



VDMA Guide How to Prevent Corruption

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Foreword

Fair competition is based on adherence to the law. Corruption distorts competition, causes damage to the reputation of the companies involved, and sanctions imposed may even put at risk the very existence of the business.

This is why every company should adopt appropriate risk management measures and ensure that acts of corruption do not occur in the first place. To achieve this, potential trouble sources need to be analysed thoroughly, a compliance strategy needs to be adopted - and implemented systematically.

The prevention of corruption has been on the agenda of the VDMA for quite some time. For years, the association has provided its members with information about the relevant framework under penal and tax law and has hosted events where companies can share their views with expert lawyers, government officers, researchers and representatives from Transparency International.

The purpose of the present guide is to support member companies in preparing their own corporate rules for the prevention of corruption. This Guide, which has been established together with the compliance officers of renowned VDMA members, describes the legal risks, identifies problematic fields in companies and also contains a check list for an internal set of rules, a so-called Code of Conduct (CoC). As the first edition has been received with extremely positive feedback, we are now pleased to published an updated 2nd edition as of September 2011. Numerous suggestions from readers have been integrated, e.g. check lists for the choice of consultants / intermediaries or whistle blower systems. We would like to thank in particular the experts of the VDMA working group for the prevention of corruption as well as the Association of Certified Fraud Examiners (ACFE).

Dr. Hannes Hesse
VDMA Executive Director

VDMA Guide: How to Prevent Corruption?

Executive Summary

- If uncovered and (legally) pursued, corruption may put at risk the very existence of a company. But also if not uncovered, corruption may jeopardize corporate structures.
- Corruption makes the persons and committees involved directly liable under penal law.
- A company must be determined to put up with economic loss if this is the only way to prevent improper conduct of business.
- The prevention of corruption must be perceived as a top management duty.
- D&O insurance cover usually does not apply in the case of corruption.
- Modern technologies enable company tax audits to detect and report to the authorities irregularities much faster and more reliably than ever before.
- For all financial years that have commenced since 1 January 1999, bribes can no longer be deducted as operational cost and hence constitute a means for committing criminal offences; the tax authorities have meanwhile significantly intensified pressure in tax evasion cases.
- German criminal law penalizes bribing of public officials (in Germany or abroad) or in the private sector (in Germany or abroad).
- There is no protection against double punishment in the case of bribery committed abroad if the act is prosecuted both inside and outside Germany.
- Prosecution of foreign offences in the US and the UK pursuant to the Foreign Corrupt Practices Act and the UK Bribery Act.
- Amounts used for bribery are usually connected to the punishable offence of obtaining credit by false pretences.
- Hermes cover is forfeited if a contract has been obtained through bribery.
- Protection by bilateral and multilateral investment protection conventions may be lost if the award of a contract is attributable to bribery.
- Bribery may, at the same time, constitute a violation of competition law.
- Uncovered acts of corruption may lead to a ban from contracts awarded by e.g. the World Bank or from entire markets (such as in the US).
- More often than not, money laundering is contributory to corruption. Telecommunications surveillance is possible if there is a suspicion of money laundering.
- Active and passive corruption, i.e. giving or taking bribes, (to public officials and private sector alike) are offences where communications surveillance measures are allowed (Sec. 100(a) German Code of Criminal Procedure, *StPO*: Active and passive corruption; and Sec. 299 in connection with Sec. 300(2) of the German Penal Code, *StGB*).
- Leniency programmes in the case of active or passive corruption (public officials and private sector alike) and money laundering (Sec. 46(b) *StGB*).
- Legal opportunities available to clean up corruption must be used before the tax authorities and the public prosecutor are involved. Also if processes are rectified internally and tax returns filed are subsequently declared as “found to be incorrect”, tax offices are still under the obligation to report such occurrences to the public prosecutor.

- Strengthening of the internal audit system is indispensable to fight and prevent corruption.
- At all levels, employees must be thoroughly aware of the fact that corruption will not be tolerated, whatever the circumstances.
- A company must carry out, or have carried out by an expert consultant, a comprehensive risk analysis to identify potential trouble spots.
- Critical administrative processes identified will serve as bases to develop adequate solutions.
- The VDMA Guide describes the legal background of corruption and facilitates the creation of an own Code of Conduct with check lists and various examples.
- Measures supplementing such rules are mandatory to effectively prevent corruption: the Code of Conduct must become a part of the corporate culture.
- Whistleblower systems

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1. VDMA Guide: How to Prevent Corruption?

Preliminary remark

The following is not intended to, and cannot, replace individual legal advice. Our comments provide a general overview and are not suitable to solve all the specific issues of a particular company. We do not discuss in depth the specific case of violations of competition law that are frequently connected to corruption. The introduction and implementation of measures to prevent, i.e. to avoid and fight, corruption also depend on the particular situation of the individual company. It is necessary for a company to create awareness of the issue on all levels of hierarchy and that the top management commits itself unreservedly and unequivocally to preventing corruption; only then can corporate integrity be achieved.

The German machinery and plant makers owe their excellent position on the world market to their innovative products, competence in the solution of problems and excellent product-related services. The quality and technology advantage does not only make it unnecessary to resort to corruption. Corrupt practices are also irreconcilable with our own standards that are based on fair, purely achievement-oriented competition. A possible option could be to join, or found, an integrity coalition where competitors commit themselves to fight corruption.

1.1. Introduction

Corruption is a topic that becomes more and more important. Hardly a week passes by without some new corruption scandal in the headlines. The Corruption Perception Index of Transparency International has Germany on place 15. This is a rather mediocre position when compared to similar industrialized countries - yet it does reflect that prosecution thresholds are low and that prosecution through the German authorities is intense. At the same time, the German Federal government has not faltered in its quest to fight corruption systematically and permanently and constantly presents new bills to this effect.

Unfortunately, outlawing corruption has not yet resulted in a company being protected from corrupt business partners' requests. Given their truly global presence, the German machinery and plant manufacturers will have to put up with the fact that some of the countries featuring on their customer list will, as a matter of course, pursue incorrect business practices. In addition, bribes are not only demanded in connection with sales activities. Companies see their representatives, recurrently, faced with more or less overt threats to life and limb by public officials or contracting parties, the police or military when making or executing a contract in some countries.

To put it short: **A general commitment to refrain from corruption does not make anti-corruption policies dispensable.** As, anyway, such commitment alone is not enough. **If acts of corruption are to be successfully prevented, uncovered and/or reappraised, this will require the unreserved support on all levels of hierarchy.** All measures must start in and from inside the company and should preferably be organised by the company itself too. If tasks are partly or totally delegated to external experts, employees will not feel to be part of the process and be reluctant to adhere to the imposed ban on corrupt acts, tacitly continue to accept such acts or even paper them over.

The significance for a company to combat and prevent corruption should not be underestimated in this context. The consequences that may ensue from corruption once discovered by the authorities are serious enough to see that it is not worth taking the risk light-heartedly or trivializing it. In extreme cases, corruption discovered and severely punished may jeopardize the very existence of a company. **Today, preventive action is more important than ever before.**

In particular criminal laws have been tightened significantly. The legislator has provided for a leniency programme that offers offenders mitigated sentences, or even no sentence at all, if they help to uncover serious corruption-related crime. Not only acts of corruption committed in Germany, but also outside Germany, will be prosecuted by the domestic authorities as provided for by international treaties. In addition, foreign authorities find themselves competent for prosecuting corruption-related illegal acts if a connection is deemed to exist between their jurisdiction and the offender.

Links between tax law and penal law have proven to be a particularly effective tool to uncover corruption. The abolition of the privilege to deduct so-called "useful expenses" under German tax law has not only further tightened the rules on the deduction of bribe money as business expenditure. In addition, tax auditors are now under the obligation to inform the public prosecutor if there is sufficient evidence that would give rise to a reasonable suspicion upon which an investigation must be started. The mere hope not to be caught becomes increasingly an illusion. Tax authorities, auditors and public prosecutors have done their homework and know about all the niceties of attempted concealment of corruption. The more elaborate the corruption is committed and/or disguised, the higher will be the criminal intent presumed by the authorities and a more severe punishment is likely to ensue.

Sophisticated software makes it possible for auditors to detect suspicious facts in the company data easily and quickly. Payments that have hitherto not given rise to objections may now, unexpectedly, become the focus of investigations under tax and/or penal law. Only very few tax audits will nowadays refrain from assessing the appropriateness of commissions paid in the course of business transactions. If public officials are involved in payments, the question whether the benefit awarded is of a particular value or not, is no longer that important, as already comparably low amounts will be caught by the penal rules.

A company should not let it come to this and adhere to certain principles to prevent corruption to occur in the first place and/or reappraise suspicious facts.

A CoC may be an invaluable and highly effective tool to provide for clear standard operation procedures to be followed in all cases where a company or an employee may be suspected of corruption, and the tax authorities or the public prosecutor may interfere. It is the aim to create awareness for the problem itself, thus preventing an attitude on the part of the workforce or a corporate subculture that makes corruption possible in the first place. Corporate codes of conduct rules may, in this respect, serve as instructions of how to act, even - and especially - in the case of doubt. The following information should help to generate and implement effective corporate rules to prevent corruption on the company level.

1.2. Criminal-law aspects

In principle, with the new legislation, the situation has tightened from a criminal-law perspective. Offences committed abroad are now also liable to prosecution in Germany, and of course, they may still be punishable under the relevant foreign jurisdictions, too. In addition, one should not forget that in specific circumstances, companies may be fined for failure to prevent corruption, and the amounts may be far from negligible.

With respect to some other countries, and especially the US (Foreign Corrupt Practices Act - FCPA) and the UK (UK Anti Bribery Act), a company affected should also be aware of the fact that it may be liable to intense prosecution by their competent authorities, even if corruption has been committed **outside** their territories, as long as the company entertains e.g. business contacts in such country.

From a legal perspective, there are two categories: Bribery of public officials (see No. 1.2.1 below), also in the public-law area, and corruption in the private sector (see No. 1.2.2 below).

1.2.1. Bribing of public officials

The German Penal Code (*Strafgesetzbuch*, hereinafter referred to as "*StGB*") in this case provides for a punishment of both the public official and the bribe payer.

1.2.1.1. The legal term "public official"

The law defines the term "public official" ("*Amtsträger*") in Sec. 11(1) No. 2 *StGB*. Accordingly, a public official is any civil servant or judge under German law or other person employed or otherwise appointed under public law to attend to duties of public administration with an administrative or other agency, irrespective of the legal status of such organization. This includes, in consequence, employees under public law or e.g. executives of municipal institutions. To be on the safe side, the definition should be interpreted in its broadest possible meaning, as it is quite difficult to distinguish who may actually fall into the group referred to as "other persons employed or otherwise appointed under public law".

