

## QUESTIONNAIRE

### Country self-assessment report on implementation and enforcement of G20 commitments on foreign bribery

G20 countries are invited to complete the questionnaire, below, on the implementation and enforcement of G20 commitments on foreign bribery.

Part I questions are drafted directly from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence endorsed by G20 Leaders in St. Petersburg, and its background note on Enforcement of Foreign Bribery Offences. Part II questions are drafted from the G20 Anti-Corruption Action Plan and the St. Petersburg Leaders' Declaration.

Responses to this questionnaire could be compiled into a summary on the "state of play" in G20 countries on steps taken to date to implement the aforementioned commitments, as well as plans for future actions in this area.

#### I. Implementation of the Guiding Principles on Enforcement of the Foreign Bribery Offence in G20 Countries

*Note 1:* This section of the questionnaire is drafted from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence and the background note on Enforcement of Foreign Bribery Offences.

##### **A. A robust legislative framework**

*In your jurisdiction:*

**1. Is there a clear and explicit foreign bribery offence that covers the key elements of the internationally agreed definition for foreign bribery, including offering, promising or giving of a bribe, bribery through intermediaries, and bribes paid to third party beneficiaries?**

- *If your jurisdiction criminalises foreign bribery*, please provide references to the relevant provisions and/or the full text, if possible.
- *If your jurisdiction does not have a foreign bribery offence:*
  - Please note whether an offence has been "drafted", "submitted for government review", or "adopted but not yet entered into force".
  - Please provide a timeline for the entry into force of draft legislation, where applicable.

Response: The relevant legal framework is provided by the Criminal Code (*Strafgesetzbuch; hereinafter "CC"*) as well as separate pieces of legislation (which refer to the Criminal Code). In 1998, Germany passed the Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung*) in order to implement the Convention.

The general approach of the *Act on Combating International Bribery* is to provide for the equal treatment of the offences of bribing domestic and foreign public officials and parliamentarians. Bribery of domestic public officials is punishable in Germany under sections 334 to 338 of the Criminal Code which, pursuant to the *Act on Combating International Bribery*, also apply to the bribery of foreign public officials. This Act also includes a separate offence for the bribery of foreign Members of Parliament and Members of parliamentary assemblies of international

organisations (article 2, section 2).

Active Bribery of domestic public officials is punishable in Germany under sections 334 to 338 of the Criminal Code.

- **The main provision in section 334(1) CC provides that:**

“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.”

- **Section 1 and 2 of the Act on Combating International Bribery provide that**

bribery

- of foreign public officials, judges and soldiers,
- of public officials who work for international organisations,
- of foreign members of parliament or parliamentarians of an international organization

is punishable if it is made in order to obtain or retain for oneself or a third party business or an improper advantage in international business transactions.

Furthermore, sections 299 CC *et seq.* cover offences committed in the course of business activity, including abroad.

- **Section 299 CC provides that:**

(1) Whosoever 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 according an unfair preference to another in the competitive purchase of goods or commercial services shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever 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’s or agent’s according him or another an unfair preference in the purchase of goods or commercial services shall incur the same penalty.

(3) Subsections (1) and (2) above shall also apply to acts in competition abroad.

*Note 2: For questions 2 through 11, jurisdictions without a foreign bribery offence should include updates on plans to address the following issues in efforts to establish the criminalisation of foreign bribery and a framework for enforcing this offence.*

**2. What is the statute of limitations for investigating and prosecuting foreign bribery?** Please indicate the criteria for suspension, interruption or extension of the statute of limitations?

Response:

Natural persons

The statute of limitations for the foreign bribery offences, as well as for the domestic bribery offences, is five years (section 78 para 3 no 4 of the CC). Since section 334 CC provides for punishment by a prison sentence of up to five years, where the basic facts of a case indicate that a public official has been bribed, the limitation period amounts to five years as well. The limitation period for the offence of commercial bribery under section 299 is five years, too. The limitation period begins with the completion of the offence. The period of limitation regarding advantages that

are granted in parts or in instalments based on one and the same unlawful contract will commence only upon acceptance of the last part or instalment. The limitation period will be suspended whenever, and prior to its expiry, a ruling has been handed down by a court of first instance (section 78b (3) CC). In these cases, the limitation period will not continue before the proceedings have been concluded finally and conclusively.

