

Adopted: 18 October 2017
Publication: 26 February 2018

Public
GrecoRC3(2017)3

Third Evaluation Round

Addendum to the Second Compliance Report on Germany

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

* * *

"Transparency of Party Funding"

Adopted by GRECO
at its 77th Plenary Meeting
(Strasbourg, 16-18 October 2017)

I. INTRODUCTION

1. The Addendum to the Second Compliance Report assesses the additional measures taken by the German authorities, since the adoption of the third Interim Report to the first Compliance Report, in respect of the recommendations made by GRECO in its Third Round Evaluation Report on Germany. It should be recalled that the Third Evaluation Round covers two distinct themes, namely:
 - Theme I – Incriminations: Articles 1a and 1b, 2 to 12, 15 to 17 and 19.1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1 to 6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (incrimination of corruption).
 - Theme II – Transparency of party funding: Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
2. GRECO adopted the Third Round Evaluation Report on Germany at GRECO's 45th Plenary Meeting (4 December 2009). The report (Greco Eval III Rep (2009) 3E [Theme I](#) / [Theme II](#)) contained twenty recommendations and was made public on 4 December 2009.
3. In the first [Compliance Report](#), which was adopted by GRECO at its 53rd Plenary Meeting (Strasbourg, 5-9 December 2011), it was concluded that Germany had implemented satisfactorily or dealt with in a satisfactory manner only four of the 20 recommendations contained in the Third Round Evaluation Report. In view of this result, GRECO categorised the very low level of compliance with the recommendations as "globally unsatisfactory" within the meaning of Rule 31, paragraph 8.3 of the Rules of Procedure. GRECO therefore decided to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the Evaluation Report.
4. The first [Interim Compliance Report](#) was adopted by GRECO at its 57th Plenary Meeting (19 October 2012) and made public on 28 November 2012. The [Second Interim Compliance Report](#) was adopted by GRECO at its 61st Plenary Meeting (18 October 2013) and made public on 16 December 2013. The [Third Interim Compliance Report](#) was adopted by GRECO at its 65th Plenary Meeting (10 October 2014) and made public on 28 January 2015. On the basis of the progress substantiated by Germany, GRECO decided not to continue applying Rule 32 as the level of compliance was no longer "globally unsatisfactory". In the [Second Compliance Report](#), which was adopted at GRECO's 71st Plenary Meeting (18 March 2016) and made public on 16 June 2016, it was concluded that Germany had implemented satisfactorily or dealt with in a satisfactory manner eight of the twenty recommendations contained in the Third Round Evaluation Report, ten recommendations had been partly implemented and two had not been implemented.
5. In view of the fact that twelve recommendations had not yet been fully implemented, GRECO in accordance with Rule 31, paragraph 9 of its Rules of Procedure asked the Head of the German delegation to submit additional information regarding the implementation of recommendations i, v, vi, vii and ix (Theme I – Incriminations) and recommendations ii-v, vii, viii and x (Theme II – Transparency of party funding), by 31 December 2016. Situation reports were submitted by the authorities on 28 December 2016 (re. Theme I) and 13 March 2017 (re. Theme II) and served as a basis for the present Addendum to the Second Compliance Report.

6. GRECO selected Austria and the Russian Federation to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Christian MANQUET on behalf of Austria and Mr Aslan YUSUFOV on behalf of the Russian Federation. They were assisted by GRECO's Secretariat in drawing up this Addendum to the Second Compliance Report.

II. ANALYSIS

Theme I: Incriminations

7. It is recalled that in its Evaluation Report GRECO addressed 10 recommendations to Germany in respect of Theme I. In the compliance procedure, until the preparation of the present report, Germany had implemented satisfactorily recommendations ii, iii, iv, viii and x and partly implemented recommendations i, v, vi and vii. Recommendation ix had not been implemented.

Recommendation i.

