

FOREIGN CORRUPT PRACTICES ACT: COMPLIANCE ISSUES FROM A GERMAN AND EUROPEAN PERSPECTIVE

*Dr. Andreas G. Junius**

I.	INTRODUCTION	361
A.	<i>IBA Study Concerning Corruption</i>	362
B.	<i>Corruption in Germany</i>	363
II.	INTERNATIONAL EFFORTS FOR IMPROVEMENT AND STANDARDIZATION	364
A.	<i>EU Convention</i>	364
B.	<i>OECD Measures</i>	365
C.	<i>Council of Europe and Other International Efforts</i>	366
III.	CURRENT LEGAL SITUATION IN GERMANY	367
A.	<i>Criminal Law</i>	367
B.	<i>Civil Law</i>	369
C.	<i>Tax Law</i>	369
D.	<i>Administrative Measures</i>	369
IV.	COMPLIANCE EFFORTS BY THE INDUSTRY	370
V.	OUTLOOK	371

I. INTRODUCTION

Corruption has become a major topic of almost daily attention within the media. It has been of varying degrees of concern in different countries. Historic and cultural differences play a role. In some Asian or Arab cultures, for instance, the *bakshish* mentality is a way of life and is socially accepted. In other countries, partly due to a lack of strength on the part of the government and to the power of organized crime, bribery is

* LL.M, Columbia University School of Law, 1982; J.D., Universities of Bochum and Bonn, 1981. Dr. Andreas G. Junius is a partner in the law firm of Pünder, Volhard, Weber & Axster, resident in the firm's New York office. His practice focuses on general civil law, German and EEC-related banking, corporate, antitrust, merger acquisitions, leveraged leasing, and project finance work. Dr. Junius has lectured on German Banking law at Boston University School of Law since 1990.

notorious and overwhelming. Thus, in recent years, sensational bribery cases concerning bribery of politicians, as well as of government officials, have been covered by the international press and have been dealt with in the different jurisdictions.

Examples of such bribery include the cases of top Italian politicians being accused and tried for receiving money from the Mafia, as well as the case in Singapore about the public official who was sentenced to fourteen years of prison after it was proven that, in exchange for confidential information in regard of government orders, he had received at least ten million dollars over the years from international companies.¹ Politicians around the world are accused of using their offices for the benefit of their political parties.

It has always been obvious, but seems to become more commonly understood, that international corruption harms domestic economies because it creates unnecessary expense, as well as losses for those competitors that attempt to market their products on a fair basis.

A. IBA Study Concerning Corruption

The Standing Committee on International Legal Practice, Section on Business Law of the International Bar Association (IBA), has recently published a comparative analysis of answers by lawyers from thirteen mostly industrialized jurisdictions (Australia, Belgium, Canada, Chile, Denmark, England, France, Germany, Italy, Japan, the Netherlands, Sweden, and the United States) to a questionnaire regarding the respective legal settings of corruption.² It led to interesting results. While there is a substantial consistency among the different jurisdictions in their criminal law approach to fighting corruption on a domestic basis, the treatment of international corruption, for example, the bribery of foreign public officials, wherever it may take place, reveals important differences. Only five of the questioned states declare some form of international corruption a criminal act, while just three of these five do not require that the bribe be committed within their own territory.³ That leaves the remaining eight

1. See Mark Pieth, *Internationale Bestechungsfälle und ihre strafrechtliche Verarbeitung*, SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 313 (1996).

2. Sietze Hepkema & Willem Booyen, *Bribery of Public Officials: An IBA Survey*, INT'L BUS. LAW, Oct., 1997, at 415-16.

3. The five countries first referred to are England, Sweden, the Netherlands, the United States, and Australia (New South Wales), whereas Sweden, the Netherlands, and the United States make up for the jurisdictions referred to in the latter part. Hepkema & Booyen, *supra* note 2, at 415-16.

jurisdictions without the possibility to prosecute and punish international bribery under their criminal statutes.⁴

Interesting distinctions were found with respect to the tax treatment of payments to public officials as well. Only five jurisdictions were found to explicitly deny the deductibility of bribery payments as legitimate business expenses under their respective tax laws.⁵ That leaves the other questioned states allowing the deduction of international bribe payments by the concerned private business organizations.

