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FOURTH EVALUATION ROUND

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FOURTH EVALUATION ROUND

Corruption prevention in respect of members of parliament, judges and prosecutors

SECOND COMPLIANCE REPORT

GERMANY

Adopted by GRECO at its 83rd Plenary Meeting
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GRECO Secretariat
Council of Europe
F-67075 Strasbourg Cedex
☎ +33 3 88 41 20 00

www.coe.int/greco

Directorate General I
Human Rights and Rule of Law
Information Society and Action
against Crime Directorate

I. INTRODUCTION

1. The Second Compliance Report assesses the measures taken by the authorities of Germany to implement the recommendations issued in the Fourth Round Evaluation Report on Germany (see paragraph 2) on "corruption prevention in respect of members of parliament, judges and prosecutors".

2. The Fourth Round Evaluation Report on Germany was adopted at GRECO's 65th Plenary Meeting (on 10 October 2014) and made public on 28 January 2015, following authorisation by Germany.

3. The Compliance Report was adopted by GRECO at its 75th Plenary Meeting (on 24 March 2017) and made public on 6 July 2017, following authorisation by Germany. As required by GRECO's Rules of Procedure, the authorities of Germany submitted a Situation Report on measures taken to implement the pending recommendations. This report was received on 12 October 2018 (and updated on 3 January 2019) and served, together with the information submitted subsequently, as a basis for the Second Compliance Report.

4. GRECO selected the Slovak Republic (in respect of members of parliament) and Switzerland (in respect of judicial institutions) to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Ján KRÁLIK, on behalf of the Slovak Republic, and Mr Ernst GNÄGI, on behalf of Switzerland. They were assisted by GRECO's Secretariat in drawing up the Second Compliance Report.

II. ANALYSIS

5. GRECO, in its Fourth Round Evaluation Report, addressed eight recommendations to Germany. In the Compliance Report, GRECO concluded that recommendations v, vii and viii had been implemented satisfactorily. Recommendations i and iii had been partly implemented. Recommendations ii, iv and vi had not implemented. Compliance with the five pending recommendations is examined below.

Corruption prevention in respect of members of parliament

Recommendation i.

6. *GRECO recommended that the transparency of the parliamentary process be further improved, e.g. by introducing rules for members of parliament on how to interact with lobbyists and other third parties seeking to influence the parliamentary process.*

7. GRECO recalls that this recommendation had been partly implemented at the time of the Compliance Report. GRECO acknowledged that the transparency of lobbying had been enhanced to some extent. It also welcomed the clarification, by court decision, that any citizen has the right to obtain information on the associations concerned. However, GRECO stressed that those measures only partly addressed the different concerns underlying the recommendation. It furthermore considered the reported publication of statements by stakeholders interested in draft legislation under the responsibility of the Federal Ministry of Justice and Consumer Protection a first – although limited – step in the direction of implementation of the recommendation.

8. The authorities now report that since September 2017 all Federal Ministries publish on their website the comments received by stakeholders from the private sector and civil society with regards to legislative initiatives in the 18th legislative term, similar to what was done by the Federal Ministry of Justice and Consumer Protection as mentioned in the Compliance Report. On 15 November 2018, the Federal Government decided to continue this practice in the 19th legislative term. The

authorities add that all comments will be considered in the drafting process, as it is precisely by providing a comprehensive overview of diverging opinions of stakeholders and other bodies who are not officially involved in the legislative process and a critical reflection thereon that brings added value to the legislative process.

9. Furthermore, in response to a letter by the Federal Minister of Justice and Consumer Protection on GRECO's Compliance Report of 24 March 2017, the President of the German *Bundestag* forwarded a memorandum to the Minister on 25 September 2018 outlining the measures to be taken to address GRECO's pending recommendations. The memorandum outlines that the Commission on Legal Status of Members of the *Bundestag*, which is also responsible for the Code of Conduct, at its fourth meeting on 12 September 2018, decided to put forward a number of proposals amending the Code of Conduct. One of these proposals is to amend paragraph 8 of the Implementing Provisions to the Code of Conduct, corresponding to Rule 1, paragraph 5, of the Code of Conduct.[1] Amendments to this rule would require Members of the *Bundestag* in such situations to not only disclose the type of activity involved but also the economic sector in which the client is active.

