



KNAB

Country Profile Germany

Raising the Institutional and Professional Capacity of the Corruption Prevention
and Combating Bureau

8 June 2006

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1. General information on the legal system

The Federal Republic of Germany is a democratic parliamentary federal republic, made up of 16 states, which in certain spheres act independently of the federation. The Federal Republic of Germany is a member state of the United Nations, NATO, the G8 and the G4 nations, and is a founding member of the European Union. It is the European Union's most populous and most economically powerful member state.

The German legal system adheres to the civil law tradition based on principles of Roman law as a basis of the German judicial system. Legal principles are organised into a number of codes. Judges decide in each specific case on the basis of the legal principles.

According to the German tradition of civil law, written legislation is the most important legal source. Court decisions are also considered important sources of law, but courts are not required to follow previous precedence even if it originates from a court placed higher in the judiciary system.

2. Sale and Lease of public real estate

Ownership of public land in Germany is divided between local governments, states (Bundesländer), and the federal government (Bund). This includes public buildings, like schools and universities, hospitals, prison, housing projects, public utilities (energy, water, waste disposal etc.); also playgrounds, parks, forests and road networks. The Bund owns large tracts of land which were formerly used for military purposes but are now being transferred to the private sector for civilian use.

There is a movement at all levels of government to privatise certain public services such as utilities and housing. A recent example was the sale of all public housing in Dresden for 1.7 billion EUR.

2.1 Sale and lease of state-owned real estate

The sale or lease of state owned land/buildings is not regulated particularly, but falls under the same rules of the German Civil Code as private property. Thus, the Sale and Purchase Agreement has to be certified by a notary and the new owner must be registered in the land register.

The pure sale of public land does not require a public tendering process (sec. 100 II h GWB), but the respective public entity must adhere to the spirit of the public tendering process, ensuring transparency and fair competition. To ensure that the sale is free of corruption and in the best interest of the state most government entities require that the property has to be sold at the actual market value. Dependent on the type of deal and location, approval by a supervisory authority may be required.

Most sales of public property are dependent on the intended use. The motivation of the state to sell or lease property often lays in the lack of state resources but also the chance to make a public service more efficient by using private models; an example might be the management of an administration building or the construction or renovation of a school. Many of these sales then result in private-public partnership (PPP). There are various models of PPP. In the example above the private entity might agree to do construction/renovation and maintenance of a property. It would own the property and collect rent but be limited to the agreed upon purpose.

Since many PPP-projects include the sale or lease of property/buildings the approval of the applicable supervisory authority might be required. In some cases the authority merely needs to be notified. Dependent on the project certain other public agencies may also need to be involved. If a State or the Bund sells property a permit of the respective ministry of finance might be required.

Private-public partnerships usually involve services like construction works which above a certain monetary threshold require that the aforementioned public tendering process needs to be formally implemented and must be advertised Europe-wide. The specific requirements depend on the kind of services involved.

With regard to corruption several governmental entities introduced a list of those companies that have a reputation for corruption. The exclusion of a company based on this corruption list is highly controversial and therefore still in the trial phase.

2.2 **Sale and lease of municipally owned real estate**

There are no rules on the sale of public property that exist specifically to prevent corruption. Sections of the German Criminal Code relating to bribery, fraud etc. apply to these sales.

Corruption in the area of public to private contracts and partnerships is extremely rare in Germany. The public tendering process ensures enough transparency that any type of fraud or dishonesty would be very difficult.

2.3 **Penal rules pertaining to corruption**

The breach of rules of confidence and of fair competition ie. by bribing public servant can fulfill the following Sections of the German Criminal Code:

- Payment of bribe or offering advantages to a public servant or elective officer (sec. 333, 334), punishment up to 5 years, in worse cases up to 10 years imprisonment
- Accepting a bribe or advantage by a public servant or elective officer (sec. 331, 332), punishment up to 3/5 years imprisonment
- Embezzlement (sec. 246), punishment up to 3 years imprisonment
- Fraud (sec. 263), punishment up to 5 years imprisonment

- Unfair competition because of unfair consultation (sec. 298), punishment up to 5 years imprisonment
- Money laundering (sec. 261), punishment up to 5 years imprisonment.

