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First Evaluation Round

Evaluation Report on Germany

Adopted by GRECO
at its 8th Plenary Meeting
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I. INTRODUCTION

1. Germany was the sixteenth GRECO member to be examined in the First Evaluation Round. The GRECO Evaluation Team (hereafter referred to as the "GET") was composed of Captain Peter GARAJ, Senior specialised police officer (Slovak Presidium of Police Force – Department of Fight against Corruption, police expert), Mr. Matti Juhani TOLVANEN, Chief Public Prosecutor, Office of Joensuu Administrative District (Finland, prosecution expert) and Mr. Paul STEPHENSON, Head of Corruption and Criminal Policy Section of the Home Office, (United Kingdom, policy expert¹). This GET, accompanied by two members of the Secretariat, visited Germany from 17 to 21 September 2001 (Berlin on 17-18, Bonn on 19-20 and Munich on 21 September). Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval I (2001) 26E).
2. The members of the GET highly appreciated the possibility of meeting representatives from the various German administrative and policy-making levels (Federation, Länder, municipality) and wishes to thank the Ministry of Justice for having made the arrangements of the visit, as well as for its kind hospitality.
3. The GET met with officials from the following German Governmental organisations/bodies: federal level: Federal Ministry of Justice (department responsible for corruption matters), Federal Ministry of Interior and Federal Police Service (*Bundeskriminalamt* – Service responsible for corruption matters), Federal Ministry of Economy, Federal Ministry of Finance (Tax law Department, Customs Department, Federal Customs Investigations Office in Cologne), Federal Ministry of Interior (Public service law department), Federal Ministry of Defence, Federal Court of Accounts, Secretariat of the Committee on immunities of the Bundestag, Administration of the Bundestag (responsible for the implementation of the code of conduct); level of the Länder: Land Berlin: Administration of Justice, General Prosecution Office, Court of Accounts, Criminal police; Land North-Rhine-Westphalia: Department of Audit (jurisdiction of Bonn), Prosecution Office (jurisdiction of Cologne); Land Bavaria: Ministry of Justice, Department of criminal police, Prosecution offices (of first and second instance courts of Munich), Regional Court of Munich I, Ministry of Economy, Transport and Technology, Higher Construction Administration, Bavarian trust control authority, Municipal authorities of Munich. Moreover, the GET met with members of the following non-governmental institutions: German Association of Chambers of Commerce and Industry, and the German Chapter of Transparency International. The list of persons met by the GET appears at Appendix I.
4. It is recalled that GRECO agreed, at its 2nd Plenary meeting (December 1999) that the 1st Evaluation round would run from 1 January 2000 to 31 December 2001, and that it agreed at its 6th Plenary meeting (September 2001) to extend this round until 30 June 2002 in order to evaluate the newer members. It was also agreed at the 2nd Plenary meeting that, in accordance with Article 10.3 of its Statute, the evaluation procedure would be based on the following provisions:
 - Guiding Principle 3 (hereafter "GPC 3": authorities in charge of preventing, investigating, prosecuting and adjudicating corruption offences: legal status, powers, means for gathering evidence, independence and autonomy);
 - Guiding Principle 7 (hereafter "GPC 7": specialised persons or bodies dealing with corruption, means at their disposal);

¹ Mr Stephenson was asked to replace Mr Joe GANGLOFF (USA), unable to join the team at the last moment by reasons of the September 11 events.

- Guiding Principle 6 (hereafter, “GPC 6”: immunities from investigation, prosecution or adjudication of corruption).
5. The principal objective of this report is to evaluate the measures adopted by the German authorities, and wherever possible their effectiveness, in order to comply with the requirements deriving from GPCs 3, 6 and 7. The report will first describe the situation of corruption in Germany, the general anti-corruption policy, the institutions and authorities in charge of combating it -their functioning, structures, powers, expertise, means and specialisation- and the system of immunities preventing the prosecution of certain persons for acts of corruption. The second part contains a critical analysis of the situation described previously, assessing, in particular, whether the system in place in Germany is fully compatible with the undertakings resulting from GPCs 3, 6 and 7. Finally, the report includes a list of recommendations to Germany in order for this country to improve its level of compliance with the GPCs under consideration.

II. GENERAL DESCRIPTION OF THE SITUATION

a. **The phenomenon of corruption and its perception in Germany**

6. The Federal Republic of Germany is located in the central-western part of Europe, the German traditional geopolitical approach privileging the concept of “Mitteleuropa”. The country borders Denmark to the north, Austria and Switzerland to the south, Poland and the Czech Republic to the east, and the Netherlands, Belgium, Luxembourg and France to the west. The total population of Germany exceeds 82 million with a little less than 9% of foreigners. The country is a Parliamentary democracy. The unification of Germany on 3 October 1990 did not fundamentally alter the administrative organisation or political and social values of the Federal Republic of Germany as the process consisted in an ‘accession’ of the GDR by the FRG, with a subsequent replacement of many senior public officials and staff of judicial authorities of the east by their counterparts from the west. The GET was informed that on unification, the rate of corruption was much lower in the new Länder, but that the privatisation and reconstruction effort initially created corruption opportunities which were exploited by criminals who often operated from the west. The problem was addressed by the introduction of more efficient systems of corruption control in the new Länder. Current statistics show that criminal proceedings for corruption are relatively evenly distributed between the old and new Länder.
7. The federal constitution or “Basic Law” (*Grundgesetz*) establishes a system in which legislative power is divided between the federation and the 16 Länder². Furthermore, it is the duty of the Länder to implement and enforce federal law. In practice, the division of competencies is roughly the following: penal and penal procedure law are in principle under the competence of the federation; its application (prosecution, law enforcement) falls within the scope of Länder, except issues relating to State security, terrorism, international cooperation. The Länder have their own Constitution which in many aspects reflect the Basic Law. At the lower levels, administrative regions in larger Länder (*Regierungspräsidien, Landkreise*) and the municipalities complete the State structure.
8. In order to combat corruption, Germany has adopted a number of legal, institutional, screening and other measures at the various administrative levels. The German approach, in both theory and practice, devotes as much attention to prevention as it does to repressive policies. A substantial part of preventive policies is in the hands of Länder and municipal authorities.

² Baden-Württemberg, Bayern, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt, Schleswig-Holstein, Thüringen.

9. At national level, several legislative and administrative measures have been adopted in recent years to complete the existing legal framework already in place to counteract corruption (e.g. Act to combat corruption of August 1997, the two Acts of September 1998 implementing the EU convention and the OECD convention on bribery, the Act to reform the Law relating to the Public Service of 24 February 1997, the Second Act to Restrict Ancillary Employment of 9 September 1997, the Directive of the Federal Government to Prevent Corruption in the Federal Administration of 17 June 1998). The aim of these measures is to prevent and combat corruption more effectively, especially in areas particularly vulnerable to corruption, such as public procurement, particularly in the construction sector; licensing, fixing and levying fees and awarding grants.
10. The police and prosecution offices have adopted a series of institutional measures and enhanced the working methods as regards corruption, including through the development of research³. At the level of the Länder, many of the police forces and public prosecution offices have set up specialised units or departments. Parallel to the enhancement of cooperation at federal level, efforts have been deployed in the Länder: in all Länder there is close cooperation between the criminal prosecution authorities and the Land Courts of Audit.
11. These anti-corruption efforts are followed closely by the German Chapter of Transparency International, an NGO which was initially founded in this country and the headquarters of which are located in Berlin.
12. Germany has ratified the OECD Convention of 1997 on Combating Bribery of Foreign Public Officials and the First Protocol to the Convention on the Protection of the European Communities' financial interests. Germany has also signed the Criminal Law and Civil Law Conventions on corruption. The latter is likely to be ratified first, given the necessity – as regards the former – of a comprehensive reform package which would take also into account the draft additional protocol to the Criminal Law Convention on Corruption (on corruption of arbitrators and jurors) to be opened for signature very soon.
13. The German Criminal Code makes a distinction between different types of offences, which is based on the minimum sentence applicable: serious criminal offences (*Verbrechen*) are unlawful acts that are punishable by a minimum sentence of one year imprisonment or more, and less serious criminal offences (*Vergehen*) are unlawful acts punishable by a minimum of a lesser term of imprisonment or a fine). Besides, administrative laws provide for administrative offences (so-called *Ordnungswidrigkeiten*) which can only be punished by an administrative fine.
14. The German criminal code criminalises the acceptance and granting of a financial or intangible advantage whether or not a breach of duty is involved (Sections 331/333). It covers also promises of advantages and advantages granted to a third person. It applies not only to statutory officials, but to all those who are in charge of a public function. The maximum penalty for these offences is three years' imprisonment. If the advantage constitutes a consideration in return for a

³ - Creation of a unit for corruption within the Federal Criminal Police Office (Bundeskriminalamt – BKA) and an organisation unit for prevention and internal investigations within the Federal Border Guards;
 - Efforts in favour of cooperation and exchange of information between the BKA, the Federal Court of Audit, the Federal Cartel Office on one side, and between the police stations, the Länder Criminal Police Office and the BKA on the other side;
 - Research projects: "Should we put up with corruption or take action" (1995), "Assessment of corruption in the police, judicial and customs authorities" (1999), annual "Situation on Corruption in the Federal Republic of Germany" (by the BKA, since 1994), Periodic Security Report (first published July 2001).

specific judicial act by a judge or arbitrator, the maximum penalty is five years' imprisonment. The limitation period is five years, section 78 (3) no. 4 of the Criminal Code.

15. Sections 332/334 cover all cases in which the advantage constitutes a consideration in return for a specific official act by the public official and where this official act is in breach of his duty. The maximum penalty for both the person granting the bribe and the person taking the bribe is, in principle, five years' imprisonment (limitation period of five years); where a judge or arbitrator is involved, the maximum penalty is up to ten years' imprisonment (limitation period of ten years, section 78 (3) no. 3 of the Criminal Code). The maximum penalty of five years' imprisonment does not apply to particularly serious cases pursuant to section 335 of the Criminal Code, especially where bribes involve large sums of money, where advantages are repeatedly accepted, or where the perpetrator acts on a commercial basis or as a member of a gang. In these cases, the range of punishment is one to ten years, and, in the event of a judge or arbitrator taking a bribe, the range of punishment is two to fifteen years (the limitation period in the latter case is ten years, section 78 (3) no. 3 of the Criminal Code). The provisions on bribery also apply to certain foreign officials in accordance with the OECD and EU instruments. Specific provisions apply to bribery of voters (Section 108b)⁴ and to bribery of members of parliament (Section 108e). Pursuant to this provision, the purchase or sale of a vote incurs criminal liability. It applies to members of the national parliament and to Members of the European Parliament. The Act of 10 September 1998 to Implement the OECD Convention imposes more extensive criminal liability for offering a bribe to foreign public officials.
16. As a result of the Act to Combat Corruption of 1997, the penal provisions relating to bribery in the private sector previously contained in the Unfair Competition Act [*Gesetz gegen den unlauteren Wettbewerb* – UWG] were made more severe and transferred to the Criminal Code (Section 299). They cover the demanding of an advantage, allowing an advantage to be promised or accepting an advantage in business transactions by an employee or agent of a business enterprise for himself or for a third person if this is intended as a consideration in return for him giving preference in an unfair manner to another in the competitive purchase of goods or commercial services. This provision also makes the active side of bribery of this type subject to punishment. The maximum period of imprisonment which can be imposed under Section 299 is three years and in particularly serious cases it is five years; the limitation period is five years (section 78 (3) no. 4)⁵.
17. Instead of the criminal liability of legal persons, the German legal system provides for a mechanism of liability of legal persons under the Act on administrative offences. As a consequence, non-criminal fines of up to one million DM can be imposed as penalties. Furthermore, measures of confiscation and forfeiture can be ordered against legal persons, where this is necessary for the purpose of confiscating the financial advantage gained as a result of the offence.
18. The formation of criminal associations and involvement in such associations is a criminal offence in Germany (section 129 of the Criminal Code) and – as seen before - corruption-related acts perpetrated as a member of a gang are considered as particularly serious offences. Money laundering and the disguising of illegally obtained assets are separate criminal offences according to the (detailed) provisions of section 261 of the Criminal Code. The criminal offences

⁴ This offence covers both the granting of an advantage and the acceptance of an advantage as a consideration in return for not voting or voting in a particular way.

