



# TRANSPARENCY INTERNATIONAL

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### **Submission of TI Deutschland To GRECO**

**Regarding the Evaluation of Anti-Corruption Activities in Germany  
Munich, 21 September 2001**

**By Michael H. Wiehen, Chairman TI Deutschland**

#### **General.**

TI Deutschland welcomes the opportunity to submit to the Secretariat of GRECO its own evaluation of the efforts at Federal, State and municipality level at fighting corruption.

In the annual Corruption Perceptions Index of TI (CPI), Germany has slipped over the last three years

- from Rank 14 (among 99) and a value of 8.0 on a scale of 10 (best) to 0 (worst) in 1999,
- to Rank 17 (among 90) and a value of 7.6 in 2000,
- to Rank 20 (among 91) and a value of 7.4 in 2001.

While the year-to-year comparison should not be overemphasized, the trend is sobering.

This international perception of the need for bribery and corruption if one wishes to do business in Germany clearly reflects the increasing number of corruption cases reported by the media in Germany, from political corruption (involving i.a. the funding of political parties, influence peddling and the mismanagement of publicly-owned corporations) to corruption in public procurement at State and municipality (not the Federal) level to corruption at municipal offices dealing with permits e.g. building or drivers permits, concessions e.g. for street cleaning or cemetery gardening and alike. Wherever serious efforts were made, and sufficient resources were made available, to investigate corruption, many cases were and are being uncovered. If some urban areas appear in the statistics to be particularly prone to corruption, this reflects also the efforts at investigating corruption in those areas. Based on extensive media reporting and on criminal statistics, it is safe to conclude that corruption of many kinds exists on a rather large scale in a large number of administrative units in Germany, and it probably has been getting worse over the last few years rather than better.

We refer here only to the many recent scandals in construction procurement in Munich, Frankfurt, Dortmund and Wuppertal (where several hundred officials and businessmen are



presently under investigation), in the mismanagement of public corporations such as the Berliner Bankgesellschaft, the Bavarian Red Cross and other banking corporations, and the corruption detected in several of the medical clearing houses for the funding of social medicine. Particularly worrying to us is the fact that in many cases the competitors collude with each other and form cartels which, with or without partners from inside the defrauded office, effectively control the award of large contracts to their members.

Public awareness of corruption problems has risen over the last 2-3 years, largely as a result of the more frequent and detailed media reporting, but many of the cases prosecuted demonstrate a remarkable degree of criminal energy and determination to use corruption in order to circumvent the traditional rules of competition. It is alarming that in several large cities recently new flourishing cartels have been uncovered, even though in those same cities other cartels had just been broken up and severe penalties had been imposed. This impudence or lack of inhibition of companies and officials suggests that the public condemnation of corruption is far from effective as of now.

Research on corruption issues is a rather recent phenomenon, but more and more studies on specific issues are being conducted at sub-doctoral and doctoral level and above; particularly interesting is a recent thorough analysis of "Corruption in Germany and its Criminal Control" (by Britta Bannenberg, dated July 2001).

There have been numerous efforts and initiatives by Federal, State and municipal authorities to curb corruption, but the laws still have major gaps, and the existing laws, regulations and institutions are not being utilized with equal intensity across the landscape.

At the Federal level, the Guidelines of June 1998 on Corruption Prevention are apparently being slowly implemented across the institutions covered by the Guidelines, albeit with differing intensity. We only regret very much that the Central Register of companies found to have bribed (and therefore to be excluded for an appropriate period of time from future competition), which the Guidelines of June 1998 presumed to be in existence, has yet to be established. Blacklisting companies for bribery is surely the most effective sanction. We would urge the Federal Government once again to go ahead and introduce this Register without further delay.

At the State level, the Innenminister-Konferenz (Conference of State Ministers and Senators of the Interior) in its "Second Report on the Corruption Prevention and Fighting Concept" (2. Bericht über die Umsetzung des Präventions- und Bekämpfungskonzepts Korruption) of 1997 showed an impressive number of unrelated corruption-prevention or -fighting measures and initiatives in the States, but it also showed that there was too little effort or emphasis on coordinating State efforts or learning from each other, and little has been said about country-wide cooperation (among Federal, State and municipal authorities and institutions) in the fight against corruption. Inadequate attention appears to be directed also at the sensitization and training of staff at all levels.

