



**DIRECTORATE GENERAL OF HUMAN RIGHTS
AND LEGAL AFFAIRS
DIRECTORATE OF MONITORING**

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Second Evaluation Round

Compliance Report on Germany

Adopted by GRECO
at its 33rd Plenary Meeting
(Strasbourg, 29 May-1 June 2007)

I. INTRODUCTION

1. GRECO adopted the Second Round Evaluation Report on Germany at its 24th Plenary Meeting (1 July 2005). This report (Greco Eval II Rep (2004) 10E) was made public by GRECO, following authorisation by the authorities of Germany, on 6 July 2005.
2. In accordance with Rule 30.2 of GRECO's Rules of Procedure, the authorities of Germany submitted their Situation Report (RS-report) on the measures taken to implement the recommendations on 29 December 2006.
3. In accordance with Rule 31.1 of GRECO's Rules of Procedure, the Rapporteurs appointed for the compliance procedure were Mr Richard M. ROGERS on behalf of the United States of America and Ms Helena LIŠUCHOVÁ on behalf of the Czech Republic. The Rapporteurs were assisted by the GRECO Secretariat in drafting the Compliance Report (RC-Report).
4. The objective of the RC-Report is to assess the measures taken by the authorities of Germany, to comply with the recommendations contained in the Evaluation Report.

II. ANALYSIS

5. It was recalled that GRECO in its Evaluation Report addressed six recommendations to Germany. Compliance with these recommendations is dealt with below.

Recommendation i.

6. *GRECO recommended to adopt appropriate freedom of information legislation and put in place administrative measures facilitating access to information by the public in accordance with such legislation.*
7. The authorities of Germany report that at the federal level the Freedom of Information Act (*Informationsfreiheitsgesetz*, hereafter IFG) entered into force on 1 January 2006. Section 1 of this Act specifies that "everyone is entitled to official information from the authorities of the Federal Government in accordance with the provisions of this Act". Official information in turn is defined in Section 2 IFG as "every record serving official purposes, irrespective of the mode of storage", with the exception of "drafts and notes which are not intended to form part of a file".¹ The IFG (Sections 3 to 6) provides a closed list of exceptions to the general rule on access to information, which includes situations in which disclosure of the requested information would have detrimental effects on international relations, security interests and/or public safety. The IFG (Section 7, paragraph 5) further stipulates that requested information is to be provided without delay and within 1 month at the latest. The IFG does not specify the amount of fees and expenses that may be charged, but instructs (Section 10, paragraph 2) that this cannot be so much that it would lead to the situation that information could no longer be claimed effectively. In all cases in which applications to access information have been refused, the applicant may lodge an administrative appeal. In addition, the IFG (Section 12) provides that anyone who considers that his/her right to access to information has been violated may lodge a complaint with the Federal Commissioner for Freedom of Information. An appeal to the Commissioner is without prejudice to the possibility of filing an administrative appeal.

¹ Which records form part of a file is regulated by the guidelines for handling and managing records in the Federal Ministries (Richtlinie für das Bearbeiten und Verwalten von Schriftgut in den Bundesministerien).

8. The German authorities furthermore report that to ensure an effective implementation of the IFG and to raise awareness on access to information, the federal government has issued press releases, published information on the Internet, held seminars and conducted regular exchanges of experience and information within and between federal authorities. In addition, the Federal Ministry of the Interior has developed guidelines on the requirements of the IFG and how applications made under this act are to be processed. Finally, the Federal Ministry of the Interior has issued a schedule of fees establishing how much can be charged for the provision of information pursuant to the IFG.
9. At the level of the *Länder*, the German authorities report that laws on freedom of information along the lines of the IFG have been adopted by a further number of *Länder* (including Bremen, Hamburg, Mecklenburg-Western Pomerania and Saarland)², which are often based on the federal IFG or refer to it.
10. GRECO takes note of information provided. It commends the German authorities for the adoption of the act on access to information and the measures taken to support implementation of this act. It notes with satisfaction that under the new law a person no longer has to demonstrate a personal or legal interest in the requested information. GRECO furthermore encourages the German authorities to verify that the fees, which have been specified in a subsequent regulation, do not impede on the public's right to information in practice.
11. GRECO concludes that recommendation i has been implemented satisfactorily.

Recommendation ii.

