



Guidelines on Hospitality and Criminal Law

(Modified and expanded 2nd Edition)



These guidelines were created in collaboration with the Federal Ministry of the Interior.

PREFACE

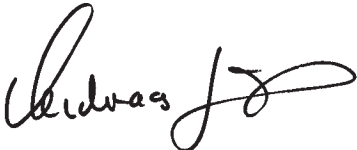
There is no doubt that sports and sporting events play a significant role in our society – be it through their powers of social integration, through the values imparted by them, or simply through the positive effects they have on our health. Sport sponsoring, as a communication medium, has undergone dynamic developments since the time of its conception and has now become an entrenched component of sport financing at nearly every organizational level. In the business world, sports function as a platform for emotional communication. Sponsoring is also a way through which corporations can fulfil their social responsibilities to society.

S20 – The Sponsors’ Voice e.V. was founded in 2006 by eminent German corporations that regard sponsoring as a vital and profitable communication tool. They joined together in order to better represent their common interests in the area of sponsoring. In 2012, the various associations, leagues, and agencies belonging to the VSA – Vereinigung der Sportsponsoring-Anbieter e.V. (a union of providers of sport sponsoring) combined their expertise to further develop and sustainably secure this cooperative form of promotion.

It is of utmost importance to S20 and VSA to tackle the ever-changing challenges of sponsoring together and to sensitize their members to the legal issues involved. Invitations to sporting and cultural events can involve a variety of legal aspects that need to be taken into account. Guidelines are useful for making stakeholders aware of the boundaries created by criminal law. They also help them profit from the opportunities presented by sponsoring activities in a lawful and morally tenable manner. The recognition of this by both the business and sport communities as early as 2011 resulted in the publishing of such guidelines.¹ These guidelines were well-received by the stakeholders, who saw them as a sound form of orientation. But in the meantime, the law has undergone a series of amendments, and we regard it as our duty to update and expand on these guidelines. These updated guidelines are an expression of our interest in fostering lawful invitation practices and in facilitating the continued use of corporate sponsoring and hospitality.



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¹ Guidelines on Hospitality and Criminal Law, S20, July 2011, www.s20.eu;
Hospitality invitations to football games in light of legal requirements, DFB/DFL, March 2013.

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INTRODUCTION

Extending invitations to business partners, clients, and other persons to sporting and cultural events is a common component of modern marketing and sponsoring concepts. These events are financed to a large degree – or are made possible in the first place – through sponsoring activities. Sponsors often receive so-called ‘hospitality packages’ from the event organizers as part of their sponsoring commitments, which in addition to tickets to the event can also include cultural programmes and hospitality services. The proceeds from such VIP boxes and business seats not only contribute to the total proceeds of the organizers of the sporting or cultural events but also actually enable the ‘cross-subsidization’ of tickets in other areas. This means that lower prices can be offered to all others who wish to attend. These proceeds also play an important role in the financing concepts of new stadiums, renovations to stadiums, and major sporting events.

The issue of corruption has become a topic of growing importance in the last years – at the political level, among the members of society, and for the criminal judiciary. Corporate invitation practices have also reached the public spotlight in recent years, where very critical voices can sometimes be heard. Therefore in light of the dynamic developments that have taken place in sport sponsoring, it has become all the more vital to create an awareness for the boundaries presented by criminal law.

In the interests of lawful invitation practices, the first guidelines were developed in 2011 by the sport associations (DFL, DFB, DOSB)² and by the sponsors (S20) as a form of orientation. These were welcomed as a valuable form of support and were gladly adopted by these stakeholders. A number of legal amend-

ments have been made since then, namely the ‘48th Criminal Code Amendment Act–Broadening the Offence of Bribing Members of the Parliament’, which came into force on 1 September 2014, and the Act on Combatting Corruption (KorrBekG), which came into force on 26 November 2015, and the Act on Combatting Corruption in the Healthcare Sector, which came into force on 4 June 2016. These amendments were the reason why the initiatives and the partners joined together to update and expand the existing guidelines.

These newly drafted guidelines draw on the expertise of the specialists involved with S20 and the VSA. In the chapter ‘Criminal Liability of Invitations’, the legal information was co-provided by the employees of the Federal Ministry of Justice and Consumer Protection responsible for criminal corruption and by the employees of the Federal Ministry of the Interior responsible for sports, civil service law, and corruption prevention. The typical constellations and the comments contained in the chapter ‘Scenarios’ are meant to encourage stakeholders to make use of sponsoring opportunities, to recognize and observe criminal law boundaries, and to avoid the risk of criminal liability.

2 DFL=Deutsche Fußball Liga (German Soccer League), DFB=Deutscher Fußball-Bund (German Soccer Association), DOSB=Deutscher Olympischer Sportbund (German Olympic Sports Confederation).



Criminal Liability of Invitations

I. Overview of Potential Corruption Offences under Criminal Law

Extending invitations to various kinds of events is a common and well-accepted practice in our society. Invitations to sporting and cultural events may be made for business-related reasons, as part of an overall sponsoring or marketing concept, or for no special reason at all, and may well be just for the sake of the sporting or cultural event itself. Nevertheless, invitation practices must comply with the applicable law. An invitation that is based on a so-called ‘wrongful agreement’ can lead to the opening of criminal investigations.

When invitations are extended to **public officials (Amtsträger)** – which include civil servants, judges, holders of other public-law offices, and employees of the public administration – and to persons with special public service obligations (für den öffentlichen Dienst besonders Verpflichteten), the following criminal offences could come into play:

- accepting and granting benefits (Sections 331 and 333 of the Criminal Code (StGB)), and
- taking bribes and offering bribes (Sections 332 and 334 StGB).

For **members of parliament and of comparable representative agencies** of the German Federal Government, the federal-state governments, at the European level, or at the municipal level, the criminal offences of taking bribes and offering bribes applies to mandate holders (Mandatsträger) (Section 108e StGB).

For **employees of private sector companies or for members of the medical professions**, the following criminal offences in particular could be involved:

- taking bribes and offering bribes in business transactions (Section 299 StGB), and
- taking bribes and offering bribes in the healthcare sector (Sections 299a und 299b StGB).