10. GRECO welcomes that comments received by stakeholders from the private sector and civil society on draft legislation are now being published on the website of ministries and that the Federal government has formally endorsed this practice, by deciding that this will continue in the 19th legislative term. It considers this is a significant step in improving transparency of the legislative process on side of the Federal Government. However, GRECO recalls that the recommendation specifically calls for the transparency of the parliamentary process to be improved. In this context, it takes note of the planned amendment to the Implementing Provisions to the Code of Conduct, but considers this rather narrow draft amendment unlikely to have a noteworthy impact on the transparency of the parliamentary process. As in any case a number of the concerns GRECO outlined in its Evaluation Report remain unaddressed (including as regards the outsourcing of preparation of draft legislation, the late publication of certain pieces of draft legislation and the shortcomings in the registration of lobbyists), GRECO cannot conclude that this recommendation has been fully implemented.

11. GRECO concludes that recommendation i remains partly implemented.

Recommendation ii.

12. *GRECO recommended (i) that a requirement of ad hoc disclosure be introduced when a conflict between specific private interests of individual members of parliament may emerge in relation to a matter under consideration in parliamentary proceedings – in the Bundestag plenary or its committees – independently of whether such a conflict might also be revealed by members' declarations of activities and income; and (ii) that members of parliament be provided written guidance on this requirement – including definitions and/or types of conflicts of interest – as well as advice on possible conflicts of interests and related ethical questions by a dedicated source of confidential counselling.*

13. GRECO recalls that this recommendation had not been implemented at the time of adoption of the Compliance Report. It took note of the discussions held by relevant parliamentary committees, but expressed concern that two and a half years after the adoption of the Evaluation Report, no concrete steps had been taken to implement the recommendation. GRECO also stressed that the existing rules of the Code of

[1] This part of the Code of Conduct (and Implementing Provisions) deals with situations in which a Member of the *Bundestag* can invoke a statutory right or contractual duty not to disclose certain information and provides that in such situations it would be sufficient to indicate the type of activity it concerns.

Conduct, to which the authorities referred, had already been examined in detail in the Evaluation Report.

14. The authorities now report that no further developments can be reported.

15. GRECO concludes that recommendation ii has not been implemented.

Recommendation iii.

16. *GRECO recommended (i) that the existing regime of declarations of interests be reviewed in order to extend the categories of information to be disclosed to include, for example, information on significant assets – including shareholdings in enterprises below the current thresholds – and significant liabilities; and (ii) that consideration be given to widening the scope of the declarations to also include information on spouses and dependent family members (it being understood that such information would not necessarily need to be made public).*

17. GRECO recalls that this recommendation had been partly implemented at the time of adoption of the Compliance Report. As regards the first part of the recommendation, it noted with concern the information provided, according to which the relevant parliamentary bodies reject any further extensions of the disclosure requirements. GRECO found the mere fact that the declaration regime had already been amended in the past not a sufficient justification for the blockage of any future reforms, and, as regards the constitutional reservations raised by the authorities, it noted that not even concrete proposals on possible amendments to the declaration regime coupled with a legal analysis had been presented. In the absence of any tangible results, GRECO concluded that this part of the recommendation had not been implemented.

18. As regards the second part of the recommendation, GRECO took account of the fact that the matter had been discussed by relevant parliamentary bodies and had been documented. However, it would have expected a more in-depth examination of possible legal solutions, possibly with the involvement of appropriate (expert) institutions/individuals. It therefore concluded that this part of the recommendation had been partly implemented.

19. The authorities now report that the Commission on Legal Status of Members of the *Bundestag*, as referred to under recommendation i above, have commissioned a legal opinion on the legitimacy of implementing this recommendation. According to this legal opinion, which was submitted on 27 August 2018, there are a variety of legal objections to the implementation of this recommendation.[2] The legal opinion outlines that an obligation to disclose assets and liabilities, as required under the first part of recommendation iii, is not compatible with the provisions of the Basic Law or Constitution (*Grundgesetz*)[3] and argues that such a duty would violate Article 8 of the European Convention on Human Rights (ECHR) on the right to respect for private

[2] The legal opinion of 27 August 2018 was drawn up by Prof. Dr. Stefanie Schmahl, LL.M, Professor of Public International Law at the University of Würzberg.

