DEVELOPMENTS

Modernization of the German Anti-Corruption Criminal Law: The Next Steps

By Sebastian Wolf[*]

> "Despite many successes in the anti-corruption movement, […] it must never be forgotten that both in political life and in the economic sphere there are powerful factors prompting and encouraging corrupt practices."[1]

A. Introduction

Shortly after the publication of our overview of necessary amendments to the German anti-corruption criminal law in the light of requirements of international anti-corruption instruments,[2] the German Federal Ministry of Justice issued a *Referentenentwurf* (first governmental draft) of a *Zweites Gesetz zur Bekämpfung der Korruption* (Second Anti-Corruption Act).[3] After several years of legislative inactivity, the new law shall implement binding international anti-corruption provisions of the Council of Europe Criminal Law Convention on Corruption, the Additional Protocol to the Criminal Law Convention on Corruption, the EU Framework Decision on Combating Corruption in the Private Sector, and the UN Convention against Corruption.[4] This short comment firstly compares the present

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[1] Terry Davis, Secretary General of the Council of Europe, 31st Group of States Against Corruption Plenary (December 6, 2006).

[2] Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions*, 7 GERMAN LAW JOURNAL 785 (2006).

[3] Bundesministerium der Justiz (Federal Ministry of Justice), *Entwurf eines Zweiten Gesetzes zur Bekämpfung der Korruption* (Second Anti-Corruption Act), Sept. 19, 2006 (on file with the author).

[4] *See* Wolf, *supra* note 2, at 790-792 for references and requirements resulting from these international instruments.

law to the draft and then provides a critical analysis. The last section will deal with corruption involving members of parliament, a subject not covered by the draft.

B. Present Anti-corruption Criminal Law and the Draft's Suggested Modifications – A Short Overview

German criminal law currently deals with bribery involving public officials in the following way:[5]

[see figure on next page]

[5] An English translation of the *Strafgesetzbuch* (*StGB* - Penal Code) is available at http://www.iuscomp.org/gla. In the following table, *EUBestG* means *EU-Bestechungsgesetz* (EU-Anti-Corruption Act), *IntBestG* stands for *Gesetz zur Bekämpfung Internationaler Bestechung* (Act Against International Corruption), and *IStGHGG* means *Gesetz über die Gleichstellung der Richter und Bediensteten des Internationalen Strafgerichtshofes* (Act for Equalization of Judges and Officials of the International Criminal Court). *See* Wolf, *supra* note 2, at 786-787 for references.

	German public officials	*Public officials of other EU Member States*	*Other foreign officials*	*Officials of the EU institutions*	*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 Sect. 332 *StGB*	–	Art. 2 Sect. 2 No. 2 *IStGHGG* plus Sect. 332 *StGB*
Passive bribery for past action (breach of duties)	Sect. 332 *StGB*	–	–	–	–	–
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*[6]	Art. 2 Sect. 1 I No. 2b) *EUBestG* plus Sect. 334 *StGB*	Art. 2 Sect. 1 No. 2c) *IntBestG*[6]	Art. 2 Sect. 2 No. 2 *IStGHGG* plus Sect. 334 *StGB*
Active bribery for past action (breach of duties)	Sect. 334 *StGB*	–	–	–	–	–

[6] Plus Sect. 334 Strafgesetzbuch [StGB] (Penal Code), restricted to bribery in international business transactions.

The most important modification of the present law suggested by the Federal Ministry of Justice's draft is the introduction of a new Sect. 335a *Strafgesetzbuch* (StGB – German Penal Code) on "*Ausländische und internationale Bedienstete*" (Foreign and international officials). Moreover, Sect. 332 and 334 StGB shall also apply to *Europäische Amtsträger* (Officials of the EU institutions). The governmental proposals can be summarized as follows:

	German public officials	*Foreign and international officials*	*Officials of the EU institutions*	*Officials of the International Criminal Court*
Acceptance of advantages for future action (no breach of duties)	Sect. 331 *StGB*	–	–	Sect. 335a II No. 2 *StGB* 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*	Sect. 335a I No. 2a and b) *StGB* plus Sect. 332 *StGB*	Sect. 332 *StGB*	Sect. 335a I No. 2b) *StGB* plus Sect. 332 *StGB*
Passive bribery for past action (breach of duties)	Sect. 332 *StGB*	–	Sect. 332 *StGB*	–
Giving of advantages for future action (no breach of duties)	Sect. 333 *StGB*	–	–	Sect. 335a II No. 2 *StGB* 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*	Sect. 335a I No. 2a and b) *StGB* plus Sect. 334 *StGB*	Sect. 334 *StGB*	Sect. 335a I No. 2b) *StGB* plus Sect. 334 *StGB*
Active bribery for past action (breach of duties)	Sect. 334 *StGB*	–	Sect. 334 *StGB*	–

As to corruption in the private sector, the present law only applies to active and passive bribery that distorts or may distort business competition. The Federal

Ministry of Justice's draft extends Sect. 299 StGB to corrupt practices that involve a breach of duties beyond business competition.

C. Critical Analysis of the Draft

In the past, the German parliament mostly implemented criminal law requirements of international anti-corruption instruments by means of *Nebengesetzen* (auxiliary laws). This approach of bypassing the StGB has been criticized many times before.[7] The draft suggests to include the central provisions of the *EU-Bestechungsgesetz* (EUBestG – EU-Anti-Corruption Act), the *Gesetz zur Bekämpfung internationaler Bestechung* (IntBestG – Act Against International Corruption), and 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) into the StGB to make the whole anti-corruption criminal legislation more accessible.[8] This is certainly a good proposal. The EUBestG would be reduced to a mere approval of the First Protocol to the Convention on the Protection of the European Communities' Financial Interests, and the IStGHGG could be repealed.

On the other hand, it is not convincing that Art. 2 Sect. 2 IntBestG on active bribery involving foreign and international parliamentarians shall not be altered. The governmental draft does not deal with corruption involving members of parliament since the *Bundestag* (Federal Parliament) is working on a specific draft,[9] but a mere inclusion of the unaltered provision into either Sect. 335a StGB on foreign and international officials or Sect. 108e StGB on members of parliament would make it much more accessible. It does not seem to make sense that the Federal Ministry of Justice excluded this provision from its strategy to make the anti-corruption legislation more accessible, especially since it is not foreseeable when the *Bundestag* will finally come up with its draft. Moreover, integrating Art. 2 Sect. 2 IntBestG as soon as possible in the StGB would make it even more obvious that current anti-bribery provisions dealing with German parliamentarians are much weaker than those concerning members of foreign assemblies and assemblies of international organizations. The latter rules do not confine the criminal offense to buying or

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[7] *See* Fernando Sanchez-Hermosilla, *Rechtpolitik zur Korruptionsbekämpfung*, 57 KRIMINALISTIK 74, 77 (2003), *and* MANFRED MÖHRENSCHLAGER, *Die Bekämpfung der Korruption auf internationaler Ebene, in* KORRUPTION IN BRASILIEN UND DEUTSCHLAND 8, 25 (Wolf Paul ed., 2002).

[8] *See* Bundesministerium der Justiz, *supra* note 3, at 16.

[9] *See* Bundesministerium der Justiz, *supra* note 3, at 14-15, and *infra* Part D.

selling a vote.[10] The Federal Ministry of Justice's approach of not touching Art. 2 Sect. 2 IntBestG also means that the criminal offense of bribery involving foreign and international parliamentarians is likely to stay restricted to corruption in international business transactions, whereas the draft suggests to abolish this restriction with regard to foreign and international officials.

There are currently four groups of officials to which different anti-corruption criminal provisions apply: (1) German public officials, (2) public officials of other EU member states and officials of the EU institutions, (3) officials of the International Criminal Court, and (4) other foreign and international officials.[11] In the light of these rather unsystematic regulatory differences, scholars have suggested to harmonize the separate anti-corruption criminal offenses.[12] The governmental draft rightly abolishes the differentiation between officials of EU member states and other foreign officials. There shall be uniform rules on bribery involving foreign and international officials, and the restriction of the criminal offense to international business transactions shall be eliminated. It is also worthy of mention that with regard to passive bribery involving foreign and international officials, the draft goes beyond the international minimum requirements. In the past, the *Bundestag* mostly confined its implementation legislation to the minimum requirements of the respective international anti-corruption instruments.

