

III.

1. 1. Please describe (cite and summarize) the measures your country has taken, if any, (or is planning to take, together with the related envisaged time frame) to ensure full compliance with article 13(1)(c) of the Convention and, in particular, its provision on undertaking anti-corruption education programmes in schools and universities.

Schools and universities in Germany have introduced various education programmes and initiatives to raise awareness for the risks of corruption.

Schools:

In Germany, designing curricula and lessons is the responsibility of the federal states. In this area, the Federation has no power to legislate (Art. 70 (1) of the Basic Law).

At present, some eleven million pupils are enrolled at primary and secondary schools in Germany. Initially, all pupils go to a primary school. The secondary schools differ mainly from primary schools in that the school-leaving examination qualifies for various higher education institutions. The highest school-leaving examination is the *Abitur*, the German university entrance qualification, which usually can be attained after 12 years.

Generally, each federal state and each type of school has the possibility to address the issue of corruption in class in a plethora of different contexts. What children are taught in school depends on the curricula defined by each federal state and on the teachers who are responsible for conducting lessons and at the same time serve as an example. Owing to the (exclusive) legislative power of the federal states, there are differences with regard to content between the curricula of the 16 federal states in Germany. In an interdisciplinary approach, however, all curricula are aimed at preparing pupils in the best possible way to cope with social challenges and at enabling and encouraging them to actively shape their environment.

One prerequisite for this is a critical examination of the free democratic basic order of Germany, including the rule of law. A vital aspect of the German legal community is the development and raising of awareness for the issue of corruption. In particular, different phenomena of corruption and their repercussions are dealt with from the fifth to the tenth grade (secondary schools). Usually, these discussions on corruption are integrated into ethics classes covering questions of law, justice and morals, or into social sciences and economics classes analysing societal phenomena and problems, or into history lessons covering questions of threats to democracy and freedom. Of course, it is also conceivable to address this subject in other classes. In Berlin, for example, the curriculum applicable from the school term 2017/2018 stipulates that civic education classes should address the issue under the heading “Life in a country based on the rule of law” and teach a zero tolerance approach to corruption.

The issue of corruption is explicitly addressed also in vocational schools. These schools are an essential element of the German dual system of vocational training. It consists of practical training in a company and parallel theoretical training at a vocational school, based on a framework curriculum. This dual vocational training qualifies people for professional practice without the need for further studies. Vocational schools in the federal state of Baden-

Württemberg, for example, address the issue of corruption in “Economics and ethics” classes under the heading “Distortion of competition, gratification, corruption”.

All federal states regularly review and update their individual curricula. The overall objective is to concentrate on competences and convey ready-to-use knowledge taking into account current events. This ensures that issues such as preventing and fighting corruption can be integrated into the curricula.

In addition, various measures are taken to raise awareness among those teachers planning and actually conducting lessons on corruption, for example through guidelines, instructions or other internal administrative rules on accepting gifts and rewards. In addition, the individual school administrations at state level take various efforts to prevent corruption, such as drawing-up guidelines, organizing training courses, designing and distributing flyers and organizing Internet information campaigns. The teachers also serve as an example and by doing so they contribute to implementing Art. 13 (1) (c) of UNCAC.

In the federal state of Brandenburg, for example, regular meetings on corruption prevention take place between the competent task force and the anti-corruption commissioner at the Ministry for Education, Youth and Sport. In addition, the competent anti-corruption bodies of the federal administration provide support to the state administrations, if they so wish.

Higher education:

In Germany, the main higher education institutions are universities and *Fachhochschulen* (universities of applied sciences). While the *Abitur* (twelfth or thirteenth-grade exam) is the required entrance qualification for academic university studies, a school-leaving certificate obtained after eleven or twelve years in school is sufficient to apply for a place to study at one of the more practice-oriented universities of applied sciences (*Fachhochschule*). In recent years, private universities and *Fachhochschulen* have become increasingly important, in addition to public universities. Accreditation procedures are in place to ensure the equality of private and public studies. A total of 2.8 million students were enrolled at both public and private universities for the winter semester 2016/2017.

All matters related to research, teaching and studies are the sole responsibility of the individual university’s administration (autonomy of institutions of higher education). This is why there are differences between universities in the way the issue of corruption is addressed. There is no specific corruption prevention course of study in Germany. Numerous courses of study at various universities throughout the country, however, thoroughly deal with this topic.

Corruption prevention, for example, is an integral subject of business economics studies, economics studies and several other courses of study. Usually, it is dealt with in the context of business and economic ethics. The university *Europa-Universität Viadrina Frankfurt (Oder)* in the federal state of Brandenburg, for example, has set up a Compliance Center. This interdisciplinary Compliance Centre organizes lectures and projects on compliance for ALL students enrolled at this university and assists students working at a doctoral thesis or equivalent on this topic (<http://compliance-academia.de/>). The subject of corruption is also discussed in political and social science studies offered by universities throughout Germany

under the heading “good governance” and “ethics”. The Hertie School of Governance in Berlin, for example, offers a course on “Good governance and anti-corruption” (<https://www.hertie-school.org/en/study/course-catalogue/course/course/good-governance-and-anti-corruption/>). In all federal states, corruption-related crime is a mandatory subject of law studies. In these lectures, law students primarily hear about and discuss the wrong resulting from corruption and how it is sanctioned under German law. Law students who wish to widen their knowledge on this topic can attend additional seminars, lectures and exercise classes. The University of Cologne in North Rhine-Westphalia, for example, organizes annual conferences on economic crime (*Kölner Kolloquium zur Wirtschaftskriminalität*) where corruption in various social spheres is discussed. Students are invited to attend these conferences free of charge; for them it is a good opportunity to meet renowned representatives from industry and politics. The focus of the most recent conference was on “Corruption in sport” (http://www.jpstrafrecht.jura.uni-koeln.de/sites/iss_juniorprof/Projekte/Programmflyer_Korruption_und_Sport_Entwurf_Anisch_MH_NEU_WEB.pdf).

Moreover, universities organize study and research projects on corruption involving a high publicity effect. Some of these projects receive financial support from international scholarship funds. The Mercator foundation, for example, is currently funding a research project dealing with the role of social media in the fight against corruption. (<http://www.mpc-international.org/fellows/kossow/>). Another example for the great attention universities in Germany pay to the subject of corruption is the recently completed corruption study conducted by the Institute for German and international law on and research in political parties under the aegis of the University of Düsseldorf in North Rhine-Westphalia. (<http://www.pruf.de/forschungsprojekte/abgeschlossene-forschungsprojekte/korruptionsstudie.html>).

The University of Administrative Sciences in Speyer in the state of Rhineland-Palatinate is the leading university for studies in administrative sciences in Germany and as such also attends to the subject of corruption prevention. For example, the most recent of the annual conferences on democracy held in Speyer (*Speyerer Demokratietagung*), which regularly look into the subject of corruption, was dedicated to shortcomings in the fight against and research in corruption (<http://www.uni-speyer.de/de/index.php>).

The *Hochschule des Bundes für öffentliche Verwaltung* (Federal University of Public Administration) and the *Verwaltungsfachhochschulen der Länder* (state universities of public administration) specifically deal with questions of preventing corruption. These education institutions offer study courses on “Police ethics and corruption prevention” and “Preventing and fighting corruption”. Students at the Brandenburg police academy (*Fachhochschule der Polizei*) and the Brandenburg university of finance (*Fachhochschule der Finanzen*) also have the possibility to go on study visits abroad. The *Hessische Hochschule für Polizei und Verwaltung* has developed a student project on corruption prevention at the institute for administration for the winter semester 2017/2018.

Many universities, such as in the federal states of Lower Saxony, Bremen and Thuringia, have appointed contact persons for corruption prevention. As part of their job, these contact

persons raise awareness among the staff of public universities and serve as an example for students.

As a form of education and awareness-raising in practice, the universities in the state of Thuringia, for example, have introduced the principles of greater scrutiny and rotation in areas particularly vulnerable to corruption. Here, responsible action focused on corruption prevention is practised and demonstrated every day. Moreover, cultural, sport and social events at the universities offer students from different fields many opportunities to meet and exchange views, including on course contents related to corruption. Other events organized by the universities which are open to the public are an opportunity for students and the interested public to enter into a dialogue on the subject. The Hertie School of Governance in Berlin, for example, regularly organizes such events.

2. Please outline actions required to ensure or improve the implementation of article 13(1)(c) on undertaking anti-corruption education programmes in schools and universities and any specific challenges you might be facing in this respect.

Schools

In order to ensure and/or improve the implementation of Art. 13 (1) (c) particularly with regard to anti-corruption education and awareness-raising at schools also in the future, the following support would be useful:

- Supplementary teaching materials on preventing and fighting corruption for use in schools;
- Assistance in defining learning objectives for pupils with regard to preventing and fighting corruption;
- Best-practice examples from other countries: In which subjects and in what grades do they deal with corruption?

Higher education

At universities and universities of applied sciences, the issue of corruption is usually addressed in courses of study preparing students for professions which are vulnerable to corruption in a wider sense. Other courses of study demand exclusive concentration on the specific academic contents, i.e. usually there is no room for dealing with the issue of corruption.

3. 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?

No.



Group of States against Corruption
Groupe d'États contre la corruption

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Adoption: 10 October 2014
Publication: 28 January 2015

Public
Greco Eval IV Rep (2014) 1E

FOURTH EVALUATION ROUND

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

EVALUATION REPORT GERMANY

Adopted by GRECO at its 65th Plenary Meeting
(Strasbourg, 6-10 October 2014)

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
I. INTRODUCTION AND METHODOLOGY	4
II. CONTEXT	6
III. CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT	7
OVERVIEW OF THE PARLIAMENTARY SYSTEM	7
TRANSPARENCY OF THE LEGISLATIVE PROCESS	9
REMUNERATION AND ECONOMIC BENEFITS.....	12
ETHICAL PRINCIPLES AND RULES OF CONDUCT.....	14
CONFLICTS OF INTEREST	15
PROHIBITION OR RESTRICTION OF CERTAIN ACTIVITIES	17
<i>Gifts</i>	<i>17</i>
<i>Incompatibilities and accessory activities, post-employment restrictions.....</i>	<i>19</i>
<i>Financial interests, contracts with State authorities, misuse of public resources, third party contacts</i>	<i>20</i>
<i>Misuse of confidential information</i>	<i>21</i>
DECLARATION OF ASSETS, INCOME, LIABILITIES AND INTERESTS	21
SUPERVISION AND ENFORCEMENT.....	25
<i>Rules on the use of public funds</i>	<i>25</i>
<i>Rules of conduct</i>	<i>26</i>
ADVICE, TRAINING AND AWARENESS	28
IV. CORRUPTION PREVENTION IN RESPECT OF JUDGES	30
OVERVIEW OF THE JUDICIAL SYSTEM.....	30
RECRUITMENT, CAREER AND CONDITIONS OF SERVICE	32
<i>Appointment.....</i>	<i>32</i>
<i>Promotion, transfer and dismissal.....</i>	<i>36</i>
<i>Conditions of service.....</i>	<i>38</i>
CASE MANAGEMENT AND PROCEDURE	38
ETHICAL PRINCIPLES, RULES OF CONDUCT AND CONFLICTS OF INTEREST.....	40
PROHIBITION OR RESTRICTION OF CERTAIN ACTIVITIES	42
<i>Incompatibilities and accessory activities, post-employment restrictions.....</i>	<i>42</i>
<i>Recusal and routine withdrawal.....</i>	<i>45</i>
<i>Gifts</i>	<i>46</i>
<i>Third party contacts, confidential information.....</i>	<i>47</i>
DECLARATION OF ASSETS, INCOME, LIABILITIES AND INTERESTS	48
SUPERVISION AND ENFORCEMENT.....	48
ADVICE, TRAINING AND AWARENESS	51
V. CORRUPTION PREVENTION IN RESPECT OF PROSECUTORS	53
OVERVIEW OF THE PROSECUTION SERVICE	53
RECRUITMENT, CAREER AND CONDITIONS OF SERVICE	56
<i>Appointment.....</i>	<i>56</i>
<i>Promotion, transfer and dismissal.....</i>	<i>57</i>
<i>Conditions of service.....</i>	<i>57</i>
CASE MANAGEMENT AND PROCEDURE	58
ETHICAL PRINCIPLES, RULES OF CONDUCT AND CONFLICTS OF INTEREST.....	58
PROHIBITION OR RESTRICTION OF CERTAIN ACTIVITIES	60
<i>Incompatibilities and accessory activities, post-employment restrictions.....</i>	<i>60</i>
<i>Recusal and routine withdrawal.....</i>	<i>61</i>
<i>Gifts</i>	<i>61</i>
<i>Third party contacts, confidential information.....</i>	<i>62</i>
DECLARATION OF ASSETS, INCOME, LIABILITIES AND INTERESTS	62
SUPERVISION AND ENFORCEMENT.....	62
ADVICE, TRAINING AND AWARENESS	63
VI. RECOMMENDATIONS AND FOLLOW-UP.....	65
ANNEX: ABBREVIATIONS OF LAWS.....	67

EXECUTIVE SUMMARY

1. Germany is generally considered to be in the top ranks internationally for fighting corruption and to have provided a good framework for repressing and preventing it. Furthermore, it would appear that public perception of corruption in general – and with respect to members of parliament, judges and prosecutors in particular – is clearly below EU average levels. Corruption prevention, including with respect to the above categories of persons, appears to be quite effective in practice. While GRECO takes account of this context, it still sees room for improvement. The present report includes recommendations – as well as a range of further suggestions and considerations – aimed at raising awareness among members of parliament, judges and prosecutors of the risks of corruption and other improper behaviour resulting from conflicts of interest, at further increasing transparency and ultimately at fostering public trust in them and the institutions they represent.

2. The authorities are to be commended for the Code of Conduct for members of parliament and the inherent disclosure requirements – concerning in particular income from secondary activities and donations – which have evolved over the years. That said, further development of the rules would make it easier to identify conflicts of interest and to further the culture of prevention and avoidance. In the current absence of clear rules on *ad hoc* disclosure, it is recommended to require parliamentarians to publicly declare potential or actual conflicts of interest as they arise in relation to their parliamentary work and to provide them with adequate guidance on this matter. Moreover, more can be done to improve access to information in the legislative process, in particular on third party involvement in decision-making, such as lobbying. Finally, while self-control and responsibility must come first from within the house, the monitoring mechanism also needs to be enhanced in order to effectively prevent violations of the rules on parliamentary comportment – which, if they remain subject mainly to *ex-post* scrutiny by the public, might give rise to mistrust of politicians and damage the reputation of the system over time.

3. The judiciary and the prosecution service in Germany are of high quality. However, growing dissatisfaction among professionals with the human and financial resources made available to the judicial system gives rise to concern about its efficient functioning in the future. Moreover, while the independence and impartiality of individual judges and public prosecutors have been undisputed to date, some controversy surrounds the issue of the structural independence of the governing bodies of the judiciary – which decide on fundamental issues such as judges' appointment – and of the prosecution service, in particular with respect to the right of Ministers of Justice to give instructions in individual cases. Steps should be taken to ensure not only that the justice system is free from, but is also seen to be free from, political influence. While German judges and public prosecutors have a strong sense of public service and of dedication to public duty, compiling the existing rules for ethical/professional conduct in specific compendia is recommended for both professions. In addition, it is recommended to further enhance the transparency and monitoring of secondary activities of judges.

I. INTRODUCTION AND METHODOLOGY

4. Germany joined GRECO in 1999. Since its accession, the country has been subject to evaluation in the framework of GRECO's First (in March 2002), Second (in July 2005) and Third (in December 2009) Evaluation Rounds. The relevant Evaluation Reports, as well as the subsequent Compliance Reports, are available on GRECO's homepage (www.coe.int/greco).

5. GRECO's current Fourth Evaluation Round, launched on 1 January 2012, deals with "Corruption prevention in respect of members of parliament, judges and prosecutors". By choosing this topic, GRECO is breaking new ground and is underlining the multidisciplinary nature of its remit. At the same time, this theme has clear links with GRECO's previous work, notably its First Evaluation Round, which placed strong emphasis on the independence of the judiciary, the Second Evaluation Round, which examined, in particular, the public administration, and the Third Evaluation Round, which focused on the incriminations of corruption (including in respect of parliamentarians, judges and prosecutors) and corruption prevention in the context of political financing.

6. Within the Fourth Evaluation Round, the same priority issues are addressed in respect of all persons/functions under review, namely:

- ethical principles, rules of conduct and conflicts of interest;
- prohibition or restriction of certain activities;
- declaration of assets, income, liabilities and interests;
- enforcement of the applicable rules;
- awareness.

7. As regards parliamentary assemblies, the evaluation focuses on members of national parliaments, including all chambers of parliament and regardless of whether the members of parliament are appointed or elected. Concerning the judiciary and other actors in the pre-judicial and judicial process, the evaluation focuses on prosecutors and on judges, both professional and lay judges, regardless of the type of court in which they sit, who are subject to national laws and regulations.

8. In preparation of the present report, GRECO used the responses to the Evaluation Questionnaire (Greco Eval IV (2014) 1E) by Germany, as well as other data, including information received from civil society. In addition, a GRECO evaluation team (hereafter referred to as the "GET") carried out an on-site visit to Germany from 10-14 March 2014. The GET was composed of Mr Yves Marie DOUBLET, Deputy Director at the National Assembly, Department of Public Procurement and Legal Affairs (France); Ms Gertraud EPPICH, Judge, Regional Court Wiener Neustadt (Austria); Mr Jean-Christophe GEISER, *Conseiller scientifique, Unité Projets et méthode législatifs, Office fédéral de la justice* (Switzerland); and Mr Djuro SESSA, Associate Justice at the Supreme Court (Croatia). The GET was supported by Mr Michael JANSSEN from GRECO's Secretariat.

9. The GET held interviews with representatives of the Federal Ministry of Justice and Consumer Protection, the Federal Court of Justice, the Cologne Higher Regional Court and the Cologne Regional Court, the Berlin Senator of Justice and Consumer Protection, the German Judicial Academy, the Public Prosecutor General of Berlin, the Public Prosecutor's Offices of Hamburg and Stuttgart, the Office of the Federal Prosecutor General. The GET also interviewed members of the *Bundestag* (the national Parliament) as well as officials of the Secretariat of the *Bundesrat* and of the *Bundestag* Administration. Finally, the GET spoke with representatives of professional organisations (the German Bar Association – *Deutscher Anwaltsverein*, the German Federal Bar Association – *Bundesrechtsanwaltskammer*, the Association for Economic Crime – *Wirtschaftsstrafrechtliche Vereinigung e.V.*, the German Association of Judges – *Deutscher Richterbund*, the New Association of Judges – *Neue Richtervereinigung*, the

German Association of Lay Judges – *Bundesverband ehrenamtlicher Richterinnen und Richter* and the Trade Union “Verdi”), non-governmental organisations (Abgeordnetenwatch, Lobbycontrol and Transparency International Germany), as well as several academics and media representatives.

10. The main objective of the present report is to evaluate the effectiveness of measures adopted by the authorities of Germany in order to prevent corruption in respect of members of parliament, judges and prosecutors and to further their integrity in appearance and in reality. The report contains a critical analysis of the situation in the country, reflecting on the efforts made by the actors concerned and the results achieved, as well as identifying possible shortcomings and making recommendations for further improvement. In keeping with the practice of GRECO, the recommendations are addressed to the authorities of Germany, which are to determine the relevant institutions/bodies responsible for taking the requisite action. Within 18 months following the adoption of this report, Germany shall report back on the action taken in response to the recommendations contained herein.

II. CONTEXT

11. GRECO's First Round Evaluation Report states that "there has been an increased incidence and awareness of corruption in Germany since the early 1990s and the GET noted with satisfaction the positive response of the authorities to the challenge. The repressive system works effectively overall, as regards both public and private sector corruption. ... Preventive work is also taken very seriously, and the Federal Government's 1998 directive on prevention [of corruption] was a major step in this field. The quality of empirical research (including both statistical data and in-depth studies) is high. The GET welcomed also the mostly positive reactions from the media, the private sector and NGOs, who have proved effective watchdogs."¹

12. This overall positive assessment has been corroborated by more recent international studies.² According to the EU Anti-Corruption Report of February 2014, "Germany is in the top rank internationally in terms of fighting corruption and is perceived to be among the consistently best performers." That said, some issues have still not been dealt with. *Inter alia*, a number of recommendations issued by GRECO in its Third Evaluation Round, concerning the incrimination of corruption offences and transparency of party financing, are still awaiting full implementation.³

13. Public perception of the level of corruption in Germany is quite low. In 2013, Germany was listed among the twelve least corrupt countries on Transparency International's yearly corruption perception index (CPI).⁴ In line with the Transparency International CPI, rule of law and control of corruption are ranked at the higher end of the World Bank governance indicators.⁵

14. In terms of the focus of the Fourth Evaluation Round of GRECO, while parliaments and political parties top the list of least trusted institutions in most of the countries surveyed for the European Commission's Eurobarometer,⁶ in Germany this phenomenon is less marked than in other countries. Similarly, the percentage of those surveyed who think that corruption is widespread among politicians in Germany was 49% in 2013, as compared to the EU average (56%).⁷ As far as the judiciary is concerned, according to the Eurobarometer on corruption, the percentage of those surveyed who think that corruption is widespread in this branch of power (16%) is clearly below the EU average (32%).⁸

15. While most of the GET's interlocutors stressed that corruption prevention concerning members of parliament, judges and prosecutors is quite effective in practice, there is still room for further improvement. In the view of the GET, awareness of the risks of corruption and conflicts of interest could benefit from being further stimulated. The measures recommended below – as well as further suggestions and considerations included in the present report – may contribute to fostering citizens' trust in some of the country's crucial institutions and their individual members.

¹ See Cf. GRECO's First Round Evaluation Report on Germany, document Greco Eval I Rep (2001) 12E, paragraph 103.

² See, in particular, the National Integrity System Assessment on Germany, Transparency International (2012); the Sustainable Governance Indicators (SGI) (2014) Germany Report by Bertelsmann Stiftung; the EU Anti-Corruption Report of February 2014.

³ The Third Round compliance procedure is on-going. See the most recent Compliance Report, document Greco Third Interim RC-III (2014) 19E.

⁴ See <http://www.transparency.org>.

⁵ See http://info.worldbank.org/governance/wgi/sc_country.asp

⁶ See http://ec.europa.eu/public_opinion/cf/step1.cfm, under "Trust in Institutions".

⁷ Special Eurobarometer on corruption 397 (published in February 2014).

⁸ Special Eurobarometer on corruption 374 (published in February 2012).

III. CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT

Overview of the parliamentary system

16. Germany, officially the Federal Republic of Germany, is a federal parliamentary republic comprising 16 constituent States (*Länder*). Each *Land* possesses its own parliament. The Constitution, known as the *Grundgesetz* (hereafter referred to as the Basic Law),⁹ divides legislative powers between the Federation and the *Länder*.

17. The national Parliament, the *Bundestag*, elects the Federal Chancellor – who is the head of Government and exercises executive power – and adopts federal laws. The current *Bundestag* comprises 631 members (MPs), 36.5% of whom are women. MPs are elected in “general, direct, free, equal and secret elections”¹⁰ “in accordance with the principle of proportional representation combined with the personal election of candidates”.¹¹ Every elector has two votes. With the first vote, electors choose the list of candidates presented by a political party, which determines the distribution of seats among the candidates included in the party lists. With the other vote, the candidate winning the largest number of votes in each of the 299 constituencies is directly elected. The seats that a party wins through the election of its constituency candidates, however, are deducted from the number of seats that are due to it on the basis of the votes cast for its list.¹²

18. Through the *Bundesrat* – a separate constitutional body – the *Länder* participate in the legislative process and administration of the Federal Republic and have a say in matters relating to the EU.¹³ The *Bundesrat* comprises members of the *Länder* Governments. The *Bundesrat* may introduce legislative bills in the *Bundestag* and in a number of cases which are defined exhaustively in the Basic Law, the *Bundesrat* can prevent the adoption of a legislative act.¹⁴ The number of votes that may be cast in the *Bundesrat* by each *Land* is determined by the relative size of its population. Each *Land* must cast its votes *en bloc*. Plenary meetings of the *Bundesrat* are public, committee meetings are confidential. The members of the *Bundesrat* (currently 69) are appointed by their respective *Länder* Governments, they may be recalled by them and are subject to their instructions. They are obliged to defend the interests of the *Land* they represent. Members do not receive any remuneration from the *Bundesrat*,¹⁵ they are remunerated for their function as minister-president or minister of a *Land* from the budget of the respective *Land*.

19. A distinct element of the German form of federalism is that through the *Bundesrat*, the individual *Länder* Governments *participate* directly in the decisions of the national State. At the same time, the Basic Law makes it clear that federal laws are *adopted* only by the *Bundestag*. Therefore, according to a 1974 decision by the Federal Constitutional Court, the *Bundesrat* is not the second chamber of a single legislature that plays a decisive role in the legislative process on an equal footing with the ‘first chamber’.¹⁶ During the interviews held on site, it was furthermore explained to the GET that the members of the *Bundesrat* cannot be considered as MPs, since they are not

⁹ English version: http://www.gesetze-im-internet.de/englisch_gg/

¹⁰ Article 38(1), first sentence, of the Basic Law

¹¹ Section 1(1) of the Federal Electoral Act (*Bundeswahlgesetz*, BWahlG)

¹² In case a party obtains a lower percentage of the list vote than of the constituency vote, additional seats are awarded until the party-political composition of the *Bundestag* reflects the proportion of the vote obtained by each party list.

¹³ Article 50 of the Basic Law

¹⁴ E.g. laws amending the Constitution and legislation relating to taxes if their revenue is to go to the *Länder* or to local authorities

¹⁵ The *Bundesrat* makes only a lump-sum payment of €60 per session day to cover costs.

¹⁶ Decisions of the Federal Constitutional Court (BVerfGE) Vol. 37, p. 363 [cited from p. 380] – In the context of the EU, however, the *Bundesrat* is regarded as a ‘second chamber’.

elected to that office. Corruption prevention measures are taken at the level of the *Länder* which the members of the *Bundesrat* represent.

20. Pursuant to article 38(1), second sentence, of the Basic Law, members of the *Bundestag* are “representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience”. According to the Federal Constitutional Court, this free exercise of the mandate and the rights flowing from it “must be subjugated to the mission of the *Bundestag* to serve the common good, not the reverse”.¹⁷ That said, MPs are not prohibited from introducing group interests or special interests into the parliamentary decision-making process. As individual MPs wishing to exert significant political influence in the *Bundestag* need coordinated support, their political identification with a party and parliamentary group is constitutionally permissible and intended¹⁸ and they have “a dual role as representatives of the whole people and as exponents of a specific party organisation”.¹⁹ That said, “an MP may, in the event of a dispute, uphold a decision dictated by conscience, even against the opinion of his/her own parliamentary group, in which case the latter is compelled to take the MP’s position seriously in its internal decision-making process.”

21. An MP may lose his/her membership²⁰ if (1) the attainment of membership is invalid; (2) the election result is reviewed and revised; (3) the MP loses one of the prerequisites for permanent eligibility, for example if s/he is convicted of a criminal offence and receives a custodial sentence of at least one year; (4) the MP renounces his/her seat; or (5) the Federal Constitutional Court finds that the political party or component organisation to which the MP belongs is unconstitutional. The decision on loss of membership in scenario 1 is taken through the scrutiny of elections procedure which leads to a decision by the *Bundestag* following receipt of a proposal from the Committee for the Scrutiny of Elections (the decision may be reviewed by the Federal Constitutional Court if the expelled MP lodges a complaint); in scenarios 2 and 5, it is taken pursuant to a decision by the Council of Elders of the *Bundestag*; in scenario 3, if the loss of eligibility is determined by a final judicial ruling, the decision on loss of membership is taken by the Council of Elders (otherwise the scrutiny of elections procedure is conducted); and in scenario 4, it is taken by the President of the *Bundestag*, who issues a confirmation of the waiver. The authorities indicate that cases of renunciation of a seat occur regularly,²¹ but there have been no instances of the other scenarios in recent years.

22. A large proportion of the work done in the *Bundestag* goes on in the permanent committees, each of which is formed by a decision of the *Bundestag* for the duration of the whole electoral term, as well as in the parliamentary groups. The permanent committees are made up of MPs from the various parliamentary groups in line with their relative strengths in the *Bundestag*, i.e. each parliamentary group has a right to a certain number of places on each of the committees proportional to its share of seats in the *Bundestag*. The organisation of the permanent committees on the whole parallels the structure of the Federal Government: in general, there is a dedicated permanent committee for each of the ministries. The permanent committees are bodies responsible for preparing the decisions of the *Bundestag*. They debate, discuss and revise draft bills relating to their policy areas. The *Bundestag* also appoints a Petitions Committee to deal with requests or complaints that every citizen may individually or jointly with others address to it in writing.²²

¹⁷ Federal Constitutional Court, Decision 2 BvE 1/06 of 4 July 2007, paragraph 216, at www.bverfg.de.

¹⁸ See also article 21(1) of the Basic Law which explicitly acknowledges the role of political parties in the formation of the political will of the people.

¹⁹ Federal Constitutional Court, Decision 2 BvE 1/06 of 4 July 2007, paragraph 218.

²⁰ See articles 46 and 47 BWahlG.

²¹ In the 17th electoral term (2009-2013) 28 MPs renounced their seat.

²² See articles 17 and 45c of the Basic Law. There are other permanent committees, like the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure and the Committee for the Digital Agenda as well as *ad hoc* committees like Committees of Inquiry and Study Commissions.

23. The President and Vice-Presidents of the *Bundestag* constitute its Presidium, which is elected for the duration of the electoral term. A majority of MPs is required for their election. It is settled practice that the President is an MP from the largest parliamentary group. Each parliamentary group is represented by at least one Vice-President. The members of the Presidium cannot be dismissed from office by a decision of the *Bundestag*. "The President shall represent the *Bundestag* and conduct its business. S/he shall uphold the dignity and rights of the *Bundestag*, further its work, conduct its debates fairly and impartially, and maintain order in the *Bundestag*."²³ Furthermore, the President is the head of the *Bundestag* Administration. Its approximately 2,800 members of staff are subject to the supreme authority of the President, who also exercises police powers and proprietary powers with respect to the premises of the *Bundestag*. In addition, each year the President determines the level of public funding allocated to the parties. The other members of the Presidium support the President in his/her work. Their regular meetings are also attended by the Secretary-General of the *Bundestag*, who is in charge of the day-to-day running of the administration. Furthermore, the members of the Presidium all sit on the Council of Elders. This is the most important coordinating body within the *Bundestag* and supports the President in the management of parliamentary business.

Transparency of the legislative process

24. Bills may be introduced by the Federal Government (which is most frequent), by the *Bundesrat* or – if they are signed by a parliamentary group or by at least 5% of the MPs – "from the floor of the *Bundestag*".²⁴ After a first reading in the plenary chamber of the *Bundestag*, the bill is discussed in the relevant committee. The committee's recommendation for a decision is the basis for the second and third readings in plenary, following which the bill is put to the final vote. Bills adopted by the *Bundestag* are then submitted to the *Bundesrat*.²⁵ Certain bills (known as *Zustimmungsgesetze*) are entirely subject to the consent of the *Bundesrat*. Moreover, the *Bundesrat* may lodge an objection to any other bills (known as *Einspruchsgesetze*), if the mediation committee invoked by the *Bundesrat* does not propose any amendments, but this objection may be overruled by the *Bundestag*.