The EU Anti Corruption Act now also refers to public officials of other EU member states and the employees of the EU institutions. With respect to these persons, bribing and accepting bribes is prohibited with respect to future acts. In international business, Art. 2(1) No. 2 of the Act Against International Corruption (*IntBestG*) and Sec. 334 *StGB* also prohibit bribery of other foreign public officials and employees of international organizations with respect to future acts. Especially abroad, persons may - quite surprisingly - fall into the category of a public official. Sometimes, a person may be considered as a public official due to a family relationship, so that also in the case of intermediaries or sponsors care must be exercised. Bribing foreign public officials may be liable to prosecution in Germany. Whether a person qualifies as a public official or not under the circumstances, is determined by the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 17 December 1997, and not according to the applicable national jurisdiction.

Accordingly, employees should be instructed to take into account that in the case of contracts referring in whatever respect to the public sector, the person representing the contracting party may be a public official and that the laws relating to active and passive corruption by public officials may apply. A corporate CoC for the prevention of corruption may be of help to handle doubtful cases. It may e.g. refer to a person within the company who is responsible for such an assessment.

1.2.1.2. The legal elements of bribery

A punishable offence on the part of the public official is deemed committed if he or she demands or accepts an advantage or a promise of an advantage related to the discharge of the public official's duties. The punishability is established if the public official either accepts advantages as stipulated in Sec. 331 *StGB* for legal official services or accepts a bribe as laid down in Sec. 332 *StGB* for a past or future infringement on his or her duties.

On the part of the bribe giver (i.e. the person who is no public official) a distinction is made between granting an advantage pursuant to Sec. 333 *StGB* and bribery pursuant to Sec. 334 *StGB*. The granting of advantages implies the offer, promise or granting of an advantage for the performance of a (legal) official duty. Hence, the public official does not infringe on his/her official duties. An example for the lawful performance of an official duty would be if a public official grants an export license, to which the applicant is entitled, but which the public official is willing to grant in a timely manner only if an advantage was awarded.

In the case of bribery, an advantage is offered, promised or granted in exchange for the performance of a past or future administrative act by which the public official had acted or would act in breach of his/her administrative duties. An example for an infringement of administrative duties would e.g. be if an operating license was granted for a plant although the legal requirements were not met. The concept of "performance of an official duty" has to be interpreted in its broadest sense to achieve the protection intended by the law. Performance of an official duty is any activity pursued by a public official or other authorized person related to duties assigned to him or her as civil service.

Also the terms "advantage" and "benefit" given to an official has to be interpreted in a broad sense. This includes any performance, to be provided free of charge, of a tangible or intangible nature, that objectively improves the economic, legal or personal situation of the recipient to which he or she is not entitled. In consequence, the benefit does not necessarily need to be tangible. Benefits given to third parties upon the official's request may also be sufficient. General measures to improve the relationship may, in specific circumstances, already be critical. In any case, the value of a benefit will be quite low to qualify as punishable benefit. The purpose is to prevent that many petty benefits would result in a routine (so-called "baiting" through enticement benefits) that later on makes bigger and illegal benefits easier to accept. This aspect must be emphasized in the Code of Conduct (see Annex: "Checklist for a Code of Conduct for the Prevention of Corruption") not only with a view to public officials, but also with respect to contracting parties and within the own company.

It has become clear that benefits do not only include money or presents but also holiday invitations or entertainment events disguised as training workshops or seminars. There must be a connection between the official act and the granting of the advantage/benefit, a so-called covenant of unlawfulness. This covenant establishes a particular relationship between both elements. That means that the advantage is granted / requested only because of the performance of an official duty. The official is granted the benefit for an illegal award of an operation permit, for example. It is indispensable not to forget that the courts have meanwhile expanded the concept of the covenant of unlawfulness. The only criterion that still has to be fulfilled is that the advantage is granted / requested for the performance of an official duty in general. Even if the situation is not totally unambiguous, the extensive view applied by the courts remains a fact. From a subjective perspective, the law assumes that so-called conditional intent on the part of the private bribe giver will suffice. In consequence, the offender needs to consider the success of his or her endeavours only to be likely to occur, no absolute confidence is necessary.

1.2.2. Active and passive corruption in the private sector

1.2.2.1. Active corruption (giving bribes) in the private sector

Pursuant to Sec. 299 *StGB*, active corruption in the private sector is subject to criminal prosecution, and so is active corruption abroad (Sec. 299(3) *StGB*). Pursuant to Sec. 299(1) *StGB*, a person commits an offence if he or she offers, promises or grants to employees or representatives of a business enterprise within the course of his/her ordinary business an advantage for their own benefit or the benefit of a third party in order to receive, for his/her own benefit or the benefit of a third party, unfair, preferential treatment regarding the supply of goods or industrial services. The concept underlying the term "employee" has to be interpreted in a quite broad sense. A permanent service or employment relationship is not required. A representative is everybody who is no employee and no owner of a business, but still obliged to act on behalf of the enterprise and may influence entrepreneurial decisions, comparable to the duties incumbent on an employee. This might be a board member or the commercial director of a stock corporation, a member of the supervisory board of a cooperative society and in some cases even a commercial agent. The concept of the term advantage is the same as in the case of active corruption of officials. There must also be a covenant of unlawfulness between the company employee and the outside party. The subject-matter aims at the unfair preferential treatment in a competitive environment. Hence, there must be - at least in the offender's view - economic competition between the beneficiary and - potential - competitors. The preferential treatment is considered unfair if the decision is objectively inappropriate. It is necessary to point out that active corruption in the private sector may, at the same time, constitute a violation of competition law and be subject to the applicable legal consequences.

1.2.2.2. Passive corruption in the private sector

Sec. 299 *StGB* also addresses passive corruption in the private enterprise system. Accordingly, also employees or representatives of a business will be liable to prosecution if they request, accept and/or have the other party promise an advantage for themselves or a third party in consideration of granting the other unfair and preferential treatment regarding the supply of goods or commercial services. The other legal criteria of the criminal offence are identical with those stipulated for active corruption in the private sector. Offences committed abroad are also punishable, according to Sec. 299(3) *StGB*.

Passive corruption in the private sector may be illustrated by the following example: from among many bids, one contractor is awarded a contract, because the decision-maker in the company will receive a commission from the contractor for the components to be supplied by the company (over-invoicing and payment of the excess amount to the bribe-taker in the company).

1.2.3. Money laundering

It is certainly worth noting that suspected money laundering falls into the category of offences that allow for far-reaching police procedures such as telecommunications surveillance. This is why it must be taken into account that public prosecutors will try to uncover corruption with these measures.

Acts of money laundering are, among others: hiding of assets and concealment of their origins, impeding and compromising of finding, collecting or confiscating these assets and of their forfeiture. As the monies that are received from bribery (e.g. kick back payments, cf. section 1.6.3 below) and which are used to commit bribery (i.e. the bribes taken), are monies from a punishable offence, corruption is most likely to go hand in glove with money laundering. Active/passive corruption of public officials will in most cases be contributory to money laundering. From a private-industry perspective, a company may be liable to prosecution for such acts or complicity in such acts if the company bribing an official contributes to committing the offence, e.g. by transferring bribe money into bank accounts or otherwise accedes to the act. Example: Contractor U has bribed the administrator of the Higher Environmental Authority B to obtain an operating permit he urgently needs but which, legally, cannot be granted as the plant is highly problematic from an environmental point of view. The parties agree that the money is to be paid once the operating permit has been granted and become final and irrevocable. To conceal the corruption, U buys, through a foreign trust, two houses at two different locations outside Germany for B and has the properties registered under the name of B's wife.

1.2.4. Fraudulent breach of trust

Whether or not a fraudulent breach of trust exists is initially measured against the duty to protect financial interests. In the case of passive corruption in the private sector, an employee is always deemed to be in breach of his/her employer's interest if the employee is bribed by a third party.

Yet, a bribing employee also infringes on the employer's interest as the relevant contracts are null and void because they are based on an illegal act, and the risk of prosecution exists as well. Fraudulent breach of trust is characterized as the breach of a duty to attend to a third party's financial interests, which is assessed from an economic point of view. In the case of a purchasing department, for example, the employees' duty to protect the financial assets of the company is fulfilled if they accept the offer that is most favorable for the company in terms of its economic reasonableness. A breach of duty (of loyalty) therefore exists if a less reasonable offer is accepted, because an employee receives a kick-back payment from the seller. Example: Purchasing director L of company U chooses to do business with supplier F. In consideration thereof, company F pays him a commission in the amount of 2.5% on the basis of the annual sales figures with U, and the commission is added to the normal price. As a result of the added commission, the goods supplied by F to U are significantly more expensive than the goods offered by competitors. Also the quality of the components is not as good as the standard of another potential subcontractor: more scrap accrues during production and U has to deal with far more warranty claims from customers. The higher price and the inferior quality impair the economic interests of U. Due to his position as purchasing director, L is under the obligation to protect these interests. L is deemed to be guilty of a fraudulent breach of trust. The creation and making available of slush funds as such is a punishable offence, i. e. breach of trust. Slush funds are accounts where money is stored that is not recorded in the accounts of the company, thereby making it not readily available to the company, although the enterprise has generated these values. It is worth noting that the circumstances surrounding the creation of suchlike accounts are relatively irrelevant, i.e. the offender cannot claim that he or she had acted in the best interests of the company.

1.2.5. Fraud

An act fulfils the legal definition for fraud if a person commits such act with the intention of unjust enrichment under false pretenses or by omitting facts so that the victim causes financial loss or damage to property to itself or a third party. In the case of fraud, it is assumed that expenses incurred in such respect are customarily included in the order value that – compared to the intrinsic value – is excessive.

Each act of corruption may therefore entail an act of fraud too.

1.2.6. Obtaining credit/Hermes cover by false pretenses

A contract won through bribery may also fulfil the legal criteria of an offence called "obtaining credit under false pretenses", which will put at risk not only amounts granted from the financing bank, but also any Hermes cover obtained. Banks and Hermes insurance use standardized clauses that make the effectiveness of the contractual financing dependent on the absence of bribery or similar offences. If a breach has occurred, the credit agreement is possibly deemed null and void, and the bank/export insurer may even claim damages.

