

T. Markus Funk\*

## Germany’s Foreign Anti-Corruption Efforts: Second-Tier No More

A March 2011 report by the Organization for Economic Cooperation and Development’s (OECD’s) Working Group on Bribery characterized Germany as assuming a “leading position” in the investigation and prosecution of foreign bribery cases.<sup>1</sup> “Germany’s enforcement has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in foreign bribery-related cases against individuals,” the OECD stated. The OECD’s June 2013 Annual Report bears this out.<sup>2</sup> The Report reflects that Germany has the world’s second most total bribery cases since 1999 (88 cases; the United States, by contrast, pursued 139 cases, and the United Kingdom pursued only 7). Similarly, Transparency International rates Germany as having “active enforcement” of the OECD’s Anti-Bribery Convention. Germany, in short, has joined the United States as the world’s leaders in foreign bribery prosecutions, with the UK (surprisingly to many caught up in the initial hype surrounding the UK Bribery Act) a fairly distant third. Accordingly, companies doing business in Germany or with German companies are well advised to make themselves familiar with Germany’s anticorruption laws.

Unsurprisingly, corruption is a criminal offense in Germany. For one, German public officials may not accept gifts or rewards. Germany, in fact, has enacted numerous laws and international treaties to combat active and passive bribery. (Generally, “active bribery” refers to offering or paying a bribe, while “passive bribery” refers to receiving a bribe.) In contrast to the United States’ Foreign Corrupt Practices Act (FCPA), which does not outlaw the receipt of a bribe, German law specifies that accepting or granting an advantage and offering or receiving a bribe are all punishable.

### A Short Review of Germany’s Key Anti-Bribery Provisions

As a matter of substantive reach, the German Criminal Code, much like the broad UK Bribery Act of 2010, prohibits active and passive bribery involving German public officials; bribery of German parliamentarians;<sup>3</sup> and, most relevant here, both ac-

tive and passive bribery in domestic or international business transactions.

Turning to jurisdiction, German criminal law generally applies to offenses committed in Germany, offenses committed abroad against a German, and offenses committed abroad by a German individual. It does not, however, extend to companies or other “legal entities.” Germany, in fact, has rejected wholesale the notion (or, from the German perspective, “fiction”) of corporate criminal liability. In Germany, unlike the United States, only individuals can be subject to criminal prosecutions.

Although companies cannot, as noted above, be criminally prosecuted under German law, a company can be held liable under Germany’s Administrative Offenses Act (OWiG) for an act of corruption committed by a person with managerial responsibility for the company if, as a result of the offense, duties of the company were violated or the company was enriched or intended to be enriched. A company may also be held liable for failure to take reasonable supervisory measures to prevent bribery by its employees. Generally, a company’s responsibility exists independently of whether or not an individual person is held criminally liable. Companies can be fined up to €10 million (€ 5 million in cases of negligence),<sup>4</sup> but stand to lose much more through confiscation or disgorgement of any economic advantage gained through the bribes.

The European Union Anti-Corruption Act (EUBestG), which Germany enacted in 1998, implemented two EU anticorruption provisions: the First Protocol to the Convention on the Protection of the European Communities’ Financial Interests and the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union. Also in 1998, Germany passed the Act on Combating International Bribery (IntBestG), which implemented the OECD’s Anti-Bribery Convention, formally called the “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.”

Taken together, the EUBestG and IntBestG,<sup>5</sup> as well as more

\* T. Markus Funk, a former U.S. federal prosecutor, U.S. State Department Resident Legal Advisor in Kosovo, National Co-Chair of the ABA’s Global Anti-Corruption Task Force, and German-American dual national who taught comparative criminal law at Oxford University, is a partner at Perkins Coie specializing in global anti-corruption compliance and internal investigations. Markus is also the author of the forthcoming “Mutual Legal Assistance Treaties and Letters Rogatory: A Pocket Guide for Judges” (Federal Judicial Center, 2014) and the co-author of the forthcoming “Global Anti-Bribery and Corruption Survey” (Oxford University Press, 2014). Some section of this article adapted with permission of the *ABA Litigation Journal*. Markus can be reached at [mfunk@perkinscoie.com](mailto:mfunk@perkinscoie.com). Special thanks also to doctoral candidate Claudia Letzien for her invaluable comments on an earlier draft of this article; any remaining errors or oversights, of course, are the sole responsibility of the author.

