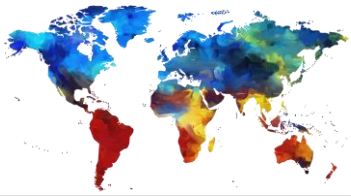
Comparative Guide
Anti-Corruption & Bribery – Germany



1. Legal Framework

1.1 Which legislative and regulatory provisions govern anti-corruption in your jurisdiction, from a regulatory (preventive) and enforcement (criminal) perspective?

In Germany, the fight against corruption is primarily governed by criminal law. The acceptance of benefits, passive corruption, granting of benefits and bribery are punishable under Sections 331 to 335a of the Penal Code. However, these criminal offences relate only to corruption involving public officials. Sections 299, 299a and 299b of the Penal Code govern criminal offences sanctioning corruption in business dealings and in the healthcare system. In addition, bribery of voters and members of parliaments (not only the Federal Parliament, but also state and local parliaments) is sanctioned under Sections 108b and 108e of the Penal Code.

In addition to the repressive regulatory provisions listed above, there are few preventive, corruption-specific provisions. Standardised rules to prevent corruption exist for the public sector only. In the healthcare and private sectors, obligations are mainly organisational. For example, associations of social health insurance-accredited physicians and statutory health insurance funds are obliged, under Sections 81a(4) and 197a(4) of the Social Code, to set up bodies to combat misconduct in the healthcare system. Similarly, companies are required to implement compliance measures to prevent corruption under Sections 30 and 130 of the Act on Administrative Offences.

1.2 Which bilateral and multilateral instruments on anti-corruption have effect in your jurisdiction?

To fight cross-border corruption effectively, Germany supports the implementation of and compliance with international standards against corruption through active participation in the United Nations, the World Bank, the G7/G20 and the Organisation for Economic Co-operation and Development (OECD).

In Germany, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions applies. In addition, Germany has acceded to the UN Convention against Corruption. The Criminal Law Convention on Corruption of the Council of Europe and a supplementary protocol were further ratified by Germany on 10 May 2017.

As Germany is an EU member state, European legal instruments to combat corruption also apply in Germany. Germany has transposed into national law the Protocol of 27 September 1996 to the Convention on the Protection of the European Communities' Financial Interests and the Convention of 26 May 1997 on the Fight against Corruption Involving Officials of the European Communities or officials of Member States of the European Union. The Directive of 5 July 2017 on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law must also be taken into account.

1.3 Are there accessible directives or other guidance from enforcement authorities in your jurisdiction?

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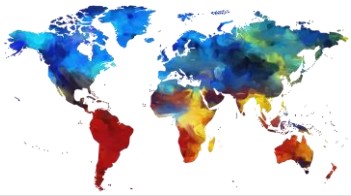


In Germany, there is no directive or guidance comparable to the guidance on the UK Bribery Act. Binding guidelines for the prevention of corruption exist only for the public sector. For example, a federal government directive governs corruption prevention at the federal administration level (available at www.itzbund.de/SharedDocs/Downloads/DE/RL_KorrPr.pdf?__blob=publicationFile&v=1).

1.4 Which bodies are responsible for enforcing the applicable laws and regulations? What powers do they have?

The law enforcement authorities and the courts are responsible for enforcing the anti-corruption legislation. In all German states, there are special public prosecutor's offices for white collar crime, in which special departments are set up to combat corruption. In some states, there are also specialised public prosecutor's offices for corruption offences.

If corruption is suspected at the outset, the public prosecutor's office is obliged to intervene. An exception in this respect exists under Section 299 of the Penal Code. Since this provision governs a relative offence on complaint, corruption in business transactions requires a formal criminal complaint.

If the suspected corruption is confirmed, the public prosecutor's office will file charges. If the culpable offence can be proven, the offender will be sentenced to a fine or imprisonment by the court.