⁵ A legislative project to extend the provision to cover acts of corruption at least in the internal market and to implement the Joint Action of the Council of the European Union of December 1998 is currently in progress.

defined under section 332 and 334 (bribery) count as predicate offences. The Anti-money laundering mechanism is organised and regulated by the Act to Trace the Proceeds from Serious Crime. The collection of information on money laundering (reports of suspicious transactions etc.) and follow-up action in this field fall within the responsibility of the Police forces and prosecution offices of the Länder. To centralise collection and analysis of money laundering information, Germany has recently created a central financial intelligence unit within the Bundeskriminalamt (BKA).

19. As it represents only 0,1% of all crimes registered by the police, corruption is sometimes considered as a relatively limited problem by the authorities. On the other hand, the number and variety of anti-corruption initiatives show that German authorities consider corruption an important issue. These initiatives include good practices which have proven to be useful tools to combat corruption: risk analysis, case studies, strengthening of the legal framework, specialisation of repressive authorities, interagency cooperation and involvement of administrative and financial institutions, availability of financial expertise, specialised training, awareness raising and codes of conduct etc.
20. The GET was informed that in Germany there has been an increased awareness of corruption since the early 1990s, which has grown more particularly since about 1997. There has also been an increase in the number of court proceedings against persons for crimes of corruption – from 258 in 1994 to 1,034 in 1999. The statistics also show that, whilst in the years 1994-99 the annual average of corruption cases coming to the attention of the police was 3400, in 2000 the corresponding figure was 5100. A detailed breakdown of the most recent statistics is in Appendix 3. These figures do not necessarily imply that German society is increasingly corrupt. Indeed, it is arguable that "an increased level of sensitivity to corruption and the increase in recent years in attempts to find appropriate measures to fight corruption led to an increase in the number of cases coming to light" (*Erster Periodischer Sicherheitsbericht, July 2001*).
21. The area most often cited as prone to corruption in Germany is competitive tendering in the construction industry, which often involves cartels. Competitive tendering in the health sector is also recognised as a problem area. There have also been some corruption scandals in the political field, particularly involving undeclared party funds.
22. According to the Transparency International Corruption Perception Index for 2001 which was published in June 2001, Germany was at rank 20 (among 91), with an index of 7.4 on a scale of 10 (best) to 0 (worst). Representatives met by the GET expressed some concern about the fact that despite the efforts deployed in the recent years, Germany had slipped down the Index (from rank 14 among 99 in 1999, and rank 17 among 90 in 2000).

b. Bodies and institutions responsible for the fight against corruption

b1. The police

23. The German police organisation comprises Federal Bodies, namely the *Bundeskriminalamt* (BKA - Federal criminal police office) and the Federal Border Police, and at the level of Länder, the 16 central criminal police offices of the Länder, and local police offices. Investigation and prosecution of corruption cases fall, in principle, within the competence of the Länder. The organisation of the police is also part of the Länder's competence. The GET was told that although it was possible to draw a picture for the various Länder, it has become difficult to do the same for subordinate levels, as some cities have now set up special bodies. The police have been given both

preventive and repressive responsibilities as regards the fight against corruption. In the field of prevention, the police act under the authority of the Ministry of Internal Affairs and although each Land uses its own laws, there is an effort to build common bases with similar institutions. The Standing Conference of ministers of Internal Affairs – in which the federal level is also represented – ensures a certain level of homogeneity among Länder initiatives. As regards the control of internal corruption, there are special departments both within the Federal Criminal Police Office and within the police forces of the Länder (e.g. the Department for Internal Investigations in Hamburg or special squads at the district detective branch inspectorates in Schleswig-Holstein, and the permanent investigation group on "Corruption and Offences Committed in the Course of Official Duties" in the Hanover police directorate).

24. The early 1990s marked the beginning of a systematic approach by the police against corruption. During a first period, the fight against corruption was part of the economic crime specialisation. The current trend is to have separate units responsible for corruption and to integrate police and prosecution in these units.
25. The Police services of the Länder are under the umbrella of the respective Ministries of Interior of the Länder. They are headed by a Land Police President who is appointed by the relevant Minister of Interior. The function of President is in 5 of the Länder (Brandenburg, Hamburg, Hesse, Lower Saxony and North Rhine-Westphalia) subject to the rules applying to the special category of "political public officials" within the status of German civil servants (*Beamte*). It is acknowledged that such special civil servants can be obliged to retire for political reasons⁶ The GET was informed by representatives of the Berlin police that the Berlin Land Police President can be appointed temporarily, but there are plans to make the police President a permanent civil servant.
26. The BKA was founded in 1951 as a central federal authority directly subordinate to the Federal Minister of the Interior. The BKA's responsibilities and activities are regulated in the BKA Act, according to which it acts as a central body for police information and intelligence. It also acts as a police body, supporting the federal and Land police forces in preventing, investigating and prosecuting crimes which involve more than one Land, have an international dimension, or are of considerable significance. The BKA also acts as the National Central Bureau for the International Criminal Police Organization (ICPO). It is headed by a Police President appointed by the Federal Cabinet upon a proposal by the Federal Minister of the Interior. The BKA carries out its own investigation proceedings within its own areas of competence. It can also perform functions in the field of criminal investigation and prosecution upon request of a Land authority.

⁶ The category of political officials is determined by law and it includes:

- for the federation: for instance: secretaries of State, ministerial directors (heads of department), high level officials of the foreign and security services, the Head of the BKA; at this level, there are approximately 400 out of 132.600;

- for the Länder as a rule (for instance Hessen Land, according to par. 57 of this Land's Law on public servants): Secretaries of State, State counsellors and ministerial directors, Head of government, head of the Office for the protection of the Constitution, Presidents of Police and the Land-President of Police.

In general such compulsory retirements take place: occasionally, when a new Minister is appointed; and more frequently in case of a change of government. The justification for this widely applied practice is that Ministers must have a possibility of being supported by top-level officials who are in political accord with them.

(www.bund.de/Wir_ueber_uns/Deutsche_Demokratie/Regierung/Bundesregierung/Bundesminister-.4711.htm). However, by "political accord" it is less a party political accord that is meant than the existence of a relationship of trust, which is indispensable for effective cooperation between the politicians at the head of an authority and the political officials who work at the interface between politics and the administration. In some Länder, Prosecutors General also belong to the category of political officials (see below).

27. Besides significant means in terms of information, intelligence and analysis, which are supported by a network with the Land authorities which is considered "good" by the representatives met by the GET, the BKA comprises an anti-corruption unit of 6 persons fully dedicated to analytical and strategic work. The anti-corruption unit now also co-operates with the German Chapter of Transparency International and there are plans to intensify cooperation with the Federal Cartel Office and the Federal Court of Audit.
28. Police forces of the Länder generally have a department specialised in economic and financial crimes at the level of the Commissioner's office. Some, as mentioned above, are involved in joint structures in which prosecutors and other experts are represented. It seems that the existence of specialised prosecution offices (where there is a demand for high quality and specialised expertise when dealing with corruption cases), has not systematically led to a corresponding level of specialisation of the police. For instance, the GET was informed that the absence of a specialised police to deal with corruption cases in the jurisdiction of Cologne does not allow a good preparation of the work when a preliminary investigation is started on the basis of anonymous information⁷.
29. Police officers undergo a basic training of three years from the Police schools of the Länder. In addition, the Federal Police Leadership Academy of Münster (jointly funded by the police forces of the federation and the Länder) trains annually over 200 members of the police forces mainly with leadership responsibilities. Those who are dealing with corruption cases usually receive additional training in economic crime, public tenders, special investigative means, banking procedures, accounting etc. When there are specialised units or working bodies, experts in these fields are also recruited and other authorities associated.
30. The German police at both federal and regional levels pay special attention to communication and interaction with the public, be it for the purposes of prevention, detection/reporting of crimes, or obtaining information and proofs in a given case. The prosecution offices and the police with the consent of prosecutors may offer financial rewards in exchange for valuable information in criminal cases.

b2. Public Prosecution Service

31. The basic regulations of the prosecution service are included in the Law on the organisation of courts (*Gerichtverfassungsgesetz*), which provides that a prosecution office is connected to every court (section 141). The regional competence of the public prosecutor's office is determined by the competence of the corresponding court. Prosecution offices are present at the level of regional courts (prosecution office headed by a leading higher prosecutor) and higher regional courts (prosecution office headed by a General Prosecutor). The Federal Supreme Court works with the Federal prosecutor general's office led by the Federal prosecutor general⁸. The Federal office does not direct the prosecutor's offices of the Länder, which function under the authority of the Länder's Ministers of Justice. The detailed organisation of prosecution offices is prescribed by the legislation of each Land. Non-professional, administrative prosecutors (*Amtsanwälte*) deal with minor offences or co-operate with prosecutors.

⁷ Such a specialisation was being introduced in the first months of 2002.

⁸ The Federal Prosecutor's Office is in charge of the cases decided by the Supreme Court. In addition to this the office prosecutes cases, specified by law, for which the higher regional courts make decisions in first instance. Prosecutors of the Federal Public Prosecutor's Office are appointed by the Federal President upon a proposal of the Federal Minister of Justice confirmed by the Bundesrat.

