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**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on Germany on Incriminations (ETS 173 and 191, GPC 2)**

(Theme I)

Adopted by GRECO  
at its 45<sup>th</sup> Plenary Meeting  
(Strasbourg, 30 November – 4 December 2009)

## **I. INTRODUCTION**

1. Germany joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 12E Final) in respect of Germany at its 8<sup>th</sup> Plenary Meeting (8 March 2002) and the Second Round Evaluation Report (Greco Eval II Rep (2004) 10E) at its 24<sup>th</sup> Plenary Meeting (1 July 2005). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption) of Resolution (97)
  - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team (hereafter referred to as the "GET") carried out an on-site visit to Germany from 8 to 12 June 2009. The GET for Theme I (26-27 January) was composed of Mr Christian Coquoz, Judge (Switzerland) and Mr Martin Kreutner, Head of the Bureau of Internal Affairs, Ministry of the Interior (Austria). The GET was supported by Mr Christophe Speckbacher from GRECO's Secretariat. Prior to the visit, the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2008) 3E, Theme I), as well as copies of relevant legislation, court decisions and other information.
4. The GET met with officials from the following governmental and non governmental institutions or organisations: Federal Ministry of Justice, public prosecutors, judges, Federal Ministry of the Interior, Federal and State Criminal Police Office (*Bundeskriminalamt* and *Landeskriminalamt*), criminal defence lawyers, university professors, Transparency International Germany.
5. The present report on Theme I of GRECO's Third Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the German authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Germany in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding – is set out in Greco Eval III Rep (2009) 3E, Theme II.

## **II. INCRIMINATIONS**

### **Description of the situation**

7. Germany signed the Criminal Law Convention on Corruption (ETS 173) on 27 January 1999 and its Additional Protocol (ETS 191) on 15 May 2003. These instruments have not been ratified yet.

8. The relevant legal framework in Germany is provided by the Criminal Code (CC), as well as separate pieces of legislation (which refer to the CC) when it comes to corruption involving soldiers or with a foreign/international dimension: a) Military Penal Law (*Wehrstrafgesetz – WStG*); b) NATO Troop Protection Act (*NATO-Truppenschutzgesetz*); c) Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung – IntBestG*) of 1998; d) EU bribery Act (*EU-Bestechungsgesetz - EUBestG* of 1998).

### **Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)**

#### **Definition of the offence**

9. Bribery of German public officials is regulated in section 331 and following (et seqq.) of the Criminal Code (CC), which incriminate two forms of corruption, namely bribery as such, but also a looser form of criminal behaviour. Passive bribery is criminalised in sections 331 and 332 CC, and active bribery in sections 333 and 334 CC. Sections 331 and 333 CC each encompass offences where the benefit is awarded for (lawful) official activity, whilst sections 332 and 334 CC encompass offences where the advantage is awarded in return for an official act which is in breach of duty or which is at the discretion of the public official. Section 335 CC contains a regulation on the assessment of punishment for especially serious cases of active and passive bribery. Section 336 CC contains a regulation spelling out clearly that a failure to act is equivalent to performing an official act and, thus, also punishable. Section 337 CC contains a statutory interpretation regulation for the remuneration of arbitrators. The applicability of the provisions on extended forfeiture is regulated in section 338 CC for serious cases of active and passive bribery. The offences are worded as follows:

#### **German Criminal Code, Special Part, Chapter Thirty – Crimes in Public Office**

##### **Section 331 Acceptance of a Benefit**

- (1) A public official or a person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of a duty, shall be punished with imprisonment for not more than three years or a fine.
- (2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed, or would in the future perform a judicial act, shall be punished with imprisonment for not more than five years or a fine. An attempt shall be punishable.
- (3) The act shall not be punishable under paragraph (1), if the perpetrator allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorizes the acceptance, or the perpetrator promptly makes a report to it and it authorizes the acceptance.

##### **Section 332 Taking a Bribe**

- (1) A public official or person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform an official act, and thereby violated or would violate his official duties, shall be punished with imprisonment from six months to five years. In less serious cases the punishment shall be imprisonment for not more than three years or a fine. An attempt shall be punishable.
- (2) A judge or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform a judicial act, and thereby violates or would violate his judicial duties, shall be punished with imprisonment from one year to ten years. In less serious cases the punishment shall be imprisonment from six months to five years.
- (3) If the perpetrator demands, allows himself to be promised or accepts a benefit in return for a future act, then paragraphs (1) and (2) shall already be applicable if he has indicated to the other his willingness to:
1. violate his duties by the act; or
  2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

**Section 333 Granting a Benefit**

(1) Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations or a soldier in the Federal Armed Forces, for that person or a third person, for the discharge of a duty, shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever offers promises or grants a benefit to a judge or an arbitrator, for that person or a third person, in return for the fact that he performed or would in the future perform a judicial act, shall be punished with imprisonment for not more than five years or a fine.

(3) The act shall not be punishable under paragraph (1), if the competent public authority, within the scope of its powers, either previously authorizes the acceptance of the benefit by the recipient or authorizes it upon prompt report by the recipient.

**Section 334 Offering a Bribe**

(1) Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces, for that person or a third person, in return for the fact that he performed or would in the future perform an official act and thereby violates or would violate his official duties, shall be punished with imprisonment from three months to five years. In less serious cases the punishment shall be imprisonment for not more than two years or a fine.

(2) Whoever offers, promises or grants a benefit to a judge or an arbitrator, for that person or a third person, in return for the fact that he:

1. performed a judicial act and thereby violated his judicial duties; or  
2. would in the future perform a judicial act and would thereby violate his judicial duties,  
shall be punished in cases under number 1 with imprisonment from three months to five years, in cases under number 2 with imprisonment from six months to five years. An attempt shall be punishable.

(3) If the perpetrator offers, promises or grants the benefit in return for a future act, then paragraphs (1) and (2) shall already be applicable if he attempts to induce the other to:

1. violate his duties by the act; or  
2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

**Section 335 Especially Serious Cases of Taking or Offering Bribes**

(1) In especially serious cases:

1. an act under:

a) Section 332 paragraph (1), sent. 1, also in conjunction with paragraph (3); and

b) Section 334 paragraph (1), sent. 1, and paragraph (2), respectively also in conjunction with paragraph (3), shall be punished with imprisonment from one year to ten years; and

2. an act under Section 332 paragraph (2), also in conjunction with paragraph (3), shall be punished with imprisonment for not less than two years.

(2) An especially serious case within the meaning of paragraph (1) exists, as a rule, when:

1. the act relates to a benefit of great magnitude;

2. the perpetrator continuously accepts benefits which he demanded in return for the fact that he would perform an official act in the future; or

3. the perpetrator acts on a commercial basis or as a member of a gang which has combined for the continued commission of such acts.

**Section 336 Failure to Perform an Official Act**

The failure to act shall be equivalent to the performance of an official act or a judicial act within the meaning of Sections 331 to 335.

**Section 337 Compensation of Arbitrators**

The compensation of an arbitrator shall only be a benefit within the meaning of Sections 331 to 335, if the arbitrator demands it, allows it to be promised him or accepts it from a party behind the back of the other or if a party offers, promises or grants it to him behind the back of the other.

**Section 338 Property Fine and Extended Forfeiture**

(1) In cases under Section 332, also in conjunction with Sections 336 and 337, Section 73d shall be applicable if the perpetrator acted on a commercial basis or as a member of a gang which has combined for the continued commission of such acts.

(2) In cases under Section 334, also in conjunction with Sections 336 and 337, Sections 43a, 73d shall be applicable if the perpetrator acts as a member of a gang which has combined for the continued commission of such acts. Section 73d shall also be applicable if the perpetrator acted on a commercial basis.

**Military Penal Law, Second Part – Military Offences**  
**Chapter Four – Offences against Other Military Duties**  
**Section 48 Violation of other official duties**

- (1) For the application of the provisions of the Criminal Code regarding (...) acceptance of a benefit and taking a bribe (sections 331, 332, 335 paragraph 1 No. 1 (a), as well as paragraph 2 and section 336),  
(...) officers and non-commissioned officers shall be treated as equal to public officials, and their armed service shall be treated as equal to an office.
- (2) For the application of the provisions of the Criminal Code regarding (...) taking a bribe (sections 332, 335 paragraph 1 No. 1 (a), paragraph 2 and section 336),  
(...) other ranks shall also be treated as equal to public officials and their armed service shall be treated as equal to an office.

Elements/concepts of the offence

*“Domestic public official”*

10. The terms “public officials”, “individual with a special obligation for the public service” and “judge” are used in sections 331 et seqq. CC, to describe the person receiving the benefit or bribe. These terms are given a statutory definition in section 11 paragraph 1 Nos. 2 to 4 CC.

**German Criminal Code, General Part, Chapter One – The Criminal Law, Title Two Terminology**  
**Section 11 Terms relating to individuals and Subject Matter**

- (1) Within the meaning of this law:  
(...)
2. a public official is whoever, under German law:
- (a) is a civil servant or judge;
  - (b) otherwise has an official relationship with public law functions or;
  - (c) has been appointed to a public authority or other agency or has been commissioned to perform duties of public administration without prejudice to the organizational form chosen to fulfil such duties;
3. a judge is, whoever under German law is a professional or honorary judge;
4. a person with special public service obligations is whoever, without being a public official, is employed by, or is active for:
- (a) a public authority or other agency, which performs duties of public administration; or
  - (b) an association or other union, business or enterprise, which carries out duties of public administration for a public authority or other agency,  
and is formally obligated by law to fulfil duties in a conscientious manner;
- (...)

11. Since soldiers do not fall under the definition of “public official”, these are deemed in section 48 of the Military Penal Law to be equal to public officials for the application of sections 331 and 332 CC; in sections 333 and 334 CC, soldiers are explicitly mentioned.
12. Following the definition of section 11 paragraph 1 No. 2, the term “public official” covers all those who, under German law (those who are subject to German law since they work in/for Germany as civil servants etc., whether or not they have German nationality) are employed as civil servants or judges, those who are otherwise in an official duty-relationship under public law functions, and those who have been appointed to a public authority or other agency or have been commissioned to perform duties of public administration without prejudice to the organisational form chosen to fulfil such duties. The German authorities take the view that this covers all individuals who are described as “officials”, “public officers” and “judges” within the meaning of Article 1 (a) of the Convention. Ministers in Germany are not civil servants, and hence do not fall under section 11 paragraph 1 No. 2 (a) CC; they are however in an official relationship under public law, and are hence public officials in accordance with section 11 paragraph 1 No. 2 (b) CC.

13. Members of parliaments and communal mandate holders are not, as a rule, public officials within the meaning of section 11 paragraph 1 No. 2 CC unless they exceptionally carry out tasks of public administration<sup>1</sup>. Corruption offences by and towards mandate holders are hence not punishable in accordance with sections 331 ff CC (the purchase and sale of a vote in elections and ballots is however punishable in accordance with section 108e CC, see underneath, paragraph 37-43).
14. Prosecutors (Article 1 (b) of the Convention) in Germany do not fall under the term “judge”; but they are civil servants, and hence public officials within the meaning of section 11 paragraph 1 No. 2 (a) CC.
15. In addition to civil servants and judges, as well as to other individuals in an official relationship under public law, individuals in Germany appointed to carry out tasks of the public administration in an authority or in another agency or on its behalf also belong to public officials within the meaning as defined under criminal law (section 11 paragraph 1 No. 2 (c) CC). These include employees in the public service who carry out public tasks, but who are not civil servants within the meaning under status law. Furthermore, it covers individuals who carry out public tasks in agencies similar to authorities. These agencies also include facilities organised under private law which are subject to such state management in carrying out administrative tasks that in an overall evaluation of the characteristics typifying them they nonetheless appear to be an extended arm of the State (cf. at court decisions / case law)<sup>2</sup> (for instance the GTZ – an international cooperation enterprise established as a limited liability company and promoting sustainable development, or a communal legal entity established as a limited liability company and distributing heating energy).
16. Furthermore, the offences in sections 331 CC also include individuals who are not public officials, but who are under a special public service obligation (section 11 paragraph 1 No. 4 CC). An obligation applies in particular to individuals who work in authorities, but do not carry out public tasks (e.g. employed cleaning staff), and to individuals who contribute as external contractors for an authority in carrying out public tasks (e.g. in preparing external expert reports and as advisors).
17. Soldiers are not public officials within the meaning of section 11 paragraph 1 No. 2 CC. However, they are deemed in section 48 of the Military Penal Law to be equal to public officials for the offences of passive bribery, and as regards active bribery are listed along with public officials as viable persons accepting the advantage. The German authorities explained that it was for historical reasons that section 48 paragraph 2 of the Military Penal Law does not also provide for an incrimination of acceptance of a benefit (pursuant to section 331 CC) for soldiers of ordinary rank, thus incriminating acceptance of a benefit only for officers and non-commissioned officers. They also confirmed that the expression “soldiers” within the meaning of sections 333 and 334 of the CC for active bribery refers to soldiers whatever their rank (officers, non-commissioned officers and all other ranks).

