



Groupe d'Etats contre la corruption
Group of States against corruption

DIRECTORATE GENERAL I - HUMAN RIGHTS AND RULE OF LAW
INFORMATION SOCIETY AND ACTION AGAINST CRIME DIRECTORATE



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Third Evaluation Round

Compliance Report on Germany

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

"Transparency of Party Funding"

Adopted by GRECO
at its 53rd Plenary Meeting
(Strasbourg, 5-9 December 2011)

I. INTRODUCTION

1. The Compliance Report assesses the measures taken by the authorities of Germany to implement the 20 recommendations issued in the Third Round Evaluation Report on Germany (see paragraph 2), covering two distinct themes, namely:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation 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. The Third Round Evaluation Report was adopted at GRECO's 45th Plenary Meeting (4 December 2009) and made public on 4 December 2009, following authorisation by Germany (Greco Eval III Rep (2009) 3E, [Theme I](#) and [Theme II](#)).
3. As required by GRECO's Rules of Procedure, the German authorities submitted a Situation Report on measures taken to implement the recommendations. This report was received on 30 June 2011 (Theme I) and 17 August 2011/26 October 2011 (Theme II) and served as a basis for the Compliance Report.
4. 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 Compliance Report.
5. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendation (partially or not implemented) will be assessed on the basis of a further Situation Report to be submitted by the authorities 18 months after the adoption of the present Compliance Report.

II. ANALYSIS

Theme I: Incriminations

6. It is recalled that GRECO in its Evaluation Report addressed 10 recommendations to Germany in respect of Theme I. Compliance with these recommendations is dealt with below.

Recommendation i.

7. *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).*
8. The authorities of Germany report that the ratification of the Convention and its Additional Protocol is still at a preparatory stage. The Federal Government is, in principle, still aiming for

such ratification and is planning for it to take place after the necessary amendments to the provisions of the German Criminal Code on the fight against corruption have been made.

9. GRECO notes that the Federal Government is, in principle, aiming for ratification of the Criminal Law Convention on Corruption and its Additional Protocol, pending necessary amendments being made to the Criminal Code. However, as no new information has been provided on any concrete steps taken to make such amendments and to ratify the above-mentioned legal instruments, GRECO cannot conclude that the recommendation has been implemented, even partly. GRECO very much regrets that Germany, one of the founding members of GRECO which signed the Criminal Law Convention on Corruption in 1999, remains one of the few GRECO members which have not ratified the Convention and the Additional Protocol. GRECO urges the authorities to make every effort to proceed swiftly with ratification of these legal instruments, as required by the recommendation.
10. GRECO concludes that recommendation i has not been implemented.

Recommendation ii.

11. *GRECO recommended to keep under review the application of the administrative authorisation procedure under sections 331 paragraph 3 and 333 paragraph 3 of the Criminal Code (concerning the acceptance and granting of a benefit by public officials), in order to ascertain possible implications for legal security, including in matters of investigation and prosecution of corruption offences and, if need be, to take appropriate measures.*
12. The authorities report that the Federal Ministry of Justice has reviewed sections 331, paragraph 3 and 333, paragraph 3 of the Criminal Code by way of conducting a survey in January 2011 among the 16 Federal *Länder*, which are competent for the courts and public prosecution offices in the federal system, on the question of whether the possibility of obtaining administrative authorisation to accept a benefit can lead to implications for legal security or to other problems in the application of these provisions. The *Länder* after having consulted with practitioners unanimously replied that this possibility did not cause any significant problems for criminal prosecution and that the administrative authorisation procedure had to be considered a necessary correction with regard to the far-reaching criminal liability for offences under sections 331 and 333 of the Criminal Code. According to the *Länder*, the administrative authorisation procedure does not affect the legal security of those concerned as, due to preventive measures, it is general knowledge among public officials that the taking of benefits is in principle not permissible and that authorisation can only be granted within narrow limits. Moreover, in cases of doubt on the part of the benefit-giver, s/he has the possibility to ask for prior authorisation and thus obtain legal certainty. Finally, the *Länder* pointed out that they have issued administrative guidelines defining the criteria under which the acceptance of an advantage may be authorised and that court decisions have helped to clarify the subject matter and scope of the authorisation procedure. The Federal Government shares the view expressed by the *Länder* and sees no need to change the relevant provisions or to take any other measures.
13. GRECO takes note of the information provided, according to which the federal authorities have reviewed the application of the administrative authorisation procedure under sections 331, paragraph 3 and 333, paragraph 3 of the Criminal Code, as required by the recommendation, on the basis of opinions obtained from the *Länder* which in turn had consulted the practitioners within their jurisdiction. GRECO recalls the concerns expressed in the Evaluation Report that this mechanism is sometimes a source of doubt in Germany and that there have been cases where,

for instance, advantages have been approved by the hierarchy although they contravened the internal regulations. However, given the fact that the *Länder* have issued administrative guidelines defining the criteria under which the acceptance of an advantage may be authorised, that court decisions have helped to clarify the authorisation procedure and that legal insecurity for those concerned may be avoided by asking for prior authorisation of the granting/accepting of a benefit, GRECO accepts the decision by the authorities not to take any further measures in this area.