Basic terminology and requirements

- The legal definition of the German term ‘**Amtsträger**’ (**public official**) that is used in Sections 331 et seq. StGB is found in Section 11(1) no. 2 StGB. According to this definition, government members and employees of the public authorities and public corporations are, as a rule, deemed public officials within the meaning of the Criminal Code.³
- Since the amending of the Act on Combatting Corruption in 2015,⁴ **European public officials** are criminally susceptible not only under Sections 332 and 334 StGB but also under Sections 331 and 333 StGB. In Section 11(1) no. 2a StGB, European public officials are defined as:
 - members of the European Commission, the European Central Bank, the European Court of Auditors, or members of a court of the European Union,
 - civil servants or other employees of the European Union or of an institution created on the basis of EU law, or
 - persons commissioned to perform tasks of the European Union or tasks of an institution created on the basis of EU law.
- In addition, the provisions of Section 331 et seq. StGB also apply to **persons with special public service obligations**. Although they are not public officials, they are persons employed by or working in the public administration who by operation of law are formally obligated to conscientiously fulfil their duties. These are defined in Section 11(1) no. 4 StGB.
- Parliamentary representatives of the Federal Government, the federal-state governments, municipal regional authorities, and of the European Parliament, as well as the other persons named in Section 108e(3) StGB, are **mandate holders** to whom the provisions of the criminal offence set out in Section 108e StGB apply.⁵ Mandate holders may simultaneously be public officials.⁶
- Invitations to events generally involve ‘**benefits**’ within the meaning of Section 331 et seq. StGB. Benefits can also include invitations directed at third parties (e.g. relatives, colleagues, friends).
- Criminal liability based on the **taking/granting of benefits** (Sections 331 and 333 StGB) presupposes that the benefit (invitation) is taken/granted in exchange ‘for the performing of an official act’ (decisive element: ‘wrongful agreement’).
- However, if the **accepting/extending** of an invitation is socially acceptable or if it has been authorized (Sections 331(3) and 333(3) StGB), then criminal liability does not arise.
- Invitations should always be made in a **transparent manner**. They specifically should
 - be addressed to the official business address of the public authority/company with which the individual is employed. They should not be sent to the individual’s private address nor contain the wording ‘private/confidential’;

3 With respect to soldiers of the Federal Armed Forces, see Section 48 of the Military Criminal Code (WStG).
4 Act on Combatting Corruption, BGBl. I 2015, which came into force on 26 November 2015.
5 For members of the legislative bodies of foreign countries or for members of the parliamentary bodies of international organizations, see also Sections 2 and 3 of Article 2 of the Act on Combatting the Bribing of Foreign Public Officials in International Business Transactions (IntBestG).
6 See Part IV for a detailed discussion of this.



- contain a precise description of the nature and extent of the invitation;
- include an express ‘subject to authorization’ statement.
- Where **public officials** are invited to major events (e.g. major sporting events such as the Olympic Games or a World Cup football game), the company should, in advance,
 - coordinate invitation concepts and invitations with the Federal Government or with the federal-state governments; or
 - send a generally worded invitation to the public authority/company with which the invited individual is employed and leave the choosing of the specific person up to them.
- For invitations extended to **employees and agents** of private sector companies, the mere granting of benefits in exchange for the performance of business transactions is not a criminal offence. What is prohibited is the bestowing of benefits in return for unfair preferential treatment in competition settings or for a breach of duty owed to the company.
- The inviting of the partners and family members of a public official is generally regarded as unlawful. Exceptions are made if the inviting of a partner/family member is socially acceptable or customary (e.g. invitation to the Ball des Sports or to an opera ball).

II. Inviting Public Officials – Accepting and Granting Benefits

Every public official, European public official, or person with special public service obligations is criminally liable under Section 331(1) StGB for accepting a benefit if such person

- demands, lets himself be promised, or accepts
- a benefit for himself or for a third party
- for the performing of an official act.

Even if these requirements are present, however, such acts will not attract criminal liability if the competent public authority, within the scope of its powers, authorizes the acceptance in advance or if the invited individual reports the invitation promptly to the public authority and the public authority authorizes the acceptance (Section 331(3) StGB).

The criminal liability of the individual extending the invitation, i.e. the granting of a benefit, is regulated in Section 333(1) StGB. The elements of the offence are the mirror image of those for the accepting of a benefit; an authorization by the competent public authority will rule out criminal liability in these cases as well (Section 333(3) StGB).

Public Officials

The definition of public official for the purposes of the criminal offence includes not only civil servants and judges (Section 11(1) no. 2 a) StGB). It also includes members of the Federal Government, the federal-state governments, and parliamentary state secretaries, since these individuals hold official positions under public law (Section 11(1) no. 2 b) StGB), and all other persons pursuant to Section 11(1) no. 2 c) StGB who are appointed under German law to exercise public administration duties for public authorities or other public bodies or on behalf of such public authorities/bodies. This group includes public service

employees under collective bargaining agreements if they are not in purely subordinate jobs, and particularly executives and employees of legal entities under private law if they function as ‘extended arms of the state’. Examples of these are employees of the Gesellschaft für Internationale Zusammenarbeit (GIZ) (BGHSt 43, 370, 377) and members of the Management Board of the WestLB (BGHSt 31, 269, 271). Other examples include the managing directors of wholly state-owned GmbHs whose core business is the supplying of such public utility services as district heating (BGH NJW 2004, 693) or waste disposal (BGH NStZ 2007, 211), and employees of local diplomatic agencies provided that they are not in purely subordinate jobs.

Through the coming into force on 26 November 2015 of the Act on Combatting Corruption, ‘European public officials’ (Section 11(1) no. 2a StGB) were included in the offences in Sections 331(1) and 333(1) StGB and therefore were put on equal footing with national public officials in relation to the accepting and granting of benefits.

The new Section 335a(2) and (3) StGB did not, contrary to what was initially thought, extend the scope of application of Sections 331 and 333 StGB to additional persons. All that it did was to transfer equivalent persons, who up to then had been governed by certain supplementary penal legislation, to the Criminal Code in a modified form (Section 1(2) no. 10 of the Act on the Protection of NATO Troops (NTSG); Section 2(1) IStGH-Gleichstellungsg).