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<sup>1</sup> Federal Court of Justice, judgment of 9 May 2006 – 5 StR 453/05; and judgment of 12 July 2007 – 2 StR 557/05: “Municipal mandate holders are not public officials if they are not entrusted with concrete administrative tasks over and above the exercise of their free mandate in the municipal assembly and the concomitant tasks.”

<sup>2</sup> Federal Court of Justice, judgment of 19 June 2008 – 3 StR 490/07: “Another agency [within the meaning of section 11 paragraph 1 No. 2 (c)] is understood to be an institution similar to an authority which, independently of its organisational form, is entitled to contribute towards the enforcement of statutes without being an authority within the meaning of administrative law. If a public facility is organised in the shape of a legal individual under private law, the characteristics must apply to it which justify it having status equal to an authority; it must ... in an overall view “appear as an extended arm of the State”.”

*“Promising, offering or giving” (active bribery)*

18. German law contains the elements “offers, promises or grants” (*anbieten, versprechen, gewähren*) as a description of the act in sections 333 and 334 CC. According to the on-site discussions and legal theory, the element of “giving” can be covered under the German concepts of “offering” or “granting”. According to German theory and practice, the offence is completed as soon as the offender has formulated the proposal and the latter has reached the potential bribe-taker, no matter what his/her reaction is. Attempt is prosecutable under section 334 paragraphs 1 and 2 CC (explicitly); there is no similar provision under section 333. The GET was advised on site that the concept of attempt is meant to cover those cases where an offer of the bribe-giver has been formalised and issued (e.g. a written message was sent) but has not necessarily reached the potential bribe-taker. The offence is already deemed to have been committed if the action (demanding, allowing him/herself to be promised or accepting, as well as offering, promising or granting an advantage) relates to an official activity, official act or judicial act.

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

19. German law contains the elements “demands, allows himself to be promised or accepts” (*fordern, sich versprechen lassen, annehmen*) as a description of the act in sections 331 and 332 CC. The element “allows himself to be promised” encompasses the acceptance of offers and promises. According to the on-site discussions and legal theory, the element of receiving is covered by the German concept of accepting (which is not – strictly speaking – related to an offer, as in the Convention, but to the advantage itself). As indicated above, the offence is - in principle – already completed if the offender has formulated the proposal and the latter has reached the potential bribe-taker, no matter what his/her reaction is<sup>3</sup> and for the same reasons as above, attempt is prosecutable under section 331 paragraph 2 (explicitly) and 332 paragraph 2 CC (implicitly since this is a serious criminal offence for which the general provisions on attempt are applicable) where the offence is committed by a judge or an arbitrator. In connection to this, the GET noted that attempt is punishable in all cases under section 332 CC on passive bribery, as well as section 331 paragraph 2 which applies to the taking of a benefit by judges and arbitrators. Attempt is not criminalised as regards the taking of a benefit by the various other categories of officials under section 331 paragraph 1.

*“Any undue advantage”*

20. German law contains the element “advantage” (or benefit) in sections 331 et seqq. CC. This covers material and immaterial advantages. The German legislature deliberately selected the element “advantage”, and not “remuneration” or “asset”, in order to make it clear that immaterial advantages are also covered. The reasoning to the Draft Amending the Criminal Code of 10 May 1973, Federal Parliament printed paper 7/550, p. 271 reads as follows: “The draft holds with the valid law to the term “advantage” in order to cover not only material, but also immaterial improvements in the situation of the recipient.” The Federal Court of Justice has already ruled several times that the element “advantage” also encompasses immaterial advantages<sup>4</sup>, including

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<sup>3</sup> Federal Court of Justice, judgment of 11 May 2006 – 3 StR 389/05: “Demanding within the meaning of the bribery offences is not only the explicit, but also the tacit demanding of an advantage in return for a service activity. In the offence variant of demanding an advantage, the taking of a bribe is already completed if the recipient of the declaration becomes aware of the public official’s demand.”

<sup>4</sup> - Federal Court of Justice, judgment of 23 May 2002 – 1 StR 372/01: “An advantage within the meaning ... of the offence is to be understood as any benefit to which the public official has no right and which in objective terms improves his/her economic, legal or even only personal situation ..., an immaterial improvement of the situation being sufficient.”

– as the German authorities confirmed – advantages of a symbolic nature (e.g. honorific titles and distinctions) as well as those which have an important value for the beneficiary him/herself (e.g. collector items).

21. Sections 331 et seqq. CC do not contain a restriction according to which only unfair or inappropriate advantages would be covered. There is no provision for a value threshold. Low-value advantages are also covered by the offences.
22. Regarding the offences of accepting a benefit (section 331 CC) and granting a benefit (section 333 CC), paragraph 3 in each section provides that the offence is not punishable if the competent public authority, within the scope of its powers, either previously authorises the acceptance or the perpetrator promptly makes a report to it and it authorises the acceptance. The German authorities stressed that this approach and the principle of authorisation is in line with the provisions on civil servants and the terms of collective bargaining law on the acceptance of gifts and rewards (see also the Second Evaluation Round report). The exemption regulation is a necessary correction with regard to the broad definition of the offences. If the public official has however demanded a benefit, its acceptance may not be authorised. What is more, it is not possible to authorise the acceptance or granting of a benefit advantage by and for a judge or arbitrator.

*“Directly or indirectly”*

23. The wording of the active and passive bribery offences involving a public official does not explicitly refer to indirect bribery, i.e. those cases where an intermediary is involved, but granting an advantage by an intermediary is a sufficient element for the offence to qualify as active bribery according to the Federal Court of Justice<sup>5</sup> and the on-site discussions with practitioners. According to the German authorities, it is accepted that this jurisprudential evolution applies equally in respect of all passive and active corruption offences (section 331 to 335 CC).

*“For himself or herself or for anyone else”*

24. The element of third party beneficiary (i.e. where the bribe/advantage/benefit goes to a third person) was inserted in the offences by the Act on Combating Corruption (*Gesetz zur Bekämpfung der Korruption*) of 13 August 1997 (Federal Law Gazette [*Bundesgesetzblatt*] Part I page 2038). Therefore, the offences in sections 331 et seqq. CC all encompass granting an advantage to a third party – see the expression “for himself or for a third person” (sections 331 and 332 CC) and “for that person or a third person” (sections 333 and 334 CC). Not only advantages are covered which for instance are granted to the spouse or to other close individuals. Advantages to third persons may also lie in advantages for groups of individuals or legal entities (clubs, enterprises, associations and parties), as well as advantages for the employing corporation of the public official, including sponsoring services and donations<sup>6</sup>.

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- Federal Court of Justice, judgment of 24 April 1985, 3 StR 66/85: “An advantage within the meaning of sections 331 and 332 of the Criminal Code can be deemed to be not only an economic advantage, but also an advantage which is immaterial in nature if it has objectively-measurable content and indeed places the public official in a better position in some way.”

- Federal Court of Justice, judgment of 9 September 1988, 2 StR 352/88: “This also includes granting sexual intercourse and tolerating sexual acts.”

<sup>5</sup> Federal Court of Justice, order of 22 October 1997 – 5 StR 223/97: “In granting an advantage in accordance with section 333 of the Criminal Code, it is not necessary that the offender contacts the public official directly; it may also be granted via an intermediary ...”

<sup>6</sup> - Federal Court of Justice, judgment of 11 May 2006 – 3 StR 389/05: “If the accused had demanded ... the payment to be effected to ... an ... association ..., this would certainly constitute demanding an advantage for a third person.”

*“To act or refrain from acting in the exercise of his or her functions”*

25. Accepting and granting advantages is criminalised in accordance with German law if it relates to a (possible) action in return on the part of the public official (“illicit agreement”). Section 331 paragraph 1 and section 333 paragraph 1 CC relate to a (lawful) “official activity” on the part of the public official. The action does not need to relate to a specific official act. The term “official activity”, rather, encompasses official acts of a public official in general. An action in return for accepting an advantage by or granting an advantage to judges (section 331 paragraph 2 and section 333 paragraph 2 CC) is a judicial act (i.e. court decisions but also any other judicial acts as well); where bribery concerns other acts, paragraph 1 applies in any case.
26. Sections 332 and 334 CC refer to the execution of an “official act” or “judicial act” in breach of duty or in the discretion of the public official or judge, which is a specific requirement of these two bribery provisions.
27. Official acts and official activity include all acts belonging to the official duties of the public official and which are carried out by him/her in his/her official capacity (cf. on this court decisions / case law)<sup>7</sup>. They do not encompass offences relating to private acts on the part of the public official. According to case law, a conduct in breach of regulations or a breach of instructions does not make the official act become a private act. Ancillary employment of the public official is not an official activity. However, the granting of ancillary employment may constitute an advantage (or benefit) within the meaning of sections 331 et seqq. CC, and may be punishable if such employment is granted in return for the official activity of the public official<sup>8</sup>.
28. As indicated earlier (see paragraphs 18-19), in all cases falling under sections 331 et seqq. CC, it is not necessary for the public official or judge to actually carry out the official activity, official act or judicial act. The offence is already deemed to have been committed if the action (demanding, allowing him/herself to be promised or accepting, as well as offering, promising or granting a benefit) relates to an official activity, official act or judicial act. Sections 331 et seqq. CC cover cases in which the acceptance or granting of the benefit takes place prior to the intended official act, as well as those in which the acceptance or granting of the advantage follows the official act

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- Cologne Higher Regional Court, order of 21 September 2001 – 2 Ws 170/01: “With the offence characteristic of an advantage, it is not possible to distinguish between benefit to the State and private benefit of granting. Such a separation is not viable, and would leave it to the public officials to determine what is beneficial to the State.”

- Celle Higher Regional Court, order of 28 September 2007 – 2 Ws 261/07: “Material and monetary benefits to a school in the context of a school photo activity give rise to sufficient suspicion of granting an advantage and of an illicit agreement within the meaning of sections 331 et seqq. of the Criminal Code.”

<sup>7</sup> - Federal Court of Justice, judgment of 10 March 1983, 4 StR 375/82: “Certainly there is no doubt that an official act has been effected if the act belongs to the official duties of the public official and is carried out by him/her in his/her official capacity.”

- Federal Court of Justice, judgment of 19 February 2003, 2 StR 371/02: “Any activity on the part of a soldier of the Federal Armed Forces constitutes service which belongs to his general task area or is directly connected therewith, in accordance with objective aspects externally appears as an official act and is borne by the will to carry out official tasks.”

- Federal Court of Justice, judgment of 14 October 2008 – 1 StR 260/08: “Official activity is (...) to be considered in principle any official activity. This does not yet even have to have been given an approximate concrete form in accordance with the ideas of those concerned; it is hence sufficient if the will of the giver of the advantage is orientated towards general well-wishing related to future specialist decisions which can be activated should the opportunity arise.”

<sup>8</sup> - Federal Court of Justice, judgment of 21 June 2007 – 4 StR 69/07: “Accordingly, the existence of an illicit agreement may only be definitely denied for such private ancillary employment as is carried out for a client with whom the public official does not have, and also cannot have, such official contact. (...) It is however different if (...) official contacts exist between the grantor of the advantage and the official service which might suggest that the advantage connected with the exercise of ancillary employment entailing remuneration was agreed between the person giving the advantage and the person accepting the advantage (...) in general within the meaning of a reciprocal relationship linked with the official activity of the public official.”

(subsequent granting, reward). Section 336 CC specifies that the carrying out of an official act or of a judicial act within the meaning of sections 331 to 335 CC is considered equal to omission of the act.

*“Committed intentionally”*

29. In accordance with section 15 CC, the offences in German law only include intentional commission unless the law expressly provides punishment for negligent conduct. This is not the case of corruption offences in Germany. Hence, only intentional action is punishable. As well as “intention” (1<sup>st</sup> degree *dolus directus*) and “sure knowledge” (2<sup>nd</sup> degree *dolus directus*), the term “intentional conduct” includes the conditional intention where it is sufficient for the offender to accept the implementation of the offence as a consequence of his/her actions (*dolus eventualis*).

