



ICLG

The International Comparative Legal Guide to:

Business Crime 2013

3rd Edition

A practical cross-border insight into business crime

Published by Global Legal Group, in association with CDR, with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
October 2012

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ISBN 978-1-908070-39-5

ISSN 2043-9199

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Germany

Prof. Dr. Juergen Wessing



Dr. Heiko Ahlbrecht



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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Business crimes are basically prosecuted by the Public Prosecutor's Office like any other crime committed in Germany. If a tax crime is suspected, the tax authorities are competent to investigate the facts of the case (Section 386 of the German Fiscal Code, AO). The cartel authorities are exclusively competent in proceedings to assess a fine against a legal person or association of persons if the fine arises from a criminal offence regarding agreements between competing undertakings intended to distort competition (Section 82 of the Act Against Restraints of Competition, GWB).

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

Generally, all criminal offences/crimes are prosecuted by the Public Prosecutor's Office. But, the tax authorities are competent for prosecution in the investigative phase of the proceedings, if the offence exclusively is a tax crime. However, tax cases can be taken over by the prosecutor at any time. Usually, the prosecutor takes the lead if there is the suspicion of other criminal offences/crimes besides the tax crime. In these cases the tax authorities only act as an ancillary organ of the Public Prosecutor's Office.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

There is no civil or administrative enforcement against criminal offences under German Law. However, the European Anti-Fraud Office (OLAF) could – by law – investigate on an administrative level in Germany as well. In fact, such investigations are always those of German prosecutors accompanied by OLAF-staff.

2 Organisation of the Courts

2.1 How are the criminal courts in Germany structured? Are there specialised criminal courts for particular crimes?

Local Courts are courts of first instance that are competent for offences if a prison sentence not exceeding 4 years is expected. The

Regional Courts are organised in different chambers for criminal matters. The small criminal chamber deals with appeals against judgments by a Local Court exclusively. The grand criminal chamber is a court of first instance. There are grand criminal chambers with special responsibilities, e.g. the business crimes chamber and the chamber for crimes against the state. The business crimes chamber is hereby also competent for appeals within its special responsibility. The Higher Regional Courts are courts of first instance only concerning state security offences. They are courts of second instance for appeals on points of law only against appellate judgments of Regional Courts. The Federal Court of Justice is competent for appeals on points of law only against judgments whose first and last instance determining the facts was at the Regional Court or Higher Regional Court.

2.2 Is there a right to a jury in business-crime trials?

There are no jury trials under German Law. However, lay-judges take part as judges of a chamber from a local court (if it is not a single judge case) up to a Regional Court.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Germany to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and misrepresentation in connection with sales of securities

- Fraud is punishable under Section 263 StGB (German Criminal Code). It requires a deceit that leads the person under the so caused misapprehension to a disposition of assets which must result in a pecuniary damage. The person that disposes and the one that suffers the damage do not have to be identical. Section 263 StGB is also applicable if the disposition can be assigned to the sphere of the person who suffered the damage. The offence has to be committed intentionally regarding the aforementioned elements of the offence and with the additional intent of obtaining unlawful material benefit for the perpetrator himself or a third person.
- Section 264a StGB (capital investment fraud) expands the punishability beyond the bounds of Section 263 StGB. Hereafter, the making of incorrect favourable statements or the keeping of unfavourable secrets in connection with the sale of securities, subscription rights or shares intended to grant participation in the yield of an enterprise or an offer to increase the capital investment in such shares is punishable. The provision requires intentional conduct.

o Accounting fraud

Misrepresentation or concealing the state of affairs of a company in the opening balance sheet, annual report, status report or interim balance sheet by a member of an organ having power of representation or the board of supervisors are punishable pursuant to Section 331 of the German Commercial Code (HGB). The provision requires intentional conduct.

o Insider trading

It is punishable to acquire or dispose an insider security intentionally pursuant to Section 38 (1) of the German Securities Trading Act (WpHG).

