

# Focus "New Regulations on Corruption in the Healthcare Sector"

## Offences under Sections 299a, 299b of the German Criminal Code

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Berlin, 19 May 2016

- I. Motivation of the Legislature**
- II. Structure of Sections 299a, 299b of the German Criminal Code**
- III. Practical Implications: Cooperation or Corruption?**

# I. Motivation of the Legislature

Decision of the Great Senate of the German Federal Court of Justice (BGH) of 29 March 2012, case GSSt 2/11:

- Doctors working under contracts with statutory healthcare insurance organisations are neither public officials within the meaning of s331 et seq. StGB (German Criminal Code – *Strafgesetzbuch*), nor agents of the health insurance organisations within the meaning of s299 StGB.
- Reasons: The Relationship between the insured individual and the doctor is essentially determined by elements of personal trust.



"loophole in the definition of punishable acts"

The Great Senate of the Federal Court of Justice calls for the legislature to act:

*„Against the background of the discussion going on in criminal law literature for some time and in view of legislative initiatives to fight corruptive acts in the healthcare sector, the Great Senate for Criminal Offences does not ignore the general legitimacy of the wish to effectively fight deplorable situations (apparently) resulting in financial burdens for the healthcare system with the means offered by criminal law. The application of existing criminal-law provisions whose structuring and assessments of circumstances prevent the recognition of certain behaviours as relevant under criminal law in connection with the provision of healthcare services under the rules of the statutory health insurance organisations, however, is forbidden for the judicature in terms of punishability considerations reserved to the legislature.“*

(emphasis added by the author)

## II. Structure of Sections 299a, 299b StGB

## **Required for application of s299a StGB in brief**

- Potential offender (health professional)
- (Demand, allow to have promised, accept) benefits
- Link to the profession
- Unlawful agreement

## **Required for application of s299b StGB in brief**

- Potential offender (health professional)
- Offer or promise of benefit
- as consideration
- for according an unfair preference in competition

## **Required for qualification as aggravated case under s300 StGB**

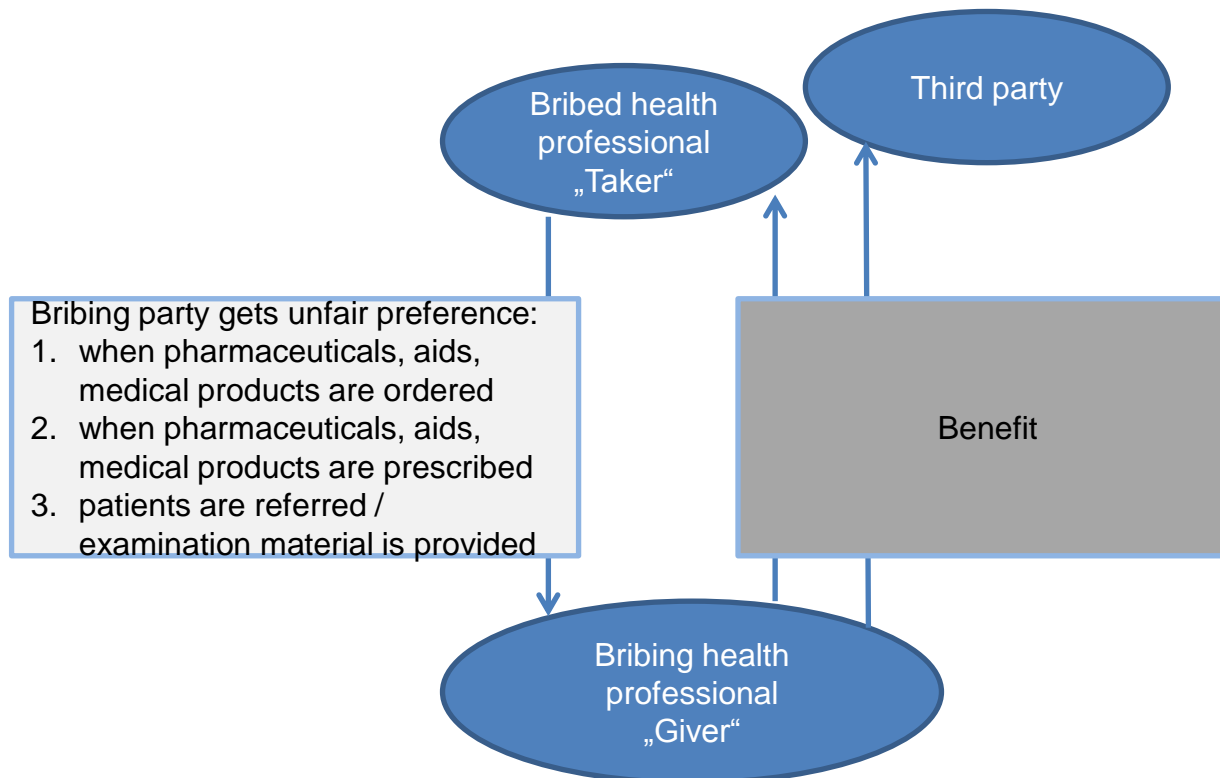
- Major benefit or
- Acting on a commercial basis or as a member of a gang

Following the suggestions of the Legal Committee, the original draft bill was changed as follows:

- Cancellation of punishability of declining decisions by healthcare professionals
- Limitation of punishability of acquisition decisions by healthcare professionals to those in respect of pharmaceuticals, aids and medical products for direct application by the member of the healthcare profession or their assistant
- Cancellation of the offence of „violation of professional duty“
- Ex-officio prosecution (criminal offence liable to public prosecution)



# Norm Structure of Sections 299a, 299b StGB



# Structure of Sections 299a, 299b StGB – Offensive Act Section 299a StGB

- Potential offenders s299a StGB
  - Health professionals who need a state-regulated examination to practice or carry a title
    - doctors, pharmacists, psychological psychotherapists, but also occupational therapists, speech therapists, etc.
  
