



**TRANSPARENCY
INTERNATIONAL
Deutschland e.V.**

Die Koalition gegen Korruption.

June 5, 2007

Transparency International Deutschland e.V. submits a complaint against 57 German companies and their subsidiaries as listed in Annex A due to violations of the OECD Guidelines for Multinational Enterprises, paragraph VI (*Combating Bribery*).

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Summary of the Complaint

Chapter VI of the OECD's Guidelines for Multinational Enterprises states that "Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage". In addition, in order to prevent bribe payments through third parties, companies are asked to ensure "that remuneration of agents is appropriate and for legitimate services only."

In October 2005 the Independent Inquiry Committee (IIC) into United Nations' Oil for Food Programme reported that 2253 companies had paid a total of 1.8 billion dollars in 'kickbacks' – illicit or disguised payments – to the Iraqi government to obtain contracts to supply food, medicines and other humanitarian goods to Iraq.

At least 57 of those companies that allegedly participated in the extensive manipulation of the Oil for Food Programme are incorporated in Germany. On the basis of the substantial evidence presented in the Committee's so-called 'Volcker Report' (named after Paul Volcker, the committee chairman and former chairman of the US Federal Reserve) Transparency International Germany (TI-G) is filing this 'specific instance', or complaint, with the German National Contact Point (NCP).

TI-G recognises that this is an unusual, indeed thus far unique, specific instance to bring to the NCP, as it involves over 50 companies; it concerns illicit relations between these companies and the representatives of a national government that subsequently was forcibly removed from office; and it deals with business transactions that occurred several years ago.

In addition, legal investigations are continuing in Germany into the kickbacks – totalling \$11.9 million – allegedly paid by German companies according to the Volcker Report. Many cases are still being pursued, some have settled out of court and a few cases have been dismissed.

Despite these aspects, TI-G submits that the alleged breaches of the OECD Guidelines by such a large number of companies may not be ignored, if the credibility of the Guidelines is not to be compromised. Indeed, the highly detailed and authoritative evidence in the Volcker Report requires the urgent attention of the NCP. In view of its responsibility to promote adherence to the Guidelines, the NCP must make an effort to ensure that in future measures and mechanisms are in place in the companies concerned, so that a recurrence of the alleged breaches of the Guidelines may be avoided. In doing so, the NCP would send a signal that companies are expected to abide by the international standards encapsulated in the OECD Guidelines and agreed upon by all 30 OECD members and nine further states.

This complaint recommends specific, practical steps the companies allegedly involved, and the NCP should take in light of the evidence presented in the Volcker Report and the standards of responsible corporate behaviour enumerated in the Guidelines.

1. Transparency International Germany

Non-governmental organisations may present ‘specific instances’ under the Guidelines, in so far as they have a justified interest in doing so (Guideline Implementation Procedures, paragraph 12).

Transparency International (TI) is a civil society organization committed to the global fight against corruption. Through its network of more than 90 locally established national chapters and an international secretariat based in Berlin, Germany, TI raises public awareness of the devastating impacts corruption has on society. With partners in government, business and civil society, TI strives to develop effective institutions and measures to combat corruption. In pursuance of these aims, TI works alongside various national and international companies, associations and organizations including the EU, UN and the OECD. Supporting and monitoring the implementation of OECD agreements on fighting corruption are among TI’s most important tasks. In addition to working on global priorities such as rooting out corruption in politics, enhancing standards in the private sector and establishing and implementing international conventions against bribery and corruption, many chapters pursue individual programmes tailored to their regional needs and chapter members’ expertise and interests. TI’s German Chapter is a case in point.

Since 2000, when the OECD Guidelines for Multinational Enterprises were revised to include a chapter on "Combating Bribery" as well as three other chapters relevant to preventing corruption: "Disclosure", "Consumer Interests", and "Competition", TI-Germany has been involved in the work of the German National Contact Point for the OECD Guidelines and has actively promoted adherence to the Guidelines. Additionally, TI-Germany works directly with partners in the private sector, helping them to adapt to new global legal standards regards corruption and to the multiplicity of requirements, recommendations and expectations regards corporate social responsibility and accountability.

2. The German Companies Involved

The 57 companies and their subsidiaries listed in Annex A did business under the Oil for Food Programme in the period between mid-1999 and 2002, during which the Iraqi authorities demanded kickback payments from their business partners. The Volcker Commission documents payments of \$11,977,570 as “After Sales Service Fees” coming from the 57 German companies and their subsidiaries in Germany and abroad. The Volcker Commission reports that even more money was paid under the label of “Inland Transportation Fees”, but does not state the exact amount.