o Embezzlement / Breach of Trust

The term embezzlement/breach of trust is identified with two variations of commitment specified in Section 266 StGB. The first variation addresses a person who abuses the power accorded to him to dispose assets of another person. It also requires an essential duty to safeguard the property interests of the person whose assets are disposed. The second variation concerns the violation of the duty to safeguard property interests. The duty has to be an exceptional part of the relationship to the assets. Both variations require a damage to the disfavour of the assets to be safeguarded and intentional conduct.

o Bribery of government officials

According to Section 334 StGB, the offering, promising or granting of a benefit to a public official, a person with special public service obligations, a soldier of the Federal Armed Forces, a judge or an arbitrator in return for a performance of an official act by violating official duties is punishable. The provision requires intentional conduct.

o Criminal anti-competition

Section 298 StGB addresses tender offers regarding goods or commercial services that are based on unlawful agreements which aim at causing the tenderer to accept a specific offer. The provision also requires intentional conduct. It is irrelevant whether the actor intends to induce the tenderer to accept a specific offer. It is already sufficient if the person making the offer had knowledge of the agreement's aim.

o Tax crimes

It is punishable to understate taxes or derive unwarranted tax advantages, whether to his own benefit or the benefit of a third person, pursuant to Section 370 AO. This result has to be achieved by providing the revenue authorities with incorrect or incomplete particulars or by failing to inform them of facts concerning matters of substantial significance for taxation although one is obliged to do so. It is also prohibited to fail to use revenue stamps or revenue stamping machines when one is obliged to do so. The provision addresses intentional conduct.

o Government-contracting fraud

Section 264 StGB punishes an attempted fraud as a completed one within the scope of public procurement and the use of subsidies. The production of incorrect or incomplete favourable statements or the unlawful concealing of information that is designated as relevant by law or by the subsidy giver in accordance with the law in the subsidy procedure is already punishable. The provision requires intentional conduct.

3.2 Is there liability for inchoate crimes in Germany? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

An attempt to commit an unlawful act is punishable if it concerns an unlawful act for which a prison sentence of one year or more is

prescribed or if it is expressly provided by law (Section 23 StGB). The offender has to act with intent regarding all elements of the offence and he has to be unjustified and guilty. Section 24 StGB provides the possibility to obtain an exemption from punishment if the offender voluntarily abandons the criminal offence.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

There is no criminal liability of an entity under German Law. However, Section 30, 130 of the Administrative Offences Act (OWiG) allows the imposition of a fine on an entity, providing that a representative or another person in a leading position has committed a criminal offence. The provision is applicable if the association has gained or was supposed to gain a profit obtained through the criminal activity or the committed offence violates duties which the entity is responsible for.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

The liability of an entity is linked to the offence of a person in a leading position, but not the other way round.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

In criminal proceedings the personal criminal liability is always the main focus of investigations. Beside this, in cases of structural criminal behaviour such as business policy (see the SIEMENS-case) investigation authorities reach for establishing the liability of the entity as well (as described in question 4.1) and for high fines.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

The limitations period begins when the unlawful act is completed. The period is determined by the punishment that is set out in the applicable penal provision.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

There is no possibility to prosecute crimes that occur outside the limitations period.

5.3 Can the limitations period be tolled? If so, how?

The statute of limitations is tolled as long as the prosecution may not be commenced or continued, except if the act is not prosecuted because complaint, authorisation or request for prosecution is lacking.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

The Public Prosecutor's Office has to initiate criminal investigation proceedings as soon as it obtains knowledge of a suspected criminal offence, providing sufficient facts indicate that the offence was committed ("initial suspicion").