32. Prosecutors work under the authority of the Minister of Justice (at the federal level the Federal Minister of Justice and at the level of Länder the State Minister of Justice), from whom they may receive instructions and to whom they forward information about cases. The Prosecutors General are the administrative superior authority for the leading higher prosecutors of their district.
33. Prosecutors of the Länder are generally appointed by the Länder's Minister of Justice. According to information received by the GET, motions by the General Prosecutors are decisive in the nominations. Some years ago, General Prosecutors were as a rule political appointees. Today, the appointments are permanent with the exception of Brandenburg, Mecklenburg-Vorpommern, Schleswig-Holstein, Thüringen.
34. The prosecution office is an impartial body placed on an equal footing with the courts. Section 150 of the *Gerichtverfassungsgesetz* prescribes that public prosecutors are independent of the court in their duties. Like the courts, prosecution offices must consider evidence on both sides of the case. Prosecution is mandatory in Germany but a prosecutor has the right not to commence a prosecution (even where there is sufficient evidence of a crime) on the basis that the offence is a minor one and (in addition) that prosecution is not required by the public interest (sections 153 and 153a of the penal procedure code). A prosecutor has also the right to discontinue proceedings, and to restrict an investigation for reasons of efficiency of the procedure / to simplify the procedure (penal procedure code, section 154 and 154a). German representatives met by the GET underlined that the discontinuation of proceedings is out of question in corruption cases, unless it is a very minor act.
35. In many offices special departments have been organised, whose main duties are connected with corruption. In Berlin there is a department of eight prosecutors, in Munich a department of eleven prosecutors and in the Land of North Rhine-Westphalia departments concentrating on economic crimes have been organised in four cities (Cologne, Wuppertal, Bielefeld and Bochum). There are for instance 30 prosecutors specialised in economic crimes (five of them are specialised in corruption) in the office of prosecutors in Cologne assisted by economic experts and accountants. The GET was informed that in other Länder, public prosecution offices have also special departments or central offices for fighting corruption, for example in Lower Saxony (Hanover), Hamburg and Schleswig-Holstein. Specialised prosecutors for corruption cases receive training in economics and accountancy. If it is necessary, cases can be transferred from smaller prosecution offices to offices with expert knowledge..
36. In the context of the massive investments for reconstruction in Berlin (as the new capital), a special group was established in 1997 at the level of the Justice Department (*Senatsverwaltung für Justiz*). The group does not perform its own investigations; rather, its function is purely of a preventive nature. Its duties are to combat corruption in a new way, concentrating and exchanging information in relation to different authorities and actors. Among other things, the group has drawn up a comprehensive directive on avoiding corruption in the Berlin administration. The group is made up of 20 members drawn from various parts of the Berlin administration, including a representative of Berlin public prosecution office as well as a representative of the Land criminal police office (*Landeskriminalamt*). In addition, the office of the Berlin Prosecutor-General has a separate central unit for fighting corruption, the head of which, a chief senior public prosecutor who also heads the working group of the justice department, does not conduct his own investigations. The group performs preventive functions and can recommend and advise authorities as well as citizens in the work against corruption. The group has organised several training measures especially for representatives of those sectors which experience has shown to be vulnerable to corruption. At the same time, internal investigating bodies have been

set up in different administrations. These bodies keep the anti-corruption group of the justice department informed about their observations. The representatives of the group indicated to the GET that this kind of preventive work represents an effective and inexpensive way to control corruption as compared with repression.

37. It is a practice in Germany, that cases are ordinarily distributed to prosecutors according to a work schedule confirmed for each year. Besides, cases can be assigned by a head of department. When assigning cases he/she will pay attention to, for instance, the character and extent of a case, any special professional skills of prosecutors and the equitable assignment of workload. The current system does not allow the police to influence the choice of a prosecutor who will be handling the case. In principle, the Minister of Justice can give prosecutors instructions about individual cases. However, the GET was told that they cannot require prosecutors not to prosecute or to drop charges in a given case. Instructions must be in a written form and included in the file. They can be appealed. The GET was also informed that the present Minister of Justice had made a public announcement in the Land of North Rhine-Westphalia that he will not give instructions to prosecutors in specific cases (unless it concerns a supervisory review of the legally flawed treatment of the case). On his side, a prosecutor can ask his superior for an opinion and in principle a prosecutor is not bound by the view of his superior. The prosecutors met by the GET did not express concern about political control.

b3. The courts

38. The basic organisation of courts is provided by the above-mentioned Law on the organisation of courts. The highest court in criminal cases is the Federal Supreme Court. Courts working on the regional level are *Amtsgerichte* (local courts), *Landgerichte* (regional courts), which are the first or the second instance courts depending on the character of the case, and *Oberlandesgerichte* (higher regional court). Regional courts may have chambers specialised in economic crime cases. There are lay judges in courts as well.
39. The principle of independence of judges is guaranteed by article 97 of the Federal Constitution and by the Constitutions of the Länder, which contain similar provisions. The courts are subject only to the law and their work cannot be controlled by any other means. The constitutions also expressly provide that a judge shall be dismissed if he or she acts against the principles of the federal constitution or of the constitution of its Land. Judges are subject to a disciplinary/jurisdictional control, which may vary. Most regional constitutions provide that a judge can be sued before the federal constitutional court upon the request of the regional parliament and the judge can be dismissed, transferred or obliged to retire. In the Rhineland Pfalz Land, such a request is made by the Prosecutor General upon an instruction from the Head of the executive. In the Berlin Land, it is a disciplinary tribunal – composed of professional and lay judges designated by the House of Representatives of Berlin – which makes the decision as to whether or not a judge acted in an unlawful way.
40. The designation of judges varies from Land to Land. For instance in Schleswig-Holstein (Article 43 of the Land Constitution), ordinary judges are designated by a decision of the Minister responsible and a commission composed of two-thirds of members of the Land's Parliament. The members of this Commission are themselves elected by the Parliament of the Land. Both the Commission and the Parliament make their decision by a majority of two-thirds of the votes expressed. The presidents of the Land's higher courts are appointed by the parliament by a two-thirds majority decision, upon a proposal of the Minister responsible. In some other Länder, the participation of a selection commission is optional, whilst in others it is provided by law. In the

Berlin Land, professional judges are designated by the Government, whereas senior judges have a right to propose candidates for their jurisdiction. Presidents of the Land's higher courts are appointed by the Government, upon a proposal by the Government and approval by the parliament by a simple majority of votes. Federal judges (Supreme Court, Federal administrative court, Federal Court of Account, Federal tribunal for employment and Federal tribunal for social security issues) are designated in a two-step procedure by the Minister responsible for the area concerned and a commission composed of equal numbers of professionals and representatives of the Bundestag (Article 95 of the Constitution).

41. Judges (like prosecutors) must have completed a full legal curriculum at university (3,5 years or more). They then serve as trainees for a couple of years and conclude their legal training with the second state examination. During the traineeship, experience both at a court and at a public prosecution office is mandatory, the new recruit making a choice afterwards as regards his/her profession. In addition to or subsequent to this legal training there are possibilities for further training at the German academy for judges, which also provides further training courses on subjects which include economic/financial issues, corruption, organised crime and international mutual legal assistance. There are career bridges between the position of prosecutor and the position of judge, and vice versa in some Länder (e.g. Bavaria, Baden-Württemberg North Rhine-Westphalia).
42. The GET also took note of the fact that the regional competence of courts is very flexible and that besides the place of the crime, charges can be pursued in several alternative places of jurisdiction (sections 8 and 13 of the penal procedure code), notably where specialisation exists. The competence to proceed against crimes committed abroad is also wide. In some well-publicised cases, newspapers have been at the origin of some controversies regarding the length of procedures to determine the jurisdiction responsible. The working conditions and increasing workload of courts (and prosecutors) are subject to discussion in Germany at the moment. However, the representatives of the judiciary met by the GET during the visit did not complain about the situation..

b4. Criminal investigation of corruption

43. The public prosecution office has responsibility for directing investigation proceedings. It can either conduct investigations of any type itself or it can have investigative acts carried out by the police authorities or police officers. For corruption cases, the following special investigative means can be used (sections 99, 100, 110 of the Code of criminal procedure):
 - seizure of mail (to be authorised by a judge, or the prosecutor in case of urgency);
 - taking photographs and making visual recordings (no prior order is required);
 - acoustic surveillance of residential premises (bugging) - if evidence cannot be obtained otherwise (the order is to be issued in principle by the national security division of the regional court, and it cannot be applied to some persons: members of the clergy, defence counsels and attorneys, tax consultants, doctors, members of parliament, journalists etc., unless the person is the defendant);
 - undercover investigators if evidence cannot be obtained otherwise (to be authorised by the prosecutor, or the judge where private premises are concerned);
 - informants (in which case no court order is required);
 - although inquiries about traffic data are possible, for the time being, interception of communications cannot be applied in corruption cases despite long-standing demands from both the police and prosecution. The need to extend the catalogue of offences under section

100a for which interception of communications can be applied, in order to include corruption, was expressed by several GET interlocutors on various occasions during the visit⁹.

44. The Police performs, in the criminal procedure, the role of the auxiliary of the public prosecution service. It is the police who is usually given the first information (by a citizen, a company etc.) on a possible corruption case. The police carry out the preliminary investigation and hand over the file to the prosecutor who decides how to continue the investigation, and the tactics and means to be applied. In corruption cases, the police involve the prosecution very quickly because they need the authorisation for various coercive measures (access to bank information etc.). In general, the court has to make a decision about the use of coercive measures. In case of urgency, it is the prosecution office, which makes the decision. The GET was told that cooperation between the police and prosecutors is facilitated not only because the former acts as an auxiliary of the latter but also because of regular joint training activities involving both police officers and prosecutors.
45. In order to facilitate the detection of corruption cases, a service law regulation on witnesses who give evidence was created in federal law (in the event of prevention or detection of corruption offences there is the possibility of payment of support also where the person concerned is removed from office). A number of Länder have introduced witness protection measures and programmes (sometimes in conjunction with special police services). These measures are applied in connexion with organised crime, sometimes even in a proactive way, i.e. the authorities may approach potential witnesses and inform them about the legal framework for witness protection in order to persuade them to give evidence (e.g. in Rhineland-Palatinate).
46. The GET was also told that the current system, which does not allow prosecutors to promise confidentiality to a person who is in a position to give information, may hinder the gathering of evidence in certain corruption cases. An assurance of confidentiality is only possible in some exceptional cases vis-à-vis informants or undercover investigators.
47. To a certain extent, the possibility of making plea bargaining agreements exists – and has already been made use of – particularly in respect of cases of economic crime, which tend to include an element of corruption. The legal starting point for this is the explicit reference to the conduct of the perpetrator after commission of the offence contained in section 46 subsection (2) of the Criminal Code; this provision is already applied to "witness who give state evidence" ("*Kronzeuge*") to an extensive degree. It is currently being examined whether there is a need for a provision, which goes beyond this. Should it be established that such a need does exist, any provision, which is more far-reaching, would, however, not just be restricted to corruption offences. Several practitioners informed the GET that for corruption cases intermediate solutions allowing for a reduction of the punishment in exchange for a testimony by the suspect/accused, would be desirable.
48. Even if the Minister of Justice is informed in specific situations criminal investigations remain secret in principle at the pre-trial stage. The GET noticed however, that the breach of secrecy is sometimes a problem¹⁰, which affects both the police and the prosecution.

⁹ It was further recommended in academic studies (see e.g. Professor Dölling *Empfehlen sich Änderungen des Straf- und Strafprozessrechts, um der Gefahr von Korruption in Staat, Wirtschaft und Gesellschaft wirksam zu begegnen*, C.H. Beck'sche Verlagsbuchhandlung, München 1996, 115 pages, page 114, and was provided for in a bill of the CDU/CSU Bundestag parliamentary group for an act to amend the Code of Criminal Procedure (Bundestag printed paper 14/162) and in a decision of the Bundesrat for an act to extend the criminal law regulation relating to witnesses who give state evidence (Bundesrat printed paper 395/00).

49. In addition to normal judicial proceedings, parliaments of the Länder or the Bundestag have the power to set up investigative committees in order to handle important and wide-ranging cases. This was done in recent cases, for instance those linked with the financing of the former ruling party. On such occasions, such committees may cooperate closely with and involve judicial bodies.

b5. Other institutions and mechanisms

i) Prevention and detection of corruption mechanisms

50. A Federal Guideline for the prevention of corruption was adopted on 17 June 1998. The federal bodies are called upon to take into account the principles it promotes¹¹ when adopting measures to prevent corruption. It contains a variety of mechanisms, both classical and more original ones (notably the principle of contact persons for corruption matters). The implementation of the guideline by federal bodies was subject to an assessment in 2000, which was positive. This federal guideline has also inspired the introduction of equivalent measures at the level of the Länder and municipalities, for instance in Munich.