In addition to the provisions of criminal law, there are also other regulations that public officials must observe, particularly under civil service law. For example all employees of the federal administration are fundamentally prohibited from accepting re-

wards, gifts, or other benefits. This applies regardless of whether they are civil servants or employees under collective bargaining agreements. For federal administration employees, either Section 71 of the Federal Civil Servants Act (BBG) or Section 3(2) of the Collective Bargaining Agreement for the Public Service (TVöD) applies. For soldiers, Section 19 of the Act on the Legal Position of Soldiers (SG) applies. Analogous regulations apply to public service employees in the federal states. Violations of the provisions of criminal law and civil service law are punished through (additional) measures under disciplinary laws.

Mandate holders – especially members of the Bundestag, of the federal-state parliaments, or of the city and municipal councils – are not public officials within the meaning of criminal law if they are not acting in exercise of an additional public office in the government or administration.

Benefits

Attending an event (e.g. sporting and cultural events) generally constitutes a ‘benefit’ within the meaning of Section 331 et seq. StGB. Whether the public official would have had free entrance to the event anyway is of no relevance in the opinion of the German Federal Court of Justice.⁷ The court held in this decision that it is ‘irrelevant from the outset that the benefitting party could also obtain a comparable benefit in some other way’ (BGHSt 53, 6, 11)

The concept of a ‘benefit’ is subject to a broad interpretation. It covers all benefits that a public official is not legally entitled to and that objectively improve his economic, legal, or merely personal situation. The benefit does not need to be advantageous to him economically. It suffices if it simply puts him in a better personal position. And the fact that the invitation might have been a bother to him is of no relevance if his position is objectively improved.

Wrongful Agreements

Only those benefits that are accepted or granted in exchange ‘for the performing of an official act’ – so-called wrongful agreements (Unrechtsvereinbarung) – are criminally punishable. A wrongful agreement will already be deemed to exist even if the benefit is only aimed at winning the public official’s general favour, i.e. his inclination towards something, or at priming the setting/atmosphere, or at ‘luring’ him into performing an official act.⁸ A wrongful agreement will not be found to exist on the other hand when benefits are accepted or granted simply to enable the performing of an official act.

The question of whether a wrongful agreement exists or not – or whether it was at least intended – must always be decided by reviewing the circumstances of the individual case. But since wrongful agreements are seldom done openly, this will necessari-

⁷ Judgment of 14 October 2008–1 StR 260/08 –, BGHSt 53, 6–22.

⁸ BeckOK StGB/von Heintschel-Heinegg, Section 331 StGB para. 25–28.1, beck-online with further references.

tate the reliance on inferential facts to determine whether a – probably implicitly agreed on – wrongful agreement exists. The Federal Court of Justice has developed a list of possible criteria to be used when determining whether a wrongful agreement exists. This must always entail a review of all relevant inferential facts within the context as a whole. These criteria are:

- the position of the public official and the benefit giver's relationship to the public official's official duties – points of official-business contact,
 - the approach taken—covertness or transparency, and
 - the nature, value, and number of benefits.
1. The inviting of a public official as a representative of the state or public authority – at the federal, federal-state, or municipal level – in order to enhance the importance of an event does not constitute an invitation in exchange 'for the performing of an official act'. The accepting of such an invitation may even be one of the public official's official duties; attending the event is then done 'as an official duty'. Even the pursuit of a commercial goal by the party extending the invitation – for example as the sponsor of an event for publicity purposes – will not lead to a criminally punishable accepting/granting of a benefit. In cases where invitations are accepted in performance of an official duty, the foregoing also applies to those accompanying persons that are needed for the performance of such duty, the number of which will of course be very low.

What are caught by the offence are, for example, invitations aimed at influencing the public official to act in favour of the party extending the invitation when fulfilling his official duties. The concrete nature of the official act itself does not need to be specified in such cases, not even in a rough form. All that is necessary is that the public official be able to recognize that the private person is expecting something in return from

him at some time.⁹ An invitation that is aimed at winning the public official's general favour, i.e. his inclinations towards something, or at priming the setting/atmosphere, or at 'luring' him into performing an official act will already be regarded as sufficient. In situations where points of official-business contact do exist between the party extending the invitation and the public official but the performing of the official act plays a mere minor role for the invitation, a criminal offence will often not be found. What is necessary is that the invitation be accepted or extended precisely in relation to the performance of an official act.

Exceptions are found in cases of invitations that are commonly regarded as acceptable practices and that are of relatively low value. The accepting/extending of an invitation in exchange for the performance of an official act can usually be ruled out in such cases for reasons of social acceptability, provided that there are no conclusive rules on this in the administrative regulations (see Scenarios).

2. Not to be overlooked is the grey zone that exists in this area. Particularly in the case of public officials in higher positions with their widely diverse decision-making powers can a connection sometimes be implied, or at least not ruled out, between the accepting/granting of a benefit and the performing of an official act by such public official.

The fact that the accepting of benefits by higher-ranking public officials now falls more easily within the scope of the criminal offence of accepting benefits was a conscious decision on the part of the legislator when enacting the Act on Combatting Corruption in 1997.¹⁰ By changing the elements of the offence, the legislator dispensed with the requirement of a concrete wrongful agreement (benefit for a specific official act)

9 MÜKoStGB/Korte, Section 331 StGB para. 93–108, beck-online.

10 Act on Combatting Corruption (KorrBekG) of 13 August 1997 (BGBl. I p. 2038).



and declared that the general accepting/granting of benefits in exchange for the performance of an official act suffices. In light of the wide range of responsibilities that higher-ranking public officials have, the courts lean towards a presumption of a connection between benefits and the performing of official acts (see for example: Federal Court of Justice, judgments of 28 October 2004–3 StR 301/03, 28 August 2007–3 StR 212/07, and 14 October 2008–1 StR 260/08).

An assessment must therefore be made in the case of representatives as to whether the sole intention of the invitation and any privileges that might be associated with it was in fact the performing of an official act of representation. Invitations to popular sporting events can, even for high-ranking representatives, be for satisfying personal interests in connection with the direct experience in the stadium (see BGHSt 53, 6, 13). They nevertheless could also be considered as benefits 'for performing an official act' in cases where there are points of official-business contact.

