Comments on the Standard and Supplemental Questionnaires
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – Phase 4 Evaluation of Germany

January 15, 2018

I. Preliminary remarks

Transparency International Germany (Transparency Germany) is pleased to present to the Evaluation Team its views on Germany's record on the key horizontal issues identified for the Phase 4 evaluation, i.e. detection of the foreign bribery offence; enforcement; responsibility of legal persons and other country specific issues as detailed in the Phase 4 Standard and Supplemental Questionnaires. Transparency Germany appreciates that the Federal Ministry of Economics and Energy made their answers to the Questionnaires available, but regrets that parts relating to case information and other details were blacked out. Overall, we find that the answers were given with great care and effort, even when data were not directly available, demonstrating the commitment of the German Government and the *Länder* to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and its enforcement.

Our main points of critique concern corporate liability and whistleblower protection. These two demands were among the 18 demands that Transparency Germany addressed to political parties during the election campaign 2017 (18 demands).[1] We would like to see corporate liability incorporated into the Criminal Code (CC) and legislation enacted to protect whistleblowers in private and public employment. In addition, we suggest that anti-money laundering measures in the non-financial sector be strengthened and financial and human resources increased. Open data and publication of all decisions in foreign bribery cases is another demand.

II. Remarks related to the Questionnaires

3. Reporting systems by the *Länder*

The description of reporting systems shows that systems vary from one *Land* to the other. A system that would set standards for all *Länder* and in particular require web-based access would be preferable.

SQ4b.2 National AML/CFT national risk assessment and specialized prosecutors' units

We hope to see risks identified to be relevant in Germany, such as casinos, in particular smaller ones, and real estate included in the national risk assessment, which, as pointed out, is currently being prepared.

With regard to specialized units, there is great variation among the *Länder*. So the success of prosecution may depend on which *Land's* prosecutor takes charge. Less experienced prosecutors may have problems handling complex cross-border corruption cases.

SQ5.1 Whistleblower protection

As part of its 18 demands, Transparency Germany is asking for legislation to protect whistleblowers in private and public employment, who report on violations of law and serious irregularities. The law should impose sanctions for discrimination of whistleblowers acting in good faith and require

[1] | https://www.transparency.de/aktuelles/detail/article/18-forderungen-an-die-deutsche-politik/

establishment of internal and external reporting mechanisms, including anonymous ones. It should apply to commercial enterprises and civil society organizations of medium-size or larger. This would need to become part of the coalition agreement of a new government. Rather than trust that German courts will take a judgment of the European Court of Human Rights (case 28247/08/Heinisch of 1 July 2011) into account, the Government should enact legislation to protect whistleblowers in private employment. This would also enable Germany to ratify the Civil Law Convention on Corruption of the Council of Europe.

Illegal conditions in enterprises can still form part of trade secrets. Their disclosure should not be criminalized. To this end, the EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure should be transposed into German law as soon as possible.

8. Changes in legal framework

Transparency Germany welcomes the integration of the foreign bribery offence into the Criminal Code and the broadening of the offence, including for mandate holders (Sec. 108e CC). Unfortunately, the integration falls short of including foreign mandate holders. There is no point in having two partially overlapping and partially competing criminal offences concerning bribery of members of foreign parliaments and international parliamentary assemblies. It would therefore be preferable to abolish Article 2 Sec. 2 of the International Bribery Act and broaden Sec. 108e CC accordingly.

SQ8a.3 Facilitation payments

Sec. 333 CC does not apply to foreign public officials, to officials of international organizations and to soldiers of foreign armed forces. This difference in treatment of bribery of domestic and foreign public officials was criticized during the Phase 3 Peer Review.[2] Transparency Germany would support equal treatment of domestic and foreign bribery and therefore propose to include a reference to Sec. 333 CC (and Sec. 331 CC) in Sec. 335a CC. This would criminalize making facilitation payments, irrespective of whether the public official violates a duty. It is the violation of a duty which is relevant according to the structure of the bribery offenses in Germany, rather than the size of a bribe.

9. Enforcement

a) Level of enforcement

Transparency International has examined enforcement efforts of OECD countries in its “Exporting Corruption Reports”. For 2015 and 2016, the Report could unfortunately not be produced. However, Transparency Germany reviewed enforcement based on the data transmitted to the Working Group on Bribery and using the methodology of Transparency International. This methodology differs from the one of the Working Group on Bribery. For example, “major” cases are given additional credit. In Transparency Germany’s opinion, a case can only be considered “major”, if information about it has become public. Cases dealt with by the Federal Courts are in general published, but since most cases are decided by the regional courts, they are not published. The press often reports about hearings and even investigations, but not all cases can be linked to press reports given the scarcity of information provided, see b) below.

