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United Nations Office on Drugs and Crime

Country Review Report of the Federal Republic of Germany

Review by the Czech Republic and Denmark
of the implementation by Germany of articles 15 - 42 of Chapter III
“Criminalization and law enforcement” and
articles 44 - 50 of Chapter IV “International cooperation” of
the United Nations Convention against Corruption
for the review cycle 2010 - 2015

I. Introduction

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

II. Process

5. The following review of the implementation by Germany of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Germany, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from the Czech Republic and Denmark and Germany, by means of telephone conferences, e-mail exchanges and meetings on the margins of the Conference of States parties to the Convention and its subsidiary bodies and involving:

Denmark:

Mr Flemming Denker, Former Deputy State Prosecutor at the State Prosecutor for Serious Economic and International Crime, Denmark

Czechia:

Mr. Jiri Pavlik, Deputy to Prosecutor General, Prosecutor General's Office, Czech Republic

Ms. Julie Zelena, Chief Commissioner, Unit combating corruption and financial crimes, International Co-operation and Methodics Department, Czech Republic

UNODC Secretariat:

Ms Jennifer Sarvary Bradford, Crime Prevention and Criminal Justice Officer

6. A country visit, agreed to by the Federal Republic of Germany was conducted from 8 to 10 March 2016. All information and analysis are based on prevailing law and the situation at the time of the country visit.

III. Executive summary

Germany

1. Introduction: Overview of the legal and institutional framework against corruption of Germany in the context of implementation of the United Nations Convention against Corruption

Germany signed the Convention on 9 December 2003 and deposited its instrument of ratification with the Secretary-General on 12 November 2014. The Convention entered into force for Germany on 12 December 2014. In line with article 59, paragraph 2, of the Basic Law of 23 May 1949 (GG – the Constitution), the Convention is an integral part of federal law.

Germany is a federal parliamentary republic consisting of 16 constituent states (*Länder*). The division of legislative powers between the federation and the *Länder* is delineated in the GG. Legislative measures to implement international instruments to combat crime fall, in principle, under the exclusive legislative powers of the federation (arts. 70–74 of the GG). The present review focuses primarily on the implementation of the Convention at the federal level.

The country's legal framework against corruption includes the Criminal Code (StGB); the Code of Criminal Procedure (StPO); the Act on Regulatory Offences (OWiG); the Act on International Cooperation in Criminal Matters (IRG); the Federal Civil Service Act (BBG); the Civil Servant Legal Status Act (BeamtStG); the Federal Disciplinary Act (BDG); and the Act to Harmonize the Protection of Witnesses (ZSHG).

The federal authorities with relevant anti-corruption mandates include the Federal Criminal Police Office (BKA), the Ministry of Justice and Consumer Protection and the Federal Office of Justice. At the level of the constituent states, dedicated anti-corruption units have been established as specialized units within the public prosecutor's offices and the criminal police offices.

Germany is a member of the European Union, the Organization for Economic Cooperation and Development, the Group of States against Corruption of the Council of Europe, the Financial Action Task Force and other international organizations.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Active and passive bribery of national public officials is criminalized (sects. 331–336 of the StGB), and covers the elements of promising, offering, granting, demanding, allowing oneself to be promised and accepting an advantage. An advantage includes both material benefits (for which no threshold values exist)

and immaterial benefits (reasoning to the StGB [Bundestag printed paper No.7/550 p. 271] and case law of the Federal Court of Justice). A separate provision covers aggravating circumstances and sets out harsher penalties for particularly serious cases of bribery, such as those involving an advantage of great magnitude or the acceptance of bribes on a continuous basis (sect. 335 of the StGB). The bribery provisions cover omissions, lawful official acts and acts in breach of duty. Case law of the Federal Court of Justice has considered indirect bribery (benefits given/taken in return for the performance or omission of an act by officials) to fall under the scope of bribery offences. Third-party benefits are explicitly covered (sects. 331–334 of the StGB).

Gifts with a value of up to 25 euros can be accepted by public officials. Gifts with a greater value should be handed to the official's employing office (sect. 71 of the BBG; circular of 8 November 2004 on the ban on accepting rewards or gifts in the federal administration; sect. 331 of the StGB). Employers must be notified of all gifts. The term "public official" is defined in section 11 of the StGB and is generally in conformity with the Convention. Members of the Parliament and communal mandate holders are not considered public officials, but a separate provision governs their active and passive bribery (sect. 108e of the StGB). However, there is a discrepancy in that the sanctions applicable for bribery involving public officials is up to 10 years' imprisonment in serious cases, while for members of the Parliament, it is up to five years' imprisonment.

The recent Act on Combating International Bribery and the European Union Bribery Act consider bribery of foreign and European officials to be equal to bribery of German public officials (sect. 334 of the StGB).

Bribery of foreign public officials and officials of international organizations is criminalized (sects. 334, 335a and 108e of the StGB; the Act on Combating International Bribery). Facilitation payments to foreign public officials outside of Germany for the performance of lawful acts and not in violation of corresponding duties are not considered bribes. However, the threshold for assessing a breach of duty for the purpose of determining a foreign bribery offence is low and is meant to cover any payments made to influence a public official's discretion.

There is no stand-alone provision on trading in influence under German law, but such behaviour would fall under StGB sections 331–336, on bribery, section 266, on embezzlement and abuse of trust, and section 357, on incitement of a subordinate to the commission of offences. Donations to political parties are not permitted if "evidently made in the expectation of, or in return for, some specific financial or political advantage" (sect. 25 (2) No. 7 of the Act on Political Parties).

Bribery in the private sector for the purpose of obtaining unfair preference in the purchase of goods or commercial services is criminalized (sects. 299 and 300 of the StGB), and may be prosecuted at the request of the victim or at the prosecution's initiative where there is a special public interest (sect. 301 of the StGB).

Money-laundering, concealment (arts. 23 and 24)

Money-laundering is criminalized (sect. 261 of the StGB). Provisions on assistance after the commission of a crime (sect. 257 of the StGB), assistance in avoiding prosecution or punishment (sect. 258 of the StGB) and handling of stolen assets

(sect. 259 of the StGB) are also relevant. The list of predicate offences in section 261 of the Code follows a combined serious crime and list approach and includes offences under StGB sections 332 and 334, but not sections 331 and 333, resulting in most but not all Convention offences being covered. Predicate offences committed abroad are subject to dual criminality (sect. 261, para. 8, of the StGB). Self-laundering is criminalized in cases where the perpetrator or the accomplice

brings into circulation an object which is a proceed of an unlawful act and, when doing so, conceals its unlawful origin (sect. 261, para. 9, of the StGB).

Concealment of proceeds of crime is covered by the provisions on money-laundering (sect. 261 of the StGB) and the handling of stolen assets (sect. 259 of the StGB).

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Embezzlement and misappropriation of property in both the private and public sector are criminalized through provisions on unlawful appropriation (sect. 246 of the StGB), fraud (sect. 263 of the StGB) and embezzlement and abuse of trust (sect. 266 of the StGB). Abuse of functions is not reflected in a stand-alone provision, but is criminalized through sections 263 and 266 of the Code, which are not limited to acts intended to obtain an undue advantage for oneself or a third party. Instead, those sections require an element of damage to have occurred as a result of the abuse of trust. However, the wider scope of article 19, the article under review, is covered by reading the aforementioned provisions in conjunction with those on, inter alia, perverting the course of justice (sect. 339); intentionally or knowingly prosecuting innocent persons (sect. 344); demanding excessive fees (sect. 352); abuse of trust in the Foreign Service (sect. 353a); and breach of official secrets and special duties of confidentiality (sect. 353b).

Germany has considered criminalizing illicit enrichment, but has concluded that the reversal of the burden of proof cannot be implemented in German law due to it being contrary to the constitutional principle of the presumption of innocence.

Obstruction of justice (art. 25)

A number of StGB provisions relate to obstruction of justice, namely the provisions on false testimony (sect. 153), perjury (sect. 154), abetting false testimony or perjury (sect. 26), attempt to abet false testimony (sect. 159), resisting enforcement officers (sect. 113), procuring false testimony (sect. 160), causing bodily harm (sect. 223), using threats or force to cause a person to do, suffer or omit an act (sect. 240), threatening the commission of a felony (sect. 241), assistance in avoiding prosecution or punishment (sect. 258), and causing bodily harm while exercising a public office (sect. 340). A public official who forces someone to make a statement (sect. 343) and incitement of a subordinate to commit offences (sect. 357) are also criminalized, but are limited to cases in which the perpetrator is a public official.

Liability of legal persons (art. 26)

According to German law, criminal liability cannot be attributed to legal persons as such persons have no guilt (“societas delinquere non potest”). There is nevertheless an ongoing discussion as to whether to introduce criminal liability for legal persons. The administrative liability of legal persons is established under the Act on Regulatory Offences (OWiG). The sanctions applicable to legal persons under the Act include regulatory fines and confiscation. The liability of legal persons is triggered when the persons involved in the entities (as listed in sect. 30, para. 1, of the OWiG) commit a criminal or regulatory offence through which the legal person’s duties are violated or the legal person is or was intended to be enriched (sect. 30 in conjunction with sect. 130 of the OWiG). The natural person can nevertheless be charged independently of the legal person in accordance with sections 30 and 130 of the OWiG, as well as being fined (guideline 180a of the Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine). In addition to a regulatory fine, which carries an upper limit of 10 million euros, the legal person can also face confiscation of its illegally obtained assets and any benefits derived therefrom, for which there is no upper limit (sects. 17 and 30 of the OWiG; sects. 73 and 75 of the StGB). The

combination of fines and confiscation was deemed sufficiently dissuasive and effective. During the country visit the usefulness of additional guidelines concerning the prosecution of legal persons and the enhancement of the technical capacity of prosecutors in that area was noted.

Participation and attempt (art. 27)

Participation in corruption offences is covered by general provisions of the StGB on principals, abetting and aiding (sects. 25, 26 and 27). While attempt is punishable for all felonies (sect. 12 and sect. 23, para. 1), attempted misdemeanours are only punishable if the law explicitly prescribes so, as is the case for some bribery offences (sect. 331, para. 2, sect. 332, para. 1, and sect. 334, para. 2) and money-laundering (sect. 261, para. 3). Preparation is only punishable if the preparatory act is punishable in itself, such as in cases of conspiracy (sect. 30).

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Corruption offences are classified as felonies or misdemeanours in the StGB. Felonies are acts punishable by a minimum sentence of one year's imprisonment, while misdemeanours are punishable by a lower minimum term of imprisonment or by a fine (sect. 12 of the StGB). Nevertheless, it was noted that the provisions relating to the maximum sentencing for bribery of public officials amounted, in serious cases of passive bribery, to 10 years' imprisonment, while the maximum sentence for members of the Parliament was five years' imprisonment (sect. 335 in conjunction with sect. 108e of the StGB).

Judges, prosecutors and other public officials do not enjoy any special immunities or privileges. Members of the Federal Parliament are granted immunity from criminal prosecution during their mandate unless they are caught in *flagrante delicto* or the day following the commission of the offence (art. 46 of the GG). The Parliament can and normally does lift their immunity, with the exception of cases of insults of a political nature. In addition, since 1969 it has been standard practice for the Parliament to grant general permission to initiate preliminary investigations against its members for criminal offences, provided that the President of the Parliament has been informed. In addition, the Parliament has adopted the procedure of lifting immunity on the first day of each electoral term.

However, further specialized investigative measures, such as search, seizure and wiretapping, would require the consent of the Parliament and are, therefore, not possible without the parliamentarian's immunity being lifted. Although Germany clarified that the suspected member of Parliament would not be informed where this would endanger the intended purpose of the measure, the reviewing experts nonetheless highlighted that this requirement and the procedure for doing so could hinder law enforcement agencies from undertaking rapid and effective investigations.

The Federal President enjoys the same level of immunities as members of the Parliament.

Prosecution of offences is mandatory on the basis of the principle of legality (sect. 152, para. 2, of the Code of Criminal Procedure (StPO)). However, in exceptional cases (such as an offence of a minor nature where there is no public interest in prosecution) and with the approval of the court, the prosecutor has the discretion to discontinue or suspend a criminal investigation and prosecution (sect. 153 et seq. of the StPO). This discretion must be reviewed by a senior prosecutor.

Detention may be ordered against an accused party if they represent a flight risk (sect. 112, para. 2, No. 2 of the StPO), but execution of the order may be suspended

if it is possible to achieve the intended purpose by less severe measures, such as the instruction to report at certain times to the judge, the instruction not to leave a place of residence or the furnishing of adequate security by the accused party (sect. 116 of the StPO). Early release from prison is regulated in section 57 of the StGB.

Disciplinary measures against civil servants include reprimand, fine, salary reduction, demotion and dismissal from service and are regulated in section 30 of the Federal Civil Service Act (BBG) and section 38 of the Federal Disciplinary Act. Similar provisions are included in the *Länder* civil service acts. Persons convicted of corruption offences can be deprived of the right to hold public office (sect. 358 in conjunction with sect. 45 of the StGB) or to vote or be elected in public elections (sects. 45 and 108e, para. 5, of the StGB). Section 70 of the StGB on orders for professional disqualification is also relevant. Section 41 of the BBG and section 24 of the Civil Servant Legal Status Act (BeamtStG) explicitly allow for the termination of civil service employment if civil servants commit corruption offences. Disciplinary proceedings are usually suspended during the course of ongoing criminal proceedings (sect. 22 of the Federal Disciplinary Act).

The reintegration of offenders is provided for through the general principles of sentencing (sect. 46 of the StGB), as well as through the Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention involving Deprivation of Liberty.

German law provides for the possibility of mitigated sentences for persons who contribute to the discovery or prevention of serious offences (sect. 46b in conjunction with sect. 100a, para. 2, of the StPO). Although not all corruption offences are deemed to be serious offences, cooperation in such cases can be taken into account (sect. 46, para. 2, of the StGB) as a reason for dispensing with prosecution or the preferment of public charges (sect. 153 et seq. of the StPO).

Immunity from criminal prosecution is not possible due to the fundamental principle of mandatory prosecution.

Persons who have participated in the commission of a criminal offence and testify as witnesses in criminal proceedings enjoy the same protection as other witnesses.

Protection of witnesses and reporting persons (arts. 32 and 33)

The Act to Harmonize the Protection of Witnesses (ZSHG) and the StPO (in particular, sects. 68, 68a, 68b, 168c, 168e and 247) provide for the protection of witnesses, their relatives and other closely related persons. Protection measures in accordance with the ZSHG are also available to victims who meet the conditions set out in section 1 of the ZSHG. Available measures include the giving of testimony via audio or video transmission (sects. 58a, 58b, 168e, 247a and 255a of the StPO); removal of the defendant from the courtroom (sect. 247 of the StPO); the assignment of legal counsel (sect. 68b of the StPO); and measures to protect a witness's identity and personal data, such as non-disclosure of information and the issuance of alias documents (sect. 68 of the StPO; sects. 4 and 5 of the ZSHG).

Participation in the witness protection programme requires not only support from the prosecution, but the persons concerned should agree to the measures proposed and their suitability. Relocation, be it temporary or permanent, is the most important measure and may be within Germany or abroad.

The possibility for victims to file criminal proceedings as joint plaintiffs and their rights in such proceedings are governed by sections 395–397a, 403–406a and 406d–406h of the StPO. While civil servants are duty bound to keep information received through their positions confidential, this does not apply in relation to suspected corruption (sect. 67 of the BBG; sect. 37 of the BeamStG). The Federal Ministry of the Interior has appointed an ombudsperson (an attorney) in charge of accepting information from reporting persons about suspected acts of corruption concerning the Ministry or its subordinate authorities, who must maintain the

confidentiality or – if desired – the anonymity of the whistle-blower. Similar proceedings are in place the *Länder*.

Legislation is in place to protect reporting persons in the private sector against retaliation or any other form of disadvantage (sects. 612 and 626 of the Civil Code, together with the rulings of the Federal Constitutional Court and the Federal Labour Court). There is no legal requirement to establish any form of reporting system or protection of reporting persons. Many private sector entities have nevertheless established compliance and protection systems or codes of ethical conduct. However, it appears the main counterparts in seeking support remains the workers' councils and labour unions. Whistle-blower protection was, at the time of the country visit, part of an ongoing dialogue on anti-corruption with the private sector.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Confiscation of proceeds of crime is regulated in the StGB (sects. 73–73e) and extends to benefits derived from proceeds of crime (sect. 73, para. 2), instrumentalities (sects. 74–74b) and objects of crime that are transformed, converted or intermingled with other property (sect. 73, para. 3), or the equivalent monetary value (sects. 73a and 74c). Non-conviction-based confiscation is possible in cases where, for reasons of law, no person may be prosecuted (sect. 76a). However, the death of a perpetrator constitutes a legal obstacle to the confiscation process. Confiscation is also not possible if the person is deemed unfit to stand trial.¹ In cases of suspected money-laundering, relevant institutions are obliged to inform the Financial Intelligence Unit of suspicious transactions and cannot execute them without the consent of the public prosecutor. Freezing or attachment of assets is possible through sections 111b–k of the Code of Criminal Procedure, which also take into consideration the claims of bona fide third persons (sect. 111h).

Seizure is subject to discretion, as the law stipulates that “objects may be seized” (sects. 94, 97, 98 and 111b-l of the StPO). However, consideration is being given to reformulating this text to make confiscation mandatory.² Guideline No. 74 of the Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine ensures that objects taken into official custody must be protected against loss, devaluation or damage. To this end, each public prosecutor's office is responsible in general for storing assets, both for federal prosecutors and at the level of the *Länder*, as there is no central or federal asset management system.

Bank secrecy cannot be invoked in criminal investigations and criminal proceedings. Section 53 of the StPO contains the closed list of those who may refuse to testify on professional secrecy grounds, which excludes financial institutions. Germany has a comprehensive register of bank accounts (sect. 24c, para. 1, of the Banking Act) where data, including on beneficial ownership, are updated on a daily basis and from which information can easily be accessed by law enforcement authorities.

Statute of limitations; criminal record (arts. 29 and 41)

The length of the statute of limitations for corruption offences varies between 5 and 10 years (sect. 78 of the StGB). It begins at the time the offence is committed; however, if a result constituting an element of the offence occurs later, the limitation period only starts to run from that time (sect. 78a of the StGB). The limitation period is suspended if the offender resides abroad and a request for his

¹ On 1 July 2017, a comprehensive reform of the asset recovery legislation became effective.

² On 1 July 2017, a comprehensive reform of the asset recovery legislation became effective.

or her extradition is made (sect. 78b, para. 5, of the StGB). The limitation period is interrupted by any of the interrupting acts set out in section 78c of the StGB, for example, by the first interrogation of the accused (sect. 78c, para. 1, No. 1, var. 1), by any judicial seizure or search warrant (sect. 78c, para. 1, No. 4), arrest warrant (sect. 78c, para. 1, No. 5), by the provisional judicial dismissal of the proceedings owing to the absence of the indicted party (sect. 78c, para. 1, No. 10, var. 1) or by any judicial request to undertake an investigative act abroad (sect. 78c, para. 1, No. 12). If a judgment has been delivered in the first instance proceedings before the expiry of the limitation period, the limitation is suspended and does not expire before the proceedings have been concluded (sect. 78b, para. 3, of the StGB).

Previous criminal convictions in other States are taken into consideration if the underlying offence is punishable under German law and if reference to the criminal record is not time-barred (sect. 45 of the Act on the Central Criminal Register and the Educative Measures Register).

Jurisdiction (art. 42)

Germany has established territorial jurisdiction (sect. 3 of the StGB), jurisdiction aboard German aircraft and ships (sect. 4 of the StGB) and passive personality jurisdiction (sect. 7 of the StGB). In addition, section 5 of the StGB establishes jurisdiction over offences committed abroad with a special domestic nexus, irrespective of dual criminality and explicitly including active and passive bribery of domestic and foreign public officials committed abroad by a German citizen (sect. 5, Nos. 12–16 of the StGB). Furthermore, German criminal law will apply to offences committed abroad where the act is an offence at the place of its commission or such place is not subject to any criminal jurisdiction, and the offender is German (sect. 7, para. 2, No. 1 of the StGB) or (subject to further conditions) is a foreigner who has not and will not be extradited (sect. 7, para. 2, No. 2 of the StGB). Jurisdiction for the purposes of subparagraph 2 (c) of article 42 of the Convention is established in section 9, paragraph 2, of the StGB.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Legal transactions contrary to law or public policy are void (sects. 134 and 138 of the Civil Code). Similarly, some administrative decisions and transactions may also be considered invalid when affected by corruption according to section 48 of the Administrative Procedure Act.

Compensation for damage can be claimed on the basis of sections 823, 826 and 839 of the Civil Code. Furthermore, art. 34 of the GG provides that the State or a public body that employs a person assumes liability with regard to violations of official duties entrusted to this person.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

Germany does not possess a single authority responsible for fighting corruption in a centralized manner. Owing to its federal system, major responsibilities for combating corruption are assigned to the *Länder*, which are responsible for setting up their own agencies empowered with corresponding mandates. In view of factual constraints, it was not possible for the reviewers to assess the situation in all 16 *Länder* and to get a complete picture relevant to the implementation of article 36 of the Convention. However, reviewers were provided with information related to the operation of federal government law enforcement agencies and several practical examples at the *Länder* level.

At the federal level, the Federal Criminal Police Office is responsible for supporting the investigation of corruption cases which involve several *Länder*, have an international element or are of considerable significance, while the overwhelming majority of such cases would be within the competence of the *Länder*. It was reported that generally, *Länder* have specialized departments on

combating economic crimes and special units on combating corruption within the police.

The Public Prosecution Service also plays an important role in combating corruption. The prosecutors in the *Länder* are appointed by and function under the authority of the *Länder* ministers of justice. The independence of prosecutors is not enshrined in law and they can receive instructions from the *Länder* ministers of justice. However, it was reported that in practice, such instructions are very rare. A number of *Länder*, such as Bavaria, have specialized public prosecutor's offices that focus on corruption offences and economic crimes.

There is no particular legislation requiring public authorities and officials to report corruption offences to law enforcement authorities. However, under the Anti-Corruption Code of Conduct, federal staff have to inform supervisors and the contact person for corruption prevention in case of specific indications of corrupt behaviour. Public prosecutor's offices can request information from all authorities and pursue investigations of any kind, either themselves or through the authorities and officials in the police force (sect. 161 of the StPO).

If any obliged entity as set out in the Money-Laundering Act, such as a financial institution, becomes aware of facts which indicate that property related to a business relationship is derived from a criminal offence that could constitute a predicate offence for money-laundering (as it is the case for some bribery offences under

sect. 332, paras. 1 and 3, and sect. 334 of the StGB), the obliged entity must report this matter to the Financial Intelligence Unit without delay, irrespective of the amount involved (sect. 43, para. 1, of the Money-Laundering Act). Pursuant to section 44, paragraph 1, of that Act, the same obligation to report to the Financial Intelligence Unit applies to supervisory and other authorities.

The data retrieval system (Central Register of Bank Accounts), processed by the Federal Financial Supervisory Authority, allows law enforcement authorities and courts to access the data of the holder of a bank account, including information on any beneficial owner, in order to perform their statutory functions (sect. 24c of the Banking Act).

Every citizen may file information regarding possible corruption offences with the law enforcement agencies either in writing or orally (sect. 158, para. 1, of the StPO). Some *Länder* also have hotlines for reporting offences. In addition, there are numerous activities organized at the *Länder* level aimed at increasing awareness and prevention of corruption in the private sector.

2.2. Successes and good practices

- Germany has established and generated high-quality crime statistics.
- The comprehensive scope of the offence of bribery of domestic public officials does not require a link between the bribe and any performance or omission of an official act by the bribe taker (art. 15).
- The country's highly detailed, comprehensive and up-to-date Central Register of Bank Accounts is easily accessible to investigative authorities and prevents bank secrecy from hindering investigations (art. 40).

2.3. Challenges in implementation

The following could further strengthen Germany's existing anti-corruption measures:

- Consider ways to coordinate and generate statistics from the many sources already available.

- With due respect for its domestic legal system, continue to ensure that the legal treatment of facilitation payments is in line with the requirements of article 16 of the Convention.
- Germany may wish to assess and consider further enhancing transparency in the financing of political parties (art. 18).
- While, at the time of the country visit, a comprehensive range of predicate offences were provided for, Germany may wish to consider widening the scope even further (art. 23, para. 2).
- Consider specifically providing that the promise, offering or giving of an undue advantage are also considered an obstruction of justice (art. 25 (a)).
- With due respect for its domestic legal system, Germany may wish to assess and consider further harmonizing the provisions on sentencing for bribery (art. 30, para. 1).
- Germany should continue to monitor and to maintain the appropriate balance between immunities and jurisdictional privileges afforded to members of the Parliament and the possibility of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention (art. 30, para. 2).
- Germany may wish to ensure that the death of a suspect does not constitute a legal obstacle to confiscation, so as to allow the widest measures of confiscation in line with the Convention (art. 31).
- Germany is encouraged to continue its dialogue with the private sector in relation to the rights of private sector reporting persons in line with article 33 of the Convention.
- Germany should continue to ensure that existing authorities specialized in combating corruption through law enforcement are able to carry out their functions effectively and without any undue influence, and that they have the appropriate training and resources to carry out their tasks (art. 36).

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

In Germany, extradition and mutual legal assistance are regulated by the Act on International Cooperation in Criminal Matters (IRG). Procedural provisions of international treaties, including the Convention, can be applied directly and take precedence over the provisions of the IRG, as set out in its section 1, paragraph 3. Germany has adopted the Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST). The Guidelines provide very comprehensive information and practical recommendations on all the steps of mutual legal assistance to domestic agencies involved in the mutual legal assistance process. The Federal Office of Justice is the central authority for such assistance; however, pursuant to section 74, paragraph 2, of the IRG, competence to execute requests for mutual legal assistance was transferred to *Länder* authorities. Although mutual legal assistance matters appear to be clearly regulated in the applicable legislation, no comprehensive statistical information on its actual implementation exists at the federal level.

*Extradition; transfer of sentenced persons; transfer of criminal proceedings
(arts. 44, 45 and 47)*

The IRG identifies extraditable offences on the basis of a minimum penalty requirement of one year (sect. 3, para. 2). While the IRG sets out the principle of

dual criminality (sect. 3, para. 3), exceptions exist for extraditions on the basis of the European Arrest Warrant. Accessory offences are extraditable (sect. 4).

Extradition is not conditional on the existence of a treaty and the Convention can be considered as a legal basis for extradition (sect. 1, para. 3, of the IRG). Simplified extradition is possible provided that the person sought has given his or her consent (sect. 41 of the IRG).

Provisional measures are covered in sections 16–19 of the IRG. International Criminal Police Organization (INTERPOL) notices can serve as a sufficient basis for provisional arrests.

German citizens generally cannot be extradited pursuant to article 16 of the GG. However, under the European Arrest Warrant, extradition of German citizens is possible on the condition that a person will be returned to Germany if he or she so wishes, for the purpose of enforcing the sentence (sect. 80 of the IRG; art. 16, para. 2, of the GG). The principle of *aut dedere aut judicare* is applied pursuant to section 7, paragraph 2 of the StGB and section 152 of the StPO).

Enforcement of foreign sentences is possible as long as the prescribed conditions are met (sects. 48 and 49 of the IRG). Fair treatment of the persons whose extradition is sought is ensured through section 77 of the IRG. Valid reasons for refusal to extradite include discrimination on the grounds of race, religion, citizenship, association with a certain social group or political beliefs (sect. 6 of the IRG).

The RiVAST obliges all competent authorities to consult with the requesting State in case the extradition request cannot be executed immediately.

Germany is a party to a great number of bilateral and multilateral extradition treaties, such as the European Convention on Extradition (1957) and its second additional protocol (1978) and the European Union Council Framework Decision on the European Arrest Warrant.

The transfer of sentenced persons is possible under the Council of Europe Convention on the Transfer of Sentenced Persons (1983), the second protocol to the European Convention on Extradition (1978), the European Union Council Framework Decision on the Application of the Principle of Mutual Recognition of Judgments in Criminal Matters (2008) and a number of bilateral agreements.

There are no explicit provisions on the transfer of criminal proceedings.

Mutual legal assistance (art. 46)

In its section 59, the IRG states that “mutual legal assistance includes any kind of support given for foreign criminal proceedings”. This broad definition aims to cover all the purposes listed in the Convention.

Germany provides mutual legal assistance in relation to offences involving legal persons (sect. 1, para. 2 of the IRG; sect. 30 of the OWiG).

Spontaneous transmission of information is regulated in sections 61a and 92c of the IRG and guideline 4 of the RiVAST). Requests for mutual legal assistance cannot be refused on the ground of bank secrecy (sect. 77 of the IRG).

With regard to dual criminality, Germany applies a flexible, conduct-based approach (sect. 3, para. 1, of the IRG). Absence of dual criminality is not a ground for refusing mutual legal assistance as long as it concerns non-coercive measures (sect. 1, para. 3, and sects. 59 and 77 of the IRG).

Germany would be able to directly apply paragraphs 9 to 29 of article 46 of the Convention to requests of other States Parties in the absence of corresponding bilateral treaties.

The transfer of detainees for the purpose of providing mutual legal assistance is regulated in sections 62, 63, 69 and 70 of the IRG.

Under the IRG, no special requirements exist in respect of the means of transmitting a request for mutual legal assistance; however, written requests are common practice. German is the only acceptable language for incoming requests for mutual legal assistance.

The hearing of witnesses via videoconference is possible (sects. 61c and 77 of the IRG and guideline 77 of the RiVAST).

The principles of specialty and confidentiality are ensured through section 72 of the IRG as well as guidelines 18, 22 and 22a of the RiVAST.

Pursuant to Section 73 of the IRG, mutual legal assistance is not granted if it would conflict with basic principles of the German legal system. Such assistance is provided only in those cases in which German courts and executive authorities could render the assistance to each other (sect. 59 of the IRG). However, Germany would accept and respond to every incoming request for mutual legal assistance.

The principle of expeditious proceedings is contained in guidelines 22 and 31 of the RiVAST.

The costs of executing incoming requests for mutual legal assistance are generally borne by the German authorities (guideline 15 of the RiVAST), except for costs relating to the hearing of witnesses via videoconference and surveillance (guidelines 77 and 77a).

The provision of government records and other documents available to the general public is possible (sect. 59 of the IRG). The provision of non-public documents requires authorization from the public prosecutor's office (sect. 24c, para. 3, of the Banking Act; sect. 30 of the Fiscal Code).

Germany is a party to a great number of bilateral mutual legal assistance treaties, the European Convention on Mutual Legal Assistance in Criminal Matters (1959) and its additional protocols (1978 and 2001), as well as instruments at the European Union level, such as the Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union (2000) and its Protocol (2001), the European Union Council Framework Decision on the Execution of Decisions on the Freezing of Property or Evidence in the EU (2003), the European Union Council Framework Decision on Simplifying the Exchange of Information and Intelligence (2006) and the Directive regarding the European Investigation Order in Criminal Matters (2014).

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

The Federal Criminal Police Office coordinates international law enforcement cooperation (sects. 3 and 14 of the Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the *Länder* in Criminal Police Matters, and guideline 123 of the RiVAST). Germany currently maintains a network of over 60 Federal Criminal Police Office liaison officers abroad.

Germany conducts active law enforcement cooperation through INTERPOL, the European Union Agency for Law Enforcement Cooperation, the European Judicial Network, the European Union Agency for Criminal Justice Cooperation, the European Anti-Corruption Network and the European Contact Point Network. Through its national Asset Recovery Office, Germany is part of the Camden Asset Recovery Inter-Agency Network. Germany is also a member of the Egmont Group of Financial Intelligence Units and the Cybercrime Convention Committee.

Germany considers the Convention as a basis for law enforcement cooperation.

The establishment of joint investigation teams is possible (sects. 61b and 93 of the IRG). In practice, numerous joint investigation teams have been instituted pursuant to European Union Council Framework Decision 2002/465/JHA on joint investigation teams.

The use of special investigative techniques in corruption cases is regulated by the provisions of the StPO (sects. 161, para. 1, 163, para. 1, 163f, 100a, 100c, 100f and 110a). Evidence obtained through special investigative techniques is admissible in courts. Special investigative techniques can be used at the international level even in the absence of a treaty.

3.2. Successes and good practices

- The comprehensive and detailed Guidelines for Relations with Foreign Countries in Matters of Criminal Law, which provide clear directions to national authorities on all the stages of mutual legal assistance process.
- The flexible approach to dual criminality.
- The ability to provide the widest measure of assistance to requesting States.

3.3. Challenges in implementation

It is recommended that Germany:

- Consider creating a comprehensive mechanism for collecting statistical information on the execution of requests for mutual legal assistance.
- Consider introducing specific legislation with regard to the transfer of criminal proceedings (art. 47).

IV. Implementation of the Convention

A. Ratification of the Convention

7. The Convention was signed on 9 December 2003. Germany deposited its instrument of ratification with the Secretary-General of the United Nations on 12 November 2014.

The Convention and Germany's legal system

8. Article 25 of the Basic Law states that generally accepted rules of international law shall form an integral part of Germany's domestic law and shall override any other contrary provision of domestic law. The United Nations Convention against Corruption has become an integral part of Germany's domestic law following ratification of the Convention (see above), and entry into force on 12 December 2014 in accordance with Article 68 of the Convention.

B. Legal system of Germany

The constitutional, political and legal system

9. The Basic Law of 23 May 1949 continues to be the Constitution of the Federal Republic of Germany following the achievement of German unity. Since reunification, completed in 1990, there have been a number of constitutional amendments, two of which should be emphasised here. Particular significance attaches first and foremost to the constitutional reform of 1994, which largely devoted itself to the questions arising in connection with German unity. The constitutional reform of 2006 served to modernise the federal order of the Basic Law. Both reforms led all in all to a strengthening of the legislative competences of the Länder.
10. The political framework for the action and organisation of the State is determined by the Basic Law via, on the one hand, the basic rights and, on the other hand, through the constitutional law governing State organisation. The main principles of the Basic Law governing the structure of the State include the republican principle, the principle of democracy, the federal State principle, the rule of law principle and the social State principle, which has already been mentioned.

I. The State form of the Republic

11. The structural principle of the State, entrenched in article 20, paragraph 1, and article 79, paragraph 3, of the Basic Law, unequivocally rejects the State form of monarchy. A monarch as Head of State is not permissible; the Head of State is elected.

II. Head of State and the State leadership

12. The Head of State and the highest representative of the Federal Republic of Germany is the Federal President. He/she is elected by the Federal Assembly, which is convened in each case only for this election, and is made up of members of the Federal Parliament and an equal number of members elected by the Land parliaments. The Federal Assembly does not have any other tasks. The period of office of the Federal President is five years, and re-election is only possible once.
13. The constitutional powers of the Federal President are largely representative and integrative in nature. The Federal President represents the Federal Republic of Germany at home and abroad, signs the federal laws and proclaims them, appoints and dismisses the Federal Chancellor, federal ministers, federal judges, federal civil servants and officers and non-commissioned officers of the Federal Armed Forces. Over and above this, he/she has several extraordinary competences to which he/she is entitled in certain crisis situations. For instance, the Federal President in particular has the power to dissolve the German Federal Parliament under certain preconditions and to declare a legislative state of emergency.
14. In terms of policy contents, however, the State leadership lies with the Federal Government, which is formed by the Federal Chancellor -currently by Federal Chancellor Angela Merkel - and the Federal Ministers. The Federal Chancellor determines policy direction and bears the responsibility for it. He/she is the only member of the Government who is elected by the Federal Parliament, and can, where appropriate, also be removed by a vote of no confidence. The Federal Ministers, by contrast, are nominated or dismissed by the Federal President at the proposal of the Federal Chancellor. A vote of no confidence against one or more Federal Ministers is not possible.

III. The Federal State principle

15. The Federal Republic of Germany is a federal State consisting of 16 Länder: Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Mecklenburg-Western Pomerania, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, the Saarland, Saxony, Saxony-Anhalt and Thuringia.
16. The *Länder* are members of the Federation, and as such play the role of States. This means that they have their own constitutions, parliaments and governments. Under certain preconditions, they are even entitled to conclude international agreements with foreign States. The constitutional spheres of the Federation and the Länder are hence equivalent. Article 28, paragraph 1, sentence 1, of the Basic Law states, however, that the constitutional system in the Länder must correspond to the fundamental principles of the republican, democratic and social State based on the rule of law within the meaning of the Basic Law. This so-called homogeneity principle ensures that the same constitutional principles apply in the Federation and the Länder.
17. In line with the character of a federal State, the Basic Law breaks down the State competences between the Federation and the Länder. For instance, the Basic Law contains comprehensive lists of competences with regard to those areas where the Federation is allowed to pass legislation. If the Basic Law does not grant legislative

competence to the Federation, the Länder have legislative competence. They may therefore in particular regulate by law on culture (schools, sections of higher education, radio and television), communal self-administration and the police, and since the constitutional reform of 2006 also prison law. The constitutional practice of recent decades shows that the perception of the legislative competences is concentrated on the Federation. In the administration of justice and the implementation of statutes, the emphasis is, however, clearly on the Länder. The federal model thus lives on the tension between a unitarian tendency on the one hand and a federal tendency on the other.

18. In the final analysis, the federal principle combines a decentralised State structure with a vertical division of powers, which supplements the classical division between legislative, executive and judicial powers. By dividing legislative, executive and judicial competences between the Federation and the Länder, independent areas of competence, and thus of responsibility, are created.

IV. Municipalities and associations of municipalities

19. Municipalities and associations of municipalities (counties, associated municipalities, associations of towns and the surrounding area) are part of the Länder in accordance with the Basic Law. They form the lowest level of general public administration, and they are self-governing bodies. Municipal self-government is guaranteed as an institution in the Basic Law (cf. art. 28, para. 1). Self-government comprises a cluster of sovereign rights including territorial, personnel, financial, planning, organisational and legislative sovereignty. Municipalities and associations of municipalities are subject to State supervision, which in matters of self-government is, however, limited to supervision on points of law.

V. Democracy and the electoral system

20. A further major characteristic of the State structure is democracy. All State power in the Federal Republic of Germany is exercised by the people. In accordance with the Basic Law, the resulting constitutional structural option for a democratic State takes the shape of representative and parliamentary democracy. The people hence exercise State power primarily through elections by forming representative organs in the Federation, Länder and local authorities, and giving them legitimacy to exert the State's power in its name. Outside elections, participation by the people in State policy-making at federal level is only provided for in absolute terms in cases of a reorganisation of the Länder (art. 29 of the Basic Law) (referendum, petition for a referendum). Other forms and cases of direct democracy are theoretically conceivable, but do not exist in practice. They are, however, practised to differing degrees in the Länder and at local level.

(a) Political parties

21. In accordance with the Basic Law, the parties are constitutionally necessary tools for the forming of political opinion by the people, and they are raised to the status of a constitutional institution. They are the links between the citizens and the State, but are outside the organised State structure. The parties are independent factors of constitutional life and carry out their activities not only in elections at federal level to the German Federal Parliament or to the European Parliament, but also in elections of representatives to the Länder and of local authorities.

22. The free formation of parties is constitutionally guaranteed. Their formation does not require State approval or other State act of recognition. Also, the free activity of the parties is guaranteed by the Basic Law. The parties decide freely, within the framework of the general statutes, as regards the legal form, name, internal organisation, manifesto and activities of party work. However, a party must adhere to certain regulations. In constitutional terms, the internal order of the party must correspond to fundamental democratic principles. In accordance with the Parties Act (Parteiengesetz), the political goals of the party are to be set out in a written manifesto and regulations adopted in statutes regarding its internal organisation.

(b) Election and tasks of the German Federal Parliament

23. At federal level, the Members of the German Bundestag, the Parliament of the Federal Republic of Germany, are elected in general, direct, free, equal and secret elections. These principles of electoral law, which are entrenched in the Constitution (art. 38 of the Basic Law), also apply to elections in the Länder and municipalities.
24. The Members are representatives of the whole people, are not bound by mandates and instructions and are subject only to their consciences. Accordingly, an elected Member does not lose his/her mandate if he/she leaves the party for which he/she was elected or changes to another party. The popular representation has comprehensive legislative rights and monitors the Government. Furthermore, the German Federal Parliament elects the Federal Chancellor, and participates in the election of the Federal President, as well as in the election of the judges of the Federal Constitutional Court. The decision-making principle in the German Federal Parliament is the majority principle.

VI. The Federal Council

25. Another important constitutional body is the Federal Council, via which the Länder participate in the legislation of the Federation. The Federal Council consists of members of the Land governments, who are bound by instructions. It adopts resolutions by majority vote. The number of votes to which a Land is entitled in the Federal Council is based on the number of inhabitants of the Land in question. As to the contribution of the member Länder to the legislative procedure of the Federation, a distinction is to be made between so-called objection and approval statutes. The approval of the Federal Council is necessary for a statute to come into being. The Federal Council may submit an objection to the planned statute, but the Federal Parliament may reject it. Over and above this, it is the task of the Federal Council to contribute towards the administration of the Federation (in particular by approving legal ordinances) and to contribute in matters related to the European Union.

VII. The principle of the rule of law

26. The rule of law State structure principle requires a division of powers and binds all State powers to law and order, and in particular to the basic rights. Executive power and jurisdiction are bound by legal provisions of all kinds, including unwritten law. The legal provisions take precedence over all other State acts. A special form of this priority of the law is constituted by the principle of the precedence of the Constitution, in accordance with which no State act may contradict the Constitution. The legislature itself is also bound by the Constitution.

27. Judicial independence, the guarantee of court legal protection against rights violations by public powers for all and the establishment of constitutional jurisdiction are particular manifestations of the principle of the rule of law, and are separately regulated in the Basic Law.
28. Additionally, the constitutional principles of legal certainty and of the so-called provision of legality, in accordance with which the rights of the individual citizen may only be encroached upon by the State administration on the basis of statutes, as well as the principle of proportionality, are among the content guarantees of the principle of the rule of law.

VII. Jurisdiction and the Federal Constitutional Court

29. In the rule of law system of the division of powers, the judicial power has received especially strong status through the Basic Law. It is entrusted to judges who are independent and only subject to the law. Judges can neither be removed nor transferred during their period of office. Judicial power is broken down into ordinary jurisdiction (civil and criminal jurisdiction), as well as into four specialist jurisdictions: labour jurisdiction, general administrative jurisdiction, social jurisdiction and finance jurisdiction. Ordinary jurisdiction is largely structured in a three-tiered arrangement among the Federation and the Länder. There are as a rule two instances within specialist jurisdiction at Land level. The third, supreme instance of the federal courts is added at federal level.
30. In addition to the jurisdictions that have already been named, there is the Federal Patent Court, as well as the organs of disciplinary and professional jurisdiction. The latter hear mainly breaches of duty which someone has committed in his/her capacity as a civil servant, judge or soldier or in connection with his/her affiliation to a statutory-regulated profession (for instance as a lawyer, tax advisor, auditor, architect, physician, veterinarian or chemist).
31. A very special role is finally carried out by constitutional jurisdiction. It is exercised at federal level by the Federal Constitutional Court, and at Land level by the Land Constitutional Courts. Constitutional jurisdiction is outside the system of instances of the specialist jurisdictions, and only deals with violations of specific constitutional law.
32. The Federal Constitutional Court consists of two Senates of eight judges each. The period of office of the judges is 12 years, but it lasts at most until the age limit of 68 has been reached. Re-election is not possible. One half of the judges of each Senate are elected by the German Federal Parliament and one half by the Federal Council.
33. The Federal Constitutional Court only acts if it is called upon. It performs its tasks as the supreme guardian of the Constitution in different ways. It monitors the legislature as to whether in handing down statutes it has acted in accordance with the provisions of the Basic Law in formal and material terms. By means of a constitutional complaint, which anyone may lodge, asserting that his/her basic rights have been violated, it also monitors authorities and courts as to whether they have complied with the Constitution in their measures and decisions. Over and above this, the Court arbitrates in disputes between the supreme State bodies and rules in proceedings between the Federation and

the Länder. Furthermore, it finds, for instance, on the validity of Federal Parliament elections, on the constitutionality of political parties and on the forfeiture of basic rights.

IX. The social State principle

34. A further major pillar of German constitutional law is the social State principle. It obliges the State to carry out social policy and welfare activity, and to bring about social justice. The principle primarily addresses Parliament, which has the obligation to ensure freedom from need, an existence worthy of human beings and suitable participation in the general prosperity. The guiding principle is to compensate for social differences and resolve conflicts, to structure society via State planning, to ensure the provision of services for the public and economic growth, as well as progress in prosperity. However, the principle of the social State is not intended to do away with all inequalities, nor does it contain any general obligation to maintain the status quo. Its primary aim is, rather, to deal with situations of social need and disadvantage, such as those caused by illness, age, disability, unemployment and other disadvantageous circumstances.
35. The inclusion of this principle in the Basic Law constitutes a decision to guarantee the social human rights by means of a mandate to Parliament regarding political structure. The social State principle does not compete with the other four structural principles, but rather the principles are structured in such a way as to supplement and limit each other.

X. The fiscal administration

36. In order to guarantee the financial independence of the Federation and the Länder, and hence to guarantee that it carries out tasks on its own responsibility, the Basic Law ensures that they are provided with sufficient funds. The Constitution therefore governs what taxes the Federation, the Länder, or both together are entitled to (art. 105, para. 3, and art. 106 of the Basic Law). The Federation and the Länder jointly receive income tax, corporate income tax and turnover (value added) tax, which make up about 70 per cent of all taxes levied. The Federation alone has the right to most excise duties (such as mineral oil tax, tobacco tax and coffee tax). The Länder alone receive, inter alia: revenue from gift/inheritance tax, land acquisition tax and beer tax. The local authorities keep for themselves revenue from trade tax, land tax and other local authority taxes such as revenue from dog licences. They are also entitled to a portion of the income and turnover tax gathered. The local authorities also receive a share of the Länder revenue from the combined taxes and the other Länder taxes in accordance with the relevant legislation. The Federation and the Länder are given a share of the trade tax.
37. Over and above this distribution of the sources of tax, and as a result of the solidarity existing between the Federation and the Länder, the Basic Law sets the stage for a redistribution of the income made in the entire federal territory to give rise to equivalent living conditions. This means, for instance, that those Länder which have little tax revenue of their own are enabled to carry out their tasks. To this end, the Basic Law facilitates two special regulatory systems: the horizontal financial equalisation between the Länder with stronger and weaker financial situations on the one hand, and supplemental federal allocations to less financially solid Länder (art. 107 of the Basic

Law) on the other. Accordingly, the differences in financial strength remaining after the distribution of fiscal income between the Länder are suitably compensated for.

XI. Law on the State Church

38. Another element of constitutional law is the public law on churches, which largely has as its subject-matter guaranteeing freedom of religion, the separation of Church and State and the Church's self-determination right.
39. The constitutional basis for guaranteeing individual and collective freedom of faith can be found in article 4, paragraphs 1 and 2, of the Basic Law. Accordingly, individual freedom of religion encompasses the freedom to form a faith or belief and to act in accordance with its requirements, as well as the freedom to reject a religious or philosophical conviction. In contradistinction to this, collective freedom of religion entails the freedom rights of a religious community.
40. The separation of Church and State is manifested in the Basic Law, in particular in the prohibition of all legal forms of State church (cf. art. 140 of the Basic Law and art. 137, para. 1, of the Weimar Reich Constitution (WRV)). The fundamental principle of the separation of Church and State, however, has several lacunae, which are reflected, for instance, in the reference to God contained in the Preamble or in the provisions on religious instruction in public schools (art. 7, para. 3, of the Basic Law). In each case, however, the State is obliged to observe philosophical neutrality with regard to the religious communities. Parallel to this, the Churches' self-determination right, which is derived from article 140 of the Basic Law and article 137, paragraph 3, of the Weimar Reich Constitution, guarantees the Churches the power to govern their own matters independently and free of State influence. Their own matters include, for instance, questions of organisation, membership, levying of contributions and fees, or indeed the structure of the circumstances of their services.

XII. Recognition of non-governmental organisations

41. Non-governmental organisations do not require State approval in the Federal Republic of Germany, but they are subject to the provisions of the general law on associations. They are granted charitable status on the basis of section 52, subsection 1, sentence 1, of the Tax Code (Abgabenordnung). Accordingly, a corporation is considered to be charitable if its activity aims to promote the public in a selfless manner in a material, intellectual or moral field.

XIII. Membership of the European Union

42. Germany is a member of the European Union (EU), established by the Treaty on European Union. The EU presently consists of 27 Member States. In line with the three-pillar model, it forms the common roof for the three pillars of the alliance of States, including, firstly, the European Communities established by separate treaties, i.e. the EC (European Community) and the EAEC (European Atomic Energy Community), secondly, the common foreign and security policy and, thirdly, police and judicial cooperation in criminal matters. The EC has its own organs (the European Parliament, the Council and the Commission) with various legislative powers. The EC Treaty authorises the passing of legal acts, especially in the form of regulations and directives,

in many fields. Regulations - like, in principle, the Treaties - are directly applicable in the Member States, while directives have to be transposed into national law. The Treaties establishing the European Communities, as well as the provisions passed on the basis of the Treaties, take precedence over the national law of the Member States. The Court of Justice of the European Communities (ECJ) ensures observance of Community law.

43. The law applicable in Germany is also largely influenced by European Community law. Parliament is obliged to properly transpose the directives into German law. It cannot pass any national law that would be in conflict with Community law. This is monitored by the Commission, which may initiate proceedings before the ECJ for violation of a treaty. The German courts have to apply directly applicable Community law in their decisions, and they have to interpret German law in conformity with Community law. In cases of doubt they are entitled and partly even obliged to obtain a binding interpretation from the ECJ. The German executive has to enforce directly applicable Community law as the European Community enforces Community law itself only as an exception, enforcement by the Member States being the rule.

XIV. Basic rights in the European Union

44. The protection of basic rights is embodied in the following general clause in article 6, paragraph 2, of the EU Treaty: "The Union shall respect basic rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." To the extent that the Federal Republic of Germany has transferred sovereign power to the European Community, the protection of basic rights is largely safeguarded by the rulings of the ECJ. On 7 December 2000, as well as on 12 December 2007, after approval by the European Council, the European Parliament, the Council and the Commission solemnly proclaimed the Charter of Basic Rights of the European Union which, in 54 articles, regulates basic rights in the European Union. When the Treaty of Lisbon amending the Treaty on European Union entered into force, the rights, freedoms and principles regulated in the 54 articles of the Charter became legally binding in accordance with article 6 of the EU Treaty and applies to the bodies and facilities of the Union. It applies to the Member States exclusively on implementing the law of the Union.

Relevant laws, policies and/or other measures:

1. Act Against Unfair Competition (UWG)
2. Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty (StVollzG)
3. Act on Combating International Bribery (Gesetz zur Bekämpfung internationaler Bestechung - IntBestG)
4. Act on International Cooperation in Criminal Matters (AICCM - IRG)
5. Act on Regulatory Offences (OWiG)

6. Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the Länder in Criminal Police Matters (Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten - BKAG)
7. Act on the Suspension of the Statute of Limitations for Prosecution of Crimes and the Consideration at Equivalent of the Judges and Staff Members of the International Criminal Court (IStGHGleichstG)
8. Act to Harmonize the Protection of Witnesses (Gesetz zur Harmonisierung des Schutzes gefährdeter Zeugen - ZSHG)
9. Administrative Procedure Act (VwVfG)
10. Banking Act (Gesetz über das Kreditwesen - KWG)
11. Basic Law for the Federal Republic of Germany (Grundgesetz - GG)
12. Civil Servant Legal Status Act (Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern) (BeamtStG)
13. Courts Constitution Act (GVG)
14. EU Bribery Act (EU-Bestechungsgesetz -EuBestG)
15. Federal Civil Service Act (Bundesbeamtengesetz - BBG)
16. Federal Disciplinary Act (Bundesdisziplinargesetz - BDG)
17. Fiscal Code of Germany (AO)
18. German Civil Code (BGB)
19. German Code of Criminal Procedure (StPO)
20. German Criminal Code (StGB)
21. Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine ("Richtlinien für das Strafverfahren und das Bußgeldverfahren", RiStBV)
22. Guidelines for Relations with Foreign Countries in Matters of Criminal Law (Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten - RiVAST)
23. Military Penal Law (Wehrstrafgesetz - WStG)
24. Money Laundering Act (Geldwäschegesetz - GwG)

25. NATO Troop Protection Act (NATO-Trupperschutzgesetz - NTSG)

All laws can be found on the website www.gesetze-im-internet.de. Most of them are translated into English.

The guidelines "RiVSt" can be found on the website http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_23122016_IIB6935088.htm
The guidelines "RiStBV" can be found on the website http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01011977_420821R5902002.htm

Referring to Art. 41 UNCAC the following attachment: Council Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings

Relevant draft bills, policies and/or other measures:

Draft bill: Government Draft Anti-Corruption Act ("Entwurf eines Gesetzes zur Bekämpfung der Korruption" - Bundestag printed paper No. 18/4350) which entered into force on 26 November 2015

Germany's anti-corruption measures have been assessed by the following review mechanisms:

- 1) GRECO Third Evaluation Round
- 2) GRECO Fourth Evaluation Round
- 3) OECD Phase 3 Report on Implementing the OECD Anti-bribery Convention in Germany

C. Implementation of selected articles

III. Criminalization and law enforcement

Article 15. Bribery of national public officials

Subparagraph (a) of article 15

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Active bribery, “offers, promises or grants” is criminalised in sections 333 and 334 of the Criminal Code; section 335 contains a regulation on the assessment of punishment for particularly serious cases of bribery, and section 336 clarifies that the granting of advantages for the omission of an official act is also punishable. Section 333 of the Criminal Code encompasses offences where the advantage is awarded for (lawful) official activity, whilst section 334 encompasses offences where the advantage is awarded in return for an official act which is in breach of duty or one which is at the discretion of the public official.

Criminal Code (StGB)

Chapter 30

Offences committed in public office

Section 333

Granting benefits

(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the discharge of a duty incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in

return for the fact that they performed or will in the future perform a judicial act incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(3) The offence does not entail criminal liability pursuant to subsection (1) if the competent authority, within the scope of its powers, either previously authorised the recipient's acceptance of the benefit or authorises it upon prompt reporting by the recipient.

Section 334

Giving bribes

(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the fact that they have performed or would in future perform an official act, and thereby breached or would breach their official duties, incurs a penalty of imprisonment for a term of between three months and five years. In less serious cases, the penalty is imprisonment for a term not exceeding two years or a fine.

(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they

1. performed a judicial act and thereby breached their judicial duties or
 2. would perform a judicial act and would thereby breach their judicial duties
- incurs a penalty of imprisonment for a term of between three months and five years in the cases under no. 1, imprisonment for a term of between six months and five years in the cases under no. 2. The attempt is punishable.

(3) If offenders offer, promise or grant the benefit in return for a future act, then subsections (1) and (2) already apply if they attempt to induce others

1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

Section 335

Especially serious cases of taking and giving bribes

(1) In especially serious cases

1. of an offence under

a) section 332 (1) sentence 1, also in conjunction with (3), and

b) section 334 (1) sentence 1 and (2), in each case also in conjunction with (3),

the penalty is imprisonment for a term of between one year and 10 years and

2. of an offence under section 332 (2), also in conjunction with (3), the penalty is imprisonment for a term of at least two years.

(2) An especially serious case within the meaning of subsection (1) typically occurs where

1. the act relates to a major benefit,
2. the offender accepts continued benefits which are demanded in return for the fact that the offender would perform an official act in the future or
3. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

Section 336

Omission of official act

The omission to act is equivalent to the performance of an official act or of a judicial act within the meaning of sections 331 to 335a.

The terms “public officials”, “individual with a special obligation for the public service” and “judge” are used in sections 331 et seqq. of the Criminal Code, to describe the person accepting the advantage (passive bribery) and the individual to whom advantages are granted in the framework of active bribery. These terms are given a statutory definition in section 11 subs. 1 Nos. 2 to 4 of the Criminal Code.

Section 11

Definitions

(1) For the purposes of this statute,

...

2. ‘public official’ means any person who, under German law,

- a) is a civil servant or judge,
- b) carries out other public official functions or
- c) has otherwise been appointed to serve with an authority or other agency or has been commissioned to perform public administrative services, regardless of the organisational form chosen to perform such duties;

2a. ‘European official’ means any person who

- a) is a member of the European Commission, the European Central Bank, the European Court of Auditors or any court of the European Union,
- b) is a civil servant or other member of staff of the European Union or of an institution established by European Union law or
- c) is tasked with carrying out the tasks of the European Union or the tasks of an institution established by European Union law;

3. ‘judge’ means any person who, under German law, is either a professional or an honorary judge;

4. ‘person entrusted with special public service functions’ means any person who, without being a public official, is employed by or acts for

- a) an authority or other agency which performs public administrative services or
- b) an association or other alliance, business or enterprise which carries out public administrative services for an authority or other agency and who is formally required by law to perform the duties of those functions in a conscientious manner;

...

The term “civil servant” in section 11 subs. 1 No. 2 (a) of the Criminal Code covers all German civil servants within the meaning of public law or of the law on the civil service, as well as judges in accordance with German law. This therefore covers all individuals who are described as “officials”, “public officers” and “judges” within the meaning of Article 1 (a) of the Convention. Mayors and ministers in Germany are not civil servants, and hence do not fall under section 11 subs. 1 No. 2 (a) of the Criminal Code; they are however in an official relationship under public law, and

are hence public officials in accordance with section 11 subs. 1 No. 2 (b) of the Criminal Code.

Prosecutors (Article 1 (b) of the Convention) in Germany do not fall under the term “judge”; but they are civil servants, and hence public officials within the meaning of section 11 subs. 1 No. 2 (a) of the Criminal Code.

In addition to civil servants and judges, as well as to other individuals in an official relationship under public law, individuals in Germany appointed to carry out tasks of the public administration in an authority or in another agency or on its behalf also belong among public officials within the meaning as defined under criminal law (section 11 subs. 1 No. 2 (c) of the Criminal Code). These include employees in the public service who carry out public tasks, but who are not civil servants within the meaning under status law. Furthermore, it covers individuals who carry out public tasks in agencies similar to authorities. These agencies also include facilities organised under private law which are subject to such state management in carrying out administrative tasks that in an overall evaluation of the characteristics typifying them they nonetheless appear to be an extended arm of the State (cf. at court decisions / case law).

Over and above this, the offences in sections 331, 332, 333 and 334 of the Criminal Code also include individuals who are not public officials, but who are entrusted with special public service functions’, i.e. persons who are, without being a public official, employed by, or acting for (a) a public authority or other agency, which performs public administrative services; or (b) an association or other union, business or enterprise, which carries out public administrative services for a public authority or other agency, and who are formally required by law to fulfil their duties with due diligence (section 11 subs. 1 No. 4 of the Criminal Code). This category covers in particular individuals who work in authorities, but do not carry out public tasks (e.g. employed cleaning staff), but also individuals who contribute as external contractors for an authority in carrying out public tasks (e.g. in preparing external expert reports and as advisors).

Soldiers are not public officials within the meaning of the section 11 subs. 1 No. 2 of the Criminal Code. Since soldiers do not fall under the definition of “public official”, these are deemed in section 48 of the Military Penal Law to be equal to public officials for the application of sections 331 and 332 of the Criminal Code, for the offences of passive bribery, and with active bribery are listed along with public officials as viable persons accepting the advantage; soldiers are explicitly included in the list in sections 333 and 334 of the Criminal Code.

Criminal liability under sections 331 et seq. of the Criminal Code requires that the bribe taker be a public official at the time when committing the offence. However, where the advantage was promised prior to the bribe taker’s assuming of office, criminal liability will kick in if the bribe is paid after the assumption of the office or where bribe taker and giver renew (even if only tacitly so) their “agreement”. The same is true, mutates mutandis, for the offence of bribing delegates (sec. 108e of the Criminal Code below).

German law contains the element “advantage” in sections 331 et seqq. of the Criminal Code. This covers material and immaterial advantages. The German

legislature deliberately selected the element “advantage”, and not “remuneration” or “asset”, in order to make it clear that immaterial advantages are also covered.

The reasoning to the Draft Amending the Criminal Code of 10 May 1973, Federal Parliament printed paper 7/550, p. 271 reads as follows: “The draft holds with the valid law to the term “advantage” in order to cover not only material, but also immaterial improvements in the situation of the recipient.” The Federal Court of Justice has already ruled several times that the characteristic “advantage” also encompasses immaterial advantages (cf. at court decisions / case law).

Sections 331 et seqq. of the Criminal Code do not contain a restriction in accordance with which only unfair or inappropriate advantages are covered. There is no provision for a value threshold. Low-value advantages are also covered by the offences.

An action in return for accepting an advantage by or granting an advantage to judges (section 331 subs. 2 and section 333 subs. 2 of the Criminal Code) is a judicial act.

German law covers both direct and indirect granting of advantage. The wording of the statute does not explicitly mention indirect granting, but the Federal Court of Justice has ruled that granting via an intermediary is sufficient in order to comply with the offences (cf. at court decisions / case law). There is hence no doubt as to the applicability of the offences to indirect granting.

The offences in sections 331 et seqq. of the Criminal Code all also cover advantages granted to third persons. This is explicitly regulated by the elements “for that person or a third person” (sections 333 and 334 of the Criminal Code). Granting to third persons was inserted in the offences by the Act on Combating Corruption (Gesetz zur Bekämpfung der Korruption) of 13 August 1997 (Federal Law Gazette [Bundesgesetzblatt] Part I page 2038).

The offences do not only cover advantages which for instance are granted to close individuals of the perpetrator such as a spouse, but also advantages granted to groups of individuals or legal entities (clubs, enterprises, associations and political parties). The offences even cover advantages granted to the official’s “employer” (e.g. a public agency); this includes cases of “sponsoring” and donations (cf. at court decisions / case law).

Donations to political parties are covered by both, sec. 331 et seq. and section 108e of the Criminal Code. It is true that according to section 108e para. 4 no. 2 of the Criminal Code a donation shall not be considered an undue advantage, if the donation is permissible under the Law on Political Parties. However, should the donation be a means for bribing the MP, it may not be permissible under the Law on Political Parties which stipulates that donations may not be accepted where they are recognisably being granted to the party with the expectation of obtaining a certain economic or political advantage.

- *to act or refrain from acting in the exercise of his or her functions.*

Accepting and granting advantages is criminalised in accordance with German law if it relates to a (possible) action in return on the part of the public official (“illicit agreement”).

Section 331 subs. 1 and section 333 subs. 1 of the Criminal Code relate to a (lawful) “official activity” on the part of the public official. The bribe taker does not need to perform any specific official act in return for the advantage. The term “official activity”, rather, encompasses the official activity of an public official in general.

An action in return for accepting an advantage by or granting an advantage to judges (section 331 subs. 2 and section 333 subs. 2 of the Criminal Code) is a judicial act.

Sections 332 and 334 of the Criminal Code link to the execution of an “official act” or “judicial act” in breach of duty or in the discretion of the public official or judge. However, it is important to note that the notion of a “violation of official duties” leaves considerable room for applying the offence. If an act is within the public official’s discretion, the offence applies already where the bribe giver “merely attempts to induce the [public official] to allow himself to be influenced by the benefit in the exercise of his discretion” (section 334 para 3 no. 2 Criminal Code), i.e. no proof is required that the benefit actually tainted the official’s exercise of his discretion and resulted in an unlawful official act. Thus, all bribe payments meant to influence a public official’s discretion are covered by the offences. Reference is made to the interpretative notes on article 16 contained in the travaux préparatoires (official records) of the negotiations for the elaboration of the United Nations Convention against Corruption.

The requirements of this note are met by German law: The notion of impartiality is an autonomous one and every (foreign) public official is under a duty to exercise judgement or discretion impartially even if under the official’s domestic law no such requirement were to exist.

Official acts and official activity include all acts belonging to the official duties of the public official and which are carried out by him/her in his/her official capacity (cf. on this court decisions / case law). They do not encompass offences relating to private acts on the part of the public official. Conduct in breach of regulations or a breach of instructions does not make the official act become a private act (cf. on this court decisions / case law). Ancillary employment of the public official is not an official activity. However, the granting of ancillary employment may constitute an advantage within the meaning of sections 331 et seqq. of the Criminal Code, and may be punishable if such employment is granted in return for the official activity of the public official (cf. court decisions / case law).

In all cases falling under sections 331 et seqq. of the Criminal Code, it is not necessary for the public official or judge to actually carry out the official activity, official act or judicial act. The offence is already deemed to have been committed if the action (demanding, allowing him/herself to be promised or accepting, as well as offering, promising or granting an advantage) relates to an official activity, official act or judicial act.

Sections 331 et seqq. of the Criminal Code cover cases in which the acceptance or granting of the advantage takes place prior to the intended official act, as well as those in which the acceptance or granting of the advantage follows the official act (subsequent granting, reward).

Section 336 of the Criminal Code clarifies that the carrying out of an official act or of a judicial act within the meaning of sections 331 to 335 of the Criminal Code is considered equal to omission of the act.

Members of parliaments and communal mandate holders are as a rule not public officials in Germany within the meaning of section 11 subs. 1 No. 2 of the Criminal Code unless they exceptionally carry out tasks of public administration (cf. court decisions / case law). Corruption offences by and towards mandate holders are punishable in accordance with section 108e of the Criminal Code. The new provision of section 108e entered into force on 1 September 2014.

Criminal Code (StGB)

Section 11 Terms Relating to individuals and Subject Matter

(1) Within the meaning of this law: ...

2. a public official is whoever, under German law:

- (a) is a civil servant or judge;
- (b) otherwise has an official relationship with public law functions or;
- (c) has been appointed to a public authority or other agency or has been commissioned to perform duties of public administration without prejudice to the organizational form chosen to fulfil such duties;

2a. “European public official” means

- a) any member of the European Commission, European Central Bank, European Court of Auditors, or a European Union court;
- b) any civil servant or other official of the European Union or of an institution established on the basis of European Union law; or
- c) any person tasked with performing functions for the European Union or for an institution established on the basis of European Union law.

3. a judge is, whoever under German law is a professional or honorary judge;

4. a person with special public service obligations is whoever, without being a public official, is employed by, or is active for:

- (a) a public authority or other agency, which performs duties of public administration; or
- (b) an association or other union, business or enterprise, which carries out duties of public administration for a public authority or other agency, and is formally obligated by law to fulfil duties in a conscientious manner;

Section 108e Criminal Code: Active and passive bribery of mandate holders

(1) Whoever as a member of a public assembly of the Federation or the Länder demands, allows him/herself to be promised or accepts an undue advantage for him/herself or a third party in return for performing or refraining from performing an act upon assignment or instruction in the exercise of his/her mandate shall be liable to imprisonment of up to five years or a fine.

(2) Whoever offers, promises or grants to a member of a public assembly of the Federation or the Länder an undue advantage for the member him/herself or a third party in return for that member performing or refraining from performing an act upon assignment or instruction in the exercise of his/her mandate shall incur the same penalty.

(3) Members of

1. a public assembly of a local authority,
2. a body, elected in direct and general elections, of an administrative unit established for a subarea of a federal Land or a local authority,
3. the Federal Convention,
4. the European Parliament,
5. a parliamentary assembly of an international organisation, or
6. a legislative body of a foreign state

shall be considered equivalent to the members referred to in subsections (1) and (2).

(4) An undue advantage shall not be deemed to exist in particular where the acceptance of the advantage is in accordance with the relevant provisions relating to the legal position of the member. The following shall not be considered an undue advantage:

1. a political mandate or a political function, or
2. a donation permissible under the Law on Political Parties or other relevant legislation.

(5) In addition to the imposition of a term of imprisonment of at least six months, the court may withdraw the capacity to attain public electoral rights and withdraw the right to elect or vote in public matters.

Germany shared the following examples of implementation and case law:

- ***public official***

Federal Court of Justice, judgment of 19 June 2008 - 3 StR 490/07: “Another agency [within the meaning of section 11 subs. 1 No. 2 (c)] is understood to be an institution similar to an authority which, independently of its organisational form, is entitled to contribute towards the enforcement of statutes without being an authority within the meaning of administrative law. If a public facility is organised in the shape of a legal individual under private law, the characteristics must apply to it which justify it having status equal to an authority; it must ... in an overall view “appear as an extended arm of the State”.”

- ***any advantage;***

Federal Court of Justice, judgment of 23 May 2002 - 1 StR 372/01: “An advantage within the meaning ... of the offence is to be understood as any benefit to which the

public official has no right and which in objective terms improves his/her economic, legal or even only personal situation ..., an immaterial improvement of the situation being sufficient.”

Federal Court of Justice, judgment of 24 April 1985, 3 StR 66/85: “An advantage within the meaning of sections 331 and 332 of the Criminal Code can be deemed to be not only an economic advantage, but also an advantage which is immaterial in nature if it has objectively-measurable content and indeed places the public official in a better position in some way.”

Federal Court of Justice, judgment of 9 September 1988, 2 StR 352/88: “This also includes granting sexual intercourse and tolerating sexual acts.”

- ***directly or indirectly;***

Federal Court of Justice, order of 22 October 1997 - 5 StR 223/97: “In granting an advantage in accordance with section 333 of the Criminal Code, it is not necessary that the offender contacts the public official directly; it may also be granted via an intermediary ...”

- ***for himself or herself or another person or entity;***

Federal Court of Justice, judgment of 11 May 2006 - 3 StR 389/05: “If the accused had demanded ... the payment to be effected to ... an ... association ..., this would certainly constitute demanding an advantage for a third person.”

Cologne Higher Regional Court, order of 21 September 2001 - 2 Ws 170/01: “With the offence characteristic of an advantage, it is not possible to distinguish between benefit to the State and private benefit of granting. Such a separation is not viable, and would leave it to the public officials to determine what is beneficial to the State.”

Celle Higher Regional Court, order of 28 September 2007 - 2 Ws 261/07: “Material and monetary benefits to a school in the context of a school photo activity give rise to sufficient suspicion of granting an advantage and of an illicit agreement within the meaning of sections 331 et seqq. of the Criminal Code.”

- ***to act or refrain from acting in the exercise of his or her official duties***

Federal Court of Justice, judgment of 10 March 1983, 4 StR 375/82: “Certainly there is no doubt that an official act has been effected if the act belongs to the official duties of the public official and is carried out by him/her in his/her official capacity.”

Federal Court of Justice, judgment of 19 February 2003, 2 StR 371/02: “Any activity on the part of a soldier of the Federal Armed Forces constitutes service which belongs to his general task area or is directly connected therewith, in accordance with objective aspects externally appears as an official act and is borne by the will to carry out official tasks.”

Federal Court of Justice, judgment of 21 June 2007 - 4 StR 69/07: “Accordingly, the existence of an illicit agreement may only be definitely denied for such private ancillary

employment as is carried out for a client with whom the public official does not have, and also cannot have, such official contact. ... It is however different if ... official contacts exist between the grantor of the advantage and the official service which might suggest that the advantage connected with the exercise of ancillary employment entailing remuneration was agreed between the person giving the advantage and the person accepting the advantage ... in general within the meaning of a reciprocal relationship linked with the official activity of the public official."

Federal Court of Justice, judgment of 14 October 2008 - 1 StR 260/08: "Official activity is ... to be considered in principle any official activity. This does not yet even have to have been given an approximate concrete form in accordance with the ideas of those concerned; it is hence sufficient if the will of the giver of the advantage is orientated towards general well-wishing related to future specialist decisions which can be activated should the opportunity arise.

Case 1: Federal Court of Justice, judgment of 26 May 2011 - 3 StR 492/10 -, juris (cf. wistra 2011, 1203-1207; StV 2012, 19-23):

Both defendants worked as executive directors of the School Photography Company (Gesellschaft für Schulfotografie, GES) and the School and Kindergarten Photography Company (Gesellschaft für Schul- und Kindergartenfotografie, GSK), "pursuing the school photography business model". This business model entailed sending a photographer to photograph pupils individually and as a class in a specified space at a time agreed upon with headteachers. With the help of the teachers, the photographs were then distributed to the pupils and their parents and offered for sale. There was no obligation to purchase these photographs.

The teachers collected the money required to the extent that the photographs were purchased, and took back any unsold photographs. The money and remaining photographs were then handed over to the school photographer. Both defendants made donations to these schools based on the turnover generated or the number of pupils photographed. These donations were made either in the form of money for the class kitty, managed by the class tutor for group purchases and outgoings, or in the form of monetary payments or payments in kind to the school as a whole. The donations were recorded in part as "discounts", "sponsoring" or "refund of expenses".

Between them, the defendants held photography sessions in 14 cases from 16 April 2002 to 26 November 2004 in which, in the above-described manner, monetary donations were made of between €96.07 and €848.56, or payments were made in kind to the equivalent of between €346.84 and €885.34.

Hildesheim Regional Court acquitted both defendants on 11 May 2010, ruling that the criminal offence of section 334 StGB had not been committed. The public prosecutor's office took the case to the Federal Court of Justice for an appeal on points of law and won. The Federal Court of Justice dismissed the

judgment of Hildesheim Regional Court and referred the matter to another criminal division of the Regional Court for a new trial and decision. (A headteacher is indisputably considered a public official pursuant to section 11 (1) no. 2 a) StGB.)

With its ruling, the Federal Court of Justice demonstrated that, under section 334 (3) no. 2 StGB, anybody who offers, promises or grants a benefit in return for a future (official) act falling within the discretionary powers of a public official will endure criminal liability for bribery even if he only attempted to bring the public official to allow himself to be influenced by the benefit in exercising his discretion. There is nothing in the Regional Court judgment to indicate that the defendants did not fulfil these elements of the offence.

A headteacher's decision on whether and how a photo shoot should take place fell within his or her discretion. Section 334 (3) no. 2 StGB criminalises the mere attempt to influence such discretionary decision by offering, promising or granting a benefit. In terms of criminal liability it is therefore irrelevant whether the official act is actually carried out and influenced by the (foreseen) advantage or not. The offence of section 334 (3) no. 2 StGB is considered to have been committed if the donations are offered in order to influence headteachers to commission GES or GSK with carrying out the photo shoot. Since Hildesheim Regional Court had not made any findings on this matter, the case was referred to another criminal division of Hildesheim Regional Court for a new trial.

Case 2: Potsdam Regional Court, judgment of 16 December 2013 - 27 Ns 200/10 (cf. LKV 2014, 335):

As chief administrative official, L. was the head of Wusterwitz local authority (Amt Wusterwitz). The area falling within the authority of Amt Wusterwitz was home to landfill sites designated for revegetation based on an order from the regional administration of the state of Brandenburg in order to avert the danger of toxic substances permeating the soil and groundwater. The Wusterwitz local authority intended to pay a company to execute these revegetation measures. The defendant L., among others, was responsible for awarding the contract to the company. R. was the proprietor of a company offering revegetation services for landfill sites. R. had heard that a Christmas party was to be held on 20 December 2005 for staff at the Wusterwitz local authority. The defendant R. offered to "sponsor" the Christmas party for the defendant L. An agreement was made for R. to pay for the Christmas party directly at the restaurant chosen for the event. In accordance with this agreement, the defendant R. paid a total of €750 for the Christmas party. R. made the payment because he hoped that in doing so he would be awarded further contracts to revegetate other landfill sites belonging to the Wusterwitz local authority.

Brandenburg an der Havel Local Court ordered the defendant L. to pay a criminal fine of 40 daily rates of €100.00 (= €4,000) for accepting a benefit pursuant to section 331 StGB; R. was ordered to pay a criminal fine of 90 daily rates of €100.00 (= €9,000) for granting a benefit pursuant to section 333

StGB.

Potsdam Regional Court upheld the decision of Brandenburg Local Court.

Statistics and data collected

The National Situation Report on Corruption is compiled annually by the Federal Criminal Police Office (BKA) on the basis of structured survey-based information supplied by the Länder (federal states), the Customs Criminological Office (ZKA) and the Federal Criminal Police Office. The information relates to preliminary investigations launched in the respective reporting period in the areas mentioned.

The Situation Report does not take account of corruption proceedings in which investigations are conducted by the Public Prosecution Office without the police's involvement. Information from the Länder to be included in the structured survey must be delivered to the Federal Criminal Police Office by a specified date.

The National Situation Report compiled on the basis of these data is forwarded to the Federal Ministry of the Interior (BMI) for approval prior to publication. The tables published in the Police Crime Statistics (PKS) are compiled according to fixed rules on the basis of the individual record sets available to the respective Land Criminal Police Offices and to the Federal Criminal Police Office. For reasons inherent in the system, the values determined at federal level may deviate slightly from the data published by the Länder.