25. Immediately after the introduction of a bill in the *Bundestag*, it is published as a *Bundestag* printed paper and may be accessed on the parliamentary website.²⁶ Federal Government bills are regularly made public even before their introduction, since they are first submitted to the *Bundesrat* for comment and are published as a *Bundesrat* printed paper. Moreover, numerous Federal Government bills are published on the website of the lead ministry immediately after their adoption by the Cabinet and sometimes even before then. *Bundesrat* initiatives are published as a *Bundesrat* printed paper and are provided on the *Bundesrat*'s website.²⁷

26. The names of the members and substitute members of the *Bundestag* committees are published in the Official Handbook and on the website of the *Bundestag*. The committees' agendas are also on the website of the *Bundestag*. As a rule, committee meetings are held behind closed doors, but a committee may decide to admit the public to the whole or parts of the discussion on a particular agenda item.²⁸ Furthermore, as a rule, participants in non-public meetings have an unrestricted right to inform the public

²³ Rule 7(1) of the Rules of Procedure of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestages*, GOBT).

²⁴ See article 76(1) of the Basic Law and Rules 76(1) and 75(1)(a) GOBT.

²⁵ Article 77(1) of the Basic Law.

²⁶ <http://drucksachen.bundestag.de/drucksachen/en/index.php> (English); <http://www.bundestag.de/dokumente/drucksachen/index.html> (German).

²⁷ <http://www.bundesrat.de/DE/dokumente/neueingange/neueingange-node.html>

²⁸ Rule 69(1) GOBT.

of the content of those meetings.²⁹ The committee presents a report to the *Bundestag*, in which it sets out its reasoned recommendation for a decision on the bill, summarises the committee proceedings and outlines the opinion of the minority;³⁰ this report is published as a *Bundestag* printed paper and can be accessed on the parliamentary website. The minutes of meetings that are recorded may, in principle, be inspected after the promulgation of the act in question, provided that a legitimate interest is demonstrated.

27. *Bundestag* committees may conduct a public hearing of experts, representatives of interest groups and other persons who can furnish information,³¹ and this opportunity is frequently used.³² The lead committee, to which a bill is referred after its first reading in the plenary chamber, is required to hold such hearings if a quarter of its members so request. In preparation for a public hearing, the committee will often request the invitees to submit written comments which are published on the committee website before the hearing, and copies are laid out at the entrance to the hearing room for the benefit of visitors. Minutes of the hearing normally take the form of a verbatim record of proceedings, which is also posted on the committee website. Many public hearings can be followed live on the *Bundestag* website or be consulted afterwards.

28. Sittings of the *Bundestag* are public.³³ On the motion of one tenth of its members, or on the motion of the Federal Government, the *Bundestag* may, by a two-thirds majority, vote to exclude the public, but such a situation has never arisen. All plenary debates are shown live on the parliamentary television channel and certain parliamentary debates are transmitted – either excerpts or in full – by various broadcasters. A stenographic record is made of each plenary sitting,³⁴ which is published in stages on the *Bundestag* website on the day of the sitting itself, the final version being posted online no later than the following day.

29. In principle, votes are cast in the *Bundestag* by a show of hands or by rising or staying seated. The chair ascertains the result of the vote which is also published in this form in the minutes of plenary proceedings. Until the vote is declared open, the use of voting cards may be requested either by a parliamentary group or by 5% of the MPs, who must be present (in a number of procedural matters such a vote is inadmissible).³⁵ The results of card votes are published in the minutes of plenary proceedings, showing each MP's name and voting decision. The *Bundestag* website also contains an interactive application in which all of these recorded votes are analysed and presented along with further information on the subject and on the MPs.³⁶ In addition, the results of all plenary votes are recorded in the Official Record of the *Bundestag* which is published on its website.

30. The GET commends the authorities for the measures taken to provide easy access to information, *inter alia*, via the *Bundestag* website. During the on-site visit the GET's attention was nevertheless repeatedly drawn to some concerns regarding the degree of transparency of the legislative process. Firstly, there have been cases where the preparation of draft legislation, primarily Government bills, was outsourced e.g. to private law firms and consultants,³⁷ and such processes were not made public. The GET understands that the use of expertise from outside the *Bundestag* or the ministries can

²⁹ Exceptions to this rule are regulated in Rule 69(7) GOBT in conjunction with section 7 of the *Bundestag* Rules on Document Security.

³⁰ Rule 66 GOBT.

³¹ Rule 70(1) GOBT.

³² E.g. in the 16th electoral term, which ran from 2006 to 2009, public hearings were held on almost 30% of all bills (270 out of 905).

³³ Article 42(1) of the Basic Law

³⁴ Rule 116(1) GOBT.

³⁵ See Rules 52 and 53 GOBT.

³⁶ <http://www.bundestag.de/bundestag/plenum/abstimmung/grafik/index.jsp>

³⁷ It was also stated that sometimes private actors take the initiative to submit draft legislation on matters of interest to them.

be a useful and efficient instrument, but it is of the strong opinion that such instances must be disclosed to the public in order to enable it to identify external influences on the decision-making process. Furthermore, several interlocutors more generally called for publication of the involvement of interest groups, enterprises and other private players in the preparation of concrete legislative acts and of the influence exerted by such stakeholders on lawmakers – not only at the initial drafting stages but also in relation to later amendments to draft bills.³⁸ The GET is of the opinion that transparency could be significantly enhanced by providing a “legislative footprint” i.e. a written trace of comments made by stakeholders that are taken into account in the drafting process.³⁹ In this connection, the GET was interested to hear from representatives of the *Bundestag* Administration that academics and other experts were discussing how such concerns could possibly be addressed. They were in favour of exploring technical possibilities to better map changes made during the legislative process. GRECO strongly encourages the authorities to take inspiration from such reflections and to seek ways to ensure timely disclosure of the involvement of third parties in the preparation and finalisation of draft legislation.

31. In addition, some of those the GET spoke to were concerned that at the final stages of legislative proceedings, draft legislation was sometimes driven very speedily through the *Bundestag*, and that the general public and the media in particular were not informed in good time about final drafts and last amendments – which made it impossible for them to comment on them before their adoption.⁴⁰ It was also considered that this phenomenon provides a possible gateway for third parties seeking to influence the legislative process without being subject to public control. The GET shares those concerns and supports the call for the introduction of adequate timeframes for the publication of draft legislation in the final stages of the law-making procedure. The authorities are strongly encouraged to take such concerns into account and to consider taking appropriate measures to address this issue.

32. Furthermore, turning specifically to MPs’ interactions with lobbyists, the GET notes that the authorities first refer to the requirement on MPs to disclose information on activities within the constituent bodies of enterprises, public corporations, clubs, associations and similar organisations,⁴¹ and to the prohibition on MPs to accept money or allowances with a monetary value which are granted solely in the expectation that the interests of the payer will be represented and asserted in the *Bundestag*.⁴² In addition, reference is made to a – very short – set of provisions contained in Annex 2 to the GOBT on “Registration of associations and their representatives”. According to those provisions, representatives of associations lobbying the *Bundestag* or the Federal Government shall only be heard by the *Bundestag* committees if they have entered themselves in a public list kept by the President of the *Bundestag*, indicating the name and seat of the association, the composition of the board of management and the board of directors, the number of members, the names of the association’s representatives and the address of

³⁸ According to the authorities, current discussions primarily relate to Government bills and in this respect they refer to the coalition agreement (p. 152) which provides as follows: “We enhance transparency with regard to the use of external experts in the administration”. The authorities furthermore indicate that according to the already existing “General administrative regulation on the use of persons not employed in the public service (external persons) in the federal administration of 17 July 2008”, external persons who are temporarily assigned to work within the federal administration may not draft bills or other legislation or carry out functions with final decision-making powers or functions directly affecting the concrete business interests of the person’s permanent employer.

³⁹ Such measures could build on already existing procedures. In particular, the rules concerning the procedures within the federal ministries provide that, before taking draft legislation to the cabinet, interested associations (as represented at federal level) should be heard, and such contacts have to be reported to the Federal Chancellery.

⁴⁰ Some interlocutors had particular misgivings about the fact that the *Bundestag* can expedite the procedure even when deciding on its own affairs – such as MPs’ remuneration and allowances – and thus hamper public scrutiny, on the basis of Rule 126 GOBT according to which departures from the provisions of the GOBT may be decided upon by a two-thirds majority of the MPs present.

⁴¹ See below under “Declaration of assets, income, liabilities and interests” (paragraph 73).

⁴² See below under “Restriction or prohibition of certain activities” (paragraph 56).

its Berlin office.⁴³ Information gathered by the GET clearly suggests that this regime introduced back in 1972 no longer fully reflects the reality of lobbying activities which has been increasing significantly over the years and is not only performed by associations but by a variety of private players. In the view of the GET, the legal framework presents several weaknesses. In particular, registration is only voluntary, and the list of associations does not include enterprises, self-employed lobbyists, lawyers, think tanks, etc. Moreover, the above-mentioned rules are interpreted in such a way that non-registered associations are limited in their rights only in so far as they cannot claim the right to be heard in a committee meeting – but they may nevertheless be heard if they are invited by the committee in question.⁴⁴

33. Against this background, the GET was interested to hear that several political parties have been advocating a more comprehensive lobbying register and had submitted legislative proposals to this effect which had, however, not been adopted. Some of the GET's interlocutors called for a mandatory register which would also disclose contracts entered into by the lobbyists and their sources of finance. It is the GET's view that measures need to be taken in order to enhance transparency in this area and to limit the risk of undue influence by third parties on MPs. It would be clearly desirable to regulate MPs' relations with third parties and also to place contacts with persons or groups representing specific or sectorial interests on an institutional footing, for example by making registration of lobbyists compulsory, requiring MPs to disclose their contacts with third parties in relation with draft legislation (as described above), introducing rules of conduct for the third parties concerned – as well as for MPs, so as to provide guidance on how to deal with third parties seeking to influence MPs' work, and to actively promote transparency in this area. In view of the above, **GRECO recommends that the transparency of the parliamentary process be further improved, e.g. by introducing rules for members of parliament on how to interact with lobbyists and other third parties seeking to influence the parliamentary process.**

Remuneration and economic benefits

34. In 2012, the average gross monthly salary of a full-time employee in Germany amounted to €3 391.00.⁴⁵

35. Following a recent reform, as of 1 July 2014 MPs receive a monthly remuneration of €8 667⁴⁶ and committee chairpersons are entitled to a supplementary allowance of 15% of the base remuneration. The President receives a monthly supplementary allowance in the amount of the base remuneration, while his/her deputies receive half of that amount.⁴⁷ The parliamentary groups may make payments to group members for performing special functions within the group, e.g. chairing the group or acting as parliamentary secretary (whip).⁴⁸

36. In accordance with section 44a(1) AbgG, "the exercise of the mandate of a Member of the *Bundestag* shall be central to his/her activity. If they do not prejudice this obligation, activities of a professional or other nature alongside the exercise of the

⁴³ The list is published annually in the Federal Gazette (*Bundesanzeiger*), and a regularly updated version can be accessed on the *Bundestag* website: <http://www.bundestag.de/dokumente/lobbyliste/>. In April 2014, there were 2,175 associations on the list.

⁴⁴ In a letter of 18 October 1979 to the Committee on the Labour and Social Order, the Committee on the Rules of Procedure communicated this interpretation which has since been followed in practice.

⁴⁵ Source:

<https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/VerdiensteArbeitskosten/VerdiensteBranchen/Tabellen/LangeReiheD.html>.

⁴⁶ Before that date, the monthly remuneration was €8 252. See below for more information on the reform.

⁴⁷ Section 11(1) of the Act on the Legal Status of Members of the German *Bundestag* (*Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages*, AbgG)

English version: http://www.bundestag.de/htdocs_e/documents/legal/memlaw.pdf

⁴⁸ cf. section 52(2)(2)(a) AbgG.

mandate are permissible in principle". On the one hand, this reflects the fact that a parliamentary mandate has become a profession that demands full working capacity, but on the other hand MPs are free, in principle, to decide how to exercise their mandate.⁴⁹

37. MPs are provided with a fully equipped office at the seat of the *Bundestag* in Berlin. They can use the common information and communication system of the *Bundestag*. They are entitled to free use of all transport services provided by the rail operator *Deutsche Bahn* within Germany and of official *Bundestag* vehicles within the city boundaries of Berlin. The cost of internal flights incurred in the exercise of the MP's mandate is reimbursed on production of receipts, and official trips abroad require the prior approval of the President.⁵⁰ In addition, a monthly budget of €16 517 is available to each MP for the employment of staff.⁵¹ The salaries of these assistants are paid to them directly by the *Bundestag* Administration. There is, however, no reimbursement of costs in respect of staff who are or have been related to the MP by blood or marriage or who are or have been registered same-sex partners.⁵²

38. For other costs incurred in connection with the exercise of his/her mandate, each MP receives a monthly expense allowance, which is currently set at €4 204. This serves chiefly to defray the cost of equipping and maintaining one or more constituency offices as well as additional expenditure at the seat of the *Bundestag*, such as a second home, and mandate-related expenditure arising from representative functions, invitations and constituency work.⁵³ This allowance is tax-free. On the other hand, MPs – unlike employees – cannot offset costs arising from their activity against their taxes, not even if their actual expenditure exceeds the amount of the monthly expense allowance.

39. Access to information concerning the extent to which and how MPs avail themselves of the above-mentioned benefits is determined by the Freedom of Information Act.⁵⁴ According to the Act, the *Bundestag* Administration may only pass on information on the use of MPs' allowances (e.g. the procurement of office equipment and supplies for an MP) to an applicant subject to the consent of the MP in question, as it is regarded as personal information connected to the MP's mandate.⁵⁵

40. MPs are allowed to use funds from third parties to upgrade their office furnishings and equipment. They may accept monetary and in-kind donations to assist them in their political activity,⁵⁶ which can also be used for purposes such as improving their office facilities. If MPs receive donations to a value of more than €10 000 in one calendar year from a single donor, they are published (amount and source) by the President, in the Official Handbook and on the website of the *Bundestag*.⁵⁷

41. Regarding social insurance, MPs receive benefits to cover necessary costs incurred as a result of illness, nursing care and births.⁵⁸ In order to enable MPs to remain in the system to which they belonged prior to entering the *Bundestag*, they may choose whether such benefits take the form of reimbursement of half of their treatment costs – as is typically the case with civil servants – with the other half covered by private insurance or whether they receive a grant towards their contributions to a state or private health insurance scheme – as is the norm for employees and the self-employed.

⁴⁹ See Federal Constitutional Court, Decision 2 BvE 1/06 of 4 July 2007, paragraphs 211-213, 216 and 233-236, at www.bverfg.de

⁵⁰ Sections 12(4), 16 and 17 AbgG

⁵¹ From March 2015 the monthly budget will be increased to €16 913, due to an increase of wages in the civil service which serve as a source of reference to the wages of MPs' staff.

⁵² Section 12(3) AbgG

⁵³ Section 12(2) AbgG

⁵⁴ English version: http://www.gesetze-im-internet.de/englisch_ifg/englisch_ifg.html

⁵⁵ cf. section 5(1) and (2) and section 8 (1) of the Freedom of Information Act.

⁵⁶ Fourth sentence of section 44a(2) AbgG and Rule 4(1) of the Code of Conduct for Members of the *Bundestag*.

⁵⁷ For more details on donations to MPs, see below under "Gifts" (paragraphs 57 to 59) and under "Declaration of assets, income, liabilities and interests" (paragraph 76).

⁵⁸ Section 27 AbgG

42. Outgoing MPs with at least one year of membership are entitled to transitional emoluments (amounting to their remuneration as MPs) which are paid for one month for each year of membership, up to a maximum of 18 months.⁵⁹ From the second month after the date of severance from the *Bundestag*, all earned income and pension benefits are set off against the transitional emoluments. Moreover, MPs receive superannuation benefits after leaving the *Bundestag*, provided that they have been a member of the *Bundestag* for at least one year. This entitlement does not apply, in principle, until they reach their 67th birthday. The amount payable depends on length of service.⁶⁰ After one year's membership, it amounts to €207. The maximum rate, for which 27 years' membership is required, would be €5 570.

43. In February 2014 the *Bundestag* adopted a bill amending the remuneration and pension benefits of MPs which entered into force on 16 July 2014.⁶¹ In accordance with the amendments, *inter alia*, remuneration will be linked to general wage developments in Germany. This indexing scheme will be applied for the first time on 1 July 2016. Prior to that, remuneration is to be aligned in two stages with that of federal judges. Consequently the monthly remuneration increased to €8 667 on 1 July 2014 and will increase to €9 082 on 1 January 2015. Chairpersons of committees, committees of inquiry and study commissions receive a supplementary allowance of 15% of an MP's remuneration. Furthermore, starting from the 19th electoral term, MPs will only be entitled to draw an early pension from the age of 63 and with reductions. Pension entitlements will also change and will in the future rise or fall as a result of remuneration being linked to general wage developments with effect from 1 July 2016.

Ethical principles and rules of conduct

44. The constitutional basis with respect to these matters is article 38(1) of the Basic Law which states that members of the *Bundestag* "... shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience". From this provision, the Federal Constitutional Court has derived a number of rights of MPs – such as the right to address the *Bundestag*, the right to participate in the work of a parliamentary committee and the right to obtain from the Federal Government information that is required for the exercise of a mandate – which must be subordinate to the mission of the *Bundestag* to serve the common good; MPs are to devote themselves to their parliamentary duties in such a way as to guarantee the performance of those duties.

45. According to the Federal Constitutional Court, the above article also aims to safeguard the independence of MPs from interest groups that seek to assert their particular wishes in the *Bundestag* by providing incentives that target MPs' financial self-interest in order to exert an influence on the political decision-making process which – unlike the influence of political parties and parliamentary groups – does not emanate from decisions taken by the electorate.⁶² Accordingly, rules designed to provide the electorate with information about possible combinations of interests and economic dependence are, in principle, permissible; due consideration should however be given to the legitimate personal interests of MPs (and of third parties) when such rules require MPs to disclose data relating to their private lives.

46. Consequently, the legislature enacted sections 44a and 44b AbgG that stipulate, *inter alia*, that the exercise of the mandate must be central to an MP's activity, and deal with fundamental matters regarding allowances paid to MPs. They furthermore require

⁵⁹ Section 18 AbgG

⁶⁰ Sections 19 to 21 AbgG

⁶¹ Cf. Federal Law Gazette (*Bundesgesetzblatt*) 2014 I 906.

⁶² Federal Constitutional Court, Decision 2 BvE 1/06 of 4 July 2007, paragraph 222, at www.bverfg.de

the *Bundestag* to enact a Code of Conduct which must, in particular, include provisions on the disclosure and publication of MPs' activities and income.

47. The Code of Conduct for Members of the German *Bundestag* forms an integral part of the Rules of Procedure which were adopted by the *Bundestag*. In place since 1972, it subsequently underwent several amendments, most recently in 2005 and 2013, with respect to publication of secondary income. Implementing Provisions enacted by the President of the *Bundestag* accompany the Code.

48. The focus of the Code of Conduct is on the obligation of MPs to provide the President with information on activities and income; on the publication of most of the declared items of information; on specific regulations on donations; and on disclosure of interests as a committee member. The code also contains procedural rules to ensure compliance with these standards, and in order to prevent infringements of the code from the outset, MPs are required to consult the President or the competent staff of the *Bundestag* Administration if they have any doubts about their obligations under the code.

49. The GET acknowledges that the *Bundestag* has put in place a Code of Conduct which regulates several key areas such as transparency of secondary activities and income as well as donations. It is noteworthy that the Code has been repeatedly amended and appears to be a living document which is complemented by quite detailed implementing provisions. The GET however regrets that in its present form the Code does not provide a complete frame of reference for MPs. In particular, the Code fails to comprehensively address general principles of behaviour/ethics and certain specific issues such as conflicts of interest (e.g. definitions and/or types), incompatibilities, use/misuse of information and of public resources and interaction with third parties such as lobbyists. The present report contains several specific recommendations aimed at regulating some of the core issues mentioned above. In addition, the GET encourages the authorities to further develop the Code of Conduct so as to make it a comprehensive reference document – which would further raise MP's awareness of integrity issues, provide them with guidance and demonstrate to the public their willingness to act in order to uphold high levels of integrity.

Conflicts of interest

50. While there is no legal definition of the concept of conflict of interests, several mechanisms serve to prevent and expose conflicts of interest, namely (1) the rules governing incompatibility; (2) the rules on allowances, including the obligation to refrain from accepting certain allowances, as well as disclosure obligations; (3) obligations to disclose certain activities predating the mandate and certain activities, contracts, shareholdings and income concurrent with the mandate; and (4) the obligation to refrain from any reference to membership of the *Bundestag* in the context of occupational and business matters.⁶³

51. In addition, pursuant to Rule 6 of the Code of Conduct, committee members who receive remuneration for activities of relevance to an item on a committee agenda must disclose any combination of interests prior to the deliberations. This does not apply if it is already apparent from the content of the MP's declaration regarding his/her secondary activities and income that is published on the *Bundestag* website. Such a combination of interests, however, does not lead in principle to exclusion of an MP from the discussion or vote in committee or at a plenary sitting. Only in configurations in which the *Bundestag* acts in a similar way to a court, is provision made for such exclusion on an exceptional basis (e.g. membership of a committee of inquiry is incompatible with the legal representation of a person summoned to testify before the committee).⁶⁴ The authorities

⁶³ Rule 5 of the Code of Conduct

⁶⁴ See article 44 of the Basic Law. Committees of inquiry are empowered by the Code of Criminal Procedure to gather evidence and, in particular, to examine witnesses. Other examples are related to the procedure for the

indicate that not many cases fall within Rule 6 of the Code of Conduct which might be invoked in circumstances not typically covered by the general disclosure requirements. In case of doubt MPs are recommended as a precaution to disclose circumstances which could lead to a combination of interests and for this to be recorded in the minutes of the meeting.

52. The authorities stress in this connection that several provisions of the Basic Law proceed on the assumption that MPs are to take decisions on those matters that concern themselves, and that exclusion of individual MPs on account of their “partiality”, as happens in judicial proceedings, could alter the relative strength of the parties in the *Bundestag* in a way that would be contrary to the will of the electorate. Accordingly, in connection with the regulation of MPs’ remuneration, the Federal Constitutional Court⁶⁵ found it unavoidable in a parliamentary democracy that Parliament decides on its own affairs. At the same time, the entire decision-making process must be clearly comprehensible to the public and the outcome of such processes must be determined before the eyes of the public.

53. Finally, the authorities state that while the rules on conflicts of interest are addressed to MPs alone, third parties may nevertheless be affected by them in cases where MPs are required to disclose the identity of persons/organisations from whom/which they obtain secondary work and income. They furthermore refer in this connection to the rule by which reimbursement of expenditure in respect of employment contracts concluded with staff who are or have been related by blood or marriage to the MP or who are or have been registered same-sex partners is not permissible.⁶⁶

54. The GET notes that different instruments are in place which have the potential to prevent conflicts of interest, such as the obligation on MPs to disclose certain activities and income and the obligation to refrain from any reference to membership of the *Bundestag* in the context of occupational and business matters. However, the GET finds the rules on *ad hoc* disclosure of potential or actual conflicts of interest unsatisfactory. The pertinent provision of Rule 6 of the Code of Conduct, which is hardly ever applied in practice, presents several shortcomings. Firstly, the GET finds the notion of “combinations of interests” in Rule 6 rather vague, and the Implementing Provisions do not clarify the concept either. Clear rules on conflicts of interest including definitions and/or types would be preferable. Secondly, the existing rule only applies to committee meetings and the GET is of the firm opinion that it needs to be extended to the plenary. Thirdly, Rule 6 does not apply if a combination of interests is already “apparent” from an MP’s declaration on secondary activities and income. In the view of the GET, this principle of subsidiarity in Rule 6 contributes to its irrelevance in practice. A satisfactory degree of transparency could only be reached by requiring MPs to publicly declare any conflicts of interest as they arise in relation to their parliamentary work, independently of whether they might also be revealed by MPs’ declarations of activities and income – since it cannot be assumed that those declarations are systematically scrutinised by MPs’ peers or the public in respect of particular matters under consideration in the *Bundestag* and its committees. Such a requirement would be of benefit not only to MPs themselves but would also strengthen public confidence in the *Bundestag* and its members, which appears to have suffered from individual cases of conflicts of interest revealed by the media and civil society.⁶⁷

scrutiny of elections (see section 17 of the Scrutiny of Elections Act) or to the decision on waiving MP’s immunity.

⁶⁵ Decisions of the Federal Constitutional Court (BVerfGE), Vol. 40, p. 296 [cited from p. 327].

⁶⁶ Section 12(3) AbgG

⁶⁷ Several cases were referred to, e.g. the case of an MP competent for health policy whose ownership of shares in a health company was just under the threshold for obligatory disclosure; cases of members of the committees on health policy and on energy policy exercising functions in health associations and in energy companies respectively; and cases of MPs gaining significant income from lectures given at companies active in sectors linked to their political activity – which were not identified in the MPs’ declarations of income and activity as the lectures had been commissioned through distinct agencies. Regarding the latter situation, it is to

55. Finally, the GET notes that under Rule 7 of the Code of Conduct, when in doubt, MPs are obliged to clarify their duties under the Code by requesting further information from the President. This means that the advisory role is played by a political figure i.e. the President – or by the staff of the *Bundestag* Administration which is headed by the President. The GET is convinced that the creation of a commissioner of ethics inside the *Bundestag* would enhance the current consultation mechanism. Favouring a system of confidential counselling for MPs would raise awareness about conflicts of interest and support strong ethical values. Consequently, **GRECO recommends (i) that a requirement of *ad hoc* disclosure be introduced when a conflict between specific private interests of individual members of parliament may emerge in relation to a matter under consideration in parliamentary proceedings – in the *Bundestag* plenary or its committees – independently of whether such a conflict might also be revealed by members’ declarations of activities and income; and (ii) that members of parliament be provided written guidance on this requirement – including definitions and/or types of conflicts of interest – as well as advice on possible conflicts of interests and related ethical questions by a dedicated source of confidential counselling.**

Prohibition or restriction of certain activities

Gifts

56. Under section 44(2) AbgG, “for the exercise of his/her mandate, an MP may not accept any allowance or other pecuniary benefit besides those provided for by law. In particular, it is inadmissible to accept money or allowances with monetary value which are granted solely in the expectation that the interests of the payer will be represented and asserted in the *Bundestag*. It is also inadmissible for an MP to accept money or allowances with monetary value if s/he does not render an appropriate service in return. The foregoing provisions shall be without prejudice to the receipt of donations.” Inadmissible allowances or the value of pecuniary benefits must be paid into the federal budget. The procedure applicable to such cases is regulated in the Code of Conduct.⁶⁸

57. Donations are regulated in detail in Rule 4 of the Code of Conduct and are understood as allowances that are made available to MPs for their political activity, as distinct from allowances that are made available for an MP’s personal use. MPs are required to keep separate account of donations and to disclose them, within certain limits.⁶⁹ The acceptance of certain donations is prohibited,⁷⁰ namely

- 1) donations from public corporations, parliamentary parties and groups and from parliamentary groups of municipal councils (local assemblies);
- 2) donations from political foundations, corporate entities, associations of persons and estates which exclusively and directly pursue civic, charitable or religious purposes;
- 3) donations from abroad which exceed €1 000 (unless they come from the assets of a German, of an EU citizen or of a business enterprise in which a German or an EU citizen holds more than 50% of the shares or whose registered office is located in an EU Member State, or from members of ethnic minorities from countries adjacent to Germany in which members of that minority live);

be noted that from the beginning of the 18th electoral term (22 October 2013), MPs must also disclose the event at which the lecture was delivered as well as the event organiser. Cf. Rule 3(1) sentence 2 of the Implementing Provisions to the Code of Conduct.

⁶⁸ See below under “Supervision and enforcement” (paragraph 89).

⁶⁹ See below under “Declaration of assets, income, liabilities and interests” (paragraph 76).

⁷⁰ See Rule 4(4) of the Code of Conduct in conjunction with section 25(2) of the Political Parties Act (*Parteiengesetz*).

- 4) donations from professional organisations which were made to the latter subject to the proviso that such funds be passed on to an MP;
- 5) donations from enterprises that are more than 25% publicly owned;
- 6) any donations exceeding €500 each, which are made by an unidentified donor or which evidently are passed on as a donation by unnamed third parties;
- 7) donations evidently made in the expectation of, or in return for, some specific financial or political advantage;
- 8) donations solicited by a third party against a fee to be paid by the MP and amounting to more than 25% of the value of the solicited donation.

MPs are obliged to hand over inadmissible donations to the President of the *Bundestag* without delay. The latter then decides, in consultation with the Presidium, what is to be done with the funds. The procedure applicable to cases where MPs have accepted inadmissible donations are regulated in Rule 8 of the Code of Conduct.⁷¹

58. Notwithstanding the above prohibitions, certain benefits of monetary value are not considered as donations in the meaning of Rule 4 of the Code of Conduct and may thus be accepted,⁷² namely if they are received in connection with inter-parliamentary or international activities, or for participation in events held for the purpose of imparting political information or presenting the positions of the *Bundestag* or of its parliamentary groups or for representing the *Bundestag* (e.g. the payment of travel and subsistence expenses by third parties when MPs attend political events). However, as far as the disclosure obligations are concerned, such benefits are treated in the same way as donations. Furthermore, gifts of pecuniary value which an MP receives as a guest or host in connection with his/her mandate (i.e. as part of the protocol of official visits) must be notified and handed to the President of the *Bundestag* if their value exceeds €200. The MP may then apply to keep the gift if s/he pays a sum equivalent to its value.⁷³

59. The GET notes that the law and the Code of Conduct applicable to MPs contain quite detailed rules on gifts and other benefits which appear to provide a satisfactory regulatory framework. The interlocutors met on site did not point to any specific problems – except with regard to direct donations to MPs, i.e. allowances made available to MPs for their political activity. It seems to be difficult to establish how frequently such donations are made directly to MPs rather than to their political parties, since donations up to €5 000 in one calendar year from the same donor need not be declared to the President of the *Bundestag* and donations up to €10 000 in one calendar year from the same donor are not made public. Some of those the GET spoke to found the current transparency rules on such direct donations insufficient – bearing also in mind that such donations can be made in cash and small donations (up to €500) can be accepted from unidentified donors, or even favoured their prohibition in order to prevent any grey zones.⁷⁴ Some other interlocutors, however, stated that in practice, donations made directly to MPs are rare because only donations to political parties are tax-deductible. The GET abstains from commenting further on this issue, given that in its Third Round Evaluation Report on Germany GRECO has already issued a specific recommendation in this respect – its full implementation is still pending and is subject to the corresponding compliance procedure.⁷⁵

⁷¹ See below under “Supervision and enforcement” (paragraphs 87 to 89).

⁷² See Rule 4(5) of the Code of Conduct.

⁷³ See Rule 4(6) of the Code of Conduct in conjunction with paragraph 11 of the Implementing Provisions.