Various decisions at the trial court level have presumed the existence of a wrongful agreement particularly in cases where the attendance of a public official is not restricted to the representation alone. In a judgment dated 24 July 2007, the Regional Court in Leipzig held that an accompanying person was not required for performing a representational function

by the mayor of the City of Leipzig at the six-day race in Berlin. In a judgment dated 1 October 2007, the District Court in Brühl held that a public official was not fulfilling mere representational duties when he was invited to an event that attached great importance to the food/beverages and to the entertainment portion of the event.

The embedding of invitations in socially acceptable acts – such as in a sponsoring context, which taken on its own is completely neutral in terms of criminal law – will not in itself rule out the applicability of the criminal offence of granting benefits; these cases too must be decided on the basis of the individual circumstances (see BGHSt 53, 6, 17).

Authorizations

Not every accepting/granting of a benefit for the performance of an official act will attract criminal liability. This is because the criminal offence allows for the authorizing of the acceptance of benefits, which in effect leads to impunity (Sections 331(3) and 333(3) StGB).

The prerequisite for such impunity is that the competent public authority, within the scope of its powers, authorizes the accepting of the benefit in advance or authorizes it retroactively after the prompt reporting of it. The request for authorization and the



prompt reporting of an acceptance of a benefit may only be made by the public official and not by the person offering it. These acts are deemed as official duties of the public official.

For federal civil servants, which includes state secretaries with civil-servant status, the authorization is governed by Section 71 of the Federal Civil Servants Act (BBG) in conjunction with the administrative regulations enacted on this by the federal ministries. Similar regulations exist for members of the federal-state governments.

All administrative regulations contain provisions on authorization procedures, authorization requirements, and on exceptions for implied authorizations (e.g. for benefits of low value).

Creating Legal Certainty

The individual extending the invitation cannot himself procure the authorization. In cases of uncertainty as to whether the mere extending of an invitation already amounts to a granting of a benefit (grey zone), the individual can obtain more legal certainty for himself in the ways set out below.

The invitations should contain an express reservation that they are extended ‘subject to authorization’. Such reservations could be worded as follows:

This invitation is made on the condition that you have obtained the authorization of your supervising officer.

or

We assume that you will obtain the required approval to attend the event from your supervising officer.

or

We assume that any internally required authorizations will be obtained.

Where there is an increased need for certainty, such as in the case of invitations of high value, the invitation can be made subject to an express confirmation of authorization. Such a confirmation could be worded as follows:

I hereby confirm that my attendance at event [XY] on [date] in [place] has been authorized by the competent public authority [...].

or

I hereby confirm that my attendance at [...] has been authorized by the department competent to make such authorizations. [Name, company name, date, signature].

The invitation should explicitly state the scope of the benefits in order to ensure the validity of the authorization (e.g. food/beverages, privileges, special seats, etc.).

In the case of larger events to which several public officials are to be invited, the public authority should be contacted in advance and asked about any authorization regulations they may have as part of an overall concept. Another possibility would be to send the invitation to the public authority and let them choose the person they want to represent them.

If an overall sponsoring concept is being created, the competent public authorities should be consulted as early as the drafting stage of it and suggested forms of invitations should be coordinated with them.

III. Inviting Public officials – Taking Bribes and Offering Bribes

If an invitation is extended in exchange for an official act through which the public official, the European public official, or the person with special public service obligations breached or would breach his official duties, then the provisions on taking a bribe and offering a bribe apply (Sections 332 and 334 StGB).¹¹ In such cases, an authorization or reservation of an authorization has no effect and does not result in impunity.

An intended influencing of the person's discretionary decision-making powers will suffice in such cases (Sections 332(3) no. 2 and 334(3) no. 2 StGB). Such discretionary decision-making powers include the evaluating of bids and the decision as to who is awarded a contract in public procurement procedures. A reasonable suspicion of such an offering of a bribe is likely to exist when invitations are extended to public officials who are responsible for making discretionary decisions in which the party extending the invitation has a vested interest.

¹¹ With respect to foreign and international public officials, see also Section 335a(1) StGB.

IV. Inviting Mandate Holders

Invitations to mandate holders must now comply with the amended version of Section 108e StGB (for foreign and international mandate holders, see also Section 2 of Article 2 of the Act on Combatting Bribery of Foreign Public Officials in International Transactions (IntBestG)). Criminal liability under the new Section 108e StGB requires the granting of an undue benefit in exchange for the mandate holder, when exercising his mandate, performing or refraining from performing an act at the order or instructions of the grantor.

The concept of a ‘benefit’ as defined above applies here as well.¹² An undue benefit within the meaning of Section 108e(4) StGB will not be found, however, in cases ‘where the accepting of the benefit accords with the regulations applicable to the legal position of the mandate holder.’ This is codified in the parliamentary regulations governing the members of the Bundestag and members of the federal-state parliaments (e.g. the Members of the Bundestag Act (AbgG), the Code of Conduct for Members of the German Bundestag, or analogous federal-state regulations). According to the legislative intent,¹³ the fact that no such accordance with the applicable regulations can be found (e.g. because no such regulations exist) does not automatically mean that the benefit is undue. If the accepting of the benefit conforms to recognised parliamentary customs, then even an apparent unlawful influencing of the exercising of the mandate is not punishable. Neither ‘a political mandate or a political function’ nor ‘a donation permitted under the Political Party Act (PartG) or other such acts’ constitutes an undue benefit (Section 108e(4) sent. 2 StGB).

According to the legislative intent,¹⁴ the inclusion of the element of the offence ‘in exchange for’ was meant to ‘demand the existence of a qualified wrongful agreement’. In the legislator’s opinion, the very reason for granting the undue benefit must be to get the mandate holder to act in a certain way, i.e. to act ‘at the order or instructions’ of the grantor of the benefit. Therefore the element ‘in exchange for’ demands, in the legislator’s view, a close causal connection between the undue benefit and the act of the mandate holder. It goes on to state that those acts of the mandate holder that are motivated by his own inner convictions and that are not influenced by the benefit granted should be encouraged without criminal punishment. The legislator was also of the opinion that the granting of benefits simply for the general exercising of the mandate should not be sufficient for a finding of criminal liability.

Benefits granted for acts already performed do not fall within the offence. But the elements of the offence are satisfied if the mandate holder demands or lets himself be promised the benefit prior to performing the relevant act, even if he does not accept it until after the act is performed or he does not accept it at all.

