



Adoption: 22 March 2019
Publication: 04 June 2019

Public
GrecoRC3(2019)1

Third Evaluation Round

Second Addendum to the Second Compliance Report on Germany

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

* * *

"Transparency of Party Funding"

Adopted by GRECO
at its 82nd Plenary Meeting
(Strasbourg, 18-22 March 2019)

I. INTRODUCTION

1. This Second Addendum to the Second Compliance Report assesses the additional measures taken by the German authorities, since the adoption of the Addendum to the Second 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 December 2011), it was concluded that Germany had implemented satisfactorily or dealt with in a satisfactory manner four and implemented partly six 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. This low level of compliance remained unchanged in the first [Interim Compliance Report](#), adopted by GRECO at its 57th Plenary Meeting (19 October 2012) as well as in the [Second Interim Compliance Report](#), adopted by GRECO at its 61st Plenary Meeting (18 October 2013). The [Third Interim Compliance Report](#) was adopted by GRECO at its 65th Plenary Meeting (10 October 2014). In this report, GRECO concluded that six recommendations had been implemented satisfactorily or dealt with in a satisfactory manner and eleven recommendations had been partly implemented; on the basis of this progress, 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) 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 the [Addendum to the Second Compliance Report](#) adopted by GRECO at its 77th Plenary Meeting (18 October 2017), Germany had implemented satisfactorily or dealt with in a satisfactory manner nine of the twenty recommendations, ten recommendations had been partly implemented and one remained not implemented. GRECO requested the Head of the German delegation to submit additional information regarding the implementation of the pending Theme I recommendations vii, but not in respect recommendations v, vi and ix, for reasons stated below (paragraphs 10 and 17). GRECO also requested additional information in respect of recommendations ii-v, vii, viii and x (Theme II – Transparency of party funding).

6. A situation report, containing additional information, was submitted by the German authorities on 28 September 2018 and served as a basis for the present Second Addendum to the Second Compliance Report.
7. GRECO had 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 the current Report.

II. ANALYSIS

Theme I: Incriminations

8. 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 i, ii, iii, iv, viii and x and partly implemented recommendations v, vi, vii and ix.

Recommendations v and vi.

9. *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).*

10. GRECO recalls that recommendations v and vii were partly implemented in the previous report. While section 335a of the German Criminal Code (CC), in force since 26 November 2015, provides for broader criminalisation of active and passive bribery of foreign public officials (recommendation v) and of international officials (recommendation vi), i.e. these offences were no longer limited to active bribery or bribery in the context of international business transactions, these offences still require a link between the bribery act and a breach of duty, as was the case before the reform. That said, Germany has, in accordance with Article 36 of the Criminal Law Convention on Corruption, made declarations in respect of Articles 5, 9 and 11 of the Convention – to the effect that these criminal offences require that the official (bribe taker) acts or refrains from acting in breach of his/her duties (which is not in line with Articles 5, 9 and 11 of the Criminal Law Convention). GRECO encouraged the authorities to reconsider this matter, but did not request Germany to provide additional information in respect of these recommendations as, by entering declarations in accordance with Article 36 of ETS 173, it was already under an obligation to reconsider the declarations under Article 38 of ETS 173.
11. As no new substantial measures have been taken, GRECO concludes that recommendations v and vi remain partly implemented.

Recommendation vii.

12. *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).*
13. *GRECO recalls that recommendation vii was partly implemented in the previous report. Section 335a CC, which came into force on 26 November 2015, provides for broader criminalisation of active and passive bribery of foreign jurors; this offence was no longer limited to active bribery or bribery in the context of international business transactions. That said, a link between the bribery act and a breach of duties was still required, as was the case before the amendment.*
14. *The authorities now report that the Federal Ministry of Justice and Consumer Protection is still reviewing options on how to implement this recommendation fully, including to possibly amend section 335a CC.*
15. *As no new substantial measures have been taken, GRECO concludes that recommendation vii remains partly implemented.*

Recommendation ix.

16. *GRECO recommended to criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173).*
17. *GRECO recalls that recommendation ix was partly implemented in the previous report. The Federal Ministry of Justice and Consumer Protection had reached the conclusion that the existing German corruption-related provisions covered corrupt behaviour in a comprehensive manner and there was no need for a stand-alone “trading in influence” offence. Therefore, Germany had made a reservation, under Article 37 of the Convention, in respect of Article 12 at the time of depositing its instrument of ratification. GRECO encouraged the authorities to reconsider this matter, but did not request Germany to provide additional information in respect of this recommendation as, by entering declarations in accordance with Article 37 of ETS 173, it was already under an obligation to reconsider this reservation, according to Article 38 of ETS 173.*
18. *GRECO concludes that recommendation ix remains partly implemented.*

Theme II: Transparency of Party Funding

19. *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 current report, Germany had implemented satisfactorily recommendations i and vi and dealt with recommendation ix in a satisfactory manner.*

Recommendations ii to v, vii, viii and x.