At the municipal level, several cities, especially some of the larger ones, have introduced a system of measures designed to curb corruption, but unfortunately recent experience shows



that the best system and structure is ineffective unless adequate financial and staff resources are put behind the effort. We wish to give due credit to the strong efforts made by many individuals in State and municipal offices to bring the scourge of corruption under control, but we do not have the impression that any municipal administration in Germany is truly united in the fight against corruption, and has allocated to the critical institutions the necessary resources to achieve the goal. It has not yet sunk in that the damage from corruption is so high that every DMark invested in prevention, control and prosecution measures will bring multiple returns (from reduced damage as well as revenues from fines, confiscations and damage liability).

### Re the GRECO Questionnaire Part I:

**Regarding Point 1.2 (*measures taken to fight corruption*)**, we would express dissatisfaction with the German legal provisions on a number of issues:

- The absence of an effective criminal liability of legal entities or corporations is a serious lacuna which is not counter-balanced by other legal provisions and thus needs to be filled. The Ordnungswidrigkeiten-Gesetz (OWiG or "minor infringements statute") regularly cited by the authorities as an "equivalent effective" measure in our view is not adequate at all: It has a ceiling on fines that is too low, it contains restrictions on a combination of fine and confiscation of the fruits of the crime, and because of its title and restrictions it leads people to consider corruption a "petty crime". Incidentally, on this issue the Federal Republic in our view is also not yet in full compliance with the OECD "Convention Against Bribery of Foreign Officials".
- The absence of even a limited "witness-of-the-crown" provision is a serious hurdle to the effective investigation and prosecution of corruption cases.
- Prosecutors should be able to use telephone monitoring of suspects in severe cases of corruption.
- Under § 73 of the Criminal Code, the fruits of a crime cannot be confiscated if a victim might post a claim; considering that corruption normally has no direct victim, and if it does, the victim may well be reluctant to out himself for fear of being prosecuted, the confiscation rules for corruption crimes should be significantly broadened and strengthened.
- § 108e of the Criminal Code dealing with the bribing of members of the European Parliament, Members of the Bundestag and members of state and municipal legislatures needs to be expanded in two ways:
  - since most important decisions today are made in committees, the "purchase of votes" needs to apply to voting in committee as well; and
  - at present, the bribery must have taken place prior to the voting; the "thank-you-bribe" after the vote must be equally covered.
- The absence of effective whistleblower protection in Germany reflects a public distaste for "informers" going back possibly to the infamous informer system in our dictatorial past history. No public effort has yet been made to address this issue and to try to turn around the public condemnation of "informers" into a public commendation for citizens willing to provide information on criminal acts being committed in their office or by



their co-workers. Whistleblower protection is a new issue in Germany on which the ground has yet to be prepared.

- Another serious issue is the inadequate cooperation among the various offices capable of providing information on corruption evidence:
  - Under Federal tax law (Steuerentlastungsgesetz 1999/2000/2002 dated 24. March 1999) the tax authorities are required to inform the prosecutors of any indication they find (while checking the books) of a criminal act such as bribery. It is not entirely clear to what extent this requirement has actually been complied with; still, there are press reports that at this moment the Federal Ministry of Finance is drafting new regulations which are designed to restrict this requirement of mutual information. This would be most regrettable.
  - Officials of any public administration as well as of the courts of audit should be under legal obligation to inform the prosecutors' offices of any substantiated suspicion of corruption they come across in their work.
- Germany needs a "revolving door" or "pantouflage" rule under which senior officials of Federal, State or European offices are prohibited from accepting employment with corporations or persons with whom they had official dealings, during a grace period of say five years.
- Finally, Germany should support and demand the establishment of a European Prosecutors Office.

**Regarding Point 5.1 and 5.7** (*concerning the finances of political parties*), a Presidential Commission on Party Funding (Kommission unabhängiger Sachverständiger zu Fragen der Parteienfinanzierung) has recently issued recommendations on revisions to the law on party funding. TI Deutschland had submitted detailed proposals to the Commission, only some of which were accepted into the Recommendations of the Commission. Among our other proposals – which we still think need to be incorporated to ensure a minimum degree of transparency in party funding – were the following:

- A ceiling on the size of donations to a political party or a candidate;
- Prohibition of donations by corporations to individual candidates;
- No cash donations allowed;
- More transparency by the requirement to publish donations above a rather low threshold;
- Tougher sanctions in cases of violations including criminal liability, loss of mandate and loss of right to stand for election.