1 The OECD Working Group on Bribery’s March 2011 report on Germany can be found at [www.oecd.org/dataoecd/5/45/47416623.pdf](http://www.oecd.org/dataoecd/5/45/47416623.pdf).

2 The OECD 2013 Annual Report can be found at <http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf>.

3 The criminalization of bribing German parliamentarians under German criminal law is limited to buying and selling votes for an election or ballot (sec. 108e of the German Criminal Code - Strafgesetzbuch, StGB). Only the direct purchase or sale of a parliamentarian’s vote is penalized, which

means that luring politicians with gifts, initially without demanding a certain behaviour in return is not covered by sec. 108e StGB. So-called “thank-you bonuses” given to lawmakers after a vote favourable to the donor are not covered either. As a result of this, the provisions regarding members of foreign parliaments have a much broader scope.

This, in fact, is one of the major barriers preventing Germany from ratifying the United Nations Convention against Corruption (UNCAC). Moreover, as a signatory state of the Criminal Law Convention on Corruption, Germany has been criticized by the Council of Europe’s Group of States against Corruption (GRECO) Evaluation Team (GET) for its limited provisions on bribery of parliamentarians. The German Federal Court (Bundesgerichtshof, BGH) also criticized the legislation as insufficient (decision BGH 5 StR 453/05, May 9, 2006) and in August 2012 more than 30 CEOs of large German companies sent a letter to German politicians urging them to ratify UNCAC.

4 Section 30 (2) OWiG has been amended by Article 4 of the 8th Amending Law of the Act against restraints of competition (8. Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of June 26, 2013).

5 Note that both the EUBestG and the IntBestG deem foreign public officials equal to domestic public officials. But this does not apply to all of the domestic bribery provisions. The EUBestG only extends the scope of Sec. 332 and 334 StGB (active and passive), whereas the IntBestG only extends the scope of Sec. 334 StGB. Both Sec. 332 and 334 StGB require the per-

ISSUE	U.K. BRIBERY ACT (2010)	U.S. FCPA (1977)	GERMAN ANTI-BRIBERY LAWS (1998, 2002)	CHINESE ANTI-BRIBERY LAWS (1979, AMENDED 2011)	INDIA'S PREVENTION OF CORRUPTION ACT (1988)
Is bribery of foreign public officials illegal?	Yes, but unlike FCPA excludes political parties, party officials, and candidates for office from definition of "foreign public official."	Yes	Yes, under the EU Anti-Bribery Law ("EUBestG") and the Act on Combating International Bribery ("IntBestG"). However, the EUBestG only applies to member states of the EU, while the IntBestG covers only active bribery in international business transactions.	Yes	No
Is commercial bribery and bribery of domestic officials illegal?	Yes	No <sup>1</sup>	Yes	Yes	Yes, but the PCA only prohibits bribery of domestic officials. <sup>2</sup>
Can the receipt of a bribe be prosecuted?	Yes	No	Yes	Yes	Yes
What is the requisite intent for liability to attach?	Bribing another person (Section 1) and offenses relating to being bribed (Section 2) require basic knowledge and the intent to "bring about improper performance." <sup>3</sup>  Bribery of a foreign public official (Section 6) requires the intent to influence the official so as to obtain/retain a business or a business advantage.  The "Corporate Offense" of failing to prevent bribery (Section 7) is a strict liability offense not requiring any mens rea. The only statutory defense is to prove the existence of "adequate systems and controls." The burden of proof for the defense is the "balance of probabilities." <sup>4</sup>	The FCPA requires the accused to have acted "willfully," "knowingly," and "corruptly." Knowledge, moreover, is defined to include "conscious disregard" or "willful blindness."	<b>Official Bribery:</b> German criminal law requires that the bribe was offered or accepted in connection with the official's discharge of an official duty or the past or future performance of an official act that violates his official duties.  <b>Commercial Bribery:</b> To be guilty of active commercial bribery, the defendant must have acted "for competitive purposes" to obtain "an unfair preference in the purchase of goods or commercial services." Passive commercial bribery requires the recipient to accept (or allow to be promised) a bribe "as consideration for accord[ing] an unfair preference to another in the competitive purchase of goods or commercial services." Finally, active commercial bribery of foreign officials requires the defendant to act "in order to obtain or retain . . . business or an unfair advantage in international business transactions."	Under Chinese criminal law, the party giving a bribe must be seeking "improper benefits" (or "improper commercial benefits" for bribes of foreign officials), whereas the recipient must intend to use his or her power, authority, or position to seek a benefit for the briber. However, as a practical matter, intent is often presumed, especially if the bribe at issue is "relatively large" (generally over RMB10,000, or about US \$1,500) or can be characterized as a "kickback" to a State entity or personnel.	The PCA requires that the "gratification" or valuable thing be offered or given as a motive or reward for performance or non-performance of an official act. Motive is presumed upon proof that the defendant offered or received any gratification or valuable thing.

