Comments and Recommendations by Transparency International Germany

UNCAC Second Review Cycle (Chapters II and V) – Review of Germany

prepared for the country visit 10-12 September 2018

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Preliminary note

Transparency International Germany (Transparency Germany) welcomes the opportunity to engage with the Review Team, hoping that the Team shares our view that the exchange covers Germany's overall implementation of Chapters II and V, not only Article 10 and 13 UNCAC.

Our preparation has been severely hampered by the fact that Transparency Germany only received the self-assessment checklist with the replies of Germany on Monday evening, September 3, even though the checklist for Chapter II was created on February 23, 2018 and for Chapter V on December 13, 2017.[1] The transparency pledge of the UNCAC Coalition which Germany has promised to comply with,[2] stipulates that the self-assessment should be put online promptly, and the review schedule and the review institution/coordinator published. We regret that these commitments are not being kept. We hope that the Federal Government immediately publishes the self-assessment concerning chapters II and V. With regard to future UNCAC review cycles, we encourage the Government to take a more participatory approach – as called for by Article 13 – and invite comments from several civil society organizations.

We also criticize that the executive summary and the country report for the first review cycle, of which the country visit took place two and a half years ago (March 8-10, 2016), have not been published yet. German civil society organizations and the public do not know the reasons for this disproportionate delay.

Transparency Germany believes that Germany's overall anti-corruption policy is satisfactory. However, there are many areas in which Germany could improve its compliance with UNCAC. In the following comments, we occasionally refer to the Federal Government's self-assessment submitted to UNODC.

Chapter II

Article 5

The requirement of maintaining effective and coordinated anti-corruption policies is somewhat difficult to fulfill in a federal structure. In fact, there are seventeen anti-corruption policies (federal level and *Länder* level), and even more if you add the local authorities. There is an exchange of information between the *Länder* on anti-corruption on the basis of common

[1] | See p. 1 of both self-assessments.
[2] | See https://uncaccoalition.org/en_US/uncac-review/transparency-pledge/#pledge.

principles, but a strict coordination of anti-corruption policy at subnational level does not exist. The *Länder* examples mentioned throughout the self-assessment seem to be deliberately selected best practices. *Länder* not mentioned are probably lagging behind. In *Hesse*, for example, the Ministry of the Interior and Sports, which is in charge of corruption prevention, issued a decree on the prevention of, and the fight against, corruption solely for its area of responsibility.[3] Only its circular on sponsoring extends to the entire administration.[4] Generally, the provisions on corruption prevention at the Federal and *Land* level are directives or ordinances issued by the respective Governments; anti-corruption laws enacted by Parliament only exist in North Rhine-Westphalia.

The self-assessment mainly relies on the Strategy on Corruption developed by the IMK in 1995 and its six implementation reports. The sixth report covering 2010-2014 is not only the latest, but probably also the last report, because as far as we know, these reports will no longer be produced. The Strategy is probably not deemed to be up-to-date. For example, Anti-Corruption Officers were unknown at the time the Strategy was developed, but they are now required to be appointed in both the federal administration and all *Länder* administrations, with the exception of North Rhine-Westphalia where appointment is voluntary. Some of the measures suggested in the Strategy are probably no longer relevant, others have been developed since, often because of advances in technology. Moreover, the Strategy can no longer be found on the website of the IMK; it seems that the implementation reports are not published at all on the internet at the moment.

Article 5 (2)

Regarding the planned Competition Register for Public Procurement, we believe that the threshold envisaged for corrupt companies to be barred is too high. It may take years until a conviction becomes final and binding. In our view, the standard of “no reasonable doubt” ought to be sufficient. North Rhine-Westphalia and Berlin in fact already apply a lower standard in their registers.

Article 5 (3)

The reports of the IMK on the implementation of its anti-corruption strategy of 1995 highlight new anti-corruption measures of the *Länder*, but there is no rigorous horizontal or vertical evaluation process which aims at streamlining the anti-corruption policies at subnational level on the basis of best practices.

Article 5 (4)

Germany is an active member of several international anti-corruption regimes, yet ratification of respective treaties and implementing recommendations often remain a challenge. UNCAC itself was only ratified eleven years after signature, and political considerations sometimes stand in the way of implementing recommendations. For example, GRECO concluded as part of its fourth evaluation round, mentioned in the self-assessment, that Germany has not implemented or not fully implemented the following recommendations so far:[5]

[3] | See https://rp-giessen.hessen.de/sites/rp-giessen.hessen.de/files/content-downloads/Erlass_Korruptionsbek%C3%A4mpfung_StAnz_21_2014.pdf.
[4] | See http://www.staatsanzeiger-hessen.de. Gemeinsamer Runderlass betreffend Grundsätze für Sponsoring, Werbung, Spenden und mäzenatische Schenkungen zur Finanzierung öffentlicher Aufgaben (3/2016).
[5] | GRECO Fourth Evaluation Round Compliance Report on Germany, March 2017.

