



**TRANSPARENCY
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Deutschland e.V.

Die Koalition gegen Korruption.

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Transparency International Germany (TI-G) is pleased to present to the GRECO Evaluation Team (GET) its views on Germany’s record in implementing the Criminal Law Convention on Corruption (Convention), the Additional Protocol, and Guiding Principle 2. While the overall situation, especially as regards law enforcement, is satisfactory, German anti-corruption criminal law has several significant gaps identified below.

Abstract

1. Without a convincing reason, Germany has not ratified the Convention since 10 years. Despite some promising draft law, the Convention and the Additional Protocol are not likely to be ratified in the short term.
2. The offence of bribery of domestic public officials is generally satisfactory in spite of minor gaps.
3. The offence of bribery of members of domestic public assemblies has significant deficiencies and does not comply with the international standard.
4. The offences of bribery of foreign public officials, foreign jurors, officials of international organisations, and judges and officials of international courts are too restricted and contain unequal treatment of specific groups of officials.
5. The offences of bribery of members of foreign public assemblies and members of international parliamentary assemblies have significant gaps.
6. The offence of bribery in the private sector is restricted to unfair preferential treatment in competition and thus deficient.
7. Without a convincing reason, there is no offence of trading in influence in German criminal law.
8. Germany has established jurisdiction over most bribery offences, but its piecemeal approach is complicated and non-transparent.
9. The statute of limitation period for international bribery cases should be extended.
10. Enforcement of the existing bribery offences is satisfactory.

Political context

Germany has not ratified the Convention for 10 years and the UN Convention against Corruption (UNCAC) for almost six years. The main reason is that there is no parliamentary majority for the necessary modification of the offence of bribery of members of domestic assemblies. The case of the OECD Anti-Bribery Convention has shown that Germany is able to quickly implement and ratify an international anti-corruption instrument if there is enough domestic political will (and international peer pressure).

The Government submitted a fairly comprehensive draft bill to Parliament (that however is not likely to be adopted in the current legislative period and would lapse in this case), but the

most controversial change (in the offence of bribery of members of domestic assemblies) is not contained in the draft bill, on the ground that both Government and Parliament feel that this change has to originate within Parliament.

It should be noted that Germany could have ratified the Convention several years ago, even without improving the offence of bribery of members of domestic assemblies, by making a reservation for a limited period of time. Germany has chosen a different approach: a large act to implement several international anti-corruption provisions coupled with a specific act to be introduced by the parliament that just deals with bribery offences involving members of parliament. Though this approach makes sense from a legal-systematic and democratic point of view, it has resulted in a situation in which ratification of the Convention (and UNCAC) is uncertain.

Bribery offences

- The offence of bribery of domestic public officials is satisfactory. However, ordinary soldiers should be treated as public officials when taking a benefit (section 331 of the Criminal Code). Moreover, there should be more guidelines to clarify the threshold of benefits which are not acceptable according to sections 331 and 333.
- The offence of bribery of members of domestic public assemblies is too restricted in that it relates only to the “buying of a vote” for a specific vote in the plenary and official committees of Parliament. In today’s general parliamentary practice most of the critical decisions are made by parliamentary groups or other bodies. The offence has to be expanded to other aspects of the exercise of the mandate than voting conduct in an election or ballot. Moreover, immaterial advantages and third-party advantages have to be covered. Finally, this offence should be a predicate offence of the offence of money laundering.
- Apart from EU officials and public officials of other EU member states, the offences of bribery of foreign public officials, foreign jurors, officials of international organisations, and judges and officials of international courts are restricted to active bribery (only future acts including a breach of duties) in the course of international business transactions. However, there are much stricter provisions for judges and officials of the International Criminal Court (ICC) and soldiers of other NATO countries. TI-G suggests to harmonise all offences regarding foreign and international officials, jurors, judges and soldiers by taking the current provisions concerning ICC officials as standard, i. e. sections 331 et seq. should apply (with the restriction to future acts).
- Apart from members of the European Parliament, the offences of bribery of members of foreign public assemblies and members of international parliamentary assemblies are restricted to active bribery (only future acts) in the course of international business transactions. While these offences are in some aspects broader than the current offence of bribery of members of domestic assemblies, TI-G suggests to abolish the restriction to international business transactions.
- The current offence of bribery in the private sector does not cover bribery in situations without market competition. The Federal Government’s draft act rightly proposes to expand the offence to all cases of bribery in which an employee violates his duties towards the employer. However, the offence should also be extended to business owners since corrupt behaviour of proprietors can also distort competition. Moreover, bribery in the private sector should become a predicate offence of the offence of money laundering without restriction to bribery on a commercial basis.

Trading in influence

There is no offence of trading in influence in German criminal law. Germany intends to make a reservation regarding Art. 12 of the Convention without a proper justification. TI-G is of the

opinion that trading in influence is not nearly adequately covered by other offences. This also goes for section 266 (embezzlement/breach of trust). Several GRECO members have established trading in influence offences, as provided by the Convention and UNCAC. Thus, it cannot be argued that this is a useless tool in the fight against corruption. GRECO has rightly rejected several arguments by national governments which have not established a strict offence of trading in influence.

Jurisdiction and statute of limitations

Germany has established jurisdiction over most bribery offences, but the relevant law is fragmented and difficult to grasp. The Federal Government's draft act rightly proposes to expand the provisions to all bribery offences involving public officials regardless of whether the offences are punishable at the place of commission. TI-G suggests that bribery in the private sector should also be included. Germany should not make a reservation in this respect. TI-G suggests that the statute of limitation period for international bribery cases is extended. The current period (five years) may not be sufficient to bring complex cases to trial which need international co-operation and legal assistance.

Enforcement

TI-G is satisfied with the current anti-bribery law enforcement. Recent developments show a more frequent use of section 266 (embezzlement or breach of trust) in cases in which bribery (especially international bribery) is difficult to prove. Despite some recent cases of high corporate sanctions and the affirmative GRECO Second Round Compliance Report on Germany, TI-G suggests to introduce criminal corporate liability in order to make the liability of legal persons more effective and deterrent.

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