

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff

v.

DAIMLER AG,
DAIMLERCHRYSLER CHINA Ltd.,
DAIMLERCHRYSLER AUTOMOTIVE
RUSSIA SAO, and
DAIMLER EXPORT AND
TRADE FINANCE GmbH,

Defendants.

CRIMINAL NO.:

RECEIVED

MAR 22 2010

U.S. DISTRICT COURT

UNITED STATES' SENTENCING MEMORANDUM

The United States of America, by and through its counsel, the United States Department of Justice, Criminal Division, Fraud Section (the "Department"), hereby submits in the above-captioned matters this United States' Sentencing Memorandum. For the reasons outlined below, the Department respectfully requests that the Court approve the disposition of this matter and accept the guilty pleas of DaimlerChrysler Automotive Russia SAO and Daimler Export and Trade Finance GmbH pursuant to Fed. R. Crim. P. 11(c)(1)(C),¹ and sentence them in accordance with the parties' plea agreements, which are being filed simultaneously herewith.

¹ The instant memorandum discusses the overall disposition of this matter between the Department and the various Daimler entities referred to herein. Therefore, even though the Court will not actually be sentencing Daimler AG and DaimlerChrysler China Ltd., as those entities have entered into deferred prosecution agreements, the United States nevertheless is filing this memorandum in those cases as well, for the Court's consideration prior to the hearing scheduled for April 1, 2010.

1. Background

During the period relevant here, Daimler AG, formerly DaimlerChrysler AG and Daimler Benz AG (collectively "Daimler"), was a German vehicle manufacturing company with business operations throughout the world. Among other things, Daimler sold all manner of cars, trucks, vans, and buses, including Unimogs, heavy duty all terrain trucks primarily used for hauling, and Actros, large commercial tractor/trailer-style vehicles. Daimler was a major global producer of premium passenger cars, as well as the largest manufacturer of commercial vehicles in the world. As a result of its luxury car and commercial vehicles lines, Daimler had among its customers government and state-owned entities from many countries in which it did business. Daimler sold its products worldwide, had production facilities on five continents, did business in many foreign countries, and employed more than 270,000 people.

Daimler is owned by individual and institutional investors in the U.S., Europe, and elsewhere. More than one billion shares of Daimler were in circulation as of December 31, 2007. For purposes of the United States securities laws, Daimler became an "issuer" in 1993, and Daimler's common stock has been traded on the New York Stock Exchange, the Pacific Exchange, the Chicago Stock Exchange, and the Philadelphia Stock Exchange. As a result of Daimler's filing of periodic reports with the Securities and Exchange Commission ("SEC") pursuant to Title 15, United States Code, Section 78m, and Daimler's use of U.S. bank accounts and U.S. companies in transacting certain business with foreign governments and officials, the company is subject to the Foreign Corrupt Practices Act ("FCPA").

In March 2004, a former Daimler employee filed a whistleblower complaint with the U.S. Department of Labor's Occupational Safety & Health Administration pursuant to Section 806 of

the Sarbanes-Oxley Act of 2002. In the complaint, the former employee alleged that he was terminated for voicing concerns about Daimler's practice of maintaining secret accounts, including accounts in its own books and records, for the purpose of bribing foreign government officials. In August 2004, the Securities and Exchange Commission granted its staff a formal order to investigate whether Daimler violated the FCPA. Thereafter, the Department opened its own investigation as to whether any such violations were criminal in nature.

Daimler engaged the law firm of Skadden Arps Slate Meagher & Flom ("Skadden") to represent the company in connection with both the SEC and the Department investigations. Skadden was also engaged to conduct a global internal investigation, the results of which were reported to the SEC and the Department. In response to the results of the company's internal investigation, and the SEC and Department investigations, Daimler and the Department have entered into a proposed global disposition for the Court's consideration that would resolve the criminal investigation into Daimler and its subsidiaries.