The Police Crime Statistics represent what is known as the baseline. That means the statistics only include offences which became known to the police and which the police completed their handling of, including any punishable attempts and drug-related crimes dealt with by the customs authorities; these offences are not recorded in the statistics until they are handed over to the Public Prosecution Office. Page 7 of the National Situation Report on Corruption 2013 indicates multi-year figures regarding section 331 of the Criminal Code (Strafgesetzbuch, StGB) (Taking bribes), section 332 of the Criminal Code (Taking bribes meant as an incentive to violating one's official duties), section 333 of the Criminal Code (Giving bribes) and section 334 of the Criminal Code (Giving bribes as an incentive to the recipient's violating his official duties). The number of cases of bribery of members of parliament (in the version applicable at the time) is included in the table on page 8. As regards the share of public officials receiving bribes in 2013, please refer to the top of page 11. The National Situation Report on Corruption is enclosed.

In 2013: 28 persons were sentenced or discharged, 20 persons were convicted on the account of having violated section 333 of Criminal Code. 137 persons were sentenced or discharged, 116 persons were convicted on account of having violated section 334 of Criminal Code. 22 persons were sentenced or discharged, 20 were convicted on account of having violated section 335 of Criminal Code. No convictions on account of having violated section 108e of Criminal Code in 2013 (Reason: Provision 108e entered into force on 1 September 2014).

Source: Federal Statistic Office

"Persons sentenced or discharged (Abgeurteilte) are defendants against whom a penal order has been imposed or criminal proceedings were conducted, after

the opening of the main proceedings, and concluded with final and binding effect by judgment or an order for termination of the proceedings. They include persons convicted and persons against whom other decisions (incl. acquittal) have been issued. In the case of defendants sentenced on account of having violated several criminal provisions either by violating multiple laws or the same law more than once (section 52 of the Criminal Code) or committing multiple offences by multiple acts (section 53 of the Criminal Code), only that criminal offence is recorded in the statistics which according to the law carries the most severe penalty.

Persons convicted (Verurteilte) are defendants against whom deprivation of liberty, detention or a fine (including by means of a final and binding penal order) has been imposed under general criminal law.

The Criminal Prosecution Statistics only ever include the most serious offence on which the conviction was based."

Source: Federal Statistical Office

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

The term public official is defined (section 11 StGB) and is generally in conformity with the Convention. While Members of Parliament and communal mandate holders are not considered public officials, they are governed by a separate provision on active and passive bribery (section 108e StGB).

Active bribery of national public officials is criminalized in sections 333 and 334 of the Criminal Code and covers the elements of promise, offer and granting of an advantage. An advantage includes both material (for which no value thresholds exist) and immaterial benefits (para 271 of the reasoning to the StGB and case law of the Federal Court of Justice).

A separate provision covers aggravating circumstances and sets out harsher penalties for particularly serious cases of bribery, e.g. involving an advantage of great magnitude or accepting bribes on a continuous basis (section 335 StGB). However, there is a discrepancy in that the sanctions applicable for bribery involving public officials is up to 10 years' imprisonment in serious cases, while for members of parliament, it remained up to five years' imprisonment. See further below under paragraph 1 of article 30.

The bribery provisions cover omissions, lawful official acts as well as acts in breach of duty. Case law of the Federal Court of Justice has considered also indirect bribery (benefits given in return for the performance or omission of an act by the officials) to fall under the scope of bribery offences. Third-party benefits are explicitly covered (section 331-334 StGB).

Subparagraph (b) of article 15

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

...

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the article under review and in addition to the information provided under 15 (a), cited the following legal provisions.

Passive bribery is criminalised in sections 331 and 332 of the Criminal Code. Accepting and granting advantages is criminalised in accordance with German law if it relates to a (possible) action in return on the part of the public official (“illicit agreement”).

The formulation “allows himself to be promised” encompasses the acceptance of offers and promises.

Criminal Code (StGB)

Chapter 30

Offences committed in public office

Section 331

Accepting benefits

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the discharge of a duty incur a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or a third party in return for the fact that they performed or will in the future perform a judicial act incur a penalty of imprisonment for a term not exceeding five years or a fine. The attempt is punishable.

(3) The offence does not entail criminal liability pursuant to subsection (1) if offenders allow themselves to be promised or accept a benefit which they did not demand and the competent authority, within the scope of its powers, either previously authorised the acceptance or offenders promptly make a report to the competent authority and it authorises the acceptance.

Section 332

Taking bribes

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact

that they performed or will in the future perform an official act, and thereby breached or would breach their official duties, incur a penalty of imprisonment for a term of between six months and five years. In less serious cases, the penalty is imprisonment for a term not exceeding three years or a fine. The attempt is punishable.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform a judicial act, and thereby breached or would breach their judicial duties, incur a penalty of imprisonment for a term of between one year and 10 years. In less serious cases, the penalty is imprisonment for a term of between six months and five years.

(3) If offenders demand, allow themselves to be promised or accept a benefit in return for a future act, then subsections (1) and (2) already apply if they have indicated to the other person that they are willing

1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

Section 331 the Criminal Code encompasses offences where the advantage is awarded for (lawful) official activity, whilst section 332 encompasses offences where the advantage is awarded in return for an official act which is in breach of duty or one which is at the discretion of the public official.

As noted above for subparagraph (b) of article 15, Section 335 of the Criminal Code contains a regulation on the assessment of punishment for particularly serious cases of bribery, and section 336 clarifies that advantages for the omission of an official act are also covered.

The terms “public officials”, “individual with a special obligation for the public service” and “judge” are used in sections 331 et seqq. of the Criminal Code, to describe the person accepting the advantage (passive bribery) and the individual to whom advantages are granted in the framework of active bribery. These terms are given a statutory definition in section 11 subs. 1 Nos. 2 to 4 of the Criminal Code.

Gifts can be accepted by public officials up to a value of EUR 25, and above which the gift should be handed to the official’s employing office (section 71 of the Federal Civil Service Act and Circular on the ban on accepting rewards or gifts in the federal administration of 8 November 2004):

Federal Civil Service Act (BBG)

Section 71

Prohibition of rewards, gifts and other advantages

- (1) Even after their civil service employment ends, civil servants may not demand or accept any rewards, gifts or other advantages or the promise of such for themselves or third persons in connection with their position. Exceptions shall require the approval of the highest service authority or the last highest service

authority. The authority to provide approval may be delegated to other agencies.

- (2) Anyone who violates subsection 1 shall surrender to his or her employer whatever was received in violation of duty, unless its forfeiture was ordered in criminal proceedings or it was otherwise surrendered to the state. The amount to be surrendered shall be governed by the provisions of the Civil Code on surrendering undue enrichment. The duty to surrender under the first sentence also includes the duty to inform the employer of the type, extent and location of whatever was received.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

In addition to the observations made under 15 (a), the experts noted that passive bribery of national public officials is criminalized in sections 331 and 332 of the Criminal Code and covers the elements of demanding and allowing oneself to be promised and acceptance of an advantage.

Moreover, gifts can be accepted by public officials up to a value of EUR 25, and above which the gift should be handed to the official's employing office (section 71 BBG; Circular on the ban on accepting rewards or gifts in the federal administration of 8 November 2004; section 331 StGB). All gifts should be notified to the employer.

(c) Successes and good practices

Germany's comprehensive bribery offence of domestic public officials not requiring a link between the bribe and any performance or omission of an official act by the bribe taker.

Germany has an impressive number of crime statistics available. While, from the perspective of the present review, the statistics would benefit from also being separated and combined in line with the provisions of the Convention, the overall effort to gather and maintain crime statistics is most definitely to be considered a good practice and a success.

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

Paragraph 1 of article 16

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or

herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

45. Active bribery of foreign public officials is criminalised by section 335a, and section 334 of the Criminal Code, whereas section 108e of the Criminal Code covers active bribery of mandate holders of the European Parliament, a parliamentary assembly of an international organisation, or a legislative body of a foreign state.

The Anti-Corruption Act which entered into force on 26 November 2015 brought the following major changes:

- The new section 335a of the Criminal Code (CC - StGB) deems foreign and international public officials to be equal to domestic public officials with regard to the application of the offences of active bribery as well as passive bribery (sections 332 and 334 CC). The new provision incorporates the formerly existing provisions on the extension of the CC provisions to foreign public officials, in particular the Act on Combating International Bribery (Gesetz zur Bekämpfung internationaler Bestechung - IntBestG)

Criminal Code (StGB)
Chapter 30
Offences committed in public office

Section 335a
Foreign and international officials

(1) For the purposes of applying section 331 (2), section 333 (2) and sections 332 and 334, in each case also in conjunction with section 335, to an offence relating to a future judicial act or a future official act, the following are equal to

1. a judge:
a member of a foreign or an international court;
2. any other public official:
 - a) an official of a foreign state and a person entrusted with performing public functions for a foreign state,
 - b) an official of an international organisation and a person entrusted with performing functions for an international organisation,
 - c) a soldier of a foreign state and a soldier entrusted with performing functions for an international organisation.

(2) For the purposes of applying section 331 (1) and section 333 (1) and (3) to an offence relating to a future judicial act or a future official act, the following are equal to

1. a judge:

a member of the International Criminal Court;

2. any other public official:

a member of staff of the International Criminal Court.

(3) For the purposes of applying section 333 (1) and (3) to an offence relating to a future official act, the following are equal to

1. a soldier in the Federal Armed Forces:

a soldier in the non-German troops of one of the member states of the North Atlantic Treaty Organization deployed in Germany and who are residing in Germany at the time of the unlawful act;

2. any other public official:

a member of staff of these troops;

3. a person entrusted with special public service functions:

a person who is employed by the troops or acts for them and has been formally obliged by general or specific instructions issued by a higher service unit of the troops to conscientiously discharge his or her duties.

- As a consequence, active bribery of foreign public officials is criminalized irrespective of whether or not it is committed in order to obtain or retain business or an improper advantage in international business transactions.
- Also as a consequence, criminalization of passive bribery by foreign public officials (before only existing in relation to public officials of the EU and its Member States) is introduced.

The Act on Combating International Bribery (Gesetz zur Bekämpfung internationaler Bestechung- IntBestG) deemed foreign and international public officials to be equal to German public officials with regard to the application of the offence of active bribery (section 334 of the Criminal Code) relating to offences in international business transactions. The regulations on equality concerning foreign and international public officials were incorporated into section 335a of the Criminal Code (StGB) by the Anti-Corruption Act which entered into force on 26 November 2015. Furthermore, the Anti-Corruption Act provides for broader criminalization of active and passive bribery of foreign public officials. In particular, bribery offences are no longer limited to active bribery and do not require that the bribery is committed in the context of international business transactions.

The EU Bribery Act (EuBestG) deemed public officials of other EU Member States and of the European Union to be equal to German public officials for the application of the offences of passive bribery (section 332 of the Criminal Code) and active bribery (section 334 of the Criminal Code). The regulations on equality of the EU Bribery Act were incorporated into the Criminal Code (StGB) by the Anti-Corruption Act which entered into force on 26 November 2015. The EU Bribery Act itself was repealed.

Furthermore, German law had separate regulations for specific groups of individuals. In section 1 subs. 2 No. 10 of the NATO Troop Protection Act (NATO-Truppenschutzgesetz - NTSG), granting an advantage and bribery of soldiers, civil servants and other employees of the NATO troops stationed in Germany was criminalized. In accordance with section 2 of the Act on the Staying of the Lapse of Prosecution and Equal Treatment of Judges and Employees of the International

Criminal Court (Gesetz über das Ruhen der Verfolgungsverjährung und die Gleichstellung der Richter und Bediensteten des International Strafgerichtshofes - IStGHGleichStG), judges, public officials and other employees of the International Criminal Court were deemed to be equal to German judges and public officials for the purposes of the application of sections 331 et seqq. of the Criminal Code. These regulations of the NTSG and of the IStGHGleichStG were incorporated into the Criminal Code (StGB) (section 335a) by the Anti-Corruption Act.

Corruption offences by and towards mandate holders of the European Parliament, of a parliamentary assembly of an international organisation or of a legislative body of a foreign state are punishable in accordance with section 108e of the Criminal Code (StGB). The provision of section 108e entered into force on 1 September 2014.

In addition, the active bribery of members of foreign public assemblies in international business transactions remains criminalized in Germany by article 2 section 2 of the Act on Combating International Bribery (IntBestG) which is still in force and has not been changed by the Anti-Corruption Act.

Act on the Convention dated 17 December 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions

(Act on Combating International Bribery [Gesetz zur Bekämpfung internationaler Bestechung -IntBestG])

Article 2: Implementing Provisions

Section 1 (repealed by the Anti-Corruption Act) Equal treatment of foreign and domestic public officials in the event of acts of bribery

For the purpose of applying section 334 of the Criminal Code (Criminal Code), also in conjunction with sections 335, 336 and 338 subsection 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an improper advantage in international business transactions, the following shall be treated as equal:

1. to a judge:
 - a) a judge of a foreign state,
 - b) a judge at an international court;
2. to any other public official:
 - a) a public official of a foreign state,
 - b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state,
 - c) a public official and an other member of the staff of an international organisation and a person entrusted with carrying out its functions;
3. to a soldier in the Federal Armed Forces (Bundeswehr):
 - a) a soldier of a foreign state,

- b) a soldier who is entrusted to exercise functions of an international organisation.

Section 2 Bribery of foreign Members of Parliament in connection with international business transactions

- (1) Anyone who offers, promises or grants to a Member of a legislative body of a foreign state or to a Member of a parliamentary assembly of an international organisation an advantage for that Member or for a third party in order to obtain or retain for him/herself or a third party business or an improper advantage in international business transactions, in return for the Member's committing an act or omission in future in connection with his/her mandate or functions, shall be punished by imprisonment not exceeding five years or by a fine.
- (2) An attempt shall incur criminal liability.

Act on the Protocol dated 27 September 1996 to the Convention on the protection of the Europeans Communities' financial interests (repealed by the Anti-Corruption Act)
(EU Bribery Act [EU-Bestechungsgesetz -EuBestG])

Article 2: Implementing Provisions

Section 1 Equal treatment of foreign and domestic public officials in the event of acts of bribery (1) For the purpose of applying sections 332, 334 to 336 and 338 of the Criminal Code [Criminal Code] to an act of bribery for a future judicial or official act, the following shall be treated as equal:

- 1. to a judge:
 - a) a judge of another Member State of the European Union;
 - b) a member of a Court of the European Communities;
- 2. to any other public official:
 - a) a public official of another Member State of the European Union, to the extent that the person's position corresponds to a public official within the meaning of section 11 subsection 1 no. 2 of the Criminal Code;
 - b) a Community official within the meaning of the Protocol of 27 September 1996 to the Convention on protection of the European Communities' interests;
 - c) a member of the Commission and of the Court of Auditors of the European Communities.

(2) ...

Act on the Suspension of the Statute of Limitations for Prosecution of Crimes and the Consideration as Equivalent of the Judges and Staff Members of the International Criminal Court (IStGHGleichstG)(repealed by the Anti-Corruption Act)

Section 2 Consideration as Equivalent of the Judges and Staff Members

Where it comes to the application of sections 331 through 336, 338 of the Criminal Code to an act of bribery that refers to an action by a judge or an official action to be taken in the future, the following shall be considered equivalent:

1. To a judge:

A judge of the International Criminal Court,

2. To an official of any other kind:

An official and a staff member of any other kind of the International Criminal Court.

Nato-Truppen-Schutzgesetz (NATO Troop Protection Act – NTSG (repealed by the Anti-Corruption Act))

(2) In order to protect the troops stationed in the Federal Republic of Germany of the non-German States Parties to the North Atlantic Treaty who, at the time the deed was

committed, are staying in the territorial scope of this Act, the following stipulations of the Criminal Code are to be applied, observing the special aspects determined in numbers 1 through 10:

1. ...

10. Section 333 subsections (1) and (3), section 334 subsections (1) and (3), section 335 subsection (1) no. 1 letter (b), subsection (2) nos. 1 and 3, section 336 to the granting of advantages and bribing of soldiers, officials of these troops or such staff members of the troop who, based on general or specific instructions issued by a higher-level authority of the troops, have been formally obligated to faithfully discharge their duties.

As examples of implementation, Germany made reference to jurisprudence submitted through the peer review mechanism of the OECD.

OECD Report 2011: Page 30: “In the cases mentioned in the Annual reports and the decisions provided by the German authorities, ten individuals were convicted for the criminal offence of bribery of foreign public officials (section 334 CC). Nine of them received prison sentences, one individual was sentenced to pay a fine only, following a penal order procedure (EUR 20 000) (.See 2008 Annual report, Hamburg (b)). Five of the nine prison sentences were suspended, four of which concerned individuals convicted for “especially serious” cases of bribery of foreign public officials. The average length of the prison sentences was 2 years and 3 months. The longest sentence was five years coupled with a EUR 2.16 million fine, though the defendant, who was convicted on two counts of foreign bribery, was also convicted on over 600 counts of other offences. (See Penal order of 14 April 2005, Amtsgericht München (Munich court) [1 individual] ; judgment of 27 February 2008, Landgericht München I (Munich regional court) [1 individual] ; and judgment of 17 March 2008, Landgericht Stuttgart (Stuttgart regional court) [3 individuals -one sentenced to non suspended

imprisonment], hereinafter referred to as Case “Company WB and three former executives”). “

OECD Report 2014 (Annual Report of the OECD Working Group on Bribery 2014): From 1999 to December 2013 40 individuals were convicted of foreign bribery and were sanctioned. In addition in 150 foreign bribery cases sanctions were agreed.

<http://www.oecd.org/daf/anti-bribery/WGB-AB-AnnRep-2014-EN.pdf>

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Active bribery of foreign public officials and officials of international organizations is criminalized according to sections 334, 335a of the Criminal Code. The Act on Combating International Bribery, and the EU Bribery Act consider bribery of foreign and European officials to be equal to bribery of German public official. Moreover, Section 108e of the Criminal Code criminalises active bribery of mandate holders of the European Parliament, a parliamentary assembly of an international organisation, or a legislative body of a foreign state.

However, the new section 335a which incorporates the foreign bribery offence into the Criminal Code does not include section 333 amongst the criminal offences extended to foreign bribery. The experts noted with concern the question whether facilitation payments to foreign public officials outside of Germany for the performance of lawful acts and not in violation of corresponding duties were considered bribes. The Germany clarified that the threshold for assessing a breach of duty for purposes of determining the foreign bribery offence is low and is meant to cover any payments to influence a public official's discretion. Nevertheless, the experts noted that Germany, with due respect for its domestic legal system, should continue to ensure that the legal treatment of facilitation payments remained in line with the requirements of article 16 of the Convention.

Paragraph 2 of article 16

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and referred to the information provided under 16 (1).

Passive bribery of foreign public officials is criminalised by section 335a, sections 331 and 332 of the Criminal Code, whereas section 108e of the Criminal Code covers passive bribery of mandate holders of the European Parliament, a parliamentary assembly of an international organisation, or a legislative body of a foreign state.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Passive bribery of foreign public officials is criminalised by section 335a read with sections 331 and 332 of the Criminal Code.

Section 108e of the Criminal Code criminalises passive bribery of mandate holders of the European Parliament, a parliamentary assembly of an international organisation, or a legislative body of a foreign state.

Article 17. Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 246 Unlawful appropriation

(1) Whosoever unlawfully appropriates chattels belonging to another for himself or a third person shall be liable to imprisonment not exceeding three years or a fine unless the offence is subject to a more severe penalty under other provisions.

(2) If in cases under subsection (1) above the property was entrusted to the offender the penalty shall be imprisonment not exceeding five years or a fine.

(3) The attempt shall be punishable.

Section 263 Fraud

- (1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.
- (3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender

1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;

2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;

3. places another person in financial hardship;

4. abuses his powers or his position as a public official or as a European public official; or

5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship.

(4) Section 243(2), section 247 and section 248a shall apply mutatis mutandis.

(5) Whosoever on a commercial basis commits fraud as a member of a gang, whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269 shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from six months to five years.

Section 266 Embezzlement and abuse of trust

(1) Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine.

(2) Section 243(2), section 247, section 248a and section 263(3) shall apply mutatis mutandis.

In relation to jurisprudence related to the present provision under review, Germany made the following references:

Case 1: Lübeck Regional Court, judgment of 31 May 2011 - 1 Ns 14/11 -, juris (cf. SchIHA 2012, 151-152):

The defendant had worked as a clerk in expert division 2 for youth, schools and culture in service 22 for families and schools, responsible in particular for youth welfare support (primarily those with names beginning with the letters .. to ..). In

addition to his function as system administrator for the Prosoz-14plus-System computer software, which was used to process youth welfare support payments, he was responsible as a case worker for approving individual payments as part of the youth welfare schemes. Thanks to his many years in the job and his knowledge as a system administrator, the defendant had an accurate overview of how youth welfare payments are processed. He also knew from experience that the "S...kasse" bank in the town of H. does not verify that the recipient indicated on a transfer is the same as the holder of the account to which the sum of money is to be transferred. The defendant was further aware that those working in youth welfare were largely trusted, and that only isolated, as opposed to systematic, checks were in place in their dealings with money. Based on this experience and the knowledge he had accrued up to April 2005, the defendant decided in April 2005 to balance his own books during a financial bottleneck by obtaining unauthorised payments from district S. In order to do this, the defendant activated a fictitious youth welfare account, which had previously been created for a transaction under the name of a youth welfare recipient called "J.H.", but which was no longer in use since the youth welfare recipient J.H. no longer had a claim to youth welfare assistance. The defendant changed the details of the account and, in the cases 1 to 60, added the name of an existing local organisation for education and vocational training at number ... K... Street in H. as the recipient under invoice number 1045344, even though this organisation had not worked with H. and had no payment claims vis-à-vis district S. Following a failed transfer, the defendant added the name of his then partner W. to the payment file for cases 61 to 67. Furthermore, in all cases, he entered an account at the S...kasse bank in H. with the account number ... and sort code... as the account to which the money was to be transferred; this account was held jointly by himself and his partner W. He was aware in doing so that the S...kasse bank in H. would not notice that the recipient's name was different to that of the account holder. Having decided that this was how his scheme would work, the defendant invented a new payment amount in each of the 67 cases that would not stand out against other comparable regular youth welfare payments. He entered this amount into the electronic data processing system with reference to the case file of J.H., providing the name of the aforementioned organisation as recipient (as of case 61: under the name "W") but submitting his own account details. All in all, 67 transfers were effected, resulting in total payments of approx. €450,000, to an account accessible by the defendant. The defendant intended to use this money to improve his day-to-day lifestyle, living more elaborately in accordance his new, now significantly augmented, income.

Ahrensburg Local Court sentenced the defendant for 67 counts of embezzlement, in one and the same act as fraud, to a custodial sentence of 3 years. Additionally, he was ordered to forfeit a monetary sum of €339,207.00 pursuant to section 73 (1), second sentence, StGB. Lübeck Regional Court upheld the judgment of the Local Court, only reducing the order for forfeiture because sums had already been transferred back in the meantime.

Provisions applied: Section 263 (1), (3), first sentence, second sentence, no. 1, 4; section 266 (1), (2); section 11 (1) no. 2 letter b, c; section 52

Case 2: Federal Court of Justice 4 StR 353/92 of 29 October 1992 (cf. BGHSt

38, 381-387, NJW 1993, 605-607, MDR 1993, 254-256): Guiding Principle

If, after investigation proceedings have been terminated in return for the accused making a payment to a charitable organisation, a public prosecutor uses the cheque provided for this purpose in order to meet his own payment obligations, the prosecutor shall not be considered to have perverted the course of justice; he is guilty of unlawful appropriation in one and the same act as removing materials under official safekeeping.

Facts of the case:

In an investigation into Dieter P., the defendant - the investigating prosecutor in a criminal case - considered terminating proceedings in return for payment of a sum of money pursuant to section 153a (1) StPO. He informed the accused of this in a meeting, adding that the sum would be paid to a charitable organisation. Following the handover of a cheque for DM2,000 made out to the social charity of the regional sports association, the defendant ordered the termination of proceedings. He submitted the cheque to a bank and ordered the bank clerk to credit the sum stated on the check to the general account of his tennis club. The defendant gave the remittance voucher to a member of staff at the association. In accordance with his request, she accepted the cheque to cover his membership and training dues worth DM1,280 and DM310, and used the remaining sum for a youth training scheme.

Dortmund Regional Court sentenced the defendant to pay a criminal fine of 120 daily rates of DM55 for unlawful appropriation constituting abuse of trust pursuant to section 246 (1) and (2) StGB. In its decision of 29 October 1992, the Federal Court of Justice found that the defendant should have been sentenced not only for unlawful appropriation constituting abuse of trust but also for removing materials under official safekeeping pursuant to section 133 StGB.

In relation to statistics related to the present provision under review, Germany made the following references:

- See the National Situation Report on Corruption 2013
- In 2013: 9413 individuals were sentenced or discharged, 6844 individuals were convicted on account of having violated section 246 of the Criminal Code. 40 individuals were sentenced or discharged, 34 individuals were convicted on account of having violated section 263 paragraph 3 no. 4 of the Criminal Code. 1988 individuals were sentenced or discharged, 1380 were convicted on account of having violated section 266 of the Criminal Code

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Embezzlement and misappropriation of property in the public sector are criminalized through the provisions on unlawful appropriation (section 246 StGB), fraud (section 263 StGB) and embezzlement and abuse of trust (section 266 StGB).

Article 18. Trading in influence

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*
- (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

In Germany, the provisions regarding trading in influence within the meaning of article 18 of the Convention are implemented by a range of provisions included in the German Criminal Code. In particular section 266 of the Criminal Code should be cited in this regard, which also applies to acts of bribery committed abroad. The Federal Constitutional Court even ruled that in situations where considerable assets are placed in “slush funds” in a company and are used to create advantages for the enterprise by bribery or by purchasing influence, the act of removing and keeping the assets in reserve is punishable as a breach of trust towards the enterprise (section 266 paragraph 1 Criminal Code). The offence is deemed committed regardless of whether the money is actually used. The intention of using the money in the economic interest of the enterprise is not a mitigating factor.

The existing offences of taking bribes (section 331 StGB) and giving bribes (section 333 StGB), for example, require a direct relationship between the benefit and the action taken by the official (“for the discharge of an official duty”). There has so far been no need for such far-reaching punishment of third persons. Criminal behaviour is covered by sections 331 et seqq StGB, which also apply to the acceptance or provision of benefits for third parties. Germany considers that the provisions under sections 331 et seqq StGB already reflect articles 15, 16 and 19 of the Convention.

Where such a case involves a lawyer or counsel who discloses secrets that were confided to him or her within the framework of the mandate, the lawyer would incur

criminal liability under section 203 StGB. Where the bribery case does not involve the disclosure of secrets, the lawyer commits a violation of the lawyer-client relationship pursuant to section 356 StGB, by serving the interests of two opposing parties. Sections 203 et seq. StGB do not only apply to lawyers, but also to certified public accountant, sworn auditor, tax consultant, tax agent, or organ or member of an organ of a law, patent law, accounting, auditing or tax consulting firm in the form of a company. Sections 356 StGB applies, in addition to lawyers, to other persons rendering legal assistance.

German Criminal Code (StGB)

Section 356

Violating the attorney-client relationship

- (1) An attorney or other person rendering legal assistance who in relation to matters confided to him in this capacity in the same legal matter serves both parties with counsel and assistance in breach of his duty shall be liable to imprisonment from three months to five years.
- (2) If the offender acts in collusion with the opposing party to the detriment of his client the penalty shall be imprisonment from one year to five years.

Section 203

Violation of private secrets

- (1) Whosoever unlawfully discloses a secret of another, in particular, a secret which belongs to the sphere of personal privacy or a business or trade secret, which was confided to or otherwise made known to him in his capacity as a

...

3. attorney, patent attorney, notary, defence counsel in statutorily regulated proceedings, certified public accountant, sworn auditor, tax consultant, tax agent, or organ or member of an organ of a law, patent law, accounting, auditing or tax consulting firm in the form of a company;
4. marriage, family, education or youth counsellor as well as addiction counsellor at a counselling agency which is recognised by a public authority or body, institution or foundation under public law;

...

shall be liable to imprisonment not exceeding one year or a fine.

- (2) Whosoever unlawfully discloses a secret of another, in particular, a secret which belongs to the sphere of personal privacy or a business or trade secret, which was confided to or otherwise made known to him in his capacity as a

1. public official;
2. person entrusted with special public service functions;
3. person who exercises duties or powers under the law on staff employment representation;
4. member of an investigative committee working for a legislative body of the Federation or a state, another committee or council which is not itself part of

- the legislative body, or as an assistant for such a committee or council;
5. publicly appointed expert who is formally obliged by law to conscientiously fulfil his duties, or
 6. person who is formally obliged by law to conscientiously fulfil his duty of confidentiality in the course of scientific research projects,

shall incur the same penalty. Particular statements about personal or material relationships of another which have been collected for public administration purposes shall be deemed to be equivalent to a secret within the meaning of the 1st sentence above; the 1st sentence above shall not apply to the extent that such particular statements are made known to other public authorities or other agencies for public administration purposes unless the law forbids it.

(2a) Subsections (1) and (2) above shall apply *mutatis mutandis* when a data protection officer without authorisation discloses the secret of another within the meaning of these provisions, which was entrusted to or otherwise revealed to one of the persons named in subsections (1) or (2) above in their professional capacity and of which he has gained knowledge in the course of the fulfilment of his duties as data protection officer.

(3) Other members of a bar association shall be deemed to be equivalent to an attorney named in subsection (1) No 3 above. The persons named in subsection (1) and the 1st sentence above shall be equivalent to their professionally active assistants and those persons who work with them in training for the exercise of their profession. After the death of the person obliged to keep the secret, whosoever acquired the secret from the deceased or from his estate shall be equivalent to the persons named in subsection (1) and in the 1st and 2nd sentences above.

(4) Subsections (1) to (3) above shall also apply if the offender unlawfully discloses the secret of another person after the death of that person.

(5) If the offender acts for material gain or with the intent of enriching himself or another or of harming another the penalty shall be imprisonment not exceeding two years or a fine.

Section 204 Exploitation of the secrets of another

(1) Whosoever unlawfully exploits the secret of another, in particular a business or trade secret, which he is obliged to keep secret pursuant to section 203, shall be liable to imprisonment not exceeding two years or a fine.

(2) Section 203(4) shall apply *mutatis mutandis*.

Section 205 Request to prosecute

(1) In cases under section 201(1) and (2) and sections 201a to 204 the offence may only be prosecuted upon request.

(2) If the victim dies the right to file a request shall pass to the relatives pursuant to section 77(2); this shall not apply to offences under section 202a or section 202b. If the secret does not relate to the sphere of the personal privacy of the victim the right to file a request for offences under section 203 and section 204 shall pass to the heirs. If the offender discloses or exploits the secret after the death of the person in cases under section 203 and section 204, the 1st and 2nd sentences above shall apply mutatis mutandis.

However, all of the offences listed below regarding Article 19 UNCAC (see below) are an option as well. Additionally, sections 331, 333, and 334 of the Criminal Code are to be cited. It is presumed only for section 263 and sections 331, 332, 333, 334 of the Criminal Code that the public official is taking action solely in order to obtain an advantage for himself or for another person (which may also be an entity). Where the other provisions of the law are concerned, it suffices for the public official to be acting in dereliction of his duties in any manner whatsoever in order to make him liable to punishment.

Additionally, section 357 of the Criminal Code should be noted, according to which a superior who incites a subordinate to commit an unlawful act in public office is liable to punishment under criminal law.

Criminal Code (StGB)

Section 357

Incitement of a subordinate to the commission of offences

(1) A superior who incites or undertakes to incite a subordinate to commit an unlawful act in public office or allows such an unlawful act of his subordinate to occur shall incur the penalty provided for this unlawful act.

(2) The same rule shall be applied to a public official to whom supervision or control over the official business of another public official has been transferred to the extent that the unlawful act committed by the supervised public official concerns the business subject to the supervision or control.

Donations to political parties are covered by both, sec. 331 et seq. and section 108e of the Criminal Code. It is true that according to section 108e para. 4 no. 2 of the Criminal Code a donation shall not be considered an undue advantage, if the donation is permissible under the Law on Political Parties. However, should the donation be a means for bribing the MP, it may not be permissible under the Law on Political Parties which stipulates that donations may not be accepted where they are recognisably being granted to the party with the expectation of obtaining a certain economic or political advantage.

Section 25 of the Act on Political Parties (PartG) determines under which conditions a donation to a political party is permissible. According to section 25 para. 2 no. 7 PartG

a donation to a political party is impermissible if the donation is given for a service in return. Hence, where the donation is a third party advantage agreed between the bribe giver and the delegate, it would be an impermissible donation and hence an undue advantage under sec. 108e of the Criminal Code.

Law on Political Parties (PartG)

Section 25 Donations

(1) Political parties are entitled to accept donations. Donations may be made in cash up to an amount of EUR 1,000. Party members who receive donations made to their party are to forward such donations without undue delay to a member of the party's board designated by the party under its statutes as being responsible for financial matters. A party is considered to have obtained donations once they have come into the realm over which a member of the party's board that is responsible for financial matters has the power to dispose, or into that of a staff member of the party; any donations that are returned to the donor immediately upon having been received are deemed to not have been obtained by the party.

(2) The following do not fall under the parties' authority to accept donations:

...

7. donations evidently made in the expectation of, or in return for, some specific financial or political advantage;

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is partially in compliance with the provision under review.

There is no stand-alone provision on trading in influence under German law, but such behaviour would fall under StGB sections 331-336 on bribery, section 266 on embezzlement and abuse of trust and section 357 on incitement of a subordinate to the commission of offences.

Nevertheless, donations to political parties are not permitted if "evidently made in the expectation of, or in return for, some specific financial or political advantage" (section 25(2-7) of the Act on Political Parties). The experts considered that the requirement that such donations be made 'evidently' in view of an undue advantage raised a question regarding the law's requirements vis-à-vis non-material donations and disclosures. To this end, Germany may wish to assess and consider further enhancing the transparency in political party financing.

Article 19. Abuse of functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse

of functions or position, that is, the performance or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Abuse of functions is implemented through several provisions of the German Criminal Code (StGB), some which require damage, others which do not.

Section 246 Unlawful appropriation

(1) Whosoever unlawfully appropriates chattels belonging to another for himself or a third person shall be liable to imprisonment not exceeding three years or a fine unless the offence is subject to a more severe penalty under other provisions.

(2) If in cases under subsection (1) above the property was entrusted to the offender the penalty shall be imprisonment not exceeding five years or a fine.

(3) The attempt shall be punishable.

Provisions which require a damage:

Section 263 Fraud

(1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.

(2) The attempt shall be punishable.

(3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender

1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;

2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;

3. places another person in financial hardship;

4. abuses his powers or his position as a public official or as a European public official; or

5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship.

Section 266 Embezzlement and abuse of trust

(1) Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine

(2) Section 243(2), section 247, section 248a and section 263(3) shall apply mutatis mutandis.

Provisions which do not require damage:

Section 240

Using threats or force to cause a person to do, suffer or omit an act

(1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine.

(2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender

1. causes another person to engage in sexual activity;
2. causes a pregnant woman to terminate the pregnancy; or
3. abuses his powers or position as a public official.

Section 258a

Assistance given in official capacity

(1) If the offender under section 258(1) is a public official involved in the criminal proceedings or the proceedings for measure (section 11(1) No 8), or in cases under section 258(2) is a public official involved in the enforcement of the sentence or measure the penalty shall be imprisonment from six months to five years, in less serious cases imprisonment not exceeding three years or a fine.

(2) The attempt shall be punishable.

(3) Section 258(3) and (6) shall not apply.

Section 332

Taking bribes meant as an incentive to violating one's official duties

(1) A public official, a European public official or person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from six months to five years. In less serious cases the penalty shall be imprisonment not exceeding three years or a fine. The attempt shall be punishable.

(2) A judge, any member of a European Union court or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform a judicial act and thereby violated or will violate his judicial duties shall be liable to imprisonment from one to ten years. In less serious cases the penalty shall be imprisonment from six months to five years.

(3) If the offender demands, allows himself to be promised or accepts a benefit in return for a future act, subsections (1) and (2) above shall apply even if he has merely indicated to the other his willingness to

1. violate his duties by the act; or

2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.

Section 339

Perverting the course of justice

A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable to imprisonment from one to five years.

Section 340

Causing bodily harm while exercising a public office

(1) A public official who in the exercise of his duties causes bodily harm or allows it to be caused shall be liable to imprisonment from three months to five years. In less serious cases the penalty shall be imprisonment of not more than five years or a fine.

(2) The attempt shall be punishable.

(3) Sections 224 to 229 shall apply mutatis mutandis to offences under subsection (1) 1st sentence above.

Section 343

Forcing someone to make a statement

(1) Whosoever as a public official involved in

1. a criminal proceeding, a proceeding for the purpose of detention by a public authority;

2. a proceeding to impose a summary fine; or

3. a disciplinary proceeding, disciplinary court or professional disciplinary court proceeding
physically abuses another, otherwise uses force against him, threatens him with force or abuses him mentally in order to force him to testify to or declare something in the proceeding or to fail to do so shall be liable to imprisonment from one to ten years.

(2) In less serious cases the penalty shall be imprisonment from six months to five years.

Section 344

Intentionally or knowingly prosecuting innocent persons

(1) Whosoever as a public official involved in a criminal proceeding other than a proceeding to order a non-custodial measure (section 11(1) No 8) intentionally or knowingly criminally prosecutes an innocent person or someone who otherwise may not by law be criminally prosecuted or makes efforts to bring about such a prosecution shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from three months to five years. The 1st sentence above shall apply mutatis mutandis to a public official involved in a proceeding for the purpose of detention by a public authority.

(2) Whosoever as a public official involved in a proceeding to order a non-custodial measure (section 11(1) No 8) intentionally or knowingly criminally prosecutes someone who may not by law be prosecuted or makes efforts to bring about such a prosecution shall be liable to imprisonment from three months to five years. The 1st sentence above shall apply mutatis mutandis to a public official involved in

1. a proceeding to impose a summary fine; or
2. a disciplinary proceeding, disciplinary court or professional disciplinary court proceeding.

The attempt shall be punishable.

Section 345

Enforcing penal sanctions against innocent persons

(1) Whosoever as a public official involved in the enforcement of a sentence of imprisonment, a custodial measure of rehabilitation and incapacitation or detention by a public authority enforces such a sentence, measure or detention although it may not by law be enforced shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from three months to five years.

(2) If the offender acts grossly negligently the penalty shall be imprisonment not exceeding one year or a fine.

(3) Whosoever as a public official involved in the enforcement of a sentence or a measure (section 11(1) No 8) other than in cases under subsection (1) above enforces a sentence or measure although it may not by law be enforced shall be liable to imprisonment from three months to five years. Whosoever as a public official involved in the enforcement of

1. juvenile detention;
2. a summary fine or ancillary order under the law on summary offences;
3. a fine or detention for disobedience of a judicial order; or
4. a disciplinary proceeding, disciplinary court or professional disciplinary

court proceeding,
enforces such a sanction although it may not by law be enforced shall incur the same penalty. The attempt shall be punishable.

Section 348

Making false entries in public records

- (1) A public official authorised to record public documents within his competence who falsely records a legally relevant fact or falsely registers or enters it into public registers, books or data storage media, shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.

Section 352

Demanding excessive fees

- (1) If a public official, attorney or other person rendering legal assistance who charges fees or other compensation for the discharge of official functions, charges fees or compensation which he knows are not due to him at all or only to a lesser amount shall be liable to imprisonment not exceeding one year or a fine.
- (2) The attempt shall be punishable.

Section 353

Levying excessive taxes; granting reduced benefits

- (1) If a public official charged with collecting taxes, fees or other fiscal charges for a public treasury collects fiscal charges which he knows are not due at all or only to a lesser amount and in whole or in part does not deposit the unlawfully collected amount in the treasury shall be liable to imprisonment from three months to five years.
- (2) Whosoever as a public official in the course of official disbursements of money or in kind unlawfully withholds amounts from the recipient and charges the account as if the disbursements had been paid in full, shall incur the same penalty.

Section 353a

Abuse of trust in the Foreign Service

- (1) Whosoever while representing the Federal Republic of Germany to a foreign government, a community of states or an intergovernmental institution, contravenes an official instruction or with the intent of misleading the Federal Government files untrue reports of a factual nature shall be liable to imprisonment not exceeding five years or a fine.
- (2) The offence may only be prosecuted upon authorisation by the Federal Government.

Section 353b

Breach of official secrets and special duties of confidentiality

- (1) Whosoever unlawfully discloses a secret which has been confided or

become known to him in his capacity as

1. a public official;
2. a person entrusted with special public service functions; or
3. a person who exercises duties or powers under the laws on staff representation

and thereby causes a danger to important public interests, shall be liable to imprisonment not exceeding five years or a fine. If by the offence the offender has negligently caused a danger to important public interests he shall be liable to imprisonment not exceeding one year or a fine.

(2) Whosoever other than in cases under subsection (1) above unlawfully allows an object or information to come to the attention of another or makes it publicly known

1. which he is obliged to keep secret on the basis of a resolution of a legislative body of the Federation or a state or one of their committees; or
2. which he has been formally put under an obligation to keep secret by another official agency under notice of criminal liability for a violation of the duty of secrecy,

and thereby causes a danger to important public interests shall be liable to imprisonment not exceeding three years or a fine.

(3) The attempt shall be punishable.

(3a) Acts of aiding by a person listed under section 53(1) 1st sentence No 5 of the Code of Criminal Procedure shall not be deemed unlawful if they are restricted to the receipt, processing or publication of the secret or of the object or the message in respect of which a special duty of secrecy exists.

(4) The offence may only be prosecuted upon authorisation. The authorisation shall be granted

1. by the president of the legislative body

(a) in cases under subsection (1) above if the secret became known to the offender during his service in or for a legislative body of the Federation or a state;

(b) in cases under subsection (2) No 1 above;

2. by the highest Federal public authority:

(a) in cases under subsection (1) above if the secret became known to the offender during his service in or for a public authority or in another official agency of the Federation or for such an agency;

(b) in cases under subsection (2) No 2 above if the offender was under put under obligation by an official agency of the Federation;

3. by the highest state public authority in all other cases under subsections (1) and (2) No 2 above.

Section 353d

Unlawful disclosure of facts subjudice

Whosoever

1. publicly makes a communication contrary to a statutory prohibition about a judicial hearing from which the public was excluded or about the content of an official document which concerns the matter;
2. unlawfully and contrary to a duty of silence imposed by the court on the basis of a statute discloses facts which came to his attention in a non-public judicial hearing or through an official document which concerns the matter; or
3. publicly communicates verbatim essential parts or all of the indictment or

other official documents of a criminal proceeding, a proceeding to impose a summary fine or a disciplinary proceeding before they have been addressed in a public hearing or before the proceeding has been concluded shall be liable to imprisonment not exceeding one year or a fine.

In addition there is one provision in the German Fiscal Code (AO):

Section 370

Tax evasion

(1) A penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person who

1. furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters of substantial significance for taxation,

2. fails to inform the revenue authorities of facts of substantial significance for taxation when obliged to do so, or

3. fails to use revenue stamps or revenue stamping machines when obliged to do so

and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.

...

(3) In particularly serious cases, a penalty of between six months and ten years' imprisonment shall be imposed. A case shall generally be deemed to be particularly serious where the perpetrator

1. deliberately understates taxes on a large scale or derives unwarranted tax advantages,

2. abuses his authority or position as a public official or as a European public official.

Germany provided the following cases as examples of implementation.

Case 1: Federal Court of Justice, decision and order of 7 January 2011 - 4 StR 409/10 -, juris (cf. Case 1: Federal Court of Justice, decision and order of 7 January 2011 - 4 StR 409/10 -, juris (cf. wistra 2011, 184-185; NJW 2011, 2149-2151))

As a court bailiff, the defendant charged excessive fees in a number of enforcement proceedings. After the defendant had already been involved in the various enforcement proceedings and accepted partial payments from debtors, the same debtors in these cases then made additional partial payments to the defendant on a voluntary basis. Pursuant to the law on court bailiffs' fees (Gerichtsvollzieherkostengesetz, GvKostG) of 19 April 2011 (Federal Law Gazette I p. 623), the defendant should have levied charges of a maximum of €3.60 for accepting each of these additional voluntary payments. Instead, the defendant demanded fees of €21.10 in each case, i.e. an amount inflated by €17.50, and deducted this money from the debtors' partial payments before passing these on to the creditors.

The defendant was sentenced to 8 months' imprisonment, which the court

suspended on probation, for 57 counts of embezzlement in one and the same act as demanding excessive fees. Furthermore, the defendant was barred from holding public office for a period of two years.

Case 2: Federal Court of Justice, decision and order of 31 March 2011 - 4 StR 657/10 -, juris (cf. wistra 2011, 308-309):

The defendant R. was head of the technical department of clinic M., an institution under public law. Starting in 1999 at the latest, he allowed himself to be promised 10% of the turnover for contracts awarded to co-defendant P., who ran two hospital service companies. P. inflated the invoices submitted by the companies he ran by increasing the number of hours or the materials charged, meaning that aside from the share he had promised to the defendant R., he also received a 5% cut for himself, of which R. remained unaware. The defendant R. was allowed to "sign off" on invoices of up to €15,000, deeming them correct in terms of the services provided and the amount charged; the invoices were then submitted for payment without any further scrutiny. Even invoices slightly exceeding the €15,000 limit were not subject to further checks after being approved by R. Between 26 January 2002 and 5 October 2008, the defendant P. produced over 600 inflated invoices with a total billing amount of €2,383,444.56 which were approved by the defendant R. and subsequently paid. The defendant R. noted these invoices and the payments made by P. and demanded payment when 10% of turnover was not reached. Between 4 February 2002 and 25 September 2008 the defendant R. received 75 payments from the defendant P. for a total of €248,929.20.

The Federal Court of Justice ruled that cases 1 to 21 were subject to the statute of limitations and could no longer be prosecuted. The defendant R. received payments in cases 1 to 21 up to and including on 25 March 2004. The first action interrupting the limitation period took place on 31 March 2009, when arrest warrants and search orders were issued against the defendants. As a result, with regard to these cases, the limitation period pursuant to section 78 (3) no. 4 StGB had already expired prior to actions taking place that would have interrupted it, i.e. the offences could no longer be prosecuted.

The Federal Court of Justice terminated proceedings pertaining to the statute-barred offences and adjusted the guilty verdict accordingly, i.e. that the defendant R. was guilty of 54 counts of passive bribery in one and same act as embezzlement and the defendant P. was guilty of 54 counts of bribery in one and the same act as aiding and abetting embezzlement.

Bielefeld Regional Court had sentenced the defendant R. to an aggregate term of imprisonment of two years and nine months for 75 counts of passive bribery in one and the same act as embezzlement and the defendant P. to an aggregate term of imprisonment of two years for 75 counts of bribery in one and the same act as aiding and abetting embezzlement.

The Regional Court suspended the sentence imposed on the defendant P. on probation. As is evident from the operative part of the decision, the defendant R.

was partially successful in his appeal on points of law, in which he claimed violations of adjective and substantive provisions.

In referencing the National Situation report on Corruption 2013, Germany provided the following statistical data and references.

- In 2013: 9.413 individuals were sentenced or discharged, 6.844 individuals were convicted on account of having violated section 246 of the Criminal Code. 40 individuals were sentenced or discharged, 34 individuals were convicted on account of having violated section 263 paragraph 3 no. 4 of the Criminal Code. 1988 individuals were sentenced or discharged, 1380 were convicted on account of having violated section 266 of the Criminal Code. 32 individuals were sentenced or discharged, 22 individuals were convicted on account of having violated section 332 of the Criminal Code. 4 persons were sentenced or discharged, 2 persons were convicted on account of having violated section 339 of the Criminal Code. 8 individuals were sentenced or discharged, 3 were convicted on account of having violated section 352 of the Criminal Code. 3 persons were sentenced or discharged, one person was convicted on account of having violated section 353 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Abuse of functions is not reflected in a stand-alone provision, but is criminalized through sections 263 and 266, which are not limited to acts intended to obtain an undue advantage for oneself or a third party. Instead, sections 263 and 266 StGB require an element of damage to have occurred as a result of the abuse of trust. However, the wider scope of the article under review is covered by reading the aforementioned provisions in conjunction with those, inter alia, on perverting the course of justice (section 339 StGB); intentionally or knowingly prosecuting innocent persons (section 343 StGB); demanding excessive fees (section 352 StGB); abuse of trust in the Foreign Service (section 353a StGB); and, breach of official secrets and special duties of confidentiality (section 353b StGB).

Article 20. Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review as, subject to its constitution and the fundamental principles of its legal system, Germany has *considered* establishing "illicit enrichment" as a criminal offence. Within the meaning of the Convention, this entails a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. This provision cannot be implemented into German criminal law, in particular because the reversal of the burden of proof runs contrary to the constitutional principle of the presumption of innocence.

Nevertheless, there are several provisions in place aimed against situations of illicit enrichments. All inhabitants of Germany who have earnings above a certain threshold are obliged to file an annual tax return. For persons who receive a salary from which income tax is already deducted (which applies to all persons working in the public administration), that threshold amounts to 410 Euro per year. In the tax return, all taxable income has to be reported.

This also applies to members of parliaments, whose remuneration is taxed, members of the government, and civil servants. Illegal earnings are taxable and, thus, also have to be declared. If the illegal earnings are not reported in the tax return, and thus, they are not taxed, this constitutes the crime of tax evasion (section 370 German Fiscal Code (AO)). In severe cases of corruption or misappropriation of public funds, the facts may be disclosed to prosecution authorities by the taxation authorities if "there is a compelling public interest in such disclosure; such compelling public interest shall be deemed to exist in particular where [...] crimes and wilful serious offences against [...] the State and its institutions are being or are to be prosecuted, [...] economic crimes are being or are to be prosecuted, and which in view of the method of their perpetration or the extent of the damage caused by them are likely to substantially disrupt the economic order or to substantially undermine general confidence in the integrity of business dealings or the orderly functioning of authorities and public institutions [...]."

In addition, MPs have to disclose to the President of the Parliament all donations, including campaign contributions, they receive if the value of donation individually or, in the case of several donations from the same donor taken together, exceeds € 5,000 per year (Rule 4 (2) of the Code of Conduct). If the aggregated value of donations exceeds € 10,000, the President of the Parliament will make this disclosure public (Rule 4 (3) of the Code of Conduct). This provision applies only to donations received for their political activity, not private gifts (Rule 4 (1) of the Code of Conduct). Private gifts for the exercise of a MP's mandate, in particular such gifts which are only granted in the expectation that the interests of the donor will be represented and asserted in the Bundestag shall not be accepted (Section 44a para. 2 of the Members of the Bundestag Act). Likewise, donations for their political activity evidently made in the expectation of, or in return for, some specific financial or political advantage shall not be accepted (Rule 4 (4) of the Code of Conduct in connection with Section 25 para. 2 Law on Political Parties).

Type of information disclosed concerning Members of the Federal Parliament (Deutscher Bundestag):

46. The focus of disclosure is primarily on the business activities and conflict of interest in regard to positions held, with less interest on properties. Received gifts and sponsored travels are also declared.

- **Properties:** Interests held in a company or partnership, if this results in 25 percent of the voting rights
- Investments and Liabilities: not required.
- **Income:** According to Rule 1(2) no. 1 of the Code of Conduct, MPs are required to disclose remunerated activities or agreements, however, this only applies to the provision of expert opinions and writing or lecturing activities if the income thereof exceeds € 1,000 per month or € 10,000 per year. The amount of income from any activity has to be declared if it exceeds € 1,000 within one month or € 10,000 within one year (Rule 1 (3) of the Code of Conduct).
- **Positions:** Activities as a member of a board of management, supervisory board, administrative board, advisory board or other body of a company, a corporation or institution under public law, a club, association or similar organization, or of a foundation of not exclusively local importance, must be declared regardless of whether the activity is remunerated or not (Rule 1 (2) no. 1 to 4 of the Code of Conduct). If the activity in question is remunerated, then income has to be declared too, if it exceeds € 10,000 per year (Rule 1 (3) of the Code of Conduct).
- **Gifts and Travel:** Gifts which MPs receive as a guest in connection with their mandate have to be notified and handed to the President of the Bundestag if the value exceeds € 200. Members may apply to keep the gift if they pay a sum equivalent to its value. Other benefits, such as reimbursement of travel, accommodation and subsistence expenses by third parties received in connection with inter-parliamentary or international activities or participation in events to state the viewpoints of the Bundestag or of its parliamentary groups or as representative of the Bundestag, must be notified (i.e. name and address of third party sponsor) to the President if the value of the benefit individually or, in the case of several benefits from the same person, taken together, exceeds € 5000 (Rule 4 (5) of the Code of Conduct).

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Germany has considered criminalizing illicit enrichment but has concluded that the reversal of the burden of proof cannot be implemented into German law due to it being contrary to the constitutional principle of the presumption of innocence.

Article 21. Bribery in the private sector

| Subparagraph (a) of article 21

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal references.

Criminal Code (StGB)

Section 299 (Sections 299 and 301 were amended by the Anti-Corruption Act)

Taking and giving bribes in commercial practice

(2) Whosoever for competitive purposes offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employee's or agent's according him or another an unfair preference in the purchase of goods or commercial services shall incur the same penalty.

(3) Subsections (1) and (2) above shall also apply to acts in competition abroad.

Section 300

Aggravated cases of taking and giving bribes in commercial practice

In especially serious cases an offender under section 299 shall be liable to imprisonment from three months to five years. An especially serious case typically occurs if

1. the offence relates to a major benefit or
2. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

Section 301

Request to prosecute

(1) The offence of taking and giving bribes in commercial practice under section 299 may only be prosecuted upon request unless the prosecuting authority considers proprio motu that prosecution is required because of special public interest.

(2) The right to file the request under subsection (1) above belongs, in addition to the victim, to all of the business persons, associations and chambers indicated in section 8(3) Nos 1, 2, and 4 of the Restrictive Practices Act.

The Anti-Corruption Act which entered into force on 26 November 2015 provided for the amendments of sections 299 and 301 CC. The new provisions read as follows:

Section 299

Taking and giving bribes in commercial practice

...

(2) Whosoever in commercial practice

1. offers, promises or grants an employee or agent of a business a benefit for that employee or agent or a third party in consideration for the employee or agent according an unfair preference to him or another in the competitive purchase of goods or services in Germany or abroad or,
2. without the permission of the business, offers, promises or grants an employee or agent of a business a benefit for that employee or agent or a third party in consideration for the employee or agent performing or refraining from performing an act in the purchase of goods or services and thus violating his duties towards the business shall incur the same penalty.

Section 301

Request to prosecute

(1) The offence of taking and giving bribes in commercial practice under section 299 may only be prosecuted upon request unless the prosecuting authority considers proprio motu that prosecution is required because of special public interest.

(2) The right to file the request under subsection (1) above belongs in cases under section 299 (1) No 1 and section 299 (2) No 1, in addition to the victim, to all of the business persons, associations and chambers indicated in section 8(3) Nos 2, and 4 of the Restrictive Practices Act.

The element “in the purchase of goods and services“ is in line with the Convention and is only relevant where purely internal matters of a company are concerned which do not affect in any way its doing business, such as for example a bribe paid to an employee to make him appear too late at work.

Some legal scholars have even criticised the new section 299 included in the Criminal Code (StGB) as being too far-reaching, as section 299 of the Criminal Code also covers the following case: The employees of a caterer have been instructed by their employer to wear red aprons while at work. A guest at an event pays money to one of the caterer’s employees to wear a green apron instead of a red one.

As examples of implementation, Germany cited the following jurisprudence.

Federal Court of Justice, judgment of 3 December 2013 - 2 StR 160/12 -, juris (cf. NStZ 2014, 323-325):

Guiding Principle

Signing off on fictitious invoices (in this case: an invoice to a construction company taking part in a bidding process) constitutes the granting of a benefit within the meaning of section 299 (2) StGB. In this context it will suffice for the parties to have a general idea of the preference foreseen in return for payment of the bribe.

Facts of the case:

The defendant K. was CEO and partner of a construction company called "T. GmbH", for which the defendant S. also worked as a freelancer in project management. The company received most of its contracts from the company group "I. Deutschland" through the department "I. -p.", against which the offences forming the basis for the guilty verdict were committed.

1. The construction engineer H. was employed by I. -p. as a freelance project manager and played an advisory role in awarding contracts. On the basis of an implied agreement with the defendants, he submitted a total of 25 fictitious invoices to T. GmbH worth a total of approx. €242,000 between 2001 and 2005 which were paid in exchange for a series of benefits for T. GmbH. In particular, the defendants intended for T. GmbH to receive preferential treatment in future contract bids by the witness H. In turn, T. GmbH included the amounts paid to the witness H. in inflated invoices addressed to the customer. The defendant K. signed off on the fictitious invoices submitted by the witness H. in eight cases; the defendant S. did so in five. To this extent, the Regional Court assumed that the defendants, who were acting single-handedly, had committed legally independent acts of bribery in business transactions in each case.

Regarding the other acts of bribery toward the witness H. on the basis of those fictitious invoices submitted by H. that were not signed off by one of the defendants single-handedly, or by any of the defendants at all, the Regional Court assumed a single act by the defendants within the meaning of section 299 StGB for the rest of the case. This was justified with reference to an agreement between the defendants reached in at least one conversation on how to proceed when fictitious invoices were submitted by the witness H.

2. In the context of the construction of a new "I. -Möbelhaus" furniture store in D., the engineer F. worked as construction manager for I. -p.; he was also responsible for verifying invoices. The company "c. projects" owned by the witness A. was involved in the construction work. A. had previously provided the construction manager F. with cash and payments in kind in order to receive preferential treatment in the bidding process for contracts awarded by I. -p. The witness A. first agreed with witness F. that both would siphon off as much money from the construction project for themselves as possible, with c. projects submitting unjustified claims to the company I. -p. and the construction manager F. approving the invoices. T. GmbH was also involved in the construction project. Once the defendant K. had announced that he was prepared to become involved in submitting inflated invoices to I. -p., an agreement was reached that the company c. projects, the witness F. and T. GmbH would each receive a third of the profits

from undue payments made on the basis of fictitious invoices. In phase one, the plan was to over-invoice by approx. €800,000 from I.'s budget for the construction project in D. As it happened, on 18 October and 12 November 2004, c. projects submitted a total of six invoices to T. GmbH for a total sum of €559,773.72, for which no services had been provided. The amounts were paid promptly. The defendant K. then ensured that T. GmbH in turn claimed these amounts alongside a surcharge of one third through inflated invoices vis-à-vis I. - p. The Regional Court saw this as the defendant K. aiding and abetting embezzlement by the engineer F.

After this, the witness F. established that there was still some "space left in the budget", i.e. that - together with the sum already obtained - at least a million euros could be unduly invoiced. The company c. projects thus generated three fictitious invoices dated 21 January 2005 and addressed to T. GmbH for a total of €220,753, which were also paid speedily. Accordingly, the defendant K. arranged for fictitious invoices to be sent by T. GmbH to I. -p. However, the Regional Court could not establish whether the agreement between the defendant K. and the witnesses A. and F. on splitting the siphoned-off funds three ways resulted in an even larger fictitious invoice being submitted to I. -p in order to cover this. In any case, over both phases, T. GmbH claimed inflated charges altogether totalling at least one million euros.

Frankfurt Regional Court sentenced the defendant K. to an aggregate custodial sentence of two years and nine months, of which six months were considered to have already been served, for nine counts of bribery in business transactions and two counts of aiding and abetting embezzlement; the defendant S. was sentenced for six counts of bribery in business transactions to an aggregate two-year suspended custodial sentence, of which six months were also considered to have already been served.

Frankfurt Regional Court's judgment was upheld by the Federal Court of Justice.

In relation to statistical data, Germany made reference to the following information:

- See the National Situation Report on Corruption 2013
- In 2013 49 persons were sentenced or discharged, 38 persons were convicted on account of having violated section 299 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Active bribery in the private sector for the purpose of the obtainment of unfair preference in the purchase of goods or commercial services is criminalized (sections 299 and 300 StGB), and may be prosecuted at the request of the victim or at the prosecution's initiative where there is a special public interest (section 301 StGB).

| Subparagraph (b) of article 21

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

...

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 299 (Sections 299 and 301 were amended by the Anti-Corruption Act)

Taking and giving bribes in commercial practice

(1) Whosoever as an employee or agent of a business, demands, allows himself to be promised or accepts a benefit for himself or another in a business transaction as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services shall be liable to imprisonment not exceeding three years or a fine.

...

(3) Subsections (1) and (2) above shall also apply to acts in competition abroad.

Section 300

Aggravated cases of taking and giving bribes in commercial practice

In especially serious cases an offender under section 299 shall be liable to imprisonment from three months to five years. An especially serious case typically occurs if

1. the offence relates to a major benefit or
2. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

Section 301 Request to prosecute

(1) The offence of taking and giving bribes in commercial practice under section 299 may only be prosecuted upon request unless the prosecuting authority considers *proprio motu* that prosecution is required because of special public interest.

(2) The right to file the request under subsection (1) above belongs, in addition to the victim, to all of the business persons, associations and chambers indicated in section 8(3) Nos 1, 2, and 4 of the Restrictive Practices Act.

The Anti-Corruption Act which entered into force on 26 November 2015 provided for the amendments of sections 299 and 301 CC. The new wording:

Section 299

Taking and giving bribes in commercial practice

(1) Whosoever as an employee or agent of a business in commercial practice

1. demands, allows himself to be promised or accepts a benefit for himself or a third party in consideration for according an unfair preference to another in the competitive purchase of goods or services in Germany or abroad or,

2. without the permission of the business, demands, allows himself to be promised or accepts a benefit for himself or a third party in consideration for performing or refraining from performing an act in the purchase of goods or services and thus violating his duties towards the business

shall be liable to imprisonment of up to three years or a fine.

...

Section 301

Request to prosecute

(1) The offence of taking and giving bribes in commercial practice under section 299 may only be prosecuted upon request unless the prosecuting authority considers *proprio motu* that prosecution is required because of special public interest.

(2) The right to file the request under subsection (1) above belongs in cases under section 299 (1) No 1 and section 299 (2) No 1, in addition to the victim, to all of the business persons, associations and chambers indicated in section 8(3) Nos 2, and 4 of the Restrictive Practices Act.

Germany provided the following case as an example of implementation.

Darmstadt Regional Court, judgment of 14 May 2007 - 712 Js 5213/04 - 9 KLa

-, juris:

Guiding Principle

1. A divisional director at an international stock corporation is guilty of embezzlement within the meaning of section 266 StGB if he takes over a "slush fund" and does not reintegrate this into the company's accounting system (at

margin no. 148).

2. A divisional director violates his asset management duty vis-à-vis the company within the meaning of section 266 StGB if he violates internal compliance guidelines and thus violates the duty incumbent upon him to exercise the skill and care of a conscientious manager faithfully complying with his duties within the meaning of section 93 (1) AktG extends to bribery payments in other EU countries (at margin no. 142).

"Operative part of the judgment

The defendant K. is guilty of two counts of bribery in business transactions. In one case bribery was committed in one and the same act as embezzlement. He is also guilty of a further count of embezzlement. He is therefore sentenced to 2 years' imprisonment as aggregate punishment. The defendant V. is sentenced to 9 months' imprisonment as aggregate punishment for two counts of aiding and abetting bribery in business transactions.

The execution of the sentences is suspended on probation.

Forfeiture of equivalent value of a total of €38,000,000 is ordered against "S. AG", address: W...platz no. ... , ... Munich.

Germany provided the following reference to statistical data.

- See the National Situation Report on Corruption 2013
- In 2013 49 persons were sentenced or discharged, 38 persons were convicted on account of having violated section 299 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Passive bribery in the private sector for the purpose of the providing an unfair preference in the purchase of goods or commercial services is criminalized (sections 299 and 300 StGB), and may be prosecuted at the request of the victim or at the prosecution's initiative where there is a special public interest (section 301 StGB).

Article 22. Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 246 Unlawful appropriation

- (1) Whosoever unlawfully appropriates chattels belonging to another for himself or a third person shall be liable to imprisonment not exceeding three years or a fine unless the offence is subject to a more severe penalty under other provisions.
- (2) If in cases under subsection (1) above the property was entrusted to the offender the penalty shall be imprisonment not exceeding five years or a fine.
- (3) The attempt shall be punishable.

Section 263 Fraud

- (1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.
- (3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender
 1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;
 2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;
 3. places another person in financial hardship;
 4. abuses his powers or his position as a public official or as a European public official; or
 5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship.
- (4) Section 243(2), section 247 and section 248a shall apply mutatis mutandis.
- (5) Whosoever on a commercial basis commits fraud as a member of a gang, whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269 shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from six months to five years.

Section 266 Embezzlement and abuse of trust

- (1) Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine.

(2) Section 243(2), section 247, section 248a and section 263(3) shall apply mutatis mutandis.

Germany provided the following case as an example of implementation.

Federal Court of Justice, decision and order of 27 August 2014 - 5 StR 181/14 -, juris (cf. NStZ 2014, 646-647):

Guiding Principle

If a defendant, who took decisions independently as head of a company's railway construction division on which companies to commission with supplying material and under what conditions, causes invoices to be issued for a certain supplier, as agreed "on demand", resulting in excessive payments being made for services not actually rendered that are then used to feed a "slush fund", it is this conduct that constitutes embezzlement. For fulfilment of the offence of embezzlement it is irrelevant whether or not the sums of money "parked" in a hidden account are retrieved at a later stage. (at margin no. 6)

Facts of the case: (Set of offences IIA)

a) As head of the railway construction division of company K., the defendant took decisions independently on which companies to hire for the supply of materials for the execution of railway construction contracts at the Deutsche Bundesbahn. One of these suppliers was company V., whose branch manager in Berlin offered in the year 2000 to set up a so-called slush fund for the defendant. The defendant refused this offer at first; thereafter, however, a system ensued whereby V. would "inflate" the outgoing invoice "on demand" by the defendant without performing the relevant services. The surplus amounts were "parked" in an account held by V.; the defendant could draw down funds that were then completely at his disposal following the submission of fictitious invoices by staff at V. In return, in cases where tracks were to be delivered at short notice, the defendant placed orders at the usual prices plus surcharges exclusively with V.; if necessary - where he had procured a comparable offer from another company - he informed staff at V. that cheaper offers were available in order that V. could adapt its prices accordingly.

The funds the defendant accessed from V.'s account were initially used to finance business matters at K. In the period from 2006 to 2008, the defendant had three sums of €12,180, €18,000 and €25,287.50 debited to cover the costs of his privately organised diving trips.

Decision:

Neuruppin Regional Court sentenced the defendant to an aggregate sentence of three years' imprisonment for three counts of embezzlement, each in one and the same act as passive bribery in business transactions (set of offences IIA), as well as for ten counts of embezzlement and for fraud.

The Federal Court of Justice repealed the judgment in reference to the above-described facts (set of offences IIA). The reasoning provided by the Federal Court of Justice was as follows:

"The Regional Court's legal approach of viewing the drawing down of funds to make payments towards the redemption of private debts as constituting the defendant's acts of embezzlement is erroneous. Rather, the key factor for establishing the offence of embezzlement (section 266 StGB) in the present case consisted in the invoices from V. to the detriment of K. that the defendant had effectuated "on demand" and that each led, on account of the lack of services actually provided, to the generation of surplus funds then utilised to feed a slush fund. It is these cash drains that divested K. of funds once and for all (cf. Federal Court of Justice, judgments of 29 August 2008 - 2 StR 587/07, BGHSt 52, 323, 336 et seqq, and of 27 August 2010 - 2 StR 111/09, BGHSt 55, 266, 282 et seqq), i.e. any later retrieval of funds from the hidden account are legally irrelevant for the fulfilment of the offence of embezzlement.

Because the Regional Court had not made any findings on V.'s inflated invoices and the cash drains effected to K.'s detriment as a result, the judgment must be vacated overall with regard to this set of offences. This also applies to the conviction for passive bribery in business transactions (section 299 (1) StGB which, while free of legal error, was issued in respect of one and the same act as the embezzlement charges. It still stands that the passive bribery was connected with the unlawful agreements reached in setting up and feeding the slush funds and were not committed only later on, for example, with the retrieval of the funds for private purposes."

47. Germany provided the following reference to statistical data.

- See the National Situation Report on Corruption 2013
- In 2013: 9413 individuals were sentenced or discharged, 6844 individuals were convicted on account of having violated section 246 of the Criminal Code. 1988 individuals were sentenced or discharged, 1380 were convicted on account of having violated section 266 of the Criminal Code

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Embezzlement and misappropriation of property in the private sector are criminalized through the provisions on unlawful appropriation (section 246 StGB), fraud (section 263 StGB) and embezzlement and abuse of trust (section 266 StGB).

Article 23. Laundering of proceeds of crime

| Subparagraph 1 (a) (i) of article 23

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 261

Money laundering; hiding unlawfully obtained financial benefits

(1) Whosoever hides an object which is a proceed of an unlawful act listed in the 2nd sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years. Unlawful acts within the meaning of the 1st sentence shall be

1. felonies;

2. misdemeanours under

(a) Section 108e, section 332 (1), also in conjunction with subsection (3), and section 334, in each case also in conjunction with section 335a;

(b) Section 29 (1) 1st sentence No 1 of the Drugs Act and section 19 (1) No 1 of the Drug Precursors (Control) Act;

3. misdemeanours under section 373 and under section 374 (2) of the Fiscal Code, and also in conjunction with section 12 (1) of the Common Market Organisations and Direct Payments (Implementation) Act;

4. misdemeanours

(a) under section 152a, section 181a, section 232 (1) and (2), section 233 (1) and (2), section 233a, section 242, section 246, section 253, section 259, sections 263 to 264, section 266, section 267, section 269, section 271, section 284, section 299, section 326 (1), (2) and (4), section 328 (1), (2) and (4) and section 348;

(b) under section 96 of the Residence Act and section 84 of the Asylum Procedure Act and section 370 of the Fiscal Code which were committed on a commercial basis or by a member of a gang whose purpose is the continued commission of such offences; and

5. misdemeanours under section 89a and under section 129 and section 129a (3) and (5), all of which also in conjunction with section 129b (1), as well as misdemeanours committed by a member of a criminal or terrorist organisation (section 129 and section 129a, all of which also in conjunction with section 129b (1)).

The 1st sentence shall apply in cases of tax evasion committed on a commercial basis or as a gang under section 370 of the Fiscal Code, to expenditure saved by virtue of the tax evasion, of unlawfully acquired tax

repayments and allowances, and in cases under the 2nd sentence no 3 the 1st sentence shall also apply to an object in relation to which fiscal charges have been evaded.

(2) Whosoever

1. procures an object indicated in subsection (1) above for himself or a third person; or
2. keeps an object indicated in subsection (1) above in his custody or uses it for himself or a third person if he knew the origin of the object at the time of obtaining possession of it shall incur the same penalty.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of money laundering.

(5) Whosoever, in cases under subsections (1) or (2) above is, through gross negligence, unaware of the fact that the object is a proceed from an unlawful act named in subsection (1) above shall be liable to imprisonment of not more than two years or a fine.

Section 257

Assistance after the fact

(1) Whosoever renders assistance to another who has committed an unlawful act, with the intent of securing for him the benefits of that act, shall be liable to imprisonment not exceeding five years or a fine.

(2) The penalty must not be more severe than that for the act.

(3) Whosoever is liable as an accomplice to the act shall not be liable for assistance after the fact. This shall not apply to a person who abets another person who did not take part in the act to provide assistance after the fact.

(4) An offence of assistance after the fact may only be prosecuted upon request, authorisation or a request by the foreign state if the offender could only be prosecuted upon request, authorisation or a request by the foreign state if he had been a principal or secondary participant to the act. Section 248 shall apply mutatis mutandis.

Section 258

Assistance in avoiding prosecution or punishment

(1) Whosoever intentionally or knowingly obstructs in whole or in part the punishment of another in accordance with the criminal law because of an unlawful act or his being subjected to a measure (section 11(1) No 8) shall be liable to imprisonment not exceeding five years or a fine.

(2) Whosoever intentionally or knowingly obstructs in whole or in part the enforcement of a sentence or measure imposed on another shall incur the same penalty.

(3) The penalty must not be more severe than that for the act.

(4) The attempt shall be punishable.

(5) Whosoever by the offence simultaneously intends to avoid, in whole or in part, his own punishment or being subjected to a measure or that a sentence or measure imposed on him be enforced shall not be liable under this provision.

(6) Whosoever commits the offence for the benefit of a relative shall be

exempt from liability.

Section 259

Handling stolen goods

(1) Whosoever in order to enrich himself or a third person, buys, otherwise procures for himself or a third person, disposes of, or assists in disposing of property that another has stolen or otherwise acquired by an unlawful act directed against the property of another shall be liable to imprisonment not exceeding five years or a fine.

(2) Section 247 and section 248a shall apply mutatis mutandis. (3) The attempt shall be punishable.

Germany provided the following case as an example of implementation.

Bamberg Higher Regional Court, decision of 25 September 2014 - 3 Ss 96/14 -, juris:

Guiding Principle

1. The criminal offence of money laundering pursuant to section 261 (1) StGB by thwarting the seizure of assets for the purposes of recovery assistance may still be deemed to have been committed if the illicit assets are located abroad. The fact that the channel of mutual legal assistance must be used for the purpose of access is irrelevant for the fulfilment of the offence. 2. In a conviction for money laundering by thwarting seizure, any consideration as an aggravating circumstance of the fact that access to the illicit funds was rendered considerably more difficult if not impossible, violates the principle of section 46 (3) StGB, whereby circumstances that are already statutory elements of the offence must not be considered again in sentencing.

3. The rejection of a motion to hear evidence pursuant to section 244 (3), second sentence, stop on the grounds that the matter is common knowledge is also permissible if the court assumes the opposite of what is asserted with the evidence.

"I. The Local Court sentenced the defendant L. to pay a criminal fine of 90 daily rates of €20 for money laundering. It sentenced the defendants M. and N. to aggregate sentences of seven months' imprisonment for money laundering and attempted money laundering, suspending these sentences on probation, and additionally ordered an aggregate criminal fine against each of the defendants of 120 daily rates of €120 in accordance with section 41 StGB. The Regional Court dismissed the second-instance appeals against this judgment on fact and law submitted by both the defendants and the public prosecution as ill-founded.

II: In response to the third-instance appeals on points of law submitted by the defendants M. and N., the pronouncement of the legal consequences is hereby overturned as a result of the appellants' assignment of errors concerning substantive law. Otherwise, the appeals are considered ill-founded within the meaning of section 349 (2) StPO. By way of reasoning, reference is made in this regard to the accurate

opinions submitted by the Office of the Chief Public Prosecutor, which was not invalidated by the submissions made in response by the defence. In addition, the Division submits the following remarks:

1. Ultimately, the Regional Court quite rightly assumed that the assets located abroad were covered by section 261 StGB ..."

48. Germany provided the following reference to statistical data.

In 2013 992 persons were sentenced or discharged, 882 persons were convicted on account of having violated section 261 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Money-laundering is criminalized by section 261 of the Criminal Code. Provisions on assistance after the commission of a crime (section 257), assistance in avoiding prosecution or punishment (section 258) and handling of stolen assets (section 259) are also relevant.

| Subparagraph 1 (a) (ii) of article 23

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

...

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and referred to the legal provisions cited under 23 (1) (a) (ii).

Germany provided the following case as an example of implementation.

Federal Court of Justice, decision and order of 18 February 2009 - 1 StR 4/09 - , BGHSt 53, 205-210:

"Operative part of the judgment

The defendant's appeal on points of law against the judgment of Stuttgart Regional Court of 30 April 2008 is dismissed as ill-founded. ...

Reasoning

The Regional Court sentenced the defendant for two counts of money laundering to an aggregate sentence of imprisonment of ten months, suspending the execution of

the sentence on probation. In addition, it ordered the deprivation of a sum of €398,628.13 plus the accrued interest. It is against this decision that the defendant submits her appeal on points of law, claiming the violation of substantive provisions. An examination of the judgment reveals no legal error to the disadvantage of the defendant (section 349 StPO).

The conviction for two counts of money laundering raises no concerns.

