DEVELOPMENTS

Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions

By Sebastian Wolf[*]

"Corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies."

PREAMBLE -
UNITED NATIONS CONVENTION AGAINST CORRUPTION

A. Introduction

The *Gesetz zur Bekämpfung der Korruption* (KorrBekG – Anti-Corruption Act), enacted in 1997,[1] was the last measure to improve Germany's anti-corruption criminal law that was solely initiated by German political actors. Since then all amendments originated in international legal instruments.[2] Implementing only the minimum requirements of these international provisions has led to inconsistencies within the criminal law dealing with active and passive bribery.[3] Further anti-

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[1] Gesetz zur Bekämpfung der Korruption [Anti-Corruption Act], August 19, 1997, BGBl. I at 2038. See Bernd Heinrich, *Rechtsprechungsüberblick zu den Bestechungsdelikten (§§ 331-335 StGB)*, 25 NEUE ZEITSCHRIFT FÜR STRAFRECHT 197 (2005) (numerous references regarding the *Korruptionsbekämpfungsgesetz*).

[2] *See infra* B. For a current overview of anti-corruption measures by International Organizations, *see* Sebastian Wolf, *Maßnahmen internationaler Organisationen zur Korruptionsbekämpfung auf nationaler Ebene. Ein Überblick*, GRIP DISCUSSION PAPER No. 31 (2006), available at http://www.foev-speyer.de/publikationen/pubdb.asp?reihen_id=3.

[3] *See infra* C. This was already noted: Manfred Möhrenschlager, *Die Bekämpfung der Korruption auf internationaler Ebene, in* KORRUPTION IN BRASILIEN UND DEUTSCHLAND 25 (Wolf Paul ed., 2002).

corruption conventions signed by the German government require additional modifications.[4] This opportunity should be used as a starting point for a thorough reform of Germany's anti-corruption criminal law.[5]

B. International Anti-corruption Provisions Implemented by Germany – A Short Overview

The Council of the European Union (EU) adopted the First Protocol to the Convention on the Protection of the European Communities' Financial Interests in 1996,[6] and the Convention on the Fight Against Corruption Involving Officials of the European Communities (EC) or Officials of Member States of the European Union in 1997.[7] Both instruments mainly require the extension of anti-bribery provisions concerning national public officials to officials of the EC and officials of other EU Member States. In Germany, they were implemented by the *EU-Bestechungsgesetz* (EUBestG – EU Anti-Corruption Act) in 1998.[8] The EUBestG deals with both active and passive bribery. Generally, "active bribery" refers to the party who offers or actually pays the bribe, while "passive" bribery refers to the recipient.

In the same year, the *Bundestag* (federal parliament) passed the *Gesetz zur Bekämpfung internationaler Bestechung* (IntBestG – Act Against International Corruption),[9] which implemented the Organization for Economic Co-operation and

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[4] *See infra* D. This was already noted: Fernando Sanchez-Hermosilla, *Rechtspolitik zur Korruptionsbekämpfung*, 57 KRIMINALISTIK 74, 76-77 (2003).

[5] *See infra* E.

[6] 1996 O.J. (C 313) 2.

[7] 1997 O.J. (C 195) 2.

[8] Gesetz zu dem Protokoll vom 27. September 1996 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften (EU-Bestechungsgesetz) [EU Anti-Corruption Act], September 21, 1998, BGBl. II at 2340. *See* Matthias Korte, *Der Einsatz des Strafrechts zur Bekämpfung der internationalen Korruption,* 18 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT 81, 83-85 (1999); Peter Gänßle, *Das Antikorruptionsstrafrecht – Balsam aus der Tube der symbolischen Gesetzgebung?*, 19 NEUE ZEITSCHRIFT FÜR STRAFRECHT 543, 546-547 (1999); Frank Zieschang, *Das EU-Bestechungsgesetz und das Gesetz zur Bekämpfung internationaler Bestechung*, 52 NEUE JURISTISCHE WOCHENSCHRIFT 105, 105-106 (1999); Dieter Dölling, *Die Neuregelung der Strafvorschriften gegen Korruption*, 112 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 334, 351-352 (2000); Möhrenschlager, *supra* note 3, at 24.