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

Recommendations iii to x.

15. *GRECO recommended to substantially broaden the incrimination of active and passive bribery of assembly members under section 108e of the Criminal Code, to bring it in line with Article 4 of the Criminal Law Convention on Corruption (ETS 173). (iii)*
16. *GRECO recommended to incriminate more broadly, active and passive bribery of members of foreign public assemblies. (iv)*
17. *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). (v)*
18. *GRECO recommended 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). (vi)*
19. *GRECO recommended 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). (vii)*
20. *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). (viii)*
21. *GRECO recommended to criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173). (ix)*
22. *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. (x)*
23. The authorities refer to the fact that under Articles 36 and 37 of the Convention and Article 9 of its Additional Protocol, any State may enter declarations and reservations. They indicate that the question of whether Germany will, at the time of depositing its instrument of ratification, make such declarations and reservations in respect of Articles 4 to 8, 10, 12 and 17, paragraph 2 of the Convention and in respect of Article 6 of the Additional Protocol – which are referred to in recommendations iii to x, is still under consideration. The authorities take the view that Germany is not obliged to implement the aforementioned Articles of the Convention and its Additional

Protocol in so far as it can make use of the possibility to enter declarations and reservations. As concerns recommendation x, item ii), they state that they will review together with the matter of ratification the question of whether all relevant rules concerning jurisdiction will be included in the Criminal Code.

24. GRECO takes note of the opinion expressed by the authorities that Germany is not obliged under international law to adjust its criminal law in line with the provisions underlying recommendations iii to x in so far as Germany can make use of the possibility provided by Articles 36 and 37 of the Convention and Article 9 of the Additional Protocol to enter declarations and reservations at the time of depositing its instrument of ratification. In this connection, GRECO wishes to comment on the fact that recommendations iii to x were made “without prejudice to the right of Germany to enter declarations and reservations pursuant to Articles 36 and 37 of the Convention and Article 9 of its Additional Protocol.” This statement was primarily meant to make it clear that if Germany entered a declaration or reservation, GRECO would take it into account when assessing the implementation of the recommendation concerned. The latter would, in such a concrete case, not be considered as implying an obligation of result but an obligation to hold discussions and consultations on possibilities for adopting the measures recommended – in line with GRECO’s usual practice in respect of countries that have entered reservations or declarations. The situation is different in Germany where the question of whether, to what extent and for what reasons reservations would be necessary at the time of future ratification of the Convention and its Protocol is still under consideration. In addition, GRECO recalls, firstly, that under Article 37 of the Convention, no State may enter reservations to more than five of the provisions mentioned thereon, whereas recommendations iii to x concern 10 provisions of the Convention (it being understood that reservations of the same nature with respect to Articles 4, 6 and 10 must be considered as one reservation, according to the Convention). Secondly, GRECO wishes to reiterate the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. To conclude, notwithstanding the possibility of entering a limited number of reservations at the time of future ratification, GRECO has to assess the current state of implementation of recommendations iii to x, bearing in mind that the implementation of these recommendations could also be achieved without ratification of the Convention and its Protocol. In the light of the above and in the absence of any concrete measures addressing recommendations iii to x, GRECO can only conclude that recommendations iii to x have not been implemented.

Theme II: Transparency of Party Funding

25. It is recalled that GRECO in its Evaluation Report addressed 10 recommendations to Germany in respect of Theme II. Compliance with these recommendations is dealt with below.
26. The authorities indicate that according to the division of competences in the Federal Republic of Germany, the issues addressed in the recommendations lie partly within the responsibility of the national Parliament (*Bundestag*) and partly within the responsibility of the German states (*Länder*). The Federal Minister of the Interior therefore forwarded the Evaluation Report to the president of the *Bundestag* and the chair of the Standing Conference of the interior ministers of the *Länder*. The president of the *Bundestag* forwarded the Evaluation Report to the parliamentary groups of the *Bundestag* and to its Committee on Internal Affairs and Council of Elders. The chair of the Standing Conference of the interior ministers of the *Länder* forwarded the Evaluation Report to its Working Group I on public law and administration.