I. Pursuant to the findings of the Regional Court, the defendant was involved between 1999 and 2002 in the payment of bribes in the amount of approximately €1.15 million to her brother, an official in the Georgian transport ministry. As part of this, the companies B. and F., based in Germany, made payments to the defendant's brother, on the basis of which the latter violated his official duties by influencing the issuing of ECMT licenses, which both companies used in international road haulage and thus obtained competitive advantages. Fully aware of the purpose of these payments, the defendant made available her German bank accounts, received the bribes transferred to these accounts for her brother, and disposed of these bribes in accordance with her brother's instructions by making transfers to various other accounts or by drawing and passing on cash. The defendant did this, first and foremost, to support her brother.

II: In doing so, the defendant is guilty of two counts of money laundering, section 261(1), first sentence, second sentence, no. 2a, (2) no. 2, section 53 StGB.

Germany informed that in 2013: 231 persons were sentenced or discharged, 176 persons were convicted on account of having violated section 257 of the Criminal Code. 3552 persons were sentenced or discharged, 2688 persons were convicted on account of having violated section 259 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

The concealment or disguise of the true nature, source, location disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime, is criminalized by the same provisions as money-laundering (sections 261, 257, 258, and 259 of the Criminal Code).

Subparagraph 1 (b) (i) of article 23

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

...

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)
Section 261

Money laundering; hiding unlawfully obtained financial benefits

(1) Whosoever hides an object which is a proceed of an unlawful act listed in the 2nd sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years.

....

(2) Whosoever

1. procures an object indicated in subsection (1) above for himself or a third person; or
2. keeps an object indicated in subsection (1) above in his custody or uses it for himself or a third person if he knew the origin of the object at the time of obtaining possession of it shall incur the same penalty.

(5) Whosoever, in cases under subsections (1) or (2) above is, through gross negligence, unaware of the fact that the object is a proceed from an unlawful act named in subsection (1) above shall be liable to imprisonment of not more than two years or a fine.

Section 259
Handling stolen goods

(1) Whosoever in order to enrich himself or a third person, buys, otherwise procures for himself or a third person, disposes of, or assists in disposing of property that another has stolen or otherwise acquired by an unlawful act directed against the property of another shall be liable to imprisonment not exceeding five years or a fine.

(2) Section 247 and section 248a shall apply mutatis mutandis.

(3) The attempt shall be punishable.

Federal Court of Justice, judgment of 24 January 2006 - 1 StR 357/05 -, BGHSt 50, 347-359: Guiding Principle

On the relationship between (grossly negligent) money laundering and handling of stolen goods.

"Operative part of the judgment

Following the appeals on law by the public prosecutor's office, the judgment of Munich II Regional Court of 3 February 2005 is hereby overturned - with the exception of the non-guilty verdict in respect of the accusation of violation of the Foreign Trade and Payments Act - alongside all related findings.

To this extent, the case is hereby referred back to another criminal division of the Regional Court for a new trial and decision, including on the costs of the appellate remedies. Ruled according to the law.

Reasoning

The Regional Court acquitted the defendant of handling stolen goods on a commercial basis, falsification of documents, abetting the falsification of documents, fraud and violation of the Control of Weapons of War Act and the Foreign Trade and Payments Act, and ordered that she be compensated by the treasury for the various prosecution measures taken. The public prosecutor's office has submitted appeals on points of law against the acquittal - with the exception of the non-guilty verdict in respect of the accusation of violation of the Foreign Trade and Payments Act - citing the violation of adjective and substantive law. It has also submitted immediate complaints against the decision on compensation. The appeals are deemed successful based on the appellant's assignment of errors concerning substantive law; the immediate complaints against the decision on compensation are rendered obsolete by the extensive reversal of the judgment.

The acquittal for handling stolen goods and falsification of documents, abetting the falsification of documents and fraud are also obsolete because the Regional Court omitted to examine the defendant's conduct underlying these points of the indictment against the provisions on money laundering in section 261 StGB. It would have seemed natural, above all, to subject the deliveries of aircraft components by Fi., Bl., V., Ma., B. and M. and the provision of falsified certificates by Fi. to such examination. The fact that the judgment does not deal with the point in particular of whether the defendants were grossly negligent in failing to realise that the aircraft components and certificates originated from criminal offences, attests to a deficit in the Regional Court's reasoning which, in response to the appellant's assignment of errors concerning substantive law, justifies the reversal of the judgment, inter alia, in this regard.

...

In the type of cases concerned in this judgment, the offence of handling stolen goods pursuant to section 259 StGB does not preclude that of money laundering pursuant to section 261 StGB. In reaching this judgment, the Panel does not fail to recognise that the alternative offences of procuring property for oneself or a third person in section 259 (1) StGB, on the one hand, and in section 261 (2) no. 1 StGB, on the other, are identical, i.e. if a listed offence within the meaning of section 261 (1), second sentence, StGB has been committed, both elements will often be fulfilled."

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime is criminalized by section 261 and 259 on handling of stolen assets of the Criminal Code.

Subparagraph 1 (b) (ii) of article 23

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

...

(b) Subject to the basic concepts of its legal system: ...

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and referred to the precited sections 261 and 257- 259 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of money-laundering offences are covered by sections 261 and 257- 259 in conjunction with sections 26, 27 of the Criminal Code.

Subparagraphs 2 (a) and 2 (b) of article 23

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 261

Money laundering; hiding unlawfully obtained financial benefits

(1) Whosoever hides an object which is a proceed of an unlawful act listed in the 2nd sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years. Unlawful acts within the meaning of the 1st sentence shall be

1. felonies;

2. misdemeanours under

- (a) Section 108e, section 332 (1), also in conjunction with subsection (3), and section 334, in each case also in conjunction with section 335a;

- (b) Section 29 (1) 1st sentence No 1 of the Drugs Act and section 19 (1) No 1 of the Drug Precursors (Control) Act;

3. misdemeanours under section 373 and under section 374 (2) of the Fiscal Code, and also in conjunction with section 12 (1) of the Common Market Organisations and Direct Payments (Implementation) Act;

4. misdemeanours

- (a) under section 152a, section 181a, section 232 (1) and (2), section 233 (1) and (2), section 233a, section 242, section 246, section 253, section 259, sections 263 to 264, section 266, section 267, section 269, section 271, section 284, section 299, section 326 (1), (2) and (4), section 328 (1), (2) and (4) and section 348;

- (b) under section 96 of the Residence Act and section 84 of the Asylum Procedure Act and section 370 of the Fiscal Code
which were committed on a commercial basis or by a member of a gang whose purpose is the continued commission of such offences; and

5. misdemeanours under section 89a and under section 129 and section 129a (3) and (5), all of which also in conjunction with section 129b (1), as well as misdemeanours committed by a member of a criminal or terrorist organisation (section 129 and section 129a, all of which also in conjunction with section 129b (1)).

The 1st sentence shall apply in cases of tax evasion committed on a commercial basis or as a gang under section 370 of the Fiscal Code, to expenditure saved by virtue of the tax evasion, of unlawfully acquired tax repayments and allowances, and in cases under the 2nd sentence no 3 the 1st

sentence shall also apply to an object in relation to which fiscal charges have been evaded.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is partially in compliance with the provisions under review. The list of predicate offences in section 261 follows a combined serious crime and list approach and includes offences under StGB sections 332 on taking bribes and 334 on giving bribes, but not sections 331 on accepting benefits and 333 on granting benefits, resulting in most but not all Convention offences being covered.

During the country visit and following exchanges, Germany highlighted that the list of money laundering predicate offences includes, inter alia, sections 332 on taking bribes and 334 on giving bribes (also in conjunction with section 335a on foreign and internal officials) as well as section 108e on taking of bribes by and giving of bribes to elected officials of the Criminal Code.

49. In its view, Germany believes that Article 15 and 16 of the UNCAC are sufficiently implemented by these provisions and that section 331 on accepting benefits and section 333 on granting benefits go considerably beyond the requirements of the UNCAC (see explanations on Article 15). Hence, the list of predicate offences complies with the requirements of Article 23 UNCAC.

50. In addition, Germany's money laundering offence is based on a serious crime approach. Sections 331 and 333 of the Criminal Code being non-serious offences (with a maximum sentence of, in general 3, years of imprisonment) and their inclusion in the list of predicate offences would not be coherent with the existing approach, but would create an unsustainable imbalance in relation to other non-serious predicate offences. Consistency and (more importantly) an equal treatment in relation to all non-serious offences would require Germany to abandon its serious crime approach.

Nevertheless, in view of fact that the list of predicate offences in section 261 follows a combined serious crime and list approach, and while the experts agreed that at the time of the country visit a comprehensive range of predicate offences were provided for, Germany may wish to consider widening the scope even further.

Subparagraph 2 (c) of article 23

2. For purposes of implementing or applying paragraph 1 of this article: ...

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under

the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code

Section 261

...

(8) Objects which are proceeds from an offence listed in subsection (1) above committed abroad shall be equivalent to the objects indicated in subsections (1), (2) and (5) above if the offence is also punishable at the place of its commission.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Predicate offences committed abroad are subject to dual criminality according to section 261 (8) of the Criminal Code.

| Subparagraph 2 (d) of article 23

2. For purposes of implementing or applying paragraph 1 of this article: ...

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

(b) Observations on the implementation of the article

Germany has furnished copies of its laws that give effect to article 23 to the Secretary-General of the United Nations.

Subparagraph 2 (e) of article 23

2. For purposes of implementing or applying paragraph 1 of this article: ...

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code

Section 261

Money laundering; hiding unlawfully obtained financial benefits

...

(9) Whosoever

1. voluntarily reports the offence to the competent public authority or voluntarily causes such a report to be made, unless the act had already been discovered in whole or in part at the time and the offender knew this or could reasonably have known and

2. in cases under subsections (1) or (2) above under the conditions named in No 1 above causes the object to which the offence relates to be officially secured shall not be liable under subsections (1) to (5) above.

Whosoever is liable because of his participation in the antecedent act shall not be liable under subsections (1) to (5) above, either. Exemption from liability pursuant to the second sentence shall be excluded if the perpetrator or participant brings an object which is a proceed of one of the unlawful acts named in subsection (1), second sentence, into circulation and, in doing so, conceals the unlawful origin of the object.

By the Anti-Corruption Act which entered into force on 26 November 2015 self-laundering was criminalized in cases where the perpetrator or the accomplice brings in circulation an object deriving from an unlawful act which is listed in § 261 subsection 1 sentence 1 of the German Criminal Code and thereby conceals its unlawful origin.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Self-laundering is criminalized in section 261 (9) of the Criminal Code in cases where the perpetrator or the accomplice brings into circulation an object which is a proceed of an unlawful act and, when doing so, conceals its unlawful origin.

Article 24. Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 261

Money laundering; hiding unlawfully obtained financial benefits

(1) Whosoever hides an object which is a proceed of an unlawful act listed in the 2nd sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years. Unlawful acts within the meaning of the 1st sentence shall be

1. felonies;

2. misdemeanours under

(a) Section 108e, section 332 (1), also in conjunction with subsection (3), and section 334, in each case also in conjunction with section 335a;

(b) Section 29 (1) 1st sentence No 1 of the Drugs Act and section 19 (1) No 1 of the Drug Precursors (Control) Act;

3. misdemeanours under section 373 and under section 374 (2) of the Fiscal Code, and also in conjunction with section 12 (1) of the Common Market Organisations and Direct Payments (Implementation) Act;

4. misdemeanours

(a) under section 152a, section 181a, section 232 (1) and (2), section 233 (1) and (2), section 233a, section 242, section 246, section 253, section 259, sections 263 to 264, section 266, section 267, section 269, section 271, section 284, section 299, section 326 (1), (2) and (4), section 328 (1), (2) and (4) and

section 348;

(b) under section 96 of the Residence Act and section 84 of the Asylum Procedure Act and section 370 of the Fiscal Code which were committed on a commercial basis or by a member of a gang whose purpose is the continued commission of such offences; and

5. misdemeanours under section 89a and under section 129 and section 129a (3) and (5), all of which also in conjunction with section 129b (1), as well as misdemeanours committed by a member of a criminal or terrorist organisation (section 129 and section 129a, all of which also in conjunction with section 129b (1)).

The 1st sentence shall apply in cases of tax evasion committed on a commercial basis or as a gang under section 370 of the Fiscal Code, to expenditure saved by virtue of the tax evasion, of unlawfully acquired tax repayments and allowances, and in cases under the 2nd sentence no 3 the 1st sentence shall also apply to an object in relation to which fiscal charges have been evaded.

(2) Whosoever

1. procures an object indicated in subsection (1) above for himself or a third person; or

2. keeps an object indicated in subsection (1) above in his custody or uses it for himself or a third person if he knew the origin of the object at the time of obtaining possession of it shall incur the same penalty.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of money laundering.

(5) Whosoever, in cases under subsections (1) or (2) above is, through gross negligence, unaware of the fact that the object is a proceed from an unlawful act named in subsection (1) above shall be liable to imprisonment of not more than two years or a fine.

Section 259

Handling stolen goods

(1) Whosoever in order to enrich himself or a third person, buys, otherwise procures for himself or a third person, disposes of, or assists in disposing of property that another has stolen or otherwise acquired by an unlawful act directed against the property of another shall be liable to imprisonment not exceeding five years or a fine.

(2) Section 247 and section 248a shall apply mutatis mutandis.

(3) The attempt shall be punishable.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Concealment of proceeds of crime is covered by the Criminal Code's provisions on money-laundering (section 261) and handling stolen assets (section 259).

Article 25. Obstruction of justice

Subparagraph (a) of article 25

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review.

Where a public official uses physical force against a witness, or threatens a witness with the use of physical force, in order to obtain a certain statement from him, or to prevent him from making a certain statement, this is a crime pursuant to section 343 of the Criminal Code. Likewise, it is a crime to incite a person to perjury pursuant to sections 154, 26 of the Criminal Code, which may be committed by anyone. Any person inciting a witness to perjure himself must reckon with a prison sentence of at least one year as punishment. Forcing someone to make a statement pursuant to section 343 of the Criminal Code and inciting a person to perjury pursuant sections 154, 26 of the Criminal Code are included as crimes in the range of predicate offences set out in section 261 subsection 1 No. 1 of the Criminal Code. Additionally, inciting anyone to give false unsworn testimony is liable to punishment under sections 153, 26 of the Criminal Code.

Above and beyond the requirements stipulated by Article 25 a UNCAC, the attempt to abet false testimony is punishable under section 159 of the Criminal Code while the procurement of false testimony is punishable under section 160 of the Criminal Code. These provisions of the law establish a liability to punishment also in those cases in which the witness does not give any false testimony. Section 160 of the Criminal Code addresses only the case in which a witness presumes, because he has been misled, that his testimony is accurate.

The use of force, or threatening such use of force, in order to have a person commit a certain act (in the case being addressed here, to give false testimony), or to refrain from a certain act, additionally represents coercion (in the sense of the use of threats or force to cause a person to do, suffer or omit an act) within the meaning of section 240 of the Criminal Code.

The provisions of the law are worded as follows:

Criminal Code (StGB)

Section 26

Abetting

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 153

False testimony

Whosoever as a witness or expert gives false unsworn testimony before a court or other authority competent to examine witnesses and experts under oath shall be liable to imprisonment from three months to five years.

Section 154

Perjury

(1) Whosoever falsely takes an oath before a court or another authority competent to administer oaths, shall be liable to imprisonment of not less than one year.

(2) In less serious cases the penalty shall be imprisonment from six months to five years.

Section 159

Attempt to abet false testimony

Section 30(1), section 31(1) No 1 shall apply mutatis mutandis to an attempt to abet false unsworn testimony (section 153) and a false sworn affidavit (section 156).

Section 160

Procuring false testimony

(1) Whosoever procures another to take a false oath shall be liable to imprisonment not exceeding two years or a fine; whosoever procures another to make a false sworn affidavit or give false unsworn testimony shall be liable to imprisonment not exceeding six months or a fine not exceeding one hundred and eighty daily units.

(2) The attempt shall be punishable.

Section 240

Using threats or force to cause a person to do, suffer or omit an act

(1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine.

(2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender

1. causes another person to engage in sexual activity or to enter into marriage;
2. causes a pregnant woman to terminate the pregnancy; or
3. abuses his powers or position as a public official.

Section 340

Causing bodily harm while exercising a public office

(1) A public official who in the exercise of his duties causes bodily harm or allows it to be caused shall be liable to imprisonment from three months to five years. In less serious cases the penalty shall be imprisonment of not more than five years or a fine.

(2) The attempt shall be punishable.

(3) Sections 224 to 229 shall apply mutatis mutandis to offences under subsection (1) 1st sentence above.

Section 343

Forcing someone to make a statement

(1) Whosoever as a public official involved in

1. a criminal proceeding, a proceeding for the purpose of detention by a public authority; 2. a proceeding to impose a summary fine; or

3. a disciplinary proceeding, disciplinary court or professional disciplinary court proceeding physically abuses another, otherwise uses force against him, threatens him with force or abuses him mentally in order to force him to testify to or declare something in the proceeding or to fail to do so shall be liable to imprisonment from one to ten years.

(2) In less serious cases the penalty shall be imprisonment from six months to five years.

Section 357

Incitement of a subordinate to the commission of offences

(1) A superior who incites or undertakes to incite a subordinate to commit an unlawful act in public office or allows such an unlawful act of his subordinate to occur shall incur the penalty provided for this unlawful act.

(2) The same rule shall be applied to a public official to whom supervision or control over the official business of another public official has been transferred to the extent that the unlawful act committed by the supervised public official concerns the business subject to the supervision or control.

Frankfurt am Main Regional Court, judgment of 20 December 2004 - 5/27 KLs 7570 Js 203814/03 (4/04) (cf. NJW 2005, 692-696): Guiding Principle:

1. The threat issued during a police examination against the individual being examined that physical pain would be inflicted upon him in order to force him to provide information corresponding to the truth (in this case: revealing the location of an abducted child), constitutes an impermissible act of coercion within the meaning of section 240 StGB.

2. The exceptional circumstances discussed in legal literature concern borderline cases which do not justify an alternative appraisal, at least if the suspicions in question in the specific situation concerned have not yet been investigated with sufficient certainty and legally permissible investigative measures have not yet been exhausted.

"In the present criminal matter, the Regional Court found the defendant E. guilty of

coercion in the course of his official duties and the defendant D. guilty of incitement of a subordinate to commit coercion in the course of his official duties and issued a warning with sentence reserved against both defendants; regarding the defendant E., the reserved sentence consisted in a criminal fine of 60 daily rates of €60; regarding the defendant D., the reserved sentence consisted in a criminal fine of 90 daily rates of €120. Regarding the facts of the case:

G., who was involved in the present proceedings as a witness, had brought an 11-year-old boy under his control and killed him in order to extort ransom money from the family of the -already deceased - child. After G. was observed picking the money up three days after the abduction and - having bought a Mercedes automobile in the meantime - was later arrested, police investigations were focused initially on establishing the victim's whereabouts; it was initially assumed that the child was still alive and was being held in a hideout. While G. was being examined, the police found a large part of the ransom money in his apartment as well as a piece of paper on which the details for preparing the offence had been written. With these findings, G. was now strongly suspected of being the sole perpetrator, or a co-perpetrator, of the abduction. Because G. had deliberately misled the authorities in their investigation on numerous occasions with the statements he gave, the defendant Wolfgang Daschner (D.) issued an instruction to the defendant E. to threaten G. during further questioning with the use of physical coercion in order to bring G. to reveal the location of the hideout. At the time, D. was the deputy head of the office of the chief of police who was otherwise in charge, but currently on holiday; as "acting head of K 12", E. headed the "general investigations" sub-unit involved in the investigation. The defendants knew that the evidence available was not definitive, and, in particular, that it had not yet been established whether any co-perpetrators were involved alongside G. who might have had a say in determining the child's fate."

Federal Court of Justice, judgment of 13 July 1966 - 4 StR 178/66 -, BGHSt 21, 116-118: Guiding Principle

1. The inciting person is also guilty of inciting the taking of a false oath if, contrary to the inciting person's plans, the incited person takes the false oath with intent.

The Regional Court sentenced the defendant F. for subornation of perjury and incitement to take a false oath and the defendant Friedrich M. for failed subornation of perjury to terms of imprisonment. The defendants' appeals on law, which cite the violation of procedural and substantive law, are deemed unsuccessful."

Federal Court of Justice, judgment of 24 September 2009 - 4 StR 347/09 -, juris (cf. NStZ 2010,151):

Guiding Principle

1. Whether a shoe worn on the foot of a perpetrator is to be considered a dangerous instrument, can be determined only pursuant to the circumstances of the individual case. For this to apply the shoe will regularly have to be either a firm, heavy shoe, or "normal streetwear" that is used to kick the victim of the offence with considerable might or at least vigorously in the face or other particularly sensitive parts of the body (at margin no. 12)

2. A policeman who delivers several vigorous kicks to the stomach of an inebriated person who is lying on the floor and is restricted in his ability to defend himself is considered guilty of dangerous bodily injury while exercising public office, including if there is no visible injury or complaint on the part of the victim.

"Operative part of the judgment

1. Following the public prosecution office's appeal on points of law, the guilty verdict of Dortmund Regional Court of 29 January 2009 is amended to state that the defendant in case II. 1 of the reasons for the judgment is guilty of dangerous bodily injury while exercising public office.

2. The appeal on points of law by the public prosecution office and the appeal on points of law by the defendant which go beyond this are hereby dismissed.

...

Ruled according to the law.

Reasoning

The Regional Court sentenced the defendant to an aggregate term of imprisonment of eight months for bodily injury while exercising public office and bodily injury, but acquitted him of all other charges. It suspended execution of the custodial sentence on probation. The defendant's appeal on points of law, which was effectively limited to the conviction in case II. 1 of the reasons for the judgment, and cites the violation of substantive law, is hereby deemed unsuccessful. The appeal on points of law submitted by the public prosecution office, represented by the Federal Prosecutor General, which was also limited to the conviction in case II. 1, is hereby deemed partially successful and results in the amendment to the guilty verdict which can be gleaned from the operative provisions of the judgment.

If available, please provide related statistical data on number of investigations, prosecutions and convictions/acquittals. Please provide per annum figures, as available. Please describe how such information is collected and analysed.

In 2013: 9 persons were sentenced or discharged, 2 persons were convicted on account of having violated section 160 of the Criminal Code. 65 persons were sentenced or discharged, 22 were convicted on account of having violated section 340 of the Criminal Code. There were no convictions concerning section 343 of the Criminal Code.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in partial compliance with the provision under review.

The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to corruption offences is criminalised through a number of Criminal code provisions: provisions on false testimony (section 153) or perjury (section 154), abetting to false testimony or perjury (section 26), attempt to abet false testimony (section 159), resisting enforcement officers (section 113), procuring false testimony (section 160), causing bodily harm (section 223), using threats or force to cause a person to do, suffer or omit an act (section

240), threatening the commission of a felony (section 241), assistance in avoiding prosecution or punishment (section 258), causing bodily harm while exercising a public office (section 340).

A public official who forces someone to make a statement (section 343) and incitement of a subordinate to the commission of offences (section 357) are also criminalised, but limited to the perpetrator being a public official.

Germany should consider specifically providing that the “promise, offering or giving of an undue advantage” also is considered a means to obstruct justice. (Art. 25 a)

Subparagraph (b) of article 25

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

...

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions in relation to criminal offences concerning the use of physical force, threats or intimidation to interfere with the exercise of official duties.

Criminal Code (StGB)

Section 113

Resisting enforcement officers

(1) Whosoever, by force or threat of force, offers resistance to or attacks a public official or soldier of the Armed Forces charged with the enforcement of laws, ordinances, judgments, judicial decisions or orders acting in the execution of such official duty shall be liable to imprisonment not exceeding two years or a fine.

(2) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if

1. the principal or another accomplice carries a weapon for the purpose of using it during the commission of the offence; or

2. the offender through violence places the person assaulted in danger of death or serious injury.

(3) The offence shall not be punishable under this provision if the official act

is unlawful. This shall also apply if the offender mistakenly assumes that the official act is lawful.

(4) If the offender during the commission of the offence mistakenly assumes that the official act is unlawful and if he could have avoided the mistake the court may mitigate the sentence in its discretion (section 49(2)) or order a discharge under this provision if the offender's guilt is of a minor nature. If the offender could not have avoided the mistake and under the circumstances known to him he could not have been expected to use legal remedies to defend himself against the presumed unlawful official act, the offence shall not be punishable under this provision; if the use of remedies could have been expected the court may mitigate the sentence in its discretion (section 49(2)) or order a discharge under this provision.

Section 223

Causing bodily harm

- (1) Whosoever physically assaults or damages the health of another person, shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.

Section 224

Causing bodily harm by dangerous means

- (1) Whosoever causes bodily harm
 1. by administering poison or other noxious substances;
 2. by using a weapon or other dangerous instrument;
 3. by acting by stealth;
 4. by acting jointly with another; or
 5. by methods that pose a danger to life,shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years.
- The attempt shall be punishable.

Section 240

Using threats or force to cause a person to do, suffer or omit an act

- (1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine.
- (2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.
- (3) The attempt shall be punishable.
- (4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender
 1. causes another person to engage in sexual activity or to enter into marriage;
 2. causes a pregnant woman to terminate the pregnancy; or
 3. abuses his powers or position as a public official.

Section 241

Threatening the commission of a felony

- (1) Whosoever threatens a person with the commission of a felony against him

or a person close to him shall be liable to imprisonment not exceeding one year or a fine.

(2) Whosoever intentionally and knowingly pretends to another person that the commission of a felony against him or a person close to him is imminent shall incur the same penalty.

Criminal offence concerning the interference with the exercise of official duties which does not require the use of physical force, threats or intimidation:

Section 258

Assistance in avoiding prosecution or punishment

(1) Whosoever intentionally or knowingly obstructs in whole or in part the punishment of another in accordance with the criminal law because of an unlawful act or his being subjected to a measure (section 11(1) No 8) shall be liable to imprisonment not exceeding five years or a fine.

(2) Whosoever intentionally or knowingly obstructs in whole or in part the enforcement of a sentence or measure imposed on another shall incur the same penalty.

(3) The penalty must not be more severe than that for the act.

(4) The attempt shall be punishable.

(5) Whosoever by the offence simultaneously intends to avoid, in whole or in part, his own punishment or being subjected to a measure or that a sentence or measure imposed on him be enforced shall not be liable under this provision.

(6) Whosoever commits the offence for the benefit of a relative shall be exempt from liability.

While section 113 StGB is a specific regulation for the protection of public officials exercising their duties, sections 223, 240, 241 StGB are generic provisions which fully meet the requirements of article 25 b UNCAC. Concerning sections 223, 240, 241 StGB public officials enjoy the same protection as anyone else. Article 25 b does not require specific regulations for public officials.

Düsseldorf Higher Regional Court, judgment of 25 January 2013 - 7 Ks 12/12 -, juris: Operative part of the judgment

"The defendant is guilty of attempted murder in one and the same act as dangerous bodily injury and as resisting enforcement officers, as well as of resisting enforcement officers in two further cases - in one of those cases in one and the same act as attempted bodily injury; in the other case in one and the same act as insult.

...

The defendant spontaneously decided to free his - supposed - "brother", who had been brought to the floor by several police officers and in whose restraint the private accessory prosecutor had been involved. In order to achieve this he ran at the private accessory prosecutor and delivered him such a mighty kick to the head that the private accessory prosecutor fell backwards to the floor, where he remained, sustaining extremely serious injuries to the face. The division considers this conditional intention to cause death."

In 2013: 5962 persons were sentenced or discharged, 4792 persons were convicted on account of having violated section 113 of the Criminal Code (CC). 231 persons were sentenced or discharged, 176 persons were convicted on account of having violated section 257 CC.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

The use of physical force, threats, or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of corruption offences is criminalized by provisions relating to resisting enforcement officers (section 113), causing bodily harm (section 223 and 224), using threats or force to cause a person to do, suffer or omit an act (section 240), threatening the commission of a felony (section 241), causing bodily harm while exercising a public office (section 340).

Article 26. Liability of legal persons

Paragraphs 1 and 2 of article 26

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

(a) Summary of information relevant to reviewing the implementation of the article

51. Germany indicated it has implemented the provision under review and cited the following legal provisions.

Act on Regulatory Offences (OWiG)

Section 30

Regulatory Fine Imposed on Legal Persons and on Associations of Persons

(1) Where someone acting

1. as an entity authorised to represent a legal person or as a member of such an entity,
2. as chairman of the executive committee of an association without legal capacity or as a member of such committee,
3. as a partner authorised to represent a partnership with legal capacity, or
4. as the authorised representative with full power of attorney or in a

managerial position as procura-holder or the authorised representative with a commercial power of attorney of a legal person or of an association of persons referred to in numbers 2 or 3,

5. as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person, or of an association of persons referred to in numbers 2 or 3, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position, has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.

(2) The regulatory fine shall amount

1. in the case of a criminal offence committed with intent, to not more than ten million Euros, 2. in the case of a criminal offence committed negligently, to not more than five million Euros.

Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. If the Act refers to this provision, the maximum amount of the regulatory fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.

(2a) In the event of a universal succession or of a partial universal succession by means of splitting (section 123 subsection 1 of the Reorganisation Act [Umwandlungsgesetz]), the regulatory fine in accordance with subsections 1 and 2 may be imposed on the legal successor(s). In such cases, the regulatory fine may not exceed the value of the assets which have been assumed, as well as the amount of the regulatory fine which is suitable against the legal successor. The legal successor(s) shall take up the procedural position in the regulatory fine proceedings in which the legal predecessor was at the time when the legal succession became effective.

(3) Section 17 subsection 4 and section 18 shall apply *mutatis mutandis*.

(4) If criminal proceedings or regulatory fining proceedings are not commenced on account of the criminal offence or of the regulatory offence, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with, the regulatory fine may be assessed independently. Statutory provision may be made to the effect that a regulatory fine may be imposed in its own right in further cases as well. Independent assessment of a regulatory fine against the legal person or association of persons shall however be precluded where the criminal offence or the regulatory offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.

(5) Assessment of a regulatory fine incurred by the legal person or association of persons shall, in respect of one and the same offence, preclude a forfeiture order, pursuant to sections 73 or 73a of the Penal Code or pursuant to section 29a, against such person or association of persons.

(6) On issuance of a regulatory fining notice, in order to secure the regulatory fine, section 111d subsection 1 second sentence of the Code of Criminal Procedure shall be applied on proviso that the judgment is substituted by the regulatory fining notice.

Section 130

(1) Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.

(2) An operation or undertaking within the meaning of subsection 1 shall include a public enterprise.

(3) Where the breach of duty carries a criminal penalty, the regulatory offence may carry a regulatory fine not exceeding one million Euros. Section 30 subsection 2 third sentence shall be applicable. Where the breach of duty carries a regulatory fine, the maximum regulatory fine for breach of the duty of supervision shall be determined by the maximum regulatory fine impossible for the breach of duty. The third sentence shall also apply in the case of a breach of duty carrying simultaneously a criminal penalty and a regulatory fine, provided that the maximum regulatory fine impossible for the breach of duty exceeds the maximum pursuant to the first sentence.

Germany cited the following Cases involving the participation of legal persons in Convention offences (as cited in OECD Report 2011).

i) Decision of the Munich I Regional Court of 4 October 2007 pursuant to section 30 OWiG in conjunction with section 334 CC - against the telecommunication unit of Siemens - fine of EUR 201 million (see also Annual reports 2006-2007 and 2007-2008 Bavaria (i) and Germany's reply to Phase 3 questionnaires), hereinafter Case "Telecommunications Unit of Siemens";

ii) Decision of the Munich I Public Prosecution office of 15 December 2008 pursuant to sections 130 and 30 OWiG - against Siemens - Fine of EUR 395 million (see all Annual reports, about a « Hesse based Company » and related decision of the Federal Court of Justice of 28 August 2008 - Ref. Supra.), hereinafter Case "Siemens (except Telecommunications Unit)",

iii) Decision of the Hamburg Regional Court of 17 July 2008 pursuant to section 30 OWiG in conjunction with sections 299 and 300 CC- against a Hamburg based shipping company - Fine of EUR 30 000 (see Germany's reply to Phase 3 questionnaires and Germany's reply to Phase 3 questionnaires Hamburg bb - decision provided only in German), hereinafter Case "Hamburg based shipping Company";

iv) Decision of Munich I Public Prosecution office of 10 December 2009 pursuant to sections 130 and 30 OWiG - against the Trucks unit of MAN -Fine of EUR 75.3 million (see Annual report 2009 Bavaria (d) and Germany's reply to Phase 3 questionnaires), hereinafter Case "Trucks Unit of MAN";

v) Decision of a Munich I Regional Court of 10 December 2009 pursuant to section 30 OWiG in conjunction with sections 334 and 299 CC - against the Turbo engines Unit of MAN - Fine of EUR 75.3 million, hereinafter Case "Turbo engines Unit of MAN.";

vi) Decision of Hildesheim Regional Court of 26 June 2009 pursuant to section 30 OWiG in conjunction with sections 334 and 335CC - against Company P. specialised in cleaning pipes - Fine of EUR 200 000 (see Annual reports 2007-2008 and 2009 Lower Saxony (a) and Germany's reply to Phase 3 questionnaires), hereinafter Case "Company P"

Annual Report of the OECD Working Group on Bribery 2014: From 1999 to December 2013 75 legal persons were sanctioned.

<http://www.oecd.org/daf/anti-bribery/WGB-AB-AnnRep-2014-EN.pdf>

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

According to German law, criminal liability cannot be attributed to the legal person as it has no guilt, *societas delinquere non potest*. There is nevertheless an ongoing discussion whether to introduce criminal liability for legal persons.

Administrative liability of legal persons is established under the Act on Regulatory Offences (OWiG). Liability of legal persons is triggered when the persons involved in the entities (as listed in OWiG section 30 para. 1) commit a criminal or a regulatory offence through which the legal person's duties are violated or the legal person is or was intended to be enriched (section 30 in conjunction with section 130 OWiG).

During the country visit the usefulness of additional guidelines concerning prosecution of legal persons and the enhancement of the technical capacity of prosecutors in that area was noted.

| Paragraph 3 of article 26

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions and referred to section 30 and 130 of the Act on Regulatory offences, as well as the following legal provision:

The Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine (RiStBV)

Number 180a: Procedure to impose a regulatory fine against a legal person or association

(1) If the accused is part of the senior management of a legal person or association, the public prosecutor shall examine whether, in addition, the imposition of a regulatory fine against the legal person or association may be considered (section 30 Regulatory Offences Act (OWiG), section 444 Code of Criminal Procedure (StPO); however, cf. no. 270, third sentence). If this is the case, the representatives of the legal person or association are to be heard as accused persons even in the preparatory proceedings (section 444 (2), section 432 StPO).

(2) In the bill of indictment or application to issue a penal order, the public prosecutor shall apply for the participation of the legal person or association (section 444 (1) StPO), especially in cases where the imposition of a regulatory fine against them enables the economic circumstances of the legal person or association to be adequately taken into account, including with respect to the economic advantage gained by the act (section 30 (3) in conjunction with section 17 (4) OWiG). In the bill of indictment, the public prosecutor shall also announce the application to impose a fine and apply for the fine in the application to issue a penal order. This may be considered primarily for economic crimes, including corruption and environmental offences.

(3) Subsection (2) shall apply mutatis mutandis to applications for the imposition of a regulatory fine in an independent proceeding against the legal person or association in the cases set out in section 30 (4) OWiG (section 444 (3) in conjunction with section 440 StPO), including cases which encompass the termination of proceedings pursuant to sections 153, 153a StPO, 47 OWiG.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Whilst criminal liability cannot be attributed to the legal person, the natural person can be charged independently of the legal person in accordance with OWiG sections 30 and 130, as well as being fined (the Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine (RiStBV) Number 180a).

Paragraph 4 of article 26

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Act on Regulatory Offences (OWiG)

Section 30

Regulatory Fine Imposed on Legal Persons and on Associations of Persons

(2) The regulatory fine shall amount

1. in the case of a criminal offence committed with intent, to not more than ten million Euros, 2. in the case of a criminal offence committed negligently, to not more than five million Euros.

Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. If the Act refers to this provision, the maximum amount of the regulatory fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.

...

(3) Section 17 subsection 4 and section 18 shall apply mutatis mutandis.

Section 17

Amount of Regulatory Fine

(1) The amount of the regulatory fine shall not be less than five Euros and unless otherwise provided by statute shall not exceed one thousand Euros.

(2) If the law threatens to impose a regulatory fine for intentional and negligent action without distinction as to the maximum regulatory fine, the maximum sanction for a negligent action shall not exceed half of the maximum regulatory fine imposable.

(3) The significance of the regulatory offence and the charge faced by the perpetrator shall form the basis for the assessment of the regulatory fine. The perpetrator's financial circumstances shall also be taken into account; however, they shall, as a rule, be disregarded in cases involving negligible regulatory offences.

(4) The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the regulatory offence. If the statutory

maximum does not suffice for that purpose, it may be exceeded

Criminal Code (StGB)

Section 73

Conditions of confiscation

- (1) If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.
- (2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.
- (3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of confiscation under subsections (1) and (2) above shall be made against him.
- (4) The confiscation of an object shall also be ordered if it is owned or subject to a right by a third party, who furnished it to support the act or with knowledge of the circumstances of the act.

Section 75

Special provision for organs and representatives If a person commits an act

1. in his capacity as an organ authorised to represent a legal entity or as a member of such an organ;
2. in his capacity as a director or member of board of directors of an association lacking independent legal capacity;
3. as a partner authorised to represent a partnership with independent legal capacity; or
4. as an authorised representative with full power of attorney or in a management position as general agent or authorised representative, with a commercial power of attorney, of a legal entity or association listed in Nos 2 or 3 above; or
5. as another person acting in a responsible capacity for the management of the business or enterprise of a legal entity or association listed in Nos 2 or 3 above, including the supervision of the management of the business, or other exercise of controlling powers in a senior management position, which in relation to him and under the other conditions of sections 74 to 74c and section 74f would allow the deprivation of an object or its surrogate value or justify the denial of compensation, his act shall be attributed and these provisions applied to the person or entity represented. Section 14(3) shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

In addition to a regulatory fine, which carries an upper limit of EUR 10 million, the legal person can also face confiscation of its illegally obtained assets and any benefits derived there from, and for which there is no upper limit (sections 17 and 30, and the StGB sections 73 and 75 of the Act on Regulatory Offences).

The combination of fines and confiscation was deemed sufficiently dissuasive and effective.

Article 27. Participation and attempt

Paragraph 1 of article 27

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 25 Principals

(1) Any person who commits the offence himself or through another shall be liable as a principal.

(2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).

Section 26 Abetting

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 27 Aiding

(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

Participation in corruption offences is covered by general provisions of the Criminal Code on principals, abetting and aiding (sections 25, 26 and 27).

Paragraph 2 of article 27

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 12

Felonies and misdemeanours

(1) Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment.

(2) Misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.

(3) Aggravations or mitigations provided for under the provisions of the General Part, or under especially serious or less serious cases in the Special Part, shall be irrelevant to this classification.

Section 23

Liability for attempt

(1) Any attempt to commit a felony entails criminal liability; this applies to attempted misdemeanours only if expressly so provided by law.

Section 246

Unlawful appropriation ...

(3) The attempt shall be punishable.

Section 261

Money laundering; hiding unlawfully obtained financial benefits ...

(3) The attempt shall be punishable.

Section 263 Fraud

....

(2) The attempt shall be punishable.

Section 331 Taking bribes ...

(2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to

imprisonment not exceeding five years or a fine. The attempt shall be punishable.

Section 332

Taking bribes meant as an incentive to violating one's official duties

(1) A public official, a European public official or person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable to imprisonment from six months to five years. In less serious cases the penalty shall be imprisonment not exceeding three years or a fine. The attempt shall be punishable.

Section 334

Giving bribes as an incentive to the recipient's violating his official duties ...

(2) Whosoever offers, promises or grants a benefit to a judge, any member of a European Union court or an arbitrator for that person or a third person, in return for the fact that he

1. performed a judicial act and thereby violated his judicial duties; or
2. will in the future perform a judicial act and will thereby violate his judicial duties,

shall be liable in cases under No 1 above to imprisonment from three months to five years, in cases under No 2 above to imprisonment from six months to five years. The attempt shall be punishable.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

While attempts are punishable for all felonies (sections 12 and 23 para 1 StGB), attempted misdemeanours are only punishable if the law explicitly prescribes so, as is the case for some bribery offences (e.g. sections 331 para 2; 332 para. 1; 334 para. 2) and money-laundering (section 261 para. 3 StGB).

Paragraph 3 of article 27

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provision.

Criminal Code (StGB)

Section 30 Conspiracy

(1) A person who attempts to induce another to commit a felony or abet another to commit a felony shall be liable according to the provisions governing attempted felonies. The sentence shall be mitigated pursuant to section 49 (1). Section 23 (3) shall apply mutatis mutandis.

(2) A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

The Criminal Code criminalizes preparation only if the preparatory act is punishable in itself, such as in cases of conspiracy (section 30).

Article 29. Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 78 Limitation period

...

(3) To the extent that prosecution is subject to the statute of limitations, the limitation period shall be

... ..

3. ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years;

4. five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years;

...

(4) The period shall conform to the penalty provided for in the law defining the elements of the offence, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or of aggravated or privileged offences in the Special Part.

Section 78a Commencement

The limitation period shall commence to run as soon as the offence is completed. If a result constituting an element of the offence occurs later, the limitation period shall commence to run from that time.

Section 78b

Stay of limitation ...

(4) If the Special Part provides for a sentence of imprisonment of more than five years in aggravated cases and if the trial proceedings have been instituted in the District Court, the statute of limitations shall be stayed in cases under section 78 (3) No 4 from the admission of the indictment by the trial court, but no longer than for five years; subsection (3) above remains unaffected.

(5) If the offender resides in a country abroad and if the competent authority makes a formal request for extradition to that state, the limitation period is stayed from the time the request is served on the foreign state,

1. until the surrender of the offender to the German authorities,
2. until the offender otherwise leaves the territory of the foreign state,
3. until the denial of the request by the foreign state is served on the German authorities or 4. until the withdrawal of the request.

If the date of the service of the request upon the foreign state cannot be ascertained, the request shall be deemed to have been served one month after having been sent to the foreign state unless the requesting authority acquires knowledge of the fact that the request was in fact not served on the foreign state or only later. The 1st sentence of this subsection shall not apply to requests for surrender for which, in the requested state, a limitation period similar to section 83c of the Law on International Assistance in Criminal Matters exists, either based on the Framework Decision of the Council of 13 June 2002 on the European Arrest Warrant and the surrender agreements between the member states (OJ L 190, 18.7.2002, p 1), or based on an international treaty.

(6) In cases under section 78 (3) Nos 1 to 3, the limitation period is stayed from the time of the surrender of the person to the International Criminal Court or the state of enforcement until his or her return to the German authorities or until his or her release by the International Criminal Court or the state of enforcement.

Section 78c Interruption

(1) The limitation period shall be interrupted by

1. the first interrogation of the accused, notice that investigations have been initiated against him, or the order for such an interrogation or notice thereof;
2. any judicial interrogation of the accused or the order for that purpose;
3. any commissioning of an expert by the judge or public prosecutor if the accused has previously been interrogated or has been given notice of the

initiation of investigations;

4. any judicial seizure or search warrant and judicial decisions upholding them;

5. an arrest warrant, a provisional detention order, an order to be brought before a judge for interrogation and judicial decisions upholding them;

6. the preferment of a public indictment;

7. the admission of the indictment by the trial court;

8. any setting of a trial date;

9. a summary judgment order or another decision equivalent to a judgment;

10. the provisional judicial dismissal of the proceedings due to the absence of the indicted accused as well as any order of the judge or public prosecutor issued after such a dismissal of the proceedings or in proceedings in absentia in order to ascertain the whereabouts of the indicted accused or to secure evidence;

11. the provisional judicial dismissal of the proceedings due to the unfitness to plead of the indicted and any order of the judge or public prosecutor issued after such a dismissal of the proceedings for the purposes of reviewing the fitness of the indicted accused to plead; or 12. any judicial request to undertake an investigative act abroad.

In separate proceedings for measures of rehabilitation and incapacitation and in an independent proceeding for deprivation or confiscation, the limitation period shall be interrupted by acts in these proceedings corresponding to those in the 1st sentence of this subsection.

(2) The limitation period shall be interrupted by a written order or decision at the time at which the order or decision is signed. If the document is not immediately processed after signing the time it is actually submitted for processing shall be dispositive.

(3) After each interruption the limitation period shall commence to run anew. The prosecution shall be barred by limitation once twice the statutory limitation period has elapsed since the time indicated in section 78a, or three years if the limitation period is shorter than three years. Section 78b shall remain unaffected.

(4) The interruption shall have effect only for the person in relation to whom the interrupting act is done.

(5) If a law which applies at the time the offence is completed is amended before a decision and the limitation period is thereby shortened, acts leading to an interruption which have been undertaken before the entry into force of the new law shall retain their effect, notwithstanding that at the time of the interruption the prosecution would have been barred by the statute of limitations under the amended law.

(b) Observations on the implementation of the article

The reviewing experts concluded that the German legislation is in compliance with the provision under review.

The length of the statute of limitations for corruption offences varies between five and ten years (section 78 StGB). It starts to run at the time of the completion of the offence; however, if a result constituting an element of the offence occurs later, the limitation period only starts to run from that time (section 78a StGB).

The limitation period is suspended if the offender resides in a country abroad and a request for his extradition is made (section 78b para. 5 StGB).

The limitation period is interrupted, by any of the interrupting acts set out in section 78c StGB, e.g. by the first interrogation of the accused (section 78c para. 1 no. 1 var. 1 StGB), by any judicial seizure or search warrant (section 78c para. 1 no. 4), arrest warrant (section 78c para. 1 no. 5), by the provisional judicial dismissal of the proceedings due to the absence of the indicted (section 78c para. 1 no. 10 var. 1) or any judicial request to undertake an investigative act abroad (section 78c para. 1 no. 12).

If a judgment has been delivered in the proceedings at first instance before the expiry of the limitation period, the limitation is suspended and does not expire before the proceedings have been finally concluded (section 78b para. 3 StGB).

Article 30. Prosecution, adjudication and sanctions

Paragraph 1 of article 30

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and made reference to the provisions and explanations previously quoted and provided in relation to articles 15, 16, 17, 19, 21, 22, 23, 24, 25. Furthermore, Germany cited the following provisions.

Criminal Code (StGB)

Section 12

Felonies and misdemeanours

(1) Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment.

(2) Misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.

(3) Aggravations or mitigations provided for under the provisions of the General Part, or under especially serious or less serious cases in the Special Part, shall be irrelevant to this classification.

Section 335

Especially serious cases of taking and giving bribes

(1) In especially serious cases

1. of an offence under

a) section 332 (1) sentence 1, also in conjunction with (3), and

b) section 334 (1) sentence 1 and (2), in each case also in conjunction with (3),

the penalty is imprisonment for a term of between one year and 10 years and
2. of an offence under section 332 (2), also in conjunction with (3), the penalty is imprisonment for a term of at least two years.

(2) An especially serious case within the meaning of subsection (1) typically occurs where

1. the act relates to a major benefit,
2. the offender accepts continued benefits which are demanded in return for the fact that the offender would perform an official act in the future or
3. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

Section 108e

Taking of bribes by and giving of bribes to elected officials

(1) Whoever, in the capacity as a Member of the Bundestag or as a member of one of the Länder parliaments, demands, allows themselves to be promised or accepts an undue advantage for themselves or a third party in return for performing or refraining from performing an act, upon request or instruction, in the exercise of their mandate incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(2) Whoever offers, promises or grants to a Member of the Bundestag or a member of one of the Länder parliaments an undue advantage for the member themselves or a third party in return for that member performing or refraining from performing an act, upon request or instruction in the exercise of their mandate, incurs the same penalty.

(3) Members of

1. a local administrative body,
2. a body of an administrative unit established for a subarea of a Land or a local authority and elected in direct and general elections,
3. the Federal Convention,
4. the European Parliament,
5. a parliamentary assembly of an international organisation and
6. a legislative body of a foreign state

are considered equal to the members referred to in subsections (1) and (2).

(4) An undue advantage is in particular not deemed to exist if the acceptance of the advantage is in accordance with the relevant provisions relating to the member's legal status. The following is not considered an undue advantage:

1. a political mandate or a political function or
2. a donation which is permissible under the Political Parties Act or other relevant legislation.

(5) In addition to a sentence of imprisonment of at least six months, the court may order the loss of the ability to be elected in public elections and to vote on public matters.

The following offences are punished by up to three years' imprisonment or a fine.

Criminal Code (StGB):

Section 331 (accepting benefits)

Section 333 (granting benefits)

Section 113 (resistance to enforcement officers)

Section 246 par. 1 (misappropriation)

Section 299 (taking and giving bribes in commercial practice)

Section 353b (breach of official secrecy and special obligation of secrecy)

The following offences are punished by up to five years' imprisonment or a criminal fine:

Criminal Code (StGB)

Section 332 (without par. 2) (taking bribes)

Section 334 (giving bribes)

Section 108^e (taking of bribes by and giving of bribes to elected officials)

Section 246 par.2 (misappropriation)

Section 263 (fraud)

Section 266 (embezzlement)

Section 257 (aiding after the fact)

Section 259 (handling stolen goods)

Section 261 (money laundering; concealing unlawfully acquired assets)

Section 332 (taking bribes): imprisonment from one to ten years

Section 339 (judicial perversion of justice): imprisonment from one to five years

Aggravated/ especially serious cases:

Section 335 (especially serious cases of taking and giving bribes):
imprisonment from one to ten years

Section 300 (especially serious cases of taking and giving bribes in
commercial practice and healthcare sector): imprisonment from three months
to five years

Section 263 para. 3 (especially serious cases of fraud): imprisonment from six
months to ten years

(b) Observations on the implementation of the article

The reviewing experts concluded that the Germany is in partial compliance with the provision under review.

Corruption offences are classified as felonies or misdemeanours in the Criminal Code. Felonies are acts punishable by a minimum sentence of one year's imprisonment, while misdemeanours are punishable by a lower minimum term of imprisonment or by fine (section 12). Nevertheless, it was noted that the provisions relating to the maximum sentencing for bribery of public officials amounted to ten years' imprisonment, while the maximum sentencing for members of parliament remained at five years' imprisonment (sections 335 cf. 108e Criminal Code).

Therefore, and with due respect for its domestic legal system, Germany may wish to assess and consider further harmonizing the provisions on sentencing for bribery.

The reviewing experts also observed that Germany had an impressive number of crime statistics available. While, from the perspective of the present review, the statistics would benefit from also being separated and combined in line with the provisions of the Convention, the overall effort to gather and maintain crime statistics is most definitely to be considered a good practice and a success.

(c) Successes and good practices

Germany has established and generated high-quality crime statistics.

Paragraph 2 of article 30

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review.

There are no special criminal procedures or immunities for judges, prosecutors and for other public officials in Germany within the meaning of section 11 subsection 1 No. 2 of the Criminal Code (StGB).

No special criminal procedures apply for Members of Parliament, but they enjoy immunity in principle from criminal prosecution during their mandate. Immunity protects Members of the Federal Parliament (Bundestag) while in office from prosecution and arrest, thereby ensuring that Parliament is able to conduct its business at all times. In accordance with Article 46 of the Basic Law, Members may only be called to account or arrested for a punishable offence with the permission of the Bundestag, unless they are apprehended in the act of committing the offence or in the course of the following day. The Bundestag's permission is also required for any other form of restriction of Members' personal liberty. If a Member is to be called to account, the Public Prosecutors' Office must, therefore, request the President of the Bundestag to lift his or her immunity before it can initiate criminal proceedings. This request is passed on immediately to the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure.

Since 1969 it has been standard practice for the Bundestag, on the basis of a decision taken anew at the beginning of each electoral term, to grant general permission for preliminary investigations to be initiated against any of its Members for criminal offences, with the exception of insults of a political nature. However, before such investigations can commence the President of the Bundestag must be informed and, unless there are reasons to believe that this might obstruct efforts to ascertain the truth, so too must the Member concerned. In this way, the Bundestag in effect grants its permission for criminal proceedings to be initiated, not, however, for charges to be brought, arrests to be made or any other measure to be taken which might restrict the liberty of Members, such as, for instance, search and seizure operations in Members' residential or business premises outside the Parliament buildings.

In all other cases involving parliamentary immunity, the Committee submits a recommendation for a decision to the plenary, which adopts it without prior debate. Generally speaking, the Bundestag only refuses to waive a Member's immunity in the case of insults of a political nature. Requests for permission to search rooms used by a Member of the Bundestag present a particular problem. In one case, the Bundestag even had to be recalled from its summer recess. Should the Bundestag grant such permission, it does so only on the condition that a representative of the parliamentary group to which the Member in question belongs is present during the search.

The President of the Federal Republic of Germany, while in office, enjoys the same immunity rights as described above in relation to Members of the German Bundestag.

The members of the parliaments of the German states (Landesparlamente) also enjoy immunity rights while in office. Leaving aside diplomatic immunities, no other public officials are afforded immunity rights.

According to the Criminal Code (StGB), the criminal statute of limitations period shall be stayed as long as prosecution is not possible due to immunity.

Basic Law for the Federal Republic of Germany (GG)

Article 46 [Immunities of Members]

(1) At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or for any speech or debate in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults.

(2) A Member may not be called to account or arrested for a punishable offence without permission of the Bundestag, unless he is apprehended while committing the offence or in the course of the following day.

(3) The permission of the Bundestag shall also be required for any other restriction of a Member's freedom of the person or for the initiation of proceedings against a Member under Article 18.

(4) Any criminal proceedings or any proceedings under Article 18 against a Member and any detention or other restriction of the freedom of his person shall be suspended at the demand of the Bundestag.

Criminal Code (StGB)

Section 78b Stay of limitation

(2) If a prosecution is not feasible because the offender is a member of the Federal Parliament or a legislative body of a state, the stay of the limitation period shall only commence upon expiry of the day on which

1. the public prosecutor or a public authority or a police officer acquires knowledge of the offence and the identity of the offender; or

2. a criminal complaint or a request to prosecute is filed against the offender (section 158 of the Code of Criminal Procedure).

Germany cited, as an example of application concerning Members of Parliament (Bundestag) that in the previous 17th electoral term nine applications for permission to bring criminal proceedings were made and the Bundestag gave its permission in all nine cases.

Statistical data on earlier election terms can be found in the “Datenhandbuch zur Geschichte des Bundestages”

http://www.bundestag.de/dokumente/datenhandbuch/02/02_04/index.html

Specific statistics on the waiving of immunity for offences relevant to the present evaluation -such as bribery, breach of confidentiality or fraud - are not available.

As there are no special criminal procedures or immunities for judges, prosecutors and other public officials in Germany within the meaning of section 11 subs. 1 No.2 of the Criminal Code (StGB), we can refer in this respect to the statistical data provided by the Federal Statistic Office and the National Situation Report on Corruption.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in partial compliance with the provision under review.

Judges, prosecutors and other public officials do not enjoy any special immunities or privileges.

Members of the Federal Parliament are granted immunity from criminal prosecution during their mandate unless they are caught in flagrante delicto or the following day after the commission of the offence (art. 46 GG).

Parliament can and normally does lift their immunities with the exception of cases of insults of political nature. In addition, since 1969 it has been a standard practice for Parliament to grant general permission to initiate preliminary investigations against its Members for criminal offences, provided that the President of the Parliament is informed. Also as a standard practice, the Parliament has adopted the procedure of lifting its immunities on its first day of each electoral term.

However, further specialized investigative measures, such as search, seizure and telephone-tapping would require the consent of the Parliament and is hence not possible without lifting the parliamentarian’s immunity. The reviewing experts highlighted that this requirement and the procedure for doing so could hinder law enforcement agencies from undertaking rapid and effective investigations even if Germany clarified that the suspected Member of Parliament is not informed where this would endanger the intended purpose of the measure.

The Federal President enjoys the same level of immunities as the members of Parliament.

Germany should continue to monitor and to maintain the appropriate balance between immunities and jurisdictional privileges afforded to members of the Parliament and the possibility of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention.

Paragraph 3 of article 30

3. *Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and explained that, while the provisions of German law enacted in this regard do not include any special regulation for the criminal offences covered by this Convention, the generic provisions existing under German law fully meet the requirements.

According to section 152 (2) StPO, the public prosecutor's office is obliged as a matter of principle to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications (so-called principle of legality). Accordingly, prosecution is fundamentally and absolutely mandated against any party suspected of a crime and, where the pre-requisites therefor are met, so is the preferral of an indictment. In derogation from this principle, the option is available - in circumstances that are narrowly defined under law - to discontinue a preliminary criminal investigation and dispense with prosecution on discretionary grounds (sections 153 et seq. StPO).

These narrow pre-requisites and the approval of the court required as a matter of principle in the cases governed by sections 153, 153a StPO warrant that these opportunities to discontinue a preliminary criminal investigation and dispense with prosecution are used only in justified cases. Discontinuing a preliminary criminal investigation and dispensing with prosecution pursuant to section 153 StPO is premised on the perpetrator's guilt being considered to be of a minor nature and there being no public interest in the prosecution. Pursuant to section 153a StPO, the preliminary criminal investigation may be discontinued and the prosecution may be dispensed with upon conditions and instructions being imposed upon the accused, provided the nature of such conditions and instructions is suited to eliminate the public interest in criminal prosecution and provided the degree of guilt does not present an obstacle.

Moreover, subject to certain pre-requisites, the prosecution of criminal offences committed abroad may be dispensed with pursuant to section 153c StPO, while the prosecution of offences the penalty for which is not particularly significant with a view to the penalty imposed for another offence may be dispensed with pursuant to section 154 StPO.

Code of Criminal Procedure (StPO)

Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

(1) The public prosecution office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecution office shall be

obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

Section 152a

[Prosecution of Elected Public Representatives]

The law of a Land concerning the conditions under which a criminal prosecution may be instituted or continued against members of a legislative body shall also be applicable to the other Länder of the Federal Republic of Germany and to the Federation.

Section 153

[Non-Prosecution of Petty Offences]

(1) If a misdemeanour is the subject of the proceedings, the public prosecution office may dispense with prosecution with the approval of the court competent to open the main proceedings if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall not be required in the case of a misdemeanour which is not subject to an increased minimum penalty and where the consequences ensuing from the offence are minimal.

(2) If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings at any stage thereof under the conditions in subsection (1). The consent of the indicted accused shall not be required if the main hearing cannot be conducted for the reasons stated in Section 205, or is conducted in his absence in the cases referred to in Section 231 subsection (2) and Sections 232 and 233. The decision shall be given in a ruling. The ruling shall not be contestable.

Section 153a

Provisional Dispensing with Court Action; Provisional Termination of Proceedings]

(1) In a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the following conditions and instructions may be applied:

1. to perform a specified service in order to make reparations for damage caused by the offence;
2. to pay a sum of money to a non-profit-making institution or to the Treasury;
3. to perform some other service of a non-profit-making nature;
4. to comply with duties to pay a specified amount in maintenance;
5. to make a serious attempt to reach a mediated agreement with the aggrieved person (perpetrator-victim mediation) thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefor;
6. to participate in a social skills training course; or
7. to participate in a course pursuant to section 2b subsection (2), second sentence, or a driver's competence course pursuant to section 4a of the Road

Traffic Act.

The public prosecution office shall set a time limit within which the accused is to comply with the conditions and instructions, and which, in the cases referred to in numbers 1 to 3, 5 and 7 of the second sentence, shall be a maximum of six months and, in the cases referred to in numbers 4 and 6 of the second sentence, a maximum of one year. The public prosecution office may subsequently revoke the conditions and instructions and may extend the time limit once for a period of three months; with the consent of the accused it may subsequently impose or change conditions and instructions. If the accused complies with the conditions and instructions, the offence can no longer be prosecuted as a misdemeanour. If the accused fails to comply with the conditions and instructions, no compensation shall be given for any contribution made towards compliance. Section 153 subsection (1), second sentence, shall apply *mutatis mutandis* in the cases referred to in numbers 1 to 6 of the second sentence. Section 246a subsection (2) shall apply *mutatis mutandis*.

(2) If public charges have already been preferred, the court may, with the approval of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second sentences, on the indicted accused. Subsection (1), third to sixth and eighth sentences, shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be given in a ruling. The ruling shall not be contestable. The fourth sentence shall also apply to a finding that conditions and instructions imposed pursuant to the first sentence have been met.

(3) The running of the period of limitation shall be suspended for the duration of the time limit set for compliance with the conditions and instructions.

(4) In the case referred to in subsection (1), second sentence, number 6, also in conjunction with subsection (2), Section 155b shall apply *mutatis mutandis*, subject to the proviso that personal data from the criminal proceedings that do not concern the accused may only be transmitted to the agency in charge of conducting the social skills training course insofar as the affected persons have consented to such transmission. The first sentence shall apply *mutatis mutandis* if an instruction to participate in a social skills training course is given pursuant to other criminal law provisions.

Section 153c

[Non-Prosecution of Offences Committed Abroad]

(1) The public prosecution office may dispense with prosecuting criminal offences

1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
2. which a foreigner committed in Germany on a foreign ship or aircraft;
3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere

membership.

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.

(2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence.

(3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution.

(4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.

(5) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General.

Section 154

[Insignificant Secondary Penalties]

(1) The public prosecution office may dispense with prosecuting an offence

1. if the penalty or the measure of reform and prevention in which the prosecution might result is not particularly significant in addition to a penalty or measure of reform and prevention which has been imposed with binding effect upon the accused for another offence, or which he may expect for another offence, or

2. beyond that, if a judgment is not to be expected for such offence within a reasonable time, and if a penalty or measure of reform and prevention which was imposed with binding effect upon the accused, or which he may expect for another offence, appears sufficient to have an influence on the perpetrator and to defend the legal order.

(2) If public charges have already been preferred, the court may, upon the application of the public prosecution office, provisionally terminate the proceedings at any stage.

(3) If the proceedings were provisionally terminated on account of a penalty or measure of reform and prevention already imposed with binding effect for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, if the penalty or measure of reform and prevention imposed with binding effect is subsequently not executed.

(4) If the proceedings were provisionally terminated on account of a penalty or measure of reform and prevention which is to be expected for another offence, the proceedings may be resumed, unless barred by limitation in the meantime,

within three months after the judgment imposed for the other offence has entered into force.

(5) If the court has provisionally terminated the proceedings, a court order shall be required for their resumption.

The public prosecution office shall submit a bill of indictment to the competent court, if the investigations offer sufficient reason for preferring public charges according to section 170 (1) StPO. In all other cases the public prosecution shall terminate the proceedings according to section 170 (2) StPO. Furthermore, certain decisions of the public prosecution office are subject to review by the court: If a public prosecution office terminates investigation proceedings on grounds of a lack of sufficient suspicion, the applicant, where he is also the aggrieved person, has the right to lodge a complaint to the Office of the Public Prosecutor General (section 172 (1) StPO). If the Office of the Public Prosecutor General dismisses the complaint, the applicant can apply for a court decision (section 172 (2) GVG).

52. The prosecutor to whom the case was assigned is, in principle, responsible for taking the decision on whether to close or prefer charges.

Upon proceedings having been terminated pursuant to section 170 of the Code of Criminal Procedure, the public prosecutor may at any time reopen them – provided the offence has not yet become statute-barred– without such reopening requiring any cause.

Code of Criminal Procedure (StPO)

Section 170

[Conclusion of the Investigation Proceedings]

(1) If the investigations offer sufficient reason for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment to the competent court.

(2) In all other cases the public prosecution office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Prosecution of offences is mandatory on the basis of the principle of legality (section 152 para 2. of the Code of Criminal Procedure). However, in exceptional cases (such as an offence of a minor nature where there is no public interest in the prosecution) and with the approval of the court, the prosecutor has the discretion to discontinue or suspend a criminal investigation and prosecution (section 153 et seqq. of the Code of Criminal Procedure). This discretion not to prosecute requires a review by a senior prosecutor.

Paragraph 4 of article 30

4. *In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and explained that while the provisions of German law enacted in this regard do not include any special regulation for the criminal offences covered by this Convention, the generic provisions existing under German law fully meet the requirements.

The remand detention ordered against an accused for risk of flight (section 112 (2) no. 2 StPO) is intended to ensure that due and proper criminal proceedings can be implemented by preventing the accused from evading them by flight, while also ensuring the later enforcement of any prison sentence or of any sentence to custodial measures of reform and prevention serving to protect the public. Pursuant to section 116 StPO, the execution of remand detention is suspended if it is possible to achieve the purpose intended by less severe measures. In the case of a risk of flight, the less severe measures that may be an option, inter alia, pursuant to section 116 (1) StPO are the following: the instruction to report at certain times to the judge, the law enforcement agency, or to a specific office to be designated by them; the instruction not to leave the place of residence, or wherever the accused party happens to be, or a certain area, without the permission of the judge or the law enforcement agency; the instruction not to leave the private premises except under the supervision of a designated person; the furnishing of adequate security by the accused party or another person. These conditions serve to ensure the presence of the accused party in the further course of the criminal proceedings.

Code of Criminal Procedure (StPO)

CHAPTER IX

ARREST AND PROVISIONAL APPREHENSION

Section 112

[Admissibility of Remand Detention; Grounds for Arrest]

(1) Remand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest. It may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed.

(2) A ground for arrest shall exist if, on the basis of certain facts,

1. it is established that the accused has fled or is hiding;
2. considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight); or
3. the accused's conduct gives rise to the strong suspicion that he will
 - a) destroy, alter, remove, suppress, or falsify evidence,
 - b) improperly influence the co-accused, witnesses, or experts, or
 - c) cause others to do so,

and if, therefore, the danger exists that establishment of the truth will be made more difficult (risk of tampering with evidence).

According to section 116, 116a of the German Code of Criminal Procedure (StPO), the judge shall suspend execution of warrant of arrest under the following conditions:

Section 116 [Suspension of Execution]

(1) The judge shall suspend execution of a warrant of arrest which is justified merely by a risk of flight if the expectation is sufficiently substantiated that the purpose of remand detention may also be achieved by less severe measures.

The following measures, in particular, may be considered:

1. an instruction to report at certain times to the judge, the criminal prosecuting authority, or to a specific office to be designated by them;
2. an instruction not to leave his place of residence, or wherever he happens to be, or a certain area, without the permission of the judge or the criminal prosecuting authority;
3. an instruction not to leave his private premises except under the supervision of a designated person;

4. the furnishing of adequate security by the accused or another person.

(2) The judge may also suspend execution of a warrant of arrest which is justified for risk of tampering with evidence, if less severe measures sufficiently substantiate the expectation that they will considerably reduce the risk of tampering with evidence. In particular, an instruction not to have contact with co-accused persons, witnesses, or experts may be considered.

(3) The judge may suspend execution of a warrant of arrest issued in accordance with Section 112a provided there are sufficient grounds to assume that the accused will comply with certain instructions and that the purpose of detention will be fulfilled thereby.

(4) In the cases referred to in subsections (1) to (3), the judge shall order execution of the warrant of arrest if

1. the accused grossly violates the duties and restrictions imposed upon him;
2. the accused makes preparations for flight, remains absent without sufficient excuse upon proper summons to appear, or shows in any other manner that the trust reposed in him was not justified; or
3. new circumstances have arisen which necessitate the arrest.

Section 116a

[Type of Bail; Authorization to Receive Service]

(1) Bail shall be furnished by depositing cash, shares or bonds, by pledging property, or in the form of a surety by suitable persons. Any diverging provisions in a statutory instrument issued under the Act on Payments to and from Courts and Judicial Authorities shall remain unaffected.

(2) The judge shall determine the amount and type of bail at his discretion.

(3) An accused person who is not resident within the territorial scope of this statute and applies for suspension of execution of the warrant of arrest upon furnishing bail shall authorize a person residing within the district of the competent court to receive service on his behalf.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Detention may be ordered against an accused for risk of flight (section 112 para 2 no.2 of the Code of Criminal Procedure) but its execution may be suspended if it is possible to achieve the intended purpose by less severe measures, such as the instruction to report at certain times to the judge, the instruction not to leave the place of residence, the furnishing of adequate security by the accused party, etc. (section 116 of the Code of Criminal Procedure).

Paragraph 5 of article 30

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 57

Conditional early release-fixed-term imprisonment

(1) The court shall grant conditional early release from a fixed-term sentence of imprisonment under an operational period of probation, if

1. two thirds of the imposed sentence, but not less than two months, have been served; and
2. the release is appropriate considering public security interests; and
3. the convicted person consents.

The decision shall particularly consider the personality of the convicted person, his previous history, the circumstances of his offence, the importance of the legal interest endangered should he re-offend, the conduct of the convicted person while serving his sentence, his circumstances and the effects an early release are to be expected to have on him.

(2) After one half of a fixed-term sentence of imprisonment, but not less than six months, have been served, the court may grant conditional early release, if

1. the convicted person is serving his first sentence of imprisonment, the term not exceeding two years; or
2. a comprehensive evaluation of the offence, the personality of the convicted person and his development while in custody warrant the acceptance of special circumstances, and the remaining requirements of subsection (1) above have been fulfilled.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Section 57 of the Criminal Code regulates early release from prison.

Paragraph 6 of article 30

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and explained that Germany's Disciplinary law deals with the consequences of service violations. While the duties of civil servants are defined in the statutes governing the rights and duties of civil servants, disciplinary law stipulates the consequences of violations and the procedures for determining penalties.

Disciplinary considerations are always based on the Federal Civil Service Act, according to which an intentional or negligent breach of duties constitutes a disciplinary offence. If there is evidence of a breach, the employer must initiate disciplinary proceedings and establish the facts in question. After the investigation it is necessary to decide whether the proceedings should be closed, or disciplinary action should be taken against the civil servant. Disciplinary law provides five disciplinary measures which may be imposed depending on the seriousness of the offence:

- reprimand,
- fine,
- salary reduction,
- demotion, and
- dismissal from service.

However, dismissal from service as the most severe disciplinary measure is imposed only if the civil servant has lost the confidence of the employer or of the general public following a serious violation of duty. The law provides for only two disciplinary measures applicable to retired civil servants: reduction or deprivation of pensions. Using what is known as a disciplinary order, superiors themselves may impose a reprimand, a fine or a reduction of pensions. A disciplinary order is an administrative act which may be legally contested via objection, action for a rescission, or, under certain conditions, appeal on questions of fact or of law. Employers considering demotion, dismissal from service or deprivation of pensions appropriate may not impose this measure themselves. They must bring a disciplinary action before the competent administrative court which will then rule on the disciplinary measure. The court decision may be appealed on questions of fact and, under certain conditions, on

questions of law only. Depending on the individual circumstances, it may be necessary to suspend a civil servant from official duties before a final decision has been taken in the disciplinary procedure to prevent harm. In addition to the possibility provided by law to temporarily suspend the civil servant from official duties, a civil servant may be temporarily removed from service on disciplinary grounds once the disciplinary action has been initiated. Such a measure should be considered if, after a preliminary evaluation of the case, the disciplinary process is likely to result in the civil servant concerned being dismissed from service. Under such circumstances, depending on the financial situation of the civil servant concerned, a certain amount not to exceed 50% may be withheld from the monthly salary.

In the year under report, 2014, a total of 26 proceedings were brought to a close that had been initiated against federal employees or third parties for suspected corruption, for the most part in periods preceding that year. In around a third of these proceedings, a deed was proven that sufficed for punishment or a disciplinary measure to be meted out. (S.7)

http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Korruption_Sponsoring/jahresbericht-2014-korruptionspraevention.pdf?__blob=publicationFile
<http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Korruption_Sponsoring/jahresbericht-2014-korruptionspraevention.pdf?__blob=publicationFile>

http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Dienstrecht/Beamte/Disziplinarrecht/disziplinarrecht_node.html
http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Dienstrecht/Beamte/Disziplinarrecht/disziplinarrecht_node.html

Bundesbeamtengesetz (Federal Civil Service Act - BBG)

Section 30 Reasons for Termination

Civil service employment shall be terminated by

1. dismissal,
2. loss of civil service rights,
3. removal from civil service employment in accordance with the Federal Disciplinary Act, or
4. age-related retirement or compulsory retirement.

Section 66 Prohibition of performance of official duties

For compelling service-related reasons, the highest service authority or the authority it designates may prohibit a civil servant from carrying out his or her official duties. The prohibition shall expire if disciplinary proceedings or other proceedings to withdraw appointment or terminate civil service employment have not been initiated within three months.

Civil Servant Legal Status Act (BeamtStG)

Section 21 Reasons for Termination

Civil service employment shall be terminated by

1. dismissal,

2. loss of civil service rights,
3. removal from civil service employment in accordance with the Disciplinary Acts, or
4. age-related retirement or compulsory retirement .

Section 39 Prohibition of performance of official duties

Civil servants may be prohibited, for compelling service-related reasons, from carrying out their official duties. The prohibition shall expire if disciplinary proceedings or other proceedings to withdraw appointment or terminate civil service employment have not been initiated within three months.

Bundesdisziplinargesetz (BDG, Federal Disciplinary Act)

Section 38 Admissibility

(1) The authority competent for bringing the action for disciplinary proceedings may temporarily suspend a civil servant from his or her duties at the same time as the disciplinary proceedings have been initiated, or after they have been initiated, if it is likely that the decision in the disciplinary proceedings will be to remove the civil servant from civil service employment or to deprive him or her of the retirement pension or, in the case of a probationary civil servant or a civil servant subject to revocation, it is likely that he or she will be dismissed pursuant to section 5 (3), second sentence, of this Act in conjunction with section 34 (1), first sentence, no. 1 or section 37 (1), first sentence, of the Bundesbeamten-gesetz (BBG, Federal Civil Service Act). Moreover, the authority may temporarily suspend a civil servant from his or her duties if his or her remaining in service would significantly impair the operations of the service or the investigations, provided that the temporary suspension from duties is not disproportionate to the significance of the matter and the disciplinary measures that can be expected to be taken.

(2) The authority competent for bringing the action for disciplinary proceedings may instruct, at the same time as the disciplinary proceedings have been initiated or after they have been initiated, that up to 50 percent of the monthly emoluments (Dienstbezüge) or pre-service training salary (Anwärterbezüge) be retained if it is likely that the decision in the disciplinary proceedings will be to remove the civil servant from civil service employment or to deprive him or her of his retirement pension. The same shall apply if it is likely that the probationary civil servant or a civil servant subject to revocation will be dismissed pursuant to section 5 (3), second sentence, of this Act in conjunction with section 34 (1), first sentence, no. 1 or section 37 (1), first sentence, of the Bundesbeamten-gesetz (BBG, Federal Civil Service Act).

(3) The authority competent for bringing the action for disciplinary proceedings may instruct, at the same time as the disciplinary proceedings have been initiated or after they have been initiated, that up to 30 percent of the pension paid to a civil servant who has entered retirement be retained if it is likely that the decision in the disciplinary proceedings will be to deprive him or her of the retirement pension.

(4) The authority competent for bringing the action for disciplinary proceedings may at any time reverse the temporary suspension from duties, the retention of emoluments (Dienstbezüge) or pre-service training salary (Anwärterbezüge), as well as the retention of the pension, as a whole or in

part.

Germany cited the following examples of implementation.

Federal Administrative Court, judgment of 28 February 2013 - 2 C 3/12 -, (cf. BVerwGE 146, 98-116):

Guiding principle

2. The seriousness of a violation against the prohibition under the laws governing the actions by officials of accepting any benefits is not dependent on the matter of whether the benefit is a payment in money or in kind (abandonment of prior adjudication). (at margin no. 32)

3. As a rule, any public official who, by taking bribes, becomes liable to punishment under criminal law (section 332 (1) StGB) is to be removed from the civil service. The same applies to the liability to punishment under criminal law for the acceptance of benefits (section 331 (1) StGB) if a public official who holds a prominent office or who occupies a position of particular trust demands or accepts a greater than negligible benefit for performing his official duties. (at margin no. 34) (at margin no. 29) (at margin no. 31)

4. The unreasonably long duration of the disciplinary proceedings within the meaning of Art. 6 (1), first sentence, of the European Convention on Human Rights (juris: MRK) is not to be taken into account as a mitigating circumstance to the benefit of the public official where his removal from the civil service is imperative. (at margin no. 53)

The decision was based on the following facts and circumstances:

The defendant is a member of the civil service of the Land of Mecklenburg-Western Pomerania as a senior police constable (salary group A 8). He was convicted for bribery (section 332 (1) StGB) by a criminal conviction that has become final and unappealable; he was sentenced to a prison sentence of ten months, the execution of which was suspended on probation. The criminal conviction makes the following determinations as to the facts of the matter: On 7 September 2003, while on duty in a video surveillance vehicle, the defendant and a colleague of his stopped a vehicle because the driver had been driving on the Autobahn motorway at a speed that was higher by 120 km/h than the permissible maximum speed. The driver stated that he stood to lose his position if, as could be expected, a driving ban were to be issued against him. The defendant did not file the official report according to usual procedure and instead arranged a meeting with the driver by telephone, at which he offered to cite a third party, whose name he did not provide, as the driver in the official report against payment of € 200 to € 250. The driver asked for some time to consider the offer. Thereupon, his attorney filed a criminal report against persons unknown, in which the events were described.

