

GERMANY

Moderate enforcement

7.6% of global exports

Investigations and cases

During the period 2016-2019, Germany opened 27 investigations, commenced 15 cases and concluded 46 cases with sanctions.

In 2018, the Office of the Munich Public Prosecutor (Prosecutor's Office) imposed a fine of €81.25 million (US\$92.7 million) on **Airbus Defence and Space GmbH** (Airbus), comprising a confiscation element of €81 million (US\$92.4 million) and a sanction element of €250,000 (US\$295,000).¹ The Prosecutor's Office could not find evidence of bribery of Austrian public officials in the sale to Austria of 18 Eurofighters, but it established that Airbus's former management negligently breached supervisory duties, contrary to the Regulatory Offences Act, by being unable to account for over €100 million (US\$114 million) paid to two shell companies.²

In 2018, former **Siemens** board member Uriel Sharef was sentenced to a suspended prison sentence for breach of trust contrary to the Criminal Code.³ Mr Sharef knew about a slush fund, but failed to return it to the regular accounts of Siemens. His conviction is the only one of a Siemens

board member in the entire Siemens corruption scandal.⁴

In the **Kraus-Maffei Wegmann** (KMW) case, prosecutors alleged in 2015 that bribes totalling €7.9 million (US\$8.8 million) were paid to secure a contract for the delivery of 24 Howitzers to the Greek government.⁵ The statute of limitations had run out on possible foreign bribery charges, as the alleged bribery had occurred in 2001. Instead, prosecutors charged tax evasion for deducting bribe payments as operating expenses.⁶ In 2015, a manager was sentenced to 11 months on probation for aiding and abetting tax evasion and KMW was fined €175,000 (US\$194,000) for tax evasion. Prosecutors considered the fines too lenient and successfully appealed the sentence, with the appellate court instructing judges in 2017 to impose a fine based on the economic advantage gained.⁷ At the retrial, the sentence against the manager was increased in 2019 to 15 months and the fine against KMW to €500,000 (US\$560,000). The fine did not include a confiscation element, as tax benefits had already been returned.⁸

Recent developments

In April 2020, the Ministry of Justice published major new draft legislation on corporate liability, the Act on Association Sanctions (*Verbandssanktionengesetz*),⁹ remedying deficiencies in the existing framework, but stopping short of

¹ Section 30. The maximum amount for negligence was then €500,000 (US\$581,000).

² <https://www.justiz.bayern.de/gerichte-und-behoerden/staatsanwaltschaft/muenchen-1/presse/2018/02.php>. The company also issued a press release, <https://www.airbus.com/newsroom/press-releases/en/2018/02/munich-public-prosecutor-ends-eurofighter-austria-investigation.html>. Transparency Germany requested the text of the decision by the Prosecutor's Office, but the request was rejected. A complaint made against the Prosecutor's Office was also rejected, <https://voices.transparency.org/the-german-press-and-public-have-a-right-to-know-details-of-airbuss-81-million-foreign-bribery-24f97b98c0f0>

³ Section 266. In 2014, Mr Sharef was acquitted of charges of authorising bribe payments of US\$4.7m and 9.6 m for a contract for electronic passports in Argentina, operating a slush fund in South America between 1991 and 1996, and failing to return the balance of US\$35 million to Siemens in 2008. The highest Federal Court upheld the acquittal regarding bribery, but ordered a retrial regarding the slush fund.

⁴ <https://www.sueddeutsche.de/wirtschaft/korruption-ein-letzter-prozess-1.3150517>

⁵ <https://www.merkur.de/bayern/ruestungsmanager-olaf-landgericht-muenchen-verdacht-steuerhinterziehung-5660535.html>

⁶ <https://sites.tufts.edu/corruptarmsdeals/greek-land-forces-and-german-bribery/>; <https://www.sueddeutsche.de/wirtschaft/krauss-maffei-wegmann-teures-schmiergeldgeschaef-1.3566020>

⁷ BGH 1 StR 265/16, <https://sites.tufts.edu/corruptarmsdeals/greek-land-forces-and-german-bribery/>

⁸ <https://www.transparency.de/aktuelles/detail/article/urteil-zu-korruptionsaffaere-um-panzerverkaeufe-nach-griechenland/>

⁹ https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=1

criminal liability.¹⁰ The law would require prosecutors to investigate cases against legal persons on initial suspicion of a crime and would allow sanctions of up to 10 per cent of turnover against companies with a turnover of more than €100 million (US\$114 million). The draft law contains, inter alia, requirements for corporate internal investigations and allows the prosecutor's office to terminate prosecution when sanctions are to be expected abroad and to provisionally defer prosecution in cases of internal investigations.¹¹ The draft law would introduce non-trial resolutions in the form of termination of proceedings currently used for natural persons, without specifically providing for access of the press or legal databases to such decisions.