<sup>1</sup> That said, acts of commercial bribery may trigger U.S. Travel Act liability, as well as books and records liability under the FCPA if there are record-keeping problems.

<sup>2</sup> Indian law focuses on the recipient of a bribe. A briber, however, can be held criminally liable as an abettor to a public official's criminal acceptance of a bribe.

<sup>3</sup> The test of whether a person intended to induce another to perform improperly is what a reasonable person in the UK would expect another to do in relation to the performance of that particular function or activity. See UK Ministry of Justice 2011 Bribery Act Guidance ("Guidance") at 10.

<sup>4</sup> Guidance at 15.

Global Anti-Bribery Comparison Chart

recent amendments to the German Criminal Code, greatly expanded Germany’s anticorruption focus. Prior to the EU-BestG and IntBestG, only bribery of domestic public officials and parliamentarians was punishable under German law. The EUBestG extended the offenses of active and passive bribery to public officials and judges of the European Communities and EU member states. It deals with both active and passive bribery, but it is limited to the territory of the European Union. Meanwhile, the goal of the IntBestG was to proscribe equally the bribing of domestic and foreign public officials and parliamentarians.

Under the IntBestG, bribery of foreign public officials, judges, and soldiers, including public officials who work for international organizations (for example, the United Nations or the European Community), is punishable if made for the purpose of obtaining business or an improper advantage in international business transactions. Unlike the EUBestG, the IntBestG applies to all international business relations and is not geographically limited to the European Union. The IntBestG, however, prohibits only active bribery in connection with international business transactions. The IntBestG also includes a separate offense for the bribery of foreign members

of parliament and members of parliamentary assemblies of international organizations.

In addition, the German Criminal Code was amended in 2002 to extend the prohibition of active and passive bribery involving domestic public officials or judges and officials of the International Criminal Court and to expand the criminal offense of bribery in business transactions to apply to bribery affecting international business transactions. Under German law, such acts of domestic or foreign bribery can be punished with substantial fines or up to 5 years of imprisonment, or up to 10 years for especially serious cases.

**Recent Enforcement Efforts**

The previously-mentioned OECD report heaped effusive praise on Germany’s recent efforts to investigate and prosecute corruption. And those enforcement efforts have, indeed, been impressive.

For example, between 2005 and 2010, some 69 individuals were sanctioned for corruption-related offenses, including 30 who were first tried criminally (for better or worse, a record-setting total). As the OECD noted, "Increased enforcement against natural persons was enabled by Germany’s pragmatic approach to prosecute and sanction foreign bribery with a range of criminal offense other than the foreign bribery offense." Of the 30 individuals who were criminally convicted, only 10

formance of an official act in violation of an official duty/an unlawful act (pflichtwidrige Diensthandlung). Sec. 331 and 333 StGB, which are related to a (lawful) „official activity“ on the part of the public official, i.e. a bribery that is intended to induce the official to perform a lawful act, do not fall within the scope of the IntBestG and the EuBestG.

were convicted of bribery of foreign officials, while the others were convicted of commercial bribery or breach of trust.