27. With regard to the recommendations relevant to the *Länder* (recommendations i and ii), Working Group I of the Standing Conference of the interior ministers of the *Länder* adopted an opinion dated 20 April 2011 and the Standing Conference took note of it in its decision of 18 May 2011. With regard to the recommendations relevant to parliamentarians (recommendations iv and x), the Council of Elders Commission on the Legal Status of Members of the *Bundestag* submitted an opinion dated 12 May 2011. Furthermore, the Evaluation Report as a whole was on the agenda of the *Bundestag* Committee on Internal Affairs for its meetings of 25 May, 8 June, 29 June and 6 July 2011. Talks between the parliamentary groups and the rapporteurs were conducted in parallel. The Committee on Internal Affairs adopted an opinion on the Evaluation Report at its meeting on 6 July 2011.
28. In response to the recommendations contained in the Evaluation Report (Theme II), the authorities submitted the opinions and decisions referred to above. As a complement, the Federal Ministry of the Interior submitted comments on all the recommendations – in particular on those which had not been commented on in detail by the above-mentioned bodies.

Recommendation i.

29. *GRECO recommended to invite the Länder to subject associations of voters (Wählervereinigungen) which participate in political life not only at local level, to the rules applicable to political parties as regards transparency requirements, the supervision of accounts and sanctions for violation of the applicable rules.*
30. The authorities refer to the fact that the Federal Minister of the Interior has forwarded the Evaluation Report to the chair of the Standing Conference of the interior ministers of the *Länder* with a view to addressing the recommendations concerning the *Länder* i.e. recommendations i and ii. Working Group I of the Standing Conference in its opinion of 20 April 2011 commented on recommendation i as follows. The legislation of 9 out of the 16 *Länder* permits associations of voters to nominate candidates in *Länder* elections. Some of the nine relevant *Länder* are of the view that their legislation already fulfills the requirements of the recommendation in terms of transparency regulations, the supervision of accounts and sanctions for violation of the applicable rules. As regards the remaining five *Länder* concerned by the recommendation (Bavaria, Hesse, North Rhine-Westphalia, Rhineland-Palatinate and Saarland), the *Länder* principally take the view that associations of voters participating in political life at *Länder* level can be considered as political parties to which the provisions of the Political Parties Act (PPA) – including regulations on transparency, supervision and sanctions – apply. However, Working Group I of the Standing Conference is of the opinion that this question should be clarified by law or by an opinion of the federal authorities, as court rulings and legal literature do not give a clear and consistent answer to the question.¹ Working Group I goes on to state that in the interest of legal certainty one might consider including an equivalent application of the relevant provisions of the PPA in *Länder* regulations on reimbursement for participation of associations of voters in *Länder* elections, where this is not already the case, and that suggestions to the parliaments of the *Länder* to this effect are being examined. The authorities add that the *Bundestag* Committee on Internal Affairs saw no need for further clarification, as the aforementioned controversy on the legal status of associations of voters concerned local associations which are not addressed by the recommendation.

¹ Notably, the authorities refer to the decision of the Federal Constitutional Court of 29 September 1998 – 2 BvL 64/93 – BVerfGE 99,69 and the ruling of 2 April 1992 – 2 BvE 2/89 – BVerfGE 85, 264. It is to be noted though that this decision concerns *local* associations of voters and their umbrella organisations, which are not recognised as parties.

31. GRECO notes that the recommendation was forwarded to the Standing Conference of the interior ministers of the *Länder*. It furthermore notes that in the view of the *Länder* concerned by the recommendation, its requirements in terms of transparency, supervision and sanctions relating to the funding of associations of voters (participating in political life at *Länder* level) are, in principle, already fulfilled, either by *Länder* law or by application of the relevant provisions of the Political Parties Act. It would appear, however, that the question of whether the Political Parties Act applies to associations of voters is debatable and suggestions are made to further clarify the issue by federal law, by an opinion of the federal authorities or by prescribing in the laws of the *Länder* an equivalent application of the relevant provisions of the Political Parties Act. GRECO is pleased that a consultation process has been initiated with the *Länder* and considers that the *Länder* have thus been invited to address the recommendation, as required by the recommendation. At the same time, GRECO encourages the authorities to continue the consultation process and to take appropriate measures, as suggested, in order to ensure that the financing of associations of voters is, without any doubt, subject to the rules applicable to political parties as regards transparency, supervision and enforcement.

32. GRECO concludes that recommendation i has been implemented satisfactorily.

Recommendation ii.

33. *GRECO recommended i) to introduce a system for the publication of election campaign accounts at 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.*

34. As concerns the first part of the recommendation, the authorities indicate that in the view of the *Bundestag* Committee on Internal Affairs, no action should be taken to address the recommendation, as the German model of transparency in political financing focused on the funding of political parties as a whole rather than election campaign funding in particular. The authorities add that in general, complete party accounts – including information on campaign funding and specifying, in particular, campaign expenses – are publicly available, at the latest, 18 months after the financial year has elapsed and that large donations (exceeding 50,000 Euro) are to be reported and made public immediately.