8. *GRECO recommended to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the ratification of its Additional Protocol (ETS 191).*
9. GRECO recalls that the recommendation had been partly implemented. In the previous compliance reports, it had welcomed the fact that the authorities had initiated several measures aimed at the ratification of the Criminal Law Convention on Corruption and its Additional Protocol. Namely, on 21 February 2014 the *Bundestag* (the national Parliament) had adopted a bill amending, *inter alia*, section 108e of the Criminal Code (CC) with a view to broadening the criminalisation of active and passive bribery of assembly members. On 20 November 2015, it had furthermore adopted a bill aimed at implementing GRECO's recommendations related to the provisions of the Criminal Law Convention on Corruption and its Additional Protocol – the Draft Anti-Corruption Act (*Regierungsentwurf eines Gesetzes zur Bekämpfung der Korruption*). The latter was directed at amending the CC to bring it fully into line with the provisions of the Criminal Law Convention on Corruption and its Additional Protocol and to thus allow for their ratification. Finally, a draft bill authorising the Federal Government to ratify the above-mentioned instruments had been prepared by the Federal Ministry of Justice and Consumer Protection.
10. The authorities of Germany now report that legislation authorising the Federal Government to ratify the Criminal Law Convention on Corruption and its Additional Protocol was adopted by the *Bundestag* on 4 November 2016 and entered into force on 20 December 2016. On that basis, the Federal Government has ratified the two legal instruments.
11. GRECO is pleased that Germany has ratified the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). It notes that the date of depositing the instrument of ratification at the Council of Europe was 10 May 2017 and these instruments entered into force in respect of Germany on 1 September 2017. It is furthermore noted that Germany has made declarations and reservations pursuant to Articles 36 and 37 of the Convention (for further details, see below under the following recommendations).
12. GRECO concludes that recommendation i has been implemented satisfactorily.

Recommendations v and vi.

13. *GRECO recommended:*

- *to incriminate active as well as passive bribery of foreign public officials more broadly, in line with Article 5 of the Criminal Law Convention on Corruption (ETS 173) (recommendation v) and*
- *to incriminate more broadly active as well as passive bribery of officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts, in line with Articles 9 to 11 of the Criminal Law Convention on Corruption (ETS 173) (recommendation vi).*

14. GRECO recalls that recommendations v and vi had been assessed as partly implemented. The provisions under section 335 a CC, in force since 26 November 2015, provide for broader criminalisation of active and passive bribery of foreign public officials (recommendation v) and of international officials (recommendation vi). In particular, these bribery offences are no longer limited to active bribery or bribery in the context of international business transactions. That said, they still require a link between the bribery act and a breach of duty, as was the case before the reform.

15. The authorities now state that at the time of depositing its instrument of ratification, Germany made use of the possibility provided by Article 36 of the Criminal Law Convention on Corruption to make declarations on Articles 5, 9 and 11 of the Convention – to the effect that it will establish as criminal offences the active and passive bribery of foreign public officials, officials of international organisations, judges and officials of international courts only to the extent that the official acts or refrains from acting in breach of his/her duties.

16. GRECO takes note of the information provided. Concerning the compliance with the current recommendations, it is clear that the provisions under section 335 a CC of Germany still require a link between the bribery act and a breach of duty, which is not in accordance with Articles 5, 9 and 11 of the Criminal Law Convention. The recommendations therefore remain partly implemented. The fact that the German authorities have used the possibility to make declarations (under Article 36 of the Convention) in respect of Articles 5, 9 and 11 at the time of ratification narrows Germany's conventional obligations as far as these Articles are concerned. The authorities are encouraged to reconsider this matter.

17. GRECO concludes that recommendations v and vi remain partly implemented. Since Germany dealt with these recommendations, *inter alia*, by entering declarations in accordance with Article 36 of ETS 173 and therefore is under an obligation to reconsider these declarations within three years (under Article 38 of ETS 173), GRECO does not request Germany to provide additional information in respect of recommendations v and vi.

Recommendation vii.

18. *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 191).*

19. GRECO recalls that recommendation vii had been assessed as partly implemented. The provisions under section 335 a CC, in force since 26 November 2015, provide for broader criminalisation of active and passive bribery of foreign jurors. This offence is no longer limited to active bribery or

bribery in the context of international business transactions. That said, it still requires a link between the bribery act and a breach of duties, as was the case before the reform.