1.2.7. Other offences

In addition to the offences described in the present document, other unlawful acts may apply, too. This paper does not discuss infringements on competition law caused by active or passive corruption. It should be noted, however, that an agreement / understanding based on active or passive corruption may qualify as an unfair restriction to competition and might therefore violate competition law. Tax law aspects are separately referred to further below. It is necessary to take into account that bribe-related offences may, at the same time, be caught by foreign currency exchange regulations in the case of business with partners abroad. It is also worth noting that according to the German Act on Unfair Competition, *UWG*, sanctions may be imposed in the case of misappropriation of trade secrets

1.2.8. Legal responsibility

Legal responsibility for bribery may not only be limited to the employees involved, including the management, but may also affect the company directly. It is also necessary to consider that there is no complete protection against multiple punishment if bribery is prosecuted both inside and outside Germany.

1.2.8.1. Legal responsibility of the persons involved

The person directly giving a bribe is liable to prosecution without exception. This applies regardless of whether the bribe-taker is an official or from the private sector. The indictability of the offence is not mitigated by including a messenger or another form of intermediary (so-called "white glove") to commit the crime. The charge is imputed by applying the principle of perpetration and accession pursuant to the German Penal Code, *StGB*. It is useless to try and avoid sanctions by bringing in a (foreign) subsidiary, either. Even if the indictable act is actually performed by a foreign branch, it can be prosecuted as a domestic offence, provided that a contribution to the offence was committed in Germany, e.g. by providing the necessary (financial) means. And if the person is a German citizen and the offence he or she committed abroad is an indictable offence in that country, he or she may even have to face proceedings in Germany too. In addition, the EU Anti-Corruption Law and the German Act on International Corruption outlaw certain corruption offences that, although committed abroad, will be liable to prosecution in Germany.

We further point out that it is virtually impossible for suspects to exonerate themselves by trying to justify their doings.

1.2.9. Legal responsibility of the management

Executives who are aware of, and tolerating, acts related to bribery will, as a rule, incur individual, personal liability. The mere fact of delegating responsibilities to an employee is not sufficient to relieve members of the management from their liability. Competencies, resources and reporting structures should be firmly implemented and the compliance system must be submitted to continuous monitoring to be possibly excluded from penal prosecution. It is also worth noting that possible penal sanctions may ensue from monitoring obligations if these obligations are not adhered to.

According to Sec. 130 of the German Administrative Offences Act, *OWiG*, it is already sufficient that a responsible person infringes on its corporate supervisory duties to justify that sanctions be levied against that person. An infringement on a corporate supervisory and management duty may be deemed to exist if cases of corruption and similar, connected unlawful acts occur in a business or company and no structural measures are taken to prevent them. In consequence, it is necessary for a company and its executives - who face personal liability pursuant to the *OWiG* - to ensure that adequate, internal measures to prevent corruption are applied.

1.2.9.1. Legal responsibility of the company (administrative offence)

Liability for corruption cannot only be incurred on the part of an infringing individual, but also by a company. Pursuant to the bases of the law on administrative offences, companies may be caught by the provisions on association punishment according to Sec. 30 *OWiG*. Accordingly fines may be imposed on a company if an authorized corporate committee, board member, authorized shareholder, or other duly and fully authorized representative commits a criminal or administrative offence infringing on the obligations relating to the company. As an accompanying statutory punishment, forfeiture ("*Verfall*") can be ordered so that the company has to surrender to the prosecution authorities any monetary advantage that has been obtained illegally.

In addition, companies may have to expect sanctions imposed by foreign authorities that can put at risk the very existence of their business.

1.2.10. Prosecution of foreign offences in Germany

German law punishes also bribery committed in the conduct of foreign business. If an unlawful act relating to foreign bribery is committed in Germany, it is liable to prosecution in Germany. The same applies to breaches committed abroad, if the offender is a German citizen.

1.2.11. Prosecution of domestic and foreign offences - double penalty

The US Foreign Corrupt Practices Act (FCPA) penalizes bribes paid to foreign public servants, other officials, parties and/or similar. Foreigners will also be subject to prosecution if such unlawful acts are committed outside the USA, provided that US prosecution authorities (including the Securities and Exchange Commission - SEC) are competent. The requirements to be met are quite low, though. An email sent to a recipient in the USA may be enough to make them have jurisdiction over a matter. Furthermore, it is important to take into account that a company caught by the rules of the exchange supervisory authority SEC may also be liable to prosecution in the US if it is allegedly guilty of passive corruption abroad, i.e. companies potentially affected should strictly prohibit so-called facilitation payments abroad. The UK Bribery Act contains similar provisions.

Companies must be aware that they are liable to prosecution and punishment abroad if a specific unlawful act relating to passive or active passive corruption is an indictable offence in such country. There is only limited protection available against double penalties for the same unlawful act at home.

1.3. Tax-law aspects

1.3.1. Tax principles

Business expenses are all expenses caused by a business, which would, in principle, encompass so-called "useful expenses". Yet, if the expense relates to the granting of an advantage in violation of the Penal Code or constitutes an administrative offence, the principle of non-deductibility postulated by Sec. 4(5) sentence 1 No. 10 of the German Income Tax Act, *EStG*, applies. This goes hand in hand with the tax authorities' reporting obligations to the public prosecutor.

Benefits given to business partners or similar may furthermore be caught by other restrictions on tax deductions, e.g. in Sec. 4(5) sentence 1 No. 1 *EStG* for presents worth more than 35 EUR or the obligation to identify the recipient of payments to the tax authorities pursuant to Sec. 160 of the German Tax Code, *AO*.

1.3.2. Restrictions on tax deductions pursuant to Sec. 4(5) sentence 1 No. 10 *EStG*

Payments relating to the granting of advantages are non-deductible for tax purposes, provided that they fulfil the criteria of an offence according to any law for which a fine can be levied. The principle of non-deductibility of "useful expenses", which has been effective for financial years starting after 31 December 1998, constitutes a material tightening of the legal situation. The ban on deducting business expenses no longer refers to the actual indictable nature of an act such as the legally binding conviction of a bribe-taker and/or the closing of the proceedings pursuant to Sec. 153-154e of the German Code of Civil Procedure, *StPO*.

The only criterion to be met is that the occurrence of the elements of an indictable offence have been ascertained. The ascertainment as to whether the facts of a case fulfil the elements of a particular penal provision has to be made by the competent tax authorities. A decision on the deductibility of business expenses will be made following this "preliminary assessment". In this context, the "small-scale" indictability assessment does not take into account whether a payer has acted culpably or whether a formal application for prosecution has been filed.

The deduction of business expenses is still deemed banned if the criminal proceedings instituted do not result in a verdict, e.g. because the act was not an act committed culpably or illegally, or even if the prosecution of the matter is statute- barred, provided that the elements of the offence are fulfilled. For the purpose of Sec. 4(5) sentence 1 No. 10 *EStG*, all criminal provisions penalizing the granting of advantages have to be taken into account. This applies to all German criminal provisions, including provisions penalizing offences committed abroad, but not to purely foreign legislation. The legal purpose of a law determines whether the granting of advantages is caught by it or not. If it pursues another purpose of protection, it is not relevant for the restrictions on tax deductions pursuant to Sec. 4(5) No. 10 *EStG*. Among such provisions are, e.g. fraudulent breach of trust (Sec. 266 *StGB*) governing the detriment of assets, or tax evasion (Sec. 370 *AO*) where the government's claim to receive tax payments in full is protected. The restrictions on tax deductions pursuant to Sec. 4(5) sentence 1 No. 10 *EStG* are explained in detail with respect to tax and penal consequences in an order by the Federal Ministry of Finance dated 10 October 2002.

1.3.3. Duty to forward information

In addition, the tax authorities are expected to report to the public prosecutor or the competent administrative authorities all facts referring to a possible criminal or administrative offence in connection with the unlawful granting of advantages. The tax authorities are bound to comply with this rule. They have no discretion in determining whether they will report these facts or not. Officials in charge failing to comply with their reporting duties may be found guilty of perverting the course of justice by a public official pursuant to Sec. 258a *StGB*.

1.3.4. Suspicion of a criminal offence

The prosecution authorities have to be informed as soon as they suspect an offence. For interpretation purposes, the term "initial suspicion" used in Sec. 152(2) *StPO* may be helpful. Accordingly, there must be "tangible facts possibly suggesting from criminological experience that an actionable offence has been committed". To be under the obligation to communicate their findings, the tax authorities must have established positively that there is concrete evidence for such suspicion. For tax purposes, their assessment should only refer to the legal elements provided for in the relevant penal rule, leaving apart questions of actual prosecution. Yet, it would not be admissible to forward such report without a tangible cause or e.g. only by reason of mere presumptions, ignorance of criminal law or knowledge gained according to the principles of evidential burden on the tax law.

Circumstances providing sufficient grounds for a suspicion of an offence are:

- lack of cooperation in the course of an audit;
- expenses shown as non-deductible in tax return;
- non-deductibility pursuant to Sec. 160 AO;
- recipient of payments is a phantom company; and
- extraordinarily high commission payments.

Each case will, however, be assessed in the light of the particular circumstances. Furthermore, the order by the Federal Ministry of Finance dated 10 October 2002 states that compared to other restrictions on deductions, the principle of non-deductibility pursuant to Sec. 4(5) sentence 1 No. 10 *EStG* would be applied as the subordinate rule. In auditing practice, however, it has become apparent that the "inappropriate" use of Sec. 160 AO is frequently interpreted to suggest a suspicion of an offence triggering the above reporting obligation. The risk of detection is further increased by the tax authorities' right to access the company's accounting data pursuant to Sections 146, 147 AO. We may well assume that the preferred expense items (expenses for commissions, consulting, services, marketing and sponsoring as well as expert opinions and other advertising cost) to disguise advantages granted are only too well-known to the auditors. Other accounts such as personnel, travel and accommodation cost and other operational expenses may become the focus of the IT audit and help to discover acts of corruption with only minimum efforts.

1.3.5. Advantages paid: tax consequences for the payer

If the principle of non-deductibility applies, neither the advantage itself nor the expenses incurred with respect to this benefit may reduce the profit generated. Such incidental expenses include, among others, cost for travel and transport and consulting and legal costs, if applicable. Any such expenditure deducted will, as a rule, fulfil the legal criteria for tax evasion. If, in connection with the granting of advantages, “phantom invoices” are submitted, the act of deducting input tax based on the VAT indicated also constitutes tax fraud.