35. Concerning the second part of the recommendation, the authorities again refer to the fact that the Evaluation Report has been forwarded to the chair of the Standing Conference of the interior ministers of the *Länder* with a view to addressing the recommendations concerning the *Länder* i.e. recommendations i and ii. Working Group I of the Standing Conference in its opinion of 20 April 2011 commented on recommendation ii by stating that the *Länder* concerned (i.e. whose legislation permits associations of voters to nominate candidates in *Länder* elections) do not consider it necessary to adopt *Länder* regulations on publication by associations of voters of election campaign accounts – given that either the PPA applies directly, or the laws of the *Länder* refer to the PPA, or a suggestion to the parliaments of the various *Länder* to include such a reference in the laws of the *Länder* is being examined (see recommendation i above).

36. GRECO takes note of the information provided. As concerns the first part of the recommendation, GRECO very much regrets that the *Bundestag* Committee on Internal Affairs did not advise addressing the issue of publication of election campaign accounts at federal level. GRECO acknowledges the fact that under the current regime, annual accounts of political parties – which include information on election campaign funding – are made public and very large donations are

to be reported and published immediately. That said, GRECO wishes to stress that in accordance with its standing practice, such a regime needs to be complemented by a system for the timely publication of information on election campaign funding in particular. As concerns the second part of the recommendation on the situation at *Länder* level, in respect of associations of voters, the reference to the fact that the regulations of the Political Parties Act are applicable in some of the *Länder* does not respond to the concerns underlying the recommendation, given that the situation at federal level itself was considered unsatisfactory in the Evaluation Report and therefore led to a recommendation. However, given the fact that a consultation process has been initiated with the *Länder*, GRECO considers that the *Länder* have been invited to address this part of the recommendation, as required.

37. GRECO concludes that recommendation ii has been partly implemented.

Recommendation iii.

38. GRECO recommended i) 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.
39. The authorities refer to the opinion of the *Bundestag* Committee on Internal Affairs of 6 July 2011, according to which the lowering of the 50,000 Euro threshold for the immediate reporting and disclosure of donations (first part of the recommendation) could be discussed but would require a political decision. According to the opinion, the threshold should not be so low that it would result in an excessive amount of data, which would undermine the aim of transparency. As regards the second part of the recommendation, the authorities stress that current legislation already prohibits political parties from accepting any secret donations, as section 24 PPA obliges parties to include information on all donations received in their annual accounts. Non compliance with this requirement is subject to sanctions under sections 31c and 31d PPA. They furthermore explain that anonymous donations – from unidentified sources – are generally prohibited as well, except for donations of small amounts which are typically received as a result of ordinary fund-raising activities such as public collections. Finally, the *Bundestag* Committee on Internal Affairs indicated that at a public committee hearing on 7 June 2010, the issues of introducing an upper limit on donations and of reducing the threshold for the disclosure of donations (third part of the recommendation) were discussed and diverging opinions had been expressed.
40. GRECO is satisfied with the information provided with respect to the second part of the recommendation, according to which political parties are prohibited from accepting any secret donations not registered in their annual accounts and, as a rule, donations from unidentified sources – except for donations of small amounts which are typically received as a result of ordinary fund-raising activities. GRECO furthermore notes that consultations are underway with regard to reporting and disclosure of thresholds for donations (first and third part of the recommendation). As concerns the first part of the recommendation, GRECO notes that no concrete decision or measure has been adopted yet in view of its implementation. As concerns the third part of the recommendation, the question has been debated by the *Bundestag* Committee on Internal Affairs, in line with the requirements of this part of the recommendation, which is therefore to be considered as implemented. That said, GRECO regrets that the reduction of the threshold for the disclosure of donations and donors was not supported by the majority and it encourages the authorities to pursue the consultation process in this regard.

41. GRECO concludes that recommendation iii has been partly implemented.

Recommendation iv.

