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## **First Evaluation Round**

### **Compliance Report on Germany**

Adopted by GRECO  
at its 18<sup>th</sup> Plenary Meeting  
(Strasbourg, 10-14 May 2004)

## **I. INTRODUCTION**

1. GRECO adopted the First Round Evaluation Report on Germany at its 8<sup>th</sup> Plenary Meeting (4-8 March 2002). This Report (Greco Eval I Rep (2001) 12E) was made public by GRECO, following authorisation by The German authorities on 29 April 2002.
2. In accordance with Rule 30.2 of GRECO's Rules of Procedure, The German authorities submitted their Situation Report (RS-report) on the measures taken to follow the recommendations on 18 December 2003. They also submitted additional information on 29 March 2004.
3. At its 13<sup>th</sup> Plenary Meeting (24-28 March 2003), GRECO selected, in accordance with Rule 31.1 of its Rules of Procedure, Belgium and the United States of America to provide Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mrs Isabelle VAN HEERS on behalf of Belgium and Mr William KEEFER on behalf of the United States of America. The Rapporteurs were assisted by the GRECO Secretariat in drafting the Compliance Report (RC-Report).
4. The RC-Report was adopted by GRECO, following examination and debate pursuant to Rule 31.7 of the Rules of Procedure, at its 18<sup>th</sup> Plenary Meeting (10-14 May 2004).
5. Under Article 15 para. 6 of the GRECO Statute and Rule 30.2 of the Rules of Procedure, the objective of the RC-Report is to assess the measures taken by the German authorities and, wherever possible, their effectiveness in order to comply with the recommendations contained in the Evaluation Report.

## **II. ANALYSIS**

6. It was recalled that GRECO in its Evaluation Report addressed 6 recommendations to Germany. Compliance with these recommendations is dealt with below.

### **Recommendation i.**

7. *GRECO recommended to keep regularly updated and to disseminate compilations of anti-corruption measures adopted in Germany. In the light of these, systems should ensure appropriate follow up of anti-corruption initiatives at federal and Länder level, providing for the possibility for making recommendations for improvements.*
8. The German authorities have reported that the Coalition Agreement of 16 October 2002 explicitly states the need for developing more substantial measures to prevent corruption.<sup>1</sup> This initiative can be seen in the framework of the amendment/updating of the Federal Government Directive concerning the Prevention of Corruption in the Federal Administration, which is available on the Internet.<sup>2</sup> In addition, the public has access to a number of sources of information pertaining to the efforts made at both the Federal and *Länder* level in the fight against corruption. This information is frequently updated:

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<sup>1</sup> The coalition agreement contains the following political declaration regarding corruption in the section entitled "Internal Security" (p. 66): "We will step up our fight against corruption. We will continue to pursue the goals of the legislative initiative on establishing a corruption register and will also examine further concrete measures based on the Federal Government's Directive Concerning the Prevention of Corruption".