Caution must be exercised particularly in the case of members of municipal agencies as well as in the case of members of the Bundestag and the federal-state parliaments. These individuals can function simultaneously as public officials and mandate holders.

¹² See p. 9.
¹³ Bundestagsdrucksache 18/476, pp. 7, 9.

¹⁴ Bundestagsdrucksache 18/476, p. 7.



V. Inviting Employees and Agents of Private Sector Companies

Invitations extended to employees and agents of companies in the private sector are governed by the provisions of the criminal offence of taking bribes and offering bribes in commercial transactions (Sections 299 StGB). In contrast to the provisions applicable to public officials, these provisions demand that the invitation, and therefore the benefit, was extended

- in exchange for unfair preferential treatment in a competitive setting in relation to the purchasing of goods or services (Section 299(1) no. 1, (2) no. 1 StGB; the so-called ‘competition model’);
- or since November 2015
- in exchange for a breach of a duty owed to one’s own company in relation to the purchasing of goods or services (Section 299(1) no. 2, (2) no. 2 StGB; the so-called ‘principal model’).

Unlike the accepting/granting of benefits pursuant to Sections 331 and 333 StGB, the situation is different for Section 299 StGB. Such things as the general priming of the business climate, the creating of a generally positive mindset among existing business partners, the fostering of existing business relationships, and the cultivating of new potential business relationships – without reference to a concrete commercial transaction and in the context of which a preferred treatment of them could be strived for – are

all things that are not caught by the elements of the offence in Section 299 StGB and are therefore fundamentally permitted. The benefit must be granted in exchange for future preferential treatment or for a breach of a duty. Therefore neither rewards for past acts nor benefits granted to win the general favour of the recipient of the benefit will suffice in the private sector.

Reasonable suspicion could arise, for example, if invitations are extended to employees responsible for purchasing or sales in companies with which the party extending the invitation is involved in concrete negotiations and the invitation is meant to influence the negotiations.

With the amendment of Section 299 StGB in November 2015, it is now criminally punishable to offer, promise, or grant a benefit to an employee or agent of a company so that this person, when purchasing goods or services, performs or refrains from performing an act and through this breaches the duties owed by such person to his company (Section 299(2) no. 2 StGB). According to the legislative intent,¹⁵ the required breach of duty on the part of the recipient of the benefit requires more than the mere acceptance of the benefit or the mere concealing of it. What is required instead is a breach of duty by the recipient of the benefit that is based on conduct that goes beyond this. This would not be the

¹⁵ Bundestagsdrucksache 18/6389, p. 15.

case if the mere acceptance of the benefit by the recipient automatically amounted to a breach of duty. The same conduct on the part of employees or agents of a company is also criminally punishable (Section 299(1) no. 2 StGB).

It is therefore not only the safeguarding of the function of competition that the offence focuses on but also the interests of the company the employee is working for. It was the legislator's intent¹⁶ that 'for a breach of obligation, a mere acceptance of the benefit or a mere concealing of it from the principal will not suffice.' A violation for example of the company's compliance regulations in the form of an acceptance of a benefit is therefore not enough to satisfy the elements of the offence. On the basis of a wrongful agreement, which is also required in the cases set out in number 2, the benefit must instead be in exchange for a breach of duties in favour of the grantor of the benefit. Not every duty arising from the particular legal relationship will suffice, however. It must involve duties related to the purchasing of goods and services. Therefore incidents of a purely inner-company nature will not be caught by the offence as these are not duties related to the purchasing of goods and services.'

Consent given by the company will always result in impunity in the case of the principal model (Section 299(1) no. 2 or (2) no. 2 StGB) since the absence of consent is one of the elements of the offence. But only consent given prior to the act can bring about such impunity.

In the case of the competition model (Section 299(1) no. 1 or (2) no. 1 StGB), the (not undisputed) decisions of the courts to date hold that the company's consent will not result in impunity.¹⁷

An offence pursuant to Section 299 StGB will only be pursued on application or if the prosecutor is of the opinion that an intervention ex officio is required on account of a special public interest in such prosecution (Section 301 StGB).

VI. Inviting Members of the Medical Professions

On 4 July 2016 the Act on Combatting Corruption in the Healthcare Sector came into force. Through this Act, Section 299a (taking bribes in the healthcare sector) and Section 299b (offering bribes in the healthcare sector) were newly incorporated in the Criminal Code (StGB). Criminally liable under Section 299b StGB is anyone who

- offers, promises, or grants
- a member of a medical profession for which a state-regulated education is required in order to exercise the profession or to use the professional title
- in conjunction with the exercising of such profession
- a benefit to him or to a third party
- in exchange for the latter, when
 - prescribing medicinal drugs, therapeutic agents, adjuvants, or other medicinal products,
 - purchasing medicinal drugs, therapeutic agents or adjuvants, or other medicinal products that are meant for direct use by the member of the medical profession or one of its professional assistants, or
 - supplying patients or examination material,
- giving him/another unfair preferential treatment in a competitive setting.'

Analogously, members of the medical professions who demand, let themselves be promised, or accept a benefit can attract criminal liability for taking a bribe in the healthcare sector pursuant to Section 299a StGB.

Members of the medical professions (e.g. medical doctors, pharmacists, psychotherapists, nursing staff, physiotherapists, etc.) formerly already fell within the scope of the corruption provisions of the Criminal Code (StGB) if they functioned as public officials (e.g. as doctors or employees in public hospitals) or if they were employees of public healthcare facilities. Now even doctors with their own private practices and other self-employed members of the medical profession are caught by the provision. In addition, the wrongful agreement is no longer restricted to purchasing decisions (as in the case of Section 299 StGB) but can also relate to the prescribing of medicinal drugs, therapeutic agents, adjuvants, medicinal products, or the supplying of patients or examination material.

Since the basic requirements of the offence, particularly the required connection between the benefit and the unfair preferential treatment, correspond to those of Section 299 StGB, the statements regarding that section apply here as well.

