

National Advisory Council
The Thalidomide Trust
1 Eaton Court Road
Colmworth Business Park
Eaton Socon
St Neots
Cambridgeshire
PE19 8ER

Your ref:

Our ref: CJ/TG/8248/8973

Date: 5 March 2015

By Email and Post

For the attention of Phil Williams and Nick Dobrik

Dear Sirs

Thalidomide: German Government Involvement in Early Termination of Criminal Trial

1. We write in response to your instructions to review the documents and findings made by researchers working on your behalf into the conduct of both the relevant State and Federal Governments of Germany in connection with the early termination of the criminal trial in 1970 against the manufacturers of Thalidomide, Grünenthal.
2. We have previously provided you with our advice on this matter on 29 August 2014. We now had sight of some further evidence and accordingly provide our updated advice.
3. Along with colleagues from our office in Germany, we have examined the documents produced to us and can confirm the contents are as follows, with comment as appropriate:-
 - a. Federal Health Ministry file note dated 21 July 1969 records a secret (confidentiality was sought by Grünenthal) meeting between Grünenthal directors, including Wirtz a principal Defendant in the criminal trial, their lawyers and the Health Ministry at which settlement of the claims was discussed. No victims nor their representatives were involved nor advised of this meeting.
 - b. Federal Health Ministry file note dated 18 September 1969 records follow up actions and notes discussions between the Federal Health Ministry, the Federal Ministry for Internal Affairs and the Federal Ministry of Labour and Social Affairs (who also wanted the Federal Ministry of Economics and the Federal Ministry of Finance to be involved). The Ministries agreed that a political level discussion was required.
 - c. Federal Health Ministry file note dated 18 September 1969 (sequel) notes that a solution had to be discussed at a higher level. The Health Ministry was aware that such negotiations could be interpreted as an attempt to interfere with the ongoing

Ince & Co LLP
International House
1 St Katharine's Way
London E1W 1AY
DX 1070 London City

Tel +44 (0)20 7481 0010
Fax +44 (0)20 7481 4968
incelaw.com

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criminal trial and should be postponed to after the trial. Nevertheless the German settlement and legislative process continued and was announced publicly in April 1970 despite the fact that the trial was continuing and was not terminated until December 1970.

- d. Explanatory memorandum regarding the proposed settlement legislation notes that the claims for compensation amounted to DM1.5 billion whilst the proposed Federal Government and Grünenthal contributions were to be only DM100 million each (which sums were in the legislation subsequently enacted) so totalling just 13¹/₃% of the damages claimed.
- e. Letter dated 6 November 1969 from the Federal President's Personal Assistant Mr Buhrow to the President of the Protestant Church in Rhineland, the Archbishop of Cologne and a representative of the charity Aktion Sorgenkind notes the concerns of the Cologne Public Prosecutor about the Federal President proposing to include in a public appeal document about settling the Thalidomide (or Contergan) issue the idea that any payment by Grünenthal should occur on the condition that the criminal trial ended. This firstly shows that it was the Federal President who was proposing that the criminal trial should end on this basis. Also it shows that the Cologne Public Prosecutor was aware that this proposal of the Federal President meant that the Federal President would be seen to be procuring the end of the criminal trial on this basis and that this was improper. Further it is clear that the office of the Federal President was aware of this concern. However, rather than withdrawing the improper proposal, the letter states that it was decided to delete the relevant passage from the body of the document and instead include it in the explanatory notes. The fact that this reference was moved to a less prominent position clearly shows that the Federal President's office knew such interference with the criminal proceedings was inappropriate.
- f. Letter from the Head of the Federal Office of the President on 5 January 1970 to the President of the Federal Republic of Germany notes the matter of settling the Contergan proceedings. The letter asks how far the Federal President has got on the case. This reference shows the involvement by members of the executive in the proposed settlement of the Contergan proceedings. But what progress could the Federal President have made in this regard without having inappropriately interfered in the trial?
- g. Letter on 27 January 1970 from the Secretary of State in the Ministry of Justice of the State of North Rhine-Westphalia Mr Münchhausen to Mr Buhrow a senior government official in the Office of the Federal President recommends the formation of a foundation or similar institution in order to satisfy the affected people's claims on the basis that a contribution by Grünenthal would be made only in exchange for a release of all liability. However, the letter notes that this solution would in the eyes of the judiciary be best suited to ensure the possible end of the criminal proceedings. It is remarkable that the Judge is considering the end to the trial on this basis some eleven months before it occurred. How did the Judge become aware of the proposal of a foundation based on a release for Grünenthal when this was not publicly announced until April 1970 three months after this letter? The inference can only be of discussions with the Judge himself by the Ministry. This is also clear from the fact that the Ministry of Justice is aware that this is the attitude

of the Judge. What is more, this letter is advising the Office of the Federal President of this.

- h. Note by the ministerial director, head of the department for public law, for the Federal Justice Ministry Bahlmann of telephone call dated 11 March 1970 with Secretary of State von Münchhausen (who worked with the Minister of Justice Josef Neuberger for the State of North Rhine–Westphalia) states the Federal Government wished to know if it could assume that the criminal trial would be discontinued in due course. It also records the Federal Government's view that the criminal trial needed to be finalised. This appears to be an attempt by the Federal Government to influence the course of the trial. The note also states that von Münchhausen assured Bahlmann that the prosecution would agree to the criminal case against Grünenthal being dismissed. The State Ministry of Justice had the power to direct the prosecutor to consent to discontinue the criminal trial. What must be noted, however, is that the State Minister of Justice, Neuberger, who had been appointed on 8 December 1966, was before that actually a partner in the law firm defending Grünenthal. Neuberger had personally taken over the defence of Wirtz in November 1966. Come 1970 Neuberger had the power to direct the prosecution. The conflict of interest is obvious.
 - i. Working paper of prosecutor (undated though from context likely to be from February 1970) notes arguments for and against the discontinuance of the criminal trial. It states that the acquittal of Grünenthal did not appear very likely. It notes that the two requirements for a discontinuance of the criminal trial (it being in the public interest; and a low degree of personal guilt) were not present. Why then did the prosecutor some time later consent to the discontinuance of the criminal trial?
4. Given the above it comes as no surprise to learn that on 4 February 2014 the Health Minister of the State of North Rhine–Westphalia announced an independent inquiry by Westphälische Wilhelm University into the conduct of the Government of the State of North Rhine–Westphalia in respect of Thalidomide to disclose how the State acted at the time.
5. It is equally unsurprising to note the comment made in a letter dated 14 August 2014 from Caren Marks, the Parliamentary State Secretary of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "... *the role of the then Minister of Justice of the Land North Rhine–Westphalia, Josef Neuberger, will be thoroughly examined*". No doubt the conflict of interest point was well in mind when this letter was written.
6. This investigation, however, will not examine the role of the Federal Government in the early termination of the criminal trial against Grünenthal. What is clear, however, as accepted in a letter dated 8 April 2014 from Elke Ferner of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, is that the, "... *constitutional principle of the division of power between the legislative, the executive and the judiciary precludes any action aimed at influencing ongoing legal proceedings.*" The question is whether that constitutional principle was breached such that the premature discontinuance of the criminal trial against Grünenthal had the effect of suppressing evidence about the prior knowledge of birth defects regarding the marketing of Thalidomide which in turn led to the inadequate out of court settlement in the United Kingdom.
7. Clearly, you will want to seek a full explanation from the Federal German Government in respect of the above documents and matters raised which, in our view, raise a prima facie

case of political involvement in the early termination of the criminal trial against
Grünenthal.

Yours faithfully

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