



**TRANSPARENCY
INTERNATIONAL**
Deutschland e.V.

Die Koalition gegen Korruption.

2007 Transparency International Progress Report on OECD Convention Enforcement

Questionnaire for TI National Chapters in OECD Signatory States

Questionnaire for Germany

Date: 05.04.2007

I. Current Status of Enforcement

A. Prosecutions brought for foreign bribery

Please list all cases involving allegations of bribery of foreign public officials brought by prosecutors in your country since the OECD Convention became effective in your country. The list should cover as far as possible all cases relating to bribery of foreign public officials, whether brought under laws dealing with corruption, or under other laws, such as laws dealing with fraud, money laundering, and tax evasion or accounting violations.

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

➤ Yes___ No__X__

If yes, please specify what kind of access is provided? If no, in what way is the access inadequate?

- As was reported previously, the access to data on foreign bribery cases in Germany is complex and difficult. The 16 Länder (which have jurisdiction) are, partly out of respect for the existing laws protecting the personal data of accused persons, reluctant to release such information. However, it may be questioned whether more precise statistics providing anonymised case data would affect data protection concerns.

The Federal Government receives the data but has yet to obtain the permission of the Länder to release them to TI-D and to OECD, and the data published by the Bundeskriminalamt in its Annual Reports (the last one for 2005) are structured differently from those coming from the Länder.

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published by the Bundeskriminalamt in its Annual Reports (the last one for 2005) are structured differently from those coming from the Länder.

The electronic and print media in Germany publish much information about prominent cases, and we make every effort to garner that information, but it is not comprehensive and thus not reliable.

Our best judgment is that there are at least four court cases pending, and probably more than twenty investigations underway.

Total number of court cases:

- 4+

New Cases since 2006 Report:

For each case please list if possible the following:

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

- Siemens AG-Power Subsidiary

(2) Date and court where filed 2007

- Landgericht Darmstadt

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

- Bribery of senior officers of ENEL (power corporation) of Italy

(4) Penalties or other sanctions sought

- too early to tell
- For three other cases, see previous reports; two of them filed in 2004, for one the date of filing is unknown.

B. 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. The list should cover as far as possible

all investigations relating to bribery of foreign public officials, whether brought under laws dealing with corruption, or under other laws, such as laws dealing with fraud, money laundering, and tax evasion or accounting violations.

- Some Länder have reported several investigations of foreign bribery, but without giving details.

Total number of known investigations:

- more than 20

C. 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.

- According to the Volcker Report on the UN Oil for Food Program, 63 German companies were involved in wrong doings but those cases do not necessarily qualify as "bribery" cases. Prosecutors in several Länder are currently said to be investigating , but details are not available.

D. Political control over enforcement actions/ Independence of prosecutors

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

- No

II. Actions to Promote Enforcement

A. Organization of Enforcement

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

- Yes___ No___**X**_

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

Please circle one of the following:

- UNSATISFACTORY SATISFACTORY **X** (barely)

- As explained under section I the jurisdiction for law enforcement rests with the Länder (some of which have established centralized economic crimes or even bribery prosecution offices). The roles of the BKA and the Federal Government are limited, they have no supervisory powers; and the Länder appear to place different levels of priority on the prosecution of foreign bribery cases.

Accordingly, organisational procedures and institutional structures for the investigation and prosecution of corruption cases vary significantly from Land to Land. The potential of this diversity of approaches should be brought to fruition more effectively. As the various models that are applied have specific inherent advantages and disadvantages, the Länder should step up their efforts to engage in a systematic exchange of experience and best practice.

In this context it must also be noted, that prosecutors' offices in several Länder make considerable efforts to tackle corruption and communicate very openly and constructively with TI Germany.

Under a new law that came into force in 2005, there is now better coordination of data among the Länder and the Federal Government.

If Germany had a centralised federal office for foreign bribery prosecutions, we might see more investigations and court cases, but there is little likelihood that Germany would introduce central (federal) legislation.