⁷⁴ Such a prohibition had already been proposed by a commission established by the former President of the Republic *R. von Weizsäcker* in 1993 and was strongly supported by some NGOs and academics, while others pointed to constitutional concerns about such a prohibition and assumed that direct donations to MPs were rare in practice, mainly due to tax law.

⁷⁵ Cf. GRECO’s Third Round Evaluation Report on Germany, Theme II, document Greco Eval III Rep (2009) 3E Final Germany PF, paragraph 105. See also the corresponding Compliance Reports adopted to date, documents Greco RC-III (2011) 9E Final Germany, Greco RC-III (2012) 15E Final Interim Germany, Greco RC-III (2013) 15E Final 2nd Interim Germany and Greco RC-III (2014) 19E Final 3rd Interim Germany.

Incompatibilities and accessory activities, post-employment restrictions

60. MPs may not simultaneously be members of a *Land* Government and the *Bundesrat*. In contrast, MPs may, alongside their parliamentary mandate, be members of the Federal Government and may exercise political functions at local government level (e.g. in local councils, county councils or as mayors). These possibilities are frequently made use of⁷⁶ and are apparently the accepted norm in Germany. However, the GET also heard some critical voices on this accumulation of functions and the questions it raises as regards the separation of powers. In particular, it was stressed that as the *Bundestag* is to control the Federal Government, members of Government holding a parliamentary mandate could be exposed to conflicts of interest. The GET shares these concerns and invites the authorities to reflect on possibilities to extend MPs' incompatibilities to include any function in the executive branch of power, as is the case in many other European States.

61. The rights and duties of permanent civil servants, civil servants appointed for a fixed term, judges, members of the armed forces and public-service employees who are elected to the *Bundestag* are suspended for the duration of their membership, except for the duty of confidentiality and the obligation to refrain from accepting rewards and gifts.⁷⁷ University professors and assistant professors may engage in research and teaching and provide assistance to doctoral and postdoctoral students when members of the *Bundestag*, but their remuneration for that work may not exceed 25% of the income which would be paid under their contract of employment.⁷⁸

62. Other activities of a professional or other nature carried out alongside the exercise of a parliamentary mandate are permissible, but the latter must be central to the MP's activity and it is inadmissible for an MP to accept money or allowances with monetary value if s/he does not render an appropriate service in return.⁷⁹ Accessory activities must be disclosed and published if Rule 1(2) and (3) of the Code of Conduct so ordain.⁸⁰ No reference may be made to membership of the *Bundestag* in the context of occupational or business matters.⁸¹

63. The Federal Constitutional Court has emphasised that while a parliamentary mandate has become a profession – albeit a temporary one – that demands full working capacity, the obligation of MPs to put the exercise of their mandate at the heart of their activity is “not conducive to enforcement of the type prescribed by labour and civil-service legislation” and is not subject to the oversight of a public authority or a court of law. The free mandate guaranteed by article 38(1) of the Basic Law is an office discharged within the structure of the State but embedded in society. MPs are free, in principle, to decide how to exercise their mandate and are accountable only to the electorate.⁸²

64. According to a recent study based on data published on the website of the *Bundestag*, during the 17th electoral term (2009 to 2013) 469 MPs (72%) were involved in bodies such as associations, federations or foundations, 356 (54.7%) had functions in corporations or institutions under public law (e.g. as a member of a local council), 219 (33.8%) sat on company boards, 210 (32.3%) exercised a paid activity alongside their

⁷⁶ In particular, the Federal Chancellor and the majority of Federal Ministers are members of the *Bundestag*.

⁷⁷ Section 5(1), first sentence, and section 8 AbgG.

⁷⁸ Section 9(2) AbgG

⁷⁹ See section 44a(1) and (2) AbgG.

⁸⁰ See below under “Declaration of assets, income, liabilities and interests” (paragraph 73).

⁸¹ Rule 5 of the Code of Conduct

⁸² See Federal Constitutional Court, Decision 2 BvE 1/06 of 4 July 2007, paragraphs 211-213, 216 and 233-236, at www.bverfg.de.

parliamentary mandate, e.g. as a lawyer or farmer; the most common paid activity was that of lawyer (70 MPs).⁸³

65. No rules or measures prohibit or restrict the employment options of MPs, or their engagement in other paid or un-paid activities, on completion of their term in office. However, agreements whereby MPs are to be entrusted with a particular activity or receive pecuniary benefits during or after their term in office must be disclosed to the President, who must publish details of them.⁸⁴

66. At the time of the visit, the possible introduction of so-called "cooling-off" periods applicable to leading politicians – primarily members of Government and State Secretaries – before engaging in private business was subject to public debate. The discussions had been triggered by several cases where prominent politicians had, shortly after leaving their political functions, occupied lucrative positions in branches of the private sector they had dealt with during their political activity. It would appear that the Government is planning to propose the introduction of waiting periods for former members of Government including State Secretaries.⁸⁵ In contrast, there are no such plans or discussions with respect to MPs in general. While one needs to take account of the fact that a parliamentary mandate will not, as a rule, provide employment that spans a whole career, the GET is nevertheless concerned that MPs could influence decisions in the *Bundestag* while bearing in mind the potential benefit they might gain once they leave the *Bundestag* possibly to join/return to the private sector. The authorities are encouraged to reflect on the necessity of introducing adequate rules/guidelines for such situations.

Financial interests, contracts with State authorities, misuse of public resources, third party contacts

67. There is no prohibition or restriction on the holding of financial interests by MPs or on them entering into contracts with State authorities. However, an MP's shareholding in any enterprise must be disclosed and published if the MP holds more than 25% of the voting rights.⁸⁶ Furthermore, MPs practising as lawyers who, for a fee exceeding €1 000, personally represent the Federal Republic of Germany, federal corporate bodies or public institutions or foundations in or out of court must inform the President of this representation.⁸⁷

68. Moreover, there are no specific rules on misuse of public resources by MPs. However, the law makes it clear that benefits classed as MPs' allowances may be used solely for mandate-related purposes.⁸⁸ In principle, benefits granted to MPs in the form of monetary payments or benefits in kind are subject to the submission of evidence (except for the expense allowance and the entitlement to free use of transport services provided by the rail operator *Deutsche Bahn*).

⁸³ Cf. Herbert Hönigsberger, *Die sechste Fraktion – Nebenverdiener im Deutschen Bundestag*, 2013, <https://www.otto-brenner-shop.de/publikationen/obs-arbeitspapiere/shop/obs-arbeitspapier-nr-11-die-sechste-fraktion.html>.

See also the follow-up study based on the information published on the website of the *Bundestag* at the beginning of the 18th electoral term (regular updates during the electoral term are planned):

<https://www.otto-brenner-shop.de/publikationen/obs-arbeitspapiere/shop/obs-arbeitspapier-nr-13-aufstocker-im-bundestag.html>.

⁸⁴ See Rule 1(2), item 5, of the Code of Conduct in conjunction with paragraph 6 of the Implementing Provisions and Rule 3 of the Code of Conduct.

⁸⁵ The coalition agreement (p. 152) provides as follows: "To avoid the appearance of conflicts of interest we seek an appropriate regulation for members of Government, State Secretaries, Parliamentary State Secretaries and political officials."

⁸⁶ See Rule 1(2), item 6, of the Code of Conduct in conjunction with paragraph 7 of the Implementing Provisions and Rule 3 of the Code of Conduct.

⁸⁷ See Rule 2(1) and (3) of the Code of Conduct in conjunction with paragraph 9 of the Implementing Provisions.

⁸⁸ Cf. section 12(1) AbgG.

69. Regarding MPs' contacts with third parties, the authorities refer to the principle of the free exercise of a parliamentary mandate.⁸⁹ MPs in exercising their mandate are free to establish and maintain the contacts they consider necessary, including with persons whose declared or supposed intention it is to influence an MP's parliamentary decision, as long as they do not engage in any prohibited action (such as accepting inadmissible allowances, benefits or donations).⁹⁰ The authorities also refer to the requirement on MPs to disclose information on activities – whether remunerated or not – on constituent bodies (management boards, advisory boards, etc.) of enterprises, of public corporations or institutions, such as local authorities, of clubs, associations and similar organisations, or of foundations other than those of purely local importance – thus including organisations that engage in regular or occasional lobbying. Finally, the authorities mention the public list of associations of trade and industry lobbying the *Bundestag* or the Federal Government which is kept by the President of the *Bundestag*. In this context, the GET refers to the further details described above and to the recommendation made concerning the interaction of MPs with lobbyists and other third parties seeking to influence the parliamentary process.⁹¹

Misuse of confidential information

70. The *Bundestag* Rules on Document Security⁹² apply to classified material originating in the *Bundestag* (e.g. if a committee applies a security classification to all or part of an item of business) or transmitted to the *Bundestag*, its committees or MPs, for example, by the Federal Government.

71. An MP who communicates classified material without authorisation can be charged under article 353b(2) of the Criminal Code (*Strafgesetzbuch*, StGB)⁹³ with breaching a special duty of confidentiality. Under that provision, anyone who "unlawfully allows an object or information to come to the attention of another or makes it publicly known,

1. which s/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 s/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 a term of imprisonment of up to three years or a fine." It is to be noted, however, that an MP may not be subject to court proceedings for utterances made in the *Bundestag* or in any of its committees, unless such an utterance constitutes a defamatory insult.⁹⁴

Declaration of assets, income, liabilities and interests

72. MPs are required to submit declarations of interest to the President of the *Bundestag* within three months of becoming an MP and when changes or additions occur during the electoral term. Under section 44a(4) AbgG, "activities predating the acceptance of the mandate as well as activities and income concurrent with the exercise of the mandate which may indicate combinations of interests with implications for the exercise of the said mandate shall be disclosed and published in accordance with the Code of Conduct". Thus, the main targets of the system of disclosure obligations for MPs are "activities and income".

73. More specifically, pursuant to Rule 1 of the Code of Conduct in conjunction with its Implementing Provisions, MPs have to inform the President

⁸⁹ See article 38(1) of the Basic Law.

⁹⁰ Cf. section 44a(2) AbgG and Rule 4(4) of the Code of Conduct.

⁹¹ See above under "Transparency of the legislative process" (paragraph 33).

⁹² See Annex 3 to the GOBT.

⁹³ English version: http://www.gesetze-im-internet.de/englisch_stgb/

⁹⁴ See Article 46(1) of the Basic Law.

- (1) in respect of the two-year period prior to membership of the *Bundestag*, of
- the occupation last practised;
 - activities as member of a management, supervisory, administrative or advisory board or of another body of a company, of an enterprise operated in another legal form, or of a corporation or institution under public law; and
- (2) of the following activities engaged in or taken up, or contracts binding on them, during membership of the *Bundestag*:
- all remunerated activities engaged in alongside the exercise of a parliamentary mandate, either by virtue of being self-employed or by virtue of being a salaried employee. These include, for example, continuing an occupation engaged in prior to membership of the *Bundestag*, as well as consultancy, representation, the provision of expert opinions and writing or lecturing activities. There is no obligation to inform the President if the income from expert opinions, writing or lecturing does not exceed €1 000 per month or €10 000 per year. Furthermore, there is no obligation to report activity as member of the Federal Government, as Parliamentary State Secretary and as Minister of State;⁹⁵
 - activities in constituent bodies of enterprises, of public corporations and institutions, of clubs, associations and similar organisations and of foundations other than those of purely local importance. This means every type of managing or advisory body, such as boards of management, supervisory boards, administrative boards and advisory boards;
 - the existence or making of agreements whereby the MP is to be assigned certain activities or receive pecuniary benefits during or after membership of the *Bundestag*;
 - shareholdings in enterprises (private corporations, *Kapitalgesellschaften*, or partnerships, *Personengesellschaften*) if the MP holds more than 25% of the voting rights in the relevant company.

In the case of any remunerated activity, the name and registered office of the client, enterprise or organisation for whom or which the work was performed must be declared. Clients of freelance professionals and self-employed persons are to be declared only if the gross income from one or more contracts with the client in question exceeds the amount of €1 000 within one month or the amount of €10 000 within one year.⁹⁶ The income that the MP receives for the activity in question must also be declared if it exceeds the amount of €1 000 within one month or the amount of €10 000 within one year. Calculations to determine whether the ceilings are exceeded must be based on the gross amounts due for an activity, including expenses, compensation and benefits in kind.

74. Since 2005 all disclosed activities, clients and income are published in the Official Handbook and on the website of the *Bundestag*,⁹⁷ the income being expressed in the form of income brackets.⁹⁸ This disclosure obligation was contested by some MPs before the Federal Constitutional Court, but it dismissed their action as unfounded.⁹⁹ The most recent amendments to the Code of Conduct in 2013 raised the number of income

⁹⁵ Parliamentary functions for which parliamentary groups remunerate MPs separately, such as chairing a group or acting as Parliamentary Secretary, need not be declared.

⁹⁶ An MP who can cite a statutory right to refuse to give evidence or a statutory or contractual duty not to disclose confidential information, as would apply in a lawyer-client situation, may list the client in an anonymous manner, for example as 'Client No 1'.

⁹⁷ <http://www.bundestag.de/bundestag/abgeordnete18/nebentaetigkeit/index.html>

⁹⁸ See Rule 3 of the Code of Conduct. Information on MPs' activities in constituent bodies of enterprises and of public corporations or institutions prior to membership of the *Bundestag* is not published.

⁹⁹ Federal Constitutional Court, Decision 2 BvE 1/06 of 4 July 2007, at www.bverfg.de. However, four of the eight judges on the panel took the view that the contested rules were unconstitutional because the way in which they were phrased did not take due account of the personal interests of the MPs whose secondary income was to be disclosed (see paragraphs 337 *et seq.*).

brackets from three to ten. They are as follows: category 1 (over €1 000 up to €3 500), category 2 (over €3 500 up to €7 000), category 3 (over €7 000 up to €15 000), category 4 (over €15 000 up to €30 000), category 5 (over €30 000 up to €50 000), category 6 (over €50 000 up to €75 000), category 7 (over €75 000 up to €100 000), category 8 (over €100 000 up to €150 000), category 9 (over €150 000 up to €250 000) and category 10 (over €250 000). According to the authorities, there is great public interest, particularly among the media, in the content of MPs' declarations.¹⁰⁰

75. In principle, the mere possession of assets or financial interests is not notifiable, except for shareholdings in enterprises if the MP holds more than 25% of the voting rights in the relevant company (see above). The underlying idea is that such large holdings of voting rights normally go hand in hand with engagement in business activity, such as participation in key shareholder decisions. Furthermore, the disclosure obligation does not apply, in principle, to income from capital assets, such as share dividends. Only if an MP who has shares in a company participates personally in the acquisition of company profits by engaging on a non-remunerated basis in activities which are normally remunerated does s/he have to declare dividends received from the company's profits (e.g. in cases where partners in a company work as managing directors of their company without drawing a salary, or where lawyers are partners in a law firm). The Code of Conduct does not provide for any specific disclosure obligation in respect of business contracts with State authorities. Only lawyers who, for a fee, personally represent the Federal Republic of Germany, federal corporate bodies or public institutions or foundations in or out of court must declare this representation if the fee exceeds €1 000.¹⁰¹ The same is true if they represent a third party against the Federal Republic of Germany. However, there is no provision for publication of such information.

76. In addition to the obligation to disclose information on activities and income, Rule 4 of the Code of Conduct contains a requirement on MPs to also declare any donation, or two or more donations from the same donor, to the President of the *Bundestag* if their total value exceeds €5 000 in one calendar year.¹⁰² The name and address of the donor and the total amount donated must be disclosed. The same threshold (more than €5 000 in a calendar year) applies to the obligation to disclose benefits of monetary value that are received in connection with inter-parliamentary or international activities, for participation in events held for the purpose of imparting political information or presenting the positions of the *Bundestag* or of its parliamentary groups or for representing the *Bundestag*. Such benefits of monetary value as well as donations are published by the President in the Official Handbook and on the website of the *Bundestag*, along with their amount and origin, if their value or, in the case of two or more donations or benefits from the same donor, their cumulative value exceeds €10 000 in one calendar year. Finally, gifts received by MPs as guests or hosts in the exercise of their mandate must be declared if their value exceeds €200, but such information is not published since gifts worth more than €200 must be surrendered, or else MPs must pay the assessed value of the gift if they wish to retain it.

77. All declarations by MPs are stored on the premises of the division of the *Bundestag* Administration entrusted by the President with the implementation of the Code of Conduct and are entered in a database. The documents are destroyed after a period of five years following the end of the subject's membership of the *Bundestag*, unless the

¹⁰⁰ The results of the 2013 study "Die sechste Fraktion – Nebenverdiener im Deutschen Bundestag" (<http://www.otto-brenner-shop.de/publikationen/obs-arbeitspapiere/shop/obs-arbeitspapier-nr-11-die-sechste-fraktion.html>), already mentioned above, was largely taken up by the media. According to the study, during the 17th electoral term 188 out of 651 MPs had noteworthy secondary income and gained altogether around €32 million from secondary income over four years.

¹⁰¹ See Rule 2 of the Code of Conduct and paragraph 9 of the Implementing Provisions.

¹⁰² In contrast, paragraph 10(2) of the Implementing Provisions makes it clear that "a donation that an MP accepts as a party donation and forwards to his/her political party, obtaining a receipt for the forwarded amount, need not be declared. These circumstances are without prejudice to the accountability of the political party."

former MP has asked for the documents to be returned. After this the subject's data are also deleted from the database.

78. Finally, Rule 6 of the Code of Conduct requires members of parliamentary committees who receive remuneration for activities of relevance to an item on the committee agenda to disclose any combination of interests prior to the deliberations, unless this is already evident from the general published information.¹⁰³ Such ad hoc declarations are made to the committee in question. There is no central register for such declarations and they are not published.

79. The GET welcomes the above-mentioned disclosure requirements which have evolved over the years. It notes that following some cases of prominent politicians who had generated very high income from secondary activities, the rules on publication of such income were strengthened in 2013. Until then, income over €7 000 was covered by one single income bracket, now it is subject to eight brackets. While the latest amendments were generally welcomed by the public, the GET notes that some NGOs, academics and political parties call for the disclosure of exact amounts of income. The authorities may wish to reconsider such a further refinement of the system, which would have the potential of further enhancing transparency and fostering citizens' trust.

80. The GET wishes to turn to another area – the scope of declarations of interest – which to their mind also leaves room for improvement. Germany has opted for a declaration system which focuses mainly on income from secondary activities and donations. MPs are asked to declare shareholdings in enterprises only if they hold 25% of the voting rights in a company, but not other financial information, e.g. real estate and other significant property, income from investments, business contracts with State authorities or significant liabilities. Some of those the GET spoke to, including some party representatives, took the view that the threshold of 25% of voting rights is quite high and needs to be lowered, given that even with 10% or 15% voting rights shareholders can exercise considerable influence and participate in key shareholder decisions. Moreover, several interlocutors called for an extension of the current disclosure rules to also include other significant assets and liabilities.¹⁰⁴

81. It is clear, on the one hand, that MPs must not be over-encumbered and the GET takes due note of the fears expressed by some that standing for election might suffer a further loss of attractiveness if further administrative burdens and requirements encroaching on privacy rights are imposed on MPs. On the other hand, the GET takes the view that the declarations of interest would be more helpful if they provided a more comprehensive picture of an individual MP's interests, and assets and liabilities, at least significant ones, are an important part of those interests. Finally, the fact that no information is provided on spouses or dependent family members may well hamper the identification of MPs' conflicts of interest and bear a certain risk that the existing transparency regulations may be circumvented by transferring property to such persons. In this connection, the GET is fully aware of the associated challenges that may arise in relation to concerns for the privacy of family members, but it holds the view that a reasonable compromise can be found by requiring MPs to provide information on significant assets and interests of spouses and dependent family members, though not necessarily to make it public. Consequently, **GRECO recommends (i) that the existing regime of declarations of interests be reviewed in order to extend the categories of information to be disclosed to include, for example, information on significant assets – including shareholdings in enterprises below the current**

¹⁰³ See above under "Conflicts of interest" (paragraph 51).

¹⁰⁴ Some interlocutors also expressed concerns about the lack of transparency when MPs who are lawyers accept to represent lobbyists and they argued that the obligation to secrecy on the part of lawyers should not apply with respect to such representation; information about clients and the income gained should be disclosed. Such claims were also discussed in the media which reported on cases where MPs worked for private law firms which accepted to represent enterprises directly affected by political decisions.

thresholds – and significant liabilities; and (ii) that consideration be given to widening the scope of the declarations to also include information on spouses and dependent family members (it being understood that such information would not necessarily need to be made public).

Supervision and enforcement

Rules on the use of public funds

82. MPs are to submit information on the use of benefits received in the form of monetary payments or benefits in kind as detailed above,¹⁰⁵ on standard forms. However, no supporting documentation is required with respect to the expense allowance (currently €4 204 per month) or the entitlement to free rail travel provided by the *Deutsche Bahn*. The expense allowance is conceived as a flat-rate reimbursement for expenses which it is expected will actually be incurred, in order to avoid difficulties of demarcation which would arise if MPs were required to submit itemised documentation of expenses relating to the exercise of their mandate.¹⁰⁶

83. In the case of trips taken in the exercise of the parliamentary mandate, the *Bundestag* Administration examines the associated invoices and other supporting documentation before public funds are disbursed. Eight members of staff from the intermediate and higher intermediate service working in the competent division of the *Bundestag* Administration are engaged in executing the application and approval procedure for trips and for settling the travel expenses of MPs.

84. With respect to equipment and supplies for MPs' offices at the seat of the *Bundestag* and expenses in connection with the provision and use of the *Bundestag's* common information and communication system, these are administered via an account for benefits in kind (*Sachleistungskonto*) set up for every MP. A total of 11 members of staff of the *Bundestag* Administration are responsible for verification of expense claims and reimbursement.

85. Staff employed by MPs at the seat of the *Bundestag* and in their constituencies are engaged on the basis of private law contracts concluded with the MPs. Their salaries are paid by the *Bundestag* Administration from a staff allowance from budget funds of up to a maximum monthly amount of €16 517 (cf. paragraph 37 above). The payment is made directly to the member of staff and only once all the conditions of the relevant regulations have been fulfilled.¹⁰⁷ Notably, MPs must submit to the administration employment contracts and personnel sheets and confirm in writing that they employ the members of staff to assist them in performing their parliamentary work, that they comply with certain minimum conditions as set out in a model employment contract and according to an established salary scale, and that they are not or have not been related by blood or marriage to the member of staff and that no civil partnership exists or has existed between them. 33 staff of the administration belonging to the intermediate and higher intermediate service are engaged in examining and processing the related payment requests. MPs themselves have a responsibility to ensure that public funds are used in accordance with the relevant regulations.

86. Several interlocutors met by the GET voiced concerns about the staff allowance which has increased significantly over the years, which is provided for in the annual *Bundestag* budget and is not subject to a general legal maximum limit. It was

¹⁰⁵ See above under "Remuneration and economic benefits" (paragraphs 37 to 38).

¹⁰⁶ Cf. Federal Constitutional Court, Decision of 26 July 2010, 2 BvR 2227/08, 2 BvR 2228/08, Rn. 7. See http://www.bverfg.de/entscheidungen/rk20100726_2bvr222708.html

¹⁰⁷ "Regulations governing the reimbursement of expenses incurred by Members of the German *Bundestag* in connection with the employment of staff" enacted by the Council of Elders of the *Bundestag* pursuant to section 34 in conjunction with section 12(3) AbgG.

furthermore stated that MPs did not always respect the rule under section 12(3) AbgG according to which the staff allowance may be used only for assistance to MPs to carry out their “parliamentary work”; at least occasionally, in particular during election periods, staff are used for election campaigning and for party work. Such allegations had also been repeatedly made in the media but were contested by party representatives met during the visit. In this connection, some of the GET’s interlocutors were concerned that the use made of MPs’ staff was not subject to any supervision. Given the sensitivity of the issue of use of public funds and in order to ensure that MPs are – and are seen to be – upholding high standards of integrity, the authorities may wish to keep under review the question of adequate supervision of the use of the staff allowance – e.g. by the Federal Court of Audit, as suggested by some.¹⁰⁸ In this connection, it is to be noted that the question of whether the current rules on the staff allowance – and the lack of disclosure – are in conformity with the Constitution is currently the subject of a case before the Federal Constitutional Court.

Rules of conduct

87. Rule 8 of the Code of Conduct includes regulations for the enforcement of the standards of conduct applicable to MPs, such as the obligation to disclose information on activities and income, restrictions and disclosure obligations concerning donations, etc. Where there are indications of an infringement of the Code of Conduct, the President of the *Bundestag* asks the MP to state his/her position and initiates an examination of the facts and the legal position. The President may seek further information from the MP concerned and ask the chairperson of the MP’s parliamentary group to state his/her position.

88. If the President concludes that a minor infringement or minor negligence has occurred, such as failure to meet a declaration deadline, the MP is reprimanded. Otherwise the President refers the case to the Presidium for an interview of the MP and informs the chairpersons of the parliamentary groups. If the Presidium concurs with the President’s assessment, a statement by the Presidium that an MP has failed to meet his/her obligations pursuant to the Code of Conduct is published as a *Bundestag* printed paper.¹⁰⁹ If the disclosure obligations under the Code of Conduct have been breached, the Presidium may, after hearing the MP once again, impose a fine whose amount must be commensurate with the gravity of the particular case and the degree of blame attaching to the MP but must not exceed half of the annual amount of the MP’s remuneration (in December 2013, this meant a maximum fine of €49 512). Decisions in the Presidium are taken by a majority if unanimity cannot be achieved. The MP concerned may seek legal redress against the publication of the printed paper and the imposition of the fine. Jurisdiction lies with the Federal Administrative Court.

89. In principle, the above-mentioned rules also apply if an MP accepts inadmissible donations,¹¹⁰ but it is not possible in that case to impose a coercive fine. In addition, it is to be noted that inadmissible donations must be handed over to the President without delay. If an MP accepts inadmissible allowances or pecuniary benefits within the meaning of section 44a(2) AbgG, which must be paid into the federal budget, the following specific procedure applies, on condition that the allowance or benefit was received within the preceding three years.¹¹¹ The President examines such cases, interviews the MP concerned and asks, where appropriate, the chairperson of the MP’s parliamentary group to comment. If s/he concludes that the allowance or benefit is inadmissible, s/he refers

¹⁰⁸ In some *Länder*, e.g. Bavaria, the use of staff allowances available for members of the *Länder* Parliaments is overseen by the Court of Audit of the respective *Land*.

¹⁰⁹ If it is found that there was no breach of the Code of Conduct, this finding may also be published at the request of the MP.

¹¹⁰ In the meaning of Rule 4(4) of the Code of Conduct in conjunction with section 25(4) of the Political Parties Act. See above under “Prohibition or restriction of certain activities” (paragraph 57).

¹¹¹ See section 44a(3) AbgG and Rule 8(5) of the Code of Conduct.

the case to the Presidium for an interview of the MP and informs the chairpersons of the parliamentary groups. If the Presidium finds that the MP has not fulfilled his/her obligations under the AbgG, its finding is published in the form of a *Bundestag* printed paper, and the President enforces the claim for payment of the allowance, or of the monetary value of the benefit, into the federal treasury.

90. Finally, it is to be noted that besides administrative legal consequences, an MP may also incur criminal liability for accepting an inadmissible donation, allowance or benefit under article 108e StGB, which deals with bribery of MPs. Such liability depends on the MP having sold or attempted to sell his/her vote in an election or division in the *Bundestag*. In February 2014, however, the *Bundestag* adopted a bill which strengthens the provisions on bribery of MPs. The new article 108e(1) StGB, which entered into force on 1 September 2014, reads: "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."¹¹²

91. Regarding more specifically the obligation to disclose information on activities and income, the information declared by each MP is entered in a database by the competent administrative staff so that it can then be published. If it emerges during this process that any information is incomplete or inconsistent, the MP concerned is asked to supplement or clarify it. If the MP had a seat in the preceding Parliament, the information that was declared and published for that electoral term may give rise to queries. The same approach is adopted when amendments and additions are made in the course of the electoral term. Otherwise, i.e. in the absence of any indications, information declared under the Code of Conduct is not automatically checked for completeness and accuracy.

92. The President and the Presidium have the *Bundestag Administration* at their disposal, *inter alia*, for performing the tasks described above. The President has entrusted the Remuneration of Members Division with the implementation of the Code of Conduct. Two members of staff of that division – a law graduate and a case officer – deal exclusively with the Code of Conduct.

93. The authorities indicate that the above-mentioned proceedings under Rule 8 of the Code of Conduct may be triggered, for example, by complaints by citizens or colleagues but that in practice, in most cases, it is MPs themselves who realise that they have failed to declare information required by the Code of Conduct or have missed the declaration deadline, whereupon they bring the matter to the attention of the President or the competent administrative staff. In the last three years, one printed paper was published as a result of the Presidium finding that an MP had failed to comply with obligations under the Code of Conduct. A number of reprimands were issued by the President or by the competent administrative staff on his behalf (no information is published about such reprimands). These were generally due to MPs failing to update their information in time or submitting incomplete updates. So far, a fine has been imposed in two cases, which were reported by and discussed in the media (a press release was issued on one of those decisions).

94. No special criminal procedures apply for MPs, but they enjoy immunity in principle from criminal prosecution during their mandate.¹¹³ However, after leaving the *Bundestag* MPs can be called to account for a criminal offence committed during the period of membership. Moreover, MPs may be called to account during their term of office if the *Bundestag* waives their immunity. At the start of each electoral term, the *Bundestag* adopts a decision relating to the waiving of immunity of MPs,¹¹⁴ which grants prior

¹¹² See *Bundestag* printed papers 18/476 and 18/607.

¹¹³ See article 46(2) of the Basic Law.

¹¹⁴ See Annex 6 to the GOBT.

permission for the preliminary investigation of MPs for criminal offences, with the exception of insulting statements of a political nature. The Office of the Public Prosecutor need only inform the President of the *Bundestag* that it intends to conduct a preliminary investigation, but the *Bundestag* can restore the immunity of the MP concerned. The Office of the Public Prosecutor can institute criminal proceedings upon further authorisation from the *Bundestag* which, according to the authorities, is rarely denied in practice. For example, 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.¹¹⁵ 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.