16 Bundestagsdrucksache 18/4350, p. 21.

17 BBundestagsdrucksache 18/6389, p. 15.



Scenarios

General Information

Outlined below are typical invitation scenarios. Each scenario explains what the party extending the invitation should observe in order to reduce the risk of criminal liability as much as possible. We have chosen three basic types of events: professional events (e.g. lectures, expert forums), mixed events (e.g. business meetings, marketing events), and (professionally) unrelated entertainment events (e.g. football games, golf tournaments, concerts).

An exceptional case here are invitations to entertainment events extended by the event organizers themselves or by marketers. This includes sporting, cultural, music, and film events. Just as product presentations or marketing and sales events in other sectors are regarded as professional or mixed events, so for example can invitations extended by a sports club to one of its games be seen as a form of business-related product presentation and/or as an information or marketing event to persuasively present or provide information about its specific marketing potential, emotions, and social powers. For the person invited, the attendance at the event can be directly connected to his official or business duties, which at least in relation to the ‘wrongful agreement’ issue would speak against a finding of criminal liability. All in all, invitations from the various entertainment sectors must therefore be reviewed in light of the circumstances of the individual case. The same holds true for invitations from companies that produce products for the entertainment industry and wish to present them ‘live’.

Products for example in the competitive sport industry must meet certain demands for which the reaction of the spectators or the required interaction with other participants are necessary for understanding them. Also in order to understand the emotional power of a sporting competition, the collective excitement of the

fans or the struggle for victory must be experienced live on location. The flair and atmosphere of such events are simply unique. The characteristic features of each of the various events can vary greatly and can thus play a major role in the success of the planned marketing measure. Each type of sport for example attracts its own kind of spectators with their own kind of behaviour. Each one has different networking possibilities in the hospitality areas, offers different fringe programmes, and has different competition and advertising settings.

Case study: The Potential Sponsor

An active automobile manufacturer that is already an advertising partner with diverse sports associations is considering purchasing hospitality services and advertising rights with another sports club. Talks are already going on or concrete offers have already been made by the club or its marketer. In order to make a ‘live’ presentation of the various advertising options and the hospitality areas of the club to the company’s senior marketing head, the latter is invited by the club/marketer to attend a Bundesliga home game in the VIP area (box seats or business seats). The invitation is written on the letterhead of the inviting club/marketer and sent to the business address of the automobile manufacturer and contains a so-called ‘compliance disclaimer’.

The case involves a relatively costly benefit directly connected – in terms of time and subject-matter – to a business decision, which therefore raises the issue of possible criminal liability under Section 299 StGB. Speaking against such criminal liability, however, is the fact that the very business decision itself is whether or not to sponsor the sports



club. The attendance at the stadium is for assessing the impact of the planned sponsoring measures, and therefore the connection between the benefit and the purchasing decision is not unfair but is directly on point. The event therefore constitutes a professional event for both the party extending the invitation and the party invited. The VIP invitation to the head of marketing would also seem justifiable due to his high-ranking position. Such a position makes it unlikely that some kind of improper influencing is going on. The sending of the invitation to the company’s official business address and the reference to any possible compliance rules also creates the requisite transparency. The invitation is therefore entirely permissible.

Note: The following of the recommendations made in respect of the various types of events can neither completely eliminate a risk of criminal liability nor can it substitute the making of a review in each individual case. The most important thing is to make sure that an ‘intimation of bad faith’ never arises in the first place. This is because the mere presence of the objective elements of the offence can amount to a reasonable suspicion on account of which the public prosecutor is forced to open preliminary investigations. This alone could damage the company’s image. To avoid this, care should be taken to ensure as far as possible that none of the negative indicators set out below

are present. Or at the very least, the individual circumstances of the case should be carefully reviewed at least in terms of such criteria.

In all cases:

- the approach taken (covertness or transparency), and
- the nature, value, and number of benefits (invitations).

In the case of public officials:

- the individual’s position and the points of official-business contact between the inviting company and the public official’s tasks.

If the planned invitation involves none of the negative indicators, then the invitation is normally unproblematic – but once again only if there are no special circumstances in the individual case. To reiterate: Each and every case must be decided on a case-by-case basis.

According to the amended Section 299 StGB, the specific duties owed to the company by an employee who accepts a benefit can be of vital importance. For precautionary reasons, invitations should therefore contain compliance statements (disclaimers) that insist on the recipient observing its own internal rules in relation to the extending or accepting of invitations.

Possible wording for a compliance disclaimer:

‘We would like to invite you to our event. In the interests of fairness and compliance, we kindly ask you to observe the following before you decide to accept the invitation:

If you are a civil servant (Beamter), a public official (Amtsträger), or a person with special public service obligations (für den öffentlichen Dienst besonders Verpflichteter), we kindly ask you to obtain the authorization of the competent public authority or institution to accept the invitation. If this cannot be done, we must ask you to please refuse the invitation.’

For invitations to corporate representatives or other representatives from the private sector, the following notifications could be used in the alternative:

‘If you accept the invitation, we assume that you are complying with the law and with your company’s internal rules.’
Or:
‘We kindly ask you to review the law and your company’s internal rules before accepting the invitation. (Should you or your compliance officer have any questions, please do not hesitate to contact us.)’

Note: For mandate holders who are simultaneously public officials (e.g. a Bundestag member who is also a member of the German Federal Government), or if there is uncertainty as to whether a particular function qualifies as a function of a public official or a mandate holder, then the stricter rules applicable to public officials should be relied on for precautionary reasons. Otherwise, for mandate holders, the principles governing invitations to employees or agents of private sector companies could be used as guidance. A review must be made in each case, however, as to whether supplementary rules and other requirements apply to the members of the respective public representatives.

