



8 September 2016

## FOURTH EVALUATION ROUND

Corruption prevention in respect of members of parliament, judges and prosecutors

### Report on the measures taken to implement the recommendations addressed to Germany by GRECO in its evaluation report of 10 October 2014

In its evaluation report of 10 October 2014, the Council of Europe's Group of States against Corruption (GRECO) issued a total of eight recommendations to Germany on prevention of corruption with respect to members of parliament, judges and public prosecutors, and invited the Federal Government to report by 30 April 2016 on measures to implement the recommendations.

The Federal Government is now able to report on the following measures to implement the recommendations:

#### I. Regarding members of parliament

On 3 December 2014, the Federal Minister of Justice and Consumer Protection forwarded a letter to the President of the German Bundestag, with which he forwarded GRECO's evaluation report and informed of the recommendations issued with respect to Germany.

The President of the German Bundestag responded to the Federal Minister of Justice and Consumer Protection on 14 March 2016. The letter is enclosed with this report as Annex 1.

It confirms that the following measures have been taken to implement the recommendations:

#### Recommendation I.

*GRECO recommended 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 (paragraph 33 of the report).*

The GRECO recommendations were deliberated by the Council of Elder's Commission for the Legal Status of Parliamentarians in its meeting on 27 March 2015. The minutes of the meeting show that the topic of the transparency of the legislative process would be addressed by the parliamentary groups in the Committee for Scrutiny of Elections, Immunity and the Rules of Procedure, and possibly in the Internal Affairs Committee. An excerpt of the minutes of the meeting is attached as a part of Annex 1.

The representatives of the Internal Affairs Committee discussed the GRECO recommendations at their meeting on 27 January 2016. The Committee for Scrutiny of Elections, Immunity and the Rules of Procedure addressed the GRECO recommendations on 24 February 2016, and notified that the transparency of the parliamentary process would continue to be the subject of political debate, both in the plenary sessions and in committees. The correspondence by the chairpersons of the two committees is attached as part of Annex1.

On 18 February 2016, the German Bundestag's Committee of Elders framed the rules with regard to the access of interest groups to properties of the German Bundestag in a more restrictive manner. That decision is included as a part of Annex 1. It states that identification cards allowing access to the building will be issued only to interest group representatives from associations that are registered pursuant to Annex 2 to the Rules of Procedure of the German Bundestag and have a representative office at the seat of the Bundestag. The maximum number of identification cards per association was reduced from five to two. Representatives from interest groups, companies or other organisations that are not registered on the list of associations will therefore no longer receive access to the building.

Based on the Freedom of Information Act, anyone may receive information from the German Bundestag regarding the number of identification/access cards issued to association representatives and the names of those organisations (cf. Berlin Administrative Court, judgment of 18 June 2015 – VG 2 K 176.14).

#### **Recommendation ii.**

*GRECO recommended (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 (paragraph 55 of the report).*

The recommendation was considered on 27 March 2015 by the Committee of Elder's Commission for the Legal Status of Parliamentarians. The minutes of the meeting show that the topic of disclosure of conflicts of interest would be addressed by the parliamentary groups in the Committee for Scrutiny of Elections, Immunity and the Rules of Procedure, and possibly in the Internal Affairs Committee. An excerpt of the minutes of the meeting is attached as a part of Annex 1.

The representatives of the Internal Affairs Committee discussed the GRECO recommendations at their meeting on 27 January 2016. They determined that the responsible bodies needed more time to consult on the recommendations. The Committee for Scrutiny of Elections, Immunity and the Rules of Procedure discussed the GRECO recommendations on 24 February 2016. The correspondence by the chairpersons of the two committees is attached as part of Annex 1.

### **Recommendation iii.**

*GRECO recommended (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) (paragraph 81 of the report).*

The recommendation was considered on 27 March 2015 by the Committee of Elder's Commission for the Legal Status of Parliamentarians. The Commission rejected the idea of extending disclosure requirements to assets and liabilities, as well as that of extending them to family members. An excerpt of the minutes of the meeting is attached as a part of Annex 1.