TI-G is aware of the fact that initiating a ‘specific instance’ procedure against such a large group of companies is quite unusual. However, the Guidelines do not specify that such cases cannot be submitted to an NCP. In the given situation it seems to be neither fair nor appropriate to single out one or a few companies, when 57 are documented allegedly to be involved in the same illegitimate practises. It is not the intention of TI-G to ‘make an example’ of particular enterprises, but to encourage all relevant companies, with the assistance of the NCP, to improve their precautionary systems against bribery and to systematically and reliably monitor their functioning.

TI-G believes that while the exact circumstances of each company's involvement in the UN programme varied, it remains within the capacity and scope of the NCP's responsibilities to act in broad terms on the types of promotional actions and preventative steps suggested in part six of this specific instance. The recommendations are seen as practical steps that can be applied to all the companies listed in the case.

NCPs have in the past often addressed 'specific instances' involving more than one company (see for instance the complaint by RAID (Rights and Accountability in Development), a British NGO, against six UK companies operating in the Democratic Republic of Congo.

Even though several years have elapsed since the alleged Guideline breaches occurred, TI-G is not aware of evidence indicating that the companies involved have installed procedures to prevent such an occurrence happening again. On this basis swift action by the NCP remains necessary to alert the companies to their responsibilities under the Guidelines.

3. The UN's Oil for Food Programme and its Manipulation

When the breaches of the UN's Oil for Food Programme first came to light in 2004, a senior New York Times columnist was explicit in his view of the scale of the scandal. "The largest financial rip-off in history" he called it.¹ A rip-off it certainly was, and all the more painful for the Iraqi people and for the UN because the bribes distorted a programme that was in fact designed to ease the suffering of ordinary Iraqis struggling under years of UN sanctions against the regime of ex-president Saddam Hussein.

The programme, launched in 1995, aimed to provide Iraq with a controlled income from its oil resources, to be used to ensure a supply of food, medicines and other humanitarian goods. It allowed Iraq to sell limited quantities of oil on the world market at a "fair market price" approved by the UN.² The proceeds of these controlled oil sales were to be deposited in a special United Nations controlled so-called 'escrow' account. The funds in this account were to be used exclusively for humanitarian and other purposes that had been approved by the UN Security Council.

Between summer 1999 and autumn 2002 the Iraqi authorities in charge of the Oil for Food Programme introduced several fees on the sale of oil and on contracts for humanitarian goods. These fees were the kickbacks paid by the 2253 companies listed in the Volcker Report. These additional payments were directed to Iraqi government-controlled bank accounts in Jordan and Lebanon or made in cash. Over two years \$1.8 billion of illicit income was generated.

The Volcker Report is detailed and explicit on the way Iraq gathered its kickbacks. It chronicles meticulously the manipulation of the Programme and provides examples of oil buyers and humanitarian goods sellers many of whom paid, directly or

¹ Traub, James 2006. *The Best Intentions: Kofi Annan and the UN in the Era of American World Power*. New York: Farrar, Straus and Giroux: 254.

² Independent Inquiry Committee into the United Nations Oil-For-Food Programme. *Report on Programme Manipulation*, issued on October 27, 2005: 2.

indirectly, illicit oil surcharges or kickbacks on humanitarian goods contracts through a variety of devices.

“By late 2000, no prospective vendors of goods to Iraq would see their bids approved by the ministries without agreeing to pay kickbacks. Typically, suppliers would be notified of the kickback obligation after they had submitted a successful tender and been selected by the contracting ministry. At this point, if the supplier agreed to pay the kickback, the official contract price would be inflated by a set percentage – in order to allow the supplier a margin for the payment of a kickback – and then the contract would be submitted to the United Nations for approval. Sometimes the kickback was incorporated directly into the price of the goods or commodities being sold; other times it was disguised as an “after-sales-service fee,” performance bond, or training expense. This inflated percentage would later be paid by the contractor back to the Government of Iraq. From the perspective of Iraqi officials, the kickback scheme was a means of obtaining control over some of the money that otherwise (would) be in the ‘escrow’ account, all of which they viewed as the legitimate property of the Government of Iraq.”³

The kickback payments were typically 10 percent of the contract value and occasionally higher. Another source of illicit payments was the so called “inland transportation fee”.⁴ Iraq started collecting these in June 1999 and they became a regular feature in summer 2000. In sum, Iraq received \$1.02 billion paid as After-Sales Service Fee and \$0.53 billion paid as Inland Transportation Fees between June 1999 and March 2003. Surcharges on the sale of oil earned the Iraqi authorities another \$229 million.

