

Annex I

Guidance Note for the provision of information by States parties for the third intersessional meeting of the Working Group on Prevention on 27 – 29 August 2012

1. The Secretariat has produced this Guidance Note to assist States parties and Signatories in providing information as to initiatives and practices they have implemented regarding the two topics under consideration at the third intersessional meeting of the Working Group on Prevention taking place on 27 – 29 of August 2012.
2. The Secretariat wishes to recall paragraph 12 of the report of the second intersessional meeting of the Working Group on Prevention, which noted that in advance of each meeting States parties should be invited to share their experiences of implementing the provisions of the Convention under consideration, preferably by using the self-assessment checklist.
3. In furtherance of this, the Secretariat outlines below a selection of self-assessment checklist questions that States parties may wish to use as a guide when providing information regarding the two topics under consideration. These questions have been annotated by the Secretariat so as to highlight the key points that States parties may wish to address when providing the requested information. States parties are encouraged to view the questions below only as guidance and remain free to provide any information they believe may be relevant to the topics under consideration.

I -Information requested from States parties in relation to conflicts of interest, reporting acts of corruption and asset declarations, particularly in the context of articles 7 – 9 of the Convention

1. Has your country adopted and implemented articles 7 – 9 of the UN Convention against Corruption?

States parties are encouraged to focus in particular on their implementation of policies and measures relating to conflicts of interest, the reporting of acts of corruption and the use of asset declarations.

Articles 7 to 9 of the UN Convention have been implemented in the Federal Republic of Germany. Regarding Articles 7 and 8, it should be pointed out that overall, the Convention does not contain any strict standards; rather, it has selected "soft" formulations ("shall endeavour," "promote," "where appropriate and in accordance with the fundamental principles of its legal system," etc.) Therefore, implementation is not negated because certain aspects (e.g. having public officials disclose investments and assets, as mentioned in Art. 8 no. 5) are not specifically regulated in Germany.

The criteria mentioned in Article 7 with regard to access to public service are governed by constitutional law in Germany. Under Article 33 (2) of the Basic Law every German is "equally eligible for any public office according to his or her aptitude, qualifications and

professional achievements.” The Convention requirement of “objective criteria such as merit, equity and aptitude” (Article 7 no. 1 a) has thus been fulfilled.

Regarding Article 8 (Code of Conduct for public officials), it should be pointed out that the laws on civil servants already contain general obligations in terms of conduct. Pursuant thereto, public servants serve the entire populace rather than a political party. They are to fulfil their duties in a just and non-partisan manner and, in exercising their office, take account of the welfare of the general public (cf. § 60 (1) Act on Federal Civil Servants (Bundesbeamtengesetz – BBG) and § 33 (1) Civil Servant Status Act (Beamtenstatusgesetz – BeamtStG). These rules on general obligations are supplemented by additional rules, e.g. on additional activities and regarding the prohibition against accepting rewards, gifts and other advantages.

2. Please cite, summarize and, if possible, provide copies of the applicable policy(ies) or measure(s):

In particular, the Secretariat would be grateful for information regarding policies or measures that:

- *Identify and address potential conflicts between the professional duties and personal interests of civil servants or elected public officials.*
- *Allow and encourage members of the civil service to report acts or suspected acts of corruption. States parties are encouraged to provide specific examples such as training, publicity campaigns, information on the existence and operation of whistleblower hotlines, etc.;*
- *Require asset declarations from civil servants or those elected to public office (States parties are encouraged to provide examples of asset declaration forms where used).*

Several years ago, the federal legislature already modified the obligation of confidentiality in civil servant law in the interests of effectively fighting against corruption. Pursuant thereto, the obligation of confidentiality expressly does not apply when civil servants notify of a suspicion, founded in fact, of a corruption offence pursuant to sections 331-337 of the Criminal Code (Strafgesetzbuch – StGB) to the competent superior service authority, a law enforcement authority, or another authority or other office outside the authority as determined by the superior service authority (cf. 67 (2) no. 3 BBG; § 37 (2) no. 3 BeamtStG)..