<sup>2</sup> <http://www.bmi.bund.de/downloadde/19573/Download.pdf>

- The Federal Ministry of the Interior and the Federal Ministry of Justice publish the **Periodic Security Report** dealing with crime and crime Control in Germany (**Periodischer Sicherheitsbericht**), accessible to the public on both Ministries' websites. The first publication was in July 2001 and the second will be in 2005. The report has a chapter on the fight against corruption (Chapter 2.5) and contains general criminological information and statistics from both Federal and *Länder* level. It also presents a compilation of the most important initiatives in the fight against corruption and additional publications in this field.
  - Since 1994 the Federal Criminal Police Office (BKA) annually publishes the **Federal Situation Report on Corruption**, which is available on their website. This report contains up-to-date information regarding registered corruption cases. In addition to reporting and analysing the work of the police in the fight against corruption, its aim is to draw attention to, and recommend, measures for combating corruption.
  - A **regular exchange of experience** continues to take place at Federal level between the persons responsible for the implementation of the Federal Government Directive concerning the Prevention of Corruption in the Federal Administration and the contact persons for prevention of corruption in the highest Federal authorities.
  - At *Länder* level there is a frequent exchange of information through the regular **Implementation Reports on the Programme for Preventing and Fighting Corruption** of the Standing Conference of the Interior Ministers of the *Länder* (the IMK Programme). The reports evaluate the implementation of the Programme for Preventing and Fighting Corruption adopted on 3 May 1996, which contains 16 guiding principles and 18 recommendations pertaining to preventive and repressive measures in the fight against corruption. The most recent report, the Third Implementation Report of 30 October 2002, is an inventory of all the preventive and repressive measures taken at *Länder* level and is available on the website of the North-Rhine/Westphalia Interior Ministry.<sup>3</sup> According to this Report (not available in one of the Council of Europe's official languages) a large number of measures for preventing and combating corruption set out in the Programme of the IMK have been implemented. Progress has especially been made in the following areas: awareness raising and further training; standardising rules on accepting rewards and gifts; compiling a status report on corruption; putting investigations on a more specialised and centralised footing. The majority of *Länder* have now formulated binding codes of conduct or provided other guidance to employees, have set up working groups on the issue and established advisory centres for citizens and employees in public administration.
  - Nearly all *Länder* draw-up annual status reports on corruption. Based on these the Federal Office of Criminal Police then compiles the above-mentioned Federal Situation Report on corruption. The majority of *Länder* have set up central departments for handling corruption proceedings. These are either in the public prosecution offices or police authorities. In some *Länder*, implementation of the IMK Programme is supervised by departmental or inter-departmental working groups or discussion groups.
  - Furthermore, the Ministry of the Interior of North-Rhine/Westphalia has created an e-mail subscription service which disseminates up-to-date information on a number of fields, including the fight against corruption.
9. GRECO took note of the information provided by Germany. The First Round Evaluation Report stated that, given the federal structure of Germany, which devolves several responsibilities to the

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<sup>3</sup> <http://www.im.nrw.de/inn/97.htm>

*Länder*, there was a need to contribute to a clearer, overall and complete picture of the existing anti-corruption initiatives at both the federal and the *Länder* level. GRECO noted that most of the information provided, in particular with regard to the Implementation Reports on the IMK Programme, was not made available in one of the official languages of the Council of Europe. This limited the possibilities for GRECO to ascertain whether the German authorities ensure appropriate follow up to anti-corruption initiatives at *Länder* level and provide for the possibility for making recommendations for improvements. That said, the Implementation Reports on the Programme for Preventing and Fighting Corruption of the Standing Conference of the Ministers of the Interior of the *Länder* serve the purpose of the recommendation at *Länder* level. Consequently, GRECO does not have particular reason to doubt the capacity of the current systems to ensure appropriate follow up of anti-corruption initiatives.

10. GRECO concluded that recommendation i. has been dealt with in a satisfactory manner.

**Recommendation ii.**

11. *GRECO recommended to ensure the independence of the prosecution in dealing with corruption cases, avoiding to the largest possible extent risks of undue influences in the exercise of prosecutorial powers. In this context, the German authorities should consider removing the political status of prosecutor generals in the few Länder where it still exists.*

12. The German authorities have reported that:

- Under German law, public prosecution offices are not subject to any instructions from outside the judicial system. As those who must carry parliamentary responsibility vis-à-vis the elected parliaments for the actions of the public prosecution office, it is only the justice ministers who possess any authority to issue instructions in this respect. This responsibility is considered as one of the achievements of the Federal Republic of Germany in relation to the rule of law, just as the independence of the judiciary represents one of the cornerstones of a democracy based on the rule of law. The fact that the public prosecution is necessarily subject to instructions does not however mean that it is open to any undue political or otherwise improper influence. Rather, as the authority in charge of the investigation proceedings, the public prosecution office is – pursuant to section 152 (2) of the Code of Criminal Procedure – obliged to take action in relation to all criminal offences which may be prosecuted, provided there are sufficient factual indications and unless otherwise provided for by law. This does of course also apply in the event of a suspected corruption offence.
- As is already stated in the Evaluation Report on Germany, it is only in the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Thuringia and Schleswig-Holstein that the prosecutor general continues to be a political appointee. The recommendation that this status be removed has been forwarded to the *Länder* concerned. The process of evaluation initiated in those *Länder* has led to the outcome that Schleswig-Holstein is considering amending the relevant provision in the land public service act, and it intends to take a decision in this respect in early 2004. The assessments conducted in the *Länder* of Brandenburg, Mecklenburg-Western Pomerania and Thuringia led to the conclusion that a change to the current legal position will not be sought.

