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Third Evaluation Round

Second Compliance Report on Germany

"Incriminations (ETS 173 and 191, GPC 2)"

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"Transparency of Party Funding"

Adopted by GRECO
at its 71st Plenary Meeting
(Strasbourg, 14-18 March 2016)

I. INTRODUCTION

1. The Second Compliance Report assesses the additional measures taken by the German authorities, since the adoption of the third Interim Report to the first Compliance Report, in respect of the recommendations made by GRECO in its Third Round Evaluation Report on Germany. It should be recalled that the Third Evaluation Round covers two distinct themes, namely:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2 to 12, 15 to 17 and 19.1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1 to 6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (incrimination of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
2. GRECO adopted the Third Round Evaluation Report on Germany at GRECO's 45th Plenary Meeting (4 December 2009). This report (Greco Eval III Rep (2009) 3E [Theme I](#) / [Theme II](#)) contained twenty recommendations and was made public on 4 December 2009.
3. In the first Compliance Report, which was adopted by GRECO at its 53rd Plenary Meeting (Strasbourg, 5-9 December 2011), it was concluded that Germany had implemented satisfactorily or dealt with in a satisfactory manner only four of the 20 recommendations contained in the Third Round Evaluation Report. In view of this result, GRECO categorised the very low level of compliance with the recommendations as “globally unsatisfactory” within the meaning of Rule 31, paragraph 8.3 of the Rules of Procedure. GRECO therefore decided to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the Evaluation Report.
4. The first Interim Compliance Report was adopted by GRECO at its 57th Plenary Meeting (Strasbourg, 15-19 October 2012) and made public on 28 November 2012. The Second Interim Compliance Report was adopted by GRECO at its 61st Plenary Meeting (Strasbourg, 14-18 October 2013) and made public on 16 December 2013. In the Third Interim Compliance Report, adopted by GRECO at its 65th Plenary Meeting (10 October 2014) and made public on 28 January 2015, it was concluded that Germany had implemented satisfactorily or dealt with in a satisfactory manner six of the 20 recommendations contained in the Third Round Evaluation Report: 11 recommendations had been partly implemented and three had not been implemented to date. GRECO decided to terminate the compliance enhancing procedure (the level of compliance was no longer “globally unsatisfactory”).
5. As required by GRECO's Rules of Procedure, the authorities of Germany submitted their Second Situation Report with additional information regarding the actions taken to implement those recommendations that were still partly implemented or not implemented according to the third interim report. This report was received on 15 July 2015 – updated on 7 and 18 January 2016 – and served as a basis for the present Second Compliance Report.
6. GRECO selected Austria and the Russian Federation to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Aslan YUSUFOV on behalf of the Russian Federation and Mr Christian MANQUET on behalf of Austria. They were assisted by GRECO's Secretariat in drawing up the Second Compliance Report.

II. ANALYSIS

Theme I: Incriminations

7. It is recalled that in its Evaluation Report GRECO addressed 10 recommendations to Germany in respect of Theme I. Recommendations ii, iii and iv were considered as implemented satisfactorily and recommendations v-viii and x were considered as partly implemented. Recommendations i and ix had not been implemented.

Recommendation i.

