

Update on German Anti-Corruption Legislation and Procedure

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In this newsletter, we focus on the following topics:

- The new and tightened German anti-corruption legislation applicable to members of Parliamentary assemblies;
- Germany's ratification of the United Nations Convention Against Corruption; and
- the statutory framework for settling criminal cases in Germany, in light of the record fine of USD 100 million, recently paid by an individual defendant to put an end to a corruption trial in Munich.

1. German Legislator Tightens Anti-Corruption Legislation Applicable to Members of Parliamentary Assemblies

On 1 September 2014, an important amendment to German anti-corruption legislation has entered into force. Section 108e of the German Criminal Code (CC), which hitherto penalised providing advantages to members of Parliamentary assemblies in very narrow circumstances only, has been broadened significantly.

The former version of Section 108e CC limited criminal conduct to "buying or selling a vote for an election or ballot" in a Parliamentary assembly in Germany or in the European Parliament. Section 108e para. 2 CC (as amended) makes it now a criminal act to offer, promise, or give an undue advantage to a member of either: the German Federal Parliament (*Bundestag*), a State Parliament (*Landtag*), a representative body at the municipal level, the European Parliament, the Parliamentary assembly of international organisations, or the legislature of a foreign country, in order that such a member should act or abstain from acting according to an order or instruction. Vice versa, section 108e para. 1 CC makes it unlawful for a member of the Parliamentary assembly to solicit, accept, or promise the acceptance of an undue advantage for such a purpose. The act will also be criminal if the advantage does not reach the member, but it is passed on to a third party.

The attempt to bribe or be bribed does not by itself constitute a criminal act. However, it should be noted that the mere offer or solicitation of an undue advantage is a criminal act under Section 108e CC. Therefore, very early stages of discussions with a member may be regarded as criminally relevant by a German prosecutor. Moreover, legislative history shows that the term "by order or

instruction" is to be construed broadly, so as to encompass any act that aims to encourage the member to comply with the briber's interest.

Obviously, a criminal prohibition defined as broadly as in Section 108e CC (as amended) is likely to conflict with certain legitimate aspects of the practical life of a member of a Parliamentary assembly. Therefore, the German legislator has accepted an important qualification. The advantage must be "undue" to be treated as criminal. Section 108e para. 4 CC states that this is not the case if the advantage is compatible with provisions relevant to the legal status of the member. Beyond that rather narrow wording, legislative history shows that "parliamentary customs" must also be taken into account. Moreover, Section 108e para. 4 CC acknowledges that advantages related to a mandate or a function within a political party are not "undue" for the purposes of criminal liability under Section 108e CC. The same applies to donations permitted by law (e.g. permissible donations under section 44a *Abgeordnetengesetz*). Finally, it could be argued that advantages given merely to establish or maintain good relationships with members of a Parliamentary assembly are not criminal, so long as no specific act or omission is being influenced or promised. However, caution and strict compliance controls should govern any activity in that field.

2. Germany to Ratify United Nations Convention Against Corruption

From a historical perspective, the amendment of section 108e CC is an important step. It finally paves the way to Germany's ratification of the United Nations Convention Against Corruption, which, among other things, sets standards regarding anti-corruption legislation applicable to members of Parliamentary assemblies. The German government had signed the Convention in 2003. However, for more than ten years, German lawmakers could not reach agreement as to how to implement the Convention's requirements in respect of themselves. Now that Section 108e (as amended) has entered into force, it is expected that Germany will formally ratify the Convention prior to the next G-20 summit in November 2014.

3. Legal Framework of Settling Criminal Cases in Germany

The outcome of a recent corruption trial in Munich, which ended with the defendant's acceptance of a record fine of USD 100 million in return for the termination of the trial, raises the question of the circumstances in which criminal allegations may be settled with German prosecutors and courts.

The German Code of Criminal Procedure (CCP) provides for several statutory avenues to settling criminal cases. They each reflect varying degrees of presumed innocence or guilt, and may come into play at different stages of the criminal proceedings. In this newsletter, we focus on two forms of settlement that both lead to some form of sanction against the accused. In each case, the accused, the prosecutor's office, and the court must have reached a mutual agreement.

- **Section 153a CCP - Settlement without guilty plea.** Under section 153a CCP (which was applied in the aforementioned case), the accused does not plead guilty, but nevertheless accepts some sort of sanction. Depending on the individual circumstances, this will consist of, for example, compensating for the damage done, paying a sum of money to a non-profit organisation or the state, doing social work, attempting conciliation or reaching a

settlement with the victim, or participating in a social training program. In return, the public prosecutor's office drops the criminal charges, or, if a trial has already begun, the court abandons the trial. There is no statutory limit for a fine under Section 153a CCP, although it should be commensurate with the alleged guilt and the defendant's economic situation. A settlement according to Section 153a CCP is limited to misdemeanors (*Vergehen*) as opposed to crimes (*Verbrechen*), which are more serious violations of the criminal law, which include bribery, fraud, embezzlement, and breach of fiduciary duties. It can be made during the preliminary proceedings or after trial has begun. In each case, the court must approve the settlement. If the defendant fulfills the terms of the settlement, he or she will be treated as not guilty, the allegations will not enter his or her criminal record, and he or she may not be charged for the same criminal offence again. If the defendant does not fulfil the terms within a certain time frame set by the prosecutor's office or the court, the prosecutor's office resumes the charges and the trial proceeds. According to its wording, section 153a CCP applies only if the settlement is in accordance with the public interest and the defendant's alleged culpability is not too severe. In practice, further aspects may play a role, such as the length of the proceedings, the public exposure of the defendant during proceedings so far, or his or her previous criminal record. The decision to drop the charges or abandon the trial is not subject to appeal.

- **Section 257c CCP - Settlement with guilty plea.** Under section 257c CCP, the court is authorised to deliver a final verdict based on a negotiated agreement with the accused and the public prosecutor's office, regarding the punishment and/or certain procedural issues. Section 257c CCP applies to both misdemeanors and crimes. In general, the agreement will be accompanied by a guilty plea from the accused. The guilty plea may not be a pure formality. It must be consistent with the result of the court's factual determination, it may not be self-contradictory, and it must support the court's reasoning and verdict. The scope and subject matter of the agreement are limited, to preserve judicial independence. The agreement may not determine the punishment in all its particulars (for example, the amount of the fine or the prison term). The accused, the court, and the prosecutor's office may only agree on an appropriate range for the sentence. Moreover, the agreement may not cover the facts that the court is to establish in its verdict, its legal reasoning, or its classification of the acts. However, it is generally acceptable that the agreement should govern certain procedural steps, such as a waiver by the court on taking further evidence, or a waiver by the prosecutor's office or the defendant on requesting the taking of evidence. Since the final outcome of a settlement according to section 257c CCP will be a verdict, the accused will be treated as guilty, and convicted of the offences stipulated in the verdict, and corresponding entries will be made in their criminal record. Moreover, the verdict can be appealed. The appeal can be based on errors of law or procedure, including those that apply to the negotiated agreement itself (for example, duress exercised on the defendant, or incomplete or mistaken advice given to the defendant in respect of his or her rights).

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