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Preventing Corruption in the Federal Administration: Germany

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I. Introduction

Bribery is a double-edged act of corruption that exposes both the giver and the taker to criminal liability. It can appear in widely different forms, and involves essentially a relationship between two conspirators. There is no directly injured party or victim, and consequently no one who has a vital and direct interest in combating it. For this reason, international anticorruption experts speak of a huge "black hole" into which 95% of bribes fall undetected. This means in effect that only 5% of bribery cases are investigated. That is just the visible tip of the iceberg. Moreover, such corruption is to be found at nearly all levels of society.

Only if it operates with integrity can an administration retain the trust of citizens and businesses. Such trust is an essential factor for competitiveness in any sector of the economy.

The risk of temptation is great. Businesses are ever more actively involved internationally and therefore in quite different legal cultures. With the growing pressures of competition, the interface between government and business is becoming a flashpoint for corruption.

Against this background, the challenges facing an anticorruption strategy are many and complex. Such a strategy must therefore be as comprehensive and as integrated as possible. Not only must crimes be thoroughly and promptly investigated and the evidence from of the investigation used effectively, but all efforts must be made to prevent such crimes from being committed.

The following presentation of an anticorruption strategy attempts to do justice to these aspects. Section II deals with prevention, while section III discusses efforts to repress corruption by making optimal use of the results of investigation. Section IV proposes an operational system of sanctions through debarment or "blacklisting".

II. Prevention

The first step in any prevention strategy must be to perform a careful and thorough risk analysis of the dangers of corruption in individual areas of work. Besides the general prevention tools such as enforcement of the "four-eyes" principle, where a second person must sign off on decisions as a form of plausibility control, or job rotation, which can involve either a simple change in the allocation of duties or agency-wide rotation of workers, special consideration should be given to a binding (and not merely exhortative) code of conduct. That code must contain clear and universally understandable rules that will constitute an integral annex to the employment contract or the official's statement of duties.

Another provision with equal legal effect is to issue guidelines for preventing conflicts of interest. They should make clear which forms of additional or secondary activity or employment must be reported, pre-authorized, or prohibited.

We must also emphasise the responsibility of managers and executives in the battle against corruption. Their responsibility for supervising their employees and workers extends to preventing corruption in their respective areas. They need to be made aware of this responsibility through appropriate training. They should be expected to make this topic a regular agenda item for staff meetings. They should arrange for and take part in special events and further training activities. They should be familiar with the typical indicators of corruption and they should have a checklist of "first aid" measures to deal with any case of corruption in their immediate area of responsibility. In addition, in the case of particularly large contracts (for example, major construction projects) the principal or client and the contractor should sign an "integrity pact" in which the parties to the contract agree to submit themselves to an audit by an independent construction expert, and are liable to specific sanctions

(contractual penalties, unconditional cancellation of contract, debarment) if they violate the rules against bribery, fraud or embezzlement.

It is strongly recommended that the general procurement conditions used in every contracting unit should include an integrity clause that will be applied to all public procurement awards. That clause should give the government contracting office a contractual right to impose penalties, contract cancellation and debarment whenever an act of bribery, fraud or embezzlement is detected. The integrity clause as such can be used in the course of negotiations as an incentive for the private sector to do its part to fight corruption.

The goal must always be to encourage the private sector to combat corruption in its own ranks. To this end we have proposed an integrity programme that consists of five essential elements:

- Element 1:

Basic values. Codification of the basic corporate values that must underlie internal and external business transactions. The code expressly indicates that preventing corruption is an integral part of the corporate culture.

- Element 2:

Code of conduct. This sets down company-specific values and rules for prevention, effectiveness and integrity in behaviour. Those rules relating to:

- Gifts or emoluments from and to business partners.
- Handling of corporate funds.
- The duty of confidentiality.
- A basic ban on "side activities", unless expressly authorised.
- Strict separation of private and corporate interests.

- Element 3:

Guidelines. The rules of the code of conduct are set out in concrete guidelines and working instructions.

- Element 4:

Organisational implementation. The code of conduct becomes a component of the labour contract, there is regular internal communication on the issue, it is the object of instruction and further training activities, and the firm's management and supervisory bodies are fully committed to it.

- Element 5:

Documentation and control. There is internal corporate documentation and control over implementation of the integrity programme, preferably through an external audit.