8. *GRECO recommended to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the ratification of its Additional Protocol (ETS 191).*
9. GRECO recalls that in the Third Interim Compliance Report, it welcomed the fact that the authorities had initiated several measures aimed at ratification of the Criminal Law Convention on Corruption and its Additional Protocol. Namely, the *Bundestag* (the national Parliament) had adopted a bill amending, *inter alia*, section 108e of the Criminal Code (CC) with a view to broadening the criminalisation of active and passive bribery of assembly members; a draft bill aimed at implementing GRECO's recommendations relating to the provisions of the Criminal Law Convention on Corruption and its Additional Protocol had been presented for public consultation by the Federal Ministry of Justice and Consumer Protection; and a draft bill authorising the Federal Government to ratify the Criminal Law Convention on Corruption and its Additional Protocol was being prepared by the Federal Ministry of Justice and Consumer Protection. However, given that the draft legislation authorising the Federal Government to ratify these instruments was only under preparation and that its adoption depended on prior amendments to the criminal legislation, GRECO concluded that the recommendation remained not implemented.
10. The authorities of Germany now report firstly that the above-mentioned draft bill aimed at implementing GRECO's recommendations relating to the provisions of the Criminal Law Convention on Corruption and its Additional Protocol – the Draft Anti-Corruption Act (*Regierungsentwurf eines Gesetzes zur Bekämpfung der Korruption*) – was adopted by the Federal Government on 21 January 2015 and by the *Bundestag* on 20 November 2015 and entered into force on 26 November 2015.¹ The Anti-Corruption Act is directed at amending the CC so as to bring it fully into line with the provisions of the two instruments and thus to allow for their ratification. Secondly, the authorities indicate that a draft bill authorising the Federal Government to ratify the above-mentioned instruments was prepared by the Federal Ministry of Justice and Consumer Protection, has been presented for public consultation and was published on the Ministry's website on 2 March 2016.² Once adopted by the Federal Government, the bill will be submitted to the *Bundestag*.
11. GRECO acknowledges the entry into force of the Anti-Corruption Act which is aimed at bringing the CC into line with the provisions of the Criminal Law Convention on Corruption and its Additional Protocol and thus allowing for their ratification, as well as the preparation and publication by the Federal Ministry of Justice and Consumer Protection of a bill authorising the Federal Government to ratify these instruments. GRECO invites the authorities to persist in their

¹ For the German language version, cf. http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl115s2025.pdf

² For the German language version, cf. http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/DE/Vertragsgesetz_Korruption.html

efforts and to proceed swiftly with ratification of the two legal instruments, as required by the recommendation.

12. GRECO concludes that recommendation i has been partly implemented.

Recommendations v, vi and vii.

13. *GRECO recommended:*

- *to incriminate active as well as passive bribery of foreign public officials more broadly, in line with Article 5 of the Criminal Law Convention on Corruption (ETS 173) (recommendation v);*
- *to incriminate more broadly active as well as passive bribery of officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts, in line with Articles 9 to 11 of the Criminal Law Convention on Corruption (ETS 173) (recommendation vi); and*
- *to ensure that active and passive bribery of foreign jurors is criminalised in Germany in accordance with the provisions of Article 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 173) (recommendation vii).*

14. GRECO recalls that in the Third Interim Compliance Report, it assessed recommendations v, vi and vii as partly implemented. GRECO welcomed the fact that the authorities had prepared draft legislation with the potential to meet the requirements of the recommendations. At the same time, it noted that the new section 335a CC on bribery of foreign and international officials would maintain the requirement that there be a link between the bribery act and a breach of duties. Germany therefore intended to make declarations in accordance with Article 36 of the Criminal Law Convention on Corruption and Article 9 of its Additional Protocol to the effect that it would establish as criminal offences the active and passive bribery of foreign public officials, officials of international organisations, judges and officials of international courts and foreign jurors only to the extent that the official acts or refrains from acting in breach of his/her duties.

15. The authorities now refer to the adoption and entry into force, on 26 November 2015, of the Anti-Corruption Act amending the CC reported under recommendation i. They indicate that the provisions relevant to recommendations v, vi and vii, under section 335 a CC, were adopted without any changes as compared to the bill assessed by GRECO in the Third Interim Compliance Report. Consequently, Germany still intends to make the above-mentioned declarations in accordance with Article 36 of the Criminal Law Convention on Corruption and to Article 9 of the Additional Protocol.