51. In addition, the Land administrations must observe the "Programme to Prevent and Combat Corruption" between the Federation and the Länder, which was adopted on the basis of a broad consensus. The "Recommendations" which complement the federal Guideline have, to a certain extent, been taken on by the Land administrations. A "General Administrative Provision of the Federal Government on the Financing of Activities of the Federation by Sponsoring of Third Parties" was also being prepared at the time of the visit.

52. The detection of corruption at the level of the administration, has been accorded special attention in Germany, an effort which was strengthened by the above-mentioned Federal Guideline. Some examples can be given: mobile inspection units reinforce in-house checks made within authorities in the various different fields e.g. in Schleswig-Holstein and Bremen; special telephone lines have been set up by individual Land building departments to take reports from anonymous callers in cases of suspicion of corruption; in judicial disciplinary proceedings against a civil servant suspected of corruption, the disciplinary court hears evidence to clarify the facts of the case,

¹⁰ Research by the BKA clearly considers breaches to the rule of secrecy of investigations to be a problem (annual report on corruption 1999 page 38, *Study Assessment of corruption within the police, judiciary and Customs*, November 1999, page 6 of the English version made available). The former Minister of Justice of Saxony had to resign following complaints that he had given information about the developments of an investigation to a member of his political party (*Berliner Zeitung*, 13 September 2000).

¹¹ 1) Identifying sectors at risk and performing risk analyses; 2) four-eyes principle and transparency in decision making processes; 3) rotation of staff; 4) internal contact person for corruption matters (who can be contacted without following the administrative route); 5) internal revision (internal sample auditing of current or terminated procedures, by specially trained staff); 6) care in appointment of staff in services at risk; 7) awareness raising on Codes of conduct, in particular how to behave in corruption situations; 8) checking the effectiveness of corruption training; 9) adequacy of management (detection of corruption signals and raising awareness of corruption issues); 10) special disciplinary bodies designated for the acceleration of disciplinary procedures; 11) obligation of heads of service to inform prosecutor's office and superior management when a suspicion of corruption is confirmed; 12) organisational separation between planning, adjudication and accounting as a principle (when it comes to construction, delivery or service); 13) official publishing of tenders as a principle (and control of the most important ones); 14) exclusion from tenders of bribing companies and setting up of a register of such bodies; 15) anti-corruption provisions in public contracts providing for a contractual compensation in case of serious damage caused to the public body by the bidder; 16) where private bodies (company, architect or engineering bureau) participate in the realisation of a tender, the agents of these bodies must clearly be informed of their obligations, and given a copy of the Guideline on the prohibition of gifts and rewards; 17) preliminary approval by the highest authority of the public body, of support and sponsoring provided by external operators to the benefit of events or initiatives of the public body.

superiors must investigate indications of corruption which arise in the examination of the results of their staff's work or from other conduct of the personnel for whom they are responsible.

53. In Germany, there is no general obligation for State employees to report suspicions of crimes. Instead, duties are placed on authorities. Specific initiatives exist for corruption issues: in cases of corruption or of substantiated suspicions of corruption, the authorities are under an obligation to call in the criminal prosecution authorities on the basis of the federal or Land guideline, e.g. by virtue of the Ordinance on Cooperation issued by the Land Government of Schleswig-Holstein on 10 September 1996, of the Bavarian guideline for the Prevention of Manipulation in public tenders of 14 May 1996. It is a basic principle in Germany that a public employee shall not contact repressive authorities directly; it is the higher hierarchical superior who has to be informed instead. Should the superior remain passive, the public official is empowered to complain to a higher superior or to the anti-corruption contact person of his department. A public official who reports directly to the law enforcement authorities could be subject – at least in theory – to disciplinary proceedings. Reporting duties also exist in specific sectors. For example the tax authorities have to report suspicions of bribery offences under the Income Tax Act.

ii) Corruption investigations in the Defence Ministry

54. In the early 1960s, the Federal Defence Ministry set up a special section (known as ES) to investigate cases of corruption involving the Ministry. This was done to support the Public Prosecutions Office (PPO) in properly evaluating the specialised documentation from the entire area of the Federal Armed Forces involved in such cases. ES was set up to support the PPO, first on a temporary basis, then permanently. ES currently comprises 15 investigators and 15 support staff, and is based in a different building from the Defence Ministry. All members of the armed forces are obliged to inform ES if they have any suspicions of corruption. Where ES consider there is a real suspicion of a criminal act, they report to the PPO, and then support the PPO's investigation and may hear witnesses under service law. In parallel, they may also arrange for disciplinary proceedings to be conducted¹². ES is also responsible for preventive measures, and devotes about one-third of its capacity to these. ES makes proposals on how to tackle any weak points identified; all contracts contain a clause to provide that if the contractor is found to have granted an undue advantage, they must pay a penalty of 10% of the value of the contract; any company considered untrustworthy will not be awarded future contracts by the Defence Ministry. ES also oversees the secondary employment of members of the armed forces, in order to prevent conflicts of interest; where there is any possibility of a conflict of interests, there must be a report to ES. In addition, post-retirement activities are also covered by this for a period of five years¹³. Statutory provisions exist in this respect.

iii) Customs and border guards

55. Customs is recognised as a vulnerable area. Though salaries of Customs officials are reasonable they are still small compared with the value of the goods over which they have control. There have been relatively few cases of corruption among customs officers, but there have been 3 'spectacular' cases in the last 10 years, 2 of these concerning false certificates of exported

¹² In 1999, ES carried out about 100 investigations, in 80 of which there appeared to be a possible breach of criminal law; of these, approximately 50 cases related to corruption. In 15 of these cases the suspicion was cleared, and in 30 the evidence was not sufficient to warrant a criminal charge. In the remaining 5 cases a criminal information was laid and 2 of these cases had been prosecuted at the time of the visit.

¹³ Since 1985, there have been about 4000 such reports, and the ES prohibited the subsequent employment in approximately 250 of these cases. In 110 cases the applicants contested ES's decision by filing a court action; the courts overturned ES's decision in 9 cases.

goods. A 1997 study showed that 20% of Customs staff thought that the Customs Service was affected by corruption. It is thought that this figure reflects greater awareness of possible corruption in the Customs service, following the 'spectacular' cases. The actual number of cases of corruption in the Customs Service has not increased. Where particular risks exist, preventive measures are taken - such as regular rotation of personnel, involving at least 2 officers in processes, and the appointment of contact persons to whom customs officers may turn if they have concerns about corruption. The contact person has discretion as to what he does with the information imparted to him. Each of the 8 Customs Regional Financial Offices has an anti-corruption unit. If a criminal case which compromises the integrity of the Custom Service arises, the office informs the police and institutes (but suspends) disciplinary proceedings. If a Customs Officer is offered a bribe, he must inform his supervisor, who will inform the police if the intention to bribe is sufficiently clear.

56. An organisation unit called "Prevention and Internal Investigations" has also been set up by the Federal Border Guards, which is designed to prevent and detect breaches of the law and other misconduct by employees of the Federal Border Guards.

iv) Codes of Conduct and other specific rules

57. Bundestag MPs have had a code of conduct for some 30 years. It is renewed at the beginning of each legislative session and has been amended and extended several times. In its present form it is 15 years old. It obliges MPs to inform the President of the Bundestag on professional activity both before and after entering the Bundestag and on secondary activities, including consultancies, lecturing and functions in associations. Information on payment for activities has to be given to the Bundestag but is not published. Other information is published in the official handbook of the Bundestag and on its website. MPs have to keep records of all donations received. Any donations worth over 10 000 DM in total have to be reported to the Bundestag and any over 20 000 DM have to be made public. As regards assets, only the investments held in businesses aiming at making a profit must be reported if they exceed 25% of the total capital of the entity or if the value of such investment exceeds a specified amount.
58. There have not been any major controversies regarding donations to MPs, though there have been regarding donations to political parties in recent years. MPs may not accept funds which could be considered as payment for Parliamentary work ("lobbying") - though it is recognised that this is a difficult area to define. In the event of a contravention formal proceedings are conducted by the President of the Bundestag. There is no appeal from the decision of the president who may publish an official Bundestag printed paper setting out his finding. That is the only form of punishment, and so far it has not been found necessary to inflict it on anyone. In a case of bribery of MPs (section 108e of the penal code) and some other offences (concerning elections) the MP may lose eligibility for re-election and as a consequence, his current membership of Bundestag if the actual sentence is at least six months.
59. There have been recent attempts to improve the image of MPs by increasing the transparency of measures applicable to them. The GET was told that these projects have failed so far because of constitutional implications concerning the balance between aspects of transparency and fundamental personal rights of the MPs, their relatives and partners.
60. Similar rules are applicable at the level of the Länder parliaments.

61. As for professional civil servants (*Beamte*) and employees of the public service who do not have the status of professional civil servants (*Arbeitnehmer*), the rules applicable to Federal Public Servants include:

- a ban on the acceptance of gifts (or employment which could be assimilated to it), which also applies to former public servants;
- an obligation (for professional civil servants; for public service employees this is a right and not an obligation) to remonstrate with a superior who gives unlawful orders; this also applies in cases when the superior is a political civil servant;
- a ban on carrying out unlawful orders, where carrying out such an order would result in commission of a criminal or regulatory offence or a violation of human dignity;
- all public officials are under an obligation to disclose any possible conflicts of interest;
- retired civil servants are under an obligation for five years after ending their active period of service to report any gainful employment which is connected with their official duties of the last five years (the intended employment can be prohibited and a violation of these obligations can be punished by disciplinary measures such as a reduction in or a cancellation of the pension; analogous provisions relating to civil servants are also contained in all the Land statutes relating to civil servants and specific provisions apply to former members of the Federal Armed Forces;

Furthermore, members of government are subject to rules on incompatibilities of function. According to the federal Constitution, federal Ministers and the Chancellor are not allowed to have any other administrative function, or any function in a company, or profession whatsoever, nor are they allowed to have management responsibilities in profit-making activities. Similar rules are generally provided for by the constitutions of the Länder. The Bundestag (or the regional parliament for executives of the Länder) may give its consent to the participation of a member of government in the board of a profit-making body.

v) *Audit*

62. The Federal Court of Audit (*Bundesrechnungshof*), whose members enjoy judicial independence, audits the performance and regularity of federal financial management on the basis of sampling. In the course of this audit work, it also verifies compliance with statutory provisions. As each federal department and agency must expect to be audited, this has a far-reaching preventive effect. The federal Court of Audit has about 750 staff at its Bonn headquarters and Potsdam branch office. Its work is supported by 9 regional audit offices in various Länder. Its President and Vice-President are appointed for 12-year terms without the possibility of re-election to ensure their political independence. The heads of the audit divisions and audit sections of the Federal Court of Audit are appointed by the Federal President on a recommendation made by the Court's President. The Court summarises the results of its audit that are relevant for Parliament's granting "discharge" to the Federal Government in respect of the annual federal accounts in the form of an annual report which is presented to the Bundestag and the Bundesrat, as well as to the Federal Government, and is published in the autumn of each year

63. The public Accounts Committee, a subcommittee of Parliament's Appropriation Committee, deliberates on the individual findings presented by the Federal Court of Audit and submits proposals for corrective and preventive action to Parliament as a whole. When these are endorsed by Parliament the executive branch must take the action demanded. Since the Federal Court of Audit does not have the power to give orders to the executive branch, this is a way of urging the latter to take the remedial action demanded.