42. *GRECO recommended 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.*
43. The authorities refer to the opinion of the Council of Elders Commission on the Legal Status of Members of the Bundestag of 12 May 2011. According to the opinion, there are not sufficient grounds for prohibiting donations to parliamentarians and candidates who are members of political parties (first part of the recommendation). The Commission reported that several proposals had been made in the past to reduce the risk of parliamentarians and candidates being influenced by financial contributions – including a prohibition on direct donations to such persons – but it followed the opinion expressed by a committee of experts on issues of party funding (“Wedel Committee”) that candidates often had to pay a significant part of their campaign costs themselves and that it would be desirable for individual parliamentarians and candidates to remain at least somewhat financially independent of their party by being able to accept donations intended specifically for them. Moreover, the committee argued that prohibiting direct donations would infringe the political freedom of donors and the Council of Elders Commission added that legislation prohibiting donations to parliamentarians who are members of political parties would be questionable from the perspective of equality of all parliamentarians derived from Article 38, paragraph 1 of the Basic Law. Finally, the Commission stated that direct donations to parliamentarians and candidates were not used to evade party donations for the following reasons. Firstly, if parliamentarians or candidates receive a donation on behalf of a political party (i.e. not directly for their own political activities) – the purpose of which is not at their discretion but determined by the donor him/herself – they are obliged under section 25, paragraph 1, third sentence PPA to forward it without delay to the member of the party’s executive committee designated by the party statutes as responsible for financial matters. Secondly, in practice, donations made directly to parliamentarians or candidates are said to be rare because only donations to political parties are tax-deductible.
44. With regard to the second part of the recommendation, concerning the introduction of record keeping and disclosure requirements on candidates and parliamentarians, the Council of Elders Commission argued, in its opinion, that current legislation already provides for such transparency rules which are similar to – and sometimes even stricter than – those applicable to political parties. In particular, the Commission recalled that members of the *Bundestag* have to account separately for donations made directly to them,² to disclose donations of 5,000 Euro or more from any single donor per calendar year and to provide the donor’s name and address to the president of the *Bundestag*.³ Moreover, details of direct donations to parliamentarians totalling 10,000 Euro or more per calendar year, including information on the source, are made public by the president of the Bundestag on Internet as soon as they are reported.⁴ Parliamentarians are prohibited from accepting the types of donations listed in section 25, paragraph 2 PPA.⁵ The Commission took the view that remaining differences – such as a requirement to audit political party accounts, as well as the fact that party finances are governed by federal law (the PPA) and donations to parliamentarians by an annex to the Rules of Procedure of the *Bundestag* (the Code of Conduct)

² Section 4, paragraph 1 of the Code of Conduct, Annex I to the Rules of Procedure of the *Bundestag*.

³ Section 4, paragraph 2 of the Code of Conduct.

⁴ Section 4, paragraph 3 of the Code of Conduct; section 25, paragraph 3 PPA.

⁵ Section 4, paragraph 4 of the Code of Conduct.

– are justified, firstly, by Article 21 of the Basic Law which requires financial accounting and federal legislation only in respect of political parties and, secondly, by the fact that political parties are to receive partial public funding for amounts of up to 3,300 Euro donated per natural person but not for direct donations to candidates and parliamentarians.⁶ Finally, the Commission considered that an extension of the above-mentioned transparency rules of the Code of Conduct to candidates for election would not be appropriate as candidates hold no public office for which special transparency is required. The Commission furthermore reiterated its opinion expressed with regard to the first part of the recommendation that in the current legal framework there is no risk of circumvention of transparency requirements applicable to donations to political parties.

45. GRECO takes note of the information provided which indicates that consultations have been initiated with a view to adopting measures for the implementation of this recommendation. According to the opinion submitted by the Council of Elders Commission on the Legal Status of Members of the *Bundestag*, donations to parliamentarians and election candidates who are members of political parties are rare in practice, should not be prohibited and are already sufficiently regulated. GRECO notes that an outright prohibition of such donations might be problematic with regard to constitutional principles such as the equality of all parliamentarians but it considers that this question warrants further clarification, given that some experts and political parties themselves have suggested such a prohibition. GRECO furthermore wishes to repeat the concerns expressed in the Evaluation Report, at least as regards some of the differences in the transparency regimes applicable to political parties and to parliamentarians, such as the fact that the latter may receive unlimited cash donations (as opposed to the 1,000 Euro limit in the case of political parties) and that they have to report to the president of the *Bundestag* only the donations exceeding 5,000 Euro (whereas political parties must, in principle, report any donations). Moreover, the complete lack of transparency regulations on donations to election candidates remains unsatisfactory, irrespective of the question of whether such regulations ought to be of the same standard as those applicable to elected parliamentarians and political parties.

46. GRECO concludes that recommendation iv has been partly implemented.

Recommendation v.

47. *GRECO recommended 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.*

48. The authorities report that the *Bundestag* Committee on Internal Affairs, having examined the Evaluation Report and its recommendations, saw no need for any measures to address the issues raised by recommendation v. The authorities add that the existing legislation already provides for a strict separation between political party funding and funding of political foundations and parliamentary groups. They refer, *inter alia*, to section 25, paragraph 2 PPA which prohibits parties from accepting donations from such entities. They furthermore argue that it would be against the logic and the letter of the law to include information on state support to political foundations and parliamentary groups in the annual accounts of political parties.

49. GRECO takes note of the information provided according to which the recommendation was examined by the *Bundestag* Committee on Internal Affairs. GRECO very much regrets that the

⁶ Section 18, paragraph 3, first sentence item 3 PPA.

Committee did not advise addressing the issues of developing an official document on the various forms of state support and of ensuring the strict separation of the financing of political parties and of foundations and parliamentary groups. GRECO recalls that the concerns expressed in the Evaluation Report did not focus on the legal situation but on prohibited, or at least questionable, financial links between parties and the parliamentary groups or foundations established in practice, calling for an increase in transparency, *inter alia*, through the development of an official document distinct from the annual party account. That said, GRECO acknowledges that consultations have been initiated on these issues and that the requirements of the second part of the recommendation are therefore fulfilled.

