

# The Private Sector and Corruption

## What German Technical Cooperation does, can and should do to adequately address the supply-side of corruption

### Corruption and the Private Sector

Recent corruption scandals like those involving the Siemens AG, Total or the British BAE as well as the bribe scandal within the *UN Oil for Food Programme* have highlighted that corruption (mostly in the form of bribes) by the private sector is common, widespread and somehow even seems to be strategically budgeted. The amount of bribes being paid worldwide is enormous: The World Bank Institute (WBI) estimated that no less than US \$ 1 trillion was spent in bribes in 2002 only.

The consequences of corruption in general and private sector corruption in particular are tremendous: For companies, corruption causes additional costs for kickbacks or for establishing corrupt networks as well as opportunity costs for lost contracts due to the bribing of other bidders. These costs are consequently transmitted to consumers through higher prices and/or lower quality of products and services. On a country level, corruption deters investments, erodes competition, negatively affects the quality of public services, undermines the confidence of citizens in state institutions and the economy, consolidates and tightens inequalities, and, in the end, endangers political stability. In sum, corruption is a serious impediment to sustainable development; especially in developing countries.

### From tax deductibility...

Nevertheless, the bribing of *foreign public officials* was treated for a long time as necessary expenditures of enterprises operating abroad thereby permitting companies to set these paying off against tax liability. This view was largely influenced by national economic interests as well as the perception that the supply-side of corruption (those who are offering, promising or giving undue pecuniary or other undue advantages - including companies) often has no choice than paying kickbacks to foreign public officials that are frequently demanding or even extorting bribes (demand-side of corruption).

A remarkable shift in this perception was first initiated by the US in the 70s, when the US adopted the *US Foreign*

*Corrupt Practices Act* (FCPA - 1977), incriminating the bribing of foreign public officials in the US. Mainly the increasing globalization process as well as *Transparency International's* (TI) advocacy activities in the 90s (worth mentioning in this context is TI's *Bribe Payers Index* that investigates into the propensity of companies from the world's leading exporting countries to bribe abroad) yielded the recognition that companies are not always just mere victims of corrupt foreign officials, but rather often *actively* resort to corrupt practices in order to gain biddings or to influence or evade legislative or administrative processes for their own interest.

### ...to the adoption of international instruments addressing the supply-side of corruption

As a consequence many international instruments and initiatives (also) addressing the supply-side of corruption have been launched and entailed that the bribing of foreign public officials in most industrialized countries (including Germany) is not only not tax deductible anymore but is established as a criminal offence. The probably most important instruments in this context are the *OECD Guidelines for Multinational Enterprises* (OECD Guidelines), the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Anti-Bribery Convention) and the *UN Convention against Corruption* (UNCAC).

The **OECD Guidelines** are voluntary codes of conduct for multinational enterprises (MNEs) in terms of *inter alia* working rights, human rights and environmental safeguards. Corruption is addressed in chapters III and VI. According to chapter VI, MNEs should refrain from any direct or indirect form of bribery; chapter III stipulates that MNEs should publish relevant financial or social information. National contact points (NCPs), which have to be established in every member state, monitor the compliance of MNEs with the guidelines. However, the guidelines are voluntary only and NCPs in the past have been often criticized for not adequately accomplishing the tasks they are entrusted with (i.e. establishing an adequate balance between economic and social interests as established in the guidelines). So far, the OECD

commissioned by

guidelines have thus not demonstrated the desired impact on the behaviour of companies.

The **OECD Anti-Bribery Convention** addresses one specific aspect of corruption only: the bribery of foreign public officials. Member states (all 30 OECD member states and 7 non-members so far have ratified the convention) are required to criminalize foreign bribery within their national legal systems. They also have to establish effective, proportionate and dissuasive forms of liability of corporations as legal subjects. The convention does not, however, require the establishment of corporate criminal liability. The *OECD Working Group on Bribery* monitors the compliance of member states with provisions of the convention. Despite some backlashes, the OECD convention so far has been largely successful, its provisions implemented and there is an increasing amount of investigations as well as prosecutions in the relevant jurisdictions.