B. Corruption in Germany

Germany has traditionally enjoyed a relatively low degree of corruption. At least, that is the perception. One can only speculate why:

1) The system of governmental employment, *civil service*, has provided for highly (some say overly) paid public officials with considerable social standing and absolute job security in exchange for an almost fiduciary relationship with the state/employer; and

2) Traditionally, there has been less opportunity for bribery, due to a comparatively low level of state owned industries; however, where opportunity exists (for instance with building permit procedures, public procurements), bribery has been present also in Germany.

These conditions have changed in particular since reunification with the former East Germany:

1) The public service sector is no longer as highly respected as before. Budget deficits led to pay freezes and outsourcing, and high unemployment has caused *envy* and has led to reduced respect for the civil service; and

2) In order for Germany to fulfill the convergence criteria for participation in Europe, there are increased opportunities due to privatization in eastern Germany and in Germany as a whole.

As a response to the rapidly growing influence of corruption on German society and economy,⁶ prompt action became necessary to combat the

4. Belgium, Canada, Chile, Denmark, France, Germany, Italy, and Japan. Switzerland has to be added to this group of countries. Pieth, *supra* note 1, at 315.

5. Canada, England, Chile, Italy, and, under certain limitations Denmark. Hepkema & Booyen, *supra* note 2, at 415-16. In Denmark those payments are only deductible if they are considered a customary and necessary means for conducting business in the relevant foreign jurisdiction. *Id.*

6. Estimated total economical damages per annum are \$300-350 billion. *Korruption ist ein Kontrolldelikt*, [Interview with Wolfgang J. Schauptenstener, the Senior District Attorney

further spread of that cancerous disease. It also follows that in Germany corruption as a problem has become a focal point now.

II. INTERNATIONAL EFFORTS FOR IMPROVEMENT AND STANDARDIZATION

As long as domestic laws do not globally prohibit international corruption, one major practical argument against *international corruption efforts* is the *level playing field* defense: we do not want to put our exporters at a competitive disadvantage from competitors in corruption-permissive countries.

To change that situation and because of the disadvantages already mentioned, political (mainly from the United States) as well as (private) economic pressure have led to different and independent, but nevertheless very strong and hopeful efforts to ban corruption on an unified or harmonized international basis. What are those international efforts?

A. EU Convention

On May 26, 1997, the Council of the European Union (EU), acting under Title VI (Article K.3 (2) (c)) of the Treaty of the European Union, adopted the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (EU Convention). Following its signing as the next step, all European Union (EU) member states are to ratify the Convention and to adjust their criminal laws concerning corruption accordingly. To date (February 1998), no member state has ratified the EU Convention. The EU Convention will only enter into force ninety days after notification by the last member state that its domestic ratification procedures are completed.

In Articles 2 and 3, the EU Convention distinguishes between passive and active corruption, a common distinction under all domestic laws concerned. Thus, the main and decisive innovation will relate to the scope of coverage. It will include with regard to bribe actions with officials of other EU countries as well as EU officials. That transborder effect has been lacking under most domestic jurisdictions, which is even more disturbing in the EU since the interdependence among the EU member states has grown to previously unknown proportions, and since virtually domestic market conditions exist. Furthermore, punishment of

and Special Corruption Officer of the District County of Frankfurter am Main, by Dr. Norbert Copray], LAY REPORT 6 (1997). According to Schaupensteiner, police statistics provided by the German F.B.I. counted since the first year of its official listing in 1994 documented there were 1557 bribery cases already. (on file with author) [hereinafter LAY REPORT].

corruption will not be dependent on its success, but instead on the intent to bribe.

Extensive concern is placed on the harmonization of domestic laws in the member states and on cooperation of criminal enforcement authorities. Article 6 deserves special recognition in that it requires members to potentially make heads of businesses vicariously liable under penal laws for acts of their employees within their business units.

Notwithstanding the innovative and important approach to extend the domestic criminal laws to international bribery, the EU Convention is also limited in two regards. First, only bribery action vis-à-vis public officials, not private individuals, is targeted. Second, the prescribed changes exclusively concern criminal legal measures. Other areas of the law, like tax legislation or administrative measures, are not addressed by the articles of the Convention.

B. OECD Measures

The Organization for Economic Cooperation and Development (OECD) differs from the EU in many aspects, but, to our concern, it is the difference in membership (including non-EU members such as the United States, Australia, Canada, Japan) that becomes crucial for the combat of international bribery. At this point, almost thirty states are members in the OECD.