50. GRECO concludes that recommendation v has been partly implemented.

Recommendation vi.

51. *GRECO recommended to clarify the conditions under which sponsoring for the benefit of political parties is permissible, as well as the applicable legal, accounting and fiscal regime.*
52. The authorities refer to the opinion of the *Bundestag* Committee on Internal Affairs of 6 July 2011, according to which the issue of sponsoring of political parties was discussed at its public hearing on 7 June 2010 with the participation of experts in the field. Several proposals were made by some of the experts with a view to further increasing transparency in this area, – such as introducing a clear legal definition of party income from sponsoring, requiring party accounts to list such income as a separate category, extending both the provisions banning the acceptance of certain kinds of donations to political parties (section 25, paragraph 2 PPA) and the transparency requirements set forth in section 25, paragraph 3 PPA to cover the sponsoring of political parties. At the same time, the legal situation of sponsoring was clarified during the Committee hearing. Sponsoring was described as a permitted element of party funding, distinct from donations. It was explained that party income from sponsoring agreements is by its very nature based on an exchange of goods or services and cannot be regarded as a donation; parties, in principle, are said to declare such income as taxable income from events and other income-related activities (in the meaning of section 24, paragraph 4, item 7) and not as donations. In its opinion, the Committee therefore came to the conclusion that the current legal framework provided by tax law and the PPA is sufficiently clear. The authorities add that the above clarifications have been included in the minutes taken during the Committee hearing, which are made public (cf. *Bundestag* Minutes no. 17/12).
53. GRECO takes note of the information provided which indicates that the legal situation of sponsoring was clarified during a public hearing of the *Bundestag* Committee on Internal Affairs. GRECO has no reason to doubt the explanations provided by the opinion of the *Bundestag* Committee on this basis, according to which the tax law and the Political Parties Act provide an adequate legal framework for party income from sponsoring, under which such income constitutes a permitted, specific funding source, different from donations. That said, GRECO also notes that during the Committee hearing further measures to enhance transparency in this area had been suggested and it encourages the authorities to pursue this matter further.
54. GRECO concludes that recommendation vi has been implemented satisfactorily.

Recommendation vii.

55. *GRECO recommended 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.*
56. The authorities report that the *Bundestag* Committee on Internal Affairs, having examined the Evaluation Report and its recommendations, saw no need for any measures to address the issues raised by recommendation vii. In this connection, the authorities indicate that following amendments to the PPA in 2002, the external audit of the parties' financial statements is regulated in the same way as the audit of commercial business⁷ and that it is complemented by the control exercised by the president of the *Bundestag* – who, in cases of suspected irregularities, has recourse to the services of independent auditors. The authorities add that further requirements on political parties – such as introducing compulsory rotation or appointing a second auditor – would contravene the harmonisation of requirements on political parties and commercial business entities and might overcharge smaller parties in particular.
57. GRECO takes note of the information provided according to which the recommendation was examined by the *Bundestag* Committee on Internal Affairs. GRECO very much regrets that the Committee advised not to take further measures to strengthen the independence of the external audit of the parties' financial statements. GRECO takes the strong view that external auditing of party accounts is an important complement to the control exercised by the supervisory body (namely the president of the *Bundestag*) and it cannot see that appropriate measures to strengthen the independence of external audit – such as introducing a reasonable degree of rotation – would place an unacceptable burden on political parties.
58. GRECO concludes that recommendation vii has not been implemented.

Recommendation viii.

59. *GRECO recommended 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.*
60. The authorities report that the staff of the president of the *Bundestag* responsible for the supervision of party funding has been increased from 8 to 9 by recruiting an additional lawyer and that it will be increased to 10 in 2012 by recruiting one further official qualified in economics. They furthermore state that the *Bundestag* Committee on Internal Affairs, having examined the Evaluation Report and its recommendations, saw no need for any additional measures to address the issues raised by recommendation viii. The authorities maintain that the president of the *Bundestag* is to be regarded as an independent and sufficiently equipped supervisory body. In this connection, they specify, firstly, that pursuant to section 23, paragraph 3 PPA the president of the *Bundestag* acts as an independent body in auditing party accounts and imposing sanctions on his/her own initiative and without being bound by instructions. Secondly, they recall that in cases of suspected irregularities, the president of the *Bundestag* may have recourse to the services of independent auditors.
61. GRECO welcomes the fact that the staff of the president of the *Bundestag* responsible for the supervision of party funding is currently increasing from 8 to 10. GRECO furthermore notes that

⁷ The authorities refer to the relevant provisions of the Commercial Code, in particular, Article 219.