Each federal ministry decides for itself on the question of introducing ombudspersons. The Federal Ministry of the Interior began on 1 October 2010 with the introduction of an ombudsperson for a test phase in three authorities within its remit. The experiences gathered were positive; as such, the project is being continued. There are comparable positions in some of the federal Länder.

3. Please provide examples of the successful implementation of domestic measures adopted to comply with articles 7 – 9 of the Convention:

States parties may wish to include case studies or specific examples of the following:

- *The successful identification of conflicts of interest between the professional duties and personal interests of public officials and the process used to resolve such conflicts.*
- *The reporting by a public official of an act of corruption through mechanisms established in accordance with the provisions of the Convention.*
- *The identification of potential conflicts of interest through the use of an asset declaration form and action taken as a result.*

The Federal Government's guidelines for corruption prevention in the federal administration provide for the appointment of a contact person for corruption prevention, whom employees as well as citizens can contact in cases of suspected corruption.

4. Have you ever assessed the effectiveness of the measures adopted to implement articles 7 – 9? Please outline (or, if available, attach) the results of such an assessment including methods, tools and resources utilized.

States parties may wish, in particular, to provide information in relation to assessments of the effectiveness of measures aimed at:

- *Identifying and resolving conflicts of interest in the public sector,*
- *The facilitation and promotion of the reporting of acts of corruption by public officials and*
- *The identification of potential conflicts of interest by requiring the completion of asset declarations by public officials.*

5. Which challenges and issues are you facing in (fully) implementing articles 7 – 9 of the Convention?

States parties may particularly wish to provide details of challenges faced when implementing practices or policies relating to conflicts of interest, reporting acts of corruption and the use of asset declarations including:

- *Technical challenges such as the design, development or drafting of new policies, practices and measures.*
- *Communication challenges such as the ability to disseminate, publicise and promote the new policy or practice both to public officials and the public more broadly.*
- *Implementation challenges such as the ability to enforce or otherwise encourage adherence to new or existing policies or practices by public officials.*

6. Do you consider that any technical assistance is required in order to allow you to fully implement this provision? If so, what specific forms of technical assistance would you require?

States parties are encouraged to provide a description of any such assistance already being provided and by whom.

II -Information requested from States parties in relation to implementation of article 12 of the Convention (Private sector), including the use of public private partnerships

1. Has your country adopted and implemented article 12 of the UN Convention against Corruption?

States parties may wish to focus in particular on policies and measures which were implemented in collaboration with private sector entities (e.g. in the form of public-private partnership, corporate social responsibility or other cooperation models).

Yes.

2. Please cite, summarize and, if possible, provide copies of the applicable measure(s) or policy (ies):

Please note that paragraph 2 of article 12 offers different examples of how corruption involving the private sector can be addressed, but does not limit the use of other approaches such as sector specific initiatives etc

The German Generally Accepted **Accounting Principles** are set out in the Commercial Code (HGB - sections 242 et seq.) and comply with the European Accounting Directives. These Accounting Directives are currently under revision. Companies are required to prepare annual financial statements in accordance with the national accounting law for the purposes of profit distribution, taxation, and financial services supervision. Listed companies are required to use International Financial Reporting Standards (IFRS) in their consolidated accounts (according to European Regulation (EC) No. 1606/2002). In addition, the German Accounting Standards Committee (GASC) issues detailed standards on consolidated accounting (if not governed by IFRS). If these standards are recognized by the Federal Ministry of Justice anybody complying with these standards is presumed to be in accordance with German general accepted accounting principles.