64. Furthermore, the Federal Court of Audit publishes an annual audit impact report which describes the remedial action taken in response to the reporting of the weaknesses found in the course of audit work. If the Court has suspicions about corruption, it does not go immediately to the police or prosecution but to the suspect's superior (who is bound to report the matter under the 1998 Federal Directive). The audit reports of the Federal Court of Audit are not generally made available to prosecutors. Where prosecutors request a report from the Federal Court of Audit, the latter will check whether forwarding the report would infringe individuals' rights to privacy. If that is the case, the consent of the individuals concerned will be obtained or the report is made anonymous. Given that budgetary law obliges public servants to provide information to the Federal Court of Audit, to reveal names would be considered a breach of an accused person's right to silence under the criminal code.
65. Each Land has its own Court of Audit, the organisation of which is similar to that of the Federal Court. Furthermore, legislation of the Länder requires all sizeable towns to establish audit offices (such legislation also covers the "Federal City" of Bonn). Using Bonn as a typical example, it can be said that the municipal audit office reports directly to the City Council and its audit activities are subject to the council's instructions. Concerning the exercise of judgement in the course of its audit work, the municipal audit office is subject only to the law. This is to ensure the necessary professional independence of the municipal auditors and the unbiased and impartial performance of the offices' audit function. Concerning the auditors' terms of employment and pay, this is the responsibility of the city's executive. Often, audit reports at Länder level are inspected in detail by prosecutors and are regarded as a valuable source of information. The GET noted that stricter rules on company accounting were introduced by the Control and Transparency Act in 1998. Its measures included new rules on the rotation of auditors.

vi) *Public procurement*

66. For constitutional reasons, public procurement is not conducted by a central procurement office. Instead, the competence is divided between Federation, Länder and local authorities. In Munich, for example, a directive on procurement was issued in 1996 which is binding on all Land authorities who award contracts and is recommended to local authorities. It requires authorities putting out contracts to take measures such as putting them to tender, involving several officials in decisions on awarding contracts, and ordering an investigation (either by the supervisory authority or the PPO) where there is a suspicion of manipulation. Bidders can be excluded from participation in competition for public contracts if there is evidence that they have committed serious misconduct which gives rise to doubt as to their trustworthiness. Convictions for anti-competitive offences or bribery would constitute such evidence. In North Rhine-Westphalia, too, handbooks on procurement have been created for the Land administration in an exemplary manner, the principles of which require mandatory application by all authorities and institutions of the Land. Some Länder keep central registers of bidders who have presented problems in the past. The purpose is not to exclude all of them entirely from future bidding but to make the information available so that offices putting out contracts can make informed decisions in the light of the facts. However, not all Länder keep such registers and there is a problem in ensuring that all the 30,000 offices in Germany who put out tenders for public contracts know who has been previously found to be untrustworthy. There are legal doubts as to whether such information can be exchanged between Länder. It is planned to establish a Federal central register, but the legislation had not been submitted to Parliament at the time of the evaluation.¹⁴

¹⁴ In March 2002, such a bill was under discussion in Parliament.

vii) *Chambers of Commerce*

67. The German Federation of Chambers of Commerce has played a positive role in developing awareness of corruption. It helped draw up guidelines for industry when the new law of 1998 made international bribery an offence. It recognises that private-to-private bribery is of similar level of seriousness to public sector bribery and is surprised that this view is not taken by all members of the ICC.

c. Immunities from investigation, prosecution and adjudication for corruption offences

68. In Germany, the following categories of persons enjoy immunities, in addition to those subject to the specific rules on diplomatic immunity: members of the Bundestag (lower federal chamber, composed of people's representatives) on the basis of Section 46 of the Federal constitution, members of the (monocameral) parliaments of the Länder on the basis of similar provisions contained in the Länder constitutions¹⁵. The immunity of members of the Bundestag applies also to the Federal President (Article 60 of the Constitution – Grundgesetz).

69. Article 46 of the federal constitution makes a distinction in para. 1 between so-called "exemption from prosecution" ("*Indemnität*"), which is to be understood in terms of freedom from court proceedings or disciplinary action in respect of votes and statements made in speeches before the Bundestag, its committees or in party groups, and cases of inviolability ("*Immunität*"), which are dealt with in paras. 2 to 4. In contrast to immunity, prosecution or disciplinary action is subject to a general ban in the case of "exemption from prosecution" pursuant to para. 1, i.e. it cannot be authorised by the Bundestag. Para 1 does not apply to defamatory insults. A member of parliament cannot renounce his/her own immunity.

70. Criminal proceedings against a member of the Bundestag, measures of search and seizure in proceedings in which the member of parliament is a defendant, arrests and the giving of declarations in lieu of oath in the case of compulsory enforcement (oath of disclosure), are all subject to permission being given by the Bundestag (except where a Member is apprehended in the act of committing an offence or in the course of the following day)¹⁶. Requests by the public prosecutors' offices or courts must be communicated through the proper channels to the Federal

¹⁵ Article 28 of the Bavarian Constitution lays down the following:

"(1) No member of the Land parliament can be taken for questioning or arrested for an act which carries a penalty during session without the permission of the Land parliament unless he was arrested when committing the act or at the latest during the following day.

(2) The same permission is required if the member of parliament is in some other way restricted in his personal freedom and if his exercise of his profession as a member of parliament is impaired as a result of this.

(3) Any criminal proceedings against a member of the Land parliament and any custody or other restriction of his personal freedom shall be lifted at the request of the Land parliament for the duration of the session. Such a request cannot however be made if the member of parliament is accused of having committed a non-political crime. The Land parliament shall decide of this is the case."

Pursuant to Article 48 of the Land Constitution of North-Rhine/Westphalia, permission is required for, among other things, proceedings to be conducted against a member of the Land parliament for criminal offences and for searches and seizures within such proceedings to be executed.

Article 58 (Immunity) of the Constitution of the Land of Brandenburg contains the following regulation:

"Any measure of criminal prosecution taken against a member of parliament, any detention and any other restriction of his personal freedom shall, at the request of the Land parliament, be suspended if it leads to the parliamentary work of the Land parliament being impaired."

Further details and other cases requiring permission are regulated in most of the Länder in corresponding rules or notices on the immunity of members of the legislative bodies.

¹⁶ The individual cases are listed in the "Principles in Matters of Immunity", which constitute an integral part of parliamentary law currently in force and are appended to the Rules of Procedure of the Bundestag.

Minister of Justice, who shall submit them to the President of the Bundestag, requesting a decision on whether permission will be granted to prosecute the person or take any other measures envisaged (creditors may address their request directly to the Bundestag). The Committee for the scrutiny of Elections, Immunity and the rules of Procedure prepares the decision of the Bundestag by submitting a recommendation. This usually takes place at the next regular meeting of the committee. To simplify procedures it is entitled to take a preliminary decision regarding road traffic and petty offences.

71. The permission is not necessary first to conduct preliminary investigations for a criminal offence by the public prosecution service. In the beginning of each legislative period the Bundestag grants permission, up to the end of the period, for preliminary investigations in all cases except those involving insulting statements of a political nature. The President and the member concerned must be informed before such measures are initiated, unless – as regards the latter – this would impede the process of ascertaining the truth. Investigation can be started not earlier than 48 hours after giving information. An arrest (or another measure restricting freedom, or issuing of a compulsory attendance order) or the institution of criminal proceedings are not covered by the decision at the beginning of the legislative term, but – as described above - require special permission. The enforcement of a sentence of imprisonment would require second permission. When making its decision, the Bundestag may not consider the evidence or interfere in a pending action designed to ascertain right or wrong, guilt or innocence (Principle 4 of the Principles governing matters relating to immunity). This is also true for the Länder.
72. In practice, according to data available since 1976, immunity in the Bundestag is as a rule lifted where the matter in question does not relate to statements made in the political arena. For instance for the period 1994-1998 (22 requests concerning 15 MPs), immunity was lifted for all disciplinary proceedings (2), all those relating to road traffic offences (2) and all those relating to crime in general (11). None of these cases concerned corruption. In the period 1976-1998, no MP has been subject to imprisonment or other freedom-restricting measure, with the exception of 5 cases of search and seizure. The GET did not go into further details as concerns the Länder.
73. Concerning diplomatic immunities, the Federal Foreign Office knows of no case in which there was convincing evidence that a German diplomat had committed acts of corruption in the country in which he benefited from diplomatic immunity.

III. ANALYSIS

a. General anti-corruption policy

74. Germany recognises that corruption is a real phenomenon and a real problem in some fields, particularly the construction and health sector (pharmaceutical industries). This is reflected by the figures made available during the visit. Whether the figures reflect an increasing level of corruption, a greater awareness (and perception by the public) or an increasing level of efficiency of the repressive authorities is open to debate. In any case, the GET believes that, in combination with the various anti-corruption measures adopted so far and notably the extent of research and data, they reflect a clear will not to tolerate corruption.
75. Various qualitative and quantitative studies, whether or not focusing on specific sectors, have been carried out, trying to analyse the reasons for the perpetration of corrupt acts and for involvement in corrupt relationships, to identify sectors at risk, and to identify possible threats (including connections with organised crime). Both strategic and operational analyses are carried

out, both at the level of the federation and the Länder. They involve many actors and practitioners and include direct empirical questioning of the law-enforcement and repressive authorities. The GET was impressed by the wide availability of high quality research and statistics for the analysis of corruption, a factor which is fundamental when it comes to policy-making in this area. It only wishes to recall here some difficulties that the BKA faces in integrating data from judicial authorities into the overall picture of the situation of corruption, as the interministerial meeting planned to discuss this has been delayed several times¹⁷.

76. Special attention is paid to prevention as a cost-effective way to control corruption at both federal and Länder level. The federal guideline appears to be a very useful tool, synthesising good practices for the prevention and detection of corruption. Some Länder seem to be particularly active, notably Berlin where cases are analysed and experience is translated into concrete preventive measures, supported by an inter-institutional dialogue. The GET was positively impressed by the efforts devoted to the prevention of corruption. In some Länder, much of this preventive work is carried out by prosecutors. Whilst the GET recognises that prosecution must remain the main function of prosecutors, it suggests that it is worth considering the involvement of prosecution offices in preventive approaches in other Länder.
77. The federal structure of Germany devolves a lot of responsibilities to the Länder. This situation poses some challenges in terms of homogeneity of anti-corruption initiatives throughout the entire territory of the federation. The federal guideline, regular conferences of the ministers of justice or interior, the BKA annual report and the new periodic security report are initiatives which contribute to a certain degree of harmonisation. The GET noted with interest that mechanisms have been put in place to coordinate the fight against corruption. The involvement of the Länder and the national associations of local authorities in the discussion of all aspects of prevention of corruption is a further step on the path towards achieving harmonised handling of this complex area.
78. As the GET was told, an overall and complete picture of the existing initiatives is hard to draw. Such a picture would perhaps facilitate the direct sharing of experience among the various Länder authorities when it comes to the setting-up of specialised prosecution or police units, integrated repressive bodies, inter-institutional cooperation and information exchange schemes, administrative inspection groups, administrative anti-corruption rules etc. The report on the "Programme to Prevent and Combat Corruption" described previously, which is currently being updated, will, however, provide a compilation of the measures taken by both the Federation and the Länder to prevent and combat corruption. The GET believes that such a global picture could be useful. It noticed notably that the new Länder, are only very seldom mentioned when it comes – for instance – to the existence of special institutional initiatives at the level of police and prosecution. The GET also noted that specialised practitioners met by the GET during the visit sometimes ignored the situation in other Länder, although according to the German authorities specialised practitioners in general have a good knowledge of what other Länder do, due to co-ordinated actions in investigations taking place in several Länder and to nationwide meetings for the exchange of experience.
79. As a consequence, the GET welcomed the drafting of compilations of anti-corruption measures adopted in Germany and recommends that these reviews be kept regularly updated and disseminated. In the light of these, systems should ensure appropriate follow up of anti-corruption initiatives at federal and Länder level, providing for the possibility for making recommendations for improvements.

