procurement contracts in appropriate cases. For example, the Federal Ministry of Transport and Digital Infrastructure regularly includes anti-corruption clauses in these contracts. Recommendation 11b is therefore implemented.

Commentary

The lead examiners welcome the implementation of recommendation 11b. and recommend that Germany take advantage of the setting up of the new Federal Debarment Register to raise awareness amongst procuring authorities of the existence of international debarment lists and the need to take such lists into consideration as a basis for due diligence of applicants.

CONCLUSION: POSITIVE ACHIEVEMENTS, RECOMMENDATIONS, AND ISSUES FOR FOLLOW-UP

297. The Working Group welcomes the important efforts made by Germany to maintain its position as one of the major enforcers of the Convention. These enforcement efforts have been complemented by a number of reforms to its anti-bribery legislation in recent years. Germany's pragmatic approach to prosecuting foreign bribery cases has led to a significant number of individuals being sanctioned as well as a number of major companies. Nonetheless, the Working Group notes with concern that the number of legal persons sanctioned is far from proportionate to the level of enforcement against natural persons. The Working Group is also concerned that there is substantial variation across *Länder* in the enforcement of the legal persons' administrative regime of liability. Against this background, the Group welcomes the commitments in the 2018 Coalition Agreement to make prosecution of legal persons mandatory, and increase the amount of punitive fines available to ensure sanctions imposed are effective, proportionate and dissuasive, particularly for large companies.

298. Regarding outstanding Phase 3 recommendations, Germany has implemented recommendation 1a on the foreign bribery offence, recommendation 1b on facilitation payments, recommendation 4d on public interest factors, recommendation 7a on money laundering, recommendation 11b on public advantages, and recommendation 11c on ODA. Progress has been limited on the remaining recommendations, and these are reflected below in the Group's Phase 4 recommendations to Germany. The recommendations which remain unimplemented are: recommendations 3b, 3c and 4b on statistics and transparency, recommendation 6 on whistleblower protection. Recommendation 7b on money laundering has been converted into a follow-up issue.

299. In conclusion, based on the findings in this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2 below. The Working Group will also follow-up on the issues identified in Part 3 below. The Working Group invites Germany to submit a written report on the implementation of these recommendations and issues for follow-up in two years (i.e. in June 2020). The Working Group also invites Germany to provide detailed information on its foreign bribery enforcement actions when it submits this report.

Good Practices and Positive Achievements

300. This report has identified several good practices and positive achievements by Germany which have proved effective in combating bribery of foreign public officials and enhancing enforcement. The German tax authorities have played a pivotal role in successfully detecting a number of foreign bribery cases because of the combination of the existence of a strong and clear reporting obligation, low reporting threshold and specific training. This is a good practice that has proven effective in enhancing enforcement in Germany. In addition, the strong cooperative approach between the tax authorities, the prosecutors and the Police together with the possibility for law enforcement authorities to swiftly reallocate and expand resources have proven to be a strong asset in the investigation and prosecution of major foreign bribery cases. Finally, the practice initiated by Germany to make its responses to the Phase 4 evaluation questionnaire available to civil society is a good practice towards a more inclusive and transparent approach in the monitoring mechanism.

301. Further positive achievements include Germany's sustained efforts in investigating, prosecuting and sanctioning natural persons and, to a lesser extent, legal persons in foreign bribery cases. This

includes the investigation and prosecution of prominent German companies operating in strategic sectors of the German economy. Germany plays a leading role in enforcing the Anti-Bribery Convention. Such strong enforcement record results from Germany's pragmatic approach in using alternative offences and a wide range of procedures in cases pertaining to the foreign bribery sphere. In some *Länder*, the use of other offences, such as tax fraud to prosecute natural and legal persons in cases where the statute of limitations has run out have prevented offenders going unpunished. Germany has actively used a range of sources to detect foreign bribery, and can initiate proceedings based on media reports. The Federal Criminal Police (BKA) plays a key role at both inter-*Länder* and international level in terms of exchange of information and cooperation. Germany has routinely used the broad range of investigative tools. Joint Investigative Teams (JIT) have been formed in a number of foreign bribery cases. The creation of a Federal Debarment Register for companies is another important step although the grounds for inclusion on the Register need to be further clarified.

Recommendations of the Working Group

Recommendations regarding detection of foreign bribery

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Germany:
 - a. In line with the intention expressed in the 2018 Coalition Agreement, introduce clear and transparent guidance on the procedures and criteria attached to self-reporting by companies when concluding a foreign bribery case, including the nature and degree of co-operation expected from the company, the sharing of the results of companies' internal investigations, considerations of anti-corruption compliance, remedies and monitoring requirements, with a view to ensuring a consistent exercise of discretion by the prosecutors across *Länder*. [2009 Recommendation III.iv and Annex I.D]
 - b. Urgently amend its legislation to provide clear, comprehensive protections for whistleblowers for example by enacting a dedicated whistleblower protection law which applies across the public and private sectors. [2009 Recommendation IX.iii; Phase 3 recommendation 6]
 - c. Ensure that the MFA develops guidelines for all officials posted abroad to require the reporting of foreign bribery, explain the reporting channels, and provide advice on how to detect foreign bribery, e.g. through enhanced media monitoring and alerts. [2009 Recommendation III.iv and IX.ii]
 - d. Consider taking appropriate steps, including through encouraging guidance on EU level for the application of the new requirements under EU law for reporting to competent authorities in order to ensure more legal security for auditors when they report to external competent authorities, including law enforcement authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure auditors making such reports reasonably and in good faith are protected from legal action as appropriate. [2009 Recommendation III.iv, v and X.B iii, v]
 - e. Take steps to ensure that GIZ and KfW staff report suspicions of foreign bribery arising in the context of projects commissioned by the German Federal Government and involving German companies or individuals to German law enforcement authorities, and issue guidelines to staff on the reporting procedure. [Convention Article 3(4); 2016 Recommendation for Development Cooperation Actors, 7, iii.]

Recommendations regarding enforcement of the foreign bribery offence

2. Regarding **investigation and prosecution** of foreign bribery, the Working Group recommends that Germany:
 - a. Compile at Federal level, or ensure consistent compilation at *Länder* level of information and statistics relevant to the monitoring and follow-up of the enforcement of the German legislation implementing the Convention. [Convention, Article 12; Phase 3 recommendation 4b.]

- b. Continue to ensure that prosecutors in those *Länder* with less experience in foreign bribery cases be offered guidance and specific training including by more experienced prosecutors from other *Länder*, with regard to the complexity of the foreign bribery offence and its investigation and prosecution for both natural and legal persons. [2009 Recommendation III.ii and V.]
- c. If not implementing recommendation 6b on removing the principle of prosecutorial discretion applicable to corporate liability, alternatively ensure that the Public Prosecutor's Office role in the instigation of investigations and prosecutions of legal persons, is exercised independently of the executive in order to guarantee that these investigations and prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention (i.e. considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved). [Convention Article 5]
- d. Align regional court jurisdiction for both foreign bribery and bribery in business transactions (section 299/300 CC). [Convention, Article 5; 2009 Recommendation, Annex I.D.]
3. Regarding **resolutions** of foreign bribery cases, the Working Group recommends that Germany:
- a. Clarify, through any appropriate means, including building on the body of concluded foreign bribery cases, the criteria by which the prosecutors may dispense with prosecution, including the level of cooperation expected from the defendants throughout the investigation, with a view to ensuring a consistent exercise of discretion by the prosecutors across *Länder* and to enhance predictability and transparency regarding the application of section 153a CCP. [Convention Article 5; 2009 Recommendation III.ii and V and Annex I D.]
- b. Ensure, through any appropriate means, that certain elements of the resolutions under Section 153a CCP, such as the legal basis for the choice of procedure, the facts of the case, the natural persons sanctioned (anonymised if necessary), and the sanctions imposed, are made public where appropriate and in line with Germany's data protection rules and the provisions of its Constitution. [Convention, Article 3 and 5; 2009 Recommendation III.ii; Phase 3 recommendation 3c]
- c. Proceed with the announced extensive empirical evaluation of negotiated agreements in Germany. [Convention Article 5; 2009 Recommendation III.ii and V and Annex I D.]
- d. Consider introducing a system of resolution for legal persons as part of its efforts to increase enforcement against legal persons. [Convention Article 2 and 3; 2009 Recommendation III.]
4. Regarding **sanctions**, the Working Group recommends that Germany:
- a. 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; and
 - ii. procedures applied (court decision with a full hearing, negotiated sentencing agreement under section 257c CCP, penal order under section 407 CCP, resolution under section 153a CCP). [Convention Article 3; 2009 Recommendation III.ii; Phase 3 recommendation 3b].
- b. Take steps to continue to achieve functional equivalence, in particular through ensuring that foreign bribery cases result in effective, proportionate and dissuasive sanctions, including when alternative offences to foreign bribery, in particular commercial bribery, are applied and when cases are resolved through a resolution under section 153a CCP. [Convention Article 3; 2009 Recommendation III.ii]
- c. Raise awareness among prosecuting authorities on the importance of making full use of the range of criminal sanctions available in law; [Convention Article 3; 2009 Recommendation III.ii]
- d. Proceed with the intention stated in the 2018 Coalition Agreement to:

- i. Introduce the possibility of an administrative fine of up to 10% of a company's turnover to ensure that sanctions are effective, proportionate and dissuasive including for large companies; [Convention, Article 3(1), 2009 Recommendation III.i]
 - ii. Develop and make available to prosecutors, judges and companies rules and guidance on the aggravating and mitigating factors and the possible impact each factor has on the effective, proportionate and dissuasive nature of sanctions; [Convention Article 3(1), Article 5, 2009 Recommendation III.ii]
 - e. Regularly provide detailed written information and training to investigators and prosecutors on how to quantify the proceeds of bribery for the purpose of calculating the confiscatory component of the fine. [Convention, Article 3(3)]
 - f. Ensure that independent forfeiture orders are not used instead of imposing a regulatory fine which includes a punitive component. [Convention Article 3, 2009 Recommendation II]
 - g. Ensure that sanctions imposed on legal persons are effective, proportionate and dissuasive, including when taking into account the tax treatment of confiscation in Germany. [Convention Article 3(1); 2009 Recommendation III.ii]
5. Regarding **international co-operation**, the Working Group recommends that Germany develop tools to collect data to measure MLA performance, to systematically gather information on the number of requests made and received, and the amount of time taken to execute incoming MLA requests and follow up on the status of outgoing MLA requests in relation to foreign bribery and related offences. [Convention Article 9(1)]

Recommendations regarding liability of, and engagement with, legal persons

6. Regarding **liability of legal persons**, the Working Group recommends that Germany:
- a. Ensure that, in a foreign bribery case, an independent forfeiture order is not used as a mean to dispose of cases when all possible measures to hold a company liable have not been explored, in particular in the absence of clear policy regarding self-reporting. [Convention Article 2 and 5; 2009 Recommendation III.iii and V]
 - b. Review its overall approach to enforcement of corporate liability in order to effectively combat foreign bribery and proceed with the 2018 Coalition Agreement to remove the principle of prosecutorial discretion applicable to corporate liability. [Convention Article 2 and 5; 2009 Recommendation III.iii and V]
 - c. Strengthen training programs available for prosecutors on corporate liability in foreign bribery cases, and further facilitate the sharing of expertise across *Länder* prosecutors' offices as appropriate, including on the use of purely administrative resolutions to hold legal persons liable under section 30 in conjunction with section 130 OWiG. [Convention Article 2; 2009 Recommendation III.ii and V, Annex I B]
 - d. Prioritise the prosecution of legal persons involved in foreign bribery cases and prosecute both natural and legal persons in a foreign bribery case whenever appropriate and even when based on the conviction of an individual for an alternative offence to foreign bribery. [Convention Article 2; 2009 Recommendation III.ii and V, Annex I B]

Recommendations regarding other measures affecting implementation of the Convention:

7. Regarding **foreign bribery in the defence sector**, the Working Group recommends that Germany:
- a. Examine possibilities to take steps to establish formal guidelines on the conduct of due diligence in the granting of defence export and marketing licences, including the consultation of international

debarment lists and confirmation and verification of a company's corruption-related compliance programme. [2009 Recommendation X.C and Annex II]

b. Ensure by any appropriate means that the application of the Federal Government's principles for vetting exporters of weapons of war and arms related goods includes due consideration of foreign bribery legislation. [2009 Recommendation X.C.vi and Annex II]

c. Train relevant Office of Export Control staff on these principles, foreign bribery risks and red flags. [2009 Recommendation X.C and Annex II]

8. Regarding the **Federal Debarment Register**, the Working Group recommends that Germany:

a. Clarify the grounds for inclusion on the register to ensure that legal entities cannot avoid being listed therein by resorting to corporate restructuring and the rules providing for the non-inclusion of successor companies in the register. [Convention Article 3(4); 2009 Recommendation III.ii and vii and V]

b. Proceed with its intention to issue guidelines on the necessary requirements for companies to prove that measures have been taken to remediate foreign bribery risks. [Convention Article 3(4); 2009 Recommendation III.ii and vii and V]

c. Ensure that export credit and official development assistance providers be granted access to the Federal Debarment register. [Convention, Articles 2 and 3.4 2009 Recommendation, XI.i, ii and XII]

d. Take advantage of the setting up of the new Federal Register to raise awareness amongst procuring authorities of the existence of international debarment lists and the need to take such lists into consideration as a basis for due diligence of applicants. [Convention Article 3(4); 2009 Recommendation III.ii and vii) and V] [Phase 3 recommendation 11b]

9. Regarding **Official Development Assistance**, the Working Group recommends that Germany:

a. Improve the sharing of information between GIZ and KfW on corruption, investigations, findings and/or sanctions within the limits of confidentiality and/or legal requirements. [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 9.vi]

b. Ensure that GIZ put in place a sanctioning regime that is effective, proportionate and dissuasive and includes clear and impartial processes and criteria for sanctioning. [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 9.iii]

c. Ensure that GIZ provide additional training on the risks of foreign bribery for staff in high risk areas. [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 3.ii]

Follow-up by the Working Group on Bribery:

10. The Working Group will follow up on the issues below as case law, practice, and legislation develops:

a. The ability of Germany's new FIU to:

i. detect foreign bribery through information received by the FIU including suspicious transaction reports, information from law enforcement agencies and co-operation with international counterparts;

ii. effectively disseminate relevant information to law enforcement agencies;

- b. Whether existing sources of foreign bribery allegations (including the information referred to Germany by the Working Group) are properly used in due time by the competent authorities to ensure that Germany further continues to detect and open investigations based on media reports;
- c. 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;
- d. The effect of the new Act to Reform Criminal Law on the Proceeds of Crime;
- e. Whether the jurisdiction rules in Section 5(15) provide sufficient basis to apply to the alternative offences of commercial bribery or breach of trust;
- f. 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;
- g. Whether the bribery of foreign and international Members of Parliaments is, in practice, available as a predicate offence for money laundering, making sure that this predicate offence is aligned with the standards in the Convention;
- h. Whether tax authorities systematically re-examine the tax returns of taxpayers convicted of foreign bribery to determine whether bribes have been deducted.

ANNEX 1: GERMANY'S FOREIGN BRIBERY ENFORCEMENT ACTIONS

Annex 1A Table of concluded cases since Phase 3

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
1.	2011	1 individual (Former member of the central board of directors)	SIEMENS CASE	Intentional violation of the duty of supervision (Section. 130 OWiG)	Section 153a (2) CCP	Payment of 175°000 Euros to be paid to various charitable institutions	2011 Report Case Bav (old) 2011/1 (1)
	2011	1 individual (Former member of the financial board)	SIEMENS CASE Bribery of several officials in a West African state. The bribery payments forming the subject matter of the proceedings amounted approx. 4.8 millions Euros, in return for which the defendant omitted, in breach of	Accomplice to bribery of foreign public officials through omission	Section 153a (1) CCP	Payment of 400°000 Euros to be paid.	2011 Report Case Bav (old) 2011/1 (5)

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			duty, to intervene.				
	2011	7 individuals (Staff members below board level)	SIEMENS CASE Establishment of slush funds	Breach of trust, given that it was not possible to prove participation in specific acts of bribery.	Conviction Penal orders (Section 407 CCP)	Penal orders were applied for and issued against a total of seven staff members, which with one exception (fine of 180 daily rates of 100 Euros each) provide for prison sentences of between six months and one year.	2011 Report Case Bav (old) 2011/1 (4)
	2012	1 individual (Divisional board director)	SIEMENS CASE	Breach of trust	Conviction Negotiated sentencing agreement (section 257c CCP)	Prison sentence totalling 1 year and 6 months, which was suspended on probation for three years. Probation was made conditional on the payment of 130°000 Euros to various charities.	2012 Report case Bav (old) 2011/1 (1)

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2012	1 individual (Former manager)	Bribe payments in the South America region	Breach of trust by omission, Sections 266 and 13 CC	Section 153a (1) CCP	Payment of 500°000 Euros	2012 report, case Bav (old) 2011/1 (4)
		1 individual (Former manager)			Section 153a (1) CCP	Payment of 40°000 Euros	
	2012	5 individuals (Staff below board member)	SIEMENS	Bribery in commercial practice (Section 299 CC)	Section 153a (1) CCP	Payments of between 4°000 and 25°000 Euros	2012 report, case Bav (old) 2011/1 (6)
	2012	3 individuals (Staff below board member)					

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2011	The exact number of individuals was has not been provided to the MoJ (Members of staff below board level)	SIEMENS	Breach of trust, Accomplice to bribery in commercial practice in one case	Section 153a (1) CCP	Payments of between 7°500 and 20°000 Euros.	2011 report case Bav (old) 2011/1 (4)
	2012	1 individual (Former member of the board)		Violation of obligatory supervision – Section 130 OWiG	Administrative decision imposing a regulatory fine	Fine of 45°000 Euros.	2012 report case Bav (old) 2011/1 (3)
	2012	3 individuals t	Bribery of a Minister of an Arab state by staff members of a technological firm to win a call of tenders relating to the construction of gas	Bribery of foreign public officials	Section 153a (2) CCP	Payment of four digit conditional payments	- 2012 Report Case Bav 2011/1 - 2011 Report

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2013	1 individual	insulated switchgear. SIEMENS case	Unknown	Section 153a (1) CCP	Payment of EUR 20°000	Case Bav 2011/1 case Bav (old) 2011/1
	2016	1 individual	SIEMENS Payment of bribes made by a large German public limited company active at the international level	Unknown	Acquittal (appealed by the public prosecutor's office and partially sent back for retrial - pending)	N/A	Case Bav 2011/1
2.	2011	1 individual (Managing director of a limited liability company)	Bribery of an employee of the Embassy of an Asian country. The accused paid commissions totalling 22,000 Euros to the Embassy employee in 2006 for support in carrying out transactions.	Bribery of foreign public officials	Section 153a (1) CCP	Payment of 15°000 Euros	2011 report Case LS 2011/1
3.	2011	6	Payments made to	Bribery of foreign	Section 153a (1) CCP	Payment of	2011

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		individuals	government agencies of an Eastern European country in the context of planning and standing order contractor services for the construction of hospitals and medical laboratories. The recipients of the payments were letterbox companies.	public officials		126°000 Euros	report Case Thu(old) 2011/2
4.	2011	1 individual (former manager)	Ferrostaal Case Bribery of foreign public officials in connection with the obtaining of defence contracts in Portugal, Greece, Indonesia and other countries. (Case known as the Submarines case)	Bribery of foreign public officials	Conviction	Suspended sentence terms of 2 years and fine of EUR 36 000 and must pay EUR 30 000 to charities.	Bav (old) 2011/6
					Conviction	Suspended sentence terms of 2 years and fine of EUR 18 000 and must pay EUR 22 000 to charities.	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		1 legal person Ferrostaal			Section 30 OWiG	Regulatory fine of EUR 140 million by Munich court.	
	2012	1 individual (former member of the board)			Conviction	Sentenced to 6 months imprisonment on probation and must pay 20°000 Euros to charities as probation condition because of bribery of foreign public officials in conjunction with bribery of officials of another Member State of the European Union.	
	2012	1 individual Chairman of the Board		Violation of obligatory supervision – Section 130 OWiG	Administrative decision imposing regulatory fine	Fine of 400°000 Euros	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
5.	2012	3 individuals		Accomplice to bribery of foreign public officials	Section 153a (1) CCP	Payment of 25°000 Euros, 400°000 Euros and 440°000 Euros respectively.	Case Bav (old) 2011/5
	2011	2 individuals	Bribery of a navy employee of a South American state in connection with the sale of a design and the conclusion of a licensing agreement on coastal speedboats.	Bribery of foreign public officials	Section 153a (1) CCP	Payments of 250°000 Euros and 10°000 Euros respectively	
	2013	1NP	Ferrostaal case	Unknown	Section 153a (1) CCP	Payment of EUR 150°000	
	2011	3 staff members (persons in senior position)	Bribery of a European Official in connection with the purchase of a foreign bank	Section 334 (1) No. 3 CC in conjunction with Article 2 (1) of the German Act on the	Section 153a (1) CCP	Payments between 9°000 and 150°000 Euros	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source		
	2014	4 board members		Protocol of 27 September 1996 to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (EUBestG).					
		2 staff member of the bank's subsidiary		Breach of trust				Section 153a (2) CCP	Payment of sums of money ranging from EUR 5°000 to 20°000
		4 individuals		Breach of trust				Section 153a (2) CCP	Payment of EUR 50°000.
	2015	1 individual		Breach of trust	Section 153a (2) CCP	Payment of EUR 50°000.			
	2015	1NP (Former CEO of the domestic (German) bank)		Bribery of foreign public officials in international business transactions.	Conviction	One year and six months prison sentence. On probation (payment of EUR 100°000)			

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
6.	2011	2 individuals (Staffs of a stock corporation)	Bribery payments to North African public officials totaling approx. 700,000 Euros	Bribery of foreign public officials	Convictions	Imprisonment of 1 year and 10 months on probation	Case Bav (old) 2011/2
	2011	2 individuals (Staffs of a stock corporation)	Bribery payments to North African public officials totaling approx. 2,700,000 Euros	Bribery of foreign public officials respectively accomplice hereto	Convictions	Imprisonment of 1 year on probation in two cases and of 6 months on probation in one case	
		1 individual (Staff member of a sub-contracted sales company)					
2011	2 individuals (Staff members of the company)	Bribery of members of parliament of the foreign country	Bribery of foreign public officials Bribery of foreign public officials	Section 153a (1) CCP	Payments of 17°000 and 35°000 Euros		

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2011	63 individuals	Bribery of public officials in Middle Eastern countries via bogus advisory firms	Commercial bribery (section 299 CC)	Section 153a (1) CCP	Payment of 3°500 Euros for one individual and amount unknown for 62 individuals	
	2011	2 individuals (Staff of a subsidiary)	Accomplice to the bribery of foreign public officials in Central Asia	Bribery of foreign public officials	Convictions Penal orders under Section 407 CCP	Fine of EUR 6°000 Fine of EUR 9°000	
7.	2011	1 legal person	Bribery of foreign public officials in Russia. In 2013, another set of offence was added concerning the payment of bribes in connection with the construction of a large industrial plant in a southern Asian State.	Section 130 (1) OWiG	Independent forfeiture proceeding Section 29 a (2) – (4) OWiG	A profit of EUR 35 million was declared forfeited. The public prosecutor's office referred to a lack of supervisory measures within the company. The amount declared forfeited was equivalent to the estimated value of the con-tracts gained as a result of the offences.	Bav 2011/2 2011 Report I. case Bav 2011/2 2012 report F. Bav 2011/2 2013 report D case Bav