Since 2007, six companies have been found liable under German law for corruption-related offenses. Each of these cases resulted in punitive fines and the disgorgement of ill-gotten gains. Probably most notable was Germany’s widely-reported case against Siemens, which resulted in two decisions that fined the industrial conglomerate almost € 600 million (\$1.6 billion total, including U.S. enforcement efforts, mentioned below) for making bribes around the world to secure huge public-works contracts.

The OECD praised Germany’s enforcement action against Siemens, calling it a “striking example” of how to prosecute a case based on “breach of trust” rather than outright bribery. (Individual defendants were convicted of breach of trust for establishing slush funds to be used for the bribes, while Siemens was found administratively liable for the bribery offenses.) Siemens also paid approximately \$800 million in fines to the U.S. Department of Justice and the Securities and Exchange Commission to settle U.S. charges for the same misconduct.

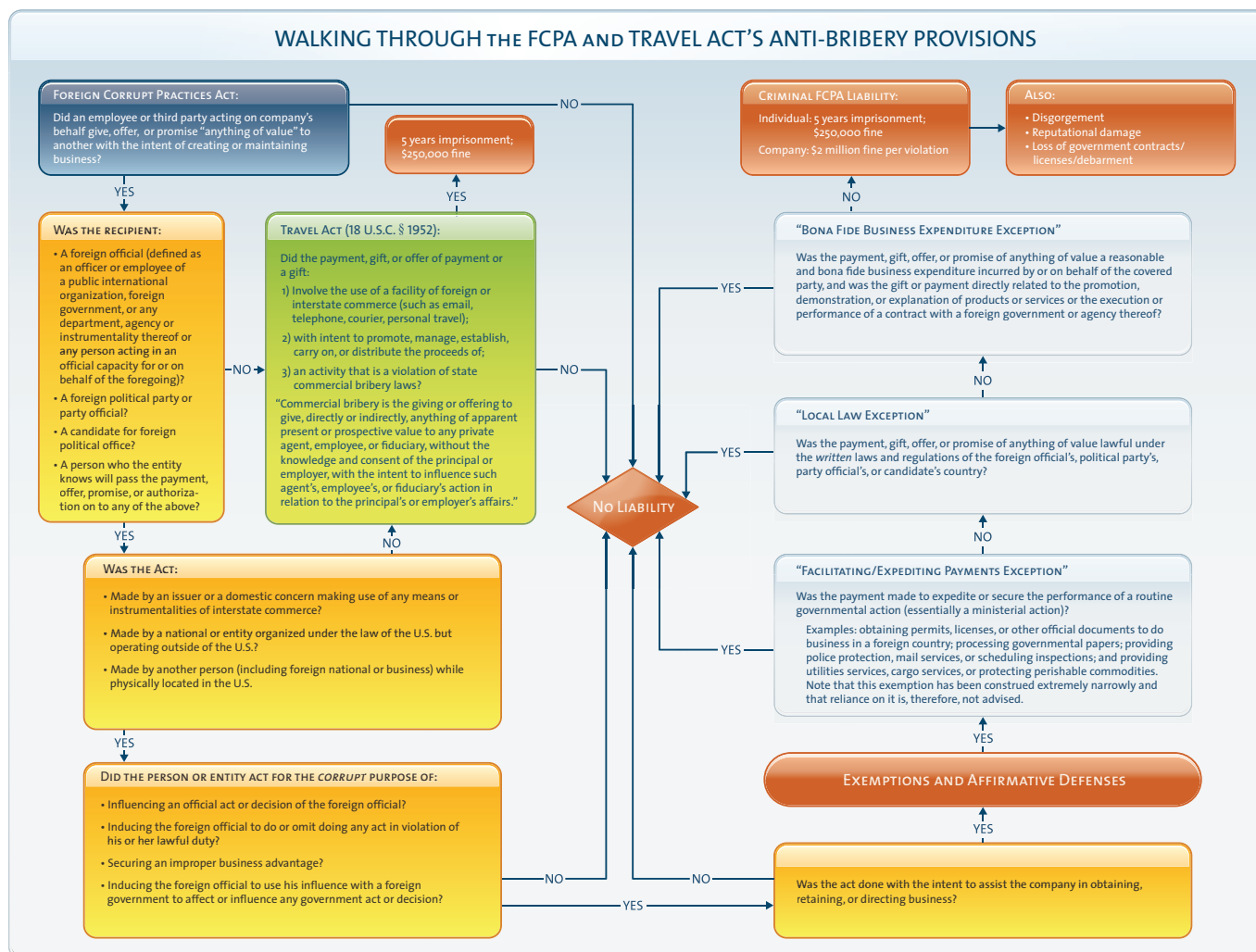
In another prominent case, the German truck maker MAN was fined €150 million for failing to prevent bribery. MAN paid bribes to win contracts, including bribes to foreign government officials in at least two cases. The actions were carried out with either the knowledge or participation of MAN’s chief