Under certain conditions, however, the public prosecutor's office may waive the prosecution (cf Sections 153 and following of the Code of Criminal Procedure. In the event of suspension under Section 153a(1) of the Code of Criminal Procedure, the public prosecutor's office may order the defendant to pay a fine.

To ensure that corruption offences are not worthwhile for offenders, Sections 73 and following of the Penal Code provide for confiscation of the proceeds of the offence. Confiscation is ordered by the court.

In the absence of corporate criminal law, companies in Germany may be sanctioned only by Section 30 of the Act on Administrative Offences. The public prosecutor's office is responsible for prosecution (cf Section 131(3) of the Act on Administrative Offences). Obviously, only a fine can be imposed on legal entities. Alternatively or cumulatively, the secondary sanction of confiscation known from criminal law (Sections 22 and following of the Act on Administrative Offences) may be ordered.

1.5 What are the statistics regarding past and ongoing anti-corruption procedures in your jurisdiction?

The Federal Criminal Police Office published a Federal Status on Corruption for 2017, in which the crime situation in Germany is presented and evaluated. The report shows that corruption in Germany mainly arises in public administration. Nevertheless, the Federal Criminal Police Office noted a decline in the number of corruption crimes registered by the police for 2017. This decline is attributed to effective compliance structures in companies and corruption prevention measures in the public sector.

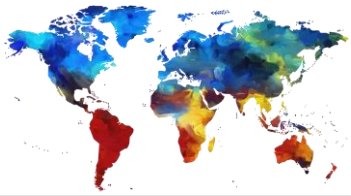
A report published by Martin Luther University in Halle-Wittenberg, entitled "White-collar crime 2018 – added value of compliance – forensic experiences" (available at www.pwc.de/de/risk/pwc-wikri-2018.pdf), reached the same conclusion.

Germany currently ranks 11th in the annual Corruption Perception Index published by Transparency International.

1.6 What are the shortcomings identified in your jurisdiction's anti-corruption legislation (including recommendations of the Organisation for Economic Co-operation and Development, where applicable)?

Criticisms relate to inadequate legislation on the one hand and shortcomings in the prosecution of acts of corruption on the other.

With respect to the current legislation, the rudimentary regulations on the liability of companies come in for particular criticism. The OECD has therefore urged Germany to hold companies accountable like natural persons for corruption offences committed from within the company, and to sanction companies effectively, appropriately and dissuasively in the future.



The existing offences of corruption are in some cases perceived to be overly vague. The lack of regulations that would allow corruption to be combated more effectively is also criticised. In particular, Germany is reminded that it has inadequate whistleblower protection. Since anonymous whistleblowers frequently provide the decisive clues and thus enable investigations into corruption cases in the first place, it is recommended that whistleblower protection be improved to ensure a more effective fight against corruption.

To prevent legal uncertainty and ensure effective cooperation with authorities, the OECD further recommends that guidelines be developed for companies to deal with corruption cases.

Shortcomings are also identified in the prosecution of acts of corruption. For example, the public prosecutor's offices and the police lack appropriate organisational structures. In addition, the report points to inconsistent prosecution of corruption nationwide. This inconsistent application of the law by courts and public prosecutors is particularly attributed to insufficient cooperation at the level of the German states and a lack of information. In the OECD's view, establishing a nationwide uniform standard would ensure that the available sanctions are fully utilised and are effective, appropriate and dissuasive.

Transparency International Deutschland eV has criticised the obligation of the public prosecutor's offices to follow instructions from the justice ministers. This obligation should be abolished, to prevent any political influence in the prosecution of corruption.

2. Definitions and scope of application,

2.1 How is 'public corruption' or 'bribery of a public official' defined in the anti-corruption legislation?

Corruption offences relating to public officials are governed by Sections 331 and following of the Penal Code. Accordingly, it is a punishable offence for a public official to demand, allows himself or herself to be promised or accept a benefit for the discharge of an official duty, even if he or she does not violate any duties. Conversely, individuals who offer, promise or grant an official a benefit for the discharge of a duty are also punished. If the benefit is promised or granted for the violation of a duty, there will be a harsher punishment.