The Council of the OECD decided upon a Convention on Combating Bribery of Foreign Public Officials (OECD-Convention) as of May 23, 1997. This convention was signed by the OECD member states on November 20, 1997. The Convention shall enter into force on the sixtieth day after five of the ten member states with the highest exports share, representing sixty percent of the total export share of these ten countries, have ratified it.

Although the scope of both Conventions is similar, the OECD-Convention differs in important material respects from the EU-Convention. The main distinctions, some of a narrowing nature, others extending the field of application of the OECD-Convention,⁷ are:

- 1) Only active corruption, such as bribing an official, is included, not passive bribery committed by an official (Article 1).
- 2) Only bribe payments in order to obtain or retain a concrete business deal are considered criminal. Thus, the so-called

7. The following analysis is based on the latest available proposal for the draft convention. During the final adoption process certain changes may have been made.

facilitating payments preceding the business relationship itself might still be tolerated.

3) In contrast to the EU-Convention, not only governmental officials in member countries of the organization, but all officials in foreign government functions as well as all officials in international organizations are going to be included.

4) Lastly, it is not clear whether prosecution has to be made or if national law may leave discretion for the respective domestic enforcement organs to decide about criminal action when international bribe actions become known. Ultimately, under good faith principles a party may not use this discretion to circumvent its obligations to combat bribery in accordance with the OECD Convention.

Still, considering the less than hopeless attempts by the United Nations in the 1970s to create an Anti-Corruption Convention, it is a major success for the OECD to form a global alliance to combat international bribery. It must be seen as a starting point on which future efforts can be built.

Prior to the adoption of, and in addition to the above-described OECD-Convention, the Council of the OECD released an official recommendation "On Combating Bribery in International Business Transactions."⁸

Apart from referring to the desired criminalization of international bribery in the member countries, the recommendation comprises many different measures. It addresses topics like tax deductibility, accounting requirements, auditing methods, internal company controls, public procurement, and others. Due to its informal nature, the effects of the recommendation may lead to precise government action in the member states, but shows an international consensus to fight corruption and also might precede future OECD actions with more authoritative strength.

C. Council of Europe Action and Other International Efforts

The Council of Europe, which is an organization that is distinct from, and less integrated than, the EU membership with a much wider membership, has been working on the subject of international bribery as well. Mainly by cooperation provisions referring to the Council of Europe in the Treaty of the European Union, the linkages between both international organizations have tightened. As a result, the importance of the Council of Europe has grown considerably.

8. OECD Doc. (C (97) 123/final) (May 30, 1997).

The efforts by the Council of Europe are meaningful for mainly one reason. In contrast to the European Union, the membership of the Council of Europe includes most former communist Eastern European States. For the purpose of reaching a *level playing field* throughout Europe, the inclusion of the Eastern European economies, which provide for many problems in the context of corruption and organized crime in the EU-member states, seems necessary.

Other organizations that have been dealing with international bribery are the Organization of American States (OAS)⁹ and the World Trade Organization (WTO) in the context of its rules of Public Procurement.

III. CURRENT LEGAL SITUATION IN GERMANY

Bribery can be dealt with under criminal, civil, tax, and administrative law. At the annual German Lawyers' Congress 1996 in Karlsruhe, one focus was organized crime and corruption. Following those discussions, and after surprisingly similar bills were introduced by all parties and legislative organs of German government, the German legislature became active. In August 1997, the *Bundestag* (the lower House in the German Parliament) passed an anti-corruption act¹⁰ to tighten criminal law as well as other segments of the German legal system on the wide field of corruption.

A. Criminal Law

The Anti Corruption Act does not criminalize international bribery. According to sections 3, 5, 6, and 7 of the German Penal Code (known as the *Strafgesetzbuch* (StGB)), German criminal laws, like most other criminal laws, only apply in cases with a close domestic connection. A specific provision for the punishment of international bribery does not exist yet.

The Anti Corruption Act of this year did not alter this concept. Thus, only domestic, but not international bribery remains criminalized, unless such conduct otherwise falls within the scope of fraud, embezzlement, or tax evasion. However, many if not most situations of

9. Organization of American States: Inter-American Convention Against Corruption, 35 I.L.M. 724 (1996); Manfred Möhrenschräger, *Strafrechtliche Vorhaben Zur Bekämpfung der Korruption auf Nationaler Und Internationaler Ebene*, JURISTENZEITUNG 822, 831 (1996).

10. The Act on the Combat of Corruption and other Measures for Fighting Corruption entered into force on August 20, 1997. (BGBl. I, S.2038) [hereinafter the Anti-Corruption Act].

international bribery do not fulfill the code definition of bribery or the ancillary crimes.