the recommendation was examined by the *Bundestag* Committee on Internal Affairs, but it regrets that Germany has not reported any further concrete measures for the implementation of the recommendation which is of prime importance. GRECO wishes to recall that in the Evaluation Report, the level of control exerted by the president of the *Bundestag* – with the assistance of the *Bundestag* administration – was considered as a great source of concern, given its limited means and powers. In particular, the staff of the administrative control unit of the *Bundestag* counted in principle 8 persons only, there were no special requirements as to their background, these civil servants have no access to the original accounting documents of the political parties and they cannot carry out controls directly. External auditors may be involved, but only if tangible indications of irregularities in party accounts have already been established. GRECO wishes to stress that despite the current upgrading of the administrative control unit, in comparison to supervisory bodies in other countries it still does not dispose of sufficient staff and powers to supervise adequately the funding of political parties.

62. GRECO concludes that recommendation viii has been partly implemented.

Recommendation ix.

63. *GRECO recommended i) to harmonise the sanctions for non compliance with the requirements of the Political Parties Act, and to address in this context the absence of sanctions for donations over 1,000 Euro made in cash and; ii) to ensure that sanctions are applicable in case of non compliance with the requirements concerning the identification of donors.*
64. The authorities report that in the view of the *Bundestag* Committee on Internal Affairs, no measures need to be taken with respect to the sanctions available for non compliance with the requirements of the PPA. In response to the concerns expressed in the Evaluation Report, the authorities clarify several questions relating to the regime of sanctions under Chapter 6 of the PPA. As regards the first part of the recommendation, they indicate that the refunding of public subsidies for parties under section 31a PPA is not applicable as a sanction but just as a public finance corrective measure in case a subsidy was allocated unduly. Moreover, the authorities confirm that in principle, the financial measures of section 31c PPA, which provides for a penalty of two or three times the amount of an illegal donation, do not apply to infringements under section 25, paragraph 1 PPA such as accepting donations in cash above 1,000 Euro. They stress, however, that such infringements are subject to sanctions under sections 31b or 31c PPA if the political party concerned concealed the cash donations exceeding the threshold, thereby rendering the party accounts incomplete – in other words, if the risk of concealment typically associated with cash donations has materialised. As regards the second part of the recommendation, the authorities explain that the financial measures of section 31c PPA are also applicable in case of non compliance with the requirements concerning the identification of donors, see paragraph 1 (second sentence) of this section which refers back to section 25, paragraph 3 PPA on donor identification.
65. GRECO takes note of the information provided and welcomes the clarification of several questions relating to the sanctions available for non compliance with the requirements of the Political Parties Act. In particular, GRECO notes that sanctions are in place for accepting donations in cash above the legal threshold of 1,000 Euro, in case they have been concealed, and for non compliance with the requirements concerning the identification of donors. GRECO therefore considers that no further measures are necessary in order to comply with the recommendation.

66. GRECO concludes that recommendation ix has been dealt with in a satisfactory manner.

Recommendation x.

67. *GRECO recommended 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.*

68. The authorities refer to the opinion of the Council of Elders Commission on the Legal Status of Members of the *Bundestag* of 12 May 2011, according to which current legislation already defines possible infringements of the Code of Conduct as regards the regime of donations to parliamentarians as well as the applicable sanctions. Firstly, parliamentarians or candidates who accept donations on behalf of their party are to pass them on immediately to a member of the party's executive committee designated in the party statutes as responsible for financial matters.⁸ The transparency provisions of the PPA apply to such donations, including the sanctions and penalties provided for. In particular, violations of the duty to pass on donations may be punished by imprisonment or a fine.⁹

69. Secondly, according to the opinion of the Commission, duties of parliamentarians regarding donations made directly to them for their own political activities are covered by section 4 of the Code of Conduct in conjunction with section 25, paragraphs 2 and 4 PPA (duty to keep separate accounts, duty to disclose the donation and the donor's name and address, prohibition on accepting donations, duty to pass donations on). Members of the *Bundestag* who fail to comply with these obligations are punished according to sections 44a and b of the Act on the Legal Status of Members of the German *Bundestag* in conjunction with the Code of Conduct as follows. In less serious cases or in cases of minor negligence (e.g. failure to comply with disclosure deadlines), the member of the *Bundestag* is given a warning by the president.¹⁰ In other cases, the president informs the Presidium and the chairs of the parliamentary groups of the results of the review. If the Presidium finds that a member of the *Bundestag* has violated his or her obligations under the Code of Conduct, it is published by the *Bundestag*.¹¹

70. GRECO takes note of the information submitted which is based on the opinion submitted by the Council of Elders Commission on the Legal Status of Members of the *Bundestag*. As concerns donations accepted by parliamentarians on behalf of their party, GRECO is satisfied with the explanation by the Commission that the transparency provisions of the Political Parties Act, including the sanctions and penalties provided for, are applicable. As regards donations made directly to members of the *Bundestag* for their own political activities – the main concern of the recommendation – GRECO notes that transparency rules are provided by the Code of Conduct in conjunction with the Political Parties Act and that infringements are subject to sanctions under the Act on the Legal Status of Members of the German *Bundestag* in conjunction with the Code of Conduct. However, GRECO cannot consider the latter sanctions, which are limited to mere warnings by the president of the Bundestag and to disclosure of the infringements, as effective, proportionate and dissuasive. A broader range of sanctions, in proportion to the infringement committed, is clearly required in order to meet the requirements of the recommendation.