[9] Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr (Gesetz zur Bekämpfung internationaler Bestechung) [Act Against International Corruption], September 21, 1998, BGBl. II at 2327. *See* Korte, *supra* note 8, at 86-88; Gänßle, *supra* note 8, at 543-546; Zieschang, *supra* note 8, at 106-107; Dölling, *supra* note 8, at 352-353; Daniel Marcus Krause/Frank Vogel, *Bestechungsbekämpfung im internationalen Geschäftsverkehr*, 45 RECHT DER INTERNATIONALEN WIRTSCHAFT 488 (1999); Jürgen Taschke, *Die Bekämpfung der Korruption in Europa auf Grundlage der OECD-Konvention*, 21 STRAFVERTEIDIGER 78 (2001);

Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[10] Unlike the *EU-Bestechungsgesetz*, only active bribery is established as a criminal offence, but the law's scope of application is not restricted to the territory of the EU. Moreover, it is also prohibits the bribery of members of foreign public assemblies.

The *Gesetz über die Gleichstellung der Richter und Bediensteten des Internationalen Strafgerichtshofes* (IStGHGG – Act for Equalization of Judges and Officials of the International Criminal Court)[11] implemented Art. 70 para. 4 of the Rome Statute of the International Criminal Court[12] in 2002. Sections 331-338 of the *Strafgesetzbuch* (StGB - Penal Code), which deal with active and passive bribery involving domestic public officials, were extended to judges and officials of the International Criminal Court.

In the same year, the *Bundestag* also implemented the Joint Action by the Council of the EU on Corruption in the Private Sector.[13] The criminal offence of bribery in business transactions (Sect. 299 *StGB*) was extended to business competition in the global economy.[14]

The UN Convention against Transnational Organized Crime[15] only requires the criminalization of passive and active bribery of domestic public officials. Since Germany was already in compliance with this requirement, the ratification of the convention in 2005 did not entail amendments to the criminal law.

Allit Nippert/Cristina Tinkl, *Bestechung im internationalen Geschäftsverkehr – straf- und steuerrechtliche Konsequenzen,* 10 AUßENWIRTSCHAFTLICHE PRAXIS 255 (2004); Möhrenschlager, *supra* note 3, at 22-24.

[10] Available at http://www.olis.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br(97)20.

[11] Gesetz über das Ruhen der Verfolgungsverjährung und die Gleichstellung der Richter und Bediensteten des Internationalen Strafgerichtshofes [Act for (…) Equalization of Judges and Officials of the International Criminal Court], June 28, 2002, BGBl. I at 2144, 2162.

[12] Available at http://www.un.org/law/icc/statute/english/rome_statute(e).pdf.

[13] 1998 O.J. (L 358) 2.

[14] Gesetz zur Ausführung des Zweiten Protokolls vom 19. Juni 1997 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, der Gemeinsamen Maßnahme betreffend die Bestechung im privaten Sektor vom 22. Dezember 1998 und des Rahmenbeschlusses vom 29. Mai 2000 über die Verstärkung der mit strafrechtlichen und anderen Sanktionen bewehrten Schutzes gegen Geldfälschung im Hinblick auf die Einführung des Euro [Act for the Implementation of (…) the Joint Action by the Council of the EU on Corruption in the Private Sector], August 29, 2002, BGBl. I at 3387. *See* Karsten Randt, *Abermals Neues zur Korruptionsbekämpfung: Die Ausdehnung der Angestelltenbestechung des § 299 StGB auf den Weltmarkt*, 57 BETRIEBS-BERATER 2252 (2002). *See also* HERBERT TRÖNDLE/THOMAS FISCHER, STRAFGESETZBUCH, § 299, para. 23a (2006), Fritjof Haft/Max Schwoerer, *Bestechung im internationalen Geschäftsverkehr, in* FESTSCHRIFT FÜR ULRICH WEBER, 367, 382-384 (Bernd Heinrich et al. eds., 2004).