2.2 How is a 'public official' defined in the anti-corruption legislation? How is a 'foreign public official' defined?

German criminal law on corruption differentiates between public officials, European public officials and foreign and international public officials.

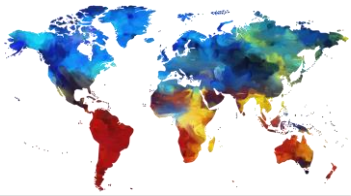
The term 'public official' is legally defined in Section 11(1)(2) of the Penal Code. Accordingly, public officials are to be considered civil servants or judges under German law, and individuals who are in another official relationship under public law or are otherwise appointed to perform public administration duties at or on behalf of an authority or other body, without prejudice to the organisational form chosen to perform their duties.

Pursuant to Section 11(1)(2a) of the Penal Code, 'European public officials' are persons who are members of the European Commission, the European Central Bank, the Court of Auditors or a court of law of the European Union; and officials or other civil servants of the European Union or of a body established on the basis of EU law, or who are responsible for carrying out tasks of the European Union or tasks of a body established on the basis of EU law.

Section 335a of the Penal Code designates judges of foreign or international courts and certain employees of foreign or international authorities as suitable beneficiaries of an act of corruption. It also covers soldiers and certain officials of the troops of non-German state parties to the North Atlantic Treaty stationed in Germany.

2.3 How is 'private corruption' or 'bribery in the private sector' defined in the anti-corruption legislation?

Passive corruption and bribery in business transactions are governed by Section 299 of the Penal Code. Accordingly, it is a criminal offence to demand, be promised or accept in an unfair manner benefits in business transactions as an



employee or representative of a business enterprise. Conversely, the offering, promising or granting of such a benefit is also punished.

The wording "in an unfair manner" clarifies that injustice is once again the central element of corruption in business transactions. Accordingly, the provision of a benefit in itself is not punishable by law. What is important is that the grantor and the recipient of the benefit agree that an inappropriate decision should be taken on the basis of the benefit.

2.4 How is 'bribe' defined in the anti-corruption legislation?

The colloquial term 'bribe' is used in Sections 299, 299a, 299b, 331 and following of the Penal Code under the concept of a 'benefit'. A 'benefit' is any tangible or intangible benefit to which there is no entitlement and which objectively improves the beneficiary's economic, legal or personal situation. Benefits that are granted to third parties are also covered by this concept.

2.5 What other criminal offences are identified and defined in the anti-corruption legislation?

In addition to corruption of public officials and business transactions, passive corruption and bribery in the healthcare sector (Sections 299a and following of the Penal Code) are also punishable by law. The bribery of voters and members of Parliament is further sanctioned under Sections 108b and 108e of the Penal Code.

2.6 Can both individuals and companies be prosecuted under the anti-corruption legislation?

Only natural persons are addressees of German criminal law. In the absence of corporate criminal law, legal entities may be prosecuted only via administrative offence law. Pursuant to Section 30 of the Act on Administrative Offences, companies are accessorily liable for criminal offences and administrative offences committed by their executives. As in many cases it is not an executive, but rather an ordinary employee who bribes or is bribed, it is frequently not the corruption itself that can be considered as a connecting offence. In such cases, however, Section 130 of the Act on Administrative Offences may be applied. Section 130 sanctions the violation of a supervisory duty as an administrative offence.

Under Section 130, management must take supervisory measures to prevent the commission of criminal offences within the company. With respect to corruption, this means that a company must take all appropriate, necessary and reasonable supervisory measures to prevent corruption.

If these supervisory measures are omitted and, as a result, acts of corruption are committed within the company, the company is liable under Section 30 of the Act on Administrative Offences.