Sanctions

30. German Law provides for criminal sanctions and measures of different kinds and levels with respect to corruption offences. There are also administrative sanctions stemming from the civil servants’ statutes. Criminal sanctions are contained in sections 331-335 CC and foresee, alternatively, deprivation of liberty or criminal fines to be determined in accordance with the daily rates system of section 40 CC: the range is 5 to 360 daily rates and the amount of each such rate, to be determined by the judge in accordance with the personal situation of the offender, is from 1 to 30,000 € (it was 1 to 5000 € before an amendment of 29 June 2009); the amount of the fine can thus vary between 5 € and 10,800,000 €. In addition to these criminal sanctions, criminal measures may be imposed. These range from deprivation of the perpetrator’s capacity to hold office (section 358 CC) in cases of passive bribery in relation to an unlawful act and in cases of particularly serious cases of active and passive bribery to an order of prohibiting the exercise of the perpetrator’s profession (section 70 CC). Furthermore, a sentence of at least six months’ imprisonment for a corruption offence will/may give rise to the perpetrator’s loss of his rights as a civil servant according to the civil servants’ statutes in Germany.
31. As regards criminal sanctions, sections 331 et seqq. provide for the following statutory ranges of punishment:
- accepting and granting a benefit by and to public officials (section 331 paragraph 1 and section 333 paragraph 1 CC): up to three years’ imprisonment or a criminal fine (5 to 10,800,000 €);
  - accepting and granting an advantage by and to judges and arbitrators (section 331 paragraph 2 and section 333 paragraph 2 CC): up to five years’ imprisonment or a criminal fine (5 to 10,800,000 €);
  - taking a bribe by public officials (section 332 paragraph 1 CC): from six months’ up to five years’ imprisonment;
  - bribery of public officials (section 334 paragraph 1 CC): from three months’ up to five years’ imprisonment;
  - taking a bribe by judges and arbitrators (section 332 paragraph 2 CC): from one up to ten years’ imprisonment;
  - bribery of judges and arbitrators (section 334 paragraph 2 CC): a) from three months’ up to five years’ imprisonment (when granted subsequently); b) from six months’ up to five years’ imprisonment (with granting for future acts);
  - if the perpetrator commits more than one of any of the above offences, the criminal court shall impose an aggregate punishment (sections 53 paragraph 1 CC); the highest aggregate punishment in those cases is up to 15 years’ imprisonment (section 38 paragraph 2 CC).

32. In some instances, the above sanctions can be modulated both ways, depending on the circumstances of the concrete case. Section 335 foresees aggravated circumstances for particularly serious cases of bribery under sections 332 and 334 CC, i.e. where the bribe was of great magnitude, or the offence was committed repeatedly over a longer period of time, or it involved a gang or a commercial basis: the sanction is then one to ten years' imprisonment for regular officials, and a minimum of two years' imprisonment in the specific cases of bribery of judges and arbitrators (the upper limit is also increased to 15 years' according to section 38 paragraph 2 CC). Sections 332 and 334 CC also contain provisions on less serious cases which entail a lower statutory range of punishment. In cases where the act or omission sought from the public official or judge is unlawful (sections 332 and 334 CC) more serious/higher sanctions apply than in cases where the act or omission sought is lawful (sections 331 and 333 CC). For this reason, sections 331 and 333 CC do not contain provisions about less serious cases.
33. As regards criminal measures, the imposition of at least six months' imprisonment in respect of a criminal offence in accordance with sections 332 and 335 CC entitles the court, on the basis of section 358 CC, to disqualify the official from holding an office for a period of 2 to 5 years (section 45 paragraph 2 CC).

**German Criminal Code, Special Part, Chapter Thirty – Crimes in Public Office**  
**Section 358 Collateral Consequences**

Collateral to imprisonment for at least six months for a crime under Sections 332, 335, 339, 340, 343, 344, 345 paragraphs (1) and (3), 348, 352 to 353b paragraph (1), 355 and 357, the court may deprive the person of the capacity to hold public office (Section 45 paragraph (2)).

34. Section 70 CC makes possible the imposition of a prohibition to exercise an occupation in case of criminal offences the commission of which entailed abuse of the occupation or trade or a gross violation of the obligations entailed thereby.

**German Criminal Code, General Part, Chapter Three – Legal Consequences of the Act**  
**Title Six – Measures of Reform and Prevention**  
**Section 70 Order of Prohibition of Engagement in a Profession**

(1) If someone is convicted of an unlawful act, which he committed in abuse of his profession or trade or in gross violation of the duties associated therewith, or is not convicted only because his lack of capacity to be adjudged guilty has been proved or may not be excluded, then the court may prohibit him from engaging in the profession, branch of profession, occupation, trade or branch of trade, for a period of from one year to five years, if a comprehensive evaluation of the perpetrator and the act reveals a danger, that by further engagement in the profession, branch of profession, occupation, trade or branch of trade he will commit serious unlawful acts of the type indicated. The order of prohibition of engagement in a profession may be permanent if it can be expected that the statutory maximum term will not suffice to avert the danger posed by the perpetrator.

(2) If the perpetrator has been provisionally prohibited from engaging in a profession, branch of profession, occupation, trade or branch of trade (section 132a of the Code of Criminal Procedure), then the minimum term of prohibition shall be reduced by the time during which the provisional prohibition of engagement in a profession was in effect. It may, however, not be less than three months.

(3) As long as the prohibition is in effect the perpetrator may not engage in the profession, branch of profession, occupation, trade or branch of trade on behalf of another or have a person dependent on his instructions engage in it on his behalf.

(4) The prohibition of engagement in a profession takes effect when the judgment becomes final. The time of a provisional prohibition of engagement in a profession ordered because of the act shall be credited to the term of prohibition, to the extent it has run following the pronouncement of the judgment in which the factual determinations on which the measure is based could last be examined. Time during which the perpetrator is held in custody in an institution by order of a public authority shall not be credited.

35. The civil servants' statutes in Germany also provide for the (automatic) loss of a civil servant's rights (salary and pension) if the civil servant was sentenced to at least six months' imprisonment for passive bribery.

36. For comparison purposes, it should be mentioned that fraud is punished by up to five years' imprisonment or a criminal fine (section 263 paragraph 1 CC), in particularly serious cases by six months' to ten years' imprisonment (section 263 paragraph 2 CC) and in the case of offences committed as a member of a gang or on a commercial basis by imprisonment from one to ten years (section 263 paragraph 5 CC). The same statutory range of punishment applies to the criminal offence of breach of trust (section 266 CC).

#### **Bribery of members of domestic public assemblies (Article 4 of ETS 173)**

37. Section 108e CC covers offences by and towards Members of the European Parliament, as well as of a public assembly of the Federation, the *Länder*, municipalities and municipal associations in Germany. Hence, offences by and towards members of all European and German (national and regional) public assemblies are covered.

**German Criminal Code, Special Part, Chapter Four – Crimes against Constitutional Organs as well as during Elections and Ballots**

**Section 108e Bribery of Members of Parliament**

(1) Whoever undertakes to buy or sell a vote for an election or ballot in the European Parliament or in a parliament of the Federation, the Lands, municipalities or municipal associations, shall be punished with imprisonment for not more than five years or a fine.

(2) Collateral to imprisonment of at least six months for a crime pursuant to paragraph (1), the court may deprive the person of the capacity to attain public electoral rights, and the right to elect or vote in public matters.

38. In Germany, the offence of active and passive bribery of members of domestic public assemblies is restricted to selling and buying a vote in elections and ballots within the respective public assembly. No other form of active and passive bribery is criminalised with respect to members of domestic public assemblies; the provisions regarding domestic public officials (sections 331 et seqq. of the CC) are not applicable to them. Moreover, immaterial advantages and third-party beneficiaries are not covered.
39. Because of the formulation of the offence ("whoever undertakes..."), bribery under section 108e CC belongs to the category of so-called "undertaking offences" (*Unternehmensdelikte*): thus, the attempt to purchase or sell a vote is also covered by the wording of the offence. The structure of the offence in section 108e CC differs from those in sections 331 et seqq. CC.
40. Although the wording of section 108e CC misses the basic elements of the passive and active bribery, it is interpreted in the same way as sections 331 et seqq. CC. The elements "buying" and "selling" are not to be understood as elements of a legal transaction, but in vernacular terms within the meaning of giving and taking, including offering, promising and granting a benefit (bribe-giver/buyer's side), and demanding, allowing oneself to be promised and acceptance of the benefit (bribe-taker/seller's side). The replies to the questionnaire also indicate that the benefit stemming from a purchase or sale of a vote can only be a material advantage (therefore, immaterial advantages are not covered).
41. In contrast to sections 331 et seqq. CC, section 108e CC does not incriminate every situation where the beneficiary is a third party. But it is accepted that indirect advantages of the mandate holder are covered (advantages which are not granted to the mandate holder him/herself, but to a third person on the basis of an agreement with the mandate holder – for instance an

association or a party – if the mandate holder has a personal interest with regard to the recipient of the advantage, e.g. a prominent position in the association or political party)<sup>9</sup>.

42. A service in return in section 108e CC can only consist in (the purely technical) voting conduct in an election or ballot. Agreements aiming at other aspects of the exercise of the mandate are not covered.

### Sanctions

43. Bribery of members of domestic public assemblies in accordance with section 108e CC is punished by up to five years' imprisonment or a criminal fine (5 to 10,800,000 €). If the sentence pronounced is at least six months' imprisonment, the court may in addition withdraw the ability to obtain rights from public elections and remove the right to vote on public matters (section 108e paragraph 2 CC).

### **Bribery of foreign public officials (Article 5 of ETS 173)**

44. In Germany, the offences of active and passive bribery of foreign public officials are not regulated in a uniform manner.
45. The Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung*) of 10 September 1998 (based on the OECD Convention) deems foreign public officials to be equal to domestic public officials with regard to the application of the offence of active bribery (section 334 CC, as well as the complementary provisions of sections 335, 336 and 338 paragraph 2 CC) insofar as these are related to future unlawful acts in the context of international business transactions. The EU Bribery Act, adopted also on 10 September 1998 (amended last in 2004), deems public officials of other EU Member States and of the European Commission to be equal to German public officials for the application of the offences of passive bribery and active bribery (sections 332 and 334 CC, respectively, together with sections 335, 336 and - as a whole - 338 CC). The relevant provisions of these two texts are reproduced below:

#### **Act on Combating International Bribery – IntBestG (basis: OECD Convention)**

##### **Article 2: Implementing Provisions**

##### **Section 1 Equal treatment of foreign and domestic public officials in the event of acts of bribery**

For the purpose of applying section 334 of the Criminal Code, also in conjunction with sections 335, 336 and 338 paragraph 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an improper advantage in international business transactions, the following shall be treated as equal:

1. to a judge:

- a) a judge of a foreign state,
- b) a judge at an international court;

2. to any other public official:

- a) a public official of a foreign state,
- b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state,
- c) a public official and an other member of the staff of an international organisation and a person entrusted with carrying out its functions;

3. to a soldier in the Federal Armed Forces (Bundeswehr):

- a) a soldier of a foreign state,
- b) a soldier who is entrusted to exercise functions of an international organisation.

<sup>9</sup> Federal Court of Justice, judgment of 21 September 1985 - 1 StR 316/85 (re section 108b of the Criminal Code): "Advantages within the meaning of the offence can also be granting to groups of individuals indirectly benefiting their members."

**EU Bribery Act – EuBestG (basis: EU Protocol to the Convention on the protection of the financial interests of the EC)**

**Article 2: Implementing Provisions**

**Section 1 Equal treatment of foreign and domestic public officials in the event of acts of bribery**

(1) For the purpose of applying sections 332, 334 to 336 and 338 of the Criminal Code to an act of bribery for a future judicial or official act, the following shall be treated as equal:

1. to a judge:

- a) a judge of another Member State of the European Union;
- b) a member of a Court of the European Communities;

2. to any other public official:

- (a) a public official of another Member State of the European Union, to the extent that the person's position corresponds to a public official within the meaning of section 11 paragraph 1 no. 2 of the Criminal Code;
- b) a Community official within the meaning of the Protocol of 27 September 1996 to the Convention on protection of the European Communities' interests;
- c) a member of the Commission and of the Court of Auditors of the European Communities.

(2) ...

46. Furthermore, German law has separate regulations for specific groups of individuals. In section 1 paragraph 2 No. 10 of the NATO Troop Protection Act (*NATO-Truppenschutzgesetz*), granting an advantage and bribery of soldiers, civil servants and other employees of the NATO troops stationed in Germany is criminalised. Sections 333 et seqq. CC are also applicable but passive bribery is not criminalised. In accordance with section 2 Act on suspending the statute of limitation and the equal treatment of judges and employees of the international criminal court (*Gesetz über das Ruhen der Verfolgungsverjährung und die Gleichstellung der Richter und Bediensteten des International Strafgerichtshofes*), judges, public officials and other employees of the International Criminal Court are deemed to be equal to German judges and public officials for the purposes of the application of section 331 et seqq. CC. Bribery is criminalised for cases involving future acts.
47. EU public officials and public officials of other EU Member States may be prosecuted for active and passive bribery only in respect of future unlawful acts, whereas public officials from other foreign states are only liable to active bribery in relation to future unlawful acts.