95. The GET finds that the system for the supervision and enforcement of the rules applicable to MPs appears adequate on paper. Breaches of the rules lead to reprimands, public statements by the Presidium, fines – for violations of the disclosure obligations –, handover of inadmissible donations or payment of inadmissible benefits into the federal budget, or in the case of criminal behaviour, criminal sanctions. According to the authorities, significant pressure is also exerted on MPs to abide by the rules, by the media which monitor closely their conduct; by the citizens – in particular constituency electorates – and by the parliamentary party groups (through the Presidium in which they are represented) and their chairpersons due to their involvement in the procedure under Rule 8 of the Code of Conduct.¹¹⁶

96. Having said that, the GET notes that during the visit several of those it spoke to were concerned about the lack of effectiveness of the administrative control mechanism. For example, it would appear that MPs' declarations are frequently not submitted on time, and the above-mentioned sanctions are rarely applied. Some of the GET's interlocutors pointed to the low number of staff of the *Bundestag* Administration responsible for the implementation of the Code of Conduct – currently two – and to their lack of investigative powers (e.g. to commission experts, summon witnesses). The GET is concerned that currently, the submitted declarations are not scrutinised beyond the information that MPs themselves provide. Finally, the question was raised of whether the administration was not too close to power in order to effectively monitor and, if need be, criticise MPs, and whether it would not be more appropriate to entrust an independent commission – possibly elected by the *Bundestag* – with supervisory functions. The GET holds the view that the monitoring mechanism needs to be enhanced in order to effectively prevent violations of the rules on MPs' comportment – which, if they remain subject mainly to *ex-post* scrutiny by the public, might give rise to mistrust of politicians and damage the reputation of the system over time. The GET is also well aware that no unnecessary bureaucracy should be created, and that it is up to the German authorities themselves to decide how the supervision and enforcement could best be strengthened and organised. Consequently, **GRECO recommends that appropriate measures be taken to ensure effective supervision and enforcement of the current and future declaration requirements, rules on conflicts of interest and other rules of conduct for members of parliament, *inter alia*, by strengthening the personnel resources allocated by the *Bundestag* Administration.**

Advice, training and awareness

97. At the start of each electoral term, a letter is sent to MPs drawing their attention to their legal obligations. It is accompanied by a brochure which contains the relevant regulatory instruments (sections 44a and 44b of the AbgG, the Code of Conduct and the Implementing Provisions), explanatory notes and the form to be used by MPs to submit

¹¹⁵ Statistical data on earlier election terms can be found in the "Datenhandbuch zur Geschichte des *Bundestages*", see http://www.bundestag.de/dokumente/datenhandbuch/02/02_04/index.html.

¹¹⁶ The authorities furthermore refer to preventive peer pressure within the parliamentary party groups because breaches of the rules might damage not only the reputation of the MP concerned but also that of the group.

information on activities and income. This takes them through the various notifiable items of information, specifies the legal provisions on which the disclosure obligations are based and contains explanatory notes. At the end of the form MPs are also instructed to declare each future addition or amendment to their disclosed information within three months of the notifiable event. In addition, all the rules, forms and other documentation relating to the Code of Conduct can be found in a dedicated section of the *Bundestag* Intranet. The GET acknowledges the above channels of information which are comprehensive and handy tools to raise MPs' awareness about the existing standards of conduct.

98. In case of doubt MPs are required to ascertain, by requesting further information from the President, the extent of their duties under the Code of Conduct.¹¹⁷ To this end, they may make direct contact with the President, which is normally done in writing. They may also seek advice by letter, phone or e-mail from the staff of the *Bundestag* Administration who have been entrusted by the President with the implementation of the Code of Conduct. Responsibility lies with the two members of the Remuneration of Members Division who form the Code of Conduct team. Routine questions are answered directly by the team, as a rule, without any formalities. If questions of fundamental importance are raised, staff of the administration generally draft a reply for the President, which is submitted to him/her through the hierarchy. In the case of some questions of principle, particularly those that might indicate a need for the amendment of legal provisions, the President occasionally asks the Legal Status Commission for its comments too. The names and contact details of the staff responsible for providing advice are available on the above-mentioned section of the *Bundestag* Intranet. Having conducted its on-site visit, the GET's impression was that this mechanism works well and ensures that competent advice is given to MPs. Nevertheless, it is of the opinion that the system would further gain from the additional provision of confidential counselling more specifically on questions concerning conflicts of interest and ethics, as recommended above.¹¹⁸

¹¹⁷ Rule 7 GOBT.

¹¹⁸ See above under "Conflicts of interest" (paragraph 55).

IV. CORRUPTION PREVENTION IN RESPECT OF JUDGES

Overview of the judicial system

99. The judicial system is established and governed by part IX of the Basic Law. Article 92 of the Basic Law establishes the courts and states that "the judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder*." The primary legislation concerning court organisation is the Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*).¹¹⁹

100. Because of the federal order of the Republic, jurisdiction is exercised by federal courts and by the courts of the 16 *Länder*. The administration of justice lies chiefly with the *Länder*. The German court system is divided into five specialised branches or jurisdictions: ordinary, labour, general administrative, fiscal and social. In addition, there is the constitutional jurisdiction, i.e. the Federal Constitutional Court and the constitutional courts of the *Länder*.

101. The highest ordinary court is the Federal Court of Justice. At regional level there are Local Courts (*Amtsgerichte*) and Regional Courts (*Landgerichte*), which are the first or the second instance courts depending on the character of the case, and Higher Regional Courts (*Oberlandesgerichte*). The administrative, labour and social jurisdictions have three tiers and the fiscal jurisdiction has two.

102. Judgments are delivered by professional judges, who belong to a single professional group but may specialise in different fields due to their appointment to different court branches. If a commercial division has been established at a court, commercial matters are handled by that division not by the civil divisions. In some proceedings, professional judges are joined by lay judges (honorary judges) and judgments are delivered jointly. Lay judges may only act in court on the basis of a statute and on the conditions laid down by statute. There are lay judges in criminal courts, commercial divisions at the Regional Courts, Administrative Courts, Social Courts, Labour Courts and Finance Courts.

103. During the main hearing, lay judges in criminal proceedings exercise judicial office in full and with the same voting rights as their professional counterparts and also participate in decisions made in the course of a main hearing that are unrelated to the delivery of the judgment and may be made without an oral hearing, e.g. decisions on coercive measures against witnesses.¹²⁰ Professional and lay judges decide jointly on the verdict and sentence delivered. All decisions made outside the main hearing are made solely by the professional judge. Similar regulations apply to the involvement of lay judges in proceedings before the Labour, Administrative, Finance and Social Courts.

104. At the end of 2012, a total of 459 professional judges were working in the federal courts (Federal Constitutional Court, ordinary jurisdiction, administrative jurisdiction, fiscal jurisdiction, labour jurisdiction, social jurisdiction, patent jurisdiction and military service courts). At the same time, a total of 19,923 professional judges were working in the *Länder*, of whom 1,970 were probationary judges.¹²¹ 40.16% of all professional judges were female. In 2009, 36,956 lay judges were sitting in the criminal courts; of those 19,183 (51.9%) were male and 17,773 (48.1%) female.¹²²

¹¹⁹ English version: http://www.gesetze-im-internet.de/englisch_gvg/index.html

¹²⁰ Section 30(1) GVG.

¹²¹ Source: Federal Office of Justice

(<https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?blob=publicationFile&v=5>)

¹²² https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Schoeffenstatistik_2009.pdf?blob=publicationFile&v=2

105. The principle of independence of the judiciary is enshrined in the Basic Law. In accordance with article 97(1), "judges shall be independent and subject only to the law." Section 1 GVG states that "judicial power shall be exercised by independent courts that are subject only to the law." Similar provisions are contained in the relevant acts for Administrative, Social, Finance and Labour Courts. As a fundamental principle of German constitutional law, judicial independence implies that when exercising judicial power, judges may not be given any instructions. The executive branch and, in particular, the court administration are not allowed to influence judicial decisions by giving instructions on a specific case, through administrative provisions or in any other way. The legislature is also prevented from directly influencing case-related decisions in ongoing proceedings. The courts of a higher instance are also not allowed to prompt a judge to make a certain decision.

106. With respect to administrative supervision and budgetary control, federal courts are supervised by the Federal Government, *Länder* courts by the respective *Land*. Special rules apply to the judicial decision-making process and to the status of judges. The status of judges is mainly governed by the German Judiciary Act (*Deutsches Richtergesetz*, DRiG),¹²³ as complemented by the Judiciary Acts of the *Länder* which contain, in particular, rules on legal education, appointment and promotion of judges working in the *Länder*. In addition, section 46 DRiG states that, unless otherwise provided in this act, the provisions applying to federal civil servants – *inter alia*, the provisions of the Act on Federal Civil Servants (*Bundesbeamtengesetz*, BBG) – apply to legal relations of federal judges "until special provision is made". Similarly, regarding the judges of the *Länder*, the provisions of the Act on the Status of Civil Servants (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern*, BeamStG) and of the civil service laws of the *Länder* are to be taken into account.

107. There are several professional organisations of judges (and public prosecutors). The largest organisation is the German Association of Judges (*Deutscher Richterbund*). Currently, around 15 000 judges and public prosecutors are members of this association which aims at furthering legislation and administration of justice, maintaining the independence of the judiciary and managing the interests of judges and public prosecutors. Furthermore, around 550 judges and public prosecutors are members of the New Association of Judges (*Neue Richtervereinigung*) which has similar objectives. There is also an association of judges of Local Courts (which appears to be active only in two *Länder*) and an association of lay judges (around 1 000 members). Around 6 200 judges, prosecutors and other staff employed in the judiciary and the prosecution service are members of the trade union "Verdi".

108. From the interviews conducted on site, it would appear that the current administration of the courts works well and that the executive does not interfere with the judicial activity. It was however brought to the GET's attention that, according to a recent study, a large majority of the judges surveyed saw a need for strengthening the independence of the judiciary in personnel and budgetary matters.¹²⁴ In this connection, the GET, which is aware that the committees for the selection of judges and the councils for judicial appointments are, to a varying degree at the federal level and at the level of the different *Länder*, involved in appointment and promotion procedures, notes that there is no council for the judiciary or equivalent body in Germany. The different associations of judges have for years been advocating for judicial self-government and have made concrete proposals to that effect. They see a system discontinuity in the fact that the

¹²³ English version: http://www.gesetze-im-internet.de/englisch_German_Judiciary_Act/index.html

¹²⁴ Roland Rechtsreport (2014) *Sonderbericht: das deutsche Rechts- und Justizsystem aus Sicht von Richtern und Staatsanwälten*, page 52, see: http://www.rolandkonzern.de/media/downloads/ROLAND_Rechtsreport_2014_Sonderbericht_Richter_und_Staatsanwaelte.pdf.

The report is based on a representative survey of 1770 judges and prosecutors in Germany and was prepared under the aegis of the German Association of Judges.

judiciary is headed by a representative of the executive (Minister of Justice) and that the Ministry of Justice distributes the resources granted and takes important personnel decisions. In this connection, the GET was interested to hear that a Commission "Judicial System" has analysed the experiences of some European countries with judicial self-government and autonomy. The Federal Ministry of Justice and the Ministries of Justice of the *Länder* Brandenburg, Hesse and Rhineland-Palatinate as well as the three large judges' associations participate in this working group, under the moderation of an academic.¹²⁵ The preliminary results of the analysis were presented to the Consultative Council of European Judges (CCJE) in the first half of the year 2014. The working group will finalise its work by the end of the year 2014. The GET welcomes this initiative and invites the authorities to continue the current reflection process and explore possibilities of reform, taking into account the above-mentioned concerns. To conclude, the GET wishes to draw the attention of the authorities to the international standards relating to the establishment of a council – or equivalent independent authority – for the judiciary, entrusted with broad competence for questions concerning the status of judges (including appointment, promotion and disciplinary matters) as well as the organisation and the functioning of judicial institutions.¹²⁶

Recruitment, career and conditions of service

Appointment

109. The federal judges – i.e. the judges at the Federal Constitutional Court as well as the judges at the Supreme Federal Courts – are appointed by the Federal President after being elected,¹²⁷ with the exception of those in the two lower remuneration groups R1 and R2 who are appointed (and dismissed) by the federal ministries. The judges at the Federal Patent Court, which is not a Supreme Federal Court, are appointed by the Federal President without prior election.¹²⁸

110. One half of the judges of the Federal Constitutional Court (16 in total) are elected by the *Bundestag* and the other half by the *Bundesrat*,¹²⁹ for a term of 12 years. They are not eligible for subsequent or later re-election.¹³⁰ The judges to be elected by the *Bundestag* are elected indirectly, through an electoral committee appointed by the *Bundestag* which consists of 12 MPs according to the rules of proportional representation.¹³¹ Whoever obtains at least eight votes is elected judge of the Federal Constitutional Court.

111. The judges at the Supreme Federal Courts are elected, for an unlimited term, by a committee for the selection of judges consisting of the 16 *Land* ministers responsible for the judicial branch in question and an equal number of members elected by the *Bundestag* in accordance with the rules of proportional representation.¹³² The competent federal minister and the members of the committee can nominate candidates.¹³³ The

¹²⁵ Prof. Dr. Peter-Alexis Albrecht from the Institute for Criminal Sciences and Legal Philosophy of the Department of Law at the Goethe University, Frankfurt/Main.

¹²⁶ See, *inter alia*, [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#); [Opinion No.10\(2007\) of the Consultative Council of European Judges \(CCJE\) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society](#).

¹²⁷ Article 60 of the Basic Law; section 10 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, BVerfGG), English version:

<http://www.iuscomp.org/gla/statutes/BVerfGG.htm>;
section 1 of the Act on the Election of Judges (*Richterwahlgesetz*, RiWG), English version:
http://www.gesetze-im-internet.de/englisch_drjg/englisch_drjg.html.

¹²⁸ See section 65(3) of the Patent Law (*Patentgesetz*).

¹²⁹ Article 94(1), second sentence, of the Basic Law

¹³⁰ Section 4(1) and (2) BVerfGG

¹³¹ Section 6 BVerfGG

¹³² Article 95(2) of the Basic Law; sections 3(1) and 5(1) RiWG

¹³³ Section 10(1) RiWG

committee examines whether a candidate satisfies the formal and personal requirements for office which include the candidate's integrity. The committee for the selection of judges is given the personnel records and the council for judicial appointments delivers a written opinion on the candidate's personal and professional aptitude.¹³⁴ The authorities stress that candidates for the position of federal judge are judges with long-term professional experience in the field of justice who have not given any cause to doubt their integrity in the course of their career. The selection can be appealed against by means of a regular administrative court proceeding, but the committee has a margin of discretion which is subject to judicial review only to a limited extent. On the basis of the selection procedure, a proposal for appointment is submitted by the federal minister – who enjoys a margin of discretion that must be exercised dutifully and in line with the applicable criteria – to the Federal President.¹³⁵

112. At the beginning of their career, professional judges of the *Länder* are, in principle, appointed as judges "on probation". No sooner than three years and no later than five years after appointment, a judge on probation is to be appointed a judge for life.¹³⁶ Judges on probation have the same rights and duties as judges for life; they can, however, be transferred since, unlike judges appointed for life, they have not yet been assigned to a specific post. They can also be dismissed before the expiry of the fourth year in office if they turn out not to be suited to holding judicial office.¹³⁷

113. The professional judges of the *Länder* are, as a general rule, appointed by the respective *Land* Minister of Justice. In many *Länder*, the appointment of judges for life requires the approval of a committee for the selection of judges¹³⁸ and, in some *Länder*, such approval is required even when judges are appointed on probation.¹³⁹ The committee for the selection of judges usually consists of *Landtag* deputies elected by the *Landtag* and representatives of the judiciary elected directly by the judges with life tenure in a secret ballot.¹⁴⁰ In some cases, public prosecutors and attorneys are also involved (in the latter case, they are elected by the respective *Landtag* on the basis of proposals made by the chambers of lawyers). In the majority of cases, the *Landtag* deputies constitute the majority – up to two-thirds of members – of the respective committees.

114. The members of the committees for the selection of judges are independent in the exercise of their office, not bound by instructions and subject only to the law. They may not be hindered in exercising their powers and should derive neither disadvantages nor benefits on account of their activity. Members of the committee are excluded from involvement in cases concerning themselves, their spouse or relatives by blood or marriage, and a member may be refused on account of a concern of partiality. The committees are required to give reasons for their decisions in writing, presenting the substantial objective and legal reasons as well as the substantial aspects for evaluating candidates' suitability, aptitude and specialist proficiency. If a committee rejects the minister's proposal, the latter can make another proposal for a decision to be taken, re-advertise the post or apply for a declaration to be made by the respective *Land* constitutional court that the decision of the committee is unlawful.

115. In the *Länder* the so-called council for judicial appointments¹⁴¹ is by federal law to be involved in the decision on the appointment of judges to senior positions in addition to or instead of a committee for the selection of judges. Additionally the *Länder* can provide

¹³⁴ See section 10(2) RiWG and section 57 DRiG.

¹³⁵ Section 13 RiWG.

¹³⁶ See section 12 DRiG.

¹³⁷ Section 22 DRiG.

¹³⁸ E.g. in Rhineland-Palatinate, Schleswig-Holstein and Thuringia.

¹³⁹ E.g. in Berlin, Brandenburg, Hamburg and Hesse.

¹⁴⁰ In some cases (e.g. in Rhineland-Palatinate) the judicial members are also elected by the *Landtag* from lists of proposals compiled by the judges of the various categories of courts.

¹⁴¹ Cf. sections 74 and 75 DRiG.

for the council to be involved in the decision of the appointment of judges to junior positions. As a general rule, the council consists of a chairing member (selected from among the presidents of the *Land* courts who are eligible to vote) and other members (judges who have had life tenure for a certain period and who hold judicial office in a court of the category for which the council for judicial appointments is being elected). Before a judge is appointed, the council is requested to submit to the ministry a written and reasoned opinion on the personal and professional aptitude of the candidate (on the basis of the documents that have been submitted to it, in particular personnel records). In some *Länder*, if the council opposes the intended measure, the matter is to be discussed between the council and the competent minister and if this does not result in agreement, the minister takes a joint decision with the committee for the selection of judges.¹⁴²

116. Finally, in the *Land* North Rhine-Westphalia, the presidents of the Higher Regional Courts (*Oberlandesgerichte*) are responsible for appointing judges. There is no committee for the selection of judges in this *Land*, and the council for judicial appointments is not involved in the decision on appointment of judges to junior positions. However, the president of the Higher Regional Court is advised by a commission consisting of one of the presidents of the Regional Courts of the district, the gender representative, the judge who heads the judicial staff department and a member of the judicial staff council of the district. The commission is presided over by the president or the vice-president of the Higher Regional Court. It advises the president on the basis of one day of "assessment". The *Land* Government is currently working on draft legislation to introduce a formal requirement of consent between the presidents of the Higher Regional Courts and the relevant regional judges' staff council (*Bezirksrichterrat*) for all relevant decisions concerning judges, including first appointment and appointment for life.

117. Recruitment to judicial service is subject to the fulfilment of a number of conditions, in particular, the conclusion of legal studies at university which last for four years in principle and involve passing the first State examination, then completing preparatory training during two years and passing the second State examination. The grades achieved in the first and most of all in the second State examination are of substantial significance in the recruitment process.

118. In selection proceedings, the applicants' personnel records are requested and evaluated in the first instance, in particular, their training references from their legal internships. Applicants are required to show that their finances are in order. They are also required to provide information about any personal relationships they may have with judges, public prosecutors, notaries public or lawyers in the respective *Land*. In addition, a police certificate of good conduct must be submitted; information is obtained from the Federal Central Register. The personal qualities of the respective applicant are tested in a structured interview. If relevant, the representative body for severely disabled employees is consulted. The members of the interview panels are given regular external training in order to guarantee the high quality of personnel selection for recruitment to judicial service.

119. The appointment of a judge may be contested by an unsuccessful applicant by taking legal action under administrative law. However, the authorities competent for the appointment have a margin of discretion which is only accessible to judicial review to a limited extent.

120. Overall, information gathered by the GET suggests that the recruitment process for professional judges is transparent and ensures that appointments are based only on

¹⁴² In *Länder* where the committee for the selection of judges is not competent for the process of appointing a judge, it operates exclusively as a body for such cases of conflict between the minister and the council for judicial appointments (e.g. in Baden-Württemberg).

objective factors. The appointing authorities pay considerable attention to well substantiating their decisions so that they can stand up to a possible judicial review. That said, the GET notes that there has been some controversy around the decision-making powers of the executive in Germany and as indicated above, judges' associations have been calling for judicial self-government which would extend to the recruitment of judges. In this connection, the GET takes into account that bodies which are drawn in substantial part from the judiciary are involved in appointment and promotion procedures and make recommendations or express opinion – in particular, committees for the selection of judges and councils for judicial appointments.¹⁴³ On the other hand, the GET notes that the competences of those bodies vary considerably from one *Land* to another and the Federation.

121. The GET has some concerns about the fact that in some of the *Länder* and at the federal level, such bodies merely give a non-binding opinion in the recruitment process and do not have any co-decision powers. The GET furthermore notes that federal judges are elected by a committee composed of *Land* ministers and members elected by the *Bundestag*. The GET understands that this mechanism was designed to ensure democratic legitimation, however, it could give the impression that the election of federal judges is based mainly on political considerations. For this reason, stakeholders such as the German Association of Judges have called for increased transparency of the recruitment process concerning federal judges and for more weight to be given to the opinions of the councils for judicial appointments. The authorities may wish to keep these questions under review and to seek ways to further strengthen the role of bodies with substantial participation of judges in the recruitment process – such as committees for the selection of judges, councils for judicial appointments or similar bodies where they exist¹⁴⁴ – at federal and *Länder* level, where appropriate. Finally, the GET notes that the modalities for the election of judges of the Federal Constitutional Court – by the *Bundestag* and the *Bundesrat* – have repeatedly been criticised in Germany. In this connection, the GET was interested to learn about current reform plans of the Government whereby judges to be selected by the *Bundestag* would in future be elected directly and openly by the plenum and no longer indirectly through an electoral committee behind closed doors. The GET can only support such moves which would have a clear potential to increase transparency and foster citizens' trust in the highest German jurisdiction.

122. The lay judges for the criminal courts (Local and Regional Courts) are elected for a period of five years, on the basis of lists of nominees, by a committee at the Local Court by a two-thirds majority vote.¹⁴⁵ The committee is composed of the professional judge concerned at the Local Court as chairman and an administrative official to be designated by the *Land* Government as well as seven upstanding individuals as associate members who are elected from among the inhabitants of the Local Court district by a representative body of the corresponding local-government subdivision. The lists of nominees are compiled by the municipalities and consolidated by the judge at the district's Local Court into a district list. As regards the election of lay youth assessors at the Youth Courts, the youth assistance committees at the regional youth offices draw up lists of nominees, who should have appropriate qualifications and training as well as experience in the education and upbringing of youths.

123. The lay judges for the commercial divisions at the Regional Courts are appointed for five years by the respective *Land* justice departments upon the expert proposal of the Chambers of Industry and Commerce. The lay judges for the Administrative Courts are elected for five years, on the basis of lists of nominees (drawn up by the districts and

¹⁴³ As required, in particular, by [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#).

¹⁴⁴ E.g. the regional judges' staff council (*Bezirksrichterrat*) in North Rhine-Westphalia, whose role in the recruitment process is currently subject to a reform process, as indicated above.

¹⁴⁵ Sections 40 and 42(1) GVG and section 35 Youth Courts Law (*Jugendgerichtsgesetz*, JGG).

cities not associated with a district), by a committee at the Administrative Court.¹⁴⁶ The lay judges for the Social Courts are appointed for five years, on the basis of lists of nominees (drawn up by the affected organisations, associations and corporations), by the body responsible pursuant to the respective *Land* law.¹⁴⁷ The lay judges for the Finance Courts are elected for five years, on the basis of lists of nominees (drawn up every five years by the president of the Finance Court), by an election committee.¹⁴⁸ For the Labour Courts, half the lay judges are selected from among employees and half are selected from among employers. They are appointed for five years, on the basis of lists of nominees (submitted by the affected organisations, associations and corporations), by the responsible supreme *Land* authority or by the body commissioned by the *Land* Government by statutory order.¹⁴⁹

124. In the criminal justice system, persons who have served as lay judges for two successive terms of office cannot be (re)appointed to the office of lay judge.¹⁵⁰ According to the public law procedural codes, the service of two terms of five years constitutes grounds for refusing further service as a lay judge¹⁵¹ but does not constitute (*ex officio*) grounds for disqualification. In labour court proceedings, lay judges can be indefinitely re-appointed as long as the general conditions for their selection/appointment are met.

Promotion, transfer and dismissal

125. The responsible federal minister decides on the proposal to promote federal judges on the basis of performance appraisals in accordance with the legal promotion criteria.¹⁵² The judge is promoted by the Federal President and taking into account the written statement of the council for judicial appointments. Aptitude, qualifications and professional achievements are the decisive criteria in this regard. An unsuccessful candidate can challenge the decision and have it subjected to judicial review.

126. Regarding the judges of the *Länder*, decisions on promotion are taken on the basis of performance appraisals according to the criteria of aptitude, qualifications and professional achievements. As a general rule, competence for such decisions lies with the respective *Land* Minister of Justice; for higher office, competence lies with the *Land* Government in some cases¹⁵³ and in others with the Minister-President.¹⁵⁴ In various *Länder*, the *Land* Minister of Justice decides jointly on promotions with the committee for the selection of judges, the approval of which is constitutive.¹⁵⁵ The council for judicial appointments has always to be involved and is to deliver a written opinion, with reasons, on the judge's personal and professional aptitude. An unsuccessful applicant can contest the decision and have it subjected to judicial review.

127. According to the Basic Law, judges appointed permanently and as their principal occupation to fixed positions may be dismissed, permanently or temporarily suspended, transferred to another position (e.g. to another court) or retired before the expiry of their term of office only by virtue of a judicial decision and only for the reasons and in the manner specified by statute.¹⁵⁶ In addition, the legislature may set age limits for the retirement of judges appointed for life. Currently, judges for life retire at the age of 67.¹⁵⁷ Moreover, in the event of changes to the structure of courts or their districts, judges may

¹⁴⁶ See articles 25 to 29 of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO), English version: http://www.gesetze-im-internet.de/englisch_vwgo/

¹⁴⁷ See sections 13 and 14 of the Social Courts Act (*Sozialgerichtsgesetz*, SGG).

¹⁴⁸ See articles 22, 23 and 25 of the Code of Finance Court Procedure (*Finanzgerichtsordnung*, FGO).

¹⁴⁹ See sections 16(1) and 20 (2) of the Labour Courts Act (*Arbeitsgerichtsgesetz*, ArbGG).

¹⁵⁰ Section 34(1) (7) GVG

¹⁵¹ See articles 23(1) no. 3 VwGO, 20(1) no. 3 FGO and 18(1) no. 2 SGG.

¹⁵² See section 46 DRiG in conjunction with sections 22(1), first sentence, and 9 BBG.

¹⁵³ E.g. in North Rhine-Westphalia from salary group R3 upwards.

¹⁵⁴ E.g. in Saxony-Anhalt from salary group R2 with a duty allowance upwards.

¹⁵⁵ E.g. in Berlin, Brandenburg, Hamburg, Rhineland-Palatinate and Schleswig-Holstein

¹⁵⁶ Article 97(2) of the Basic Law

¹⁵⁷ See section 48(1) DRiG and the relevant provisions of the *Länder* laws.

be transferred to another court or removed from office, but only if they retain their full salary. The Basic Law furthermore states that if a federal judge infringes the principles of the Basic Law or the constitutional order of a *Land*, the Federal Constitutional Court, upon application of the *Bundestag*, may order by a two-thirds majority that the judge be transferred or retired (impeachment).¹⁵⁸

128. The corresponding statutory provisions¹⁵⁹ state that a judge for life or for a specified term can be transferred to another position or removed from office without his written consent only in judicial impeachment proceedings, in formal disciplinary proceedings, in the interests of the administration of justice or where changes are made to the organisation of the courts. As a general rule, the transfer of judges of the *Länder* lies within the competence of the respective *Land* Minister of Justice, but in some cases this competence applies only for a certain salary group upwards. The committee for the selection of judges is also to be involved in such cases in many *Länder*. In the case of judges on probation, the decision is – as a general rule – taken by the president of the higher court.

129. A judge is dismissed by statute under the following circumstances:¹⁶⁰ loss of German citizenship within the meaning of article 116 of the Basic Law; entering the service of, or taking up office with, another public employer; or appointment to the armed forces as a professional soldier or as a soldier serving for a specified term. The dismissal takes effect by operation of law. The establishment of the dismissal by the Service Court is declaratory. Furthermore, the responsible minister must dismiss a judge in the cases stipulated by the law, e.g. where s/he requests his/her own dismissal in writing. Federal judges are dismissed by the Federal President.¹⁶¹ Moreover, judicial tenure ceases upon entry into final and binding effect of a judgment against a judge imposing a sentence of at least one year's imprisonment for a criminal offence committed with intent or where judgment is given for an offence committed with intent punishable in accordance with the provisions concerning the ban on wars of aggression, high treason, jeopardy to the democratic constitutional State or concerning espionage and jeopardy to external security; or upon entry into final and binding effect of a judgment against a judge imposing disqualification from holding public office or imposing forfeiture of a basic right.¹⁶² Finally, in particularly serious individual cases, judges may be removed from judicial office on account of serious professional misconduct,¹⁶³ by decision of the respective judges' disciplinary tribunal.

130. A judge on probation can be dismissed on expiry of 6, 12, 18 or 24 months following appointment if there are factual reasons for doing so.¹⁶⁴ S/he can be dismissed on expiry of the third or fourth year only if s/he is not suited to holding judicial office, or if a judicial selection committee refuses to give him/her judicial tenure for life or for a specified term. The dismissal is ordered by the responsible minister. The judge can challenge the order for dismissal before the Service Court.

131. The appointment of a lay judge can be terminated before expiry of the judge's term of office only on the conditions laid down by statute – e.g. if s/he has violated the fundamental principles of humanity or of the constitutional State – and such appointment can be terminated against the judge's will only through a court decision.¹⁶⁵

¹⁵⁸ Article 98(2) of the Basic Law

¹⁵⁹ See sections 30 *et seqq.* DRiG.

¹⁶⁰ See section 21 DRiG.

¹⁶¹ Article 60 of the Basic Law

¹⁶² See section 24 DRiG.

¹⁶³ See section 63(1) DRiG in conjunction with section 10 of the Federal Disciplinary Act (*Bundesdisziplinargesetz*, BDG), and the respective *Land* disciplinary acts

¹⁶⁴ See section 22 DRiG.

¹⁶⁵ See sections 44(2) and 44b(1) in conjunction with section 44a(1) DRiG. Further grounds for termination of the appointment of a lay judge are regulated in the provisions applicable to the individual jurisdictions. A special provision for the removal of lay judges in criminal courts can be found in section 51 GVG.

Conditions of service

132. At the start of their career, the annual gross salary of professional judges in the *Länder* is based on salary group R1 with little variation in the individual *Länder*. The starting annual salary is between €41 089.92 and €47 441. The highest salary level also varies and depends *inter alia* on the size of the respective *Land*. In most *Länder*, the salaries vary between €105 000 and €120 000. Within salary groups R1 and R2 there are different levels depending on the length of the judge's professional experience. Judges at the Supreme Federal Courts are remunerated according to the R6 salary level; the basic salary is €8 725.94 per month, making an annual gross income of €104 711.28 (not including increments). The basic salary of judges in the Federal Constitutional Court corresponds to group R10 (i.e. €12 558.28 per month, not including increments), and the annual gross income (not including increments) is €150 699.36. Judges are not entitled to any special benefits such as tax or housing allowances.¹⁶⁶

133. During the interviews, the GET was concerned to hear about growing dissatisfaction among judges (and prosecutors) with the resources made available to the administration of justice, which was also evidenced by a recent survey – according to which a large majority of the judges (and prosecutors) interviewed found that the basic working conditions had deteriorated in recent years.¹⁶⁷ The discontent is not only related to salaries, which in the view of several interlocutors have not kept track with those paid in other sectors, but also to framework conditions such as personnel and technical equipment for the courts. Moreover, several interlocutors had misgivings about judges' salaries being fixed at the *Länder* level since the federalism reform of 2006, which means that remuneration has been diverging increasingly. The GET invites the authorities to take these concerns into account and to seek ways to ensure that courts and judges have at their disposal adequate resources and to avoid significant discrepancies in judges' remuneration.

