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The ARD.ZDF Medienakademie is a non-profit corporation with the broadcasting companies ARD, ZDF and Deutschlandradio as partners.

Irregularities in the Administration of Public Service Media

- Preventing Corruption by Means of Counsels of Trust ("Ombudsmen") -

Speech on 20th November 2014 in Tirana / Albania (Regional Workshop: Public Service Media and Building Trust with People)

A. Risks of Corruption in Public Service Broadcasting

In recent years, there have been quite a few corruption affairs in Germany relating to public service broadcasting companies and their subsidiaries. Based on the audacity of the modus operandi itself and the high sums of money involved, they have caused a stir in the public eye.

The most famous one was the case of the broadcasting company KIKA (Kinderkanal), a subsidiary of ARD and ZDF. From 2009 to 2011, a production company allegedly invoiced the broadcasting company exorbitant sums of money for TV productions. The money was paid from the public service broadcasting company's funds. A not inconsiderable portion of the exorbitant amounts of money flowed back into the private pockets of the criminal contracting bodies at the broadcasting company.

It is said to have resulted in damage worth more than 8 million euros, merely a small proportion of which could be repaired. In the meantime, the key player has been found guilty of embezzlement and corruptibility, and sentenced to six years and three months imprisonment.

The affair was uncovered mainly because an employee of one the production companies involved reported themselves to the police.

The example demonstrates the particular susceptibility of public service media to compromise and corruption. In Germany alone, several hundreds of millions of euros are spent by public service broadcasting companies on external TV productions every year. The private production companies produce the corresponding programmes and invoice the public service broadcasting companies.

The particular susceptibility of broadcasting has various causes:

- The market is characterised by private connections.
- Many productions are one-off projects, i.e. there are neither objective quality standards nor a holistic and comparable market price.
- The awarding of a contract usually involves high sums of money without any international competitors.
- Due to the historically developed federal structure and the public service and private legal forms, the broadcasting companies are not clearly organised. This makes monitoring difficult and leads to a lack of transparency.

Not only in the broadcasting sector but also and especially among internationally active companies, significant efforts have been made in recent years to prevent corruption. At the same time, a line is being drawn in judicature and legislature to punish corruption much more harshly than done so a few years ago.

> *Particularly worth emphasising is the legislature by the German Supreme Criminal Court, the Federal Court of Justice, in Karlsruhe, on the criminal liability of so-called secret accounts as embezzlement. In this judgement, which was issued in the most famous German corruption affair involving Siemens, it was postulated that if so-called secret accounts were set up alongside the official books, it would always cause damage to the company.*
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> *The background behind this judgement is that in a criminal case, it can usually be proven that such secret accounts are solely set up for paying bribes. Frequently, however, the prosecutors are not able to prove exactly which parties have received how much money. For this reason, the border of criminal liability for corruption is "moved forward" to a certain extent, so that even the keeping of such monies ready yet outside the company's official accounting circle is classified as embezzlement.*

A fundamental decision by the Federal Court of Justice in 2005 dealt with the question as to under what conditions people working for companies under private law can be **office bearers**. The term "office bearer" is of considerable importance for German Criminal Law, as bribery and corruptibility are punished much more severely if there is at least one office bearer on either side.

> *The participation of an office bearer in corruption leads to considerably greater threats of punishment. If there is no office bearer involved, then merely a criminal liability for commercial corruptibility and bribery pursuant to § 299 Criminal Code applies. The requirement for this crime is an anticompetitive preference of a competitor.*
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> *The cause for the firm establishment of the term "office bearer" by the Federal Court of Justice in 2005 was the so-called Cologne garbage affair. In correlation with the con-*

struction of a garbage incineration plant, a swamp of corruption had formed in the 90s in which both private businessmen and local politicians and community staff were involved.

