

July 2012

## German High Court Judgment on Bribery of Physicians Casts Spotlight on Public Official and B2B Corruption

In a recent decision, the German Federal Court of Justice (*Bundesgerichtshof* - BGH), Germany's highest court, acquitted a sales representative of a major German pharmaceutical company who, as part of the company's bonus program, had handed out cash amounts to doctors in exchange for prescribing that company's products. The Court's decision serves to draw a line respecting the term "public official" and clarifies that bribing a business owner is not punishable under German criminal law. Thus, the decision illustrates that not every kind of questionable or even unethical business conduct will qualify as criminally sanctionable corruption as a matter of German law.

### The Court's Decision

In one of its most recent holdings, the German Federal Court of Justice ("Court") had to address the case of a sales representative for a major German pharmaceutical company who was in charge of part of the company's bonus program. In exchange for prescribing the company's products, certain physicians operating within Germany's public health insurance system (*Kassenärzte*) were granted five percent of the gross price of each item which they prescribed. The payments were officially described as compensation for academic presentations, which were in fact never held. The lower court had found the sales representative guilty of commercial bribery. The Grand Criminal Panel of the German Federal Court of Justice, in reversing the lower court's interpretation of the applicable criminal law provisions, acquitted the accused.

### Grounds for the Court's judgment

The Grand Criminal Panel extensively discussed the case in the context of two provisions of the German Criminal Code (*Strafgesetzbuch* - StGB): Bribery of public officials, sec. 332 StGB, and commercial bribery, sec. 299 StGB.

In its analysis of sec. 332 StGB, the Court focused primarily on whether the doctors at issue could be characterized as public officials. It held that this was not the case even though the medication prescribed was to be financed by public health insurance funds. While the Court found that such public health insurance funds form part of the public administration, it held that their relation to the doctors at issue did not warrant a qualification of those doctors as public officials acting for a public administrative body. The Court expressly distinguished the physicians from (i) other doctors employed by public hospitals owned by, e.g., municipalities or counties and (ii) doctors working in a state-governed polyclinic system, both of which could be regarded as public officials under German law. The Court's main reason for distinguishing the doctors at issue was based on the typically close doctor-patient relationship in these cases, which is characterized by the doctors' and patients' freedom to decide about the means, time and duration of the treatment and thus does not meet the typical criteria of a public administrative service.

Sec. 299 StGB sanctions employees or representatives of businesses demanding, allowing to be promised or accepting benefits in business transactions as consideration for granting an unfair advantage in such transaction. Both the lower court and the prosecution took the position that the physicians at issue were to be viewed as representatives of public health insurance funds, thereby finding a breach of sec. 299 StGB in the present case. The Court, after extensive discussion, rejected this position. Rather, the doctors at issue were held to be self-employed practitioners. Finding the existence of an employee or agency relationship with the health insurance carriers would have required some sort of subordination of the doctors to the insurance carriers. However, under the applicable German health insurance law, the Court found that the relationship of the doctors at issue and the public health insurance funds was one of equals. In addition, the close doctor-patient relationship – again – was held to prevent the doctors from being viewed as mere representatives of public health insurance companies.

In a final note, the Court reiterated the principle under German criminal law that benefits given to the owner of a business do not fall within the scope of sec. 299 StGB. As such, the benefits given to the doctors in their capacity as independent/self-employed practitioners also did not violate German criminal law.

#### The Courts' Policy Considerations

The Court concluded its ruling by referring to current discussions within the legal community and recent legislative initiatives targeted at combating corrupt and unethical business practices within the German health insurance system in order to prevent the "apparent grave financial burden" resulting from existing loopholes. The Court, however, explicitly stated that the provisions of German criminal law currently in force do not support criminal sanctions, and that the development of new sanctions is reserved for future legislative action.

#### Consequences in practice

The Court's decision provides a welcome clarification to the scope of German anti-corruption and anti-bribery laws, and will most likely give an impetus to the discussion and legislative activities already under way to penalize bonus systems perceived as negatively affecting the public health care system.

Of importance for companies and compliance practitioners in general is the Court's reference to the exclusion of business owners from criminal liability under sec. 299 StGB when requesting or receiving benefits in commercial transactions in order to grant an unfair advantage. While such actions may well be perceived as questionable from an ethical standpoint depending on the specific circumstances, German law currently generally allows such practices.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Prof. Dr. Richard Kreindler  
Frankfurt  
+49.69.97111420  
[rkreindler@shearman.com](mailto:rkreindler@shearman.com)

Dr. Markus S. Rieder  
München  
+49.89.23882119  
[markus.rieder@shearman.com](mailto:markus.rieder@shearman.com)

WWW.SHEARMAN.COM

Copyright © 2012 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.