### The UN Convention against Corruption (UNCAC)

The UNCAC (entry into force in 2005) requires member states on the one hand to prevent corruption within the private sector (Art. 12, for example, requires the enhancement of accounting and auditing standards of companies) as well as to criminalize certain corrupt practices related to the private sector within their national jurisdictions. This includes the bribery of national and foreign public officials as well as public officials of international organisations, embezzlement, trading in influence, bribery in the private sector, and money laundering. Here, too, the Convention obliges member states to establish the liability of legal persons which not necessarily has to be installed in form of criminal liability.

Due to its universal reach (so far there are 107 member states) as well as to its nearly all-embracing character, the UNCAC might be the most effective instrument in terms of anti-corruption in general and fighting private sector corruption in particular. However, since the UNCAC includes many optional provisions and there has yet to be adopted an effective implementation mechanism that monitors state compliance with provisions of the UNCAC, it remains to be seen to what extent the UNCAC will positively contribute to the global fight against corruption, including private sector corruption.

### Activities of German Technical Cooperation

German Technical Cooperation (GTZ) operates at many different levels in order to include the private sector in its fight against corruption: On the one hand, GTZ *consults* the *German Federal Ministry for Economic Cooperation and Development (BMZ)* in issues relevant to private sector corruption. For instance, GTZ consulted the BMZ as well as the German NCP on whether NCP should accept a complaint filed by TI against 57 German companies allegedly involved in the *UN Oil for Food* bribery scandal. Despite the final rejection of the complaint - which GTZ was in favor for - GTZ's contribution might positively influence a necessary reorganization of NCP.

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GTZ also actively influences the establishment and further development of international anti-corruption instruments. For example, GTZ consulted the OECD in its planned revision of the OECD Convention against Bribery and lobbies for the establishment of an effective monitoring mechanism of the UNCAC. GTZ also actively participates in international networks like the *Governance-Network (GovNet)* of OECD's *Development Assistance Committee*, which has recently elaborated *Principles for Donor Action in Anti-Corruption*, aiming at facilitating harmonisation efforts among donors on anti-corruption. The principles also include the obligation for donors to actively counteract corruption in donor countries with a focus on bribery of MNEs.

GTZ has further conducted several pilot projects addressing the supply side of corruption as well as supporting companies in their efforts to invest in developing countries: This includes supporting DANIDA's *Business Anti-Corruption Portal* (an internet platform providing information on corruption in developing countries for Small and Medium Enterprises), conducting *Business Climate Surveys* (surveys investigating into the investment climate in certain regions) or supporting the *Business against Crime* initiative (companies and the government of South Africa are conjointly fighting corruption). GTZ also supported the establishment of the anonymous whistle-blower system - *Business Keeper Monitoring System (BKMS)* - within the *Kenya Anti-Corruption Commission*, as well as the *Extractive Industries Transparency Initiative (EITI)*, an initiative that requires governments and corporations involved in the extractive industries to publish payments made in the context of the exploitation of natural resources.

### Prospects and future areas of engagement for GTZ

In order to adequately address the supply side of corruption, many steps at an international stage as well as within Germany are necessary: On an international level the establishment of a legally binding instrument addressing the activities of multinational enterprises as was already unsuccessfully envisaged under the auspices of the UN seems to be necessary. Voluntary initiatives like the OECD Guidelines for Multinational Enterprises cannot adequately address the supply side of corruption. In Germany, two steps are essential: First, Germany should ratify the UNCAC. Second, the establishment of criminal legal liability of legal persons should be seriously considered.

German Technical Cooperation should continue to increase its efforts to address the supply side of corruption. In order to effectively fight corruption, all actors have to be actively engaged. It is thus essential for German Technical Cooperation to increasingly engage with the private sector and to influence national and international instruments that oblige the private sector to refrain from corrupt practices.