It was disputable whether one could refer to "office bearers" if private parties also participate in a company under private law providing services for the public. The garbage incineration plant was structured as a limited liability company under private law. The City of Cologne had a 50.1% share in it; the rest belonged to private investors. According to the articles of association, important decisions required a three-quarter majority.

The German Supreme Criminal Court, the Federal Court of Justice decided in this case that the managing directors of the limited liability company were not "office bearers". The requirement for that would be that legal entities under private law were put on a par in their function and responsibilities with authorities. In this context, the metaphor ***"the longer arm" of the state*** *is readily used.*

In the concrete case, the office bearer property of the accused was negated, as the private investors were able to take part in business decision-making.

Further milestones on the way towards combating corruption were, among others:

- 1996 The EU Anti-Corruption Law– equivalence of foreign with domestic office bearers in bribery negotiations.
- 1998 The introduction of the International Anti-Corruption Law – the implementation of the OECD Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions.
- United States Securities and Exchange Commission (**SEC**): The imposition of draconian punishments against internationally active companies whose employees bribe foreign civil servants, in order to be considered in the awarding or public contracts.
- 2010 UK Bribery Act. A special feature of this law is that it applies globally and both natural persons and companies can be sanctioned. The requirement is merely a so-called "close connection" to the United Kingdom, which can be affirmed with almost all internationally active companies.
- 2013 Munich Regional Court: Siemens manager must pay 15 million euros in damages to his former employer, as he had not ensured that a functional Compliance Management System ("CMS") was installed.

On an international level, the combating of corruption was given "teeth" in the shape of the SEC, after employees of the Securities and Exchange Commission developed a new self-image as "global police officers against corruption".

There was a similar development in Germany from 1996 onwards due to the introduction of the non-deductibility of bribes as business expenses. For practice in Germany of particular im-

portance was the introduction of § 4 Para. 5 P. 1 No. 10 Income Tax Act with which, for the first time since 1996, the **tax deductibility of bribes** was forbidden.

Since then, tax auditors and tax investigators have been looking specifically for transactions in the accounts that indicate "secret accounts" or bribe payments.

If tax inspectors find, for example, conspicuously overpriced consultant invoices for which there is no noticeable service in return, they call in the federal prosecutor. A large majority of criminal proceedings initiated on the grounds of corruption allegations trace back to reports by tax authorities.

> ***Corruption is no longer regarded as a trivial offence. Even if corruption cannot be proven, there is still the threat of being convicted of tax evasion. (Even Al Capone, who could not be proven to have committed murder in his lifetime, was convicted of tax evasion and money laundering).***

Even the public broadcasting companies responded with a series of measures to improve the prevention of corruption in the future. The installation of external ombudsmen is one of these measures.

B. External counsels of trust for combating corruption ("ombudsmen")

In the following, I wish to introduce the concept of external counsels of trust for preventing corruption. This concept has been successful in Germany for some years now.

The concept of the external whistle-blower allows for the fact that typical corruption issues are mostly so-called **victimless crimes**. The actors on both sides benefit from the corruption. The injured parties are 'faceless' – namely the companies and the general public.

An ombudsman is an external lawyer. In most cases, he is consciously selected such that he maintains no other business or legal relations with the company. Larger companies in particular prefer a lawyer whose domicile is also elsewhere to the company head office when choosing an external ombudsman. As a rule, lawyers with particular experience in the field of commercial criminal law and especially in corruption crimes act as ombudsmen.

In German, the term "ombudsman" is generally used to describe a person who is available as a person of contact to people whose issues would otherwise hardly be taken notice of. This term has also become common in the scope of compliance measures for external counsels of trust for the prevention of corruption.

The word "ombudsman" is a term that originates from Nordic languages and originally describes people, who have the task within an organisation to prevent the unfair treatment of individuals. The Swedish word "ombudsman" literally translates as "intermediary".