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		8 individuals		Bribery in commercial practice (Section 299 CC)	section 153a (1) CCP	Payments (amount unknown)	(old) 2011/2
		7 individuals		Bribery in commercial practice (Section 299 CC)	Convictions (penal orders)	12 months, suspended, 270 daily penalty charges	
			8 months, suspended, penalty charges				
			90 daily penalty charges				
			300 daily penalty charges				
			6 months, daily penalty charges				
			12 months, suspended, 300 daily penalty charges				

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
						300 daily penalty charges	
8.	2011	1 individual (Managing Director)	Bribe payments in connection with pipeline projects in one Central Asian country and two European countries	Bribery in commercial practices (section 299 CC)	Convictions (penal orders under section 407 CCP)	Prison sentence of one year suspended on probation plus a fine of 150 daily rates	2011 report case Bav 2011/2g and Bav (Old) 2011/7
		1 individual (Managing Director)				Fine of 300 daily rates	
	2011	1 legal person		Bribery in commercial practices (Section 299 CC)	Section 30 OWiG	Regulatory fine of EUR 3.25 million Euros	
9.	2011	1 legal person Man Ferrostaal	Man Ferrostaal More than 8 million in bribes paid to decision-makers in the Central Asian ministry responsible for	Section 130 OWiG	Section 30 OWiG	Fine of a total of 10 million Euros	Case Bav 2011/3
	2013	1 individual		Unknown (charges were brought in	Section 153a (2) CCP	Payment of EUR 500°000 (info from	2011 Report

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			awarding a contract to build a gas compressor station. Payments made both via bogus invoices contracts and via a joint venture made up of foreign firms which issued bogus invoices for construction services.	2012)		the WGB matrix)	J. Case Bav 2011/3 2012 report G case Bav 2011/3 2013 report E case Bav (old) 2011/3 2014 report D case Bav (old) 2011/3
		1 individual (facilitator)		Bribery of foreign public official Section 334(1) in conjunction with section 1 IntBestG;	Conviction	Prison sentence–one year and six months suspended on probation. A condition of probation of EUR 20°000 was imposed. (info from Annex 7: 10 months of imprisonment suspended on probation; condition of probation: payment of EUR 20°000; final and binding)	
	2016	3 individuals		Bribery of foreign public official Section 334(1) in conjunction with section 1 IntBestG;	Section 153a (2) CCP	Payment of EUR 11°000 Payment of EUR 7°500 Payment of EUR 6 000	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		3 individuals		Bribery of foreign public official Section 334(1) CC in conjunction with section 1 IntBestG;	Section 153a (2) CCP	Payment of EUR 12°000	
	2017	1 individual		Unknown	Acquittal (under appeal)	Payment of EUR 12°000 Payment of EUR 12°000 N/A	
10.	2011	1 individual (An industrial consultant)	Payments of 700,000 Euros to a deputy mayor in a Central Asian state	Bribery of foreign public officials Section 334(1)CC in conjunction with section 1 IntBestG	Conviction	Two years' imprisonment on probation + forfeiture of compensation of 100°000 Euros	Case Thu (old) 2011/1

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
11.	2012	1 individual (managing director)	Bribe payments to persons holding responsible positions in an Arab company between 2004 and 2006. The bribes paid (by the contracted company) amounted to nearly €3m over six separate projects.	Commercial bribery (Section 299 CC)	Conviction Penal order, Section 407 CCP	One year of imprisonment, suspended on probation.	Case Hes (old) 2011/2
	2012	2 legal persons		Section 130 OWiG	Forfeiture orders (section 29a OWiG)	Replacement value forfeiture of EUR 3million	
				Section 130 OWiG		Replacement value forfeiture of 550°000 Euros	
	January 2013	1 individual		Commercial bribery (Section 299 CC)	Section 153a (1) CCP	Payment of 50°000 Euros	
12.	2012	1 individual	Payments of a total of approximately 4.3 million Euros were made to responsible staff members of a Western Asian country	Section 334 (1) No. 3 CC in conjunction with Article 2 (1) of the German Act on the Protocol of	Conviction Penal order, Section 407 CCP	Fine totaling 320 daily rates of 100 Euro each	Case Hes (old) 2011/3

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		1 legal person	from 2004 to 2006 for obtaining tenders together with a further co-defendant, who acted as intermediary.	27 September 1996 to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (EUBestG).	Section 30 OWiG	2 Regulatory fines of 600°000 Euros imposed each.	
		4 individuals			Section 153a (1) CCP	Payments totaling 75°000 Euros.	
	April 2015	2 individuals		Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG	Conviction Penal order under Section 407 CCP	Discrepancy In annual Lander report: Fine EUR 26°400 and 11-month imprisonment suspended on probation (payment of EUR 12°000) In translated penal order: fines of €32°000 and €24°000	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
					Conviction Penal order under Section 407 CCP	Discrepancy In annual <i>Länder</i> report: Fine EUR 16°500 and 11-month imprisonment suspended on probation (payment of EUR 9°000) In translated penal order: fines of €24°000	
		1 legal person		Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG	Section 30 OWiG	Regulatory fine of Eur 2.1 million	
	2015	1 individual Former employee		Section 334 (1) CC in conjunction with section 1 IntBestG	Penal order (section 407 CCP)	Warning notice (section 59 CCP)The court reserved the right to impose a fine in the amount of 180 daily rates of EUR 100 each. A	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
						condition on probation of Eur 29°000 was imposed.	
		2 individuals (employees of the company)		Bribery of foreign public official (IntBestG and EuBestG)	Section 153a (2) CCP	Payment of EUR 4°000	
						Payment of EUR 24°000	
	July 2016	2 individuals (Former managing directors of the company)		Charged with having facilitated act of bribery, tax evasion and violation of supervisory duties (Section 130 OWiG)	Section 153a (2) CCP	Payment of EUR 12°000 to a non-profit-making institution.	
						Payment of EUR 25°000 to a non-profit-making institution.	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
13.	2011	1 individual	Sales representative of a German company involved in the construction of vehicle parts is alleged to have granted reduced purchase prices to representatives of companies in Arab countries.	Bribery in commercial practice (Section 299 CC	Conviction Penal order under Section 407 CCP	One year's imprisonment suspended on probation, payments of an amount of 75°000 Euros as a condition for probation	Case Hes (Old) 2011/4
	2012	1 individual		Bribery in commercial practice (Section 299 CC	Conviction	Prison sentence totaling two years (suspended on probation)	
		1 individual		Bribery in commercial practice (Section 299 CC	Conviction Penal order under Section 407 CCP	Fine of 180 daily rates at 100 Euros each	
		1 individual		Bribery in commercial practice (Section 299 CC	Section 153a (1) CCP	The proceedings were temporarily discontinued on condition of payment of 5°000 Euros.	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
14.	2012	3 individuals	Bogus invoices issued to hide bribe payments to foreign public officials by persons responsible for a manufacturer of printing machines Payment of bribes worth more than EUR 8 million transferred from the company's accounts to Switzerland by a large number of staff using pro-forma invoices for supposed advisory services. The amounts are alleged to have been	Bribery in commercial practice (Section 299 CC	Seizure order (legal ground)	A writs of attachment totaling 671°000 Euros	Case Hes (old) 2011/9
	2012	1 individual	withdrawn from the Swiss account in cash and distributed for use as bribes at home and abroad	Bribery in commercial practice (Section 299 CC	Seizure order (legal ground)	A writs of attachment of 80°000 Euros	
	March – April 2016	4 individuals	Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG	Convictions	Prison sentence of 1 year and two months suspended on probation of the payment of Eur 5°000		

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2015	2 individuals		Bribery of foreign public officials Section 334 (1) CC in conjunction with section 1 IntBestG	Section 153a(2) CCP	<p>Prison sentence of 1 year and 11 months suspended on probation of the payment of Eur 35°000</p> <p>Prison sentence of 1 year and 9 months suspended on probation of the payment of Eur 10°000</p> <p>Prison sentence of 1 year and 6 months suspended on probation of the payment of Eur 10°000</p> <p>Payment of Eur 150°000</p> <p>Payment of Eur 30°000</p>	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2015	1 individuals		Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG	Conviction	Prison sentence (1 year) suspended on probation (payment of Eur 5°000). Eur 280°000 blocked for asset recovery	
	2015	3 individuals		Section 334 (1) CC in conjunction with section 1 IntBestG	Convictions Penal order (Section 407 CCP)	6-month prison sentence suspended on probation (payment of Eur 5°000)	
15.	2011	1 individual (Management director)	The proceedings against the managing director of a steel trading company were based on the results of a company audit according to which six cash payments of amounts between 500 and 11,000 Euros were made to a middleman in a large Asian country.	Bribery in commercial practice (Section 299 CC)	Section 153a (1) CCP	Payments of EUR 5°000	Case Hes (old) 2011/6

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
16.	2013	1 individual	Payment of bribes to police officers of a central European country cash in return for these officers issuing driving licences to German nationals.	Bribery of foreign public officials in international business transactions	Conviction	Fine (180 daily rates at EUR 10 each)	Case BW (old) 2011/5
		Penal order under section 407			Acquittal		
17.	2013	2 individuals (Member of the management and authorized representative of the company)	Bribery of 8 persons in responsible position in a state-owned company in the run-up to the acquisition of a plaster factory in a North African state for the sale not to be put out to international tender. Suspicion that customs officers were also bribed in connection with the import of means of production for the plaster factory.	Commercial bribery (Section 299 CC)	Section 153a (1) CCP	Payment of EUR 100°000 and EUR 30°000	Case Bav 2011/5
	2013	1 individual Department manager		Aiding and abetting commercial bribery (section 299 CC)	Conviction	Prison sentence suspended on probation	
	2013	1 legal person		Section 130 OWiG	Forfeiture order (section 29a OWiG)	Order for forfeiture of equivalent value amounting to EUR 16,500,000	
	2014	2 individuals		Commercial bribery (section 299 CC)	Convictions	Fines in the amount of EUR 180 per	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
						diem for 360 days and EUR 120 per diem for 180 days, respectively.	
18.	2013	1 individual (managing director)	Payment of bribes to employees of southern European and South American state companies by the managing director and an employee of a company that sells water treatment plants.	Unknown	Section 153a (1) CCP	Payment of a six-figure amount.	Case Ham 2011/3
19.	2013	2 individuals	Suspicion of commission payments of turnover-based commissions by responsible employees of five companies in four eastern European states for the delivery of pharmaceutical products. The payments were made to staff of a 100% state-owned company in	Commercial bribery (section 299 CC)	Convictions (penal orders)	A fine (180 daily rates) and a sentence of probation for each NP. (one received a 12-month imprisonment suspended on probation with a fine to be paid to a non-profit organisation of	Case Ham (old) 2011/5 2010 report Hamburg G 2011 report J. case Ham

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			a Western Asian country. Date of acts: between 2005 -2008			€96°000.)	2011/5 2012 report H. case Ham 2011/5
		1 legal person		Unknown	Section 29a OWiG	Forfeiture order (amount unknown)	
20.	2013	2 individuals	Payment of bribes by the chief executive officer and the authorised representative of a mechanical engineering company to private and public contracting entities in eastern Europe.	Unknown	Section 153a (1) CCP	Unknown	Case NRP (old) 2012/4
		1 legal person		Commercial bribery (Section 299 CC)	Regulatory fine (section 30 OWiG)	Regulatory fine in the amount of EUR 950°000	
21.	2014	1 individual (Employee)	Payment of bribes through concealed funds in a south-eastern Asian country	Criminal breach of trust (section 266 CC)	Section 153a (1) CCP	Payment of EUR 10,000.	Case Bav 2014/1
	2015	1 individual (Board member of a German		Maintaining concealed funds	Section 153a (1) CCP -	Payment of EUR 10°000	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		foreign subsidiary)					
22.	2014	6 individuals	Payment of bribes to employees of a SOE in an eastern European country in order to have them award contracts for the delivery of animal feed. The payments (approx. EUR 120,000 in 2008 and 2009) were declared as compensation for alleged consulting services.	Unknown	Section 153a (1) CCP	The amount of the payment is unknown	Case LS (old) 2012/1
		1 legal person		Section 130 OWiG	Forfeiture order (section 29a OWiG)	Forfeiture in the amount of EUR 500°000	
23.	2014	1 individual	Payment of bribes by a German pharmaceutical company to public officials of an eastern European state.	Unknown	Section 153a (1) CCP.	Amount of the payment unknown.	Case TH 2014/1
24.	2014	1 individual	Payment of bribes amounting to a total of approx. 1,000,000 Euros to members of the government, police and military of a central	Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 of the Act on Combating	Conviction	Four-year prison sentence	Case BW (old) 2011/1