[15] Available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

C. Consequences for the Coherence of the German Anti-corruption Criminal Law

I. Overview

German criminal law currently deals with passive bribery involving public officials in the following way:[16]

	German public officials	*Public officials of other EU Member States*	*Other foreign officials*	*Officials of the EU*	*Officials of International Organizations*	*Officials of the International Criminal Court*
Acceptance of advantages for future action (no breach of duties)	Sect. 331 *StGB*	–	–	–	–	Art. 2 Sect. 2 No. 2 *IStGHGG* plus Sect. 331 *StGB*
Acceptance of advantages for past action (no breach of duties)	Sect. 331 *StGB*	–	–	–	–	–
Passive bribery for future action (breach of duties)	Sect. 332 *StGB*	Art. 2 Sect. 1 I No. 2a) *EUBestG* plus Sect. 332 *StGB*	–	Art. 2 Sect. 1 I No. 2b) *EUBestG* plus § 332 *StGB*	–	Art. 2 Sect. 2 No. 2 *IStGHGG* plus Sect. 332 *StGB*
Passive bribery for past action (breach of duties)	Sect. 332 *StGB*	–	–	–	–	–

[16] The following two tables are based on: Winfried Schubert, *Korruption, in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS 691, 707-708 (Heinz-Bernd Wabnitz/Thomas Janovsky eds., 2004).

As to active bribery involving public officials, the current criminal law provides for the following rules:

	German public officials	*Public officials of other EU Member States*	*Other foreign officials*	*Officials of the EU*	*Officials of International Organizations*	*Officials of the International Criminal Court*
Giving of advantages for future action (no breach of duties)	Sect. 333 *StGB*	–	–	–	–	Art. 2 Sect. 2 No. 2 *IStGHGG* plus Sect. 333 *StGB*
Giving of advantages for past action (no breach of duties)	Sect. 333 *StGB*	–	–	–	–	–
Active bribery for future action (breach of duties)	Sect. 334 *StGB*	Art. 2 Sect. 1 I No. 2a) *EUBestG* plus Sect. 334 *StGB*	Art. 2 Sect. 1 No. 2a) *IntBestG*[17]	Art. 2 Sect. 1 I No. 2b) *EUBestG* plus Sect. 334 *StGB*	Art. 2 Sect. 1 No. 2c) *IntBestG*[18]	Art. 2 Sect. 2 No. 2 *IStGHGG* plus Sect. 334 *StGB*
Active bribery for past action (breach of duties)	Sect. 334 *StGB*	–	–	–	–	–

The provisions regarding bribery of domestic judges were similarly extended to foreign judges. Therefore, this comment does not deal with them separately. Section 108e *StGB*, which concerns bribery involving members of German public assemblies and the European Parliament, only applies to buying or selling a vote in the plenum and in committees. However, Art. 2 Sect. 2 *IntBestG* generally penalizes bribing a member of a foreign public assembly or an assembly of an International Organization for an undue action in connection with his or her mandate.

II. Evaluation

Apart from the case of the EU Joint Action on Corruption in the Private Sector,[19] the *Bundestag* confined its implementation legislation to the minimum requirements of the respective international legal instruments. This policy has led to legal inconsistencies. Whereas, for example, even giving advantages for dutiful

[17] Plus Sect. 334 *StGB*, restricted to bribery in international business transactions.

[18] Plus Sect. 334 *StGB*, restricted to bribery in international business transactions.