13. GRECO took note of the information provided by the German authorities and welcomed the efforts made, in particular by the Land Schleswig-Holstein in considering the removal of the political status of the Prosecutor General in their Land.

14. GRECO concluded that recommendation ii. has been implemented satisfactorily.

**Recommendation iii.**

15. *GRECO recommended that the possibility of using interception of communications should be extended so as to apply to serious corruption offences.*
16. The German authorities have reported that during the current parliamentary term the Federal Government is in the process of reconsidering the laws regarding the interception of telecommunications. In the light of the severity of the interference entailed by interception of telecommunications, in particular with the basic right to respect for the privacy of telecommunications (Article 10 of the Basic Law [*Grundgesetz*]), as well as the side effects of such interference (a large number of persons not under suspicion are usually affected by this investigative measure), a careful examination is being conducted in order to determine in respect of which offences the interception of telecommunications should in future be possible, and subject to which procedural safeguards.
17. In addition, the Federal Ministry of Justice commissioned a study on “Legal Reality and Efficiency of Interception of Telecommunications pursuant to Sections 100a and 100b of the CCP and other Undercover Investigative Measures” by the Max Planck Institute for Foreign and International Criminal Law. The conclusions of this study were available in May 2003 and were used as a guideline for assessing the effectiveness of the use of undercover investigative measures, in particular the interception of telecommunications.<sup>4</sup>
18. The study suggests that the permissibility of telecommunications surveillance be determined with reference to the criteria of the seriousness of a criminal offence and its communication-related aspects, as may occur in grave corruption offences too.
19. The German authorities have intimated that the recommendation can only be followed up, however, in connection with an overall revision of the secret investigation measures. That would require comprehensive reformulation of the system prescribed by Articles 100a and 100b of the Code of Criminal Procedure, also necessitating consideration of the relationship with other secret investigative measures, particularly audio surveillance of private homes. This measure is dealt with in the second part of the aforementioned study, whose completion is not expected until the autumn of 2004. In addition, the Federal Constitutional Court lately adverted to this measure in a landmark judgment of 3 March 2004, whose implications for reform of telecommunications surveillance are currently being assessed.
20. Furthermore, in previous years, individual *Länder* have taken several initiatives to introduce proposals via the Bundesrat for legislation providing *inter alia* for an appropriate extension of the scope of interception of communications to corruption offences. This is also taken as a reason for the serious approach to the recommendation.
21. It is submitted that by invoking Article 100a, indent 1 c) of the Code of Criminal Procedure, telephone tapping in respect of corruption offences is even now permissible in certain contexts, i.e. in the case of criminal associations, within the meaning of Article 129 of the Penal Code.

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<sup>4</sup> See: [http://www.iuscrim.mpg.de/verlag/online/Band\\_115.pdf](http://www.iuscrim.mpg.de/verlag/online/Band_115.pdf). A summary of the Study is available in English. Parts of the project description have also been translated into English and are available on the website of the Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau : <http://www.iuscrim.mpg.de/forsch/krim/tue.html#PM>

22. GRECO took note of the information provided by Germany. It welcomed the steps taken by the German authorities with a view to assessing and defining serious corruption offences and to ensuring that appropriate procedural safeguards are in place. As work is still proceeding at present on a reform of telecommunication surveillance, which would also provide for its use in combating serious corruption offences, Germany is invited to submit to GRECO further information at the appropriate time.
23. GRECO concluded that recommendation iii. has been partly implemented.