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		1 individual	African state from 2004 to 2008 in order to procure at least four contracts on behalf of a limited liability company (<i>GmbH</i>) for the delivery of goods with a total value of approx. 7.5 million Euros although the purchase price was much higher.	International Bribery (IntBestG)			
		2 legal persons		Aiding and abetting bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG, section 27 of the Criminal Code (Strafgesetzbuch, StGB);	Conviction	Two-year prison sentence suspended on probation.	
				IntBestG	Forfeiture order (section 73(3) CC	Against the two defendants and the 2LP: forfeiture of EUR 8°490°000 in equivalent value. (appealed – awaiting new hearing)	
25.	2014	1 individual	Payment of bribes by a car company's subsidiary to officials of city administrations in several foreign states in	Bribery of foreign public official in international business transactions (in Latvia) Section	Penal order (Section 407 CCP)	One year imprisonment suspended on probation	Case BW (old) 2007/3

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		1 legal person	order to win contracts.	334 (1) CCin conjunction with section 1 IntBestG; Section 130 OWiG	Forfeiture order (section 29a OWiG)	Forfeiture of EUR 12 million.	
26.	2014	1 legal person	Payments of bribes (totalling EUR 100.000 from February 2007 to January 2011) by a German aviation company to a public official of a central African state.	Bribery of foreign public officials in international business transactions (section 334CC)	Section 30 OWiG	A regulatory fine in the amount of EUR 100°000 pursuant to the Act on Regulatory Offences	Case NRP (old) 2013/2
27.	November 2014	1 legal person	In connection with the planning of a construction materials factory, employees of a company based in a western European state which is a subsidiary of a parent company headquartered in Germany are suspected of having paid bribes to officials responsible for	Section 130 OWiG	Forfeiture order Section 29a (3) OWiG	Forfeiture of EUR 2 million	Case Bav (old) 2013/1
	2015	2 individuals (managing director of the holding company and former employee of a subsidiary		Unknown	Section 153a (2) CCP	Fine EUR 250°000	
					Section 153a (2) CCP	Fine EUR 150°000	
2016	4	Unknown	Section 153a (1) CCP	Payment of EUR			

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		individuals	the authorisation procedure.			150°000 Payment of EUR 150°000 Payment of EUR 5°000 Payment of EUR 2°500	
28.	2014	1 individual 1 legal person Rheinmetall Defence Electronics GmbH	Rheinmetall Defence Electronics GmbH (RDE). (Greece) Proceedings were initiated in 2003 against persons responsible for two weapons companies, who are suspected of having paid bribes to officials of a south-eastern European state from 1998 to 2011 to receive weapons contracts. Both companies are to have paid substantial commissions - approx. EUR 17 million	Breach of supervisory duties (section 130 OWiG) Section 130 OWiG	Administration decision imposing a regulatory fine Sections 30 OWiG	Regulatory fine of EUR 17°050 Regulatory fine of Eur. 37.07 million	Case Bremen 2013/1

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			according to current knowledge - to representatives of south-eastern European companies. It is suspected that this money was then used to bribe officials.				
29.	1 June 2017	1 legal person Atlas Elektronik	Atlas Elektronik (Greece) Proceedings were initiated in 2003 against persons responsible for two weapons companies, who are suspected of having paid bribes to officials of a south-eastern European state from 1998 to 2011 to receive weapons contracts. Both companies are to have paid substantial commissions - approx. EUR 17 million according to current	Based on the violation of supervision by a company executive in putting in place an insufficient compliance programme to ensure corrupt payments were not made.	Forfeiture Order Section 29a OWiG	Forfeited of approx. EUR 48 million	Bremen 2013/2

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			knowledge - to representatives of south-eastern European companies. It is suspected that this money was then used to bribe officials.				
30.	2015	1 individual (external consultant)	T GmbH (Iran) USD 60 000 paid in bribe to secure the procurement of a EUR 10 million contract for a northern European subsidiary of a German stock corporation from a western Asian state for a construction of a milk powder factory.	Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG.	Conviction (negotiated sentencing agreement (s.257c))	Prison sentence of two years and 8 months	Case Bav 2014/4
31.	2016	2 individuals	Two employees of a German company supplied technical equipment for a state-owned company and are suspected of having made payments running into tens of millions of	Bribery of foreign public officials Section 334 (1)CCin conjunction with section 1 IntBestG.	Section 153a (2) CCP	Payment of a midway five-figure sum Payment of a midway five-figure sum	Case BW 2011/7

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			<p>euros to officials of an eastern European states as well as further payments to officials of African and Asian states in order to win contracts for the delivery of technical equipment.</p> <p>The value of the contract was an amount in the double- digit million Euros range. Approx. 30 % of the contract amount was paid to foreign public officials in bribes.</p>				
32.	2016	2 individuals	An industrial company specialised in the manufacture of engines, including for military	Unknown	Section 153a (1) CCP	Payment of EUR 75°000 Payment of EUR 12°000	Case BW 2012/1

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	2016	1 individual	purposes is suspected of having paid bribes to representatives of authorities in several Asian states in order to win contracts. It includes trips with a great recreational value (disguised as “training courses”) organised for the concerned group of persons, mostly officials.	Bribery of foreign public official Section 334 (1) CC in conjunction with section 1 IntBestG.	Conviction Penal Order -Section 407 CCP	10-month prison sentence suspended on probation	
	2017	3 individuals		Unknown	Section 153a CCP	Payment of EUR 95°000	
						Payment of EUR 12°000	
						Payment of EUR 12°000	
33.	2016	1 individual (Former employee)	Krauss Maffei Wegmann (Greece) Payment of bribes to public officials of the defence ministry of a south-eastern European state by employees of a German tank manufacturer. The bribes were allegedly paid in relation with	Tax evasion, fraud and money laundering. The foreign bribery offence was time barred.	Conviction	11-month prison sentence suspended on probation	Case Bav 2013/2
	2016	1 legal person		Tax offence	Section 30 of the Regulatory Offences	Fine of EUR 175°000	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
		Krauss Maffei Wegmann (German armament manufacturer);	two contracts on the delivery of artillery and tanks. The two bribe payments amounted to EUR 750,000 and EUR 100,000.		Act (<u>under appeal</u>). Both the public prosecutor's office and the company filed appeals on points of law regarding the regulatory fine.		
34.	2016	5 individuals	Bribes of between 5 and 50 euros are said to have been paid to customs and police officers in two eastern European states by drivers of a German haulage firm	Bribery in business transactions (section 299 CC)	Section 153a (2) CCP	Payment of EUR 4°000 Payment of EUR 6°500 Payment of EUR 9°800 Payment of EUR 10°000 Payment of EUR 20°000	Case Ham 2011/1
35.	January 2016	1 individual	Payments in the amount of several million euros to apparent dummy ("letter box") companies by a company specialising in the global distribution of slaughter equipment and conveyors.	Embezzlement and breach of trust (sections 246, 266 CC)	Conviction	2-year prison sentence suspended on probation (payment of EUR 100°000 in installments to non-profit-making institutions and to the Treasury).	Case Hes 2011/10

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
	January 2016	1 individual		Aiding and abetting embezzlement and breach of trust (sections 246, 266, 27 CC)	Conviction	1-year and 6-month prison sentence suspended on probation (payment of EUR 50°000 to non-profit making institutions and to the Treasury).	
36.	July 2016	2 individuals	Biotest Russia case Payment of EUR 55 million in bribes to Easter European customs officers and employees of health authorities by persons responsible of a mid-sized company which, develops, manufactures and distributes medical and pharmaceutical products and equipment.	Aiding and abetting embezzlement and tax evasion	Conviction (under appeal)	5-years and 9-month prison sentence (under appeal)	Case Hes 2011/4
						4-year and 6-month prison sentence (under appeal)	
	1legal person Biotest Pharma compagny	section 266 CC (Breach of trust) and section 370 of the Fiscal Code (tax evasion)		Section 30 OWiG	EUR 1 million regulatory fine		
	2017	6 individuals		Unknown	Section 153a(1) CCP	Payment of EUR 50°000	
				Payment of EUR 25°000			
						Payment of EUR 22°500	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
						Payment of EUR 15°000	
						Payment of EUR 12°500	
						Payment of EUR 10°000	
37.	October 2016	1 legal person DB Schenker	DB Schenker (Russia) (freight business of state-owned German rail company Deutsche Bahn)	Bribery of foreign public official	Section 30 OWiG	Fine of 2 million euros (fine of Eur 300°000 and confiscatory component of Eur 1.7 million)	Case NRW 2014/1
		7 individuals	Payment of bribes in the amount of around one million US dollars each year to eastern European customs officers since 2006 in connection with the delivery of car parts to an eastern European subsidiary of the German car manufacturer, in order to get these officers to forego the customs	Unknown	Section 153a (1) CCP	Payments of Eur 30°000	
						Payments of Eur 30°000	
						Payments of Eur 20°000	
						Payments of Eur 20°000	
						Payments of Eur 10°000	
						Payments of Eur 8°000	
						Payments of Eur	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			controls and to accelerate the customs clearance.			3°000	
38.	2016	2 individuals	Bribery of employees of a public international organisation in connection with the awarding of contracts for the construction of hospitals.	Unknown	Section 153a (1) CCP	Payment of Eur 3°725 to a non-profit-making institution or to the Treasury	Case SH 2013/1
		1 individual				Section 153a (1) CCP	
39.	2016	1 individual	Bribery of customs officials to speed up the delivery hauls to an Eastern European State for a total of between EUR 60 and EUR 80 by the managing director of an enterprise active in the fields of design,	Unknown	Section 153a (2) CCP	Payment of EUR 3°000	Case Ham 2015/1

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			production, finishing, and distribution of apparel.				
40.	2017	2 individuals	Suspicion that persons responsible for a company that manufactures – and trades in – corrosion prevention devices have paid bribes to public officials of an African state. Allegedly, the bribes were paid in order to procure a contract regarding the construction of a port facility. The contract was not awarded.	Unknown	Section 153a (2) CCP	Payment of EUR 120°000 Payment of EUR 40°000	Case Ham 2014/1
41.	2017	1 legal person	Investigation proceedings initiated at the Stuttgart public prosecution office in May 2011. Suspicion of bribery of foreign public officials by a German company that	Section 130 OWiG	Forfeiture order Section 29a OWiG	Forfeiture (approx. ten of millions)	Case BW (old) 2011/2 Central America

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			had supplied short and long-range weapons to a Central American country between the years 2005-2007. The value of the contract was an amount in the double-digit million Euros range, The possibly bribed foreign public officials belong to the military administration.				
42.	2011	1 individual	Proceeding against two former managing directors of a company which supplies refrigeration equipment to the cement industry. They are suspected of having reduced tax payments by submitting materially erroneous tax declarations by claiming that profits were reduced by the	Unknown	Section 153a CCP	EUR 325°000	Case LS (old) 2011/1
	2011	1 Legal person		Tax evasion	Section 30 OWiG	Fine of EUR 400°000	

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			payment of commissions even though these payments were either subject to the prohibition on deduction for bribery payments contained in the Income Tax Act or they were disguised dividend payments.				
43.	2017	1 individual	Employees of a company that sells high quality medicinal products suspected of having given gifts and invitations to medical practitioners, technicians and other decision makers of hospital in Russia to win contracts for the delivery of high end medical technical technology.	Unknown	Section 153a (1) CCP	Payment of 50°000	Ham 2013/1
44.	2017	1 legal person	Bribery of members of the Navy of a Latin	Section 130 OWiG	Forfeiture order Section 29a OWiG	Forfeiture of EUR 4.4 million	Bremen 2017/1

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			American country by executives of a Bremen arms manufacturer in order to secure arms contracts between 2008 and 2012.				
45.	2015	1 individual	Proceedings directed against the chief executive officer of a commercial company for suspicion of tax evasion and bribery of foreign public officials in international business transactions.	Tax fraud	Conviction	Sentence 10 months, suspended Payment of EUR 4° 500	Hes 2011/7
46.	2016	1 individual	Suspensions that persons responsible for a company active in the field of production of extinguishing foam have paid bribes to the research director of the academy of state-run fire control in an eastern European state in order	Breach of trust	Section 153 a CCP	Payment of EUR 6°000	Ham 2011/2

	Date judicial decision	Number of person(s) sanctioned	Facts	Offence	Judicial decision	Sanction	Source
			to prompt him to award them contracts.				
47.	2017	2 individuals	Suspicion of bribes paid to an employee of an international organization. In return, the employee was to make available information about public invitations to tender bids for contracts in the health care sector.	Unknown	Penal order	Prison sentence suspended on probation	Hes 2012/2
				Unknown	Section 153a CCP	Payment of EUR 100° 000	
		1 legal person		Section 130 OWiG Decision of the Hesse Public Prosecutor	Section 30 OWiG	Regulatory fine of EUR. 1.1 million	

Annex 1B Concluded enforcement actions involving legal persons since Phase 3.