The Federal Debarment Register, established based on legislation passed in 2017, will become operational at the end of 2020.

Transparency of enforcement data

The Federal Ministry of Justice does not publish enforcement statistics on opened investigations, cases commenced, cases concluded or requests for mutual legal assistance (MLA) made and received. However, it does compile this information for the OECD WGB and makes it available to Transparency International Germany on a confidential basis.

Federal court decisions are generally published in full on the internet. Decisions of the regional or local courts where corruption cases are decided in first instance can appear on the internet,¹² but rarely do.¹³ National and regional newspapers report on court cases involving foreign bribery, but the majority of such cases are terminated without trial,

and therefore mostly without involvement of the media.

Beneficial ownership transparency

There is no comprehensive central beneficial ownership register. However, the Transparency Register (*Transparenzregister*) introduced in 2017, contains beneficial ownership information of companies, unless such information is already included in other public registers, such as the commercial register, the partnerships register, the register of cooperatives, the register of associations or the business register.¹⁴ For most legal entities, the Transparency Register will only provide a link to the Commercial Register (*Handelsregister*),¹⁵ or to some of the other, smaller registers (for partnerships and for cooperatives). In theory, if those registers do not contain beneficial ownership information (e.g. for foundations, trusts and some companies), an entry in the Transparency Register is mandatory. In practice, however, the fact that these registers are not fully integrated makes it almost impossible to verify whether companies that should be disclosing their beneficial owners to the Transparency Register are doing so.¹⁶

Beneficial ownership information on trusts must be included in the Transparency Register if the trust is profit oriented.¹⁷ Charitable trusts do not need to provide this information. The information in the Transparency Register and the Commercial Register was made publicly available from 2020, subject to some exceptions, e.g. where the beneficial owner can prove a danger of blackmail, kidnap or similar threats.¹⁸ Registration is required, with a penalty of up to €100,000 (US\$116,000) for failure to register

¹⁰ As recommended by Transparency Germany, https://www.transparency.de/fileadmin/Redaktion/Publikationen/2019/Positionspapier_zur_strafrechtlichen_Verantwortung_von_Unternehmen.pdf

¹¹ <https://www.jdsupra.com/legalnews/germany-faces-drastic-increase-of-fines-10616/>

¹² Joint Justice Portal of the federal government and the states, <https://justiz.de/onlinedienste/rechtsprechung/index.php>, and also other free and commercial databases.

¹³ Reitmaier, "Anti-bribery enforcement: The case for making court decisions freely available in Germany", <https://oecdonthellevel.com/2017/12/05/anti-bribery-enforcement-the-case-for-making-court-decisions-freely-available-in-germany/>

¹⁴ <https://www.transparenzregister.de/treg/de/start;jsessionid=DD503B126D4024A055ED87EBA777295D.app31?0;> § 18 Geldwäschegesetz, http://www.gesetze-im-internet.de/gwg_2017/_18.html

¹⁵ Commercial Register (*Handelsregister*), https://www.handelsregister.de/rp_web/welcome.do, § 8 Handelsgesetzbuch

¹⁶ <https://www.taxjustice.net/2020/05/11/fatf-ante-portas-why-many-berlin-real-estate-owners-remain-anonymous-despite-new-transparency-laws/>

¹⁷ § 21 Geldwäschegesetz

¹⁸ § 23 para 1 no 3 Geldwäschegesetz and § 23 para 2 Geldwäschegesetz

and a fee is payable for each access to the register. Access is not automatic for the Transparency Register, which uses a manual check for each case.¹⁹ Access is automatic for the Commercial Register.

Inadequacies in legal framework

The financial penalties that can be imposed on legal persons are inadequate. The maximum that can be imposed is €10 million (US\$11 million) for intentional commission of criminal offences, and €5 million (US\$5.5 million) for negligent commission.²⁰ This is inconsistent with the OECD Anti-Bribery Convention requirement of proportionality for legal persons, particularly large companies.²¹ Prosecution of offences is at the discretion of the prosecuting authority, allowing possible violation of the principles of effective, proportionate and deterrent sanctions against companies.²² As mentioned above, a new law is proposed to address these and other shortcomings.