1.3.6. Advantages received: tax consequences for the payee

Bribes paid by a third party to an employee are no salary, as they are received without the employer's knowledge and contrary to its interest. Yet, it adds to the employee's taxable income, which means that it has to be recorded and specified as other income in the declaration form. If the recipient is a businessperson, operating income has been generated. If, in order to conceal advantages granted, “phantom invoices” have been issued by the recipient that include VAT, the recipient is under the obligation to pay the corresponding amount of VAT.

1.3.7. Possible lump-sum taxation in the case of operational expenses in kind

Operational expenses in kind given to customers, business partners and their employees as well as to one's own staff constitute, as a rule, a taxable monetary advantage to be added to the operational expenses or the salary of the recipient. Accordingly, the recipient is obliged to increase the value indicated as his or her taxable income by the amounts received also for tax return purposes. With respect to staff employed by business partners, an exception is possible if recipients, in compliance with their reporting duties, have informed their employer of their third-party salary who may then take the appropriate steps with a view to the consequences on the deduction procedure for income tax.

Since 1 January 2007, Sec. 37b *EStG* offers the possibility to levy income tax at a uniform rate of 30 % (plus solidarity surcharge and church tax, if any) per fiscal year for all

- operational benefits paid in addition to the usual, agreed consideration, and
- non-cash presents within the meaning of Sec. 4(5) sentence 1 No. 1 sentence 1 *EStG*.

This then excludes any further tax consequences for the recipient.

This method is applicable to non-cash benefits to customers, business partners and their employees as well as to own employees, to the extent that they are given in addition to the regular salary. The lump-sum tax is always determined by the expenses incurred by the taxpayer, including turnover tax. Lump-sum taxation is not possible if the expenditure incurred by the granting taxpayer exceeds the amount of 10,000 EUR per fiscal year and recipient. Lump-sum taxation is also excluded if the expenditure incurred for each individual benefit exceeds the amount of 10,000 EUR.

In addition, the payer has to inform the recipient that the payer will bear the tax. No formal requirements exist, so that this fact can be already established e.g. through an invitation to a sports event.

For clarification: The provisions of Sec. 37(b) *EStG* never serve the purpose of relieving a person from his or her liability for incorrect payments under criminal law. Their purposes is solely to provide for the settlement of income-tax related consequences on the recipient.

1.4. Legal consequences

1.4.1. Prosecution

In the case of the above offences, the law provides for imprisonment or the payment of a fine. Imprisonment is up to ten years in severe cases, otherwise up to three or five years.

1.4.2. Fines

In the case of an administrative offence, fines can be imposed, too. As a rule, a threshold of 1 million Euro applies to each individual case with respect to the fine- related part of the penalty. Furthermore, the fine should exceed the economic benefit the offender has generated from the offence. To the extent that the statutory threshold imposed is not sufficient, a premium may be added that may be much higher.

1.4.3. Forfeiture

Forfeiture is the term used for the skimming of sales from a monetary advantage that has been obtained illegally in consideration of an offence and that has been added to the assets of the offender or participant or has become part of the assets of a third party. The criterion is always the economic value of the advantage the offender has gained through the offence. The amount skimmed must be totally identical with the monetary advantage. The total amount generated by the offence is thus forfeited. In the case of an order, the total order value, without any deductions, would be skimmed, i.e. the total gross value plus any monies invested.

1.4.4. Exclusion from public contracts

In addition to the above measures, it is also possible to exclude a company from the award of public tenders. This may be the case if a company has committed such an offence and there is no sufficient, objective evidence available that would leave room for a reasonable doubt. No final judgment or penalty notice is necessary in this context.

1.4.5. Other legal consequences

Note that contracts concluded through bribery may be considered null and void. In addition, claims for damages of the affected contracting party/parties and affected competitors might further inflict a company. For an exporting company it is also worth considering that any export credit insurance obtained for foreign business based on bribery is void. This applies in particular to Hermes cover where the corporate signatory has to declare that the order had been won without any means of corruption. If bribery is involved in the conclusion of a contract, this may also have repercussions on the protection of the bribing investor pursuant to bilateral or multilateral investment protection treaties.

If an investor files a suit, the competent court of arbitration may refer to the existing bribery and refuse to grant protection. Furthermore, exclusion from public (see 1.4.4 above) and, increasingly, also private contract awards is likely to ensue. In the case of an existing corruption register, such company's name will usually be entered too.

1.5. Cleaning up corruption

Once detected, it is indispensable to thoroughly investigate and reappraise cases of corporate corruption internally. In the negative, any future investigations by the tax authorities and public prosecutor will be pursued much more vigorously as consistent failure to act or even attempted concealment are deemed to be sufficient evidence for them to imply aggravated criminal intent. A thorough reappraisal of cases of corruption may also help to prevent exclusion from contract awards. Many countries in this respect provide for so-called “self-cleaning” measures. The reappraisal process should also include tax law considerations. A company may therefore avail itself of a voluntary self-disclosure to avoid penalty if it fulfils the relevant statutory requirements. To do so, a company may file a supplementary application, indicating any illegal acts relating to a specific type of tax that are not yet time-barred or, as the case may be, correcting incorrect previous applications.

To avoid prosecution in the event of tax evasion relating to more than €50,000 per offence, an offender shall pay – in addition to the actual tax arrears and interest in the amount of 6% per annum – an amount of 5% of the amount of tax evaded for the benefit of the exchequer.

An internal appraisal should be based on sound judgement and care. It needs to be taken into account that internal reappraisal is a cross-sector task that requires a large range of competencies and, in addition to the requirements related to the subject-matter as such, outstanding project management abilities. In addition to knowledge in the fields of criminal, civil and labour law, expertise is required in business administration and reporting and accounting, as well as in forensic audits. As each individual case is different, the following outlines only very general requirements. The project manager must be a highly experienced person. The individual aims of a reappraisal can vary significantly and so may the type and extent of the reappraisal and documentation. What is needed in any case is sufficient knowledge regarding legally unequivocal and reliable project and audit results. Interrogation of internal witnesses or potential perpetrators have to take into account the respective persons' rights and must be duly documented. Data from IT systems must be retrieved and stored in a way so that they may be used as evidence in court. Documents should, of course, be treated in the same way.

1.6. Practical examples

It might be a good idea to integrate the following examples into your own company manual.

1.6.1. Acts of corruption committed by third parties, esp. intermediaries

Often companies try to conceal corruption and include an intermediary in order not to have the bribe-taker or bribe-giver commit the actual offence. This, however, is absolutely futile from a penal law perspective and does not avoid the prosecution of the parties. An offence is also deemed to exist if payment is made in an indirect way, e.g. to a family member of the other partner or to an organization, e.g. a foundation or a charity "recommended" by the other.

1.6.2. Facilitation payments

Another variation linked to corruption occurs in the case of so-called facilitation payments. They are usually chosen to facilitate or speed up processes related to a transaction. Most likely, they concern administrative acts (e.g. surrender of bonded goods, approvals, etc.). This applies also in the case of e.g. the speedier approval of a permit: the act will be punishable in Germany pursuant to Sec. 331 *StGB* as acceptance of advantages by an official or, as the case may be, pursuant to Sec. 333 *StGB* as granting of an advantage for the third party, even if and irrespective of whether the third party would have been entitled to the administrative act. The corruption might just as well constitute an offence in a foreign country. And also German criminal law may outlaw offences committed abroad if the offence is subject to punishment in the foreign country.

It is not always easy to assess when facilitation actually becomes liable to prosecution. It will surely be punishable if e.g. an authority refrains from making a legally necessary and mandatory administrative step in consideration of the benefit, thus impairing third parties' rights.

1.6.3. Kick-back payments

Kick-back payments are also a common means of corruption. A party to a contract is over-invoiced and a part of the excess is returned and given to the contracting parties' employee in consideration of the conclusion of the contract. Another variant is to invoice services that have never been rendered and distribute payments made to the corrupt employees of the principal. There are probably many other ways to generate recoveries than by over-invoicing. Apart from payments to a private individual, one might also think of payments into a company account with a foreign bank.

1.6.4. Presents, invitations and incentives

Presents and invitations usually constitute a benefit in kind that may fulfil the legal criteria of corruption, especially if a favour is expected to be rendered in return. Incentives are, as a rule, also benefits in kind that are granted with respect to the achievement of specific targets, i.e. specific turnover figures or turnover thresholds. Incentives may also be caught by the legal definition of corruption, especially if the incentive is promised only to specific employees of the customer without their employers' knowledge. From the perspective of a recipient of the benefit, more problems are likely to occur as the benefits qualify as taxable income that is also subject to social security deductions. These benefits do not only entail corruption issues, but also touch upon tax law matters. Examples for such presents, invitations and incentives are the expensive ticket for an open air concert, invitations to a corporate VIP lounge for a soccer match, a cruise or a stay at a hotel.

1.6.5. Intermediaries – instead of end customers – as contracting parties of the machinery and plant industry

Sometimes end customers of plant makers express their wish that the plant contract should not be concluded directly with them, but with an intermediary close to them. The intermediaries may be a trading house or a project company, often incorporated in a tax shelter. Their request is justified by reasons of strategic purchase, financing or tax optimization. What, at first sight, seems to be an innocuous request, may on closer inspection pave the way for serious risks of all kind: If it remains unclear what performance is actually incumbent on the intermediary with respect to the end customer or why such performance should justify the surcharge included in the plant contract between the end customer and the intermediary, the plant maker could become at least subject to the suspicion of complicity in fraudulent breach of trust, fraud, credit fraud, and tax evasion of the end customer, as well as making itself personally guilty of fraud. A careful analysis of the individual case is indispensable, and if appropriate a contract should not be concluded with an intermediary.

1.7. Strategies to prevent corruption in a company

Prevention of corruption is a key management task. A company cannot afford that any doubt occurs in this respect, internally or externally. Measures tend to fail to achieve their goal if the senior and middle management do not commit themselves unreservedly to the prevention and combat of corruption by sending out appropriate messages (“tone at the top”). The requirements of the code of conduct, within the meaning of a compliance management system (CMS) must therefore penetrate a company without exception.

1.7.1. Internal identification of high-risk areas

In a first step, a company should identify the areas that are prone to corruption. These are above all areas where contracts are concluded with external partners, that is usually Sales and Procurement. In addition – albeit not burdened with the same risk potential – other departments have to be assessed that deal with customer care and marketing. In this context, all will depend on the circumstances of the individual case. Subsidiaries and branches abroad should not be neglected either but have to become an integral part of the corporate anti-corruption strategy. It would then be appropriate to prepare country-specific risk analyses and develop adequate strategies.