Despite those shortcomings, there are a number of positive changes under German criminal laws that are worth mentioning:

1) The definition of government official was broadened to include employees of public entities organized under private law, and it now matches the EU-Convention's definition described above. For example, not the form of the entity by which the person is employed, but the substantive scope of the occupation in question determines the quality as potential addressee and potential perpetrator of passive bribery.

2) In contrast to the former law, the favor being sought by the private party does not have to refer to a specific action by the official, but it is sufficient that the favor is granted within the context of the official's duties.

3) This amendment reflects the statutory purpose of maintaining the trust of the public in the Public Administration. Formerly, the official had to benefit at least indirectly from his or her wrongdoing (e.g., donation to official's sport club); under the amendment, benefits to third parties not directly related to the official are sufficient (e.g., donation to the church).

4) The potential punishment was raised to a maximum of ten years for severe bribery. The minimum sentence for certain actions such as when bribery leads to illegal acts of the influenced officials, was raised to one or to two years, which is the threshold to become a felony (in contrast to a misdemeanor).

5) Under the amendment, protection of free competition has been emphasized much more by moving the provisions into the Penal Code and by increasing the punishment. Among the more interesting provisions rank the prohibition of illegal agreements in the context of public procurement¹¹ and in bribery in private business dealings.¹²

As a result, it has to be emphasized that there still remains a decisive distinction from the United States Foreign Corrupt Practices Act

11. § 298 StGB.

12. § 299 StGB (formerly and with less severity included only in section 12 of the Gesetz gegen den unlauteren Wettbewerb (UWG), which stands for the Act Against Unfair Competition). For a detailed look at all the changes, see Matthias Korte, *Kampfansage gegen die Korruption*, 39 NEUE JURISTISCHE WOCHENSCHRIFT 2556, 2557 (1997).

because under current German law it is not illegal to bribe foreign public officials.

B. Civil Law

For many years, the German Federal Supreme Court has held that contracts resulting from bribery actions are void under section 138 BGB, the German Civil Code, as conflicting with "bonos mores."¹³ Thus, a party that formerly paid *under the table* is not only hindered from enforcing its seemingly contractual claim, but it also has to bear all the consequences resulting from the nullity of the contract in concern. In addition, bribe payments can lead to the obligation to pay damages under the intentional fraud provisions of the Civil Code, section 826 BGB.

C. Tax Law

Under German tax law, it is, in principle, possible to deduct foreign bribe payments as necessary business expenses.¹⁴ However, there are limitations to that rule. For instance, according to section 4 (as amended) of the German Income Tax Code, the deduction is disallowed if the concerned action has led to prosecution or sentencing under the German criminal code.¹⁵

Since under the current criminal code actions of international bribery are not included, those expenses do not fall within section 4. Thus, they remain deductible, at least for now.

In addition, tax procedure rules give the tax authorities the right to require precise disclosure of the recipient and the circumstances of the deductible expense. This feature, combined with exchange of information procedures between certain countries under their double taxation treaties with Germany, can be expected to have a desirable impact on foreign bribery activities.

D. Administrative Measures

It is important to note that companies and other judicial persons cannot be criminally liable under German law. Hence, other measures have to be found to *get to* the companies.

13. 94 BGHZ 268, 271.

14. Press release 20/94 by the BdF (Federal Treasury) as of March 21, 1994. *Bestechungs- und Schmiergelder*, 5 RECHT DER INTERNATIONALEN WIRTSCHAFT 436 (1994).

15. § 4 Abs. 5 S. 1 Nr. 10 EstG. For details, see Wolfgang Joecks, *Abzugsverbot für Bestechungs- und Schmiergelder*, 27 DEUTSCHE ZEITSCHRIFT FÜR STEUERRECHT 1025 (1997).

To strengthen the effects of new legislation, (and also the upcoming efforts to combat international bribery) administrative measures like so called *black lists* have been put into place.

Companies that get caught in bribe actions have been listed with the effect that they are banned from government orders for varying periods of time. One German federal state, Hesse, came up with that procedure in 1995 and, in 1996, listed more than sixty enterprises.¹⁶ The names on these lists are kept strictly confidential from the public, but not to the companies concerned. Just the number of companies being listed is published on a frequent basis. Public agencies intending to contract with mainly private construction companies have to check with the Hessian County Government to make sure that the company with whom they wish to enter into a contract is not banned from government orders.