12. *GRECO recommended to introduce clear rules/guidelines for situations where public officials move to the private sector before they retire, in order to avoid conflicts of interest.*
13. The authorities of Germany report that, as is already mentioned in the Second Round Evaluation Report (paragraph 36), the Act on Federal Civil Servants (*Bundesbeamtengesetz*, hereafter *BBG*) obliges retired civil servants and former civil servants who receive pension payments to report, during a period of 3 to 5 years, any employment they intend to engage in if such employment is related to their former duties in the civil service. If there is any reason to fear that official interests will be compromised by this employment, such employment is prohibited. A similar provision already existed at the level of the *Länder* (paragraph 42a of the *Beamtenrechtsrahmengesetz* or *BRRG*), and has now also been included in the draft Bill to Regulate the Law governing the Status of Civil Servants in the *Länder* (Civil Servants Status Act or *Beamtenstatusgesetz*, hereafter *BeamtStG*).³
14. The German authorities state that until now they have not seen any reason to extend these regulations to former civil servants who do not receive pension payments. Civil servants who leave the civil service by their own choice before retirement lose their civil service pension rights. A move to the private sector is therefore financially disadvantageous and rarely occurs. It is furthermore considered that persons no longer in receipt of financial support from their former (public sector) employer must for constitutional reasons be given a wider opportunity to search for

² As was indicated in the Second Round Evaluation Report (paragraphs 28 and 44), Berlin, Brandenburg, North-Rhine Westphalia and Schleswig-Holstein had already adopted legislation enabling public access to information on administrative procedures without the need to invoke any legitimate interest.

³ This bill was approved by the government in November 2006, but has not been adopted by Parliament yet]. It is planned to enter into force in 2007 after the conclusion of the legislative process.

other employment in their field of expertise, including in the private sector, than those who continue to receive pension payments from their former (public sector) employer. Nevertheless, at the federal level, a (clarifying) draft amendment to Section 70 *BBG*, was approved by the government in May 2006. If adopted as foreseen, this amendment will provide that “a civil servant may not, even after termination of his/her employment as a civil servant, request, receive, or accept the promise of any rewards, gifts or other advantages, either for him/herself or a third party, in relation to his/her official position”. An employment contract would also be considered to be an advantage⁴ within the meaning of this provision, as it might give rise to (the appearance of) a conflict of interest. It would therefore be prohibited for a civil servant to accept such employment. Exception to the prohibition can only be made with the consent of the highest level of administrative authority of the civil servant’s (former) employment. A similar provision has been included in Section 43 of the abovementioned draft *BeamtStG* for civil servants employed in the *Länder*. It is foreseen that (former) civil servants who would violate (draft) Section 70 *BBG* or (draft) Section 43 of the *BeamtStG* will be required to hand over to their (former) public sector employer that which was obtained in violation of this provision. Further details are regulated in the administrative regulation prohibiting acceptance of gratuities and gifts in the Federal Administration, which imposes a duty to report any offer of such employment if this employment is related to the previous official activity. Similar regulations exist at the level of the *Länder*.

15. In addition, official interests are protected by provisions, both in the legislation on federal civil servants and as regards those employed at the level of the *Länder*, on the duty of (former) civil servants to maintain secrecy concerning matters about which they have obtained knowledge through their official duties.
16. Finally, the German authorities report that, for public employees at the federal level, similar provisions on secrecy, accepting gifts (and other advantages) and reporting offers of advantages to the employer are included in Section 3 of the Collective Agreement for the Public Service (*TVöD*).
17. GRECO takes note of the information provided. GRECO would like to recall that it already noted in its Second Round Evaluation Report the existence of regulations on retired civil servants taking up employment which was linked to their previous public employment, the position of the German authorities that leaving the civil service before retirement would be rare and that everyone would have a “fundamental right to take up employment”, as well as the existing professional secrecy regulations, which require civil servants to maintain secrecy on matters on which they have received knowledge in the exercise of, or in relation to, their official duties.
18. Besides what has already been reported on this matter in the Second Round Evaluation Report, it now appears that there are guidelines for civil servants (both at federal level and the level of the *Länder*) which oblige them to report any offer of employment, if this employment is related to their official duties. Furthermore, the German authorities intend to include in the relevant legislation a prohibition for civil servants and former civil servants, at both the federal level and the level of the *Länder*, to accept an advantage or the promise of an advantage, which reportedly includes employment offers, if this is in relation to their official duties. Although GRECO welcomes both this (draft) prohibition and the guidelines on reporting offers of employment, it is not convinced