Case management and procedure

134. Legal disputes are allocated to a specific adjudicating body or judge.¹⁶⁸ The allocation within the competent court, and thus the attribution to a specific judge or a specific division, is regulated by the allocation plan¹⁶⁹ which is adopted by the court's presidium in an act of judicial self-governance prior to the beginning of the business year. The presidium is composed of the court president and a maximum of ten additional judges, depending on the size of the court. It is not possible to influence which adjudicating body will decide in a specific case that is brought to the court in the course of the business year. There are also detailed deputisation rules set up in advance for when the adjudicating body responsible for a particular case according to the allocation plan is unavailable. If a judge's judicial independence is compromised by the allocation plan, s/he can bring an action for a declaratory judgment before the Administrative Court.

135. Since one half of the judges of the Federal Constitutional Court are selected by the *Bundestag* and the other half by the *Bundesrat* and since they are assigned not to the court but to one of the two Senates when appointed, the competences of the panels are primarily regulated by statute.¹⁷⁰ However, the plenum of the Federal Constitutional Court may, with effect from the beginning of the next business year, modify the allocation of competences between the Senates provided that such re-allocation is

¹⁶⁶ Cf. Annex IV to the Federal Civil Service Remuneration Act (*Bundesbesoldungsgesetz*, BBesG)

¹⁶⁷ See Roland Rechtsreport (2014), quoted above, page 18 *et seqq.* and 42 *et seqq.*

¹⁶⁸ See article 101(1), second sentence, of the Basic Law, and the Decision by the Federal Constitutional Court BVerfGE 18, 65 *et seqq.*

¹⁶⁹ See sections 21e *et seqq.* GVG.

¹⁷⁰ See section 14 BVerfGG.

necessary due to an excessive non-temporary caseload of one Senate.¹⁷¹ Each of the two Senates decides, prior to the beginning of each business year and for the duration of that business year, on the allocation of competences within the Senate concerned.

136. As a rule, a judge can be removed from a case only if there are grounds for disqualification, on a motion by the parties to the proceedings.¹⁷²

137. The Act on Remedies for Protracted Court Proceedings and Criminal Investigations,¹⁷³ which entered into force in 2011, entitles persons affected by unreasonably long court proceedings to claim compensation from the State regardless of fault (strict liability). The first step of the procedure requires those affected to file an objection pointing out the delay to the court that in their view is working too slowly, so that judges always have the opportunity to remedy the situation. If the proceedings continue to be delayed despite the objection, a complaint for compensation may then be filed (step two). The affected citizens receive, as a general rule, €1 200 per year for non-pecuniary disadvantages (e.g. psychological and physical burdens) to the extent that compensation of another type is not sufficient, as well as appropriate compensation for pecuniary disadvantage. In cases where there are a large number of complaints due to the length of proceedings, those responsible will need to reflect on how to improve facilities, the allocation of business, and organisation.

138. In addition, further-reaching official liability claims are conceivable if the delay in court or investigation proceedings is due to a culpable breach of official duties. Finally, supervisory measures can be considered in individual cases (such as censuring the improper execution of an official duty and urging proper and prompt attention to official duties), where this does not compromise judicial independence, i.e. in respect of the official formalities of judicial business (e.g. adherence to time limits provided for by law). The person affected can lodge a disciplinary complaint against the judge.

139. The authorities indicate that in 2012, in civil proceedings, the average amount of time taken for a court proceeding at first instance was 4.7 months at the Local Courts and 8.3 months at the Regional Courts. In the same year criminal proceedings at first instance took on average 3.8 months at the Local Courts and 6.6 months at the Regional Courts.

140. As a general rule, oral court hearings are public.¹⁷⁴ The proceedings as such – in particular the contents of case files and the court's deliberations – are not public, but the parties involved in the legal dispute may view the file on the proceedings at any time.¹⁷⁵ The public may be excluded from hearings to protect the person concerned if the subject of the proceedings is the placement of the defendant in a psychiatric hospital or in an institution for detoxification; if this is necessary to protect the privacy of the persons involved; if there is a potential risk to State security, public order or public morals; if there is a potential danger to the life, limb or liberty of a witness or another person; if an important business, trade, invention or tax secret is referred to, the public discussion of which would violate overriding interests worthy of protection; if a private secret is discussed, the unauthorised disclosure of which by a witness or expert carries a penalty; or if a person under the age of 18 is being examined.¹⁷⁶ Special rules apply to criminal proceedings against juveniles (from 14 to 17 years of age) and young adults¹⁷⁷ before the Youth Courts; as a general rule for juveniles, the hearing and the pronouncement of

¹⁷¹ The Court's decision is published in the Federal Law Gazette (*Bundesgesetzblatt*).

¹⁷² See below under "Prohibition or restriction of certain activities" (paragraphs 161 to 165).

¹⁷³ "Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren"

¹⁷⁴ Section 269 GVG.

¹⁷⁵ See e.g. article 299(1) of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO), English version: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

¹⁷⁶ See sections 170 *et seqq.* GVG.

¹⁷⁷ From 18 to 20 years of age, if these persons were, at the time the offence was committed, equivalent to a juvenile in terms of their moral and mental development, or if the offence constitutes juvenile misconduct.

the decision are not open to the public. Furthermore, hearings in family matters and in non-contentious matters are, as a general rule, not public.

Ethical principles, rules of conduct and conflicts of interest

141. Pursuant to article 97(1) of the Basic Law, "judges shall be independent and subject only to the law" and article 20(3) states that "the judiciary [shall be bound] by law and justice". Paragraph 3 of article 1 which introduces the chapter on basic and human rights reads as follows: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." The authorities add that from the constitutionally required independence of the judiciary follows the need for a judge to maintain impartiality and perceptible personal distance from one's cases. In accordance with section 45(1) DRiG, an honorary judge "shall be independent to the same extent as a professional judge."

142. There is no separate statutory code of ethics for judges. However, there are legal provisions concerning ethical principles and rules of comportment, such as the provisions regarding the acceptance of gifts and other advantages and the corruption provisions of the StGB,¹⁷⁸ as well as several basic provisions of the DRiG. Section 9 no. 2 DRiG states that "judicial tenure may only be given in the case of a person who makes it clear that s/he will at all times uphold the free democratic basic order within the meaning of the Basic Law." In accordance with section 38 DRiG, judges take the following oath: "I swear to exercise judicial office in conformity with the Basic Law of the Federal Republic of Germany and with the law, to adjudicate to the best of my knowledge and belief, without distinction of person, and to serve the cause of truth and justice alone - so help me God."¹⁷⁹ Lay judges take a judicial oath as well.¹⁸⁰ Pursuant to section 39 DRiG, a judge shall, "in and outside office, (...) conduct him/herself, in relation also to political activity, in such a manner that confidence in his/her independence will not be endangered" (*Mäßigungsgebot*, requirement of moderation).

143. In addition, with regard to federal courts, the "Federal Government's Guidelines on the Prevention of Corruption in the Federal Administration"¹⁸¹ which comprise an Anti-Corruption Code of Conduct and Guidelines for Supervisors and Heads of Public Authorities/Agencies, are applicable to the extent that judicial independence is not affected, i.e. in particular as long as their activity of adjudicating is not concerned. The Guidelines include chapters on "Identifying and analysing areas of activity especially vulnerable to corruption", "Transparency and the principle of greater scrutiny", "Personnel", "Contact person for corruption prevention", "Organisational unit for corruption prevention", "Staff awareness and education", "Basic and advanced training", "Conscientious administrative and task-related supervision", "Notification and action in case of suspected corruption", "Guidelines for awarding contracts", "Anti-corruption clause, obligation of contractors under the Obligations Act", "Donations to public activities and facilities; sponsoring" and "Recipients of contributions".

144. There are also guidelines for the prevention of corruption in a number of *Länder*, which are applicable to judges to the extent that judicial independence is not affected: e.g. one of the first such documents was the "Guidelines to Prevent and Fight Corruption in Public Administration"¹⁸² of 13 April 2004 (Bavaria), and most recently, on 1 January

¹⁷⁸ See below under "Prohibition or restriction of certain activities" (paragraphs 168 to 168).

¹⁷⁹ The oath can be taken without use of the words "so help me God". In respect of judges who are in the service of a *Land* the oath can include a commitment to the *Land* constitution concerned.

¹⁸⁰ See section 45 DRiG.

¹⁸¹ "*Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung*". The Guidelines were published in the Federal Gazette (*Bundesgesetzblatt*) on 10 August 2004 and entered into force on 11 August 2004. English version:

http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschueren/Texte_zur_Korruptionspraevention_en.pdf?__blob=publicationFile

¹⁸² "*Richtlinie zur Verhütung und Bekämpfung von Korruption in der öffentlichen Verwaltung*".

2013, the Ministry of the Interior of Schleswig-Holstein brought into force guidelines on "Preventing and Fighting Corruption in the *Land* Administration of Schleswig-Holstein".¹⁸³

145. While it is true that German judges generally seem to be well aware of the ethical requirements inherent to the judicial profession, the GET notes that there is not much written guidance in this respect. Anti-corruption codes of conduct or guidelines are in force at federal level and in many *Länder*, but currently such tools are not applicable to all judges in Germany. Moreover, the existing documents are not tailor-made for the judiciary. GRECO wishes to draw attention to international standards which call for the development of codes of conduct and ethics, including the principles enounced in Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe.¹⁸⁴ According to that Recommendation, judges should be guided by ethical principles of professional conduct laid down in codes of judicial ethics. They should inspire public confidence in judges and the judiciary, and judges should play a leading role in their development. In this connection, the authorities state that in accordance with German tradition, the rules governing judicial ethics are embedded in provisions on the factual matter in question – thus offering highly tailored rules for each individual context – and that attempts at separating ethical standards from the specific regulated context and incorporating them in a stand-alone code would run the risk of creating friction with the tried and tested system already in place. Similarly, according to several interlocutors questioned by the GET on the subject – including representatives of the German Association of Judges – it is the view of the German judiciary that no code of conduct or similar document is needed and that a document on professional ethics should mainly serve the purpose of raising judges' awareness of the ethical dimensions of their profession and should not take the form of a strict and detailed regulatory framework.

146. Taking the above concerns into account, the GET believes that a reasonable compromise can be found by calling for the existing rules on professional conduct of judges to be compiled in one document which would thus provide a comprehensive overview of existing standards. GRECO is convinced that such an initiative would send a positive message to the public as to the high standards of conduct to be upheld in and by the judiciary. It would also offer a good opportunity to clarify specific matters and provide detailed guidance, including practical examples.

147. Moreover, it is crucial that a compendium of the existing rules be complemented by practical measures for their implementation which could build on the initiatives taken, first, by the German Association of Judges which has developed several documents on ethical matters, in particular, "Judicial ethics in Germany" and "Judicial ethics in practice"¹⁸⁵ which include general principles as well as practical examples and, secondly, training activities including discussions on ethical questions organised by the German Judicial Academy. In the view of the GET, as a complement to a compendium of the existing rules, further guidance – e.g. on incompatibilities and secondary activities, gifts, third party contacts/confidentiality, on how to act if and when confronted with a conflict of interests and on other ethical dilemmas – could be usefully provided to judges by way of explanatory comments and/or practical examples, confidential counselling within the judiciary and, in any case, specific (preferably regular) training activities of a practice-oriented nature. Further issues discussed during the on-site visit might also be addressed by this means. In particular, some interlocutors were concerned that the wide discretion judges can use when appointing, in particular, legal defenders, insolvency administrators and expert witnesses might give the impression that such decisions are not always taken on the basis of objective and impartial considerations alone – while the authorities state that there are no objective indications to justify this apprehension. The GET furthermore

¹⁸³ "Korruptionsprävention und Korruptionsbekämpfung in der Landesverwaltung Schleswig-Holstein".

¹⁸⁴ See [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#).

¹⁸⁵ "Richterethik in Deutschland" and "Richterethik in der Praxis", see: <http://www.drb.de/cms/index.php?id=459>

heard that according to a recent study taken up by the media, around a fourth of experts surveyed indicated that they had received hints from judges as to the expected tenor of their expert assessment.¹⁸⁶ The GET is of the opinion that awareness-raising and other appropriate measures need to be sought in order to prevent such incidences.

148. Finally, the GET wishes to stress how important it is that measures such as those described above also be taken for the benefit of lay judges. During the on-site visit, the GET was concerned to hear that lay judges are not systematically provided even with initial training/introductory information on their role and expected conduct. Given the preceding paragraphs, **GRECO recommends i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments and/or practical examples, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all judges and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling for both professional judges and lay judges. The *Länder* are to be invited to contribute to such a process.** While taking due account of the federal structure of Germany, GRECO is convinced that the measures recommended can be achieved by the combined efforts of the pertinent federal and *Länder* authorities and/or representatives of the judiciary. As stated above with reference to Recommendation Rec(2010)12, it is crucial that judges themselves play a leading role in this process.

149. The procedural codes include provisions on conflicts of interest in the chapters which regulate the disqualification of a judge,¹⁸⁷ but the concept of “conflict of interests” is not otherwise described by law. The authorities add, however, that it follows from the above-mentioned section 39 DRiG that even if there is no reason for disqualification, a judge must always consider whether s/he would face a conflict of interests in specific proceedings. Possible conflicts of interests can also be taken into consideration when, for example, a newly appointed judge is assigned to a certain court district. In addition, the courts' presidiums can take account of possible conflicts of interests when adopting the business allocation plan.

150. On site, the GET's attention was drawn to a current development which in some cases might give rise to conflicts of interest. It was stated that fines amounting to “millions of euros” are paid yearly by those convicted of a criminal offence to non-profit-making institutions and to the Treasury as a condition for terminating proceedings.¹⁸⁸ As in such cases judges are free to decide on the recipients of payments, some interlocutors saw a certain risk that their personal preferences might come into play. The GET noted with interest that North Rhine-Westphalia, for example, has taken the initiative to register such fines and the recipients. The GET can only encourage the *Länder* authorities to adopt similar measures to increase transparency and, even more, to set criteria for determining the recipients.

Prohibition or restriction of certain activities

Incompatibilities and accessory activities, post-employment restrictions

151. Judges at the Federal Constitutional Court must not be members of the *Bundestag*, of the *Bundesrat*, of the Federal Government, or of any of the corresponding bodies of a *Land*.¹⁸⁹ Moreover, the functions of a judge at the Federal Constitutional Court preclude any other professional occupation save that of law professor or lecturer of

¹⁸⁶ 252 physicians, psychologists and psychiatrists had been surveyed in Bavaria in the framework of a doctoral study at the University of Munich (B. Jordan, “Begutachtungsmedizin in Deutschland am Beispiel Bayern”).

¹⁸⁷ See below under “Prohibition or restriction of certain activities” (paragraphs 161 to 165).

¹⁸⁸ Cf. sections 153a and 153b StPO.

¹⁸⁹ Article 94(1), third sentence, of the Basic Law

law at a German institution of higher education. The functions of a judge of the Federal Constitutional Court take precedence over such academic functions.¹⁹⁰

152. In accordance with section 4(1) DRiG, judges may not take on judicial and legislative or executive duties simultaneously. If a judge accepts election as member of the *Bundestag* or a *Land* Parliament (*Landtag*), the official duties of judicial tenure are suspended by law.¹⁹¹ The same applies to a judge who is to become a member of the Federal Government.¹⁹² During the interviews it held, the GET was informed that a number of judges are elected to bodies of local or regional self-government such as municipal councils. Notwithstanding the above-mentioned section 4(1) DRiG, it would appear that *Länder* courts accept such practices,¹⁹³ at least as long as they do not imply further activities – e.g. delegation to the supervisory board of a municipal company. The latter occupation would then be subject to the general rules and restrictions concerning secondary activities (see below). Those consulted on the subject considered this mechanism as a sufficient safeguard against any possible interference of such occupations with service-related interests of the judiciary. The authorities indicate that according to the majority view in legal literature and case law, judges may sit in representative bodies of local government on an honorary basis – as long as they are not involved in the actual administration of the municipality – and thus exercise a political mandate aimed at shaping the policy of the municipality.¹⁹⁴ The GET discussed this issue with some interlocutors and while it did not identify any specific problems resulting from this practice, it wishes to stress that it raises questions with respect to the separation of powers, the risk of conflicts of interest and the necessary independence and impartiality of the judiciary. Moreover, it could conflict with the principle enounced in section 4(1) DRiG. The authorities are therefore invited to keep the application of 4(1) DRiG under review, to analyse recent cases in which judges' participation in representative bodies of local government have been subject to judicial review – with a view to ascertaining the risks of conflicts of interest and of impairment of the independence and impartiality of the judiciary – and, if need be, to take further appropriate measures.

153. If a federal judge wishes to perform a paid secondary activity, prior permission must in principle be sought from the supreme authority served i.e. the president of the respective court.¹⁹⁵ Some unpaid secondary activity such as freelance or commercial activity also requires prior permission.¹⁹⁶ Permission must always be refused if there is a concern that secondary activity might interfere with service-related interests.¹⁹⁷ Grounds for refusal exist, in particular, when the secondary activity could influence a judge's neutrality or impartiality. Permission must also be refused if the total amount of the remuneration for one or more secondary activities would exceed 40% of the annual final basic salary of a judge. As a rule, grounds for refusal also exist if the time spent on the secondary activity or activities is more than one-fifth of the regular weekly working hours.¹⁹⁸ Furthermore, it was stated during the interviews that no permission would in practice be granted for a judge to become a member of a company's supervisory board, as this would undermine the reputation of the judiciary. Some secondary activity that does not require prior permission (e.g. research and teaching activities) requires a judge to submit written notification in advance. The authorities indicate that in practice, the

¹⁹⁰ Section 3(4) BVerfGG

¹⁹¹ As far as the election to the *Bundestag* is concerned, this is regulated in section 5(1) AbgG.

¹⁹² Cf. section 18 of the Act governing Federal Ministers (*Bundesministergesetz*, BMinG).

¹⁹³ It is to be noted that the various *Länder* laws which regulate incompatibilities with functions in local or regional authorities do not refer to the office of judge.

¹⁹⁴ As is shown by section 39 DRiG, judges are allowed to engage in political activities. See above under "Ethical principles, rules of conduct and conflicts of interest" (paragraph 142). In this connection, the authorities indicate that judges would not be allowed to issue a judgment with respect to the application of rules on whose adoption they had previously voted.

¹⁹⁵ Section 99(1) and (5) BBG in conjunction with section 46 DRiG

¹⁹⁶ Section 99(1) BBG in conjunction with section 46 DRiG

¹⁹⁷ Section 99(2) BBG in conjunction with section 46 DRiG

¹⁹⁸ Section 99(3), first sentence, BBG.

majority of secondary activities performed by federal judges are of an academic nature (e.g. research, writing, lecturing and examining).

154. Judges of the *Länder* are obliged to inform their employers about any paid or unpaid secondary activity.¹⁹⁹ A secondary activity which might interfere with service-related interests requires prior permission. Further details are regulated in the civil service laws of the *Länder*. The authorities state that *Länder* regulations are similar to the rules at federal level described above. For example, in Brandenburg and Mecklenburg-Western Pomerania there is an explicit provision that in principle, notification of secondary activity is to be made in writing at least one month before it is taken up and carried out. In Bavaria, providing unpaid guardianship, supervision or foster care is also subject to approval unless a family member is involved; execution of a will and trusteeship are also explicitly subject to approval. In North Rhine-Westphalia, the performance of secondary activities is subject to permission by the president of the respective Higher Regional Court. Income from secondary employment has to be reported yearly and is examined with a view of the amount of working time involved. Similarly, in Baden-Württemberg judges are required to submit to their superiors by 1 July each year an annual list of all the secondary activities subject to authorisation that they carried out during the previous calendar year and, among other things, the amount of remuneration they received in each case.²⁰⁰

155. A judge may be granted permission to act additionally as an arbitrator or give an expert opinion in arbitration proceedings only where the parties to the arbitration agreement commission him jointly or where s/he is nominated by an agency that is not a party to the proceedings. Permission must be refused where at the time of the decision on whether to grant permission, the judge is has been assigned the case or could be assigned the case according to the allocation of court business. The same applies to a judge who acts additionally as a mediator in disputes between associations or between the latter and third parties.²⁰¹ Some *Länder* have adopted complementary rules. For example, in North Rhine-Westphalia, a binding ministerial order prevents a judge from being an arbitrator in several cases simultaneously.

156. A judge may not draw up expert legal opinions, nor give legal advice for remuneration outside the course of his/her official duties.²⁰² Furthermore, it is, in principle, not possible for a judge to take on duties from another service relationship. If a judge enters the service of, or takes up office with, another public employer, s/he is to be dismissed by statute from his/her service relationship.²⁰³

157. The above rules on secondary activity also apply to judges who remain in public service but do not perform judicial functions. A secondary activity must be refused if there is a concern that it might interfere with service-related interests. This is always the case if the secondary activity in question may harm the image of the public administration or the judiciary.²⁰⁴

158. There are no statistics available on the number of judges performing secondary activities. According to media reports the large majority of judges at the Supreme Federal Courts gain side-income from activities such as lecturing and arbitration. It would appear that many judges of the labour jurisdiction, both at federal and *Länder* level, engage in arbitration. Furthermore, during the interviews conducted on site it was stated that in North Rhine-Westphalia, for example, applications for permission for secondary

¹⁹⁹ See section 40 BeamtStG

²⁰⁰ Sections 8 and 13 of the Land Secondary Activity Regulation (*Landesnebenstätigkeitenverordnung*, LNTVO). Comparable provisions exist in other *Länder*, e.g. Hesse, Rhineland-Palatinate and Saxony.

²⁰¹ Section 40 DRiG

²⁰² Section 41(1) DRiG

²⁰³ See section 21 DRiG

²⁰⁴ Section 99(2) no. 6 BBG in conjunction with section 46 DRiG; and sections 40 and 41 BeamtStG in case of retired judges.

activities are manifold and, most often, successful. Sometimes, however, the conditions of such activities need to be adjusted. The GET is of the opinion that overall, the rules on secondary activities are quite satisfactory, given that they require judges to seek permission, to report the amounts of income and working time involved and to respect income thresholds. At the same time, the GET believes that transparency could be further increased, e.g. via publication of judges' secondary activities, which would allow the public to discern possible conflicts of interest. Moreover, the GET is concerned that monitoring of secondary activities might not always be satisfactory. It would appear that it is generally carried out by court presidents who do not always have – in particular at *Länder* level – staff and means at their disposal to verify the information submitted by judges. The authorities take the view that regular mandatory checks of the information submitted are not necessary, as judges are bound by law to unconditional truthfulness. The GET is of the opinion, however, that this general requirement cannot replace monitoring of the observance of the applicable rules.

159. In the view of the GET, it is crucial not only that the judiciary is free from corruption and conflicts of interest, but that it is also seen to be so by the general public. The GET was somewhat concerned to hear about media reports on the – sometimes significant – side-income of mainly federal judges from activities such as lecturing for private consultants, companies etc. It would be unfortunate if a perception emerged among citizens that taking part in secondary activities might interfere with the professional duties of a judge. In the long term, such perceptions could contribute to undermining the authority of the court system. The GET holds the view that appropriate measures need to be taken to ensure that secondary activities of judges are compatible with judicial status and do not distract from the proper performance of judicial duties. Such measures might include enhanced transparency rules (including e.g. the publication of secondary activities of judges) and more in-depth controls. Consequently, **GRECO recommends that appropriate measures be taken with a view to enhancing the transparency and monitoring of secondary activities of judges. The *Länder* are to be invited to contribute to such a reform process.**

160. Retired judges must report in writing before taking up any paid or other employment outside the public service which is related to their service activity during the five years previous to leaving the service and could interfere with service-related interests. This obligation to report ends three years after the judge retires upon reaching the regular retirement age and five years after leaving office in all other cases. As is the case with regard to active judges, paid or other employment is prohibited where there are concerns that such activity may interfere with service-related interests.²⁰⁵ The aforementioned rules do not apply to judges who move to the private sector before they retire. The GET did not find this a particular source of concern, as judges generally leave judicial service upon reaching retirement age.

Recusal and routine withdrawal

161. With regard to civil proceedings, section 41 ZPO defines situations in which a conflict of interests is always to be assumed, and provides that, in these instances, a judge is disqualified by law from exercising judicial office in that case. These include especially: matters in which the judge him/herself – directly or indirectly – is a party liable to recourse; matters concerning his/her spouse, his/her partner in a civil union or persons to whom s/he is lineally related or related by marriage; matters in which s/he was appointed as attorney of record or as a person providing assistance to a party, or in which s/he is or was authorised to make an appearance as a legal representative of a party; matters in which s/he is examined as a witness or expert. A judge can be recused by all parties if s/he is disqualified by law or, if there are circumstances which justify

²⁰⁵ See section 105 BBG in conjunction with section 46 DRiG; section 41 BeamtStG and the *Länder* Civil Servants Acts.

doubts as to his/her impartiality or independence, for fear of bias.²⁰⁶ The court of which the judge is a member rules on a motion to recuse him/her, without that judge being involved in the decision.²⁰⁷ The decision not to disqualify the judge can be appealed.

162. Via references made in the respective acts, the above ZPO provisions also apply to labour court proceedings²⁰⁸ as well as to administrative, social and finance court proceedings.²⁰⁹ Furthermore, in the latter cases, a judge is also disqualified from exercising judicial office in a case if s/he was involved in the preceding administrative proceedings. Fear of bias is always considered reasonable where a judge is a member of the board of a corporation or an institution under public law, the interests of which are directly affected. In the case of Finance Courts, judges may also be recused if it is to be feared that their participation in the proceedings could result in the violation of a business or trade secret or cause damage to the business activities of one of the parties.

163. A judge is under obligation to inform the participants in the proceedings if s/he seriously considers it possible that there may be a reason pertaining to his/her person for his/her disqualification or to fear that s/he is biased.²¹⁰ Self-disqualification is an official obligation for a judge that s/he must exercise in accordance with his/her duty-bound discretion. If s/he fails to fulfil this obligation this may constitute grounds for appeal and constitute a procedural error. Moreover, any failure to fulfil the self-disqualification requirement in breach of official duty may, by itself or in combination with other circumstances, also constitute a reason to fear bias. If the circumstances in question affect a multitude of proceedings, they must also be disclosed to the presidium of the court.²¹¹

164. Similar rules apply to criminal proceedings. Under sections 22 and 23 of the Code of Criminal Procedure,²¹² a judge is disqualified by law from exercising judicial office in a case under the following circumstances: if s/he himself was aggrieved by the criminal offence; if s/he is or was the spouse, the civil partner, the guardian or the carer of the defendant or of the aggrieved person; if s/he is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the defendant or to the aggrieved person; if s/he has acted in the case as an official of the public prosecution office, as a police officer, as attorney of the aggrieved person or as defence counsel, or if s/he has been heard in the case as a witness or expert; or if s/he was involved in reaching certain prior decisions. A judge can also be recused for fear of bias.²¹³ The court of which the judge is a member rules on the motion to recuse him, without that judge being involved in the decision.²¹⁴ The decision not to disqualify the judge can be appealed.

165. The above-mentioned rules also apply to lay judges.²¹⁵

Gifts

166. Judges are prohibited by law from receiving any reward, gift or other benefit.²¹⁶ This prohibition is applicable even after termination of their service relationship. If a

²⁰⁶ Article 42 ZPO.

²⁰⁷ See articles 45(1) and 48 ZPO.

²⁰⁸ See section 46(2) ArbGG.

²⁰⁹ See articles 54(1) VwGO, 51(1) FGO and 60(1) SGG.

²¹⁰ Federal Court of Justice (*Bundesgerichtshof*, BGH), judgment of 15 December 1994 - I ZR 121/92

²¹¹ See BGH, judgment of 7 May 2009, BGHZ 181, 29 [37]: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=48635&pos=0&anz=1>

²¹² *Strafprozessordnung* (StPO), English version: http://www.gesetze-im-internet.de/englisch_stpo/index.html

²¹³ Article 24 StPO.

²¹⁴ Articles 27 and 30 StPO.

²¹⁵ With regard to criminal proceedings, see article 31 in conjunction with articles 22 *et seqq.* StPO. Concerning civil proceedings, articles 41 to 48 ZPO apply to every judge including the honorary judges of the Chambers of Commerce.

²¹⁶ Section 71(1) BBG in conjunction with section 46 DRiG; section 42(1) BeamStG.

judge violates this prohibition s/he must, upon demand, surrender to the public service employer that which was obtained as a result of the prohibited conduct in breach of duty. This prohibition comprises all benefits to which the judge is not entitled that are provided, directly or indirectly, by another person.²¹⁷ In principle, the economic value of the benefit is irrelevant. Exceptions require the authorisation of the supreme authority served or of the supreme authority most recently served. According to case law, such consent can be considered only in rare, specific cases where any possible damage to confidence in the independent conduct of official duties can be ruled out from the outset.²¹⁸ Exemptions from the obligation to subject benefits to authorisation by the highest administrative authority are only accepted when the benefit received comprises unobjectionable small gifts generally perceived as being of negligible value (e.g. promotional articles such as ball-point pens, calendars or notepads).

167. This ban is backed at federal level by the supplementary "Circular on the Ban on Accepting Rewards or Gifts in the Federal Administration" of 8 November 2004,²¹⁹ which contains further details of the regulations, such as a definition of the terms "reward" and "gift" and the procedure to be observed. In some *Länder*, too, there are supplementary provisions and administrative regulations.²²⁰

168. In addition to this, under the bribery provisions of the StGB, a judge incurs criminal liability if s/he demands, allows him/herself to be promised or accepts a benefit for him/herself or a third party in return for the fact that s/he performed or will in the future *perform a judicial act*.²²¹ This offence is punishable by a prison sentence of up to five years or a fine. S/he also incurs criminal liability if s/he demands, allows him/herself to be promised or accepts a benefit for him/herself or for a third party for the *discharge of an official duty*,²²² i.e. irrespective of the performance of any judicial act in return for the advantage. This offence is punishable by imprisonment for up to three years or a fine. Finally, if a judge has violated or will *violate his/her judicial duties* on account of the act performed in return for the benefit, s/he is liable to a term of imprisonment of one to ten years.²²³

169. The GET has the clear impression that judges do not consider it permissible for them to accept gifts, and that being seen to be of impeccable character and independent is implicit in the status of a judge.

Third party contacts, confidential information

170. It follows from section 39 DRiG²²⁴ that a judge must refuse communication outside the official procedures with a third party and refer to the official channels of communication. If the judge fails to do so and accepts such communication, this may constitute grounds to doubt his/her independence and may thus justify his/her recusal.²²⁵ The judge is under obligation to inform the participants in the proceedings about the existence of such grounds. If the communication is aimed at influencing the judge, the judge may, under certain conditions, incur criminal liability, in particular, if s/he allows him/herself to be promised a benefit in exchange for performing a judicial act.²²⁶ Disciplinary measures may also be taken against the judge.

²¹⁷ See Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG), judgment of 20 February 2002, - 1 D 19/01 = NVwZ, 2002, 1515.

²¹⁸ BVerwG, judgment of 20 January 2000 - 2 C 19/99BVerwG = ZBR 2000, 273.

²¹⁹ "Rundschreiben zum Verbot der Annahme von Belohnungen oder Geschenken in der Bundesverwaltung".