¹⁷ see BKA report on the situation of corruption 1999, p. 17.

b. Institutions, bodies and services dealing with the prevention, investigation, prosecution and adjudication of corruption offences

b1. Police, Public Prosecution and Judiciary

80. In general, it seems that repressive authorities have sufficient means. None of the representatives met by GET complained about a possible lack of human and material resources and there is no large backlog of cases. Statistical information about the work of special prosecution offices given to the GET indicates that work is carried out effectively. Specialisation and multi-disciplinarity seem to lead to results in terms of detection and convictions. However, due to the difficulty of obtaining a full picture of the organisation of anti-corruption services at infra-Länder level, it is difficult to know where there are insufficiencies in terms of specialised/multidisciplinary police or prosecution bodies to fight corruption. The current possibilities of giving a case to an adequately experienced prosecution office or jurisdiction compensate possible lacks. However, specialisation sometimes exists at the level of prosecution, but not at the corresponding level of police jurisdiction (e.g. in Cologne), a situation which seems to pose some difficulties. The GET believes that the follow up system recommended above should enable such problems to be taken into account and to ensure the necessary enhancement of specialisation and training where they are needed.
81. The GET had rather a positive impression of the inter-institutional dialogue in Germany. However, some lack of central coordination seems to hinder fuller consideration being given to positive initiatives at the level of certain federal bodies or certain Länder, which have already shown their use and value in Germany or elsewhere; this is for example the case for the enhancement of prevention activities which appear to be particularly cost effective (e.g. the efforts of the BKA anti-corruption unit in developing contacts with new partners; and the example of the Berlin prosecution office's involvement in prevention).
82. The GET was aware of the current debate in Germany concerning the means to improve the functioning of the judiciary as a whole (including prosecutors). It considered preferable not to enter into a detailed analysis of this issue as no firm conclusions could be drawn after such a short evaluation visit. In the GET's view, direct political control in concrete cases handled by prosecutors seems to be limited and guarantees seem to be sufficient (there are conditions for giving instructions, conditions for appealing instructions, criteria for the distribution of work among prosecutors, principle of legality of prosecution etc.). The GET noted that in four out of sixteen Länder, the public prosecutor generals are still political appointees. In principle, there can be no objection to the supervision of public prosecution offices in corruption cases, too, as long as there is no exertion of undue influence which could hinder an objective treatment of the case.
83. The GET noted that according to the German authorities, instructions in individual cases do, in practice, constitute an absolute exception; these authorities also state that there is no evidence to confirm that improper influence in the exercise of the powers of a public prosecutor could be prevented by increasing the degree of independence of public prosecutors. However, the GET further noted that the issue of political influence has caused criticism in public mass media and that public perception of prosecutors' independence is an important factor. In this respect, the GET took note of the personal and public commitment of the Minister of Justice of North Rhine-Westphalia not to give instructions anymore in individual cases as a means to increase the confidence of the public.

84. With the aim of ensuring that the possibility of improper political influence over prosecutors in corruption cases is removed, the GET recommended to ensure the independence of the prosecution in dealing with corruption cases, avoiding to the largest possible extent risks of undue influences in the exercise of prosecutorial powers. In this context, the German authorities should consider removing the political status of prosecutor generals in the few Länder where it still exists.
85. As far as judges and courts are concerned, according to empirical research, there is only little perception of corruption (see appendix 2). The only significant controversies at the moment relate to the wish of the profession to enjoy a greater management (administrative/financial) autonomy, and to the designation of judges which sometimes grant to political actors, as for prosecutors, an important responsibility. The selection procedures could be more transparent in this respect and grant a greater role to the profession itself. Thus, in North Rhine-Westphalia, for example, selection commissions have been created for the appointment of new staff, these commissions consisting solely of members drawn from the judiciary or from the public prosecution service.

b2. Sources of information

86. The GET was positively impressed by the work accomplished by the police and judicial authorities from both a quantitative and qualitative point of view. The various detection mechanisms put in place seem to perform in a satisfactory way. In this respect, the GET assessed very positively the tendency to involve expert bodies such as courts of audits and cartel authorities. The GET further noted that there were no general complaints from the side of German practitioners as regards difficulties connected with the obtaining of evidence, which is traditionally a major problem in corruption cases. The legal means already available seem to be used to the widest extent possible.
87. However, the absence of a possibility to intercept communications in corruption cases was brought up by enforcement authorities as the most significant deficiency. The possibility of interceptions might increase the efficiency of investigations especially in the initial phase and prevent the risk of evidence disappearing. The GET noted that the importance of interceptions should not be overestimated - as the availability of such means would probably lead criminals to take counter measures (for instance frequent changing of telephone numbers). Nevertheless, allowing interception of communications would be only a logical continuation of the police's existing right to listen to conversations in private dwellings by means of technical equipment on special conditions regulated by the law. The GET further recalled that corruption is generally the result of a hidden pact which has to be deduced from various kinds of information and behaviours.
88. For these reasons, the GET recommended that the possibility of using interception of communications should be extended so as to apply to serious corruption offences.
89. Germany appears to have satisfactory measures in the field of witness protection. However, the current schemes apply only in cases of significant crime, especially where corruption is connected with terrorism or organised crime (as is stated in the Act to Harmonise the Protection of Witnesses at Risk (ZSHG). Where this is not the case, the only way to provide a certain degree of protection, would be to use anonymous testimonies, a solution that could be difficult to reconcile with the requirements of the European Convention on Human Rights.

90. Providing assistance to the authorities in the course of a criminal investigation can be a mitigating factor for persons suspected or accused of a punishable offence. However, neither the police nor the prosecution are empowered to provide any guarantees that the court actually will accept to mitigate the sentence of the person willing to co-operate. Some of the GET's interlocutors argued that without such a guarantee it was often very hard or even impossible to obtain the assistance of the suspect or accused during the investigation. Indeed, the idea is that a person considering divulging a corrupt agreement and, in this way, exposing him/herself to a danger of prosecution or punishment should be put in a position to assess with some certitude what sort of benefit he/she will obtain from his/her co-operation with the authorities. The GET heard some proposals aiming at solving this difficulty, such as, providing for compulsory mitigation in this kind of cases or empowering the prosecutor to press a lesser charge against persons who assist the investigation, or binding the court to the maximum term of punishment proposed by the prosecutor. However, the GET was made aware that these solutions might be in conflict with essential constitutional principles of judicial power being vested in judges (Article 92 of the Basic Law) and of the independence of judges (Article 97 of the Basic Law).
91. The GET agreed however with the opinion, repeatedly stressed and confirmed by already existing proposals¹⁸ to the same effect, that rules should be considered to allow the police and/or the prosecution to negotiate agreements on outcome in corruption cases, with the participation of the court, if the suspect or accused person agrees to co-operate with the authorities. By reason of the aforesaid, the GET recommended the German authorities to give further consideration to the existing proposals.
92. According to the federal guideline, federal authorities are under an obligation to report grounded suspicions of corruption offences to the police or public prosecution. Similar regulations exist at least in some Länder. Public officials are therefore under an obligation to inform their superior, and not the police or prosecution directly. In case of lack of reaction, the official can use the channel of hierarchical remonstrance, and the internal anti-corruption contact person is a valuable source of advice on how to handle concrete corruption – related issues. However, some concern arose due to the possibility of applying disciplinary proceedings against an official who has violated the internal reporting obligation. As a consequence, and under certain circumstances, the dissuasive effect of possible disciplinary measures could hinder the detection of corruption (e.g. when the department of the official concerned is affected by corruption). This could explain why a number of tips to the repressive authorities originate from persons who prefer to remain anonymous. In the light of these considerations, the GET recommended to the German authorities that disciplinary measures should not apply to an official who – in breach of internal reporting duties – reports directly a grounded suspicion of corruption to the police or prosecution.

c. Other institutions involved in the fight against corruption

93. The German Government's recent efforts to tackle private sector corruption were praised by both the Chamber of Commerce and Transparency International as having led industry to re-examine its practices. However the absence of criminal liability for companies was criticised by TI which considered that the *Ordnungswidrigkeiten-Gesetz* did not offer an effective equivalent to the criminal liability, and that maximum penalties available were still too low. The German authorities take the view, on the other hand, that the existing system is allowed by international instruments and that non-criminal fines of 1 million DM (or more) can indeed affect companies' behaviour, particularly as they have to operate on increasingly small profit margins.

¹⁸ See BKA 1999 report on corruption, pages 49-50, and Professor Döling's work (ibid footnote 17), page 112.

94. As concerns public procurement, the GET was of the opinion that the absence of a central supervisory agency is partly compensated by other sectoral control mechanisms (e.g. the well-developed system of the Ministry of Defence). GRECO pointed out, in this respect, to the importance – in the light of comparative experience – to provide such control mechanisms with appropriate investigative and auditing capacities. Moreover, according to some sources, the procurement rules as such are not objectionable, but they are not always enforced strictly enough, on the grounds of urgency or of the need to protect local industry and employment. This problem has been commented on by the Federal and the Berlin Courts of Auditors. The Federal Court said in 2000 that “non-compliance with the general principle of public competitive bidding (for all contracts below the threshold which requires EU-wide competition) is still a frequent occurrence”.
95. At the time of the GET visit, a proposal to establish a Federal Register of untrustworthy companies under the responsibility of the Federal economic administration was under preparation. This proposal was welcomed by most of the people interviewed by the GET, even if some concerns were expressed about the very harsh consequences for companies that depend on public procurement, and about the need to administer such a register neutrally (i.e. not by government or industry). Since the sector of public procurement remains a sector at risk in Germany, the GET considered nevertheless that such a Register would be a useful tool, though it should be regarded as providing historical information, rather than debarring companies for all time. The GET considered also that it could compensate for the absence of a central public procurement agency. As TI pointed out, the 1998 Federal Directive on Prevention cannot be fully effective without such a Register. Prosecutors mentioned their sense of frustration that pharmaceutical companies they had successfully prosecuted for corruption were subsequently found to be committing similar offences in neighbouring countries. Clearly this problem cannot be resolved by Germany alone, but points to the need for a wider international Register.
96. In view of the above, the GET recommended that the rules on public procurement should be better enforced, including in cases which fall below the threshold for EU-wide competition, and legislation should establish at Federal level a central register ('blacklist') of companies who have previously been found untrustworthy in bids for public contracts.
97. The GET wondered whether the conjunction of certain factors exposes the category of senior officials to specific risks in terms of corruption. The GET noted that public officials are not required to make declarations of income (except for tax purposes and in the context of ancillary employment) or assets, since such an obligation would conflict with German constitutional law and data protection law. The GET was told by T.I. that there is some concern in Germany about cases of former officials who accept employment with corporations or persons with whom they had official dealings). Furthermore, the politicisation of certain senior public officials makes them subject to specific relationships with their minister in practice (notably in terms of accountability). Finally, the GET was informed that some obligations aiming at preventing conflicts of interest do not apply to former civil servants who were dismissed upon their own application or whose public service relationship was terminated because of misconduct by act of law or as a result of disciplinary proceedings. As a conclusion, the GET observed that although there is a number of control mechanisms, there is still some room for improvements to strengthen control over all senior public officials.
98. As far as the rules applicable to MPs are concerned, there has been no evidence of any cases of corruption within the Bundestag. However, bearing in mind situations that have arisen within other parliaments, the sanctions do appear to be relatively weak. In the event of a breach of the

rules, the President may publish a paper setting out his findings, and that is the only sanction. In the event of a conviction for bribery, the member would not be suspended from Parliament (as the minimum sentence is less than one year). This is a difficult area and, in view of the absence of practical problems, the GET makes no recommendation on this matter. However, it observes that, with a view to the future, the relevant authorities in Germany may wish to consider introducing more dissuasive sanctions to ensure the independence of MPs.