A Inviting Public Officials, European Public Officials, and Persons with Special Public Service Obligations (collectively referred to below as ‘public officials’)

Type of Event	Assessment
<p>Professional event</p> <p>Short events (generally less than one day) dealing with professional topics with a material connection to the inviting company’s product range; sometimes linked to (in)direct advertising of its products and services, e.g.:</p> <ul style="list-style-type: none">▪ expert forums▪ podium discussions▪ oral presentations▪ speeches▪ product presentations▪ sales and marketing events▪ days of action▪ factory tours	<p>Principle</p> <p>Unproblematic when the invited person’s attendance is authorized by the employer. Usually unproblematic even if unauthorized – although the inviting company has business relations or points of official-business contact with the public official – especially under the following conditions:</p> <ul style="list-style-type: none">▪ food/beverages are not more than snacks▪ event is limited to the professional topics▪ no entertainment elements whatsoever▪ handouts are limited to seminar materials (including on electronic data carriers, topic-related materials) and inexpensive give-aways <p>Negative Indicators</p> <ul style="list-style-type: none">▪ costly food/beverages for the guests (more than snacks or disproportionate to the event)▪ handing out of costly gifts▪ incorporation of entertainment elements to lighten up the strictly professional character of the event▪ event lasts longer than the professional part of it▪ conditions/venue of the event have a highly touristic or recreational character▪ paying for the travelling and/or hotel expenses of the guests (exception: speakers)▪ inviting accompanying persons unrelated to the profession▪ weak connection between the topic and the position/expertise of the public official <p>Recommended Action</p> <p>If no negative indicators are present, the invitation can be extended. It should be transparent, i.e. written on the company’s letterhead and addressed to the business address of the invited party. If one or more negative indicators are present, a review must be made in the individual case – using the criteria set out above– to determine whether the invitation is permitted. The invitation should always be transparent (written on the inviting company’s letterhead, addressed to the head of the public authority) and contain a reservation that it is subject to authorization.</p>

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Case 1: World Championships in Athletics

A member of the management board of a large electronics company that sponsors the World Championships in Athletics in Germany plans to invite two members of the Federal Government, the mayor of the city in which the company is located and the second mayor who heads the city's municipal building department, to watch the games on one day from the company's VIP box. The invitation is to be written on the management board member's personalized company letterhead and sent to each of the official addresses of the public authorities to which the public officials belong. The net value of the invitation including food/beverages is around 250 euros. The management board member wishes to 'decorate' himself with the presence of prominent national and local politicians and believes that these guests will help him obtain national and local media exposure. The mayor's and second mayor's travelling and hotel expenses of around 300 euros each are to be paid for to make sure they attend. Around two months prior to this, the city's building department had issued the company a building permit that the inviting company had applied for.

What should be observed

Requirements

The invitation is made for a recognized reason, because the public officials are obviously being invited for representational purposes. The management board member extending the invitation wishes to use the national prominence of the members of the Federal Government and the local prominence of the mayor and second mayor for advertising purposes for the company.

Negative Indicators

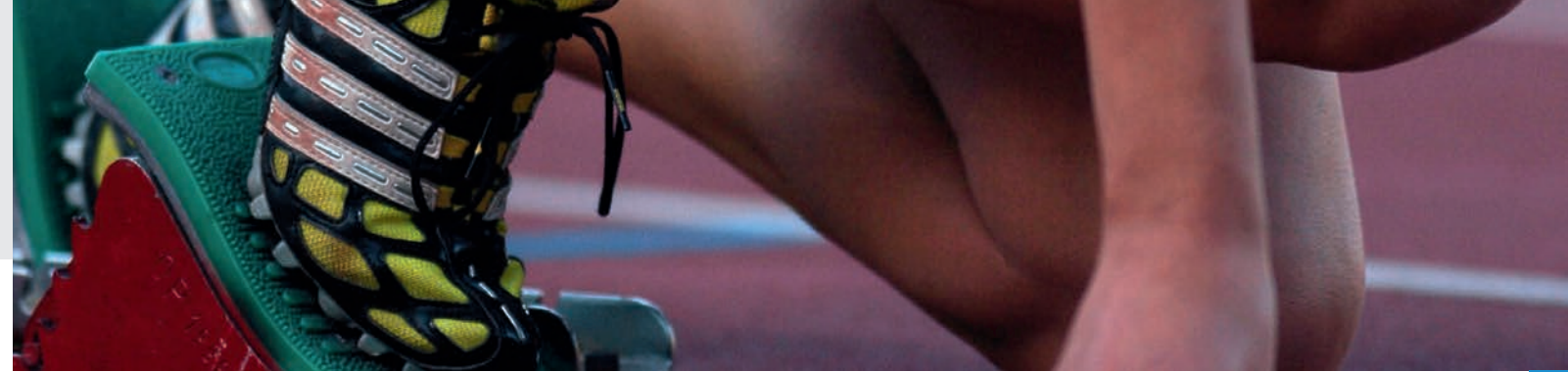
Because the second mayor is the head of the municipal building department, the fact that a building permit had been issued just a short time before gives rise to a presumption that there are points of official-business contact with the inviting company. And because the mayor is a high-ranking public official with widely diverse decision-making powers, it is also likely that there are points of official-business contact on account of his position. This is a situation that must be reviewed on the basis of the circumstances of the individual case.

Conclusion

For the members of the Federal Government, the invitation would appear unproblematic – subject to the consideration of other details in the individual case – in terms of criminal liability as there are no negative indicators present.

For the mayor, the paying of the travelling and hotel expenses is a negative indicator. There is the danger of a reasonable suspicion or of a bad faith intimation of the granting of a criminally punishable benefit: at least one negative indicator is present and the monetary value of the invitation is not insubstantial (around 550 euros). Therefore the individual circumstances surrounding the invitation must be reviewed.

If the paying of the travelling and hotel expenses is dispensed with, the invitation would appear unproblematic in terms of criminal liability. And even if the travelling and hotel expenses are paid, neither the mayor under Section 331(1) StGB nor the manage-



ment board member under Section 333(1) StGB would ultimately attract criminal liability because of the obvious representational purpose of the invitation, which means that the objective element of the offence would be missing.

Because several negative indicators are present in the case of the second mayor, there is an increased risk of a finding of a reasonable suspicion or of a bad faith intimation of a criminal granting of a benefit. Therefore the individual circumstances surrounding the invitation must be reviewed. It would seem advisable, however, to dispense with inviting the second mayor altogether because of the existence of points of official-business contact.

The use of a personalized company letterhead is sufficient for creating transparency because it makes clear that the management board member is acting as part of the company's executive organs. A reservation of authorization should, however, be included. If the inviting of the second mayor is insisted on, the obtaining of the separate authorization of the head of the public authority should be considered.