2.7 Can foreign companies be prosecuted under the anti-corruption legislation?

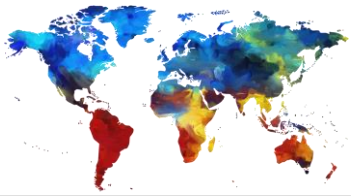
Foreign companies can be prosecuted pursuant to Section 30 of the Act on Administrative Offences only to the extent that:

- the connecting act constitutes a criminal offence or administrative offence under German law;
- German criminal law or administrative offence law is applicable; and
- the legal form of the foreign company is comparable to that of a German legal entity or association of persons.

2.8 Does the anti-corruption legislation have extraterritorial reach?

The German criminal provisions for corruption under Sections 331 and following of the Penal Code claim extraterritorial validity if:

- the offender is German at the time of the offence; or
- the offence is committed against a European public official or a foreign or international official within the meaning of Section 335a of the Penal Code (assuming German nationality) (cf Section 5(15) of the Penal Code).



3. Corruption and bribery

3.1 How are gifts, hospitality and expenses treated in your jurisdiction?

The granting of benefits is not classified as corruption if the benefits are not granted in expectation of consideration and are socially adequate. As no injustice exists in such cases, gifts, entertainment, invitations and expense allowances may be permitted in individual cases.

The decisive factor is that the gift is both socially customary and generally approved. Against this backdrop, the donation of cash is prohibited.

The assessment of the social adequacy of the benefit depends in particular on the role of the beneficiary, the relationship between the giver and the beneficiary, the procedure of the giver and the nature, value and timing of the gift.

If the beneficiary is a public official, a stricter measure of social adequacy applies. Under no circumstances may a gift convey an impression of the public official's bias or purchasability towards third parties. The hierarchical position of the beneficiary can also provide clarification on whether a gift is admissible. For example, invitations of representatives are more socially adequate than invitations of simple administrators.

The admissibility of a gift may be contradicted by enduring points of contact between the parties involved. In addition, a clandestine approach by the giver indicates the inadmissibility of the gift.

As far as the admissibility of gifts is concerned, low-value gifts are generally admissible, although different value limits may apply in this regard.

The admissibility of dinner invitations or event invitations depends on the value, the specific relation to the invited person and other particular circumstances of the case.

Other contributions, such as donations and sponsorship, frequently give rise to an unspecified presumption of undue influence on the beneficiary's decisions. To avoid this, companies should allow such support only on the basis of clear guidelines. In particular, the donation should always be transparent to the public.

3.2 Can both individuals and companies be prosecuted under the anti-corruption legislation?

In assessing the admissibility of discounts and benefits, it is important to determine whether the discount is an admissible customer-oriented business strategy or an unacceptable unfair initiation of a relationship.

An unusual level of the relevant benefit and a small variance are arguments against admissibility.

On the other hand, the transparent and properly documented negotiation of discounts regularly raises no concerns.

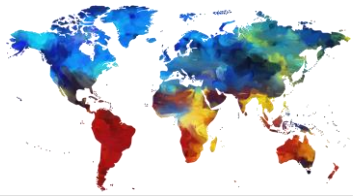
3.3 How is bribery through intermediaries and other third parties treated in your jurisdiction? Can those third parties be held liable?

Corruption offences committed with the help of intermediaries are subject to the general rules on perpetration and aiding and abetting corruption. Depending on the contribution to the offence, intermediaries are liable as accomplices, instigators or accomplices.

However, difficulties in establishing the criminal liability of intermediaries arise in the case of bribery in business transactions pursuant to Section 299(1) of the Penal Code.

The use of intermediaries to pay bribes does not avoid criminal liability for the employer. Especially when bribes are paid by the intermediary out of his or her compensation, the employer remains punishable if it was aware of it, while the intermediary can also be held liable for aiding and abetting bribery.