The Committee for Scrutiny of Elections, Immunity and the Rules of Procedure discussed the recommendation on 24 February 2016. A majority of the Committee members did not wish to follow the recommendation. Specifically, the members stated that all parliamentary groups had constitutional reservations against a renewed extension of existing disclosure requirements, which had been expanded in 2013 following lengthy debate, to include

information on significant assets or liabilities, as well as on the financial situation of family members. In the opinion of the committee members, this type of legal change would unjustifiably interfere with the free mandate, as well as with the fundamental rights of third parties. The letter from the committee chair dated 23 February 2016 to the President of the Bundestag is included as a part of Annex 1.

#### **Recommendation iv.**

*GRECO recommended 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 (paragraph 96 of the report).*

The Commission of the Council of Elders on the Legal Status of Parliamentarians addressed the recommendation on 27 March 2015. An additional position has been applied for to the Bundestag administration to improve supervision and enforcement of the rules of conduct.

## **II. Regarding judges**

#### **Recommendation v.**

*GRECO recommended i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments and/or practical examples, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all judges and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling both for professional judges and lay judges. The Länder are to be invited to contribute to such a process (paragraph 148 of the report).*

The German judiciary is a bastion of high ethical standards in all areas. In accordance with the historically established structure of German law, the rules governing these judicial ethics are embedded within provisions on the respective matter rather than being collected in a separate law. Therefore, the ethical standards and requirements of German law for the administration of justice and the role of the judiciary, for the conduct of court proceedings, for regulating judicial service, and for assessing secondary activities and employment, are to be

found in pinpointed provisions in the respective pieces of legislation governing each of these areas as a whole. The same applies for public prosecutors.

These ethical and professional standards, as governed in the respective factual context and therefore "scattered," have now been collated into a clear display consistent with the recommendation (Annex 2 Compendium, German only). The Compendium includes not only rules at the level of constitutional and federal law; rather, it encompasses the *Länder* level as well and covers questions of conduct in office, conflicts of interest, secondary activities, bans on accepting rewards, gifts or other benefits, and corruption prevention in general. The *Länder* participated in the process by forwarding the rules valid at the *Land* level. The Compendium has become quite extensive due to the necessary involvement of all 16 of the federal *Länder* and the rules they have issued based upon their competence as provided by Germany's constitution. Nonetheless, it is easy to handle because of its clear structure. For example, the reader can look up in a targeted manner the rules which apply to him/her based upon the *Land* in which he/she works. See the easy to handle online version on the Ministries' website: [PDF](#).

The Compendium also contains explanatory comments and/or practical examples. It should be taken into account that, because the rules on ethical and professional standards are placed within their respective factual context, these are not abstractions; rather, they provide specific instructions for taking action in concrete factual situations. Furthermore, both at the federal and *Länder* levels there are a large number of various administrative provisions and guidelines, which generally include comprehensive codes of conduct and which also include a number of example cases and explanations of typical factual constellations, in the fields of corruption, sponsoring and conflicts of interest (cf., for example, the Code of Conduct against Corruption and Guidelines for Superiors and Authority Leadership as annexes to the Guidelines of the Federal Government on the Prevention of Corruption in the Federal Administration of 30 July 2004 [pp. 47-57 of the Compendium; an English translation is included as sub-annex 2 to Annex 2 (Rules on Integrity, pp. 14-26)], or explanations and examples regarding the ban on accepting gifts in the federal administration [pp. 60-66 of the Compendium; an English translation is included as sub-annex 2 to Annex 2 (Rules on Integrity, pp. 38-44)]. There are comparable rules in the *Länder* (cf. e.g., Bavarian guidelines on combating corruption, and Bavarian sponsoring guidelines (pp. 153-167 of the Compendium)).

Furthermore, additional explanations or comments have been added in places where it appeared helpful for aiding understanding of the rules and/or the Compendium (e.g., pages 177-187 and others).

As such, the Compendium, with its rules portraying concrete factual situations and its many examples and explanations, offers judges and public prosecutors valuable orientation assistance in matters involving conflicts of interests and associated issues.

Also, German judges and public prosecutors address often and in detail a wide range of subjects dealing with professional ethics, in particular in events organised by existing professional organisations: in addition to initiatives by the *Länder* (e.g., "Schleswig or Mainz Ethics Roundtable"), the German Association of Judges (*Deutscher Richterbund - DRB*) maintains a "Judicial Ethics Network" for all *Länder*. The DRB has published two discussion papers ("Judicial Ethics in Germany – Theses on the Discussion of Judicial and Prosecutorial Professional Ethics in the German Association of Judges" and "Judicial Ethics in Practice – Work Materials on the Discussion of Judicial and Prosecutorial Professional Ethics in the German Judges' Association," which contain a collection of example cases from judicial practice. Correspondingly, the affected professional associations were also invited to contribute to the implementation process of the recommendations.