Mark Pieth, a respected Swiss law professor and a member of the IIC said at the Report’s publication in 2005: “Companies will claim that the incidents (in the Volcker Report) happened at the periphery (of their business activities). In fact the findings show that even the centres of big companies [...] can be touched by corruption.”⁵

The Volcker Report offers little evidence on the use of the illicit payments by the Iraqi government. Concerning some of the purchased goods it states that the civilian ministries were instructed by Iraq’s top officials “to procure goods on behalf of government organs that could not participate legitimately in the Programme, such as the Ministry of Military Industrialization, the Ministry of Defense and the *Mukhabarat*, or Intelligence Services”.⁶ In particular, the Ministry of Agriculture and the Ministry of Transportation and Electricity acquired products that were allegedly diverted to the above named institutions. In any case, the kickbacks bolstered financially a regime that was at the time widely condemned in the international community as being responsible for political and human rights abuses.

International human rights groups and the international media reported regularly on such abuses. For example, Human Rights Watch summarizes in its World Report 2000 the situation as follows: “The Iraqi government continued to commit widespread and gross human rights violations, including arbitrary arrests of suspected political

³ Independent Inquiry Committee into the United Nations Oil-For-Food Programme. The Management of the United Nations Oil-For-Food Programme, Volume II, issued September 7, 2005: 35.

⁴ IIC-OFFP Sept. 2005: 36.

⁵ Turner, Mark & Williamson, Hugh 2005. Whitewash feared in oil-for-food scandal. Financial Times, December 2, 2005.

⁶ IIC-OFFP Sept. 2005: 31.

opponents, executions of prisoners, and forced expulsions of Kurds and Turkmen from Kirkuk and other districts.”⁷ Some of the ministries cited by the Volcker Report as benefiting illicitly from the Programme – such as the Mukhabarat – were often singled out as being responsible for human rights abuses.

4. Evidence in UN Report of Illicit Payments Made to the Iraqi Government and of Companies that Refused to Pay Them

In a number of independent investigations into the scandal subsequent to the Volcker Report some companies have acknowledged paying kickbacks to get business in the UN programme. Many company executives have been questioned or detained by prosecutors, and various types of inquiries are still underway.

For example, last November a high-level Australian inquiry found that eleven former executives of the Australian Wheat Board were responsible for paying 290 million Australian Dollars (€173 million) in kickbacks to the Iraqi regime as part of the Oil for Food Programme. Alexander Downer, Australian foreign minister, called the bribes an “exercise in deceit by the AWB”, the country’s monopoly wheat exporter.⁸

In another case, El Paso, the largest US natural gas transmission company, agreed in February 2007 to pay \$7.7 million to settle a case brought by the US Securities and Exchange Commission. The company admitted it had in 2001-2002 bought Iraqi crude oil from third parties who had paid the Iraqi government illegal surcharges worth \$5.5 million. El Paso paid the SEC an additional \$2.2 million to settle allegations that it had failed to account for the charges and failed to have controls in place to prevent them. The El Paso case shows that the company took responsibility for the illicit payments, even though it was not directly involved in making them. The company in mid-2002 voluntarily stopped buying Iraqi oil amid concerns it could not prevent third parties from making kickbacks.⁹

Significantly, some companies refused to pay kickbacks and withdrew their bids for contracts as part of the Oil for Food Programme because of the kickbacks demanded by the Iraqi government.

The Swedish company Scania CV AB and another five suppliers in 2000 informed the United Nations’ Office of the Iraq Programme that Iraqi officials had asked for kickback payments amounting to 10 to 15 percent of the value of potential contracts. Scania CV AB refused to pay the kickbacks – unlike the many other companies that did not question the request and failed to inform the Office.

This example shows that some companies were fully aware – or allegedly were able to become aware – of the kickback requests, and were in a position to refuse the payments, with the consequence of course of losing the chance to win contracts.

⁷ Human Rights Watch. World Report 2000. Chapter on Iraq and Iraqi Kurdistan. Published under: <http://www.hrw.org/wr2k1/mideast/iraq.html>.

⁸ Minder, Raphael 2006. Howard cleared in inquiry on AWB’s Iraq links Australian Wheat Board. Financial Times, November 28, 2006.

⁹ Masters, Brooke 2007. US gas group in bribes deal - Oil-For-Food Programme. Financial Times, February 8, 2007

According to the Volcker Report some of the illicit payments were made by agents possibly without the knowledge of the supplying firm.¹⁰ Although it was arguably more difficult to prevent payments made by agents, it remained the responsibility of companies, also under the Guidelines, to examine and take a view on these additional fees demanded by government officials. As the El Paso and other examples show, companies were aware that kickbacks were being demanded, even if they were not directly involved in paying them.