executive officer. The fine was explicitly set at a level to recoup the pretax profit gained from the tainted transactions.

The OECD report also complimented Germany’s use of non-prosecution agreements to obtain monetary settlements from individuals and tax audits to force cooperation from businesses. The OECD did, however, recommend increasing the sanctions imposed on violators, which have tended to be on the lower end of the available range. In addition, some commentators and activists have criticized the fact that Germany has signed but not yet ratified the UN Convention against Corruption.

### Despite Germany’s Record-Setting Gains, U.S. Remains Standard Bearer

Although certainly there are sound reasons for praising Germany’s recent anticorruption efforts, the United States remains the standard bearer for prosecuting corruption-related offenses. For example, in October 2010, the OECD commended the United States for “its visible and high level of support for the fight against the bribery of foreign public officials, including engagement with the private sector, substantial enforcement, and stated commitment by the highest echelons of the Government.” Indeed, U.S. enforcement of anti-bribery laws has increased steadily since 2002 and has resulted in significant prison sentences, monetary penalties, and disgorgement of ill-gotten profits.



The information contained herein is not, and should not be relied upon as, legal advice, and is not a substitute for qualified legal counsel.

Flow Chart Examining Flow and Function of the U.S. FCPA and Travel Act

The United States, stated simply, continues to lead the world in the number of foreign bribery cases charged and tried. And there is no reason to believe this status will change.

Vigorous enforcement and record penalties by the Department of Justice, Federal Bureau of Investigation, and Securities and Exchange Commission have resulted in U.S. companies implementing robust compliance programs. That said, the OECD continues to encourage the United States to lengthen the statute of limitations for foreign bribery crimes, to eliminate the “facilitation payments exception, to increase transparency regarding how and why corruption cases are resolved, and to enhance awareness of the Foreign Corrupt Practices Act’s application and defenses among small businesses and the general public.