As in response to the results of these investigations, Daimler has instituted numerous compliance reforms, including linking a portion of board members' compensation to success in compliance-related matters. The company has terminated numerous individuals involved in the criminal wrongdoing described in these matters, and has overhauled its internal compliance organization and its compliance program. Significantly, Daimler did not wait to make these reforms until a final disposition was reached with the Department or the SEC. Instead, Daimler began reforming its worldwide compliance program as its investigation was ongoing, and regularly reported such reforms to the Department.

2. Summary of Facts – Daimler’s Knowing Falsification of Books and Records

Daimler’s internal investigation, along with the SEC and the Department investigations, revealed that Daimler engaged in a long-standing practice of paying bribes to “foreign officials” as that term is defined in the FCPA (hereinafter “governmental officials”) through a variety of mechanisms, including the use of corporate ledger accounts known internally as “third-party accounts” or “TPAs,” corporate “cash desks,” offshore bank accounts, deceptive pricing arrangements, and third-party intermediaries.

Within Daimler, bribe payments were often identified and recorded as “commissions,” “special discounts,” and/or “nützliche Aufwendungen” or “N.A.” payments, which translates to “useful payment” or “necessary payment,” and was understood by certain employees to mean “official bribe.”

Between 1998 and January 2008, Daimler made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries – including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Nigeria, Russia, Serbia and Montenegro, Thailand, Turkey, Turkmenistan, Uzbekistan, Vietnam, and others – to assist in securing contracts with government customers for the purchase of Daimler vehicles valued at hundreds of millions of dollars. In some cases, Daimler wired these improper payments to U.S. bank accounts or to the foreign bank accounts of U.S. shell companies in order to transmit the bribe. In at least one instance, a U.S. shell company was incorporated for the specific purpose of entering into a sham consulting agreement with Daimler in order to conceal improper payments routed through the shell company to foreign government officials. Certain improper payments

even continued as late as January 2008. In all cases, Daimler improperly recorded these payments in its corporate books and records.

Daimler's longstanding violations of the FCPA resulted from a variety of factors, including: (1) an inadequate compliance structure; (2) a highly decentralized system of selling vehicles through a myriad of foreign sales forces, subsidiaries, and affiliates, with no central oversight; (3) a corporate culture that tolerated and/or encouraged bribery; and (4) the involvement of certain key executives, such as the then head of its overseas sales division ("DCOS"), the then head of internal audit, and the then CEOs of several subsidiaries and affiliates.

In total, the corrupt transactions with a territorial connection to the United States resulted in over \$50,000,000 in pre-tax profits for Daimler.

a. Use of Third Party Accounts to Make Improper Payments

At the time of the merger between Chrysler Corporation² and Daimler-Benz in 1998, Daimler maintained over 200 internal "third-party accounts" ("TPAs"), known in German as "interne Fremdkonten." TPAs were maintained as receivable ledger accounts on Daimler's books and were controlled by third parties outside the company or by Daimler's own subsidiaries and affiliates. Daimler used these accounts, among other things, to facilitate the making of improper payments and the provision of gifts to foreign government officials. Funds were credited to these accounts through price inclusions, discounts, rebates, and other mechanisms. Although these accounts appeared in Daimler's books and records, they were accounted for improperly and were not subject to normal auditing or other financial controls. Moreover, certain

² The criminal conduct described herein was unrelated to Chrysler Corporation.

accounts remained "off the books" of those Daimler affiliates on whose behalf Daimler maintained the accounts.

Daimler had maintained certain written policies governing the operation of TPAs since 1977, although until recently none of those policies addressed improper payments to government officials, or the inaccurate recording of payments to government officials in the company's books and records, or required internal controls to prevent and detect such improper payments and related false accounting. Daimler's written policies provided that TPAs were managed internally by the company at the request of the TPA account holder, and the funds on account were managed according to the instructions of the account holder. In one case, an account was managed by Daimler for the benefit of a foreign government official. Other TPA holders included Daimler's foreign subsidiaries, outside distributors, dealers, or consultants that Daimler used as intermediaries to make payments to foreign government officials. As reflected in a 1986 audit report, the TPAs were maintained with "absolute confidentiality" to protect account holders from having to reveal funds distributed to them from their respective third-party accounts, or to any other ultimate beneficiary. At that time, Daimler was aware that the existence of the accounts may violate the laws of other countries and that disclosure of the accounts to other governments could pose "significant difficulties for the account holder," as well as for Daimler.