16. GRECO welcomes the adoption and entry into force of the amendments to the CC already assessed positively at the drafting stage in the Third Interim Compliance Report. The new provisions under section 335 a CC provide for broader criminalisation of active and passive bribery of foreign public officials (recommendation v), of international officials (recommendation vi) and of foreign jurors (recommendation vii) . In particular, these bribery offences are no longer limited to active bribery or bribery in the context of international business transactions. That said, they still require a link between the bribery act and a breach of duties, as was already the case before the reform. GRECO notes that for this reason, Germany plans to enter declarations pursuant to Article 36 of the Criminal Law Convention on Corruption and Article 9 of its Additional Protocol. However, as long as this process is not completed – draft legislation authorising the Federal Government to ratify these instruments, possibly with declarations, is still under

preparation (see above under recommendation i) – GRECO cannot conclude on full implementation of the recommendations.

17. GRECO concludes that recommendations v, vi and vii remain partly implemented.

Recommendation viii.

18. *GRECO recommended to amend the provisions on bribery in the private sector of section 299 CC in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).*
19. GRECO recalls that the recommendation was considered partly implemented in the Third Interim Compliance Report. The draft Anti-Corruption Act provided for the amendment of section 299 CC according to which private sector bribery offences would no longer be limited to cases where the advantage is given or taken in return for obtaining “an unfair preference (...) in the competitive purchase of goods or commercial services”, but would also cover cases where the advantage is given or taken in return for the bribe-taker violating his/her duties towards the business. As was already the case before, the offences would cover all forms of advantage, irrespective of value, and would not be limited to undue advantages. The draft legislation had been assessed positively by GRECO.
20. The authorities now state that the above amendments to section 299 CC provided for by the draft Anti-Corruption Act were adopted and have entered into force (cf. under recommendation i above) with the following two changes in paragraph 1 item 2 and paragraph 2 item 2. Firstly, the new version includes the words “refraining from performing an act”. This amendment is based on the Criminal Law Convention which uses the same language and aims at explicitly clarifying that the advantage needs to be given or taken in return for the employee’s or agent’s *acting*, or *refraining from acting* (in breach of his/her duties). Secondly, the new version includes the words “without the permission of the business” in order to make it clear that there is no criminal liability where the employee or agent acts in a transparent way and in accordance with the business. The authorities stress that according to the bill’s explanatory memorandum, the permission of the business needs to relate to both the giving or taking of the advantage and to the link between the advantage and the employee’s or agent’s acting or refraining from acting in breach of his/her duties. The new provisions read as follows:

Section 299 CC: Taking and giving bribes in commercial practice

(1) *Whosoever as an employee or agent of a business in commercial practice*

1. *demands, allows him/herself to be promised or accepts a benefit for him/herself or a third party in consideration for according an unfair preference to another in the competitive purchase of goods or services in Germany or abroad, or*
2. *without the permission of the business, demands, allows him/herself to be promised or accepts a benefit for him/herself or a third party in consideration for performing or refraining from performing an act in the purchase of goods or services and thus violating his/her duties towards the business,*

shall be liable to imprisonment not exceeding three years or a fine.

(2) *Whosoever in commercial practice*

1. *offers, promises or grants an employee or agent of a business a benefit for that employee or agent or for a third party in consideration for the employee or agent according him/her or another an unfair preference in the competitive purchase of goods or services in Germany or abroad, or*

2. *without the permission of the business, offers, promises or grants an employee or agent of a business a benefit for that employee or agent or for a third party in consideration for the employee or agent performing or refraining from performing an act in the purchase of goods or services and thus violating his/her duties towards the business,*
shall incur the same penalty.