[19] *See* Haft/Schwoerer, *supra* note 14, at 379.

behaviour to officials of the International Criminal Court is prohibited,[20] grand bribery involving foreign officials (outside the EU) is only penalized if it occurs in international business transactions. The only apparent reason for these asystematic regulatory differences seems to be the diverging requirements of the above-mentioned international anti-corruption instruments. One may argue that protecting the integrity of domestic public officials should be the principal aim of German criminal law.[21] Nevertheless, there is much to be said for a uniform rule to criminalize bribery involving officials of foreign states and International Organizations.[22]

As to corruption involving members of public assemblies, the current anti-bribery provisions dealing with German parliamentarians are much weaker than those concerning members of foreign public assemblies and assemblies of International Organizations. The latter rules do not confine the criminal offence to buying or selling a vote. Again, there is no factual reason for this regulatory divergence.[23] It seems rather incongruous that different anti-bribery rules apply to a single member of the *Bundestag*, depending on whether he or she acts in the *Bundestag* or the Council of Europe.[24] The *Bundestag* still has not remedied this legal shortcoming, which has been criticized many times before.[25]

D. International Anti-corruption Provisions Not Yet Implemented

Germany has signed the following international anti-corruption conventions without, as yet, ratifying and implementing them: the Council of Europe Criminal Law Convention on Corruption,[26] the Additional Protocol to the Criminal Law

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[20] *See* Manfred Möhrenschlager, *Internationales Wirtschaftsstrafrecht – Erfassung auslandsbezogener Wirtschaftsstraftaten, in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS 237, 253 (Heinz-Bernd Wabnitz/Thomas Janovsky eds., 2004).

[21] *See* Dölling, *supra* note 8, at 353.

[22] *See* Joachim Vogel, *Wirtschaftskorruption und Strafrecht – ein Beitrag zu Regelungsmodellen im Wirtschaftsstrafrecht, in* FESTSCHRIFT FÜR ULRICH WEBER 395, 400-402 (Bernd Heinrich et al., eds., 2004) (a discussion of a uniform criminal law model against all types of bribery).

[23] *See* Dölling, *supra* note 8, at 354.

[24] *See* Schubert, *supra* note 16, at 719.

[25] *See* Anne van Aaken, *Genügt das deutsche Recht den Anforderungen an die VN-Konvention gegen Korruption?*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 407, 429 (2005); Hans Herbert von Arnim, *Der gekaufte Abgeordnete – Nebeneinkünfte und Korruptionsproblematik*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 249, 252 (2006).

[26] Available at http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm.

Convention on Corruption,[27] and the UN Convention against Corruption.[28] Moreover, the EU Framework Decision on Combating Corruption in the Private Sector,[29] which replaced the Joint Action in 2003, has not been implemented yet. The amendments to the German criminal law necessitated by these international instruments are not always obvious. First, signatory states are permitted several reservations under the Criminal Law Convention (Art. 36 and 37). Second, some of the international provisions are rather ambiguous and leave a notable margin of interpretation. They are apparently the compromises of complex intergovernmental negotiations.[30]

Keeping this background in mind, Art. 15 of the UN Convention clearly requires the extension of Sect. 108e *StGB* to actions beyond voting in the plenum and committees of public assemblies.[31] This should prevent Germany from declaring a reservation with regard to Art. 4 of the Criminal Law Convention, which deals with passive and active bribery involving members of domestic public assemblies.[32] Focusing on the compulsory requirements of the Criminal Law Convention yields the following results: the offence of bribing foreign public officials (outside the EU) no longer may be restricted to international business transactions (Art. 5). As to officials of International Organizations (apart from the EC), passive bribery has to be established as a new criminal offence. Both active and passive bribery involving officials of International Organizations no longer may be restricted to international business transactions (Art. 9). That also applies to judges and other officials of international courts (Art. 11). The Additional Protocol to the Criminal Law Convention requires Germany to establish active bribery of foreign arbitrators (Art. 4) and foreign jurors (Art. 6) as new criminal offences.

Article 2 para. 1 EU Framework Decision requires that bribery in the private sector involving a breach of an employee's duties be made a criminal offence. Up to now, Sect. 299 *StGB* only applied to bribery that distorts or may distort business competition. Germany declared its intention to limit the scope of para. 1 to such conduct that involves a distortion of competition in relation to the purchase of goods or commercial services (Art. 2 para. 3). If the

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[27] Available at http://conventions.coe.int/Treaty/EN/Treaties/Html/191.htm.