⁴ Pursuant to Section 70 *BBG*, civil servants were already prohibited - even after they left the civil service – from accepting rewards and gifts in relation to their official duties. The term ‘advantage’ has now also been included in (the proposed amendment to) Section 70 *BBG*, in line with the wording used in the Criminal Code, to be able to refer to the court decisions that have been made in relation to the term ‘advantage’ of the Criminal Code. According to these court decisions an advantage includes an offer of employment.

that this sufficiently addresses actual or potential conflicts of interest arising from situations where civil servants move to the private sector. GRECO has some doubts, in particular, about the enforceability of this (draft) provision in the *BBG* and *BeamtStG* and whether this indeed covers employment in the private sector, as the stipulation, that - in case the (former) civil servant breaches this provision - s/he is to hand over that what was obtained to his/her (former) public service employer, suggests an advantage of a more tangible nature than an offer of employment or an employment contract.

19. Finally, as regards public officials who do not have the civil servants' status, it appears that provisions on official secrecy, non-acceptance of advantages in relation to official activities and the reporting of offers of advantages already exist. Again, as already stated above with regard to civil servants, GRECO is not convinced that this sufficiently addresses actual or potential conflicts of interest arising from situations where public officials look for or take up employment in the private sector. In this regard, it should perhaps also be noted that actual or potential conflicts of interest created by the prospect of employment in the private sector may be more of a problem in case of public officials who do not have civil service status, as it might well not be as rare for them as it apparently is for civil servants to leave the public service to take up employment in the private sector before their retirement. In view of the above, GRECO considers that a more tailored and – as required by the recommendation - clear regulation would be appropriate.
20. GRECO concludes that recommendation ii has been partly implemented.

Recommendation iii.

21. *GRECO recommended to ensure that public officials, in addition to the existing system of reporting suspicions of corruption in public administration to the hierarchical superior or to the “contact persons for corruption prevention”, have also the possibility to report suspicions of corruption directly to the competent law enforcement authorities – i.e. even without previously informing their superior.*
22. The authorities of Germany report that an amendment to the *BBG* (*Bundesbeamtengesetz*) was approved by the government in May 2006. If adopted as foreseen, it will provide that the obligation to maintain secrecy shall not apply to reporting suspicions of corruption to a higher authority or law enforcement authority, thus enabling civil servants at the federal level to report directly to law enforcement authorities. It is expected that the amendment to the *BBG* will enter into force in 2007, after the legislative process has been completed.
23. As regards the level of the *Länder*, the German authorities report that a corresponding regulation is included in the draft legislation to regulate the status of civil servants in the *Länder*, which was approved by the government in November 2006. If adopted as foreseen, Section 38 of the *BeamtStG* will provide that the official obligation for civil servants to maintain secrecy concerning matters on which they have received knowledge in the exercise of, or in relation to, their official duties shall not apply to suspicions of corruption reported to a higher authority, law enforcement authority or another authority determined by *Länder* law.
24. The German authorities furthermore report that other employees in the public service already have the possibility to report suspicions of criminal offences (including corruption) directly to law enforcement authorities, on the basis of existing regulations in the labour law, in particular sections 626 and 612a of the civil code, section 1 of the termination protection law (*Kündigungsschutzgesetz*) and article 2 (1), in connection with article 20 (3) of the constitutional

law, as interpreted by the Federal Labour Court⁵ and the Federal Constitutional Court⁶. On the basis of this, there is a right to report suspicions of criminal offences including corruption offences by the employee in good faith, if the report of the suspicion is not a disproportionate reaction towards the employer.

25. GRECO takes note of the information provided. As the legislation allowing all public officials to directly report their suspicions of corruption to the competent law enforcement authorities, without informing their superior, has not entered into force, GRECO can at this point not yet conclude that recommendation iii has been fully complied with.
26. GRECO concludes that recommendation iii has been partly implemented.

Recommendation iv.

