



UNCAC First Review Cycle (Chapters III and IV) – Review of Germany

Comments and Recommendations by Transparency International Germany
prepared for the country visit (8-10 March 2016)

Preliminary note

After ten years of inaction, Germany finally ratified UNCAC on 12 November 2014. Recent criminal law reforms (mentioned in the Federal Government's self-assessment) significantly improved the country's anti-corruption framework. It remains to be seen whether some of the new provisions – particularly Section 108e CC (see below) – are effective. Transparency International Germany is pleased to note that Germany complies to a large extent with UNCAC's obligatory stipulations. However, there is considerable room for improvement with regard to the implementation of several UNCAC articles, as outlined below. Transparency International Germany welcomes the Ministry's of Justice and Consumer Protection honouring of the transparency pledge of the UNCAC Coalition as the peer review process starts and hopes that the Ministry will fulfil all six principles in the course of this peer review.

Article 15 – Bribery of national public officials

As to members of parliament, the new Section 108e CC is an obvious improvement. However, the formulation "upon assignment or instruction" might be too narrow. In addition, the exemptions (para. 4) could be too broad. Moreover, the criminal offense regarding foreign and international parliamentarians (laid down in a special law) differs from 108e CC; it is broader in some aspects, but is restricted to bribery in the context of business transactions.

Article 16 – Bribery of foreign public officials and officials of public international organizations

Sections 331 and 333 do not apply to foreign public officials and officials of public international organizations, i.e. facilitation payments are not criminalized regarding this group of officials. Unconvincingly, there are stricter special rules regarding judges and employees of the International Criminal Court as well as NATO troops and employees.

Article 18 – Trading in influence

Germany considered, but did not adopt, a respective provision. In its Evaluation Round 3 Report, GRECO noted that Germany "could think about certain phenomena which may qualify as trading in influence (for instance with the involvement of elected officials); the introduction of criminal provisions in this area would thus fill a gap" (para. 114). We agree with that recommendation and requested such a provision in our comments of 11 August 2014 to the draft Anti-Corruption Act. Countries with similar legal systems like Austria (308 CC) and Liechtenstein show that it is possible to successfully integrate trading in influence provisions in their anti-corruption criminal laws.

Article 20 – Illicit enrichment

In their coalition agreement, the political parties forming both the current Federal Government and parliamentary majority, state their intention to reverse the burden of proof with regard to assets of unclear origin, in accordance with constitutional requirements. Such a reform would be an important step towards implementing Article 20 UNCAC. Transparency International Germany requests that it be modelled after the Swiss "Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte ausländischer politisch exponierter Personen" (SRVG). This law demonstrates that more can be done, including reversing the burden of proof on the illegality of the acquired assets, and freezing assets in order to safeguard the interests of the respective country. Apart from criminal law, the regulations on the publication of the additional income of parliamentarians show that certain transparency rules regarding political exposed persons are possible.

Article 21 – Bribery in the private sector

The proprietor of a business is not included in Section 299 CC. He or she should be included according to Article 21 UNCAC (“any person who directs or works, in any capacity”). Moreover, Section 301 CC should be abolished in order to make it mandatory for the public prosecutor to initiate criminal investigations.

Article 23 – Laundering of proceeds of crime

According to Article 23 UNCAC, State Parties “shall seek to apply paragraph 1 of this article to the widest range of predicate offences”. Therefore, sections 331 CC and 333 CC should be added to the list of predicate offenses.

Article 26 – Liability of legal persons

In our opinion, the current German provisions on the liability of legal persons, which are not part of the Criminal Code, but of the Act on Regulatory Offences, are not “effective, proportionate and dissuasive” as required by Article 26 UNCAC. For one, prosecution is not mandatory for the public prosecutor, but leaves it to his/her discretion (“Legalitätsprinzip” vs. “Opportunitätsprinzip”). The fact that the Minister of Justice has the power to give instructions to the prosecutor makes the discretion even less dissuasive. In addition, monetary sanctions are limited to a fixed amount of Euro 10 million. While Transparency International Germany welcomed the recent raise of the limit of 1 million, sanctions need to be based on a percentage of turnover to be dissuasive. The discretion given in imposing a regulatory fine should be revoked and replaced by a mandatory imposition of a fine, in order for the sanction to be effective and dissuasive. Overall, Transparency International Germany requests that liability of legal persons be transferred to the Criminal Code in order to make this liability effective. Switzerland, for example, incorporates the liability of legal persons in its Criminal Code (Article 102 Swiss CC).

Article 31 – Freezing, seizure and confiscation

Germany has not yet taken respective measures “to the greatest extent possible within its domestic legal system” to enable freezing, seizure and confiscation according to Article 31 UNCAC. The applicability of the relevant provisions should be increased by simplifying and streamlining the regulatory framework. In particular, to the extent possible, the provisions on confiscation and deprivation should be merged. Confiscation should be based on civil law principles. We understand the Ministry of Justice is currently drafting new legislation, which we hope would address the concerns outlined above. In addition, we request that provisions as contained in the Swiss SRVG (see above) be included in the draft legislation to improve international cooperation.

Article 33 – Protection of reporting persons

The protection of whistleblowers requires strong legal provisions; the *status quo* is insufficient in the opinion of Transparency International Germany. We will raise this concern in the current process of ratification of the Council of Europe’s Criminal Law Convention on Corruption with regard to the law enforcement authorities. With regard to the private sector, protection is currently granted only by court decisions. Because of the absence of strong legal provisions, Germany is not even considering ratification of the Council of Europe’s Civil Law Convention on Corruption. The coalition agreement, cited above, requires examining the current situation, which we hope will result in enactment of strong legislation.

Article 36 – Specialized authorities

In Germany, public prosecutors are subject to instruction from the respective ministers of justice of the *Länder*. Transparency International Germany requests that (1) prosecutors be independent as judges, in order to have the “necessary independence”, and (2) special prosecutor’s offices and/or special criminal investigation departments dealing with cases of corruption be established in every *Land*.