[28] Available at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

[29] 2003 O.J. (L 192) 54.

[30] *See* Philippa Webb, *The United Nations Convention Against Corruption. Global Achievement or Missed Opportunity?*, 8 JOURNAL OF INTERNATIONAL ECONOMIC LAW 191, 208-222 (2005); Gilian Dell, *Eindämmung von Bestechung und Bestechlichkeit. Das Übereinkommen der Vereinten Nationen gegen die Korruption*, 52 VEREINTE NATIONEN, 77, 79-82 (2004).

[31] *See* van Aaken, *supra* note 25, at 424-430.

[32] *See* Manfred Möhrenschlager, *Die Struktur des Straftatbestandes der Abgeordnetenbestechung auf dem Prüfstand – Historisches und Künftiges, in* FESTSCHRIFT FÜR ULRICH WEBER 217, 231 (Bernd Heinrich et al., eds., 2004).

Council does not decide that such declarations under para. 3 can be renewed, the scope of Sect. 299 *StGB* will have to be extended by July 2010 at the latest (Art. 2 para. 4 and 5). The Framework Decision and Art. 7 and 8 Criminal Law Convention do not require the inclusion of the business owner since they primarily focus on a breach of duties within a principal-agent-relationship.[33] However, it would make sense to extend the criminal offence to business owners as well, considering that Sect. 299 *StGB* is principally meant to protect competition.[34] Bribery by business owners may also distort competition.[35]

E. Conclusion

The *Bundestag* should use the international requirements not yet implemented as a starting point for a thorough reform of Germany's anti-corruption criminal law. Instead of proceeding with the piecemeal approach of implementing only minimum requirements by means of auxiliary laws, it should integrate the *IntBestG* and the *EUBestG* into the *StGB*.[36] Moreover, it should harmonize criminal offences for active and passive bribery involving foreign public officials and officials of International Organizations. The scope of theses offences no longer should be restricted to international business transactions.[37] When improving the criminal offence of bribery involving members of domestic public assemblies, the *Bundestag* may use Art. 2 Sect. 2 *IntBestG* as guidance.[38] However, the parliamentarians will have to decide on their own account in this case.[39] Hence, the ratification and implementation of international anti-corruption instruments signed by Germany up to seven years ago might be further delayed.[40]

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[33] *See* Art. 1 EU Framework Decision, and Explanatory Report on the Criminal Law Convention, para. 55, available at http://conventions.coe.int/Treaty/en/Reports/Html/191.htm.

[34] *See* Wolfgang Winkelbauer, *Ketzerische Gedanken zum Tatbestand der Angestelltenbestechlichkeit (§ 299 Abs. 1 StGB), in* FESTSCHRIFT FÜR ULRICH WEBER, 385, 386 (Bernd Heinrich et al., eds., 2004), TRÖNDLE/FISCHER, *supra* note 14, at § 299, para. 2.

[35] *See* Vogel, *supra* note 22, at 405; TRÖNDLE/FISCHER, *supra* note 14, at § 299, para. 10a.

[36] *See* Sanchez-Hermosilla, *supra* note 4, at 77; Möhrenschlager, *supra* note 3, at 25.

[37] *See* Sanchez-Hermosilla, *supra* note 4, at 77.

[38] *See* Möhrenschlager, *supra* note 32, at 231-232. For further suggestions, *see* van Aaken, *supra* note 25, at 430.

[39] See Hans Herbert von Arnim/Regina Heiny/Stefan Ittner, *Korruption. Begriff, Bekämpfungs- und Forschungslücken*, GRIP DISCUSSION PAPER No. 33, 33-34 (2006), available at http://www.foev-speyer.de/publikationen/pubdb.asp?reihen_id=3.

[40] The resistance of members of the *Bundestag* against the inclusion of parliamentarians into the UN Convention's definition of "public official" was documented by Möhrenschlager, *supra* note 32, at 229-230.