The term is misleading insofar as the ombudsman is not really an "intermediary", who stands in a neutral position between the parties. Rather, the external counsel of trust is instructed and paid

by the company. After all, he acts in their interests. If he were the whistle-blower's lawyer at the same time, there would be a conflict in interests which could not be reconciled with the lawyer's occupational law.

However, the whistle-blower is guaranteed protection by the company and lawyer by the contractual framework. In terms of civil law, one speaks of a contract with protective consequences for third parties or a third-party beneficiary contract. This means, above all, that the lawyer does not disclose the identity of the whistle-blower to the company unless the whistle-blower gives his express permission. This protective effect in favour of the whistle-blower is legally protected by the fact that lawyers as accredited professionals are also subject to the obligation to secrecy if they have obtained information from third parties who are not their own clients, to the extent it happened whilst exercising their professional activity.

> *Currently under dispute is whether this special protection for whistle-blowers – who are not the lawyer's actual clients – also refers to the content of the information disclosed. It is also disputable to what extent the corresponding lawyer records are exempt from being confiscated by law enforcement authorities.*

Irrespective of the legal matters of dispute, I represent the opinion that the contract with the company should be laid down such that it grants the whistle-blower the greatest possible protection at any rate. An ombudsman should thus not disclose *any kind of information* to the company unless it has been expressly approved. In practice, the source – and thus the identity of the whistle-blower – can usually be deduced from the issue the tip is based on anyway.

One of the key questions that has emerged from the organisation of whistle-blower systems in Germany is the scope of the breach of rules the lawyer is responsible for.

The demarcation of the field of responsibility is important for reasons of data protection among others, but also, for example, of significance for the lawyer's fee.

> ***Example:*** *the ombudsman for the Deutsche Bahn continuously receives complaints regarding trains being late.*
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> *From the media sector, I personally have not yet encountered a complaint from a viewer who was not satisfied with the programming, but it is by all means imaginable.*

In any case, an ombudsman is interested in facts that fulfil the elements of a criminal law. There is no uniform answer, for example, to the question as to whether the field of responsibilities of an external counsel of trust covers the receiving of indications of mobbing, sexual harassment or the work-related breach of duties.

This problem arises, above all, in businesses providing service for the public where there is mass foot traffic. This is readily used as a contra-argument in discussions about whether a whistle-blower system should be introduced at all. In practice, however, it has crystallised that by

carefully working out the field of responsibilities and the remuneration system, the problems in den can be brought under control.

As a rule, whistle-blowers – these may be employees of the company but also third parties, for example business partners, etc. – approach the lawyer by e-mail or telephone, sometimes even by letter. In doubt, he will seek a personal meeting. The objective of this meeting is to go through the reliability and validity of the information as well as its legal significance.

If the whistle-blower then gives the "all go", the lawyer then passes the information on to the company. Ideally, the persons of contact have already been stipulated in the scope of a general compliance concept. In most cases, the compliance officer or a board (comprising representatives of the revision department, company management and other departments such as the personnel department) appointed specifically for this matter take care of the internal processing of the tips. It is advisable to stipulate in advance the handling of the tips in a "Compliance Code of Procedure" that can be viewed by the public and to make it transparent for potential whistle-blowers.

The extent to which the whistle-blower receives feedback from the company on the handling of the information is dealt with by companies or lawyers acting as ombudsmen on a case-to-case basis. De jure, the whistle-blower has no entitlement to feedback or a certain procedure. In practice, however, it is advisable to involve the whistle-blower to the extent that is can be reconciled with the clarification of the matter or the legal obligations of data protection.

In a large number of cases that result in tips of crimes within a company, the company decides to inform state investigative authorities, in particular public prosecution departments and, where applicable, tax authorities. In some cases, lawyers even recommend including in the compliance guidelines that every tip of criminal activity will always be followed by the company reporting it. The reason behind this is that otherwise, the impression may be given that the company wants to "hush up" crimes. In addition, only state investigative authorities have the possibility of clarifying the facts by applying state means of coercion (search, confiscation, etc.). According to German Employment and Data Protection Law, upon a suspicion against their own company employees, an employer only has restricted possibilities for clarifying the matter.

