

THE EXTRA-TERRITORIAL REACH OF US, UK AND GERMAN ANTI-BRIBERY LAW

In a globalised world, it is not only business that crosses borders, regulation does too. In this edition of the **Alliance for Integrity – Compliance Bulletin**, we focus upon the extra-territorial¹ reach of UK, US and German bribery law to highlight its far-reaching impact upon companies anywhere in the world.

TABLE A: OVERVIEW OF BRIBERY OFFENCES^{2,3}

Bribery Offence	Is it regulated by law?		
	US	UK	Germany
Making or offering to make a corrupt payment to a foreign public official	YES	YES	YES
Bribery in the commercial setting i.e. in order to obtain a business advantage	YES (indirectly) ²	YES	YES
Failure of a commercial organisation to prevent bribery	NO	YES	YES ³

Commercial Bribery

In the case of commercial bribery, both **Germany** (German Criminal Code) and the **UK** (UK Bribery Act) claim jurisdiction based upon **where** the bribery, or its effects, take place.⁴ The nationality of the perpetrator is irrelevant if the corrupt act is committed at least partly on domestic soil.

In addition, both countries also claim jurisdiction over domestic persons and companies **for acts committed entirely in foreign lands**.⁵

At federal level (under the Foreign Corrupt Practices Act), the US doesn't have specific laws on commercial bribery, but nevertheless regulates it indirectly by requiring 'issuers' to ensure accuracy in the reporting of their accounts. 'Issuers' are companies that list on a US stock exchange, **regardless of main location of business**.⁶ It should also be noted that in addition, the US has state-level laws addressing commercial bribery.

¹ Extra-territoriality is being defined as 'the application of a country's laws beyond their national borders.'

² Under the accounting provisions of the Foreign Corrupt Practices Act (FCPA), "Issuers" may be liable if the improper payments (bribes) are inaccurately recorded, or if the control provisions are insufficient. See FCPA Resource Guide at 39 (2012)

³ This is an administrative fine as opposed to a criminal sanction. See Section 130 Regulatory Offences Act.

⁴ Section 3 German Penal Code (StGB); UK Bribery Act, Section 12(1).

⁵ Section 7(2) German Criminal Code (StGB); UK Bribery Act, Section 12(2)–(6)

⁶ Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A), FCPA Resource Guide, p.39 (2012).

Note that the grasp of **German law** reaches further than meets the eye. Once it is established that the corrupt act took place at least partly in German territory, jurisdiction may be **extended to foreign accomplices acting abroad**.⁷

EXAMPLE 1

An Argentinian agent (A) of a company based in Germany (G) offers bribe payments during a meeting in Belgium (B), to the CEO of a Canadian company (C).

An employee of G provided A with the money to bribe via a transaction issued in Germany.

Acts of preparation are sufficient to constitute complicity. Thus, the act has partly been committed in Germany and so Germany can claim jurisdiction over both A and G.

TABLE B: COMMERCIAL BRIBERY⁸⁹

Jurisdiction Type	Country		
	Germany	US	UK
Territoriality (Jurisdiction based exclusively on the fact that the act (or part of the act) of bribery takes place on domestic soil)	YES	NO	YES
Nationality (Jurisdiction based exclusively on the nationality of the perpetrator regardless of where the act took place)	YES	YES ⁹	YES ⁹
Other	YES Accomplices world-wide are included once partial territoriality is established.	YES FCPA accounting provisions apply to 'Issuers', regardless of nationality.	YES See below: 'Failure of Commercial Enterprises to Prevent Bribery'. This includes bribery in the commercial setting.

Bribery of a Foreign Public Official

All three countries claim jurisdiction over bribes paid to foreign public officials a) by **nationals anywhere in the world**¹⁰, and b) by **anyone within their own territory**.¹¹ The German provisions relating to accomplices acting worldwide, as seen under commercial bribery, also apply here.¹²

However, it is US law that takes a particularly far-reaching approach. Even **acts committed by foreigners, predominantly in foreign lands** may be caught. Firstly, actions with **minimal connections to US territory** may be considered sufficient to qualify as 'taking place within the US' (see Example 2). Additionally, jurisdiction will be taken over a foreign 'issuer', should they commit the act using '**means of inter-state commerce**' based in the US.¹³ Examples include the use of US email servers, telephone lines and bank accounts.

⁷ Section 9(2) German Criminal Code (StGB).

⁸ This is the case under the laws of certain US States.

⁹ Jurisdiction over those with a 'close connection to UK.' See s12.4 UK Bribery Act 2010. This includes UK persons, companies and residents (non-exhaustive list).

¹⁰ This includes citizens, companies and residents (non-exhaustive list).

