



Germany - Global bribery offenses guide

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1) What is the legal framework governing bribery in Germany?

The German Criminal Code (GCC).

2) What constitutes a bribe?

German criminal law differentiates between bribery in commercial practice (section 299 GCC) and bribery in connection with public officials (sections 331 ff. GCC). Furthermore, German criminal law also contains special provisions governing bribery by or giving bribes to elected officials (section 108e GCC) and members of a healing profession (sections 299a and 299b GCC).

Pursuant to section 299 of the GCC, the following acts qualify as bribery in commercial practice:

- demanding, allowing themselves to be promised or accepting as an employee or agent of business a benefit for themselves or another in a business transaction as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services in Germany or abroad (section 299 para. 1 no. 1);
- for competitive purposes offering, promising or granting an employee or agent of a business a benefit for themselves or for a third person in a business transaction as consideration for such employee's or agent's according him/her or another an unfair preference in the purchase of goods or commercial services in Germany or abroad (section 299 para. 2 no. 1);
- obtaining, being promised or accepting as an employee or agent of business a benefit for themselves or for a third party without the consent of the company as consideration for goods or services and thereby breaching their obligations vis-à-vis the company by performing or refraining from performing any act in relation to such goods or services (section 299 para. 1 no. 2); or
- offering, promising or granting to an employee or agent of a business without the consent of the company, a benefit to that company or to a third party as consideration for performing or refraining from performing any act in relation to the purchase of goods or services, and thereby failing to fulfill its obligations vis-à-vis the company (section 299 para. 2 no. 2).

With respect to the healthcare sector, pursuant to sections 299a and 299b GCC, taking and giving bribes to members of a healing profession in return for prescribing medication, remedies or health aids or medical devices, procuring medication or health aids or medical devices (which are designed for direct use by the member of the profession or one of their professional assistants) or supplying patients or samples and diagnostic data qualifies as bribery as well.

Further, pursuant to sections 331 ff. GCC, it is qualified as bribery in connection with public officials if the relevant offenses (demanding, allowing themselves to be promised or accepting or alternatively offering, promising or granting a benefit) are related to an official duty by a (European) public official or a person entrusted with special public service

functions.

With respect to elected officials of local, federal or European bodies (eg Länder parliaments, the German Bundestag or the European Parliament) taking and giving bribes in return for performing or refraining from performing an act, upon request or instruction, qualifies as bribery.

A benefit is any advantage which puts the perpetrator or a third party in a better economic, legal or personal position, material or immaterial, and which the perpetrator is not legally entitled to.

3) What are the principal offenses under this legal framework?

- Taking and giving bribes in commercial practice (section 299 GCC).
- Taking and giving bribes in the healthcare sector (sections 299a and 299b GCC).
- Taking bribes as a (European) public official or a person entrusted with special public service functions (section 331 GCC).
- Taking bribes as a (European) public official or a person entrusted with special public service functions meant as an incentive to violating one's official duties (section 332 GCC).
- Giving bribes to a (European) public official or a person entrusted with special public service functions (section 333 GCC).
- Giving bribes to a (European) public official or a person entrusted with special public service functions as an incentive to the recipient violating their official duties (section 334 GCC).
- Bribery in relation to foreign and international officials (section 335a GCC).

4) What is the jurisdictional reach of the legal framework?

German criminal law applies to acts committed on German territory (section 3 GCC). Pursuant to section 9 GCC, an offense is deemed to have been committed in every place where the offender acted or, in the case of an omission, should have acted, or in which the result, if it is an element of the offense, occurs or should have occurred according to the intention of the offender.

In addition, under certain circumstances, German criminal law may apply to offenses committed abroad against domestic legal interest, regardless of the law applicable in the locality where the act was committed (section 5 GCC).

Further, German criminal law shall apply to (section 7):

- offenses committed abroad against a German, if the act is a criminal offense at the locality of its commission or if that locality is not subject to any criminal jurisdiction;
- other offenses committed abroad if the act is a criminal offense at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:
 - was German at the time of the offense or became German after the commission; or
 - was a foreigner at the time of the offense, is discovered in Germany and, although the Extradition Act would permit extradition for such an offense, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.

5) Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

Private individuals (members of a healing profession) and public and elected officials concerned can be prosecuted for bribery offenses under sections 108e, 299, 299a, 299b, 331, 332, 333, 334, 335a GCC.

Since no corporate criminal law exists in Germany, legal entities may not be held criminally liable for bribery.

Nevertheless, other sanctions may be imposed on legal entities, especially administrative fines (section 30 of the Act on Regulatory Offenses) or a confiscation order (section 29a of the Act on Regulatory Offenses or section 73 GCC).

- According to section 30 of the Act on Regulatory Offenses, an administrative fine up to EUR10 million may be imposed against the legal entity if someone acting on behalf of the legal entity has committed a criminal offense (eg bribery) or a regulatory offense as a result of which duties incumbent on the legal entity have been violated, or where the legal

entity has been enriched or was intended to be enriched.

- That fine shall exceed the financial benefit that the legal entity has obtained from commission of the offense and may therefore exceed the statutory maximum of EUR10 million.
- Alternatively, if an unlawful act has been committed and the legal entity has acquired proceeds from it, the court shall order the confiscation of what was obtained.

6) Can a parent company be liable for its subsidiary's involvement in bribery?

It is disputed under German law whether and to what extent a parent company and its management may be held liable for a subsidiary's involvement in bribery. This must be assessed on a case-by-case-basis.

7) Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

Yes, provided they meet the criteria, facilitation payments are considered bribes.

8) Does the legal framework restrict political and charitable contributions?

Political or charitable contributions may be considered to be bribes and would fall to be assessed by reference to the provisions described in this note, in particular section 108e GCC has to be considered.

9) Does the legal framework place restrictions on corporate hospitality?

Whether corporate hospitality given amounts to a bribe would be assessed on the case-by-case-basis.

The GCC makes no express provisions with regard to corporate hospitality and any financial or other advantage given in that context would fall to be assessed by reference to the provisions described in this note.

10) Are there any defenses for bribery offenses?

There are no specific statutory defenses for bribery offenses in Germany. However, according to a judgment of the German Federal Court of Justice, the quality and efficiency of a compliance management system is to be taken into account as a mitigating factor when calculating a potential administrative fine against a company. Further, the company's efforts to optimize an existing compliance management system after a violation has been exposed is to be considered.

11) What are the key regulatory or enforcement bodies with regard to bribery?

The Public Prosecution Office is the competent authority in Germany with regard to bribery.

12) What are the legal consequences of being found guilty of bribery offenses?

Individuals face up to ten years' imprisonment and/or a fine on conviction (depending on the severity of the offense and depending on whether public officials are involved).

If bribery has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained (section 73 GCC).

No corporate criminal liability exists in Germany. However, an administrative fine or confiscation order may be imposed against a legal entity (section 29a and 30 of the Act on Regulatory Offenses, see above 5.).

Any person convicted of bribery or subject to an administrative fine may also face debarment from public procurement contracts.

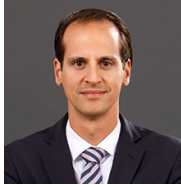
13) Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

In Germany there are no deferred prosecution agreements available. However, informal settlements with the Public Prosecutor's Office are possible.

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