Upon the criminal conviction having become final and unappealable in June of 2006, the Ministry of the Interior of the Land regarded it as imperative - and in this was contradicted by the head of the Neubrandenburg police office, who as the disciplinary supervisor was responsible for pursuing the disciplinary proceedings - to achieve the removal of the defendant from civil service by way of filing an action for disciplinary proceedings. Both the staff council and the committee representing the defendant's career level refused to consent to the action being brought. In November of 2007, the Land Ministry of the Interior informed the staff representation committees that it would pursue the matter as intended. In July of 2008, the Ministry instructed the defendant's

supervisor to file an action for disciplinary proceedings. Thereupon, the supervisor instructed the head of the legal department of the Landesamt für zentrale Aufgaben und Technik der Polizei (Land authority for central tasks and technical matters of the police) to “prepare for the proceedings and the representation before the court in the proceedings.” The head of department, as the party authorised to represent the department in the proceedings, filed the writ of complaint with the Administrative Court which he had signed, under the letterhead of the authority employing him, in August of 2008, with the caption “Disciplinary matter of the Land of Mecklenburg-Western Pomerania, represented by the Ministry of the Interior, this finally represented by the head of the Neubrandenburg police office.” The defendant was charged with passive corruption and theft.

The Administrative Court has removed the defendant from civil service. The Higher Administrative Court has demoted him to the office of police officer (salary group A 7).

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Disciplinary measures against civil servants include reprimand, fine, salary reduction, demotion, and dismissal from service and are regulated in section 30 of the Federal Civil Service Act (BBG) and the Federal Disciplinary Act (section 38). Similar provisions are included in the Länders’ Civil Service Acts.

Paragraph 7 of article 30

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office;

(b) Holding office in an enterprise owned in whole or in part by the State.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 358 Ancillary measures

In addition to a sentence of imprisonment of at least six months for an offence under section 332, section 335, section 339, section 340, section 343, section

344, section 345(1) and (3), section 348, sections 352 to 353b(1), section 355 and section 357 the court may deprive the person of the capacity to hold public office (section 45(2)).

Section 108e

Active and passive bribery of mandate holders

(5) In addition to the imposition of a term of imprisonment of at least six months, the court may withdraw the capacity to attain public electoral rights and withdraw the right to elect or vote in public matters.

Section 45

Loss of ability to hold public office, to vote and be elected in public elections

(1) A person who has been sentenced for a felony to a term of imprisonment of not less than one year shall, for a period of five years, lose the ability to hold public office and be elected in public elections.

(2) The court may deprive a convicted person of the ability indicated in subsection (1) above for a period of from two to five years if the law expressly so provides.

(3) At the same time that the loss of ability to hold public office takes effect, the convicted person shall lose any corresponding legal positions and rights he may at that time hold.

Section 70

Order for professional disqualification

(1) If a person has been convicted of an unlawful act he committed in abuse of his profession or trade or in gross violation of the attendant duties, or has not been convicted merely because he was proven to have acted in a state of insanity or his having so acted could not be excluded the court may make an order disqualifying him from engaging in that profession, branch of profession, trade or branch of trade, for a period from one year to five years, if a comprehensive evaluation of the offender and the offence shows that by further engagement in the profession, branch of profession, trade or branch of trade there is a danger that he will commit serious unlawful acts of the kind indicated above. The disqualification order may be made in permanence if there is reason to believe that the statutory maximum period will not suffice to avert the danger posed by the offender.

(2) If the offender had been provisionally disqualified from engaging in a profession, branch of profession, trade or branch of trade (section 132a of the Code of Criminal Procedure), the minimum term of disqualification shall be reduced by the time during which the provisional disqualification was in effect. In no case may it be less than three months.

(3) For the duration of the disqualification the offender must neither engage in the profession, branch of profession, trade or branch of trade on behalf of another nor have a person who is subject to his instructions engage in it on his behalf.

(4) The disqualification shall commence when the judgment becomes final. Any period of a provisional disqualification imposed because of the act shall be credited to the disqualification period to the extent it has run following the date on which the judgment in those proceedings in which the factual findings underlying the measure could last have been examined was pronounced. Any

period during which the offender was kept in detention by order of a public authority shall not be so credited.

Bundesbeamtengesetz (BBG, Federal Civil Service Act)

Section 41 Loss of civil service rights

(1) If civil servants are convicted in regular criminal proceedings in a German court 1.

of a deliberate crime and sentenced to imprisonment of at least one year, or 2. of a deliberate act punishable under the provisions on crimes against peace, high treason, endangering the democratic state under the rule of law or treason and endangering national security, or, if the crime involves an official act in the civil servant's primary position, corruption, and sentenced to imprisonment of at least six months,

their civil service employment shall be terminated when the sentence takes effect. The same shall apply if the civil servant is no longer recognised as capable of performing the duties of public office, or if, due to a decision of the Federal Constitutional Court (BVerfG) in accordance with Article 18 of the Basic Law (GG), the civil servant has forfeited a basic right.

(2) After termination of civil service employment under subsection (1), a civil servant shall have no right to claim remuneration or pension benefits unless otherwise specified by law. He or she shall have no right to use the official designation nor the title assigned to the position.

Civil Servant Legal Status Act (BeamtStG)

Section 24 Loss of civil service rights

(1) If civil servants are convicted in regular criminal proceedings in a German court 1.

of a deliberate crime and sentenced to imprisonment of at least one year, or 2. of a deliberate act punishable under the provisions on crimes against peace, high treason, endangering the democratic state under the rule of law or treason and endangering national security, or, if the crime involves an official act in the civil servant's primary position, corruption, and sentenced to imprisonment of at least six months,

their civil service employment shall be terminated when the sentence takes effect. The same shall apply if the civil servant is no longer recognised as capable of performing the duties of public office, or if, due to a decision of the Federal Constitutional Court (BVerfG) in accordance with Article 18 of the Basic Law (GG), the civil servant has forfeited a basic right.

(2) Where a decision resulting in the loss of civil service rights is reversed in subsequent proceedings, the status as civil servant shall be considered as not having been interrupted.

The following examples of implementation was cited by Germany.

Federal Court of Justice, decision and order of 08 January 2008 - 4 StR 468/07 -, juris (cf. NStZ 2008, 283-284)

Guiding principle

The loss of ability to hold public office may be ordered also in those cases in which a

court has handed down a sentence, for several offences set out in the catalogue in section 358 StGB, stipulating an aggregate prison sentence of at least six months (at margin no. 8).

Reasoning:

“The Regional Court has sentenced the defendant, for 874 counts of charging fees in excessive amounts, to a total prison sentence of eight months, suspending the execution of the sentence on probation. Furthermore, it has revoked his ability to hold public office for the duration of two years. The defendant has challenged this sentence by his appeal on points of law, which he is basing on violations of procedural and substantive law.

b) By its considerations of the financial equalisation in cases of hardship, in which it erred in the law, the Regional Court has blinded itself to the fact that it was imperative in the present case to review the imposition of a separate aggregate fine pursuant to section 53 (2), second sentence, StGB because a sentence of an (aggregate) prison sentence of a minimum of six months was suited to lead to the loss of ability to hold public office pursuant to section 358 in conjunction with section 45 (2) StGB.

...

aa) The loss of ability to hold public office pursuant to section 358 StGB may be ordered - and the Regional Court was correct in proceeding from that assumption - in a case such as the one at hand also where solely the aggregate prison sentence imposed amounts to a minimum of six months. Inasmuch as can be ascertained, the matter has not been ruled on by the supreme courts of Germany thus far. The Panel concurs with the opinion prevailing in legal scholarly literature, which holds that it is possible in cases - such as the one at hand - in which a sentence was handed down for an aggregate term of imprisonment of at least six months for several offences of the same nature as designated in section 358 StGB, to order an ancillary measure pursuant to section 358 in conjunction with section 45 (2) StGB. In cases such as these, it is irrelevant if the individual punishments fail to reach the minimum term of six months of imprisonment required by section 358 StGB (Jescheck in LK, 11th edition, section 358 at margin no. 5; Vossen in MünchKomm, section 358 at margin no. 6; Rudolphi/Rogall in SK-StGB, section 358 at margin no. 2; Cramer/Heine in Schönke/Schröder, 27th edition, section 358 at margin no. 2; a different view of the matter is taken by Fischer in StGB, 55th edition, section 358 in conjunction with section 45 at margin nos. 6 and 7). According to the purpose of the law, the decisive factor is not whether the perpetrator has committed solely one act pursuant to section 358 StGB that is to be punished by the minimum sentence, or whether he has demonstrated his unsuitability for public office by having committed several offences in dereliction of his official duties that are set out in the catalogue of section 358 StGB, the aggregate punishment of which reaches the minimum required (Jescheck in LK loc. cit.; Vossen in MünchKomm loc. cit.).

This view is in keeping with the interpretation to be found in section 48 BBG and the corresponding stipulations of the Land acts on civil servants, according to which a public official's status as a civil servant ends mandatorily should he have been sentenced to a prison sentence of at least one year for an offence committed intentionally. These regulations are likewise understood to also comprise the case in which a sentence is handed down for an aggregate prison sentence for at least one year for several offences committed intentionally, even if each of the individual punishments

meted out, taken for themselves, amount to less than one year (cf., for the LBGRh.Pf., BGH NStZ 1981, 342; for the BbgLBG, BGH wistra 2004, 264; Jescheck in LK loc. cit.; Battis BBG third edition, section 48 at margin no. 8).”

Ellwangen Regional Court, judgment of 18 March 2014 - 3 Ns 35 Js 16551/11 -, juris:

Guiding Principle:

An attorney who has been convicted of three counts of (attempted) fraud, committed in one and the same act with the concurrent offences of forgery of documents, betrayal of a client, and embezzlement, may also be prohibited, in addition to being sentenced to imprisonment of two years with the sentence being suspended on probation, from exercising his profession for the duration of three years. In the overall assessment of the circumstances given in the instant case, the real risk has become evident that the attorney, whose financial circumstances are precarious and who is not considering to leave the profession of attorney voluntarily, will once again use third-party funds to redeem his own debts should he continue to work in this profession.

Operative part [of the judgment]: ...

“The defendant is prohibited from working in the profession of attorney for the duration of three years.”

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Persons convicted of corruption offences can be deprived of the capacity to hold public office (section 358 cum 45 of the Criminal Code) or to vote or be elected in public elections (section 45 and 108e para 5 of the Criminal Code).

Section 70 of the Criminal Code on orders for professional disqualification is also relevant.

The Federal Service Act (section 41) and the Civil Servant Legal Status Act (section 24) further explicitly allow for the termination of the civil service employment in case the civil servants committed corruption offences.

| Paragraph 8 of article 30

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Federal Disciplinary Act

Section 22 Accumulation of disciplinary proceedings with criminal proceedings or other proceedings, suspension of proceedings

(1) Where public charges have been preferred in criminal proceedings against the public servant regarding the facts and circumstances on which the disciplinary proceedings are based, the disciplinary proceedings shall be suspended. They shall not be suspended if there are no reasonable doubts as to the facts and circumstances or if it is not possible to pursue the court proceedings in the criminal matter for reasons given in the person of the civil servant.

(2) Any disciplinary proceedings suspended pursuant to subsection (1), first sentence, are to be continued without undue delay as soon as the pre-requisites set out in subsection (1), second sentence, have been met retroactively, and at the latest upon the criminal proceedings having been completed and the ruling having become final and unappealable.

(3) The disciplinary proceedings may also be suspended if the matter to be ruled on in another proceedings governed by statute is one the evaluation of which is of significant import to the decision to be taken in the disciplinary proceedings. Subsection (1), second sentence, and subsection (2) shall apply *mutatis mutandis*.

Section 23

Binding nature of factual findings from criminal or other proceedings

(1) The findings as to the facts and circumstances made in a ruling that has become final and non-appealable in criminal proceedings or proceedings for the imposition of an administrative fine or in proceedings before the administrative courts, by which it has been ruled pursuant to section 9 of the Bundesbesoldungsgesetz (Federal Civil Service Remuneration Act) that the civil servant is to lose his or her right to remuneration in the case of culpable absence, shall be binding in the disciplinary proceedings pursued regarding the same facts and circumstances.

(2) The findings as to the facts and circumstances made in a ruling in another proceedings governed by statute shall not be binding, but may be taken as a basis for the decision taken in the disciplinary proceedings without being subjected to additional review.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Criminal sanctions are without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants. However, disciplinary proceedings are usually suspended during the course of ongoing criminal proceedings (section 22 of the Federal Disciplinary Act).

Paragraph 10 of article 30

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code

Section 46

Principles of sentencing

(1) The guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender's future life in society shall be taken into account.

Act concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention involving Deprivation of Liberty

Section 2 Objectives of Execution

By serving his prison sentence, the prisoner shall be enabled in future to lead a life in social responsibility without committing criminal offences (objective of the execution of the sentence). The execution of the prison sentence shall also serve to protect the general public from further criminal offences.

Almost every *Land* has one or even several reintegration programs. There is a so-called violence prevention network. For example, Saarland has a reintegration program called SoKoS which is addressed to any convict in order to gain social skills.

Germany cited the following case as an example of implementation

Federal Constitutional Court, judgment of 21 June 1977 - 1 BvL 14/76 -, BVerfGE 45, 187-271:

Guiding principle

1. The sentence of life imprisonment for murder (section 211 (1) StGB) is compatible with the Basic Law (GG) in accordance with the following guiding principles.

2. According to the findings gained thus far, it cannot be established that the enforcement of a sentence of life imprisonment pursuant to the stipulations of the Prison Act, taking account of current pardoning practice, will of necessity lead to irreparable damages of a psychological or physical nature that violate human dignity (Art 1 (1) GG).

3. The pre-requisites on which an execution of prison sentences in keeping with human dignity is based include that anyone sentenced to life imprisonment

continues to have the chance, as a matter of principle, to once again attain freedom. The possibility of being pardoned alone does not suffice in this regard; rather, the principle of a state governed by the rule of law demands that the pre-requisites under which the execution of a sentence of life imprisonment may be stayed, and the procedure to be applied in this regard, be provided for by law.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Reintegration of offenders is taken into account through the general principles of sentencing (section 46 of the Criminal Code), as well as the Act concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention involving Deprivation of Liberty.

Article 31. Freezing, seizure and confiscation

Subparagraph 1 (a) of article 31

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 73

Conditions of confiscation

(1) If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.

(2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.

- (3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of confiscation under subsections (1) and (2) above shall be made against him.
- (4) The confiscation of an object shall also be ordered if it is owned or subject to a right by a third party, who furnished it to support the act or with knowledge of the circumstances of the act.

Section 73a

Confiscation of monetary value

To the extent that the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason or because confiscation of a surrogate object pursuant to section 73(2) 2nd sentence has not been ordered, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained. The court shall also make such an order in addition to the confiscation of an object to the extent that its value falls short of the value of what was originally obtained.

Section 73b Assessment of value

The scope of what was obtained and its value as well as the amount of the victim's claim the satisfaction of which would deprive the principal or secondary participant of that which was obtained may be estimated.

Section 73c Hardship

- (1) Confiscation shall not be ordered to the extent it would constitute an undue hardship for the person affected. The order may be waived to the extent the value of what was obtained is no longer part of the affected person's assets at the time of the order or if what was obtained is only of minor value.
- (2) As to conditions of payment section 42 shall apply mutatis mutandis.

Section 73d

Extended confiscation

- (1) If an unlawful act has been committed pursuant to a law which refers to this provision, the court shall also order the confiscation of objects of the principal or secondary participant if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them. The 1st sentence shall also apply if the principal or secondary participant does not own or have a right to the object merely because he acquired the object as a result of an unlawful act or for the purpose of committing it. Section 73(2) shall apply mutatis mutandis.
- (2) If the confiscation of a particular object has, after the act, become impossible in whole or in part section 73a and section 73b shall apply mutatis mutandis.
- (3) If after an order of confiscation pursuant to subsection (1) above, due to another unlawful act which the principal or secondary participant committed before that order, a decision must again be taken as to the confiscation of objects of the principal or secondary participant, the court in doing so shall take into account the previous order.
- (4) Section 73c shall apply mutatis mutandis.

Section 73e

Effect of confiscation

(1) If the confiscation of an object is ordered title to the property or the right confiscated shall pass to the state once the order becomes final if the person affected by the order has a right to it at the time. The rights of third parties in the object remain unaffected.

(2) Prior to its becoming final the order shall have the effect of a prohibition to sell within the meaning of section 136 of the Civil Code; the prohibition shall also cover dispositions other than sales.

Section 74c

Deprivation of monetary value

(1) If the principal or secondary participant has used, particularly disposing of it or consuming it, the object which he owned or had a right to at the time of the offence and which could have been subject to deprivation, or if he has otherwise obstructed the deprivation of the object, the court may order the deprivation from the principal or secondary participant, of a sum of money no greater than the amount equivalent to the value of the object.

(2) The court may also make such an order in addition to the deprivation of an object or in place thereof, if the principal or secondary participant has, prior to the decision on the deprivation, encumbered it with the right of a third party, the extinguishment of which cannot be ordered without compensation or could not be ordered in the case of deprivation (section 74e(2) and section 74f); if the court makes the order in addition to the deprivation, then the amount of the surrogate value shall be assessed according to the value of the encumbrance.

(3) The value of the object and the encumbrance may be estimated.

(4) As to conditions of payment section 42 shall apply mutatis mutandis.

According to Number 74 RiStBV objects that have been seized in criminal proceedings or that have otherwise been taken into official custody must be protected against loss, devaluation or damage in order to prevent any claims from being raised to compensation of damages. Almost every Land has additional administrative regulations on keeping objects in official custody. Please find below these administrative regulations of Bavaria and Brandenburg:

<http://www.gesetze-bayern.de/Content/Document/BayVwV234830>

<http://bravors.brandenburg.de/de/verwaltungsvorschriften-222689>

If, for reasons of fact, it is not possible to prosecute a specific person, confiscation can also be ordered independently (i.e. without a conviction) under section 76a StGB. It is therefore possible to (independently) confiscate assets of a fugitive suspected offender as confiscated. However, if the suspected offender dies during the criminal proceedings, it is not possible to order confiscation because the death of the accused is considered a legal obstacle.

At the time of the country visit, the Federal Ministry of Justice and Consumer Protection had submitted a ministry draft serving to reform confiscation under criminal law. Section 73b subsection 1 number 3 of the draft amendment to the Criminal Code (StGB-E) allows the proceeds of offences to be confiscated from heirs. Moreover, the new

provision will also allow assets to be confiscated if the person involved in the deed is permanently unfit to stand trial. The draft was in public consultation. After the consultation the bill was adopted by the Federal Government and submitted to parliament. The legislation cited above includes the amendment proposed by that bill.

Germany cited the following case as an example of implementation.

Lübeck Regional Court, judgment of 31 May 2011 - 1 Ns 14/11 -, juris (cf. SchlHA 2012, 151-152):

The defendant had worked as a clerk in expert division 2 for youth, schools and culture in service 22 for families and schools, responsible in particular for youth welfare support (primarily those with names beginning with the letters .. to ..). In addition to his function as system administrator for the Prosoz-14plus-System computer software, which was used to process youth welfare support payments, he was responsible as a case worker for approving individual payments as part of the youth welfare schemes.

Thanks to his many years in the job and his knowledge as a system administrator, the defendant had an accurate overview of how youth welfare payments are processed. He also knew from experience that the "S...kasse" bank in the town of H. does not verify that the recipient indicated on a transfer is the same as the holder of the account to which the sum of money is to be transferred. The defendant was further aware that those working in youth welfare were largely trusted, and that only isolated, as opposed to systematic, checks were in place in their dealings with money. Based on this experience and the knowledge he had accrued up to April 2005, the defendant decided in April 2005 to balance his own books during a financial bottleneck by obtaining unauthorised payments from district S. In order to do this, the defendant activated a fictitious youth welfare account, which had previously been created for a transaction under the name of a youth welfare recipient called "J.H.", but which was no longer in use since the youth welfare recipient J.H. no longer had a claim to youth welfare assistance. The defendant changed the details of the account and, in the cases 1 to 60, added the name of an existing local organisation for education and vocational training at number ... K... Street in H. as the recipient under invoice number 1045344, even though this organisation had not worked with H. and had no payment claims vis-à-vis district S.

Following a failed transfer, the defendant added the name of his then partner W. to the payment file for cases 61 to 67. Furthermore, in all cases, he entered an account at the S...kasse bank in H. with the account number ... and sort code... as the account to which the money was to be transferred; this account was held jointly by himself and his partner W. He was aware in doing so that the S...kasse bank in H. would not notice that the recipient's name was different to that of the account holder. Having decided that this was how his scheme would work, the defendant invented a new payment amount in each of the 67 cases that would not stand out against other comparable regular youth welfare payments. He entered this amount into the electronic data processing system with reference to the case file of J.H., providing the name of the aforementioned organisation as recipient (as of case 61: under the name "W") but submitting his own account details.

All in all, 67 transfers were effected, resulting in total payments of approx. €450,000, to an account accessible by the defendant. The defendant intended to use this money to improve his day-to-day lifestyle, living more elaborately in accordance with his new,

now significantly augmented, income. Ahrensburg Local Court sentenced the defendant for 67 counts of embezzlement, in one and the same act as fraud, to a custodial sentence of 3 years. Additionally, he was ordered to forfeit a monetary sum of €339,207.00 pursuant to section 73 (1), second sentence, StGB.

Lübeck Regional Court upheld the judgment of the Local Court, only reducing the order for forfeiture because sums had already been transferred back in the meantime.

Provisions applied: Section 263 (1), (3), first and second sentences, no. 1, 4; section 266 (1), (2); section 11 (1) no. 2 letters b, c; section 52, 53, 54 StGB; sections 111i StPO, 73 (1), second sentence, StGB

Freezing, seizure and confiscation of proceeds of crime and international cooperation in this area: country guide “Asset Recovery under German Law – Pointers for Practitioners”

With regard to assistance by German to the authorities of other States in the field of identifying, freezing and tracing proceeds, the Federal Ministry of Justice and Consumer Protection has produced a guide on the topic which gives foreign practitioners an overview and quick access to further information. It was first issued in 2012 within the Framework of the Arab Forum on Asset Recovery (see <https://star.worldbank.org/star/ArabForum/asset-recovery-guides>). It has since been updated and can now be found online at the Ministry’s website in four languages (German, English, Arabic, Ukrainian, see e.g. http://www.bmjv.de/SharedDocs/Publikationen/DE/Vermoegensabschoepfung_im_deutschen_Recht.pdf for the German version, and http://www.bmjv.de/SharedDocs/Publikationen/DE/Vermoegensabschoepfung_im_deutschen_Recht_Englisch.pdf for the English version).

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in partial compliance with the provision under review.

Confiscation of proceeds of crime or the equivalent monetary value is regulated in the Criminal Code (sections 73–73e, 73a and 74c).

Non-conviction based confiscation is possible in cases where for reasons of law no person may be prosecuted (section 76a). However, the death of a perpetrator constitutes a legal obstacle to the confiscation process. Confiscation is also not possible if the person is deemed unfit to stand trial.³

Therefore, Germany may wish to ensure that the death of a suspect does not constitute a legal obstacle to confiscation, so as to allow the widest measures of confiscation in line with the Convention

³ On 1 July 2017, a comprehensive reform of the asset recovery legislation has become effective.

Subparagraph 1 (b) of article 31

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

...

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 74

Conditions of deprivation

(1) If an intentional offence has been committed objects generated by or used or intended for use in its commission or preparation, the court may make a deprivation order.

(2) A deprivation order shall not be admissible unless

1. the principal or secondary participant owns or has a right to the objects at the time of the decision; or

2. the objects, due to their nature and the circumstances, pose a danger to the general public or if there is reason to believe that they will be used for the commission of unlawful acts.

(3) Under the provisions of subsection (2) No 2 above the deprivation of objects shall also be admissible if the offender acted without guilt.

(4) If deprivation is prescribed or permitted by a special provision apart from subsection (1) above, subsections (2) and (3) above shall apply *mutatis mutandis*.

Section 74a

Extended conditions of deprivation

If the law refers to this provision, objects may be subject to a deprivation order as an exception to section 74(2) No 1 if at the time of the decision the person who owns or has a right to them

1. at least with gross negligence contributed to the property or the right being the object of or being used for the act or its preparation; or

2. acquired the objects dishonestly with knowledge of the circumstances that would have allowed their deprivation.

Section 74b

Principle of proportionality

(1) If deprivation is not otherwise prescribed it may not be ordered in cases under section 74(2) No 1 and section 74a if it is disproportionate to the

significance of the act committed and the blameworthiness of the principal or secondary participant or of the third party in cases of section 74a.

(2) In cases under section 74 and section 74a the court shall defer the deprivation order and impose a less incisive measure if the purpose of a deprivation order can also be attained thus. Particular consideration shall be given to instructions

1. to destroy the objects;
2. to remove particular fittings or distinguishing marks from or otherwise modify the objects; or
3. to dispose of the objects in a specified manner.

If the instructions are carried out the deferment order shall be rescinded; otherwise the court shall subsequently order the deprivation.

(3) If deprivation is not otherwise proscribed it may be limited to a part of the objects.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Property, equipment or other instrumentalities can be confiscated according to sections 74-74b of the Criminal Code.

Paragraph 2 of article 31

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Code of Criminal Procedure (StPO)

Section 94

[Objects Which May Be Seized]

(1) Objects which may be of importance as evidence for the investigation shall be impounded or otherwise secured.

(2) Such objects shall be seized if in the custody of a person and not surrendered voluntarily. (3) Subsections (1) and (2) shall also apply to driver's licences which are subject to confiscation.

Section 97

[Objects Not Subject to Seizure]

(1) The following objects shall not be subject to seizure:

1. written correspondence between the accused and the persons who, according to Section 52 or Section 53 subsection (1), first sentence, numbers 1 to 3b, may refuse to testify;
2. notes made by the persons specified in Section 53 subsection (1), first sentence, numbers 1 to 3b, concerning confidential information entrusted to them by the accused or concerning other circumstances covered by the right of refusal to testify;
3. other objects, including the findings of medical examinations, which are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 1 to 3b, to refuse to testify.

(2) These restrictions shall apply only if these objects are in the custody of a person entitled to refuse to testify unless the object concerned is an electronic health card as defined in section 291a of Part Five of the Social Code. Objects covered by the right of physicians, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives to refuse to testify shall not be subject to seizure either if they are in the custody of a hospital or a service provider which collects, processes or uses personal data for the persons listed, nor shall objects to which the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 3a and 3b, to refuse to testify extends, be subject to seizure if they are in the custody of the counselling agency referred to in that provision. The restrictions on seizure shall not apply if certain facts substantiate the suspicion that the person entitled to refuse to testify participated in the criminal offence, or in accessoryship after the fact, obstruction of justice or handling stolen goods, or where the objects concerned have been obtained by means of a criminal offence or have been used or are intended for use in perpetrating a criminal offence, or where they emanate from a criminal offence.

(3) Insofar as the assistants (Section 53a) of the persons mentioned in Section 53a subsection (1), first sentence, numbers 1 to 3b, have a right to refuse to testify, subsections (1) and (2) shall apply mutatis mutandis.

(4) The seizure of objects shall be inadmissible insofar as they are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, number 4, to refuse to testify. This protection from seizure shall also extend to objects which the persons mentioned in Section 53 subsection (1), first sentence, number 4, have entrusted to their assistants (Section 53a). The first sentence shall apply mutatis mutandis insofar as the assistants (Section 53a) of the persons mentioned in Section 53 subsection (1), first sentence, number 4, have a right to refuse to testify. (5) The seizure of documents, sound, image and data media, illustrations and other images in the custody of persons referred to in Section 53 subsection (1), first sentence, number 5, or of the editorial office, the publishing house, the printing works or the broadcasting company, shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify. Subsection (2), third sentence, and Section 160a subsection (4), second sentence, shall apply mutatis mutandis, the participation provision of subsection (2), third sentence, however, only where the particular facts substantiate strong suspicion of participation; in these cases, too, seizure shall only be admissible, however, where it is not disproportionate to the

importance of the case having regard to the basic rights arising out of Article 5 paragraph (1), second sentence, of the Basic Law, and the investigation of the factual circumstances or the establishment of the whereabouts of the perpetrator would otherwise offer no prospect of success or be much more difficult.

Section 98

[Order of Seizure]

- (1) Seizure may be ordered only by the court and, in exigent circumstances, by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act). Seizure pursuant to Section 97 subsection (5), second sentence, in the premises of an editorial office, publishing house, printing works or broadcasting company may be ordered only by the court.
- (2) An official who has seized an object without a court order shall apply for court confirmation within three days if neither the person concerned nor an adult relative was present at the time of seizure, or if the person concerned and, if he was absent, an adult relative of that person expressly objected to the seizure. The person concerned may at any time apply for a court decision. The competence of the court shall be determined by Section 162. The person concerned may also submit the application to the Local Court in whose district the seizure took place, which shall then forward the application to the competent court. The person concerned shall be instructed as to his rights.
- (3) Where after public charges have been preferred, the public prosecution office or one of the officials assisting has effected seizure, the court shall be notified of the seizure within three days; the objects seized shall be put at its disposal.
- (4) If it is necessary to effect seizure in an official building or an installation of the Federal Armed Forces which is not open to the general public, the superior official agency of the Federal Armed Forces shall be requested to carry out such seizure. The agency making the request shall be entitled to participate. No such request shall be necessary if the seizure is to be made in places which are inhabited exclusively by persons other than members of the Federal Armed Forces.

Section 111b [Securing of Objects]

- (1) Objects may be secured by seizure pursuant to Section 111c if there are grounds to assume that the conditions for their forfeiture or for their confiscation have been fulfilled. Section 94 subsection (3) shall remain unaffected.
- (2) If there are grounds to assume that the conditions have been fulfilled for forfeiture of equivalent value or for confiscation of equivalent value of the object, attachment in rem may be ordered pursuant to Section 111d in order to secure such equivalent value.
- (3) If there are no cogent grounds, the court may revoke the order in respect of the measures referred to in the first sentence of subsection (1) and in subsection (2) after a maximum period of six months. Where certain facts substantiate the suspicion of the offence and the time limit referred to in the first sentence is not sufficient given the particular difficulty or particular extent of the investigations or for another important reason, the court may, upon application by the public prosecution office, extend the measure

provided the grounds referred to justify their continuation. Unless there are cogent grounds, the measure shall not be continued for longer than a period of twelve months.

(4) Sections 102 to 110 shall apply *mutatis mutandis*.

(5) Subsections (1) to (4) shall apply *mutatis mutandis* insofar as forfeiture may not be ordered for the sole reason that the conditions under section 73 subsection (1), second sentence, of the Criminal Code apply.

Section 111c [Effecting Seizure]

(1) Seizure of a moveable asset shall be effected in the cases referred to under Section 111b by impounding the asset or by indicating the seizure by seal or in some other way.

(2) Seizure of a plot of land or of a right subject to the provisions on compulsory execution in respect of immovable property shall be effected by making an entry concerning the seizure in the Land Register. The provisions of the Act on Compulsory Sale by Public Auction and Compulsory Administration in respect of the extent of seizure on compulsory sale by public auction shall apply *mutatis mutandis*.

(3) Seizure of a claim or any other property right not subject to the provisions on compulsory execution in respect of immovable property shall be effected by attachment. The provisions of the Code of Civil Procedure on compulsory execution in respect of claims and other property rights shall apply *mutatis mutandis*. The request to make the declarations referred to in section 840 subsection (1) of the Code of Civil Procedure shall be linked to seizure.

(4) Seizure of ships, ship constructions and aircraft shall be effected pursuant to subsection (1). The seizure shall be entered in the Register in respect of those ships, ship constructions and aircraft that are entered in the Register of Ships, in the Register of Ship Constructions or in the Register of Liens on Aircraft. Application for such entry may be made in respect of ship constructions or aircraft that have not been, but are capable of being, entered in the Register; the provisions governing an application by a person who is entitled to request entry in the Register by virtue of an executory title shall apply *mutatis mutandis* in this case.

(5) Seizure of an object pursuant to subsections (1) to (4) shall have the effect of a prohibition of alienation within the meaning of section 136 of the Civil Code; the prohibition shall also cover other directions besides alienation.

(6) A moveable asset that has been seized may

1. be handed over to the person concerned against immediate payment of its value or

2. be retained by the person concerned, subject to revocation at any time, for further use in the interim until conclusion of the proceedings.

The sum paid pursuant to the first sentence, number 1, shall be substituted for the asset. The measure pursuant to the first sentence, number 2, may be made dependent on the person concerned providing security or fulfilling certain conditions.

Section 111d

[Attachment for Equivalent Value; Fine or Costs]

(1) Attachment in rem may be ordered by virtue of forfeiture or of confiscation of equivalent value, by virtue of a fine or of the anticipated costs

of criminal proceedings. Attachment may only be ordered by virtue of a fine or of the anticipated costs if judgment has been passed against the defendant imposing punishment. Attachment shall not be ordered to secure execution costs or negligible amounts.

(2) Sections 917 and 920 subsection (1) as well as sections 923, 928, 930 to 932, and 934 subsection (1) of the Code of Civil Procedure shall apply *mutatis mutandis*.

(3) If attachment has been ordered by virtue of a fine or of the anticipated costs, an enforcement measure shall be revoked upon application by the defendant if the defendant needs the object of attachment to pay the costs of his defence, his maintenance or the maintenance of his family.

Section 111e

[Order for Seizure or Attachment]

(1) Only the court, and in exigent circumstances also the public prosecution office, shall be competent to order seizure (Section 111c) and attachment (Section 111d). Officials assisting the public prosecution office (section 152 Courts Constitution Act) shall also be competent to order seizure of a moveable asset (Section 111c, subsection (1)) in exigent circumstances.

(2) If the public prosecution office has ordered seizure or attachment, it shall apply for court confirmation of the order within one week. This shall not apply when seizure of a moveable asset has been ordered. In all cases the person concerned may apply for a court decision at any time.

(3) The public prosecution office shall inform the person who is aggrieved as a result of the act without delay of enforcement of the order for seizure or attachment, insofar as his identity is known or becomes known during the course of proceedings.

(4) If notifying each aggrieved person individually would result in a disproportionate amount of effort or if it may be assumed that other yet unknown aggrieved persons have claims arising from the act, notice may be given of the seizure or attachment by insertion once in the Federal Gazette. In addition, notice may also be published in some other suitable manner. Personal particulars may only be published insofar as their provision is essential for enabling the aggrieved persons to access the secured assets in order to enforce their claims. Once the security measures have been concluded the public prosecution office shall initiate the deletion of the publication inserted in the Federal Gazette.

Section 111f

[Effecting Seizure and Enforcing Attachment]

(1) Effecting seizure (Section 111c) shall be incumbent upon the public prosecution office and, in the case of moveable assets (Section 111c subsection (1)), also upon the officials assisting it. Section 98 subsection (4) shall apply *mutatis mutandis*.

(2) The required entries in the Land Register as well as in the registers referred to in Section 111c subsection (4) shall be made upon application by the public prosecution office or by the court that ordered seizure. The same shall apply *mutatis mutandis* to the applications referred to in Section 111c subsection (4).

(3) If enforcement of attachment is to be effected pursuant to the provisions on attachment of

moveable assets, this may be effected by the authority designated in section 2 of the Ordinance on Recovery of Claims of the Judicial Authorities, by the court bailiff, by the public prosecution office, or by the officials assisting it (section 152 of the Courts Constitution Act). Subsection (2) shall apply *mutatis mutandis*. The public prosecution office or, upon the application of the public prosecution office, the court that ordered the attachment shall be competent to order attachment of a registered ship or ship construction and to order attachment of a claim arising out of the attachment pursuant to Section 111d.

(4) Section 37 subsection (1) shall apply to service, subject to the proviso that the officials assisting the public prosecution office (section 152 of the Courts Constitution Act) may also be assigned the task of implementing the order.

(5) The person concerned may at any time apply for a decision of the court in respect of measures taken in the course of enforcing the seizure or attachment.

Section 111g

[Compulsory Execution; Enforcement of Attachment by the Aggrieved Person]

(1) Seizure of an object pursuant to Section 111c and the enforcement of attachment pursuant to Section 111d shall not take effect against a disposition made by the aggrieved person, by way of compulsory execution or enforcement of attachment on the basis of a claim arising from the criminal offence.

(2) Compulsory execution or enforcement of attachment pursuant to subsection (1) shall require the approval of the court which is competent to order seizure (Section 111c) or attachment (Section 111d). The decision shall be given in the form of an order that may be contested by the public prosecution office, the accused and the aggrieved person by means of an immediate complaint. Approval shall be refused if the aggrieved person cannot furnish *prima facie* evidence that the claim arose from the criminal offence. Section 294 of the Code of Civil Procedure shall apply.

(3) The prohibition of alienation pursuant to Section 111c subsection (5) shall apply from the moment of seizure also for the benefit of aggrieved persons who, during seizure, pursue compulsory execution in respect of the object seized or who enforce attachment. Entry of the prohibition of alienation in the Land Register for the benefit of the state shall also apply, for the purposes of section 892 subsection (1), second sentence, of the Civil Code, as an entry for the benefit of those aggrieved persons who, during seizure, are entered in the Land Register as beneficiaries of the prohibition of alienation. Proof that the claim arose from the criminal offence can be furnished to the Land Registry by submission of the order granting approval. The second and third sentences shall apply *mutatis mutandis* to the prohibition of alienation in the case of ships, ship constructions and aircraft referred to in Section 111c subsection

(4). The legal force of the prohibition of alienation for the benefit of the aggrieved person shall not be affected by revocation of seizure. The first and fifth sentences shall apply *mutatis mutandis* for the effect of the lien which arises in respect of the moveable assets through the enforcement of the attachment (Section 111d).

(4) If the object seized or distrained by virtue of attachment is not subject to forfeiture on grounds other than those referred to in section 73 subsection (1),

second sentence, of the Criminal Code, or if approval was wrongfully granted, the aggrieved person shall be obliged to compensate third parties for the damage caused to them due to the fact that the prohibition of alienation applies for his benefit pursuant to subsection (3).

(5) Subsections (1) to (4) shall apply *mutatis mutandis* if forfeiture of an object has been ordered but the order has not yet become binding. They shall not apply if the object is subject to confiscation.

Section 111h

[Prior Satisfaction of Claims of the Aggrieved Person on Attachment]

(1) If the aggrieved person applies for compulsory execution in respect of a claim arising from the criminal offence or if he enforces attachment in respect of a plot of land where attachment has been enforced pursuant to Section 111d, he may demand that his right shall have priority over the collateral mortgage established by enforcement of that attachment. The priority of such right shall not be lost by virtue of revocation of the attachment. The consent of the owner shall not be required for the change of priority. In all other respects section 880 of the Civil Code shall apply *mutatis mutandis*.

(2) The change of priority shall require approval by the judge who is competent to order attachment (Section 111d). Section 111g subsection (2), second to fourth sentences, and subsection (3), third sentence, shall apply *mutatis mutandis*.

(3) If approval was wrongfully granted, the aggrieved person shall be obliged to compensate third persons for the damage caused to them due to the change of priority.

(4) Subsections (1) to (3) shall apply *mutatis mutandis* if attachment pursuant to Section 111d is enforced in respect of a ship, a ship construction or an aircraft as defined in Section 111c subsection (4), second sentence.

Section 111i [Maintenance of Seizure]

(1) The court may order that seizure pursuant to Section 111c or attachment pursuant to Section 111d be maintained for a maximum period of three months, as long as the proceedings pursuant to Sections 430 and 442, subsection (1) are confined to the other legal consequences and the immediate revocation would be unjust in respect of the aggrieved person.

(2) If the court did not order forfeiture simply because claims of an aggrieved person within the meaning of section 73 subsection (1), second sentence, of the Criminal Code present an obstacle to this, it may state this in the judgment. In such a case, it shall describe what was acquired. Insofar as the preconditions for section 73a of the Criminal Code apply, the court shall determine a sum of money equivalent to the value of what was acquired.

Insofar as

1. the aggrieved person has already taken action by way of compulsory execution or enforcement of attachment,
2. it is proven that the aggrieved person was satisfied out of assets that were not seized or pledged by way of enforcement of attachment, or
3. what was acquired was delivered to the aggrieved person pursuant to Section 111k,

this is to be deducted as part of the assessment to be made pursuant to the second and third sentences.

(3) Insofar as the court proceeds pursuant to subsection (2), it shall maintain, in its order, the seizure (Section 111c) of what was acquired within the meaning of subsection (2), second and fourth sentences, as well as the attachment in rem (Section 111d) up to the amount of the sum determined pursuant to subsection (2), third and fourth sentences, for three years. Time shall start to run with effect from the binding judgment. Secured assets shall be listed in the order. Section 917 of the Code of Civil Procedure shall not apply. If it is proven that the aggrieved person was satisfied out of assets that were not seized or distrained by way of enforcement of attachment, the court shall revoke the seizure (Section 111c) or attachment in rem (Section 111d) upon application by the person concerned.

(4) The court shall notify the person aggrieved by the act without delay of the order made pursuant to subsection (3) as well as the fact of its entry into force. With the notification, attention is to be drawn to the consequences listed in subsection (5) and to the option of enforcing claims by way of compulsory execution or enforcement of attachment. Section 111e subsection (4), first to third sentences, shall apply mutatis mutandis.

(5) Upon expiry of the time limit specified in subsection (3) the state shall acquire the assets listed in accordance with subsection (2) pursuant to section 73e subsection (1) of the Criminal Code, as well as a right to payment in the amount of the sum assessed pursuant to subsection (2), unless

1. the aggrieved person has in the meantime already taken action by way of compulsory execution or enforcement of attachment in respect of his claim,
2. it is proven that the aggrieved person was satisfied out of assets that were not seized or distrained by way of enforcement of attachment, or
3. objects have in the meantime been delivered to the aggrieved person or deposited pursuant to Section 111k, or
4. objects pursuant to Section 111k would have had to have been delivered to the aggrieved person and he applied for their delivery prior to expiry of the time limit specified in subsection (3).

At the same time, the state may realize the lien based on enforcement of attachment in rem in accordance with the provision of Part Eight of the Code of Civil Procedure. The proceeds as well as any money deposited as security shall fall to the state. Upon realization the right to payment which arose pursuant to the first sentence shall also expire insofar as the proceeds of realization do not exceed the amount of the claim.

(6) The court of first instance shall issue an order confirming the occurrence, and extent, of the acquisition of rights by the state pursuant to subsection (5) first sentence. Section 111l subsection (4) shall apply mutatis mutandis. The order may be challenged by way of immediate complaint. Once the order has legal force the court shall initiate the deletion of the publications in the Federal Gazette initiated pursuant to subsection (4).

(7) Insofar as the person convicted or affected by the seizure or attachment in rem satisfies the claims of the aggrieved person secured thereby after expiry of the time limit specified in subsection (3), he may demand compensation up to the amount received by the state for the realization. The right to compensation shall be excluded

1. insofar as the state's right to payment pursuant to subsection (5), first sentence, taking into account the proceeds received by the state, precludes it or
2. if three years have passed since expiry of the time limit set out in subsection

(3).

(8) In the cases referred to in section 76a subsection (1) or (3) of the Criminal Code, subsections (2) to (7) are to be applied mutatis mutandis to the proceedings pursuant to Sections 440 and 441 in conjunction with Section 442 subsection (1).

Money Laundering Act (GwG)

Section 11 Suspicious transaction reports

(1) Whenever factual circumstances exist that indicate that the assets or property connected with a transaction or business relationship are the product of an offence under section 261 of the Criminal Code or are related to terrorist financing, obliged entities shall promptly report such transaction, irrespective of the amount involved, or such business relationship to the Financial Intelligence Unit of the Federal Criminal Police Office and the competent prosecution authorities orally, by telephone, fax or via electronic data transmission. The reporting obligation pursuant to sentence 1 shall exist as well where factual circumstances indicate that the contracting party failed to comply with its duty of disclosure under section 4 (6) sentence 2.

(1a) A requested transaction may not be executed before the public prosecutor's office has informed the obliged entity of its consent, or before the expiry of the second working day following the transmission date of such suspicious transaction report unless the transaction's execution was prohibited by the public prosecutor's office; in this respect Saturday shall not be considered a working day. If it is impossible to postpone the transaction, or if doing so could frustrate efforts to pursue the beneficiaries of a suspected criminal offence, the execution of the transaction shall be permitted; the suspicious transaction report shall be filed subsequently without undue delay.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Freezing, or attachment of assets is possible through sections 111b-k of the Code of Criminal Procedure.

Seizure is subject to discretion, as the law stipulates that “objects may be seized” (sections 94, 97, 98, 111b-l StPO). However, the reformulation of this text is under consideration to make confiscation mandatory⁴.

Concerning the identification of suspected money-laundering, relevant institutions are obliged to inform the Financial Intelligence Unit of suspicious transactions and cannot execute them without the consent of the public prosecutor.

Paragraph 3 of article 31

⁴ On 1 July 2017, a comprehensive reform of the asset recovery legislation has become effective.

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Section 111l [Emergency Sale]

(1) Objects which have been seized pursuant to Section 111c, as well as objects which have been attached (Section 111d), may be sold before the judgment becomes final if they are subject to deterioration or substantial reduction of their value, or if their preservation, care or maintenance would result in disproportionately high costs or difficulties. In the cases referred to in Section 111i subsection (2), assets which have been attached (Section 111d) may be sold after the judgment has become binding, if this appears expedient. The proceeds shall be substituted for the objects.

(2) The emergency sale shall be ordered by the public prosecution office in the preparatory proceedings and after the judgment has become final. The officials assisting it (section 152 of the Courts Constitution Act) shall have the authority to order such sale if there is a danger that the object will be subject to deterioration before the decision of the public prosecution office can be obtained.

(3) Upon preferring public charges the order shall be made by the court seized of the main proceedings. The public prosecution office shall have the authority to make such order if there is a danger that the object will be subject to deterioration before the decision of the court can be obtained; subsection (2), second sentence, shall apply mutatis mutandis.

(4) The accused, the owner and other persons who have rights in relation to the object shall be heard prior to the order. The order, as well as the time and place of the sale, shall be made known to them as far as this appears to be practicable.

(5) The emergency sale shall be carried out in accordance with the provisions of the Code of Civil Procedure concerning the use of an attached object. The public prosecution office shall take the place of the court responsible for execution (section 764 of the Code of Civil Procedure) in the cases referred to in subsections (2) and (3), second sentence; in the case of subsection (3), first sentence, the court seized of the main proceedings. The use admissible pursuant to section 825 of the Code of Civil Procedure may be ordered at the same time as the emergency sale or subsequently, either proprio motu or upon application of the persons designated in subsection (4), or in the case of subsection (3), first sentence, also upon application by the public prosecution office. If it appears expedient, an emergency sale may be ordered in some other manner and by a person other than the bailiff.

(6) The person concerned may request a decision by the court competent pursuant to Section 162 regarding orders of the public prosecution office or

the officials assisting it. Sections 297 to 300, 302, 302 to 306, 311a and 473a shall apply mutatis mutandis. The court, and in urgent cases the presiding judge, may order suspension of the sale.

Number 74 RiStBV: The Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine (RiStBV) are supplementary administrative regulations applying to criminal proceedings in Germany.

They have been enacted by the Federal Ministry of Justice and Consumer together with the ministries of justice of the various Länder in order to ensure that these proceedings are, for the most part, uniform throughout Germany in processing such cases. As administrative regulations, the RiStBV do not have any force of law and are binding solely upon the civil servants working in the administration of justice. While they address the 'public prosecutors office first and foremost, they also provide guidance to judges, who are not bound by any instructions, so that such guidance is non-binding in nature. As a consequence, and since they do not have any external dimension, the RiStBV are not tantamount to a source of law; however, they are taken into account in the internal procedures of the police and the judiciary. As a consequence, it is possible as a matter of principle to object to violations under the laws governing civil service.

Handling objects kept in official custody

74

Exercise of due care in keeping objects in official custody

Objects that have been seized in criminal proceedings or that have otherwise been taken into official custody must be protected against loss, devaluation or damage in order to prevent any claims from being raised to compensation of damages. This responsibility initially is incumbent on the official seizing the objects; it then devolves to the party (this being the public prosecutor's office or the court) that is authorised to further dispose over the object taken into official custody. The administrative regulations of the Länder on keeping objects in official custody are to be taken into account.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Number 74 RiStBV ensures that objects taken into official custody must be protected against loss, devaluation or damage. To this end, each public prosecutor's office is responsible in general for storing the assets, both for the federal prosecutors and at the level of the Länder, as there is no central or federal asset management system.

4. *If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provision.

Criminal Code (StGB)

Section 73

Conditions of confiscation

...

(2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.

(3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of confiscation under subsections (1) and (2) above shall be made against him.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Confiscation of proceeds of crime extends to objects of crime that are transformed or converted into other property under section 73 paragraphs 2 and 3.

| Paragraph 5 of article 31

5. *If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and made reference to the above-cited Section 73 paras 2 and 3 of the Criminal Code (StGB) under article 31 (4).

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Confiscation of proceeds of crime extends to objects of crime that are intermingled with other property under section 73 paragraphs 2 and 3.

Paragraph 6 of article 31

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 73

Conditions of confiscation

(2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.

Section 73a

Confiscation of monetary value

To the extent that the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason or because confiscation of a surrogate object pursuant to section 73(2) 2nd sentence has not been ordered, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained. The court shall also make such an order in addition to the confiscation of an object to the extent that its value falls short of the value of what was originally obtained.

Section 73b Assessment of value

The scope of what was obtained and its value as well as the amount of the victim's claim the satisfaction of which would deprive the principal or secondary participant of that which was obtained may be estimated.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Confiscation of proceeds of crime extends to income or other benefits derived from proceeds of crime according to section 73 paragraph 2 of the Criminal Code. Section 73a and 73b specify how the monetary value shall be determined.

Paragraph 7 of article 31

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review pursuant to sections 94 et seqq. and 111 StPO (Code of Criminal Procedure), by which bank secrecy may not be invoked in preliminary criminal investigations and criminal proceedings.

Section 94

Securing and seizure of objects for evidentiary purposes

- (1) Objects which may be of importance, as evidence, for the investigation shall be taken into custody or otherwise secured.
- (2) Such objects shall be seized if they are in the custody of a person and are not surrendered voluntarily.
- (3) Subsections (1) and (2) shall also apply to driving licences which are to be confiscated.
- (4) The surrender of movable property shall be governed by sections 111n and 111o.

Section 95

Obligation to surrender

- (1) A person who has an object of the above-mentioned kind in his custody shall be obliged to produce it and to surrender it upon request.
- (2) In the case of non-compliance, the administrative measures and means of compulsion set out in section 70 may be used against such person. This shall not apply to persons who are entitled to refuse to testify.

Section 96

Papers in official custody

The submission or surrender of files or other papers which are in the official custody of authorities or public officials may not be requested if their highest service authority declares that publication of the content of such files or papers would be detrimental to the welfare of the Federation or of one of the Länder. Sentence 1 shall apply accordingly to files and other papers held in the custody of a Member of the Bundestag or of a Land parliament or of an employee of a federal or Land parliamentary group if the authority responsible for granting authorisation to give testimony has made the relevant declaration.

Section 97

Prohibition of seizure

(1) The following objects shall not be subject to seizure:

1. written correspondence between the accused and the persons who, under section 52 or section 53 (1) sentence 1 nos. 1 to 3b may refuse to testify;
2. notes made by the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b concerning confidential information confided to them by the accused or concerning other circumstances covered by the right of refusal to testify;
3. other objects, including the findings of medical examinations, which are covered by the right of the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b to refuse to testify.

(2) These restrictions shall only apply if these objects are in the custody of a person entitled to refuse to testify, unless the object concerned is an electronic health card as defined in section 291a of the Fifth Book of the Social Code (Sozialgesetzbuch V). The restrictions on seizure shall not apply if certain facts give rise to the suspicion that the person entitled to refuse to testify participated in the offence or in handling stolen data, aiding after the fact, obstructing prosecution or punishment, or handling stolen goods, or if the objects concerned were derived from an offence or have been used or are intended for use in committing an offence or if they emanate from an offence.

(3) Subsections (1) and (2) shall apply accordingly insofar as those persons who are involved, pursuant to section 53a (1) sentence 1 in the professional activity of the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b have the right to refuse to testify.

(4) The seizure of objects shall be inadmissible insofar as they are covered by the right of the persons referred to in section 53 (1) sentence 1 no. 4 to refuse to testify. This protection from seizure shall also extend to objects which have been entrusted by the persons referred to in section 53 (1) sentence 1 no. 4 to the persons involved in their professional activity pursuant to section 53a (1) sentence 1. Sentence 1 shall apply accordingly insofar as the persons who are involved, pursuant to section 53a (1) sentence 1 in the professional activity of those persons referred to in section 53 (1) sentence 1 no. 4 are entitled to refuse to testify.

(5) The seizure of papers, audio and video media, data carriers, images or other depictions in the custody of persons referred to in section 53 (1) sentence 1 no. 5 or of the editorial office, the publishing house, the printing works or the broadcasting company shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify. Subsection (2) sentence 3 and section 160a (4) sentence 2 shall apply accordingly, the provision on participation in subsection (2) sentence 3, however, only where the particular

facts give rise to a strong suspicion of participation; in these cases, too, seizure shall only be admissible, however, where it is not disproportionate to the importance of the case having regard to the basic rights arising out of Article 5 (1) sentence 2 of the Basic Law (Grundgesetz) and the investigation of the factual circumstances or the establishment of the whereabouts of the offender would otherwise offer no prospect of success or would be much more difficult.

Section 98

Procedure for seizure

(1) Seizure may be ordered only by the court and, in exigent circumstances, by the public prosecution office and its investigators (section 152 of the Courts Constitution Act). Seizure pursuant to section 97 (5) sentence 2 on the premises of an editorial office, publishing house, printing works or broadcasting company may be ordered only by the court.

(2) An official who has seized an object without a court order is, as a rule, to apply for court confirmation within three days if neither the person concerned nor an adult relative was present at the time of seizure or if the person concerned and, if he was absent, an adult relative of that person expressly objected to the seizure. The person concerned may at any time apply for a court decision. The competence of the court shall be determined by section 162. The person concerned may also submit the application to the local court in whose district the seizure took place, which shall then forward the application to the competent court. The person concerned shall be instructed as to his rights.

(3) If, after public charges have been preferred, the public prosecution office or one of its investigators has effected seizure, the court shall be notified of the seizure within three days; the objects seized shall be put at its disposal.

(4) If it is necessary to effect seizure in an official building or an installation or facility of the Federal Armed Forces which is not open to the general public, the superior authority of the Federal Armed Forces shall be requested to carry out such seizure. The requesting agency shall be entitled to participate. No such request shall be necessary if the seizure is to be made in places which are inhabited exclusively by persons other than members of the Federal Armed Forces.

Section 110

Examination of identity papers and electronic storage media

(1) The public prosecution office and, if it so orders, its investigators (section 152 of the Courts Constitution Act) shall have the authority to examine identity papers belonging to the person affected by the search.

(2) In all other respects, officials shall be authorised to examine identity papers found by them only if the holder permits such examination. Otherwise, they shall deliver any identity papers the examination of which they deem necessary to the public prosecution office in an envelope, which is to be sealed with the official seal in the presence of the holder.

(3) The examination of an electronic storage medium on the premises of the person affected by the search may be extended to also cover physically separate storage media insofar as they are accessible from the storage medium if there is a concern that the data sought would otherwise be lost. Data which may be of significance for the investigation may be secured; section 98 (2)

shall apply accordingly.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

The courts or in exceptional circumstances the public prosecution office have the authority to order that bank, financial or commercial records be made available or seized according to sections 94 - 98 and 111 of the Code of Criminal Procedure.

Moreover, bank secrecy may not be invoked as a refusal to seize such records, as it does not fall under one of the objects excluded from seizure under section 97 of the Code of Criminal Procedure.

Paragraph 8 of article 31

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and explained that German law provides for confiscation under certain circumstances where the court has verified that objects have been acquired as a result of unlawful acts. The concrete circumstances of the unlawful acts do not need to be established.

Criminal Code (StGB)

Section 73d Extended confiscation

(1) If an unlawful act has been committed pursuant to a law which refers to this provision, the court shall also order the confiscation of objects of the principal or secondary participant if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them. The 1st sentence shall also apply if the principal or secondary participant does not own or have a right to the object merely because he acquired the object as a result of an unlawful act or for the purpose of committing it. Section 73(2) shall apply mutatis mutandis.

(2) If the confiscation of a particular object has, after the act, become impossible in whole or in part section 73a and section 73b shall apply mutatis mutandis.

(3) If after an order of confiscation pursuant to subsection (1) above, due to another unlawful act which the principal or secondary participant committed before that order, a decision must again be taken as to the confiscation of

objects of the principal or secondary participant, the court in doing so shall take into account the previous order.

(4) Section 73c shall apply mutatis mutandis.

As an example of implementation, Germany cited the following case.

Federal Constitutional Court, decision and order of 14 January 2004 2 BvR 564/95 (cf. BVerfGE 110, 1-33):

The extended confiscation (section 73d StGB) is a measure that does not pursue any repressive objectives of retribution, but is targeted instead at ensuring order by preventive means; thus, it is not a measure similar to punishment governed by the principle of culpability.

Section 73d StGB does not violate the presumption of innocence.

The assumption of an object having been acquired as a result of unlawful acts in the sense of section 73d (1), first sentence, StGB is justified if the judge establishing the facts of the case has verified it by way of exhausting the available evidence.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

The Federal Constitutional Court has clarified that under section 73d of the Criminal Code, property may be confiscated if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts.

| Paragraph 9 of article 31

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Persons who are affected by measures in the sense of this article have the opportunity, pursuant to sections 304 (admissibility), 431 (appellate proceedings) et seqq. 439 (legal consequences equivalent to confiscation), 442 (1) StPO (Code of Criminal Procedure), to have the matter reviewed before a court.

Criminal Code (StGB)

Section 73

Conditions of confiscation

(1) If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.

Section 73e

Effect of confiscation

(1) If the confiscation of an object is ordered title to the property or the right confiscated shall pass to the state once the order becomes final if the person affected by the order has a right to it at the time. The rights of third parties in the object remain unaffected.

Section 74e

Effect of deprivation

- (1) If the deprivation of an object is ordered, title to the property or the right ordered deprived shall pass to the state once the order becomes final.
- (2) The rights of third parties in the object remain unaffected. The court shall order the cessation of these rights if it bases the deprivation on the fact that the conditions of section 74(2) No 2 are met. It may also order the cessation of the rights of a third party if no compensation is due to him pursuant to section 74f(2) Nos 1 or 2.
- (3) Section 73e(2) shall apply mutatis mutandis to the order of deprivation and the order deferring deprivation before they have become final.

Section 74f Compensation

- (1) If a third party had title to the property or to the right ordered deprived at the time the decision on deprivation or destruction became final or if the object was encumbered by a right of a third party which was extinguished or prejudiced by the decision, the third party shall be adequately compensated in money from the public treasury, taking into consideration the fair market value.
- (2) Compensation shall not be granted if
1. the third party at least with gross negligence contributed to the property or the right being the object of or being used for the act or its preparation,
 2. the third party acquired the objects or the right dishonestly with knowledge of the circumstances that would have allowed their deprivation, or
 3. it would be lawful under the circumstances which justified the deprivation or destruction, to deprive the third party permanently of the object and without compensation on the basis of provisions outside the criminal law.
- (3) In cases under subsection (2) above the court may grant compensation to the extent that it would constitute an undue hardship to deny it.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

The rights of bona fide third parties are protected by 73, 73e, 74e, 74f of the Criminal Code.

Article 32. Protection of witnesses, experts and victims

Paragraph 1 of article 32

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Pursuant to section 1 (1) of the Act to Harmonize the Protection of Witnesses (Zeugenschutz-Harmonisierungsgesetz, ZSHG), a person without whose information the investigation of the facts or the determination of the whereabouts of the accused in criminal proceedings would have no prospect of success or would be significantly impeded can be protected, with their consent, if their willingness to testify exposes them to a threat to life, limb, health, liberty or significant assets and that person is suited to witness protection measures. These include witnesses who testify in regard to the criminal offences underlying the Convention.

Under the aforementioned Act, relatives or other persons to whom the person closely relates can also be protected.

Act to Harmonize the Protection of Witnesses (ZSHG)

Section 1 Scope of application

(1) A person providing information in criminal proceedings, without which the investigation of the facts and circumstances or the identification of the whereabouts of the accused party would have no reasonable chance of success or would be significantly impaired, may be protected in accordance with the provisions of the present Act, subject to his or her agreement, if that person's willingness to testify endangers his or her life, limb, health, liberty or significant assets and if that person is suited for measures of witness protection.

(2) Furthermore, anyone may be protected in accordance with the provisions of the present Act, subject to his or her agreement, who is a relative (section 11 (1) no. 1 of the Criminal Code (StGB) of a person set out in subsection (1) or otherwise closely affiliated with that person, if that person's willingness to testify endangers his or her life, limb, health, liberty or significant assets and if that person is suited for measures of witness protection.

(3) Inasmuch as this is required in terms of witness protection, measures pursuant to the present Act may also be extended to relatives (section 11 (1) no. 1 of the Criminal Code (StGB) of a person set out in subsection (1) or (2) or to persons otherwise closely affiliated with that person, if those persons are suited for measures of witness protection and declare their agreement with such measures.

(4) 1 Measures pursuant to the present Act may be terminated if one of the pre-requisites set out in subsections (1) through (3) was not given or has subsequently ceased to exist.

2 Inasmuch as the person to be protected continues to be at risk, the protection measures shall be governed by the general laws governing risk prevention.

3 The termination of criminal proceedings does not result in the witness protection measures being cancelled should the risk continue to exist.

Section 2 Witness protection authorities

(1)

1 The police or the authorities competent under federal law or Land law (witness protection authorities) are responsible for the protection of a person in accordance with the provisions of the present Act.

2 Any provisions under federal law or Land law concerning the prevention of risk for the person to be protected shall remain unaffected.

(2)

1 The witness protection authority shall take its decisions after having duly assessed the circumstances.

2 In the assessment, in particular the seriousness of the crime as well as the degree of risk, the rights of the accused party, and the effects of the measure are to be taken into account.

(3)

1 The decisions and measures taken in connection with the protection of the witness are to be recorded in the files.

2 The files shall be kept by the witness protection authority; they are confidential and shall not be part of the files compiled in the course of the investigation.

3 They are to be made accessible to the public prosecutor's office upon the latter's demand.

4 The employees of the public prosecutor's office and of the witness protection authority are under obligation to provide information also on the witness protection in criminal proceedings, pursuant to the general principles and taking account of the stipulations of section 54 of the Code of Criminal Procedure (StPO).

(4)

1 Prior to criminal proceedings having been brought to a close and the sentence having become final and unappealable, agreement is to be obtained with the public prosecutor's office as to the commencement and ending of the protection of the witness. 2 After this time, the public prosecutor's office is to be informed of the planned termination of the witness protection.

Section 3 Confidentiality, obligation

1 Whoever is involved in witness protection work is prohibited, unless authorisation has been granted, from disclosing any insights he has gained

regarding the witness protection measures; this prohibition applies also beyond the time at which the witness ceases to be protected. 2Persons who are not officials (section 11 (1) no. 2 of the Criminal Code (StGB)) are to be placed under obligation pursuant to the Gesetz über die förmliche Verpflichtung nicht beamteter Personen (Act on the Formal Obligation of Persons who are not Civil Servants), where this is deemed imperative.

Code of Criminal Procedure (StPO)

Section 68a

[Questions Concerning Degrading Facts and Previous Convictions]

(1) Questions concerning facts which might dishonour the witness or a person who is his relative within the meaning of Section 52 subsection (1) or which concern their personal sphere of life are to be asked only if they cannot be dispensed with.

(2) Questions concerning circumstances justifying the witness' credibility in the case at hand, particularly concerning his relationship with the accused or the aggrieved person, are to be asked so far as this is necessary. A witness is to be asked about his previous convictions only if their establishment is necessary in order to decide whether the conditions of Section 60, number 2 have been met, or to determine his credibility.

Section 68b

[Assignment of Legal Counsel]

(1) Witnesses may avail themselves of the assistance of legal counsel. Legal counsel appearing at the examination of the witness shall be permitted to be present. He may be barred from the examination if certain facts justify the assumption that his presence would not only negligibly hinder the orderly taking of evidence. As a rule, this shall be the case if, on the basis of certain facts, it can be assumed that

1. counsel participated in the offence to be investigated or in accessoryship after the fact, obstruction of justice or handling of stolen goods connected therewith;

2. the testimony of the witness will be influenced by the fact that counsel appears committed not only to the interests of the witness; or

3. counsel will use information obtained during the examination for tampering with evidence within the meaning of Section 112 subsection (2), number 3, or pass on such information in a manner detrimental to the purpose of the investigation.

(2) A witness who does not have the assistance of legal counsel at his examination and whose interests meriting protection cannot be taken into account in another way shall be assigned such counsel for the duration of the examination if special circumstances obtain from which it is evident that the witness is unable to exercise his rights himself at his examination. Section 142 subsection (1) shall apply mutatis mutandis.

(3) Decisions pursuant to subsection (1), third sentence, and subsection (2), first sentence, shall not be contestable. The grounds therefor shall be documented, insofar as this does not endanger the purpose of the investigation.

Section 168c

[Presence During Judicial Examination] ...

(3) The judge may exclude an accused from being present at the hearing if his presence would endanger the purpose of the investigation. This shall apply in particular if it is to be feared that a witness will not tell the truth in the presence of the accused.

Section 247

[Removal of the Defendant from the Courtroom]

The court may order that the defendant leave the courtroom during an examination if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant. The same shall apply if, on examination of a person under 18 years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health. The defendant's removal may be ordered for the duration of discussions concerning the defendant's condition and his treatment prospects, if substantial detriment to his health is to be feared. When the defendant is present again the presiding judge shall inform him of the essential contents of the proceedings, including the testimony, during his absence.

Witness protection offices have been established with the Land police forces and the Federal Criminal Police Office to that end.

No information regarding the average costs per person of witness protection measures is recorded. Due to the varied nature of these cases it is also not possible to make any reliable statements in this regard.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

The Act to Harmonize the Protection of Witnesses and the Code of Criminal Procedure provide for the protection of witnesses, their relatives and other closely related persons. The participation in the witness protection programme requires not only support from the prosecution, but the persons concerned should agree to the measures proposed and their suitability.

| Subparagraph 2 (a) of article 32

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate,

non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(a) Summary of information relevant to reviewing the implementation of the article

53. Germany indicated it has implemented the provision under review and cited the following legal provisions.

Act to Harmonize th Protection of Witnesses (ZSHG)

Section 4 Use of personal data

(1) The witness protection authority may refuse to provide information on the personal data of the person to be protected inasmuch as this is required for the protection of the witness.

(2)

1 Public authorities are entitled to block the personal data of the person to be protected, or to not transmit them, upon a corresponding request having been made by the witness protection authority.

2 They shall comply with this request unless the interest of the public or interests of third parties meriting protection predominate.

3 The assessment by the witness protection authority of the necessity of the measure shall be binding upon the authority requested.

(3) The witness protection authority may demand of non-public bodies that they block the personal data of the person to be protected or that they not transmit such personal data.

(4) In processing data within the public authorities and non-public bodies, it is to be ensured that the protection of the witness is not impaired.

(5) Sections 161, 161a of the Code of Criminal Procedure (StPO) shall remain unaffected.

(6) The public authorities and non-public bodies shall inform the witness protection authority of any request for the disclosure of blocked data or data that have otherwise been identified, and shall do so without undue delay.

Section 5 Temporary aliases

(1)

1 At the request of the witness protection authority, public authorities may create, or temporarily modify, records or other documents for a person to be protected in order to establish or maintain an identity that has been temporarily changed (alias documents) on the basis of the the data provided by the witness protection authority, and may process the changed data.

2 They shall comply with this request unless the interest of the public or interests of third parties meriting protection predominate.

3 The assessment by the witness protection authority of the necessity of the measure shall be binding upon the authority requested.

4 No entries may be made in the register of births, deaths, and marriages (Personenstandsregister) for purposes of the first sentence. 5 No personal identity cards or passports may be issued to persons who are not a German citizen within the meaning of Article 116 of the Basic Law (GG).

(2) The witness protection authority may demand of non-public bodies that

they create alias documents for a person to be protected using the data provided, or to modify such documents, and to process the modified data.

(3) The person to be protected may enter into legal relations under his or her temporarily changed identity.

(4) Subsections (1) through (3) apply mutatis mutandis with regard to the staff members of witness protection authorities, inasmuch as this is imperative for them to fulfil their tasks.

Section 10 Witness protection in proceedings conducted in accordance with the rules governing judicial process

(1) 1A person to be protected who is to be examined in court proceedings other than criminal proceedings, or in proceedings before a parliamentary committee of inquiry, is entitled to provide his or her particulars, in derogation from the provisions of the respectively applicable rules of procedure and rules of courts, only as regards an earlier identity and is also entitled to refuse, by reference to his or her protection as a witness, to provide information that would allow conclusions to be drawn regarding his or her current particulars as well as his or her residence and place of abode.

2 Instead of the residence or place of abode, the competent witness protection authority is to be provided.

(2) Records and other documents allowing conclusions to be drawn regarding an alias identity or the residence or place of abode of a protected person are to be included in the proceedings' files only insofar as this is not contravened by the purposes of witness protection.

(3) For criminal proceedings, the regulations of sections 68, 110b (3) of the Code of Criminal Procedure (StPO) continue to apply.

Code of Criminal Procedure (StPO)

Section 68

[Examination as to Witness' Identity] ...

(2) A witness shall furthermore be permitted to state his business address or place of work or another address at which documents can be served instead of stating his place of residence if there is well-founded reason to fear that legally protected interests of the witness or of another person might be endangered or that witnesses or another person might be improperly influenced by the witness stating his place of residence. If the conditions set out in the first sentence obtain at the main hearing, the presiding judge shall permit the witness not to state his place of residence.

(3) If there is well-founded reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to provide personal identification data or to provide such data only in respect of an earlier identity. However, if so asked at the main hearing, he shall be required to state in what capacity the facts he is indicating became known to him.

(4) If there are sufficient indications that the conditions set out in subsections (2) or (3) obtain, the witness is to be advised of the rights provided thereunder. In the case of subsection (2), the witness shall be assisted in specifying an address at which documents can be served. Documents establishing the witness' place of residence or identity shall be kept by the public prosecution

office. They shall only be included in the files when the fear of danger ceases.
(5) Subsections (2) to (4) shall also apply after conclusion of the examination of the witness. Insofar as the witness was permitted not to provide data, it must be ensured in the course of provision of information from or inspection of files that this data is not made known to other persons, unless a danger within the meaning of subsections (2) and (3) appears to be ruled out.

Section 74 [Challenge] ...

(2) The public prosecution office, the private prosecutor and the accused shall have a right of challenge. The appointed experts shall be made known to the persons entitled to challenge unless special circumstances present an obstacle thereto.

Courts Constitution Act (GVG)

Section 172

The court may exclude the public from a hearing or from a part thereof if

1. endangerment of state security, the public order or public morals is to be feared,

1a. endangerment of the life, limb or liberty of a witness or another person is to be feared, ...

The federal and Land witness protection offices take the necessary protective measures at their reasonable discretion, which can include data and transmission blocking (section 4 of the Act to Harmonize the Protection of Witnesses) or creating temporary aliases (section 5 of the Act to Harmonize the Protection of Witnesses).

All those involved in witness protection work are obliged to maintain secrecy regarding any measures taken (section 3 of the Act to Harmonize the Protection of Witnesses).

The examples listed in paragraph (2) (a) of article 32 are standard measures in Germany.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

German legislation provides for procedures for the physical protection of witnesses, including measures to protect the witness's identity and personal data, such as non-disclosure of information and issuance of alias documents (section 68 of the Code of Criminal Procedure, section 4 and 5 of the Act to Harmonize the Protection of Witnesses).

Moreover, temporary or permanent relocation can take place primarily domestically but also internationally in accordance with section 7 in conjunction with section 66 Bundeskriminalamtgesetz (BKAG) and/or the Länders' police laws under which necessary protection measures including domestic and international relocation may be taken.

Subparagraph 2 (b) of article 32

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

...

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

According to section 247a subsection 1, first sentence, of the Code of Criminal Procedure (StPO), the court may order a witness to be examined by video in a video conference if there is an imminent risk of serious detriment to the well-being of the witness were he to be examined in the presence of those attending the main hearing, or if the pre-requisites of section 251 subsection 2 StPO are given and the video examination is required in order to establish the truth. In this context, it is incumbent on the court to duly assess whether or not the examination should be performed using video transmission, and direct examination of a witness in the courtroom continues to be normal procedure; any video examination is tied, by its nature as an exception from this principle, to pre-requisites that are to be interpreted narrowly. Only once these pre-requisites have been met will the court have the discretion to take this decision. In this context, the legitimate interests of the witness (protection of the witness) on the one hand and the right enjoyed by the defendant to fair proceedings on the other hand (which also includes the presumption of the defendant's innocence along with his entitlement to an effective and fair legal hearing and his right to ask questions) are to be weighed and balanced out against each other in the manner required, while considering the need to clear up the offence expeditiously and, at the same time, comprehensively.

The examination of a witness by video conference pursuant to section 247a StPO is to be recorded if there is a concern that the witness will not be available for examination at a future main hearing and the recording is necessary for establishing the truth (section 247a subsection 1, fourth sentence StPO).

Section 247a StPO does not stipulate any limitation to certain fields of offences or to particular groups of witnesses; instead, its purpose is to afford comprehensive protection to witnesses. Accordingly, this provision of the law does not apply solely to underage witnesses or to victims of offences against sexual self-determination; other than is the case for section 255a subsection 2 StPO, it applies to all witnesses in need of protection who stand to suffer grave disadvantages. This group includes, besides the victims of sexual offences, particularly endangered investigators and persons who have renounced their criminal past and who would be subject to particular risks and dangers

were they to be examined under the usual conditions, as well as witnesses who are elderly, ill, or infirm. Fundamentally, this group also includes undercover agents.

Code of Criminal Procedure (StPO)

Section 247a

[Witness Examination in Another Place]

(1) If there is an imminent risk of serious detriment to the well-being of the witness were he to be examined in the presence of those attending the main hearing, the court may order that the witness remain in another place during the examination; such an order shall also be admissible under the conditions set out in Section 251 subsection (2), insofar as this is necessary to establish the truth. The decision shall be incontestable. A simultaneous audio-visual transmission of the testimony shall be provided in the courtroom. The testimony shall be recorded if there is a concern that the witness will not be available for examination at a future main hearing and the recording is necessary for establishing the truth. Section 58a subsection (2) shall apply *mutatis mutandis*.

(2) The court may order that the examination of an expert be conducted in such a way that the expert is located in another place than the court and the examination is simultaneously transmitted audio-visually to the place where the expert is located and to the courtroom. This shall not apply in the cases referred to in Section 246a. The decision pursuant to the first sentence shall not be contestable.

Section 255a

[Showing Audio-Visual Recordings]

(1) The provisions relating to the reading of a transcript of an examination pursuant to Sections 251, 252, 253 and 255 shall apply *mutatis mutandis* to the showing of an audio-visual recording of a witness examination.

(2) In proceedings relating to criminal offences against sexual self-determination (sections 174 to 184g of the Criminal Code) or against life (sections 211 to 222 of the Criminal Code) or for ill-treatment of an individual placed in the charge of another (section 225 of the Criminal Code) or to criminal offences against personal liberty pursuant to sections 232 to 233a of the Criminal Code, the examination of a witness under 18 years of age may be replaced by the showing of an audio-visual recording of his previous judicial examination if the defendant and his defence counsel were given the opportunity to participate in such examination. This shall also apply to witnesses who have been aggrieved by one of these criminal offences and were under the age of 18 at the time of the offence. When taking its decision the court shall also consider the interests of the witness meriting protection and shall give the reason for showing the recording. Supplementary witness examination shall be admissible.