20. The authorities refer to the ratification of the Additional Protocol to the Criminal Law Convention on Corruption. No other legal measures have been taken in respect of this recommendation.
21. GRECO takes note of the ratification of the Additional Protocol to the Criminal Law Convention on Corruption. Apart from that, the legal situation remains the same now as it was at the adoption of the previous compliance report.
22. GRECO concludes that recommendation vii remains partly implemented.

Recommendation ix.

23. *GRECO recommended to criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173).*
24. GRECO recalls that recommendation ix had been assessed as not implemented. The Federal Ministry of Justice and Consumer Protection had reached the conclusion that the existing corruption-related provisions, as amended by the above-mentioned legislation, covered corrupt behaviour in a comprehensive manner and did not need to be complemented by a stand-alone “trading in influence” offence; therefore, it was planned to enter a reservation to Article 12 of the Criminal Law Convention on Corruption. GRECO had maintained its position that the introduction of specific criminal provisions on trading in influence would fill a gap (e.g. with regard to cases involving elected officials).
25. The authorities now state that Germany has made use of the possibility provided by Article 37 of the Convention to enter a reservation to Article 12 at the time of depositing its instrument of ratification. They maintain their position that there is no need to introduce a specific “trading in influence” offence into the German CC.
26. GRECO takes note of the information provided. Concerning the compliance with the current recommendation, the situation as described in the previous compliance report remains the same, i.e. the criminal legislation in Germany is still not in compliance with the particular offence trading in influence under Article 12 of the Criminal Law Convention. That said, the reservation made under Article 36 of the Convention limits Germany's conventional obligations as far as Article 12 of the Convention is concerned. The authorities are encouraged to reconsider this matter.
27. GRECO concludes that recommendation ix has been partly implemented. Since Germany dealt with this recommendation by entering a reservation in accordance with Article 37 of ETS 173 and therefore is under an obligation to reconsider the reservation within three years (under Article 38 of ETS 173), GRECO does not request Germany to provide additional information in respect of recommendation ix.

Theme II: Transparency of Party Funding

28. It is recalled that in its Evaluation Report GRECO addressed 10 recommendations to Germany in respect of Theme II. In the compliance procedure, until the preparation of the present report, Germany had implemented satisfactorily recommendations i and vi and dealt with recommendation ix in a satisfactory manner. Recommendations ii, iii, iv, v, viii and x had been partly implemented and recommendation vii had not been implemented.

Recommendations ii to v, vii, viii and x.

29. *GRECO recommended:*

- *i) to introduce a system for the publication of election campaign accounts at the federal level, which would make the information available shortly after election campaigns; ii) to invite the Länder to adopt similar measures that would be applicable to associations of voters participating in elections to Länder parliaments and at local level (recommendation ii);*
- *to lower the 50,000 Euro threshold for the immediate reporting and disclosure, under the Political Parties Act, of donations made to political parties; ii) to put a ban on anonymous donations and iii) to consider reducing significantly the threshold for the disclosure of donations and donors (recommendation iii);*
- *to prohibit donations to parliamentarians and candidates who are members of political parties or, alternatively, to subject them to requirements for record keeping and disclosure similar to those applicable to political parties (recommendation iv);*
- *i) to develop a more global approach of party financing in Germany by presenting in an official document the various forms of state support effectively granted or available; ii) to initiate consultations about the additional measures needed to better ensure the strict separation, under the law, of the financing of political parties on the one hand, and foundations and parliamentary groups on the other hand (recommendation v);*
- *to strengthen the independence of the external audit of the parties' financial statements, for instance by introducing a reasonable degree of rotation or by appointing a second auditor from a different company (recommendation vii);*
- *to ensure that the body to which the supervision of party financing is attributed, enjoys a sufficient degree of independence and is equipped with proper means of control, adequate staffing and appropriate expertise (recommendation viii); and*
- *i) to clarify the possible infringements to the Code of Conduct appended to the Rules of Procedure of the Bundestag, as regards the regime of donations to parliamentarians; ii) to ensure that these infringements are subject to effective, proportionate and dissuasive sanctions (recommendation x).*