⁸ Section 25, paragraph 1, third sentence of the Political Parties Act.

⁹ Section 31d, paragraph 1, first sentence item 3 of the Political Parties Act.

¹⁰ Section 8, paragraph 2, first sentence of the Code of Conduct.

¹¹ Section 8, paragraph 2, fourth sentence of the Code of Conduct.

71. GRECO concludes that recommendation x has been partly implemented.

III. CONCLUSIONS

72. **In view of the above, GRECO concludes that Germany has implemented or satisfactorily dealt with only four of the twenty recommendations contained in the Third Round Evaluation Report.** With respect to Theme I – Incriminations, recommendation ii has been implemented satisfactorily and recommendations i and iii to x have not been implemented. With respect to Theme II – Transparency of Party Funding, recommendation 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.

73. Concerning incriminations, only one recommendation – to keep under review the application of the administrative authorisation procedure concerning the acceptance and granting of a benefit by public officials – has been implemented. By contrast, no progress whatsoever has been achieved in respect of any of the nine recommendations requiring concrete measures. GRECO recognises the overall high standards set by Germany in its fight against corruption; however, it very much regrets that Germany, one of the founding members of GRECO which signed the Criminal Law Convention on Corruption in 1999, remains one of the few GRECO members which have not ratified the Convention and its Additional Protocol. The authorities state that ratification is pending necessary amendments to be made to the Criminal Code. However, no further steps have been taken, since the adoption of the Evaluation Report, to prepare such legal amendments in line with GRECO's recommendations. As to the reference made by Germany to its right to enter, at the time of depositing its instrument of ratification, declarations and reservations to the Convention and the Additional Protocol, GRECO again – as in the Evaluation Report – draws attention to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. Furthermore, it is to be noted that under Article 37 of the Convention, States may enter reservations only to a limited number of provisions of the Convention. For these reasons, GRECO does not accept a general reference to the possibility provided for making declarations and reservations, without any explanation at this stage whether, to what extent or for what reasons they might be necessary. Finally, GRECO wishes to stress that the shortcomings in German bribery law – such as the limited criminalisation of bribery of parliamentarians and other members of domestic assemblies, coupled with the absence of trading in influence offences and, furthermore, certain limits in the criminalisation of bribery of foreign and international officials and of private sector bribery – are significant lacunae. GRECO therefore urges the authorities to make every effort to proceed swiftly to the ratification of the Convention and the Additional Protocol and to the adoption of the necessary amendments to the Criminal Code.

74. In so far as the transparency of political funding is concerned, GRECO welcomes the fact that the competent bodies – namely the Standing Conference of the interior ministers of the *Länder* and the *Bundestag* Committee on Internal Affairs – have examined the Evaluation Report and each of the recommendations and have adopted opinions thereon, based on preparatory work by the relevant working groups and committees. Additional debate has thus helped clarify a number of issues. That said, GRECO has strong misgivings about the fact that many shortcomings as presented in the Evaluation Report have only received very limited attention. Little concrete and substantial action has been taken to implement the recommendations, except for the invitation

addressed to the *Länder* to address recommendations i and ii, as required. GRECO regrets that in respect of most issues examined, the opinions expressed conclude that the current legal framework is sufficient and no further action – as required by the relevant recommendations – is needed. It is a matter of great concern that no measures have been initiated in order to address recommendations on issues of prime importance, such as introducing a system for the timely publication of election campaign accounts and enhancing the transparency of direct donations to parliamentarians and election candidates who are members of political parties. Moreover, the resources of the monitoring mechanism need to be further strengthened. GRECO urges the authorities to pursue the discussions initiated on the subject of transparency of political financing and to take appropriate action in line with the recommendations.

75. In view of the above, GRECO therefore concludes that as regards the implementation of the recommendations addressed to Germany in this Evaluation Round the current very low level of compliance with the recommendations is “globally unsatisfactory” in the meaning of Rule 31, paragraph 8.3 of the Rules of Procedure. GRECO therefore decides to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the Evaluation Report, and asks the Head of the German delegation to provide a report on progress in implementing the outstanding recommendations by 30 June 2012 at the latest, pursuant to paragraph 2(i) of that rule.
76. Finally, GRECO invites the authorities of Germany to authorise, as soon as possible, the publication of this report, to translate it into the national language and to make the translation public.