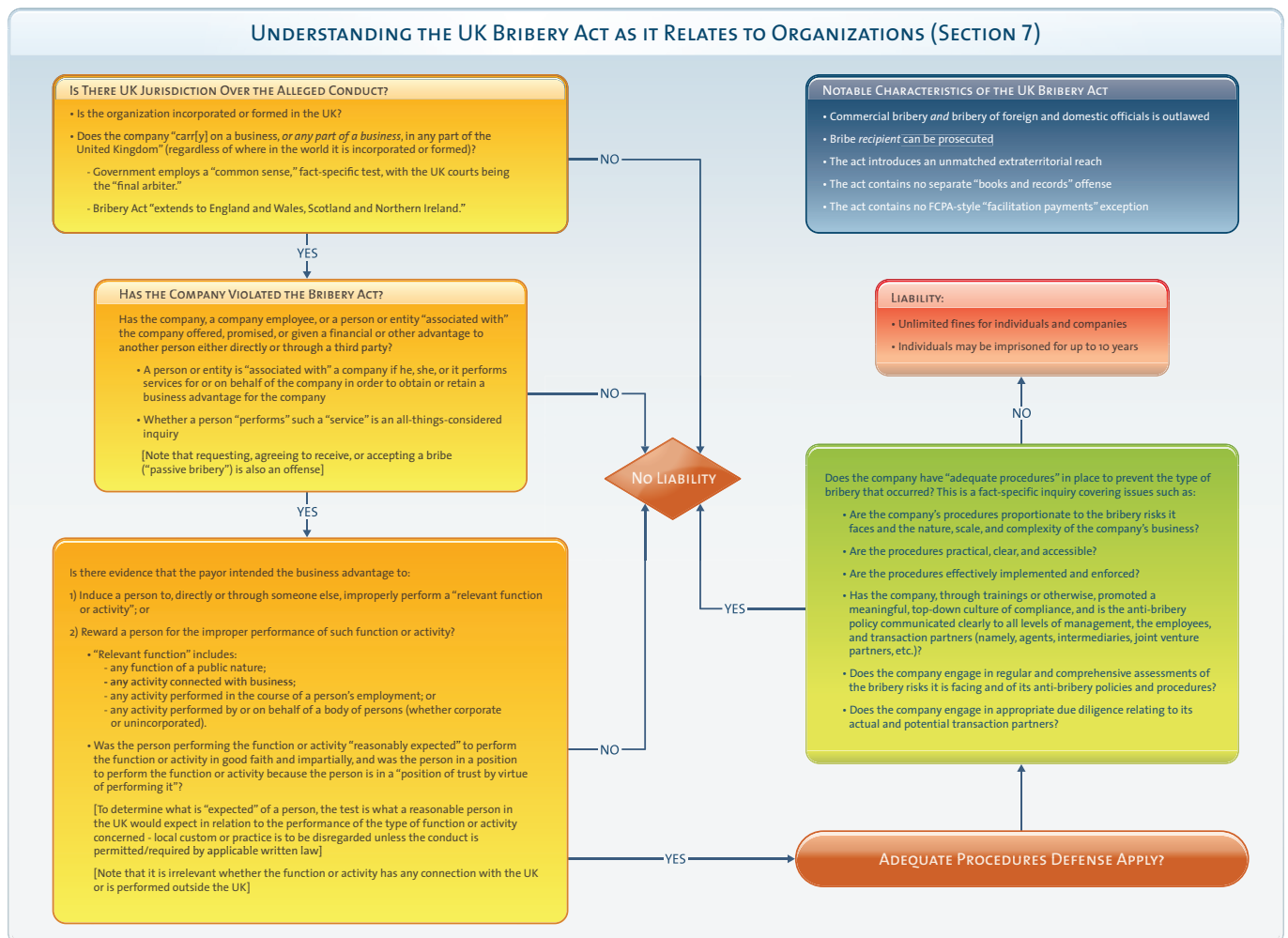
In addition, since its implementation of the UK Bribery Act in 2011, the United Kingdom has emerged as a recognized world leader in the fight against international corruption (though actual enforcement has notably lagged the attention heaped on the relatively newly-minted Act). The OECD, in fact, recently congratulated the United Kingdom publicly for enacting the Bribery Act, which it characterizes as a major improvement over the prior patchwork of UK bribery laws. The OECD also expressed satisfaction that the Bribery Act adopted several features of the OECD Anti-Bribery Convention. That said, the OECD did criticize specific perceived “shortfalls” in the act. For example, the OECD criticized the United Kingdom’s

continued reliance on the common-law identification theory for corporate liability and the lack of nationality jurisdiction to prosecute legal entities incorporated in crown dependencies and overseas territories for foreign bribery.

### Imitation as the Sincerest Form of Flattery – The Rise and Rise of “Carbon Copy Prosecutions”

One increasingly recognized anti-corruption trend now gaining worldwide recognition in enforcement circles is the phenomenon of “carbon copy prosecutions.” Since my former colleague Andrew S. Boutros and I first introduced and fully developed the concept in the context of anti-corruption prosecutions,<sup>6</sup> the phrase ‘carbon copy prosecutions’ has been commonly accepted to refer to successive, duplicate pro-

<sup>6</sup> See, e.g., Mara V.J. Senn, et al., “Businesses Become Easy Targets in Carbon Copy Prosecutions for Corruption Violations,” Expert Guide: Fraud and White Collar, at 7 (August 2013), available at <http://www.arnoldporter.com/resources/documents/Carbon%20Copy%20Article.pdf>, L. Cassin, “‘Carbon Copy Prosecutions’ Change the Rules of the Game,” FCPA Blog (November 9, 2012), available at <http://www.fcpablog.com/blog/2012/11/9/carbon-copy-prosecutions-change-the-rules-of-the-game.html>; Juliet S. Sorensen, “The Globalization of Anti-Corruption Law,” FCPA Professor Blog (Aug 16, 2011), available at <http://www.fcpaprofessor.com/2011/08/page/3>.





secutions by different states for conduct that is illegal under each of their national laws but arises out of the same common facts.<sup>7</sup>

The four elements are:

1. Jurisdiction A
2. Files an enforcement action
3. Based on charging document/guilty plea/admissions
4. From Jurisdiction B

Put another way, prosecutors in different countries each punish transnational conduct that violates their own domestic laws, but elect to do so after an offender has admitted to the wrongful conduct in an earlier foreign proceeding.