**Recommendation iv.**

24. *GRECO recommended to give further consideration to the existing proposals aiming at allowing the police and/or the prosecution to negotiate agreements on the outcome in corruption cases, with the participation of the court, if the suspect or accused person agrees to co-operate with the authorities.*
25. The German authorities have reported that a provision in the Coalition Agreement of 16 October 2002 requires the establishment of a general rule that allows accused persons to be rewarded for their co-operation in the prevention or elucidation of serious criminal offences, including corruption. Under this rule an accused person could be given an alleviated sentence as reward for collaboration with the authorities, which could serve as an encouragement for those involved in corruption, to contribute to the elucidation and prevention of further offences.
26. The German authorities have clarified that the concept of “agreement” in the context of criminal proceedings refers to an agreement among all those involved in the main hearing, excluding the police. Based *inter alia* on the right of the defendant to be given a fair trial in accordance with the rule of law, as well as on the need to have an efficiently functioning criminal justice system, the Federal Constitutional Court and the Federal Court of Justice have established basic principles, including the prohibition on a court to agree to impose a specific punishment. However, a court may indicate a maximum sanction - if the defendant confesses - which cannot be surpassed on the condition that no new evidence becomes known.
27. GRECO took note of the information provided by Germany and in particular the clarification given regarding the practice of the courts and the understanding of “agreement” under the German system; this indicates that the German authorities have given further consideration to GRECO’s recommendation. It welcomed the efforts of the German authorities to lay down a rule providing for the possibility of rewarding accused persons for cooperating with the authorities in order to prevent or elucidate serious criminal offences. In this context, the German authorities may wish to transmit to GRECO further information regarding legislative developments in this area.
28. GRECO concluded that recommendation iv. has been dealt with in a satisfactory manner.

**Recommendation v.**

29. *GRECO recommended that disciplinary measures should not apply to an official who – in breach of internal reporting duties – reports directly a grounded suspicion of corruption to the police or prosecution.*

30. The German authorities have reported that in the private sector a supplement will be added to Section 612a of the Civil Code, which is to be considered in the context of the ratification of the Civil Law Convention on Corruption of the Council of Europe foreseen in 2004. The essence of the supplement is to exclude unfavourable measures also in respect of employees reporting a suspicion of corruption in good faith.
31. As regards the public sector, the rules and methods concerning the reporting, by civil servants, of a suspicion of corruption are contained in Section 38 (2) of the Framework Act on the Law Applicable to Civil Servants and relevant legislation of the *Länder* based on the above-mentioned Act, and Section 56 (2) of the Act on Federal Civil Servants in conjunction with the Federal Government Directive regarding the Prevention of Corruption in the Federal Administration.
32. The Federal Government is presently reviewing the regulations under the service law relating to the issue of “whistle-blowers”, which is taking place in the context of the preparation of the Act to Ratify the Civil Law Convention on Corruption. It is anticipated that there will be additional exceptions from the responsibility to conform to secrecy, which will be incorporated into the Act on Federal Civil Servants and the Framework Act on the Law Applicable to Civil Servants as a means of ensuring that disciplinary measures will not be applied to officials who do not follow the obligation of secrecy in office and report a suspicion of corruption or other criminal offences committed in office directly to law enforcement authorities.
33. In April 2003 the Land Rhineland-Palatinate established an external contact person (“lawyer of trust”) for a large part of the Land administration. The external contact person can provide anonymity to the informer, which the already existing internal anti-corruption official cannot. The Land of Saarland currently considers introducing this system as well.
34. GRECO took note of the information provided by the German authorities. It welcomed the establishment of a “lawyer of trust” in Rhineland-Palatinate. GRECO invited Germany to submit to GRECO, when finalised, the additional exceptions from the responsibility to conform to secrecy, which will be incorporated into the Act on Federal Civil Servants and the Framework Act on the Law Applicable to Civil Servants as a means of ensuring that disciplinary measures will not be applied to officials who do not follow the guidelines, and report a suspicion of corruption directly to law enforcement authorities.
35. GRECO concluded that recommendation v. has been partly implemented.

**Recommendation vi.**

36. *GRECO recommended to better enforce the rules on public procurement, including in cases which fall below the threshold for EU-wide competition, and to adopt legislative measures to establish at Federal level a central register ('blacklist') of companies which have previously been found untrustworthy in bids for public contracts.*
37. The German authorities have reported that rules on public procurement which ensure that public tendering procedures take precedence over other ways of awarding public contracts, exist at Federal level and at the level of the *Länder*. Even in cases where a restricted tender would be possible, public contracts should nevertheless be awarded by means of public tendering procedures to the extent possible. Any divergence from this principle must be supported by reasons and documented.