3.4 Does the anti-corruption legislation have extraterritorial reach?



If the perpetrator of the corruption offence is a chairperson, director or manager, the company can be held liable for his or her misconduct under Section 30(1) of the Act on Administrative Offences.

The prerequisite for this is that the manager etc. has committed the act of corruption in the course of his or her managerial functions. The operational nature of the breach of duty required for the determination of a fine is to be affirmed in the case of corruption, since the criminal offences in Sections 299 and 331 and following of the Penal Code affect the business sphere and sphere of activity of the company.

If an employee has committed an act of corruption, the company is not directly liable for this misconduct. Liability can be considered only via Sections 30 and 130 of the Act on Administrative Offences. A fine may be imposed on an undertaking only if a breach of the supervisory duty by a manager is established.

3.5 How is bribery through intermediaries and other third parties treated in your jurisdiction? Can those third parties be held liable?

A group's liability under Sections 30 and 130 of the Act on Administrative Offences for corrupt acts by employees of subsidiaries is controversial. The decisive factor is whether the group can be considered the owner of the company. The courts have not issued any relevant rulings to date.

3.6 Does the anti-corruption legislation have extraterritorial reach?

A company is liable for legal violations committed by its legal predecessor under two conditions:

- The former legal entity is a member of the group of addressees set out in Section 30 of the Act on Administrative Offences; and
- The new legal entity is either identical to the former legal entity from an economic point of view or its legal successor within the meaning of Section 30(2a), sentence 1 of the Act on Administrative Offences.

According to the jurisprudence of the Federal Court of Justice, economic identity is to be presumed if the liable assets continue to be used in the same or similar manner as previously and constitute a substantial part of the new legal entity's total assets. It is sufficient that the assets taken over have retained an economically independent position that characterises the new legal entity.

Section 30(2a), sentence 1 of the Act on Administrative Offences covers cases of universal succession and partial universal succession by division. Spin-offs, demergers and transfers of individual rights are not included.

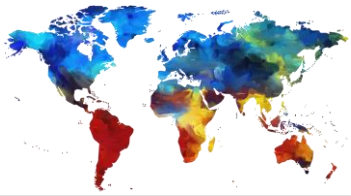
4. Compliance

4.1 Is implementing an anti-corruption compliance programme a regulatory requirement in your jurisdiction?

The obligation for companies to implement an anti-corruption compliance programme is not explicitly governed by German law. In particular, there are no corruption-specific regulatory provisions.

Pursuant to Section 25a of the Banking Act, a direct obligation to introduce a compliance programme exists only for credit institutions and financial services institutions. For other companies, Section 130 of the Act on Administrative Offences merely obliges them to take appropriate and reasonable precautions to avoid legal infringements within the company. The measures to be taken in individual cases depend on the size of the company and the respective risks. In the opinion of the Federal Court of Justice, the entrepreneurial organisational obligation to set up a compliance programme may be stronger in the case of a corresponding hazardous situation; although it is unclear under which circumstances such a hazardous situation is to be presumed.

4.2 What compliance best practices should a company implement to mitigate the risk of anti-corruption violations?



There is no universal recipe for successfully preventing corruption. The necessary compliance measures are always company-specific. Key factors include the size of the company, the industry in which it operates, suspected cases from the past and its national or international orientation.

However, there is a basic set of prevention measures that all companies should normally implement.

First, a risk analysis should be carried out to identify particularly risky business areas. Based on this risk analysis, appropriate measures should be implemented in the company's organisation, such as the double-checking principle. Particular attention should also be paid to ensuring that the corporate culture rejects corruption. A company should take a clear stand against corruption through measures such as employee training, anti-corruption guidelines and the introduction of an internal sanctioning system. To ensure the effectiveness of anti-corruption measures, regular checks and spot checks should be carried out.

Companies are also advised to properly document the compliance measures they have taken. If corruption does occur despite the existence of a compliance programme, the documentation may be sufficient to exonerate the company.

