



2008 TI Progress Report on OECD Convention Enforcement

Questionnaire for TI National Chapters in OECD Signatory States

22.1.08

Questionnaire for: (Name of country) **Germany**

Date: **28.3.08**

I. Current Status of Enforcement

Please note: Foreign bribery cases (and investigations) shall include all cases involving bribery of foreign public officials, criminal and civil, whether brought under laws dealing with corruption, money laundering, tax evasion, fraud, or accounting and disclosure.

A. TOTAL FOREIGN BRIBERY CASES, PENDING AND CONCLUDED: _
_over 200_____ (=Sum total of numbers under B. & C.)

B. PENDING CASES: Pending foreign bribery cases

Please list all pending foreign bribery cases brought since the OECD Convention became effective in your country.

Total number of pending cases: more than 100 _____

Cases pending brought since 1 January 2007: ca 50 _____

There is generally no official Federal Government's or Bundesländer report on foreign bribery cases and allegations.

However, The Federal Government has just recently, in the Answer of March 10, 2008, to the request (Kleine Anfrage) of the Party "Bündnis 90/Die Grünen) to the Enforcement of the OECD Convention –BT- Drucksache 16/8463 (Att. 1) published the following information on foreign bribery investigations and cases which is based on the communication of the Bundesländer:

Number of investigations: 2004: 24;
2005: 65
2006: 88

2004 – 2006: 177

Number of terminations 2004 – 2006: 21

Number of indictments 2005 – 2006: 13
Number of convictions 2005 - 2006: 9

For each case please list if possible the following:

- (1) Name of case, including principal parties
- (2) Is this a major case? (See Guidelines for definition) Yes___ No ___

Note: For major cases please provide as much detail as possible to the questions below. Less detail is needed for minor cases.

- (3) Is it a criminal or civil case?
- (4) Date and court where filed
- (5) Current status of case i.e. likely trial date
- (6) Summary of principal charges, including name of the country whose officials were allegedly bribed
- (7) Penalties or other sanctions sought
- (8) To your knowledge has a case involving the same facts or defendants been brought in another country? If so where and when?
- (9) To your knowledge, is there a pending request or requests for mutual legal assistance lodged with another country?

C. CONCLUDED CASES: Including convictions, settlements, dismissals or other final dispositions of cases

Total number of concluded cases: 30:

Convictions : 9

Terminated cases: 21

Cases concluded since 1 January 2007: ca 20

For each case please list if possible the following:

Convictions.

1.. Landgericht in Baden-Württemberg, March 23.07; in one of the two proceedings against an international transport company (Betz) on suspicion of bribery of foreign public officials to illegally obtain ECMT licenses, the domestic co-indicted public official who received travel costs and an automobile as bribery payments, was, after confessing to corruptibility, convicted and sentenced to imprisonment of 11 months, suspended on probation.

2. . Landgericht in Bayern.

In a proceeding based on suspicion of bribing a Slovakian public official, a defendant was, inter alia, convicted and sentenced to an aggregate sentence of imprisonment of two years and ten months and an aggregate fine of 400 daily rates of 250 € each based upon bribery of a foreign public official (§ 334 StGB in conjunction with the Act on Combating International bribery (IntBestG).

***3/4. : Landgericht Darmstadt, . May 14, 2007, of two managers
of a division of Siemens headquartered in Hesse***

One of the defendants was convicted of bribery in business transactions (§ 299 StGB) and breach of trust and sentenced to two years of imprisonment suspended on probation.

In addition, he is to make a payment of 400.000 € to charitable organisations.

The conviction was not based on bribery of a foreign public official in international transactions because the court could not find that the recipient of the money had the status of a public official.

The second defendant was convicted of aiding and abetting the above-named crime and sentenced to imprisonment of nine months on probation.

In regard to the company, the court ordered forfeiture of the profits: The Company must pay 38 million € to the state treasury to compensate for profits from the contracts obtained by the bribery.

The convictions are not yet final.

5/7 : Landgericht in Hessen:

The proceeding, based on, inter alia, suspicion of bribing Central Asian public officials in connection with a contract for the supply of dispatch equipment for an airport, was terminated in 2006 in regard to this accusation because the necessary proof of an illegal agreement between giver and recipient could not be produced.

The orders of summary punishment issued against three accused persons based not upon bribery of public officials but on fraud and breach of trust or aiding and abetting breach of trust have become final and binding. Imprisonment of up to one year was imposed the execution of which was suspended on probation.

8. Landgericht in North-Rhine Westphalia:

Of eleven proceedings upon the evaluation of the final report of the IIC, none has resulted in charges in regard to bribery of foreign public officials, but one proceeding based upon violation of the Foreign Trade and Payments Act was concluded by sentencing a defendant with a fine of 200 daily rates of 150 € each and the imposition of a company fine pursuant to § 30 of the Act on Administrative Offences with final and binding effect.