Section 251

Furnishing of documentary evidence by reading out of records

(1) Examination of a witness, expert or co-accused may be substituted by reading out a record of another examination or of a document containing a

statement originating from him

1. if the defendant has defence counsel and the public prosecutor, defence counsel and defendant consent thereto;
2. if the reading out merely serves to confirm the defendant's confession and both a defendant who has no defence counsel and the public prosecutor consent thereto;
3. if the witness, expert or co-accused has died or cannot be examined by the court for another reason within a foreseeable period of time;
4. insofar as the record or the document concerns the presence or the amount of asset loss.

(2) Examination of a witness, expert or co-accused may also be substituted by reading out the record of his previous examination by a judge if

1. illness, infirmity or other insurmountable impediments prevent the witness, expert or co-accused from appearing at the main hearing for a longer or indefinite period;
2. the witness or expert cannot, having regard to the importance of his statement, reasonably be expected to appear at the main hearing given the great distance involved;
3. the public prosecutor, defence counsel and the accused consent to the reading out.

(3) If the reading out is to serve purposes other than specifically reaching a judgment, in particular preparing a decision as to whether an individual is to be summoned and examined, then records and documents may otherwise be read out, too.

(4) In the cases under subsections (1) and (2), the court shall decide whether reading out shall be ordered. The reason for reading out shall be indicated. If the record of a judicial examination is read out, it shall be stated whether the person concerned was examined under oath. If not, an oath shall be subsequently administered if the court deems this necessary and an oath can still be administered.

Section 58a

[Examination by Audio-Visual Medium]

(1) The examination of a witness may be recorded on an audio-visual medium. The examination shall, after evaluation of the relevant circumstances, be recorded and conducted as a judicial examination if

1. the interests meriting protection of persons of less than 18 years of age as well as of persons who as children or juveniles have been aggrieved as a result of one of the criminal offences designated under Section 255a subsection (2) can thus be better safeguarded; or
2. there is a concern that it will not be possible to examine the witness during the main hearing and the recording is required in order to establish the truth.

(2) Use of the audio-visual recording shall be admissible only for the purposes of the criminal prosecution and only insofar as it is required in order to establish the truth. Section 101 subsection (8) shall apply mutatis mutandis. Sections 147 and 406e shall apply mutatis mutandis subject to the proviso that copies of the recording may be made available to persons entitled to inspect the files. The copies may not be duplicated nor may they be passed on. They are to be returned to the public prosecution office as soon as there is no further legitimate interest in using them. The transfer of the recording or the release of

copies to persons other than those aforementioned shall be subject to the consent of the witness.

(3) If the witness does not consent to a copy of the recording of his examination as a witness being made available pursuant to subsection (2), third sentence, then instead a written transcript of the recording shall be released to the persons entitled to inspect the files in accordance with Sections 147 and 406e. The person who produces the transcript shall sign with the addendum that he confirms the accuracy of the transcript. The right to view the recording pursuant to Sections 147 and 406e shall remain unaffected. The witness is to be informed of the right to refuse his consent pursuant to the first sentence.

Section 58b

[Examination Outside the Main Hearing]

The examination of a witness outside the main hearing can be effected in such a way that the witness is located in another place than the person being examined and the examination is simultaneously transmitted audio-visually to the place where the witness is located and to the examination room.

Section 168e

[Separate Examination]

If there is an imminent risk of serious detriment to the well-being of the witness in the event of his being examined in the presence of persons entitled to be present and if that risk cannot be averted in some other way, the judge shall carry out the examination separately from those entitled to be present. There shall be simultaneous audio-visual transmission of the examination to the latter. Their rights of participation shall otherwise remain unaffected. Sections 58a and 241a shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be incontestable.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

German legislation provides for evidentiary rules permitting witnesses to give testimony in a manner that ensures the safety of such persons. This includes the possibility of giving testimony via audio-video transmission (section 58 a, 58 b, 168e, 247a and 255a of the Code of Criminal Procedure) and the removal of the defendant from the courtroom (section 247 of the Code of Criminal Procedure).

| Paragraph 3 of article 32

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Cooperation regarding witness protection in Europe is conducted on the basis of the European Handbook, Europol 2013, File Number #667932v2.

International police cooperation in the field of witness protection has for years involved relocating witnesses at the highest risk abroad or from abroad to Germany.

In 2013 a total of eight at-risk persons were relocated to Germany or abroad from Germany. For the German witness protection offices, taking an at-risk person abroad is the measure of last resort.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Germany enters into bilateral exchange with the EU member states concerned when it comes to the relocation of witnesses.

Paragraph 4 of article 32

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that the provisions of this article also apply to victims insofar as they are witnesses.

The regulations cited concerning Art. 32 are applicable to any witnesses, including witnesses who are the victim of a criminal offence.

Witness protection measures in accordance with the Act to Harmonize the Protection of Witnesses can be taken in respect of victims who meet the conditions set out in section 1 (1) of that Act:

Act to Harmonize the Protection of Witnesses (ZSHG)

Section 1 Scope of application

(1) A person providing information in criminal proceedings, without which the investigation of the facts and circumstances or the identification of the whereabouts of the accused party would have no reasonable chance of success or would be significantly impaired, may be protected in accordance with the

provisions of the present Act, subject to his or her agreement, if that person's willingness to testify endangers his or her life, limb, health, liberty or significant assets and if that person is suited for measures of witness protection.

However, no statistics are kept about such measures.

As a consequence of numerous legislative proposals, the standard of protection afforded to victims in Germany is high. Beginning with the First Act on the Improvement of the Position of the Aggrieved Party in Criminal Proceedings (Erstes Gesetz zur Verbesserung der Stellung des Verletzten im Strafverfahren – Opferschutzgesetz (Protection of Victims Act)) of 18 December 1986, the situation of victims was continually improved by many further legislative proposals so that in the meantime, the protection of aggrieved parties has been firmly enshrined in the Code of Criminal Procedure.

The Third Act on the Reform of the Laws governing Victims' Rights (3. Opferrechtsreformgesetz – 3. ORRG) of 21 December 2015 represents further, major steps towards augmenting the standard of protection afforded to victims. On the one hand, the obligations of the Federal Republic were implemented as they derived from Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. As Germany had already attained a high standard of protection where the protection of victims is concerned, the Directive needed to be implemented only in parts, specifically where procedural rights and the rights to obtain information were concerned. On the other hand, Germany has gone far beyond the requirements of the Victims' Directive by enshrining in the law psycho-social counselling services provided to victims over the course of court proceedings, and has created a touchstone for the protection of children and youth. Children and youth who have become victims of serious sexual offences or of serious violent crimes are legally entitled to psycho-social counselling services being provided to them in the course of proceedings at no charge, in other words highly professional counselling before, during, and after the main hearing. The court is to take a decision, depending on the circumstances of the individual case, as to whether other victims of serious sexual offences or of serious violent crimes are to be granted the psycho-social counselling services. The provisions governing such psycho-social counselling services to be provided over the course of court proceedings will enter into force on 1 January 2017. Inasmuch, the provisions of sections 397, 397a StPO have been amended.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Protection measures in accordance with the Act to Harmonize the Protection of Witnesses are available also to victims who meet the conditions set out in section 1.

Paragraph 5 of article 32

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

On the one hand, aggrieved persons have the option in Germany to accede to proceedings as joint plaintiffs where a criminal offence has been committed that is governed by sections 340 StGB, 240 (4) StGB or section 223 StGB (cf. Art. 25 UNCAC). Where an aggrieved person accedes to proceedings as a joint plaintiff, he enjoys the rights resulting from section 397 StPO. Moreover, aggrieved persons may, pursuant to section 403 et seqq. StPO, bring a property claim against the perpetrator arising out of the criminal offence in the context of the criminal proceedings. Furthermore, the aggrieved person is to be notified of the outcome of the proceedings pursuant to section 406d StPO. The aggrieved person may apply to be allowed to inspect the files via an attorney, section 406e StPO.

The options pursuant to section 403 et seqq. StPO are available to any aggrieved person, while acceding to proceedings as a joint plaintiff is possible only subject to the prerequisites set out in section 395 StPO.

Code of Criminal Procedure (StPO)

CHAPTER II

PRIVATE ACCESSORY PROSECUTION

Section 395

[Right to Join as a Private Accessory Prosecutor]

(1) Whoever is aggrieved by an unlawful act pursuant to

1. sections 174 to 182 of the Criminal Code,
2. sections 211 and 212 of the Criminal Code, that was attempted,
3. sections 221, 223 to 226a and 340 of the Criminal Code,
4. sections 232 to 238, section 239 subsection (3), sections 239a and 239b, and section 240 subsection (4) of the Criminal Code,
5. section 4 of the Act on Civil Law Protection against Violent Acts and Stalking,
6. section 142 of the Patent Act, section 25 of the Utility Models Act, section 10 of the

Semi-Conductor Protection Act, section 39 of the Plant Variety Protection Act, sections 143 to 144 of the Trade Mark Act, sections 51 and 65 of the Designs Act, sections 106 to 108b of the Copyright and Related Rights Act,

section 33 of the Act on the Copyright of Works of Fine Art and Photography, and sections 16 to 19 of the Act against Unfair Competition may join a public prosecution or an application in proceedings for preventive detention as private accessory prosecutor.

(2) The same right shall vest in persons

1. whose children, parents, siblings, spouse or civil partner were killed through an unlawful act, or

2. who, through an application for a court decision (Section 172), have initiated the preferment of public charges.

(3) Whoever is aggrieved by another unlawful act, in particular pursuant to sections 185 to 189, section 229, section 244 subsection (1), number 3, sections 249 to 255 and section 316a of the Criminal Code, may join the public prosecution as private accessory prosecutor if, for particular reasons, especially because of the serious consequences of the act, this appears to be necessary to safeguard his interests.

(4) Joinder shall be admissible at any stage of the proceedings. It may also be effected for the purpose of seeking an appellate remedy after judgment has been given.

(5) If prosecution is limited pursuant to Section 154a, this shall not affect the right to join the public prosecution as private accessory prosecutor. If the private accessory prosecutor is admitted to the proceedings, a limitation pursuant to Section 154a subsection (1) or (2) shall not apply insofar as it concerns the private accessory prosecution.

Section 396 [Declaration of Joinder]

(1) The declaration of joinder shall be submitted to the court in writing. A declaration of joinder received by the public prosecution office or the court prior to preferment of public charges shall take effect on preferment of public charges. In the proceedings involving penal orders the joinder shall take effect when a date for the main hearing has been set down (Section 408 subsection (3), second sentence, Section 411 subsection (1)) or the application for issuance of a penal order has been refused.

(2) After hearing the public prosecution office the court shall decide whether a person is entitled to join as a private accessory prosecutor. In the cases under Section 395 subsection (3) it shall decide, after also hearing the indicted accused, whether joinder is imperative on the grounds referred to there; this decision shall be incontestable.

(3) If the court is considering terminating the proceedings pursuant to Section 153 subsection (2), Section 153a subsection (2), Section 153b subsection (2), or Section 154 subsection (2), it shall first decide on entitlement to joinder.

Section 397

[Rights of the Private Accessory Prosecutor]

(1) The private accessory prosecutor shall be entitled to be present at the main hearing even if he is to be examined as a witness. He shall be summoned to the main hearing; Section 145a subsection (2), first sentence, and Section 217 subsections (1) and (3) shall apply mutatis mutandis. The private accessory prosecutor shall also be entitled to challenge a judge (Sections 24 and 31) or

an expert (Section 74), to ask questions (Section 240 subsection (2)), to object to orders by the presiding judge (Section 238 subsection (2)) and to object to questions (Section 242), to apply for evidence to be taken (Section 244 subsections (3) to (6)), and to make statements (Sections 257 and 258). Unless otherwise provided by law, he shall be called in and heard to the same extent as the public prosecution office. Decisions which are notified to the public prosecution office shall also be notified to the private accessory prosecutor; Section 145a subsections (1) and (3) shall apply mutatis mutandis.

(2) The private accessory prosecutor may avail himself of the assistance of an attorney or be represented by such attorney. The attorney shall be entitled to be present at the main hearing. He shall be notified of the date set down for the main hearing if his selection has been notified to the court or if he has been appointed as counsel.

Section 397a

[Appointment of an Attorney as Counsel]

(1) Upon application of the private accessory prosecutor an attorney shall be appointed as his counsel if he

1. has been aggrieved by a felony pursuant to sections 176a, 177, 179, 232 and 233 of the Criminal Code;

2. has been aggrieved by an attempted unlawful act pursuant to sections 211 and 212 of the Criminal Code or is a relative of a person killed through an unlawful act within the meaning of Section 395 subsection (2), number 1;

3. has been aggrieved by a felony pursuant to sections 226, 226a, 234 to 235, 238 to 239b, 249, 250, 252, 255 and 316a of the Criminal Code which has caused or is expected to cause him serious physical or mental harm;

4. has been aggrieved by an unlawful act pursuant to sections 174 to 182 and 225 of the Criminal Code and had not attained the age of 18 at the time of the act or cannot sufficiently safeguard his own interests himself; or

5. has been aggrieved by an unlawful act pursuant to sections 221, 226, 226a, 232 to 235, 237, 238 subsections (2) and (3), 239a, 239b, 240 subsection (4), 249, 250, 252, 255 and 316a of the Criminal Code and has not attained the age of 18 at the time of his application or cannot sufficiently safeguard his own interests himself.

(2) Where the conditions for an appointment pursuant to subsection (1) have not been fulfilled, the private accessory prosecutor shall, upon application, be granted legal aid for calling in an attorney subject to the same provisions as apply in civil litigation if he cannot sufficiently safeguard his own interests or if this cannot reasonably be expected of him. Section 114, subsection (1), second part of the first sentence, and subsection (2) as well as section 121 subsections (1) to (3) of the Code of Civil Procedure shall not be applicable.

(3) Applications pursuant to subsections (1) and (2) may already be made prior to the declaration of joinder. The presiding judge of the court seized of the case shall decide on the appointment of the attorney, to which Section 142 subsection (1) shall apply mutatis mutandis, and on the granting of legal aid.

Section 400

[Private Accessory Prosecutor's Right to Appellate Remedy]

(1) The private accessory prosecutor may not contest the judgment with the

objective of another legal consequence of the offence being imposed, or of the defendant being sentenced for a violation of the law which does not justify joinder by the private accessory prosecutor.

(2) The private accessory prosecutor shall have the right to lodge an immediate complaint against the order refusing to open the main proceedings or terminating the proceedings pursuant to Sections 206a and 206b, insofar as the order concerns the offence on the basis of which the private accessory prosecutor is entitled to joinder. In other respects the decision by which the proceedings are terminated cannot be contested by the private accessory prosecutor.

Section 401

[Appellate Remedy for Private Accessory Prosecutor]

(1) The private accessory prosecutor may avail himself of an appellate remedy independently of the public prosecution office. If joinder for the purpose of appellate remedy occurs after judgment, the contested judgment shall immediately be served upon the private accessory prosecutor. The time limit for stating the grounds for an appellate remedy shall begin to run on expiry of the time limit to be observed by the public prosecution office for filing an appellate remedy or, if the judgment has not yet been served upon the private accessory prosecutor, on service of the judgment upon him even if a decision has not yet been given on the private accessory prosecutor's entitlement to joinder.

(2) If the private accessory prosecutor was present at the main hearing or was represented by an attorney, the time limit for filing an appellate remedy shall begin to run for him on pronouncement of judgment even if he was no longer present or represented when judgment was pronounced; he may not claim restoration of the status quo ante in respect of non-observance of the time limit on the ground that he was not instructed on his right to appellate remedy. If the private accessory prosecutor was not present or represented at all at the main hearing the time limit shall begin to run when the operative provisions of the judgment are served on him.

(3) Where only the private accessory prosecutor has filed an appeal on fact and law, such appeal shall immediately be dismissed, notwithstanding the provision in Section 301, if at the beginning of a main hearing neither the private accessory prosecutor nor an attorney representing him appeared. The private accessory prosecutor may, within one week after non-appearance, demand restoration of the status quo ante under the conditions of Sections 44 and 45.

(4) Further action in the case shall be incumbent on the public prosecution office if the contested decision is quashed by virtue of an appellate remedy filed by the private accessory prosecutor alone.

CHAPTER III

COMPENSATION FOR THE AGGRIEVED PERSON

Section 403

[Conditions]

The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the

claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the Local Court irrespective of the value of the matter in dispute.

Section 404

[Application by the Aggrieved Person]

- (1) The application asserting the claim may be made in writing or orally to be recorded by the registry clerk, or also orally at the main hearing before the closing speeches begin. The application must specify the subject of, and the grounds for, the claim and should set forth the evidence. If the application is not made at the main hearing, it shall be served on the accused. (2) Making an application shall have the same effect as bringing an action in civil litigation. They come into effect upon receipt of the application by the court.
- (3) The applicant shall be notified of the place and time of the main hearing if the application is made before the main hearing begins. The applicant, his statutory representative, and the spouse or civil partner of the person entitled to make the application may participate in the main hearing.
- (4) The application may be withdrawn at any time prior to pronouncement of the judgment.
- (5) The applicant and the indicted accused shall, upon application, be granted legal aid under the same provisions as in civil litigation as soon as public charges have been preferred.

Section 121 subsection (2) of the Code of Civil Procedure shall be applicable with the proviso that, if the indicted accused has defence counsel, the latter shall be assigned to him; if the applicant avails himself of the assistance of an attorney in the main proceedings, the latter shall be assigned to him. The court seized of the case shall be competent to decide; the decision shall not be contestable.

Section 405

[Dispensing with a Decision]

- (1) Upon application by the aggrieved person or his heir, and of the accused, the court shall include, in the court record, a settlement in respect of the claims arising out of the criminal offence. Upon unanimous application by the persons named in the first sentence, the court shall make a proposal for a settlement.
- (2) The court of civil jurisdiction in whose district the criminal court of first instance is located shall have jurisdiction to decide upon objections to the legal effect of the settlement.

Section 406 [Decision]

- (1) The court shall grant the application in the judgment in which the accused is pronounced guilty of a criminal offence or in which a measure of reform and prevention is ordered in respect of such criminal offence, so far as the application is based on such criminal offence. The decision may be limited to the ground for, and part of, the asserted claim; section 318 of the Code of Civil Procedure shall apply mutatis mutandis. The court shall dispense with a decision if the application is inadmissible or insofar as it appears unfounded. In all other cases the court may dispense with a decision only if the application

is not suitable to being dealt with in criminal proceedings even after taking into account the legitimate interests of the applicant. An application will be unsuited to being dealt with in criminal proceedings particularly where its further examination, even where a decision is only conceivable on the ground for, or a part of, the asserted claim, would considerably protract the proceedings. Where the applicant has asserted a claim in respect of damages for pain and suffering (section 253 subsection (2) of the Civil Code) a decision may only be dispensed with in accordance with the third sentence.

(2) If the accused wholly or partly acknowledges the claim asserted against him he shall be sentenced in pursuance of the acknowledgment.

(3) The decision on the application shall be equivalent to a judgment in civil litigation. The court shall declare the decision to be provisionally enforceable; sections 708 to 712, as well as sections 714 to 716 of the Code of Civil Procedure shall apply *mutatis mutandis*. Insofar as the claim has not been awarded, it may be asserted elsewhere. If a final judgment has been given on the ground for the claim, the hearing concerning the amount shall take place before the competent civil court pursuant to section 304 subsection (2) of the Code of Civil Procedure.

(4) The applicant shall be provided with a copy of the judgment with reasons, or with an excerpt thereof.

(5) If the court is considering dispensing with a decision on the application, it shall inform the participants to the proceedings thereof as soon as possible. As soon as the court considers, after hearing the applicant, that the requirements for a decision on the application are not fulfilled, it shall issue an order dispensing with a decision on the claim.

Section 406a [Appellate Remedy]

(1) An immediate complaint against the order dispensing with a decision on the application pursuant to Section 406 subsection (5), second sentence, shall be admissible if the application was made prior to commencement of the main hearing and as long as proceedings have not been concluded by a final decision at that instance. In all other cases, the applicant shall not be entitled to an appellate remedy.

(2) If the court grants the application, the defendant may contest the decision by an appellate remedy which would otherwise be admissible, even without contesting that part of the judgment which concerns the criminal offence. In this case the decision on the appellate remedy may be given in an order at a sitting held *in camera*. If the admissible appellate remedy is the appeal on fact and law, then upon an application by the defendant or the applicant an oral hearing of the participants shall be held.

(3) If the conviction is quashed and the defendant is found not guilty of a criminal offence and no measure of reform and prevention is ordered against him in respect of the decision on which the application was founded, the decision granting the application shall be quashed. This shall apply even if the judgment has not been contested in this respect.

CHAPTER IV OTHER RIGHTS OF THE AGGRIEVED PERSON

Section 406d

[Notification of the Aggrieved Person]

(1) The aggrieved person shall, upon application, be notified of the termination of the proceedings and of the outcome of the court proceedings to the extent that they relate to him. (2) Upon application, the aggrieved person shall be notified as to whether

1. the convicted person has been ordered to refrain from contacting or consorting with the aggrieved person;
2. custodial measures have been ordered or terminated in respect of the accused or the convicted person, or whether for the first time a relaxation of the conditions of detention or leave has been granted, if he can show a legitimate interest and if there is no overriding interest meriting protection of the person concerned in excluding the notification; in the cases referred to in Section 395 subsection (1), numbers 1 to 5, as well as in the cases referred to in Section 395 subsection (3), in which the aggrieved person was admitted as private accessory prosecutor, there shall be no requirement to show a legitimate interest;
3. the convicted person is again granted a relaxation of the conditions of detention or leave if a legitimate interest can be shown or is evident and if there is no overriding interest meriting protection of the convicted person in excluding the notification.

(3) Notification need not be furnished if delivery is not possible at the address which the aggrieved person indicated. If the aggrieved person has selected an attorney as counsel, if counsel has been assigned to him or if he is legally represented by such counsel, Section 145a shall apply mutatis mutandis.

Section 406e [Inspection of Files]

(1) An attorney may inspect, for the aggrieved person, the files that are available to the court or the files that would be required to be submitted to it if public charges were preferred, and may inspect officially impounded pieces of evidence, if he can show a legitimate interest in this regard. In the cases referred to in Section 395, there shall be no requirement to show a legitimate interest.

(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation, also in another criminal proceeding, appears to be jeopardized. It may also be refused if the proceedings could be considerably delayed thereby, unless, in the cases designated in Section 395, the public prosecution office has noted the conclusion of the investigations in the files.

(3) Upon application and unless important reasons constitute an obstacle, the attorney may be handed the files, but not the pieces of evidence, to take to his office or private premises. The decision shall not be contestable.

(4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall give this decision. An application may be made for a decision by the court competent pursuant to Section 162, appealing against the decision made by the public prosecution office pursuant to the first sentence. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply mutatis mutandis. The court's decision shall be incontestable as long as the investigations have not yet been

concluded. These decisions shall not be given with reasons if their disclosure might endanger the purpose of the investigation. (5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsections (2) and (4) and Section 478 subsection (1), third and fourth sentences, shall apply mutatis mutandis. (6) Section 477 subsection (5) shall apply mutatis mutandis.

Section 406f

[Assistance and Representation of the Aggrieved Person]

(1) Aggrieved persons may avail themselves of the assistance of an attorney or be represented by such attorney. Legal counsel appearing at the aggrieved person's examination shall be permitted to be present.

(2) At the examination of aggrieved persons, a person whom they trust who has appeared at the examination shall, at their request, be permitted to be present, except where this could endanger the purpose of the investigation. The person conducting the examination shall decide; the decision shall not be contestable. The reasons for denying the request shall be documented on the files.

Section 406g

[Assistance for an Aggrieved Person Entitled to Private Accessory Prosecution]

(1) Persons who are entitled to join the proceedings as a private accessory prosecutor pursuant to Section 395 may also avail themselves of the assistance of an attorney or be represented by such attorney, prior to preferment of public charges and without declaration of joinder. They shall be entitled to be present at the main hearing, even if they are to be examined as witnesses. If it is in doubt whether a person is entitled to private accessory prosecution, the court shall decide upon hearing the person and the public prosecution office whether the person is entitled to be present; the decision shall be incontestable. Persons entitled to private accessory prosecution shall be notified of the date set down for the main hearing if they have so requested. (2) The attorney of the person entitled to private accessory prosecution shall be entitled to be present at the main hearing; subsection (1), third sentence, shall apply mutatis mutandis. He shall be notified of the date set down for the main hearing if his selection has been notified to the court or if he has been appointed as counsel. The first and second sentences shall apply mutatis mutandis at judicial examinations and judicial inspections, unless the presence or notification of the attorney would jeopardize the purpose of the investigation.

(3) Section 397a shall apply mutatis mutandis to 1. the appointment of an attorney and

2. the granting of legal aid for calling in an attorney.

In preparatory proceedings the court which would be competent pursuant to Section 162 shall decide.

(4) Upon application by the person entitled to join the proceedings as a private accessory prosecutor an attorney may, in the cases referred to in Section 397a subsection (2), be appointed as counsel provisionally if

1. this is imperative for special reasons,

2. the assistance of counsel is urgently required and

3. the granting of legal aid appears to be possible, but a decision cannot be

expected on it in time.

Section 142 subsection (1) and Section 162 shall apply *mutatis mutandis* to the appointment. The appointment shall end unless an application for granting legal aid is filed within a time limit to be set by the judge, or if the granting of legal aid is refused.

Section 406h [Information as to Rights]

(1) Aggrieved persons shall be informed as early as possible, as a rule in writing, and as far as possible in a language they understand, of their rights following from Sections 406d to 406g and, in particular, shall also be informed of the fact that they may,

1. under the prerequisites of Sections 395 and 396 of this statute or section 80 subsection (3) of the Youth Courts Act, join the public prosecution as private accessory prosecutors and thereby apply, pursuant to Section 397a, to have legal counsel appointed for them or to have legal aid granted for calling in such counsel;

2. in accordance with Sections 403 to 406c of this statute and section 81 of the Youth Courts Act, assert a property claim arising out of the criminal offence in criminal proceedings;

3. in accordance with the Crime Victims Compensation Act, assert a claim for benefits;

4. in accordance with the Act on Civil Law Protection against Violent Acts and Stalking, apply for the issue of orders against the accused; and

5. obtain support and assistance through victim support institutions, e.g. in the form of counselling or psychosocial support during the proceedings.

Where the prerequisites for a certain right have obviously not been fulfilled in a particular case, the information concerned may be dispensed with. There shall be no duty to inform aggrieved persons who have not specified any address at which documents can be served. The first and third sentences shall also apply to relatives and heirs of aggrieved persons, insofar as they are entitled to the corresponding rights.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

The possibility for victims to file criminal proceedings as joint plaintiffs and their rights in such proceedings are governed by the Code of Criminal Procedure in sections 395 - 397a, 403-406a, 406d-406h.

Article 33. Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent

authorities any facts concerning offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

54. Germany indicated it has implemented the provision under review and cited the following legal provisions.

Federal Civil Service Act (Bundesbeamtengesetz, BBG)

Section 67 Duty to maintain confidentiality

(1) Civil servants shall maintain confidentiality concerning official matters of which they become aware in the course of their official activity. This shall also apply beyond the remit of an employer and following termination of civil service employment.

(2) Subsection (1) shall not apply

1. where official communications are required,

2. to information shared that is common knowledge or that by its nature does not require confidentiality, or

3. to reasonable suspicion of corruption under Sections 331 through 337 of the Criminal Code (StGB) reported to the responsible highest service authority, a law enforcement agency or other agency or non-service body designated by the highest service authority.

In all other regards, the legal obligation to report planned crimes and to uphold the free and democratic basic order shall remain unaffected by subsection (1).

Civil Servant Legal Status Act (BeamtStG)

Section 37 Duty to maintain confidentiality

(1) Civil servants shall maintain confidentiality concerning official matters of which they become aware in the course of their official activity. This shall also apply beyond the remit of an employer and following termination of civil service employment.

(2) Subsection 1 shall not apply

1. where official communications are required,

2. to information shared that is common knowledge or that by its nature does not require confidentiality, or

3. to reasonable suspicion of corruption under Sections 331 through 337 of the Criminal Code (StGB) reported to the responsible highest service authority, a law enforcement agency or other agency or non-service body designated by the highest service authority.

In all other regards, the legal obligation to report planned crimes and to uphold the free and democratic basic order shall remain unaffected by subsection 1.

Civil Code

Section 612a

Prohibition of victimisation

The employer may not discriminate against an employee in an agreement or a

measure because that employee exercises his rights in a permissible way.

Section 626

Termination without notice for a compelling reason

(1) The service relationship may be terminated by either party to the contract for a compelling reason without complying with a notice period if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the notice period or to the agreed end of the service relationship, taking all circumstances of the individual case into account and weighing the interests of both parties to the contract.

(2) Notice of termination may only be given within two weeks. The notice period commences with the date on which the person entitled to give notice obtains knowledge of facts conclusive for the notice of termination. The party giving notice must notify the other party, on demand, of the reason for notice of termination without undue delay in writing.

Employees are protected by the regulations of labour law and constitutional law in conjunction with the adjudication handed down by the Federal Labour Court (Bundesarbeitsgericht), the Federal Constitutional Court (Bundesverfassungsgericht), as well as the [European Court of Human Rights](#). Moreover, the protection of reporting persons is to be reviewed with regard to other international requirements (cf. generally Article 8 (4)).

Additional Information concerning whistleblowing in public service:

http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Korruptionspraevention-Sponsoring-IR/Korruptionspraevention/korruptionspraevention_node.html

Contact for cases involving corruption:

http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Korruptionspraevention-Sponsoring-IR/Korruptionsbeauftragte/korruptionsbeauftragte_node.html>

55. Links to the Office of the Ombudsman:

http://www.bescha.bund.de/DE/Service/Korruption/Ombudsmann.html;jsessionid=4F0F36805586AE63F9EAE904D4E355DC.1_cid380?nn=4067956

<http://www.bpb.de/die-bpb/51297/beauftragte-und-ombudspersonen-zurkorruptionspraevention>

<https://www.destatis.de/DE/Meta/Impressum/Ombudsperson.html>

https://www.schleswig-holstein.de/DE/Fachinhalte/A/antikorrupsionsbeauftragter_kT/beauftragterAntikorrupsion.html

Likewise, the Federal Ministry of the Interior has appointed one ombud (an attorney) for each of its offices; this ombud is charged with accepting information from

whistleblowers regarding suspected acts of corruption and is to safeguard the confidentiality or – if desired – the anonymity of the whistleblower. Similar proceedings are in place in other federal ministries and in the *Länder*.

The *Länder* have put in place additional protective mechanisms for those bringing charges and other informants.

Thus, a “trusted attorney for notifications” was introduced in the Rhineland-Palatinate in April of 2013 as an external contact responsible for large parts of the Land administration. Other than is the case for the internal anti-corruption officers who have already been in office for some time now, this external contact is able to guarantee anonymity to the informants in his capacity as attorney. Moreover, the trusted attorney for notifications is also available to external business partners of the administration. In Hamburg, a “trusted centre for notifications” was instituted that is available first and foremost to employees of the private economy; it is likewise run by an attorney.

Furthermore, the amendment of the Hamburg Act on Disciplinary Measures Taken against Officials (*Disziplinargesetz*) of 18 February 2004 has established that any decision regarding a disciplinary sanction is to be based also on the active assistance by the official in clearing up any offences to which public service law is applicable.

Lower Saxony has put in place a web-based whistleblowing system called “Business-Keeper-Monitoring-System (BKMS®-System)” that is operated by the Land Criminal Police Office of Lower Saxony and that allows staff members to submit allegations anonymously to the investigating authority without having to disclose their own identity. This system is special insofar as it allows the dialogue between the whistleblower and the party processing the investigations to remain absolutely anonymous for the time of the investigation. The Business Keeper Monitoring System (BKMS) is a web-based whistleblowing system allowing information or suspicious indications to be transmitted anonymously. The system’s provider, Business Keeper, has assured the anonymity of the whistleblower. Both the contents of the notices submitted and the means of transmission used are protected by a certified encryption process. No IP addresses, time stamps or other data are stored. As a consequence, it is ruled out that the whistleblower can be traced and identified using technical means. The provider company is unable to read this information. Should the whistleblower seek further contact or wish to allow the addressee (in Germany, this is solely the Land Criminal Police Offices of Lower Saxony and Baden-Württemberg) to contact him, he has the option of creating a mailbox that he can use to enter into a dialogue with the police. Depending on the respective needs given, the BKMS system may be used for different areas of offences. A license fee is charged for the use of the system; as far as we are aware, the amount of the fee depends on the agreement concluded with the provider. No figures are known to us, however.

The Federal Public Service in general:

<http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschueren/2014/federal-public-service.html?nn=3316956>

Many enterprises have instituted Compliance systems or have put in place Codes of Ethical Conduct that employees may use to obtain information. To cite an example,

Siemens has provided information about its Compliance notification service "Tell Us" on the internet

(<http://www.siemens.com/about/sustainability/de/themenfelder/compliance/system/tell-us.htm>).

Employees may turn to the elected Works Council of their enterprise; this committee has co-determination rights where the introduction of internal whistleblowing systems is concerned.

Members of unions also have the option of obtaining advice free of charge from their union.

As a matter of course, employees can also contact an attorney on the topic of whistleblowing, in particular a lawyer specialising in labour law.

Additionally, there is a large number of informational texts available to employees (e.g. specialist books, specialist articles, specialist journals, and the internet). To cite but one example, the Hans-Böckler-Stiftung (a foundation of the Federation of German Trade Unions "Deutscher Gewerkschaftsbund" formed for purposes of co-determination, research, and study and research) has made available a whistleblowing brochure on the internet that includes a template for a company agreement and a checklist for employees (http://www.boeckler.de/pdf/p_edition_hbs_159.pdf).

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in partial compliance with the provision under review.

While civil servants are duty-bound to keep information received through their positions confidential, this does not apply to suspicions of corruption (section 67 BBG, section 37 of the Civil Servant Legal Status Act – BeamtStG).

The Federal Ministry of Interior has appointed an ombudsperson (an attorney) in charge of accepting information from reporting persons regarding suspected acts of corruption concerning the Ministry or its subordinate authorities and who must maintain the confidentiality or – if desired – the anonymity of the whistleblower. Similar proceedings are in place the Länder.

Private sector reporting persons are legislatively protected against retaliation or any other form of disadvantage (Civil Code sections 612, 626, together with the rulings of the Federal Constitutional Court and the Federal Labour Court). There is no legal requirement to establish any form of reporting system or protection thereto. Many private sector entities have nevertheless established compliance and protection systems or codes of ethical conduct. However, it appears the main counterpart in seeking support remains the workers' councils and the labour unions. Whistleblower protection was at the time of the country visit part of an ongoing dialogue on anti-corruption with the private sector.

Thus, Germany is encouraged to continue its dialogue with the private sector in relation to the rights of private sector reporting persons in line with article 33 of the Convention.

Article 34. Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

German Civil Code (Bürgerliches Gesetzbuch - BGB)

Section 134

Statutory prohibition

A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.

Section 138

Legal transaction contrary to public policy; usury

(1) A legal transaction which is contrary to public policy is void.

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

Thus, for example, a building permit or a residence permit issued unlawfully in return for a bribe as a rule is to be withdrawn without the party affected thereby being entitled to take recourse to any trust meriting protection (section 48 (2), third sentence, No 1 of the Administrative Procedure Act VwVfG). Depending on the circumstances given, an administrative decision that is tied to corruption may also be null and void pursuant to section 44 subsection (1) or (2) No 6 VwVfG and thus invalid. Discretionary decisions that are influenced by acts of corruption are, as a matter of principle, flawed and it will thus be possible to at least correct them.

Any legislative acts taken by the administration while under the influence of corruptive acts are null and void as a matter of principle; as a general rule, a zoning plan thus will be invalid if, due to the influence of corruption, the requirement to balance out the interests under the laws pertaining to construction planning as stipulated in section 1 (7) of the Building Code (BauGB) or if the prohibitions of municipalities to assist with proceedings as provided for by Land law have been violated.

Agreements under public law that are tied to acts of corruption may be null and void, for example pursuant to section 59 (1) VwVfG in conjunction with section 134 BGB. Payments of money, such as subsidies, that were made without having a cause in law - for example on the basis of an agreement under public law that is null and void due to

acts of corruption having been committed - are to be repaid by the beneficiary (generally recognised claim to reimbursement under public law; partially codified in the law, such as in section 49a VwVfG).

Administrative Procedure Act (VwVfG)

Section 48 Withdrawal of an unlawful administrative decision

(1) An unlawful administrative decision may be withdrawn also after it has become unappealable, and may be so withdrawn as a whole or in part, with effect for the future or for the past. An administrative decision that has established or confirmed a right or a legally significant advantage (administrative decision granting a benefit) may be withdrawn only subject to the restrictions imposed by subsections (2) through (4).

(2) An unlawful administrative decision granting a non-recurrent or ongoing payment of money, or a divisible performance in kind, or that is the prerequisite for such benefits, may not be withdrawn inasmuch as the beneficiary has relied on the existence of the administrative decision and this trust merits protection when weighed against the public interest in withdrawing the administrative decision. As rule, such trust will merit protection if the beneficiary has used up the benefits granted or has made dispositions regarding his assets that cannot be reversed any longer, or only subject to unreasonable disadvantages. The beneficiary may not take recourse to such trust if he

1. Has obtained the administrative decision by wilful deceit, threats, or bribery;
2. Has obtained the administrative decision by making statements that were incorrect or incomplete in essential aspects;
3. Was aware of the unlawful nature of the administrative decision or was unaware of it as a result of gross negligence.

In the cases of the third sentence, the administrative decision as a rule will be withdrawn with effect for the past.

(3) Where an unlawful administrative decision is withdrawn that is not governed by subsection (2), the authority is to compensate the party affected, upon the latter's application, for the pecuniary prejudice he has suffered by having relied on the existence of the administrative decision, inasmuch as his trust merits protection when weighed against the public interest in withdrawing the administrative decision. Subsection (2), third sentence is to be applied. However, the pecuniary prejudice is not to be compensated above and beyond the amount of the interest of the affected party in the existence of the administrative decision. The authority shall determine the pecuniary prejudice that is to be compensated. The claim may be asserted only within one year; the period shall commence running as soon as the authority has indicated it to the party affected.

Section 49a Reimbursement, interest accruing

(1) Inasmuch as an administrative decision has been withdrawn or revoked with effect for the past, or has become invalid due to a condition precedent

having occurred, the benefits already provided are to be reimbursed. The benefits to be reimbursed are to be determined by a written administrative decision.

(2) The provisions of the Civil Code (BGB) governing the disgorgement of unjust enrichment shall apply *mutatis mutandis* to the scope of the reimbursement, to the exception of the interest accruing. The beneficiary cannot take recourse to the allegation that no case of enrichment was given inasmuch as he was aware of the circumstances, or was unaware due to gross negligence, that resulted in the administrative decision being withdrawn, revoked, or becoming invalid.

(3) The amount to be reimbursed is to accrue interest, from the date on which the administrative decision becomes invalid, at five percentage points above the base rate of interest per annum. The enforcement of the claim to interest may be refrained from in particular in those cases in which the beneficiary is not responsible for the circumstances leading to the administrative decision being withdrawn, revoked, or becoming invalid and makes payment of the amount to be reimbursed within the period set by the authority.

(4) Where a performance granted is not used for the intended purpose promptly after having been disbursed, interest pursuant to subsection (3), first sentence, may be demanded for the period until it is used in accordance with the intended purpose. This shall apply *mutatis mutandis* insofar as the benefits are claimed although other funds are to be deployed on a pro-rata basis, or with priority. Section 49 (3), first sentence, no. 1 shall remain unaffected.

Section 59 Nullity of the agreement under public law

(1) An agreement under public law shall be null and void if its nullity results from the corresponding application of the Civil Code (BGB).

Germany cited the following cases as examples of implementation.

Federal Court of Justice, judgment of 8 May 2014, reference number: I ZR 217/12, Juris, Rn. 33:

“Arrangements on the payment of a bribe by way of “greasing someone’s palm” in order to obtain preferential treatment in future when contracts are awarded, which employees, agents, or other representatives of one party secretly make with the other party to the agreement, are contrary to public policy and null and void pursuant to section 138 (1) BGB. The nullity of such an arrangement also extends to the main agreement and the subsequent agreements concluded in its wake if the arrangement as to bribes being paid has resulted in the agreement being structured to the disadvantage of the principal. In any case of doubt, it is to be assumed that the nullity of an arrangement to pay bribes will extend to the main agreement that has been concluded as a result of the bribe’s having been paid simply because a representative will not be authorised to so conclude an agreement on behalf of the party he is representing with the negotiations partner who has just bribed him without previously having informed the party he is representing of this fact.”

Federal Court of Justice, judgment of 28 January 2014, reference number: II ZR 371/12, Juris, guiding principle:

“An agreement will be null and void for collusion contrary to public policy if a party to whom power of attorney has been granted and who is released from the prerequisites set out in section 181 BGB abuses such power of attorney to conclude a transaction, in which he himself is the counterparty, to the detriment of the party being represented. Such a case is given also if the representative involves a delegated representative who is unsuspecting, or if he, based on his power of attorney, prompts a further, unsuspecting (co-) representative to enter into the transaction and thus obfuscates the transaction he has concluded with himself as the representative of another.”

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Legal transactions contrary to law or public policy are void (sections 134 and 138 of the Civil Code (BGB)). Similarly, some administrative decisions and transactions may also be considered invalid when affected by corruption according to the Administrative Procedure Act (section 48 VwVfG).

Article 35. Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and provided the following information and relevant legal provisions.

If, by an act of corruption, the life, limb, health, freedom, property or any other right of another person is injured in violation of the law, the injured party may demand compensation, simply based on section 823 (1) BGB, for the damages resulting therefrom. In like manner, that party who intentionally or negligently violates a law serving to protect another party shall be liable pursuant to section 823 (2) BGB. The following can be considered such laws serving to protect against acts of corruption: the elements constituting the offence under criminal law of fraud (section 263 StGB), of embezzlement (section 266 StGB), of taking and giving bribes in commercial practice (section 299 StGB), and of disclosure of trade and industrial secrets (section 17 UWG).

Furthermore, anyone shall be liable to make compensation for damage pursuant to section 826 BGB who, in a manner contrary to public policy, intentionally inflicts damage on another person. This includes acts of corruption committed in the intention of causing damage.

Finally, corruption in the public sector may be subject to sanctions based on liability in the case of breach of official duty under section 839 BGB in conjunction with Art. 34 GG. Such a claim exists according to section 839 (1), first sentence, BGB, if an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party. This personal liability is transferred to the state or to the entity in the service of which the official is employed by Art. 34, first sentence, GG.

German Civil Code (Bürgerliches Gesetzbuch - BGB)

Section 823 Liability in damages

- (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
- (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Section 826

Intentional damage contrary to public policy

A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.

Section 839

Liability in case of breach of official duty

- (1) If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way.
- (2) If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function.
- (3) Liability for damage does not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal.

Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland - GG)

Article 34

If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

The Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG)

Section 17

Disclosure of trade and industrial secrets

- (1) Whoever as the employee of a business communicates, without authorisation, a trade or industrial secret with which he was entrusted, or to which he had access, during the course of the employment relationship to another person for the purposes of competition, for personal gain, for the benefit of a third party, or with the intent of causing damage to the owner of the business shall be liable to imprisonment not exceeding three years or to a fine.
- (2) Whoever for the purposes of competition, for personal gain, for the benefit of a third party, or with the intent of causing damage to the owner of the business, acquires or secures, without authorisation,
1. a trade or industrial secret a) by using technical means;
 - b) by creating an embodied communication of the secret; or c) by removing an item in which the secret is embodied;
- or
2. without authorisation, uses or communicates to anyone a trade secret which he acquired through one of the communications referred to in subsection (1), or through an act of his own or of a third party pursuant to number 1, or which he has otherwise acquired or secured without authorisation shall incur the same liability.
- (3) An attempt shall incur criminal liability.
- (4) In particularly serious cases the sentence shall consist in imprisonment not exceeding five years or a fine. A particularly serious case shall usually exist in circumstances where the perpetrator
1. acts on a commercial basis;
 2. knows at the time of the communication that the secret is to be used abroad;
 - or 3. himself effects a use pursuant to subsection (2), number 2, abroad.
- (5) The offence shall be prosecuted upon application only, unless the criminal prosecution authority considers that it is necessary to take ex officio action on account of the particular public interest in the criminal prosecution.
- (6) Section 5, number 7, of the Criminal Code shall apply mutatis mutandis.

Code of Criminal Procedure (StPO)

Section 50 Capacity to be a party to court proceedings

- (1) Any person having legal capacity shall also have the capacity of being a party to court proceedings.
- (2) An association having no legal capacity may sue and be sued; in a legal dispute, the association shall have the same position as an association having legal capacity.

Section 51 Capacity to sue and be sued; legal representation; pursuit of court proceedings

- (1) Unless stipulated otherwise by the subsections hereinbelow, the ability of a party to appear before a court, the representation of parties having no capacity to sue or be sued by other persons (legal representatives), and the need for a special authorisation for the pursuit of court proceedings are determined pursuant to the stipulations of civil law.
- (2) Any fault of a legal representative shall be equivalent to the fault of the party.
- (3) If a party having no capacity to sue or be sued, who is an individual of full

legal age, has validly authorised another individual, in writing, to represent him before the court, the person so authorised shall be equivalent to a legal representative wherever the authorisation is suited to cancel the need for custodianship in accordance with section 1896 (2), second sentence, of the Civil Code (Bürgerliches Gesetzbuch, BGB).

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany is in compliance with the provision under review.

Compensation for damage can be claimed on the basis of the provisions of the BGB (sections 823, 826 and 839). Furthermore, art. 34 GG provides that the State or a public body that employs a person carries the liability with regard to violations of official duties entrusted to this person.

Article 36. Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Code of Criminal Procedure (StPO)

Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

(1) The public prosecution office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

Section 160 [Investigation Proceedings]

(1) As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.

(2) The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken.

(3) The investigations of the public prosecution office shall extend also to the circumstances which are important for the determination of the legal

consequences of the act. For this purpose it may avail itself of the service of the court assistance agency.

(4) A measure shall be inadmissible where special provisions regulating its application, being provisions under Federal law or under the corresponding Land law, present an obstacle thereto.

Basic Law for the Federal Republic of Germany

Article 97

[Judicial independence]

(1) Judges shall be independent and subject only to the law.

(2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Germany further clarified that its law enforcement agencies and the criminal courts were competent for combating corruption under criminal law. The independence of the (criminal) judges is enshrined in constitutional law in Article 97 (1) GG. By contrast, public prosecutors are bound by instructions. However, the statutory framework conditions for exercising the right to issue instructions have been designed in such a way that a sufficient degree of efficiency in the sense of the Convention is assured. The right to issue instructions is limited in particular by the principle of legality. Where there is an initial suspicion, the public prosecutor's office is obliged to initiate criminal investigations and, should the initial suspicion be sufficiently confirmed, it is obliged to prefer charges (section 152 (2), section 160 (1) StPO). Instructions issued in order to pursue purposes that are foreign to the service of justice (e.g. political expediency) are impermissible. The party entitled to issue instructions may not let himself be guided by considerations that are contrary to the law or foreign to the subject matter concerned. Where an official of the public prosecutor's office raises concerns against instructions issued to him, he is to file them without undue delay via the official channels. Where a higher-ranking official confirms the instructions, they are to be implemented; however, in such event the party instructed is released from his own responsibility. In cases in which the conduct so ordered is recognisably punishable - for example assistance in avoiding prosecution or punishment that is given in an official capacity pursuant to section 258a StGB - or is in breach of an administrative rule, the party to whom instructions have been issued is to continue to refuse to follow the order given. In the actual practice of public prosecutor's offices, individual instructions are the exception rather than the rule.

In many Länder, the competencies of the law enforcement agencies have been transferred to specialist work units. For example, the police office in some instances has special directorates combating corruption, and in some instances, there may be specialised units with the police offices at the Land level. At the federal level, the Federal Criminal Police Office (BKA) as the central office of the criminal police has the task of combating corruption. In parallel, there is a specialisation among the public prosecutor's offices. Numerous Länder have instituted public prosecutor's offices

focusing on economic crime, some of which have special departments combating corruption. A number of Länder have public prosecutor's offices focusing on crimes of corruption and/or contact persons for corruption proceedings.

The establishment and organizational set-up of police anti-corruption offices in the Länder is subject to the discretion of the individual Länder. Separate offices have been established in two Länder which are directly affiliated to the respective Senator for Interior Affairs, namely the Internal Investigations Department (DIE) in Hamburg and the Central Anti-Corruption Office (ZAKS) in Bremen.

The anti-corruption offices in the other Länder have been established as special units within the respective Land Criminal Police Office or larger authorities. Due to Germany's federal structure, the Länder are responsible for the prevention and prosecution of criminal offences. Within the Federal Criminal Police Office it falls to Division SO 31, as the central office, to deal with corruption offences committed within the criminal police; Department RI is responsible for internal audits and internal corruption prevention.

No up-to-date figures regarding personnel in the anti-corruption offices are available. It should be emphasized that, given how specialized the subject-matter is, great importance is attached to basic and continuing training for police officers working in the field of combating corruption.

(b) Observations on the implementation of the article

The reviewing experts observed that Germany did not possess a single authority responsible for a centralized fight against corruption. Due to its federal system, major responsibilities for combatting corruption are assigned to the Länder, which are responsible for setting up their own agencies empowered with corresponding mandates. For factual constraints it was not possible for the reviewers to assess the situation in all 16 Länder and to get a complete picture relevant to the implementation of art. 36 of the Convention. However, reviewers were provided with the information related to the operation of federal government law enforcement agencies and several practical examples from the Länder level.

At the federal level, the Federal Criminal Police Office (Bundeskriminalamt (BKA)) is responsible to support the investigation of corruption cases which involve several Länder, have an international element or are of considerable significance, while the overwhelming majority of such cases would be within the competence of the Länder. It was reported that generally, Länder have specialized departments on combatting economic crimes and special units on combatting corruption within the police.

The Public Prosecution Service also plays an important role in combatting corruption. The prosecutors in the Länder are appointed by and function under the authority of the Länder Ministers of Justice. The independence of prosecutors is not enshrined in law and they can receive instructions from the Länder Ministers of Justice. However, it was reported that in practice such instructions are very rare. A number of Länder (e.g. Bavaria) have specialized public prosecutor offices that focus on corruption offences and economic crimes.

It is recommended that Germany should continue to ensure that existing authorities specialized in combating corruption through law enforcement are able to carry out their

functions effectively and without any undue influence and have the appropriate training and resources to carry out their tasks.

Article 37. Cooperation with law enforcement authorities

Paragraphs 1 and 2 of article 37

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Criminal Code (StGB)

Section 46

Principles of sentencing

(1) The guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender's future life in society shall be taken into account.

(2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to the motives and aims of the offender; the attitude reflected in the offence and the degree of force of will involved in its commission;

the degree of the violation of the offender's duties; the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim.

(3) Circumstances which are already statutory elements of the offence must not be considered.

Section 46b

Contributing to the discovery or prevention of serious offences

(1) If the perpetrator of an offence punishable by an increased minimum sentence of imprisonment or a sentence of life imprisonment,

1. has contributed to the discovery of an offence under section 100a(2) of the Code of Criminal Procedure by voluntarily disclosing his knowledge, or
2. voluntarily discloses his knowledge to an official authority in time for the completion of an offence under section 100a(2) of the Code of Criminal Procedure, the planning of which he is aware of, to be averted, the court may mitigate the sentence under section 49(1); a sentence of life imprisonment shall be replaced with a term of imprisonment over ten years. In order to determine whether an offence is punishable by an increased minimum sentence of imprisonment, only aggravations for especially serious cases but no mitigations shall be taken into account. If the offender participated in the offence, his contribution to its discovery must exceed his own contribution. Instead of a reduction in sentence the court may order a discharge if the offence is punishable by a fixed-term sentence of imprisonment only and the offender would not be sentenced to a term of more than three years.

(2) In arriving at its decision under subsection (1) above the court shall have particular regard to:

1. the nature and scope of the disclosed facts and their relevance to the discovery or prevention of the offence, the time of disclosure, the degree of support given to the prosecuting authorities by the offender and the gravity of the offence to which his disclosure relates, as well as
2. the relationship of the circumstances mentioned in No. 1 above to the gravity of the offence committed by and the degree of guilt of the offender.

(3) A mitigation of sentence or a discharge under subsection (1) above shall be excluded if the offender discloses his knowledge only after the indictment against him has been admitted by the trial court (section 207 of the Code of Criminal Procedure).

Code of Criminal Procedure (StPO)

Section 100a

...

(2) Serious crimes for the purposes of subsection (1) no. 1 shall be

1. under the Criminal Code:

- a) offences against peace, high treason, endangering the democratic state under the rule of law, treason and endangering external security under sections 80a to 82, 84 to 86, 87 to 89a, section 89c (1) to (4) and sections 94 to 100a,
- b) taking of bribes by and giving of bribes to elected officials under section 108e,

- c) offences against national defence under sections 109d to 109h,

- d) offences against public order under sections 129 to 130,

- e) counterfeiting of money and official stamps under sections 146 and 151, in each case also in conjunction with section 152, as well as section 152a (3) and section 152b (1) to (4),

- f) offences against sexual self-determination in cases under sections 176a and 176b and, under the conditions of section 177 (6) sentence 2 no. 2, in cases under section 177,

- g) dissemination, procurement and possession of child and youth pornography under section 184b (1) and (2) and section 184c (2),
- h) murder under specific aggravating circumstances (Mord) and murder (Totschlag) under sections 211 and 212,
- i) offences against personal liberty under section 232, section 232a (1) to (5), section 232b, section 233 (2), sections 233a, 234, 234a, 239a and 239b,
- j) gang theft under section 244 (1) no. 2 and aggravated gang theft under section 244a,
- k) robbery or extortion under sections 249 to 255,
- l) commercial handling of stolen goods, handling as a member of a gang and commercial handling as a member of a gang under sections 260 and 260a,
- m) money laundering or concealing unlawfully acquired assets under section 261 (1), (2) and (4); if criminal liability is based on the fact that impunity pursuant to section 261 (9) sentence 2 is ruled out under section 261 (9) sentence 3, then only where the object is derived from one of the serious crimes referred to in nos. 1 to 11,
- n) fraud and computer fraud under the conditions of section 263 (3) sentence 2 and in the case under section 263 (5), in each case also in conjunction with section 263a (2),
- o) subsidy fraud under the conditions of section 264 (2) sentence 2 and in the case under section 264 (3) in conjunction with section 263 (5),
- p) sports betting fraud and manipulation of professional sports competitions under the conditions of section 265e sentence 2,
- q) withholding and misappropriation of wages or salaries under the conditions of section 266a (4) sentence 2 no. 4,
- r) offences involving forgery of documents under the conditions of section 267 (3) sentence 2 and in the case under section 267 (4), in each case also in conjunction with section 268 (5) or section 269 (3), as well as under section 275 (2) and section 276 (2),
- s) bankruptcy under the conditions of section 283a sentence 2,
- t) offences against competition under section 298 and, under the conditions of section 300 sentence 2, under section 299,
- u) offences constituting a public danger in the cases under sections 306 to 306c, section 307 (1) to (3), section 308 (1) to (3), section 309 (1) to (4), section 310 (1), sections 313 and 314, section 315 (3), section 315b (3), as well as sections 361a and 361c,
- v) taking and giving of a bribe under sections 332 and 334;

Code of Criminal Procedure (StPO)

Section 153

Non-prosecution of petty offences

(1) Where a less serious criminal offence (Vergehen) is the subject of the proceedings, the public prosecution office may dispense with prosecution with the consent of the court competent to open the main proceedings if the offender's guilt is considered to be minor and there is no public interest in the prosecution. The consent of the court shall not be required in the case of a less serious criminal offence which is not subject to an increased minimum sentence and if the consequences ensuing from the offence are minor.

(2) If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the

proceedings at any stage thereof under the conditions of subsection (1). The consent of the indicted accused shall not be required if the main hearing cannot be conducted for the reasons stated in section 205 or is conducted in his absence in the cases under section 231 (2) and sections 232 and 233. The decision shall be given by way of an order. The order shall not be contestable.

Section 153a

Non-prosecution subject to imposition of conditions and directions

(1) In a case involving a less serious criminal offence, the public prosecution office, with the consent of the accused and of the court competent to order the opening of the main proceedings, may dispense with the preferment of public charges and concurrently impose conditions on and issue directions to the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle thereto. In particular, the following conditions and instructions may be considered:

1. rendering of a specified service in order to make reparations for damage caused by the offence,
2. payment of a sum of money to a non-profit-making institution or to the Treasury,
3. rendering of some other service of a non-profit-making nature,
4. compliance with duties to pay a specified amount in maintenance,
5. making of a serious attempt to reach a mediated agreement with the aggrieved person (victim–offender mediation), thereby trying to make reparation for the offence, in full or to a predominant extent, or to strive therefor,
6. participation in a social skills training course or
7. participation in a supplementary course pursuant to section 2b (2) sentence 2 or a driving aptitude course pursuant to section 4a of the Road Transportation Act (Straßenverkehrsgesetz).

The public prosecution office shall set a time limit within which the accused is to comply with the conditions and directions and which, in the cases under sentence 2 nos. 1 to 3, 5 and 7, shall be a maximum of six months and, in the cases under sentence 2 nos. 4 and 6, a maximum of one year. The public prosecution office may subsequently revoke the conditions and directions and may extend the time limit once for a period of three months; with the consent of the accused it may also subsequently impose or change conditions and directions. If the accused complies with the conditions and directions, the offence can no longer be prosecuted as a less serious criminal offence. If the accused fails to comply with the conditions and directions, no compensation shall be given for any contribution made towards compliance. Section 153 (1) sentence 2 shall apply accordingly in the cases under sentence 2 nos. 1 to 6. Section 246a (2) shall apply accordingly.

(2) Where public charges have already been preferred, the court may, with the consent of the public prosecution office and of the indicted accused, provisionally terminate the proceedings and concurrently impose the conditions on and issue directions to the indicted accused as referred to in subsection (1) sentences 1 and 2. Subsection (1) sentences 3 to 6 and 8 shall apply accordingly. The decision under sentence 1 shall be made by way of an order. The order shall not be contestable. Sentence 4 shall also apply to a

finding that conditions and directions imposed pursuant to sentence 1 have been complied with.

(3) The running of the period of limitation shall be suspended for the duration of the time period set for compliance with the conditions and directions.

(4) In the case under subsection (1) sentence 2 no. 6, also in conjunction with subsection (2), section 155b shall apply accordingly, subject to the proviso that personal data from the criminal proceedings which do not concern the accused may only be transmitted to the agency in charge of conducting the social skills training course to the extent the data subjects have consented to such transmission. Sentence 1 shall apply accordingly if a direction to participate in a social skills training course is given pursuant to other criminal law provisions.

Section 153b

Non-prosecution where imposition of penalty may be dispensed with

(1) If the conditions under which the court might dispense with imposing a penalty are met, the public prosecution office may, with the consent of the court which would have jurisdiction over the main hearing, dispense with the preferment of public charges.

(2) If charges have already been preferred, the court may, with the consent of the public prosecution office and of the indicted accused, terminate proceedings at any time prior to commencement of the main hearing.

Section 153d

Non-prosecution of offences against national security due to overriding public interests

(1) The Federal Public Prosecutor General may dispense with prosecuting offences of the kind designated in section 74a (1) nos. 2 to 6 and in section 120 (1) nos. 2 to 7 of the Courts Constitution Act if the conduct of proceedings would pose a risk of serious detriment to the Federal Republic of Germany or if other overriding public interests present an obstacle to prosecution.

(2) If charges have already been preferred, the Federal Public Prosecutor General may withdraw the charges under the conditions of subsection (1) at any stage of the proceedings and terminate the proceedings.

Section 153e

Non-prosecution of offences against national security for active remorse (tätige Reue)

(1) If offences of the kind designated in section 74a (1) nos. 2 to 4 and in section 120 (1) nos. 2 to 7 of the Courts Constitution Act are the subject of the proceedings, the Federal Public Prosecutor General, with the consent of the higher regional court competent pursuant to section 120 of the Courts Constitution Act, may dispense with prosecuting such an offence if the offender, subsequently to the offence and before he has learned of the discovery thereof, contributed towards averting a danger to the existence or the security of the Federal Republic of Germany or its constitutional order. The same shall apply if the offender has made such contribution by disclosing to an agency after the offence such knowledge as he had with respect to activities involving high treason, endangering the democratic state under the

rule of law, treason and endangering external security.

(2) If charges have already been preferred, the higher regional court competent pursuant to section 120 of the Courts Constitution Act may, with the consent of the Federal Public Prosecutor General, terminate the proceedings if the conditions of subsection (1) are met.

(b) Observations on the implementation of the article

To encourage persons who have participated in the commission of an offence established in accordance with this Convention to cooperate with law enforcement authorities, German law provides for the possibility of mitigated sentences for persons who contribute to the discovery or prevention of serious offences (section 46b together with section 100a para2 StPO). Although not all the corruption offences are deemed to be serious offences, cooperation also in such cases can be taken into account (section 46 para 2 StGB) as a reason for dispensing with prosecution or the preferment of public charges (section 153 et seqq. StPO).

Paragraph 3 of article 37

3. Each State Party shall consider providing for the possibility, in accordance with the fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that granting immunity from criminal prosecution was not possible due to the fundamental principle of mandatory prosecution.

Code of Criminal Procedure (StPO)

Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

...

(2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

(b) Observations on the implementation of the article

Granting immunity from criminal prosecution is not possible due to the fundamental principle of mandatory prosecution.

Paragraph 4 of article 37

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that a person involved in the commission of a criminal offence who testifies in criminal proceedings as a witness against a person accused of the same criminal offence enjoyed the same protection as do witnesses who were not involved in the criminal offence in line with the regulations cited with regard to art. 32 UNCAC.

In 2013 a total of eight at-risk persons were relocated to Germany or abroad from Germany.

For the German witness protection offices, taking an at-risk person abroad is the measure of last resort.

(b) Observations on the implementation of the article

The reviewing experts observed that persons who participated in the commission of criminal offences and testify as witnesses in criminal proceedings enjoy the same protection as other witnesses in Germany.

Paragraph 5 of article 37

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that it had not yet entered into agreements or arrangements for the provision of measures encouraging cooperation with law enforcement authorities when a person who has participated in the commission of an offence in accordance with the Convention is located in another State Party, and vice versa.

(b) Observations on the implementation of the article

The reviewing experts observed that Germany had not yet entered into agreements or arrangements for the provision of measures encouraging cooperation with law enforcement authorities when a person who has participated in the commission of an offence in accordance with the Convention is located in another State Party, and vice versa, but would consider to do so if such a need arises.

Article 38. Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

- (a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*
- (b) Providing, upon request, to the latter authorities all necessary information.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that while there is no provision requiring public authorities and officials to report corruption offences to law enforcement authorities, under the Anti-Corruption Code of Conduct, federal staff shall inform supervisors and the contact person for corruption prevention in case of specific indications of corrupt behaviour.

Moreover, the public prosecutor's offices can request information from all authorities.

Code of Criminal Procedure (StPO)

Section 161

[Information and Investigations]

(1) For the purpose indicated in Section 160 subsections (1) to (3), the public prosecution office shall be entitled to request information from all authorities and to make investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office and shall be entitled, in such cases, to request information from all authorities.

Section 163

[Duties of the Police]

(1) The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled to request, and

in exigent circumstances to demand, information from all authorities, as well as to conduct investigations of any kind insofar as there are no other statutory provisions specifically regulating their powers.

(2) The authorities and officials in the police force shall transmit their records to the public prosecution office without delay. Where it appears necessary that a judicial investigation be performed promptly, transmission directly to the Local Court shall be possible.

(3) Section 52 subsection (3), Section 55 subsection (2), Section 57 subsection (1) and Sections 58, 58a, 58b and 68 to 69 shall apply mutatis mutandis to the examination of a witness by officials in the police force. The decision on permission pursuant to Section 68 subsection (3), first sentence, and on the assignment of counsel to a witness shall be taken by the public prosecution office; in all other cases the necessary decisions shall be taken by the person in charge of the examination. Section 161a subsection (3), second to fourth sentences, shall apply mutatis mutandis to decisions by officials in the police force pursuant to Section 68b subsection (1), third sentence. Section 52 subsection (3) and Section 55 subsection (2) shall apply mutatis mutandis to the instruction of an expert by officials in the police force. In the cases referred to in Section 81c subsection (3), first and second sentences, Section 52 subsection (3) shall also apply mutatis mutandis to examinations by officials in the police force.

In its capacity as central criminal police office, the Federal Criminal Police Office is responsible for national coordination measures and sharing intelligence in the field of corruption with other police forces at international level. Competence for conducting police investigations into corruption offences lies with the Länder. A special national reporting service for corruption offences which was launched in 2004 aims to promote intelligence sharing between the Länder and Federal Government; this step was taken on the basis of a decision by the Working Group of the Land Criminal Police Offices and the Federal Criminal Police Office (AG Kripo).

Police cooperation and the extent of such cooperation is not based on any statutory assignment of tasks, for example in the Federal Criminal Police Office Act (Bundeskriminalamtgesetz, BKAG). It can, for instance, also result from decisions taken by the relevant committees. Reference is here in particular made to the Standing Conference of the Interior Ministers of the Länder (IMK), Working Group II and the AG Kripo, with its subordinate Commission on Organized Crime (KOK) and Commission on Combating Crime (KKB). As well as cooperating in the context of day-to-day police case processing, at technical level institutionalized annual working meetings are also, for example, held which involve representatives of the police anti-corruption offices at federal and Länder level. At these meeting current issues are discussed and specialist information and experience shared. These committees, which comprise representatives from all the Länder, meet at regular intervals or on an ad hoc basis, and are chaired by the Federal Criminal Police Office.

Along with international police intelligence sharing, information is shared at international level on an ad hoc basis in the context of various committees and at specialist conferences.

(b) Observations on the implementation of the article

The reviewing experts observed that there is no particular legislation requiring public authorities and officials to report corruption offences to law enforcement authorities.

However, under their Anti-Corruption Code of Conduct federal staff has to inform supervisors and the contact person for corruption prevention in case of specific indications of corrupt behaviour.

The public prosecutor's offices can request information from all authorities and pursue investigations of any kind, either themselves or through the authorities and officials in the police force (section 161 StPO).

Article 39. Cooperation between national authorities and the private sector

Paragraph 1 of article 39

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions relevant to the implementation of the provision under review.

Money Laundering Act (Geldwäschegesetz - GwG)

Section 11 Suspicious transaction reports

(1) Whenever factual circumstances exist that indicate that the assets or property connected with a transaction or business relationship are the product of an offence under section 261 of the Criminal Code or are related to terrorist financing, obliged entities shall promptly report such transaction, irrespective of the amount involved, or such business relationship to the Financial Intelligence Unit of the Federal Criminal Police Office and the competent prosecution authorities orally, by telephone, fax or via electronic data transmission. The reporting obligation pursuant to sentence 1 shall exist as well where factual circumstances indicate that the contracting party failed to comply with its duty of disclosure under section 4 (6) sentence 2.

(1a) A requested transaction may not be executed before the public prosecutor's office has informed the obliged entity of its consent, or before the expiry of the second working day following the transmission date of such suspicious transaction report unless the transaction's execution was prohibited

by the public prosecutor's office; in this respect Saturday shall not be considered a working day. If it is impossible to postpone the transaction, or if doing so could frustrate efforts to pursue the beneficiaries of a suspected criminal offence, the execution of the transaction shall be permitted; the suspicious transaction report shall be filed subsequently without undue delay.

(2) A suspicious transaction report made orally or by telephone pursuant to subsection (1) shall be repeated in writing, by fax or electronic data transmission. The Federal Ministry of the Interior may, with the agreement of the Federal Ministry of Finance and the Federal Ministry of Economics and Technology, by means of a Regulation not requiring the consent of the Bundesrat, enact more detailed provisions concerning the form of reporting under subsection (1) or section 14 (1) and the permitted data media, methods of transmission and data formats to the extent this is necessary for the Financial Intelligence Unit of the Federal Criminal Police Office to perform its functions.

(3) In derogation of subsection (1), the obliged entities referred to in section 2 (1) nos. 7 and 8 shall be exempted from the reporting obligation if the reportable facts relate to information they obtained in the context of providing legal advice or the legal representation of the contracting party. The reporting requirement shall continue to exist if the obliged entities know that the contracting party has used or is using their legal advice for the purpose of money laundering or terrorist financing.

(4) In derogation of subsection (1) sentence 1, the obliged entities referred to in section 2 (1) nos. 7 and 8, who are members of a professional chamber, shall transmit the report pursuant to subsection (1) to the competent federal professional chamber. Such chamber may comment on the report pursuant to subsection (1). The chamber concerned shall transmit the report pursuant to subsection (1) together with its comments in accordance with subsection (1) sentence 1 to the Financial Intelligence Unit of the Federal Criminal Police Office and the competent prosecution authorities without undue delay. This shall apply mutatis mutandis for notaries who are not members of a chamber of notaries subject to the condition that the supreme authority at Länder level responsible for the regulation of their profession shall take the place of the chamber of notaries.

(5) The reporting requirement pursuant to subsections (1) and (2) does not rule out the voluntary nature of the report within the meaning of section 261 (9) of the Criminal Code.

(6) The contents of a report pursuant to subsection (1) may be used only for the criminal

proceedings referred to in section 15 (1) and (2) sentence 3, for criminal proceedings related to a criminal offence liable to maximum punishment of more than three years of imprisonment, for taxation proceedings, for the supervisory functions of competent authorities pursuant to section 16 (2) and for the purpose of averting threats.

(7) The Federal Ministry of the Interior and the Federal Ministry of Finance may, by means of a Regulation requiring the consent of the Bundesrat, for the purpose of combating money laundering and terrorist financing define individual types of transactions which must always be reported in accordance with subsection (1) sentence 1 by the obliged entities. Such Regulation should be time-limited.

(8) In criminal proceedings for which a report was filed pursuant to subsection (1) or section 14, and in other criminal proceedings relating to an offence pursuant to section 261 of the Criminal Code or in which suspected offences within the meaning of section 1 (2) are being investigated, the competent public prosecutor's office shall inform the Financial Intelligence Unit of the Federal Criminal Police Office of the commencement of public prosecution and the outcome of proceedings, including any decisions to close proceedings. Such notification shall be effected by sending a copy of the indictment, the decision to stay proceedings setting out the reason for such decision, or the verdict. The obliged entity that filed a report pursuant to subsection (1) may, upon request in accordance with section 475 of the Code of Criminal Procedure, be provided with information from the files if this proves necessary to check its reporting behaviour; section 477 (3) of the Code of Criminal Procedure shall not apply in this respect. The obliged entity may use personal data obtained pursuant to sentence 3 solely for purposes of checking its reporting behaviour and must delete such data when no longer needed for this purpose.

Section 43 Reporting Obligation of obliged entities, regulation authorization

(1) Where there are any facts indicating that

1.
an asset connected with a business relationship, brokerage or transaction originates from a criminal offence which could constitute a predicate offence to money laundering
2.
a business transaction, activity or asset is related to terrorist financing, or
3.
the contracting party has not fulfilled its obligation pursuant to § 11 paragraph 6 sentence 3 to disclose to the obliged entity whether it intends to establish, continue or carry out the business relationship or the transaction for a beneficial owner the obliged entity shall immediately report this fact to the Central Authority for Financial Transaction Investigations, irrespective of the value of the asset concerned or the amount of the transaction.

(2) By way of derogation from subsection (1), obliged entities under section 2(1)(10) and (12) shall not be obliged to report if the facts subject to reporting relate to information obtained in the course of legal advice or representation. However, the obligation to report shall remain in force if the obliged entity knows that the contracting party has used or is using the legal advice or legal representation for the purpose of money laundering, terrorist financing or another criminal offence, or a case of paragraph 6 exists.

3. A member of the senior management of an obliged entity shall make a report to the Central Financial Intelligence Unit pursuant to paragraph 1 if

1.
the obliged entity has an establishment in Germany, and
2.
the facts to be reported are connected with an activity of the German branch.

(4) If a fact reported to the Central Office for Financial Transaction Investigations pursuant to paragraph 1 also contains the information required

for a report pursuant to Section 261 (9), first sentence, of the German Criminal Code, the report shall also be deemed to be a voluntary report within the meaning of Section 261 (9), first sentence, of the German Criminal Code. The obligation to report pursuant to subsection 1 does not exclude the voluntary nature of the report pursuant to § 261 subsection 9, first sentence, of the Criminal Code.

(5) The Central Office for Financial Transaction Investigations may, in consultation with the supervisory authorities, identify typified transactions which must always be reported pursuant to paragraph 1.

(6) The Federal Ministry of Finance, in agreement with the Federal Ministry of Justice and for Consumer Protection, may, by statutory order and without the consent of the Bundesrat, determine facts in the case of acquisition transactions pursuant to section 1 of the Real Estate Transfer Tax Act, which must always be reported by obliged entities pursuant to section 2(1) nos. 10 and 12 in accordance with subsection 1.

Section 44 Reporting obligation of supervisory authorities

1. If there are facts indicating that an asset is connected with money laundering or terrorist financing, the supervisory authority shall report these facts without delay to the Central Financial Transaction Investigation Office.

(2) Paragraph 1 shall apply mutatis mutandis to authorities responsible for monitoring the stock, foreign exchange and financial derivatives markets.

The Federal Criminal Police Office, Central Office for Suspicious Activity Reports, the central office within the meaning of section 2 (1) of the Federal Criminal Police Office Act, supports the police forces at federal and Land level when it comes to preventing and prosecuting money laundering and terrorist financing. It is responsible for collating and analyzing any reports it receives in accordance with sections 11 and 14 of that Act. It is, in particular, responsible for having data compared with those stored by other offices, for immediately informing the federal and Land criminal prosecution authorities of any information affecting them and of the connections between criminal offences which become known to them, for keeping statistics regarding the figures and information referred to in Article 33 para. 2 of Directive 2005/60/EC, publishing an annual report which analyzes the reports referred to in number 1, and regularly informing those subject to reporting obligations in accordance with that law of the typologies and methods of money laundering and terrorist financing.

Germany cited the following case as an example of implementation.

Case: Lübeck Regional Court, judgment of 31 May 2011 - 1 Ns 14/11 (cf. SchIHA 2012, 151-152).

The facts and circumstances that this case entailed have already been described in the observations regarding Art.17 UNCAC. The criminal investigation was initiated based on a notice issued to the authorities for suspected money laundering by the bank “S.kasse H.” pursuant to section 11 of the Money Laundering Act (GwG): “Upon the police and the public prosecutor’s office having become aware, by a notice issued by the bank S.kasse H. to the authorities for suspected money laundering pursuant to section 11 GwG on 22 March 2010, of the amounts being credited to the defendant’s account and the further criminal investigations having confirmed the initial suspicion,

the defendant's condominium apartment along with the annex buildings and his office were searched in the early morning hours of 9 April 2010 on the basis of the search warrant of 7 April 2010, which covered all deeds from 2005 onwards."

There are numberless telephonic or personal counselling services rendered by the FIU staff to the parties required to report under the MLA and to the law enforcement authorities at federal and Land level have increased in number.

One essential focus of the FIU's public relations work is in the field of presentations and training measures. Members of the FIU held presentations on the occasion of a large number of national and international events and assisted training measures.

Within the scope of these activities, the FIU has conveyed target-specific information to various audiences. As in the years before, the circumstances, the participants and the framework conditions differed greatly on these occasions.

The number of presentations and the participation in training courses were kept at a high level. The FIU Germany was actively involved in a total of 45 events in 2012 and 31 events in 2013 at national and international level.

(b) Observations on the implementation of the article

The reviewing experts observed that if any obliged entity in the sense of the Money-Laundering Act (e.g. financial institution) becomes aware of facts which indicate that property related to a business relationship is derived from a criminal offence which could constitute a predicate offence for money laundering (as it is the case for some bribery offences such as section 332 para 1 and 3, section 334 StGB) the obliged entity has to report this matter, irrespective of the amount involved, to the Financial Intelligence Unit (FIU) without delay (section 43 para 1 Money-Laundering Act). Pursuant section 44 para 1, the same reporting obligation to the FIU applies for supervisory authorities and other authorities.

| Paragraph 2 of article 39

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that every citizen may file information with the law enforcement agencies, either in writing or orally (section 158 (1) StPO):

Code of Criminal Procedure (StPO)

Section 158

[Criminal Informations; Applications for Prosecution]

(1) Information of a criminal offence or an application for criminal prosecution may be filed orally or in writing with the public prosecution office, with authorities and officials in the police force, and with the Local Courts. An oral information shall be recorded in writing.