21. GRECO takes note of the information provided with respect to the amendments to the private sector bribery offences which are largely identical to the draft amendments already assessed by GRECO. In particular, they address the main concern underlying the recommendation, by extending the scope of those provisions to all situations where an advantage is given or taken in return for the bribe-taker violating his/her duties. Regarding the new element of the employee or agent of a business acting “without the permission of the business”, GRECO notes that such a requirement does not contradict the requirements of Articles 7 and 8 of the Criminal Law Convention on Corruption: As has been explained in the Explanatory report to the Convention (paragraph 55), “the notion of ‘breach of duty’ can also be linked to that of ‘secrecy’, that is the acceptance of the gift to the detriment of the employer or principal and without obtaining his authorisation or approval.” That said, the authorities may wish to keep under review the question of whether this element (“without the permission of the business”) does not hamper the effective application of the private sector bribery offences. As GRECO has pointed out on previous occasions, a “breach of duty” can ideally be determined with reference to contractual, legal, ethical or other provisions which, in principle, are relatively predictable and clear, whereas it could be difficult for the judicial authorities conducting corruption proceedings to check the validity – especially *post hoc* – of statements by a company’s managing body.
22. GRECO concludes that recommendation viii has been implemented satisfactorily.

Recommendation ix.

23. *GRECO recommended to criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173).*
24. GRECO recalls that the Federal Ministry of Justice and Consumer Protection had reached the conclusion that the existing corruption-related provisions, as amended by the above-mentioned draft bill, covered corrupt behaviour in a comprehensive manner and did not need to be complemented by a stand-alone “trading in influence” offence; therefore, the memorandum accompanying the consultation process pointed out that Germany intended to enter a reservation in relation to Article 12 of the Criminal Law Convention on Corruption accordingly, as provided for in Article 37 of the Convention. GRECO, however, encouraged the authorities to reconsider their position, reiterated the formal Appeal by the Committee of Ministers to States³ to limit as far as possible the reservations that they declare pursuant to the Convention, and recalled that according to the Evaluation Report, the introduction of specific criminal provisions on trading in influence would indeed fill a gap. Therefore, given that draft legislation amending the criminal legislation on corruption and authorising the Federal Government to ratify the Convention – possibly with a reservation in relation to Article 12 – was still only under preparation, GRECO could not conclude that the recommendation had even been partly implemented.

³ made by the Committee of Ministers to States at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998)

25. The authorities now state that following the public consultation on the draft bill initiated in June 2014 and the preparation of its adoption by the Federal Government, the Federal Ministry of Justice and Consumer Protection once again considered the issue of establishing an offence of "trading in influence" and once again came to the conclusion that the existing provisions, as amended by the draft bill, cover corrupt behaviour in a comprehensive manner and do not need to be complemented by a stand-alone "trading in influence" offence. Therefore, it was still planned to enter a reservation in relation to Article 12 of the Criminal Law Convention on Corruption.
26. GRECO takes note of the information provided. It maintains its position that the introduction of specific criminal provisions on trading in influence would fill a gap (e.g. with regard to cases involving elected officials) and that, at the current stage of the reform process where draft legislation authorising the Federal Government to ratify the Convention – possibly with a reservation in relation to Article 12 – is still under preparation, GRECO cannot conclude that the recommendation has even been partly implemented.
27. GRECO concludes that recommendation ix has not been implemented.

Recommendation x.

28. *GRECO recommended i) to clearly establish jurisdiction for the various corruption offences in line with Article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) and its additional Protocol (ETS 191); ii) to include, to the extent possible, all relevant rules concerning jurisdiction in the Criminal Code in order to facilitate their understanding by practitioners and the public at large.*
29. GRECO recalls that in the Third Interim Compliance Report, it assessed recommendation x as partly implemented. Draft legislation had been presented which was aimed at ensuring that jurisdiction is established over all corruption offences⁴ (first part of the recommendation) and that all the jurisdiction rules are contained in the CC itself (second part of the recommendation). However, GRECO could not see that jurisdiction would also be established in cases committed abroad by members of German public assemblies without German citizenship.⁵
30. The authorities now report that following the public consultation on the above-mentioned draft bill and taking into account GRECO's comments, the Ministry amended the draft bill and included a provision to be incorporated in the CC (section 5 item 16) establishing jurisdiction for corruption offences committed abroad by members of German public assemblies irrespective of their citizenship. The amendment has practical relevance for members elected to representative bodies of municipalities who (unlike members of the *Bundestag*) do not need to be German citizens. The relevant provisions of the bill, which has in the meantime been adopted and has entered into force (see under recommendation i above), read as follows:

⁴ Regarding bribery in the private sector, according to the draft bill's explanatory memorandum Germany intended to declare, pursuant to Article 37 paragraph 2 of the Criminal Law Convention on Corruption, that it avails itself of the reservation provided for in Article 17 paragraph 2 of the Convention – i.e. to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 b and c of Article 17 of the Convention.