1. Cases predicated on foreign bribery by a natural person

Case Ferrostaal (Greece and Portugal) [case Bav (old) 2011/6]

Ferrostaal, a German mechanical and engineering company, paid bribes to foreign public officials to secure submarine defence contracts in Portugal and Greece. The payments were channelled through intermediaries to senior government decision makers in both countries. In Portugal, Ferrostaal allegedly paid a total of EUR 1.6 million in bribes to a Portuguese intermediary for his services as a "consultant" in securing a EUR 880 million sale of two submarines in November 2003, as well as allegedly paying EUR 1 million to a high-ranking Portuguese official. In Greece, at least EUR 12.4 million were paid in bribes to Greek officials to secure a contract yielding an estimated EUR 173.4 million profit. The suspicious payments were first detected by the tax authorities who reported to law enforcement authorities. Investigation proceedings were reportedly initiated in 2009 and several investigative measures were taken, including searches and seizures at the company's headquarters and subsidiary as well as the sending of mutual legal assistance requests to four Parties to the Convention. Ferrostaal also initiated an internal investigation on the alleged payments. In total, ten individuals were either convicted or entered into a resolution under section 153a CCP. Ferrostaal in turn was held liable in December 2011 by the Regional Court Munich I and received an overall regulatory fine of EUR 139.8 million. The punitive component of the fine is EUR 500°000 and the confiscatory component EUR 139.3 million.¹⁸³

Railway construction case [case Hes (old) 2011/3]

A German construction company and a Joint-Venture-Partner of the company paid bribes to foreign public officials to secure at least two separate engineering services projects as part of railway construction activities in North Africa and South-Eastern Europe. In the first project, the German construction company was involved in a joint venture which paid bribes to secure a EUR 7.2 million contract for the provision of various advisory services in relation to railway projects in 2003. In total, between October 2003 and September 2007, bribe payments totalling at least EUR 338 000 were made, amounting to 7 % of the contract value. In relation to the second project, the German construction company secured a EUR 5.76 million consultant contract on project management in relation to the extension of a metro line through the payments of at least EUR 150 000. The contract which was formally awarded on 4 April 2006 was due in 2012 but was never completed. The suspicious payments were detected following a suspicious transaction report under anti-money laundering regulations in 2009. Several investigative measures were taken, including search and seizures at the company's premises, witness hearings and the sending of mutual legal assistance requests. In total, 12 individuals settled their case either as a result of a penal order or a resolution under section 153a CCP. In 2011, the German construction company and its joint venture partner respectively received two separate administrative fines of EUR 600 000 (with a punitive component of EUR 200°000 and a confiscatory component EUR 400°000) and EUR 2.1 million (with a punitive component of EUR 500°000 and a confiscatory component EUR 1.6 million).¹⁸⁴

¹⁸³ Case Bav (old) 2011/6 in *Länder Annual Reports 2011* (Bavaria, case f) and 2012 (Bavaria, case d); *Süddeutsche Zeitung* (January 2012) "[Millionenstrafe für Ferrostaal](#)".

¹⁸⁴ Case Hes (old) 2011/3 in *Länder Annual Reports 2011* (Hesse, case c), 2012 (Hesse, case c); 2013 (Hesse, case c) 2014 (Hesse, case b); 2015 (Hesse, case b); 2015 (Hesse, case 33).

Aviation company case [case NRP (old) 2013/2]

A subsidiary of a German aviation company paid bribes amounting to EUR 100 000 between 2007 and 2011 to responsible persons of an aviation authority in a central African state to facilitate the securing more consulting service contracts for the privatisation of the African state run airports. The benefits resulting from the concluded consulting service contract were estimated to equal the paid bribes. The investigation proceedings were initiated in 2013 based on information self-reported by the company and received from foreign authorities. In the course of the investigation, MLA requests were sent to three Parties to the Convention in 2014 and 2017. Informal contacts were established with one Party prior to the execution of one of the MLA requests. The German aviation company was held liable by Cologne Local Court in 2014 and received a EUR 100 000 regulatory fine. No individual was held liable in this case.¹⁸⁵

DB Schenker (Russia) case [case NRW 2014/1]

DB Schenker, a German logistics provider of the state-owned German rail company Deutsche Bahn, was commissioned to deliver car parts to Russia. Bribes amounting to EUR 1.7 million were paid to customs officers in order to get these officers to forego the customs controls and to accelerate customs clearance. The Cologne Public Prosecutor office opened an investigation in 2013 based on an anonymous report which led Schenker's parent company DB Deutsche Bahn to self-report to law enforcement authorities. In total, seven individuals, including the former chief executive, entered into a resolution pursuant to section 153a CCP. In turn, DB Schenker was held liable by the Cologne Local Court in 2016 and received an overall regulatory fine of EUR 2 million. The punitive component of the fine is EUR 300'000 and the confiscatory component EUR 1.7 million.¹⁸⁶ The prosecutors indicate that the amount of the confiscatory component is equal to the amount of the bribe payments because the proceeds of bribery could not be estimated.

2. Cases settled under a resolution

a. Cases concluded since Phase 3 and counted as part of Germany's enforcement data as of December 2017

MAN Ferrostaal case [case Bav 2011/2j/Bav 2011/3]

MAN Ferrostaal, a German specialised firm in plant construction in the crude oil and natural gas field; allegedly paid more than EUR 8 million in bribes to officials in Central Asia to secure the awarding of a contract to build a gas compressor station. The payments were made to officials working at the Ministry responsible for awarding the contract through bogus invoices for construction services and via a joint venture. The suspicious payments were detected in the course of other investigation proceedings against Ferrostaal in relation to the bribery allegations in Portugal and Greece. The investigation was initiated in July 2009 and Investigative measures include execution of search warrants, interrogation of suspects and witnesses, analysing and evaluation of seized material, documents and electronic data. A MLA request was sent to another Party to the Convention whose answers helped to follow the payments to the foreign public official. In December 2011, MAN Ferrostaal entered into a resolution with the Munich I Prosecutor Office and agreed to a regulatory fine of EUR 10 million for the administrative offence of violation of supervisory duties committed negligently by an unidentified person in a managerial position (section 130 OWiG). The punitive component of the fine is EUR 500'000 and the confiscatory

¹⁸⁵ Case NRP (old) 2013/2) in *Länder Annual Reports 2013* (NRP, case d); 2014 (NRP, case b).

¹⁸⁶ Case NRW 2014/1 in *Länder Annual Reports 2014* (case NRP c), 2015 (case NRP) and 2016 (NRW case 44); DW (August 2015), "[US joins German Ford bribe investigation](#)"; Reuters (August 2015), "[SEC joins German investigation of Ford: source](#)"; Automotive Logistics (October 2016) "[DB Schenker pays out over allegations of bribery in Russia; Ford still under investigation](#)".

component EUR 9.5 million. In total, one individual was convicted of foreign bribery and seven individuals entered into a resolution pursuant to section 153a (2) CCP.¹⁸⁷

Rheinmetall Defence Electronics case [case Bremen 2013/1]

Rheinmetall Defence Electronics, a German arms company, allegedly paid bribes amounting to over EUR 20 million to Greek officials from 1998 to 2001 to secure weapons contracts. The payments were made and concealed through the UK mailbox company of a commercial agent used by Rheinmetall Defence Electronics and via other accounts in Switzerland. Proceedings were initiated in 2013 as a result of information provided by tax authorities. Investigative measures include company searches and seizures, witness interviews and mutual legal assistance requests to five Parties to the Convention. In December 2014, Rheinmetall Defence Electronics entered into a resolution with the Bremen prosecutor office and agreed to a EUR 37 million fine for the administrative offence of violation of supervisory duties committed by an individual in a managerial position (section 130 OWiG). The punitive component of the fine is EUR 300°000 and the confiscatory component EUR 36.7 million. One person in a managerial position was also held liable in 2014 for the administrative offence of violation of supervisory duties under section 130 OWiG and received a EUR 17°050 regulatory fine. The investigation against other responsible persons at Rheinmetall Group is ongoing. Foreign bribery charges were filed with the court against five defendants in December 2016 and two additional defendants were charged with foreign bribery before the Regional Court in 2017.¹⁸⁸

Health care case [Case Hes 2012/2]

An unnamed German company in the health care sector, allegedly paid bribes to an employee of an international organisation to get information about public tender bids for contracts in the health care sector. Investigation proceedings were initiated as a result of a MLA request and include searches and assessment of the seized documents and electronic data together with OLAF as well as MLA requests. In 2017, the Hesse Public Prosecutor imposed a EUR 1.1 million regulatory fine to the company pursuant to section 30 OWiG in relation to the administrative offence of violation of supervisory duties under section 130 OWiG. In addition, one individual agreed to a penal order and received a suspended prison sentence on probation. Charges are unknown. Another individual agreed to resolve his/her case under section 153a (1) CCP and to the payment of EUR 100 000

b. Case concluded since Phase 3 and after the cut-off date of 31 December 2017

Airbus Space and Defence GmbH case [case Bav 2012/1]

Former EADS Deutschland GmbH, legal predecessor of Airbus Space and Defence GmbH since 2014,¹⁸⁹ allegedly paid bribes to secure a EUR 2 billion sale of 18 Eurofighter Typhoon jets to the Austrian government in 2003. As part of the transactions, EADS Deutschland GmbH committed itself to offset transactions worth more than EUR 4 billion for the benefit of the Austrian economy. Proceedings were initiated in 2012 for suspicions of bribery of foreign officials in connection with the sale of the Eurofighter Typhoon jets based on information received from foreign authorities. Several investigative

¹⁸⁷ Case Bav 2011/2j/Bav 2011/3 in *Länder Annual Reports 2011* case j., 2012 case g., 2013 case e., 2014 case d., 2015 case d., 2016 case 9 and 2017 case 7.

¹⁸⁸ Case Bremen 2013/1 in *Länder Annual Reports 2013-2017*; Bremen Public Prosecutor Press Release (December 2014).