In some of the Länder, there are other, special forms of contacting the authorities, for example by hotlines.

The provisions of the laws governing criminal proceedings and the judicature allow arrangements to be made for the protection of witnesses, who also include whistleblowers (e.g. section 68 subsections (2), (3) StPO, sections 58a, 247, 247a StPO, and section 172 No. 1a of the Judicature Act)

Section 68

[Examination as to Witness' Identity]

(2) A witness shall furthermore be permitted to state his business address or place of work or another address at which documents can be served instead of stating his place of residence if there is well-founded reason to fear that legally protected interests of the witness or of another person might be endangered or that witnesses or another person might be improperly influenced by the witness stating his place of residence. If the conditions set out in the first sentence obtain at the main hearing, the presiding judge shall permit the witness not to state his place of residence.

(3) If there is well-founded reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to provide personal identification data or to provide such data only in respect of an earlier identity. However, if so asked at the main hearing, he shall be required to state in what capacity the facts he is indicating became known to him.

Section 58a

[Examination by Audio-Visual Medium]

(1) The examination of a witness may be recorded on an audio-visual medium. The examination shall, after evaluation of the relevant circumstances, be recorded and conducted as a judicial examination if

1. the interests meriting protection of persons of less than 18 years of age as well as of persons who as children or juveniles have been aggrieved as a result of one of the criminal offences designated under Section 255a subsection (2) can thus be better safeguarded; or

2. there is a concern that it will not be possible to examine the witness during the main hearing and the recording is required in order to establish the truth.

(2) Use of the audio-visual recording shall be admissible only for the purposes of the criminal prosecution and only insofar as it is required in order to establish the truth. Section 101 subsection (8) shall apply mutatis mutandis. Sections 147 and 406e shall apply mutatis mutandis subject to the proviso that copies of the recording may be made available to persons entitled to inspect the files. The copies may not be duplicated nor may they be passed on. They are to be returned to the public prosecution office as soon as there is no further legitimate interest

in using them. The transfer of the recording or the release of copies to persons other than those aforementioned shall be subject to the consent of the witness.

(3) If the witness does not consent to a copy of the recording of his examination as a witness being made available pursuant to subsection (2), third sentence, then instead a written transcript of the recording shall be released to the persons entitled to inspect the files in accordance with Sections 147 and 406e. The person who produces the transcript shall sign with the addendum that he confirms the accuracy of the transcript. The right to view the recording pursuant to Sections 147 and 406e shall remain unaffected. The witness is to be informed of the right to refuse his consent pursuant to the first sentence.

Section 58b

[Examination Outside the Main Hearing]

The examination of a witness outside the main hearing can be effected in such a way that the witness is located in another place than the person being examined and the examination is simultaneously transmitted audio-visually to the place where the witness is located and to the examination room.

Section 247

[Removal of the Defendant from the Courtroom]

The court may order that the defendant leave the courtroom during an examination if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant. The same shall apply if, on examination of a person under 18 years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health. The defendant's removal may be ordered for the duration of discussions concerning the defendant's condition and his treatment prospects, if substantial detriment to his health is to be feared. When the defendant is present again the presiding judge shall inform him of the essential contents of the proceedings, including the testimony, during his absence.

Section 247a

[Witness Examination in Another Place]

(1) If there is an imminent risk of serious detriment to the well-being of the witness were he to be examined in the presence of those attending the main hearing, the court may order that the witness remain in another place during the examination; such an order shall also be admissible under the conditions set out in Section 251 subsection (2), insofar as this is necessary to establish the truth. The decision shall be incontestable. A simultaneous audio-visual transmission of the testimony shall be provided in the courtroom. The testimony shall be recorded if there is a concern that the witness will not be available for examination at a future main hearing and the recording is necessary for establishing the truth. Section 58a subsection (2) shall apply *mutatis mutandis*.
(2) The court may order that the examination of an expert be conducted in such a way that the expert is located in another place than the court and the examination is simultaneously transmitted audio-visually to the place where the expert is located and to the courtroom. This shall not apply in the cases referred to in Section 246a. The decision pursuant to the first sentence shall not be

contestable.

Numerous documents concerning the prevention of corruption in the federal administration can be retrieved at the following links:

<https://www.bmi.bund.de/EN/topics/administrative-reform/corruption-prevention/integrity.html>

<https://www.bmi.bund.de/DE/themen/moderne-verwaltung/integritaet-der-verwaltung/integritaet-der-verwaltung-node.html>

Inquiries made with the federal Länder obtained the results summarised below:

- Implementation of symposia, informational events, and presentations for specific target groups, such as rural districts, cities, the German army Bundeswehr, enterprises, universities, and companies, also in cooperation with Transparency International;
- Preparation of flyers and posters, also with the involvement of advertising agencies and professionals (North Rhine-Westphalia);
- Distribution of flyers on the topic of corruption in the context of the above-referenced events, and keeping such flyers available in the authorities;
- Implementation of workshops for executives of the German railway service Deutsche Bahn under a cooperation agreement (Baden-Württemberg);
- Articles in trade magazines, e.g. union papers;
- Participation in the investor trade fair INVEST, at which the police present their work in combating corruption and preventing it at a stand (Baden-Württemberg);
- Information of professional associations and economic federations on the anonymous whistleblower system BKMS® (Business Keeper Monitoring System) and, in that context, press conferences, posts on the Facebook page of the Land Criminal Police Office of Baden-Württemberg, and the optimization of the URL address on the internet by way of increasing the frequency of hits by search engines;
- Internet presence (<http://www.antikorruption.brandenburg.de/>);
- Publication of a regular newsletter on the prevention of corruption (Brandenburg);
- Institution of a police counselling office on the prevention of corruption with the Directorate for Internal Investigations (Direktion Interne Ermittlungen – D.I.E.) in Hamburg;
- Publication of information on combating corruption and preventing it on the homepage of the Central Anti-Corruption Office (Zentrale Anti-Korruptionsstelle – ZAKS) in Bremen;
- Active press relations work where dictated by events;
- Implementation of a “Police Information Day” (Tag der Polizei) at which comprehensive information is provided, inter alia, on how corruption is combated and prevented (North Rhine-Westphalia).

The Business Keeper Monitoring System (BKMS) is a web-based whistleblowing system allowing information or suspicious indications to be transmitted anonymously. The system’s provider, Business Keeper, has assured the anonymity of the whistleblower. Both the contents of the notices submitted and the means of transmission used are protected by a certified encryption process. No IP addresses, time stamps or other data are stored. As a consequence, it is ruled out that the whistleblower can be

traced and identified using technical means. The provider company is unable to read this information. Should the whistleblower seek further contact or wish to allow the addressee (in Germany, this is solely the Land Criminal Police Offices of Lower Saxony and Baden-Württemberg) to contact him, he has the option of creating a mailbox that he can use to enter into a dialogue with the police. Depending on the respective needs given, the BKMS system may be used for different areas of offences. A license fee is charged for the use of the system; as far as we are aware, the amount of the fee depends on the agreement concluded with the provider. No figures are known to us, however.

There are various ways in which corruption offences can be notified to the law enforcement authorities, specifically:

1. Contacting a police station or the judicial authorities (in person, by telephone, via the internet);
2. Providing information anonymously using a web-based system, for example Business Keeper's Business Keeper Monitoring System (BKMS). This system is currently being used by two Land Criminal Police Offices (Lower Saxony and Baden-Württemberg). Once the Land Criminal Police Office receives information which does not fall within its area of responsibility, it is passed on to the competent office (outside of the system). The system guarantees the anonymity of the person supplying the information, i.e. the police/judicial authorities cannot trace the original IP address. Where the person supplying the information sets up a "mailbox", they can enter into an anonymous dialogue with the authorities. Other systems are also in use (e.g. the "Internet Police Station" in Brandenburg, a new online system in Berlin);
3. Contacting an ombudsperson. These are available in some companies and in individual public authorities. They provide staff with the possibility of contacting someone if they have relevant information. These ombudspersons are generally contracted lawyers who, in addition to their professional qualifications, guarantee the statutory obligation to maintain secrecy/protective mechanisms to those providing information;
4. Free telephone hotlines (e.g. 0800-Korrupt in North Rhine-Westphalia).

The Federal Criminal Police Office is not aware of any investigations in the field of corruption in which any reward was offered.

(b) Observations on the implementation of the article

The reviewing experts observed that every citizen may file information regarding possible corruption offences with the law enforcement agencies either in writing or orally (section 158 para. 1 StPO).

Some Länder also have hotlines for reporting offences and there are numerous activities organized at the Länder level aimed at the increase of awareness and prevention of corruption in the private sector.

Article 40. Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated bank secrecy may not be invoked in preliminary criminal investigations and criminal proceedings.

Section 53 StPO contains a closed list of those who may refuse to testify on professional secrecy grounds, which excludes financial institutions.

Code of Criminal Procedure (StPO)

Section 53

Right to refuse testimony on professional grounds

(1) The following persons may also refuse to testify:

1. clergy, concerning that information which was confided to them or which became known to them in their capacity as spiritual advisers;
2. defence counsel of the accused, concerning that information which was confided to them or which became known to them in this capacity;
3. lawyers and non-lawyer providers of legal services who have been admitted to a bar association, patent attorneys, notaries, certified public accountants, sworn auditors, tax consultants (Steuerberater) and tax representatives (Steuerbevollmächtigte), doctors, dentists, psychological psychotherapists, psychotherapists specialising in the treatment of children and juveniles, pharmacists and midwives, concerning that information which was confided to them or which became known to them in this capacity; subject to section 53a, the same shall not apply to in-house lawyers (section 46 (2) of the Federal Code for Lawyers) and in-house patent attorneys (section 41a (2) of the Federal Code for Patent Attorneys (Patentanwaltsordnung)) in respect of that which was confided to them or became known to them in this capacity;
- 3a. members or representatives of a recognised counselling agency under sections 3 and 8 of the Act on Pregnancies in Conflict Situations (Schwangerschaftskonfliktgesetz), concerning that information which was confided to them or which became known to them in this capacity;
- 3b. drug dependency counsellors in a counselling agency recognised or set up by an authority, a body, an institution or a foundation under public law, concerning that information which was confided to them or which became known to them in this capacity;
4. Members of the Bundestag, of the Federal Convention, of the European Parliament from the Federal Republic of Germany or of a Land parliament, concerning persons who have confided certain facts to them in their capacity as members of these bodies or to whom they have confided facts in this particular capacity, as well as concerning the facts themselves;
5. individuals who are or have been professionally involved in the

preparation, production or dissemination of printed matter, broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion.

The persons designated in sentence 1 no. 5 may refuse to testify concerning the author or contributor of comments and documentation or concerning any other informant or the information communicated to them in their professional capacity, including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention. This shall only apply insofar as this concerns contributions, documentation, information and materials for the editorial element of their activity or information and communication services which have been editorially reviewed.

(2) The persons designated in subsection (1) sentence 1 nos. 2 to 3b may not refuse to testify if they have been released from their obligation of secrecy.

The right of the persons designated in subsection (1) sentence 1 no. 5 to refuse to testify concerning the content of materials which they themselves have produced and matters which have received their professional attention shall lapse if the testimony is required to assist in investigating a serious criminal offence (Verbrechen) or if the subject of the investigation is

1. a crime against peace and of endangering the democratic state under the rule of law or of treason and of endangering external security (sections 80a, 85, 87, 88, 95, also in conjunction with sections 97b, 97a, 98 to 100a of the Criminal Code (Strafgesetzbuch)),

2. a crime against sexual self-determination under sections 174 to 176 and section 177 (2) no. 1 of the Criminal Code or

3. money laundering or concealing unlawfully acquired assets under section 261 (1) to (4) of the Criminal Code

and an investigation of the facts and circumstances or an investigation as to the whereabouts of the accused would otherwise offer no prospect of success or would be much more difficult. The witness may refuse to testify even in such cases, however, where testimony would result in disclosure of the identity of the author or contributor of comments and documentation or of any other informant, or of the information communicated to him in his professional capacity pursuant to subsection (1) sentence 1 no. 5 or of the content of such communications.

Germany has a comprehensive bank accounts register from which information can easily be accessed by law enforcement authorities:

Banking Act (Gesetz über das Kreditwesen - KWG)

Section 9 Confidentiality requirement

(1) Persons employed by BaFin and persons commissioned under section 4 (3) of the Act Concerning the Federal Financial Supervisory Authority (Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht), the special representatives appointed under section 45c, the liquidators appointed under section 37 sentence 2 and section 38 (2) sentences 2 and 4 and persons employed by the Deutsche Bundesbank, insofar as they are acting to

implement this Act, may not disclose or use without authorisation facts which have come to their notice in the course of their activities and which should be kept secret in the interests of the institution or a third party (especially business and trade secrets), not even after they have left such employment or their activities have ended. 2 This is without prejudice to the provisions of the Federal Data Protection Act which must be complied with by the institutions and enterprises under supervision. 3 This shall also apply to other persons who, by way of official reporting, obtain knowledge of the facts referred to in sentence 1. 4 In particular, it shall not be deemed to be such disclosure or use without authorisation within the meaning of sentence 1 if facts are passed on to

1 criminal prosecution authorities or courts having jurisdiction in criminal cases or administrative fine cases,

2 authorities which are entrusted by law or public mandate with the supervision of institutions, asset management companies, financial enterprises, insurance companies, financial markets or payment systems or operations, and to persons commissioned by such authorities,

3 authorities dealing with an institution's liquidation or insolvency proceedings over its assets,

4 persons entrusted with the statutory auditing of the accounts of institutions or financial enterprises and to authorities which supervise such persons,

5 a deposit guarantee scheme or an investor compensation scheme, 6 stock exchanges or futures exchanges,

7 central banks,

8 operators of systems pursuant to section 1 (16),

9 the competent authorities of other EEA states or of non-EEA states with which BaFin cooperates in supervisory colleges pursuant to section 8e, or 10 the Committee of European Banking Supervisors (CEBS), insofar as these authorities require the information for the performance of their functions.

5 The confidentiality requirement specified in sentence 1 shall apply *mutatis mutandis* to persons employed by these authorities. 6 If the authority is located in another state, the facts may be passed on only if that authority and the persons commissioned by it are subject to a confidentiality requirement corresponding to that specified in sentence 1. 7 The foreign authority is to be informed that it may use information solely for the purpose for which it has been passed on to it. 8 Information from another state may be passed on only with the express permission of the competent authorities providing this information and only for such purposes as have been agreed by these authorities.

(2) 1 Sections 93, 97 and 105 (1), section 111 (5) in conjunction with section 105 (1), and section 116 (1) of the Fiscal Code shall not apply to the persons specified in subsection (1) insofar as they are acting to implement this Act.

2 This shall not apply if the fiscal authorities require the information for instituting tax offence proceedings and the associated tax assessment proceedings in the prosecution of which there is a pressing public interest, or if the person required to provide information or the persons acting on his/her behalf have intentionally supplied incorrect information. 3 Sentence 2 shall not apply if the facts involved were communicated to the persons specified in subsection (1) sentence 1 or 3 by the competent supervisory authority of another state or by persons commissioned by that authority.

Section 24c Automated access to account details

(1) Credit institutions shall maintain a data file in which they must promptly store the following data:

1 the number of any account which is subject to the obligation to verify proof of identity within the meaning of section 154 (2) sentence 1 of the Fiscal Code or of a safe custody account, as well as the dates on which the account was opened and closed,

2 the name - and for natural persons the date of birth - of the holder and of any party authorised to draw on the account, as well as - in the cases specified in section 3 (1) number 3 of the Money Laundering Act - the name and, if available, the address of any other economic beneficiary within the meaning of section 1 (6) of the Money Laundering Act.

2A new data record shall be created promptly for each change in the data entered pursuant to sentence 1. 3The data shall be deleted three years after the account or safe custody account has been closed. 4In the case of sentence 2, the previous data record shall be deleted three years after the new data record has been created. 5The credit institution shall ensure that BaFin has automated access at all times to the data entered in the data file pursuant to sentence 1 by means of a procedure of BaFin's choice. 6The institution shall ensure by means of technical and organisational measures that it cannot monitor such data retrievals.

(2) BaFin may access individual data entered in the data file pursuant to subsection (1) sentence 1 insofar as this is necessary to enable it to perform its prudential functions under this Act or the Money Laundering Act, in particular with respect to unauthorised banking business and financial services or the misuse of the institutions by means of money laundering or fraudulent activities to the detriment of the institutions, and if there is particular urgency in individual cases.

(3) 1Upon request, BaFin shall provide information entered in the data file pursuant to subsection (1) sentence 1 to

1 the supervisory authorities pursuant to section 9 (1) sentence 4 number 2 insofar as this is necessary to enable them to perform their prudential functions under the conditions set out in subsection (2),

2 the authorities or courts responsible for providing international judicial assistance in criminal cases, and otherwise for the prosecution and punishment of criminal offences, insofar as this is necessary to enable them to perform their statutory functions,

3 the national authority responsible for imposing restrictions on capital transfers and payment transactions pursuant to the Foreign Trade and Payments Act insofar as this is necessary to enable it to perform its functions ensuing from the Foreign Trade and Payments Act or from legal instruments of the European Communities in connection with restrictions on economic and financial relations.

2BaFin shall access the data stored in the data files by means of an automated procedure and transmit them to the agency making the request. 3BaFin verifies the permissibility of such transmission only if it has particular grounds for doing so. 4Responsibility for the permissibility of the transmission shall lie with the agency making the request. 5BaFin may, pursuant to section 4b of the

Federal Data Protection Act, provide foreign agencies with information from the data file pursuant to subsection (1) sentence 1 for the purposes described in sentence 1. 6Section 9 (1) sentences 5 and 6 and subsection (2) shall apply mutatis mutandis. 7This is without prejudice to the provisions on international judicial assistance in criminal cases.

(4) 1For the purpose of monitoring compliance with data protection rules on the part of the competent agency, BaFin logs the time of each data retrieval, the data used during the retrieval, the data retrieved, the name of the retriever, the reference number and, if the data are retrieved at the request of another agency, the name of that agency and its reference number. 2The log data may not be used for any other purposes. 3The log data shall be kept for at least 18 months and deleted after two years at the latest.

(5) 1The credit institution shall, at its own expense, put in place all the procedures necessary for the automated data access within its area of responsibility. 2These include, in each case in accordance with the relevant BaFin provisions, the procurement of the equipment necessary to ensure confidentiality and protection against unauthorised access, the installation of a suitable telecommunications link and participation in the closed user system, as well as the ongoing provision of these facilities.

(6) 1The credit institution and BaFin shall put in place state-of-the-art measures to safeguard data protection and data security, which in particular shall guarantee the confidentiality and integrity of the retrieved and transmitted data. 2The state of the art shall be defined by BaFin in consultation with the Federal Office for Information Security (Bundesamt für Sicherheit in der Informationstechnik) by a procedure of BaFin's choice.

(7) 1The Federal Ministry of Finance may, by way of a statutory order, permit exemptions from the obligation to transmit data by means of an automated procedure. 2It may delegate this authority to BaFin by way of a statutory order.

(8) Insofar as the Deutsche Bundesbank and the Federal Republic of Germany - Finance Agency (Bundesrepublik Deutschland - Finanzagentur GmbH) maintain accounts and safe custody accounts for third parties, they shall be deemed to be credit institutions within the meaning of subsections (1), (5) and (6).

See also the case described under Art. 39 (1) UNCAC: **Lübeck Regional Court, judgment of 31 May 2011 - 1 Ns 14/11 (cf. SchlHA 2012, 151-152)**. The facts and circumstances that this case entailed have already been described in the observations regarding Art. 17 UNCAC. The criminal investigation was initiated based on a notice issued to the authorities for suspected money laundering by the bank S.kasse H. pursuant to section 11 of the Money Laundering Act (GwG): “Upon the police and the public prosecutor’s office having become aware, by a notice issued by the bank S.kasse H. to the authorities for suspected money laundering] pursuant to section 11 GwG on 22 March 2010, of the amounts being credited to the defendant’s account and the further criminal investigations having confirmed the initial suspicion, the defendant’s condominium apartment along with the annex buildings and his office were searched in the early morning hours of 9 April 2010 on the basis of the search warrant of 7 April 2010, which covered all deeds from 2005 onwards.”

(b) Observations on the implementation of the article

The reviewing experts observed that bank secrecy cannot be invoked in criminal investigations and criminal proceedings.

The data retrieval system (Central Register of Bank Accounts), processed by the Federal Financial Supervisory Authority, allows law enforcement authorities and courts to access the data of the holder of a bank account, including information on any beneficial owner, in order to perform their statutory functions (sect. 24c of the Banking Act).

Section 53 StPO contains the closed list of those who may refuse to testify on professional secrecy grounds, which excludes financial institutions.

Moreover, Germany has a comprehensive bank accounts register (section 24c para 1 Banking Act) where data, including on beneficial ownership, is updated on a daily basis and from which information can easily be accessed by law enforcement authorities.

(c) Successes and good practices

Germany's highly detailed, comprehensive and up-to-date Central Register of Bank Accounts provides easy access for investigative authorities and prevents bank secrecy from hindering investigations.

Article 41. Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provision relevant to the implementation of the provision under review..

Criminal Code (StGB)

Section 46

Principles of sentencing German Criminal Code

(2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to
the motives and aims of the offender;
the attitude reflected in the offence and the degree of force of will involved in its commission;
the degree of the violation of the offender's duties;
the modus operandi and the consequences caused by the offence to the extent

that the offender is to blame for them;
the offender's prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim.

Germany further clarified that previous criminal convictions handed down in other states may be taken into account, if the offence is punishable under German law and if the criminal record does not need to be deleted according to section 45 BZRG (Federal Court of Justice, order of 19 Oktober 2011, NStZ-RR 2012, 305):

Act on the Central Criminal Register and the Educative Measures Register (Bundeszentralregistergesetz – BZRG)

Section 45

Deletion after expiry of time limit

- (1) Entries concerning convictions (section 4) are deleted after the expiry of a specified time limit.
- (2) An entry which is to be deleted is removed from the Register one year after it qualifies for deletion. During this period information concerning the entry may only be disclosed to the person concerned.
- (3) Subsection (1) does not apply
 1. to convictions to imprisonment for life,
 2. to orders for placement in preventive detention or in a psychiatric hospital.

Criminal convictions handed down in other Member States of the EU have the same legal effects as national convictions under German law according to art. 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings:

Article 3

Taking into account, in the course of new criminal proceedings, a conviction handed down in another Member State

1. Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.
2. Paragraph 1 shall apply at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction, in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.
3. The taking into account of previous convictions handed down in other

Member States, as provided for in paragraph 1, shall not have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings.

4. In accordance with paragraph 3, paragraph 1 shall not apply to the extent that, had the previous conviction been a national conviction of the Member State conducting the new proceedings, the taking into account of the previous conviction would, according to the national law of that Member State, have had the effect of interfering with, revoking or reviewing the previous conviction or any decision relating to its execution.

5. If the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

However, the Member States shall ensure that in such cases their courts can otherwise take into account previous convictions handed down in other Member States.

(b) Observations on the implementation of the article

Previous criminal convictions in other States are taken into consideration if the underlying offence is punishable under German law and if reference to the criminal record is not time-barred (section 46 StGB; section 45 BZRG).

Article 42. Jurisdiction

Subparagraph 1 (a) of article 42

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provision.

Criminal Code (StGB)

Section 3

Offences committed on the territory of the Federal Republic of Germany
German criminal law shall apply to acts committed on German territory.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany established territorial jurisdiction according to section 3 of its Criminal Code.

Subparagraph 1 (b) of article 42

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

...

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provision.

Criminal Code (StGB)

Section 4

Offences committed on German ships and aircraft

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to acts committed on a ship or an aircraft entitled to fly the federal flag or the national insignia of the Federal Republic of Germany.

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany has established jurisdiction aboard German aircraft and ships according to section 4 StGB of its Criminal Code.

Subparagraph 2 (a) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 7

Offences committed abroad-other cases

(1) German criminal law shall apply to offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction.

...

Section 5

Offences committed abroad with a special domestic nexus

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

...;

14. acts committed against public officials, persons entrusted with special public service functions, or soldiers in the Armed Forces during the discharge of their duties or in connection with their duties;

15. Offences committed in public office pursuant to sections 331 to 337, where

a) the offender is German at the time of the act,

b) the offender is a European public official and his public authority has its seat in Germany,

c) the act is committed in relation to a public official, a person entrusted with special public service functions or a soldier of the Bundeswehr, or

d) the act is committed in relation to a European public official or arbitrator who is a German at the time of the act, or a person deemed equal pursuant to section 335a who is a German at the time of the offence;

16. Active and passive bribery of mandate holders (section 108e), where

a) the offender is a member of a German public assembly or German at the time of the act

or

b) the act is committed in relation to a member of a German public assembly or to a person who is German at the time of the act;

(b) Observations on the implementation of the article

The reviewing experts concluded that Germany established passive personality jurisdiction when there is dual criminality or if the place of the commission of the offence is not subject to any criminal jurisdiction according to section 7 of its Criminal Code.

In addition, section 5 establishes jurisdiction over offences committed abroad with a special domestic nexus, irrespective of dual criminality.

Subparagraph 2 (b) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

...

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Criminal Code (StGB)

Section 7

Offences committed abroad-other cases

...

(2) German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:

1. was German at the time of the offence or became German after the commission; or
2. was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.

Section 5

Offences committed abroad with a special domestic nexus

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

...

12. offences committed by a German public official or a person entrusted with special public service functions during their official stay or in connection with their official duties;

13. acts committed by a foreigner as a public official or as a person entrusted with special public service functions;

...

15. Offences committed in public office pursuant to sections 331 to 337, where

- a) the offender is German at the time of the act,
- b) the offender is a European public official and his public authority has its seat in Germany,
- c) the act is committed in relation to a public official, a person entrusted with special public service functions or a soldier of the Bundeswehr, or

d) the act is committed in relation to a European public official or arbitrator who is a German at the time of the act, or a person deemed equal pursuant to section 335a who is a German at the time of the offence;

16. Active and passive bribery of mandate holders (section 108e), where

a) the offender is a member of a German public assembly or German at the time of the act or

b) the act is committed in relation to a member of a German public assembly or to a person who is German at the time of the act;

(b) Observations on the implementation of the article

The reviewing experts concluded that section 7 of the Criminal Code establishes jurisdiction to offences committed abroad where the act is an offence at the place of its commission or such place is not subject to any criminal jurisdiction, and the offender is German (section 7, para 2 no. 1 StGB) or (subject to further conditions) a not extradited foreigner (section 7 para 2 no. 2 StGB).

In addition, Section 5 StGB establishes jurisdiction over offences committed abroad with a special domestic nexus, irrespective of dual criminality and explicitly including active and passive bribery of domestic and foreign public officials committed abroad by a German citizen (section 5, nos. 12-16 StGB).

Subparagraph 2 (c) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

...

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provision.

Criminal Code (StGB)

Section 9

Place of the offence

...

(2) Acts of secondary participation are committed not only in the place where the offence was committed, but also in every place where the secondary participant acted or, in the case of an omission, should have acted or where, according to his intention, the offence should have been committed.

(b) Observations on the implementation of the article

Jurisdiction for the purposes of subpara 2(c) of art. 42 of the Convention is established in section 9 para. 2 of the German Criminal Code.

| Subparagraph 2 (d) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

...

(d) The offence is committed against the State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Criminal Code (StGB)

Section 5

Offences committed abroad with a special domestic nexus

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

...

12. offences committed by a German public official or a person entrusted with special public service functions during their official stay or in connection with their official duties;

13. acts committed by a foreigner as a public official or as a person entrusted with special public service functions;

14. acts committed against public officials, persons entrusted with special public service functions, or soldiers in the Armed Forces during the discharge of their duties or in connection with their duties;

15. Offences committed in public office pursuant to sections 331 to 337, where

a) the offender is German at the time of the act,

b) the offender is a European public official and his public authority has its seat in Germany,

c) the act is committed in relation to a public official, a person entrusted with special public service functions or a soldier of the Bundeswehr, or

d) the act is committed in relation to a European public official or arbitrator who is a German at the time of the act, or a person deemed equal pursuant to section 335a who is a German at the time of the offence;

16. Active and passive bribery of mandate holders (section 108e), where

a) the offender is a member of a German public assembly or German at the time of the act

or

b) the act is committed in relation to a member of a German public assembly

or to a person who is German at the time of the act;

(b) Observations on the implementation of the article

Section 5 of the German Criminal Code establishes jurisdiction over offences committed abroad with a special domestic nexus, irrespective of dual criminality.

Paragraph 3 of article 42

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provision.

Criminal Code (StGB)

Section 7

Offences committed abroad-other cases

(2) German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:

1. was German at the time of the offence or became German after the commission;

(b) Observations on the implementation of the article

Section 7 StGB appears to cover cases where the offender is present in its territory and Germany does not extradite the person solely on the ground that he or she is German.

Paragraph 4 of article 42

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provision.

Criminal Code (StGB)

Section 7

Offences committed abroad-other cases

(2) German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:

1. ..

2. was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.

(b) Observations on the implementation of the article

The reviewing experts concluded that section 7 para 2 no. 2 of the Criminal Code establishes jurisdiction over offences when an alleged offender is present in its territory and Germany does not extradite him or her.

Paragraph 5 of article 42

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that information received by Germany from another State Party in the areas covered by Paragraph 5 of article 42 may be dealt with in accordance with section 59 AICCM(IRG). That provision applies to legal assistance in respect to State Parties. The obligations to cooperate under UNCAC must be taken into account in terms of the discretion exercised, by virtue of Section 1 para 3 AICCM (IRG).

German requests for legal assistance may be submitted to other State Parties pursuant to the Code of Criminal Procedure. They must be submitted (zero margin of discretion) where this is mandatory in the case in question (Section 160 of the Code of Criminal Procedure). If a German public prosecutor establishes that parallel proceedings are pending in another State, that is an important fact of relevance to the proceedings which

must be taken into account in the investigative measures. Naturally, the discretion exercised must also take full account of mechanisms including UNCAC.

Section 153c StPO allows for non-prosecution of offences committed abroad.

Germany cited the following legal provisions:

Code of Criminal Procedure (StPO)

Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

(1) The public prosecution office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

Section 153c

[Non-Prosecution of Offences Committed Abroad]

(1) The public prosecution office may dispense with prosecuting criminal offences

1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;

2. which a foreigner committed in Germany on a foreign ship or aircraft;

3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.

(2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence.

(3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution.

(4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.

(5) If criminal offences of the nature designated under section 74a subsection

(1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General.

Section 160 [Investigation Proceedings]

(1) As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.

ACT ON INTERNATIONAL COOPERATION IN CRIMINAL MATTERS (AICCM - IRG)

Part I.

Scope of Application

Section 1 Scope of Application

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 59 Admissibility of Assistance

(1) At the request of a competent authority of a foreign State, other legal assistance in a criminal matter may be provided.

(2) Legal assistance within the meaning of subsection (1) above shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Germany further clarified that for resolving issues of multiple jurisdiction through cooperation and consultation, the general clause for mutual legal assistance with other countries serves as the legal base (section 59 AICCM - IRG, as already mentioned, c.f. para. (1) thereof: "... other legal assistance in a criminal matter may be provided."). The duty to consult for the purpose of furthering the conduct of the investigations flows from the general principle of mandatory prosecution (Section 160 of the Code of Criminal Procedure, as cited before). As has become clear from the implementation of the cited EU Framework Decision that no further legislative bases are needed. The current German law already obliges prosecutors to consult and allows them to suspend and terminate proceedings, as appropriate.

The cooperation and consultation efforts may result in prosecution in one State and a dropping of charges or some other form of suspension of the investigations in the other state. It must be noted, though, that Article 42 para. 5 as well as the above-mentioned EU Framework Decision provide for consultation with a view to coordination only, not for reaching a binding agreement. It is a possibility, which is not barred by either instrument, that the competent prosecution authorities in the concerned states may ultimately choose to both continue with their proceedings. The issue of "ne bis in idem", if applicable, is a separate one and arises only after a conviction or a similar

decision has been handed down in one state.

(b) Observations on the implementation of the article

Germany indicated that it would consult with another State Party with a view to coordinating their action if Germany exercises jurisdiction over a conduct where an investigation, prosecution or judicial proceeding is being conducted by another State Party.

Paragraph 6 of article 42

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that its law contained a number of grounds for criminal jurisdiction, in Sections 3 to 9 of the German Criminal Code (StGB). Germany can be said to exercise additional domestic grounds as allowed by para. 6. In short, grounds for criminal jurisdiction under German law are:

- territoriality (including cases where only the participant to a crime, and not the principal offender, acts with a link to Germany),
- the flag principle,
- active and passive personality,
- surrogate adjudication (“aut dedere aut iudicare”),
- German legal interests (going beyond offences “against the State Party” as mentioned in Article 42, para. (2)(d)), and including a range of corruption-related offences in Section 5 of the German Criminal Code)
- international legal interests / universality (with a list of offences in Section 6 of German Criminal Code, including where provided so by international treaty, see no. 9 thereof).

Germany cited the following legal measures:

Criminal Code (StGB)

Section 3

Application to offences committed on German territory

German criminal law applies to offences committed on German territory.

Section 4

Application to offences committed on German ships and aircraft
Regardless of which law is applicable at the place where the offence was committed, German criminal law applies to offences committed on a ship or an aircraft which is entitled to fly the federal flag or to carry the national insignia of the Federal Republic of Germany.

Section 5

Offences committed abroad with specific domestic connection
Regardless of which law is applicable at the place where the offence was committed, German criminal law applies to the following offences committed abroad:

1. (repealed)
2. high treason (sections 81 to 83);
3. endangering the democratic state under the rule of law
 - a) in the cases under section 89, section 90a (1) and section 90b if the offender is a German national whose livelihood is based within the territorial scope of this statute and
 - b) in the cases under section 90 and section 90a (2);
4. treason and endangering external security (sections 94 to 100a);
5. offences against national defence
 - a) in the cases under section 109 and sections 109e to 109g and
 - b) in the cases under sections 109a, 109d and 109h if the offender is a German national whose livelihood is based within the territorial scope of this statute;
6. offences against personal liberty
 - a) in the cases under sections 234a and 241a if the offence is directed against a person who is a German national and that person's domicile or habitual residence is in Germany at the time of the offence,
 - b) in the cases under section 235 (2) no. 2 if the offence is directed against a person whose domicile or habitual residence is in Germany at the time of the offence and
 - c) in the cases under section 237 if the offender is a German national at the time of the offence or if the offence is directed against a person whose domicile or habitual residence is in Germany at the time of the offence;
7. violation of the business or trade secrets of a business which is physically located within the territorial scope of this statute or of an enterprise which has its seat therein, or of an enterprise which has its seat abroad and which is dependent on an enterprise which has its seat within the territorial scope of this statute and which forms a corporate group with the latter;
8. offences against sexual self-determination in the cases under section 174 (1), (2) and (4), sections 176 to 178 and section 182 if the offender is a German national at the time of the offence;
9. offences against life
 - a) in the cases under section 218 (2) sentence 2 no. 1 and (4) sentence 1 if the offender is a German national at the time of the offence and
 - b) in the other cases under section 218 if the offender is a German national at the time of the offence whose livelihood is based in Germany;
- 9a. offences against physical integrity
 - a) in the cases under section 226 (1) no. 1, in conjunction with (2), in the case of loss of the ability to procreate if the offender is a German national at the

time of the offence and

b) in the cases under section 226a if the offender is a German national at the time of the offence or if the offence is directed against a person whose domicile or habitual residence is in Germany;

10. false testimony, perjury and false declarations in lieu of an oath (sections 153 to 156) in proceedings pending before a court or another German authority within the territorial scope of this statute which has the authority to administer oaths or declarations in lieu of an oath;

10a. sports betting fraud and manipulation of professional sports competitions (sections 265c and 265d) if the offence relates to a competition which takes place in Germany;

11. offences against the environment under sections 324, 326, 330 and 330a which are committed within Germany's exclusive economic zone insofar as international conventions on the protection of the sea allow for their prosecution as criminal offences;

11a. offences under section 328 (2) nos. 3 and 4, (4) and (5), also in conjunction with section 330, if the offender is a German national at the time of the offence;

12. acts committed by a German public official or a person entrusted with special public service functions whilst on official business or in connection with official duties;

13. acts committed by a foreigner in the capacity as a public official or a person entrusted with special public service functions;

14. acts committed against public officials, persons entrusted with special public service functions or soldiers in the Federal Armed Forces in the discharge of their duties or in connection with their duties;

15. offences under sections 331 to 337 committed in public office if

a) the offender is a German national at the time of the offence,

b) the offender is a European official whose authority has its seat in Germany at the time of the offence,

c) the offence is committed in relation to a public official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces or

d) the offence is committed in relation to a European official or arbitrator who is a German national at the time of the offence, or a person deemed equal under section 335a who is a German national at the time of the offence;

16. taking of bribes by and giving of bribes to elected officials (section 108e) if

a) the offender is, at the time of the offence, a member of a German parliament or is a German national or

b) the offence is committed against a member of a German parliament or a person who is a German national at the time of the offence;

17. trafficking in human organs and tissue (section 18 of the Transplantation Act (Transplantationsgesetz)) if the offender is a German national at the time of the offence.

Section 6

Offences committed abroad against internationally protected legal interests
Regardless of which law is applicable at the place where they are committed,
German criminal law further applies to the following offences committed

abroad:

1. (repealed)
2. serious crimes involving nuclear energy, explosives and radiation under section 307 and section 308 (1) to (4), section 309 (2) and section 310;
3. attacks on air and maritime traffic (section 316c);
4. human trafficking (section 232);
5. unauthorised sale of narcotics;
6. dissemination of pornographic material under section 184a, section 184b (1) and (2) and section 184c (1) and (2), each also in conjunction with section 184d (1) sentence 1;
7. counterfeiting money and securities (sections 146, 151 and 152), counterfeiting guaranteed payment cards and blank Eurocheques (section 152b (1) to (4)) as well as the relevant preparatory acts (sections 149, 151, 152 and section 152b (5));
8. subsidy fraud (section 264);
9. offences which, based on an international agreement which is binding on the Federal Republic of Germany, are to be prosecuted even though they are committed abroad.

Section 7

Other offences committed abroad

- (1) German criminal law applies to offences committed abroad against a German national if the act is a criminal offence at the place of its commission or if that place is not subject to any criminal law jurisdiction.
- (2) German criminal law applies to other offences committed abroad if the act is a criminal offence at the place of its commission or if that place is not subject to any criminal law jurisdiction and if the offender
 1. was a German national at the time of the offence or became a German national after its commission or
 2. was a foreign national at the time of the offence, was found to be staying in Germany and, although extradition legislation would permit extradition for such an offence, is not extradited because no request for extradition is made within a reasonable period, is rejected or the extradition is not feasible.

Section 8

Time of offence

An offence is deemed to have been committed at the time when the offender or the participant acted or, in the case of an omission, was required to act. The time when the result occurs is irrelevant.

Section 9

Place of commission of offence

- (1) An offence is deemed to have been committed at every place where the offender acted or, in the case of an omission, was required to act or in which the result, if it is an element of the offence, occurs or was to have occurred as envisaged by the offender.
- (2) Acts of participation are not only committed at the place where the offence was committed, but also at every place where the participant acted or, in the case of an omission, was required to act or where, as envisaged by the participant, the offence was to have been committed. If the participant to an

offence committed abroad acted within the territory of the Federal Republic of Germany, German criminal law applies to the participation even if the act is not a criminal offence according to the law of the place of its commission.

(b) Observations on the implementation of the article

The reviewing experts observed that sections 3 to 7 of the Criminal Code establish the exercise of criminal jurisdiction as established in Germany.

IV. International cooperation

Article 44. Extradition

Paragraph 1 of article 44

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions relevant to the implementation of the provision under review.

Act on International Cooperation in Criminal Matters (AICCM) (IRG)

Section 3

Extradition for the Purpose of Prosecution or Enforcement

(1) Extradition shall not be granted unless the offence is an unlawful act

- 2) under German law or unless *mutatis mutandis* 3) the offence would also constitute an offence under German law.
- (2) Extradition for the purpose of prosecution shall not be granted unless the offence is punishable under German law by a maximum penalty of imprisonment of no less than one year, or unless *mutatis mutandis* the offence would be punishable by such a penalty under German law.
- (3) Extradition for the purpose of the enforcement of a sentence shall not be granted unless an extradition for the purpose of prosecution for the offence would be admissible and a custodial penalty is to be enforced. It shall not be granted unless it is to be expected that the period of the custodial penalty still to be served or the sum of the periods of custodial penalties still to be served is not less than four months.

Federal Constitutional Court, Second Senate, 2 BvR 1820/14 of 20 November 2014: “An extradition to ... for suspected crimes against property has as its pre-requisite a careful review of the ability to reconcile the extradition with the minimum standards enshrined in constitutional law.”

(b) Observations on the implementation of the article

The reviewing expert observed that the IRG identifies extraditable offences on the basis of a minimum penalty requirement of one year (sect. 3, para. 2).

Paragraph 2 of article 44

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions relevant to the implementation of the provision under review.

Act on International Cooperation in Criminal Matters (AICCM) (IRG)

Section 81

Extradition for the Purpose of Prosecution and Enforcement S. 3 shall apply under the proviso that

...

4. double criminality shall not need to be established if the offence on which the request is based is under the law of the requesting State punishable by a custodial sanction with a maximum term of no less than three years and is listed in one of the categories of offences listed in article 2 (2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190/1 of

18 July 2002).

Germany further clarified that the exception to the dual criminality requirement applies for extradition on the basis of the European Arrest Warrant, i.e. between Germany and another Member State of the European Union (Part. VIII of the AICCM). Among the listed categories of offences are, inter alia and as defined by the laws of the issuing Member State: participation in a criminal organisation; corruption; fraud; laundering of the proceeds of crime; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; forgery of administrative documents and trafficking therein.

Germany further provided the following citation from Federal Constitutional Court, Second Senate, 2 BvR 2236/04 of 18 July 2005:

“The procedural and substantive pre-requisites for the extradition were given, and there were no obstacles preventing the extradition, it was said. In particular, the double criminality pursuant to section 81 (1) No. 4 IRG did not need to be reviewed since the deed on which the request was based violated a penal provision under Spanish law and was among the offences listed in the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Accordingly, the argument went, the liability to punishment of the complainant under German law was not relevant.

84. ... The prosecuted person's confidence in his or her own legal system is especially protected by Article 16.2 of the Basic Law in conjunction with the principle of the rule of law where the act on which the request for extradition is based has been committed in whole or in part on German territory, aboard German vessels or aircraft or in places that are under German sovereign power. Charges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens.

94. ... In any case as regards offences with a significant domestic connecting factor within the meaning that has been set out, the legislature had to create the possibility, as regards the constituent elements of offences, and the legal obligation of refusing the extradition of Germans. 122. ... The partial waiver of the principle of double criminality (§ 81 no. 4 of the Law on International Judicial Assistance in Criminal Matters) is also a central decision of principle by the legislature, which is, however, predetermined by the Framework Decision. It can remain undecided whether it is compatible with the required level of fundamental-rights protection not to make a Member State's decision that an act is not punishable the basis of the mechanism of mutual recognition, but instead the decision in favour of punishability. Because as concerns cases with a domestic connecting factor, this in any case is not decisive because the legislature can incorporate the Framework Decision into national law pursuant to the constitutional guidelines."

(b) Observations on the implementation of the article

The reviewing expert observed that according to section 81 of the German Act on International Cooperation in Criminal Matters, the exception to the dual criminality requirement applies only within the European Union.

Paragraph 3 of article 44

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that the possibility of extraditing for “accessory offences” was contained in Section 4 no. 1 of the Act on International Cooperation in Criminal Matters (AICC). It points to Sections 3(2), (3) (which in principle sets thresholds of a abstractly possible prison term of one year or more, if extradition for prosecution, and of a concrete remainder of at least four months of prison, if extradition for enforcement of a sentence), and declares those thresholds irrelevant for the “accessory offences“, if at least one “principal offence” satisfies them.

In terms of practice, it is remarked, though, that it is inconceivable how extradition from Germany could fail because of the one-year minimum. The standard sentencing bracket even for the standard offences is usually up to five years of imprisonment (such as fraud, embezzlement, tax evasion: up to five years, some bribery offences: up to three years, others: up to five years), i.e. more than the required one-year term und therefore resulting in extraditability. Only four offences are discernable from the German Criminal Code which carry a lower maximum of one year (up to six months, see Sections 107b - Forging of election documents, 160 - Inciting someone to commit perjury when not under oath, but if under oath: up to 2 years, 184f - a specific prostitution offence, 285 - participation in public gambling). It is submitted that they will appear rarely relevant in the context of the Convention, and it is emphasized that extradition will only fail if the request aims at prosecution for only one or several of those.

Germany cited the following legal provisions relevant to the implementation of the provision under review.

Act on International Cooperation in Criminal Matters (AICCM - IRG)
Section 4
Extradition for Additional Offences

If an extradition request may be granted, it may additionally be granted for another offence even if with respect to the latter
(1) the conditions under s. 3(2) or (3) do not apply, or
(2) the conditions pursuant to ss. 2 or 3(1) do not apply because the offence is punishable only by a penalty according to s. 1(2).

Germany further provided the following citation from Karlsruhe Higher Regional Court, First Criminal Division, 1 AK 85/09 of 28 December 2009:

“The lack of dual criminality does not contravene the permissibility of an extradition based on a European arrest warrant where the matter concerns an accessory extradition.”

(b) Observations on the implementation of the article

The reviewing experts observed that accessory offences are extraditable based on sect. 4 of AICCM – IRG.

Paragraph 4 of article 44

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 3

Extradition for the Purpose of Prosecution or Enforcement

(1) Extradition shall not be granted unless the offence is an unlawful act under German law or unless mutatis mutandis the offence would also constitute an offence under German law.

(b) Observations on the implementation of the article

Germany confirmed that the Convention offences are deemed to be included as an extraditable offence in extradition treaties with other States Parties and the Convention can be considered as a legal basis for extradition (sect. 1, para. 3, of the IRG), and that Convention can be also considered as a legal basis for extradition.

Paragraph 5 of article 44

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that it does not make extradition conditional on the existence of a treaty.

(b) Observations on the implementation of the article

Extradition in Germany is not conditional on the existence of a treaty.

Paragraph 7 of article 44

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that UNCAC could be relied on as a legal base according to section 1 para. 3 AICCM - IRG as cited above.

(b) Observations on the implementation of the article

Germany clarified that all the Convention offences are extraditable with other States parties per sect. 1, para. 3 of the IRG

Paragraph 8 of article 44

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM) (IRG)

Section 3

Extradition for the Purpose of Prosecution or Enforcement ...

(2) Extradition for the purpose of prosecution shall not be granted unless the offence is punishable under German law by a maximum penalty of imprisonment of no less than one year, or unless mutatis mutandis the offence would be punishable by such a penalty under German law.

(3) Extradition for the purpose of the enforcement of a sentence shall not be granted unless an extradition for the purpose of prosecution for the offence would be admissible and a custodial penalty is to be enforced. It shall not be granted unless it is to be expected that the period of the custodial penalty still to be served or the sum of the periods of custodial penalties still to be served is not less than four months.

Germany further indicated that it had provided extradition in 2012 as follows:

1449 new requests, 1570 completed requests, 1556 completed requests (transfer included), 1303 granted requests, 186 refused requests and 77 other completion (eg request was drawn).

Grounds for refusal (see [Ratsdokument 7196/3/13 REV 3 vom 24. Juli 2012, Annex 1](#),:

- “- The requested person was not in Germany: 5
- The European arrest warrant did not satisfy the formal requirements: 6
- Under the law of the requested Member State, the offence was not punishable by a maximum custodial sentence of at least 12 months: 1
- The requested person had already been convicted of the same offence in

another Member State by a judgment having the force of res judicata: 1
(custodial sentence of at least 4 months)

- Execution was requested on the basis of a judgment in absentia without the admissible conditions pursuant to Article 5 of the Framework Decision having been fulfilled: 17

- Prosecution or enforcement of the sentence was statute-barred under German law: 16

- There was no double criminality for an offence not listed in Article 2(2) of the Framework Decision: 11

- Extradition would have violated European public policy (ordre public): 3

- The requested person was being prosecuted in Germany for the same offence: 3

- It could not be presumed that the requesting State would grant a similar request from Germany (non-reciprocity): 0

(b) Observations on the implementation of the article

Conditions applicable to extradition are contained in the German Act on International Cooperation in Criminal Matters (AICCM) (IRG).

Paragraph 9 of article 44

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM) (IRG)

Section 16 AICCM

Provisional Extradition

Detention (1) [Omitted]

(2) The extradition arrest warrant shall be lifted if the person sought has been in detention from the day of his apprehension or arrest for a period of two months for the purpose of extradition and an extradition request accompanied by the extradition documents has neither been received by the authorities mentioned in s. 74 nor by any other authorities competent to receive the request and documents. If a non-European State has requested the order for provisional extradition detention, the period shall be three months.

(3) After receipt of the extradition request and extradition documents, the Oberlandesgericht shall decide without undue delay whether the detention is to be upheld.

There is also the possibility of simplified extradition:

Section 41 AICCM Simplified Extradition

(1) Upon the request of a competent authority of a foreign State for extradition or arrest for the purpose of extradition, the extradition of a person sought against whom an extradition arrest warrant has been issued may be granted without formal extradition proceedings provided the person sought, after being advised of his rights, consents to the simplified extradition and his consent has been entered into the court record.

(2) In the case of subsection (1) above the requirements of s. 11 need not be complied with if the person sought after being advised of his rights consents and his consent has been entered into the court record.

(3) The consent cannot be revoked.

(4) On the application by the public prosecution service at the Oberlandesgericht the judge at the Amtsgericht shall advise the person sought of the possibility of simplified extradition and its legal consequences (subsections (1) to (3) above) and record his declaration. The judge at the Amtsgericht in whose district the person sought is located shall have jurisdiction.

German courts do not conduct an inquiry into the merits of the foreign case, unless there are grounds that warrant so.

Act on International Cooperation in Criminal Matters (AICCM) (IRG)

Section 10

Extradition Documents

(1) Extradition shall not be granted unless an arrest warrant or a document with corresponding legal force or an enforceable decision ordering detention from a competent authority of the requesting State as well as a description of the applicable laws have been submitted in relation to the offence. If extradition is requested for the purpose of prosecution of multiple offences, a document from the competent authorities of the requesting State describing the charges made against the person sought shall suffice with regard to additional offences and replace an arrest warrant or a document with corresponding legal force.

(2) If special circumstances justify a review as to whether there are reasonable grounds to believe that the person sought has committed the offence with which he is charged, extradition shall be not granted unless a description of the facts showing probable cause for the commission of the offence has been submitted.

German courts do not conduct an inquiry into the merits of the foreign case, unless there are grounds that warrant so:

Cologne Higher Regional Court, Second Criminal Division, 6 AuslA 84/11-

58, 6 Ausl A84/11 -
58 of 6 October 2011:

For the most part, extradition proceedings are governed by procedural law. This means in particular that as a matter of principle, the suspicion of a crime having been committed is not reviewed. In this regard, section 10 (2) IRG includes an exemption provision for extradition relations that are in place without a corresponding treaty having been concluded. For extradition relations that are governed by a treaty, and to which the European Convention on Extradition applies, section 10 (2) IRG is not applicable unless the requesting state is abusing its claim to extradition or unless the particular circumstances of the case give rise to the concern that minimum standards of international law will be violated in the course of the proceedings following the extradition. The same must apply as well, and all the more so, to extradition relations within the area of applicability of the Act Transposing into National Law the Framework Decision on the European Arrest Warrant (EuHbG).

Frankfurt Higher Regional Court NStZ-RR 2011, 341-342:

“1. Section 81 No. 4 IRG in conjunction with Art. 2 (2) of the Framework Decision on the European arrest warrant, which has evolved from the principle of mutual recognition and the far-reaching declarations of mutual trust by the states involved that it entailed, serves to limit section 83a IRG and to consciously waive dual criminality inasmuch as facts and circumstances are brought before the court that may be allocated to the offence categories pursuant to Art. 2 (2) of the Framework Decision on the European arrest warrant.(at margin no. 11)
2. For this reason, sending the national regulations as part of the European arrest warrant may be dispensed with where said offence categories are concerned, since in these cases dual criminality is not reviewed.”

(b) Observations on the implementation of the article

Simplified extradition is possible provided that the person sought has given his or her consent (sect. 41 of the IRG).

| Paragraph 10 of article 44

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 16

Provisional Extradition Detention

(1) Under the conditions of s. 15 extradition detention may be ordered prior to receipt of the extradition request, if

1. a competent authority of the requesting State so requests ; or
2. if there is a strong reason to believe that a foreigner, based on ascertainable facts, may have committed an offence which could lead to his extradition.

(2) The extradition arrest warrant shall be lifted if the person sought has been in detention from the day of his apprehension or arrest for a period of two months for the purpose of extradition and an extradition request accompanied by the extradition documents has neither been received by the authorities mentioned in s. 74 nor by any other authorities competent to receive the request and documents. If a non-European State has requested the order for provisional extradition detention, the period shall be three months.

(3) After receipt of the extradition request and extradition documents, the Oberlandesgericht shall decide without undue delay whether the detention is to be upheld.

Section 18

Measures to Determine the Whereabouts of the Person Sought

If an extradition request has been submitted and the location of the person sought is unknown, measures necessary for determining the whereabouts and apprehension of the person sought may be taken. No special request is required for specific measures to be ordered. The public prosecution service at the Oberlandesgericht shall have jurisdiction to issue and advertise an order for his apprehension. The provisions of s. 9(a) of the Strafprozessordnung shall apply mutatis mutandis.

Section 19 Provisional Arrest

If the conditions for an extradition arrest warrant are fulfilled the public prosecution service and the police may provisionally arrest the person sought. Under the requirements of s. 127(1) no. 1 of the Strafprozessordnung everyone shall have the right to make a citizen's arrest.

Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the Länder in Criminal Police Matters

Article 1

Section 15 Powers to issue wanted notices in international cooperation

(1) Upon receipt of a request issued with a view to criminal prosecution or enforcement of a sentence by a competent authority of a foreign country or an international criminal court established by an act legally binding for the Federal Republic of Germany, the Federal Criminal Police (BKA) may

1. issue a wanted notice for the arrest or location of a person if it appears that this person may be committed to custody pending extradition or transfer,
2. issue wanted notices for the location of other persons,
3. issue discreet checks alerts for persons or property items and

4. conduct proceedings to establish the identity of a person.

Germany further noted that it considered INTERPOL notices as a basis for provisional arrest.

(b) Observations on the implementation of the article

The reviewing experts observed that provisional measures are covered in sections 16–19 of the IRG. International Criminal Police Organization (INTERPOL) notices can serve as a sufficient basis for provisional arrests.

Paragraph 11 of article 44

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that the principle "aut dedere aut iudicare" is entrenched in section 7 para. 2 StGB (German Criminal Code), in respect of non-extradition of German citizens (cf. Art. 16 GG Basic Law for the Federal Republic of Germany). This is complemented by provisions of the StPO (German Code of Criminal Procedure) which would compel German prosecution authorities to investigate (section 152 StPO), but also allow for refraining from completing the German criminal proceeding if the case is prosecuted abroad.

Germany cited the following legal provisions.

Basic Law for the Federal Republic of Germany (GG-the Constitution)

Article 16 [Citizenship – Extradition]

(1) No German may be deprived of his citizenship. Loss of citizenship may occur only pursuant to a law and, if it occurs against the will of the person affected, only if he does not become stateless as a result.

(2) No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 80

Extradition of German nationals

(1) Extradition of a German national for the purpose of criminal prosecution is only permissible where

1. it is guaranteed that the requesting Member State, after imposing a final sentence of imprisonment or other sanction, will offer to return the person pursued on that person's request for the purpose of enforcement within the area of application of this Act and

2. the offence has a substantial link to the requesting Member State.

An offence generally has a substantial link to the requesting Member State if the entire offence or essential parts of the offence were committed in that Member State's sovereign territory and at least essential parts of the result occurred there, or if the offence is a serious crime with a typical cross-border dimension which was committed at least in part in that Member State's sovereign territory.

(2) If the conditions of subsection (1) sentence 1 no. 2 are not met, extradition of a German national for the purpose of criminal prosecution is only permissible if

1. the conditions of subsection (1) sentence 1 no. 1 are met and

2. the offence has a substantial link to Germany and

3. the offence is also an unlawful act under German law which fulfils the elements of a criminal provision or would also be such an act under German law in the case of analogous conversion of the facts, and, after weighing up the various concrete, contradictory interests, the person pursued's legitimate expectation in not being extradited does not prevail.

An offence generally has a substantial link to Germany if the entire offence or essential parts of the offence were committed within the area of application of this Act and at least essential parts of the result occurred there. When considering the various interests, the criminal charge, the practical requirements and possibilities in respect of effective criminal prosecution, and the person pursued's constitutionally protected interests are specifically to be weighed up and set in proper relation to one another, giving due consideration to the goals associated with the creation of a European judicial area. Where a public prosecution office or a court has given a decision to terminate or not to institute criminal proceedings in Germany for the offence which is the subject matter of the request for extradition, this decision and its reasoning are to be included when considering the various interests; the same applies accordingly where a court has opened main proceedings or has issued a summary penalty order.

(3) Extradition of a German national for the purpose of criminal prosecution is only permissible if the person pursued consents, following instruction, and that consent is declared before and placed on record by a judge. Section 41

(3) and (4) applies accordingly.

(4) (repealed)

Criminal Code (StGB)

Section 7

Offences committed abroad-other cases ...

(2) German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality

is not subject to any criminal law jurisdiction, and if the offender:
1. was German at the time of the offence or became German after the commission;

Code of Criminal Procedure (StPO)

Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

(1) The public prosecution office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

Section 153c

[Non-Prosecution of Offences Committed Abroad]

(1) The public prosecution office may dispense with prosecuting criminal offences

1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;

2. which a foreigner committed in Germany on a foreign ship or aircraft;

3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.

(2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence.

(3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution. (4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.

(5) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General.

(b) Observations on the implementation of the article

German citizens generally cannot be extradited pursuant to article 16 of the GG. However, under the European Arrest Warrant, extradition of German citizens is possible on the condition that a person will be returned to Germany if he or she so wishes, for the purpose of enforcing the sentence (sect. 80 of the IRG; art. 16, para. 2, of the GG). The principle of *aut dedere aut judicare* is applied pursuant to section 7, paragraph 2 of the StGB and section 152 of the StPO).

Paragraph 12 of article 44

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 80

Extradition of German Citizens

(1) Extradition of a German national for the purpose of criminal prosecution is only permissible where

1. it is guaranteed that the requesting Member State, after imposing a final sentence of imprisonment or other sanction, will offer to return the person pursued on that person's request for the purpose of enforcement within the area of application of this Act and

2. the offence has a substantial link to the requesting Member State.

An offence generally has a substantial link to the requesting Member State if the entire offence or essential parts of the offence were committed in that Member State's sovereign territory and at least essential parts of the result occurred there, or if the offence is a serious crime with a typical cross-border dimension which was committed at least in part in that Member State's sovereign territory.

Germany further provided a citation from the Federal Constitutional Court, Second Senate, 2 BvR 2236/04 of 18 July 2005:

Guiding principle

1. [Art 16 GG](#) warrants as a basic rights, by its prohibition of any deprivation of citizenship and of extradition, the special ties of citizens to the legal order based on the principle of liberty, which they endorse and to which they contribute. It is in keeping with the relationship of a citizen to a democratic society based on the principle of liberty that the citizen cannot, as a matter of principle, be expelled from this community.

3. In signing into law the Act Transposing into National Law the Framework Decision on the European Arrest Warrant (EuHbG), the legislator was under obligation to implement the objective of the Framework Decision such that the restriction of the basic right to be free from extradition is proportionate. In particular, the legislator is to ensure, beyond observing the guarantee as to the essence of a basic right not being affected, that any interference with the scope of protection governed by [Art 16 \(2\) GG](#) is effected with due care. In so doing, it must take into account that the prohibition of extradition is precisely intended to protect the principles of legal certainty and of the protection of trust for any German affected by an extradition.

4. The trust of a person whose extradition is being sought in his own legal order is especially protected by [Art 16 \(2\) GG](#) in conjunction with the principle of a state governed by the rule of law in those cases in which the act on which the extradition request is based is closely tied to Germany.

In 2014 39 German nationals were surrendered on the basis of the European arrest warrant. (59 European arrest warrants had been executed against German nationals). In two cases extradition was refused because of the lack of assurances to return an own national/ or a foreigner with residence in Germany for enforcement (cf. Art. 5 Framework Decision).

(b) Observations on the implementation of the article

Germany allows extradition of its nationals upon the condition that the person will be returned to Germany to serve the sentence imposed per sect. 80(1) of the IRG.

| Paragraph 13 of article 44

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that the enforcement of foreign decisions depriving of liberty, including the transfer for such purpose, is possible if the requirements of section 48 AICCM (IRG) et seq. are fulfilled (in addition the provisions 84 to 85f apply to cases within the EU on the basis of the Framework Decision on Custodial Sentences.):

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 48 Principle

For criminal proceedings assistance may be provided through enforcement of a penalty or any other sanction imposed with final and binding force in a foreign country. Part IV of this Law shall also apply to requests for the enforcement of an order for confiscation or deprivation, made by a court exercising other than criminal jurisdiction in the requesting State if the order is based on a punishable offence.

Section 49

Additional Prerequisites for Admissibility of Assistance (1) The enforcement shall not be admissible unless

1. a competent authority of the foreign State submitting the complete, legally binding and enforceable decision has requested it;
2. in the proceedings on which the foreign decision is based the convicted person had an opportunity to be heard and to present an adequate defence, and the sanction has been imposed by an independent court or, in the case of a fine, was imposed by an authority whose decision may be appealed to an independent court;
3. under German law notwithstanding possible procedural obstacles and, if necessary *mutatis mutandis*, a criminal penalty, measure of rehabilitation and incapacitation or a regulatory fine could have been imposed in respect of the offence on which the foreign judgment is based or, where enforcement of an order for confiscation or deprivation is requested, such an order could have been made, notwithstanding section 73(1) 2nd sentence of the Strafgesetzbuch;
4. a decision of the kind mentioned in s. 9 no. 1 has been made, unless the enforcement of an order for confiscation or deprivation is requested and such an order could be made independently under s. 76 a of the Strafgesetzbuch;
5. the statute of limitations for the enforcement under German law has not lapsed or would not have lapsed *mutatis mutandis*; the above notwithstanding the enforcement of an order for confiscation or deprivation shall be admissible if
 - a) German criminal law does not apply to the offence on which the order is based or
 - b) such an order could be made *mutatis mutandis* by analogous application of s. 76 a(2) no. 1 of the Strafgesetzbuch.

(2) If a custodial sanction has been imposed in a foreign State and the convicted person is located there, enforcement shall not be admitted unless the convicted person, after having been advised, consented and his consent was entered into the record of a court in the requesting State or the consent was declared before a German consular career official empowered to certify

legally relevant declarations. The consent cannot be revoked.

(3) If German law does not recognise any type of sanction corresponding to the sanction imposed in the foreign State, enforcement shall not be admissible.

(4) If in the foreign order for confiscation or deprivation a decision has been made concerning the rights of third parties, it shall be binding unless

a) the third party had not been given sufficient opportunity to defend their rights, or

b) the decision is incompatible with a German civil court decision issued in the same matter or c) the decision relates to third party rights to real estate located on German territory or to a real estate rights; third party rights shall also include priority notices⁴).

(5) Orders depriving of or suspending a right, or ordering prohibitions or the loss of a capacity, shall extend to German territory if so provided for in an international agreement approved by law in accordance with Article 59(2) of the Grundgesetz.

Section 56

Granting Assistance

(1) Legal assistance shall not be granted unless the foreign decision has been declared enforceable.

(2) The decision regarding legal assistance shall be notified to the Bundeszentralregister. S. 55(3) 2nd-4th sentences shall apply mutatis mutandis.

(3) If upon request the enforcement of a fine or a sentence of imprisonment is granted, the offence may no longer be prosecuted under German law.

(4) The granting of a request for legal assistance seeking the enforcement of an order for confiscation or deprivation shall be equivalent to a final order and decision within the meaning of ss. 73, 74 of the Strafgesetzbuch. S. 493 of the Strafprozessordnung shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts observed that the enforcement of foreign sentences is possible as long as the prescribed conditions are met (sects. 48 and 49 of the IRG).

Paragraph 14 of article 44

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Germany further clarified that section 77(1) of the Act on International Cooperation in Criminal Matters (AICCM) incorporated the various domestic codes of procedure, including the procedural rights thereunder, into the AICCM - IRG. It awards all the rights and guarantees provided by German domestic law in criminal procedure. Relevant standards are mainly contained in the Code of Criminal Procedure as well as in other legislation (Youth Courts Law, Fiscal Code, Act on Regulatory Offences). The provisions of the AICCM-IRG governing the rights during the extradition procedure mirror the provisions under the Code of Criminal Procedure and also contain a number of additional rules that are specific to the extradition procedure.

The fair trial and right to liberty provisions in Articles 103 and 104 and other articles of the German constitution, the Basic Law (Grundgesetz) and the corresponding provisions of the European Charter of Human Right as well as the [International Covenant on Civil and Political Rights](#) and other human rights instruments underline these domestic standards and apply the same to extradition.

Basic Law (GG)

Article 103

[Fair trial]

(1) In the courts every person shall be entitled to a hearing in accordance with law.

...

Article 104

[Deprivation of liberty]

(1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.

(2) Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.

(3) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.

(4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty.

German Code of Criminal Procedure (StPO)

Section 134

[Bringing the Accused Before the Court]

(1) It may be ordered that the accused be brought before the court immediately if reasons exist which would justify the issuance of a warrant of arrest.

(2) The order shall precisely describe the accused and the criminal offence with which he is charged; the reason for his being brought before the court shall be indicated.

Section 135

[Immediate Examination]

The accused shall be brought before the judge without delay and shall be examined by him. He shall not be kept in custody by virtue of the order for longer than the end of the day following the moment he was first brought before the court.

Section 136

[First Examination]

(1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with defence counsel of his choice. He shall further be advised that he may request evidence to be taken in his defence and, under the conditions set out in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3). In appropriate cases the accused shall also be informed that he may make a written statement, and of the possibility of perpetrator-victim mediation.

(2) The examination shall give the accused an opportunity to dispel the grounds for suspecting him and to assert the facts which speak in his favour.

(3) At the first examination of the accused, consideration shall also be given to ascertaining his personal situation.

Section 136a

[Prohibited Methods of Examination]

(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.

(2) Measures which impair the accused's memory or his ability to understand shall not be permitted.

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 20

Notification

- (1) Once the person sought is provisionally arrested he must be informed of the reason for his arrest.
- (2) If an extradition arrest warrant has been issued the person sought must immediately be informed about it. The person sought shall receive a copy.

Section 21

Procedure after Arrest Pursuant to an Extradition Arrest Warrant

- (1) A person sought who is apprehended on the basis of an extradition arrest warrant shall be brought without delay, but no later than on the day following his apprehension, before a judge of the nearest Amtsgericht.
- (2) The judge at the Amtsgericht shall examine the person sought immediately after he is brought before him but no later than on the day following his apprehension, about his personal circumstances and especially his citizenship. He shall advise him that he may at any time during the proceedings have the assistance of counsel (s. 40) and that he is free to make or not to make any statements regarding the charges made against him or to remain silent. He shall ask him whether and if so on what grounds he wishes to object to the extradition, to the extradition arrest warrant or to its execution. In the case of s. 16(1) no. 2 this examination shall also include the object of the charges. In all other cases, those statements which the person sought makes voluntarily in that context are to be entered into the court record.
- (3) If the examination shows that
 1. the detainee is not the person identified in the extradition arrest warrant;
 2. the extradition arrest warrant has been rescinded; or
 3. the execution of the extradition arrest warrant has been stayed,the judge at the Amtsgericht shall order his release.
- (4) If the extradition arrest warrant has been rescinded or its execution stayed, the judge at the Amtsgericht shall order the person sought to be detained pending the decision by the Oberlandesgericht, if
 1. the requirements for a new extradition arrest warrant on the same charges exist or
 2. reasons for ordering the execution of the extradition arrest warrant exist.The public prosecution service at the Oberlandesgericht shall without undue delay request a decision by the Oberlandesgericht.
- (5) If the person sought raises other objections to the extradition arrest warrant or to its execution which are not manifestly unfounded, or if the judge at the Amtsgericht has reservations against the continuation of the detention, he shall immediately inform the public prosecution service at the Oberlandesgericht in the most expeditious manner. The public prosecution service at the Oberlandesgericht shall without undue delay request a decision by the Oberlandesgericht.
- (6) If the person sought does not raise any objections to the extradition, the judge at the Amtsgericht shall advise him about the possibility of a simplified extradition and its legal consequences (s. 41). He shall then record his statements.
- (7) The decision of the judge at the Amtsgericht shall not be subject to appeal. The public prosecution service at the Oberlandesgericht may order the release of

the person sought.

Section 22

Procedure after Arrest

- (1) A person sought who is arrested shall be brought without delay, but no later than the day following his arrest, before the judge of the nearest Amtsgericht.
- (2) The judge at the Amtsgericht shall examine the person sought immediately after he is brought before him, but no later than on the day following his apprehension, about his personal circumstances and especially his citizenship. The judge at the Amtsgericht shall advise him that he may at any time during the proceedings have the assistance of counsel (s. 40) and that he is free to make any statements regarding the charges made against him, or to remain silent. He shall ask him whether and if so on what grounds he wishes to object to the extradition or to his arrest. S. 21(2) 4th sentence shall apply mutatis mutandis.
- (3) If the examination shows that the detainee is not the person to whom the request or the facts within the meaning of s. 17(2) no. 4 refer, the judge shall order his release. Otherwise, the judge at the Amtsgericht shall order that the person sought be detained pending the decision by the Oberlandesgericht. S. 21(4) 2nd sentence, (6) and (7) shall apply mutatis mutandis.

Section 23

Decision on Objections Raised by the Person Sought

The Oberlandesgericht shall rule on any objections raised by the person sought against the extradition arrest warrant or against its execution.

Section 24

Repeal of Extradition Arrest Warrant

- (1) The extradition arrest warrant shall be repealed as soon as the requirements for the provisional extradition detention or for the extradition detention no longer exist or a decision denying extradition has been issued.
- (2) The extradition arrest warrant shall also be repealed if the public prosecution service at the Oberlandesgericht applies for its repeal. Simultaneously with the application, the public prosecution service shall order the release of the person sought.

Section 25

Stay of Execution of Extradition Arrest Warrant

- (1) The Oberlandesgericht may stay the execution of the extradition arrest warrant if less intrusive measures will ensure that the purpose of the provisional extradition detention or of the extradition detention is served.
- (2) S. 116(1) 2nd sentence, (4), ss. 116 a, 123 and 124(1), (2) 1st sentence, (3) of the Strafprozessordnung as well as s. 72(1), (4) 1st sentence of the Jugendgerichtsgesetz shall apply mutatis mutandis.

Section 26

Review of Detention

- (1) If the person sought is held in extradition detention, the Oberlandesgericht shall decide on its continuation provided the person sought has been detained for a total of two months from the day of his apprehension or his arrest or the day of the last decision concerning the continuation of the detention for the purpose of

extradition. The review shall be repeated every two months. The Oberlandesgericht may order that the review take place within shorter periods of time.

(2) If the person sought is provisionally detained in temporary placement in an approved school (s. 71(2) of the Jugendgerichtsgesetz), subsection (1) above shall apply mutatis mutandis.

Section 27

Execution of Detention

(1) The provisions on the execution of custody pending trial and s. 119 of the Strafprozessordnung shall apply mutatis mutandis to provisional extradition detention, to extradition detention and to detention pursuant to an order issued by a judge at the Amtsgericht with regard to the execution of detention pending further investigation.

(2) The public prosecution service at the Oberlandesgericht shall designate the facility in which the person sought is to be kept.

(3) The presiding judge of the appropriate senate of the Oberlandesgericht shall issue the necessary judicial orders.

Section 28

Examination of the Person Sought

(1) Upon receipt of the extradition request, the public prosecution service at the Oberlandesgericht shall apply to the Amtsgericht in whose district the person sought is located for his examination.

(2) The judge at the Amtsgericht shall examine the person sought about his personal circumstances and especially his citizenship. He shall advise him that he may at any time during the proceedings have assistance of counsel (s. 40) and that he is free to make any statements regarding the charges made against him or to remain silent. He shall ask him whether and if so on what grounds he wishes to object to the extradition. The person sought shall be interrogated with regard to the object of the charges only if the public prosecution service at the Oberlandesgericht has applied for it. Other than that, the statements concerning the subject matter of the charges volunteered by the person sought shall be entered into the court record.

(3) If the person sought does not raise any objections to the extradition, the judge at the Amtsgericht shall advise him about the possibility of a simplified extradition and its legal consequences (s. 41) and record any declarations of the person sought.

Germany further clarified that the Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST), nos. 40 to 42 and 49, inter alia, explicitly elaborate on the procedure to be followed for extradition, including the procedural rights. A case by the German Constitutional Court (decision of 16 September 2010, file no. 2 BvR 1608/07) illustrates that the extradition procedure must match up with the national standards for the deprivation of liberty and judicial review. The Court held that the limited judicial review under Section 22(3), second sentence of the AICCM, must be applied in a way that, in spite of its wording, allows the judge to review the grounds for detention, as he or she would be mandated to do in a domestic arrest warrant procedure.

(b) Observations on the implementation of the article

The reviewing experts observed that the fair treatment of the persons whose extradition is sought is ensured through section 77 of the IRG.

Paragraph 15 of article 44

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 6

Political Offences, Political Prosecution ...

(2) Extradition shall not be admissible if there is serious cause to believe that the person sought if extradited would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his situation would be made more difficult for one of these reasons.

Section 73

Limitations on Assistance (Ordre Public)

Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system.

Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.

Germany further cited Karlsruhe Higher Regional Court, First Criminal Division 1 AK 68/08 of 8 December 2008:

An obstacle preventing extradition which will most likely contravene the permissibility of the extradition of the person whose extradition is being sought to ... (section 15 (2) IRG) results, in the instant case, from the fact that, should the person whose extradition is being sought in fact be extradited, he cannot count on fair proceedings (section 73, first sentence, IRG). As the Appeals Chamber of the International Criminal Tribunal for ... has established in its decision of 8 October 2008 in the matter of ... (Case No. ICTR-97-36- R 11 bis) regarding the petition, which it had refused, to transfer criminal proceedings being pursued before said Tribunal to the national judiciary of ..., following a prior decision and order by the

Criminal Division III of the International Criminal Tribunal for of 28 May 2008, it is not assured that criminal proceedings pursued in will be compliant with the rule of law, in any case since it is to be considered unlikely that any witness for the defence that the person whose extradition is being sought might potentially name in such court proceedings, be they located within ... or abroad, would ever appear at a main hearing since they had to reckon with intimidation, threats, harassment, torture, arrest, and death. Moreover, the principle of equality of arms would be violated by the fact that the majority of the witness for the defence would have to be examined by video conference, whereas most of the witnesses for the prosecution would be appearing in person to testify.

(b) Observations on the implementation of the article

The reviewing experts observed that valid reasons for refusal to extradite had included discrimination on the grounds of race, religion, citizenship, association with a certain social group or political beliefs (sect. 6 of the IRG).

Paragraph 16 of article 44

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that the Act on International Cooperation in Criminal Matters (AICCM) is silent on fiscal matters as no such exception to extradition or mutual legal assistance exists (it contains, e.g., specific provisions on military and political offenses). Fiscal offences are treated as any other general crimes by the AICCM, and even were there would theoretically be a discrepancy, the Convention would supersede this.

Germany cited the following legal provision.

Act of International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

(b) Observations on the implementation of the article

The reviewing experts observed that the Act on International Cooperation in Criminal Matters (AICCM) is silent on fiscal matters as no such exception to extradition or mutual legal assistance exists. The Convention's requirements would apply directly via section 1 of the AICCM – IRG.

Paragraph 17 of article 44

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that the Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST - Number 18 Supplementation) oblige all competent authorities to consult with the requesting state if the request cannot be executed immediately.

Germany cited the following legal provisions.

The Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST)

Number 18 Supplementation

Where the granting of legal assistance is contravened by a remediable obstacle, the requesting state is to be given the opportunity to supplement the request.

(b) Observations on the implementation of the article

The reviewing experts observed that the Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST) oblige all competent authorities to consult with the requesting state if the request cannot be executed immediately.

Paragraph 18 of article 44

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

Germany referred to the following agreements it had concluded with other States on extradition matters:

Bilateral:

Anguilla:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes)

from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Australia:

Treaty of 14 April 1987 between Australia and the Federal Republic of Germany concerning Extradition.

Bahamas:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Bermuda:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

British Virgin Islands:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Canada:

Treaty of 11 July 1977 between the Federal Republic of Germany and Canada concerning Extradition, amended by the Supplementary Treaty of 13 May 2002

Dominica:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Falkland Islands (Malwinen):

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Fiji:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Ghana:

Agreement of June 8/10, 1966 between the Government of the Federal Republic of Germany and the Government of the Republic of Ghana on the extradition of fugitive lawbreakers

Grenada:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Hong Kong:

Agreement of May 26, 2006 between the Government of the Federal Republic of Germany and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the transfer of fugitive offenders

India:

Treaty of 21 June 2001 between the Federal Republic of Germany and the Republic of India on Extradition.

Jamaica:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5,

1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Cayman Islands:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Kenya:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Lesotho:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Malawi:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Mauritius:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Montserrat:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Netherlands:

Agreement (by exchange of notes) of December 10, 2001/22. January 2002 between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands amending the Treaty of August 30, 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands on the amendment to the European extradition convention of December 13, 1957 and the facilitation of its application as well on extending its application to the Netherlands Antilles and Aruba

Norway:

Agreement (exchange of notes) of August 27, 1973/22. October 1973 between the Federal Republic of Germany and the Kingdom of Norway on the amendment to the European extradition convention of December 13, 1957 and the European convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of their application

Paraguay:

German-Paraguayan extradition treaty of November 26, 1909

Pitcairn:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Zambia:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Switzerland:

Treaty of November 13, 1969 between the Federal Republic of Germany and

the Swiss Confederation on the amendment of the European extradition convention of December 13, 1957 and the facilitation of its application

Switzerland:

Treaty of July 8, 1999 between the Federal Republic of Germany and the Swiss Confederation on the amendment of the treaty between the Federal Republic of Germany and the Swiss Confederation on the addition of the European extradition convention of December 13, 1957 and the facilitation of its application of November 13, 1969 after his Article 3 paragraph 1

Seychelles:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Singapore:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

St. Helena:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

St. Kitts and Nevis:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

St. Lucia:

German-British extradition treaty of May 14, 1872; partially reapplied and

amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

St. Vincent and the Grenadines:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Swaziland:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Tonga:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Trinidad and Tobago:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Turks and Caicos Islands:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

Uganda:

German-British extradition treaty of May 14, 1872; partially reapplied and amended by the German-British agreement of February 23, 1960 on the extradition of fugitive criminals; changed by agreement (exchange of notes) from 25./27. September 1978; Agreement (exchange of notes) of July 5, 1982/28. February 1983 on further application; Agreement on the continued application of the German-British extradition contract was concluded.

UNITED STATES:

Treaty of June 20, 1978 between the Federal Republic of Germany and the United States of America in concerning Extradition, as amended by the Supplementary Treaties of 21 October 1986 and 18 April 2006

Multilateral:

Council of Europe:

European Convention on Extradition of December 13, 1957

Council of Europe:

Second Additional Protocol of March 17, 1978 to the European Convention on Extradition

European Union:

Council framework decision 2002/584 / JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States

USA / EU:

Agreement of June 25, 2003 between the European Union and the United States of America on extradition

Japan / EU:

Agreement of November 30, 2009 / December 15, 2009 between the European Union and Japan on mutual assistance in criminal matters.

(b) Observations on the implementation of the article

The reviewing experts observed that Germany was a party to a great number of bilateral and multilateral extradition treaties, such as the European Convention on Extradition (1957) and its second additional protocol (1978) and the European Union Council Framework Decision on the European Arrest Warrant.

Article 45. Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application ...

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 48

Principle

For criminal proceedings assistance may be provided through enforcement of a penalty or any other sanction imposed with final and binding force in a foreign country. Part IV of this Law shall also apply to requests for the enforcement of an order for confiscation or deprivation, made by a court exercising other than criminal jurisdiction in the requesting State if the order is based on a punishable offence.

Germany indicated that it had the following bilateral and multilateral agreements:

Bilateral;

Treaty of May 26, 1993 between the Federal Republic of Germany and the Kingdom of Thailand on the surrender of criminals and on cooperation in the enforcement of criminal judgments

Multilateral:

Council of Europe:

Convention on the Transfer of Sentenced Persons of March 21, 1983

Council of Europe:

Second Additional Protocol of March 17, 1978 to the European Convention on Extradition

European Union:

Council framework decision 2008/909 / JHA of November 27, 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing a custodial sentence or measure for the purposes of their enforcement in the European Union

Germany further indicated that it had provided assistance by the enforcement of foreign custodial sentences in 2012 as follows (most recently available annual statistics):

118 new requests, 109 completed requests, 69 granted requests, 23 refused requests, 17 other completions (eg request was drawn)

(b) Observations on the implementation of the article

The reviewing expert observed that the transfer of sentenced persons was possible under the Council of Europe Convention on the Transfer of Sentenced Persons (1983), the second protocol to the European Convention on Extradition (1978), the European Union Council Framework Decision on the Application of the Principle of Mutual Recognition of Judgments in Criminal Matters (2008) and a number of bilateral agreements.

Article 46. Mutual legal assistance

| Paragraph 1 of article 46

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 59

Admissibility of Assistance

- (1) At the request of a competent authority of a foreign State, other legal assistance in a criminal matter may be provided.
- (2) Legal assistance within the meaning of subsection (1) above shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.
- (3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Germany indicated that it concluded the following bilateral and multilateral agreements:

Bilateral:

Andorra:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Anguilla:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Antigua and Barbuda:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Bahamas:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Bermuda:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

British Virgin Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Cook Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Gibraltar:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Grenada:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Guernsey:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Hong Kong:

Agreement of May 26, 2006 between the Government of the Federal Republic of Germany and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning mutual legal assistance in criminal matters

Isle of Man:

Agreement in the field of legal and administrative assistance and the exchange

of information (also applies to criminal tax matters)

Israel:

Additional treaty of July 20, 1977 between the Federal Republic of Germany and the State of Israel on the addition of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Italy:

Treaty of October 24, 1979 between the Federal Republic of Germany and Italy supplementing the European Convention of April 20, 1959 on mutual assistance in criminal matters and facilitating its application

Jersey:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Cayman Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Liechtenstein:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Monaco:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Montserrat:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Netherlands:

Treaty of August 30, 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands supplementing the European Convention of April 20, 1959 on mutual assistance in criminal matters and facilitating its application

Netherlands:

Agreement (by exchange of notes) of December 10, 2001/22. January 2002 between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands amending the Treaty of 30 August 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands on the supplement to the European Convention of 20 April 1959 on mutual assistance in criminal matters and to facilitate its application and to extend its application to the Netherlands Antilles and Aruba

Poland:

Treaty of July 13, 2003 between the Federal Republic of Germany and the

Republic of Poland on the amendment of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Switzerland:

Treaty of November 13, 1969 between the Federal Republic of Germany and the Swiss Confederation on the amendment of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Switzerland:

Treaty of April 27, 1999 between the Federal Republic of Germany and the Swiss Confederation on cross-border police and judicial cooperation

Switzerland:

Treaty of July 8, 1999 between the Federal Republic of Germany and the Swiss Confederation on the amendment of the treaty between the Federal Republic of Germany and the Swiss Confederation on the amendment of the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and the facilitation of its application of April 13, 1959 November 1969 according to its article 3 paragraph 1

St. Lucia:

Abkommen auf dem Gebiet der Rechts- und Amtshilfe und des Informationsaustauschs (findet auch auf Steuerstrafsachen Anwendung)

St. Vincent and the Grenadines:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Czech Republic:

Treaty of February 2, 2000 between the Federal Republic of Germany and the Czech Republic supplementing the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and simplifying its application

Turks and Caicos Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

UNITED STATES:

Supplementary contract of April 18, 2006 to the treaty between the Federal Republic of Germany and the United States of America on mutual legal assistance in criminal matters

UNITED STATES:

Treaty of October 14, 2003 between the Federal Republic of Germany and the United States of America on mutual assistance in criminal matters

Multilateral:

European Union:

- Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union
- Protocol of October 16, 2001 to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
- Framework decision 2003/577 / JHA of the Council of 22 July 2003 on the enforcement of decisions to freeze property or evidence in the European Union
- Council Framework Decision 2006/960 / JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities in the Member States of the European Union

Council of Europe:

- European Convention of April 20, 1959 on Mutual Assistance in Criminal Matters
- Additional Protocol of March 17, 1978 to the European Convention on Mutual Assistance in Criminal Matters
- Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters;
- Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Japan / EU:

Agreement of November 30, 2009 / December 15, 2009 between the European Union and Japan on mutual assistance in criminal matters

USA / EU:

Agreement of June 25, 2003 between the European Union and the United States of America on mutual legal assistance

(b) Observations on the implementation of the article

The reviewing expert observed that in its section 59, the IRG stated that “mutual legal assistance includes any kind of support given for foreign criminal proceedings”. This broad definition aims to cover all the purposes listed in the Convention.

Germany would be able to directly apply paragraphs 9 to 29 of article 46 of the Convention to requests of other States Parties in the absence of corresponding bilateral treaties.

The reviewing experts also positively noted the comprehensive system of processing incoming MLA requests maintained by the Federal Office of Justice.

In particular, in order to streamline the process of the provision of MLA, Germany adopted a comprehensive and detailed Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST).

It was noted, however, that Germany did not maintain a comprehensive mechanism for collecting statistical information on the execution of requests for mutual legal assistance. In that regard, the reviewing experts recommended that Germany consider

creating such a system.

(c) Successes and good practices

The comprehensive and detailed Guidelines for Relations with Foreign Countries in Matters of Criminal Law providing clear directions to national authorities on all the stages of MLA process;

The ability to provide the widest measure of assistance to requesting States.

Paragraph 2 of article 46

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that legal persons could be sanctioned under German law on the basis of regulatory offences. Regulatory offences are subject to criminal mutual legal assistance:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application

(2) Criminal matters under this Act shall include proceedings resulting from an offence which under German law would constitute a regulatory offence sanctionable by a fine or which pursuant to foreign law is subject to a similar penalty, provided that a court of criminal jurisdiction determines the sentence.

Act on Regulatory Offences (OWiG)

Section 30

Regulatory Fine Imposed on Legal Persons and on Associations of Persons

(1) Where someone acting

1. as an entity authorised to represent a legal person or as a member of such an entity,
2. as chairman of the executive committee of an association without legal capacity or as a member of such committee,
3. as a partner authorised to represent a partnership with legal capacity, or
4. as the authorised representative with full power of attorney or in a managerial position as procura-holder or the authorised representative with a commercial power of attorney of a legal person or of an association of persons referred to in numbers 2 or 3,

5. as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person, or of an association of persons referred to in numbers 2 or 3, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position,

has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.

(2) The regulatory fine shall amount

1. in the case of a criminal offence committed with intent, to not more than ten million Euros, 2. in the case of a criminal offence committed negligently, to not more than five million Euros.

Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. If the Act refers to this provision, the maximum amount of the regulatory fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.

(2a) In the event of a universal succession or of a partial universal succession by means of splitting (section 123 subsection 1 of the Reorganisation Act [Umwandlungsgesetz]), the regulatory fine in accordance with subsections 1 and 2 may be imposed on the legal successor(s). In such cases, the regulatory fine may not exceed the value of the assets which have been assumed, as well as the amount of the regulatory fine which is suitable against the legal successor. The legal successor(s) shall take up the procedural position in the regulatory fine proceedings in which the legal predecessor was at the time when the legal succession became effective.

(3) Section 17 subsection 4 and section 18 shall apply mutatis mutandis.

(4) If criminal proceedings or regulatory fining proceedings are not commenced on account of the criminal offence or of the regulatory offence, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with, the regulatory fine may be assessed independently.

Statutory provision may be made to the effect that a regulatory fine may be imposed in its own right in further cases as well. Independent assessment of a regulatory fine against the legal person or association of persons shall however be precluded where the criminal offence or the regulatory offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.

(5) Assessment of a regulatory fine incurred by the legal person or association of persons shall, in respect of one and the same offence, preclude a forfeiture order, pursuant to sections 73 or 73a of the Penal Code or pursuant to section 29a, against such person or association of persons. (6) On issuance of a regulatory fining notice, in order to secure the regulatory fine, section 111d subsection 1 second sentence of the Code of Criminal

Procedure shall be applied on proviso that the judgment is substituted by the regulatory fining notice.

Section 130

(1) Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.

(2) An operation or undertaking within the meaning of subsection 1 shall include a public enterprise.

(3) Where the breach of duty carries a criminal penalty, the regulatory offence may carry a regulatory fine not exceeding one million Euros. Section 30 subsection 2 third sentence shall be applicable. Where the breach of duty carries a regulatory fine, the maximum regulatory fine for breach of the duty of supervision shall be determined by the maximum regulatory fine impossible for the breach of duty. The third sentence shall also apply in the case of a breach of duty carrying simultaneously a criminal penalty and a regulatory fine, provided that the maximum regulatory fine impossible for the breach of duty exceeds the maximum pursuant to the first sentence.

(b) Observations on the implementation of the article

The reviewing experts observed that Germany provided mutual legal assistance in relation to offences involving legal persons (sect. 1, para. 2 of the IRG; sect. 30 of the OWiG).

Subparagraphs 3 (a) to 3 (i) of article 46

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters

Section 59

Admissibility of Assistance

- (1) At the request of a competent authority of a foreign State, other legal assistance in a criminal matter may be provided.
- (2) Legal assistance within the meaning of subsection (1) above shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.
- (3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 77

Application of Procedural Rules

- (1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts observed that provision under review was implemented broadly via section 55 and 77 of the IRG.

| Subparagraphs 3 (j) and 3 (k) of article 46

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

...

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 48 Principle

For criminal proceedings assistance may be provided through enforcement of a penalty or any other sanction imposed with final and binding force in a foreign country. Part IV of this Law shall also apply to requests for the enforcement of an order for confiscation or deprivation, made by a court exercising other than criminal jurisdiction in the requesting State if the order is based on a punishable offence.

Section 49

Additional Prerequisites for Admissibility of Assistance (1) The enforcement shall not be admissible unless

1. a competent authority of the foreign State submitting the complete, legally binding and enforceable decision has requested it;
2. in the proceedings on which the foreign decision is based the convicted person had an opportunity to be heard and to present an adequate defence, and the sanction has been imposed by an independent court or, in the case of a fine, was imposed by an authority whose decision may be appealed to an independent court;
3. under German law notwithstanding possible procedural obstacles and, if necessary *mutatis mutandis*, a criminal penalty, measure of rehabilitation and incapacitation or a regulatory fine could have been imposed in respect of the offence on which the foreign judgment is based or, where enforcement of an order for confiscation or deprivation is requested, such an order could have been made, notwithstanding section 73(1) 2nd sentence of the Strafgesetzbuch;
4. a decision of the kind mentioned in s. 9 no. 1 has been made, unless the enforcement of an order for confiscation or deprivation is requested and such an order could be made independently under s. 76a of the Strafgesetzbuch;
5. the statute of limitations for the enforcement under German law has not lapsed or would not have lapsed *mutatis mutandis*; the above notwithstanding the enforcement of an order for confiscation or deprivation shall be admissible if

a) German criminal law does not apply to the offence on which the order is based or

b) such an order could be made *mutatis mutandis* by analogous application of s. 76a(2) no. 1 of the Strafgesetzbuch.

(2) If a custodial sanction has been imposed in a foreign State and the convicted person is located there, enforcement shall not be admitted unless the convicted person, after having been advised, consented and his consent was entered into the record of a court in the requesting State or the consent was declared before a German consular career official empowered to certify legally relevant declarations. The consent cannot be revoked.

(3) If German law does not recognise any type of sanction corresponding to

the sanction imposed in the foreign State, enforcement shall not be admissible.

(4) If in the foreign order for confiscation or deprivation a decision has been made concerning the rights of third parties, it shall be binding unless

a) the third party had not been given sufficient opportunity to defend their rights, or

b) the decision is incompatible with a German civil court decision issued in the same matter or

c) the decision relates to third party rights to real estate located on German territory or to a real estate rights; third party rights shall also include priority notices.

(5) Orders depriving of or suspending a right, or ordering prohibitions or the loss of a capacity, shall extend to German territory if so provided for in an international agreement approved by law in accordance with Article 59(2) of the Grundgesetz.

Section 58

Measures Safeguarding Enforcement

(1) If a request for enforcement in the meaning of s. 49(1) no. 1 has been received, or if prior to its receipt it has been so requested by a competent authority of the requesting State with details of the offence on which the sentence is based, the time and place when it was committed and as exact a description of the convicted person as possible, the detention of the convicted person for the purpose of ensuring enforcement of a sentence of imprisonment may be ordered provided that on the basis of ascertainable facts

1. there is reason to believe that he would abscond from the enforcement proceedings or from enforcement, or

2. if there is a strong reason to believe that in the enforcement proceedings he would dishonestly obstruct the ascertainment of the truth.

(2) The court having jurisdiction pursuant to s. 50 shall issue the decision regarding detention. Ss. 17, 18, 20, 23 to 27 shall apply mutatis mutandis.

The Oberlandesgericht shall be substituted by the Landgericht, the public prosecution service at the Oberlandesgericht shall be substituted by the public prosecution service at the Landgericht. Decisions of the Landgericht shall be subject to appeal.

(3) If the request for enforcement relates to a fine, a regulatory fine or an order for confiscation or deprivation, or if a competent authority of the requesting State has, with identification of the person sought, the offence on which the criminal proceedings are based and the time and place of its commission prior to receipt of such request, requested preliminary measures for the purpose of ensuring enforcement under ss. 111b to 111d of the Strafprozessordnung, s. 67(1) shall apply mutatis mutandis. For the purpose of the preparation of an order for confiscation or deprivation in the requesting State, which may also relate to the monetary value, decisions

under ss. 111b to 111d of the Strafprozessordnung may be issued if the conditions of s. 66(2) nos. 1 and 2 are fulfilled.

(4) Subsections (1) and (3) above shall not apply if it appears ab initio that

enforcement will not be admissible.

Section 66

Handing Over of Objects

(1) At the request of a competent authority of a foreign State objects may be handed over 1. which may serve as evidence in foreign proceedings or 2. which the person concerned or an accomplice have obtained for or through the offence on which the request is based, 3. which the person concerned or an accomplice have obtained through the sale of such object or as a replacement for its being destroyed, damaged or taken away or on the basis of a right accrued to them or as usufruct or 4. which were created by or used or meant to be used in the commission or preparation of the offence on which the request is based.

(2) Surrender shall not be admissible unless

1. the offence on which the request is based contains elements of the *actus reus* and *mens rea* of a criminal offence or of an offence permitting the imposition of a fine under German law or unless *mutatis mutandis* it would be such an offence under German law, 2. an order for seizure by a competent authority of the requesting State is submitted or a declaration of such an authority shows that the requirements for seizure would exist if the objects were located in the requesting State and 3. measures are in place to ensure that the rights of third parties will not be infringed and that objects handed over under a condition will be returned upon request without undue delay.

(3) The handing over under subsection (1) nos. 2 to 4 above shall be admissible only as long as no pertinent final and enforceable foreign decision exists with regard to the abovementioned objects.

(4) The public prosecution service at the Landgericht shall prepare the decision about the handing over and shall execute it if granted. The public prosecution service at the Landgericht in whose district the object is located shall have jurisdiction. S. 61(2) 2nd sentence shall apply *mutatis mutandis*.

Section 67

Search and Seizure

(1) Objects that may be considered for handing over to a foreign State may be seized or otherwise secured even prior to the receipt of the request for surrender. To this end, a search may be conducted.

(2) If the conditions specified in s. 66(1) no. 1 and (2) no. 1 apply, objects may also be seized or otherwise secured if necessary for the enforcement of a request which is not directed at the handing over of the objects. Subsection (1) 2nd sentence above shall apply *mutatis mutandis*. (3) The Amtsgericht in whose district they are to be performed shall have jurisdiction to order the search and seizure. S. 61(2) 2nd sentence shall apply *mutatis mutandis*.

(4) If cases of emergency the public prosecution service or its agents (s. 152 of the Gerichtsverfassungsgesetz) may order the search and seizure.

Germany further clarified that the German term for “object” as referred is in the provisions above is “Gegenstand, which also included categories such as “Forderungen” (claims) and “Recht” (rights). “Unbewegliche Gegenstände“ are

immovables. Similar legal language is used in civil law and dates back to codifications of law during the 19th century. The wide concept can easily be illustrated from the relevant provisions on the seizure of proceeds of crime in the Code of Criminal Procedure (which actually apply the same when Germany executes requests for mutual legal assistance due to the reference to the Code of Criminal Procedure in Section 77(1) AICCM). Sections 111b, para. 1, also uses “objects” in the official English courtesy translation and “Gegenstand” in the German original. Section 111c, to which Section 111b, para. 1, refers, then spells out the method of securing the various types of assets (“moveable asset”, “plot of land or of a right subject to the provisions on compulsory execution in respect of immovable property”, “claim or any other property right not subject to the provisions on compulsory execution in respect of immovable property”, “ships, ship constructions and aircraft”).

Germany further cited the following legal provisions:

German Code of Criminal Procedure (StPO)

Section 111b

[Securing of Objects]

(1) Objects may be secured by seizure pursuant to Section 111c if there are grounds to assume that the conditions for their forfeiture or for their confiscation have been fulfilled. Section 94 subsection (3) shall remain unaffected.

...

Section 111c

[Effecting Seizure]

(1) Seizure of a moveable asset shall be effected in the cases referred to under Section 111b by impounding the asset or by indicating the seizure by seal or in some other way.

(2) Seizure of a plot of land or of a right subject to the provisions on compulsory execution in respect of immovable property shall be effected by making an entry concerning the seizure in the Land Register. The provisions of the Act on Compulsory Sale by Public Auction and Compulsory Administration in respect of the extent of seizure on compulsory sale by public auction shall apply mutatis mutandis.

(3) Seizure of a claim or any other property right not subject to the provisions on compulsory execution in respect of immovable property shall be effected by attachment. The provisions of the Code of Civil Procedure on compulsory execution in respect of claims and other property rights shall apply mutatis mutandis. The request to make the declarations referred to in section 840 subsection (1) of the Code of Civil Procedure shall be linked to seizure.

(4) Seizure of ships, ship constructions and aircraft shall be effected pursuant to subsection (1). The seizure shall be entered in the Register in respect of those ships, ship constructions and aircraft that are entered in the Register of Ships, in the Register of Ship Constructions or in the Register of Liens on Aircraft. Application for such entry may be made in respect of ship constructions or aircraft that have not been, but are capable of being, entered in the Register; the provisions governing an application by a person who is entitled to request entry in the Register by virtue of an executory title shall

apply mutatis mutandis in this case.

(5) Seizure of an object pursuant to subsections (1) to (4) shall have the effect of a prohibition of alienation within the meaning of section 136 of the Civil Code; the prohibition shall also cover other directions besides alienation.

Germany additionally clarified that in the context of the execution of requests for search and seizure multiple local jurisdictions could be applicable, but it was usually avoided in practice. It is legally possible to seize one prosecution office only, which can then concentrate the proceedings, consequently before one court.

Germany further cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 61

Decision of the Court

(1) ...

(2) ... If acts of legal assistance are to be or have been carried out in the districts of different Oberlandesgerichte [Higher Regional Courts], jurisdiction shall lie in the district of the Oberlandesgericht [Higher Regional Court] which first became seized of the matter, and if no court has yet been seized of the matter, in the district in which the public prosecution service at the Oberlandesgericht [Higher Regional Court] first became seized of the matter.”

This concentration occurs automatically if the requesting state sends the request to one certain prosecution office, or if the Federal Office of Justice (acting as the Central Authority for the purpose of the Convention) channels the request to one prosecution service. It is noted that the Federal Office of Justice also acts as the national justice contact point within the European Union’s Asset Recovery Offices network (ARO) and the worldwide Camden Asset Recovery Inter-Agency Network.

Furthermore, the rules for conflicts of jurisdiction in domestic cases enshrined in the Court Constitution Act and the Code of Criminal Procedure apply mutatis mutandis, pursuant to Section 77(1) of the AICCM. This would, if needed, allow to have the competent prosecutor or court appointed by the superior prosecutors, ultimately the Federal Prosecutor General (Section 143(3) of the Court Constitution Act, below). Conflicts between courts can also be decided on by superior courts, as a last resort by the Federal Court of Justice (see Sections 13 to 14 of the Code of Criminal Procedure, below). In urgent matters, any court can assert jurisdiction (Section 21 of the Code of Criminal Procedure, below).

Court Constitution Act (GVG)

Section 143

(1) The local competence of the public prosecution office shall be determined by the local jurisdiction of the court at which the public prosecution office exists. If venue cannot be established in any court within the territorial scope of this Act, or if such court cannot be ascertained, the public prosecution office first seized of the matter shall be competent. If in the cases referred to in the second sentence the jurisdiction of a court is established, the proceedings

shall be referred to the public prosecution office competent pursuant to the first sentence as soon as all necessary measures have been taken to secure the proceedings and the state of the proceedings permits an orderly referral. The third sentence shall apply mutatis mutandis where the competence of one public prosecution office has ceased to exist and another public prosecution office has become competent.

(2) In exigent circumstances, an official of the public prosecution office who lacks competence must perform the official acts necessary in his district.

(3) If the officials of the public prosecution office from different Länder cannot agree which one of them is to take over the prosecution, the official of the public prosecution office who is their common superior shall decide; otherwise the Federal Prosecutor General shall decide.

Code of Criminal Procedure

Section 13

[Venue for Connected Cases]

(1) ...

(2) If more than one connected criminal case is pending in different courts, they may be joined in whole or in part in one of the courts, where such courts so agree upon application of the public prosecution office. If such agreement is not reached, the common superior court, upon application by the public prosecution office or an indicted accused, shall decide whether and in which court the cases shall be joined.

(3) Cases which have been joined may be severed in the same manner.

Section 13a

[Determination of the Competent Court by the Federal Court of Justice]

If venue cannot be established in any court within the territorial scope of this Federal statute, or if such court cannot be ascertained, the Federal Court of Justice shall decide which court shall be competent.

Section 14

[Dispute Regarding Jurisdiction]

If a dispute arises between courts as regards jurisdiction, the common superior court shall decide which court shall conduct the investigation and give the decision.

Section 21

[Exigent Circumstances]

A court lacking jurisdiction shall, in exigent circumstances, conduct acts of investigation in its district.

Germany further clarified that the wording of Section 67, para. 1, second sentence of the IRG explicitly states that “objects”, including bank accounts, emphasis added: “(1) ... may be seized or otherwise secured **even prior to the receipt of the request for surrender.**”, and that this also applies where the aim is not to transfer the “object”, see para. 2: “(2) ... which is not directed at the handing over of the objects. Subsection (1) 2nd sentence above shall apply mutatis mutandis”. Such securing measures therefore do not presuppose any formal request but are conceivable upon simplified information.

They may of course be subject to judicial authorization.

In the context of suspicious transaction reports (STR) to the German Financial Intelligence Unit under the Money Laundering Act, it may also be possible to hold a transaction until the competent prosecutor consents (who may take the STR as the reason to initiate domestic criminal proceedings or contact foreign counterparts with the view of sending an MLA request), pursuant to Section 11, para. 1a of the Money Laundering Act:

Germany cited the following legal provisions:

Money Laundering Act (Geldwäschegesetz, GwG)

Section 11

Suspicious transaction reports

(1) Whenever factual circumstances exist that indicate that the assets or property connected with a transaction or business relationship are the product of an offence under section 261 of the Criminal Code or are related to terrorist financing, obliged entities shall promptly report such transaction, irrespective of the amount involved, or such business relationship to the Financial Intelligence Unit of the Federal Criminal Police Office and the competent prosecution authorities orally, by telephone, fax or via electronic data transmission. The reporting obligation pursuant to sentence 1 shall exist as well where factual circumstances indicate that the contracting party failed to comply with its duty of disclosure under section 4 (6) sentence 2.

(1a) A requested transaction may not be executed before the public prosecutor's office has informed the obliged entity of its consent, or before the expiry of the second working day following the transmission date of such suspicious transaction report unless the transaction's execution was prohibited by the public prosecutor's office; in this respect Saturday shall not be considered a working day. If it is impossible to postpone the transaction, or if doing so could frustrate efforts to pursue the beneficiaries of a suspected criminal offence, the execution of the transaction shall be permitted; the suspicious transaction report shall be filed subsequently without undue delay.

Germany also indicated that with regard to assistance by German to the authorities of other States in the field of identifying, freezing and tracing proceeds, the Federal Ministry of Justice and Consumer Protection had produced a guide on the topic which gives foreign practitioners an overview and quick access to further information. It was first issued in 2012 within the Framework of the Arab Forum on Asset Recovery (see <https://star.worldbank.org/star/ArabForum/asset-recovery-guides>). It has since been updated and can now be found online at the Ministry's website in four languages (German, English, Arabic, Ukrainian, see e.g. http://www.bmjv.de/SharedDocs/Publikationen/DE/Vermoegensabschoepfung_im_deutschen_Recht.pdf for the German version, and http://www.bmjv.de/SharedDocs/Publikationen/DE/Vermoegensabschoepfung_im_deutschen_Recht_Englisch.pdf for the English version).

Germany further provided the following practical example of the execution of an MLA request regarding the freezing of assets and informal exchange of information, and on

the notion of "objects" in sec. 67 of the AICCM.

In year 2009, the Prosecutor's Office (PPO) Munich I received a formal MLA request from Switzerland, regarding economic crime. The MLA request laid out that the suspect was holder of a bank account in Munich and asked to freeze it. A check with the register of bank accounts at BAFIN (German financial supervisory authority) was done, and the information was confirmed. In application of sec. 59, sec. 67 and sec. 77 (1) of the Act on International Cooperation in Criminal Matters (AICCM) and sec. 111b (1), 111d, 111e (1) of the German Code of Criminal Procedure, on request of the Munich PPO the Munich local court (Amtsgericht) issued a court order to freeze assets of the suspect up to an indicated sum (beyond 1 million). Based on this court order, the Munich PPO froze the indicated bank account. The balance of the account was less than 50.000 €, which was frozen.

Days later, the suspect noticed his account was frozen, and called the PPO Munich. He complained that he needed the account for maintenance fees for his Munich apartment (which by that time was unknown to both the Swiss and Munich PPO).

The German prosecutor immediately after that incident called the Swiss prosecutor and asked if he would be interested in seizing the apartment. The Swiss colleague orally asked to do so, an additional MLA request was promised to be sent soon. At the same time, the Munich PPO asked a police officer specialized in financial investigations to detect all immovables of the suspect in Munich, and within hours the relevant data from the land register (Grundbuch), which is directly accessible to the police, was forwarded to the Munich PPO.

Within 1 or 2 days and based on sec. 67 (1) of the AICCM, even prior to the receipt of the additional MLA request, the apartment was seized by entering an official notice to that effect in the Grundbuch.

It might be of interest that it would have been admissible to seize immovables even before calling back the Swiss authority, given that even without that call one could expect that an additional request would have been sent once the requesting authority would have been informed of the seizure. The German prosecutor favored the immediate call in order to (1) inform the requesting authority that the MLA request had been disclosed to the suspect, (2) make sure that the value of the assets seized in both countries would not exceed the total sum needed by the requesting authority, (3) make sure the requesting authority actually would support seizure of this kind of asset.

Another example where a German court has ordered the confiscation of "bitcoins" and of their corresponding value, would be a judgment by the Regional Court of Kempten of 29 October 2014. (In the appellate decision, the Federal Court of Justice, decision of 21 July 2015, case no. 1 StR 16/15, saw no reason to pronounce on this confiscation, although it ordered a retrial for legal reasons unrelated to the asset recovery aspects of the case).

From the alleged offenses, the two accused had obtained "bitcoins" as proceeds of crime. A "wallet" with 895 "bitcoins" was found on the computer of the first

accused. He agreed to cooperate voluntarily with the prosecution in the course of the proceedings and disclosed the password. The "bitcoins" were then transferred to a "wallet" held by the prosecution authorities. The second accused had a laptop, with a number of "wallets", originally containing a total of 6098 "bitcoins". 86 "bitcoins" from an unencrypted "wallet" could be secured successfully. Another "wallet" with 1730 "bitcoins" was seized provisionally but was password-protected and could therefore not be decrypted by the authorities, leaving the powers to dispose of those "bitcoins" to that accused. Nonetheless, the Regional Court ordered confiscation: it applied the standard confiscation clause of the Criminal Code (Sec. 73(1), first sentence: "If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. ...") to the 86 "bitcoins" already seized. In respect to the 1730 "bitcoins" in the encrypted "wallet", the Court argued that actual confiscation of those "bitcoins" was impossible due to the password, but that their value was to be confiscated instead. It relied on the provision on value-based confiscation (Sec. 73a, first sentence: "To the extent that the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason or because confiscation of a surrogate object pursuant to section 73(2) 2nd sentence has not been ordered, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained. ..."). The Court estimated a total value of 432.500 Euros (1730 x 250 Euros, assuming an exchange rate of 268 Euros at the time of the judgment and reducing to 250 Euros as mark-down safety margin to the benefit of the accused due to "bitcoin" volatility).

(b) Observations on the implementation of the article

The reviewing experts observed that the provision under review was implemented primarily via sections 58, 66 and 67 of the IRG.

| Paragraph 4 of article 46

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party to this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that its prosecution authorities could submit spontaneous information in accordance with AICCM.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 61 a

Transmission of Personal Data Without Request

(1) Courts and the public prosecution service may transmit personal data from criminal proceedings to the public authorities of another State as well as to Inter-State and supranational authorities without request by the latter if

1. transmission without request to a German court or to a German public prosecution service were admissible,
2. facts exist which warrant the expectation that the transmission is necessary
 - a) in order to prepare a request by the receiving State for assistance for the purpose of prosecution or enforcement of a sentence for an offence which would be punishable by a maximum term of more than five years' imprisonment under German law, and the conditions for granting assistance on request would be fulfilled if such a request was made or
 - b) in the individual case to avert a danger to the existence or security of the State, or to the life, limb or freedom of a person, or to property of significant value, protection of which is in the public interest, or to prevent a crime as described under a) above, and
3. the public authority to which the data are transmitted is competent to implement the appropriate measures under no. 2 above.

If an adequate level of data protection is ensured in the receiving State, the 1st sentence no. 2 a) above shall apply with the proviso that an offence punishable under German law by a maximum term of more than five years' imprisonment shall be substituted by an offence of significant gravity.

(2) The transmission shall occur under the condition that

1. time limits pursuant to German law for data deletion and for review of data deletion will be observed,
2. transmitted data will only be used for the purposes for which they were transmitted and
3. transmitted data will be deleted or corrected immediately upon information in accordance with subsection (4) below.

(3) Transmission shall be precluded if it is evident to the court or the public prosecution service that - taking into consideration the special public interest in the transmission - the protected interests of the person demand the preclusion of the transmission in the individual case; the protected interests of the person concerned include the existence of an adequate level of data protection in the receiving State.

(4) The receiving authority shall be notified without undue delay upon discovery that the transmission of data was inadmissible or that the transmitted data were incorrect.

Section 92c AICCM

Data Transmission without Request

(1) To the extent that an international agreement or Framework Decision 2006/960/JHA so provide, public authorities may transmit without request personal data that give rise to the suspicion that an offence has been committed, to public authorities of another Member State of the European Union or a Schengen-associated State as well as organs and institutions of the European Union, if

1. a transmission without request to a German court or prosecution service were permissible and
2. the transmission is useful in
 - a) initiating criminal proceedings in another Member State or
 - b) assisting

criminal proceedings already pending there and
3. the authority to whom the data are transmitted has jurisdiction for the measures under no. 2 above.
(2) S. 61a(2) to (4) shall apply mutatis mutandis.

RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 4 Scope of legal assistance

(3) Unprompted information (Sections 61a, 92 of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on International Cooperation in Criminal Matters)) is to be transmitted through diplomatic channels of communication unless an international treaty stipulates any deviating regulation for the transmission of personal data by courts or public prosecutor's offices when no request for legal assistance has been made.

Germany further provided the following practical example of the execution of an MLA request regarding the freezing of assets and informal exchange of information, and on the notion of "objects" in sec. 67 of the AICCM:

In the year 2009, the Prosecutor's Office (PPO) Munich I received a formal MLA request from Switzerland, regarding economic crime. The MLA request laid out that the suspect was holder of a bank account in Munich and asked to freeze it. A check with the register of bank accounts at BAFIN (German financial supervisory authority) was done, and the information was confirmed. In application of sec. 59, sec. 67 and sec. 77 (1) of the Act on International Cooperation in Criminal Matters (AICCM) and sec. 111b (1), 111d, 111e (1) of the German Code of Criminal Procedure, on request of the Munich PPO the Munich local court (Amtsgericht) issued a court order to freeze assets of the suspect up to an indicated sum (beyond 1 million). Based on this court order, the Munich PPO froze the indicated bank account. The balance of the account was less than 50.000 €, which was frozen.

Days later, the suspect noticed his account was frozen, and called the PPO Munich. He complained that he needed the account for maintenance fees for his Munich apartment (which by that time was unknown to both the Swiss and Munich PPO).

The German prosecutor immediately after that incident called the Swiss prosecutor and asked if he would be interested in seizing the apartment. The Swiss colleague orally asked to do so, an additional MLA request was promised to be sent soon. At the same time, the Munich PPO asked a police officer specialized in financial investigations to detect all immovables of the suspect in Munich, and within hours the relevant data from the land register (Grundbuch), which is directly accessible to the police, was forwarded to the Munich PPO.

Within 1 or 2 days, and based on sec. 67 (1) of the AICCM, even prior to the receipt of the additional MLA request, the apartment was seized by entering an official notice to that effect in the Grundbuch.

It might be of interest that it would have been admissible to seize immovables

even before calling back the Swiss authority, given that even without that call one could expect that an additional request would have been sent once the requesting authority would have been informed of the seizure. The German prosecutor favored the immediate call in order to (1) inform the requesting authority that the MLA request had been disclosed to the suspect, (2) make sure that the value of the assets seized in both countries would not exceed the total sum needed by the requesting authority, (3) make sure the requesting authority actually would support seizure of this kind of asset.

(b) Observations on the implementation of the article

The reviewing experts observed that spontaneous transmission of information was regulated in sections 61a and 92c of the IRG and guideline 4 of the RiVAST).

Paragraph 5 of article 46

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restriction on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that by the reference to the provisions of StPO (German Code of Criminal Procedure), relevant rules apply under German law, in particular section 77 para. 1 AICCM in conjunction with section 147 StPO. In addition, division 2 of part 7 AICCM provides in section 77c – 77h for a set of rules regulating the protection of personal data in mutual assistance matters.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 72 Conditions

Conditions which the requested State has attached to the legal assistance shall be honoured.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz

zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Section 77c

Sope of application

The provisions of this Division apply to personal data which are transmitted or received in the context of mutual assistance matters.

Section 77d

Transmission of personal data

(1) Where provided for by law and subject to the rules set out in sections 97a and 97b, personal data may be transmitted to public agencies in other states as well as to intergovernmental or supranational institutions

1. where it is necessary to prevent or prosecute criminal or regulatory offences, or to enforce or execute criminal-law sanctions or to avert threats,
2. where the receiving agency is responsible for one of the tasks referred to in no. 1,
3. where, in cases in which the personal data were transmitted from another Member State of the European Union or another Schengen Associated State, that state has previously consented to the transmission or has expressly waived the need for consent,
4. where the European Commission has adopted a decision on the adequacy of the level of protection (adequacy decision) in the receiving state or the receiving intergovernmental or supranational institution pursuant to Article 36 (3) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89; L 127, 23.5.2018, p. 9), or where the conditions of section 77f are met and
5. where, in cases in which data were collected for a purpose other than that on which the transmission is based, it would also be permissible to collect the personal data for that transmission purpose by comparable means.

(2) Personal data are not transmitted, including where consideration is given to the special public interest in the data transmission, if there is insufficient guarantee, in the individual case, that the receiving state or the receiving intergovernmental or supranational institution will handle the personal data in an adequate manner and in line with basic human rights, or if the data

subject's other legitimate interests pose an obstacle thereto.

(3) The transmission of personal data to agencies other than those competent agencies designated in subsection (1) no. 2 or to non-public agencies is permissible where the remaining conditions of subsection (1) are complied with if

1. transmission is vital in order for the transmitting agency to be able to carry out an assigned task,
2. transmission to the competent agency would be ineffective or unsuitable, in particular because the transmission could not be effected in due time, and
3. the receiving agency's attention is drawn to the purpose of the data transmission and to the fact that the personal data may only be used if it is necessary to fulfil the relevant purpose.

The competent agency is to be notified without delay of the transmission, unless such notification would be ineffective or unsuitable.

(4) If the prior consent of the Member State of the European Union concerned or of the Schengen Associated State concerned as required under subsection (1) no. 3 cannot be obtained in due time, the transmission of personal data is permissible without such consent if it is necessary to avert a present and substantial threat

1. to the public security of a state or
2. to the key interests of one of the Member States of the European Union or of a Schengen Associated State.

The agency in the Member State of the European Union concerned or in the Schengen Associated State which is responsible for giving consent is to be notified without delay.

(5) Responsibility for the permissibility of the transmission of personal data lies with the transmitting agency. The possibility of attaching conditions to the transmission of personal data remains unaffected.

(6) 'Member States of the European Union' within the meaning of this provision means those states to which Directive (EU) 2016/680 applies; 'Schengen Associated States' means those states as defined in section 91 (3).

Section 77e

Transmitting agency's verification, reporting and logging obligations

(1) The transmitting agency

1. is, as a general rule, to check the accuracy, completeness and currency of

the personal data before transmission,

2. includes information, where possible, when transmitting personal data which permits the receiving agency to assess the accuracy, completeness, currency and reliability of the data,
 3. expressly informs the receiving agency when transmitting the data about the fact that the transmitted personal data may only be used for the purpose for which they were transmitted,
 4. expressly informs the receiving agency about the fact that forwarding the data to other states or intergovernmental or supranational institutions requires the transmitting agency's prior consent,
 5. informs the receiving agency when transmitting the data of any conditions which apply under German law to the processing of the transmitted personal data and which must be complied with,
 6. notifies the receiving state without delay if it transpires that data ought not to have been transmitted or that incorrect data were transmitted,
 7. notifies the competent data protection supervisory authority about the transmission of data in accordance with section 77d (3) and
 8. records each instance in which personal data are transmitted under the provisions of domestic law.
- (2) Subsection (1) no. 5 applies accordingly where the transmitting agency has received data from another state or from an intergovernmental or supranational institution with conditions attached with which the receiving agency must also comply.

Section 77f

Procedure in case of lack of adequacy decision

(1) Personal data may be transmitted without an adequacy decision as referred to in section 77d (1) no. 4 if

1. an instrument which is legally binding on the receiving state or on the receiving intergovernmental or supranational body provides suitable guarantees concerning the protection of personal data or
2. the transmitting agency, after assessing all the relevant circumstances, has come to the conclusion that appropriate safeguards concerning the protection of personal data are in place.

(2) Where no adequacy decision has been given and no suitable guarantees are in place as required under subsection (1), personal data may only be transmitted in an individual case if this is necessary

1. to protect the data subject's or another person's vital interests,
 2. to safeguard the data subject's legitimate interests,
 3. to avert a present and substantial threat to a state's public security,
 4. to prevent or prosecute criminal or regulatory offences or to enforce or execute criminal-law sanctions or
 5. to assert, exercise or defend legal claims in connection with those purposes referred to in no. 4.
- (3) The transmitting agency notifies the competent data protection supervisory authority about groups of cases of transmission as per subsection (1) no. 2.

Section 77g Consent to forwarding of personal data

Where the transmitting agency is requested by the receiving agency to consent to the forwarding of transmitted personal data to other states or to other intergovernmental or supranational institutions, such consent may be given if the corresponding direct data transmission would be permissible pursuant to section 77d.

Section 77h Use of transmitted personal data

- (1) Personal data which have been transmitted by public agencies in other states or by intergovernmental or supranational institutions may, where provided for by law, only be used for purposes other than those for which they were transmitted if the transmitting agency has previously consented thereto. Section 77d (4) applies accordingly.
- (2) Conditions attached to the use of the personal data to which the transmitting agency has drawn attention must be complied with.
- (3) Where personal data are transmitted without a request, the receiving agency without delay examines whether the data are required for the purpose for which they were transmitted.

Code of Criminal Procedure (StPO)

Section 147

[Inspection of the Files]

- (1) Defence counsel shall have authority to inspect those files which are

available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence.

(2) If investigations have not yet been designated as concluded on the file, defence counsel may be refused inspection of the files or of individual parts of the files, as well as inspection of officially impounded pieces of evidence, insofar as this may endanger the purpose of the investigation. If the prerequisites of the first sentence have been fulfilled, and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.

(3) At no stage of the proceedings may defence counsel be refused inspection of records concerning the examination of the accused or concerning such judicial acts of investigation to which defence counsel was or should have been admitted, nor may he be refused inspection of expert opinions.

Section 406e [Inspection of Files]

(1) An attorney may inspect, for the aggrieved person, the files that are available to the court or the files that would be required to be submitted to it if public charges were preferred, and may inspect officially impounded pieces of evidence, if he can show a legitimate interest in this regard. In the cases referred to in Section 395, there shall be no requirement to show a legitimate interest.

(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation, also in another criminal proceeding, appears to be jeopardized. It may also be refused if the proceedings could be considerably delayed thereby, unless, in the cases designated in Section 395, the public prosecution office has noted the conclusion of the investigations in the files.

(3) Upon application and unless important reasons constitute an obstacle, the attorney may be handed the files, but not the pieces of evidence, to take to his office or private premises. The decision shall not be contestable.

(4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall give this decision. An application may be made for a decision by the court competent pursuant to Section 162, appealing against the decision made by the public prosecution office pursuant to the first sentence. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. The court's decision shall be incontestable as long as the investigations have not yet been concluded. These decisions shall not be given with reasons if their disclosure might endanger the purpose of the investigation.

(5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsections (2) and (4) and Section 478 subsection (1), third and fourth sentences, shall apply *mutatis mutandis*.

(6) Section 477 subsection (5) shall apply *mutatis mutandis*.

Section 474

[Provision of File Information and Other Information to Judicial Authorities and Other Public Institutions]

(1) Courts, public prosecution offices and other judicial authorities shall be able to inspect the files if this is necessary for the purposes of the administration of justice.

(2) Provision of file information to public agencies shall otherwise be admissible where

1. such information is needed for establishment or enforcement of, or opposition to, legal claims connected with the criminal offence;

2. such agencies would otherwise, pursuant to a special provision, be entitled to transmission of personal data from criminal proceedings ex officio, or where, following ex officio transmission, the transmission of further personal data is needed for the performance of duties; or

3. the information is required in order to prepare measures upon whose implementation personal data from criminal proceedings may, ex officio, be transmitted to such agencies pursuant to a special provision.

Provision of information to the intelligence services shall be governed by section 18 of the Federal Act on Protection of the Constitution, by section 10 of the Armed Forces Counterintelligence Service Act and by section 8 of the Federal Intelligence Service Act.

(3) Under the conditions referred to in subsection (2) inspection of the files may be granted if provision of information requires disproportionate effort or the agency requesting inspection of the files declares, indicating the reasons, that the provision of partial information would not be sufficient for the performance of its duties.

(4) Under the conditions referred to in subsection (1) or (3) officially impounded pieces of evidence may be inspected.

(5) In the cases referred to in subsections (1) and (3) files may be sent for inspection.

(6) Provisions under Land law granting parliamentary committees the right to inspect the files shall remain unaffected.

Section 475

[Information and File Inspection for Private Individuals and Other Institutions]

(1) For a private person and for other agencies, without prejudice to the regulation in section 406e, an attorney may obtain information from a file that is available to the court or which would have been submitted to the court if public charges had been preferred, if he sets forth a legitimate interest. Information shall be refused when an affected person has an interest meriting protection by such refusal.

(2) Under the conditions set forth in subsection (1), inspection of the files may be granted when the provision of information would require disproportionate effort or when it would be insufficient to exercise the

justifiable interest according to the explanation by the one requesting inspection of the files.

(3) Under the conditions set forth in subsection (2), officially impounded pieces of evidence may be inspected. Upon application, the attorney, to the extent inspection of the files is granted and there are no significant grounds to the contrary, may be given the files, with the exception of pieces of evidence, to take to his business or private premises. The decision is not contestable.

(4) Under the conditions set forth in subsection (1), private persons and other agencies may also be given information from the files.

RiVSt, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 22a Inspection of the records

(1) The regulations of the Code of Criminal Procedure (StPO) apply to any approval of the inspection of the records of a legal assistance procedure, as to Numbers 182 through 189 of the Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine (RiStBV). Where the procedural files include documents that are suited to affect foreign policy interests of the Federal Republic of Germany, then prior to any approval of such inspection, a report is to be filed with the supreme judicial or administrative authority, which is to take the decision. Fundamentally, any processes that concern the approval are not subject to the inspection of records.

(2) Prior to approving the inspection of the records, the requesting authority is to be asked via the proper communications channels to state whether and in which scope the inspection of records may be approved, unless it is obvious that approving such inspection of records will not jeopardise the purpose of the proceedings pursued by the requesting authority.

(b) Observations on the implementation of the article

| Paragraph 8 of article 46

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that banking secrecy could not be relied on in preliminary criminal investigations and criminal proceedings (cf. the observations made regarding Art. 40). The same applies to requests for legal assistance. The stipulations of the StPO in this regard are applicable by way of section 77 (1) IRG.

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts observed that requests for mutual legal assistance could not be refused on the ground of bank secrecy (sect. 77 of the IRG).

Subparagraph 9 (a) of article 46

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that it provided mutual legal assistance in principle without requiring dual criminality to the extent that no coercive measures need to be taken.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application ...

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 59

Admissibility of Assistance

(1) At the request of a competent authority of a foreign State, other legal assistance in a criminal matter may be provided.

(2) Legal assistance within the meaning of subsection (1) above shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law)

Number 2 International legal assistance

International legal assistance in the sense of these guidelines is any support provided to proceedings in a criminal matter (section 1 of the Act on International Cooperation in Criminal Matters (IRG) printed in Attachment I under no. 1) in another state, independently of whether the proceedings are being pursued by a court or another authority and of whether the legal assistance is to be provided by a court or another authority.

(b) Observations on the implementation of the article

The reviewing experts observed that with regard to dual criminality, Germany applied a flexible, conduct-based approach (sect. 3, para. 1, of the IRG). Absence of dual criminality is not a ground for refusing mutual legal assistance as long as it concerns non-coercive measures (sect. 1, para. 3, and sects. 59 and 77 of the IRG).

(c) Successes and good practices

The flexible approach to dual criminality.

Subparagraph 9 (b) of article 46

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that the principle of proportionality was entrenched as a constitutional principle in its legal system. Cases of de minimis nature are not as such excluded from providing mutual legal assistance.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 59 AICCM Admissibility of Assistance

(1) At the request of a competent authority of a foreign State, other legal assistance in a criminal matter may be provided.

(2) Legal assistance within the meaning of subsection (1) above shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 73

Limitations on Assistance (Ordre Public)

Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system. Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

(2) In the case of incoming requests, the provisions applicable in German criminal and regulatory fine proceedings relating to immunity, indemnity and the conditions for search and seizure on the premises of a parliament shall apply.

With regard to practical examples relevant to the provision under review, Germany further clarified that when executing mutual legal assistance requests, neither German law nor policy led to refusal because of the minor or *de minimis* nature of the offence or request. Decisions must be made on a case-by-case basis. Therefore, no generalization or authoritative examples are possible. Personal experience has shown that prosecutors have declined to execute request where they held the gravity of the offence was disproportionate to the necessary measure (e.g., summoning a witness to testify on an argument between farmers where one was alleged to have kicked the donkey of the other one; asking a telecommunications provider to produce the content of a text message which an alleged insult by using a common swearword).

(b) Observations on the implementation of the article

The reviewing experts observed that under German law cases of *de minimis* nature were not as such excluded from providing mutual legal assistance.

Subparagraph 9 (c) of article 46

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that it provided mutual legal assistance without requiring dual criminality as long as it concerned non-coercive measures.

Germany cited the following legal provisions.

Act on International Cooperation on Criminal Matters (AICCM - IRG)

Section 1

Scope of Application

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 59

Admissibility of Assistance

(1) At the request of a competent authority of a foreign State, other legal assistance in a criminal matter may be provided.

(2) Legal assistance within the meaning of subsection (1) above shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Germany further clarified that the German Code of Criminal Procedure, like the codes of criminal procedure of other jurisdictions, did not hold a formal definition of “coercive nature”. In the context of mutual legal assistance, it becomes clear from the AICCM - IRG that the surrender of objects (against the will of the concerned person), see Section 66, and search and seizure, see Section 67, are MLA measures which presuppose dual criminality. Both can easily be considered as “coercive”. As to other measures, the AICCM - IRG does not define specific requirements. The general rule,

again, is that incoming requests are treated equal to domestic investigations (see Section 59 para. 3 AICCM - IRG, cited above, and the general reference to the Code of Criminal Procedure in Section 77 para. 1 AICCM. This results in a scheme that Germany handles MLA requests “consistent with the basic concepts of its legal system”, as provided in Article 49 para. 9(b) of the Convention. Coercive measures are therefore subject to the same restrictions that apply in domestic cases. E.g., the interception of telecommunications can only be ordered for a list of offences “serious criminal offences”) and is subject to certain condition, see Section 100a of the Code of Criminal Procedure. This would also apply to telephone wiretaps in Germany upon request of a foreign authority.

Germany further cited the following legal provisions:

German Code of Criminal Procedure (StPO)

Section 100a

[Conditions Regarding Interception of Telecommunications]

(1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an offence by committing a criminal offence; and
2. the offence is one of particular gravity in the individual case as well; and
3. other means of establishing the facts or determining the accused's whereabouts would be much more difficult or offer no prospect of success.

(2) Serious criminal offences for the purposes of subsection (1), number 1, shall be:

1. pursuant to the Criminal Code:

- a) crimes against peace, high treason, endangering the democratic state based on the rule of law, treason and endangering external security pursuant to sections 80 to 82, 84 to 86, 87 to 89a and 94 to 100a;
- b) taking of bribes by, and offering of bribes to, mandate holders pursuant to section 108e;
- c) crimes against the national defence pursuant to sections 109d to 109h;
- d) crimes against public order pursuant to sections 129 to 130;
- e) counterfeiting money and official stamps pursuant to sections 146 and 151, in each case also in conjunction with section 152, as well as section 152a subsection (3) and section 152b subsections (1) to (4);
- f) crimes against sexual self-determination in the cases referred to in sections 176a, 176b, 177 subsection (2), number 2, and section 179 subsection (5), number 2;
- g) dissemination, purchase and possession of pornographic writings involving children and involving juveniles, pursuant to section 184b subsections (1) to (3), section 184c subsection (3);
- h) murder and manslaughter pursuant to sections 211 and 212;
- i) crimes against personal liberty pursuant to sections 232 to 233a, 234, 234a, 239a and 239b;
- j) gang theft pursuant to section 244 subsection (1), number 2, and aggravated gang theft pursuant to section 244a;

- k) crimes of robbery or extortion pursuant to sections 249 to 255;
 - l) commercial handling of stolen goods, gang handling of stolen goods and commercial gang handling of stolen goods pursuant to sections 260 and 260a;
 - m) money laundering or concealment of unlawfully acquired assets pursuant to section 261 subsections (1), (2) and (4);
 - n) fraud and computer fraud subject to the conditions set out in section 263 subsection (3), second sentence, and in the case of section 263 subsection (5), each also in conjunction with section 263a subsection (2);
 - o) subsidy fraud subject to the conditions set out in section 264 subsection (2), second sentence, and in the case of section 264 subsection (3), in conjunction with section 263 subsection (5);
 - p) criminal offences involving falsification of documents under the conditions set out in section 267 subsection (3), second sentence, and in the case of section 267 subsection (4), in each case also in conjunction with section 268 subsection (5) or section 269 subsection (3), as well as pursuant to sections 275 subsection (2) and section 276 subsection (2);
 - q) bankruptcy subject to the conditions set out in section 283a, second sentence;
 - r) crimes against competition pursuant to section 298 and, subject to the conditions set out in section 300, second sentence, pursuant to section 299;
 - s) crimes endangering public safety in the cases referred to in sections 306 to 306c, section 307 subsections (1) to (3), section 308 subsections (1) to (3), section 309 subsections (1) to (4), section 310 subsection (1), sections 313, 314, 315 subsection (3), section 315b subsection (3), as well as sections 361a and 361c;
 - t) taking and offering a bribe pursuant to sections 332 and 334;
2. pursuant to the Fiscal Code:
- a) tax evasion under the conditions set out in section 370 subsection (3), second sentence, number 5;
 - b) commercial, violent and gang smuggling pursuant to section 373;
 - c) handling tax-evaded property as defined in section 374 subsection (2);
3. pursuant to the Pharmaceutical Products Act:
- criminal offences pursuant to section 95 subsection (1), number 2a, subject to the conditions set out in section 95 subsection (3), second sentence, number 2, letter b;
4. pursuant to the Asylum Procedure Act:
- a) inducing an abusive application for asylum pursuant to section 84 subsection (3);
 - b) commercial and gang inducement to make an abusive application for asylum pursuant to section 84a;
5. pursuant to the Residence Act:
- a) smuggling of aliens pursuant to section 96 subsection (2);
 - b) smuggling resulting in death and commercial and gang smuggling pursuant to section 97;
6. pursuant to the Foreign Trade and Payments Act:
- wilful criminal offences pursuant to sections 17 and 18 of the Foreign Trade and Payments Act;
7. pursuant to the Narcotics Act:
- a) criminal offences pursuant to one of the provisions referred to in section

29 subsection (3), second sentence, number 1, subject to the conditions set out therein;

b) criminal offences pursuant to section 29a, section 30 subsection (1), numbers 1, 2 and 4, as well as sections 30a and 30b;

8. pursuant to the Precursors Control Act:

criminal offences pursuant to section 19 subsection (1), subject to the conditions set out in section 19 subsection (3), second sentence;

9. pursuant to the War Weapons Control Act:

a) criminal offences pursuant to section 19 subsections (1) to (3) and section 20 subsections (1) and (2), as well as section 20a subsections (1) to (3), each also in conjunction with section 21;

b) criminal offences pursuant to section 22a subsections (1) to (3);

10. pursuant to the Code of Crimes against International Law:

a) genocide pursuant to section 6;

b) crimes against humanity pursuant to section 7;

c) war crimes pursuant to sections 8 to 12;

11. pursuant to the Weapons Act:

a) criminal offences pursuant to section 51 subsections (1) to (3);

b) criminal offences pursuant to section 52 subsection (1), number 1 and number 2, letters c and d, as well as section 52 subsections (5) and (6).

(3) Such order may be made only against the accused or against persons in respect of whom it may be assumed, on the basis of certain facts, that they are receiving or transmitting messages intended for, or transmitted by, the accused, or that the accused is using their telephone connection.

(4) If there are factual indications for assuming that only information concerning the core area of the private conduct of life would be acquired through a measure pursuant to subsection (1), the measure shall be inadmissible. Information concerning the core area of the private conduct of life which is acquired during a measure pursuant to subsection (1) shall not be used. Any records thereof shall be deleted without delay. The fact that they were obtained and deleted shall be documented.

(b) Observations on the implementation of the article

The reviewing experts observed that the absence of dual criminality was not a ground for refusing mutual legal assistance as long as it concerns non-coercive measures (sect. 1, para. 3, and sects. 59 and 77 of the IRG).

Paragraph 10 of article 46

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 62

Temporary Transfer to a Foreign Country for Foreign Proceedings

(1) A person detained in pretrial detention or serving a prison sentence or detained under a custodial measure of rehabilitation and incapacitation on German territory may, at the request of a competent authority of a foreign State, be temporarily transferred to that State in order to testify as a witness or for the purpose of identification or inspection by the court in proceedings pending there if

1. after being advised of his rights by a judge he consents to such transfer and his consent is entered into the court record,
2. it is not to be expected that as a result of the transfer the person's detention would be prolonged or that the purpose of the criminal proceedings would be jeopardised,
3. measures are in place to ensure that the person will not, during the period of his transfer, be punished or be subjected to any other sanction that cannot be issued in absentia, and that in the case of his release he may leave the requesting State, and
4. if measures are in place to ensure that the person will be returned immediately after the evidence has been taken unless this requirement has been waived.

The consent (1st sentence no. 1 above) cannot be revoked.

(2) The public prosecution service at the Oberlandesgericht shall prepare the transfer and shall execute it. The public prosecution service at the Oberlandesgericht in whose district the person is detained shall have jurisdiction.

(3) The detention served in the requesting State shall be credited towards the detention being enforced in Germany. S. 37(4) shall apply mutatis mutandis.

Section 63

Temporary Transfer from a Foreign Country for Foreign Proceedings

(1) A person detained in pretrial detention or serving a prison sentence or detained under a custodial measure in a foreign State may, at the request of a competent authority of that State, be temporarily transferred to German territory to give evidence in proceedings pending in that State and after the evidence has been taken, be returned. In order to ensure his return the person shall be held in detention.

(2) Detention shall be ordered by means of a written arrest warrant. The written arrest warrant shall contain information concerning the following:

1. The person,
2. the request for taking evidence in the presence of the person and 3. the reason for the detention.

(3) The judge who is to provide the legal assistance or the judge of the Amtsgericht in whose district the executive authority that is to provide the legal assistance is located, shall have jurisdiction over the decision regarding

the detention. The decision shall not be subject to appeal.
(4) Ss. 27, 45(4) and 62(2) 1st sentence shall apply mutatis mutandis.

Section 69

Temporary Transfer from a Foreign Country for German Proceedings

(1) A person in a foreign State who is held in pre-trial detention or serving a prison sentence or against whom a custodial measure has been ordered and who has upon request been temporarily transferred to a German court or a German authority in order to give evidence as a witness, for the purpose of identification or inspection shall during his presence on German territory and in order to ensure his return be held in detention.

(2) The decision regarding the detention shall be made by the court in charge of the proceedings, in preliminary proceedings by the judge at the Amtsgericht in whose district the public prosecution service conducting the case has its seat. The decision shall not be subject to appeal.

(3) Ss. 27, 45 (4), 62(2) 1st sentence and 63(2) shall apply mutatis mutandis.

Section 70

Temporary Transfer to a Foreign Country for German Proceedings

A person in pre-trial detention or serving a prison sentence or against whom a custodial measure of rehabilitation and incapacitation has been ordered in Germany may be transferred to a foreign State for the taking of evidence in German criminal proceedings if the conditions of s. 62(1) 1st sentence nos. 1, 3 and 4 are fulfilled. S. 62(1) 1st sentence and (2) to (3) shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts observed that the transfer of detainees for the purpose of providing mutual legal assistance was regulated in sections 62, 63, 69 and 70 of the IRG.

Paragraph 11 of article 46

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters

Section 62

Temporary Transfer to a Foreign Country for Foreign Proceedings

(1) A person detained in pretrial detention or serving a prison sentence or detained under a custodial measure of rehabilitation and incapacitation on German territory may, at the request of a competent authority of a foreign State, be temporarily transferred to that State in order to testify as a witness or for the purpose of identification or inspection by the court in proceedings pending there if

1. after being advised of his rights by a judge he consents to such transfer and his consent is entered into the court record,
2. it is not to be expected that as a result of the transfer the person's detention would be prolonged or that the purpose of the criminal proceedings would be jeopardised,
3. measures are in place to ensure that the person will not, during the period of his transfer, be punished or be subjected to any other sanction that cannot be issued in absentia, and that in the case of his release he may leave the requesting State, and
4. if measures are in place to ensure that the person will be returned immediately after the evidence has been taken unless this requirement has been waived.

The consent (1st sentence no. 1 above) cannot be revoked.

(2) The public prosecution service at the Oberlandesgericht shall prepare the transfer and shall execute it. The public prosecution service at the Oberlandesgericht in whose district the person is detained shall have jurisdiction. (3) The detention served in the requesting State shall be credited towards the detention being enforced in Germany. S. 37(4) shall apply mutatis mutandis.

Section 63

Temporary Transfer from a Foreign Country for Foreign Proceedings

(1) A person detained in pretrial detention or serving a prison sentence or detained under a custodial measure in a foreign State may, at the request of a competent authority of that State, be temporarily transferred to German territory to give evidence in proceedings pending in that State and after the evidence has been taken, be returned. In order to ensure his return the person shall be held in detention.

(2) Detention shall be ordered by means of a written arrest warrant. The written arrest warrant shall contain information concerning the following:

1. The person,
2. the request for taking evidence in the presence of the person and 3. the reason for the detention.
- (3) The judge who is to provide the legal assistance or the judge of the Amtsgericht in whose district the executive authority that is to provide the legal assistance is located, shall have jurisdiction over the decision regarding the detention. The decision shall not be subject to appeal.
- (4) Ss. 27, 45(4) and 62(2) 1st sentence shall apply mutatis mutandis.

Section 69

Temporary Transfer from a Foreign Country for German Proceedings

- (1) A person in a foreign State who is held in pre-trial detention or serving a prison sentence or against whom a custodial measure has been ordered and who has upon request been temporarily transferred to a German court or a German authority in order to give evidence as a witness, for the purpose of identification or inspection shall during his presence on German territory and in order to ensure his return be held in detention.
- (2) The decision regarding the detention shall be made by the court in charge of the proceedings, in preliminary proceedings by the judge at the Amtsgericht in whose district the public prosecution service conducting the case has its seat. The decision shall not be subject to appeal.
- (3) Ss. 27, 45 (4), 62(2) 1st sentence and 63(2) shall apply mutatis mutandis.

Section 70

Temporary Transfer to a Foreign Country for German Proceedings

A person in pre-trial detention or serving a prison sentence or against whom a custodial measure of rehabilitation and incapacitation has been ordered in Germany may be transferred to a foreign State for the taking of evidence in German criminal proceedings if the conditions of s. 62(1) 1st sentence nos. 1, 3 and 4 are fulfilled. S. 62(1) 1st sentence and (2) to (3) shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts observed that the requirements of the provisions under review were addressed in in section 63 of the IRG.

| Paragraph 12 of article 46

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it has implemented the provision under review and cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 62

Temporary Transfer to a Foreign Country for Foreign Proceedings

(1) A person detained in pretrial detention or serving a prison sentence or detained under a custodial measure of rehabilitation and incapacitation on German territory may, at the request of a competent authority of a foreign State, be temporarily transferred to that State in order to testify as a witness or for the purpose of identification or inspection by the court in proceedings pending there if

1. after being advised of his rights by a judge he consents to such transfer and his consent is entered into the court record,
2. it is not to be expected that as a result of the transfer the person's detention would be prolonged or that the purpose of the criminal proceedings would be jeopardised,
3. measures are in place to ensure that the person will not, during the period of his transfer, be punished or be subjected to any other sanction that cannot be issued in absentia, and that in the case of his release he may leave the requesting State, and
4. if measures are in place to ensure that the person will be returned immediately after the evidence has been taken unless this requirement has been waived.

The consent (1st sentence no. 1 above) cannot be revoked.

(2) The public prosecution service at the Oberlandesgericht shall prepare the transfer and shall execute it. The public prosecution service at the Oberlandesgericht in whose district the person is detained shall have jurisdiction.

(3) The detention served in the requesting State shall be credited towards the detention being enforced in Germany. S. 37(4) shall apply mutatis mutandis.

Section 63

Temporary Transfer from a Foreign Country for Foreign Proceedings

(1) A person detained in pretrial detention or serving a prison sentence or detained under a custodial measure in a foreign State may, at the request of a competent authority of that State, be temporarily transferred to German territory to give evidence in proceedings pending in that State and after the evidence has been taken, be returned. In order to ensure his return the person shall be held in detention.

(2) Detention shall be ordered by means of a written arrest warrant. The written arrest warrant shall contain information concerning the following:

1. The person,
2. the request for taking evidence in the presence of the person and 3. the reason for the detention.

(3) The judge who is to provide the legal assistance or the judge of the Amtsgericht in whose district the executive authority that is to provide the

legal assistance is located, shall have jurisdiction over the decision regarding the detention. The decision shall not be subject to appeal.

(4) Ss. 27, 45(4) and 62(1) 1st sentence number 3 and (2) 1st sentence shall apply mutatis mutandis.

Section 69

Temporary Transfer from a Foreign Country for German Proceedings

(1) A person in a foreign State who is held in pre-trial detention or serving a prison sentence or against whom a custodial measure has been ordered and who has upon request been temporarily transferred to a German court or a German authority in order to give evidence as a witness, for the purpose of identification or inspection shall during his presence on German territory and in order to ensure his return be held in detention.

(2) The decision regarding the detention shall be made by the court in charge of the proceedings, in preliminary proceedings by the judge at the Amtsgericht in whose district the public prosecution service conducting the case has its seat. The decision shall not be subject to appeal.

(3) Ss. 27, 45(4), 62(1) 1st sentence number 3 and (2) 1st sentence, 63(2) shall apply mutatis mutandis.

Section 70

Temporary Transfer to a Foreign Country for German Proceedings

A person in pre-trial detention or serving a prison sentence or against whom a custodial measure of rehabilitation and incapacitation has been ordered in Germany may be transferred to a foreign State for the taking of evidence in German criminal proceedings if the conditions of s. 62(1) 1st sentence nos. 1, 3 and 4 are fulfilled. S. 62(1) 1st sentence and (2) to (3) shall apply mutatis mutandis.

Section 72 Conditions

Conditions which the requested State has attached to the legal assistance shall be honoured.

Section 69(3) AICCM specifies that in cases of temporary transfer from abroad for German proceedings section 62 (1) sentence 1 no. 3 AICCM applies accordingly, hence, it is guaranteed that the person concerned will not be punished, subjected to another sanction or will not be prosecuted by measures which cannot also be taken in his or her absence and that, in the event of being released, said person may leave the requesting state.

(b) Observations on the implementation of the article

Germany clarified that it would be able to directly apply the requirements of the provision under review to requests of other States Parties in the absence of corresponding bilateral treaties.

...

Paragraph 13 of article 46

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated its central authority for the purposes of UNCAC was the Federal Office of Justice. The Office can receive assistance request directly, including through the International Criminal Police Organization in urgent cases.

Germany further provided the following example of the implementation of the provision under review.

With a letter-rogatory of 13 September 2013 to the Federal Office of Justice based on the UNCAC, the UNTOC and the OECD Convention, the competent authorities of Brazil requested the hand-over of contents of case files held with the Prosecution Office I of Munich. The bases were proceedings of the Brazilian authorities investigating a number of employees of a German stock-exchange listed company. The allegations amounted to millions of bribe payments to win public tenders in the field of the construction, furnishing and maintenance of public transport systems.

The case was a particular one in the respect that the Brazilian authorities conducted criminal proceedings and civil proceedings alongside. The Federal Office of Justice forwarded the request to the competent German prosecution office. The requested excerpts from the German prosecution file – more than 800 pages – were identified and then transmitted directly to the central authority of Brazil based on the channels provided for by UNTOC and the OECD Convention (the UNCAC had at that point not entered into force yet, but would just the same have constituted a base for executing the request with the same result).

(b) Observations on the implementation of the article

The reviewing experts observed that Germany designated the Federal Office of Justice located in Bonn as the central authority for the purposes of the Convention.

Paragraph 14 of article 46

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that under AICCM (IRG) no special requirements existed for the means of transmitting a mutual legal assistance request. A written request which allows the requested state to verify the authenticity and reproducing the request is common practice. German authorities in principle require requests in German language.

Germany cited the following legal provisions:

Courts Constitution Act

Section 184

The language of the court shall be German.

Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law)

Number 10 Transmission in particular cases

(3) In urgent matters and to the extent that it is sufficient for the execution of incoming and the transmission of outgoing requests, other means of transmission (e. g. telex, telefax, telephone, e-mail) may be used.

Number 27 Form of request and its annexes

(1) The request is to be sent to the foreign authority competent for providing the requested the legal assistance in original and via the prescribed channels of communication. In the case of doubt as to which authority is competent for the dealing with the request, the cover letter shall note supplementally, next to the authority presumed to be competent, “or the authority otherwise competent.” If several acts of legal assistance are to be taken abroad, then the requests must be filed in that number in which authorities are presumed to be competent for dealing with such request.

Number 30 Verification and transmission

(1) The request, supporting report and, if required, the cover letter (cf. no. 11 and no. 12, paragraph 2, template number 2, 2a) and the translations (cf. no. 14) shall be submitted to the verification authority by the requesting authority; where several copies of documents are prepared, this shall be noted in the files. ...

(3) As a rule, the request, its attachments and translations shall be transmitted to the foreign state in two copies.

(b) Observations on the implementation of the article

The reviewing experts observed that under the IRG, no special requirements existed in respect of the means of transmitting a request for mutual legal assistance; however, written requests are common practice. German is the only acceptable language for incoming requests for mutual legal assistance.

Paragraphs 15 and 16 of article 46

15. A request for mutual legal assistance shall contain: (a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and (f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions:

For incoming requests:

RiVSt, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 17 Defective transmission

(1) Where a request has been transmitted through a non-authorized channel of communication, it shall be complied with unless other causes contravene its being dealt with. The documents in proof of execution shall be returned via the authorized channel of communications.

(2) Where a request has been received by a non-competent authority, it shall be forwarded immediately to the competent approval authority. The requesting authority shall be informed of the matter having been forwarded via the authorized channel of communications. Where a request has been received by a non-competent authority via a supreme judiciary and administrative authority, the information about the matter having been forwarded shall be addressed to the supreme judiciary and administrative authority and not to the requesting authority.

Number 18 Supplementation

Where the granting of legal assistance is contravened by a remediable obstacle, the requesting state is to be given the opportunity to supplement the request.

Number 22 Dealing with requests

(1) Where the approval authority regards the pre-requisites for the provision of legal assistance to have been met, then unless otherwise provided for by law or by contract, the request shall be dealt with by the enforcing authority in accordance with the provisions that would apply had the request been submitted by a German authority; this applies also to coercive measures as may become necessary in dealing with the request (section 59 (3), section 77 of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on International Cooperation in Criminal Matters)). Unless mandatory regulations stipulate otherwise, special wishes of the requesting authority shall be met.

(2) As a rule, the execution of legal assistance shall not be commenced prior to approval of the legal assistance pursuant to subsection (1). As an exception, the enforcing authority may execute the legal assistance prior to having obtained approval in exigent circumstances provided there are no concerns about granting the approval. Where the legal assistance has been provided prior to obtaining the approval, the enforcing authority shall send the request and the documents in proof of execution to the approval authority.

(3) Inasmuch as parties involved in the proceedings are permitted by German regulations to be present at investigative actions, the enforcement agency may also permit the corresponding persons involved in the foreign proceedings to be present. Foreign judges or officials may be granted permission to be present in their official capacity only after the consent of the competent authority has been obtained (cf. nos. 138, 139), inasmuch as such permission has not been granted generally in the relations with certain states.

(4) Where notice of a hearing has been requested, the hearings are to be scheduled such that the parties involved who reside abroad are able to participate. The notice of the hearing shall note that it is incumbent on the requesting authority to inform the parties involved in the proceedings who

reside abroad.

(5) Where the completion of a request is delayed to a greater than negligible extent, it may be appropriate to issue an interim notice to the requesting authority.

For outgoing requests:

RiVASt, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 26 Consideration of foreign procedural law

It is to be noted that the foreign authorities will deal with and complete requests for legal assistance in accordance with the provisions regarding competence and, as a rule, also in accordance with the formal requirements of foreign law; abiding by these provisions will suffice for the German proceedings. The foreign authorities may be requested, in particular where this has been provided for in international treaties, to take into account certain German procedural regulations in the course of dealing with and completing the request.

Number 27 Form of request and its annexes

(1) The request is to be sent to the foreign authority competent for providing the requested legal assistance in original and via the prescribed channels of communication. In the case of doubt as to which authority is competent for the dealing with the request, the cover letter shall note supplementally, next to the authority presumed to be competent, "or the authority otherwise competent." If several acts of legal assistance are to be taken abroad, then the requests must be filed in that number in which authorities are presumed to be competent for dealing with such request.