The concept of “foreign public official”

48. Article 2 section 1 of the Act on Combating International Bribery (IntBestG) and Article 2 section 1 of the EU Bribery Act (EuBestG) use the term “foreign public official”. In accordance with Article 2 section 1 No. 2 IntBestG, the term “public official” is to be interpreted autonomously on the basis of the OECD Convention<sup>10</sup>. Court decisions have been rendered in this area<sup>11</sup>.
49. The definition of “public official of another EU Member State” in accordance with the EU Bribery Act is, as a starting point, to be interpreted in accordance with the law of the other Member State. A restriction however applies in that they are deemed to be equal only insofar as the position of the public official in the other EU Member State corresponds to the position under German law in accordance with section 11 paragraph 1 No. 2 CC (see paragraphs 10 to 12 of the present

<sup>10</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997

<sup>11</sup> Federal Court of Justice, judgment of 29 August 2008, 2 StR 587/07: “The term “public official” in accordance with Article 2 section 1 No. 2 of the Act on Combating International Bribery is not to be interpreted within the meaning of the respective national legal system, but autonomously on the basis of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997.”

report). The GET noted that, from a technical point of view, this cross reference thus excludes the category of “persons with special public service obligations” under section 11 paragraph 4<sup>12</sup>.

50. The IntBestG and EuBestG only contain regulations on deeming foreign public officials equal to domestic public officials. Therefore, sections 332 and 334 CC also apply to passive and active bribery of foreign public officials. In this respect, the elements of the offence do not differ.

### Sanctions

51. The sanctions for taking a bribe and bribery of foreign public officials correspond to those applicable to domestic officials, including for particularly serious cases (sections 332, 334, 335 CC).

### **Bribery of members of foreign public assemblies (Article 6 of ETS 173) and of members of international parliamentary assemblies (Article 10 of ETS 173)**

52. The active bribery of members of foreign public assemblies and of members of international parliamentary assemblies in international business transactions is criminalised in Germany on the basis of the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The passive bribery of such mandate holders is not punishable. Active bribery of foreign mandate holders which do not aim to obtain advantages in international business transactions is also not punishable. *Please note that members of the European Parliament fall under the regime for bribery of members of domestic public assemblies (Article 4 of ETS 173) as described under point 22 above.*

#### **Act on Combating International Bribery – IntBestG**

##### **Article 2: Implementing Provisions**

##### **Section 2 Bribery of foreign Members of Parliament in connection with international business transactions**

(1) Anyone who offers, promises or grants to a Member of a legislative body of a foreign state or to a Member of a parliamentary assembly of an international organisation an advantage for that Member or for a third party in order to obtain or retain for him/herself or a third party business or an improper advantage in international business transactions, in return for the Member's committing an act or omission in future in connection with his/her mandate or functions, shall be punished by imprisonment not exceeding five years or by a fine.

(2) An attempt shall incur criminal liability.

53. Article 2 paragraph 2 of the Act on Combating International Bribery (IntBestG) covers offences against members of legislative bodies of foreign states (which is an autonomous definition, as the German authorities explained) and against members of a parliamentary assembly of an international organisation (to be understood in the same way as in the context of bribery of officials of international organisations, but including also organisations Germany is not a member of). Article 2 paragraph 2 of this Act is also applicable to members of the European Parliament (who are covered under the provisions of section 108e CC applicable to domestic assembly members).
54. Reflecting section 334 CC, the offence contained in Article 2 paragraph 2 of the Act on Combating International Bribery covers the actions of offering, promising and granting a material or immaterial advantage for the mandate holder him/herself or a third person. The service rendered in return by the mandate holder can be any act linked with his/her mandate or tasks.

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<sup>12</sup> i.e. “whoever, without being a public official, is employed by, or is active for: (a) a public authority or other agency, which performs duties of public administration; or (b) an association or other union, business or enterprise, which carries out duties of public administration for a public authority or other agency and is formally obligated by law to fulfil duties in a conscientious manner”.

The offence is however restricted by virtue of the fact that the advantage may only constitute an unfair advantage in international business transactions.

### Sanctions

55. Article 2 paragraph 2 of the Act on Combating International Bribery provides for sanctions of up to five years' imprisonment or a criminal fine (5 to 10,800,000 €). The statutory range of punishment corresponds to that provided for the bribery of domestic (and EU parliament) mandate holders in section 108e CC.

### **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

#### Definition of the offence

56. Section 299 – and sections 300 to 302 CC for complementary provisions – appear under Chapter 26 CC, which deals with crimes against competition. It is a fact that although the elements of the offence are to be interpreted in broad terms, active and passive bribery in the private sector, under German law, only cover bribery in situations of market competition.

#### **German Criminal Code, Special Part, Chapter Twenty-Six – Crimes against competition**

##### **Section 299 Taking and Offering a Bribe in Business Transactions**

(1) Whoever, as an employee or agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving an unfair preference to another in the competitive purchase of goods or commercial services, shall be punished by imprisonment for not more than three years or a fine.

(2) Whoever, for competitive purposes, offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employee or agent giving him or another an unfair preference in the purchase of goods or commercial services, shall be similarly punished.

(3) Paragraphs (1) and (2) shall also apply to acts performed in foreign competition.

#### Elements/concepts of the offence

*“Persons who direct or work for, in any capacity, private sector entities”*

57. Possible offender and recipient of advantages of an offence in accordance with sections 299 et seqq. CC is “the employee or agent of a business”. The elements “employee” and “agent” are to be interpreted broadly. An “employee” (*Angestellter*) is anyone who is in a service relationship with the proprietor of the business on the basis of a contract or de facto and is subject to his/her instructions. A permanent or paid activity is not required. De facto employees within the meaning of the offence also include individuals who are used as “go-betweens” to hide the acceptance and payment of bribes. Employed managers of legal persons (limited companies), as well as civil servants and employees of corporations under public law (owned or not by the State) taking part in business transactions, are also employees. An “agent” (*Beauftragter*) is whoever, without being an employee, acts with an empowerment for a business. The term “agent” is not to be determined in accordance with civil law standards; only the actual circumstances are material and there is no need for a contractual relationship<sup>13</sup>. Agents are also organs or members of organs of legal entities. Independent proprietors of a business – which is not organised as a

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<sup>13</sup> Federal Court of Justice of 13 May 1952, 1 StR 670/51: “Were one to cast doubt on the characteristic of an employee because his/her employment was (...) not of a contractual nature, at least that person was an agent. This term is to be given a broad interpretation; it covers anyone who as a result of his/her position in the business is entitled and obliged to act for it in business activity, and exerts an influence on the decisions to be taken in the context of the operation.”

corporation, a limited company or another independent legal person – remain outside the scope of section 299 CC.

*“In the course of business activity”; “...in breach of duties”*

58. Sections 299 et seqq. CC only cover offences committed in the course of business activity. This term is very broad and covers all measures serving to promote any business objective, i.e. any activity pursuing an economic purpose in which participation in competition is expressed. These sections, in their current wording, cover offences which target acts and omissions where the person accepting the advantage violates his/her duties by unfairly preferring the advantage-giver or a third person in competition (“competition model”).

#### Other elements of the offence

59. The offences criminalising bribery in the private sector correspond to those criminalising bribery of public officials with respect to such elements as “demanding, allowing oneself to be promised and accepting” (passive bribery) and “offering, promising and granting” (active bribery), “advantage” and the coverage of advantages granted to third persons.

60. The action sought under section 299 et seqq. CC is however different from the one sought under section 331 et seqq. CC. Here, the service to be rendered in return constitutes unfair preferential treatment related to the acquisition of goods or services in the context of competition. The intended preference must consist of a future privilege. The beneficiary of the preference can be the advantage-giver or any third person; a third person does not need to be formally designated yet at the time of the offence<sup>14</sup>.

#### Sanctions

61. Offences of active and passive bribery in accordance with section 299 CC are punished by up to three years’ imprisonment or a criminal fine (5 to 10,800,000 €). In particularly serious cases, the term of imprisonment is three months to five years.

#### **Section 300 Especially Serious Cases of Taking and Offering a Bribe in Business Transactions**

In especially serious cases an act under Section 299 shall be punished with imprisonment from three months to five years. An especially serious case exists, as a rule, if:

1. the act relates to a benefit of great magnitude; or
2. the perpetrator acted on a commercial basis or as a member of a gang which has combined for the continued commission of such acts.

#### **Section 301 Application for Criminal Prosecution**

(1) Taking and offering a bribe in business transactions under Section 299 shall only be prosecuted upon complaint, unless the prosecuting authority considers ex officio that it is required to enter the case because of the special public interest therein.

(2) The right to file the complaint under paragraph (1) belongs, in addition to the aggrieved party, to all of the business persons, associations and chambers indicated in Section 8 paragraph (3), nos. 1, 2, and 4, of the Law Against Unfair Competition.

<sup>14</sup> - Federal Court of Justice of 13 May 1952, 1 StR 670/51: “The conduct suggested to and promised by them was unfair because, if they hold their promise, they no longer advised their superiors in accordance with purely factual aspects, but under the influence of the advantages received or anticipated.”

- Federal Court of Justice of 16 July 2004, 2 StR 486/03: “Section 299 paragraph 2 of the Criminal Code criminalises the offering, promising or granting of an advantage in the context of an illicit agreement, the subject-matter and object of which is the future unfair preference of another in acquiring goods or commercial services. Preference in this sense means here an inappropriate decision between at least two applicants; in other words it is contingent on competition and on a competitor being placed at a disadvantage.”

**Section 302 Property Fine and Extended Forfeiture**

(1) In cases under Section 299 paragraph (1), Section 73d shall be applicable if the perpetrator acted on a commercial basis or as a member of a gang which has combined for the continued commission of such acts.

(2) In cases under Section 299 paragraph (2), Sections 43a,73d shall be applicable, if the perpetrator acted as a member of a gang which has combined for the continued commission of such acts. Section 73d shall also be applicable if the perpetrator acted on a commercial basis.

62. Under section 70 CC an occupational prohibition can be imposed in cases of criminal offences which have been committed in abuse of the occupation or trade or in gross violation of the duties connected therewith.

**Bribery of officials of international organisations (Article 9 of ETS 173)****Definition of the offence**

63. Active bribery of EU public officials is criminalised in the same way as domestic public officials. Members of other international organisations however are liable only to the offence of active bribery in relation to future unlawful acts in the context of international business transactions. The respective offence is criminalised by the Act on Combating International Bribery (IntBestG) implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

**Elements/concepts of the offence***“Official of an international organisation”*

64. In accordance with Article 2 paragraph 1 No. 2 (c) IntBestG, public officials and other employees of an international organisation, as well as individuals who are entrusted with performing tasks of an international organisation, are deemed to be equal to German public officials for the application of the offence against active bribery (section 334 CC) in the context of international business transactions.
65. The element of the offence “international organisation” covers all international organisations which are formed by states, governments or other international organisations, regardless of the form of the organisation and of the area of competence, and also includes regional organisations aimed at economic integration such as the EC. Not only civil servants of these organisations are covered, but also all individuals employed and seconded to serve in the organisation, as well as individuals who carry out tasks for the organisation without being employed or seconded to render service.
66. In Article 2 paragraph 1 No. 2 (b) and (c) of the EU Bribery Act, Community civil servants, as well as members of the Commission and of the European Court of Auditors, are deemed to be equal to German public officials for the application of sections 332 and 334 CC.

**Other elements of the offence and sanctions**

67. IntBestG and EuBestG only contain regulations on deeming international public officials equal to domestic public officials. Therefore, sections 332 (only as regards EU public officials) and 334 CC apply to the passive and active bribery of public officials of international organisations. The elements of the offences do not differ in this respect. Under the IntBestG, criminalisation pursuant to section 334 CC is limited to the context of international business transactions. The

sanctions for taking a bribe and bribery of public officials of international organisations correspond to those applied to domestic public officials, including for particularly serious cases (sections 332, 334, 335 CC).

### **Bribery of judges and officials of international courts (Article 11 of ETS 173)**

#### **Definition of the offence**

68. Bribery of judges and officials of international courts, as for bribery of foreign public officials and officials of international organisations, is not regulated in a uniform manner. Also in this context, the Act on Combating International Bribery (IntBestG) and the EU Bribery Act (EuBestG) apply. In addition, the Act on Equal Status of Officials of the International Criminal Court (*ISTGH-Gleichstellungsgesetz*) applies to judges of the ICC (see paragraph 44 et seqq. for the respective provisions of Article 2 (1) of the IntBestG and Article 2 (1) of the EuBestG).
69. Article 2 paragraph 1 No. 1 (b) IntBestG deems judges of international courts to be equal to domestic judges for the application of section 334 CC with respect to future unlawful acts of active bribery in the context of international business transactions. Article 2 paragraph 1 paragraph 1 No. 1 (b) EuBestG deems judges of a court of the European Communities to be equal to domestic judges for the application of sections 332 and 334 CC as regards active and passive bribery in relation to future unlawful acts. Furthermore, in accordance with section 2 No. 1 of the *ISTGH-Gleichstellungsgesetz*, judges of the International Criminal Court are deemed to be equal to judges in accordance with German law for the application of the various sections 331 et seqq. CC (the elements of the offences do not differ in this respect). The regulations on deeming public officials equal apply both to public officials at international courts and to public officials of international organisations.
70. The sanctions for taking a bribe and bribery of judges and public officials of international courts are those applicable to domestic judges and public officials, including for particularly serious cases (see paragraphs 30 of this report).