⁵ as required by Article 17 paragraph 1b of the Convention

Section 5 CC: Offences committed abroad against domestic legal interests

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

[...]

15. Offences committed in public office pursuant to sections 331 to 337, where

- a) the offender is German at the time of the act,*
- b) the offender is a European public official and his public authority has its seat in Germany,*
- c) the act is committed in relation to a public official, a person entrusted with special public service functions or a soldier of the Bundeswehr, or*
- d) the act is committed in relation to a European public official or arbitrator who is a German at the time of the act, or a person deemed equal pursuant to section 335a who is a German at the time of the offence;*

16. Active and passive bribery of mandate holders (section 108e), where

- a) the offender is a member of a German public assembly or German at the time of the act or**
- b) the act is committed in relation to a member of a German public assembly or to a person who is German at the time of the act.**

31. GRECO welcomes the fact that the draft legislation which it had already assessed in the Third Interim Compliance Report has been further amended with a view to filling the remaining gap – by also establishing jurisdiction over corruption offences committed abroad by members of German public assemblies without German citizenship – and has been adopted and has entered into force.
32. GRECO concludes that recommendation x has been implemented satisfactorily.

Theme II: Transparency of Party Funding

33. It is recalled that in its Evaluation Report GRECO addressed 10 recommendations to Germany in respect of Theme II. Recommendations i and vi were assessed as having been implemented satisfactorily and recommendation ix as having been dealt with in a satisfactory manner. Recommendations ii, iii, iv, v, viii and x were considered partly implemented and recommendation vii not implemented.

Recommendations ii to v, vii, viii and x.

34. *GRECO recommended:*
- i) to introduce a system for the publication of election campaign accounts at the federal level, which would make the information available shortly after election campaigns; ii) to invite the Länder to adopt similar measures that would be applicable to associations of voters participating in elections to Länder parliaments and at local level (recommendation ii);*
 - to lower the 50,000 Euro threshold for the immediate reporting and disclosure, under the Political Parties Act, of donations made to political parties; ii) to put a ban on anonymous donations and iii) to consider reducing significantly the threshold for the disclosure of donations and donors (recommendation iii);*