Prior to 2002, Daimler's TPA policies permitted Daimler employees to make cash disbursements which were deducted from ledger balances on the TPAs. The cash was disbursed from a corporate "cash desk" located at a Daimler manufacturing facility in Stuttgart, Germany. In some instances, Daimler employees then took the cash and transported it to other countries, where the funds were used to pay bribes to governmental officials.

b. Daimler's Oil For Food Contracts

Daimler, or its intermediaries, agreed to pay a 10% commission to the government of Iraq in connection with sales of its vehicles under the Oil for Food ("OFF") program. In cases where Daimler entered into contracts to sell vehicles to the Iraqi government under the OFF program but the contracts were never executed (either because they failed to receive U.N. approval or the Iraqi government decided not to make the purchase), Daimler offered to make payments worth 10% of the contract value to the government of Iraq. Daimler entered into side agreements or side letters with its Iraqi government customers in which Daimler expressly promised to kick back 10% of the anticipated contract value to the Iraqi government.

c. DaimlerChrysler Automotive Russia SAO

DaimlerChrysler Automotive Russia SAO ("DCAR"), now known as Mercedes-Benz Russia SAO, was a Moscow-based, wholly owned subsidiary of Daimler AG. DCAR sold Daimler spare parts, assisted with the sale of vehicles from various Daimler divisions in Germany, including in particular DCOS, to government customers in the Russian Federation ("Russia"), and also imported Daimler passenger and commercial vehicles into Russia for sale to customers and distributors. Daimler sold passenger cars and commercial vehicles directly from its headquarters in Stuttgart, Germany, to its Russian government clients with the assistance of DCAR and Daimler's representative office in Moscow. Daimler carried out such sales from DCOS with DCAR acting as an agent to assist with such direct sales. DCAR and Daimler sold passenger cars, commercial vehicles, and Unimogs in Russia.

Daimler's business in Russia was substantial. DCAR and Daimler's government customers in Russia included the Russian Ministry of Internal Affairs, the Russian military, the

City of Moscow, the City of Ufa, and the City of Novi Urengoi, among others. Daimler, through DCAR, made improper payments at the request of Russian government officials or their designees in order to secure business from Russian government customers. Payments of this nature were made with the knowledge and participation of the former senior management of DCAR and DCOS.

Daimler and DCAR sometimes made improper payments to government officials in Russia to secure business by over-invoicing the customer and paying the excess amount back to the government officials, or to other designated third parties that provided no legitimate services to Daimler or DCAR with the understanding that such payments would be passed on, in whole or in part, to Russian government officials. When payments were made to third parties, the payments were recorded on one of at least nine Daimler debtor accounts.

These overpayments were maintained as reserves on Daimler's books and records in certain internal debtor accounts, including debtor accounts that were identified by the name of the government customer with which Daimler and DCAR did business. When requested, Daimler employees wired and authorized the wiring of payments from Daimler's bank accounts in Germany to, among other destinations, U.S. and Latvian bank accounts beneficially owned by shell companies with the understanding that the money, in whole or in part, was for the benefit of Russian government officials.

Daimler and DCAR employees also made and authorized the making of cash payments to Russian government officials employed at Russian government customers, or their designees, in order to induce sales of Unimogs to several Russian government municipalities.

Daimler and DCAR recorded improper payments to Russian government officials or their designees, in their books and records as “commissions,” “special discounts,” and “N.A.”