27. *GRECO recommended to introduce legal provisions establishing that a person who has been convicted for a corruption offence, at least those categorised as serious offences, can be disqualified from acting in a leading position in legal persons.*
28. The authorities of Germany report that the question whether the possibility of disqualifying managing directors of limited liability companies (*Gesellschaft mit beschränkter Haftung – GmbH*) and members of the management board of public limited companies (*Aktiengesellschaft – AG*) should be expanded to include certain offences of general criminal law (including fraud, criminal breach of trust and corruption) has been extensively assessed within the framework of the planned reform of the law on limited liability companies. It was however concluded that constitutional reservations exist against elements for disqualification that already apply in the cases of a conviction based upon provisions of general criminal law. Prohibiting someone from carrying out a certain profession, as regulated in section 6, paragraph 2, of the law on limited liability companies (*GmbHG*) and Section 76, paragraph 3 of the law on public limited companies (*AktG*), solely on the basis of a conviction for a criminal offence under the general criminal law, for 5 years independently of the severity and way in which the offence was committed may be disproportionate, in particular as the commission of the criminal offence in question does not necessarily have a close connection with the management activities.
29. In addition, the German authorities report that Section 70 of the Criminal Code already contains the possibility of imposing a prohibition on engaging in a certain profession. This sanction can be imposed if the offender is convicted of an unlawful act, committed by abusing his/her profession or trade or in gross violation of the duties associated therewith. This sanction may thus also be imposed for corruption offences, if the corruption offence represents a gross violation of duties or is committed by abusing one's profession or trade. This 'disqualification sanction' can be imposed for a period of 1 to 5 year, if the court believes that the offender by further engaging in his/her profession, branch of profession, occupation, trade or branch of trade, s/he will commit serious unlawful acts of the type indicated, and may even be permanent if the court expects that the statutory maximum period will not suffice to avert the danger posed by the offender. This prohibition also includes the exercise of management functions within a legal person, if the business purpose is completely or partially consistent with the subject matter of the prohibition (cf. Section 6, paragraph 2, *GmbHG* and Section 76, paragraph 3, *AktG*) and may thus, for example, entail that the convicted person may not become the managing director of a corresponding limited liability company or a member of the management board of a public limited company. The

⁵ Decision from 3 July 2003 - 2 AZR 235/02 – NZA 2004, 427.

⁶ Decision from 25 February 1987 – 1 BvR 1086/85 – NJW 1987, 19292.7.2001 - 1 BvR 2049/00 - NJW 2001, 3474.

Criminal Procedure Code (Section 132a) also provides for the possibility to impose a provisional prohibition on engagement in a certain profession, so that the conclusion of the criminal proceedings does not need to be awaited.

30. GRECO takes note of information provided. It would have appreciated a clarification from the German authorities of their conclusion on the disproportionality of a 'disqualification sanction' and in particular why this would always be imposed for 5 years, independently of the severity and the way the offence was committed. Notwithstanding, it would appear that legal provisions providing for the possibility of disqualifying persons from acting in a leading position in a legal person were already in place at the time of adoption of the Second Round Evaluation Report. Indeed, Section 70 of the Criminal Code is mentioned briefly in the description of available sanctions in the Second Round Evaluation Report (paragraph 57), where it is stated this sanction "may exceptionally apply". Although GRECO would have welcomed further information on whether the sanction provided by Section 70 CC has ever been imposed on a member of the management board of, for example, an AG and how this sanction would be enforced against persons in a leading position in a legal person, it accepts that a provision allowing offenders of serious corruption offences to be disqualified from acting in a leading position in a legal person is in fact in place, which is what was required by the recommendation.
31. GRECO concludes that recommendation iv has been dealt with in a satisfactory manner.

Recommendation v.

32. *GRECO recommended to examine the use of corporate sanctions with a view to identifying and remedying disparities in the application of the relevant provisions in the Law on Administrative/Regulatory Offences and, if appropriate, to issue guidelines for public prosecutors concerning a more uniform application of the law.*
33. The authorities of Germany report that, to ensure the uniform application of the provisions on liability of legal persons, an amendment to the Guidelines for Criminal and Administrative Fine Proceedings (*RiStBV*) was adopted. The amended guidelines entered into force on 1 August 2006 and prescribe that, if the accused is part of senior management of a legal person or association, public prosecutors should examine in particular if – in addition to the prosecution of the natural person – a regulatory fine, within the meaning of Section 30 of the Law on Administrative/Regulatory Offences (*OWiG*) and Section 444 of the Code of Criminal Procedure, should be imposed on the legal person or association. The *RiStBV* further prescribes that, when appropriate, the prosecutor is to submit a motion to have the legal person or association participate in proceedings and to determine an appropriate regulatory fine against them, taking into account the legal person's financial position and the economic advantage it has gained by the offence⁷. The *RiStBV* stipulate that participation of the legal person or association in the proceedings and imposition of a regulatory fine on them "should be considered primarily for economic crimes, including corruption and environmental offences" (no. 180a *RiStBV*).
34. GRECO takes note of the information provided. Although it does not seem that any analysis on or examination of the use of corporate sanctions preceded the amendment to the Guidelines for Criminal and Administrative Fine Proceedings (*RiStBV*), GRECO welcomes the adoption of the