### **Trading in influence (Article 12 of ETS 173)**

71. German law does not incriminate trading in influence and does not contain any other offence leading to the prohibition to exert an influence within the meaning of Article 12 of the Convention. The replies to the questionnaire suggested that some offences like breach of trust may, to some extent, allow addressing this kind of criminal behaviour<sup>15</sup>.

### **Bribery of domestic and foreign arbitrators (Articles 1-4 of ETS 191)**

72. The respective paragraphs 2 of sections 331 to 334 CC (see paragraph 9 above) also apply to passive and active bribery of arbitrators. Since those paragraphs also criminalise active and passive bribery of domestic judges, the same rules apply to domestic judges and to domestic and

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<sup>15</sup> If considerable assets are placed in "concealed funds" in an enterprise which are to be used to create advantages for the enterprise by bribery or by purchasing influence, removing and keeping the assets in reserve is already punishable as a breach of trust towards the enterprise (section 266 paragraph 1 CC) regardless of whether the use of the money is punishable as such. The intention of using the money in the economic interest of the enterprise is irrelevant in this respect (Federal Court of Justice, judgment of 29 August 2008 – 2 StR 587/07. Breach of trust in accordance with section 266 CC is punished by up to five years' imprisonment or by a criminal fine. In particularly serious cases, the punishment is from six months' up to ten years' imprisonment.

foreign arbitrators in this respect. Thus, conduct in relation to unlawful acts as well as in relation to lawful acts is criminalised with regard to arbitrators.

#### Elements of the offences and sanctions

*"Domestic arbitrator / arbitrator exercising his/her functions under the national law on arbitration"*

73. German law does not contain a statutory definition of "arbitrator". Corresponding to the requirements of the Protocol to the Convention, the term "arbitrator" under German law covers all individuals who on the basis of an arbitration agreement, through statutes, through a final will or through another legal transaction are entrusted to issue a final ruling on a legal dispute.  
*"Foreign arbitrator / arbitrator exercising his/her functions under the national law on arbitration of any other State"*
74. The element "arbitrator" in paragraph 2 of sections 331 to 334 CC does not contain any restriction to German arbitrators. Furthermore, in contrast to the term "public official", the term "arbitrator" is not defined in the General Part of the Criminal Code. Hence, the restriction contained in section 11 paragraph 1 No. 2 CC, stipulating that for the application of the Criminal Code, public officials and judges are only recognised as such if they exercise their functions under German law, is not applicable.
75. The offences of passive and active bribery of domestic and foreign arbitrators correspond to those applicable to the passive and active bribery of judges. Section 337 CC (see paragraph 9 above) contains a statutory interpretation rule on the term "advantage" as regards active and passive bribery of arbitrators. According to this rule, the remuneration of an arbitrator may only constitute an advantage within the meaning of sections 331 to 335 CC if the arbitrator demands, allows himself to be promised or accepts the remuneration from one party behind the back of the other, or if the remuneration is offered, promised or granted to him/her by one party behind the back of the other. The purpose of the interpretation rule is to make it clear that the granting and acceptance of the arbitrator's remuneration, as well as the submission of fee offers, do not fall under the offences of sections 331 et seqq. CC."
76. The statutory range of punishment for passive and active bribery of domestic and foreign arbitrators are the same as those applicable to offences involving judges (see paragraphs 30 et seqq. of this report). The statutory range of punishment is higher than the one applicable to passive and active bribery of public officials.

#### Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191)

*"Domestic juror / person acting as a juror within its judicial system"*

77. Germany has no jury system as such. In the German legal system, honorary judges, meaning citizens who without being nominated as a judge are appointed to assist the professional judges on an honorary basis in court proceedings, participate in such proceedings as lay judges at local courts with one professional and two lay judges and at the criminal chambers of the Regional Courts (criminal jurisdiction), as commercial judges in the chambers for commercial cases, and as non-professional associate judges in the labour and social courts, the finance and administrative courts. Honorary judges also serve as members of the honour courts for solicitors, and as non-nominated associate judges of the disciplinary courts. All these individuals are "judges" within the meaning of section 11 paragraph 1 No. 3 CC (see paragraph 10 above).

78. The offences of passive and active bribery of honorary judges correspond to those on passive and active bribery of (professional) judges. Sections 331 et seqq. CC are thus applicable. The sanctions are thus the same.

### **Bribery of foreign jurors (Article 6 of ETS 191)**

*“Foreign juror / any person acting as a juror within the judicial system of any other State”*

79. Foreign honorary judges are deemed to be equal to foreign judges and fall under the regulations of the Act on Combating International Bribery and EU Bribery Act. The criminal liability of passive and active bribery of foreign honorary judges corresponds to that of offences by and towards foreign (professional) judges. They fall under the regulations on equality contained in the Act on Combating International Bribery and the EU Bribery Act and are therefore subject (only) to the specific provisions of these acts.
80. The range of sanctions for passive and active bribery of foreign honorary judges is the same as the one applicable to bribery of (domestic and foreign) judges; penalties are higher than for passive and active bribery of public officials.

### **Other offences and questions**

#### **Bribery of voters**

81. The GET noted that the German Criminal Code also incriminates, under section 108b, active and passive bribery of voters by using a wording similar to the other corruption offences:

#### **Section 108b**

- (1) Whoever offers, promises or grants to another person gifts or other benefits for not voting or for voting in a particular manner, shall be punished with imprisonment for not more than five years or a fine.  
(2) Whoever requests, allows himself to be promised or accepts gifts or other benefits in exchange for not voting or voting in a particular manner, shall be similarly punished.

#### **Participatory acts**

82. German law contains general regulations in sections 25 to 27 CC on perpetration, incitement and accessoryship in criminal offences. Intentional incitement and accessoryship is punishable with regard to all intentionally-committed unlawful offences, and hence also with regard to all the corruption offences listed above.

#### **Section 25 Perpetration**

- (1) Whoever commits the crime himself or through another shall be punished as a perpetrator.  
(2) If more than one person commits the crime jointly, each shall be punished as a perpetrator (co-perpetrator).

#### **Section 26 Incitement**

Whoever intentionally induces another to intentionally commit an unlawful act, shall, as an inciter, be punished the same as a perpetrator.

#### **Section 27 Accessoryship**

- (1) Whoever intentionally renders aid to another in that person's intentional commission of an unlawful act shall be punished as an accessory.  
(2) The punishment for the accessory corresponds to the punishment threatened for the perpetrator. It shall be mitigated pursuant to Section 49 paragraph (1).

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### Jurisdiction

83. The principle of territoriality, according to which Germany has jurisdiction in respect of all offences committed domestically (including extensions applicable to vessels and aircrafts) is provided for under sections 3, 4 and 9 CC. The principle of territoriality is complemented by the doctrine of ubiquity and the doctrine of effects which apply in this respect in accordance with section 9 of the CC.

**Section 3 Applicability to Domestic Acts**

German criminal law shall apply to acts, which were committed domestically.

**Section 4 Applicability to Acts on German Ships and Aircraft**

German criminal law shall apply, regardless of the law of the place where the act was committed, to acts which are committed on a ship or in an aircraft, which is entitled to fly the federal flag or the national insignia of the Federal Republic of Germany.

**Section 9 Place of the Act**

(1) An act is committed at every place the perpetrator acted or, in case of an omission, should have acted, or at which the result, which is an element of the offence, occurs or should occur according to the understanding of the perpetrator.

(2) Incitement or accessoryship is committed not only at the place where the act was committed, but also at every place where the inciter or accessory acted or, in case of an omission, should have acted or where, according to his understanding, the act should have been committed. If the inciter or accessory in an act abroad acted domestically, then German criminal law shall apply to the incitement or accessoryship, even if the act is not punishable according to the law of the place of its commission.

84. Nationality-based jurisdiction is provided for under section 7 paragraph 2(1) CC, according to which Germany can prosecute offences committed abroad by German nationals, but subject to the principle of dual criminality or absence of enforcement<sup>16</sup>.

**Section 7 Applicability to acts committed abroad in other cases**

(1) German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

(2) German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

1. was a German at the time of the act or became one after the act; or

2. was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not practicable.

85. Section 5 CC establishes jurisdiction (without dual criminality requirement) for a series of acts committed abroad: 1) acts, which a German public official or a person with special public service obligations commits during his official stay or in connection with his duties, 2) acts committed by

<sup>16</sup> E.g. in polar no man's land, space, or aboard vessels operating under no flag. Commentaries consider this could also apply to certain "failed state" situations.

a foreigner as a German public official or as a person with special public service obligations, 3) acts which someone commits against a public official, a person with special public service obligations, or a soldier in the Federal Armed Forces during the discharge of his duties or in connection with his duties (this provision, however, would not allow Germany to prosecute foreign offenders who bribe (abroad) German officials who are also abroad at the time of the offence); 4) bribery of a member of parliament (section 108e) if the perpetrator is a German at the time of the act or the act was committed in relation to a German:

**Section 5 Acts committed abroad against domestic legal interests**

German criminal law shall apply, regardless of the law of the place the act was committed, to the following acts committed abroad:

(...)

12. acts, which a German public official or a person with special public service obligations commits during his official stay or in connection with his duties;

13. acts committed by a foreigner as a public official or as a person with special public service obligations;

14. acts which someone commits against a public official, a person with special public service obligations, or a soldier in the Federal Armed Forces during the discharge of his duties or in connection with his duties;

14a. bribery of a member of parliament (Section 108e) if the perpetrator is a German at the time of the act or the act was committed in relation to a German; (...)

86. Special competence is awarded to Germany under section 3 of the Act on Combating International Bribery, in respect of certain bribery offences (sections 334 to 336 CC) committed abroad by Germans against foreign officials or members of parliament (no dual criminality is required but jurisdiction applies only in the context of international business transactions):

**Act on Combating International Bribery – IntBestG (based on the OECD Convention)**

**Article 2: Implementing Provisions**

**Section 3 Acts committed abroad**

Irrespective of the law of the place of commission, German law shall apply to the following offences committed abroad by a German national:

1. bribery of foreign public officials in connection with international business transactions (sections 334 to 336 of the Criminal Code in conjunction with section 1);

2. bribery of foreign Members of Parliament in connection with international business transactions (section 2).

87. Special competence is also provided for under article 2, section 2 of the EU bribery Act for certain bribery offences (sections 332 and 334 to 336 CC) committed abroad, without dual criminality requirement if 1) the offender is a German at the time of the act or he/she is a foreigner who commits the act as a public official or community official (employed by a body which has its seat in Germany); 2) the act is committed in respect of a judge, any other public official or a person to treated as equal pursuant to section 1 paragraph 1, provided that they are German.

**EU Bribery Act - EuBestG – based on the EU Protocol to the Convention**

**Article 2: Implementing Provisions**

**Section 2 Acts committed abroad**

Regardless of the law of the place of commission, sections 332 and 334 to 336 of the Criminal Code, also in conjunction with section 1 paragraph 1, shall apply to an offence committed abroad if:

1. the perpetrator

a) is a German at the time of the act, or

b) is a foreigner who commits the act

- aa) as a public official within the meaning of section 1 paragraph 1 no. 2 of the Criminal Code,

- bb) as a Community official within the meaning of section 1 paragraph 1 no. 2 letter b, who is the member of one of the bodies set up in accordance with the Treaties establishing the European Communities which has its seat in Germany,

Or

2. the act is committed in respect of a judge, any other public official or a person to treated as equal pursuant to section 1 paragraph 1, provided that they are German.

88. The replies to the questionnaire indicated that, so far, German law does not apply to offences of granting a benefit (section 333 CC) committed abroad by Germans where the offence is not punishable at the place of commission.
89. Besides, offences committed abroad by Germans in accordance with section 299 CC are only covered by German criminal law if the offence is punishable at the place of commission (or the place of its commission is subject to no criminal law enforcement, see paragraph 84 above and related footnote). German criminal law currently applies to offences of granting an advantage to German arbitrators (section 333 paragraph 2 CC) and bribery of German arbitrators (section 334 paragraph 2 CC) abroad only if the offence is punishable at the place of commission; here, the expression “German” refers to the nationality.