This comprehensive overview of existing ethical and professional standards, which has been compiled for the first time, has been made available in suitable form both to the public and to judicial practitioners. It has been forwarded to the federal courts, the federal prosecutor general's office, and the *Land* justice administrations with the request to make it available to judges and public prosecutors; it has also been published on the Internet site of the Federal Court of Justice and Consumer Protection [PDF](http://bmjv.de/Ministerium/Fachpublikationen) (bmjv.de | Ministerium | Fachpublikationen).

With regard to implementation of the rules into practice, we are able to report that the existing rules governing ethical and professional standards and associated topics are the subject of targeted and multi-faceted advanced training measures. The German Judges' Academy (DRA), an advanced training facility for judges and prosecutors jointly operated by the federation and the *Länder*, is open to judges from all jurisdictions and public prosecutors throughout Germany; it regularly offers seminars, many with an interdisciplinary approach, which address the topic of ethical and professional conduct. Additionally, the *Länder* offer their own advanced training in this area. These events will continue to take place in the future and will therefore contribute to implementation of the rules contained in the Compendium. The Compendium will now serve seminar leaders as a helpful tool to carry out their events, in addition to providing helpful support to their participants. An overview of the advanced training measures and seminars offered on these topics is included as Annex 3 (practical measures).

Additionally, there are contact persons both at the federal and *Länder* levels for prevention of corruption whose work will also be aided by the Compendium and the information it contains.

**Recommendation vi.**

*GRECO recommended 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 (paragraph 159 of the report).*

The topic of secondary activities of federal judges has been raised several times. In addition to a meeting held with the Presidents of the superior federal courts, the topic was also discussed in Fall 2015 among the justice state secretaries of the Federation and the *Länder*. It became clear there that the legal situation varies greatly even in the Federation and among the *Länder*, and that given the federal structure of Germany, it would likely not be possible to achieve a uniform rule – even just among the *Länder*. The justice state secretaries have agreed to again raise the topic within the course of their 2016 autumn meeting.

Additionally, a review carried out by the Federal Ministry of Justice and Consumer Protection found that there is little room to further restrict the legal framework conditions with regard to secondary activities of federal judges:

- Given the already-existing instrument in this regard and the constitutional protection of freedom of opinion and academic freedom, there is little leeway for a further restriction of federal judges' rights to engage in secondary activities, in particular for extending the reasons to deny secondary activities not subject to prior approval.
- Reducing salaries due to other earned income in the private sector as a result of secondary activities would be problematic given the case law of the Constitutional Court on the subject of salaries. The Federal Administrative Court has held unconstitutional an obligation to hand over income earned due to secondary activities in the private sector.

Therefore, measures to promote more effective application of the law promise greater success.

Currently the Court of Audit (*Bundesrechnungshof*) is carrying out a review of side activities at a high-level federal court within the remit of the Federal Ministry of Justice and Consumer Protection. Possible measures with regard to the recommendation will be examined subsequent to this review.

### III. Regarding prosecutors

#### Recommendation vii.

*GRECO recommended (i) that consideration be given to abolishing the right of Ministers of Justice to give external instructions in individual cases; and, in case this right is not abolished, (ii) that further appropriate measures be taken to ensure that such instructions by Ministers of Justice carry with them adequate guarantees of transparency and equity and – in case of instructions not to prosecute – are subject to appropriate specific control. The Länder are to be invited to contribute to such a reform process (paragraph 205 of the report);*

The recommendation to abolish the justice ministers' right to issue external instructions in individual cases was reviewed extensively. Germany's *Länder* were requested to take a position in writing on the recommendation and have done so. Also, the following professional associations and interest groups were invited by the Federal Ministry of Justice and Consumer Protection to state their position on the recommendation:

Deutsche Juristinnenbund e.V.<sup>1</sup>, Deutscher Richterbund e.V.<sup>2</sup>, Neue Richtervereinigung e.V.<sup>3</sup>, Deutscher Anwaltverein e.V.<sup>4</sup>, Bundesrechtsanwaltskammer<sup>5</sup>, Wirtschaftsstrafrechtliche Vereinigung e.V.<sup>6</sup>, Bundesverband ehrenamtlicher Richterinnen und Richter<sup>7</sup> und ver.di<sup>8</sup>.