2.4 **Squandering**

The budget of communities has to be approved by an authoritative agency each year. This ensures that the budget of communities is balanced. Most of the community regulations (Gemeindeordnung) contain a clause that property has to be sold at the actual market price. The same applies for federal States and the Bund where the budget has to be approved by the respective Parliament.

Public servants are not personally liable for squandering but internal disciplinary measures can be taken.

2.5 **Alienation**

The German law does not contain specific provisions on alienation.

3. **Procurement related issues**

The national German law stipulates that the EC Procurement Directives must be implemented in national law. In case of a delay in the implementation the public authorities have to apply the principles of the directives. There have been delays in the implementation of the European directive which have been overcome in the meantime. The most recent EC directive concerning the raise of the threshold has not yet been implemented. But since national law can be stricter than European law there is no conflict.

3.1 **Liability for public employees**

Civil servant or other public employees are not liable for their acts, but the State can be made liable pursuant § 839 German Civil Code (BGB). Internally, mistakes/abuses can be pursued with disciplinary measures.

3.2 **The complaint mechanisms / enforcement of procurement rules**

Provided that a public tendering process with European publicity had to be applied the following remedies exist:

Complaints in the procurement procedure are usually addressed during the phase of first offers and evaluation. Reasons can be lacks of fair competition, transparency or equal treatment. These could be based on unfair exclusion of a competitor or giving privileges only to one competitor etc. The complainant may raise its complaint in an

informal administrative procedure before a specialised administrative agency (Vergabeprüfstelle). The installation of such a specialised administrative agency is voluntary for the States and Bund. Therefore, not all States have such an agency. If a State does not provide this informal procedure, the complainant may raise its complaints directly in a formal procedure before a specialised chamber of the civil courts (Vergabekammer am LG) in the respective State or before the applicable specialised agency of the Bund. If the complainant finds the administrative decision unsatisfactory he can immediately appeal the decision to the High Court of the respective State (Vergabekammer am OLG).

If a competitor wants to pursue compensation the case has to be brought before the civil courts.

Generally if the bid was selected and a contract was signed it can only be cancelled under very restrictive conditions. Usually the competitor can only pursue its lost profit based on the mistakes in the procurement procedure.

Besides that the competitor can pursue a claim because of unfair competition.

For tender actions below the threshold the competing company has practically no means to fight the award granted by the governmental entity. The award is regarded as fiscal act and, therefore, can not be disputed at a public court. The competitor can only base its case on unfair competition at civil court if the award was granted to a market dominating company. This is easily possible in areas like public road construction or defense industry. But the competitor can only ask to be treated equally. Signed contracts can usually not be cancelled by a complaint of a competitor. The competitor can only pursue damages before the civil court.

If a contracting authority is responsible for the infringement of the regulation¹ dealing with the procedure of public procurement and due to this malfeasance has not accepted the winning bid, the contracting authority must award damages to the tenderer because of the infringement of his rights, § 126 Law against restraints on competition.

3.3 **Thresholds for application of procurement rules**

There is no threshold for the sale or lease of public property. But if services are linked the procurement regulations apply at the following thresholds:

- for construction works: 5,000,000 EUR (§ 1 a Nr. 1 I VOB/A). If the procurement takes place as lottery the threshold for each lot is 1,000,000 EUR (§ 1 a Nr. 1 II VOB/A).

¹ Regulation on the award of public contracts, Official contracting terms for the award of construction performance contracts, Official contracting terms for the award of service performance contracts, General terms and conditions applicable to performance contracts

- for delivery and other services: 200,000 EUR (§ 1 a Nr. 1 I VOL/A). For certain sectors the threshold can vary from 400,000 EUR to 600,000 EUR (§ 1 b Nr. 2 VOL/A). If the *Bund* is acting the threshold is 130,000 EUR (§2 Nr. 2 VgV).
- for service of professional persons (freiberufliche Leistungen): 200,000 EUR (§ 2 II VOF)

The estimation of the threshold can be complicated if different services are combined. In the future we can expect that the above mentioned threshold will be increased by about 25 % based on directive 2004/18/EC.

3.4 **Framework contracts in procurement**

In most cases of the PPP-project a standardized framework contract is used. These are usually based on not legally binding guidelines (VOB/B or VOL/B). These can be incorporated and herewith made legally binding for the parties. Furthermore, another list provides technical standards (VOB/C).