Transparency International uses a broad definition of foreign bribery cases, covering cases where foreign bribery is the underlying issue, whether brought under laws dealing with corruption, money laundering, tax evasion, fraud or violation of accounting or disclosure requirements. So, we would count cases prosecuted as commercial bribery according to Sec. 299 CC or as breach of trust ac-

[2] | Para. 28 and 29 of the Phase 3 Report.

cording to Sec. 266 CC.[3] However, if the evidence gathered could not confirm the initial suspicion that a foreign public official was involved, we would not count such a case as a case completed.

b) Open data and publishing court decisions in foreign bribery cases

According to Article 3 of the Convention, criminal penalties need to be "effective, proportionate and dissuasive". In our opinion, penalties imposed need to be published to be "dissuasive". This relates to all court decisions in foreign corruption cases. In our view, the right to privacy of the offender, which is affected when a criminal verdict is published with names, has to be balanced against the principle of open criminal trials and the right of the public in a democracy to oversee the judiciary. The latter should prevail in cases of foreign bribery, especially as far as the names of foreign countries and companies are concerned, but also the names offenders.[4]

We appreciate that the Federal Ministry of Justice and Consumer Protection shares with us the data it submits to the OECD Working Group on Bribery. Case descriptions have improved.[5] Even respecting current anonymization practice, they could, however, include the name of the court,[6] the date of decision and the actual file number. We hope that initial discussions to that effect with the Ministry of Justice and Consumer Affairs will lead to, at least, the naming of the court in next year's report. This would facilitate asking courts for the texts of decisions rendered.

Regarding investigations, we understand that detailed information may compromise ongoing investigations. And regarding terminations of proceedings, in particular according to Sec. 153a (1) Code of Criminal Procedure (CCP), we understand that the accused is still presumed innocent, so that publication of the decision may generally not be possible. But more transparency could be provided by publishing basic information about terminations in an annual corruption report.[7] This would be in line with Recommendation 3(c) of the Phase 3 Report[8].

Termination of proceedings according to Sec. 153a (2) CCP takes place in a court hearing which is public according to *Sec.* 169 of the German Judicature Act (Gerichtsverfassungsgesetz). In our opinion, the decision (Beschluß) to terminate should also be published, and in this case anonymized, because the guilt of the accused (Angeschuldigter) is not established. At least, the decision should be made available, if requested by the media or anti-corruption civil society organizations such as Transparency International.

14. Challenges encountered in investigating and bringing foreign bribery enforcement actions

We welcome the organizational and legal reforms that have taken place in line with the 4th EU Anti-Money Laundering Directive and the agreement reached between the European Parliament and the Council in the negotiation of a 5th directive. However, as indicated in the "Preliminary remarks on question 14 – Reports from the Länder" two main challenges in the detection of bribery cases directly related to the German Money Laundering Act (Geldwäschegesetz – MLA) remain unchanged, namely the use of intermediaries and offshore companies.

Transaction monitoring and risk assessments conducted by financial institutions may not provide sufficient indications of fraudulent behavior or bribery as they only concern a small piece of large transaction schemes generally dispersed among multiple countries, institutions and accounts. As

---

[3] | SQ 36.1 deals with the German practice of prosecuting cases of foreign bribery as commercial bribery or breach of trust.
[4] | Angela Reitmaier, Anti-bribery enforcement: The case for making court decisions freely available in Germany, https://oecdonthelevel.com/2017/12/05/anti-bribery-enforcement-the-case-for-making-court-decisions-freely-available-in-germany/
[5] | See para. 13-15 of the Phase 3 Report.
[6] | See decision of German Federal Administrative Court (BVerwG 6 C 35.13) of Oct.1, 2014 re naming of defence attorney and prosecutor
[7] | The *Länder* of North Rhine-Westphalia and Schleswig-Holstein publish corruption reports with case descriptions of corruption cases (not necessarily foreign bribery).
[8] | *Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements under Sec. 153a CCP, such as the reasons why they were used in a specific case and the arrangements' terms.*