⁷ If the accused is a member of the senior management of a legal person or association and if the imposition of a regulatory fine against such a person or association is to be considered (no. 180a), the economic advantage gained by the legal person should, pursuant to number 15, paragraph 3, of the *RiStBV* be investigated by the public prosecutor during the preliminary proceedings.

amended guidelines. It hopes that these guidelines will ensure a more uniform application of corporate sanctions under the Law on Administrative/Regulatory Offences (OWiG).

35. GRECO concludes that recommendation v has been implemented satisfactorily.

Recommendation vi.

36. *GRECO recommended to consider amending Section 30 (2) no. 1 of the Law on Administrative/Regulatory Offences with a view to ensuring that effective, proportionate and dissuasive pecuniary sanctions can be imposed on legal persons involved in corruption.*
37. The authorities of Germany report that, as the maximum fine that can be imposed on legal persons was doubled in 2002, it is at present not considered necessary to further increase the maximum amount that can be imposed. This conclusion was reached as the result of on-going considerations through the Federal Ministry of Justice. The German authorities state that in connection with the involvement of the *Länder* with the draft law for the implementation of the Criminal Law Convention on Corruption (ETS 173)⁸ and the UN Convention against Corruption, the *Länder* have not expressed any concerns about the level of the fines which can be imposed on legal persons. Moreover, there have been no indications that the described statutory possibility for sanctioning and confiscating economic advantages gained through acts of bribery are insufficient. The German authorities furthermore recall that the maximum administrative fine is €1 million, in case of an intentional criminal offence. The maximum fine can however be exceeded in order to take away the economic advantage gained by the act. The administrative fine and the amount of economic advantage to be handed over are independent of each other and may thus add up to a total of more than €1 million. The German authorities furthermore point out that cases of serious corruption in which large companies are involved would be difficult to conceive without an economic advantage. The proof required to calculate this economic advantage is reportedly not subject to very strict requirements; it may be estimated.
38. GRECO takes note of the information provided. As regards the arguments of the German authorities for not amending the Law on Administrative/Regulatory Offences, it would like to point out that the “confiscation” of the economic advantage derived from a criminal offence cannot be considered a sanction, but is simply the taking of what the legal person was not entitled to in the first place. It is therefore merely a ‘corrective’ measure, which aims to put the legal person back in the position it would have been in had the offence not been committed. Furthermore, GRECO wishes to recall that the GET understood that, conceivably, there were cases in which the financial benefit gained by legal persons involved in corrupt activities would be difficult to prove, leading GRECO to believe that the standard of proof required to calculate the economic advantage may not be as light as the German authorities make it out to be. As regards the consideration which has been given to amending the Law on Administrative/Regulatory Offences, GRECO would have appreciated further information on this, in particular whether any analysis of sanctions imposed on legal persons has been carried out and whether prosecutors handling cases against legal persons have in any way been involved in these considerations. Nevertheless, GRECO accepts that the German authorities have considered amending Section 30 (2) no. 1 of the Law on Administrative/Regulatory Offences, as is required by the recommendation.

⁸ The draft law to amend the Criminal Code to implement, *inter alia*, the Criminal Law Convention on Corruption (ETS 173) and the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), was approved by the Federal government on 30 May 2007.

39. GRECO concludes that recommendation vi has been dealt with in a satisfactory manner.

III. CONCLUSIONS

40. **In view of the above, GRECO concludes that Germany has implemented satisfactorily or dealt with in a satisfactory manner two thirds of the recommendations contained in the Second Round Evaluation Report.** Recommendations i and v have been implemented satisfactorily and recommendation iv and vi have been dealt with in a satisfactory manner. Recommendations ii and iii have been partly implemented.
41. GRECO invites the Head of the German delegation to submit additional information regarding the implementation of recommendations ii and iii by 30 November 2008.
42. Finally, GRECO invites the authorities of Germany to translate the report into the national language and to make this translation public.