In contrast to suspensions, interruption of the statute of limitation will cause that part of a limitation period that has already lapsed to be cancelled by certain procedural actions. In these cases, the limitation period will commence anew and in full. The statute of limitations shall be interrupted by facts enumerated in subsection 78c(1) CC. The limitations period is renewed after each interruption. However, the prosecution is barred when twice the statutory limitation period has elapsed since completion of the offence (absolute statute of limitations, section 78c(3) CC), i.e. after ten years for the domestic and foreign bribery offences.

#### Legal persons

In accordance with a *decision of the Federal Court of Justice*, the same limitations period applies to legal persons (instead of the three-year limitations period for administrative offences under the Administrative Offences Act (hereinafter "OWiG") where the related natural person committed a criminal offence, including bribery. This means that an interruption of the limitation period against a natural person will be effective also against a legal person if no separate proceedings are being pursued against that person. Where separate proceedings are concerned regarding the assessment of a fine against a legal person, the limitation period is interrupted by actions that correspond to those actions serving to interrupt the limitation period for natural persons (section 31(1) OWiG second sentence). In the field of bribery offences, search warrants issued by prosecutors/and/or judges or an order to examine the accused party are the most frequent procedural actions that interrupt the limitation period.

### 3. Please describe the form of jurisdiction available over the foreign bribery offence (i.e. territorial or nationality jurisdiction).

#### Response:

German criminal law generally applies to offences committed abroad against or by a German, if the act is a criminal offence at the place of its commission or if that place is not subject to any criminal jurisdiction (section 7(1) and section 7(2)1 CC). Particularly, German criminal law also applies to other offences committed abroad if the act is a criminal offence at the place of its commission or if the place is not subject to any criminal law jurisdiction and if the offender was a foreigner at the time of the offence and is discovered in Germany. Another requirement is that although the Extradition Act would permit extradition for such an offence, the offender is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible (section 7(2)2 CC).

In addition, the Act on Combating International Bribery provides that German Criminal law applies to the offense of Bribery of foreign public officials and Bribery of foreign MPs regardless whether the act is a criminal offense at the locality of its commission if the offender is German (section 3 of the Act on Combating International Bribery).

### 4. Please indicate whether your jurisdiction has a corporate liability regime for the offence of foreign bribery.

*If your jurisdiction does not have a corporate liability regime for the offence of foreign bribery, please provide a timeline for implementation of corporate liability.*

Germany establishes the liability of legal persons, including liability for the foreign bribery offence, under the OWiG. According to section 30 OWiG companies may be held liable, if a person with managerial responsibility for the company has committed a criminal offence (such as the offense of foreign bribery) or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where

the legal person or the association of persons has been enriched or was intended to be enriched.

Thus, the criminal offence of foreign bribery can lead to a liability of a company.

Furthermore, the violation of the duty to take appropriate supervisory measures required to prevent breaches of criminal or administrative law is a regulatory offense according to section 130 OWiG. Thus, if a violation of supervisory measures has resulted in an offense of foreign bribery, the company can be held liable according to section 30 OWiG in conjunction with section 130 OWiG.

**5(a) Please describe the sanctions and confiscation measures available for natural and legal persons for the crime of foreign bribery.**

**5(b) Please provide the number of criminal, administrative, and civil cases of foreign bribery that have resulted in a final disposition, and indicate (i) how many of these cases have resulted in a criminal conviction or acquittal, or similar findings under an administrative or civil procedure, and (ii) the number of natural and legal persons who have been convicted or otherwise sanctioned.**

- *Where possible, please provide references to the relevant provisions and/or the full text, if possible.*

Response:

(a)

**Natural persons:**

With respect to the foreign bribery offence, the available duration of imprisonment ranges from 3 months to 5 years and rises from 1 to 10 years in “especially serious” cases of foreign bribery (section 335 of the German Criminal Code).

The offence of commercial bribery offence under section 299 can be punished with imprisonment for up to three years or a fine. Furthermore, the available duration of imprisonment for “especially serious” cases of commercial bribery (and all foreign bribery cases resolved with the commercial bribery offence were so far deemed “especially serious” as reflected in case law) ranges from 3 months to 5 years.