99. The GET welcomed the effective role played by the media and the NGO sector in Germany. Sensitive corruption cases seem to be followed closely by the media although, as was said during the visit, not always accurately. On their side, professional bodies and organisations such as Transparency International have shown their strong involvement and capacity to advocate in favour of improvements.
100. The GET welcomed the progressive involvement at the level of the Federation and Länder of expert bodies such as the courts of audit and cartel offices. The increasing dialogue should provide the authorities traditionally involved in the control of corruption with information useful for the detection of corruption and expertise for the handling of concrete cases. It should also raise the awareness of these bodies about the challenge and the needs of the fight against corruption. The GET believed that the right of courts of audit to suggest criminal prosecution deserves serious consideration, in order to enhance further the detection of corruption.
101. Finally, the GET noted that the legislation of North Rhine-Westphalia has not granted the same degree of independence to municipal auditors as is enjoyed by Federal and State Courts of Auditors. For example, municipal auditors' terms of employment and pay are the responsibility of the city's executive. The GET observed that this situation might be worthy of further consideration.

d. Immunities

102. Immunities are enjoyed only by MPs in the federal parliament and the sixteen Länder parliaments. According to information received by the GET, immunity does not appear as an obstacle for the investigation of crimes committed by MPs, at least at the level of the Bundestag - where the major interests might be crystallised. The committee responsible does not examine the substance of the case submitted and the GET observed that the number of cases where the lifting of immunity by the Bundestag had not been lifted remained at the lowest levels in recent years; furthermore, it was lifted systematically in criminal cases. It is likely that immunity would be lifted if a member of Parliament were under suspicion of corruption, although most cases which have occurred so far were not connected with corruption. Furthermore, there is no need for a permission of the Bundestag or its competent committee to start a preliminary investigation. On the other hand, keeping in mind the risk of leakages of information already encountered and its possible consequences (in terms of disappearance of evidence before an investigation has been started), the GET expressed some concern as the current system combines a restriction on starting the investigation earlier than 48 hours after notification of the Bundestag by the prosecutor, with the fact that the MP concerned has to be informed (as a matter of fact only insofar as this does not impede the process of ascertaining the truth). And as already seen, bugging cannot be used against an MP (unless he is a defendant).

IV. CONCLUSIONS

103. There has been an increased incidence and awareness of corruption in Germany since the early 1990s and the GET noted with satisfaction the positive response of the authorities to the challenge. The repressive system works effectively overall, as regards both public and private sector corruption. Considerable resources are devoted to prosecutors' office in the main urban centres, and they have access to accounting and financial expertise which is vital in tackling business crime. Preventive work is also taken very seriously, and the Federal Government's 1998 directive on prevention was a major step in this field. The quality of empirical research (including both statistical data and in-depth studies) is high. The GET welcomed also the mostly positive reactions from the media, the private sector and NGOs, who have proved effective watchdogs.
104. The GET noted the difficulty to obtain a full picture of the anti-corruption measures applied in Germany, despite the amount of studies and publications available. While this is to some extent a consequence of the Federal structure of the State, the GET believed that steps could be taken to ensure a more intense exchange of good practice. In addition, it appeared that some improvements are needed in order to facilitate the gathering of information/evidence, to strengthen the control over public tenders and to complete the ongoing reform in favour of the statutory independence of the judiciary. The GET further noted the importance of avoiding disciplinary proceedings against officials reporting directly suspicions of corruption to the law enforcement authorities. Finally, it also pointed out to the usefulness of enhancing further the control over certain categories of public functions.
105. In view of the above, GRECO addressed the following recommendations to Germany:
- i. to keep regularly updated and to disseminate compilations of anti-corruption measures adopted in Germany. In the light of these, systems should ensure appropriate follow up of anti-corruption initiatives at federal and Länder level, providing for the possibility for making recommendations for improvements;
 - ii. to ensure the independence of the prosecution in dealing with corruption cases, avoiding to the largest possible extent risks of undue influences in the exercise of prosecutorial powers. In this context, the German authorities should consider removing the political status of prosecutor generals in the few Länder where it still exists;
 - iii. the possibility of using interception of communications should be extended so as to apply to serious corruption offences;
 - iv. to give further consideration to the existing proposals aiming at allowing the police and/or the prosecution to negotiate agreements on outcome in corruption cases, with the participation of the court, if the suspect or accused person agrees to co-operate with the authorities;
 - v. that disciplinary measures should not apply to an official who – in breach of internal reporting duties – reports directly a grounded suspicion of corruption to the police or prosecution;
 - vi. to better enforce the rules on public procurement, including in cases which fall below the threshold for EU-wide competition, and to adopt legislative measures to establish at

Federal level a central register ('blacklist') of companies which have previously been found untrustworthy in bids for public contracts.

106. Moreover, the GRECO invites the authorities of Germany to take account of the observations made by the experts in the analytical part of this report.
107. Finally in conformity with article 30.2 of the Rules of Procedure, GRECO invites the authorities of Germany to present a report on the implementation of the above-mentioned recommendations before 31 December 2003.

APPENDIX I

List of institutions and representatives met by the GET

Fed. Ministry of Justice	Mr M. MÖHRENSCHLAGER Ms I. ARNOLD Mr BURMEYER Mr WEINGÄRTNER Mr BLATH (Head of Criminology Section)
Fed. Ministry of Interior	Mr Von BRONSART (Police Department) Mr U. BEHRENS (Prevention Department) Mrs HAFERKAMP, Mrs KLUGE (Disciplinary Dept.) Mr C.P. HOLZ (BKA – Head of Corruption Unit)
Federal Ministry of Defence	Mr FRISCHHOLZ
Fed. Ministry of Economy and Technology	Mrs OTTEMEYER Mr WANKMÜLLER
Federal Ministry of Finance	Mrs MEURER (Tax Law Department) Mr HAAKE (Customs Department) Mrs ELSCHKER Mr KELLER (Federal Customs Investigation Office)
Bundestag	Mr WINKELMANN (Committee for Immunities etc.) Mr NOWAK (Code of Conduct)
Federal Court of Audit	Mr BUTTKEREIT (Head of Audit unit) Mr BOEKER (Senior Auditor)
Land Berlin	Mr THIEL (Ministry of Justice, General administration) Mr WULFF (Prosecutor's Office, Head of corruption unit) Mr MAASS (Criminal Police Office, Head of corruption unit) Mr PAAR (Court of Accounts, construction department)
Land Bavaria	Mr HELD, MARKWARDT, KARTZKE, KRAMES (Ministry of Justice) Mrs Von WILMOWSKY, SCHMIDT (Ministry of Economy, traffic and Technology) Mr BASSALIG, OTTMANN (Criminal Police Office) Mr SAUTER (Prosecution Office to High Court) Mr WICK, NÖTZEL (Prosecution Office Munich I) Mr THOLL (Court Munich I) Mr BIEBL, GERZ (Municipal administration Munich) Mr FISCHLE (higher construction administration) Mr SCHUH (authority for the supervision of trusts)
Land North Rhine-Westphalia	Mr SUHR (Audit Department of Bonn municipality) Mr KRAKAU, POHL (Prosecution Office Cologne)
Association of Chambers of Commerce	Mr J. MÖLLERING (Head of Legal Department)
Transparency International	Mr M.H. WIEHEN (Head of German Chapter)

APPENDIX II

Self assessment of the extent of corruption

The following table summarizes the results of replies to the question: *to what extent do you consider the various groups under research affected by corruption*. It is based on information provided by 582 respondents from the uniform and criminal police of the Länder, the Federal Border Guard and BKA, public prosecutors, penal judges, staff of the sentence enforcement sector (prisons), staff of the higher financial directorates and the Customs criminal service.

Source: *Assessment of Corruption within the police, judiciary and Customs*; research project of the BKA and Federal Police Academy, November 1999

The figures are given in percentage (ex: 2% of respondents consider the uniform police not affected)

			Rather seriously affected		
Uniform police	2,0	70,3	19,7	2,0	6,0
Criminal police	2,1	72,1	20,4	1,2	4,2
Customs	1,2	80,0	16,5	2,4	0,0
Public Prosecution	42,9	50,0	0,0	0,0	7,1
Penal jurisdictions	77,4	12,9	0,0	0,0	9,7
Sentence enforcement sector	0,0	80	16,7	3,3	0,0

APPENDIX III

Additional statistics and information on the phenomenon of corruption

1) The Police Statistics on Crime [*Polizeiliche Kriminalstatistik – PKS*] show the following number of cases of crimes involving corruption - sections 108e, 299, 300 and 331-335 German Criminal Code:

1998	1999	2000
3,566	3,015	5,223

It must be pointed out in respect of the statistics that a case is recorded as the offence which incurs the most severe penalty in terms of type and degree. Fluctuations in the figures are partly due to complex investigation procedures involving numerous individual cases. Fluctuations can also be observed as for the number of persons suspected of having committed a corruption offence:

1998	1999	2000
2,621	1,840	4,593

2) The number of persons convicted, which can be ascertained from the statistics on criminal prosecution, was as follows for former West Germany including Berlin:

	1998	1999	2000
for the offence of acceptance of an advantage (section 331)	28	31	30
for the offence of taking a bribe (section 332)	88	100	79
for the offence of granting an advantage (section 333)	11	23	32
for the offence of offering a bribe (section 334)	283	218	169
particularly serious offence within the meaning of section 335	17	23	12

The offence is included in the statistics as the offence which incurs the most severe penalty under the law. These figures do not include cases where criminal proceedings were terminated for reasons of discretionary prosecution, in some cases on condition of payment of a sum of money.

3) Occasional file analyses since 1985 have shown the different motives for corruption¹⁹. The professional category mostly affected is the general administration²⁰ (in 1999: 748 procedures concerning this sector, compared to 123 procedures for the repressive/judicial sector, 109 procedures for the economic sector, 0 for the political sector). As concerns the perception of corruption within the repressive/judicial sector, a table is appended (see appendix 2).

¹⁹ To obtain public contracts, loans from public banks, permits from public authorities - such as building permits, night club licences, residence permits, driving licences – and to avoid payment of import duties, fines for traffic offences, or imposition of conditions for instance in the field of environment protection).

²⁰ 31,1 % of bribees were operating in the health sector, 18% belonged to construction authorities, and 13,9% belonged to municipal authorities. Source: BKA report 1999.