5. Illicit Payments Allegedly Made by German Companies

The 57 German companies and their subsidiaries listed in the Volcker Report represent only a small portion of companies cited, both in number of contracts and in volume of alleged illicit payments. Ignoring the unspecified payments made as “Inland Transportation Fees”, the total volume of illicit payments allegedly made by German companies adds up to \$11,977,570. The total volume of the contracts realized by these German companies is \$193,944,330. The kickbacks paid by them allegedly ranged from \$1270 to \$790,344, according to the Volcker Report. Appendix B list the information gathered in the Volcker Report on all allegedly illicit payments made by German companies.

The reason for the relatively small involvement of German corporations lies in the sourcing policy of the Iraqi authorities. According to the Volcker Report, political considerations influenced Iraq's selection of humanitarian goods vendors. Since Iraq was free to choose its business partners, suppliers from countries that were perceived as sympathetic to lifting the sanctions against Iraq – such as Russia or China – were favoured. Due to the fact that the German government supported the sanctions, only a small number of contracts was awarded to German companies and it can be assumed that the reason for doing business with Germany at all was due to that some products could not be found elsewhere in a similar quality or a similar price.

German companies involved have varied in their reactions, since the Report was published in October 2005. A lawyer for Meyra Ortopedia, a leading international wheelchair producer that allegedly paid \$236,580 for realizing two contracts with Iraq claimed that the company was not responsible for its agents dealings with Iraqi officials.¹¹ In contrast, a number of companies have admitted paying kickbacks. Fresenius Medical Care, for instance, a medical supply company based near Frankfurt am Main, has acknowledged it paid kickbacks worth \$174,638 to gain a contract worth €1.9 million to supply medical equipment under the UN programme. The company's illicit payments “were not in line with our internal rules” a company spokesman said.¹²

Other companies have paid fines or made payments as part of out-of-court settlements, in acknowledgement of their involvement in giving kickbacks to the Iraqi government. German prosecutors are investigating between 30 and 40 of the German companies – or their staff – mentioned in the Volcker Report, according to

¹⁰ Independent Inquiry Committee into the United Nations Oil-For-Food Programme. Report on Programme Manipulation, issued on October 27, 2005: 1.

¹¹ Döbler, Moritz 2007. Anklage nur im Ausnahmefall. Tagesspiegel, April 10, 2007

¹² Döbler, Moritz 2007. Justiz weitet Irak-Ermittlungen aus. Tagesspiegel, January 5, 2007.

media reports. It is unclear when investigations will be completed.¹³ Fines or settlements of up to €750,000 are cited in media reports.¹⁴

The Case of DaimlerChrysler

In some cases the Volcker Report gives details of how the payments were made and even includes copies of invoices and other paperwork involved. Two German companies were singled out as examples by the Commission due to their high profiles – Siemens and DaimlerChrysler.

The case of DaimlerChrysler is a useful example of the ‘paper trail’ that accompanied the Oil For Food transactions and gives clear evidence of kickbacks made; the alleged ultimate responsibility of the German company involved; and the lack of action taken to alert the UN or other authorities of potential wrongdoing.

According to the Report, Wolfgang Denk, an ‘area manager’ for DaimlerChrysler in Iraq, signed three contracts with Iraqi authorities to pay kickbacks worth around €87,000. The contracts were to supply vehicles and spare parts.

In the end, DaimlerChrysler transferred a kickback payment for only one of these contracts – a deal worth about €67,000 to supply an armoured van, known as a ‘mobile box truck’ to the Ministry of Oil. For this, the company transferred a kickback worth €6950 – 10 per cent of the contract value – to a bank account in Jordan on December 19, 2002. A letter signed by Mr Denk to this effect is reprinted in the Volcker Report.

DaimlerChrysler wrote to the Volcker Commission saying it did not “knowingly” pay a kickback because Mr Denk “expressed his confusion about the program’s rules and regulations”.¹⁵ It did not dispute that he signed the documents or suggest a basis for Mr Denk’s “confusion”. The company did not deny that the payment was made, or that Mr Denk had held a managerial position in the company.