Once the areas have been identified, it is often helpful to scrutinize their structure to identify the persons and processes that are potentially affected by corruption. The persons and processes under scrutiny will always relate to the obtaining, granting and implementing of contracts and the pertaining cash flows. In addition, to effectively combat corruption, areas should be analyzed that monitor the relevant company processes. These are in particular accounting and IT. The inclusion of Controlling, Auditing and comparable units of the company on an early stage should be taken into account. The damage for a company caused by judicial investigations and negative publicity can be reduced, if not altogether avoided, if cases of corruption are detected and addressed at an early stage.

1.7.2. Creating an own code of conduct

Once all sensitive areas and processes have been identified, it is necessary to compile a corporate code of conduct addressing such areas and processes. Of course, only *writing* a manual will not provide the desired protection. Accompanying measures such as trainings etc. will be indispensable to create awareness for the problem.

1.7.2.1. Labour-law aspects

When writing and implementing an own code of conduct, labor-law aspects need to be taken into consideration, too. This applies especially to the works councils, as the manual may have an effect on the employment relationships. We have dedicated an extra section to labor-law aspects that starts on page 39.

1.7.2.2. General aims and contents of a code of conduct

A code of conduct must not leave any room for (mis)interpretation, and employees must be told exactly what e.g. they are not allowed to do to prevent corruption. A code of conduct further creates awareness for corruption-related situations and their compliance-oriented solution. This also means that legally unobjectionable and correct processes need to be documented in sufficient detail as to prevent, right from the start, any suspicion, e.g. by the tax auditor, that could subsequently lead to an official investigation.

Hence, a part of the code should also be reserved to describe the situation with a view to criminal law and corruption. One might even think of including the text of the relevant legal provisions. Legal services should be available to employees for any queries they may have. Of course, all employees working in areas prone to corruption should receive appropriate training.

In addition to more general words of advice, it is surely useful to provide hands-on procedures for critical cases and illustrate them by giving practical examples where corruption may occur (see below for details).

The manual must provide persons in the areas concerned with clear-cut advice and instructions for their own actions. The following pattern should be applied: The more critical a process is and the more exposed the person, the clearer the instructions. A rather rough yardstick to determine an employee's own conduct is the so-called public view test:

- Do I act in the best interests of the company?
- Is my behaviour in line with the values pursued by my company and my own values?
- Is my behaviour legal?
- Would I disclose it to the public too?
- Would I be ready to accept responsibility for it?

1.7.2.3. Payments to private persons and/or public officials

One area that needs to be specifically addressed is the acceptance and giving of gifts of any kind and of any value whatsoever. Unequivocal answers and/or prohibitions must be stipulated. A principle decision must be made as to whether thresholds for the value of presents should be included in the code or not, taking into account the so-called "social adequacy rule". In the case of group companies, concrete figures seem to be advisable. The same applies to benefits granted as discounts on company products or other types of customer care. With respect to officials, a company may adopt the policy that in this case no benefits to officials should be possible at all. In addition to the above aspects, the social adequacy of gift should be assessed and appropriately documented. Example: A gift given by a managing director or CEO to his or her peer in another company will probably fall into another value category than one on the sales staff level. The activities of staff abroad should be taken into account just as well as the cultural characteristics of the individual country. It should be provided for up to what value give-aways can be accepted or given and what rules apply to the distribution of give-aways to current and/or future business partners.

All in all, the area of marketing, advertising and customer/client relationship management should be regulated specifically to avoid a vacuum entailing the possible risk of corruption. This applies also to obtaining information on current, potential and future customers and competitors. But also the gathering of this information is subject to statutory rules. In the case of subsidiaries or affiliated companies abroad, the question often occurs whether German codes can be implemented "as are". If appropriate, they have to be amended to address the specific issues and requirements of the country as provided for by the there applicable law. Also in this context, it is necessary to identify critical conduct and give clear-cut instructions. It must be avoided by all means that corruptive practices are pursued by pretending that they were simply due to local customs ("Well, in XYZ, it has always been that way, no getting around it, etc.").

Also invitations from/to present or future business partners to events of any kind, e.g. business lunch or travel, conferences, etc. need to be taken into account. The latter aspects also imply the practice of "baiting" people, that is to try and make corruption acceptable by repeatedly giving small benefits of various types to foster a corruptive environment. Rules should be made with respect to travel and entertainment costs. Special attention should be given to formulating a prohibition on benefits in the course of negotiations. A clear indication is necessary that these benefits can be granted only in exceptional circumstances and that in the case of doubt, no advantage should be granted at all.

Rules applicable to contacts with domestic and foreign authorities have to be drafted extremely carefully. Precise instructions and analyses of administrative rules as well as a determined implementation of the corporate guidelines will eradicate tolerance towards corruptive practices. To the extent that during specific periods of time, a zero-tolerance model should apply for advertising or other gifts to authorities and/or public officials, the code of conduct should expressly so provide.

If maximum amounts are fixed, as (flexible) reference points for benefits to officials, these must be significantly lower than benefits given in the private sector to avoid any corruption-related suspicion. The guidelines may provide examples what gifts up to what specific value are acceptable (e.g. pens, company calendars, USB sticks, etc.) and refer to local specific local laws and customs, too.

It goes without saying that rules should expressly exclude customary presents, e.g. for the host company or jubilees, but still indicate maximum thresholds to be observed.

In general, all the rules must be formulated as to ensure that any kind of benefit to private individuals or officials at no time give the recipient the impression that the giver expects in return any kind of inappropriate or improper preferential treatment. The tax side of benefits - of whatever kind - also requires careful attention.

In addition, an internal reporting and/or documentation system could be installed to monitor the extent of benefits received and given.

1.7.2.4. Benefits given to own staff

The rules described above apply here, too. Tax relevant issues must equally be taken into account by the company, as such benefits usually fall into the category of taxable income generated by the employee.

1.7.2.5. Donations as bribes

Donations to political parties, foundations, charities, etc., at home and abroad need to be addressed, too, as these organisations are often indicated as recipients to conceal direct cash flows to the bribe-taker. Donations of this kind should be subject to the prior consent of a superior, all the more as donations to political parties, but also other types of donations, are a particularly sensitive area for companies. We also refer to the legal criteria applicable to the offence of bribing members of Parliament.

1.7.2.6. Consultancy and intermediary contracts

Consultancy and intermediary contracts, whether domestic or foreign, must not be neglected. The code must address the amounts of commission to be paid (adequacy in terms of performance/counter-performance), conditions of payment (never in cash, always seamless documentation of accounts, however no anonymous numbered account) and address of the consultant and his/her banking details (never unchecked in tax havens).

Criteria also need to be determined for an intermediary's integrity. Among these are: family relationship with public officials, unusual methods of payment (see above), recommendation of negotiation partner, "accidental" appearance when negotiations are at a deadlock, request for anonymity, request for high prepayments, etc. An objective background check may remove or confirm an existing doubt. A model consulting agreement that must be used and approved by a superior, may prove to be helpful in this respect, among other things. One might also think of excluding specific groups of persons as consultants or intermediaries, e.g. family members of politicians, and politicians themselves. Services rendered by consultants have to be documented, too. Staff should be briefed accordingly. In addition, it is necessary to ensure that payments made to intermediaries or consultants are not used by them as bribes.

In general, a company should always carefully select and monitor its consultants and intermediaries. Disproportionately high commission, that may even be payable in cash or partly in cash, may be considered as an indicator for corruption, either of the intermediaries or consultants themselves or through forwarding payments to third parties.

To the extent that a company makes extensive use of consultants and intermediaries in various foreign countries, a check list (cf. the example attached as an annex hereto), and maybe even a blacklist, for their selection should be compiled to fence off allegedly corrupt and/or high-risk persons who must not be hired. On the other hand, a white list of trustworthy consultants and intermediaries might also be useful.

1.7.2.7. Collision of interests and corruption

Furthermore, a collision of interests may ensue if business partners were commissioned to perform services for private purposes. A conflict between the interests of the company and private interests is hardly avoidable and may have serious repercussions on the company, too. The guidelines should quite clearly specify when a particular person qualifies as "related" and is hence excluded from being a contracting partner. The rules for refusal applicable to judges may help in this context, although even relationships outside the family may be reason enough for exclusion. A collision of interests also exists of course in the case of direct or indirect financial interests (e.g. shareholdings) in a customer, supplier or competitor. The same applies to activities in corporate committees (supervisory board, etc.) or other work, whether against valuable consideration or not, in another company or organization.

1.7.2.8. Whistleblower systems

In specific cases it might be appropriate to install a whistleblower system. This option may be particularly useful in larger companies that already operate a CMS. A whistleblower system should not be the very first step in this direction.

Whistleblower systems can be implemented in many different ways. It has to be determined first whether the system should be established with internal or external resources, and the prime concern should always be the protection of the whistleblower. The advantage of an internal solution is, among other things, that cases can be investigated and reappraised without the outflow of know-how, yet external service providers should be preferred in the case that the anonymity of the reporter should be preserved in all respects. Furthermore, factors have to be defined that trigger the whistleblower system. This measure should prevent that the system is constipated with irrelevant enquiries and must be communicated to the risk groups in adequate training sessions. Finally, it should be clear how the whistleblower system is to react in the case of suspicious reports and what reporting structures have to be followed. Especially the last point must be given careful attention in the light of data protection and labor law provisions.

How the system is actually implemented in practice is of course always determined by the individual risk situation and the possibilities available in the individual case. Even global players will find it difficult to have a team of lawyers, tax lawyers, auditors etc. (with adequate knowledge of the local language and law) available 24/7 and everywhere in the world.

1.7.2.9. General measures

There should be an internal reporting system for benefits, and for presumed corruption, but in doubtful cases, also the legal department or a specifically appointed compliance officer/committee, the management or an ombudsman should be contacted. In addition, the work flow of large projects or projects in critical countries should be organized in a way that the compliance officer may become active already at an early stage.

It is further necessary to ponder whether internal check lists would be useful to assess and document the corruption risk potential in the case of services accompanying a plant project or other areas. If the check list brings up specific suspicious facts, no contract should be concluded with these service providers at all, or only subject to increased documentation and monitoring requirements or in the case of clearly defined circumstances that refute the suspicion of corruption.

Suspicious facts may include, without limitation, the following: unusual amount of remuneration or missing or suspicious track record, the seat of the partner in a particular country, the request for prepayment, fuzzy description of services to be provided or no plausible connection between the intended service and the overall project. Doubts are also necessary in the case of service providers demanding payment in cash or other unusual type of payment (numbered account), if the provider does not have the required number of staff, the recipient of the payment is not clearly identifiable or if no neutral, reliable assessments of the person can be obtained. It is therefore always advisable to document that an account and/or banking details actually exist and that the recipient is actually authorized to access the account. Overall, the same standards should apply as in the case of consultants and intermediaries (cf. annexed check list).