Terminations:

In Baden-Württemberg:

A proceeding against three senior employees of a German company who allegedly paid bribes within the framework of a construction project in an Eastern European country was terminated in Dec. 2006 pursuant to § 170 subs, 2 St PO (insufficient reason for the preferment of public charges). There was a lack of sufficient suspicion and the possible beneficiaries were not public officials.

Criminal liability based upon bribery in business transactions was also rejected because the supply agreement at issue was concluded in August 2002 and thus prior to the date of effectiveness of the Regulation on Foreign Criminal Liability upon bribery in business transactions (§ 299 StGB).

In Bavaria:

Of the seven examinations in connection with the UN program “Oil for Food” , three

proceedings were terminated in accordance with § 170 subs. 2 St PO (insufficient grounds for the preferment of public charges). It could not be proven that payment in Iraq took place.

The investigations of the other cases are mainly based upon suspicion of the Foreign Trade and Payments Act.

In Brandenburg:

A proceeding in connection with a contract award for the construction of a street in an Eastern Central European country was terminated at the end of June 2006 in accordance with § 170 subs.2 St PO (insufficient grounds for the preferment of public charges). The investigations did not confirm the suspicion. A flow of money to foreign public officials was not established despite substantial evaluation of accounts.

In Hamburg:

The preliminary investigation proceeding based upon payment of a commission after the privatization of a cement factory in South East Europe has been terminated in accordance with § 170 St PO (insufficient grounds for the preferment of public charges),

as well as the investigation proceeding after the self-denunciation of an accused based upon suspicion of bribery of public officials in a Southeast Asian country.

In Hessen:

The investigation proceedings against companies from Hesse in connection with the final report of the IIC are now being completely dealt with through the so-called “rapid deployment team” that is attached to the Chief Public Prosecutor’s Office of the Frankfurt Higher Regional Court.. The matter now involves ten individual proceedings (last year seven) of which search warrants have been obtained and executed in eight cases.

In Lower Saxony:

One out of five investigation proceedings related to disclosures of the IIC regarding the UN’s “Oil for Food” program has been terminated based on a lack of sufficient suspicion pursuant to “ 170 St PO; one other proceeding was provisionally terminated pursuant to § 153a subsection 1 StPO (termination upon fulfilment of conditions and instructions) on the basis of a monetary condition of 4.500 € In all of the cases the charges were violations of the Foreign Trade and Payments Act, but none of the five proceedings has resulted in charges in regard to bribery of foreign public officials.

In North-Rhine –Westphalia:

Eleven proceedings have been conducted related to disclosures of the IIC regarding the UN’ “Oil for Food” program. None of these proceedings has resulted in charges in regard to bribery of foreign and international public officials, but they were based upon violation of the Foreign Trade and Payments Act.

Of the eleven proceedings, one was terminated pursuant to § 170 subs.2 St PO (insufficient reason for the preferment of public charges), two were provisionally terminated pursuant to § 153 a subs.1 St PO (termination upon fulfilment of conditions and instructions). In both of these proceedings company fines pursuant to § 30 of the Act on Administrative Offences were imposed.

In Rhineland-Palatinate:

Two proceedings involving the UN “Oil for Food” program upon violation of the Foreign Trade and Payments Act were terminated, in one case concerning the kickback Payment of 14.655 €pursuant to § 153 a St PO upon monetary conditions of two responsible individuals of the company of 35.000 €and 25.000 €, in the other case the proceeding was terminated pursuant to § 170 St PO (insufficient reason for the preferment of public charges).

In Schleswig – Holstein:

Two of four proceedings in connection with the final report of the IIC have been terminated pursuant to § 170 St PO (insufficient reason for the preferment of public charges). In both cases, there were no illegal payments found.

(1) Name of case, including principal parties (Please indicate if major multinationals involved)

(2) Is this a major case? (See Guidelines for definition.) Yes___ No ___

Note: For major cases please provide as much detail as possible to the questions below. Less detail is needed for minor cases.

(3) Date and court where filed

(4) Is it a civil or criminal case? _____

(5) Summary of principal charges, including name of the country whose officials were allegedly bribed

(6) Penalties or other sanctions sought

(7) Criminal or civil case

(8) Disposition of case (Please describe form and substance of disposition)

(9) To your knowledge has a case involving the same facts or defendants been brought in another country? If so where and when?

D. INVESTIGATIONS UNDER WAY

Please provide available information on government investigations of allegations of bribery of foreign public officials which were commenced since the OECD Convention became effective in your country.

Total number of known investigations: more than 200_____

Number since 1 January 2007 :ca 50_____

If information unavailable, please indicate:_____

E. ACCESS TO INFORMATION: Information available about foreign bribery cases

Is there adequate public access to information about foreign bribery cases?