[3] More in particular, the legal opinion outlines that a possible duty to report on significant assets and liabilities would *inter alia*:

- violate Article 38 of the *Grundgesetz* (which outlines that Members of the *Bundestag* are not bound by orders or instruction and responsible only to their conscience), *inter alia* as it would not in line with the principle of proportionality (also because the use of this data contrary to its intended purpose cannot be excluded);
- could come very close to a provision on economic incompatibilities (which in turn would violate the constitutional prohibition on prevention a person from accepting or exercising the officer of Member of the *Bundestag*, under Article 48 of the *Grundgesetz*);
- would infringe personal freedoms, as guaranteed by Article 2 of the *Grundgesetz*;
- would encroach upon the freedom to practice an occupation or a profession, as guaranteed by Article 12 of the *Grundgesetz*;
- would violate the rights of third parties, as the declarations of Members of the *Bundestag* would also contain information on other entities (e.g. customers, patients, clients).

and family life, home and correspondence, as well as Article 1 of Protocol 1 to the ECHR on the right to property.[4]

20. Furthermore, as regards the second part of the recommendation, the aforementioned legal opinion outlines that widening the scope of the declarations to also include information on spouses and dependent family members would be a disproportionate interference of the personal freedoms under Article 2 of the *Grundgesetz*, would additionally partly deprive the protective effects of the right to refuse to give evidence under section 383(1) of the Code of Civil Procedure (and in appropriate circumstances, section 52(1) of the Code of Criminal Procedure) and this interference with the right to respect private and family life under Article 8 of the ECHR would even be less justified than for Members of the *Bundestag* themselves.

21. Moreover, the authorities refer to the Act to Implement the Fourth EU Anti-Money Laundering Directive, which *inter alia* provides that Members of the *Bundestag* – as domestic politically-exposed persons (PEPs) – are subjected to a stricter duty of care, requiring banks and other financial institutions to take appropriate measures to determine the origin of assets which are used in the course of business relationships or transactions to and from PEPs.

22. GRECO welcomes that a legal analysis into a possible duty for members of the *Bundestag* to disclose also significant assets and significant liabilities has now been conducted. Having said that, it regrets that the analysis does not seem to have been conducted with a view to looking for possibilities or legal solutions to extend the categories of information to be disclosed, but seems to have rather looked at justifications for not doing so. In this respect, GRECO takes note of the findings of the study, that the disclosure of significant assets and liabilities would violate German constitutional provisions as well the provisions of the ECHR. It can however not concur with the latter conclusion in respect of the ECHR[5] and also notes that other GRECO member states have found appropriate solutions in line with their own domestic constitutional provisions, which are in some cases similar to German constitutional provisions, in full respect of the ECHR. As in any case the existing regime of declarations of interests has not been reviewed in order to extend the categories of information to be disclosed, as required by the first part of the recommendation, this part of the recommendation remains not implemented. As regards the second part of the recommendation, while GRECO would have expected a discussion on or more in-depth examination of the legal opinion by the relevant commission in the *Bundestag*, it accepts that consideration has been given to widening the scope of the declarations to also include information on spouses and dependent family members. The second part of the recommendation has thus been satisfactorily implemented.

[4] The legal opinion argues *inter alia* that a possible duty to report on significant assets and liabilities would restrict the right to a private life under Article 8(1) ECHR, would not satisfy the requirement of the principle of proportionality under Article 8(1) ECHR and could have a Member of the *Bundestag* who is self-employed or a free-lancer lose some or all of his/her established clientele, which would interfere with Article 1 of Protocol 1 to the ECHR.