- *to prohibit donations to parliamentarians and candidates who are members of political parties or, alternatively, to subject them to requirements for record keeping and disclosure similar to those applicable to political parties (recommendation iv);*
 - *i) to develop a more global approach of party financing in Germany by presenting in an official document the various forms of state support effectively granted or available; ii) to initiate consultations about the additional measures needed to better ensure the strict separation, under the law, of the financing of political parties on the one hand, and foundations and parliamentary groups on the other hand (recommendation v);*
 - *to strengthen the independence of the external audit of the parties' financial statements, for instance by introducing a reasonable degree of rotation or by appointing a second auditor from a different company (recommendation vii);*
 - *to ensure that the body to which the supervision of party financing is attributed, enjoys a sufficient degree of independence and is equipped with proper means of control, adequate staffing and appropriate expertise (recommendation viii); and*
 - *i) to clarify the possible infringements to the Code of Conduct appended to the Rules of Procedure of the Bundestag, as regards the regime of donations to parliamentarians; ii) to ensure that these infringements are subject to effective, proportionate and dissuasive sanctions (recommendation x).*
35. The authorities report that, by letter of 28 January 2015, the Federal Minister of the Interior requested that the President of the *Bundestag* inform him of the Parliament's position as regards the outstanding recommendations and to what extent further measures for their implementation had been taken or were planned. By letter of 2 July 2015, the chair of the Committee on Internal Affairs of the *Bundestag* – in consultation with the spokespersons of the parliamentary groups in the Committee – reported that the Committee on Internal Affairs, which is the lead committee for the law governing party funding, was discussing an amendment of the Political Parties Act. He stated that GRECO's recommendations were also taken into account during the ongoing consultations.
36. On 22 December 2015, the *Bundestag* adopted the Tenth Act amending the Political Parties Act which entered into force on 1 January 2016. The amendments concern i.a. details of public funding of political parties, the inclusion of membership fees in the calculation of the 10 000 € value threshold of donations received by political parties which is relevant to the parties' obligation to record such donations in their statements of accounts, and the introduction of additional sanctions including fines in case of violation of the obligation by a political party to submit a public statement of accounts. Finally, the authorities add that they expect the *Bundestag* to shortly inform the Federal Government on its position towards the GRECO recommendations which have not yet been fully implemented.
37. GRECO takes note of the recent reform of the Political Parties Act which, among other things, amended some provisions on transparency of party funding and enforcement of the rules. While these amendments appear to go in the right direction, GRECO notes that they are not directly relevant for the implementation of the pending recommendations. It is concerned that no tangible progress has been achieved in that respect since the adoption of the Third Interim Compliance Report. GRECO urges the authorities to pursue the reform process initiated and to take appropriate action in line with the recommendations.

38. GRECO concludes that recommendations ii, iii, iv, v, viii and x remain partly implemented and recommendation vii not implemented.

III. CONCLUSIONS

39. **In view of the above, GRECO concludes that Germany has implemented satisfactorily or dealt with in a satisfactory manner eight of the twenty recommendations contained in the Third Round Evaluation Report.** Ten recommendations have been partly implemented and two have not been implemented to date.
40. More specifically, with respect to Theme I – Incriminations, recommendations ii, iii, iv, viii and x have been implemented satisfactorily. Recommendations i, v, vi and vii have been partly implemented and recommendation ix has still not been implemented. With respect to Theme II – Transparency of party funding, recommendations i and vi have been implemented satisfactorily and recommendation ix has been dealt with in a satisfactory manner. Recommendations ii, iii, iv, v, viii and x have been partly implemented and recommendation vii has not been implemented.
41. Regarding Theme I – Incriminations, GRECO notes that the reform process already welcomed in the Third Interim Compliance Report has been further pursued and almost completed. Following the adoption and entry into force of the Anti-Corruption Act in November 2015, GRECO's recommendations relating to the criminalisation of active and passive bribery of foreign public officials, international officials and foreign jurors, private sector bribery and the jurisdictional rules have been addressed – thus paving the way for ratification by Germany of the Criminal Law Convention on Corruption and its Additional Protocol. With respect to Theme II – Transparency of party funding, it would appear that the recent amendments to the Political Parties Act have the potential to increase the transparency and effective enforcement of the rules and can thus be considered as steps in the right direction. That said, GRECO regrets that this reform process has not been used to implement the outstanding recommendations. It wishes to stress again that several recommendations are pending on issues of prime importance – such as the introduction of a system for the timely publication of election campaign accounts, enhancing the transparency of direct donations to parliamentarians and election candidates who are members of political parties, and further increasing the resources available to the president of the *Bundestag* for supervising party funding. GRECO once again urges the German authorities to address the outstanding recommendations as soon as possible.
42. In conclusion, in view of the fact that twelve recommendations have not yet been fully implemented, GRECO in accordance with Rule 31, paragraph 9 of its Rules of Procedure asks the Head of the German delegation to submit additional information, namely regarding the implementation of recommendations i, v, vi, vii and ix (Theme I – Incriminations) and recommendations ii-v, vii, viii and x (Theme II – Transparency of party funding), by 31 December 2016.
43. GRECO invites the authorities of Germany to authorise, as soon as possible, the publication of the present report, to translate it into the national language and to make this translation public.