- Accepting benefits
  - basically everything that improves the situation of the recipient
  - material and immaterial benefits
  - in line with s299, s331 et seq. StGB, so existing case law and literature can be referred to

# Structure of Sections 299a, 299b StGB – Offensive Act Section 299a StGB

- Link to exercised profession
  - objective connection between agreed benefit and exercise of the relevant health profession
  - reliance on existing case law and literature (s299 StGB)
  
- Unlawful agreement
  - Consideration for an at least intended unfair preference required when
    - prescribing pharmaceuticals, aids and appliances or medical products
    - purchasing pharmaceuticals, aids and appliances or medical products intended for direct use by the health professional or their assistant
    - referring patients or providing examination material

### III. Practical Implications: Cooperation or Corruption?

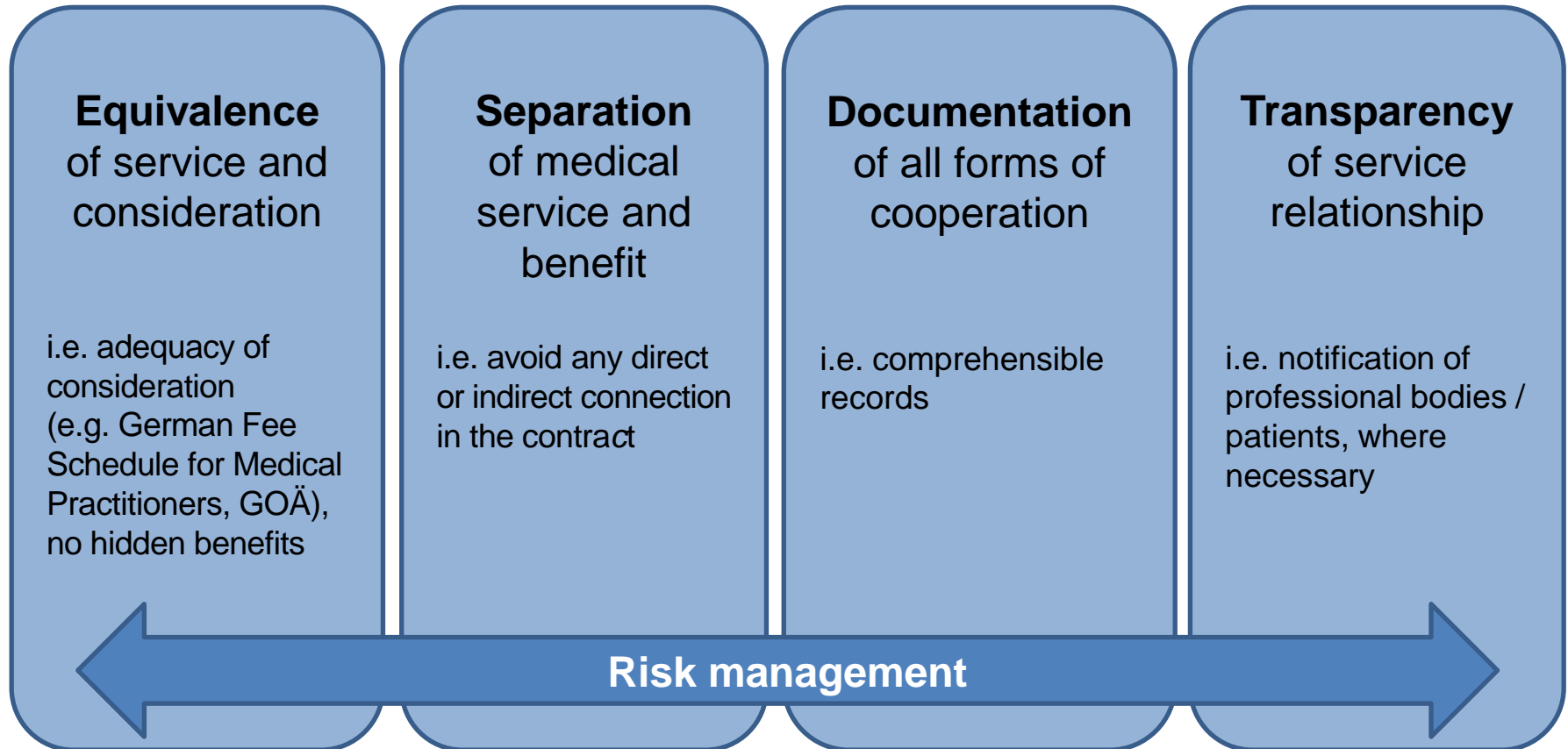
## Corruption

- kick-back payments
- private trips
- leisure offers
- bogus conferences

## Cooperation

- is desired
  - partly seamless transition from desired cooperation to punishable corruption
- Observation of the guiding principle to minimise risks

# Practical Implications: Cooperation or Corruption?



Speaker

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