Yes___ No_____

If yes, please specify what kind of access is provided? _____

If no, in what way is the access inadequate? What reasons are given for the lack of access? _____

The scope of this question is not quite clear for Germany.

Official information by the prosecution authorities or by the courts about investigations or pending cases is limited in Germany by the legal protection of personal rights of defendants and the presumption of innocence of accused persons.

On the other hand, public information by the press or other media about interesting investigations and cases of bribery, included foreign bribery, is by no means restricted in Germany.

F. SERIOUS ALLEGATIONS

Please provide information about serious allegations of foreign bribery or related offences by companies or individuals based in your country, that (a) have been published in reputable international or domestic publications since the OECD Convention became effective in your country, and (b) with respect to which, as far as you know, no investigation or prosecution has been undertaken.

Total number of serious allegations: 0_

For each matter, where available, please list the following:

- (1) Names of companies and/or individuals involved
- (2) Date of publication:
- (3) Nature of allegations
- (4) Name of country whose officials were allegedly bribed

II. Actions to Promote Enforcement	
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A. Organisation of Enforcement

1. Is there a centralised national office or unit for foreign bribery enforcement?

Yes___ No **X**__

2. If foreign bribery enforcement is not centralised, what level of coordination and supervision is provided for foreign bribery enforcement?

Please circle one of the following:

UNSATISFACTORY **X** SATISFACTORY

Explanation for choice, including any difference from last year:

As explained already in the past years, the jurisdiction for law enforcement rests with the Länder. The competence of the Federal Ministry of Justice, the Generalbundesanwalt and of the Bundeskriminalamt is regulated by the Basic Law and is limited, they have no supervisory powers.

The main competence for the prosecution and investigation of crimes, committed in Germany or abroad, including foreign bribery cases, lies with the Länder. Accordingly, organisational procedures and institutional structures for the investigation and prosecution of corruption cases may vary from Land to Land.

But there is to observe in the last years a tendency in most of the Länder to concentrate the responsibility for the prosecution of foreign bribery cases in special prosecution units, and an effort among the prosecution authorities of the Länder to exchange data, experience and best practice models.

The results of the enforcement in 2007 (pending and concluded cases) laid down in Section I show a serious progress in the general prosecution of foreign bribery cases.

Also the Federal Government makes credible efforts to provide adequate guidance and ground rules for the investigation and prosecution of bribery cases, but its possibilities for coordinating the Länder activities are limited. Worth noting in this context is, as in 2007, the publication in 2006 of the federal guideline for criminal prosecutions and administrative sanctions ("RiStBV") which advises prosecutors i.a. on how to deal with the liability of legal persons (see further below). And as a result of a new law that came into force in 2005, there is now better coordination of data among the Länder and the Federal Government.

In addition, the Federal Government has submitted to the Bundestag a bill (with a wide public consultation process) that would incorporate into German law several obligations Germany has subscribed to in international conventions, including the UN Convention on Corruption.

If Germany had a centralised Federal Office for foreign bribery prosecutions, we might see more investigations and court cases. But there is little likelihood –seen the rules of distribution of competence between the Federal Government and the Länder -, that Germany will and can introduce central (federal) legislation.

We support therefore the continued transfer of competence for foreign bribery cases to special prosecution units within the Länder and the continued and effective exchange of the experiences and best practice cases between the prosecution authorities of the Länder themselves and with the Federal Government.

Available Resources

How would you assess staffing and resources for foreign bribery enforcement?

B. Complaint Procedure

How would you assess your government's efforts to provide publicly-known and accessible procedures for reporting foreign bribery allegations, such as hotlines and websites?

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY

Explanation for choice, including any difference from last year:

s. Answer to 1 E above.

The scope of this question does not fit for Germany.

C. Whistleblower Protection

1. How would you assess the level of whistleblower protection in law and in practice in the public sector for foreign bribery complaints?

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY

Explanation for choice, including any difference from last year:

The Federal Government last year submitted to the Bundestag a bill allowing federal civil servants to report serious crimes –including any form of corruption- directly to a public prosecutor instead of to their immediate superior.

This bill which would lead to a fundamental and far-reaching improvement in the current situation and would be a major advance in the protection of whistle-blowers within the civil service has not yet passed the Bundestag.

2. How would you assess the level of whistleblower protection in law and in practice in the private sector for foreign bribery complaints?

Please circle one of the following:

UNSATISFACTORY SATISFACTORY

Explanation for choice, including any difference from last year:

At present there is no specific whistleblower protection legislation that applies to the private sector. The Federal Minister for Labour is considering to prepare legislation that would establish the same rules for the private sector as for civil servants. Such legislation would translate existing rulings of the Federal Constitutional Court and the Federal Court of Labour safeguarding the rights of whistleblowers into written law. But this Law has not even been submitted to the Bundestag.