²²⁰ E.g. in Brandenburg, Saxony and Thuringia

²²¹ Article 331(2) StGB

²²² Article 331(1) StGB. According to paragraph 3, the offence is not punishable "if the offender allows him/herself to be promised or accepts a benefit which s/he has not solicited and the competent public authority, within the scope of its powers, has previously authorised the acceptance of the benefit or if the offender files a report with this authority and the authority then authorises the acceptance."

²²³ Article 332(2) StGB

²²⁴ See above under "Ethical principles, rules of conduct and conflicts of interest (paragraph 142)."

²²⁵ See article 42 ZPO and article 24 StPO.

²²⁶ Article 331 (2) StGB

171. Both professional and lay judges are obliged to preserve secrecy regarding the course of deliberations and voting.²²⁷ This obligation remains in force after their service has ended.

172. Pursuant to article 203(2) StGB, whosoever discloses a secret of another, which was made known to him/her in confidence or otherwise, in his/her capacity as a judge, shall be punished by a prison sentence of up to one year or a fine. In accordance with article 353b StGB, whosoever unlawfully discloses a secret which was made known to him/her in confidence or otherwise, in his/her capacity as a judge and thereby causes a danger to important public interests, shall be punished by a prison sentence of up to five years or a fine; prosecution of this offence takes place only upon authorisation. A danger to important public interests may be caused, for example, if the conduct of criminal investigation proceedings is compromised by such disclosure. Pursuant to article 353d StGB, if a judge discloses certain protected information about a court hearing, s/he shall be punished by a prison sentence of up to one year or a fine. According to article 355 StGB, if a judge unlawfully discloses or uses circumstances of another or business or trade secrets of another which became known to him/her in tax matters, s/he shall be punished by a prison sentence of up to two years or a fine. If, by passing on information, a judge obstructs the punishment of another for an illegal act, s/he shall be punished by a prison term of between six months and five years (obstruction of criminal prosecution in public office, see article 258a StGB in connection with article 258 StGB). Finally, disciplinary measures may also be taken against the judge.

Declaration of assets, income, liabilities and interests

173. There are no specific requirements, duties or regulations in place for judges and their relatives to submit asset declarations.

174. However, the authorities stress that appointment as a civil servant or judge can, as a general rule, only be considered if the applicant's finances are in order. Therefore, before his/her appointment, the applicant must provide information to this effect. Moreover, judges are obliged to disclose any circumstance that can be considered to warrant disqualification in a particular case and as a general rule, they may only take up a paid secondary activity subject to prior permission (see above). When applying for such permission, judges must indicate in writing the income that would be gained from this secondary activity (and the amount of working time involved); any change must be reported immediately and in writing.²²⁸ Unpaid activities also require prior permission if such activities mean holding a secondary position, commercial or freelance activities or assistance with one of these activities, or admission to a body of a company other than a cooperative.²²⁹ Reports and applications for permission for secondary activity are kept as part of personnel records; they are not made public. In Bavaria, in addition, anonymous records are to be kept by the office responsible for authorising secondary activity on the authorisation it has given, on the notifications received, on the secondary activity carried out and on cases in which authorisation requested was refused.

Supervision and enforcement

175. Judges are subject to supervision only to the extent that this does not interfere with their independence.²³⁰ Their adjudication in accordance with the applicable law and all other activities directly related to this are not subject to supervision. However, the official formalities of judicial business are, as detailed below.

²²⁷ See sections 43 and 45(1) DRiG.

²²⁸ Section 99 (5) BBG in conjunction with section 46 DRiG. The Civil Servants Acts of the *Länder* contain similar rules, see e.g. section 53 of the Civil Servants Act of the *Land* North Rhine-Westphalia.

²²⁹ Section 99 (1), second sentence BBG in conjunction with section 46 DRiG

²³⁰ Section 26(1) DRiG

176. If a judge culpably breaches his/her duties s/he is subject to disciplinary liability.²³¹ *Inter alia*, there is a breach of duty if a judge does not respect the provision of section 39 DRiG according to which a judge shall, "in and outside office, (...) conduct him/herself, in relation also to political activity, in such a manner that confidence in his/her independence will not be endangered", or if s/he violates the requirements described above under "Prohibition or restriction of certain activities", such as the duty to disclose any close personal relations with a party to the proceedings or that party's representative, or any other objective circumstances indicative of bias during the proceedings; the ban on accepting gifts; and the obligation to report or obtain prior approval for secondary activity.

177. Disciplinary powers are exercised by a judge's superior authority and the Judicial Service Courts.²³² Firstly, the superior authority can, by means of a disciplinary order, issue a reprimand and thus condemn the specific behaviour of a judge. The "superior authority" is the person competent to decide in matters governed by civil service law regarding the personnel subordinate to him/her;²³³ it is determined partly by law and partly by regulations, or it follows from the structure of the court, and the Judiciary Acts of some *Länder* also contain provisions on this.

178. Secondly, if instituting administrative disciplinary proceedings is not sufficient, the highest authority served can make an application for the institution of formal disciplinary proceedings, on which the Federal Service Court or the Service Court of the *Land* concerned decides.²³⁴ In the case of federal judges, the legal basis for disciplinary proceedings is the Federal Disciplinary Act,²³⁵ and in the case of *Land* civil servants it is the respective *Land* Disciplinary Act. The following disciplinary measures may be imposed: reprimand, regulatory fine, reduction of earnings, demotion and dismissal; disciplinary measures against retired civil servants consist in the reduction or cancellation of pension payments. In some *Länder*²³⁶ the following supplementary provision applies: if a judge does not report on time or is in full secondary activity that is subject to an obligation to report, s/he may be prohibited temporarily from starting or continuing the secondary activity until a decision has been taken on whether there are reasons justifying a prohibition.

179. The Federal Service Court is a special division of the Federal Court of Justice.²³⁷ It conducts its proceedings and renders its decisions as a panel composed of a presiding judge and two permanent associate judges who must be members of the Federal Court of Justice, as well as two non-permanent associate judges who must, as judges for life, be members of the judicial branch to which the judge concerned is attached. The president of a court and his permanent deputy may not be members of the Federal Service Court. The *Länder* must also establish Service Courts.²³⁸ All the *Länder* except Saxony-Anhalt have chosen the option to establish them as adjudicating bodies at a court of ordinary jurisdiction. The Service Courts must be composed of a presiding judge alongside an equal number of permanent associate judges (who participate in all proceedings) and non-permanent associate judges (who participate in those proceedings which concern judges of their own judicial branch). Any judge appointed for life at the *Land* level can become a member of the Service Court. It may be stipulated under *Land* law that honorary judges who are practising lawyers shall participate as permanent associate judges.²³⁹

²³¹ Section 77 BBG in conjunction with section 46 DRiG; section 47 BeamStG

²³² See sections 63(2), 78 and 83 DRiG.

²³³ See section 46 DRiG in conjunction with section 3(2) BBG.

²³⁴ See sections 62, 63(2) and 78 no. 1 DRiG.

²³⁵ *Bundesdisziplinargesetz* (BDG) – in conjunction with sections 46 and 63(1) DRiG.

²³⁶ E.g. Saxony-Anhalt

²³⁷ See section 61 DRiG

²³⁸ Section 77 DRiG

²³⁹ This is the case, for example, in Baden-Württemberg.

180. Disciplinary proceedings must always be instituted if there are sufficient factual indications to justify the suspicion that a disciplinary offence has been committed.²⁴⁰ An application by the judge him/herself may lead to the institution of proceedings in cases where s/he would like to exonerate him/herself from the suspicion of misconduct. Frequently, these factual indications originate from citizens, colleagues and whistleblowers. Possible sources of information are analysing files, obtaining official information (in writing), hearing witnesses, consulting judicial assistants, obtaining expert opinions and inspection.

181. An objection can be lodged at the next level against a disciplinary order issued by a superior authority. In addition, the order can be subjected to judicial review. Moreover, the judgments of the *Länder* Service Courts may be challenged by means of an appeal on points of fact and law, which must be lodged at the next instance, i.e. the Higher Service Court (*Dienstgerichtshof*). The Federal Service Court decides on appeals on points of law against the judgments of the Higher Service Courts of the *Länder*, insofar as the respective *Land* Judiciary Act makes provision for an appeal on points of law alone. The decisions of the Federal Service Court cannot be appealed.²⁴¹

182. In certain cases of breach of duty, judges may also be subject to criminal liability. Namely, a judge who becomes involved in a conflict of interests and who, in conducting or deciding a legal matter, perverts the course of justice for the benefit or to the detriment of a party is liable to a term of imprisonment of one to five years pursuant to article 339 StGB (perverting the course of justice). The acceptance of a gift may also constitute the criminal offence of acceptance of a benefit (article 331(1) and (2) StGB) or taking a bribe (section 332(2) StGB). Furthermore, judges may incur criminal liability for breach of confidential information. In such cases, the sanction is imposed in criminal proceedings. There are no special criminal procedures or immunities for judges.

183. Regarding the application in practice of the above-mentioned sanctions, the authorities report that the courts within the remit of the Federal Ministry of Justice are obliged to provide an annual report on the secondary activity of judges. So far, no conspicuous issues have been recorded. The authorities furthermore indicate that in the *Länder* as well, violations of relevant regulations are rare, both with respect to the rules concerning secondary employment as well as disqualification or the acceptance of gifts. One example was quoted where many years ago, in North Rhine-Westphalia, it was discovered that a judge performed a secondary activity as an estate agent; with disciplinary proceedings imminent he resigned from office. There have been no known cases of disqualification or acceptance of gifts by judges, nor any criminal cases related to the professional duties of judges in recent years.

184. Lay judges are also subject to supervision by the court in which they serve and can face removal by court decision – *inter alia*, if they violate the fundamental principles of humanity or of the constitutional State²⁴² or if they are guilty of a gross breach of their official duties²⁴³ – or, in severe cases like acceptance of gifts, criminal sanctions.

185. It is widely held in Germany that judges have a high level of integrity, impartiality and independence and that there are hardly any cases of misconduct. The GET has no reason to doubt that the system for ensuring accountability of the judiciary is well construed and operates effectively. The different control mechanisms, namely internal control by the courts, external control and enforcement by the Judicial Service Courts as

²⁴⁰ Section 17 BDG.

²⁴¹ Section 62(1) DRiG.

²⁴² See section 44b(1) in conjunction with section 44a(1) DRiG.

²⁴³ See section 51 GVG, with respect to lay judges in criminal courts. The decision is given by a criminal division of the Higher Regional Court upon application of the Local Court judge in a ruling after hearing the public prosecution office and the lay judge concerned.

well as the criminal justice system, provide independent protection against misconduct of judges. It seems that the disciplinary and criminal sanctions available in the case of a breach of official duties by a judge are dissuasive and effective. That said, the GET believes that the monitoring of secondary activities could be further developed and it refers in this connection to the recommendation made above.²⁴⁴

Advice, training and awareness

186. The German Judicial Academy, an in-service training institute jointly supported by the Federation and the *Länder*, offers one-week conferences each year on subjects such as "Judicial Ethics – Basics, Perspectives, Worldwide Comparison of Judicial Ethical Standards" and "On the Independence of the Judiciary – A European Comparison". Participation is open to judges from all the *Länder* and is voluntary. Between 2009 and 2013 a total of 766 judges and public prosecutors participated in such courses. The authorities add that many judges and public prosecutors participate in other training activities organised by the Academy which do not exclusively focus on ethics but nevertheless include questions of ethics and conduct. They furthermore indicate that the Academy plans to change its format dedicated to ethical questions to explicitly target judges as well as prosecutors with the new title: "Judicial and Prosecutorial Ethics: Behavioural Standards in a Cross-Border Comparison".

187. Furthermore, various voluntary in-service training courses take place regularly in the *Länder*, which address subjects such as judicial independence and professional ethics (e.g. in Brandenburg) or fighting corruption in public administration (e.g. in Hamburg and Mecklenburg-Western Pomerania). In Bavaria, newly-appointed judges in ordinary jurisdiction take part in an obligatory two-part introductory conference which includes a session on judicial independence and judicial self-image. In the Saarland, participation in an in-service training session on ethics for judges and public prosecutors is compulsory for judges during their probationary period. Finally, in the context of legal traineeships, professional ethics are addressed as well; e.g. in Thuringia participation in a special session is obligatory for all legal trainees.²⁴⁵

188. The federal courts have each appointed contact persons for corruption prevention who ensure, in close cooperation with their respective administrations, that the relevant provisions are complied with. In specific cases the courts can mount an inquiry or coordinate their decision with the Ministry of Justice. The contact persons are also available to provide guidance to the judges. The authorities furthermore refer to the "Federal Government's Guidelines on the Prevention of Corruption in the Federal Administration" which comprise an Anti-Corruption Code of Conduct and state that "when taking the oath of office or agreeing to abide by the requirements of their position, staff members shall be informed of the risk of corruption and the consequences of corrupt behaviour (...) In view of the risk of corruption, staff attention shall continue to be directed to this issue."

189. In the courts of the *Länder*, judges can contact in particular their superior or – through official channels – the respective highest administrative authority. The authorities furthermore refer to the guidelines for the prevention of corruption which exist in a number of *Länder*, according to which the respective administrative authority is, as a general rule, required to appoint a special contact person for corruption prevention. The main responsibility of the contact persons is to raise awareness among staff through providing advice and education and to inform and advise the head of the office in case of suspicion or evidence of corrupt conduct. They receive specific training for this purpose.

²⁴⁴ See above under "Prohibition or restriction of certain activities" (paragraph 159).

²⁴⁵ The session uses the biographical film about former Public Prosecutor-General Fritz Bauer who initiated and led the Frankfurt Auschwitz trials.

190. In accordance with several *Länder* regulations, lay judges should receive initial training/introductory information at the respective courts. During the interviews held on site, the GET was however informed that such training is not systematically provided and where it exists, its content and quality vary considerably from one court to another and it is not subject to any evaluation or supervision. The GET was furthermore informed that some training is also provided by the German Association of Lay Judges through its regional branches where they exist (currently, there are seven regional branches). The association also gives advice to lay judges, publishes manuals and journals for lay judges, etc.

191. The professional judges met by the GET were well aware of ethical principles and proper conduct. Several interlocutors commended the German Judicial Academy as well as the relevant *Länder* authorities for their training programmes which include regular courses on ethical questions in which a significant number of judges participate. That being said, the GET wishes to draw attention to the need to ensure that future training takes into account the compendium of the existing rules for professional conduct accompanied by explanatory comments and/or practical examples advocated for in this report. Moreover, it is of the view that the introduction courses and other awareness-raising activities organised for lay judges leave much to be desired and that it is crucial that the latter – which play an important role in the German judicial system – also benefit from adequate training. A recommendation to that effect has been made above.²⁴⁶

²⁴⁶ See above under “Ethical principles, rules of conduct and conflicts of interest” (paragraph 148).

V. CORRUPTION PREVENTION IN RESPECT OF PROSECUTORS

Overview of the prosecution service

192. The public prosecution offices are part of the executive branch, despite their integration in organisational terms into the judicial branch. Within the field of criminal justice, the public prosecution offices share the task, on an equal footing with the courts, of providing access to justice and form a distinct judicial body of the judiciary.

193. According to the Basic Law, responsibility for criminal justice lies as a matter of principle with the *Länder*. The primary legislation concerning the organisation of the prosecution service is the GVG according to which there should be a public prosecution office in principle at every court.²⁴⁷ In the *Länder*, there is a total of 116 public prosecution offices at the Regional Courts. They are subordinate to the Offices of the Public Prosecutors General (*Generalstaatsanwaltschaften*) located at each of the Higher Regional Courts.²⁴⁸ There are a total of 25 Public Prosecutors General in the *Länder*. In turn, the Offices of the Public Prosecutors General are subordinate to their respective *Land* Justice Ministries.²⁴⁹

194. At the federal level and parallel to the Federal Court of Justice, there is the "Office of the Federal Prosecutor General at the Federal Court of Justice" (*Der Generalbundesanwalt beim Bundesgerichtshof*). The Office of the Federal Prosecutor General performs the tasks of a classic public prosecution office at the Federal Court of Justice, i.e. it represents the prosecution in all proceedings conducted before the criminal panels of that court²⁵⁰ (both appeals on points of law and complaint proceedings), and it acts in the capacity of a public prosecution office in criminal cases where Higher Regional Courts exercise jurisdiction in the first instance²⁵¹ (including criminal offences affecting the internal and external security of the Federal Republic of Germany, i.e. treason, espionage, crimes pursuant to the Code of Crimes against International Law and, in particular, terrorist acts of violence).

195. At the end of 2012, a total of 5 132 public prosecutors were working in the *Länder* and 99 public prosecutors were working at federal level. Of these, 2 203 (42.11%) were female and 3 029 (57.89%) were male.²⁵²

196. The public prosecution offices are structured hierarchically. They are headed by "superior officials". The superior official of public prosecution offices at the Higher Regional Courts is the Public Prosecutor General, and the superior official of the public prosecution offices located at the Regional Courts is the Chief Senior Public Prosecutor. The Office of the Federal Prosecutor General is headed by the Federal Prosecutor General him/herself.

197. Public prosecution offices are not autonomous institutions. They are subject to administrative and professional supervision by the relevant superior official of the public prosecution office at the relevant Higher Regional Court and of the public prosecution office of the Regional Court who have the right to issue internal instructions.²⁵³ The Federal Prosecutor General at the Federal Court of Justice is subject to supervision by the Federal Ministry of Justice and the public prosecutors of the *Länder* are subject to

²⁴⁷ Section 141 GVG.

²⁴⁸ See sections 142, 147 no. 3 GVG.

²⁴⁹ Section 147 no. 2 GVG

²⁵⁰ Sections 135, 121(2) and 142 GVG

²⁵¹ Section 120(1) and (2) and section 142a GVG.

²⁵² Source: Federal Office of Justice

(<https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?blob=publicationFile&v=5>)

²⁵³ Section 147 no. 3 GVG

supervision by the Justice Ministries of the *Länder*, who have the right to issue external instructions.²⁵⁴

198. More precisely, internal instructions may be given by the Offices of the Public Prosecutors General to subordinate public prosecution offices and, within the latter, by superior public prosecutors to lower-ranking public prosecutors. Such instructions require prosecutors to act in a specific way in a particular situation. They may relate to issues surrounding the ascertainment of facts and/or application of the law. Within legal limits, both the initiation and termination of investigation proceedings may be the subject of an instruction.

199. External instructions may be individual (orders) or general (guidelines). They are issued by the Federal Minister of Justice directly to the Federal Prosecutor General; instructions by the *Land* Justice Ministers are, as a general rule, directed at the Offices of the Public Prosecutor General where they are then converted into internal instructions.

200. The authorities state that in practice, the ministries are very reluctant to make use of their right to issue external instructions and do so only in very rare, exceptional cases.²⁵⁵ They indicate that the law allows little room for such instructions by ensuring that they comply with only objective requirements²⁵⁶ and are free of any political opportunism. They stress that in accordance with the principle of mandatory prosecution – which is binding also on the ministries of justice – a public prosecution office is obliged to take action in relation to all prosecutable offences, provided that there are sufficient factual indications to justify it.²⁵⁷ According to the authorities, external instructions serve mainly to ensure proper application of criminal law provisions and procedures and the uniform administration of criminal justice.²⁵⁸

201. Some *Länder* have published guidelines on issuing external instructions,²⁵⁹ limiting them to general instructions. In pending investigation proceedings they are permitted only in exceptional cases and in writing when the competent Public Prosecutor General wrongly fails to intervene when the public prosecution office has erred in law in its handling of a matter.

202. As public prosecutors have full personal responsibility for the legality of their official actions,²⁶⁰ they must report any reservations they have about the lawfulness of an official instruction to their immediate supervisor without delay. If the order is nevertheless maintained, the public prosecutor must turn to the next level. If the order is confirmed (in writing, if requested), the public prosecutor must carry it out but is relieved of personal responsibility. However, this does not apply if the action ordered violates human dignity or criminal or administrative law and the public prosecutor is aware that it constitutes a criminal or administrative offence.

²⁵⁴ Section 147 nos. 1 and 2 GVG

²⁵⁵ E.g. the judicial administration in *Land* Baden-Württemberg has used this right in only one case in the last 20 years.

²⁵⁶ Cf. Decision of the Federal Constitutional Court, BVerGE 9, 223, 229.

²⁵⁷ See article 152(2) StPO. That said, a prosecutor has the discretion not to commence a prosecution, e.g. if the offence is a minor one and prosecution is not required by the public interest (see article 153 StPO), or to discontinue proceedings (see articles 153a and 153b StPO) or to restrict an investigation for reasons of efficiency of the procedure/to simplify the procedure (see articles 154 and 154a StPO). Depending on the gravity of the offence, the approval of the court to dispense with prosecution or to discontinue proceedings may be necessary.

²⁵⁸ See e.g. the "Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine" ("*Richtlinien für das Strafverfahren und das Bußgeldverfahren*", RiStBV), which are published on the internet: http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01011977_420821R5902002.htm

²⁵⁹ E.g. Hesse, Lower Saxony and North Rhine-Westphalia

²⁶⁰ cf. section 63 BBG and section 36 BeamtStG.

203. The officials of the public prosecution offices must comply with the official instructions of their superiors.²⁶¹ However, given that all public prosecutors subordinate to the head of the office act as his/her deputies,²⁶² their acts and decisions are effective even if they violate an instruction given by a superior. That said, if the decision of a public prosecutor is not binding and the defendant cannot invoke the protection of his legitimate expectations, it can be set aside either by the prosecutor's superior or on instruction by him/her,²⁶³ following which a different decision can be taken. As a general rule, procedural acts by a public prosecutor²⁶⁴ have direct effect and cannot be revoked or annulled.

204. The right of the Ministers of Justice to issue external instructions in individual cases was discussed in length during the interviews held on site. The GET acknowledges that ministers make use of this right only in very rare, exceptional cases. That said, according to a number of interlocutors, anticipatory obedience by Public Prosecutors General is a more frequent phenomenon, and prosecution may be influenced by ministers in more subtle ways, e.g. through phone calls or regular meetings, "reports of intention" to be submitted to the ministry in cases of primary importance. Such cases have been repeatedly reported in the media. While some of those the GET spoke to did not see how such practices could possibly be prevented, others called for an increase in transparency and/or the abrogation of the right of the Ministers of Justice to issue external instructions in individual cases. In this connection, the GET also notes that in a recent study²⁶⁵ a large majority of the public prosecutors consulted would like to have this right abrogated. Various associations of judges and public prosecutors seem to be of the same opinion and have prepared concrete proposals to that effect, in order to strengthen the independence of the prosecution service and to prevent the impression that prosecution is influenced by politics. The GET is of the firm opinion that the above-mentioned concerns need to be taken seriously and that the question of whether the right of the Ministers of Justice to issue external instructions in individual cases should be abolished warrants further consideration by the authorities.

205. The GET furthermore recalls that it is crucial for public confidence that prosecution is, and is seen to be, impartial and free of any improper influence, particularly of a political nature. Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe stresses that instructions by the Government in a specific case must carry with them adequate guarantees of transparency and equity – such as Government being under a duty to seek prior written advice from the competent public prosecutor, to duly explain its written instructions, to see to it that, before the trial, the advice and the instructions become part of the file; and that public prosecutors remain free to submit to court any legal arguments of their choice even if they are under a duty to reflect in writing the instructions received.²⁶⁶ Furthermore, instructions not to prosecute are to remain exceptional and subject to an appropriate specific control, in order in particular to guarantee transparency. The GET notes that such guarantees are not in place in Germany, where instructions do not in all cases even have to be made in written form. In this context, the GET was interested to hear that the above-mentioned working group²⁶⁷ established by the Federal Ministry of Justice and the Ministries of Justice of several *Länder* in order to analyse the experiences of some European countries with judicial self-government and autonomy also examines the role and status of the prosecution service and the governments' right to issue instructions to the latter. Given the preceding paragraphs, **GRECO recommends (i) that consideration be given to abolishing the right of Ministers of Justice to give external instructions in individual cases;**

²⁶¹ Section 146 GVG.

²⁶² Section 144 GVG.

²⁶³ Cf. section 145 GVG.

²⁶⁴ E.g. his/her approval in the main hearing of a case for proceedings to be terminated

²⁶⁵ See Roland Rechtsreport (2014), quoted above, page 53.

²⁶⁶ See principle 13 of Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member States on the role of public prosecution in the criminal justice system.

²⁶⁷ See above under "Corruption prevention in respect of judges" (paragraph 108).

and, in case this right is not abolished, (ii) that further appropriate measures be taken to ensure that such instructions by Ministers of Justice carry with them adequate guarantees of transparency and equity and – in case of instructions not to prosecute – are subject to appropriate specific control. The *Länder* are to be invited to contribute to such a reform process.

206. The status of the public prosecutors is mainly governed by the relevant civil service acts, i.e. the BBG on the one hand (as far as public prosecutors of the Federation are concerned) and the BeamtStG as well as the civil service acts of the *Länder* on the other hand.

Recruitment, career and conditions of service

Appointment

207. Public prosecutors, like professional judges, are first appointed on probation and later appointed for an unlimited period of time.

208. At the federal level, the public prosecutors in remuneration group R2 are appointed directly by the Federal Ministry of Justice, For public prosecutors in remuneration groups R3 and above, a proposal for appointment must be approved by the Federal Government (Council of Ministers). The public prosecutors in remuneration group 2 are mostly officials who have already before the time of their promotion to the federal level been employed as judges or public prosecutors and have worked for several years as research assistants at the service of the Federal Prosecutor General. The appointment of the Federal Prosecutor General and the Federal Prosecutors additionally requires approval by the *Bundesrat*; they are appointed by the Federal President.²⁶⁸ The criteria for the selection of candidates are aptitude, qualifications and professional achievements.²⁶⁹ Unsuccessful candidates can appeal against the decision of the supreme authority served.²⁷⁰

209. In some *Länder*, public prosecutors are appointed as probationary judges and later appointed as public prosecutors for life while in others, they are appointed as probationary public prosecutors. This depends on whether the probationary period in the *Länder* is completed both in court and at a public prosecution office or only at a public prosecution office. Thus, in some *Länder*, it is only upon completion of the probationary period that a decision is taken on whether the person concerned is taken into judicial service with life tenure and whether s/he enters the public prosecution or the judicial service.

210. As a general rule, the *Land* Minister of Justice is responsible for appointments, but in some *Länder* s/he can transfer this power to the Public Prosecutor General. In some *Länder*, the Main Council of Public Prosecutors (*Hauptstaatsanwaltsrat*) also has to be involved in appointing public prosecutors. It consists of a number of elected public prosecutors, usually five, and as a general rule is formed at the Ministry of Justice of the respective *Land*. An unsuccessful candidate can contest the decision through official channels.

211. The general requirements for recruitment as a public prosecutor are the same as for judges. The evaluation of an applicant's personal suitability and integrity for the office of public prosecutor is made on the basis of the personal impression gained in the application process. As a general rule, the applicant's suitability is tested in a targeted manner by a selection committee on the basis of given facts and circumstances on which the candidate is required to make a statement.

²⁶⁸ Section 149 GVG.

²⁶⁹ Section 9 BBG.

²⁷⁰ See section 126 BBG which provides for recourse to the Administrative Courts.

Promotion, transfer and dismissal

212. The rules for the promotion of public prosecutors of the Federation are the same as for federal judges. At the *Länder* level, promotions are made by the Minister of Justice, or in some *Länder* the Public Prosecutor General, on the basis of performance appraisals according to the criteria of aptitude, qualifications and professional achievements. In some *Länder*, the Main Council of Public Prosecutors also has to be involved in decisions on promotion.

213. Decisions on any transfer or rotation (within one authority) at the federal level can be taken by the Federal Prosecutor General under his/her own authority. In taking such decisions, s/he ensures that the public prosecutors working for the Office of the Federal Prosecutor General are employed both in the investigations division and in the division dealing with appeals on points of law. In the *Länder*, the Minister of Justice or the Public Prosecutor General takes decisions on such measures. As a general rule, rotations within a public prosecution office are ordered by the head of the respective public prosecution office.

214. The dismissal of public prosecutors of the Federation is ordered in writing by the same agency responsible for the appointment.²⁷¹ As a general rule, this is also the case for public prosecutors of the *Länder*. Public prosecutors may request their dismissal in writing at any time²⁷² and they may be dismissed for compelling reasons, namely if they refuse to take an oath of service or required equivalent, cannot be retired because the employment period required by pension regulations has not been completed, or if they hold an office which by law is incompatible with their mandate at the time of appointment or had been a member of the *Bundestag* or the European Parliament and did not give up their seat within the period specified by the ministry.²⁷³ They shall be dismissed by virtue of the law if the conditions required for civil service status are no longer met.²⁷⁴ An appeal can be lodged against a dismissal in administrative court proceedings. In particularly serious individual cases, public prosecutors may be removed from their office on account of serious professional misconduct.²⁷⁵

Conditions of service

215. At the start of their career, the annual gross salary of public prosecutors in the *Länder* is the same as for judges.²⁷⁶ In most *Länder*, the highest possible salaries vary between €98 000 and €100 000. At the Federal Court of Justice, the basic salary of public prosecutors – without the special allowance of €4 593.69 per month – amounts to an annual income of at least €55 124.28 (remuneration group R2); that of Senior Public Prosecutors amounts to €88 111.44 (remuneration group R3); and that of Federal Prosecutors amounts to €104 711.38 (remuneration group R6) or, if they head a department, to €110 102.76. The basic salary of Public Prosecutors General – without the special allowance – amounts to an annual gross income of €122 745.12 (remuneration group R9). Like judges, public prosecutors are not entitled to any special benefits such as tax or housing allowances.

216. As mentioned above in respect of judges, in a recent survey a large majority of the prosecutors (and judges) consulted found that their basic working conditions had deteriorated in recent years.²⁷⁷ Some of those the GET spoke to considered the lack of adequate resources for the prosecution service as a “massive problem” which might

²⁷¹ Section 38 in conjunction with section 12 BBG

²⁷² Section 33 BBG.

²⁷³ Section 32 BBG.

²⁷⁴ See sections 7(1) and 31 BBG.

²⁷⁵ Section 10 BDG.

²⁷⁶ See above under “Corruption prevention in respect of judges” (paragraph 132).

²⁷⁷ See Roland Rechtsreport (2014), quoted above, page 18 *et seqq.* and 42 *et seqq.*

explain current phenomena such as the high rate of proceedings that are discontinued (around 70%) and an alleged preference to prosecute lucrative cases (where the State can gain income from regulatory fines). Mention was also made of the use of external sources by the prosecution service, for example assistance by the personnel of health insurance companies or private investigations “offered” by the defence lawyers (which can be considered as co-operation by the defendant and thus benefit him/her). The GET invites the authorities to take these concerns into account and to seek ways to ensure that the prosecution service and prosecutors have at their disposal adequate resources to cope with the high workload assigned to them.

Case management and procedure

217. The allocation of business is a matter for the head of the public prosecution office. Possible criteria determining the allocation of tasks include alphabetical distribution (using the first letter of the defendant's surname) or by type of offence. Alternatively, cases may be distributed as equally as possible pursuant to the chronological order in which they arrive.