[5] In this respect, GRECO points to – for example – the case *Wypych v. Poland* (October 25, 2005, application no. 2428/05), in which the European Court of Human Rights *inter alia* found that the requirement upon a local councillor to disclose details concerning his financial situation and property portfolio was indeed an interference with the right to privacy but that it was justified. The Court considered it "necessary in a democratic society" in that running for public office is voluntary and the financial situation of persons holding such office is one of legitimate public interest and concern. The Court furthermore acknowledged that the information that councillors were being requested to submit was quite comprehensive, but considered "that it is precisely this comprehensive character which makes it realistic to assume that the impugned provisions will meet their objective of giving the public a reasonably exhaustive picture of councillors' financial positions. It further considers that the additional obligation to submit information on property, including marital property, can be said to be reasonable in that it is designed to discourage attempts to conceal assets simply by acquiring them using the name of a councillor's spouse."

23. GRECO concludes that recommendation iii remains partly implemented.

Recommendation iv.

24. *GRECO recommended that appropriate measures be taken to ensure effective supervision and enforcement of the current and future declaration requirements, rules on conflicts of interest and other rules of conduct for members of parliament, inter alia, by strengthening the personnel resources allocated by the Bundestag Administration.*

25. GRECO recalls that this recommendation had not been implemented at the time of adoption of the Compliance Report. GRECO noted that an application had been made to increase the number of staff of the *Bundestag* Administration from two to three. While it welcomed this initiative, it could not conclude that the recommendation had even been partly implemented, as it would have expected a broader approach to possible reforms of the administrative control system.

26. The authorities report that a staff position for the *Bundestag* Administration in support of supervision and enforcement of the Code of Conduct has been applied for once again, as the additional staff position mentioned in the Compliance Report had only been granted until the end of 2019.

27. Furthermore, as mentioned in recommendation i above, following a number of meetings to discuss the pertinent recommendations by GRECO, the Commission on the Legal Status of Members of the *Bundestag*, has put forward a proposal to amend the Code of Conduct, as well as the Members of the *Bundestag* Act (*Abgeordnetengesetz*). Accordingly Section 44a(4), sentence 2, of the *Abgeordnetengesetz* would be amended to read "If notifiable activities, donations or income are not reported or if there is a violation of duties under subsection 2, the Presidium may impose an administrative penalty of up to half of the Member's annual remuneration". In turn, Rule 8(4), sentence 1, of the Code of Conduct would read "After hearing once again the Member, the Presidium may impose a coercive fine pursuant to section 44a(4) sentence 2, of the *Abgeordnetengesetz*". The proposed amendments to the *Abgeordnetengesetz* would still need to be consulted with parliamentary groups and introduced in the legislative proceedings. The proposed amendments to the Code of Conduct are being submitted to the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure with the aim of submitting a recommendation for a decision by the plenary.

28. GRECO welcomes that the application for an additional staff member for the *Bundestag* administration is repeated to secure this position beyond the end of 2019 and takes note of the reflection process in the Commission on the Legal Status of Members of the *Bundestag*, which has led to a proposed amendment to the pertinent legislation and the Code of Conduct. It would seem however that these amendments are limited to an extension of the current possibilities to impose a fine. In light of the clear need for reform outlined in the Evaluation Report, GRECO cannot say that with these initial – and in effect rather limited – steps appropriate measures have now been taken to ensure effective supervision and enforcement of the declaration requirements, rules on conflicts of interest and other rules of conduct for members of parliament, as required by the recommendation.

29. GRECO concludes that recommendation iv has not been implemented.

Corruption prevention in respect of judges

Recommendation vi.

30. *GRECO recommended that appropriate measures be taken with a view to enhancing the transparency and monitoring of secondary activities of judges. The Länder are to be invited to contribute to such a reform process.*

31. GRECO recalls that this recommendation had not been implemented at the time of adoption of the Compliance Report. It took note of the information, according to which the topic of secondary activities of judges and possible further restrictions in this area had been discussed at different levels (i.e. with the Presidents of the superior federal courts, among justice state secretaries of the Federation and the *Länder* etc.). In the absence of any concrete achievements in this respect, GRECO found it could not conclude that the recommendation had even been partly implemented.