**Legal persons:**

According to Sec. 30 (2) OWiG the maximum regulatory fine that can be imposed on a legal person for criminal offences (such as foreign bribery) committed by the management of said legal persons is ten million euros – not including confiscation of proceeds (Section 30 (2) Sentence 1 OWiG).

Furthermore, the Act on Regulatory Offences contains a provision stipulating that the maximum regulatory fine that can be imposed on a legal person for administrative offences committed by the management said of legal person is multiplied by ten, provided that a reference to this new provision is made in the corresponding statute which regulates the maximum regulatory fine that can be imposed upon a natural person (Section 30 (2) Sentence 3 OWiG).

Such a reference is put in place by the newly inserted Section 130 (3) Sentence 2 OWiG, thus increasing the maximum regulatory fine that can be imposed on legal persons for the offence of omitting supervisory measures (Sections 130 and 30 OWiG) from one million euros to up to ten million euros if the omission leads to a breach of duty carrying a criminal penalty, such as for example foreign bribery.

In addition, it should be noted that pursuant to Section 17a (4) OWiG a fine can exceed the maximum amount of ten million euros in order to deprive the offender of the total financial benefit gained by the offence (i.e. to confiscate proceeds of the crime).

**Confiscation measures:**

The German Criminal Code provides for provisions that allow the confiscation of the proceeds of crimes and the deprivation of the object of the crime.

The legal conditions for the confiscation of the proceeds are set out in section 73 of the German Criminal Code. Section 73 provides that the court shall order the confiscation of what was obtained if an unlawful act has been committed and the perpetrator or a secondary participant has acquired proceeds from it.

Additionally, section 73 d CC states that if an unlawful act has been committed pursuant to a law which refers to this provision, the court shall also order the confiscation of objects of the principal or secondary participant if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them. Thus, section 73 d CC provides for a facilitation of the burden of proof for confiscation measures.

Furthermore, the bribe is subject to “deprivation” (section 74 CC) when it is still in the possession of the briber (this will be the case if the bribe has either not been handed over or has been rejected by the person to be bribed).

Section 76a CC provides for non-conviction based confiscation and deprivation measures if for reasons of fact no person can be prosecuted or convicted of the offence and if the conditions under which the measure is prescribed or available otherwise are met.

(b) Reference is made to the data provided to the OECD Working Group on Bribery in International Business Transactions.

**B. Effective detection and domestic coordination**

*In your jurisdiction:*

**6. What steps have been taken to engage with relevant agencies, such as overseas missions, broader tax administrations, trade promotion, public procurement and export credit agencies, as well as with the private sector, on issues related to implementation and enforcement of the foreign bribery offence? Where possible, please cite specific examples.**

Response:

Overseas missions:

The German Foreign Office has for several years been keeping its diplomatic missions informed by means of a memorandum on foreign bribery. Subsequent to the Phase 3 Evaluation Report of the OECD Working Group on Bribery, Germany has updated this —Runderlass zur Rolle der Auslandsvertretungen bei der Bekämpfung der Korruption im internationalen Geschäftsverkehr (—Memorandum on the Role of the Diplomatic Missions in Combating Corruption in International Commercial Practice ) (RES 53-8 from 7 June 2012). This update took place in 2012. In this connection the duties of the German embassies and consulates general were respecified subsequent to the results of the Phase 3 Evaluation. Attached to the memorandum is a summary of the relevant criminal offences under German law, also including the Act on Combating International Bribery (IntBestG).

One of the main duties of the German diplomatic missions in this connection is to support German companies in acting in a compliant manner, thus in accordance with German laws and the laws in force in the receiving country. The diplomatic missions are in particular encouraged to use suitable means to sensitise small and medium-sized German companies to compliance issues and to advise them in this respect. At the same time it is explicitly clear that no provision is made for legal counselling in individual cases. The duty of companies to obtain legal advice in cases of doubt is not therefore removed.

The diplomatic missions are urged to point out in particular to smaller and medium-sized German companies in the



course of their co-operation with them that

- bribery of foreign public officials is a crime under German law and bribery of foreign public officials in international commercial practice is equivalent to corruptive action in Germany,
- only lawful behaviour in international commercial practice will be supported by the diplomatic mission,
- corruptive conduct is not in the interests of the companies as it can lead to considerable, even existence-threatening, consequences for the individual companies, such as criminal prosecution of management and employees, and
- corruption harms the national economies of both the receiving country and of Germany.