¹⁸⁹ Airbus Space and Defence GmbH is a division of Airbus responsible for defence and aerospace products and services. The division was formed in January 2014 during the corporate restructuring of European Aeronautic Defence and Space (EADS)

measures were taken, including searches and seizures, witnesses' interviews and questioning of the defendants, the setting-up of a joint investigative team (JIT) with Austrian authorities and several mutual legal assistance requests sent to Parties and non-Parties to the Convention. While proof of bribery could not be established, the Munich I Prosecutor Office found that two related entities - EADS Vector Aerospace LLP and City Chambers Limited companies – had received funds totalling hundreds of millions of euros in connection with the acquisition and offset transactions, and that these funds were used for unclear purposes in the absence of internal corporate compliance measures. In February 2018, Airbus Space and Defence GmbH concluded a resolution with the Munich I Prosecutor Office and agreed to a EUR 81.25 million fine for the administrative offence of violation of supervisory duties committed by an individual in a managerial position (section 130 OWiG). The punitive component of the fine is EUR 250°000 and the confiscatory component EUR 81 million. Investigation against several defendants is ongoing.¹⁹⁰

¹⁹⁰ Case Bav 2012/1 in *Länder Annual Reports 2012-2017*; Munich I Prosecutor Office Press Release (February 2018) "[Bußgeld über 81,25 Millionen Euro gegen die Airbus Defence and Space GmbH](#)"; GIR (2018) "[Airbus and Munich prosecutors negotiating settlement](#)"; Handelsblatt Global (2018) "[Unraveling Airbus' murky offset deals in Austria](#)"; Reuters (2017) "[Munich prosecutors say nearing end of Austrian Eurofighter probe](#)".

Annex 1C Sanctions Imposed against Legal Persons in Foreign Bribery Cases in Germany since the entry into force of the Convention

The table below compiles the information provided on enforcement of corporate liability in foreign bribery cases.

Case	Legal person involved	Grounds	Underlying offence committed by the natural persons	Regulatory fine issued by a court or by the prosecution	Total amount of the regulatory fine	Regulatory fine	
						Punitive component	Confiscatory component
Bavaria <i>(Phase 3)</i>	Siemens (telecom unit)	Section 30 OWiG	Section 334CC	Court decision (Munich I regional court – October 2007)	Total fine of EUR 201 million	EUR. 1 million	EUR 200 million
Bavaria <i>(Phase 3)</i> <i>Case Bav 2011/2 (old)</i>	MAN (turbo engine unit) subsidiary of MAN SE	Section 30 OWiG	Sections 334 and 299 CC	Court decision (Munich I regional court – (December 2009)	Total fine of EUR 75.3 million	EUR 300°000	EUR 75 million
Lower Saxony <i>(Phase 3)</i>	Company P	Section 30 OWiG	Sections 334 and 335 CC	Court decision (Hildesheim Regional court June 2009)	Total fine of EUR 200°000	EUR. 20°000	EUR 180°000
Bav (old) 2011/6	Ferrostaal	Section 30 OWiG	Foreign bribery (former section 334 CC)	Court decision (Munich I regional court – December 2011)	Total fine of EUR. 139.8 million	EUR 500°000	EUR 139.3 million
Hes (old) 2011/3 (2 LPs)	German construction company and its joint venture partner	Section 30 OWiG	Foreign bribery (former section 334 CC)	Court decision (Local court 2011)	Fine of EUR 600°000	EUR. 200°000	EUR 400°000
					Total fine of EUR 2.1million	EUR 500°000	EUR 1.6 million
NRP (old) 2013/2	Consultant company of an aviation company	Section 30 OWiG	Section 334 CC	Local court, Cologne (2014)	Total fine of EUR. 100°000	Unknown	Unknown
NRW 2014/1	DB Schenker	Section 30	Section 334, 335 CC	Court decision	Total fine of EUR 2	EUR. 300°000	EUR 1.7 million

Case	Legal person involved	Grounds	Underlying offence committed by the natural persons	Regulatory fine issued by a court or by the prosecution	Total amount of the regulatory fine	Regulatory fine	
						Punitive component	Confiscatory component
	(subsidiary)	OWiG		(Cologne Local Court , September 2016)	million		
Hamburg (Phase 3)	Hamburg based maritime shipping company	Section 30 OWiG	Commercial bribery Section 299 and 300 CC	Hamburg Regional court (July 2008)	Total fine of EUR 30°000	Unknown	Unknown
Bav 2011/2g (also referred as case Bav (old) 2011/7)	Technical consultancy company	Section 30 OWiG	Commercial bribery (section 299 CC)	Court decision (Local court Munich 23.11.2011)	Total fine of EUR. 3.25 million	EUR 250°000	EUR 3 million
NRP (old) 2012/4	Unnamed company	Section 30 OWiG	Commercial bribery (section 299 CC)	Court decision (Local court Duisburg 2014)	Total fine of EUR 950°000	EUR 250°000	EUR 700°000
Bavaria (Phase 3)	Siemens AG	Section 30 OWiG	Section 130 OWiG	Regulatory fine issued by the Munich I prosecution office (December 2008)	Total fine of EUR 395 million	EUR. 1 million	EUR 394 million
Bavaria (Phase 3)	MAN (truck unit) Subsidiary of MAN SE	Section 30 OWiG	Section 130 OWiG	Regulatory fine issued by the Munich I prosecution office (10.12.2009)	Total fine of EUR 75.3 million	EUR 300°000	EUR 75 million
Bav 2011/2j (report 2011) also referred as case Bav 2011/3	MAN Ferrostaal	Section 30 OWiG	Section 130 OWiG	Regulatory fine issued by the Munich I prosecution office	Total fine of EUR 10 million	EUR 500°000 million	EUR 9.5 million

Case	Legal person involved	Grounds	Underlying offence committed by the natural persons	Regulatory fine issued by a court or by the prosecution	Total amount of the regulatory fine	Regulatory fine	
						Punitive component	Confiscatory component
				(08.12.2011)			
Bremen 2013/1	Rheinmetall Defence Electronics	Section 30 OWiG	Section 130 OWiG	Regulatory fine issued by the Bremen prosecution office 2014	Total fine of EUR 37.07 million	EUR 300°000	EUR. 36°770°000
Case Hes 2011/2	Unnamed company	Section 30 OWiG	Section 130 OWiG	Decision of the Hesse Public Prosecutor (2017)	Total fine of EUR 1.1 million	Unknown	Unknown
Case Bav 2012/1	Airbus Defence and Space GmbH	Section 30 OWiG	Section 130 OWiG	Regulatory fine issued by the Munich I prosecution office (February 2018)	Total fine of EUR 81.25 million	EUR 250,000	EUR 81 million
Hes 2011/4	Biotest	Section 30 OWiG	Section 266 CC and section 370 of the Fiscal Code (embezzlement and tax evasion)	Court decision (local court 2016)	Total fine of EUR 1 million	EUR 1 million	None
LS (old) 2011/1	Unnamed	Section 30 OWiG	Tax evasion	Local court 2011	Total fine of EUR. 400°000	EUR. 400°000	None
Case Bav 2013/2	Krauss Maffei Wegmann (Greece)	Section 30 OWiG	Tax evasion and Money laundering	Regional Court decision 2015 (appealed by the prosecution and the defendant)	Total fine of EUR. 175°000	EUR 175°000	None

Annex 1D Description of investigative measures used in a sample of cases

Sample of cases investigated against legal persons

- **Case Bav (old) 2011/6 - Ferrostaal case:** the proceedings in this case were launched as a result of a notification by the Munich revenue office that led to investigation proceedings with a different subject matter. In the course of these proceedings, the company headquarters' premises were searched and documents seized led to additional searches at one of the company's subsidiary. The 2010 annual report (the investigation started at the time of Phase 3 but sanctions were imposed post-Phase 3) indicates that the findings from the company's internal investigation were shared with the Bavarian PPO.
- **Case Hes 2011/4 – Biotest Russia:** the proceedings were initiated based on a report by an employee of the company. Searches were undertaken at the company's premises and in residential premises. The prosecution used witness testimony and issued two arrest warrants. A request for mutual legal assistance (MLA) was sent to Russia but was never executed.
- **Case Ham 2011/5:** the proceedings were initiated in 2010 based on information provided by tax authorities. Search measures were undertaken, as well as surveillance of telecommunication systems and requests were issued to the Federal Central Tax Office.
- **Case Bremen 2013/1 (Rheinmetall Defence Electronics) and 2013/2 (Atlas Elektronik):** the proceedings were initiated in 2013 as a result of information provided by tax authorities. Searches were undertaken at the company's premises and in residential premises. MLA requests were sent to five Parties to the Convention to question the accused, obtain bank documents and information from files as well as perform search measures.

**ANNEX 2: PHASE 3 RECOMMENDATIONS TO GERMANY AND
ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON
BRIBERY IN 2013**

	RECOMMENDATIONS	WRITTEN FOLLOW-UP
<i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</i>		
1.	Regarding the foreign bribery offence , the Working Group recommends that Germany:	
	1. 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.];	<i>Partially implemented</i>
	2. 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)];	<i>Not implemented</i>
	3. c) Encourage companies to prohibit or discourage the use of facilitation payments.	<i>Fully implemented</i>
2.	4. Regarding the responsibility of legal persons , the Working Group recommends that Germany further increase the effectiveness of the liability of legal persons including by means of raising awareness among the prosecuting authorities at Länder level to ensure that the wide range of possibilities available in the law triggering 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];	<i>Fully implemented</i>
3.	Regarding sanctions , the Working Group recommends that Germany:	
	a) Raise awareness among prosecuting authorities of 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];	<i>Fully implemented</i>
	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)	<i>Partially implemented</i>

	[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 terms of the arrangements [Convention, Article 3];	<i>Not implemented [no change in March 2014 follow-up]</i>
	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];	<i>Not implemented [fully implemented in March 2014 follow-up.]</i>
	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)];	<i>Fully implemented</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 be 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.];	<i>Fully implemented</i>
	b) Strengthen its efforts to compile at 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.];	<i>Partially implemented</i>
	c) Clarify the criteria by which the prosecutors may dispense with prosecutions , with a view to ensuring uniform application of Section 153a CCP [2009 Recommendation III. (ii) and V.; Phase 2 Evaluation, recommendation 8];	<i>Fully implemented</i>
	d) Clarify, by 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];	<i>Partially implemented</i>
<i>Recommendations for ensuring effective prevention and detection of foreign bribery</i>		
5.	Regarding raising of awareness the Working Group recommends that Germany:	
	a) Continue its efforts to raise awareness among companies, especially SMEs, about foreign bribery offences [2009 Recommendation X.C];	<i>Fully implemented</i>

	1. b) Strengthen the role of German missions abroad in raising awareness and reporting suspicions of foreign bribery [2009 Recommendation IX. (ii)];	<i>Fully implemented</i>
6.	2. Regarding whistleblower protection , the Working Group recommends that Germany enhance reporting of suspicions of foreign bribery by company employees by 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)];	<i>Not implemented [no change in March 2014 follow up]</i>
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)];	<i>Not implemented</i>
	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)];	<i>Not implemented</i>
8.	Regarding accounting and auditing requirements , the Working Group recommends that Germany consider extending exceptions to auditors' duty of confidentiality to include 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];	<i>Fully implemented</i>
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];	<i>Fully implemented</i>
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)];	<i>Fully implemented</i>
	b) Complete its assessment of 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];	<i>Fully implemented</i>
11.	Regarding public advantages , the Working Group recommends that Germany:	
	a) Consider establishing a national register of unreliable companies and improve co-ordination among <i>Länder</i> registers [2009 Recommendation, II. and XI.];	<i>Fully implemented</i>
	b) Issue guidelines to public procurement authorities to take the following measures, where they are not already in place: (i) take international debarment	<i>Not implemented</i>

	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 (a) the discovery by procurement units that information regarding compliance with foreign bribery legislation provided by the applicant was false, or (b) 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.];	<i>Not implemented</i>

PHASE 3 ISSUES FOR FOLLOW UP BY THE WORKING GROUP

12	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 3: LEGISLATIVE EXTRACTS

The Administrative Offences Act (OWiG)

Section 29a – Forfeiture Confiscation of the Value of the Proceeds of an Offence

(1) If the perpetrator has gained something by means of or for an act which may be sanctioned by a regulatory fine, and if a regulatory fine has not been assessed against him for the act, the confiscation of a sum up to the amount of the pecuniary advantage gained may be ordered.