32. The authorities now report that justices of the Federal Constitutional Court (who – pursuant to section 3 of the Act on the Federal Constitutional Court – cannot combine their position with any other professional occupation, other than that of professor of law at a German institution of higher education) have declared that their conduct during and after their term of office is guided by a new code of conduct (of September 2017), which *inter alia* provides that "engaging in non-judicial activities may not affect the performance of judicial duties" and that justices of the Federal Constitutional Court "may only accept remuneration for attending events and for publications if and to the extent that it does not compromise the reputation of the Court, nor cast doubt on the independence, impartiality, neutrality and integrity of the Court's members. They disclose any resulting income". Remuneration received by individual judges for attending events or publications is now also published on the website of the Federal Constitutional Court.[6]

33. Furthermore, the Court of Audit (*Bundesrechnungshof*) has carried out a review of secondary activities at one high-level federal court, focusing particularly on the type and workload of secondary activities and the transparency of the remuneration received for these activities. As a result of this review, the court in question improved its monitoring of secondary activities where necessary, including by regularly requiring more information on secondary activities and by regularly verifying the completeness of reported information.

34. GRECO welcomes that for justices of the Federal Constitutional Court a new code of conduct has been adopted and that information on income received as a result of attending events or contributing to publications by justices of the Federal Constitutional Court is now being published. GRECO also welcomes that for one high-level federal court steps have been taken to improve the monitoring of secondary activities, following a review by the *Bundesrechnungshof*. However, notwithstanding the important role of the Federal Constitutional Court, GRECO considers that this represents only one specific jurisdiction (for which rules on other professional activities were already more restrictive than for other judges) and that additional measures to improve the monitoring of secondary activities of judges have been put in place at only one other federal court. While these are certainly very positive steps, GRECO cannot say that the recommendation has now been fully addressed, as the reported improvements are restricted to two federal courts.

35. GRECO concludes that recommendation vi has been partly implemented.

III. CONCLUSIONS

[6] See https://www.bundesverfassungsgericht.de/EN/Richter/Eink%C3%BCnfte/Eink%C3%BCnfte.html;jsessionid=83D1A8278FA548AC3D4642026E90B631.1_cid370

36. **In view of the foregoing, GRECO concludes that Germany has implemented satisfactorily or dealt with in a satisfactory manner three of the eight recommendations contained in the Fourth Round Evaluation Report.** Of the five remaining recommendations three have been partly implemented and two have not been implemented.

37. More specifically, recommendations v, vii and viii have been implemented satisfactorily, recommendations i, iii and vi have been partly implemented and recommendations ii and iv have not been implemented.

38. With respect to members of Parliament, GRECO is pleased with the decision that that all ministries are now to publish comments received by stakeholders from the private sector and civil society on legislative initiatives and considers this a significant step in improving transparency of the legislative process on side of the Federal Government. At the same time, from the side of the *Bundestag* itself very little progress has been made to enhance the transparency of the parliamentary process, to regulate conflicts of interest more closely and to ensure effective supervision and enforcement of the different rules of conduct for members of the *Bundestag*. A legal opinion on an extension of the categories of information to be disclosed by Members of the *Bundestag* has been commissioned, and while this has led to a welcome consideration of widening the scope of declarations to also include information on spouses and family members, it has not in effect led to any extension to the categories of information to be disclosed by Members of the *Bundestag*, as required by GRECO. Furthermore, GRECO notes that amendments to the Code of Conduct and related legislation have been deliberated by the Commission on the Legal Status of Members of the *Bundestag*, but the proposals that have come out of these deliberations appear to be rather limited in scope. It is clear that more determined action is needed to achieve adequate progress in addressing GRECO's remaining recommendations.

39. With respect to judges, GRECO welcomes the measures taken by the Federal Constitutional Court improving the transparency of income received by its judges from publications or attending events as well as those taken by one federal court to improve the monitoring of secondary activities of its judges, following a review by the *Bundesrechnungshof*. However, as these measures remain limited to the Federal Constitutional Court and one other federal court, more progress needs to be made in enhancing the transparency and monitoring of judges' secondary activities in general.

40. In view of the above and notwithstanding positive steps taken as regards some of the recommendations, GRECO concludes that the overall very low level of compliance with the recommendations is "globally unsatisfactory" within 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 mutual evaluation report, and asks the Head of the German delegation to provide a report on the progress in implementing the pending recommendations (i.e. recommendations i-iv and vi) as soon as possible, but at the latest by 30 June 2020, pursuant to paragraph 2(i) of that rule.

41. Finally, GRECO invites the authorities of Germany to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.