218. The superior officials of the public prosecution offices are entitled to take over the official duties of the public prosecution offices at all courts in their district themselves, or to commission an official other than the one initially competent to perform these tasks.²⁷⁸

219. Public prosecution offices are required to take all appropriate and acceptable measures to conclude investigations with the requisite speed, and to bring about a judicial decision on the offences with which the defendant has been charged (principle of expedition in criminal proceedings).²⁷⁹ Given the presumption of innocence, and in order to avoid excessively long periods of detention, this mainly serves to protect the defendant. At the same time, it also serves to safeguard the truth, which is the core aim of criminal proceedings. The head of the public prosecution office must ensure that proceedings are processed speedily and can issue official instructions to expedite proceedings.

220. The person affected by lengthy proceedings can lodge a supervisory complaint, and s/he is entitled to claim compensation from the State regardless of fault if the investigation proceedings have been excessively long.²⁸⁰ In addition, further-reaching official liability claims are conceivable if the delay is based upon a culpable breach of official duties.

Ethical principles, rules of conduct and conflicts of interest

221. As for judges, there is no separate statutory code of ethics for prosecutors but there are legal provisions concerning ethical principles and rules of conduct. In particular, the civil service acts provide that civil servants “are to fulfil their duties in a just and impartial manner and, in exercising their office, take account of the welfare of the general public”.²⁸¹ Moreover, “the conduct of public prosecutors on and off duty must do justice to the respect and trust required by their profession.”²⁸² The authorities also refer to the provisions regarding the acceptance of gifts and other advantages and the corruption provisions of the StGB.²⁸³

²⁷⁸ Section 145(1) GVG.

²⁷⁹ See e.g. articles 115(1) and (2), 121 and 122 StPO.

²⁸⁰ In accordance with the provisions of the Act on Remedies for Protracted Court Proceedings and Criminal Investigations. Cf. above under “Corruption prevention in respect of judges” (paragraph 137).

²⁸¹ Section 60(1) BBG and section 33(1) BeamtStG.

²⁸² Section 61 BBG and section 34 BeamtStG.

²⁸³ See below under “Prohibition or restriction of certain activities” (paragraphs 233 and 234).

222. In addition, with regard to public prosecutors of the Federation, the above-mentioned "Federal Government's Guidelines on the Prevention of Corruption in the Federal Administration"²⁸⁴ which comprise an Anti-Corruption Code of Conduct and Guidelines for Supervisors and Heads of Public Authorities/Agencies, are applicable.

223. The authorities furthermore mention the above-mentioned guidelines for the prevention of corruption in a number of *Länder*, which are applicable to public prosecutors.²⁸⁵ They add that some supplementary staff regulations apply to public prosecutors in the *Länder* on account of the fact that, unlike judges, they are subject to a requirement to report, as per e.g. the Anti-corruption Act for the *Land* North Rhine-Westphalia.²⁸⁶ In Baden-Württemberg, public prosecutors were involved in formulating the text of the "Administrative Regulation on Preventing and Fighting Corruption".²⁸⁷ In Hamburg, the "Agreement on a General Administrative Regulation on Measures to Fight Corruption"²⁸⁸ was concluded between the personnel office as the supreme administrative authority and the central organisations of the trade unions and professional civil service associations (without direct involvement of public prosecutors).

224. There are no special definitions for conflicts of interest in public prosecution offices. The authorities indicate, however, that on account of the principle of the rule of law – which includes the right to a fair trial and, in particular, the impartiality required of public officials involved in the proceedings – the public prosecutor is obliged to point out any conflict of interests and to work toward his/her replacement by the superior official. The authorities add that when assigning tasks, the head of the public prosecution office must also take care to ensure that conflicts of interest are avoided.

225. The authorities furthermore refer to the Anti-Corruption Code of Conduct which is applicable to public prosecutors of the Federation and contains guidelines for the prevention of conflicts of interest. *Inter alia*, the guidelines call on federal civil servants to "check every procedure for which you are also responsible to see whether your private interests or those of your relatives or of organisations to which you feel obliged could lead to a conflict with your professional obligations. Avoid any appearance of possible partiality. If you recognise, given a specific official task, that your obligations and your private interests or the interests of third parties to whom you feel obliged might come into conflict, inform your supervisor so that he or she may respond appropriately (e. g. by releasing you from activities in a specific instance)."

226. The GET notes that with respect to standards of ethics and conduct, the situation is quite similar to that of judges. Generally speaking, public prosecutors seem to be well aware of the ethical requirements inherent to their profession. Anti-corruption codes of conduct for public officials exist at the federal level and in some *Länder*, but are not applicable to all public prosecutors. While such texts can serve as a valuable basis, the GET – bearing in mind international standards such as Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe²⁸⁹ which calls for the adoption of codes of conduct for public prosecutors – is of the opinion that a tailor-made reference text for all public prosecutors would be useful as a tool for guiding them in ethical questions and for maintaining – and even further raising – their awareness and informing

²⁸⁴ See above under "Corruption prevention in respect of judges" (paragraph 143). English version: http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschueren/Texte_zur_Korruptionspraevention_en.pdf?__blob=publicationFile

²⁸⁵ See above under "Corruption prevention in respect of judges" (paragraph 144).

²⁸⁶ "*Korruptionsbekämpfungsgesetz*". This law includes different measures aimed at preventing corruption in the *Land* administration – e.g. section 21 provides that staff in areas vulnerable to corruption should not, as a general rule, be deployed for more than five years.

²⁸⁷ "*Verwaltungsvorschrift Korruptionsverhütung und -bekämpfung*" of 1997

²⁸⁸ "*Vereinbarung einer Allgemeinen Verwaltungsvorschrift über Maßnahmen zur Korruptionsbekämpfung*" of 2001

²⁸⁹ See principle 35 of Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member States on the role of public prosecution in the criminal justice system, which requires States to ensure that "in carrying out their duties, public prosecutors are bound by codes of conduct".

the general public of the standards that are to be adhered to. Given the specific context in Germany where the rules governing ethics of public prosecutors are embedded in provisions on the factual matter in question, such a reference text could take the form of a compendium of the existing rules, as recommended with respect to judges. Moreover, the provision of guidance on ethical questions – with regard, *inter alia*, to conflicts of interest/disqualification, incompatibilities and secondary activities, gifts, third party contacts/confidentiality and other ethical dilemmas – by way of supplementary measures such as providing explanatory comments and/or practical examples (which could also build on the work already carried out by the German Association of Judges with respect to ethical questions which also concerns public prosecutors²⁹⁰), confidential counselling within the prosecution service and, in any case, specific (preferably regular) training activities of a practice-oriented nature would be a further asset. Consequently, **GRECO recommends i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments and/or practical examples specifically for public prosecutors, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all public prosecutors and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling for all public prosecutors. The *Länder* are to be invited to contribute to such a process.** While taking due account of the federal structure of Germany, GRECO is convinced that the measures recommended can be achieved through the combined efforts of the pertinent federal and *Länder* authorities and/or representatives of the prosecution service.

Prohibition or restriction of certain activities

Incompatibilities and accessory activities, post-employment restrictions

227. As is the case for judges, if a public prosecutor is elected as an MP, the official duties resulting from his/her membership of the civil service are suspended by law.²⁹¹ If a public prosecutor is appointed as a member of the Federal Government without being an MP his/her duties as a public prosecutor are suspended by law as well.²⁹²

228. Regarding secondary activity of public prosecutors of the Federation, the same rules as for federal judges apply.²⁹³ In particular, paid secondary activity (and in some cases, unpaid activity) in principle requires the prior permission of the supreme authority served. Similar rules apply to the public prosecutors of the *Länder*. As for judges, in most *Länder* prior permission to carry out secondary activities is generally required, whereas in a few others they only need to be reported and are prohibited if they might be detrimental to official interests.²⁹⁴

229. Information gathered by the GET suggests that relatively few prosecutors are engaged in secondary activities. Some prosecutors occasionally carry out, for example, academic activities (e.g. research, writing, lecturing, examining). There appears to be no similar tradition of prosecutors being involved in private business, as a member of a company board for example. Given that no concerns have come to light as regards inappropriate conduct and that the prosecution service is generally perceived as being a highly trustworthy institution, the GET does not consider it necessary to recommend further regulation of secondary activities. At the same time, the GET is of the opinion that the development of clear common standards regarding transparency and possible restrictions at the federal level and at the level of the different *Länder* would help to

²⁹⁰ See above under "Corruption prevention in respect of judges (paragraph 147).

²⁹¹ As far as election to the *Bundestag* is concerned, this is regulated in section 5(1) AbgG.

²⁹² Cf. section 18 BMinG.

²⁹³ Cf. section 99 BBG. See above under "Corruption prevention in respect of judges" (paragraph 153).

²⁹⁴ E.g. in Saxony-Anhalt

maintain a high level of trust in the prosecution service. The authorities are therefore encouraged to reflect on possible legal amendments to that effect.

230. Regarding employment of retired public prosecutors, the same rules as for judges apply.²⁹⁵ In particular, during a specified period after retirement, public prosecutors must report in writing before taking up any paid or other employment outside the public service which is related to their service activity during the five years previous to leaving the service and could interfere with service-related interests. Paid or other employment is prohibited where there are concerns that such activity may interfere with service-related interests. The aforementioned rules do not apply to public prosecutors who move to the private sector before they retire.²⁹⁶ As in the case of judges, the GET did not find this to be a particular source of concern in the context of Germany as public prosecutors generally leave the prosecution service upon reaching retirement age, unless they apply for a position as judge.

Recusal and routine withdrawal

231. No explicit disqualification rules apply to prosecutors. The authorities refer in this respect to the provisions mentioned above²⁹⁷ which require civil servants to fulfil their duties in a just and impartial manner. They state that public prosecutors are therefore obliged to point out any conflict of interests and to initiate the procedure needed for them to be replaced by their superior authority.

232. The authorities explain that public prosecutors are not subject to the same rules as judges because of their different status. In principle, the assignment of cases to a judge is irrevocable, which makes it necessary to provide for clear disqualification rules. In contrast, the public prosecutor belongs to the executive and his/her superior can transfer a case to another prosecutor. That said, several *Länder*²⁹⁸ have put in place disqualification rules for public prosecutors which mirror the provisions applicable to judges, and the GET was informed that more generally, the principles underlying the latter provisions are followed in practice also in respect of public prosecutors. It was furthermore indicated that in practice, public prosecutors habitually withdraw from cases in which they might potentially face a conflict of interests. As no concerns have come to light as regards incorrect conduct by public prosecutors, the GET does not consider it necessary to recommend further regulation in this area. That said, the development of clear common standards at the federal level and at the level of the different *Länder* might help to maintain a high level of trust in the prosecution service.

Gifts

233. Like judges, public prosecutors are prohibited by the provisions of the civil service acts from receiving any reward, gift or other benefit.²⁹⁹ Exceptions to this rule require permission, which can be considered only in rare and specific cases where any possible damage to confidence in the independent conduct of official duties can be excluded from the outset.³⁰⁰

²⁹⁵ Cf. section 105 BBG; section 41 BeamtStG and the *Länder* Civil Servants Acts.

²⁹⁶ Some *Länder* have nevertheless introduced rules on post-public employment. The GET was informed that e.g. in Berlin public prosecutors are not allowed to work as a lawyer in a private law firm for a five-year period after leaving the prosecution service. The GET's interlocutors were aware of altogether three cases in Berlin which fell under this regulation.

²⁹⁷ Section 60(1) BBG and section 33(1) BeamtStG. See above under "Ethical principles, rules of conduct and conflicts of interest" (paragraphs 221).

²⁹⁸ E.g. Baden-Württemberg.

²⁹⁹ Section 71(1) BBG and section 42(1) BeamtStG. For more details, see above under "Corruption prevention in respect of judges" (paragraphs 166).

³⁰⁰ Cf. BVerwG, judgment of 20 January 2000 - 2 C 19/99BVerwG = ZBR 2000, 273.

234. Moreover, under the bribery provisions of the StGB, a prosecutor who demands, allows him/herself to be promised or accepts a benefit for him/herself or for a third person for the discharge of an official duty, is liable to a term of imprisonment of up to three years or a fine.³⁰¹ If a public prosecutor has violated or will violate his/her official duties on account of the act performed in return for the benefit, s/he is liable to a term of imprisonment of six months to five years.³⁰²

235. The GET has the clear impression that public prosecutors do not consider it permissible for them to accept gifts as it would impair the dignity of the office, and that being of impeccable character is implicit in the status of a public prosecutor.

Third party contacts, confidential information

236. Unofficial contacts with third parties would be in conflict with the rule that "the conduct of public prosecutors on and off duty must do justice to the respect and trust required by their profession",³⁰³ and must therefore be rejected. If the contact is aimed at influencing the public prosecutor, s/he may, under certain conditions, incur criminal liability, in particular, if s/he allows him/herself to be promised a benefit in exchange for performing an official duty.³⁰⁴ Disciplinary measures may also be taken against the public prosecutor.

237. Like a judge, a public prosecutor may incur criminal liability for breach of confidential information under articles 203(2), 353b, 353d, 355, 258 and 258a StGB. Disciplinary measures may also be taken against the public prosecutor.

Declaration of assets, income, liabilities and interests

238. There are no specific requirements, duties or regulations in place for public prosecutors and their relatives to submit asset declarations. As they did in respect of judges, the authorities refer here to the general rule that appointment as a civil servant (or judge) can only be considered if the applicant's finances are in order and, furthermore, to the rules on conflicts of interest in specific cases and on secondary activities.

Supervision and enforcement

239. If a public prosecutor culpably breaches his/her duties s/he is subject to disciplinary liability.³⁰⁵ *Inter alia*, there is a breach of duty if a public prosecutor violates the requirements described above under "Prohibition or restriction of certain activities", e.g. by acting despite the existence of a conflict of interests, accepting gifts or not requesting prior approval for secondary activity.

240. Disciplinary measures and proceedings against public prosecutors of the Federation are regulated by the provisions of the BDG. Disciplinary proceedings in the *Länder* are based on the disciplinary laws of the respective *Land* which essentially follow the same principles as the federal law. Professional supervision and disciplinary powers are exercised by the superior authority (i.e. the Federal Prosecutor General or, in the *Länder*, the respective Public Prosecutor General). The supreme authority served (i.e. the Federal Ministry of Justice or the respective *Land* Ministry of Justice) is responsible for

³⁰¹ Article 331(1) StGB. According to paragraph 3, the offence is not punishable "if the offender allows him/herself to be promised or accepts a benefit which s/he has not solicited and the competent public authority, within the scope of its powers, has previously authorised the acceptance of the benefit or if the offender files a report with this authority and the authority then authorises the acceptance."

³⁰² Article 332(1) StGB.

³⁰³ Section 61 BBG and section 34 BeamtStG.

³⁰⁴ Article 331 (1) StGB

³⁰⁵ Section 77 BBG; section 47 BeamtStG.

the decision in disciplinary proceedings if, following the examination of the results of the hearing, the powers of the superior authority are considered inadequate.³⁰⁶

241. Disciplinary measures against public prosecutors are imposed either by the superior authority (reprimand or regulatory fine) or by the supreme authority served (reduction of earnings) by means of a disciplinary order.³⁰⁷ However, for the public prosecutor to be sanctioned with demotion, discharge from public service including removal of civil servant status or cancellation of his/her pension, disciplinary charges must be brought against him/her at the Disciplinary Court.³⁰⁸

242. Disciplinary proceedings can be initiated *ex officio* or upon application by the public prosecutor concerned.³⁰⁹ The latter is to be heard within a period of one month (in case of a written statement) or two weeks (in the case of an oral statement), following which the necessary investigations, which always depend on the specific case, will be carried out.³¹⁰ Should the investigations show that the offence is so severe as to justify demotion, discharge from public service including removal of civil servant status, or cancellation of pension payments, the highest authority served must bring disciplinary charges at the Disciplinary Court. Decisions on disciplinary measures can be appealed against.

243. In the *Länder*, disciplinary powers are, as a general rule, exerted by the public prosecutor's superior and by the judges' disciplinary tribunals. Public prosecutors appointed as honorary judges are usually associated with the decision taken by the judges' disciplinary tribunals when a case involves a public prosecutor.³¹¹

244. In certain cases of breach of duty, public prosecutors may also be subject to criminal liability. Namely, the acceptance of a gift may constitute the criminal offence of acceptance of a benefit (article 331(1) and (2) StGB) or taking a bribe (section 332(2) StGB) and public prosecutors may also incur criminal liability for breach of confidential information. In such cases, the sanction is imposed in criminal proceedings. There are no special criminal procedures or immunities for public prosecutors.

245. Regarding the application in practice of the above-mentioned sanctions, the authorities report that the personnel administration of the Office of the Federal Prosecutor General must ensure compliance with the respective provisions of civil service law under its own authority. So far, no conspicuous issues have been recorded.

246. In the *Land* North Rhine-Westphalia, for example, a request for authorisation to take up a secondary activity was refused in one case as it was considered detrimental to service interests (legal work by a public prosecutor).

247. The GET notes that it is widely held in Germany that public prosecutors have a high level of integrity and are aware of their role and duties as representatives of the State. It would appear that the sanctions available in case of misconduct are as dissuasive and effective as they are for judges.

Advice, training and awareness

248. The training activities for judges mentioned above³¹² are open also to public prosecutors.

³⁰⁶ Cf. section 31 BDG.

³⁰⁷ Cf. section 33 BDG.

³⁰⁸ Cf. section 34 BDG.

³⁰⁹ Cf. sections 17 and 18 BDG.

³¹⁰ Cf. sections 20 and 21 BDG.

³¹¹ See e.g. sections 90 *et seq.* of the Lower Saxon Judiciary Act.

³¹² See above under "Corruption prevention in respect of judges" (paragraphs 186 and 187).

249. The Federal Prosecutor General has appointed contact persons for corruption prevention who ensure, in close cooperation with the respective administrations, that the relevant provisions are complied with. They are also available to provide guidance to the public prosecutors. As they did in respect of judges, the authorities furthermore refer here to the "Federal Government's Guidelines on the Prevention of Corruption in the Federal Administration".

250. Regarding the practice in the *Länder*, the authorities indicate that the first person to contact is the immediate superior and the contact person for the prevention of corruption, who, as a rule, is appointed by the office. This contact person's main task is to raise awareness among staff through advice and education and to inform and advise the head of the office in case of suspicion or when there is evidence of corrupt conduct. Within the scope of his/her activities, s/he generally has a wide-ranging right to access files with the exception of personal files. Claims and declarations are also submitted through official channels via the superior with a pertinent statement. Finally, the authorities state that the attention of public prosecutors is regularly drawn to the relevant regulations. Internal auditors examine the public prosecution offices to check whether awareness-raising among public prosecutors has taken place.

251. The public prosecutors met by the GET were well aware of ethical principles and proper conduct. As is the case with judges, public prosecutors are provided training that includes ethical questions by the German Judicial Academy and by the relevant *Länder* authorities. It is the GET's opinion that future training should take into account the compendium of the existing rules for professional conduct accompanied by explanatory comments and/or practical examples advocated for in this report. A recommendation to that effect has been made above.³¹³

³¹³ See above under "Ethical principles, rules of conduct and conflicts of interest" (paragraph 148).

VI. RECOMMENDATIONS AND FOLLOW-UP

252. In view of the findings of the present report, GRECO addresses the following recommendations to Germany:

Regarding members of parliament

- i. **that the transparency of the parliamentary process be further improved, e.g. by introducing rules for members of parliament on how to interact with lobbyists and other third parties seeking to influence the parliamentary process** (paragraph 33);
- ii. **(i) that a requirement of *ad hoc* disclosure be introduced when a conflict between specific private interests of individual members of parliament may emerge in relation to a matter under consideration in parliamentary proceedings – in the *Bundestag* plenary or its committees – independently of whether such a conflict might also be revealed by members' declarations of activities and income; and (ii) that members of parliament be provided written guidance on this requirement – including definitions and/or types of conflicts of interest – as well as advice on possible conflicts of interests and related ethical questions by a dedicated source of confidential counselling** (paragraph 55);
- iii. **(i) that the existing regime of declarations of interests be reviewed in order to extend the categories of information to be disclosed to include, for example, information on significant assets – including shareholdings in enterprises below the current thresholds – and significant liabilities; and (ii) that consideration be given to widening the scope of the declarations to also include information on spouses and dependent family members (it being understood that such information would not necessarily need to be made public)** (paragraph 81);
- iv. **that appropriate measures be taken to ensure effective supervision and enforcement of the current and future declaration requirements, rules on conflicts of interest and other rules of conduct for members of parliament, *inter alia*, by strengthening the personnel resources allocated by the *Bundestag* Administration** (paragraph 96);

Regarding judges

- v. **i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments and/or practical examples, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all judges and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling for both professional judges and lay judges. The *Länder* are to be invited to contribute to such a process** (paragraph 148);
- vi. **that appropriate measures be taken with a view to enhancing the transparency and monitoring of secondary activities of judges. The *Länder* are to be invited to contribute to such a reform process** (paragraph 159);

Regarding prosecutors

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

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

253. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Germany to submit a report on the measures taken to implement the above-mentioned recommendations by 30 April 2016. These measures will be assessed by GRECO through its specific compliance procedure.

254. GRECO invites the authorities of Germany to authorise, at its earliest convenience, the publication of this report, to translate the report into its national language and to make the translation publicly available.

ANNEX: ABBREVIATIONS OF LAWS

Abbreviation	English Title	German Title
AbgG	Act on the Legal Status of Members of the German <i>Bundestag</i>	Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages (Abgeordnetengesetz)
ArbGG	Labour Court	Arbeitsgerichtsgesetz
BBG	Federal Civil Service Act	Bundesbeamtengesetz
BBesG	Federal Civil Service Remuneration Act	Bundesbesoldungsgesetz
BDG	Federal Disciplinary Act	Bundesdisziplinargesetz
BeamtStG	Civil Servant Legal Status Act	Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern
BMinG	Act governing Federal Ministers	Bundesministergesetz
BVerfGG	Federal Constitutional Court Act	Gesetz über das Bundesverfassungsgericht
BWahlG	Federal Electoral Act	Bundeswahlgesetz
DRiG	German Judiciary Act	Deutsches Richtergesetz
FGO	Code of Fiscal Court Law	Finanzgerichtsordnung
GOBT	Rules of Procedure of the German Bundestag	Geschäftsordnung des Deutschen Bundestages
GVG	Courts Constitution Act	Gerichtsverfassungsgesetz
JGG	Youth Court Law	Jugendgerichtsgesetz
RiWG	Act on the Election of Judges	Richterwahlgesetz
SGG	Social Court Law	Sozialgerichtsgesetz
StGB	German Criminal Code	Strafgesetzbuch
StPO	German Code of Criminal Procedure	Strafprozessordnung
VwGO	Code of Administrative Court Procedure	Verwaltungsgerichtsordnung
ZPO	Code of Civil Court Procedure	Zivilprozessordnung

About GRECO

The Group of States against Corruption (GRECO) monitors the compliance of its 49 member states with the Council of Europe’s anti-corruption instruments. GRECO’s monitoring comprises an “evaluation procedure” which is based on country specific responses to a questionnaire and on-site visits, and which is followed up by an impact assessment (“compliance procedure”) which examines the measures taken to implement the recommendations emanating from the country evaluations. A dynamic process of mutual evaluation and peer pressure is applied, combining the expertise of practitioners acting as evaluators and state representatives sitting in plenary.

The work carried out by GRECO has led to the adoption of a considerable number of reports that contain a wealth of factual information on European anti-corruption policies and practices. The reports identify achievements and shortcomings in national legislation, regulations, policies and institutional set-ups, and include recommendations intended to improve the capacity of states to fight corruption and to promote integrity.

Membership in GRECO is open, on an equal footing, to Council of Europe member states and non-member states. The evaluation and compliance reports adopted by GRECO, as well as other information on GRECO, are available at: www.coe.int/greco.



Group of States against Corruption
Groupe d'États contre la corruption

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Adoption: 24 March 2017
Publication: 6 July 2017

Public
GrecoRC4(2017)1

FOURTH EVALUATION ROUND

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

COMPLIANCE REPORT

GERMANY

Adopted by GRECO at its 75th Plenary Meeting
(Strasbourg, 20-24 March 2017)

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I. INTRODUCTION

1. The Compliance Report assesses the measures taken by the authorities of Germany to implement the recommendations issued in the Fourth Round Evaluation Report on Germany which was adopted at GRECO's 65th Plenary Meeting (10 October 2014) and made public on 28 January 2015, following authorisation by Germany ([Greco Eval IV Rep \(2014\) 1E](#)). GRECO's Fourth Evaluation Round deals with "Corruption prevention in respect of members of parliament, judges and prosecutors".
2. As required by GRECO's Rules of Procedure, the authorities of Germany submitted a Situation Report on measures taken to implement the recommendations. This report was received on 20 September 2016 and served, together with the information submitted subsequently, as a basis for the Compliance Report.
3. GRECO selected the Slovak Republic and Switzerland to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mrs Alexandra KAPIŠOVSKÁ on behalf of the Slovak Republic and Mr Ernst GNÄGI on behalf of Switzerland. They were assisted by GRECO's Secretariat in drawing up the Compliance Report.
4. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendation (partially or not implemented) will be assessed on the basis of a further Situation Report to be submitted by the authorities 18 months after the adoption of the present Compliance Report.

II. ANALYSIS

5. GRECO addressed eight recommendations to Germany in its Evaluation Report. Compliance with these recommendations is dealt with below.

Corruption prevention in respect of members of parliament

6. The authorities of Germany indicate that on 3 December 2014, the Federal Minister of Justice and Consumer Protection sent a letter to the President of the *Bundestag* (the national Parliament), along with GRECO's Evaluation Report and informing him of the recommendations issued with respect to Germany. The President of the *Bundestag*, in his reply of 14 March 2016, reported on the measures taken to implement the recommendations.
7. Namely, GRECO's recommendations concerning members of parliament had been deliberated during meetings of the Council of Elders' Commission for the Legal Status of Parliamentarians on 27 March 2015, representatives of the Internal Affairs Committee on 27 January 2016, the Committee for Scrutiny of Elections, Immunity and the Rules of Procedure on 18 February 2016. The outcome of those discussions and further measures are detailed under the individual recommendations below.

Recommendation i.

8. *GRECO recommended that the transparency of the parliamentary process be further improved, e.g. by introducing rules for members of parliament on how to interact with lobbyists and other third parties seeking to influence the parliamentary process.*

9. The authorities refer, firstly, to the discussions held by the three relevant parliamentary bodies (cf. paragraph 7 above). In particular, the Committee for Scrutiny of Elections, Immunity and the Rules of Procedure stressed that the transparency of the parliamentary process would continue to be the subject of political debate, both in the plenary sessions and in committees. At the same time, the Committee stated that the majority of its members did not wish to follow GRECO's recommendations.
10. On 18 February 2016, the Committee of Elders framed the rules with regard to the access of interest groups to properties of the *Bundestag* in a more restrictive manner: i.e. identification cards allowing access to the building would only be issued to interest group representatives from associations that are registered pursuant to Annex 2 to the Rules of Procedure of the *Bundestag* and have a representative office at the seat of the *Bundestag*. The maximum number of identification cards per association was reduced from five to two. Representatives from interest groups, companies or other organisations that are not registered on the list of associations would therefore no longer receive access to the building. Furthermore, the Berlin Administrative Court decided in June 2015 that on the basis of the Freedom of Information Act, anyone has the right to receive information from the *Bundestag* regarding the number of identification/access cards issued to association representatives and the names of those organisations.¹ The decision was confirmed in the second instance² and is final.
11. Finally, the authorities indicate that, since April 2016 – on the basis of an internal directive – statements by stakeholders (including lobby groups) interested in a legislative proposal under the responsibility of the Federal Ministry of Justice and Consumer Protection have systematically been made publicly available at the Ministry's website ("legislative footprint").³
12. GRECO acknowledges that transparency of lobbying has been enhanced to some extent, in particular, by limiting permanent access to the *Bundestag* premises by representatives of interest groups to those associations which are registered on the list of associations kept by the President of the *Bundestag*. It also welcomes the clarification, by court decision, that any citizen has the right to obtain information on the associations concerned. That said, GRECO wishes to stress that those measures only partly address the different concerns underlying the recommendation. For example, the Evaluation Report refers to outsourcing of the preparation of draft legislation, without such processes being made public; lack of transparency on the involvement of interest groups, enterprises and other private players in the preparation of concrete legislative acts and of the influence exerted by such stakeholders on lawmakers during the legislative process; late publication, in some instances, of draft legislation in the final stages of the law-making procedure; several shortcomings regarding the list of associations kept by the President of the *Bundestag*, which is voluntary and excludes other private players such as enterprises, self-employed lobbyists, lawyers, think tanks, etc.
13. The Evaluation Report includes a number of examples of how those concerns could be addressed, ranging from a "legislative footprint" i.e. a written trace of comments made by stakeholders that are taken into account in the drafting process – which by that time turned out to already be part of the German academic debate – to measures such as "making registration of lobbyists compulsory, requiring MPs to disclose their contacts with third parties in relation to draft legislation (as described above), introducing rules of conduct for the third parties concerned – as well as for

¹ Cf. Berlin Administrative Court, judgment of 18 June 2015 – VG 2 K 176.14.

² The *Bundestag* Administration had appealed against the decision by the Berlin Administrative Court.

³ See, for example, <http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/CSR-Richtlinie-Umsetzungsgesetz.html>

MPs, so as to provide guidance on how to deal with third parties seeking to influence MPs' work, and to actively promote transparency in this area." Even though the recommendation does not specifically require that all those possible measures are taken, it is clear that much more needs to be done to address the above-mentioned concerns. The reported publication of statements by stakeholders interested in draft legislation under the responsibility of the Federal Ministry of Justice and Consumer Protection is a first – although limited – step in that direction. GRECO would welcome other ministries following that example and also it being made clear which comments were taken into account in the drafting process.

14. GRECO concludes that recommendation i has been partly implemented.

Recommendation ii.

15. *GRECO recommended (i) that a requirement of ad hoc disclosure be introduced when a conflict between specific private interests of individual members of parliament may emerge in relation to a matter under consideration in parliamentary proceedings – in the Bundestag plenary or its committees – independently of whether such a conflict might also be revealed by members' declarations of activities and income; and (ii) that members of parliament be provided written guidance on this requirement – including definitions and/or types of conflicts of interest – as well as advice on possible conflicts of interests and related ethical questions by a dedicated source of confidential counselling.*

16. The authorities report that at their meeting of 27 January 2016, the representatives of the Internal Affairs Committee determined that the responsible bodies needed more time to consult on the recommendations. The Committee for Scrutiny of Elections, Immunity and the Rules of Procedure, for its part, concluded at its meeting of 18 February 2016 that the majority of its members did not wish to follow GRECO's recommendations. As a complement, the authorities draw attention to already existing disclosure requirements under Rules 3 and 6 of the Code of Conduct for Members of the German *Bundestag*, which in their view have proven effective to meet any expectations on a legal requirement of *ad hoc* disclosure.

17. GRECO takes note of the information provided with regard to discussions held by relevant parliamentary committees. It is concerned that two and a half years after the adoption of the Evaluation Report, no concrete steps have been taken in view of the implementation of this important recommendation. GRECO wishes to stress that the existing rules of the Code of Conduct, to which the authorities refer, had already been examined in detail in the Evaluation Report and found insufficient to ensure transparency of actual or potential conflicts of interest. The authorities are urged to speed up the process and to present tangible results.