30. The authorities report that, by letter of 2 June 2016, the Federal Minister of Justice and Consumer Protection invited the President of the *Bundestag* to inform him of the Parliament's position as regards the outstanding recommendations, and of the extent to which further measures for their implementation had been taken or were planned. By letter of 10 March 2017, the Secretary of the Committee on Internal Affairs of the *Bundestag* reported that the Committee chair had forwarded the Second Compliance Report to the representatives of the parliamentary groups for their consideration. He added that, bearing in mind the upcoming *Bundestag* election in September 2017, even if (legislative) initiatives regarding the transparency of party funding were to emerge, it is not possible to predict with certainty whether they will be dealt with by the current or future Parliament.

31. GRECO is concerned about the absence of any further progress in the implementation of any of the outstanding recommendations. It notes that legislative reforms will be difficult to achieve

ahead of the parliamentary elections. GRECO wishes to stress, however, that seven and a half years have elapsed since the adoption of the Evaluation Report. It can only reiterate its urgent appeal to the authorities to address the seven pending recommendations as a matter of priority.

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

III. CONCLUSIONS

33. With the adoption of this Addendum to the Second Compliance Report on Germany, GRECO concludes that out of the twenty recommendations issued to Germany, nine in total have been implemented satisfactorily or dealt with in a satisfactory manner. Ten recommendations have been partly implemented and one has not been implemented to date.
34. More specifically, with respect to Theme I – Incriminations, recommendations i, ii, iii, iv, viii and x have been implemented satisfactorily and recommendations v, vi, vii and ix have been partly implemented.
35. With respect to Theme II – Transparency of Party Funding, recommendations i, and vi have been implemented satisfactorily and recommendation ix has been dealt with in a satisfactory. Recommendations ii, iii, iv, v, viii and x remain partly implemented and recommendation vii not implemented.
36. Regarding Theme I – Incriminations, it is a major achievement that Germany, one of the founding members of GRECO, and which signed the Criminal Law Convention on Corruption in 1999, has now joined the vast majority of member States that have ratified the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). This has been a long process, during which relevant provisions of the Criminal Code had to be amended. In this respect, GRECO has already acknowledged in its previous compliance reports that the specific recommendations relating to the criminalisation of active and passive bribery of members of domestic and foreign public assemblies (including *Bundestag* members), foreign public officials, international officials and foreign jurors, private sector bribery and the jurisdictional rules have been addressed. At the same time, GRECO notes that Germany has used its right to enter, at the time of depositing its instrument of ratification, declarations with regard to the criminalisation of active and passive bribery of foreign public officials and international officials and a reservation concerning trading in influence. Germany's conventional obligations to deal with certain shortcomings of domestic legislation in those areas are thereby reduced to some extent.
37. With respect to Theme II – Transparency of party funding, GRECO is concerned about the absence of any further progress. It must be stressed that seven and a half years have elapsed since the adoption of the Evaluation Report. GRECO can only reiterate its urgent appeal to the authorities to address the seven outstanding recommendations as a matter of priority. It underscores again that several recommendations are pending on issues of prime importance – such as the introduction of a system for the timely publication of election campaign accounts, enhancing the transparency of direct donations to parliamentarians and election candidates who are members of political parties, and further increasing the resources available to the president of the *Bundestag* for supervising party funding.
38. In conclusion, GRECO in accordance with Rule 31 revised, paragraph 9 of its Rules of Procedure asks the Head of the German delegation to submit additional information regarding the

implementation of recommendation vii (Theme I – Incriminations) and recommendations ii-v, vii, viii and x (Theme II – Transparency of party funding), by 31 July 2018.

39. GRECO invites the authorities of Germany to authorise, as soon as possible, the publication of the present report, to translate it into the national language and to make the translation public.