Overall, between 2000 and 2005, Daimler’s vehicle sales in Russia, consisting of sales of passenger vehicles, commercial vehicles, and Unimogs, totaled approximately €1.4 billion, of which approximately 5% or €64,660,000 was derived from the sale of vehicles to Russian government customers. In connection with these vehicle sales, DCAR and Daimler made over €3 million in improper payments to Russian government officials employed at their Russian governmental customers, their designees, or to third-party shell companies that provided no legitimate services to Daimler or DCAR with the understanding that the funds would be passed on, in whole or in part, to Russian government officials.

d. Daimler Export and Trade Finance GmbH

Daimler Export and Trade Finance GmbH (“ETF”), a German corporation, was a wholly owned, German-based subsidiary of Daimler Financial Services AG (“DFS”), which was itself a wholly owned subsidiary of Daimler. ETF formerly was known as “debis International Trading GmbH” (“dIT” or “debis”). ETF specialized in the structuring and arranging of customized financing solutions for exports by Daimler and external customers to countries without a local DFS company. In addition to these financing services, ETF participated in business ventures outside of Daimler’s core businesses of the manufacture and sale of passenger cars and commercial vehicles.

ETF made improper payments directly to Croatian government officials and to third parties with the understanding that the payments would be passed on, in whole or in part, to Croatian government officials, to assist in securing the sale of 210 fire trucks (the “Fire Trucks

Contracts”) to the government of Croatia. In total, between 2002 and January 2008, ETF made approximately €4.69 million in such payments.

e. DaimlerChrysler China Ltd.

DaimlerChrysler China Ltd. (“DCCL”), now known as Daimler North East Asia Ltd., was a Beijing-based wholly-owned Daimler subsidiary and cost center that managed Daimler’s business relationships in China, assisted Daimler in selecting and managing its joint ventures in China, and helped manage Daimler’s expatriate employees in China.

Although DCCL did not itself sell any vehicles directly into China, certain DCCL employees assisted with the sale of vehicles by various Daimler divisions in Germany to government customers in China, including principally the Bureau of Geophysical Prospecting (“BGP”), a division of the China National Petroleum Corporation, a Chinese state-owned oil company, and Sinopec Corp. (“Sinopec”), a Chinese state-owned energy company. Both BGP and Sinopec were involved in, among other things, exploration for oil and gas.

Between 2000 and 2005, DCCL employees and/or Daimler employees through DCCL made at least €4,173,944 in improper payments in the form of “commissions,” delegation travel, and gifts for the benefit of Chinese government officials or their designees, in connection with over €112,357,719 in sales of commercial vehicles and Unimogs to Chinese government customers. These sales were made directly from Daimler’s commercial vehicles and Unimog divisions in Germany through various intermediaries to Chinese government customers with the assistance of DCCL employees in the commercial vehicles division.

To make improper payments to Chinese government officials, Daimler and DCCL typically inflated the sales price of vehicles sold to Chinese government customers and

maintained the overpayments in debtor accounts on Daimler's books and records, including one debtor account called the "special commissions" account. The "special commissions" account, also known as the "819" account for the last three digits of the account number, was used by Daimler to make improper payments to Chinese government officials.

DCCL and Daimler also employed agents to assist in securing commercial vehicles and Unimog business from Chinese government customers. Neither DCCL nor Daimler performed due diligence on these agents, and there were inadequate controls in place to ensure that payments made to agents were not passed on to Chinese government officials and their designees. The agency agreements were often not in writing. In addition, DCCL and Daimler lacked adequate oversight into the appropriateness or purpose of payments from debtor accounts that ultimately went to government officials in China and their designees.

3. Dispositions With Daimler, DCAR, ETF, and DCCL

a. Overall Summary

The Department and Daimler agree that the appropriate resolution of this matter consists of (1) a deferred prosecution agreement ("DPA") with Daimler AG, the parent company; (2) a DPA with DCCL, the Chinese subsidiary; (3) guilty pleas pursuant to plea agreements with DCAR, the Russian subsidiary, and ETF, the Daimler Finance subsidiary; (4) overall payment of a \$93.6 million criminal penalty, which is apportioned, based on a Guidelines analysis, among the subsidiaries and the parent company; (5) continued obligation to provide full, complete, and truthful cooperation to the Department and any other law enforcement agency, domestic or foreign; (6) implementation of rigorous compliance enhancements, including periodic testing of same, with a recognition that the Company has already implemented substantial compliance

changes due to the investigation; and (7) the imposition of a corporate compliance monitor who will, over a three-year term, conduct a review of the compliance code, the Company's internal controls and related issues, and will prepare periodic reports on his reviews.