- *"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"*
- *"(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"*
- *"(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)"*
- *"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"*

Article 6 (1)

Due to Germany's federal structure, anti-corruption policies and bodies are decentralized and therefore to some extent fragmented and heterogeneous. Therefore, "overseeing and coordinating" anti-corruption is a challenge. In some instances, citizens may have difficulties in finding the appropriate institution or body to report suspected corruption cases or to ask for anti-corruption information or training. There is also a certain dispute over the proper role of anti-corruption and internal audit officers. Some *Länder* strictly separate their work, others do not.[6] The Federal Government's self-assessment does not address this dispute.

Article 6 (3)

The Federal Ministry of the Interior may have been nominated as the authority within the meaning of paragraph 3, but as far as we know, particularly the Federal Ministry for Economic Cooperation and Development is promoting good governance and anti-corruption worldwide, especially via agencies such as the GIZ.

Article 7 (1) (2) and (4)

Although the self-assessment does not provide respective information, there are certainly court cases regarding (1) the selection of the best candidates for certain positions in the public sector; (2) salaries of certain public officials; (3) the eligibility to be elected to public office, and (4) conflicts of interest in the public sector.

[6] | See e.g. the information on North Rhine-Westphalia in the self-assessment, p. 28 and the directive in Brandenburg, which strictly separates the two functions in para. 5.3, https://mik.brandenburg.de/media_fast/4055/Antikorrutionsrichtlinie.pdf.

Article 7 (3)

In our opinion, Germany only partially complies with the provision on transparency in funding of candidatures for elected public office and political parties. For example, GRECO strongly criticized Germany for not, or only partially, implementing the following recommendations over a period of many years:[7]

- "*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"*
- *"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"*
- *"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"*
- *"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"*
- *"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"*
- *"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"*

Transparency Germany included transparency of funding of political parties in its "18 key demands" for the 2017 election.[8] Specifically, the threshold for publishing donations to political parties should be lowered to Euro 2.000.

Article 8 (2) and (3)

Members of the Bundestag need only to disclose their additional incomes in ten income brackets, as described in the self-assessment. We take the view that they should disclose the exact amount of their additional incomes. Lawyers and advisors/consultants should at least disclose in which area they practice. In addition, we support GRECO's recommendation on Code of Conduct infringements: *"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"*.[9]

Article 8 (4)

In our opinion, whistleblower protection in both the public and private sector should be improved by enacting appropriate legislation. This was part of our above-mentioned "18 key demands" for the 2017 elections. Internal and external (anonymous) whistleblower hotlines

[7] | GRECO Third Evaluation Round Addendum to the Second Compliance Report on Germany, October 2017.
[8] | See https://www.transparency.de/fileadmin/_processed_/4/8/csm_18_Forderungen_Cover_c2fdf2182f.jpg.
[9] | GRECO Third Evaluation Round Addendum to the Second Compliance Report on Germany, October 2017.

need to be established nationwide, and discriminations of whistleblowers acting in good faith should be prohibited. For the private sector, there is no specific law. There are only decisions of the Federal Labor Court and the European Court for Human Rights, as described in the self-assessment. Due to its deficient whistleblower protection, Germany currently cannot ratify the Council of Europe Civil Law Convention on Corruption signed in 1999. We welcome that a review is conducted whether the current protection of whistle-blowers complies with international requirements. This was a commitment from the coalition agreement of the previous Federal Government. The coalition agreement of the present government is silent as to whistleblower protection.

Article 8 (5)

Examples show that the current cooling-down period of generally twelve months is too short. We believe that regarding former Federal Ministers and Parliamentary State Secretaries, the waiting period to take up employment that conflicts with public interests should be extended to three years. Hamburg, for example, has a waiting period of two years. All *Länder* should enact strict legislation regarding members of government. Some Länder do not have any respective rules so far. The federal laws do not provide for a mechanism of sanctions if former members of the federal government fail to notify the government about their plans to take up employment in the private sector. A policy evaluation was discussed, but not included in the legislation; it should nonetheless be undertaken in our opinion.

Article 9 (1) (d)

Legal remedies regarding the award of public contracts above the EU threshold are adequate, but below, remedies are limited. This tends to also diminish detection of possible corrupt activities.

Article 10 (a)

From our point of view, the exceptions restricting the access to documents should be reduced and the administrative fee for applications be abolished to make the Federal Freedom of Information Act more effective and citizen-friendly. Moreover, instead of granting access on request, important documents, for example relating to procurement or decision-making processes should be proactively published. The "*Transparenzgesetz*" of Hamburg is a best practice in this respect. We expect the Federal Government to push those few *Länder* that have not done so yet to adopt citizen-friendly Freedom of Information laws.

Article 10 (c)

The National Situation Report on Corruption issued by the Federal Criminal Police Office includes statistical information, yet the problem of the high incidence of unreported cases of corruption is not acknowledged. To avoid drawing wrong conclusions, this problem ought to be addressed.

Article 11 (1)

We take the view that Germany should fully implement the following GRECO recommendation: "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". [10]

Article 12 (1) and (2)

The self-assessment describes the accounting and auditing regulations, but fails to deal with corruption prevention in this regard. In our above-mentioned "18 key demands" for the 2017 election, we included legislation on minimum standards for compliance management systems (CMS) for companies with more than 500 employees irrespective of their legal form of organization. We also demand that the CMS should be published, acknowledged as an integral part of all company activities, and Compliance Managers be independent. Sanctions for intentional circumvention of CMS-rules need to be increased. Regarding foreign bribery, the OECD Phase 4 Report found that no legal person has ever been held liable for false accounting offences.[11]

Regarding accounting and auditing requirements, the risk management system (RMS) described in the self-assessment only applies to developments that may endanger the continued existence of the company. This is a standard that is too high and should be lowered to adequately address any risks of corruption. As mentioned above, Transparency Germany advocates for setting minimum standards for compliance management systems. This would eliminate the discretion corporate management currently has whether or not to establish a comprehensive compliance organization[12] and also abolish the restriction to capital-market oriented companies. The same applies to the 2014 amendment of the German Corporate Governance Code. Compliance management must be strictly made part of the responsibility of a company's management.

Article 13 (1)

We appreciate that Transparency Germany regularly has the opportunity to freely comment on Germany's anti-corruption performance in the context of intergovernmental evaluation processes (GRECO, OECD Working Group on Bribery, UNCAC). However, we note once again that this time we did not receive the completed self-assessment early enough to properly prepare our comments. Moreover, we regret that this time the Federal Government did not invite other civil society organizations as far as we know. From our point of view, this is not in line with provisions of the UNCAC Coalition Transparency Pledge to which Germany has subscribed.[13]

As to public participation in the preparation of legislation, we take the view that first drafts of governmental bills (*Referentenentwürfe*) should be published online (e.g. on the website of the Federal Ministry of Justice and Consumer Protection referred to in the self-assessment) in order to enable everybody to submit a respective statement (like for example in Switzerland and Liechtenstein). We believe that there should be a more comprehensive "legislative footprint" than mentioned in the self-assessment. This was part of our above-mentioned "18 key demands" for the 2017 elections. For example, the participation of every lobby group in the administrative or parliamentary process of law-making should be documented and published.

[10] | GRECO Fourth Evaluation Round Compliance Report on Germany, March 2017.
[11] | OECD Phase 4 Report on Germany, June 2018, p. 66.
[12] | Cf. self-assessment, p. 110.
[13] | See supra footnote 1.

Article 13 (2)

Only a couple of *Länder* authorities have established anonymous whistleblowing systems so far. There are also remarkable differences at subnational level regarding measures like ombuds persons and specialized anti-corruption bodies.

Article 14 (1) (a)

Section 10 (9) of the Money Laundering Act requires the so-called "obliged entities" to refrain from establishing, or continuing, a business relationship when they are unable to fulfill the due diligence requirements. In the case of non-financial obliged entities, there is no centralized supervisory body to monitor compliance with this provision, so the risk of detection and sanction is low. This is reflected in the small number of suspicious transaction reports filed by the non-financial sector (249) compared to the financial sector (35.038).[14]

To make the decentralized approach of giving the *Länder* supervisory authority over the non-financial sector more effective, funding would need to be expanded so that sufficient staff to effectively monitor Anti-Money Laundering (AML) provisions could be employed. AML trainings would also need to be increased and sharing of knowledge across state borders instituted, especially regarding cases of non-compliance and sanctions. Without an effective and more centralized supervisory authority to ensure compliance and enforce sanctions, we believe that the UNCAC requirement of instituting a comprehensive domestic supervisory system is not complied with.

Recent media reports show that in a sample of real estate companies reviewed, the transparency register on beneficial owners included information on only a very small number of respective companies.[15] Furthermore, a compliance mechanism ensuring the validity of the data entered is lacking. Another shortcoming is the failure to include companies registered outside the EU.[16] We demand a stricter regulation and transparency for non-EU entities.