With this in mind the diplomatic missions are also required to reinforce their co-operation ventures locally with the partner organisations for foreign trade promotion and development co-operation in matters concerning the fight against corruption.

In concrete terms the commercial departments of the diplomatic missions are available to German companies for issues relating to the fight against corruption in international commercial practice. Internet sites of some diplomatic missions make interested companies aware of this (for example see the internet sites of the German Embassies in Cotonou and in Bangkok:

[www.cotonou.diplo.de/Vertretung/cotonou/de/05-Wirtschaft/Aussenwirtschaftsfoerderung/s\\_korruption\\_d.html](http://www.cotonou.diplo.de/Vertretung/cotonou/de/05-Wirtschaft/Aussenwirtschaftsfoerderung/s_korruption_d.html)

[www.bangkok.diplo.de/Vertretung/bangkok/de/02/Korruptionspraevention.html](http://www.bangkok.diplo.de/Vertretung/bangkok/de/02/Korruptionspraevention.html)

If a German diplomatic mission becomes aware that there is cause for suspicion of a case of foreign bribery, it is obliged to make contact with the headquarters of the German Foreign Office in Berlin. The circumstances will be materially and legally investigated there. If the suspicion is substantiated the German Foreign Office will notify the competent German public prosecutor's office.

Tax measures:

Section 4(5) 1st sentence No. 10 of the German Income Tax Act establishes the obligation for tax authorities to report suspected cases of bribery. The obligation to report suspected cases of corruption under the Income Tax Act has been reinforced by a circular issued by the Federal Ministry of Finance on 10 October 2002 and related Guidelines. A further step towards strengthening the effectiveness of tax audits in the detection and reporting of bribery was a 2008 ruling by the Federal Finance Court (BFH), the highest German court dealing with tax matters, establishing that in all cases involving expenditures or the granting of benefits as defined by section 4 (5) of the German Income Tax Act, the relevant information must be forwarded to the prosecuting authorities. This also includes bribes paid to foreign public officials. The legal obligation to report suspected cases has proven to be one of the most common trigger for investigations for bribery offences.

Public procurement:

Besides legal sanctioning powers, public procurement law also includes powers to react to criminal offences including foreign bribery. In the event of previously committed acts of bribery companies are regarded as unreliable and, therefore, have to be debarred from the awarding of public contracts.

**7(a) Are appropriate reporting channels available for whistleblowers in both the private and public sectors?**

**7(b) Are appropriate protections available for whistleblowers in both the private and public sectors?**

*Where possible, specific reference should be made to implementation of the G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation.<sup>1</sup>*

**Response:**

The German law provides for specific provisions for whistle blowers in the public sector. According to the Law on Public Officials public officials are released from the obligation of secrecy if certain facts have given raise to the suspicion of bribery.

For employees in the private sector there are no specific provisions for whistleblowers. However, in Germany employees who notify external authorities about a contravention of laws (such as foreign bribery cases) are protected by German labor law which grants a high level of protection against dismissals.

Based on a ruling by the highest German Court, the Federal Constitutional Court, the highest court for German labour law, the Federal Labour Court, has ruled that employees who report in good faith on their company's misconduct generally enjoy protection from dismissal (see German phase 3 report, page 64; German first follow-up report to phase 3, page 23). Furthermore the European Court of Human Rights substantiated in 2011 the employees' right to publicly refer to nuisances at their place of employment (judgement of 21 July 2011, 28274/08). German labour courts must take these judgements into account when making their rulings in future.

The coalition agreement of the current government provides that it is to be considered, whether with regard to the protection of whistleblowers international provisions are sufficiently implemented.

### **C. Effective investigation and prosecution**

*In your jurisdiction:*

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<sup>1</sup> Available online here: <http://www.oecd.org/corruption/48972967.pdf>

**8(a) Please describe the investigative powers granted to law enforcement authorities to proactively and effectively investigate and prosecute foreign bribery.**

**8(b) Please describe the specialized training on detecting, investigating and prosecuting foreign bribery provided and/or planned to be provided to law enforcement authorities.**

Response:

a. There are no special statutory provisions in Germany relating to investigation proceedings for bribery. The German Code of Criminal procedure is applicable to all crimes including foreign bribery.