Statutory audits are also regulated in the HGB (sections 316 et seq.) and trace back to the European Directive on statutory audit that is currently under revision, as well. With this revision the EU Commission explicitly aims at a higher quality audit market. Moreover, the Institute of Public Auditors (IDW) issues German auditing standards that transpose the International Standards on Auditing (for more details see www.idw.de/idw/portal/n281334/n281114/index.jsp and the attached document to the due process and the character of the standards). Therefore, the requirements for the conduct of audits encompass both legal requirements and professional auditing standards. The professional rules of the auditors are basically regulated in the "Wirtschaftsprüferordnung" (Public accountants Act - find an english version under http://www.apak-aoc.de/english/statutory_provisions/statutory_provisions.asp . The related disciplinary oversight (see below) is complemented by a system of regular inspections and quality assurance executed by the oversight bodies. For details see also <http://www.apak-aoc.de/english/home/home.asp> and <http://www.wpk.de/english/home/home.asp>.

The German Transparency Directive Implementation Act of 2007 modified the **criminal offence on false accounting**, including the falsification of accounting documents. False statements regarding bookkeeping and accounting are now subject to inter alia custodial

sentence of up to three years or a monetary (administrative) fine (sections 331 et seq. HGB). Additionally, since 2005 the accounting practices of listed companies have been subject to an external control by the privately organised Financial Reporting Enforcement Panel and the Federal Financial Supervisory Authority (BaFin - sections 342b et seq. HGB and sections 37n et seq. of the Securities Trading Act). This financial reporting enforcement supplements the internal audit. In case of an infringement of financial reporting requirements BaFin takes administrative measurements and generally orders the company to publish the errors identified (for detailed information see www.frep.info/index_en.php and the attached Annual Activity Report 2011 of FREP with regard to the conducted examinations).

German **auditing standards** were reformed in 2005 so that the responsibilities of auditors for detecting material misstatements due to fraud were reinforced. The same goes for the responsibilities of auditors for communicating identified fraud or indications of fraud to managements and those charged with governance on a timely basis. Auditors must reflect how the supervisory body carries out the monitoring of the management processes and must make inquiries to the supervisory body to determine whether members have knowledge of any actual, suspected or alleged fraud affecting the entity. If the auditor has identified or suspects fraud that involves the entity's management, these suspicions must be communicated to the persons charged with governance without delay. The same applies if the auditor has identified or suspects fraud involving employees who have significant roles in internal control. Moreover, the auditor has to present a long-form audit. In addition the auditor must report orally to the supervisory board or the audit committee (see below) on the main results of the audit, especially on significant weaknesses in the internal control and the risk management systems with regard to the financial reporting process (section 321 HGB). According to the Corporate Governance Code the supervisory board also has to arrange for the auditor to report without delay on all facts and events of importance that arose during the performance of the audit. The executive and supervisory boards are required by law and by the rules of proper corporate management to undertake within the limits of their power the measures required to stop any violations of law and to investigate any suspicions of breaches. In case of an audit of a financial institution or an insurance company the auditor must BaFin whenever the auditor becomes aware of certain facts such as non-adherence to regulatory requirements.

According to the Public Accountants Act, disciplinary oversight of the audit profession in Germany is organised into a two-tier system. Minor violations of professional rules are investigated and sanctioned by the chamber of auditors under public oversight of an oversight board (the AOC). Severe violations of professional rules are sanctioned by special divisions of criminal courts. The charge is brought to court by the chief public prosecutor's office at the Berlin District Court after its own investigations.

In 2009 the German **Accounting Law Modernisation Act** (BilMoG) clarified the possibility to establish audit committees in all listed entities. Listed companies that have no supervisory body are required to establish an audit committee (para 324 HGB, see also section 107 para 3 of the Stock Corporation Act - AktG). At least one member of the audit committee or the supervisory body has to be an independent financial expert. One of the legal duties of the audit committee is the supervision of the company's internal control and internal risk management system and compliance programme. As to the German Corporate Governance Code the executive board ensures that all provisions of law and the enterprise's internal policies are abided (see the attached convenience translation, point 4.1). The auditor's task is an assessment of the appropriateness and effectiveness of

an entity's compliance management system or specific parts of such system.