**Regarding Point 5.4** (*disclosure of assets and income by members of elected bodies*), TI Deutschland has recommended to the Kommission that

- members of the Bundestag be required to disclose additional income not only to the President of the Bundestag, but to put this information on the Internet;
- members of the various elected bodies and senior officials be required to disclose any potential conflict of interest ahead of time, and refrain from participating in any decision making that might affect them personally in any manner;
- the political parties are urged to establish a code of ethics for their members, with appropriate sanctions in cases of breach.



**Regarding Point 5.5**, procurement rules in Germany are basically adequate, except that they are too often breached with little consequence. In particular the thresholds for applying competitive procedures are too often violated (i) on grounds of "urgency" which may not be truly justified and may in fact be manufactured on purpose and (ii) on grounds of "protecting local industry and local jobs" which frequently is directly associated with corruption and, even if it is not, is associated with higher prices for which there is no justification. Reports of the Federal Court of Audit (dated October 2000 ) and of the Berlin Court of Audit (of 1995) report on and criticize the high degree of non-compliance, but apparently without any consequence. The Federal Court of Audit had reviewed the compliance with prescribed procedures for about 11000 contracts entered into during the period 1995-1998 by the Federal Transport Administration. The Court's sobering conclusion was that "the non-compliance with the general principle of public competitive bidding (for all contracts below the threshold which requires Europe-wide competition) can be considered nearly standard, with no convincing arguments being offered to justify this practice". As a minimum, the respective legislatures should officially address all issues raised by the court of audit, and administrations should be required to justify their (non)action.

German procurement rules, although basically adequate, indeed should be modified in one important respect: While the bid opening is to be public and the bid prices are read out, the process of evaluating the several bids and determining the winner is secret. Only the name of the winner is announced, not the reasons for selecting him. This allows officials with criminal intent to manipulate the evaluation and thus the award. The procedure should be changed so as to assure transparency of the evaluation process and decision. Several other countries today resort to putting all procurement decisions, including the evaluation process and reasons, on the Internet. Germany should adopt this transparent process in order to minimize the opportunity for manipulation during the evaluation. Unfortunately, a current proposal for a Federal Freedom of Information law, which would provide for some degree of transparency of government administration decision making, explicitly excludes procurement information and provides for continued secrecy of this vital information. This needs to be changed.

**Regarding Point 5.6** (*concerning the validity of contracts obtained through bribery*), German civil law says that a contract obtained through bribery is unethical ("sittenwidrig") and consequently null and void. Of course it takes a party to claim the non-existence of legal obligations. But the law is clear.

Some jurisdictions in Germany have decided to introduce clauses of "liquidated damages" into construction contracts, providing for a liability for damages in a pre-determined amount ("x % of the contract value") if a party is found to have discussed the contract with a competitor and thus to have committed collusion. This clause has proven to be extraordinarily effective. However, the trigger should be "bribery" as well as "collusion", and it should be applied countrywide.

The German export credit insurance institution Hermes Exportkreditversicherungs-AG 18 months ago introduced, at TI's urging, no-bribery-affidavits which have to be signed by every



applicant for insurance cover. Similar no-bribery or integrity clauses should be applied by Federal, State and municipal authorities to raise the awareness of the contractors and to credibly threaten criminal contractors and suppliers with sanctions serious enough to have an impact.

**Regarding Point 5.12 (concerning access to information)**, Germany has a tradition of secrecy of public information, the principle being that everything is secret unless it is specifically declared public. Over the last four years three States in Germany (Brandenburg, Berlin and Schleswig-Holstein) have changed this paradigm and introduced Freedom of Information laws, with excellent results. A bill for a Federal Freedom of Information law has recently been published which unfortunately contains a number of highly restrictive provisions and provides for prohibitive costs and fees. This bill requires substantial redrafting to come up with an effective Freedom of Information law. TI Deutschland has submitted detailed recommendations for changes. It should also be noted that bills for similar laws are under active discussion in several other States in Germany, especially in Northrhine-Westfalia.