20. *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).*

21. It is recalled that recommendations ii, iii, iv, v, viii and x had been partly implemented and recommendation vii had not been implemented. It is also recalled that the Government has repeatedly communicated with the Bundestag requesting its position as regards the implementation of these recommendations.
22. The authorities of Germany now report that on 24 January 2018, the Federal Minister of Justice and Consumer Protection sent a new letter to the President of the Bundestag to which he attached the Addendum to the Second Compliance Report of GRECO and requested information as to whether any further measures had been taken or were planned in order to implement the pending Theme II-recommendations. The Chair of the Committee on Internal Affairs and Community of the Bundestag responded by letter of 11 June 2018 that further deliberations in respect of GRECO's recommendations would only take place following an expert opinion by Prof. Stefanie Schmahl (University of Würzburg). The expert opinion, which deals with freedoms and rights of members of parliament, was received by the Bundestag on 27 August 2018. No further measures have been taken.
23. GRECO notes that in addition to the continued exchange of letters between the Government and the Bundestag and the request of an expert opinion by the latter, no concrete measures have been taken to deal with the recommendations. Similar letters have been sent on several occasions (2012, 2013, 2014, 2015, 2016 and 2017) requesting Parliament's position as regards the pending Theme

- II-recommendations. The expert opinion referred to by the German authorities does not directly concern the current recommendations and has not resulted in any further measures.
24. This means that Germany is still to a large degree not in compliance with GRECO's Theme II-recommendations. In summary, a system for the publication of election campaign accounts at federal level has not been introduced (recommendation ii); the criticised EUR 50,000 threshold for immediate reporting of donations to political parties has not been lowered (recommendation iii); the lack of transparency regulations in respect of donations to election candidates remains (recommendation iv); the financing of political parties on the one hand and foundations and parliamentary groups on the other hand, are still not separated (recommendation v); the level of independence in respect of external audits of political parties' financial statements has not been enhanced (recommendation vii); the monitoring mechanism under the President of the Bundestag, responsible for the supervision of political party funding, is still not considered sufficiently empowered to carry out this function (recommendation viii); and the effectiveness of the sanctions in respect of infringements of the Code of Conduct of Parliamentarians (recommendation x) have not been ensured.
25. GRECO concludes that recommendations ii, iii, iv, v, viii and x remain partly implemented and recommendation vii remains not implemented.

III. CONCLUSIONS

26. With the adoption of this Second Addendum to the Second Compliance Report on Germany, GRECO concludes that out of the twenty recommendations issued to Germany, nine have been implemented satisfactorily or dealt with in a satisfactory manner. Ten recommendations have been partly implemented and one has not been implemented.
27. 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.
28. With respect to Theme II – Transparency of Party Funding, recommendations i, and vi have been implemented satisfactorily and recommendation ix has been dealt with in a satisfactory manner. Recommendations ii, iii, iv, v, viii and x remain partly implemented and recommendation vii not implemented.
29. Regarding Theme I – Incriminations, it was a major achievement when Germany finally ratified the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) in 2017, following a long process, during which some provisions of the Criminal Code have been amended. In this respect, it is acknowledged that the 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. That said, GRECO notes that Germany has used the possibility of entering 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, a situation that has to be reconsidered by Germany in accordance with Article 38 of the Criminal Law Convention.
30. With respect to Theme II – Transparency of party funding, GRECO is disappointed by the low level of progress achieved. Some clarifications, e.g. that political parties are prohibited from taking

anonymous donations (except in regard of small amounts) are to be welcomed, but other considerations made have not resulted in much progress, even if some recommendations have been met partly. GRECO notes a clear lack of political will to enhance the system, ever since the adoption of the Evaluation Report more than nine years ago and, as a consequence, this system falls short of European standards.¹ GRECO reiterates its strong appeal to the authorities to address the seven pending Theme II-recommendations as a matter of priority, underscoring that several recommendations are pending on issues of prime importance – such as the introduction of a system for 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 enhancing the capacity to supervise political party financing in Germany.

31. The adoption of this Second Addendum to the Second Compliance Report terminates the Third Round compliance procedure in respect of Germany. However, in view of the recommendations still outstanding, particularly on the transparency of political party funding, GRECO invites the German authorities to keep GRECO informed of future progress on the implementation of these recommendations.
32. 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.

¹ Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns.