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to the United Nations
Convention against Corruption**

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Executive summary

Note by the Secretariat

Addendum

Contents

	<i>Page</i>
II. Executive summary	2
Germany	2



II. 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 BeamtStG). 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

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

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 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.

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

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 RiVSt). 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).
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