In accordance with the Department's Principles of Federal Prosecution of Business Organizations, the Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Daimler's cooperation and remediation efforts, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department's analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts, and in particular included European Union Directive 2004/18/EC, which provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts in all EU countries.

b. Charges

The information filed against Daimler AG contains two counts, including conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371, that is, to violate the books and records provisions of the FCPA, as amended, 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a) (Count One); and violating the books and records provisions of the FCPA, 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a), and 18 U.S.C. § 2 (Count Two).

The informations filed against the three subsidiaries – DCAR, ETF, and DCCL – also each contain two counts, including conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, that is, to violate the anti-bribery provisions of the FCPA, as

amended, 15 U.S.C. § 78dd-3 (Count One), and violating of the anti-bribery provisions of the FCPA, 15 U.S.C. § 78dd-3 (Count Two).

c. Sentencing Guidelines Calculation and Criminal Penalties

At the parent level, the Department and Daimler agree that an application of the Sentencing Guidelines to determine the applicable fine range yields the following analysis:

Base Offense. Based upon USSG § 2C1.1, the total offense level is 38, calculated as follows:

(a)(2) Base Offense Level	12
(b)(1) Specific Offense Characteristic (More than one bribe)	+2
(b)(2) Specific Offense Characteristic (Value of Benefit Received > \$50,000,000 based on transactions with U.S. nexus, taking the greater of the corrupt payment or the benefit received for each transaction pursuant to USSG § 2C1.1, comment. (n. 3))	+24
TOTAL	38

Base Fine. Based upon USSG § 8C2.4(a)(1), the base fine is \$72,500,000 (fine corresponding to the Base Offense level as provided in Offense Level Table)

Culpability Score. Based upon USSG § 8C2.5, the culpability score is 8, calculated as follows:

(a) Base Culpability Score	5
(b)(1) The organization had 5,000 or more employees and tolerance of the offense by substantial authority personnel was pervasive throughout the organization	+5
(g) The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of	

responsibility for its criminal conduct	<u>- 2</u>
TOTAL	8

Calculation of Fine Range:

Base Fine	\$72,500,000
Multipliers	1.6(min)/3.20(max)
Fine Range	\$116,000,000 / \$232,000,000

The overall criminal penalty of \$93,600,000 is approximately 20% below the bottom of the Sentencing Guidelines fine range of \$116,000,000. The parties believe that such a reduction is appropriate given the nature and extent of Daimler's cooperation in this matter, including sharing information with the Department regarding evidence obtained as a result of Daimler's extensive investigation of corrupt payments made by Daimler in various countries around the world. Indeed, because Daimler did not voluntarily disclose its conduct prior to the filing of the whistleblower lawsuit, it only receives a two-point reduction in its culpability score. The Department respectfully submits that such reduction is incongruent with the level of cooperation and assistance provided by the company in the Department's investigation. The three subsidiary agreements – guilty pleas for DCAR and ETF and a DPA for DCCL – contain separate Guidelines analyses for the transactions applicable to those entities. Those analyses yield criminal penalties attributable to the subsidiaries in the following amounts: (i) \$5,040,000 (DCCL); (ii) \$27,360,000 (DCAR); and (iii) \$29,120,000 (ETF).

DCAR and ETF are pleading guilty pursuant to Fed. R. Crim. P. 11(c)(1)(C). Under Fed. R. Crim. P. 11(c)(1)(C), the Department respectfully submits that the appropriate criminal penalties in

this case are as reflected in these Guidelines calculations, in light of Daimler's (a) assistance in the investigation, (b) its payments of fines or disgorgement in other related proceedings, and (c) its compliance and remediation efforts. The Department also respectfully submits that such a disposition adequately takes into account the nature and circumstances of the offense, reflects the seriousness of the offense, promotes respect for the law, provides just punishment, and affords adequate deterrence to criminal conduct for Daimler and the marketplace generally. *See* 18 U.S.C. § 3553(a). On this point, the Department notes that, when combined with Daimler's payment to the SEC, the instant disposition represents one of the largest payments in the history of the FCPA.

d. Daimler's Cooperation and Remediation Efforts

The Department considers Daimler's cooperation in this investigation to have been excellent. Specifically, Daimler conducted a worldwide internal investigation, involving dozens of countries and every major market in which the company does business. The company regularly presented its findings to the Department. In addition, Daimler made certain witnesses available to the Department, and voluntarily complied with requests for the production of documents from overseas.