According to section 100a (2) of the German Code of Criminal Procedure it is possible to intercept telecommunications wherever offences entail the bribery of foreign public officials in international business transactions. Furthermore, the search of premises including the private premises of the suspect is possible. The German Code of Criminal Procedure also allows undercover investigations in the course of investigations.

b. The actual investigation and prosecution of the majority of all criminal offences, including domestic and foreign bribery, is conducted by the governments of the 16 *Länder*. Therefore, the *Länder* are responsible for training measures for their law enforcement authorities.

**9(a) Please describe the procedures in place for ensuring prompt and effective handling of outgoing and incoming mutual legal assistance requests in relation to foreign bribery cases.**

**9(b) Please describe how informal assistance is encouraged, in conformity with your jurisdiction's legal system.**

*Where possible, specific reference should be made to implementation of the G20 High-Level Principles on Mutual Legal Assistance.<sup>2</sup>*

Response:

The Act on International Legal Assistance in Criminal Matters (Gesetz über die international Rechtshilfe in Strafsachen – IRG) governs how and under what preconditions support may be provided to criminal proceedings in another country. It forms the basis for the field of mutual legal assistance. This Act is of course also applicable for cases related to bribery.

Germany has become a signatory to the important multilateral agreements which are designed to facilitate Mutual legal assistance. These are complemented by bilateral agreements between Germany and a single other state.

Pursuant to German legal rules, however, performance of mutual legal assistance is possible without an existing international law agreement as well. In its non-treaty-based assistance with a large number of states, Germany also has good and trusting cooperation in sanctioning and preventing criminal offences such as bribery.

Section 59 of the IRG is a broadly-framed provision which enables investigative acts; in principle, this is allowed in the same scope as the mutual legal assistance which German courts or authorities could provide to one another. In addition to the IRG, the provisions of general German criminal procedure law apply to acts of mutual legal

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<sup>2</sup> Available online here: <http://www.oecd.org/g20/topics/anti-corruption/High-Level-Principles-on-Mutual-Legal-Assistance.pdf>



assistance.

Requests for mutual legal assistance are submitted to Germany via various channels of communication; this can be diplomatically via the Foreign Office, interministerially among justice ministries, or directly between public prosecution offices or, in exceptional cases, between police authorities. The proper channels of communication are set forth in the applicable international-law agreement. If no such agreement exists, diplomatic channels of communication are to be maintained.

**II. Implementation of Foreign Bribery Provisions in the 2012-2013 G20 Anti-Corruption Action and the St Petersburg Declaration**

*Note 3: This section of the questionnaire is drafted from the 2012-2013 G20 Anti-Corruption Action Plan and the St. Petersburg Leaders’ Declaration. It also seeks updates from G20 countries on next steps for fighting foreign bribery.*

**10. Please specify next steps for continuing “efforts to adopt and enforce laws and other measures against foreign bribery”.<sup>3</sup>**

Response:  
 A draft bill (Draft Anti-Corruption Act – Entwurf eines Gesetzes zur Bekämpfung der Korruption), which will amend the Criminal Code was presented for public consultation by the Federal Ministry of Justice and Consumer Protection on 9 June 2014 and is publicly available on the Ministry’s website. The draft bill will provide, *inter alia*, for the broader criminalization of both active and passive bribery of foreign public officials and of bribery in the private sector. It will also broaden the applicable jurisdiction rules.

**11. Please specify next steps for engagement with the OECD Working Group on Bribery with a view to explore possible adherence to the OECD Anti-bribery Convention as appropriate.**

**Specifically and where applicable, please indicate any plans to:**

- Attend meetings of the WGB in 2014;
- Co-organize or attend meetings on foreign bribery; and/or
- Engage in technical assistance activities on the issue of implementation and enforcement of the foreign bribery offence;
- Open discussion for Membership in the WGB, with a view to acceding to the OECD Anti-Bribery Convention.

Response:  
 Germany is a WGB member and attends its meetings of the WGB.

<sup>3</sup> G20 Anti-Corruption Action Plan 2013 – 2014, Point 2.