described in the Questionnaire, to facilitate bribery payments, companies employ middle men in the form of intermediaries, consultants, notaries or lawyers to handle large multinational deals. Although this group of professionals is included in Sec. 2 of the German MLA and obligated to report suspicious transactions (Sec. 43 MLA), only very few do so. Whereas financial institutions submitted 35.038 suspicious transaction reports in 2016, professionals from the non-financial sector only filed 249[9]. Yet, these professionals may well come across indications of suspicious transactions relevant for detecting money laundering and foreign bribery. Their regulation by the Länder is uneven and so they remain largely unchecked. Therefore, Transparency Germany demands a comprehensive reassessment and reform of MLA compliance measures in the non-financial sector as well as more resources and experts dedicated to their oversight.

As further described in the text, there is significant evidence that offshore companies are a major tool to facilitate foreign bribery payments and a major obstacle to investigations. Without international automatic exchange on beneficial ownership information and public access to beneficial ownership registries this issue cannot be resolved. Therefore, Transparency Germany welcomes that the 5th Directive, as agreed in negotiations between the European Parliament and the Council, will provide public access to beneficial ownership registers[10] by the end of 2019 and improve data exchange.

SQ31 Prosecutorial independence

Regarding SQ31 related to "any authority of the executive branch to direct the opening, closure or continuance of an investigation or prosecution", the Government points to the GRECO evaluations. GRECO's initial recommendation was to abolish the right of Ministers of Justice to give instructions in individual cases. Transparency Germany agrees with this recommendation. The right to give instructions compromises the principle of mandatory prosecution. It is not even necessary. Internal supervision is sufficient to ensure that prosecutors follow the law. Additional conditions as outlined by GRECO to ensure transparency and fairness have, for example, been enacted by *Schleswig-Holstein* (Sec. 65 of the Law Implementing the Courts Constitution Law). These conditions would require that the instruction be given in written form and be communicated to the President of the Parliament. In its comments on the draft law, Transparency Germany noted that only formal instructions would be covered. Informal influencing of decisions would still be possible. The Minister could, for example, make a suggestion to the Chief Public Prosecutor, who could turn this into an internal instruction, given to the prosecutor in charge of an investigation during an internal discussion about the factual and legal situation. Such discussions with supervisors are recorded only in the reference file, not the official file. Neither courts, nor defense attorneys, nor complainants have access to reference files.

33. Confiscation

Transparency Germany welcomes the reform of confiscation in criminal proceedings. Far-reaching changes of provisions on asset recovery were enacted, aimed at simplifying confiscation and improving the rights of victims. The new rules will make it easier to fight crime, in particular organized crime, economic crime and corruption. Their implementation will, however, increase the workload of courts, prosecutors and police, which are already overextended. Additional training will also be necessary. But the Government expects that simplification of confiscation will increase revenues, which in turn could be used to cover the costs of additional human resources. Transparency Germany had indicated in its comments on the draft legislation that it would monitor the implementation of the law and in particular the adequacy of human resources. To this effect, letters were sent to all *Länder* asking them for details on budgetary provisions.

---

[9] | (p. 8); https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/FIU/Jahresberichte/fiuJahresbericht2016.pdf?__blob=publicationFile&v=4

[10] | https://www.transparency.de/aktuelles/detail/article/gesetzesentwurf-zur-eu-geldwaescherichtlinie-transparenzregister-lueckenhaft/

SQ38.1 Federal corruption register (Wettbewerbsregister)

Transparency Germany welcomes new legislation establishing a federal register of companies involved in corrupt activities. The present law requires a final conviction for inclusion in the register. Transparency Germany believes this threshold to be too high, because proceedings can take a long time (cf. answer to SQ33.3). It should be sufficient that the evidence shows that there is no reasonable doubt of a serious criminal activity on the part of the company.

39. Corporate liability

As part of its 18 demands, Transparency Germany is asking for legislation to impose liability of legal persons under the Criminal Code. At present liability is imposed under the Regulatory Offenses Act. It has a limit for fines of 10 Million Euros, which is too low and therefore not dissuasive. In addition, the Act gives prosecutors discretion on whether to start an investigation of a legal person. With regard to natural persons, the prosecutor has to investigate if there is an initial suspicion (Anfangsverdacht). Also, there is discretion on whether to impose a fine or not. Transparency Germany hopes that legislation on criminal liability be part of a coalition agreement of the new government and be implemented, unlike the respective provisions of the coalition agreement of the previous government.