¹¹ The German law was recently amended to make domestic German entities subject to German jurisdiction for the bribery of foreign officials, regardless of where in the world the act takes place. See Section 5 No.15 Criminal Code (StGB).

¹² Section 9(2) German Criminal Code (StGB)

¹³ 15 U.S.C. §78dd-3(a)

EXAMPLE 2

A German company acting outside of the US, bribed foreign officials whilst listed on the New York Stock Exchange. The payments were routed – unbeknown to the German company – through US bank accounts.

They were held guilty of violating US law.

It is possible that, even without the status of ‘issuer’, the mere passing of money through US accounts could have qualified as the necessary presence in the US to claim territorial jurisdiction over the German company.

What’s more, whenever US jurisdiction applies, not only the person/company itself but also its **officers, directors, employees, agents or stockholders acting on its behalf anywhere in the world can be prosecuted**.¹⁴ Foreign parties acting abroad may also be pursued for their part in US-connected conspiracies.

EXAMPLE 3

A Japanese company was charged under US law with conspiracy, for its joint role (together with a US company) in bribing Nigerian officials. The act took place outside of the US.

In a related case, a UK citizen was extradited to the US for his role in the conspiracy on the grounds of being an agent of a US company. His actions also took place outside of the US.

TABLE C: BRIBERY OF FOREIGN PUBLIC OFFICIALS^{15 16 17}

Jurisdiction Type	Country		
	Germany	US	UK
Territoriality (Jurisdiction based exclusively on the fact that the act takes place on domestic soil)	YES	YES ¹⁵	YES
Nationality (Jurisdiction is based exclusively on the nationality of the perpetrator regardless of where the act took place)	YES	YES ¹⁶	YES ¹⁷
Other	YES Accomplices worldwide once partial territoriality is established.	YES Foreign companies listed on a US stock exchange, who use the ‘means of inter-State commerce’ (emails, bank accounts etc). Foreign agents or accomplices of US actors, who act abroad.	YES See below: ‘Failure of Commercial Enterprises to Prevent Bribery’. This includes the bribery of foreign public officials.

14 See p.10 FCPA Resource guide

15 Foreign persons and non-issuer entities that ‘engage in any act in furtherance of a corrupt payment whilst in the territory of the US.’ 15 U.S.C. §78dd-3(a)

16 ‘Nationals or residents, business of any legal form organized under the laws of the US or principal place of business in the US.’ 15 U.S.C. §78dd-2.

17 Jurisdiction over those with a ‘close connection to UK.’ See s12.4 UK Bribery Act 2010. This includes UK persons, companies and residents (non-exhaustive list).

Failure of Commercial Enterprises to Prevent Bribery

This offence correlates directly to whether a company possesses a **culture of compliance**. Although Germany possesses a similar administrative offence, it is UK law that poses the extra-territorial hazards.

A commercial organisation (whatever its nationality) performing **at least part of its business in the UK**, is guilty of an offence if a **person associated with it** commits bribery anywhere in the world with the intent to obtain or retain business, or an advantage in the conduct of business, for that commercial organisation. The only defence is that the organisation had adequate procedures in place to prevent such behaviour.¹⁸

Who is 'associated' with my business? And what qualifies as 'performing part of a business,' in the UK?

The fact that the organisation does not commit the act itself will not prevent it being liable for this offence. An organisation also has responsibility for external persons, such as employees, agents or subsidiaries (this isn't an exhaustive list), performing services on their behalf.

Additionally, an offence is committed regardless of where in the world the bribery takes place, so long as the implicated organisation carries on at least 'part of its business' in the UK. What this means in practice is yet to be defined in the courts, making it possible that only minor UK activities will be sufficient for jurisdiction to be claimed.

EXAMPLE 4

A Danish company's (D) independent advisor (associated person) with Ecuadorian nationality (E), offers gifts to the CEO of a company based in France (F), intending to persuade F to further employ D. D has a UK subsidiary. In this scenario, the English courts may seize jurisdiction over the bribe in France.

Conclusion

'The stakes for multinational companies with regard to anti-corruption enforcement have never been higher... Anti-corruption enforcement is now a global endeavor.'¹⁹

It is for this reason that it is now more important than ever for companies to look beyond their own borders if they are to ensure compliance. Even those who consider themselves to be unaffected by the laws and scenarios discussed above, may nevertheless find it to be a competitive business advantage to bear the laws of other jurisdictions in mind, should they wish to present themselves as a risk-free business associate to other organisations across the world.

The cost of ensuring a system of effective compliance is nothing in comparison to the costs of dealing with a corruption scandal. As an initiative with the mandate to bring all relevant stakeholders in the economic system together and to create a dialogue that will strengthen the capacity of companies to collectively counter corruption, the Alliance for Integrity is here to support companies in achieving their compliance goals.