The draft rightly equates officials of the EU institutions with German public officials regarding active and passive bribery (Sect. 332 and 334 StGB). This means an extension of the present legislation concerning European officials since the accepting or giving of advantages for a past breach of duties is currently not penalized. Once again, the draft goes beyond the international minimum requirements. Nevertheless, compared to the provisions on officials of the International Criminal Court, these improvements seem suboptimal. With regard to officials of the ICC, the present law even penalizes acceptance or giving of advantages for future action without a breach of duties. The Federal Ministry of Justice justified its proposal to slightly extend the provisions concerning European officials by highlighting Germany's advanced integration into the EU.[13] But the country's integration into the EU is obviously much deeper than into the slowly

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[10] This has been criticized many times before: *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), *and* Hans Herbert von Arnim, *Der gekaufte Abgeordnete – Nebeneinkünfte und Korruptionsproblematik*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 249, 252 (2006).

[11] *See supra* Part B, Table 1.

[12] *See* Sanchez-Hermosilla, *supra* note 7, at 77, *and* Wolf, *supra* note 2, at 792.

[13] *See* Bundesministerium der Justiz, *supra* note 3, at 30.

emerging international criminal law regime.[14] Thus, despite the above mentioned improvements, the draft does not reduce the number of groups of officials to which different anti-corruption criminal provisions apply: There still shall be four groups, albeit differently defined.[15]

The current criminal offense of corruption in the private sector (Sect. 299 StGB) primarily protects free business competition.[16] However, a comparative view shows that most states prefer to protect individual companies by focussing on a breach of duties within a principal-agent relationship.[17] The draft rightly suggests to extend the present German law to corrupt practices that involve a breach of duties by employees beyond business competition (new Sect. 299 I No. 2 and II No. 2 StGB). Unfortunately, the draft does not extend the criminal offense to business owners. Business owners are principals and therefore cannot commit a breach of duties, but bribery involving business owners may distort competition.[18]

D. Corruption Involving Members of Parliament

The criminal offense of bribery involving members of parliament (Sect. 108e StGB) is currently limited to buying or selling a vote in the plenary or the committees. This provision does not meet international requirements any more[19] and has been criticized as symbolic legislation.[20] In its draft, the Federal Ministry of Justice does not deal with corruption involving German, foreign, and international parliamentarians since the *Bundestag* intends to develop a specific bill.[21] However, the members of parliament have to decide on their own account in this case and did

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[14] *See* Bernd Schünemann, *Das Strafrecht im Zeichen der Globalisierung*, 150 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 299 (2003) for a harsh critique of the present criminal law regime.

[15] *See supra* Part B, Table 2.

[16] *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), *and* HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH, § 299, para. 2 (2006).

[17] *See* JOACHIM VOGEL, *Wirtschaftskorruption und Strafrecht – ein Beitrag zu Regelungsmodellen im Wirtschaftsstrafrecht, in* FESTSCHRIFT FÜR ULRICH WEBER 395, 398 (Bernd Heinrich et al., eds., 2004).

[18] *See* TRÖNDLE & FISCHER, *supra* note 16, at § 299, para. 10a, *and* Vogel, *supra* note 17, at 405.

[19] *See* van Aaken, *supra* note 10, at 429.

[20] *See* von Arnim, *supra* note 10, at 252.

[21] *See* Joachim Stünker, *Speech to the Bundestag on September 5, 2006*, MINUTES OF PLENARY PROCEEDINGS No. 16/45, at 4451.

not show much willingness to tackle the problem in the past.[22] Thus, even if the *Bundestag* quickly adopted the governmental draft, the ratification and implementation of anti-corruption instruments signed by Germany up to seven years ago might be further delayed.

The *Bundesregierung* (Federal Government) should be more courageous and use its agenda-setter role to put the *Bundestag* under pressure by including in its draft provisions to implement international requirements regarding corruption involving members of parliament. In their vaguely announced bill, German parliamentarians are likely not to go beyond the international minimum requirements anyway. This makes it even easier for the Federal Ministry of Justice to supplement its draft, e. g. by taking Art. 2 Sect. 2 IntBestG as a model.[23] One should remember that the IntBestG, which introduced, *inter alia*, the criminal offense of active bribery of German parliamentarians as members of assemblies of international organizations, was drafted by the Federal Government. It was quickly adopted by the *Bundestag* in 1998.

[22] *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.

[23] *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).