(2) The ordering of the confiscation of a sum up to the amount stated in subsection 1 may be directed against another party who is not the offender if

1. he has obtained something by means of an act which may be sanctioned by a regulatory fine and the offender acted for him,

2. what has been acquired

a) was transferred to him free of charge or without lawful reason, or

b) was transferred, and he recognised or should have recognised that what has been acquired originates from an act which may be sanctioned by a regulatory fine, or

3. what has been acquired

a) has passed to him as an inheritance, or

b) was transferred to him as a person entitled to a compulsory portion or a legatee.

The first sentence numbers 2 and 3 shall not apply if what has been acquired was previously transferred to a third party who did not recognise or could not be expected to recognise that what has been acquired originates from an act which may be sanctioned by a regulatory fine, for a fee and with a lawful reason.

(3) The expenditure of the offender or of the third party shall be deducted when determining the value of what has been acquired. What was expended or used for the commission of the offence or its preparation shall however not be allowed.

(4) The extent and value of what has been acquired, including the deductible expenditure, may be estimated. Section 18 shall apply *mutatis mutandis*.

(5) If no regulatory fining proceedings are initiated against the perpetrator, or if they are discontinued, confiscation may be ordered in its own right.

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 authorised representative with full power of attorney or in a managerial position as procura-holder or the authorised representative with a commercial power of attorney 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 ten million Euros,
2. in the case of a criminal offence committed negligently, to not more than five million 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. If the Act refers to this provision, the maximum amount of the regulatory fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. 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.

(2a) – Successor liability In the event of a universal succession or of a partial universal succession by means of splitting (section 123 subsection 1 of the Reorganisation Act [Umwandlungsgesetz]), the regulatory fine in accordance with subsections 1 and 2 may be imposed on the legal successor(s). In such cases, the regulatory fine may not exceed the value of the assets which have been assumed, as well as the amount of the regulatory fine which is suitable against the legal successor. The legal successor(s) shall take up the procedural position in the regulatory fine proceedings in which the legal predecessor was at the time when the legal succession became effective.

(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 supervisory duties

(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. Section 30 subsection 2 third sentence shall be applicable. 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 third 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.

Criminal Code**Criminal Code** (*Strafgesetzbuches, StGB*)**Section 5 Offences committed abroad with a particular domestic connection**

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

(...)

15.

Offences committed in public office pursuant to sections 331 to 337, where:

- a) the offender is German at the time of the act,
- b) the offender is a European public official and his public authority has its seat in Germany,
- c) the act is committed in relation to a public official, a person entrusted with special public service functions or a soldier of the Bundeswehr, or
- d) the act is committed in relation to a European public official or arbitrator who is a German at the time of the act, or a person deemed equal pursuant to section 335a who is a German at the time of the offence;

Section 73**Confiscation of the proceeds of offences from principal and secondary participants**

(1) Where the principal or secondary participant has obtained something by an unlawful act or for such an unlawful act, the court shall order its confiscation.

Section 73a**Expanded confiscation of the proceeds of offences from principal and secondary participants**

(1) Where an unlawful act has been committed, the court shall order the confiscation of objects of the principal or secondary participant also in those cases in which the objects were obtained by other unlawful acts or for such acts.

(2) Where the principal or secondary participant was involved in some other unlawful act prior to the confiscation having been ordered pursuant to subsection (1) and where a decision is to be taken once again regarding the confiscation of his objects, the court shall take account, in so doing, of the order already issued.

Section 73b**Confiscation from others of the proceeds of offences**

(1) The order of confiscation pursuant to sections 73 and 73a shall be directed against another person who is not the principal or secondary participant if:

1. That person has obtained something by the offence and the principal or secondary participant acted on his behalf;
2. The object so obtained:
 - a) Was transferred to that person without consideration or without a legal reason, or
 - b) Was transferred to that person and he recognised, or ought to have recognised, that the object obtained originates from an unlawful act, or
3. The object so obtained:
 - a) Has devolved to that person in his capacity as heir, or
 - b) Has been transferred to that person in his capacity as a party entitled to the compulsory portion of an estate or as a legatee.

Numbers 2 and 3 of the first sentence shall have no application if the object obtained was previously transferred, against consideration and on the basis of a legal reason, to a third party who did not recognise or did not have any reason to recognise that the object obtained originates from an unlawful act.

(2) Where, subject to the pre-requisites set out in subsection (1), first sentence, number 2 or number 3, the other party obtains an object which is equivalent in value to the object obtained, or benefits that have been derived from such object, the court shall order its/their confiscation as well.

(3) Subject to the pre-requisites stipulated by subsection (1), first sentence, number 2 or number 3, the court may also order the confiscation of whatever was acquired

1. By the sale of the object obtained or as compensation for its destruction, damage, or seizure, or

2. On the basis of a right obtained.

Section 73e

Preclusion of the confiscation of the proceeds of offences or of their equivalent value

(1) The confiscation pursuant to sections 73 to 73c shall be precluded inasmuch as the claim has lapsed to which the injured party is entitled as a consequence of the offence, such claim being the entitlement to return of the object obtained or to compensation of the equivalent value of the object obtained.

(2) In the cases provided for by section 73b, also read in conjunction with section 73c, the confiscation shall be precluded, moreover, inasmuch as the value of the object obtained no longer forms part of the assets of the person affected at the time the order is issued, unless the person affected was aware, or negligently unaware, at the time at which unjust enrichment ceased to be given, of the circumstances that otherwise would have allowed the confiscation to be ordered against the principal or secondary participant.

Section 74c

Confiscation of the value of the products of an offence, means and resources used by the offender, and objects of the offence from the principal and secondary participants

(1) Where it is impossible to confiscate a certain object because the principal or secondary participant has sold or used up the object or frustrated its confiscation in some other way, the court may order the confiscation of an amount of money from said principal or secondary participant equivalent to the object's value.

(2) The court may issue such an order also in addition to the confiscation of an object, or instead of its confiscation, if the principal or secondary participant has encumbered said object, prior to the decision as to the confiscation having been handed down, with the right of a third party, the expiry of which cannot be ordered or cannot be ordered without compensation (section 74b subsections (2) and (3) and section 75 (2)). Where the court issues such an order in addition to the confiscation, the amount of the equivalent value shall be determined based on the value of the encumbrance of the object.

(3) The value of the object and of the encumbrance may permissibly be determined by an estimate.

Section 75

Effects of the confiscation

(1) Where confiscation of an object is ordered, title to the property or the right shall devolve to the state once the order becomes final if the object

1. Belongs to the person affected by the order at that time or if the person affected by the order is entitled to the object at that time, or if the object
2. Belongs to some other person, or if some other person is entitled to it, who has granted it for the offence or for other purposes while being aware of the circumstances of the offence.

In other cases, title to the property or the right shall devolve to the state once six months have expired following the notice as to the order of confiscation having become final, unless that person who held title to the property or held the right has previously filed his right with the enforcement authority.

(2) In all other regards, the rights of third parties to the object shall continue in force. In the cases designated in section 74b, however, the court shall order the expiry of these rights. In the cases provided for by sections 74 and 74a, the court may order the expiry of the right of a third party if that third party

1. Has contributed at least negligently to the object being used by the offender as a means or resource, or to its being the object of the offence, or

2. Has acquired the right to the object in a reprehensible manner while being aware of the circumstances giving rise to the confiscation.

(3) Until the devolution of title to the property or of the right, the order of confiscation or the order reserving the right to confiscate shall have the effect of a prohibition of disposal within the meaning of section 136 of the Civil Code.

(4) In the cases governed by section 111d (1), second sentence, of the Code of Criminal Procedure, section 91 of the Insolvency Statute shall have no application.

Section 76a Independent confiscation

(1) If it is impossible to prosecute or sentence a certain person for the crime, the court shall independently order the confiscation of the object or that the object be rendered unusable, provided that, in all other regards, the pre-requisites are given subject to which the measure is stipulated by law. Where confiscation is permissible, the court may independently order it subject to the pre-requisites set out in the first sentence. The confiscation shall not be ordered if there has been no request to prosecute, authorisation to prosecute, or request to prosecute by a foreign state, or if a decision with regard to said confiscation has already been taken and become final.

(2) Subject to the pre-requisites stipulated by sections 73, 73b, and 73c, it shall be permissible for the court to independently order the confiscation of the proceeds of offences and to independently confiscate the value of the proceeds of offences also in those cases in which the prosecution of the crime has become statute-barred.

Subject to the pre-requisites stipulated by sections 74b and 74d, the same shall apply to instances in which the court independently orders an object to be confiscated by way of security or that it be rendered unusable, or in which it independently orders documents to be confiscated.

(3) Subsection (1) is to be applied also if the court refrains from meting out punishment or if the proceedings are withdrawn based on a regulation that allows this to be done, as the public prosecutor's office or the court may decide at its discretion, or as they may decide by mutual consent.

(4) An object originating from an unlawful act, which has been seized in proceedings brought for the suspicion of a crime having been committed that is listed in the third sentence hereof, is to be confiscated independently also in those cases in which it is impossible to prosecute or sentence for the crime the person affected by the confiscation.

Where the confiscation of an object is ordered, title to the property or the right shall devolve to the state once the order becomes final; section 75 (3) shall apply *mutatis mutandis*. Crimes within the meaning of the first sentence are the following:

1. Under the present Code:

[...]

f) Money laundering; hiding unlawfully obtained financial benefits pursuant to section 261 subsections 1, 2 and 4,

2. Under the Fiscal Code:

a) Tax evasion subject to the pre-requisites set out in section 370 (3) number 5,

[...]

Section 108e CC

Active and passive bribery of mandate holders

(1) Whoever as a member of a public assembly of the Federation or the Länder demands, allows him/herself to be promised or accepts an undue advantage for him/herself or a third party in return for performing or refraining from performing an act upon assignment or instruction in the exercise of his/her mandate shall be liable to imprisonment of up to five years or a fine.

(2) Whoever offers, promises or grants to a member of a public assembly of the Federation or the Länder an undue advantage for the member him/herself or a third party in return for that member performing or refraining from performing an act upon assignment or instruction in the exercise of his/her mandate shall incur the same penalty.

(3) Members of

1. a public assembly of a local authority,
2. a body, elected in direct and general elections, of an administrative unit established for a subarea of a federal *Land* or a local authority,
3. the Federal Convention,
4. the European Parliament,
5. a parliamentary assembly of an international organisation, or
6. a legislative body of a foreign state

shall be considered equivalent to the members referred to in subsections (1) and (2).

(4) An undue advantage shall not be deemed to exist in particular where the acceptance of the advantage is in accordance with the relevant provisions relating to the legal position of the member. The following shall not be considered an undue advantage:

1. a political mandate or a political function, or
2. a donation permissible under the Law on Political Parties or other relevant legislation.

(5) In addition to the imposition of a term of imprisonment of at least six months, the court may withdraw the capacity to attain public electoral rights and withdraw the right to elect or vote in public matters.

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 not exceeding five years or a fine.

(2) Section [...] and section 263(3) shall apply *mutatis mutandis*.

Section 263 (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 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 not exceeding 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 employee's or agent's 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 European 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, a member of a Court of the European Union 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 recipient's violating his official duties

(1) Whosoever offers, promises or grants a benefit to a public official, a European 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, a member of a Court of the European Union 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) [...]

(b) Section 334(1) 1st sentence and (2), each also in conjunction with (3), the penalty shall be imprisonment from one to ten 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.

Section 335a

(1) For the application of sections 332 and 334, in each case also in conjunction with section 335, to an offence relating to a future judicial act or a future official act

1. the following persons shall be deemed equal to a judge:

members of a foreign or international court;

2. the following persons shall be deemed equal to a public official:

a) officials of a foreign State and persons entrusted with performing public functions for a foreign State;

a) officials of an international organisation and persons entrusted with performing functions for an international organisation;

b) soldiers of a foreign State and soldiers entrusted with performing functions for an international organisation

(2) For the application of sections 331 and 333 to an offence relating to a future judicial act or a future official act

1. the following persons shall be deemed equal to a judge:

members of the International Criminal Court;

2. the following persons shall be deemed equal to a public official:

officials of the International Criminal Court.