¹⁸ Guidance as to procedural adequacy can be found in the Secretary of State's Official Guidance (s9.1 UK Bribery Act); See 'The UK Bribery Act 2010 Guidance' (<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>)

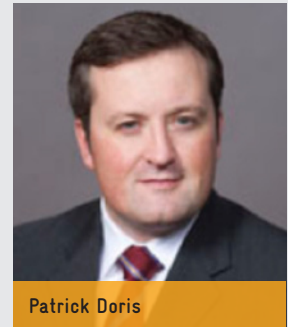
¹⁹ Mark Zimmer and Patrick Doris, Partners of International Law Firm, Gibson, Dunn & Crutcher LLP, 2016

INTERVIEW

with Mark Zimmer and Patrick Doris,
Partners of Leading International Law Firm,
Gibson, Dunn & Crutcher LLP



Mark Zimmer



Patrick Doris

We were fortunate to have the opportunity to talk to industry leading lawyers, Mark Zimmer (Munich office) and Patrick Doris (London office), about their opinions on future developments in US, UK and German anti-bribery law, with specific focus upon extra-territoriality.

Mr. Zimmer, what developments do you anticipate in the extra-territorial enforcement of US law?

There were some peaks (in extra-territorial enforcement) between 2007 and 2011. Afterwards, enforcement settled at roughly 20 actions per year. The extreme peak in 2010 was due to so-called "sting operations" in the law enforcement and military equipment industry, especially against individuals.

The extra-territorial enforcement will probably not cease, particularly as US Deputy Attorney General Sally Yates issued a memorandum to all federal prosecutors on 9 September 2015, announcing a policy of holding individual corporate officers accountable in investigations of corporate misconduct. This is the latest in a series of increasingly direct statements from senior Department of Justice (DOJ) officials that demonstrates a renewed focus on the subject.

In our view, this investigation trend will not stagnate, as the Dodd-Frank-Act has introduced attractive financial incentives for whistleblowers (10–30% of penalties over \$ 1 million). Also, the US government authorities have considerably beefed up their force of agents investigating FCPA cases – in addition to the DOJ hiring an external compliance expert with experience in government and industry, Hui Chen.

Are there any potential developments in German bribery law for which companies should keep an eye out?

Although companies can be subject to very high administrative fines (€ 596 million has been the record), Germany does not yet provide for corporate criminal liability. The German state of North-Rhine-Westphalia presented a draft Corporate Criminal Liability Act to be enacted in the Federal Parliament, but that endeavor has not yet been successful. In its coalition agreement of 2013, the current Merkel-led Federal government has indicated its intention to introduce corporate criminal liability for "multinational groups of companies". No movement has become evident in this regard, though. Given more pressing problems, especially the current refugee crisis, it seems very unlikely that this plan is going to be executed in the near future.

Mr. Doris, there have been criticisms that, although the UK Bribery Act has far reaching consequences on paper, in practice it is not extensively enforced. How to do you see this?

As with any new piece of legislation, there is often a period of bedding in while the enforcement authorities are forming settled views on the scope of their new powers, their investigative and enforcement priorities and their staffing and resourcing to deal with the new regime. While there has been some criticism of the apparent slow-peddling of the Serious Fraud Office (SFO), what is often overlooked is that the period since the entry into force of the Bribery Act has been marked by an unprecedented level of extraterritorial criminal anti-corruption enforcement by UK authorities under the pre-existing offences from the turn of the last century.

In this case, do you anticipate an increase in extra-territorial enforcement of the UK Bribery Act?

There are a number of reasons to anticipate a significant up-tick in coming months and years in extra-territorial anti-corruption enforcement actions.

The last three months of 2015 saw the first three commercial enforcement actions under the Bribery Act's major innovation, the Section 7 offence of failure by a commercial organisation to prevent bribery by persons associated with it – "the FCPA on steroids", as it has been described.

In September, Scottish cabling company Brand-Rex Limited made a self-report and accepted a civil recovery order in respect of bribery relating to its distributorship arrangements. In November, the Serious Fraud Office made the first use of its Deferred Prosecution Agreement regime in entering into a DPA

with Standard Bank in respect of bribery in Tanzania in relation to government financing, as a result of which Standard Bank paid over £ 30 million in penalty, disgorgement, compensation and costs. And in December, property surveyor Sweett Group pled guilty to charges relating to bribes paid by staff to win business in the Middle East.

In addition to this, the increasing acceptance among corporate counsel and boards of the benefits of self-reporting, the sizeable SFO inventory of extra-territorial investigations in a wide range of sectors and the sustained efforts by the SFO to increase its funding provision to bring such transnational cases, all contribute to the prevailing market view in London that we are entering a period of sustained, better-resourced, effectively-empowered and politically-supported anti-corruption enforcement in the UK.

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