

# German Federal Supreme Court of Justice Excludes Private Practitioners from Scope of Bribery Related Criminal Liability

## The Judgment

The Grand Senate for Criminal Matters of the German Federal Supreme Court of Justice (*Bundesgerichtshof*, "Supreme Court"), in a press release on 22 June 2012, provided clarification on a much disputed issue of German Criminal Law, i.e. whether private practitioners who treat patients insured by public sick funds are to be considered either public officials (*Amtsträger*) or agents (*Beauftragte*) for the purposes of the German Criminal Code (Sec. 331 et seq. and Sec. 299, respectively).

To this question, the Supreme Court decided that private practitioners who treat patients insured through the public sick funds are subject neither to Sec. 331 German Criminal Code (i.e. the prohibition of bribery of public officials) nor to Sec. 299 of the German Criminal Code (i.e. the prohibition of commercial bribery).

While the Supreme Court clearly sees the practice of providing monetary and other benefits to private practitioners as harmful to the healthcare system, because the Criminal Code does not classify private practitioners as public officials or agents, the Supreme Court was compelled to exclude applicability of criminal liability to this context. Correspondingly, the Supreme Court suggested that the legislature may wish to enact new legislation which would prohibit potentially criminal activity arising from suspect interactions between industry and private practitioners.

## Practical Consequences

The pharmaceutical and medical device industries have been highly anticipating this decision from the Supreme Court. By clearly denying the applicability of criminal anti-corruption laws to interactions between the industry and private practitioners, the Supreme Court has now provided much needed legal certainty to this previously unclear area of law.

Of course, there are still many other criminal laws which could be applicable to private practitioners in their interactions with the pharmaceutical and medical device industries, such as fraud or breach of trust. In addition, there are many civil laws and the professional code of conduct for physicians which ensure appropriate behavior. Finally, the strict industry codes of conduct provide a thorough framework of rules by which even incipiently corrupt behavior is forbidden and strongly sanctioned. Given these laws and codes, it is not clear whether the legislature would have a sufficient need for broadening the scope of the criminal law to prospectively apply to private practitioners. A much more efficient use of the legislative power would be to put more effort into promoting the full implementation of the existing legal framework as well as the self-regulation of the pharmaceutical and medical device industries.

## Overview

- Private practitioners are not government officials under German Criminal Law
- Private practitioners are also not agents of public sick funds
- Consequently, private practitioners are not subject to German anti-bribery laws

Nonetheless, it remains to be seen in which way the legislature will respond to this decision by the Supreme Court. This is especially so with respect to the fact that the governing parties, in reference to the upcoming decision of the Supreme Court, recently postponed a proposal from the opposition which would have explicitly made private practitioners criminally liable for corrupt behavior.

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