(3) For the application of section 333 (1) and (3) to an offence relating to a future official act

1. the following persons shall be deemed equal to a soldier of the Bundeswehr: soldiers who belong to the troops stationed in Germany of non-German States Parties to the North Atlantic Treaty and who are located in Germany at the time of the act;
2. the following persons shall be deemed equal to a public official: officials of these troops;
3. the following persons shall be deemed equal to a person entrusted with special public service functions: persons who are employees or agents of the troops and who, on the basis of general or specific instructions from a higher duty station of the troops, have been formally obligated to perform their duties in a conscientious manner.

Section 336
Omission of an official act

The omission to act shall be equivalent to the performance of an official act or a judicial act within the meaning of sections 331 to 335a.

Section 337
Arbitration fees

The fees of an arbitrator shall only be a benefit within the meaning of sections 331 to 335 if the arbitrator demands them, allows them to be promised him or accepts them from one party unbeknown to the other or if one party offers, promises or grants them to him unbeknown to the other.

Criminal Code of Procedure

German Code of Criminal Procedure
(Strafprozeßordnung, StPO)

Section 100b
Online search

(1) Technical means may be used, without the person concerned's knowledge, to gain access to an information technology system used by the person concerned and to extract data from that system ("online search") where

1. certain facts give rise to the suspicion that a person, either as perpetrator or participant, has committed a particularly serious criminal offence as referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence,

2. the offence is one of particular gravity in the individual case as well and

3. investigating the facts or establishing the accused's whereabouts would, in some other way, be significantly more difficult or lacking in prospects of success.

(2) Particularly serious criminal offences within the meaning of subsection (1), number 1, shall be

1. pursuant to the Criminal Code:

(...)

(m) a particularly serious case of taking and offering of a bribe pursuant to section 335 subsection (1) under the conditions set out in section 335 subsection (2), numbers 1 to 3;

(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 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 407 – Penal Orders

(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))

ANNEX 4: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government ministries and agencies

- Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)
- Euler Hermes (Export Credits Agency)
- Federal Criminal Customs Office (FIU)
- Customs Investigations Headquarter
- Federal Foreign Office
- Federal Ministry for Economic Affairs and Energy
- Federal Ministry for Economic Co-operation and Development (BMZ)
- Federal Ministry of Finance
- Federal Ministry of the Interior
- Federal Ministry of Justice and Consumer Protection
- Federal Ministry of Labour and Social Affairs
- KfW Group

Law enforcement and the Judiciary

- Criminal Police Office, Baden-Württemberg
- Criminal Police Office, Bavaria
- Criminal Police Office, Bremen
- Criminal Police Office, Hamburg
- Criminal Police Office, Lower Saxony
- Criminal Police Office, North Rhine-Westphalia
- Federal Court of Justice
- Federal Criminal Police Office
- Federal Prosecutor General's Office, Federal Court of Justice, Karlsruhe
- Fiscal authority, Hamburg
- Public Prosecutors' Office, Bavaria
- Public Prosecutors' Office, Berlin
- Public Prosecutors' Office, Bremen
- Public Prosecutors' Office, Hamburg
- Public Prosecutors' Office, Hesse
- Public Prosecutors' Office, Lower Saxony
- Public Prosecutors' Office, Saxony-Anhalt
- Regional Court Judiciary
- Tax authority for audits and criminal matters, Hamburg
- Tax authorities companies division, Berlin
- Tax investigation unit, Bavaria

Private enterprises

- Bauer Spezialtief
- Bilfinger
- Biotest
- Deutsche Bahn
- FSM Logistics
- Goldschmidt Thermit

- Kennametal Shared Services
- KPMG
- Linde
- MAN
- Merck
- Messe Berlin
- Rheinmetall
- Siemens
- SMS Group
- Thales Deutschland
- Thyssenkrupp

Business organisations and auditing associations

- Association of German Chambers of Commerce and Industry (DIHK)
- German Association for Small and Medium Size Businesses (BVMW)
- German Institute for Compliance (DICO)
- Institute of Public Auditors in Germany (IDW)
- International Chambers of Commerce, Germany

Legal profession

- CMS
- White & Case

Civil society and academics

- Handelsblatt
- Pro Honore e.V.
- Transparency International
- University of Augsburg
- University of Cologne
- University of Tübingen

ANNEX 5: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AG	German Stock Company (<i>Aktiengesellschaft</i>)
AML	Anti-Money Laundering
AO	Fiscal Code (<i>Abgabenordnung</i>)
BGH	German Federal Court of Justice (<i>Bundesgerichtshof</i>)
BKA	German Federal Criminal Police (<i>Bundeskriminalamt</i>)
BKAG	Law on the Federal Criminal Police Office and the Cooperation between Federal and State Authorities in Criminal Police Matters
BMZ	German Federal Ministry for Economic Co-operation and Development
BVMW	German Association for Small and Medium-sized Businesses
BW	Baden-Württemberg
CC	Criminal Code (<i>Strafgesetzbuch, StGB</i>)
CCP	Code of Criminal Procedure (<i>Strafprozeßordnung, StPO</i>)
DAC	Development Assistance Committee
DICO	<i>Deutsches Institut für Compliance</i>
DIHK	German Chambers of Commerce and Industry
EIO	European Investigation Order
EStG	Income Tax Act (<i>Einkommensteuergesetz</i>)
EU	European Union
EUR	Euro (currency)
FATF	Financial Action Tax Force
FDI	Foreign Direct Investment
FinDAG	Financial Services Supervision Act (<i>Finanzdienstleistungsaufsichtsgesetz</i>)
FIU	Financial Intelligence Unit
GDP	Gross Domestic Product
GIZ	German ODA Agency (<i>Deutsche Gesellschaft für Internationale Zusammenarbeit</i>)
GmbH	German limited liability company (<i>Gesellschaft mit beschränkter Haftung</i>)
GRECO	Council of Europe Group of States against Corruption
GVG	Courts Constitution Act (<i>Gerichtsverfassungsgesetz</i>)
GwG	Money Laundering Act (<i>Geldwäschegesetz</i>)
GZD	Central Customs Authority (<i>Generalzolldirektion</i>)
IntBestG	Act on Combatting International Bribery (<i>Gesetz zur Bekämpfung Internationaler Bestechung</i>)

IDW	German Institute for Auditors
ISA	International Standards on Auditing
JIT	Joint Investigation Team
LKA	German <i>Länder</i> Police (<i>Landeskriminalamt</i>)
MFA	German Ministry of Foreign Affairs
MLA	Mutual Legal Assistance
MOJ	German Federal Ministry of Justice and Consumer Protection
NRW	North Rhine-Westphalia
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OWiG	Administrative Offences Act (<i>Gesetz über Ordnungswidrigkeiten</i>)
PEP	Politically Exposed Person
RiStBV	Guidelines for Criminal Proceedings and Administrative Fines (<i>Richtlinien für das Strafverfahren und das Bußgeldverfahren</i>)
SME	Small and Medium Sized Enterprise
SOE	State Owned Enterprise
STR	Suspicious Transaction Report
UN	United Nations
USD	US Dollar
WGB	Working Group on Bribery in International Business Transactions

ANNEX 6: GERMANY'S ODA AT A GLANCE

Germany

Net ODA

	2015	2016	Change 2015/16 %
Current (USD m)	17,940.2	24,735.7	37.9
Constant (2015 USD m)	17,940.2	24,473.2	36.4
National Currency * (million)	16,173.1	22,368.5	38.3
ODA/GNI (%)	0.52	0.70	
Bilateral share (%)	79	79	

* Euro

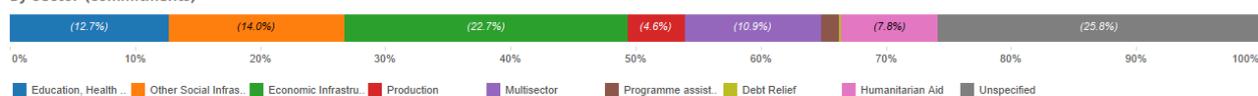
Top Ten Recipients of Gross ODA (USD million)

1	India	906
2	China (People's Republic of)	793
3	Syrian Arab Republic	551
4	Morocco	480
5	Indonesia	476
6	Afghanistan	432
7	South Africa	410
8	Turkey	390
9	Brazil	312
10	Ukraine	275

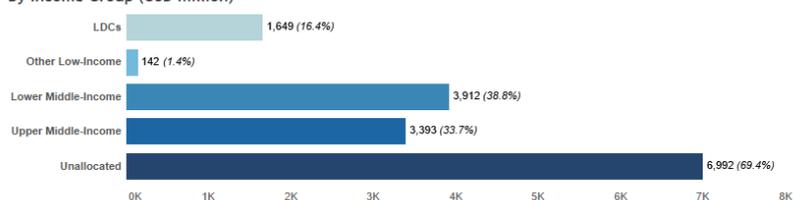
Memo: Share of gross bilateral ODA

Top 5 recipients	17%
Top 10 recipients	27%
Top 20 recipients	36%

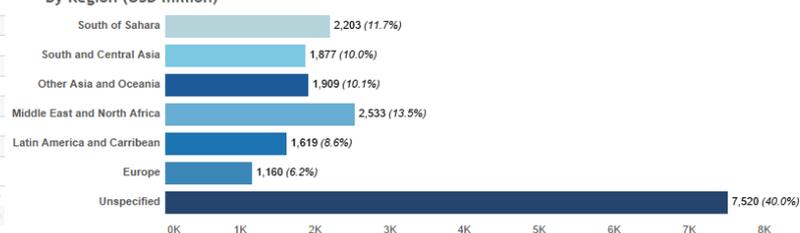
By Sector (commitments)



By Income Group (USD million)



By Region (USD million)



Source: OECD - DAC ; <http://www.oecd.org/dac/financing-sustainable-development/development-finance-data/aid-at-a-glance.htm>

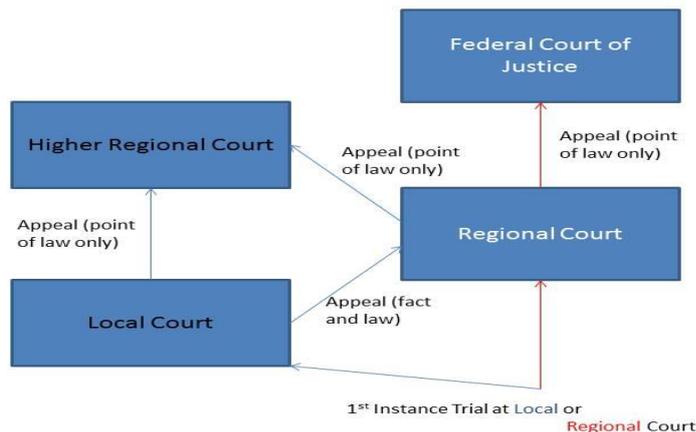
ANNEX 7: TRIAL AND APPELLATE JURISDICTION IN FOREIGN BRIBERY CASES

Either the prosecution or the accused can appeal on fact and law to the Regional Court, which will sit in its appellate capacity as a small criminal division (one professional judge and two lay judges).

An appeal on a point of law is available directly to the higher regional court (*Oberlandesgerichte*), known as a “leapfrog” appeal.

If the trial was heard in the regional court, which will be usually heard by three professional judges and two lay judges, an appeal lies only by way of a point of law to the Federal Court of Justice (*Bundesgerichtshof*).¹⁹¹

Trial and Appellate Jurisdiction in Foreign Bribery Cases



¹⁹¹ A decision made on appeal by the Small Criminal Chamber of the Regional Court (i.e. appealed from a decision of the Local Court) can be further appealed on a point of law only to the Higher Regional Court.