Depending on the labor-law situation, employee rotation in a corruption-prone environment may prove to be a valuable tool to avoid overly tight relationships between individual members of staff and authorities or other companies.

A company conducting business also abroad will invariably encounter payments that may or may not be problematic; it is therefore recommended to analyse the risk, provide for clear rules and implement a monitoring system.

Accompanying measures are likewise important to ensure that employees receive the support they need to combat corruption. An internal contact, an ombudsman, may be an appropriate solution, but also a confidential hotline or even personal protection in the case of bodily threats by corrupt backers in the foreign country.

1.7.3. Principles for the documentation of relevant processes

As already mentioned above, it is necessary to avoid suspicion of any kind in the course of a company audit and attend to a seamless and complete documentation of the relevant processes. It is indispensable to include the departments concerned in this task. The most important ones will probably be accounting and IT.

Particular attention needs to be given to payments relating to the closing and implementation of agreements and administrative acts and/or contact with public authorities. Payments that are not properly traceable or explainable must not exist. Otherwise a company may be suspected to operate a slush fund out of which it pays its bribes. Just as well, amounts to items and accounts that are not clearly specified (e.g. account / item "miscellaneous") should be kept at bay, too. Also the budget for advertising, sponsoring, donations and similar need to be minutely documented and controlled. It must be avoided that bribes are channeled via a holistic budgetary item and insufficient proof of appropriate use, or only that such an impression is created.

The use of consultants and intermediaries is, of course, still allowed and often simply necessary to tap new markets. But, this process is always prone to a certain risk as it borders corruption payments disguised as "consultant's fees" or "commission payments". This is why services under a contract provided by consultants and intermediaries must be documented in sufficient detail. Consultants/intermediaries should prepare and submit regularly activity reports on their current work as evidence of their services. This practice should also be pursued in the case of unsuccessful or discontinued projects to be able to prove that there has been an actual performance in return for the consideration paid.

As already referred to above, check lists for the drafting of contracts and model contracts may be useful that are geared at the detection of potential bribery in contracts e.g. with service providers. In addition, a reporting system for benefits can be installed, too. This may also be used as a monitoring system to find out where conspicuous processes occur and bribery is possibly initiated. In this case, the relevant documents need to be monitored in regular intervals.

Inspections of the documentation should include, among other things, the use of fake or unusual documents, inconsistencies with respect to the subject-matter of the transaction, above-average income, disproportionately high or low complexity of the documentation considering the type of transaction. An unreasonably complicated structure may be interpreted as an indication of an attempt to conceal illegal operations.

A closer investigation will also be necessary if the usual inspection of documents is refused without good cause or by making obscure reference to confidentiality issues. This is why one should not simply accept a refusal if the submission of documents is allegedly impossible as doing so might put at risk the transaction or violate an unspecified legal secrecy requirement of a foreign jurisdiction, and rather give rise to a profound investigation.

1.7.4. Preparation of accompanying documents

1.7.4.1. Model contracts

A company should ponder the use of use model contracts (VDMA publishers offer specimen contracts for customary transactions in the industry). On the one hand, model agreements may help to prevent that clauses are inserted that virtually weave corruption into the contractual fabric, e.g. kick-back payments, etc., on the other, model agreements will facilitate the monitoring of standardized processes.

To the extent that model agreements prove to be impractical to apply to the type of activity pursued by the company or the subject-matter of the contract, it will be indispensable to scan contracts individually for suspicious content. In some cases it may be appropriate not only to install a dual control principle, but a more extensive monitoring system may be needed.

Model agreements should also be used for business with consultants and intermediaries to keep this area, too, under control.

It should be clear, however, that model agreements are nothing but one element of the overall strategy and that they are no "magic bullet" to fight bribery. In addition to the use of model agreements, training courses and other staff-related measures are indispensable to create sufficient awareness for the issue.

1.7.4.2. Country risk

To achieve optimum monitoring of processes, it is recommended to draft lists of countries with a high inherent risk. This list could possibly include all countries where the company does not want to do business at all or only when specific precautionary measures are applied. Business with such countries would then be associated with a high corruption potential. A decision on what state would qualify as a high-risk country could be based e.g. on the current Corruption Perception Index published by Transparency International. Contacts in a country identified as high-risk should give rise to an intense assessment of the business relationship.

A blacklist may also specify the high-risk countries that - if used as the recipient of banking transfers - should raise immediate suspicion. As a rule of thumb: the more unknown a recipient country is or the fewer payments are transferred to such countries, the more likely will it be that corruption is involved in the business. The notorious countries are usually known to be connected with tax evasion or suspected money laundering, have signed no double taxation treaty and operate a regime of strict confidentiality of banking operations.

1.7.5. Internal implementation of the CoC

Upon completion of the necessary internal risk analysis follows the implementation of the new CoC. It is usually not enough to make compliance guidelines available within a company. It is necessary to make certain that they are read, understood and internalised. Compliance begins at home, i.e. with each individual employee: An employee is responsible that statutory provisions are adhered to in his or her field of work. The fact that a CMS is in place is no excuse for non-compliance. The CMS rather operates as a means of support to achieve the highest possible degree of compliance. To optimise processes, measures like employee rotation in corruption-prone areas or a mandatory dual control rule in the case of specific processes may be an option, in addition to employee training. The installation of an internal reporting body (e.g. ombudsman) should be considered to handle inquiries or suspicion quickly. Should serious doubts occur it is advisable to have the matter addressed and resolved forthwith by the top management. If compliance is perceived - internally and externally - as a top management issue, this will be an important signal that the company is unreservedly committed to preventing corruption.

A company, irrespective of its size, should provide for compliance functions, e.g. in the legal department, to implement and monitor training, the compliance program, and other measures. But also at the executive level, a person should be specifically responsible for compliance issues to demonstrate, throughout all company levels, how important prevention of corruption is and this person should also attend to managerial tasks to enforce and implement the compliance programme. In the case of conflicting interests, a company should have available a person responsible to decide on whether or not a conflict exists and give the necessary instructions and/or seek the necessary approvals. Conflicting interests, by their very nature, are prone to trivialize the impact of a benefit, and this is why an employee should be able to find out in an easy way whether his or her case is problematic or not.

Employees working on contracts at home and abroad must have a copy of the CoC available and must be thoroughly aware of its contents. This way, the employees clearly demonstrate from the onset that their company will not be a part of unfair machinations of whatever kind. Staff abroad should also receive appropriate training. It goes without saying that the choice of personnel, especially outside Germany, is a valuable tool to effectively combat corruption. Check lists and model agreements, in particular for agreements with intermediaries/consultants, should be accessible and available to the employees any time. How to use these documents should be explained in specific training sessions.

It is also necessary to take into account relevant internal secrecy policies. Corruption may also be about letting know-how transcend corporate boundaries in return for a benefit. Also information about or received from customers and business partners are sensitive and potentially interesting for third parties.

Corruption is not an unusual way to obtain such data. At the same time, employees must be put under the obligation not to obtain third parties' company secrets by unfair means. Internal Auditing and/or Controlling should be closely involved in a company's efforts to prevent corruption. These departments should be appropriately positioned, organized and trained in these matters. It goes without saying that the top management must give its unreserved backing to Internal Auditing and Controlling. Accounting should in any case be organized and trained as to be able to detect and report conspicuous records. If cash flows are not sufficiently transparent and controlled, corruption will be difficult to prevent. In addition, other technological measures, especially in IT, maybe useful to facilitate monitoring tasks. This applies in particular to all cash flows and all pertaining steps to trigger an alarm as soon as a problem has been detected (e.g. money transfer into a bank account to a blacklisted country).

The Institute of Public Auditors in Germany (*Institut der Wirtschaftsprüfer in Deutschland e.V., IDW*) has recently adopted a standard named "Principles of proper auditing of compliance management systems" (IDW PS 980). According to the standard, the objective of the audit is to determine if a framework concept for a CMS, whether generally recognised or developed by the company itself, is appropriate, implemented and effective to such a degree that it would ensure the timely detection, and thus prevention, of significant breaches with reasonable certainty.

To date, experts have found themselves unable to confirm that such an audit certificate would indeed produce the desired effect and relieve the company management from their liability and reduce the company's exposure to sanctions. IDW PS 980 provides a basis for the principles, preparation and implementation of an own CMS and may be used for this purpose.

1.8. Conclusion

The globalised economy, with its increasingly complex processes between companies but also within the company itself, requires a high degree of trustworthiness from all participants. This applies in particular to the German machinery and plant making industry whose products are sought after and bought worldwide. Even if the expenditure incurred for drafting, implementing and complying with an anti-corruption manual is indeed high, it will prove to be a sound investment in the long run. It fosters and reinforces not only the confidence in the integrity of one's own employees, but also their demeanour towards third parties and the recognition of the company as a reliable business partner on the market. The anti-corruption codes of conduct, together with the legal provisions, will provide employees with the tools they need to defend themselves against solicitations of any kind. The necessary awareness for the issue is created in the company. They also provide valuable guidance in critical situations and stipulate the framework for compliance-oriented solutions in the best interest of the company. And last but not least: recent studies have shown that the pro-active implementation of a compliance programme has often proven to be a strategic competitive advantage.

Annex: Checklist for the preparation of a code of conduct for the prevention of corruption, illustrated by the CoC for the employees of ACME GmbH & Co. KG Preventing and combating corruption

[Note to the Reader: This check list for the drafting of an anti-corruption manual is only a proposal and not binding in any way. Each company wishing to compile its own manual will have to adapt it to its specific requirements and issues resulting from the respective industry, company structure, foreign activities, clientele, distribution network, etc. and will need to re-assess the text in the light of an individual analysis and implementation. We refer to the text of the Guide for further details of how to draft a manual and its specific contents. The present Guide and/or this model manual will in no instance replace individual legal advice. Our suggestions are meant to illustrate how an individual company manual could be drafted.]

The corruption phenomenon is multi-faceted indeed. "Corrupt" behaviour is described as a manner of acting that deviates from the ordinary duties of an office function to obtain financial or other advantages of a private character (personal, family or group-related). And there are many countries where corruption is omnipresent. This, however, is no excuse or justification for being corrupt, too. To claim that things have always been that way and that others do it all the same, is no valid reason either. A company must thrive through quality and integrity. Even if that means that an order and turnover is lost. The Management is quite aware of these effects and is ready to accept them. The ACME Management is determined to avoid and vigorously fight corruption. Infringements will be prosecuted without exception. We do not accept that misconduct of individual members of staff will put at risk the very existence of our company. Corruption is irreconcilable with the interests of ACME.