Part III. Prevention through prosecution

To combat corruption effectively requires not only the thorough implementation of preventive measures but also an efficient system of criminal prosecution, ideally through what are known as "special prosecutor's offices" that are located throughout the country and that deal primarily with cases of bribery and related offences. The strict prosecution of acts of corruption can have a significant deterrent effect.

Wherever they have been implemented in Germany, these special prosecutor's offices have shown that they can contribute to deterrence by compiling information and deepening expertise. This is achieved in part through close interdisciplinary cooperation between prosecutors, police investigators, financial inspectors, auditors and accountants (for example INES in Dresden). In this way they can assemble all aspects of a corruption case as quickly as possible and plan the steps for a prompt and effective investigation.

The efficiency of investigation by the state prosecutors is important not only for prompt punishment of criminals but also for making best use of the investigation results. It is essential to ensure that the responsible personnel offices are placed in a position to impose penalties under labour or civil service laws, while protecting the suspect's right to the presumption of innocence. Thorough application of the appropriate measures can greatly enhance the deterrent and punishment potential.

It is also important to launch civil proceedings to recover any bribe money from the recipient, and to demand damages from the person who paid the bribe. Bribes are generally built into the invoice submitted. Against this background there needs to be close cooperation with the prosecution authorities so that, in the course of the official (financial) inquiry, legal action can be taken on behalf of the victim to recover any profit that has been skimmed off.

This calls for interdisciplinary cooperation among the offices involved in these proceedings. This is done, on one hand, through close cooperation of the institutions involved in the preliminary inquiry.

On the other hand, there are provisions in Germany for keeping the responsible authorities informed of the specific results of criminal investigation proceedings in such cases through a compulsory reporting system (MiStra, a sample of the reporting form is available). These reports allow the offices concerned to request and assess state prosecution records and to make use of all the assembled investigation results to take action under labour law and to sue for damages and the repayment of bribes.

The key point at the outset of an internal enquiry during an in-house audit or an official investigation, however, is to extract information from a corrupt relationship.

This raises the question of how to protect informants or "whistleblowers". Behind this concept lies the idea of "picking up" witnesses and informants. This is a significant tactical instrument for crime repression and prevention alike. The importance of a whistleblower lies in the assistance he can provide in identifying weak spots and discovering the various forms that corruption can take (prevention) as well as shedding light into the "black hole" and launching new inquiries (repression), and thereby stopping corruption in its tracks. There is a further preventive effect when such whistleblower protection offers individuals the chance to "bail out" anonymously from a corrupt relationship.

In corruption investigations, a greater effort must be made to induce informants to come forward and report corrupt behaviour. Experience in Poland and elsewhere shows however that informants/whistleblowers often refuse to give up their information, or will do so only anonymously, because they are afraid of unpleasant consequences of a personal, professional or financial kind. To ensure effective prevention and repression in such cases, there must be a competent professional contact person or other mechanism to which they can turn. Whistleblowers must also feel secure in their situations, and protected against discrimination.

In Germany, the federal Laender and the municipalities, and private firms as well, have successfully implemented two kinds of information strategies: the so-called "virtual letterbox" and the "ombudsman system" (which, to avoid confusion, we might better call the "confidential advocate" system). Both systems allow the whistleblower to protect his identity if he so wishes, and to communicate

anonymously. The difference is that the "virtual letterbox" works exclusively via the Internet, while the "ombudsman system" involves direct personal contact and counselling between the whistleblower and the confidential advocate.

In any case, the decisive thing is that the information provided by the whistleblower is taken seriously, i.e. that the information is professionally and properly verified as to its credibility. The inquiry must be pursued promptly and expertly. Experience has shown that the whistleblower should be given feedback in order to document and make clear to him that he and his information are being taken in earnest.

Part IV. An operational government system of sanctions: blacklisting

The threat of blacklisting or debarment against corrupt firms is the most effective but also the most controversial deterrent in the anticorruption arsenal. The key point is not to wait for a final conviction to impose procurement blacklisting, but to do so - after a proper hearing – at a much earlier stage, as soon as there are verifiable and compelling grounds for suspicion (i.e. great likelihood) of the existence of an act of bribery or related offences.

As part of this approach, the firm to be blacklisted should be given the opportunity to clarify the facts and to make good any damages, and to take appropriate organisational and personnel steps to reduce the period of debarment. One such step could be for the firm to provide clear evidence that it has adopted and put into effect an integrity programme.