

THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY GERMANY

ARTICLE 12 UNCAC

PRIVATE SECTOR AND PUBLIC-PRIVATE PARTNERSHIPS

GERMANY (THIRD MEETING)

Code (HGB - sections 242 et seq.) and comply with the European Accounting Directives. These Accounting Directives are currently under revision. Companies are required to prepare annual financial statements in accordance with the national accounting law for the purposes of profit distribution, taxation, and financial services supervision. Listed companies are required to use International Financial Reporting Standards (IFRS) in their consolidated accounts (according to European Regulation (EC) No. 1606/2002). In addition, the German Accounting Standards Committee (GASC) issues detailed standards on consolidated accounting (if not governed by IFRS). If these standards are recognized by the Federal Ministry of Justice anybody complying with these standards is presumed to be in accordance with German general accepted accounting principles.

Statutory audits are also regulated in the HGB (sections 316 et seq.) and trace back to the European Directive on statutory audit that is currently under revision, as well. With this revision the EU Commission explicitly aims at a higher quality audit market. Moreover, the Institute of Public Auditors (IDW) issues German auditing standards that transpose the International Standards on Auditing (for more details see www.idw.de/idw/portal/n281334/n281114/index.jsp and the attached document to the due process and the character of the standards). Therefore, the requirements for the conduct of audits encompass both legal requirements and professional auditing standards. The professional rules of the auditors are basically regulated in the "Wirtschaftsprüferordnung" (Public accountants Act - find an English version under http://www.apakaoc.de/english/statutory_provisions/statutory_provisions.asp). The related disciplinary oversight (see below) is complemented by a system of regular inspections and quality assurance executed by the oversight bodies. For details see also <http://www.apakaoc.de/english/home/home.asp> and <http://www.wpk.de/english/home/home.asp>.

The German Transparency Directive Implementation Act of 2007 modified **the *criminal offence on false accounting, including the falsification of accounting documents***. False statements regarding bookkeeping and accounting are now subject to inter alia custodial sentence of up to three years or a monetary (administrative) fine (sections 331 et seq. HGB). Additionally, since 2005 the accounting practices of listed companies have been subject to an external control by the privately organised Financial Reporting Enforcement Panel and the Federal Financial Supervisory Authority (BaFin - sections 342b et seq. HGB and sections 37n et seq. of the Securities Trading Act). This financial reporting enforcement supplements the internal audit. In case of an infringement of

financial reporting requirements BaFin takes administrative measurements and generally orders the company to publish the errors identified (for detailed information see www.frep.info/index_en.php and the attached Annual Activity Report 2011 of FREP with regard to the conducted examinations).

German *auditing standards* were reformed in 2005 so that the responsibilities of auditors for detecting material misstatements due to fraud were reinforced. The same goes for the responsibilities of auditors for communicating identified fraud or indications of fraud to managements and those charged with governance on a timely basis. Auditors must reflect how the supervisory body carries out the monitoring of the management processes and must make inquiries to the supervisory body to determine whether members have knowledge of any actual, suspected or alleged fraud affecting the entity. If the auditor has identified or suspects fraud that involves the entity's management, these suspicions must be communicated to the persons charged with governance without delay. The same applies if the auditor has identified or suspects fraud involving employees who have significant roles in internal control. Moreover, the auditor has to present a long-form audit. In addition the auditor must report orally to the supervisory board or the audit committee (see below) on the main results of the audit, especially on significant weaknesses in the internal control and the risk management systems with regard to the financial reporting process (section 321 HGB). According to the Corporate Governance Code the supervisory board also has to arrange for the auditor to report without delay on all facts and events of importance that arose during the performance of the audit. The executive and supervisory boards are required by law and by the rules of proper corporate management to undertake within the limits of their power the measures required to stop any violations of law and to investigate any suspicions of breaches. In case of an audit of a financial institution or an insurance company the auditor must BaFin whenever the auditor becomes aware of certain facts such as non-adherence to regulatory requirements.

According to the Public Accountants Act, disciplinary oversight of the audit profession in Germany is organised into a two-tier system. Minor violations of professional rules are investigated and sanctioned by the chamber of auditors under public oversight of an oversight board (the AOC). Severe violations of professional rules are sanctioned by special divisions of criminal courts. The charge is brought to court by the chief public prosecutor's office at the Berlin District Court after its own investigations.

In 2009 the German *Accounting Law Modernisation Act* (BilMoG) clarified the possibility to establish audit committees in all listed entities. Listed companies that have no supervisory body are required to establish an audit committee (para 324 HGB, see also section 107 para 3 of the Stock Corporation Act - AktG). At least one member of the audit committee or the supervisory body has to be an independent financial expert. One of the legal duties of the audit committee is the supervision of the company's internal control and internal risk management system and compliance programme. As to the German Corporate Governance Code the executive board ensures that all provisions of law and the enterprise's internal policies are abided (see the attached convenience translation, point 4.1). The auditor's task is an assessment of the appropriateness and effectiveness of an entity's compliance management system or specific parts of such

system. In a listed company the executive board has (section 91 para 1 AktG) to make sure that books of account are maintained. Auditors must include in the audit of the financial statements the audit of the accounting books and records, covering the accuracy of entries, timeliness, and the transparency of entries (section 317 para 1 and 4 HGB).

In general, listed companies must include in their management reports the main features of the internal control and risks management system that are of relevance for the accounting process (section 289 para 5 HGB). Where such a system is absent, this must be mentioned in the management report. Auditors must intervene if a description of the internal control and risk management system in the management report is wrong or misleading. Thus, it would have to be reported and to become public if an internal control and risks management system gave reason for concern that the above mentioned acts can be carried out for the purpose of committing an offence in the field of corruption. Moreover, listed companies must issue a declaration on corporate governance in the management report or on their website (§ 289a HGB). The report must include three components: a declaration of compliance with the recommendations of the German Corporate Governance Code and explanations of any deviations from it (see para 161 AktG), relevant disclosures on corporate governance practice that go beyond legal requirements and a description of the management and supervisory boards' rules of procedure.

The valid federal civil service law contains regulations to waiting periods (*abstinence time*) of three (sometimes five) years in case of a civil servant changing into the private sector. In accordance with § 41 BeamStG and § 105 BBG all civil servants including retired officials have to indicate a gainful employment or an other occupation outside of the public service before admission, if it is connected with his or her official activity in the last 5 years and can be impaired by interests. It is to be forbidden, if it is to be procured that official interests can be impaired.

Within the private sector numerous activities have been conducted within Germany to promote the prevention of, and the fight against, corruption as well as the promotion of good corporate governance. The Federal government does not have a complete oversight about these actions. Therefore, reference is made solely to a number of activities in which the Federal government took part. For a number of years the Federal Ministry of Justice together with representatives from the private sector develops and promotes a Good Governance Code which, among many other goals, aims at strengthening transparency and accountability in the private sector. The Federal Ministry for the Interior established round table-discussions with the private sector on the prevention of corruption. One outcome of these discussions was the development and publication of "FAQ's about gifts, hospitality and other benefits". In March 2012 the Federal Ministry for Transport, Building and Urban Development invited to a public conference to promote joint efforts of the private and public sectors in fighting corruption. A public conference about the fighting against, and the prevention of, foreign bribery, especially among SME's, was organised in April 2012 by the Federal Ministry of Economics and Technology jointly with the German Federation of Industry (BDI) and the German Federation of Chambers of Industry and Commerce.