Compensation is possible if corruption caused damage to individual persons, not the general public – for example, to a competitor in cases of bribery in business transactions. Bribery of public officials is intended to protect the integrity of the office, not any persons. Foreign bribery is therefore treated as a victimless crime in Germany.²³ However, foreign bribery committed by business enterprises may well cause serious human rights violations, for which there is currently no remedy. In 2016, the Council of Europe passed a resolution asking Member States

to consider applying legislative and other measures to ensure that business enterprises can be held liable for the commission of offences under, *inter alia*, the UN Convention against Corruption, which includes foreign bribery.²⁴ This call needs to be heeded in Germany at a time when a law on the liability of business enterprises is being drafted.

Investigations into foreign bribery and MLA requests are complex and time-consuming. The five-year statute of limitations period has in several cases been too short for prosecution of criminal acts such as foreign bribery.

Whistleblower protection in Germany is insufficient, especially in the private sector,²⁵ where laws are lacking and protection is dependent on relevant court decisions.²⁶ The EU Whistleblower Protection Directive requires protection for persons reporting breaches of EU law in a work-related context, but not for breaches of national law.²⁷

Inadequacies in enforcement system

German enforcement authorities have not to date prioritised the prosecution of legal persons involved in foreign bribery cases.²⁸ Until this 2020 report, enforcement in Germany was always characterised by Transparency International as being in the top “active” category in assessments of foreign bribery enforcement in OECD Convention countries. However, this is only true for enforcement against natural persons, not legal persons.²⁹ Since 2014, there have been 38 cases concluded with sanctions

¹⁹ Requests to the Transparency Register (*Transparenzregister*) in the first quarter of 2020 needed up to two weeks for a request to be accepted, although most were accepted within a few days.

²⁰ Section 30, Regulatory Offences Act

²¹ Art. 3 (2) of the OECD Anti-Bribery Convention, See N)o. 243, 244 and Commentary, <http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf>

²² Section 47, Regulatory Offences Act. See <http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf>, No. 233-235 and Commentary.

²³ Transparency International Secretariat Submission to the UN Working Group on Business and Human Rights multi-stakeholder consultation on “Connecting business and human rights and anti-corruption agendas”, 14 May 2020, II; Foreign bribery, human rights impacts and victims’ remedies, https://www.ohchr.org/Documents/Issues/Business/2020Survey/Civil_society/Transparency_International.docx

²⁴ CM/Rec (2016) 3 # 44 <https://rm.coe.int/human-rights-and-business-recommendation-cm-rec-2016-3-of-the-committee/16806f2032>

²⁵ This has been the subject of criticism by the OECD WGB, e.g. <http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf>, Recommendation 1 b), and Transparency International Germany.

²⁶ In particular, the Federal Labour Court, *Bundesarbeitsgericht*, decision of 3 July 2003 – 2 AZR 235/02.

²⁷ https://www.transparency.de/fileadmin/Redaktion/Publikationen/2020/Positionspapier_AG_Hinweisgeber_Umsetzung_EU-Richtlinie_Hinweisgeberschutz_neu.pdf

²⁸ <http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf>, Recommendation 6 d), also recommended by Transparency International Germany.

²⁹ <http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf>

against natural persons, 11 of which – less than 30 per cent – also included sanctioning of legal persons. This may also be a result of inadequate human resources for enforcement authorities.

Recommendations

- Publish foreign bribery enforcement statistics
- Publish all court decisions, including those from regional and local courts
- Publish basic information about cases of foreign bribery, including terminations of proceedings and cases against companies, in an annual corruption report at the federal level
- Create a single central register of beneficial ownership information that is publicly accessible
- Enact the Act on Association Sanctions (*Verbandssanktionengesetz*), ensuring publication of decisions in legal databases and press access to decisions, and allowing for victims of serious human rights violations to claim damages
- Include protection for whistleblowers reporting on breaches of German law, when transposing the EU Directive into national law
- Increase the statute of limitation for foreign bribery to 10 years
- Prioritise prosecution of legal persons involved in foreign bribery cases and provide adequate human and financial resources and training to prosecutors.