In order to protect ACME, each and every member of staff is under the obligation to prevent and fight corruption. To assess whether a particular act is admissible or not, use your inner compass and ask yourself the following questions:

- Do I act in the best interests of the company?
- Is my behaviour in line with the values pursued by my company and my own values?
- Is my behaviour legal?
- Would I disclose it to the public too?
- Would I be ready to accept responsibility for it?

This manual explains what other tools help to ensure that corruption is prevented. Please feel free to contact Legal Services and in particular the Compliance Officer if you have any question regarding the contents or the interpretation of the rules contained herein. Of course, questions and suggestions may also be directly addressed to the Management. [Possible regional adaptation: the manual should specifically refer to the countries where it usually transacts business. Yet, criminal prosecution abroad, especially in the US or the UK, may already be possible in the case of minor business contacts, as already described above, and maybe, in the case of the US, even if no contact has been established at all, as the local prosecution threshold is extremely low. A possible wording could be: Given that the USA and the UK are major markets for ACME activities and ACME is subject to the American Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, ACME may be prosecuted by US, or as applicable UK, authorities for corruption committed outside the USA/UK, too. This is also why anti-corruption policies are particularly important for ACME.]

I. The legal aspects of corruption - basics

[You are free to use, and amend, any of the explanations given in this Guide.]

Statutory definitions relating to bribery

German criminal law distinguishes between corruption of officials and corruption in the private sector.

1 Corruption of public officials

[Give explanations of the relevant offences that can be understood by a non-lawyer, including maybe the legal text, i.e. a definition of the terms "public official", "advantage/benefit" and "covenant on unlawfulness". Inform the reader that bribing public officials is only legally justifiable in very extreme and specific cases. The penalties should be listed, as well the potential consequences, i.e. exclusion from public contracts, etc. We refer to page 9 of the present Guide.]

Corruption of public officials means that either the official requests an advantage or that a third party offers the public official an advantage. In consideration of the advantage, the public official renders a lawful public service or may even violate his or her official duties.

2 Corruption in the private sector

[Give explanations of the relevant offences that can be understood by a non-lawyer, including maybe the legal text. Refer to the prosecution by German authorities of offences committed abroad pursuant to Sec. 299 para 3 StGB. We refer to page 11 of the present Guide.] Corruption in the private sector means that a company employee prefers, for improper reasons, a third party in a business environment over its competitors (e.g. with respect to purchase of goods or services) in consideration of an advantage received.

3 Money laundering

[Give explanations of the relevant offences that can be understood by a non-lawyer, including maybe the legal text. The manual may also point out the related duties of Accounting and the tasks of Controlling. We refer to page 11 of the present Guide.]

4 Fraudulent breach of trust

[Give explanations of the relevant offences that can be understood by a non-lawyer, including maybe the legal text. Explain the consequences provided for by labour law, if appropriate. We refer to page 12 of the present Guide.]

A fraudulent breach of trust can be committed by an employee who is under the duty to safeguard the financial interests of a company. A person in a company accepting a bribe in order to conclude a contract that is less beneficial for the company than another contract would have been, is guilty of a fraudulent breach of trust against the company. Also the act of giving a bribe puts at risk the economic interests of the company.

5 Tax-related offences

[We refer to page 15 of the present Guide.] Bribes cannot be deducted as business expenses. If they are deducted all the same, the company will be liable for tax evasion and other offences. Also the granting of other advantages (donation, advertising gifts, etc.) must be put under scrutiny as to whether the expenditure is deductible or not. In doubt, employees are **under the obligation** to contact the tax department. This also applies to invitations and events with third parties.

6 Administrative offences

[We refer to page 18 of the present Guide.]

In addition to the penal code, the law on administrative offences will be relevant for a company, not least because it provides for significant fines to be imposed on a guilty company. Bribery committed in a corporate context may fulfil the legal elements of an administrative offence and lead to prosecution and fines being imposed.

7 Sanctions provided for by penal law, tax law and law on administrative offences

(a) The sanctions provided for by penal law are: imprisonment, fines for the offender; by law on administrative offences: fines for companies.

(b) Other sanctions when corruption comes to light

Corruption puts at risk ACME's export finance cover. Banks and Hermes may withdraw their cover any time if there is certainty or even only a reasonable doubt that an order financed by a bank and/or insured by Hermes has been won through corruption. So, corruption clearly puts at risk the financial interests of ACME. In addition, there is the risk of forfeiting the turnover generated with the help of bribes, i.e. the company will be deprived of the amounts received from the business.

(a) Prosecution abroad, especially in the USA and the UK

[In this context, the manual should, if relevant for the undertaking, describe the most important aspects of these laws to show just how far-reaching the situation is abroad. Listed companies with a significant share of US business will probably have no other choice but include these references in their manuals.]

II Anti-corruption strategies

[The following list is not exhaustive; depending on the corporate structure, some items can be left out.]

1 Consultants, Intermediaries

[The following is only relevant if the company actually uses consultants or intermediaries. Contracts with consultants and intermediaries is a field that is particularly prone to corruption, and not only so with foreign partners; detailed instructions are therefore a must. To prescribe the use of model agreements and check lists is, in our opinion, a tried and tested way to prevent corruption.]

(a) Model contracts mandatory for agents/intermediaries

The use of the model agreements for consultants and intermediaries is mandatory. Legal Services will be glad to provide you with extra copies. If you have a question regarding the agreements or the conclusion of consultants and/or intermediaries agreements, kindly contact the Compliance Officer or the legal department.

(b) Check lists for the selection of consultants/intermediaries

[A check list may include e.g. criteria like a track record, cover addresses in exotic countries, money transfer to numbered accounts in countries related to money laundering, family relationship to highly influential persons in the country, registration, licences, references, etc.. For more details, we refer to page 24 of this Guide.] The check list has to be completed when the consultants/intermediaries are selected, even if prior, extensive experience with these people has been positive, i.e. unrelated to bribery, and forwarded to the Compliance Officer. The Compliance Officer will gather all individual feedback received to establish a pool of trustworthy and qualified consultants/intermediaries to be used with priority.

The check list must be filled in if an intermediary/consultant is to be employed with no company history so far. Lacking a completed and verified check list, the contract will not be approved of.

The following check list may serve as an example for your own document:

Type of contract	Consultancy agreement
Individual contract details (contract/order number)	
	Distribution agreement
	Commercial agency agreement
	Sponsoring agreement
	Intermediary agreement
	Other
Choice of contract document	Use of group model contract
	Use of other model contract

	Use of other party's document
	Document based on individual negotiations
Contact data of contracting party	Address for service of process
	Third-party cross check (Embassy/German chamber of industry and commerce abroad/bank, etc.)
	P.O. box address
	Seat of the company in a country referred to in Annex 1
	Telephone and fax number
	Cell phone number
	Website
	E-mail address
	Other means of communication
	Existence of office or premises verified (photos/by third parties)
	Register excerpt, organisation chart, company brochure
	Is the company wholly or partly state-owned
	Is the owner personally known
	Is there a personal relationship between an employee and the customer
Conclusion of contract	Place where the contract is concluded
	Maturity of costs and fees upon conclusion of the contract (attach cost regulations, etc.)
	Duty to register contract with public authorities
Banking details	Bank account with known bank
	Bank account with unknown bank
	Place of payment deviates from place of delivery
	Place of payment deviates and is associated with country risk

	Contracting partner has not disclosed banking details
Payment details	Payment is made by money transfer
	Payment is to be made in cash (totally or partly)
	Payment deviates by reason of changes to contract
	Payment includes pre-payment share
	Payment is to be made to unknown bank account holder
Other contract provisions	Unusual provisions on payment or foreign currency details
	The Contract is subject to an expiry period
	Inclusion of code of conduct for contracting parties
	Right to terminate the contract in the case of CoC breach
	Claim to compensation of contracting partner upon termination of contract
Description of performance	Documentation of performance by contracting party
	Periodic reporting duty
	Verifiable appearance at specified events
	Specification of contractual territory, customers, or products (projects)
Contract monitoring	Assignment of a competent employee to each contract
	Contract management, in particular assessment of contract changes, extension of the contract period and monitoring of adherence to contract deadlines
	Claims management

Termination of the contract	Ordinary termination or by termination agreement
	Extraordinary termination
	Contentious termination
Visits, travel, presents, etc.	Contracting partners pay for their own board and lodging
	Costs are paid for intermediary visits
	Contracting partner pays for board and lodging there
	Adherence to rules on giving and receiving gifts
Personal details of own employee	Has there been an ongoing relationship with the contracting partner
	Monitoring system in place (e.g. dual control concept)

(c) Black-listed representatives/consultants known to be corrupt or with risk potential
The compliance department will also keep a record of consultants/intermediaries who do not fulfil the integrity standards of the company. Prohibition on business with black-listed persons.

1 Code of conduct regarding presents, donations and invitation, etc. in Germany and abroad

[To the extent that the manual specifies thresholds for the value of presents, details on internal approval structures for expenditure exceeding specific amounts, e.g. seminars for customers, events with customers, etc. should be included too. The guidelines should also clarify the approval and monitoring mechanisms for expenses. The following is only an excerpted and condensed suggestion. A code of conduct is also useful to settle the receipt of presents by members of staff. We refer to page 24 of this Guide.]

Also presents, donations, invitations to events, such as seminars, conferences and others are potentially suspicious. Advertising gifts (a list of admissible advertising gifts is listed in the Annex) are no cause for concern. Please bear in mind that benefits of whatever kind to officials are strictly prohibited. For all other cases, the principle of social adequacy applies. Please contact NN (Legal Services) for prior approval of exceptions to the rule and contact the compliance officer. Consult with Legal and Tax Services prior to any company events where customers, potential customers or other external persons are invited.

2 Contracts

[The use of model agreements or check lists is useful to avoid that clauses infest a contract with corruption, but this should not be the only measures imposed. We refer to page 27 of this Guide.]

(a) Model Forms

[The guidelines should indicate where the model agreements can be obtained and that their use is mandatory. Furthermore, a decision has to be made who may grant and/or approve of any permissible deviations in the individual case.]

(b) Check lists, if model agreements are not accepted

[The guidelines may also include e.g. a check list with the most important clauses and references to suspicious elements of a contract as well as the steps necessary to avoid corruption when a contract is being concluded.]