### Statute of limitations

90. The statute of limitations for the prosecution of criminal offences is regulated in sections 78 et seqq. CC.

#### **Section 78 Period of Limitation**

- (1) The imposition of punishment and the ordering of measures (Section 11 paragraph (1), no. 8) shall be excluded on expiry of the period of the statute of limitations. Section 76a paragraph (2), sent.1, no. 1, shall remain unaffected.
- (2) Serious criminal offences under Section 211 (murder) are not subject to a statute of limitations.
- (3) To the extent that prosecution is subject to a statute of limitations, the period of limitation shall be:
1. thirty years in the case of acts punishable by imprisonment for life;
  2. twenty years in the case of acts punishable by a maximum term of imprisonment of more than ten years;
  3. ten years in the case of acts punishable by a maximum term of imprisonment of more than five years but not more than 10 years;
  4. five years in the case of acts punishable by a maximum term of imprisonment of more than one year but not more than five years;
  5. three years in the case of other acts.
- (4) The period shall conform to the punishment threatened by the norm defining the elements of the offence fulfilled by the act, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or for especially serious or less serious cases.

#### **Section 78a Commencement**

The statute of limitations shall commence to run as soon as the act is completed. If a result constituting an element of the offence only occurs later, then the statute of limitations shall commence to run at that time.

#### **Section 78c Interruption**

- (1) The running of the statute of limitations shall be interrupted by:
1. the first interrogation of the accused, notice that investigative proceedings have been initiated against him, or the order for such interrogation or notice;
  2. any judicial interrogation of the accused or the order thereof;
  3. any commissioning of an expert by the judge or public prosecutor if the accused has previously been interrogated or he has been given notice of the initiation of investigative proceedings;
  4. any judicial seizure or search order and judicial decisions which uphold them;
  5. an arrest warrant, placement order, order to be brought before a judge for interrogation and judicial decisions which uphold them;
  6. the preferment of a public indictment;
  7. the institution of proceedings in the trial court;
  8. any setting of a trial date;
  9. a penal order or another decision equivalent to a judgment;
  10. the provisional judicial dismissal of the proceedings due to the absence of the indicted accused as well as any order of the judge or public prosecutor which issues after such a dismissal of the proceedings or in proceedings in absentia to ascertain the whereabouts of the indicted accused or to secure evidence;
  11. the provisional judicial dismissal of the proceedings due to the lack of capacity of the indicted accused to stand trial as well as any order of the judge or public prosecutor which issues after such a dismissal of the proceedings to review the fitness of the indicted accused to stand trial; or
  12. any judicial request to undertake an investigative act abroad.

In a preventive detention proceeding and in an independent proceeding, the running of the statute of limitations shall be interrupted by acts in the conduct of a preventive detention proceeding or an independent proceeding which correspond to those in sentence 1.

(2) The running of the statute of limitations shall be interrupted by a written order or decision at the time at which the order or decision is signed. If the document is not immediately processed after signing, then the time it is actually submitted for processing shall be decisive.

(3) After each interruption the statute of limitations shall commence to run anew. Prosecution shall be barred at the latest by the statute of limitations, however, when twice the statutory period of limitation has elapsed since the time indicated in Section 78a, or three years, if the period of limitation is shorter than three years. Section 78b shall remain unaffected.

(4) The interruption shall have effect only in relation to the person to whom the act relates.

(5) If a norm which applies at the time the act is completed is amended before the decision and the period of limitation is thereby shortened, then acts triggering an interruption, which have been undertaken before the entry into force of the new law, shall maintain their effect, even if at the time of the interruption the prosecution would already have been barred by the statute of limitations under the new law.

91. Since the basic statutory range of punishment of the corruption offences (less serious or particularly serious cases are not taken into account in this respect) is up to between three and five years of imprisonment, the prosecution of these offences lapses after five years (section 78 paragraph 3 No. 4 CC). An exception applies to the acceptance of a bribe by judges and arbitrators (section 332 paragraph 2 CC). Since such offences are punishable in the basic statutory offence by a maximum of up to ten years' imprisonment, the prosecution lapses after ten years (section 78 paragraph 3 No. 3 CC).
92. The statute of limitations does not start to run until the offence has ended. If the offender initially demands or permits him/herself to be promised an advantage and later accepts it, the offence has not ended until the acceptance of the advantage. The GET understood this was a logical consequence of the way the offences of bribery are defined. If acceptance of the advantage does not happen, the offence is not ended until the demand or the promising has conclusively proven to have failed and the offender no longer anticipates completion<sup>17</sup>.
93. In case the advantage is granted but the official act that has been purchased is only carried out later, the statute of limitations in accordance with the case-law of the Federal Court of Justice does not commence until the performance of the official act (cf. at court decisions/case law<sup>18</sup>).

### Statistics

94. The Police Statistics on Crime (*Polizeiliche Kriminalstatistik – PKS*) lists the following number of cases of offences involving corruption – sections 299 CC (taking and offering a bribe in business transactions), 300 CC (especially serious cases of taking and offering a bribe in business transactions) and 331 CC (acceptance of a benefit), 332 CC (taking a bribe), 333 CC (granting a benefit), 334 CC (offering a bribe) and 335 CC (especially serious cases of taking and offering a bribe). A case is recorded as the offence which incurs the most severe penalty in terms of type and degree only. Fluctuations in the figures are partly due to complex investigation procedures involving numerous individual cases.

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<sup>17</sup> Federal Court of Justice, judgment of 18 June 2003 – 5 StR 489/02: "In those cases of bribery in which an advantage is promised or demanded, but the advantage is not granted, the offence ... is ended when the demand or the promising have been conclusively proven to have "failed" and the offender no longer anticipates its completion."

<sup>18</sup> Federal Court of Justice, judgment of 19 June 2008 – 3 StR 90/08: "If bribery and taking a bribe are committed such that the person bribing initially grants the advantage and the public official then carries out the official act in breach of duty, the statute of limitations of both criminal offences only begins when the public official act is carried out."

year	2004	2005	2006	2007	2008
	cases	cases	cases	cases	cases
section 299	340	246	409	378	488
section 300	42	37	69	23	124
section 331	802	718	695	976	752
section 332	242	240	303	250	291
section 333	462	254	199	255	213
section 334	421	436	477	574	435
section 335	21	159	118	269	71

95. The table below gives an overview of the number of persons against whom a verdict was rendered, and those who were convicted<sup>19</sup>:

A = adjudged C = convicted

year	2004		2005		2006		2007		2008	
	A	C	A	C	A	C	A	C	A	C
section 299	23	17	46	35	40	33	64	56	72	49
section 300	20	13	32	22	39	38	41	36	35	31
section 331	58	33	120	30	72	17	43	23	62	29
section 332	72	50	58	33	60	41	44	26	67	43
section 333	99	91	22	17	39	29	37	31	54	37
section 334	181	153	148	123	148	114	224	180	185	157
section 335	33	32	27	25	29	25	46	38	33	23

96. Bearing in mind the economic/commercial importance of the country, the GET was interested in statistics concerning cross border cases. The federal authorities keep no specific figures in this area but they indicated that in the years 2007 and 2008, there have been at least 74 investigations initiated, 27 proceedings ended and at least 7 offenders convicted.

#### Legislative amendments, reforms planned

97. In 2007, the Ministry of Justice submitted in Parliament the draft Act Amending the Criminal Law (Federal Parliament printed paper 16/6558), the adoption of which was expected to take place in 2008. Although the higher chamber (the *Bundesrat*) made no reservations to the draft, the Bundestag did not manage to adopt it before the end of the legislature in the summer of 2009. The objective of the draft was to implement the Criminal Law Convention and its Additional Protocol (and thus to allow their ratification)<sup>20</sup>, as well as the EU Framework Decision of 22 July 2003 on combating corruption in the private sector, and the criminal law requirements of the United Nations Convention against Corruption. Another objective of the draft was to transfer into the Criminal Code the corruption elements contained in supplementary criminal law provisions

<sup>19</sup> Source: Statistics on Criminal Prosecution (*Strafverfolgungsstatistik*). The data for the years 2004 - 2006 only refer to the territory of the former Federal Republic of Germany (without the 5 *Länder* of the former GDR) and the data for the years 2007 and 2008 refer to the whole territory of the country.

<sup>20</sup> The proposed amendments aimed i.a. at: a) extending the regulations on the applicability of German criminal law to offences committed abroad: all offences committed abroad which would have been related to Germany would have been punishable under German law, regardless of whether the offence was punishable at the place of commission (expansion of section 5 CC) – this would not have applied to active and passive bribery in the private sector, as the GET was informed; b) introducing a definition of "European public official" also deeming European public officials to be equal to (German) public officials under sections 332 and 334 CC and in respect of other offences; c) establishing the offences of taking a bribe and bribery in business transactions (section 299 of the Criminal Code) as predicate offences of money laundering (section 261 CC) and so as to cover actions by employees or agents aimed at violating their duties towards the enterprise; d) extending the equalisation of foreign and international public officials with (German) public officials to all cases of passive and active bribery (section 335a of the Criminal Code); e) introducing criminal liability for the accepting of advantages by non-officer-rank soldiers of the Federal Armed Forces.

which have been left outside the Criminal Code until now (in particular the Act on Combating International Bribery and the EU Bribery Act). Since the draft was not adopted, a new text will need to be submitted to the parliament newly elected in September 2009.

### III. ANALYSIS

98. Germany is one of the few GRECO members which have not ratified the Criminal Law Convention on Corruption (ETS 173) (hereinafter: the Convention) and the Additional Protocol thereto (ETS 191). Nevertheless, Germany, like any other member of GRECO, is subject to peer review according to the standards of the Convention and its Additional Protocol which are under examination in the Third Evaluation Round, together with Guiding Principle 2 of Resolution (97) 24 on the twenty guiding principles for the fight against corruption (“to ensure co-ordinated criminalisation of national and international corruption”). The GET notes that Germany was one of the founding members of GRECO and it signed the Convention on 27 January 1999. A draft law was finally presented in Parliament in 2007 to proceed with a series of amendments that would have enabled Germany to ratify the Criminal Law Convention on Corruption and its Additional Protocol as well as the United Nations Convention against Corruption. Another objective of the draft was to consolidate under the Criminal Code the various pieces of legislation<sup>21</sup> adopted in recent years by Germany to comply with various international requirements, but which incriminate cross-border corruption offences in a manner which, at present, lacks consistency. Although the adoption of this draft legislation was expected in the course of 2008 or early 2009, the Bundestag did not manage to adopt it<sup>22</sup>. The GET recommends **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the ratification of its Additional Protocol (ETS 191)**. In this context, attention is drawn to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. On the same occasion the Committee of Ministers appealed to States “which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible.” The recommendations contained in paragraph 99 to 122 of this report are without prejudice to the right of Germany to enter declarations and reservations pursuant to Articles 36 and 37 of the Convention and Article 9 of its Additional Protocol.
99. The German Criminal Code contains two series of provisions which deal with bribery offences involving domestic public officials. It incriminates, as basic offences, the granting of a benefit (sections 331 CC) and the acceptance of a benefit (section 333 CC) in relation with the discharge of official duties. Furthermore, it incriminates the taking of a bribe (section 332 CC) and the offering of a bribe (section 334 CC) in return for the performance of an official act which violates or would violate official duties of the public official involved. The provisions of sections 331 et seqq. CC result from changes introduced in 1974, and later with a major enlargement in 1997 with the Act on Combating Corruption of 13 August 1997, to facilitate the prosecution of corruption offences. The GET was told that these provisions of sections 331 and 333 CC also constitute a “safety net”: offences that do not qualify as bribery offences under sections 332 and

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<sup>21</sup> See paragraph 8.

<sup>22</sup> The GET was told on site the most probable explanation for not adopting the draft law was a lack of political will to criminalise more broadly bribery of assembly members (since an official one was never given in the Bundestag); in principle, the draft amendments could have been adopted without the extended incrimination of bribery of assembly members; besides, two opposition political parties failed to reach an agreement on separate draft laws they submitted on this incrimination specifically. This being said, the GET also noted that strong opposition to most of the changes proposed by the government also came from society, for instance the German Bar Association.

334 CC (e.g. where there is no breach of duty or where the prosecution cannot substantiate that the bribe is connected with a specific decision or action from the official) may qualify as a taking-/granting-a-benefit offence under sections 331 and 333 CC. It is also common practice in German legal theory to consider these various sections as a whole since they bear many common features as regards the basic elements of the offences.