4) Key information is presented in the "Situation on Corruption in the Federal Republic of Germany 1999" (by the BKA)²¹:

	1998	1999
registered investigation proceedings relating to corruption	1,072	1,034
separate offences of corruption detected	11,049	6,743
Number of suspected offenders involved	2,040	2,535

5) Information is available on all 1,299 "takers" (identified in 1999) in respect of their function:

Clerical workers	39,6%
Worked in a managerial position	24,5%
mayors	1,5%
others	34,4%

6) As far as the "givers" are concerned, information relating to their function is available only in respect of 546 persons (of a total of 1181 "givers"):

belonged to higher management level	87,6%
Had a position with managerial responsibility	5,1%
Had no position with managerial responsibility	7,3%

7) The target for corruption is primarily the public administration, where the awarding of public contracts (construction projects, supply etc) and services are affected most of all. The 1999 report also indicates that the group of the most affected Länder between 1994 and 1998 (Bavaria, Hamburg, Berlin and North Rhine-Westphalia), comprises since 1999 also the Länder of Lower-Saxony and Schleswig-Holstein.

²¹ The discrepancy between the figures for corruption offences and for suspected offenders given by the PKS and the report on the corruption situation can be put down to the different methods of collecting the statistics. Whilst the figures given by the PKS are statistics which are only collected once the police investigations have been concluded and the case passed on to the public prosecution office, the figures for the statistics contained in the report on the corruption situation are collected at the beginning of police investigations. Since it is not possible for all the charges made at the beginning of proceedings to be clarified and confirmed by the police, the PKS contains lower figures.

APPENDIX IV

Selected provisions of the German penal code (English – unofficial – versions of the German penal and penal procedure codes are available at www.bmj.de)

Section 78 Period of Limitation

- (3) To the extent that prosecution is subject to a statute of limitations, the period of limitation shall be:
1. thirty years in the case of acts punishable by imprisonment for life;
 2. twenty years in the case of acts punishable by a maximum term of imprisonment of more than ten years;
 3. ten years in the case of acts punishable by a maximum term of imprisonment of more than five years but not more than 10 years;
 4. five years in the case of acts punishable by a maximum term of imprisonment of more than one year but not more than five years;
 5. three years in the case of other acts.

Section 108b Bribery of Voters

- (1) Whoever offers, promises or furnishes another gifts or other benefits for not voting or for voting in a particular manner, shall be punished with imprisonment for not more than five years or a fine.
- (2) Whoever requests, is promised or accepts gifts or other benefits in exchange for not voting or voting in a particular manner, shall be similarly punished.

Section 108e Bribery of Members of Parliament

- (1) Whoever undertakes to buy or sell a vote for an election or ballot in the European Parliament or in a parliament of the Federation, the *Lands*, municipalities or municipal associations, shall be punished with imprisonment for not more than five years or a fine.
- (2) Collateral to imprisonment of at least six months for a crime pursuant to subsection (1), the court may deprive the person of the capacity to attain public electoral rights, and the right to elect or vote in public matters.

Section 129 Formation of Criminal Organizations

- (1) Whoever forms an organization, the objectives or activity of which are directed towards the commission of crimes, or whoever participates in such an organization as a member, recruits for it or supports it, shall be punished with imprisonment for not more than five years or a fine.
- (2) Subsection (2) shall not be applied:
1. if the organization is a political party, which the Federal Constitutional Court has not declared to be unconstitutional;
 2. if the commission of crimes is only an objective or activity of minor significance; or
 3. to the extent that the purposes or activity of the organization relate to crimes under Sections 84 to 87.
- (3) An attempt to form an organization indicated in subsection (1) shall be punishable.
- (4) If the perpetrator is one of the ringleaders or supporters or there exists an especially serious case, then imprisonment from six months to five years shall be imposed.
- (5) The court may dispense with punishment under subsections (1) and (3) in the case of participants whose guilt is slight or whose involvement is of minor significance.

(6) The court may in its discretion mitigate the punishment (Section 49 subsection (2)) or dispense with punishment under these provisions if the perpetrator:

1. voluntarily and earnestly makes efforts to prevent the continued existence of the organization or the commission of a crime consistent with its goals; or
2. voluntarily discloses his knowledge to a government agency in time, so that crimes, the planning of which he is aware, may still be prevented;

if the perpetrator attains his goal of preventing the continued existence of the organization or if it is attained without his efforts, then he shall not be punished.

Section 261 Money Laundering; Concealment of Unlawfully Acquired Assets

(1) Whoever hides an object which is derived from an unlawful act named in sentence 2, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its forfeiture, its confiscation or its being taken into custody, shall be punished with imprisonment from three months to five years. Unlawful acts within the meaning of sentence 1 shall be:

1. serious criminal offences;
2. less serious criminal offences under:
 - a) Section 332 subsection (1), also in conjunction with subsection (3), and Section 334;
 - b) Section 29 subsection (1), sent. 1, no. 1, of the Narcotics Law and Section 29 subsection (1), no. 1, of the Precursors Control Law;
3. less serious criminal offences under Section 373 and, if the perpetrator acted professionally, under Section 374 of the Fiscal Code, and also in conjunction with Section 12 subsection (1), of the Law to Implement the Common Market Organizations respectively;
4. less serious criminal offences:
 - a) under Sections 180b, 181a, 242, 246, 253, 259, 263 to 264, 266, 267, 269, 284, 326 subsections (1), 2 and 4, and 328 subsections (1), 2 and 4;
 - b) under Section 92a of the Aliens Law and Section 84 of the Asylum Procedure Law, which were committed professionally or by a member of a gang which has combined for the continued commission of such acts; and
5. less serious criminal offences committed by a member of a criminal organization (Section 129).

In cases under sentence 1, number 3, sentence 1 shall also apply to an object in relation to which fiscal charges have been evaded.

(2) Whoever:

1. procures an object indicated in subsection (1) for himself or a third person; or
2. keeps an object indicated in subsection (1) in his custody or uses it for himself or a third person,

shall be similarly punished.

(3) An attempt shall be punishable.

(4) In especially serious cases the punishment shall be imprisonment from six months to ten years. An especially serious case exists, as a rule, if the perpetrator acts professionally or as a member of a gang, which has combined for the continued commission of money laundering.

(5) Whoever, in cases under subsections (1) or (2), is recklessly unaware, that the object is derived from an unlawful act named in subsection (1), shall be punished with imprisonment for not more than two years or a fine.

(6) The act shall not be punishable under subsection (2), if a third person previously acquired the object without having thereby committed a crime.

(7) Objects to which the crime relates may be confiscated. Section 74a shall be applicable. Sections 43a, 73d shall be applicable if the perpetrator acts as a member of a gang which has combined for the

continued commission of money laundering. Section 73d shall also be applicable if the perpetrator acts professionally.

(8) Objects which are derived from an act of the type indicated in subsection (1) committed overseas shall be the equivalent of the objects indicated in subsections (1),2, and 5, if the act is also punishable at the place of commission of the act.

(9) Whoever:

1. voluntarily reports the act to the competent public authority or voluntarily causes such a report to be made, if the act was not already discovered in whole or in part at the time and the perpetrator knew this or should have taken this into account upon a reasonable evaluation of the factual situation; and

2. in cases under subsections (1) or (2) under the prerequisites named in number 1, causes the object to which the crime relates to be taken into custody,

shall not be punished under subsections (1) to (5).

Whoever is punishable because of participation in the antecedent act shall also not be punished under subsections (1) to (5).

(10) The court in its discretion may mitigate the punishment (Section 49 subsection (2)) in cases under subsections (1) to (5) or dispense with punishment under these provisions, if the perpetrator through voluntary disclosure of his knowledge has substantially contributed, so that the act, beyond his own contribution thereto, or an unlawful act of another named in subsection (1), could be uncovered.

Section 299 Taking and Offering a Bribe in Business Transactions

(1) Whoever, as an employee or agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services, shall be punished by imprisonment for not more than three years or a fine.

(2) Whoever, for competitive purposes, offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration, for his giving him or another a preference in an unfair manner in the purchase of goods or commercial services, shall be similarly punished.

Section 300 Especially Serious Cases of Taking and Offering a Bribe in Business Transactions

In especially serious cases an act under Section 299 shall be punished with imprisonment from three months to five years. An especially serious case exists, as a rule, if:

1. the act relates to a benefit of great magnitude; or

2. the perpetrator acted professionally or as a member of a gang which has combined for the continued commission of such acts.

Section 331 Acceptance of a Benefit

(1) A public official or a person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of a duty, shall be punished with imprisonment for not more than three years or a fine.

(2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed, or would in the future perform a judicial act, shall be punished with imprisonment for not more than five years or a fine. An attempt shall be punishable.

(3) The act shall not be punishable under subsection (1), if the perpetrator allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its

powers, either previously authorizes the acceptance, or the perpetrator promptly makes a report to it and it authorizes the acceptance.

Section 332 Taking a Bribe

(1) A public official or person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform an official act, and thereby violated or would violate his official duties, shall be punished with imprisonment from six months to five years. In less serious cases the punishment shall be imprisonment for not more than three years or a fine. An attempt shall be punishable.

(2) A judge or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform a judicial act, and thereby violates or would violate his judicial duties, shall be punished with imprisonment from one year to ten years. In less serious cases the punishment shall be imprisonment from six months to five years.

(3) If the perpetrator demands, allows himself to be promised or accepts a benefit in return for a future act, then subsections (1) and (2) shall already be applicable if he has indicated to the other his willingness to:

1. violate his duties by the act; or
2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

Section 333 Granting a Benefit

(1) Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations or a soldier in the Federal Armed Forces, for that person or a third person, for the discharge of a duty, shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever offers promises or grants a benefit to a judge or an arbitrator, for that person or a third person, in return for the fact that he performed or would in the future perform a judicial act, shall be punished with imprisonment for not more than five years or a fine.

(3) The act shall not be punishable under subsection (1), if the competent public authority, within the scope of its powers, either previously authorizes the acceptance of the benefit by the recipient or authorizes it upon prompt report by the recipient.

Section 334 Offering a Bribe

(1) Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces, for that person or a third person, in return for the fact that he performed or would in the future perform an official act and thereby violates or would violate his official duties, shall be punished with imprisonment from three months to five years. In less serious cases the punishment shall be imprisonment for not more than two years or a fine.

(2) Whoever offers, promises or grants a benefit to a judge or an arbitrator, for that person or a third person, in return for the fact that he:

1. performed a judicial act and thereby violated his judicial duties; or
2. would in the future perform a judicial act and would thereby violate his judicial duties,

shall be punished in cases under number 1 with imprisonment from three months to five years, in cases under number 2 with imprisonment from six months to five years. An attempt shall be punishable.

(3) If the perpetrator offers, promises or grants the benefit in return for a future act, then subsections (1) and (2) shall already be applicable if he attempts to induce the other to:

1. violate his duties by the act; or

2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

Section 335 Especially Serious Cases of Taking or Offering Bribes

(1) In especially serious cases:

1. an act under:

a) Section 332 subsection (1), sent. 1, also in conjunction with subsection (3); and

b) Section 334 subsection (1), sent. 1, and subsection (2), respectively also in conjunction with subsection (3),

shall be punished with imprisonment from one year to ten years; and

2. an act under Section 332 subsection (2), also in conjunction with subsection (3), shall be punished with imprisonment for not less than two years.

(2) An especially serious case within the meaning of subsection (1) exists, as a rule, when:

1. the act relates to a benefit of great magnitude;

2. the perpetrator continuously accepts benefits which he demanded in return for the fact that he would perform an official act in the future; or

3. the perpetrator acts professionally or as a member of a gang which has combined for the continued commission of such acts.