Often, when Daimler would present its findings to the Department, it would also inform the Department about disciplinary actions that had already been taken by the company against culpable employees. These disciplinary actions resulted in sanctions against over 60 company employees, with approximately 45 employees being terminated or separated under termination agreements.

Finally, and perhaps most significantly, Daimler began to reform its anti-bribery compliance program while the investigation was still ongoing, without waiting until the finalization of a

disposition with the Department. Daimler regularly updated the Department on the changes being made to its compliance program, including the following:

- Centralization of Corporate Compliance Operations (“CCO”) – this initiative has resulted in the increase in CCO to approximately 60 full-time staff, plus 85 Local Compliance Managers in 41 countries who cover a total of 95 entities and business units.” The company also retained external compliance experts, including a former German prosecutor. The CCO is integrated into Daimler’s organization. This represents a significantly more robust compliance organization than existed previously.
- Centralization of Corporate Audit (“CA”) – key CA initiatives include standardizing the methodology used by CA staff to conduct its audits, the express inclusion of control objectives from CCO in its work plans, and the performance of ad hoc audits. The CA staff consists of a total of 150 employees. Again, this is a more robust CA department than existed previously.
- Inclusion of compliance component in board-level compensation – the company began including compliance as a component of Board of Management compensation. Specifically, failure to reach compliance targets can reduce a Board of Management member’s personal bonus by up to 25%. The company also now includes compliance, including FCPA and anti-corruption compliance, as part of its regular performance evaluation process.
- The company has established a whistleblower hotline, managed by the Business Practice Office (“BPO”), which falls under the CCO. The BPO’s quarterly reports are provided to the Audit Committee. This reform is significant, given that the allegations of foreign bribery in this case first surfaced as the result of a Sarbanes-Oxley whistleblower complaint filed against the company.
- The company has established a sales practices hotline known as the Compliance Consultation Desk, which also falls under the CCO. There are nine CCO employees dedicated to fielding and responding to hotline inquiries. Among other things, these employees counsel others in the prevention of bribery in connection with benefits such as discounts and donations, as well as in the prevention of bribery in business transactions with government bodies, consultants and intermediaries, and due diligence of third parties.
- The company now requires anti-bribery contract terms and audit rights for its intermediaries, including provisions that allow for unilateral termination by Daimler. This requirement has resulted in over 15,000 company contracts being amended.

- The company has instituted numerous other policies and training initiatives regarding FCPA compliance, including the implementation of company-wide rules regarding the use of bank accounts, gifts and entertainment, signature authorities, and approvals.
- Finally, the company has instituted a zero-tolerance policy for violations of the company's Integrity Code as well as other laws and regulations.

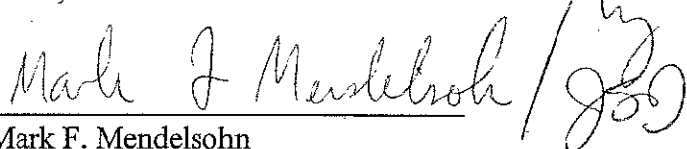
CONCLUSION

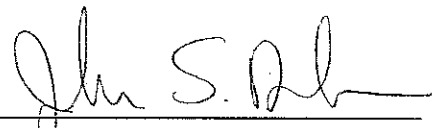
For the foregoing reasons, the Department respectfully recommends that the Court approve the disposition of this matter as described in this memorandum and accept the guilty pleas of DCAR and ETF pursuant to Fed. R. Crim. P. 11(c)(1)(C).

Respectfully submitted,

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