4.3 Which books and records requirements have relevance in the anti-corruption context?

Companies have no documentation or reporting obligations with respect to corruption.

There is an exception for corporations, however. Pursuant to Section 289c of the Commercial Code, corporations are obliged to submit an annual non-financial declaration, in which they must also report on anti-corruption measures.

Nevertheless, for the reasons listed under question 4.2, companies are recommended to keep proper documentation with respect to the fight against corruption.

4.4 Are companies obliged to report financial irregularities or actual or potential anti-corruption violations?

There is no statutory reporting obligation to the authorities in the event that internal company irregularities pointing to corruption become apparent. Irrespective of any non-existent disclosure obligation, the company must put an end to the misconduct and initiate the necessary actions under employment law against the employee concerned.

However, companies are obliged to correct wrongful tax declarations from the past (Section 153 of the Tax Act). Wrongful tax declarations may occur in connection with corruption.

4.5 Does failure to implement an adequate anti-corruption programme constitute a regulatory and/or criminal violation in your jurisdiction?

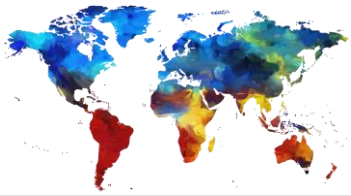
Inadequate anti-corruption compliance programmes are sanctioned on a case-by-case basis. The company is liable for omitted compliance measures under Section 30 of the Act on Administrative Offences only if acts of corruption occur as a result of a breach of the supervisory duty by a manager.

5. Enforcement

5.1 Can companies that voluntarily report anti-corruption violations or cooperate with investigations benefit from leniency in your jurisdiction?

There is no leniency programme with respect to corruption offences. Disclosure of violations and cooperation with investigating authorities can nevertheless be worthwhile for a company. For example, administrative offence proceedings initiated against the company may be discontinued for reasons of expediency pursuant to Section 47 of the Act on Administrative Offences.

If the proceedings are not discontinued, the public prosecutor's office has several options to reward the company's willingness to cooperate. It may take cooperation into account when calculating the fine in accordance with Section 30 in conjunction with Section 17(3) of the Act on Administrative Offences; or, in accordance with Section 30(4) of



the Act on Administrative Offences, it may even refrain entirely from issuing a fine and instead merely skim off the economic advantage obtained through corruption.

Even in the case of extensive cooperation, however, the company is not entitled to such relief. Therefore, disclosure should be considered well in advance.

5.2 Can the existence of an anti-corruption compliance programme constitute a defence to charges of anti-corruption violations?

The prevailing view is that an anti-corruption compliance programme that meets the respective operational requirements reduces liability. The reason for this is that the company or its management has not violated its supervisory duties under Section 130 of the Act on Administrative Offences.

In practice, however, it is difficult to determine retrospectively which supervisory measures a company was obliged to take. The fact that corruption has occurred despite the existence of a compliance programme may lead courts and public prosecutor's offices to presume prematurely that the compliance programme did not meet the company's operational requirements and it thus may not serve to reduce liability.

Such a conclusion is out of the question, however, because the assessment should be based on a fictitious view prior to the act of corruption. If the anti-corruption compliance programme satisfies the operational requirements in a fictitious 'ex ante' view, the fact that corruption nevertheless occurred should not affect the ability of the compliance system to reduce liability.

If an appropriate compliance programme is maintained, a company will not normally be liable. Should liability be affirmed in an individual case, the existence of a compliance system programme may at least have an advantageous effect of reducing the fine. However, there is no guarantee with regard to appropriate handling.

5.3 What other defences are available to companies charged with anti-corruption violations?

A company's liability for corruption violations is based on breach of its supervisory duty within the meaning of Section 130 of the Act on Administrative Offences, for which the company is liable under Section 30 of the Act on Administrative Offences. To avoid liability, the existence of a breach of supervisory duty must therefore be refuted. Where a supervisory measure has been omitted, it must be demonstrated that the supervisory measure in question either was inappropriate to prevent the act of corruption or was not necessary or reasonable.