In addition, the Report notes that the ‘side agreement’ detailing the €6950 was supplied by the (post-Saddam) government of Iraq to the UN investigators, not by DaimlerChrysler, even though the Volcker Commission explicitly asked the company for evidence of kickbacks paid. The company also did not alert the UN to irregularities during the Oil for Food Programme. The Report concludes that DaimlerChrysler “knowingly made or caused to be made a kickback payment of approximately €6950 to the Government of Iraq outside the Programme and in violation of the UN sanctions against Iraq”.¹⁶

TI-G’s View on the Ongoing Investigations by German state prosecutors

In the view of TI-G, the investigations by German state prosecutors should not influence a decision by the NCP to take action on this specific instance. The Guidelines deal with a separate set of issues than those addressed in the respective legal investigations and they constitute a much broader set of international principles

¹³ Leyendecker, Hans & Krüger, Paul Anton 2007. Schmiergeld, Aufgeld oder legale Provision. Süddeutsche Zeitung, January 10, 2007. Döbler Jan. & Apr. 2007.

¹⁴ Leyendecker & Krüger 2007; IIC-OFFP Sept. 2005; Döbler Jan. & Apr. 2007.

¹⁵ IIC-OFFP Oct. 2005: 371.

¹⁶ IIC-OFFP Oct. 2005: 371.

agreed by governments covering social, environmental, labour, anti-corruption and other recommended standards to be observed by multinational corporations. Furthermore, even companies that admitted paying kickbacks or were found guilty in legal terms of doing so, are under no legal obligation to establish mechanisms to prevent a recurrence of such practices. By contrast, the NCP, in view of its responsibility to promote adherence to the standards set by the Guidelines is authorized to demand of companies to take a proactive approach to prevent corruptive behaviour.

The experiences of the German NCP also suggest in this context that the Guidelines can play a positive role. The specific instances regarding Continental in Mexico and Bayer in the Philippines show that sensitive issues can sometimes be dealt with more expediently under the OECD Guidelines specific instances dispute resolution procedure than in legal proceedings. In each of these two specific instances the involved parties were able to agree on a plan for a remedy to the dispute independent of the lengthy, unresolved proceedings at various court levels.

Indeed parallel proceedings are a common practise. According to the most recent OECD statistics, about half of the specific instances addressed by NCPs worldwide were subject to parallel proceedings elsewhere, e.g. national courts, other mediation processes, in international organisations. At a recent "Workshop on Accountability and Dispute Resolution" held at Harvard University it was pointed out that "ongoing legal processes should be no bar to mediation".¹⁷

6. Violations of the OECD Guidelines and Recommended Action by the NCP

According to the data presented by the Volcker Report, the companies listed in Appendix A and B have committed serious breaches of the OECD Guidelines, in particular those in Chapter VI on 'Combating Bribery'.

TI-Germany suggests that the companies might have violated some or all of the following sections of the Guidelines:

"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.

2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public

¹⁷ OECD: Human Rights, Alternative Dispute Resolution and the OECD Guidelines for Multinational Enterprises. Briefing Note for the Participants at the Workshop on Accountability and Dispute Resolution. Kennedy School of Governance, Harvard University, 11-12 April 2007: 6.

bodies and state-owned enterprises should be kept and made available to competent authorities.”

In addition, under the Guidelines companies are responsible for installing a system that prevents illicit payments being made and for raising employees’ awareness about such systems.

Enterprises should:

“4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.

5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of “off the books” or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.”

The actions by the German companies operating in Iraq lie in the past, so the focus now for the NCP should be on ensuring that appropriate and sustainable steps are taken by the companies to ensure the alleged Guideline violations are not repeated.

Companies should:

- define and implement procedures designed to prevent breaches of the Guidelines in the future, in particular, when acting in high risk areas;
- implement or improve management systems that reveal and prevent corruption, fraud and deception;
- establish mechanisms to communicate these decisions and procedures to staff, suppliers, agents, other stakeholders and the public;
- where appropriate, organise information and training courses on these anti-corruption procedures.

The NCP should:

- establish contact with the companies concerned to ensure that the companies are aware of the Guideline and explain why OECD governments and nine further states have agreed to promote companies adhere to these standards;
- issue recommendations to the companies on how they can avoid future breaches of the Guidelines;
- request reports on the steps companies have taken to ensure that the standards recommended in the Guidelines are adhered to in all company activities including in their supply chains wherever they engaged
- make this information publicly available;
- liaise, if applicable, with other NCPs that are also dealing with special instances related to the Oil for Food Programme.

7. List of Sources

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Appendices (see separate files or attachments)

A German Companies Cited in the Volcker Report

B Details of Illicit Payments by German Companies Documented in the Volcker Report

C Sources

Please find attached hard copies of cited newspaper articles and internet sources and a CD containing the Volcker Report.



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