#### **Re the GRECO Questionnaire Part II Section A (Guidelines 3 and 7):**

**Regarding Points 1.1 and 1.2**, several States and municipalities have established organs specialized on corruption fighting. The so-called "Schwerpunktstaatsanwaltschaften" (units of prosecutors dealing exclusively with corruption or other economic crime cases) have proved their value; but at this time there are only 7 of them in existence (Munich, Frankfurt, Wuppertal, Neuruppin, Hamburg, Hannover and Kiel), and it appears that even they are not nearly adequately provided with staff and other financial and technical resources. Generally, more prosecutors, with specialized knowledge and experience about economic crime, and better (dedicated) police support are called for. A number of municipalities have established task forces and control groups against corruption, but recent experience in Frankfurt and Munich shows again, that inadequate staff resources easily render such units ineffective. Many authorities have experimented with such measures as frequent rotation of staff in sensitive positions and the four-eyes principle. Such measures are necessary but not sufficient by themselves.

Unfortunately the German State Courts of Audit (Landes-Rechnungshöfe), with the exception of Hesse, have not seen it as a principal task to pursue any indications of corruption they come across during the audit work, even though they clearly have the competence, the resources and, in our view, also the mandate. This may be changing but not fast enough. Furthermore, there have long been efforts to provide the courts of audit with the right to initiate or to suggest criminal prosecution, but so far to no avail. As a minimum, they should be under obligation, as called for above, to report serious suspicion of corruption to the prosecutors.

**Item:** Abolishment of the Office of the Federal Disciplinary Attorney (Bundesdisziplinaranwalt): Germany still has the Office of the Federal Disciplinary Attorney (and a Central Disciplinary Court) to deal with disciplinary offenses by civil servants. As part of a major overhaul of the general legislation concerning the substantive and procedural aspects of civil servants rules, this office is to be abolished shortly. TI Deutschland had campaigned against this abolishment, to no avail, because we think that the Federal Disciplinary Attorney, who is independent and not



subject to instructions, should continue to be able to monitor the handling of disciplinary cases throughout the country, and he should continue to be able to take heads of offices to task who – following a not uncommon inclination – rather terminate a disciplinary case than allow a possibly embarrassing investigation of a corruption case under their jurisdiction. We still believe the Federal Republic needs to retain the Office of the Federal Disciplinary Attorney and should modify the recent change legislation accordingly.

**Item:** Public Control Instruments: Over the last decade or so, some public control instruments were in fact reduced with the objective of "cost control". Under the impact of public health and other problems such as e.g. BSE and Lipobay, new institutions and instruments are being developed such as the new central consumer protection agency, the improved prescription drug controls and the changed marketing procedures for veterinary drugs. These are initiatives in the right direction, but they are painfully slow and not yet adequately funded.

**Regarding Point 1.9**, anecdotal evidence suggests that the customs and tax authorities are not nearly as willing to share indications of corruption with the prosecution authorities as we believe they should be. Indeed, at this moment the Federal Ministry of Finance is engaged in redrafting and apparently weakening the instructions for tax officials as to what they should pass on to the prosecutors. This is most unfortunate. See above.

**Regarding Point 1.12** (*concerning the independence of public prosecutors*), public prosecutors are subject to instructions by their administrative and political superiors. It appears that this right to give instructions is not, in everyday activities, being used to exercise undue influence or otherwise abused. However, the situation gets more precarious when prosecutorial investigations get close to prominent political figures. In the last year or two, several cases have been reported in the media where the suspicion of direct and undue influence certainly was palpable.

**Regarding Points 1.15 and 1.20**, introduction of a true "witness-of-the-crown" procedure would significantly enhance the ability of prosecutors to obtain cooperation from corruption perpetrators, considering that corruption is a crime with no immediate victim. See also above.

**Regarding Point 1.18**, the whole concept of whistleblowing and whistleblower protection needs major attention in Germany. See above.

**Regarding GRECO Questionnaire Part II Section B (Guideline 6):**

TI Deutschland has no information and no experience on this issue.