100. The basic elements of Article 2 and 3 (active and passive bribery of domestic public officials) of the Convention are reflected in sections 331 et seqq. CC: German law uses the terms “offering, promising or granting a benefit” to describe active bribery (section 334 CC) and the granting of a benefit offence (section 333 CC), and “demanding, allowing oneself to be promised or accepting a benefit” to describe passive bribery (section 332 CC) and acceptance of a benefit offence (section 331CC). Legislation and practice are clear about the fact that active and passive bribery are distinct offences which can be prosecuted independently from each other (whether the solicitation of one party was accepted by the other does not matter). Attempted bribery is criminalised primarily as a consequence of the categorisation of offences as serious crimes or less serious crimes<sup>23</sup>. Besides, the explicit reference to attempted offences in certain bribery provisions is an element of criminal policy, namely to ensure the highest degree of protection of judges and arbitrators and to fight the severe cases of bribery<sup>24</sup>. Criminalisation of an attempt enables the prosecution of unilateral initiatives (offering, promising, requesting) even when they have not reached the other party (e.g. the bribe taker or bribe giver has drafted a letter and has sent it, but it has not reached the other party). Most practitioners met on site stressed that according to their experience, the provisions on “attempt” are never used in practice, especially since bribery offences are already completed with the act of offering (passive bribery) and demanding (active bribery); section 108e CC (Bribery of members of parliament) falls under the category called “undertaking offences” (*Unternehmensdelikt*), which implies that the offence is complete even though it does not reach its purpose.
101. The requirements in the law “for the discharge of a duty” and “in return for the fact that...” are traditionally named “agreement contrary to law” (*Unrechtsvereinbarung*) by the German courts. This wording is misleading since unilateral acts (requesting or offering a bribe), which are covered by law, do not imply that both parties have reached an agreement and even where the bribe-taker or bribe giver has responded positively to a solicitation, it is not necessary to demonstrate the existence of a formal agreement but rather some kind of proportional linkage between a bribe and the bribe-taker’s action (or inaction). Besides, evidence can be based on objective factual circumstances, including to substantiate the criminal intent. During the on-site discussions, the need for further measures to increase the specialisation of judges in the area of action against corruption was stressed by one public prosecutor but in general, German practitioners expressed no particular dissatisfaction with the current situation.
102. The GET noted that the criminal offences of active and passive bribery under sections 332 and 334 CC always imply that the behaviour of the official involves (effectively or potentially) a breach of duty (articles 2 and 3 the Convention are broader in this respect). Therefore, cases which do not involve a breach of duty would need to be prosecuted under sections 331 and 333 CC dealing with the taking and granting of a benefit, since these offences constitute the “safety net”

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<sup>23</sup> According to section 12 CC combined with section 23 CC: An attempt to commit a serious criminal offence (an act punishable by a minimum of imprisonment for one year or more) is always punishable, while an attempt to commit a less serious criminal offense is only punishable if expressly provided by law.

<sup>24</sup> Under section 331(2) on the taking of an advantage by a judge or arbitrator, under section 332(1) on passive bribery of public officials and under section 334(2) on active bribery of judges and arbitrators; the attempt of passive bribery under section 332(2) concerning offences involving a judge or arbitrator is punishable since this offence is a serious crime (see footnote 23).

mentioned earlier. However, this safety net is not always available for the time being, as one can take from the provisions specifically applicable to certain categories of officials employed abroad or at international level (see below; sections 331 and 333 CC on giving/taking a benefit are often not applicable)<sup>25</sup> and in principle, this issue would be addressed through the recommendations made below (see paragraphs 107 to 110).

103. Finally, German law does not foresee that the advantage has to be “undue”; instead, jurisprudence and legal theory have made it clear that in principle, all gifts of any value and all immaterial benefits are “advantages” in the meaning of the criminal provisions on bribery. The GET understood that this was one of the reasons why the legislator had to provide - under sections 331(3) and 333(3) CC dealing with the taking and granting of a benefit (not under sections 332 and 334 CC on passive and active bribery in exchange for a specific act which violates or would violate the official duties) for the existence of a mechanism to authorise such advantages in case of doubt as to their legitimacy. Despite the merits of this pragmatic approach, the situation might be seen as problematic from the point of view of legal security and the (potential) benefit-giver, who may not necessarily be familiar with the internal rules in place in a given administration, or whose liability could possibly depend on whether or not the official complies with the requirement to apply for an authorisation to keep the advantage. This mechanism (which, by the way, does not apply to judges and arbitrators) is sometimes a source of doubts also in Germany, as the GET found out during the on-site discussions and it was confirmed that there have been cases where, for instance, advantages have been approved by the hierarchy although they contravened the internal regulations.
104. To conclude on the basic incrimination mechanisms applicable to active and passive bribery of public officials, the GET takes the view that having two sets of provisions can be a useful tool to deal with various forms of bribery, especially if the incriminations address both future and past acts. This being said, there is still room for improvement as regards the system for the approval of advantages by the relevant administrative services. The GET recommends to the German authorities **to keep under review the application of the administrative authorisation procedure under sections 331 paragraph 3 and 333 paragraph 3 of the Criminal Code (concerning the acceptance and granting of a benefit by public officials), in order to ascertain possible implications for legal security, including in matters of investigation and prosecution of corruption offences and, if need be, to take appropriate measures.**
105. It is widely accepted in jurisprudence (including at the level of the Federal Court of Justice) and legal commentaries that the concept of “advantage” (or “benefit”) covers both material and immaterial advantages, and that the offence can take place also indirectly, i.e. through an intermediary, although the law does not refer explicitly to these types of situations. Third party beneficiaries are clearly mentioned in the various provisions (sections 331 to 334 CC all refer to the expression “for that person or a third person”) and it is accepted that the beneficiary can be a natural or a legal person, including a political party or association<sup>26</sup>. The officials’ negative acts (refraining from acting) are also covered under the various crimes established under sections 331 to 335 CC, according to section 336 CC.

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<sup>25</sup> Besides, the GET noted that it may also happen that in other criminal law areas, Germany has not always included the taking/granting of a benefit offence of sections 331 and 333 CC in the list of relevant corruption offences: by a reservation made to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141), Germany has excluded various corruption-related offences (including those of sections 331 and 333 CC) from the list of predicate offences of money laundering. For further information, see also paragraph 15 of the Second Round Evaluation Report.

<sup>26</sup> The main issue that was discussed in practice is whether this also covers entities with which the official has no ties, i.e. where the official has no personal indirect benefit at all, especially where the ultimate beneficiary is a purely charitable organisations.

106. The concept of public official encompasses a wide range of persons in Germany (see paragraphs 10 et seqq. in the descriptive part). The concept excludes only a few specific categories of persons<sup>27</sup> besides those who are subject to specific regulations, as seen hereinafter. Decisions of the Federal Court of Justice have, in 2006, ruled out members of local self-governing bodies such as communal and city councils and county councils unless they are entrusted with administrative duties (e.g. members of a supervising committee). It is acknowledged that this has created a gap in the coverage of anti-corruption provisions at local level that would require an extension of section 108e CC (see below). The GET also noted that the provisions applicable specifically to soldiers (see paragraph 47 et seqq.) are not uniform and the German authorities may wish to align them altogether on those applicable to public officials.
107. The incrimination of bribery of members of domestic assemblies under section 108e CC is very narrow and limited to the buying and selling of a vote for an election or ballot. Compared to sections 331 et seqq. CC, section 108e CC lacks many important elements<sup>28</sup>. Surprisingly, the incrimination of bribery of foreign parliamentarians has been, since 1999, broader than that (albeit limited to the context of international business transactions). During the on site visit, the GET was advised that this incrimination was particularly contentious and the most likely explanation for the failure to adopt the draft amendments which were in parliament. Practitioners and civil society representatives criticised the current wording of the offence; it was stressed that it was of little use in practice (decisions are often prepared in working groups before the formal vote, and thus not well captured by the offence) and that prosecution was difficult due to the evidentiary requirements in practice<sup>29</sup>. The GET is of the opinion that such a narrow provision on bribery of assembly members constitutes a major lacuna: besides other factors which are specific to Germany and show the potential importance of this issue<sup>30</sup>, one needs to bear in mind that the political financing model adopted in Germany implies at the same time that personal donations to elected officials are subject to no restriction and do not fall under the rules on political financing (see the other part on party financing of the present Evaluation Report). There are thus little legal tools to limit, control and sanction the questionable corruption-related behaviour not just of elected officials, but also of entrepreneurs and other individuals who would approach or enter into agreements with the latter. Finally, as indicated in the previous paragraph, recent decisions of the Federal Court of Justice have created a loophole as regards the members of local self-governing bodies (such as communal and city councils and county councils) who are not entrusted with administrative duties. Since they cannot be considered as public officials and thus be subject to the general provisions of sections 331 et seqq., it would appear that they have to be dealt with under section 108e CC; this provides further justification for amending this section. In view of the above, the GET recommends **to substantially broaden the incrimination of active and passive bribery of assembly members under section 108e of the Criminal Code, to bring it in line with Article 4 of the Criminal Law Convention on Corruption (ETS 173).**

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<sup>27</sup> In particular clerical office, who are not subject to any corresponding rules; depending on their rank, soldiers are subject to the general advantage-taking provisions (section 331CC) or to those on passive bribery (section 332 CC), in accordance with military law.

<sup>28</sup> It does not provide for third party beneficiaries generally; immaterial advantages and negative acts (refraining from acting) are not covered; although it is understood as a bribery offence comparable to bribery under sections 332 and 334 CC there is no reference to the attempt and the sanctions do not provide for a minimum term of imprisonment etc.

<sup>29</sup> The GET noted that to date, only one case has led to a (final) conviction (Tribunal of Neuruppin, decision of the 3<sup>rd</sup> criminal chamber of 2 April 2007); the conviction of a municipal council member was based on the existence of a written private loan agreement between him and a real estate company by which they explicitly agreed that the latter would grant the former an advantageous loan of 100,000 EUR should, in return, the municipality approve the company's project.

<sup>30</sup> According to certain estimates, Germany counts over 220,000 elected officials; besides, according to the last results available on Germany under the Global Corruption Barometer published by Transparency International (2007), political parties and business are seen as the most affected by corruption.

108. With the exception of members of the European Parliament (who fall under the regime applicable to domestic assembly members, according to section 108e CC discussed above), the incrimination of bribery is the same for members of foreign public assemblies and international assemblies and provided for under article 2 section 2 of the Act on combating international bribery of 1998. Although it differs from the bribery provisions related to domestic assembly members as regards the purpose (it does not apply to the purchase of a vote), it remains limited in scope: based on the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, it covers active bribery with a view to obtaining or retaining an advantage in the context of international business transactions; bribery outside this context, and passive bribery generally, are thus not covered. The GET understood that the concept of “legislative body [of a foreign state]” (“*Gesetzgebungsorgan*”) does not raise particular issues: it appears to be broad enough to encompass public assemblies at any territorial level and irrespective of their composition, it being understood that bribery of a member of an assembly vested only with administrative powers would be prosecutable under the general provisions on bribery of foreign public officials (see the paragraph below). The GET recommends **to incriminate more broadly, active and passive bribery of members of foreign public assemblies.**
109. In Germany, the incrimination of active and passive bribery of foreign public officials is based on specific laws transposing the OECD and European Union requirements, namely the Act on Combating International Bribery (IntBestG) and the EU Bribery Act (EUBestG). From the point of view of the Criminal Law Convention and as regards public officials from non-EU foreign countries, only active bribery is incriminated, and this in the context of international business transactions. Besides, the extension of the existing provisions to foreign public officials does not apply to the offences of offering/taking of a benefit of sections 331 and 333 CC, although these are the legal “safety net” which allows to deal with cases that cannot be prosecuted under sections 332 and 334 CC (on active and passive bribery) because of the evidential requirements (link between the bribery act and a breach of duties). The GET underlines that, in principle, domestic and foreign domestic officials should be treated in a similar way according to the Convention<sup>31</sup>. It therefore recommends **to incriminate active as well as passive bribery of foreign public officials more broadly, in line with Article 5 of the Criminal Law Convention on Corruption (ETS 173).**
110. The situation is similar as regards the incrimination of corruption involving the various other categories of persons employed or working at the international level: officials of international organisations, members of international parliamentary assemblies (as seen above, they are subject to the rules on bribery of foreign assembly members), judges and officials of international courts with the exception of judges and officials of the International Criminal Court (who are subject to the specific legal provisions of the Act on Equal Status of Officials of the International Criminal Court and fall under the entire legal regime of sections 331 et seqq. of the CC). The GET recommends **to incriminate more broadly active as well as passive bribery of officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts, in line with Articles 9 to 11 of the Criminal Law Convention on Corruption (ETS 173).**
111. The various bribery offences of sections 331 et seqq. CC are applicable explicitly to arbitrators (without a distinction between domestic and foreign ones). As for jurors, Germany has no jury

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<sup>31</sup> Countries may, of course, avail themselves of Article 36 of the Convention and limit the incrimination of active and passive bribery of foreign public officials and some other categories of persons (officials of international organisations, and judges and officials of international courts) to acts which involve a breach of duties.