In just the last two years, at least five other companies have faced carbon copy prosecutions, with three of those actions brought by the Nigerian authorities and two initiated by US enforcers. Consider, for example, the Siemens case. As noted above, in December 2008, Siemens AG paid \$800 million to the US authorities to resolve the largest ever Foreign Corrupt Practices Act matter in US history while simultaneously paying an additional \$569 million to the Public Prosecutor’s Office in Munich, Germany, for a total combined payment of nearly \$1.4 billion, followed by an additional \$100 million to the World Bank Group (among a variety of other concessions), \$46.5 million to the Nigerian authorities and another €270 million (approximately \$336 million) to Greece, all the while still remaining “subject to corruption-related investigations in several jurisdictions around the world.”

The number of carbon copy prosecutions in the transnational anti-corruption sector is increasing, and this type of prosecution has altered the equation for conducting and resolving international anti-corruption investigations. Assume a corporation reaches a negotiated resolution with U.S. or foreign authorities on international bribery-related charges – whether through a non-prosecution agreement. The deferred prosecution agreement or a guilty plea—there is a bona fide risk that other countries will on their own accord (whether because of cooperation between the nations’ law enforcement agencies – something which is now routine between the US and Germany – or simply because news reporting widely publicized one nations’ prosecution a matter touching on one or more other nations) initiate prosecutions based on the same facts as, and admissions arising out of, the initial case. Given the relative ease with which enforcers can bring such actions, carbon copy prosecutions, like those brought against KBR, Shell, Snamprogetti/ENI, BAE Systems and Innospec Inc., are likely to soon become the norm.

### Recommendations for U.S. Companies Doing Business in Germany (And Vice Versa)

As with the Foreign Corrupt Practices Act and UK Bribery Act, companies doing business in Germany are well advised to consult with experienced counsel and to establish a robust, meaningful internal compliance program:

## Basic Steps on Path Towards Robust Compliance

### Phase I

Conduct Comprehensive Risk Assessment

- Design *external factor* risk assessment suitable for company and analyze results.
- Tailor *internal* corruption risk assessment questionnaire and analyze results.

### Phase II

Design and implement an anti-corruption compliance program

- Design anti-corruption policies and procedures, including: ethics, gifts, charitable giving, and entertainment policies; and international travel policies.
- Draft compliance-based Operating Procedures.
- Draft Distributor/Sales Agent Policies

### Phase III

Develop a Risk Based Third Party Vetting Program

- Prepare procedures for vetting and monitoring third-party intermediaries whose conduct may be imputed to the company, including by drafting a questionnaire for such third-party intermediaries.
- Review existing contracts and draft anti-corruption provisions to be incorporated into standard contracts.
- Draft procedures for performing anti-corruption due diligence in connection with third party transactions.

### Phase IV

Monitoring & Remediation

- Assess accounting, controls, and monitoring compliance, and identify areas for possible improvement.
- Prepare practical training programs tailored to specific groups of employees.
- Training sessions (or “Train the Trainer” sessions).

### Phase V

Address ongoing questions and issues arising in the course of business

- Implement a reporting mechanism for individuals to make confidential reports of suspected violations.
- Emphasize the need to be proactive in investigating and addressing any potential corruption.
- Encourage employees to contact designated counsel if they have any suspicions or questions while remaining cognizant of Germany’s more restrictive privacy laws.

<sup>7</sup> See generally “‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World,” University of Chicago Legal Forum (2013), available at [http://www.perkinscoie.com/files/upload/12\\_10\\_Boutros\\_Funk\\_Final.pdf](http://www.perkinscoie.com/files/upload/12_10_Boutros_Funk_Final.pdf).