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 Länder activities are limited. Worth noting in this context (in addition to the actions referred to in last year's Report) is 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).

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

B. Available Resources

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

Please circle one of the following:

- UNSATISFACTORY **X** SATISFACTORY

Explanation for choice, including any difference from last year:

- The question of resources varies significantly between the Länder. Generally prosecutors believe that an increase in personnel and financial

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 **X**

Explanation for choice, including any difference from last year:

- At present there is no specific whistleblower protection legislation that applies to the private sector. But the 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.

On a voluntary basis, several large companies in Germany have 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.

(cf. http://www1.dgfp.com/dgfp/data/pages/DGFP_e.V/Produkte_-_Dienstleistungen/Zeitschrift_Personalfuehrung/Jahrgang_2005/Ausgabe_12_05/TH2_12_05.php)

Are you aware of any foreign bribery cases or investigations that have been brought as a result of whistleblowing by persons in the public or private sector?

- According to the BKA report for 2005, out of a total of 1.649 investigations 68 were initiated following anonymous whistleblower reports. Another 64 reports were made by whistleblowers known to the authorities. These figures indicate that whistleblowers can play an important role in disclosing and uncovering bribery. While the data provided by the BKA do not differentiate between domestic and foreign bribery it is safe to assume that the potential significance of whistleblowing activities applies to both forms of corruption.

➤ UNSATISFACTORY **X** SATISFACTORY

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

- While a significant number of companies have enhanced their anti-corruption efforts (see section D.2), the private sector as a whole does not play a constructive role when it comes to sharpening the tools available to public authorities in the fight against corruption or with regard to the protection of whistleblowers.

All major Business Associations (The Federation of German Industry - BDI-, the Federation of Employers Association - BDA-, the Federation of Chambers of Industry and Commerce - DIHK -, and the Association of the German Insurance Companies - GDV - have - in letters to TI - pointed out that they have repeatedly advised their members that bribery of foreign officials is a crime and that enterprises should introduce organisational measures against corruption.

At the same time, though, they appear to favour voluntary action by the industry and oppose stricter legislation.

H. Statutory and Other Legal Obstacles

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

- Yes **X** No

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):

- Regarding the criminal liability of legal persons, we still (refer to last year's Report) believe the pecuniary sanctions under the OWiG are not adequate.

We have had a long-standing and controversial debate with officials of the Federal Ministry of Justice on the introduction of criminal liability of legal persons. While it is true that the OECD Convention does not require the introduction of corporate criminal liability, it does require the existence of "effective, adequate and deterrent" sanctions; we still believe that the present status does not meet this threshold.

However, we explicitly welcome the new Guidelines for the penal and sanctions procedures (RiStBV) referred to above.

III. Actions Needed in Your Country

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" sanctioning of bribery committed by legal persons.
- 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.
- 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.

IV. Current and Anticipated Level of Enforcement

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	X
Decreased enforcement	No change	Increased Enforcement

3. How do you expect your government's enforcement of foreign bribery to change in the coming three years?

Please choose one of the following:

1	2	X
Decreasing Enforcement	No change	Increasing enforcement

Report prepared by:

_____ (signature)

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Affiliation: TI Germany Members

Professional experience:

Carel Mohn holds degrees in political science and journalism from the Free University of Berlin and the Berlin School of Journalism. He was programme officer for Germany, Austria and Switzerland from 1996 to 2001. At present he works as Head of Communications at the Federation of German Consumer Organisations.

Max Dehmel, Dr.jur.MCL, Ministerialrat a.D., former head of section for media, film and book policy in the Federal Ministry of Economics and with the Federal State Minister for Culture and Media.

Supported by Michael H. Wiehen, board member, TI Germany

Appendix

List of persons consulted (with affiliation)

Ministerialrat Dr. Matthias Korte, Federal Ministry of Justice

Regierungsdirektorin Dr. Brahms, Federal Ministry of Justice

Ministerialdirigent Michael Kruse, Federal Ministry of Economics

Ministerialrat Dr. Ernst Röder, Federal Ministry of Economics