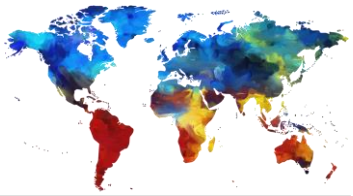
5.4 Can companies negotiate a pre-trial settlement through plea bargaining, settlement agreements or similar?

According to German law, under Sections 46 and 71(1) of the Act on Administrative Offences in conjunction with Section 257c of the Code of Criminal Procedure, it is possible to negotiate an agreement during the fine proceedings. The company may reach an agreement with the public prosecutor's office that an accommodation by the company (eg, in the form of a confession) will be rewarded with discontinuation of the proceedings or the prospect of an upper or lower limit in the assessment of the fine. An agreement on the exact amount of the fine is inadmissible, however.

5.5 What penalties can be imposed for violations of the anti-corruption legislation? Can non-exhaustive penalties be imposed for such violations (eg, exclusion from public procurement, exclusion from entitlement to public benefits or aid, disqualification from the practice of certain commercial activities, judicial winding up)?

Natural persons who commit a corruption offence can be sanctioned with a fine or imprisonment (up to five years).

Companies held responsible for acts of corruption under Section 30 of the Act on Administrative Offences may in particular be subject to monetary fines. Pursuant to Section 30(2)(1) of the Act on Administrative Offences,



'association fines' may amount to up to €10 million; while fines imposed pursuant to Section 30(3) in conjunction with Section 17(4) of the Act on Administrative Offences may be considerably higher.

In addition, as with natural persons, it is also possible to confiscate the proceeds of the offence.

The 'naming and shaming' method of sanctioning can be particularly sensitive for companies. Sections 3 and 2(1)(3) of the Competition Register Act provide that final decisions imposing fines pursuant to Section 30 of the Act on Administrative Offences are to be entered in the Competition Register. As contracting authorities are obliged to consult the register, registration of the company may exclude it from public procurement procedures.

5.6 What is the statute of limitations to prosecute anti-corruption violations in your jurisdiction?

Pursuant to Section 78(3)(5) of the Penal Code, corruption offences expire three years after the end of the offence.

The limitation period with respect to the association fines imposed on companies pursuant to Section 30 of the Act on Administrative Offences is governed by Section 31(2)(1) of the Act on Administrative Offences. The limitation period for prosecution is three years after the end of the last business-related act of corruption committed in the company.

6. Trends and predictions

6.1 How would you describe the current anti-corruption enforcement landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

The German judiciary finds it difficult to effectively combat corruption. This is due in particular to the fact that insufficient judicial resources are available to resolve these often very complex issues.

Corruption criminal law has undergone several legislative changes in recent years. It cannot be ruled out that there will be additional changes in the foreseeable future. For example, changes to Sections 331 and following of the Penal Code may be necessary on the basis of the Directive on the Fight against Fraud affecting the Union's Financial Interests. In addition, legal restrictions are being discussed due to the breadth of some corruption offences. Proposals include the introduction of a self-reporting system exempting corruption offences and a corruption amnesty.

It is also possible that the legal basis for sanctioning companies will change in the foreseeable future. In the coalition agreement for the 18th parliamentary term, the parties have agreed to expand the administrative offence law. It is to be expected that in the future, companies will not be held exclusively liable for breaches of supervisory duties by management personnel, but that direct corporate liability will be introduced.

On the basis of the recently published draft EU directive on whistleblower protection, it is to be expected in the medium term that Germany will align the level of protection afforded to anonymous whistleblowers with EU requirements. The expectation is that whistleblowers will then increasingly decide to report legal violations such as corruption.