Access to the transparency register for persons other than competent authorities and obliged entities is restricted to persons with a "legitimate interest". This term has been defined in the *Transparenzregistereinsichtnahmeverordnung*, the regulation on access to the transparency register. Yet, the definition is too narrow to allow access to non-governmental organizations, as the example of Transparency Germany shows. It failed to gain access.

With the implementation of the 5th EU Anti-Money Laundering Directive, the transparency register will become public, but cost and scope of access still have to be determined. We demand a fully accessible, free and public transparency register. Otherwise the register will remain rather ineffective.

The requirement of obliged entities in the Money Laundering Act to report to the Financial Intelligence Unit (FIU) without delay is ineffective, due to the chaotic and inefficient set up of the FIU after it was shifted from the Federal Criminal Police Office to the customs administration. Processing of suspicious transaction reports reportedly takes up to a year, with tens of thousands suspicious transaction reports currently left unprocessed.[17]

[14] | See https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/FIU/Jahresberichte/fiuJahresbericht2016.html?nn=28276, p. 8.

[15] | See https://www.stern.de/politik/deutschland/tillack/das-neue-transparenzregister-ist-selbst-wenig-transparent-7929378.html; https://www.stern.de/politik/deutschland/immobilien--fuehrende-firmen-verstossen-offenbar-gegen-neues-transparenz--und-geldwaeschegesetz-7925594.html.

[16] | See https://www.wiwo.de/politik/deutschland/transparenzregister-maessige-bilanz-fuer-das-anti-geldwaesche-register/22735850.html.

[17] | See https://global.handelsblatt.com/finance/terrorists-germany-anti-money-laundering-unit-943933.

Chapter V

Article 51

Transparency Germany welcomes the reform of criminal law regarding the proceeds of crime (*Vermögensabschöpfungsgesetz*), including the provision allowing non-conviction based confiscation. In its comments on the draft legislation, Transparency Germany had indicated that it would monitor the implementation of the law and in particular the adequacy of human resources. Letters were sent to all Länder asking them for details on budgetary provisions. We will follow up on this.

Transparency Germany has also suggested to enact a law similar to the Swiss law on the "*Sperrung und Rückerstattung unrechtmäßig erworbener Vermögenswerte ausländischer politisch exponierter Personen*" to deal with situations in which the country is unable to request confiscation. We re-iterated this recommendation in the first UNCAC review cycle.

Assets recovered enter the budget of the *Land* in which the court is located. Even in cases in which the country of origin initiates proceedings, assets returned may not benefit the true victims of corruption. The UNCAC Coalition has developed "Principles for managing and disposing of recovered and returned stolen assets",[18] which we recommend should be followed. Overall, the Federal Government and the *Länder* should engage more actively in the return of stolen assets.

Article 51 – international cooperation

Regarding confiscation, collecting and maintaining comprehensive statistics is mandated in the relevant EU Directive (2014/42/EU, Art. 11). Germany does not yet comply with this provision.

Recommendation 5 of the *OECD Phase 4 Peer Review* regarding international co-operation suggests that Germany develops tools to collect data to measure Mutual Legal Assistance performance. Transparency Germany supports this recommendation and would in general recommend that Germany develops tools to collect – and publish – data to measure performance in other areas as well. Regarding asset recovery, this should include a public data base of asset recovery cases, which could then feed into the respective database of the Stolen Asset Recovery Initiative (StAR).

Regarding court cases, one reason so few are mentioned in the self-assessment may be that court cases are not published as a matter of course. Decisions of the Federal Courts are, but most corruption cases are decided at the regional or sub-regional level, and such decisions are not published. While there is a decision regarding civil cases that an anonymized version of a decision has to be made available upon request (BGH, 5.4.2017, IV AR (VZ) 2/16), a recent decision regarding criminal cases held that such texts should be made available only subject to the stringent requirements of access to files (BGH, 20.6.2018, 5 AR (Vs) 112/17). The press has the right to request anonymized versions of court decisions (BVerfG, 14.9.2015, 1 BvR 857/15). But what is needed is the general publication of court decisions. Germany should make this a priority for the second action plan under the Open Government Partnership.

Article 53 (b)

Courts in the United Kingdom can make a compensation order following a criminal conviction as part of the sentencing procedure. Transparency Germany would welcome similar provisions for foreign bribery cases in Germany in cases in which an injured party has not filed a claim, so that courts would be able to compensate the true victims of corruption, in line with Article 57 (3)

[18] | See https://uncaccoalition.org/en_US/uncac-coalition-recommendations-to-un-meeting-on-management-and-disposal-of-stolen-assets/.

(c). The above-mentioned “Principles for managing and disposing of recovered and returned stolen assets” developed by the UNCAC Coalition should be respected in this regard.

Article 55 (5)

We recommend that the guide to asset recovery that Germany made available to StAR is updated to include the new law on confiscation.