(2) The request and the information required to deal with it shall be set out in one and the same document. The files and documents shall be attached to the request only in certified copies. Otherwise, at least for documents, a certified copy shall be retained at a minimum.

(3) The annexes shall be attached to the request in a manner preventing loss or confusion. It is to be noted on any photos, photocopies, plans etc. attached, if any, which persons or objects they show.

(4) Requests that are to be dealt with and completed on an urgent basis and requests involving criminal detention are to set out an indication, at the head of the document, that the matter is urgent or involves criminal detention.

Number 28 Legalisation

(1) By the legalisation it provides, the consular post headed by career consular officers of a foreign state confirms that the signature on a national official document is authentic. In its expanded form, the legalisation also comprises the confirmation that the issuer was competent for issuing the document in accordance with the law and that the document has been recorded in the form legally stipulated.

(2) The part concerning countries includes information on the states in the relationship with which a legalisation or an expanded form of legalisation is needed. The part concerning countries also sets out which states consider sufficient a certain form of certification (e.g. by the federal government) or

the simplified form of a certificate of authenticity (so-called apostille, cf. template 3a) instead of the legalisation.

(3) The legalisation by the consular post headed by career consular officers shall be obtained by the verification authority. As a rule it suffices for one copy of the document, which has been provided with a note on authentication (cf. template no. 3) to be legalised.

Number 29 Contents of the request

(1) Each request must exactly designate the action that it is being requested be performed. It must be worded briefly and clearly, while nonetheless providing sufficient information on the proceedings for which legal assistance is being requested. Inasmuch as this is necessary, it must contain information on the affected party, his citizenship, and his current place of abode.

(2) Inasmuch as parties involved in the proceedings are permitted by German regulations to be present at the taking of evidence, inquiries are to be made with them as to whether they waive this right. Where they do not so waive the right, it is to be asked that the requesting authority be notified in such due time of the time at which evidence is to be taken that it is able to inform the parties involved of the time at which evidence is to be taken and to, in turn, enable the parties involved to attend. If, in exceptional cases, e.g. because the parties involved are in the territory of the requested state, it appears to better serve the purpose if they are notified directly by the authority of the requested state, this is to be asked in the request and the address of the parties involved is to be included in same.

Number 30 Verification and transmission

(1) The request, supporting report and, if required, the cover letter (cf. no. 11 and no. 12, paragraph 2, template number 2, 2a) and the translations (cf. no. 14) shall be submitted to the verification authority by the requesting authority; where several copies of documents are prepared, this shall be noted in the files. If there are objections against the request, the verification authority shall return it with the necessary observations. Where the request is unobjectionable, the verification authority shall note this in the supporting report and shall forward the documents via the prescribed channels of communication to the approval authority, unless the verification authority is also the approval authority. Inasmuch as in the relationship with certain states (cf. country descriptions) the process requires specific transmission authorities to be involved (e.g. the public prosecutor's office with the higher regional court (OLG), then the cover letter shall be prepared by the latter authority.

(2) The approval authority shall transmit the request via the prescribed channels of communication. Where they are the diplomatic channel of communication, the request may be sent directly to the German diplomatic mission in the requested state, as long as the supreme judicial or administrative authority has authorised this generally or for the specific case.

(3) As a rule, the request, its attachments and translations shall be transmitted to the foreign state in two copies.

(4) Where the requests can not be transmitted via the direct channels of communication, they shall be submitted to the supreme judicial or

administrative authority

- a) via the diplomatic channels of communication, in six copies,
- b) via the ministerial channels of communication, where the request is to be transmitted by a Federal Office (Bundesamt) or by a Federal Minister, in four copies, and
- c) in the other cases of the ministerial channels of communication, in three copies.

Where the transmission is effected via the consular channels of communication and in the cases set out in subsection (2), second sentence, the documents shall be sent to the German mission abroad in three copies. In all cases, the translations shall be attached in two copies. Specific circumstances may emerge in the event of the requests for legal assistance in extradition and execution cases (cf. nos. 93, 93a, 112)

(5) Where the request has been transmitted by the supreme judicial or administrative authority and the documents in proof of execution are not transmitted via this authority, it shall be informed about the request having been executed.

Number 31 Subsequent change of the facts and circumstances

(1) If, following a request's having been dispatched, the circumstances change such that this significantly affects how the request is dealt with and completed, the requested foreign authority shall be informed of this fact without undue delay via the prescribed channels of communication, and in urgent cases directly, if necessary via the Federal Criminal Police Office.

(2) These provisions shall apply mutatis mutandis to cases in which, prior to filing a formal request for legal assistance, it was suggested that provisional measures be taken abroad (e.g. by initiating an international search) or if it is known that the foreign authorities have taken temporary measures in anticipation of a request.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 66

Surrender of property

(1) Upon request by a competent agency in a foreign state, that property may be surrendered

- 1. which may serve as evidence in foreign proceedings,
- 2. which the person concerned or a party to the offence obtained for or as a result of the offence giving rise to the request,
- 3. which the person concerned or a party to the offence obtained by selling an object obtained or was given as compensation for its destruction, damage or confiscation or on account of an obtained right or for the use thereof or
- 4. which was created by the offence giving rise to the request or which was used or destined to be used to commit or prepare that offence.

(2) Such surrender is only permissible if

- 1. the offence giving rise to the request is also an unlawful act under German law which fulfils the elements of a criminal provision or of a provision which permits punishment by imposition of an administrative fine or if it would also constitute such an act under German law in the case of analogous conversion of the facts,
- 2. an order for seizure issued by a competent agency in the requesting state is submitted or a declaration made by such an agency indicates that the conditions for seizure would be met if

the property were located in the requesting state and

3. it is guaranteed that the rights of third parties remain unaffected and property which is conditionally surrendered is returned without delay upon request.

(3) Surrender pursuant to subsection (1) nos. 2 to 4 is only permissible as long as no final and enforceable foreign judgment relating to that property has been submitted.

(4) The public prosecution office at the regional court prepares the decision concerning the surrender and effects the surrender once it has been authorised. Local jurisdiction lies with the public prosecution office at the regional court in whose district the property is located.

Section 61 (2) sentence 2 applies accordingly.

Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters

"Article 17

Contents and Form of Requests

(1) A request shall:

1. identify the authority making the request;
2. identify the authority conducting the criminal investigation or proceeding to which the request relates;
3. describe the subject matter and nature of the criminal investigation or proceeding, including:
 - a) a summary of the facts;
 - b) the text of the applicable criminal law provisions; and
 - c) if known, the identity of the person who is the subject of the criminal investigation or proceeding;
4. describe the evidence or information sought or the acts to be performed; and
5. state the purpose for which the evidence, information or action is sought.

(2) As appropriate, and to the extent possible, a request also should include:

1. information on the identity or description and suspected location of a person or item to be located;
2. information on the identity and location of a person to be served, that person's relationship to the criminal investigation or proceeding, and the manner to which service is to be made;
3. the identity and location of persons from whom evidence is sought, a description of the manner in which any testimony or statement is to be taken and recorded, and a description of the testimony or statement sought, which may include a list of questions to be answered;
4. a precise description of the place or person to be searched and the item to be seized;
5. a description of any particular procedure to be followed in executing the request;
6. information as to the allowances and expenses to which a person appearing in the requesting state will be entitled; and
7. any other information that may be brought to the attention of the Requested State to facilitate its execution of the request.

(3) A request shall be in writing except that in urgent situations the Central Authorities may utilize another form. If the request is not in writing, it shall be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise."

(b) Observations on the implementation of the article

... Germany clarified that it would be able to directly apply the requirements of the provision under review to requests of other States Parties in the absence of corresponding bilateral treaties.

Germany additionally clarified that where MLA is based on German national law no such general provisions exist.

There is a specific provision regarding measures which will be enforced by coercive powers in section 66 paragraph 2 number 2 and 3 AICCM.

In general standards as laid down for example in art. 17 paragraph 1 and 2 MLA treaty Germany-USA may be cited as relevant.

Paragraph 17 of article 46

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 73

Limitations on Assistance (Ordre Public)

Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system. Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 17 Defective transmission

(1) Where a request has been transmitted through a non-authorized channel of communication, it shall be complied with unless other causes contravene its being dealt with. The documents in proof of execution shall be returned via the authorized channel of communications.

(2) Where a request has been received by a non-competent authority, it shall be forwarded immediately to the competent approval authority. The requesting authority shall be informed of the matter having been forwarded

via the authorized channel of communications. Where a request has been received by a non-competent authority via a supreme judiciary and administrative authority, the information about the matter having been forwarded shall be addressed to the supreme judiciary and administrative authority and not to the requesting authority.

Number 18 Supplementation

Where the granting of legal assistance is contravened by a remediable obstacle, the requesting state is to be given the opportunity to supplement the request.

Number 22 Dealing with requests

(1) Where the approval authority regards the pre-requisites for the provision of legal assistance to have been met, then unless otherwise provided for by law or by contract, the request shall be dealt with by the enforcing authority in accordance with the provisions that would apply had the request been submitted by a German authority; this applies also to coercive measures as may become necessary in dealing with the request (section 59 (3), section 77 of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on International Cooperation in Criminal Matters)). Unless mandatory regulations stipulate otherwise, special wishes of the requesting authority shall be met.

(3) Inasmuch as parties involved in the proceedings are permitted by German regulations to be present at investigative actions, the enforcement agency may also permit the corresponding persons involved in the foreign proceedings to be present. Foreign judges or officials may be granted permission to be present in their official capacity only after the consent of the competent authority has been obtained (cf. nos. 138, 139), inasmuch as such permission has not been granted generally in the relations with certain states.

(4) Where notice of a hearing has been requested, the hearings are to be scheduled such that the parties involved who reside abroad are able to participate. The notice of the hearing shall note that it is incumbent on the requesting authority to inform the parties involved in the proceedings who reside abroad.

(5) Where the completion of a request is delayed to a greater than negligible extent, it may be appropriate to issue an interim notice to the requesting authority.

(b) Observations on the implementation of the article

...Section 73 AICCM allows the execution of an incoming MLA request in accordance with the procedure specified in the request. A conflict with basic principles of the German legal system constitutes the only limitation to this principle.

| Paragraph 18 of article 46

18. Whenever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 61 c

Audiovisual Examination

A witness or an expert who fails to appear for examination by a foreign legal authority by use of a video conference although properly summoned shall neither be charged with the costs arising from his failure to appear nor have any penalty for contempt imposed upon him.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 77 Examination

(1) Requests for the examination of accused parties, witnesses or experts shall be dealt with and completed by the courts where this has been indicated in the request.

(2) Requests seeking an examination by video conference or telephone conference may be dealt with and completed both without a corresponding treaty having been concluded (section 59 (1) of the Act on International Cooperation in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen, IRG)) as well as on the basis of an international treaty pursuant to section 1 (3) of the Act on International Cooperation in Criminal Matters (IRG). The video conference / telephone conference is permissible pursuant to section 77 of the Act on International Cooperation in Criminal Matters (IRG) subject to the provisions of the Code of Criminal Procedure (StPO) (cf. sections 48 et seqq., 58a, 168e, 247a, 239 et seqq.). Unless otherwise provided for in an international treaty, the following rules shall apply:

a) The person to be examined must have agreed to so being examined;

- b) The German judicial authorities are authorised to direct the proceedings;
- c) A record is to be prepared of the examination that sets out, at a minimum, the course of the examination and the findings obtained while reflecting the essential formal acts;
- d) The requesting state shall bear the costs of establishing and operating the connection, if any, as well as the costs of interpreters and experts, if any are involved;
- e) The technical equipment shall be made available in accordance with the arrangements made with the authorities involved.

(b) Observations on the implementation of the article

The reviewing experts observed that the hearing of witnesses via videoconference is possible (sects. 61c and 77 of the IRG and guideline 77 of the RiVAST).

Paragraphs 19 and 20 of article 46

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that its authorities were bound by section 72 AICCM-IRG as well as by the applicable provision on the inspection of files referred to section 77 para. 1 AICCM - IRG. "Disclosure" under German law on criminal investigation usually occurs by an inspection of the file.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 72 Conditions

Conditions which the requested State has attached to the legal assistance shall be honoured.

RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 18 Supplementation

Where the granting of legal assistance is contravened by a remediable obstacle, the requesting state is to be given the opportunity to supplement the request.

Number 22 Dealing with requests

(1) Where the approval authority regards the pre-requisites for the provision of legal assistance to have been met, then unless otherwise provided for by law or by contract, the request shall be dealt with by the enforcing authority in accordance with the provisions that would apply had the request been submitted by a German authority; this applies also to coercive measures as may become necessary in dealing with the request (section 59 (3), section 77 of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on International Cooperation in Criminal Matters)). Unless mandatory regulations stipulate otherwise, special wishes of the requesting authority shall be met.

Number 22a Inspection of the records

(1) The regulations of the Code of Criminal Procedure (StPO) apply to any approval of the inspection of the records of a legal assistance procedure, as to Numbers 182 through 189 of the Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine (RiStBV). Where the procedural files include documents that are suited to affect foreign policy interests of the Federal Republic of Germany, then prior to any approval of such inspection, a report is to be filed with the supreme judicial or administrative authority, which is to take the decision. Fundamentally, any processes that concern the approval are not subject to the inspection of records.

(2) Prior to approving the inspection of the records, the requesting authority is to be asked via the proper communications channels to state whether and in which scope the inspection of records may be approved, unless it is obvious that approving such inspection of records will not jeopardise the purpose of the proceedings pursued by the requesting authority.

Germany further clarified that Section 72 of the AICCM had been cited to illustrate that the German authorities are by law bound to honour conditions imposed on part of the executing state. Such conditions, and its details, may attach explicitly or implicitly. For that purpose, Section 72 has to be read in conjunction with the general legal regime governing MLA between that state and Germany. That legal regime may include the Convention. Therefore, the pertinent obligations under the Convention, including Article 46, para. 19, do apply pursuant Section 1, para. 3, of the AICCM.

Aside from this and irrespective of whether MLA is subject to the Convention, German authorities are bound by no. 22a, para. 2 of the Guidelines for Relations with Foreign Countries in Matters of Criminal Law, to notify the requesting authority before disclosure. Inspections of records”, the term used here, is synonymous with the terminology in the English courtesy translation of the German Code of Criminal

Procedure. The German original wording is “Akteneinsicht”. It denotes the concept under which German prosecutors may be under an obligation to disclose the file or parts thereof to parties to the proceedings or third persons. Unless someone can claim a right to “inspect”, criminal files are confidential under law.

(b) Observations on the implementation of the article

The reviewing experts observed that the principles of specialty and confidentiality were ensured through section 72 of the IRG as well as guidelines 18, 22 and 22a of the RiVSt.

Paragraph 21 of article 46

21. Mutual legal assistance may be refused:

- (a) If the request is not made in conformity with the provisions of this article;*
- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*
- (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Referring to a)

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application ...

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Referring to b)

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 73

Limitations on Assistance (Ordre Public)

Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system. Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.

Referring to c)

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 59

Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Referring to d)

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application ...

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 59

Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 73

Limitations on Assistance (Ordre Public)

Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system. Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.

(b) Observations on the implementation of the article

The reviewing experts observed that pursuant to Section 73 of the IRG, mutual legal assistance was not granted if it would conflict with basic principles of the German legal system. Such assistance is provided only in those cases in which German courts and executive authorities could render the assistance to each other (sect. 59 of the IRG). However, Germany would accept and respond to every incoming request for mutual legal assistance

Paragraph 22 of article 46

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 59

Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

(b) Observations on the implementation of the article

The reviewing experts observed that the Act on International Cooperation in Criminal Matters (AICCM) is silent on fiscal matters as no such exception to mutual legal assistance exists. The Convention's requirements would apply directly via section 1 of the AICCM – IRG.

Paragraph 23 of article 46

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that the provision of the Convention was applicable presumed to section 1 para. 3 AICCM-RG.

In addition, Guidelines for Relations with Foreign Countries in Matters of Criminal

Law No. 19 obliges the executing German authority to consult the requesting authority and inform it about any obstacles to execution. This entails setting out the reasons which would otherwise lead to non-execution. Moreover, no. 22, para. 5, directs the executing German authority to inform the requesting authority about the state of execution. This offers a possibility to include therewith the reasons for the handling of the request.

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application ...

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

RiVAST, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 18 Supplementation

Where the granting of legal assistance is contravened by a remediable obstacle, the requesting state is to be given the opportunity to supplement the request.

No 19 Decision on approval of legal assistance

(1) A request for legal assistance being received by the performing authority shall immediately be submitted to the competent approval authority.

(2) Where the approval authority intends to reject the request for legal assistance, it shall inform the highest justice and administrative authority, attaching also the request, and wait for its statement.

(3) Where the approval authority deems necessary that Oberlandesgericht renders a decision on the admissibility of the legal assistance in accordance with § 61, par 1, sentence 2 IRG, it shall inform the highest justice and administrative authority, attaching also the request, and wait for its statement.

(4) Where the Oberlandesgericht decides to have a decision rendered by Federal Supreme Court (§ 61, par 1, sentence 4 i.V.m. § 21 IRG), the prosecution office at the Oberlandesgericht transmits the documents immediately to the Federal Prosecution Office General; It shall simultaneously report to the superior authority.

(5) In the event of incoming requests, the violation of the provisions on the public legal duties or smuggling, the approval authority ensures the involvement of the tax and customs search services, unless the request is about delivery or enforcement legal assistance.

Number 22 Dealing with requests

(1) Where the approval authority regards the pre-requisites for the provision of legal assistance to have been met, then unless otherwise provided for by law or by contract, the request shall be dealt with by the enforcing authority in accordance with the provisions that would apply had the request been submitted by a German authority; this applies also to coercive measures as may become necessary in dealing with the request (section 59 (3), section 77 of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on

International Cooperation in Criminal Matters)). Unless mandatory regulations stipulate otherwise, special wishes of the requesting authority shall be met.

...

(5) Where the completion of a request is delayed to a greater than negligible extent, it may be appropriate to issue an interim notice to the requesting authority.

(b) Observations on the implementation of the article

The reviewing experts observed that the Guidelines for Relations with Foreign Countries in Matters of Criminal Law (RiVAST) obliged all competent authorities to consult with the requesting state if the request cannot be executed immediately. In addition, the provision of the Convention is applicable presumed to section 1 para. 3 AICCM-RG.

Paragraph 24 of article 46

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that the principle of expeditious proceedings was specifically laid down in the RiVAST (Guidelines for Relations with Foreign Countries in Matters of Criminal Law), and that it was also a constitutional principle.

Germany cited the following legal provisions:

Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 22 Dealing with requests

(1) Where the approval authority regards the pre-requisites for the provision of legal assistance to have been met, then unless otherwise provided for by law or by contract, the request shall be dealt with by the enforcing authority in accordance with the provisions that would apply had the request been submitted by a German authority; this applies also to coercive measures as may become necessary in dealing with the request (section 59 (3), section 77

of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on International Cooperation in Criminal Matters)). Unless mandatory regulations stipulate otherwise, special wishes of the requesting authority shall be met.

(5) Where the accomplishment of a request is delayed to a greater than negligible extent, it may be appropriate to issue an interim notice to the requesting authority.

Number 31 Subsequent change of the facts and circumstances

(1) If, following a request's having been dispatched, the circumstances change such that this significantly affects how the request is dealt with and completed, the requested foreign authority shall be informed of this fact without undue delay via the prescribed channels of communication, and in urgent cases directly, if necessary via the Federal Criminal Police Office. (2) These provisions shall apply mutatis mutandis to cases in which, prior to filing a formal request for legal assistance, it was suggested that provisional measures be taken abroad (e.g. by initiating an international search) or if it is known that the foreign authorities have taken temporary measures in anticipation of a request.

With regard to the collection of statistical information, Germany further clarified that no comprehensive statistics on mutual legal assistance requests was maintained. The customary length depends on the specific case and the requested measures, in particular their scale and complexity as well as the applicable channel of communications on both sides. It seems fair to state that many requests, especially with neighboring countries, can be executed within a few weeks, sometimes even shorter. Some very complex or comprehensive may take up to one year or longer until full completion, including necessary consultations during this time-frame.

(b) Observations on the implementation of the article

The reviewing experts observed that the principle of expeditious proceedings is contained in guidelines 22 and 31 of the RiVAST.

| Paragraph 25 of article 46

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that domestic proceedings needed to be taken into account according to RiVAST. Furthermore, such a scenario would be a case where domestically no or temporarily restricted mutual legal assistance could be provided.

Germany cited the following legal provisions.

Act on International Cooperation on Criminal Matters (AICCM - IRG)

Section 59

Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 24 Domestic criminal prosecution and administrative measures

Requests are to be verified also in terms of whether a measure of criminal prosecution or an administrative measure will be an option. Where either such measure is deemed necessary, the competent German authority shall be notified or, in the event of the notifying authority itself being competent, the necessary arrangements shall be made.

(b) Observations on the implementation of the article

The reviewing experts observed that the provision of the Convention was implemented via section 1 para. 3 AICCM-IRG. In addition, section 59 of the IRG and no. 24 of RiVSt are relevant.

Paragraph 26 of article 46

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that this provision applied by virtue of section 1 para. 3 AICCM-IRG. This principle can also be found in specific German provisions for incoming and outgoing requests.

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 72

Conditions which the requested State has attached to the legal assistance shall be honoured.

Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 18 Supplementation

Where the granting of legal assistance is contravened by a remediable obstacle, the requesting state is to be given the opportunity to supplement the request.

Number 22 Dealing with requests

(5) Where the accomplishment of a request is delayed to a greater than negligible extent, it may be appropriate to issue an interim notice to the requesting authority.

Number 73 Compliance with foreign conditions

Any conditions on which the requesting state has based the request and that concern the scope of the enforcement shall be complied with in the course of dealing with the enforcement assistance. Where a guarantee has been given to the requesting state that the principle of specialty will be honoured, nos. 100 and 101 shall apply *mutatis mutandis*.

Number 76 Surrender (Section 66 of the Gesetz über die internationale Rechtshilfe in Strafsachen (IRG, Act on International Cooperation in Criminal Matters))

(1) Where a request is filed that objects be surrendered, the competent public prosecutor's office at the regional court (Landgericht) shall cause the objects to be seized or impounded (cf. no. 75). The public prosecutor's office shall verify whether any conditions are to be imposed in approving the surrender, and if so, which conditions, and shall in particular verify whether the return of such objects may be waived. It shall monitor, as appropriate, the return of the objects.

Number 96 Surrender of objects ...

(4) The conditions imposed for the surrender of an object are to be honoured. As regards the safekeeping of objects, reference is made to no. 74 of the Guidelines for Criminal Proceedings and Proceedings for the Imposition of an Administrative Fine (RiStBV).

Number 101 Rendition note in the files

(1) In order to honour the principle of specialty and any conditions that may have been imposed (section 72 of the Act on International Cooperation in Criminal Matters (IRG)), a cover sheet is to be inserted into the criminal files and the hand files, along with a prominently placed note showing that the accused party has been rendered from abroad (cf. template no. 23).

Number 142 Approval from the foreign government ...

(2) The foreign conditions and wishes are to be diligently honoured, also in those cases in which they are only notified abroad by a foreign authority.

(b) Observations on the implementation of the article

The reviewing experts observed that the provision of the Convention was implemented via section 1 para. 3 AICCM-IRG.

Paragraph 27 of article 46

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that this provision of the Convention took precedence before the German Code of Criminal Procedure (StPO) which does not contain save conduit for witnesses as such.

(b) Observations on the implementation of the article

This provision takes precedence before the German Code of Criminal Procedure (StPO) which does not contain save conduit for witnesses as such.

Paragraph 28 of article 46

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

(a) Summary of information relevant to reviewing the implementation of the article

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 75 Costs

The reimbursement of costs incurred in the provision of legal assistance from the requesting State may be waived.

Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 15 Cost of legal assistance

(1) The costs of legal assistance shall be demanded or reimbursed only inasmuch as an international treaty permits this to be done or the foreign state requires the reimbursement on its side; this shall apply notwithstanding the provision made for special cases (cf. no. 77 and no. 77a)..

(2) The German regulations as to costs have been set out in the Ordinance on Costs in the Area of Judicial Administration (Kosten im Bereich der Justizverwaltung).

(3) Where a foreign authority is in its rights to demand reimbursement of the costs, the performing authority shall collect the receipts and shall prepare an invoice as to the costs. Where the documents are sent via the direct channel of communication or the consular channel, the cover letter shall ask the requesting authority to promptly reimburse the costs set out in the attached invoice as to costs to the judicial collection office, citing the reference number noted in the invoice. In all other cases the invoice as to costs shall be submitted to the supreme judicial or administrative authority. Should the costs demanded not be reimbursed within six months, then in the cases set out in the second sentence, the requesting authority shall be reminded that it is to make payment; this shall be reported to the supreme judicial or administrative authority. All cases are to be reported in which the costs demanded have not been reimbursed within one year. (4) For costs that are not reimbursed by the requesting foreign state, no recourse shall be taken to other authorities.

(5) Costs incurred by the German authorities in the course of requesting legal assistance shall, as a rule, be imposed on the authority having initiated the request. Where several authorities are involved in the event of a rendition, the Agreement on the Costs Entailed by Renditions (Vereinbarung über die Kosten in Einlieferungssachen) shall apply (printed in Annex I under no. 3).

Number 77 Examination

(2) Requests seeking an examination by video conference or telephone conference may be dealt with and completed both without a corresponding treaty having been concluded (section 59 (1) of the Act on International Cooperation in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen, IRG)) as well as on the basis of an international treaty pursuant to section 1 (3) of the Act on International Cooperation in Criminal Matters (IRG). The video conference / telephone conference is permissible pursuant to section 77 of the Act on International Cooperation in Criminal Matters (IRG) subject to the provisions of the Code of Criminal Procedure (StPO) (cf. sections 48 et seqq., 58a, 168e, 247a, 239 et seqq.). Unless otherwise provided for in an international treaty, the following rules shall apply:

d) The requesting state shall bear the costs of establishing and operating the connection, if any, as well as the costs of interpreters and experts, if any are involved;

e) The technical equipment shall be made available in accordance with the

arrangements made with the authorities involved.

Number 77a Surveillance of telecommunications

- (1) Requests for telecommunications surveillance measures may be executed non-treaty based (Sec. 59 para. 1 AICCM) or on the basis of an international treaty pursuant to Sec. 1 para. 3 AICCM. By virtue of Sec. 77 AICCM, the surveillance of telecommunications is permissible in accordance with the provisions of the Code of Criminal Procedure (Sec. 100a, 100b, 101). Unless a treaty provides otherwise or it suffices to impose conditions at the completion of the request, the foreign authority must give assurances that
- a) -c) [Omitted]
 - d) reciprocity is ensured und
 - e) that the requesting State will bear the costs of the measure.

Germany further clarified that the taking of evidence by video or telephone conference and the interception of telecommunications (“wire-tapping”) could be cited as examples where the execution of a request can associated with extraordinary expenses because of necessary technical equipment and interpretation. Accordingly, the Guidelines (RiVAST) in nos. 77 and 77a stipulate exceptions from the general rule that German authorities waive the costs for those cases.

(b) Observations on the implementation of the article

The costs of executing incoming requests for mutual legal assistance are generally borne by the German authorities (guideline 15 of the RiVAST), except for costs relating to the hearing of witnesses via videoconference and surveillance (guidelines 77 and 77a).

Subparagraph 29 (a) of article 46

29. *The requested State Party:*

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that publicly available documents or information could be provided on the basis of the general clause of section 59 AICCM.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 59 Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Such records, documents or information can be obtained from

Bundesamt für Justiz 53094 Bonn
Telefon: +49 228 99 410-40
Telefax: +49 228 99 410-5050
Website: www.bundesjustizamt.de

(b) Observations on the implementation of the article

The reviewing experts observed that the provision of government records and other documents available to the general public was possible (sect. 59 of the IRG).

Subparagraph 29 (b) of article 46

29. *The requested State Party: ...*

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that the legal base for providing mutual legal assistance would be the general clause of section 59 AICCM. To the extent that documents or information is concerned that it is not publicly available a separate legal base authorizing the transmissions for the purpose of criminal proceedings may be required (eg section 24c para. 3 No. 2 KWG automated access to central bank account register). Furthermore, specific limitation may exist, in particular, for reasons of privacy such as section 30 Fiscal Code relating to tax secrecy.

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 59 Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

Section 77 Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Code of Criminal Procedure (StPO)

Section 161 [Information and Investigations]

(1) For the purpose indicated in Section 160 subsections (1) to (3), the public prosecution office shall be entitled to request information from all authorities

and to make investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office and shall be entitled, in such cases, to request information from all authorities.

Banking Act (KWG)

Section 24c Automated access to account details

(1) Credit institutions shall maintain a data file in which they must store the following data without delay

1. the number of any account which is subject to the obligation to verify proof of identity within the meaning of section 154 (2) sentence 1 of the Fiscal Code or of a safe custody account, as well as the dates on which the account was opened and closed,
- 2 the name - and for natural persons the date of birth - of the holder and of any party authorised to draw on the account, as well as - in the cases specified in section 3 (1) number 3 of the Money Laundering Act - the name and, if available, the address of any other economic beneficiary within the meaning of section 1 (6) of the Money Laundering Act.

...

(2) [Omitted]

(3) Upon request, BaFin will provide information entered in the data file pursuant to subsection (1) sentence 1 to

1. the supervisory authorities pursuant to section 9 (1) sentence 4 number 2 insofar as this is necessary to enable them to perform their prudential functions under the conditions set out in subsection (2),
2. the authorities or courts responsible for providing international judicial assistance in criminal cases, and otherwise for the prosecution and punishment of criminal offences, insofar as this is necessary to enable them to perform their statutory functions,
3. the national authority responsible for imposing restrictions on capital transfers and payment transactions pursuant to the Foreign Trade and Payments Act insofar as this is necessary to enable it to perform its functions ensuing from the Foreign Trade and Payments Act or from legal instruments of the European Union in connection with restrictions on economic and financial relations.

BaFin will access the data stored in the data files by means of an automated procedure and transmit them to the authority making the request. BaFin will verify the permissibility of such transmission only if it has particular grounds for doing so. The responsibility for the permissibility of the transmission shall lie with the authority making the request. BaFin may, pursuant to section 4b of the Federal Data Protection Act, provide foreign agencies with information from the data file pursuant to subsection (1) sentence 1 for the purposes described in sentence 1. Section 9 (1) sentences 5 and 6 and subsection (2) shall apply mutatis mutandis. This is without prejudice to the provisions on international judicial assistance in criminal matters.

(4)-(8) [Omitted]

Fiscal Code of Germany (AO)

Section 30 Tax secrecy

(1) Public officials shall be obliged to observe tax secrecy. (2) Public officials shall be in breach of tax secrecy if they

1. disclose or make use of, without authorisation, circumstances of a third person which have become known to them

a) in an administrative procedure, an auditing procedure or in judicial proceedings in tax matters,

b) in criminal proceedings for tax crimes or in administrative fine proceedings for tax-related administrative offences,

c) for other reasons from notification by a revenue authority or from the statutory submission of a tax assessment notice or a certification of findings made in the course of taxation, or

2. disclose or make use of, without authorisation, a corporate or commercial secret which has become known to them in procedures/proceedings as designated under number 1 above, or

3. electronically retrieve, without authorisation, data protected pursuant to number 1 or 2 above which have been stored in a file for procedures/proceedings as designated under number 1 above.

(3) The following shall be deemed to be of equivalent status to public officials:

1. persons under special obligations to the civil service (section 11(1) number 4 of the Criminal Code),

1a. the persons designated in section 193(2) of the Act on the Constitution of Courts, 2. officially consulted experts,

3. holders of offices of the churches and other religious communities being public-law entities.

(4) Disclosure of information obtained pursuant to subsection (2) above shall be permissible, insofar as

1. it serves the implementation of procedures/proceedings within the meaning of subsection (2) number 1(a) and (b) above,

2. it is expressly permitted by law,

3. the persons concerned give their consent,

4. it serves the implementation of criminal proceedings for a crime other than a tax crime, and such information

a) was obtained in the course of proceedings for tax crimes or tax-related administrative offences; however, this shall not apply in relation to facts which a taxpayer has disclosed while unaware of the instigation of the criminal proceedings or the administrative fine proceedings or which have already become known in the course of taxation before the instigation of such proceedings, or

b) was obtained in the absence of any tax liability or by waiver of a right to withhold information,

5. there is a compelling public interest in such disclosure; such compelling public interest shall be deemed to exist in particular where

a) crimes and wilful serious offences against life and limb or against the State and its institutions are being or are to be prosecuted,

b) economic crimes are being or are to be prosecuted, and which in view of the method of their perpetration or the extent of the damage caused by them are likely to substantially disrupt the economic order or to substantially undermine general confidence in the integrity of business dealings or the

orderly functioning of authorities and public institutions, or
c) disclosure is necessary to correct publicly disseminated incorrect facts which are likely to substantially undermine confidence in the administration; such decision shall be taken by the highest revenue authority responsible in mutual agreement with Federal Ministry of Finance; the taxpayer is to be consulted before correction of the facts.

(b) Observations on the implementation of the article

The provision of non-public documents requires authorization from the public prosecutor's office (sects. 59-77 of the IRG, sect. 161 of StPO, sect. 24c, para. 3 of the Banking Act; sect. 30 of the Fiscal Code).

Paragraph 30 of article 46

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Germany provided references to the following agreements it had concluded with other States:

Bilateral:

Andorra:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Anguilla:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Antigua and Barbuda:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Bahamas:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Bermuda:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

British Virgin Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Cook Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Gibraltar:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Grenada:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Guernsey:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Hong Kong:

Agreement of May 26, 2006 between the Government of the Federal Republic of Germany and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on mutual legal assistance in criminal matters

Isle of Man:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Israel:

Additional treaty of July 20, 1977 between the Federal Republic of Germany and the State of Israel on the addition of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Italy:

Treaty of October 24, 1979 between the Federal Republic of Germany and Italy supplementing the European Convention of April 20, 1959 on mutual assistance in criminal matters and facilitating its application

Jersey:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Cayman Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Liechtenstein:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Monaco:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Montserrat:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Netherlands:

Treaty of August 30, 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands supplementing the European Convention of April 20, 1959 on mutual assistance in criminal matters and facilitating its application

Netherlands:

Agreement (by exchange of notes) of December 10, 2001/22. January 2002 between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands amending the Treaty of 30 August 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands on the supplement to the European Convention of 20 April 1959 on mutual assistance in criminal matters and to facilitate its application and to extend its application to the Netherlands Antilles and Aruba

Poland:

Treaty of July 13, 2003 between the Federal Republic of Germany and the Republic of Poland on the amendment of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Switzerland:

Treaty of November 13, 1969 between the Federal Republic of Germany and the Swiss Confederation on the amendment of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Switzerland:

Treaty of April 27, 1999 between the Federal Republic of Germany and the Swiss Confederation on cross-border police and judicial cooperation

Switzerland:

Treaty of July 8, 1999 between the Federal Republic of Germany and the Swiss Confederation on the amendment of the treaty between the Federal Republic of Germany and the Swiss Confederation on the amendment of the European Convention on Mutual Assistance in Criminal Matters of April 20,

1959 and the facilitation of its application of April 13, 1959 November 1969 according to its article 3 paragraph 1

St. Lucia:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

St. Vincent and the Grenadines:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

Czech Republic:

Treaty of February 2, 2000 between the Federal Republic of Germany and the Czech Republic supplementing the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and simplifying its application

Turks and Caicos Islands:

Agreement in the field of legal and administrative assistance and the exchange of information (also applies to criminal tax matters)

UNITED STATES:

Supplementary contract of April 18, 2006 to the treaty between the Federal Republic of Germany and the United States of America on mutual legal assistance in criminal matters

UNITED STATES:

Treaty of October 14, 2003 between the Federal Republic of Germany and the United States of America on mutual assistance in criminal matters

multilateral:

European Union:

- Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union
 - Protocol of October 16, 2001 to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
 - Framework decision 2003/577 / JHA of the Council of 22 July 2003 on the enforcement of decisions to freeze property or evidence in the European Union
 - Council Framework Decision 2006/960 / JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities in the Member States of the European Union
- Council of Europe:
- European Convention of April 20, 1959 on Mutual Assistance in Criminal Matters
 - Additional Protocol of March 17, 1978 to the European Convention on Mutual Assistance in Criminal Matters

- Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters;
- Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Japan / EU:

Agreement of November 30, 2009 / December 15, 2009 between the European Union and Japan on mutual assistance in criminal matters

USA / EU:

Agreement of June 25, 2003 between the European Union and the United States of America on mutual legal assistance

(b) Observations on the implementation of the article

The reviewing experts observed that Germany was a party to a great number of bilateral mutual legal assistance treaties, the European Convention on Mutual Legal Assistance in Criminal Matters (1959) and its additional protocols (1978 and 2001), as well as instruments at the European Union level, such as the Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union (2000) and its Protocol (2001), the European Union Council Framework Decision on the Execution of Decisions on the Freezing of Property or Evidence in the EU (2003), the European Union Council Framework Decision on Simplifying the Exchange of Information and Intelligence (2006) and the Directive regarding the European Investigation Order in Criminal Matters (2014).

Article 47. Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that if a German public prosecutor established that parallel proceedings are pending in another State, that is an important fact of relevance to the proceedings which must be taken into account in the investigative measures. Naturally, the discretion exercised must also take full account of mechanisms including UNCAC. Section 153c StPO allows for non-prosecution of offences committed abroad.

Germany cited the following legal provisions:

Code of Criminal Procedure (StPO)

Section 153c

[Non-Prosecution of Offences Committed Abroad]

- (1) The public prosecution office may dispense with prosecuting criminal offences
1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
 2. which a foreigner committed in Germany on a foreign ship or aircraft;
 3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.
- Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.
- (2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence. (3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution. (4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.
- (5) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General.

(b) Observations on the implementation of the article

The reviewing experts observed that there were no explicit provisions on the transfer of criminal proceedings in German legislation. They further recommended that Germany consider introducing specific legislation with regard to the transfer of criminal proceedings.

Article 48. Law enforcement cooperation

Paragraph 1 of article 48

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that as a general rule, the Federal Criminal Police Office coordinates the criminal-law cooperation with the police, judicial authorities and other public offices responsible for the prevention or prosecution of crimes in other States, as well as with intergovernmental and transnational offices working on the prevention and/or prosecution of crimes (cf. section 14 (1) BKA Act in conjunction with no. 123 of the Guidelines on Relations with Foreign Countries in Criminal Matters (Richtlinien für

den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten - RiVAST).

Germany cited the following legal provisions:

BKAG, Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the Länder in Criminal Police Matters (Article 1)

Section 3 International cooperation

(1) The Federal Criminal Police Office (BKA) shall be the National Central Bureau of the Federal Republic of Germany for the International Criminal Police Organisation.

(1a) The Federal Criminal Police Office (BKA) shall be the national central body serving the exchange of information according to Article 39 (3) and Article 46 (2) of the Convention implementing the Schengen Agreement, for operating the national section of the Schengen Information System and the SIRENE bureau for the exchange of supplementary information. Alerts in the Schengen Information System shall be entered in the police information system pursuant to section 11.

(2) It shall be incumbent on the Federal Criminal Police Office (BKA) to ensure communications between the Federal and Land police forces and the police and judicial authorities, or other public bodies competent in this regard, of foreign countries, which communications are required for the prevention and prosecution of crime. Special provisions under federal law, in particular the provisions pertaining to international legal assistance in criminal matters and divergent rules specified in agreements concluded between the Federal Ministry of the Interior (Bundesministerium des Innern) and the competent supreme Land authorities or in agreements concluded between the competent supreme Land authorities and the competent bodies of foreign countries in the context of agreements concluded by the Federation, and the international cooperation between the customs authorities shall remain unaffected.

(3) Subsection (2), first sentence shall not apply to official communications with the competent authorities of neighbouring countries or member countries of the European Union if these communications concern crime of regional significance in the border areas or in the case of exigent circumstances. The transmitting police forces shall inform the Federal Criminal Police Office (BKA) without delay about any official communications arising in accordance with the first sentence. In definable cases in the context of regional priority operations, the police forces may, in derogation from subsection (2), first sentence, officially communicate with the competent authorities of foreign countries as required, in agreement with the Federal Criminal Police Office (BKA).

BKAG, Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the Länder in Criminal Police Matters (Article 1) Section 14 Powers in international cooperation

(1) The Federal Criminal Police Office (BKA) may transmit personal data to police and judicial authorities and to other public bodies responsible for the prevention or prosecution of crime in foreign countries as well as to intergovernmental and supranational bodies dealing with the prevention and

prosecution of crime if this is necessary

- 1.to fulfil a task incumbent on the Federal Criminal Police Office (BKA),
- 2.to prosecute offences and enforce sentences pursuant to the provisions on international legal assistance in criminal matters or the provisions on cooperation with the International Criminal Court or
- 3.to defend against a significant risk to public safety given in an individual case.

The same shall apply if there is reason to assume that it is intended to commit offences of major importance.

(2) Subject to the approval of the Federal Ministry of the Interior (Bundesministerium des Innern), the Federal Criminal Police Office (BKA) may keep available stored non-personal data that may be of use in searching for wanted property with a view to automated data retrieval by central police authorities in foreign countries, in accordance with intergovernmental agreements, for the purpose of seizing stolen, misappropriated or otherwise lost property.

(3) For data stored for the purposes of searches for persons or discreet checks by the police, an automated retrieval process as mentioned in subsection (2) may be set up, subject to the approval of the Federal Ministry of the Interior (Bundesministerium des Innern), in consultation with the Ministries of the Interior and Senate Departments for the Interior of the Länder provided that

- 1.facts indicate that the data retrieval is necessary for the prevention and prosecution of offences of major importance and for defending against risks to public safety,

2. this form of data transmission is appropriate because of the large number of transmissions to be made or their particular urgency, taking into account the interests meriting protection of the individuals concerned, and
- 3.the recipient country has ratified the Convention of the Council of Europe for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981 or that equivalent protection is guaranteed and a supervisory body exists to independently supervise compliance with the data protection provisions.

If the data retrieval procedure is set up for a period exceeding three months, the agreement shall require the involvement of the legislative bodies pursuant to Article 59 paragraph 2 of the Basic Law (GG). The recipients shall be notified that they may use the data for wanted notices in their own search systems only upon submission of a request for legal assistance.

(4) Personal data may permissibly be transmitted regularly to international data collections within the framework of a systematic cooperation in accordance with legal acts of the European Union and international treaties, which require the involvement of legislative bodies pursuant to Article 59 paragraph 2 of the Basic Law (GG).

(5) The Federal Criminal Police Office (BKA), in its capacity as the National Central Bureau of the Federal Republic of Germany for the International Criminal Police Organisation, may transmit personal data to the General Secretariat of the Organisation subject to the terms of subsection (1) provided that this is required for the onward transmission of the data to other National Central Bureaux or to the bodies mentioned in subsection (1), or that this is necessary for the purposes of collection and analysis of information by the General Secretariat.

(6) The Federal Criminal Police Office (BKA) may transmit personal data to offices of the armed forces stationed in Germany within the framework of article 3 of the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany of 3 August 1959 (Bundesgesetzblatt (BGBl., Federal Law Gazette) 1961 II p. 1183) if this is necessary for the lawful accomplishment of the tasks they are responsible for.

(7) The Federal Criminal Police Office (BKA) is responsible for the lawfulness of the transmission. Section 10 subsection (4), second sentence shall apply mutatis mutandis. The Federal Criminal Police Office (BKA) shall record the transmission and the reason for it. The recipient of personal data is to be notified that the data may be used only for the purpose for which they were supplied. Furthermore, the recipient is to be informed of the date on which deletion is due at the Federal Criminal Police Office (BKA). Personal data shall not be transmitted if there is reason to assume that their transmission would be contrary to the purpose of a German law. Furthermore, personal data shall not be transmitted if, in the individual case, the interests meriting protection of the person concerned in the exclusion of the transmission predominate, even if the particular public interest in the transmission of the data is taken into account. The interests meriting protection of the person concerned shall also include the existence of an appropriate data protection level in the recipient country. The interests meriting protection of the person concerned may also be safeguarded by the recipient country or the receiving intergovernmental or supranational body guaranteeing the appropriate protection of the transmitted data in the individual case.

RiVAsT, Guidelines for Relations with Foreign Countries in Matters of Criminal Law

Number 123 Activity of the Federal Criminal Police Office (BKA)

(1) The Federal Criminal Police Office may deal with and complete requests incoming from the police in the context of its fundamental competence and the competence delegated to it pursuant to the Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the Länder in Criminal Police Matters (Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten, BKAG), provided that this has been prescribed in an international treaty pursuant to section 1 subsection (3) of the Act on International Cooperation in Criminal Matters (IRG) or in a legal act of the European Union having immediate applicability. In this field, particularly any bilateral or multilateral agreements on cross-border collaboration in matters of the police and the judiciary are to be observed (cf. overview in attachment IV of Annex II). Furthermore, the Federal Criminal Police Office (BKA) may take the following actions within the context of domestic law upon receiving a request from a foreign authority: issue an arrest warrant for a person being prosecuted, or a warrant for the location of that person; carry out search measures; establish the identity of persons; provide information from registers, databases or other compilations of data as well as from documents kept by the criminal police; provide criminal technical reports.

The Federal Criminal Police Office (BKA) may deal with and complete other requests within the context of its competence (first sentence) or may have another police authority so deal with them and complete them, provided the Federal government has authorised this generally or for the specific case.

(2) The Federal Criminal Police Office (BKA) may forward incoming requests in accordance with no. 6. In the cases governed by no. 6, second sentence, the Federal Criminal Police Office (BKA) shall inform whether the legal assistance has been approved or whether it still requires approval from the competent authority.

(3) The Federal Criminal Police Office (BKA) may file requests, in the context of its fundamental competence and the competence delegated to it pursuant to the Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the Länder in Criminal Police Matters (BKAG)

a) in the cases governed by section 163 (1) of the Code of Criminal Procedure (StPO), inasmuch as an international treaty stipulates that police requests are to be dealt with and completed;

b) where the matter concerns requests that search measures be carried out, the identity of persons be established, information be provided within the meaning of no. 118, paragraph 2, and where it concerns the preparations for an outgoing request - e.g. establishing the readiness of a witness to testify - and where taking any coercive measures under criminal procedural law is ruled out in dealing with such requests and completing them; or

c) provided the Federal government has authorised this generally or for the specific case.

(4) The Federal Criminal Police Office (BKA) may forward outgoing requests of judicial authorities seeking measures within the meaning of subsection (3) letter b) as well as requests seeking arrest, an order of detention pending extradition or temporary arrest. Furthermore, the Federal Criminal Police Office (BKA) may forward outgoing requests provided that an international treaty has provided that the channel of communication shall be via the Federal Criminal Police Office (BKA) - specifically via Interpol or Europol. The same applies to urgent cases, where the direct channel of communication is permitted. The Federal Criminal Police Office (BKA) may also forward outgoing requests within the meaning of no. 124 paragraphs 3 and 4 and may file requests within the meaning of no. 124, paragraph 4. Where a request that does not meet the pre-requisites set out in this paragraph is to be forwarded as an exception by the Federal Criminal Police Office (BKA), the requesting authority shall obtain the decision of its supreme judicial or administrative authority.

(5) In the cases governed by no. 5, letter c) of the Agreement on Competence (Zuständigkeitsvereinbarung) (printed in Annex I under no. 2) as well as no. 13 paragraph 1, the Federal Criminal Police Office (BKA) shall obtain the decision of the competent federal ministry. The Federal Ministry of the Interior is to be informed.

Germany further indicated that 66 BKA liaison officers filled posts at 53 locations in 50 countries at German diplomatic representations abroad. The liaison officers have a preventive and repressive mandate. They are active in both initiating and supporting investigations. Their clarification and support activity, their information gathering and

analysis and other investigation-related activities are generally oriented towards concrete, case-specific facts which are of relevance for the police. They are furthermore responsible for the strategic and tactical observation of the crime situation in the host country and/or the region, including the measures for crime suppression, in particular, internationally organised crime. The liaison officers do not perform any activities of a sovereign nature in the host country and, in the course of performing their duty, are obliged to observe international law, the law of the host country as well as the agreements concluded with the host country. They represent the interests of the German police, - in particular, those of the BKA - and support other German law enforcement bodies.

(b) Observations on the implementation of the article

The reviewing experts observed that the Federal Criminal Police Office coordinated international law enforcement cooperation (sects. 3 and 14 of the Act on the Federal Criminal Police Office and the Cooperation of the Federal Government and the *Länder* in Criminal Police Matters, and guideline 123 of the RiVAST).

The reviewing experts further observed that Germany maintained a network of over 60 Federal Criminal Police Office liaison officers abroad.

Paragraph 2 of article 48

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that to combat corruption at the international level, the BKA is a participant in the European Anti-Corruption Network (EACN).

The European Contact Point Network against Corruption was set up under the auspices of the European Partners against Corruption (EPAC) by EU Council Decision 2008/852/JHA of 24 October 2008. For the most part, the EACN members are identical to those of EPAC.

The network's goals are of a purely operative nature and may include the following:

- establishment, maintenance and continued development of contacts among offices;
- promotion of independence, non-partisanship and legitimacy as well as accountability, transparency and accessibility with regard to all systems established and maintained for the purpose of independent monitoring of police work and combating corruption;
- promotion of international legal instruments and mechanisms from the expert perspective;
- support for the development and promotion of common working standards and best practices for police monitoring offices and anti-corruption authorities;
- establishment of a platform to exchange information and experiences with regard to developments in monitoring police work and in matters relating to combating corruption;
- support for other countries and organisations that are planning to establish or develop monitoring mechanisms and anti-corruption authorities;
- cooperation with other organisations, authorities, networks and stakeholders, taking into account the above-mentioned goals.

The EPAC/EACN secretariat compiles an annual EACN contact catalogue, which lists the members of the network and is sent to all members. In addition to the BKA, representatives of Germany's Länder and judiciary participate in the network as well.

During the course of an EU-supported project titled "European Anti-Corruption Training (EACT) - Practice meets Practice," which was led by the Austrian Federal Office for Prevention and Combating of Corruption (BAK), the Slovakian Interior Ministry on the Combating of Corruption (UBPK), the national investigative authority of the Slovenian Interior Ministry and the Slovenian Commission for the Prevention of Corruption, a two-year study (2011-2013) was carried out for the purpose of the joint support for prevention or corruption and practice-oriented combating of corruption.

The BKA has already participated in the "International Cooperation" working group. The working group has compiled a Best Practices Manual for the areas of investigations, law enforcement, prevention and international cooperation, and has forwarded it to all Member States.

UNCAC can also be considered as a basis for law enforcement cooperation.

(b) Observations on the implementation of the article

The reviewing experts observed that Germany conducted active law enforcement cooperation through INTERPOL, the European Union Agency for Law Enforcement Cooperation, the European Judicial Network, the European Union Agency for Criminal Justice Cooperation, the European Anti-Corruption Network and the European Contact Point Network. Through its national Asset Recovery Office, Germany is part of the Camden Asset Recovery Inter-Agency Network. Germany is also a member of the Egmont Group of Financial Intelligence Units and the Cybercrime Convention Committee.

Germany considers the Convention as a basis for law enforcement cooperation.

Paragraph 3 of article 48

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated it was a member of the Cybercrime Convention Committee (T-CY) and was cooperating with other States to respond to offences committed through the use of modern technology.

(b) Observations on the implementation of the article

The reviewers observed that Germany had reported on its cooperation with other States with regard to offences committed through the use of modern technology.

Article 49. Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

(a) Summary of information relevant to reviewing the implementation of the article

Germany reported that at the time of the review there were no joint investigation on the basis of UNCAC yet. However, numerous joint investigation teams have already been instituted pursuant to the EU Framework Decision.

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 61 b

Joint Investigation Teams

- (1) If an international treaty so provides joint investigation teams may be established. A member of the joint investigation team seconded by a foreign State may be allowed to conduct investigations under the supervision of the relevant German team member if this has been previously approved by the sending State.
- (2) Other persons may participate in the joint investigation team based on the law of the participating States or any agreement between them.
- (3) The German officers participating in the joint investigation team may

directly transmit information obtained in the execution of their office, including personal data, to the members sent by other States, insofar as this is necessary for the work of the joint investigation team.

(4) Insofar as the transmission of the information obtained under subsection (3) above requires a specific agreement amending the purpose of its use such an agreement is admissible if a request for the use of the information was admissible.

Section 93

Joint Investigation Teams

(1) A member of the joint investigation team seconded by a Member State of the European Union may be allowed to conduct investigations under the supervision of the relevant German team member if this has been previously approved by the sending Member State.

(2) Other persons may participate in the joint investigation team based on the law of the participating Member States or any agreement between them.

(3) The German officers participating in the joint investigation team may directly transmit information obtained in the execution of their office, including personal data, to the members sent by other Member States, insofar as this is necessary for the work of the joint investigation team.

(4) Insofar as the transmission of the information obtained under subsection (3) above requires a specific agreement amending the purpose of its use such an agreement is admissible if a request for the use of the information was admissible.

Germany further provided in the following, two examples for joint investigation teams (JIT) with participation by German prosecution. It is noted that German authorities have been involved in many more such JITs on EU level. The two outlined here are foremost notable in the regard that they have their focus on corruption offences.

Case study 1 – Joint Investigations Team by Prosecution Office I of Munich (Germany) and Austrian authorities

In the year 2012, the Prosecution Office I of Munich initiated investigations for the suspicion of bribery. The suspects, employees of a German limited liability company (GmbH), were alleged to have provided bribe payments to companies and public officials in Austria in connection with existing commercial relationships, with a view to conclude a number of contractual obligations of the Republic of Austria.

For that purpose, a second German company, which was co-owner of the first-mentioned GmbH, was used to set up a brokerage firm, through which payments of at least 50 m. Euros were made over the course of approx. 3 years. These payments were said to constitute commissions from consultancy contracts.

In reality, they are assumed to constitute funds for agreed bribery funds to influence Austrian decision makers (public officials) in regard to awarding the contract to the German GmbH company, and to reward the tender for the benefit of that GmbH accordingly. The brokerage firm did not actually render any meaningful consulting or brokerage services aimed at the subject of the contract. Such services were not truly required as the contracting Austrian entities regularly committed themselves to the contracts and performed, i.e. paid, according to the agreed contractual frame and payment period without raising

further concerns. The amount for the bribe funds were calculated as a part of the purchasing price owed by the Republic of Austria, which was thus increased and over-priced.

The second German company, co-owning the GmbH, had agreed to cover the fees for the consultancy and brokerage services. By paying for them, the company incurred damages to the amount of the payments made to the brokerage firm.

The involved German and Austrian prosecution authorities founded a Joint Investigation Team (JIT) on the basis of Article 13 of the European Union Mutual Legal Assistance Convention of 2000. This JIT operated successfully, and the JIT agreement has been extended three times, most recently up until November 2016.

Case study 2 – Joint Investigations Team by Prosecution Office I of Munich (Germany) and Romanian authorities

Since 2013, the Prosecution Office I of Munich has conducted investigations on employees of a German limited liability company (GmbH) for the suspicion of bribery. The suspects are alleged to have made bribe payments to Romanian officials, in order to have a public tender by the Romanian Government awarded initially, as well as having it continued in the course of subsequent negotiations and furthermore to enter additional project phases only agreed on as optional.

The initial award of the tender to the German GmbH occurred in August 2004, when a so-called framework contract with an order volume of up to 650 m. Euros was signed. Additional contracts, which fixed the total order volume at approx. 500 m. Euros, were concluded in the years 2005 und 2009. The overall project foresaw three phases, of which the third phase from 2009 onwards was initially only agreed on as an optional one.

There are sufficient grounds to believe that bribe funds were provided via various Romanian companies to Romanian officials with responsibility for the overall project. The German GmbH company held a central role, according to the current state of investigations, for organizing the payments. Moreover, suspicious transactions were observed which benefitted companies only involved at the fringes of the overall project. Those companies are said to have channel money via other companies to further official on Romania.

In 2015, the Prosecution Office I of Munich started contacting the Romanian authorities to discuss the setting-up of a Joint Investigation Team (JIT) under Article 13 of the European Union Mutual Legal Assistance Convention of 2000. The discussions are still under way.

(b) Observations on the implementation of the article

The reviewing experts observed that the establishment of joint investigation teams was possible in Germany (sects. 61b and 93 of the IRG). In practice, numerous joint investigation teams have been instituted pursuant to European Union Council Framework Decision 2002/465/JHA on joint investigation teams.

Article 50. Special investigative techniques

Paragraph 1 of article 50

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

(a) Summary of information relevant to reviewing the implementation of the article

Germany clarified that the provisions of the StPO were applicable by way of section 77 (1) IRG.

The law enforcement agencies may perform controlled deliveries and may also effect observations of persons pursuant to sections 161 (1), 163 (1) and section 163f StPO, provided that the pre-requisites set out therein are met. Sections 100a and 100f StPO provides for further, electronic measures of surveillance. Subject to the pre-requisites set out in section 110a StPO, undercover agents may be deployed. Any legally obtained findings made in such measures are admissible for use in court.

Germany cited the following legal provisions.

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 77

Application of Procedural Rules

(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.

Code of Criminal Procedure (StPO)

Section 100a

[Conditions Regarding Interception of Telecommunications]

(1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an offence by committing a criminal offence; and
2. the offence is one of particular gravity in the individual case as well; and
3. other means of establishing the facts or determining the accused's whereabouts would be much more difficult or offer no prospect of success.

- (2) Serious criminal offences for the purposes of subsection (1), number 1, shall be: 1. pursuant to the Criminal Code:
- a) crimes against peace, high treason, endangering the democratic state based on the rule of law, treason and endangering external security pursuant to sections 80 to 82, 84 to 86, 87 to 89a and 94 to 100a;
 - b) taking of bribes by, and offering of bribes to, mandate holders pursuant to section 108e; c) crimes against the national defence pursuant to sections 109d to 109h;
 - d) crimes against public order pursuant to sections 129 to 130;
 - e) counterfeiting money and official stamps pursuant to sections 146 and 151, in each case also in conjunction with section 152, as well as section 152a subsection (3) and section 152b subsections (1) to (4);
 - f) crimes against sexual self-determination in the cases referred to in sections 176a, 176b, 177 subsection (2), number 2, and section 179 subsection (5), number 2;
 - g) dissemination, purchase and possession of pornographic writings involving children and involving juveniles, pursuant to section 184b subsections (1) to (3), section 184c subsection (3); h) murder and manslaughter pursuant to sections 211 and 212;
 - i) crimes against personal liberty pursuant to sections 232 to 233a, 234, 234a, 239a and 239b; j) gang theft pursuant to section 244 subsection (1), number 2, and aggravated gang theft pursuant to section 244a;
 - k) crimes of robbery or extortion pursuant to sections 249 to 255;
 - l) commercial handling of stolen goods, gang handling of stolen goods and commercial gang handling of stolen goods pursuant to sections 260 and 260a;
 - m) money laundering or concealment of unlawfully acquired assets pursuant to section 261 subsections (1), (2) and (4);
 - n) fraud and computer fraud subject to the conditions set out in section 263 subsection (3), second sentence, and in the case of section 263 subsection (5), each also in conjunction with section 263a subsection (2);
 - o) subsidy fraud subject to the conditions set out in section 264 subsection (2), second sentence, and in the case of section 264 subsection (3), in conjunction with section 263 subsection (5);
 - p) criminal offences involving falsification of documents under the conditions set out in section 267 subsection (3), second sentence, and in the case of section 267 subsection (4), in each case also in conjunction with section 268 subsection (5) or section 269 subsection (3), as well as pursuant to sections 275 subsection (2) and section 276 subsection (2);
 - q) bankruptcy subject to the conditions set out in section 283a, second sentence;
 - r) crimes against competition pursuant to section 298 and, subject to the conditions set out in section 300, second sentence, pursuant to section 299;
 - s) crimes endangering public safety in the cases referred to in sections 306 to 306c, section 307 subsections (1) to (3), section 308 subsections (1) to (3), section 309 subsections (1) to (4), section 310 subsection (1), sections 313, 314, 315 subsection (3), section 315b subsection (3), as well as sections 361a and 361c;
 - t) taking and offering a bribe pursuant to sections 332 and 334; 2. pursuant to the Fiscal Code:
 - a) tax evasion under the conditions set out in section 370 subsection (3),

second sentence, number 5;

b) commercial, violent and gang smuggling pursuant to section 373;

c) handling tax-evaded property as defined in section 374 subsection (2); 3. pursuant to the Pharmaceutical Products Act: criminal offences pursuant to section 95 subsection (1), number 2a, subject to the conditions set out in section 95 subsection (3), second sentence, number 2, letter b;

4. pursuant to the Asylum Procedure Act:

a) inducing an abusive application for asylum pursuant to section 84 subsection (3);

b) commercial and gang inducement to make an abusive application for asylum pursuant to section 84a;

5. pursuant to the Residence Act:

a) smuggling of aliens pursuant to section 96 subsection (2);

b) smuggling resulting in death and commercial and gang smuggling pursuant to section 97; 6. pursuant to the Foreign Trade and Payments Act: wilful criminal offences pursuant to sections 17 and 18 of the Foreign Trade and Payments Act;

7. pursuant to the Narcotics Act:

a) criminal offences pursuant to one of the provisions referred to in section 29 subsection (3), second sentence, number 1, subject to the conditions set out therein;

b) criminal offences pursuant to section 29a, section 30 subsection (1), numbers 1, 2 and 4, as well as sections 30a and 30b;

8. pursuant to the Precursors Control Act: criminal offences pursuant to section 19 subsection (1), subject to the conditions set out in section 19 subsection (3), second sentence;

9. pursuant to the War Weapons Control Act:

a) criminal offences pursuant to section 19 subsections (1) to (3) and section 20 subsections (1) and (2), as well as section 20a subsections (1) to (3), each also in conjunction with section 21; b) criminal offences pursuant to section 22a subsections (1) to (3);

10. pursuant to the Code of Crimes against International Law: a) genocide pursuant to section 6;

b) crimes against humanity pursuant to section 7; c) war crimes pursuant to sections 8 to 12;

11. pursuant to the Weapons Act:

a) criminal offences pursuant to section 51 subsections (1) to (3);

b) criminal offences pursuant to section 52 subsection (1), number 1 and number 2, letters c and d, as well as section 52 subsections (5) and (6).

(3) Such order may be made only against the accused or against persons in respect of whom it may be assumed, on the basis of certain facts, that they are receiving or transmitting messages intended for, or transmitted by, the accused, or that the accused is using their telephone connection.

(4) If there are factual indications for assuming that only information concerning the core area of the private conduct of life would be acquired through a measure pursuant to subsection (1), the measure shall be inadmissible. Information concerning the core area of the private conduct of life which is acquired during a measure pursuant to subsection (1) shall not be used. Any records thereof shall be deleted without delay. The fact that they

were obtained and deleted shall be documented.

Section 100c

[Measures Implemented Without the Knowledge of the Person Concerned]

(1) Private speech on private premises may be intercepted and recorded using technical means also without the knowledge of the person concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a particularly serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence; and
2. the offence is one of particular gravity in the individual case as well; and
3. on the basis of factual indications it may be assumed that the surveillance will result in the recording of statements by the accused which would be of significance in establishing the facts or determining the whereabouts of a co-accused; and
4. other means of establishing the facts or determining a co-accused's whereabouts would be disproportionately more difficult or offer no prospect of success.

(2) Particularly serious criminal offences for the purposes of subsection (1), number 1, shall be:

1. pursuant to the Criminal Code:

a) crimes against peace, high treason, endangering the democratic state based on the rule of law, treason, and endangering external security pursuant to sections 80, 81, 82, 89a, pursuant to section 94, section 95 subsection (3) and section 96 subsection (1), in each case also in conjunction with section 97b, as well as pursuant to section 97a, section 98 subsection (1), second sentence, section 99 subsection (2), section 100 and section 100a subsection (4);

b) formation of criminal groups pursuant to section 129 subsection (1) in conjunction with subsection (4), second part of the sentence, and formation of terrorist groups pursuant to section 129a subsections (1), (2), (4) and subsection (5) first sentence, first alternative, in each case also in conjunction with section 129b subsection (1);

c) counterfeiting money and official stamps pursuant to sections 146 and 151, in each case also in conjunction with section 152, as well as pursuant to section 152a subsection (3) and section 152b subsections (1) to (4);

d) crimes against sexual self-determination in the cases referred to in section 176a subsection (2), number 2, or subsection (3), section 177 subsection (2), number 2, or section 179 subsection (5), number 2;

e) distribution, acquisition and possession of pornographic writings involving children in the cases referred to in section 184b subsection (3);

f) murder and manslaughter pursuant to sections 211 and 212;

g) crimes against personal liberty pursuant to section 234, section 234a subsections (1) and (2), sections 239a and 239b, and trafficking in human beings for the purpose of sexual exploitation and for the purpose of exploitation of labour pursuant to section 232 subsection (3), subsection (4) or subsection (5), section 233 subsection (3), in each case to the extent that it concerns a felony;

h) gang theft pursuant to section 244 subsection (1), number 2, and aggravated gang theft pursuant to section 244a;

i) aggravated robbery and robbery resulting in death pursuant to section 250 subsection (1) or subsection (2), section 251;

- j) extortion resembling robbery pursuant to section 255 and a particularly serious case of extortion pursuant to section 253 under the conditions set out in section 253 subsection (4), second sentence;
- k) commercial handling of stolen goods or gang handling of stolen goods or commercial gang handling of stolen goods pursuant to sections 260 and 260a;
- l) a particularly serious case of money laundering or concealment of unlawfully acquired assets pursuant to section 261 under the conditions set out in section 261 subsection (4), second sentence;
- m) a particularly serious case of taking and offering bribes pursuant to section 335 subsection (1) under the conditions set out in section 335 subsection (2), numbers 1 to 3;

2. pursuant to the Asylum Procedure Act:

- a) inducing an abusive application for asylum pursuant to section 84 subsection (3);
- b) commercial or gang inducement of an abusive application for asylum pursuant to section 84a subsection (1);

3. pursuant to the Residence Act:

- a) smuggling of aliens pursuant to section 96 subsection (2);
- b) smuggling resulting in death and commercial and gang smuggling pursuant to section 97;

4. pursuant to the Narcotics Act:

- a) a particularly serious case of a criminal offence pursuant to section 29 subsection (1), first sentence, numbers 1, 5, 6, 10, 11 or 13, subsection (3) subject to the requirements of section 29 subsection (3), second sentence, number 1;

- b) a criminal offence pursuant to section 29a, section 30 subsection (1), numbers 1, 2, and 4, or section 30a;

5. pursuant to the War Weapons Control Act:

- a) a criminal offence pursuant to section 19 subsection (2), or to section 20 subsection (1), in each case also in conjunction with section 21;
- b) a particularly serious case of a criminal offence pursuant to section 22a subsection (1) in conjunction with subsection (2);

6. pursuant to the Code of Crimes against International Law: a) genocide pursuant to section 6;

- b) crimes against humanity pursuant to section 7; c) war crimes pursuant to sections 8 to 12;

7. pursuant to the Weapons Act:

- a) a particularly serious case of a criminal offence pursuant to section 51 subsection (1) in conjunction with subsection (2);
- b) a particularly serious case of a criminal offence pursuant to section 52 subsection (1), number 1, in conjunction with subsection (5).

(3) The measure may be directed only against the accused and may be implemented only on the private premises of the accused. The measure shall be admissible on the private premises of other persons only if it can be assumed on the basis of certain facts that

- 1. the accused named in the order pursuant to Section 100d subsection (2) is present on those premises; and that
- 2. applying the measure on the accused's premises alone will not lead to the establishment of the facts or the determination of a co-accused person's whereabouts.

The measures may be implemented even if they unavoidably affect third

persons.

(4) The measure may be ordered only if on the basis of factual indications, in particular concerning the type of premises to be kept under surveillance and the relationship between the persons to be kept under surveillance, it may be assumed that statements concerning the core area of the private conduct of life will not be covered by the surveillance. Conversations on operational or commercial premises are not generally to be considered part of the core area of the private conduct of life. The same shall apply to conversations concerning criminal offences which have been committed and statements by means of which a criminal offence is committed. (5) The interception and recording is to be interrupted without delay if during the surveillance indications arise that statements concerning the core area of the private conduct of life are being recorded. Recordings of such statements are to be deleted without delay. Information acquired by means of such statements may not be used. The fact that the data was obtained and deleted is to be documented. If a measure pursuant to the first sentence has been interrupted, it may be re-continued subject to the conditions set out in subsection (4). If in doubt, a court decision on the interruption or continuation of the measures should be sought without delay; Section 100d subsection (4) shall apply *mutatis mutandis*.

(6) In the cases referred to in Section 53 a measure pursuant to subsection (1) shall be inadmissible; if during or after implementation of the measure it becomes apparent that a case referred to in Section 53 is applicable, subsection (5), second to fourth sentences, shall apply *mutatis mutandis*. In the cases referred to in Sections 52 and 53a, information acquired through a measure pursuant to subsection (1) may only be used if, taking into consideration the significance of the underlying relationship of trust, this is not disproportionate to the interest in establishing the facts or determining the whereabouts of an accused person. Section 160a subsection (4) shall apply *mutatis mutandis*.

(7) Insofar as a prohibition on use pursuant to subsection (5) is conceivable, the public prosecution office shall obtain a decision without delay from the court which made the order, as to whether the information acquired may be used. Insofar as the court does not approve such use, the decision shall be binding for the further proceedings.

Section 100f

[Use of Technical Means]

(1) Words spoken in a non-public context outside private premises may be intercepted and recorded by technical means also without the knowledge of the persons concerned if certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a criminal offence referred to in Section 100a subsection (2), being a criminal offence of particular gravity in the individual case as well, or, in cases where there is criminal liability for attempt, has attempted to commit such an offence, and other means of establishing the facts or determining the accused's whereabouts would offer no prospect of success or be much more difficult.

(2) The measure may only be directed against an accused person. Such a measure may only be ordered against other persons if it is to be assumed, on the basis of certain facts, that they are in contact with an accused or that such contact will be established, the measure will result in the establishment of the

facts or the determination of an accused's whereabouts, and other means of establishing the facts or determining an accused's whereabouts would offer no prospect of success or be much more difficult.

(3) The measure may be implemented even if it unavoidably affects third persons.

Section 110 [Examination of Papers]

(1) The public prosecution office and, if it so orders, the officials assisting it (section 152 of the Courts Constitution Act), shall have the authority to examine documents belonging to the person affected by the search.

(2) In all other cases, officials shall be authorized to examine papers found by them only if the holder permits such examination. In all other cases they shall deliver any papers, the examination of which they deem necessary, to the public prosecution office in an envelope which shall be sealed with the official seal in the presence of the holder.

(3) The examination of an electronic storage medium at the premises of the person affected by the search may be extended to cover also physically separate storage media insofar as they are accessible from the storage medium if there is a concern that the data sought would otherwise be lost. Data which may be of significance for the investigation may be secured; Section 98 subsection (2) shall apply mutatis mutandis.

Section 161

[Information and Investigations]

(1) For the purpose indicated in Section 160 subsections (1) to (3), the public prosecution office shall be entitled to request information from all authorities and to make investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office and shall be entitled, in such cases, to request information from all authorities.

Section 163

[Duties of the Police]

(1) The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled to request, and in exigent circumstances to demand, information from all authorities, as well as to conduct investigations of any kind insofar as there are no other statutory provisions specifically regulating their powers.

Germany further referred to the Federal Court of Justice, decision and order of 21 November 2012 - Az. 1 StR 310/12 on the admissibility for use in court of the interception of telecommunications performed abroad:

“The admissibility for use in court of evidence obtained via the legal assistance provided by a foreign state is governed by domestic law. (at margin no. 21)

Evidence obtained in this way will not be subject to a prohibition of its use in

court, even if it fails to comply with the relevant provisions of the laws governing legal assistance, where the evidence could have been obtained also in observance of the laws governing legal assistance by the requested state and the requesting state (at margin no. 25) (at margin no. 27)

Where the legal assistance has been provided by a Member State of the European Union, it may be reviewed, in evaluating the use of the evidence in court in Germany, only in a limited scope whether the evidence was lawfully obtained according to the domestic laws of the requested Member State. This applies in any case in those instances in which the evidence was taken in that Member State without any request for assistance having been filed by Germany.”

(b) Observations on the implementation of the article

The reviewing experts observed the use of special investigative techniques in corruption cases is regulated by provisions of the StPO (sections 161 para. 1, 163 para. 1 and 163f, 100a, 100c, 100f, 110a). Evidence obtained through special investigative techniques is admissible in courts.

Paragraph 2 of article 50

2. For the purpose of investigating the offences covered by this Convention, States parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

(a) Summary of information relevant to reviewing the implementation of the article

Germany provided reference to the following agreements with other States:

Bilateral:

Hong Kong:

Agreement of May 26, 2006 between the Government of the Federal Republic of Germany and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on mutual legal assistance in criminal matters

Israel:

Supplementary Treaty of July 20, 1977 between the Federal Republic of Germany and the State of Israel on the addition of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Italy:

Treaty of October 24, 1979 between the Federal Republic of Germany and Italy supplementing the European Convention of April 20, 1959 on mutual assistance in criminal matters and facilitating its application

Netherlands:

Treaty of August 30, 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands supplementing the European Convention of April 20, 1959 on mutual assistance in criminal matters and facilitating its application

Netherlands:

Agreement (by exchange of notes) of December 10, 2001/22. January 2002 between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands amending the Treaty of 30 August 1979 between the Federal Republic of Germany and the Kingdom of the Netherlands on the supplement to the European Convention of 20 April 1959 on mutual assistance in criminal matters and to facilitate its application and to extend its application to the Netherlands Antilles and Aruba

Poland:

Treaty of July 13, 2003 between the Federal Republic of Germany and the Republic of Poland on the amendment of the European Convention of April 20, 1959 on mutual assistance in criminal matters and the facilitation of its application

Switzerland:

Treaty of November 13, 1969 between the Federal Republic of Germany and the Swiss Confederation to supplement the European Convention of April 20, 1959 on mutual assistance in criminal matters and to facilitate its application

Switzerland:

Treaty of April 27, 1999 between the Federal Republic of Germany and the Swiss Confederation on cross-border police and judicial cooperation

Switzerland:

Treaty of July 8, 1999 between the Federal Republic of Germany and the Swiss Confederation on the amendment of the treaty between the Federal Republic of Germany and the Swiss Confederation on the addition of the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and the facilitation of its application of April 13, 1959 November 1969 according to its article 3 paragraph 1

Czech Republic:

Treaty of February 2, 2000 between the Federal Republic of Germany and the Czech Republic supplementing the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and simplifying its application

UNITED STATES:

Supplementary contract of April 18, 2006 to the treaty between the Federal Republic of Germany and the United States of America on mutual legal assistance in criminal matters

UNITED STATES:

Treaty of October 14, 2003 between the Federal Republic of Germany and the United States of America on mutual assistance in criminal matters

Multilateral:

European Union:

- Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union
- Protocol of October 16, 2001 to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
- Council Framework Decision 2003/577 / JHA of 22 July 2003 on the enforcement of Decisions on the freezing of property or evidence in the European Union
- Council Framework Decision 2006/960 / JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities in the Member States of the European Union

Council of Europe:

- European Convention of April 20, 1959 on Mutual Assistance in Criminal Matters
- Additional Protocol of March 17, 1978 to the European Convention on Mutual Assistance in Criminal Matters
- Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters;
- Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Japan / EU:

Agreement of November 30, 2009 / December 15, 2009 between the European Union and Japan on mutual assistance in criminal matters

USA / EU:

Agreement of June 25, 2003 between the European Union and the United States of America on mutual legal assistance

(b) Observations on the implementation of the article

The reviewing experts observed that Germany had concluded many agreements with other States on the transnational use of special investigative techniques.

Paragraphs 3 and 4 of article 50

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part

(a) Summary of information relevant to reviewing the implementation of the article

Germany indicated that legal assistance is granted also without a corresponding treaty having been concluded.

Germany cited the following legal provisions:

Act on International Cooperation in Criminal Matters (AICCM - IRG)

Section 1

Scope of Application ...

(3) Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.

Section 59

Admissibility of Assistance ...

(3) Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.

(b) Observations on the implementation of the article

The reviewing experts observed that special investigative techniques could be used at the international level by Germany even in the absence of a treaty, including controlled delivery.