38. The Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration is to be amended by mid-2004. Its field of application is to be extended to include legal persons under public and private law in which only the Federal Republic of Germany has a share. In addition, in future, all public contracts are to incorporate so-called anti-corruption clauses together with appropriate contractual penalties, which should act as an increased deterrent against corruption.
39. The Land of Brandenburg has set up review panels for public procurement procedures in the area of construction work, which can be referred to freely. Other *Länder* have also created such panels. In some federal authorities as well, including the Federal Ministry of Economy and Labour such review panels exist for their sphere of work. Above the EU-thresholds, public tendering procedures are reviewed by public procurement tribunals upon request of a rejected tenderer. The decisions of the public procurement tribunals are subject to a legal remedy before an appellate court.
40. Towards the end of 2002, two bills on fighting corruption at federal level failed. The first bill related to the adherence to collective agreements (*Tariftreuegesetz*) and to the establishment of a register of untrustworthy companies (Corruption Register). The aim of the adherence to collective agreements was to place a legal obligation on public contractors to ensure that companies involved in contracts for public construction projects and local public transport services pay their employees wages and salaries that are not below the collectively agreed wages or salaries at the place where the services are delivered. The Corruption Register was intended to ensure that corrupt or otherwise untrustworthy companies would not be awarded any public contracts. The register was to be set up at the Federal Office of Economy and Export Control and would list those companies that were to be excluded from public contracts on account of serious infringements – for example, corruption, illegal work and undeclared employment. Since, however, agreement could not be reached with the Bundesrat in the Mediation Committee concerning the adherence to collective agreements this project was dropped. The draft bill of the Act on the Corruption Register was resubmitted. As in the previous case, no agreement could be reached in the Mediation Committee regarding this bill.
41. The Federal Government plans to introduce a “pre-qualification” procedure initially for the construction sector and thereafter in respect of other public contracts as well. The procedure consists of a voluntary, non-contractual examination of suitability. Enterprises which successfully pre-qualify receive a certificate valid for a specified period and releasing the holder from the obligation to produce detailed authentication repeatedly with every bid for a public contract. Under the pre-qualification procedure, bidders are required for example to declare whether they are listed in a corruption register kept at Land level. Untrue declarations lead to disqualification. In this way, the pre-qualification process also contributes to the fight against corruption by constituting a “white list” of enterprises. A paper establishing the cardinal points of the pre-qualification procedure is currently being prepared by a working group which also includes representatives of the building trade. On the basis of this framework document, draft regulations are to be formulated subsequently.
42. A number of *Länder* have established corruption registers at their own initiative, and others are currently in the process of setting up similar systems.
43. GRECO took note of the information provided by the German authorities. It welcomed the creation of public procurement review panels. However, it noted that there is an absence of other safeguards to ensure an improvement in the enforcement of the rules on public procurement.

Consequently, GRECO invited the German authorities to submit further information regarding the enforcement of these rules. As regards the second part of recommendation vi. it welcomed the efforts undertaken at Federal and *Länder* level with a view to establishing corruption registers and was confident that the German authorities will pursue action in this area at both Federal and *Länder* level.

44. GRECO concluded that recommendation vi. has been partly implemented.

### III. CONCLUSIONS

45. GRECO reached the overall conclusion that Germany has implemented, at least partly, all the recommendations of the First Round Evaluation Report.
46. Recommendation ii has been implemented satisfactorily. Recommendations i. and iv. have been dealt with in a satisfactory manner. Recommendations iii, v. and vi. have been partly implemented.
47. GRECO invited the German authorities to submit to it additional information as well as, where appropriate, the supporting legislation relating to the implementation of recommendations iii., v. and vi.
48. The German authorities may also wish to transmit to GRECO additional information with regard to the implementation of recommendation iv.
49. GRECO invited the Head of the German delegation to submit an additional report concerning the information referred to in paragraphs 47 and 48 by 30 November 2005.