Yet, companies frequently have reservations in passing on matters to state investigative authorities. The – not unfounded – fear that they lose control when "handing over" information. First and foremost, state investigative authorities follow their own interests, which do not always coincide with those of the company's.

If it amounts to a discussion about reporting an offence, an ombudsman may well act as a mediator between the company and the prosecution authorities in individual cases. In practice, in forefront of a search of company premises, for example, it can be agreed that it is limited to certain departments, that documents are handled carefully and taken for as short as possible and – particularly important – that the public preferably hear nothing of the measures.

The key issues of the system are in essence recognised in Germany and have been established for some years. The legislator has, indeed, not used the various reforms of the Data Protection Act and the Employment Act that have taken place in recent years to regulate whistle-blower protection by law and to anchor the role of the corruption lawyer of trust in law. Serious problems in correlation to the work of an ombudsman have thus not become known until this day. However, some **problem areas** are currently being discussed in Germany, whose solution depends on the corporate philosophy or the individual company's readiness to assume risk.

In Germany, despite the high standards of **data protection**, it is fundamentally assumed that tips may also be accepted is the whistle-blower remains **anonymous**. However, in such cases, there are special requirements of the treatment of such information under data protection laws. It is precisely one of the advantages of a whistle-blower system under the involvement of an external counsel of trust that anonymous tips are declining and yet, the identity of the whistle-blower can be protected.

There is a fundamental **conflict of interests** between the interest of the company in clarifying the matter and the **personal rights** of the persons concerned, whose data is collected and disclosed. Thus, it is disputable in detail whether and when a party involved must be informed that a company has "collected" data concerning their own employee.

> ***Example*****:** *A company employee says that a superior regularly stays overnight at a hotel at the company's expense and cheats on his wife.*
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> *Upon checking, it turns out that there was "adultery", yet the overnight stays at the hotel were paid for by the employee himself fully legally.*
>
> *Does the company have to inform the employee that it had conducted investigations into his private life?*
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> *Is the company or the lawyer allowed to archive the information?*

The **whistle-blower's risks under criminal law** are also being discussed. In § 17 of the German Act Against Unfair Practices, the sell-out of business and company secrets is penalised. If an employee discloses information to the ombudsman that, according to this provision, he is not allowed to pass on to third parties as **business secrets**, the question is posed as to whether the ombudsman is allowed to pass on such illegally acquired information. The German legislator lets those involved down. Demands for a so-called whistle-blower protection clause have been left unheard. In line with the current legal situation, it would even be a crime for a whistle-blower

to pass on information to a lawyer for him to use the material to file a report directly with the police of prosecutor.

Another problem that cannot be answered uniformly – and which probably will remain unanswered in the end – is the question whether, in individual cases, the company pays **money** for a whistle-blower to reveal information.

C. Conclusion

The installation of an external compliance counsel of trust ("ombudsman") has become established as a part of an extensive compliance concept as a means for preventing and solving criminal offences.

The advantage for the company lies in the fact that matters can be solved discretely and effectively. Anonymous reports are on the decline.

The awareness of "being found out" in itself prevents corruption. A transparent system of preventing corruption also has generally preventative effects. The ombudsman gives this system "a face".

For the whistle-blower, there is the possibility of solving matters without disclosing his identity. This is particularly significant in those cases where the whistle-blower fears disadvantages (e.g. dismissal or his own criminal proceedings).

Both internationally and nationally, legislative standards and guidelines would be desirable. This affects in particular the tense relationship to data protection as well as the "whistle-blower's" protection under employment law.

In order to make the system effective, regular training courses, presentations and publications should take place.

Furthermore, employees should also be trained on a personal level in how to deal with conflicts of interests if they are confronted with "immoral offers" (www.compliance-seminar.de).