3 Payment processes

(a) List: Country risk for payment processes

[The guidelines should list the countries that are excluded from money transactions. To the extent that payments have been, or are to be, made to such a country, clarify and document the matter immediately. The guidelines must provide clear rules of how to handle these payments, i.e. reporting duties, etc.]

(b) Mandatory rules regarding the implementation of payments (e.g. prohibition of payment made in cash, no numbered accounts, etc.).

4 Specific instructions for major ACME markets

[If the company pursues business in countries with a high corruption risk potential, the guidelines should provide for detailed rules to be followed, or the company may even ponder to refrain from any business in this area at all in the future. The guidelines may also describe how to proceed in high-risk areas if it comes to e.g. protection money demanded from armed groups.]

5 Instructions for subsidiaries abroad / foreign representations

[Rules for subsidiaries and branches are meant to make it quite clear that they are by no means excluded from the company's anti-corruption strategy and that no circumvention via foreign sources will be tolerated. And of course also other rules need to be integrated to take account of any local customs and traditions.]

6 Dual-control principle for processes

[A tried and tested means to monitor specific processes for discrepancies or conspicuous facts such as contracts with consultants or intermediaries, but also transactions, is to have them carried out by more than one person. The guidelines will therefore include appropriate rules for the monitoring of specific processes.]

7 Employee rotation

[Employee rotation, to the extent allowed by labour law, is a useful tool to prevent the development of overly close and thus corruption-prone ties between a member of staff and e.g. a public servant. The guidelines could point out that company rotation will be applied in certain work areas.]

8 Reinforce position of internal auditing/controlling

[Another important aspect in a company's efficient preventive activities against corruption is to reinforce the position of Internal Auditing/Controlling. The guidelines may refer to the crucial role of Auditing/Controlling and explain the department's position as contact partner in the case of problems.]

9 Organization and monitoring of accounting department

[The guidelines may be used to explain that Accounting is adequately instructed and organized to detect and report suspicious occurrences. In addition, the manual may also include the name of the person to be contacted for further queries in the department.]

10 Documentation of processes

[The guidelines may indicate how to proceed and e.g. document contracts to ensure transparency and proper implementation.]

11 Employee training

[The guidelines may explain that staff will have to attend mandatory anti-corruption training sessions, how to tackle issues when they occur, and how to use models, templates and check lists, etc..]

12 Ombudsman, contact persons in the company, hotline, help desk

2. VDMA Guide How to Prevent Corruption – Labour-Law Aspects –

The following is not intended to and cannot replace individual legal advice. Our comments provide a general overview and are not suitable to solve the specific issues of a particular company.

2.1. Introduction

Prevention of corruption starts in the minds of the workforce. A corruption-free environment necessitates constant efforts on the part of the company management and the staff.

A Code of Conduct for the prevention of corruption as described in Part One above is a useful and partly unavoidable step into the right direction. The implementation of appropriate measures in many respects touches upon the staff's work conditions. The following comments - that are neither exhaustive nor do they address detailed formulations – concern the labour-law side of how a company may prevent and fight corruption.

2.2. Collective labour-law aspects

2.2.1. Employee participation when introducing a CoC for the prevention of corruption

Invariably, if a company intends to draft its own set of anti-corruption rules with specific obligations to be imposed on its workforce, the question arises of how the works council has to be involved. This very much depends on the wording of the manual. Employers, by virtue of their management prerogative according to Sec. 106 of the German Trade Regulation Act, GewO, may determine the order and the conduct of employees in their works at their equitable discretion and further specify the duties incumbent on an employee.

It has been recognized that an employer may give unilateral instructions in order to prevent damage to the company's assets. Among these are rules to make the employee pursue a law-abiding and contractual conduct. A blanket prohibition on giving or accepting bribes may therefore be pronounced without works council's involvement as it would simply reiterate the existing legal requirements. And most of the organizational measures referred to above may be implemented without the works councils' participation, provided that they are aimed exclusively at the work-related conduct.

Co-determination rights exist, however, if the planned code concerns measures caught by worker participation rules. Anti-corruption measures will therefore most likely be introduced through an employer/works council agreement. It may be a good idea to consider in a first step to divide the manual into two parts: one that is caught by these labour-law provisions and one that is not. The latter part will be subject to a voluntary employer/works council agreement. On the one hand, the inclusion of the works council may not only generate more acceptance of the unrestricted part among the workforce, on the other, the company will not have the option to modify, at their own discretion, the rules prior to their agreed expiry.

Measures to prevent corruption may first of all be caught by the legal criteria for co-determination according to Sec. 87 para 1 No. 1 of the German Works Constitution Act *BetrVG*, according to which the works council has a say in matters relating to the order of the business and the conduct of employees. This law distinguishes between the general conduct, which is subject to co-determination rights, and the work-related conduct, which is not. To the extent that these areas are not clearly separable, the allocation will depend on the overall purpose pursued by the provision. The prohibition of accepting presents is probably one of the best examples in this context. The prevailing legal opinion on this matter is that such a prohibition reflects on the work-related conduct of employees regarding third-party contacts and is hence not caught by co-determination rights. Another interpretation may ensue if standardized processes are to be installed according to which an employee will have to obtain his/her line manager's approval if he/she is offered a present or if this fact has to be reported officially.

Co-determination duties according to Sec. 87(1) No. 1, *BetrVG*, also arise if the anti-corruption manual obliges employees to report infringements of the code of conduct to the employer. Although this will also depend to some degree on the actual wording of the obligation, by and large the employer will thereby submit its workforce to a conduct relating to the internal order that falls into the scope of Sec. 87(1) No. 1 *BetrVG*. Anti-corruption guidelines may also prescribe a certain conduct if a case of corruption has actually been detected and the police is making their inquiries in the company. If general rules of conduct are given that exceed a duty to report official requests by the police or if these rules provide for a specific way to act with media representatives, these rules will be subject to co-determination.

The works council may have to be consulted pursuant to Sec. 87(1) No. 6 *BetrVG* if security technology is used to prevent corruption. "Security technology" has to be understood in a rather broad meaning.

If the technology is suitable to monitor the conduct of the workforce, its implementation will be caught by the co-determination rules. This may be the case e.g. with software programmes that trigger an inspection process when corruption-prone account movements occur. To what extent a telephone hotline to report suspected corruption will be subject to the co-determination rules, will largely depend on the actual implementation. A co-determination right may also exist in the case of anti-corruption measures pursuant to Sec. 94 *BetrVG*. The law grants the works council a say in the use of personnel questionnaires. This might occur if a questionnaire or, during the recruitment phase, a model employment contract is used to inquire into the employee's personal contacts or family relationships to customers, etc..

2.2.2. Acts of corruption within the company

Practical experience has shown that corruption may also occur within a company. Collective labour law provides for specific rules in Sec. 119(1) No. 3 *BetrVG*. Anyone found guilty of preferring a member of the works council or similar official due to their office, is subject to a penalty of up to one year imprisonment or a fine. The type of bribe may be any advantage whatsoever. In this context, probably the criminal offences of fraudulent breach of trust or fraud will apply, too.

2.3. Individual labour-law aspects

2.3.1. Corruption as valid reason for dismissal

Accepting and/or granting bribes constitutes a sufficient reason to terminate the employment. Whether the dismissal should be with or without notice, largely depends on the individual case. A decisive factor will be the offender's position in the company hierarchy. In the case of a transgressor holding a position of trust in the company, one single, minor case of accepting bribes may justify an extraordinary termination.

The same applies to the granting of bribes. The decisive factor is to what extent the act is prone to put at risk the reputation of the company. The threshold to be applied to a dismissal without notice will be lower, the more intense an employee has been made aware of the fact that the company will not put up with corruption. Any act contravening an express anti-corruption rule will, in general, justify a termination without notice. This must apply in particular to senior management. The dismissal of an employee as a scapegoat will usually be impossible if he or she has acted in compliance with orders given by the company. An effective deterrent requires that all those involved will face consequences under labour law.

If an employee committed bribery in a previous employment, a distinction has to be made: If the former and the present work are not connected, it will probably be impossible to dismiss the person later on. A company, however, runs a much higher risk to lose its reputation and will be able to justify a dismissal if the person in question is an executive or a member of a management committee.

2.3.2. Employee rotation

Employee rotation may be a useful tool to prevent corruption in high-risk areas. This system e.g. re-allocates responsibilities of employees for customers or suppliers in regular intervals. Employers are usually entitled to assign responsibilities on the basis of their management prerogative. A quite different picture possibly emerges in the case of a transfer to an entirely different position or location. If and to what extent this is legally possible, will depend on the exact wording of the employment contract. An assessment should be made already when the rotation scheme is introduced and/or when a person is hired. The works council has to be involved pursuant to Sec. 95 *BetrVG* if the employee rotation scheme is deemed to fulfil the criteria of a fully-fledged transfer and general rules of application are issued in this respect.

2.4. Data protection aspects

The legal requirements of data protection do have to be taken into account, too, when it comes to the implementation of the manual and the anti-corruption measures agreed. They reflect much less on the actual manual itself, but rather on the supporting measures to be instituted. The range of possible issues is so large that we will limit our comments on the matter and give only a brief overview of potential trouble spots. The internal data protection officer should be included when anti-corruption measures are planned.

The German Federal Data Protection Act specifically provides protection to personal data, such as name, address, marital status, bank accounts, etc.. As to their own workforce, these data are already available and do not give rise to further concern. Data relating to third parties is a much more sensitive issue. To avoid bribery – as described in Part One above – it may be appropriate not to enter into additional agreements with family relatives or friends beyond the scope of existing or initiated contracts. To be able to identify economic activities or contacts with relatives, etc. pursued by own employees – who may be used to conceal corruption-related activities – in the first place, corresponding data must be collected and stored. Any reporting forms or similar are of course subject to data protection.

From a data protection perspective it may be legally difficult to forward data within a company. Issues may occur if the personal workforce data referred to above and also information on business contacts are communicated to a foreign parent company or own subsidiaries abroad. Data cannot be passed on to outside the EU unless the country of destination offers an adequate degree of data protection.

Whether this is ensured by way of statutory provisions in the country of destination, a voluntary self-commitment of each company as in the US, or an individual corporate agreement on standard clauses must be decided on a case-by-case basis.

2.5. Conclusion

The establishment and implementation of an anti-corruption CoC could touch upon employment issues in the most various of ways. Depending on the complexity of the rules and scope of the code of conduct, works councils will have to be included in the implementation process. The mandatory and/or enforceable co-determination rights should be perceived as an opportunity to create general awareness among the workforce for the risks inherent to corruption and bribery.

As of: September 2011

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Note:

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