Also in the jurisdiction of the Labour Courts, one cannot see the establishment of rules of effective protection of whistleblowers.

We would consider as one means of more effective protection to whistleblowers the introduction by law of an independent contact point or address to which a potential whistleblower could give his information.

As already reported last year, several large companies in Germany have, on a voluntary basis, stepped up their efforts to curb corruption by sharpening their internal proceedings and by establishing reporting and disclosure mechanisms such as anti-corruption ombudsmen or whistleblower hotlines. Among these companies are ABB Germany, Allianz, BASF, Deutsche Bahn AG, Deutsche Telekom, DaimlerChrysler, Hochtief, Siemens and Volkswagen as well as AOK Niedersachsen (public health insurance in the state of Lower Saxony). According to an article published by the German Society of Personnel Issues, the various procedures established by the private sector have proven to be largely successful and have led to hundreds of investigations. At Deutsche Bahn AG alone, the creation of the position of two anti-corruption ombudsmen had led to 33 criminal convictions by the end of 2004.). No distinction is made, in this case, between domestic and foreign bribery.

D. Statutory and Other Legal Obstacles

1. Are there significant inadequacies in the legal framework for foreign bribery prosecutions in your country?

Yes _____ No **Almost no** _____

Lack of a central prosecution office

2. If so, please indicate if these include:

- Inadequate definition of foreign bribery Yes _____ No **X** _____
- Short statutes of limitation: Yes _____ No **X** _____
- Jurisdictional limitations: Yes _____ No **X** _____
- Lack of (criminal) liability for corporations: Yes **X** _____ No _____
- Inadequate sanctions: Yes _____ No **X** _____

3. Please list any additional inadequacies:

Lack of a public register of companies debarred on corruption grounds from competing for public contracts.

- _____
- _____

Explanation for choice, including any difference from last year (at least 1 paragraph):

E. Political control over enforcement actions/ Independence of prosecutors

Are you aware of any instances where a foreign bribery investigation or prosecution has been terminated by political decision-makers?

NO

F. Actions Needed in Your Country

1. Your suggestions

Please list, in order of importance, the most important actions the government in your country should take to promote enforcement and compliance. Please consider the actions listed above, but feel free to add other actions.

- a) The data of the Länder concerning (foreign) bribery cases should be accessible to the public more easily, and in a more timely fashion.**
- b) Strengthen the "effective, adequate and deterrent" sanctions for legal persons liable for bribery committed by their representatives.**
- c) Strengthen the financial and personnel resources of bribery investigation and prosecution authorities.**
- d) Establish a Central Register for the purpose of debarring corrupt companies from competing for additional public contracts.**
- e) Enact legislation effectively protecting whistleblowers both in the public and private sector, introduction by law of an independent contact point or address to which potential whistleblowers could give their information.**
- f) Consider shifting jurisdiction for investigating and prosecuting foreign bribery cases from the Länder to a Federal office. The prosecution of terrorism charges and hate crimes – in which case the Chief Federal Prosecutor can assume responsibility for enforcement - might serve as a model.**
- g) Notwithstanding proposal f), centralised institutional structures should be created in all Länder for the investigation and prosecutions of all corruption cases to allow for more systematic and effective enforcement,**

G. Enforcement Trends

1. How would you assess the current level of foreign bribery enforcement in your country?

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY X

2. Did your government's enforcement efforts increase since last year?

Please choose one of the following:

1	2	3 X
<i>Decreased enforcement</i>	<i>No change</i>	<i>Increased Enforcement</i>

Report prepared by :

_____ (signature)

Name of respondent: Dr. Max Dehmel

Affiliation: Head of TI working group on International Conventions

Professional experience: Former civil servant

Appendix

List of persons consulted (with affiliation) :

Dr. Mathias Korte ,

Oberstaatsanwalt beim Bundesgerichtshof,
Head of Section II A 4 "Strafrechtliche Bekämpfung der Wirtschafts-,
Computer -, Korruptions- und Umweltkriminalität " at the Federal Ministry of Justice,
Mohrenstr 37, 10117 Berlin,
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E-mail: korte-ma@bmj.bund.de

Dr. Anke Raloff,

Federal Ministry of Economics, Rechtsreferat (ZR)

List of references and sources used in responding to this questionnaire :

**Att. 1: Antwort der Bundesregierung vom 10.03.2008 (BT-Drucksache 16/8463)
auf die Kleine Anfrage der Abgeordneten Jerszy Montagund der Fraktion
"Bündnis 90/Die Grünen" : Praktische Umsetzung der Strafvorschriften zur
Bekämpfung der Auslandskorruption.**