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

The cooperation is ruled by the laws of mutual legal assistance in criminal matters. Especially in the EU there are several investigation-authorities like OLAF, EUROJUST or EUROPOL which build a strong network of cooperation. Such cooperation with foreign prosecutors is standard.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The power of the government to gather information extends to the examination of witnesses, experts and defendants, seizure of evidence, automated comparison and transmission of personal data, interception of telecommunications and undercover investigators.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

There is an obligation to hand over objects that may have importance as evidence for the investigation. An initial suspicion and a potential importance as evidence are sufficient for this measure. But the defendant, as well as a company under investigation, is not obliged to submit or produce any material. A judge or, in exigent circumstances, the public prosecutor can authorise the search of the premises of a person that is suspected of committing a criminal offence, providing that the discovery of evidence can be assumed. They may also order seizures if a person does not want to hand over alleged evidence voluntarily. The same can happen to a company not willing to cooperate as well. A search and seizure of a company is possible like those of witnesses.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Germany recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Germany's labour laws protect personal documents of employees, even if located in company files?

Generally, there is no legal protection for any document at companies or individuals. The only accepted privilege derives from

the client-attorney-privilege between the defence-counsel and the individual client. Any other privilege, especially for the company's external counsel in criminal proceedings, is in discussion but not legally defined or judged by any court so far.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The circumstances are the same as described in question 7.2.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

The circumstances are the same as described in question 7.2.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Every witness that is summoned by the court or the Public Prosecutor's Office is obliged to appear, to testify truthfully and to take an oath if he has no right to refuse the answers. There is no obligation to appear for an interview at the police. However, the questioning could take place anywhere, also during a search at the premises searched. Usually, interviews are conducted at the police station, the Public Prosecutor's Office or at the court.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The circumstances are the same as described in question 7.6.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

The testimony may be refused on professional grounds or if the witness is a relative of the defendant. A witness may also refuse to answer questions if the answer would subject him to the risk of being prosecuted for a criminal or regulatory offence. In the latter case, the constitutional right to a fair trial also includes the right to consult an attorney. There is a general right to be accompanied by an attorney during questioning under Section 68b StPO (German Criminal Procedure Code).

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The prosecutor writes an indictment and applies for a court trial of the case at the court. The court decides on the opening of main proceedings.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

Main proceedings have to be opened if there is sufficient suspicion that a criminal offence was committed in the light of the results of the investigation proceedings.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

The Public Prosecutor's Office may dispense the proceedings pursuant to Section 153 StPO if the culpability of the offender is considered to be of a minor nature and there is no public interest in the prosecution. The prosecutor may ask the accused if he's willing to pay a certain amount of money as a precondition to terminate the proceedings according to Section 153a StPO. The prosecutor has to ask a judge to accept the termination of proceedings. Once the requested amount of money has been paid, the proceedings will be terminated.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

The aggrieved person can bring a property claim against the accused arising out of the criminal offence in criminal proceedings instead of a civil litigation claim pursuant to Section 403 StPO.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The court is obliged to take evidence *propriu motu* regarding all facts in order to establish the truth. According to the principle *in dubio pro reo*, all elements of the business crime regarding the facts have to be proofed.

9.2 What is the standard of proof that the party with the burden must satisfy?

The court has to be convinced that all statutory elements of the criminal offence are fulfilled pursuant to Section 267 StPO.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The court decides based on the result of the evidence taken according to its free conviction pursuant to Section 261 StPO.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

It is punishable to intentionally incite someone or render aid to

someone regarding the intentional commitment of an unlawful act of another person pursuant to Section 26, 27 StGB. The intention of the participant has to concern the own participation and the actions of the perpetrator.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

A reasonable doubt concerning the required intention favours the defendant with regard to Section 15 StGB. The reasonable doubt can only concern the facts and not the legal situation.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

A reasonable doubt concerning the knowledge of the applicable law and the understanding how it applies to the current case suspends the guilt of the offender pursuant to Section 17 StGB if he was unable to avoid the mistake. If the offender could have avoided the mistake, the punishment may be mitigated.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

A person can be liable for failing to report a crime to the government only when he is obliged to contribute to the prosecution by law, e.g. police officers on duty.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

There is no obligation of individuals to report crimes to the government or authorities.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

If a perpetrator helps to prosecute or even to prevent a crime that may be punished with a significant prison sentence by disclosing voluntarily his information, the court may mitigate or abandon the sentence according to Section 46 b StGB. The provision does not

apply to entities. An entity cannot become a perpetrator of a criminal offence.