Similar methods are used abroad. It appears that this feature has become very effective. For instance, in connection with an action that led to imprisonment of a public official, one major German corporation was banned from Singaporean government orders for five years.¹⁷

IV. COMPLIANCE EFFORTS BY THE INDUSTRY

There is growing concern among enterprises to make sure by internal measures that corruption, including international bribery, is contained. Experts are convinced that despite the necessity of tougher criminal laws, international bribery can be successfully limited only by the industry itself.¹⁸ Companies have to install effective internal revision procedures and sanction mechanisms to be able to control and stop bribery payments.

In an attempt to raise that topic and to help standardize those internal means, the Bundesverband der Deutschen Industrie e.V. (BDI), the German Industry Association, recently published a pamphlet with recommended guidelines of conduct.¹⁹ There is a common understanding that the often made statement, "not companies, but their employees are corrupt" does not reflect the true situation.²⁰ Since, mainly higher level management and representatives are able to participate in illegal antitrust

16. *Litwin*, Maßnahmen zur Bekämpfung der nationalen und internationalen Korruption, *Zeitschrift für Rechtspolitik* (ZRP) 1996.

17. Reiner Scholz, *Uternehmen Schwarze Liste*, *DIE ZEIT*, Mar. 7, 1997, at 30, 31.

18. See LAY REPORT, *supra* note 6.

19. BUNDESVERBAND DER DEUTSCHEN INDUSTRIE EMPFEHLUNGEN AN GESCHÄFTSFÜHRUNGEN UND VORSTÄNDE DER GEWERBLICHEN WIRTSCHAFT ZUR BEKÄMPFUNG DER KORRUPTION IN DEUTSCHLAND, 3 [hereinafter BDI].

20. BDI, *supra* note 19; LAY REPORT *supra* note 6, at 6.

agreements, sales agents and foreign branch representatives being involved in such actions, typically receive orders from higher ranking management. Therefore, it is necessary to provide for role model behavior by the boards and leaders of the German companies operating in international business, and by that, also to avoid the spectacular criminal trials we have seen in recent years. Article 6 of the EU-Convention calling for criminal liability of business heads when making bribery related decisions, must be seen in this context.

In evaluating the BDI guidelines' recommendation of strict observance of the German criminal law as the most important measure, the question of the non-criminalization of international bribery must be raised. So far enterprises have been able to hide behind the existing gap in German statutory law,²¹ an aspect United States companies have been complaining about for a long time.

For the EU, the possibility to corrupt foreign officials and to escape criminal liability will be gone with the new legislative act in 1998. However, there will always be the difficulty to obtain knowledge of foreign bribery payments. The OECD Convention, by requiring that the member states secure their accounting and bookkeeping rules prevent bribery payments from being covered up, will be a major step forward. However, it appears to fall short of expressly prohibiting tax deductibility. A realistic chance to achieve a certain control over bribery abroad, is the strict implementation of internal company measures like specific training and education of the employees, job rotation in positions with increased exposure to the possibility of bribery, to create alternatives in the supply chain, and so as to avoid dependencies, effective revision methods and better cooperation among the concerned company departments.

V. OUTLOOK

In the context of growing concern about international corruption, Germany will quickly attempt to tighten its legislative and administrative measures. The Anti-Corruption Act of 1997 should be followed by new legislative measures in 1998 to close the gap to the efforts by the EU and the OECD. As it appears right now, a new legislative act will be presented to the German parliament by April 1998 that should contain the prescribed changes by the EU. Since all domestic parties agree in substance, there should be no problem in passing that bill. It remains to be seen, though, if the new act will be limited to the measures prescribed by the EU-Convention or if it goes beyond, which seems possible, for

21. The cited pamphlet still leaves the door open for international bribe payments. BDI, *supra* note 19, at 6.

example, by banning tax deductibility of foreign bribe payments. This should apply also to the efforts to adopt legislation in accordance with the OECD-Convention.²²

It is safe to say that there exists an almost unique coalition among the opposing parties in the German Parliament, the Association of Chambers of Commerce (known as the Deutscher Industrie-und Handilstag (DIHT)), and the Federation of the German Industry (BDI) to combat international bribery. That kind of common effort has become possible since the awareness has grown that corruption is not only unethical, but also harms the export industries with higher costs and unfair competition, and thus, a level playing field would be beneficial for all involved.

22. BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 13/8082 from June 26, 1997.