B Inviting Employees or Agents of Private Sector Companies (collectively referred to below as ‘employees’)

Type of Event	Assessment
Professional Event	Principle
Short events (generally less than one day) dealing with professional topics with a material connection to the inviting company's product range; sometimes linked to (in)direct advertising of its products and services, e.g.:	Unproblematic if the invited person's attendance is authorized by the employer. Usually unproblematic even if unauthorized – although the inviting company has business relations or points of official-business contact with the employee – especially under the following conditions:
<ul style="list-style-type: none">▪ expert forums▪ podium discussions▪ oral presentations▪ speeches▪ product presentations▪ sales and marketing events▪ days of action▪ factory tours	<ul style="list-style-type: none">▪ food/beverages are not more than snacks▪ event is limited to the professional topics▪ no entertainment elements whatsoever▪ handouts are limited to seminar materials (including on electronic data carriers, topic-related materials) and inexpensive give-aways
	Negative Indicators
	<ul style="list-style-type: none">▪ costly food/beverages for the guests (more than snacks or disproportionate to the event)▪ handing out of costly gifts▪ incorporation of entertainment elements to lighten up the strictly professional character of the event▪ event lasts longer than the professional portion▪ conditions/venue of the event have a highly touristic or recreational character▪ paying the travelling and/or hotel expenses of the guests (exception: speakers)▪ inviting accompanying persons unrelated to the profession▪ weak connection between the topic and the position/expertise of the public official
	Recommended Action
	If no negative indicators are present, the invitation can be extended. The invitation should always be transparent, i.e. written on the company's letterhead and addressed to the business address of the invited person. If one or more negative indicators are present, a review must be made in the individual case to determine whether the employee to be invited is materially involved in an imminent purchasing decision. If this is not the case, the invitation may be extended despite the negative indicators. If it is the case, a review must be made in the individual case to determine whether the invitation is permitted.

Type of Event	Assessment
Mixed Event	Principle
Generally several-day events dealing with professional topics with a material connection to the inviting company's product range; sometimes linked to (in)direct advertising of its products and services or to business topics. Entertainment elements are incorporated into the event to lighten up the atmosphere, e.g.:	Usually unproblematic, especially under the following conditions:
<ul style="list-style-type: none">▪ business meetings (especially over several days)▪ product presentations▪ sales and marketing events▪ factory tours▪ user forums	<ul style="list-style-type: none">▪ entertainment elements constitute a meaningful, socially acceptable bridge between the professional or business portions of the event▪ invitations are written on the letterhead of the inviting company and sent to the business address of the invited employee▪ usual food/beverages appropriate to the event and the duration of it▪ any gifts for the guests are topic-related and are appropriate to the event
	Negative Indicators
	<ul style="list-style-type: none">▪ employee is materially involved in an imminent purchasing decision of the company with which he is employed▪ entertainment elements exceed the professional or business portions of the event▪ costly food/beverages for the invited persons▪ conditions/venue of the event have a highly touristic or recreational character▪ inviting accompanying person/s▪ handing out of costly gifts▪ paying for travelling and/or hotel expenses
	Recommended Action
	If no negative indicators are present, the invitation can be extended. The invitation should always be transparent, i.e. written on the company's letterhead and addressed to the business address of the invited person. If one or more negative indicators are present, a review must be made in the individual case to determine whether the invitation is permitted. If the first mentioned negative indicator is not present, the invitation can be made despite the presence of other negative indicators.
	If the first mentioned negative indicator is present, however, the invitation should be dispensed with altogether or certain elements of the event should be eliminated or modified in such a way that no other negative indicators are present. In case of doubt, the legal advice of the internal compliance department or the legal department should be obtained.

Type of Event	Assessment
(Unrelated) Entertainment Events ¹⁹ Invitations to entertainment events, especially sporting or cultural events, with no professional or business portions	<p>Principle</p> <p>Usually possible, especially under the following conditions:</p> <ul style="list-style-type: none">invitation is for a special occasion to which the employee has a connection (e.g. company anniversary, official appointment of a new CEO, opening of a new plant, etc.)invited person has a high-ranking position, e.g. event for management board members with attendance of high-calibre participants <p>Negative Indicators</p> <ul style="list-style-type: none">employee is materially involved in a current purchasing decision of the company with which he is employedinviting accompanying person/s, unless the kind of event requires this (e.g. Ball des Sports)handing out of expensive giftspaying for travelling and/or hotel expensesduration of several days combined with other costly entertainment elements <p>Recommended Action</p> <p>If no negative indicators are present, the invitation can be extended. The invitation should always be transparent, i.e. written on the company's letterhead and addressed to the business address of the invited person or to his manager. If one or more negative indicators are present, a review must be made in the individual case to determine whether the invitation is permitted. If the first mentioned negative indicator is not present, the invitation can be made despite the presence of other negative indicators.</p> <p>If the first mentioned negative indicator is present, however, then the invitation should be dispensed with altogether or certain elements of the event should be eliminated or modified in such a way that no other negative indicators are present. In case of doubt, the legal advice of the internal compliance department or the legal department should be obtained.</p>

19 See p. 18 for the definition.



➔ Case 2: The VIP Lounge

An employee of an IT service provider invites a business partner to the company's VIP lounge to watch a sporting event. The business partner works in the IT purchasing department of an automobile corporation. The invitation is written on the letterhead of the inviting company. Neither of the employees has a particularly high-ranking position. The ticket, including food/beverages and the business seat, has a net value of 250 euros. Although there are no concrete purchasing decisions pending on the part of the automobile corporation, the person extending the invitation and the person invited are constantly in contact with each other with respect to ongoing projects. It also cannot be ruled out that new business contracts will be concluded in the (near) future for the IT services provided by the inviting company.

What should be observed

Requirements

Although the invited person is generally involved in the purchasing decisions of his company, including in relation to the inviting company, no purchasing decisions are 'currently' pending. As a rule, the mere prospect of such purchases happening in the future will not suffice. However, a very careful review must be made to determine whether the bestowing of the benefit could be interpreted as an attempt to influence future decisions.

Negative indicators

There are no negative indicators.

Conclusion

The invitation would appear unproblematic in terms of criminal liability, even though not all requirements are satisfied, since no negative indicators are present. The absence of requirements has no effect in terms of criminal law, unless the absence itself is a negative indicator.

The invitation should nevertheless be written on the letterhead of the inviting company and sent to the business address of the invited employee.

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