In a listed company the executive board has (section 91 para 1 AktG) to make sure that books of account are maintained.

Auditors must include in the audit of the financial statements the audit of the accounting books and records, covering the accuracy of entries, timeliness, and the transparency of entries (section 317 para 1 and 4 HGB).

In general, listed companies must include in their management reports the main features of the internal control and risks management system that are of relevance for the accounting process (section 289 para 5 HGB). Where such a system is absent, this must be mentioned in the management report. Auditors must intervene if a description of the internal control and risk management system in the management report is wrong or misleading. Thus, it would have to be reported and to become public if an internal control and risks management system gave reason for concern that the above mentioned acts can be carried out for the purpose of committing an offence in the field of corruption.

Moreover, listed companies must issue a declaration on corporate governance in the management report or on their website (§ 289a HGB). The report must include three components: a declaration of compliance with the recommendations of the German Corporate Governance Code and explanations of any deviations from it (see para 161 AktG), relevant disclosures on corporate governance practice that go beyond legal requirements and a description of the management and supervisory boards' rules of procedure.

The valid federal civil service law contains regulations to waiting periods (***abstinence time***) of three (sometimes five) years in case of a civil servant changing into the private sector. In accordance with § 41 BeamtStG and § 105 BBG all civil servants including retired officials have to indicate a gainful employment or an other occupation outside of the public service before admission, if it is connected with his or her official activity in the last 5 years and can be impaired by interests. It is to be forbidden, if it is to be procured that official interests can be impaired.

The general prohibition of the acceptance of rewards, gifts and other advantages regarding the office is valid even after retirement (see § 42 BeamtStG, § 71 BBG).

Tax deductibility of expenses that constitute bribes is disallowed in the Federal Republic of Germany.

3. Please provide examples of the successful implementation of domestic measures adopted to comply with article 12.

States parties are encouraged to provide examples of anti-corruption initiatives carried out together with the private sector.

States parties may wish to include information on lessons learnt during the planning and/or implementation process as well as specific factors which led to the success of an initiative.

Moreover, the Secretariat would be grateful for information regarding the form of

collaboration with the private sector (e.g. steering structure and processes, communication, financial aspects) and the main partners (e.g. private sector representative organizations, networks, individual companies, SMEs).

Within the private sector numerous activities have been conducted within Germany to promote the prevention of, and the fight against, corruption as well as the promotion of good corporate governance. The Federal government does not have a complete oversight about these actions. Therefore, reference is made solely to a number of activities in which the Federal government took part. For a number of years the Federal Ministry of Justice together with representatives from the private sector develops and promotes a Good Governance Code which, among many other goals, aims at strengthening transparency and accountability in the private sector. The Federal Ministry for the Interior established round table-discussions with the private sector on the prevention of corruption. One outcome of these discussions was the development and publication of "FAQ's about gifts, hospitality and other benefits". In March 2012 the Federal Ministry for Transport, Building and Urban Development invited to a public conference to promote joint efforts of the private and public sectors in fighting corruption. A public conference about the fighting against, and the prevention of, foreign bribery, especially among SME's, was organised in April 2012 by the Federal Ministry of Economics and Technology jointly with the German Federation of Industry (BDI) and the German Federation of Chambers of Industry and Commerce.

4. Have you ever assessed the effectiveness of the measures adopted to implement article 12? If so, please outline (or, if available, attach) the results (intended/unintended/positive/negative) of such an assessment including methods, tools and resources utilized.

States parties may wish, in particular, to provide information in relation to the effectiveness of measures implemented jointly with private sector entities.

5. Which challenges and issues are you facing in (fully) implementing the provision?

6. Do you consider that any technical assistance is required in order to allow you to fully implement this provision? If so, what specific forms of technical assistance would you require?

States parties are encouraged to provide a description of any such assistance already being provided and by whom it is being provided.