Thereupon, the German Lawyers' Association (*Deutscher Anwaltverein e.V.*) and the Association on Financial and Economic Offences (*Wirtschaftsstrafrechtliche Vereinigung e.V.*), both registered associations, submitted an extensive statement detailing their positions.

The position statements of the *Länder* and the associations were evaluated and included in the review, taking into account the results of various talks that had previously been held with

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<sup>1</sup> German Female Lawyers' Alliance

<sup>2</sup> German Judges' Alliance

<sup>3</sup> New Judges' Association

<sup>4</sup> German Lawyers' Association

<sup>5</sup> German Federal Bar Association

<sup>6</sup> Association on Financial and Economic Offences

<sup>7</sup> Federal Alliance of Volunteer Judges

<sup>8</sup> United Service Industry Trade Union



the *Länder* on the topic of "right to issue external instructions in specific cases." Also included in the review were the results of a Federation-*Länder* Commission to analyse judicial autonomy in Europe, under the academic supervision of Prof. Dr. Albrecht ("Albrecht Commission"). From the perspective of the German justice system, the Albrecht Commission did not identify any fundamental need for reform. Discussions of the Albrecht Commission with representatives of other States have shown that, due to the many differing models of judicial self-administration in Europe, a uniform assessment of various justice models is not possible.

Against the background of the design of the system of criminal prosecution in Germany, reservations exist about completely abolishing the right to issue instructions.

Most of the *Länder*, which are responsible for the great majority of the justice system in Germany, advocated against abolishing the right to issue instructions. In addition to having constitutional reservations, the *Länder* see no need to act because in practice the right to issue external instructions is exercised either extremely rarely or not at all. The right to issue external instructions in specific cases is already limited by the *Legalitätsprinzip*, which in principle requires the public prosecutor's office to intervene if factual indications exist of any prosecutable offence (section 152 (2) of the Code of Criminal Procedure, see Annex 4). In cases where the law leaves no leeway for discretion and strictly requires a specific measure, divergent instructions are prohibited. Evidently unlawful instructions are punishable for the person issuing such instructions (sections 344, 258a of the Criminal Code, see Annex 4) and are not binding on the person instructed. Following such instructions would also place him/her at the risk of criminal prosecution.

Abolishing the right to issue external instructions in specific cases would result in constitutional reservations as well: Pursuant to the principle of parliamentary control, there cannot be a complete exclusion of ministerial control in the area of criminal prosecution, and therefore there can likewise be no complete exclusion of the right to issue external instructions in specific cases. The respective justice minister is accountable to parliament for the actions of the public prosecutors' offices; this also applies to instructions – or the failure to issue instructions – in a specific case.

Against that background, we plan to take a different path and implement the recommendation by creating appropriate guarantees of transparency and fairness. Several *Länder* have already initiated measures in this regard. North Rhine-Westphalia, for example, has developed "Ten Guidelines on Exercising the Authority to Issue Instructions to the Public Prosecutor's Offices in North Rhine-Westphalia," with which the Justice Minister obligates himself as a general rule to refrain from making use of his authority to issue instructions in

pending investigation proceedings. The only exception to this is when the responsible public prosecutor general improperly refrains from intervening even if the prosecutor's office handles a case in a manner amounting to an error of law. However, according to the guidelines, such an instruction may be issued only in writing and is to be directed to the public prosecutor general, who checks its lawfulness before forwarding it to the prosecutor who has committed the error. This writing requirement, as well as the restriction that instructions may be issued only via the public prosecutor general, applies in Berlin as well. In Schleswig-Holstein, the "Act to Establish Transparency of Political Instructions to Officials from the Public Prosecutor's Offices" of 14 October 2014 governs, among other things, an obligation on the part of the judicial administration to notify the President of the Land Assembly of official instructions in specific cases.

Implementation at the federal level, taking into account the transparency rules in effect in other States, is currently under review.

#### **Recommendation viii.**

*GRECO recommended i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments targeted specifically at public prosecutors and/or practical examples, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all public prosecutors and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling for all public prosecutors. The Länder are to be invited to contribute to such a process (paragraph 226 of the report).*

This recommendation has been implemented along with recommendation v. In this regard, we refer to the statements made above.