There is also a leniency programme of the Federal Cartel Office (FCO) for participants of so-called “hardcore cartels” pursuant to Article 81 (7) GWB. Individual persons and entities can apply for this programme to achieve a mitigation or even a dispense from a fine under the OWiG.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Germany, and describe the favourable treatment generally received.

An entity that applies for the leniency programme of the FCO has to provide the FCO with significant verbal and written information and evidence. The applicant has to cooperate fully and on a continuous basis. The FCO treats the applicant as confidential and protects all trade and business secrets during the proceedings up to the point at which a statement of objections is issued to a cartel participant.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

The defendant can make a confession in exchange for an agreement on the range of the sentence.

14.2 Please describe any rules or guidelines governing the government’s ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

Plea bargaining is subject to Section 257c StPO. The Court is not allowed to choose the option of plea bargaining prematurely. The Court has to extend the taking of evidence to all relevant facts and means of proof *proprio motu* pursuant to Section 244 (2) StPO to establish the truth. On this account, the Court has to examine the facts of the case and the legal situation first. The content of the bargaining must not comprise the verdict of guilty. Only a floor and a capping of a sentence may be part of an agreement, which have to remain related to the seriousness of the crime. The opportunity to allocute has to be granted to all participants. A waiver of the right to file an appellate remedy is barred in cases of plea bargaining.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court’s imposition of sentence on the defendant? Please describe the sentencing process.

The assessment of penalty sets out from the range of sentences according to the applicable penal provision. At the second step, a mitigation of the punishment is considered. The assessed action has to be classified with regard to the shifted range of sentencing. If a

judgment concerns more than one committed crime, an aggregate punishment has to be formed by increasing the highest punishment incurred pursuant to Sections 53, 54 StGB. The aggregate punishment has to be less than the sum of the individual punishments.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

It is not possible to impose a criminal sentence on a corporation. However, it is possible to impose a fine on the basis of administrative law against a company, providing that representative or another person in a legal position has committed a criminal offence or was supposed to have committed such an offence. See section 4.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

The verdict is appealable by the defendant, as well as the Public Prosecutor’s Office.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The sentence is appealable in cases of an appeal on fact and law. The assessment of the penalty is subject to the discretionary power of the instance determining the facts and therefore cannot be reviewed comprehensively by the court hearing an appeal on law only. It may only assess if the sentencing process violates a legal norm. The defendant and the Public Prosecutor’s Office may appeal.

16.3 What is the appellate court’s standard of review?

The appellate body that hears an appeal on fact and law reviews the case comprehensively as the court of first instance. In cases of an appeal on law only, the court only examines whether a legal norm was violated or not.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

In cases of an appeal on fact and law, the court files a decision on the merits and quashes the judgment of the trial court. In cases of an appeal on law only, the appellate body itself may only render a decision on the merits if the judgment is to take a specific form.

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Our experienced lawyers provide clients with professional services, whether it be legal counseling or litigation. Our law firm advises in all matters of corporate compliance, litigation and prevention. We assist corporations in meeting the fast-developing standards of national and international compliance regulations. When criminal disputes arise, our clients benefit from our in-depth strategic analysis and early litigation advice. It is our goal to support you in accomplishing your objectives - before a conflict arises, in trial, and in appellate courts.

In our law firm, experience gained over decades meets the dynamics of a young and highly qualified team of attorneys. Beyond their legal education, our lawyers served in business management positions, spent years abroad acquiring further qualifications in the common law system, are licensed tax consultants, or are qualified to practice medicine. All of the lawyers stay in close touch with academia through teaching at the university level, publishing in academic journals, and giving talks and presentations in selected areas of corporate criminal law. The team is supported by our well-trained staff and state-of-the-art equipment that enables us to meet the highest technological standards.

Other titles in the ICLG series include:

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