system as such but the judicial system uses honorary judges (lay judges) who are subject, like ordinary judges, also to the various bribery offences of sections 331 et seqq. CC. The German authorities explained that foreign arbitrators are covered under the above provisions since the Criminal Code makes no distinction between domestic and foreign arbitrators. As regards foreign jurors, the applicable rules are those provided in the Act on Combating International Bribery (IntBestG) and the EU Bribery Act (EuBestG) insofar as they are (can be) considered as honorary judges. In any event, this would mean that the limitations observed earlier in respect of these Acts apply also as regards the incrimination of bribery of foreign jurors. The GET recommends **to ensure that active and passive bribery of foreign jurors is criminalised in Germany in accordance with the provisions of Article 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 173).**

112. The incrimination of private sector bribery under section 299 CC does not suppose a breach of duty from the part of the bribe-taker or bribe-giver (unlike Articles 7 and 8 of the Convention); therefore, the regulations, general duties or terms of employment/hiring of staff and representatives applicable within a business entity are, in principle, irrelevant for the purposes of qualifying the offence. Furthermore, bribe-takers under section 299 CC can be employees (*Angestellte*) and agents (*Beauftragte*); although this does not apply to the independent owner of a business (*Geschäftsinhaber*) which is not organised as a corporation, the present situation does not appear to be in contradiction with the Convention (independent business owners cannot commit a breach of duties against themselves). On the other side, the scope of section 299 CC is limited to the context of obtaining “an unfair preference (...) in the competitive purchase of goods or commercial services”. Section 299 results from the transfer into the Criminal Code in 1997 of a provision formerly contained in the Law on unfair competition of 1909 (it appears today under *Chapter Twenty-Six – Crimes against competition* of the CC). In principle, the current wording of section 299 CC may exclude some situations that private sector entities are involved in, or confronted with in practice and which are not strictly related to procurement transactions; in comparison, articles 7 and 8 of the Convention refer to bribery “in the course of business activity”, which encompasses the broadest range of situations. Therefore, the GET recommends **to amend the provisions on bribery in the private sector of section 299 CC in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).**
113. The GET also noted that section 301 CC introduces a limitation to the prosecution of private sector bribery offences since a complaint from the aggrieved party or another entity which has a legitimate interest<sup>32</sup> is – in principle – needed to initiate proceedings; certain organisations and the prosecuting authority may<sup>33</sup> still act *ex officio*, but the latter only if the case involves a “special public interest”. Bearing in mind the general need for an effective anti-corruption policy, there is – theoretically – little justification for subjecting the prosecution of corruption in the private sector to a regime different from the general regime applicable to the other corruption offences. This being said, the number of cases of private sector bribery actually dealt with by law enforcement institutions in Germany is far from being insignificant; this suggests that the above restrictions do not constitute a real obstacle for the prosecution of such cases in practice. Besides, the fact that prosecutions can be initiated by private organisations constitutes some kind of safeguard in case prosecutorial authorities cannot act.
114. Germany has not criminalised trading in influence. The provisions on “breach of trust towards the enterprise” (section 266 CC) contain tools which have the potential to be powerful in the context of the fight against corruption generally, but they cannot be seen as a fully satisfactory alternative

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<sup>32</sup> As indicated in the descriptive part, section 8 paragraph 3 subparagraph 1, 2 and 4 enumerates these entities as follows: competitors, professional or business associations as well as industry and commerce chambers interested in the case

<sup>33</sup> This faculty is a derogation to the general principle of mandatory (or legality of) prosecution in Germany.

to the trading in influence offence of Article 12 of the Convention, which aims at covering a large variety of situations. Although all experts met did not see the necessity to criminalise trading in influence, the GET noted that Germany too, could think about certain phenomena which may qualify as trading in influence (for instance with the involvement of elected officials); the introduction of criminal provisions in this area would thus fill a gap. The GET recommends to **criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173)**.

115. As regards the sanctions applicable to corruption offences (and leaving aside the situation of legal persons which was addressed in the Second Evaluation Round), the GET was told that for less serious cases, the prison sentences imposed are, on average, about one to two years in practice and that suspended prison sentences generally apply for first-time offenders, like in other countries. The GET understood that for several offences which entail a maximum term of imprisonment of 3 years, there is no lower limit and a fine can be pronounced as an alternative to imprisonment<sup>34</sup>. The GET also noted that, in addition, acceptance and granting of a benefit offences under section 331 and 333 CC (which are also the safety net for the bribery offences of sections 332 and 334 CC) do not seem to be subject to aggravating circumstances for especially serious cases, nor the professional disqualification and extended forfeiture measures. This being said, as indicated in paragraph 31, the commission of more than one of the offences under any of the bribery offences established under sections 331 et seqq. lead to an aggregate punishment of up to 15 years' imprisonment. Therefore, it would appear that the law provides for effective, proportionate and dissuasive sanctions for all corruption offences.
116. The on-site discussions showed that there is no definition of an advantage of "great magnitude" used for the definition of especially serious cases of bribery involving officials (section 335 in connection with sections 332 and 334 CC) or business transactions (section 300 in connection with section 299 CC). This is left to the discretion of the courts, which have not had an opportunity yet to develop a set of criteria or thresholds, as they did for fraud offences. The GET was advised that courts have to take into account a variety of parameters, including the social/professional standard of the bribe-giver / bribe-taker (which implies a differentiation between the importance of an advantage given to a low level employee and that given to a high level official). It would appear that the situation is similar regarding "less serious cases" under sections 332 and 334 CC. However, the German authorities stressed that the lack of definitions or general criteria was not an issue in practice.
117. The GET was advised that many corruption cases (particularly those which have an international dimension) are prosecuted as breach of trust due to the easier way to substantiate the offence without mutual legal assistance from other countries; therefore, the number of convictions obtained in Germany does not reflect the whole picture of the country's anti-corruption efforts in the criminal field. The trend of using increasingly the provisions on breach of trust following recent, major cases which have received media attention, reflects the concern of general cost-effectiveness and efficiency of criminal proceedings as well as human rights considerations (reasonable length of proceedings); but at the same time, it would not allow to reveal the whole spectrum of offenders and modus operandi of the crime and it would leave certain criminal acts out of reach of criminal justice. The GET came to the conclusion that the present situation does not raise any particular problems as long as the provisions on breach of trust are not used as the main basis for the prosecution of bribery cases.

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<sup>34</sup> Private sector bribery offences generally (section 299 CC), advantage-taking and advantage-giving offences involving a public official (sections 331(2) and 333(2) CC, and active and passive bribery under sections 332 and 334CC as far as it involves a less serious case.

118. Among the GRECO members, Germany is a major economic and commercial power with a strong presence abroad, in particular the neighbouring European countries. The number of prosecutions of transnational bribery is far from being negligible. Although, according to the German authorities, the figures for international bribery cases are the highest of all OECD countries in comparison to the size of the population, they show the difficulty of handling international cases.
119. The statute of limitation for the prosecution of corruption is 5 years for the vast majority of bribery offences (10 years where it concerns passive bribery of judges or arbitrators under Article 332 paragraph 2). Bearing in mind the secretive nature of corruption, this is not a long deadline to initiate proceedings but it is not different from that of many other countries and the calculation is interrupted with almost any first act of criminal proceedings.
120. The jurisdiction of Germany is based on the general provisions of the Criminal Code as well as specific provisions of the Act on Combating International Bribery and the EU bribery Act (adopted in 1998 to comply with the EU and OECD conventions' requirements). The German authorities take the view that they assume general jurisdiction where the offence was committed in whole or in part in Germany (Article 17 paragraph 1a of the Convention): the GET noted that section 9 CC provides for the applicability of the ubiquity principle in connection with the place where the offender and his/her accomplices acted, and the place where the results of the offence occur or should occur according to the understanding of the perpetrator.
121. As regards jurisdiction in accordance with Article 17 paragraph 1b and 1c of the Convention, the relevant provisions are quite fragmented and they could be complex to understand for practitioners and offenders themselves; the general rules are laid down in the Criminal Code and they are complemented by specific provisions of the EU bribery act and the Act on Combating International Bribery. As regards jurisdiction based on the type of offender (Article 17 paragraph 1b of the Convention), German law so far does not seem to cover certain offences committed abroad by Germans if the offence is not punishable at the place of commission: granting and taking of a benefit (sections 331 and 333 CC), private sector bribery offences (section 299 CC), granting a benefit to German arbitrators (section 333 paragraph 2 CC) and bribery of German arbitrators (section 334 paragraph 2 CC). The GET noted that jurisdiction in respect of active and passive bribery offences by or involving foreign public officials and assembly members, by or involving officials of international organisations (besides the EU, in some specific cases) / members of an international assembly / judges and officials of an international court is restricted to the context of the EU or international business transactions, since foreign bribery offences are only criminalised insofar.
122. As regards the mechanisms of Article 17 paragraph 1c of the Convention, in principle the broad provisions of sections 5 paragraph 14 and section 7 paragraph 1 CC are limited to offences "against" (not "involving") German public officials and German nationals, and are not applicable in the context of corruption (for instance, the case in which a domestic official – whether or not s/he is a German national – would be bribed abroad by a foreigner); partial exceptions were made under section 5 paragraph 14a CC for bribery of German members of parliament<sup>35</sup>, as well as under the Act on Combating International Bribery and the EU bribery Act<sup>36</sup>. In view of the above, the GET concludes that the rules applicable to jurisdiction need to be extended; it is

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<sup>35</sup> The perpetrator must be German or the offence was committed against a German

<sup>36</sup> There are various restrictions: the context is limited to international business transactions, to the applicability of sections 334 to 336 CC, to offences committed abroad by Germans (Act on Combating International Bribery); to corruption offences except those of sections 331 and 334, the perpetrator must be German or where s/he is a foreigner s/he commits the act as a public official or Community official.

recommended i) to clearly establish jurisdiction for the various corruption offences in line with Article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) and its additional Protocol (ETS 191); ii) to include, to the extent possible, all relevant rules concerning jurisdiction in the Criminal Code in order to facilitate their understanding by practitioners and the public at large.

#### **IV. CONCLUSIONS**

123. The incriminations of corruption in Germany have slightly evolved over the years. It would appear that practitioners in charge of investigating and prosecuting corruption are deploying real efforts to make best use of the legal tools currently at their disposal; despite Germany's economic and commercial power, these tools are subject to certain limitations when it comes to dealing with cross border forms of corruption. In this context, it is regrettable that the federal parliament has not managed during the past legislature to adopt the draft act on revision of the anti-corruption provisions, which was presented in 2007 and would have enabled Germany to ratify the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS191), as well as the United Nations Convention against Corruption; the country has thus missed an opportunity to improve further and in a timely manner its criminal anti-corruption provisions and to simplify its legislation, in line with international requirements. A particular source of concern is the fact that certain categories of persons (including members of parliament and local council members who are not officials) are subject to limited anti-corruption provisions. This could generate the impression, within the wider public, that parts of German society are not subject to the same rules as the rest of the population, when it comes to the preservation of integrity in social, political and business relations. Germany is urged to pass an ambitious set of legal measures to complement the existing legal anti-corruption provisions. Particular attention will need to be paid i.a. to broadening the incrimination of active and passive bribery of assembly members, foreign public officials and persons employed at international level, broadening the incrimination of private sector bribery, criminalising trading in influence and harmonising and extending the rules on the jurisdiction of Germany for corruption offences.
124. In view of the above, GRECO addresses the following recommendations to Germany:
- i. **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the ratification of its Additional Protocol (ETS 191) (paragraph 98);**
  - ii. **to keep under review the application of the administrative authorisation procedure under sections 331 paragraph 3 and 333 paragraph 3 of the Criminal Code (concerning the acceptance and granting of a benefit by public officials), in order to ascertain possible implications for legal security, including in matters of investigation and prosecution of corruption offences and, if need be, to take appropriate measures (paragraph 104);**
  - iii. **to substantially broaden the incrimination of active and passive bribery of assembly members under section 108e of the Criminal Code, to bring it in line with Article 4 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 107);**
  - iv. **to incriminate more broadly, active and passive bribery of members of foreign public assemblies (paragraph 108);**

- v. **to incriminate active as well as passive bribery of foreign public officials more broadly, in line with Article 5 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 109);**
  - vi. **to incriminate more broadly active as well as passive bribery of officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts, in line with Articles 9 to 11 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 110);**
  - vii. **to ensure that active and passive bribery of foreign jurors is criminalised in Germany in accordance with the provisions of Article 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 173) (paragraph 111);**
  - viii. **to amend the provisions on bribery in the private sector of section 299 CC in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 112);**
  - ix. **to criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 114);**
  - x. **i) to clearly establish jurisdiction for the various corruption offences in line with Article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) and its additional Protocol (ETS 191); ii) to include, to the extent possible, all relevant rules concerning jurisdiction in the Criminal Code in order to facilitate their understanding by practitioners and the public at large (paragraph 122).**
125. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the German authorities to present a report on the implementation of the above-mentioned recommendations by 30 June 2011.
126. Finally, GRECO invites the authorities of Germany to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.