18. GRECO concludes that recommendation ii has not been implemented.

Recommendation iii.

19. *GRECO recommended (i) that the existing regime of declarations of interests be reviewed in order to extend the categories of information to be disclosed to include, for example, information on significant assets – including shareholdings in enterprises below the current thresholds – and significant liabilities; and (ii) that consideration be given to widening the scope of the declarations to also include information on spouses and dependent family members (it being understood that such information would not necessarily need to be made public).*

20. The authorities indicate that at its meeting of 27 March 2015, the Council of Elders' Commission for the Legal Status of Parliamentarians rejected the idea of extending

disclosure requirements to assets and liabilities, as well as that of extending them to family members. Similarly, the Committee for Scrutiny of Elections, Immunity and the Rules of Procedure concluded at its meeting of 18 February 2016 that the majority of its members did not wish to follow GRECO's recommendations. Specifically, the members stated that all parliamentary groups had constitutional reservations against a renewed extension of existing disclosure requirements, which had been expanded in 2013 following lengthy debate, to include information on significant assets or liabilities, as well as on the financial situation of family members. In the opinion of the committee members, this type of legal change would unjustifiably interfere with the free mandate, as well as with the fundamental rights of third parties. The authorities add that in their view, any publication of assets or liabilities would disproportionately infringe on the right to privacy and, on these grounds, be unconstitutional; to an even greater extent this would apply to family members. It is planned to prepare a legal analysis of those questions which would take into account the legal framework provided by the European Convention on Human Rights, the Constitution of Germany and the Code of Conduct for Members of the German *Bundestag*. Finally, the authorities stress that economic relations of members of parliament with third parties (ancillary activities, contributions/donations or stakes in enterprises) are being published above certain thresholds, which in their view already ensures disclosure of all relevant actual or potential conflicts of interests to the public.

21. GRECO takes note with concern of the information provided, according to which the relevant parliamentary bodies reject any further extensions of the disclosure requirements. The mere fact that the declaration regime has already been amended in the past cannot justify the blockage of any future reforms. As far as the constitutional reservations raised by the authorities are concerned, not even concrete proposals on possible amendments to the declaration regime coupled with a legal analysis have been presented. GRECO looks forward to the legal analysis which is now planned. It is convinced that adequate solutions can be found, bearing in mind that many other European countries have found ways to balance the conflicting rights and interests – e.g. by ensuring that some of the information declared by MPs is not made public. GRECO is of the firm opinion that more needs to be done to ensure transparency of actual or potential conflicts of interest, as described in the Evaluation Report and in line with GRECO's standing practice. In the current absence of any tangible results, GRECO concludes that the first part of the recommendation has not been implemented.
22. The situation is somewhat different as regards the second part of the recommendation, since it only requires *that "consideration be given to widening the scope of the declarations to also include information on spouses and dependent family members"*. In line with its standing practice regarding this type of recommendation, GRECO takes account of the fact that the matter has been discussed by the relevant parliamentary bodies and has been documented; on the other hand, GRECO would expect more in-depth examination of possible legal solutions, possibly with the involvement of appropriate (expert) institutions/individuals. It therefore concludes that the second part of the recommendation has been partly implemented. Finally, GRECO wishes to stress that its recommendations aimed at enhancing transparency through more comprehensive disclosure obligations – including MPs' interests as well as significant assets and liabilities – are a cornerstone of the Fourth Evaluation Round with respect to MPs. GRECO therefore invites the authorities to step up their efforts on this matter with a view to presenting concrete results.
23. GRECO concludes that recommendation iii has been partly implemented.

Recommendation iv.

24. *GRECO recommended that appropriate measures be taken to ensure effective supervision and enforcement of the current and future declaration requirements, rules on conflicts of interest and other rules of conduct for members of parliament, inter alia, by strengthening the personnel resources allocated by the Bundestag Administration.*
25. The authorities report that the Council of Elders' Commission for the Legal Status of Parliamentarians discussed the recommendation at its meeting of 27 March 2015 and that an additional position has been applied for the *Bundestag* administration to improve supervision and enforcement of the rules of conduct. The authorities add that in their view, the existing supervisory mechanism works well, given that political opponents seek to highlight any misbehaviour and therefore only very few MPs actually do not comply with the rules.
26. GRECO notes that an application has been made to increase the number of staff of the *Bundestag* Administration from two to three. While this initiative is clearly to be welcomed, GRECO cannot conclude – at this early stage – that the recommendation has even been partly implemented. GRECO would also expect a broader approach to possible reforms of the administrative control system. It recalls that in the Evaluation Report, a need for reform had been identified and several possible measures had been indicated by way of example, such as providing the monitoring mechanism with investigative powers (e.g. to commission experts, summon witnesses), ensuring that the declarations submitted are scrutinised beyond the information that MPs themselves provide, considering entrusting an independent commission with supervisory functions.
27. GRECO concludes that recommendation iv has not been implemented.

Corruption prevention in respect of judges

Recommendation v.

28. *GRECO recommended i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments and/or practical examples, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all judges and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling for both professional judges and lay judges. The Länder are to be invited to contribute to such a process.*
29. With regard to the first part of the recommendation, the authorities indicate that the ethical and professional standards applicable to judges – and public prosecutors – as governed in the respective factual context and therefore “scattered” across various legal acts, have been collated into a comprehensive compendium. The *Länder* participated in the process by forwarding the rules valid at the *Land* level. The compendium thus includes rules both at the level of constitutional and federal law and at the level of all 16 of the federal *Länder*; it covers questions of conduct in office, conflicts of interest, secondary activities, bans on accepting rewards, gifts or other benefits, and corruption prevention in general. The compendium has therefore become quite extensive (more than 500 pages). The authorities stress nonetheless that it is easy to handle because of its clear structure. For example, the reader can look up in a targeted manner the rules which apply to him/her based upon the *Land* in which s/he works.

30. The authorities stress that this comprehensive overview of existing ethical and professional standards, which has been compiled for the first time, has been made available both to the public and to legal practitioners. It has been forwarded to the federal courts, the federal prosecutor general's office, and the *Land* justice administrations with the request to make it available to judges and public prosecutors; it has also been published as an easy to handle online version on the website of the Federal Ministry of Justice and Consumer Protection.⁴
31. As far as the second part of the recommendation is concerned, the authorities report that the compendium also contains explanatory comments and/or practical examples. It furthermore includes a large number of various administrative provisions and guidelines (both at the federal and *Länder* levels), which generally include comprehensive codes of conduct and a number of example cases and explanations of typical factual constellations, in the fields of corruption, sponsoring and conflicts of interest. Additional explanations or comments have been added in places where it appeared helpful to aid understanding of the rules and/or the compendium.
32. The authorities go on to state that the existing rules governing ethical and professional standards and associated topics are the subject of targeted and multi-faceted advanced training measures. An extensive list of training activities for judges (and prosecutors), both at the federal and *Länder* levels, has been made available to GRECO. The German Judicial Academy (DRA), an advanced training facility for judges and public prosecutors jointly operated by the federation and the *Länder*, is open to judges from all jurisdictions and public prosecutors throughout Germany; it regularly offers seminars, many with an interdisciplinary approach, which address the topic of ethical and professional conduct. Additionally, the *Länder* offer their own advanced training in this area. These events will continue to take place in the future and will therefore contribute to implementation of the rules contained in the compendium. The compendium will now serve seminar leaders as a tool to carry out their events, in addition to providing support to their participants. Moreover, the authorities indicate that there are contact persons for corruption prevention, both at the federal and *Länder* levels, whose work will also be aided by the compendium and the information it contains. Finally, the authorities refer to guidance provided to lay judges in the form of written guidelines and introductory sessions in different *Länder*.
33. GRECO very much welcomes the elaboration of the compendium of existing rules for judges' – and public prosecutors' – ethical/professional conduct. The compendium is an impressive document which provides a comprehensive overview of existing standards, as recommended. GRECO acknowledges that all the *Länder* have been involved in its development and that it has been distributed and made available to both legal practitioners concerned and to the public at large. Moreover, it is noteworthy that this document includes practical examples, guidelines and comments. GRECO also notes with satisfaction that the compendium now serves as a basis for training on ethical and professional conduct, which is provided to judges – and public prosecutors – on a regular basis, and for counselling by contact persons for corruption prevention. Finally, it notes that guidance on questions of conduct is also provided to lay judges. GRECO encourages the authorities to continue and further develop training and counselling on matters of ethics and conduct for judges at the federal and *Länder* levels, including for lay judges, and to keep the compendium updated in the future.
34. GRECO concludes that recommendation v has been implemented satisfactorily.

⁴ See http://www.bmju.de/SharedDocs/Downloads/DE/Fachinformationen/Kompendium_von_Regelungen_in_Bund_und_Laendern_%C3%BCber%20das_berufsethische_Verhalten_von_Richtern_und_Staatsanwaelten_Web.pdf?__blob=publicationFile&v=2 (German only).

Recommendation vi.

35. *GRECO recommended that appropriate measures be taken with a view to enhancing the transparency and monitoring of secondary activities of judges. The Länder are to be invited to contribute to such a reform process.*
36. *The authorities report that the topic of secondary activities of federal judges has been raised several times. In addition to a meeting held with the Presidents of the superior federal courts, the topic was also discussed in autumn 2015 among the justice state secretaries of the Federation and the Länder. It became clear there that the legal situation varies greatly even in the Federation and among the Länder, and that given the federal structure of Germany, it would likely not be possible to achieve a uniform rule – even just among the Länder. The justice state secretaries agreed to again raise the topic in the course of their 2016 autumn meeting. This has apparently not led to any concrete initiatives.*
37. *Additionally, a review carried out by the Federal Ministry of Justice and Consumer Protection found that there is little room to further restrict the legal framework conditions with regard to secondary activities of federal judges. This was explained by the constitutional protection of freedom of opinion and academic freedom, and by the case law of the highest German jurisdictions. Inter alia, the Federal Administrative Court has held unconstitutional an obligation to hand over income earned through secondary activities in the private sector.*
38. *The authorities conclude that measures to promote more effective application of the existing law promise greater success. They add that the Court of Audit (Bundesrechnungshof) carried out a review of side activities at a high-level federal court within the remit of the Federal Ministry of Justice and Consumer Protection. Currently, its report is being analysed. Further, it can be noted that side activities of judges of different courts have recently triggered a broad public debate.*
39. *GRECO takes note of the information, according to which the topic of secondary activities of judges and possible further restrictions in this area have been discussed at different levels. GRECO wishes to stress that the recommendation was mainly aimed at enhancing transparency and monitoring of secondary activities (rather than introducing additional restrictions). It would appear that the authorities have started to explore possible measures to reach that aim. However, in the present absence of any concrete achievements, GRECO cannot conclude that the recommendation has even been partly implemented.*
40. *GRECO concludes that recommendation vi has not been implemented.*

Corruption prevention in respect of prosecutors

Recommendation vii.

41. *GRECO recommended (i) that consideration be given to abolishing the right of Ministers of Justice to give external instructions in individual cases; and, in case this right is not abolished, (ii) that further appropriate measures be taken to ensure that such instructions by Ministers of Justice carry with them adequate guarantees of transparency and equity and – in case of instructions not to prosecute – are subject to appropriate specific control. The Länder are to be invited to contribute to such a reform process.*
42. *The authorities report that the recommendation was subject to an extensive review by the Federal Ministry of Justice and Consumer Protection. The Länder had been requested to take a position in writing on the recommendation and have done so.*

As regards more particularly the first part of the recommendation, aimed at abolishing the justice ministers' right to issue external instructions in individual cases, the position statements of the *Länder* and of professional associations and interest groups⁵ were evaluated and included in the review, as well as the results of a Federation-*Länder* Commission to analyse judicial autonomy in Europe.⁶ The latter did not identify any fundamental need for reform and stressed that due to the many differing models of judicial self-administration in Europe, a uniform assessment of various justice models is not possible. Similarly, most of the *Länder* saw no need to act because the right to issue external instructions in specific cases is exercised rarely in practice and is already limited, in particular, by the principle of mandatory prosecution. In addition, constitutional reservations were raised, given that the respective justice ministers are accountable to parliament for the actions of the public prosecutors' offices.

43. Against that background, the authorities decided to implement the recommendation by creating appropriate guarantees of transparency and fairness. It is to be noted that professional associations which submitted detailed position statements on the Evaluation Report, and on recommendation vii in particular,⁷ also advocated for the introduction of further measures to ensure transparency and equity, including the requirement that all instructions in individual cases be written and reasoned. Several *Länder* have already initiated measures in this regard, e.g. in North Rhine-Westphalia,⁸ Berlin and Schleswig-Holstein. Implementation at the federal level has been prepared, taking into account the transparency rules in effect in other states. On 13 December 2016, a revised version of the decree of the Federal Ministry of Justice and Consumer Protection regarding the reporting obligations of the Federal Prosecutor General entered into force. In order to ensure that instructions are transparent and revisable, the decree now provides that any instructions by the Federal Ministry of Justice and Consumer Protection to the Federal Prosecutor General must now always be issued in written form. This was previously not explicitly regulated.⁹ The revised decree further points out that the right to issue external instructions is subject to legal limitations and is generally exercised by the Federal Ministry of Justice and Consumer Protection in a restrictive manner. Any such instructions would have to become part of the file.
44. GRECO acknowledges that the recommendation has been reviewed by the Federal Ministry of Justice and Consumer Protection, with the involvement of the *Länder*, of professional associations and interest groups and of a Federation-*Länder* Commission to analyse judicial autonomy in Europe. The reservations against abolishing the justice ministers' right to issue external instructions in individual

⁵ The following professional associations and interest groups had been invited by the Federal Ministry of Justice and Consumer Protection to state their position on the recommendation: Deutsche Juristinnenbund e.V. (German Female Lawyers' Alliance), Deutscher Richterbund e.V. (German Association of Judges), Neue Richtervereinigung e.V. (New Association of Judges), Deutscher Anwaltverein e.V. (German Lawyers' Association), Bundesrechtsanwaltskammer (German Federal Bar Association), Wirtschaftsstrafrechtliche Vereinigung e.V. (Association on Financial and Economic Offences), Bundesverband ehrenamtlicher Richterinnen und Richter (Federal Alliance of Volunteer Judges), ver.di (United Service Industry Trade Union).

⁶ "Albrecht Commission", under the academic supervision of Prof. Dr. Albrecht.

⁷ Namely, the Deutscher Anwaltverein e.V. (German Lawyers' Association) and the Wirtschaftsstrafrechtliche Vereinigung e.V. (Association on Financial and Economic Offences)

⁸ Cf. the "Ten Guidelines on Exercising the Authority to Issue Instructions to the Public Prosecutor's Offices in North Rhine-Westphalia", with which the Justice Minister obligates him/herself as a general rule to refrain from making use of his/her authority to issue instructions in pending investigation proceedings. The only exception to this is when the responsible public prosecutor general improperly refrains from intervening even if the prosecutor's office handles a case in a manner amounting to an error of law. However, according to the guidelines, such an instruction may be issued only in writing and is to be directed to the public prosecutor general, who checks its lawfulness before forwarding it to the prosecutor who has committed the error.

⁹ It is to be noted, however, that section 63 (2), fifth sentence of the Federal Civil Service Act already previously provided that the confirmation of an instruction (following remonstrance, i. e. an objection by a civil servant to an instruction given by his/her superior) had to be issued in written form upon request of the subordinate civil servant – which would include a public prosecutor.

cases – which was the subject of the first part of the recommendation – are mainly based on arguments already referred to in the Evaluation Report (rare occurrence in practice, principle of mandatory prosecution, etc.). GRECO wishes to recall the concerns expressed in the Evaluation Report about phenomena such as anticipatory obedience and influence on the prosecution by ministers in more subtle ways than express instructions. That said, this part of the recommendation has nevertheless been implemented as it has been duly considered.

45. As far as the second part of the recommendation is concerned, GRECO acknowledges that, by revising the decree regarding the reporting obligations of the Federal Prosecutor General – including by requiring written form of any instructions by the Federal Ministry of Justice and Consumer Protection to the Federal Prosecutor General – further measures have been taken to increase transparency and fairness of instructions, in addition to those already in place at *Länder* level. At the same time, it encourages the authorities to keep under review the question of whether additional measures are necessary such as those suggested in the Evaluation Report (e.g. requiring Government to seek prior written advice from the competent public prosecutor and to duly explain its written instructions, or to subject instructions not to prosecute to an appropriate specific control) and whether appropriate guarantees of transparency and fairness are in place in all the *Länder*.
46. GRECO concludes that recommendation vii has been implemented satisfactorily.

Recommendation viii.
47. *GRECO recommended i) that a compendium of the existing rules for ethical/professional conduct – accompanied by explanatory comments and/or practical examples specifically for public prosecutors, including guidance on conflicts of interest and related issues – be developed, communicated effectively to all public prosecutors and made easily accessible to the public; and ii) that it be complemented by practical measures for the implementation of the rules, including dedicated training and confidential counselling for all public prosecutors. The Länder are to be invited to contribute to such a process.*
48. The authorities refer to the information provided under recommendation v with respect to judges, which is relevant to public prosecutors as well. Namely, the compendium of existing rules for public prosecutors’ – and judges’ – ethical/professional conduct has been elaborated, with the participation of the 16 *Länder*; it has been distributed and made available to both legal practitioners concerned and to the public at large; it includes practical examples, guidelines and comments; and it now serves as a basis for training on ethical and professional conduct, which is provided to public prosecutors – and judges – on a regular basis, and for counselling by contact persons for corruption prevention
49. GRECO very much welcomes the elaboration, distribution, publication and use (e.g. during regular training sessions and by contact persons for corruption prevention) of the compendium of existing rules for public prosecutors’ – and judges’ – ethical/professional conduct. It refers to the positive assessment it made in this respect above under recommendation v.
50. GRECO concludes that recommendation viii has been implemented satisfactorily.

III. CONCLUSIONS

51. In view of the foregoing, GRECO concludes that Germany has implemented satisfactorily or dealt with in a satisfactory manner three of the eight recommendations contained in the Fourth Round Evaluation Report. Of the remaining recommendations, two have been partly implemented and three have not been implemented.
52. More specifically, recommendations v, vii and viii have been implemented satisfactorily, recommendations i and iii have been partly implemented and recommendations ii, iv and vi have not been implemented.
53. With respect to members of parliament, GRECO notes that its recommendations were deliberated during several meetings of relevant parliamentary bodies but met with some resistance – in particular as regards further extensions of the declarations of interest to be submitted by parliamentarians. GRECO wishes to stress that its recommendations aimed at enhancing transparency through additional disclosure obligations – including parliamentarians' interests as well as significant assets and liabilities – are a cornerstone of the Fourth Evaluation Round. On a positive note, transparency of lobbying has been enhanced to some extent, in particular, by limiting permanent access to the *Bundestag* premises by representatives of interest groups to those associations which are registered on the list of associations kept by the President of the *Bundestag*. That said, much more needs to be done to increase transparency of the parliamentary process in a more comprehensive sense. All in all, little tangible progress has been achieved. More determined action is also needed to regulate conflicts of interest more closely and to ensure effective supervision and enforcement of the different rules of conduct for members of parliament.
54. As far as judges and prosecutors are concerned, the elaboration of a comprehensive compendium of existing rules for judges' and public prosecutors' ethical/professional conduct – as complemented by practical examples, guidelines and comments – is to be welcomed. The compendium has been made available to the public at large and now serves as a basis for training and counselling provided to judges and public prosecutors. Some measures have also been taken to ensure that external instructions by Ministers of Justice in individual cases carry with them adequate guarantees of transparency and equity. At the same time, the authorities are encouraged to keep this matter under review in order to ascertain possible needs for further reform. Moreover, the authorities are invited to step up their efforts to enhance transparency and monitoring of judges' secondary activities.
55. In view of the above, GRECO notes that in the current absence of final achievements in respect of a number of recommendations, further significant material progress is necessary to demonstrate that an acceptable level of compliance with the recommendations within the next 18 months can be achieved. However, bearing in mind that several positive measures have already been taken and on the understanding that the German authorities will further pursue their efforts, GRECO concludes that the current low level of compliance with the recommendations is not "globally unsatisfactory" in the meaning of Rule 31, paragraph 8.3 of GRECO's Rules of Procedure. GRECO invites the Head of delegation of Germany to submit additional information regarding the implementation of recommendations i, ii, iii, iv and vi by 30 September 2018.
56. Finally, GRECO invites the authorities of Germany to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.

Germany: Additional submission in preparation of the 8th meeting of the UNCAC working group on prevention; subject: Integrity in criminal justice institutions (Arts. 7, 8 and 11)

I. Abstract:

This paper presents efforts made by German development cooperation to exchange experiences with and build awareness in partner countries of existing national and international standards of judicial integrity, especially with focus on the Bangalore Principles on Judicial Conduct and Article 11 of the UN Convention against Corruption (UNCAC). This extends to the evaluation of the judiciary in selected countries and contributions to improve transparency, accountability and efficiency in procedures of the judiciary sectors of selected partner countries by using the Judicial Integrity Scan, a tool developed by the German Development Agency GIZ. Through risk assessment, comparative analysis and interviews the scan assessed the integrity and effectiveness of the judiciary and court system more broadly, including by soliciting inputs from court users and other stakeholders. The Scan to date was executed in five countries (Georgia, Cote D'Ivoire, Bhutan, Mongolia and Kyrgyzstan). Furthermore, the paper refers to a more recent peer exchange event in Costa Rica in April 2017. The valuable exchange among members of the judiciaries and international organisations illustrates the German support for facilitated dialogue between different specialists of the judicial sector. Germany welcomes the invitation of the Working Group for experience exchange with other State Parties and is looking forward to a productive discussion and exchange on tools and means to achieve judicial integrity.

II. Background:

The Working Group had recommended at its second intersessional meeting that in advance of each future meeting of the Working Group, States parties should be invited to share their experiences of implementing the provisions under consideration, where possible, including e.g. successes, challenges, technical assistance needs, and lessons learned in implementation (CAC/COSP/WG.4/2011/4, paragraph 12).

In this regard States parties and signatories to the Convention were requested to provide pertinent information on their relevant initiatives and practices in relation to topic on integrity in criminal justice institutions to the Secretariat for discussion at the eighth intersessional Working Group meeting as outlined above. With this submission Germany would like to provide information on its work on integrity in the judicial sector (including criminal justice) in relation to Article 11 and measures to promote the independence, integrity and impartiality of members of the judiciary.¹ Especially experiences made with its approach to strengthen judicial integrity through development cooperation with its partner countries shall be the focus of this submission.

III. Introduction:

Corruption is one of the major obstacles to development. It constitutes a risk to democracy and creates legal uncertainty, thus deterring foreign investment. Peace, justice and effective, accountable and inclusive institutions are at the core of sustainable development (Agenda 2030). From the standpoint of the vulnerability to corruption and of its social impact, the justice system remains one of the most sensitive and visible areas in this respect. Fostering

¹ The work and projects introduced in this submission derives solely from the Sector Programme Anti-Corruption and Integrity of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and can only present a fragment of GIZ's work in the judicial sector. For more information on the sector programme, see here: <https://www.giz.de/expertise/html/5392.html>. For more information on GIZ's work in the judicial sector see for example U4 Issue No 3 from February 2016, Mapping anti-corruption tools in the judicial sector, available here: <http://www.u4.no/publications/mapping-anti-corruption-tools-in-the-judicial-sector/downloadasset/3971>.

Germany: Additional submission in preparation of the 8th meeting of the UNCAC working group on prevention; subject: Integrity in criminal justice institutions (Arts. 7, 8 and 11)

integrity and the independence of the judiciary are essential to fighting corruption – not only within the judiciary, but also in other sectors. This means the judiciary must respect integrity standards if they want to effectively combat corruption. The importance of rule of law, including an impartial, functioning judiciary, is crucial for the success of any work in sustainable development. Widespread corruption within the judicial sector further contributes to the limitation of courts to limit the excesses of the executive and legislative branches of government. Nonetheless, especially judicial reform is often undervalued by donors who consider such interventions as, first, sensitive, especially when it comes to addressing corruption within the judiciary, and second, tedious, because of the technical nature of reforms.²

In their social function judges and courts must not only deliver justice but also uphold and protect the values and integrity of the state. To do this effectively the judicial sector must be independent from other organs of state, such as the government and the parliament. Tools that are designed to increase the accountability or make the internal workings of the judicial sector more transparent must take into account the constitutional requirement that the judiciary be independent from the influence of the executive and legislative branches and to the ethical principle that judges must adjudicate without being subject to inappropriate influences.³

IV. Support of the Judicial Integrity Group and the Bangalore Principles

Germany has been supporting the Judicial Integrity Group together with UNODC since 2005. The Judicial Integrity Group is an independent group of high ranking judges from both developing and industrialised countries who have been striving to improve the level of judicial integrity since 2000. The objectives of the Group are to formulate and develop the concept of judicial accountability, to design mechanisms which can be used by the judiciary to strengthen the integrity of the judicial system, to formulate and promote standards, guidelines and instruments relating to vital aspects of the judicial system, and to assist in the implementation of measures of judicial reform which are demonstrably effective in fighting against corruption within justice systems.

Following a broad consultation process, the Group in 2001 adopted the Bangalore Principles of Judicial Conduct. These Principles have been acknowledged as an international standard for judicial integrity and were recognised and promoted by the UN Economic and Social Council in its resolution 2006/23. Not only have some States adopted the Bangalore Principles but others have modelled their own Principles of Judicial Conduct on them (e.g. Georgia, Belize and Scotland). Furthermore, the Kyrgyz Republic for example adopted a Code of Ethics for judges, which explicitly refers to the Bangalore Principles. As of today, these principles are already part of the examination of candidates for the office of judge.

Furthermore, the Judicial Integrity Group has developed a Commentary on the Bangalore Principles (2007), Measures for the Effective Implementation of the Bangalore Principles (2010) and Principles of Conduct for Court Personnel (2005). The UNODC's "Implementation Guide and Evaluative Framework for Article 11 UNCAC complement these efforts. This set of documents forms a comprehensive basis for an integrity-based legal reform discussion.

Inter alia, Germany has funded the development of the Commentary and the Implementation Measures as well as the fifth meeting of the Group in Vienna (2007) and the sixth meeting in Lusaka (2010). Germany also designed and developed the website of the Group which was

² See also U4 Issue No 3 from February 2016, p. 1, Bergen, Norway: U4 Anti-Corruption Resource Centre.

³ *Ibid.* p. 4.

Germany: Additional submission in preparation of the 8th meeting of the UNCAC working group on prevention; subject: Integrity in criminal justice institutions (Arts. 7, 8 and 11)

launched in January 2012.⁴ Furthermore, Germany organised the seventh meeting of the Group held near Munich in October 2012 and organised several regional and national workshops to promote judicial integrity and the Bangalore Principles (see e.g. the Conference in Costa Rica, p. 5). Projects of German development cooperation (e.g. in the South Caucasus, in Central Asia) have started to apply the Bangalore Principles to improve the quality of the justice systems in partner countries.

V. Development of the Judicial Integrity Scan

In order to examine the judiciary's compliance with integrity standards, the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH working on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) in 2012 has developed the Judicial Integrity Scan. The Scan assesses the legal and institutional framework of a country, particularly with regards to the Bangalore Principles of Judicial Conduct and Article 11 UNCAC. It helps to gather data on the institutional framework, the legal provisions and their implementation, and civil society's perception of the judiciary in order to draw-up recommendations on integrity building measures.

The Judicial Integrity Scan, meanwhile a firmly established tool of German development portfolio, assesses the legal and institutional framework of a country, particularly with regards to the Bangalore Principles of Judicial Conduct and Article 11 of the United Nations Convention against Corruption. It helps to gather data on the institutional framework, the legal provisions and their implementation, and civil society's perception of the judiciary in order to draw-up recommendations on integrity-building measures.

The primary aim of the Scan is to identify gaps and to provide entry points for integrity based reform efforts targeted at enhancing judicial integrity. It can also be used to complement and prepare UNCAC-self assessments. Germany conducted the Scans in Georgia (2012), Cote d'Ivoire (2013), Bhutan (2015), Mongolia and Kyrgyz Republic (2016).

VI. Scan Methodology

The Judicial Integrity Scan follows a three step approach. First, there is a desk study accompanied by a questionnaire. Local experts give answers to questions concerning the legal framework of the judiciary, which is relevant for judicial integrity. Then, based on the findings of this desk study, a mission to the country takes place, beginning with interviews of stakeholders. The aim of the interviews is to verify the findings of the desk study and to learn how the interviewed groups perceive and assess the situation as regards judicial independence and integrity. This mission may be finalised by a round table, which allows participants to discuss preliminary conclusions. Finally, the results of the interviews and the findings of the desk study will be combined in a report, which provides the overall picture. The recommendations of this report are thought to be a contribution to the discussion of judicial integrity. This can also be used to design projects or tailored measures to address potential areas for improvement.

The scan doesn't claim to be a thorough investigation. In addition, it does not intend to set up a ranking system. This would be impossible as regards judicial integrity. To a large extent, our report relies upon investigations and assessments, which have been done by others. The advantage of the Integrity Scan is based on its method i.e. to look at the judiciary from two sides: from the side of the state, and from within the judiciary itself. Judges and other legal professions are invited to talk about ways how to improve the situation, and discuss judicial

⁴ See here: www.judicialintegritygroup.org

Germany: Additional submission in preparation of the 8th meeting of the UNCAC working group on prevention; subject: Integrity in criminal justice institutions (Arts. 7, 8 and 11)

integrity as an important part of judicial reform. At the same time, they are confronted with questions about the legal framework.

Such a cooperative approach is especially obvious in the phase when judges and other stakeholders are interviewed and the preliminary results are discussed at a round table. Although this phase lasts for only one week, it can be quite impressive to hear about the state of the judiciary from various points of view at such a dense time. We are hopeful that our findings and assessments will reflect this.

Based on the “Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct”⁵ and the “Implementation Guide and Evaluative Framework for Article 11 UNCAC, the GIZ drafted a questionnaire that aims at assessing the legal and institutional framework for judicial integrity in the relevant country. Just like the Bangalore Implementation Measures, the questionnaire covers the following areas:

- Responsibilities of the judiciary (i.e. Formulation of a Statement of Principles of Judicial Conduct, Application and Enforcement of Principles of Judicial Conduct, Assignment of Cases, Court Administration, Access to Justice, Transparency in the Exercise of Judicial Office, Judicial Training, Advisory Opinions and Immunity of Judges)
- Responsibilities of the State (i.e. Constitutional Guarantee of Judicial Independence, Qualifications for Judicial Office, the Appointment of Judges, Tenure of Judges, Remuneration of Judges, Discipline of Judges, Removal of Judges from Office and the Budget of the Judiciary).

VII. Experiences made with the Scan

Countries that used the scan where either approached because of long standing relationship with partners from both the judiciary and civil society in the respective countries or, furthermore, political will was utilized where governments have demonstrated that they are determined to fight corruption and to support reforms to improve transparency and integrity.

Results of the Scan showed where requirements related to the legal and institutional framework were fulfilled, where gaps with regard to comprehensive codes for court personnel’s conduct existed, system of corrupt practices had affected the judiciaries and where justice systems were found to be largely adhering to the values of Independence, Impartiality, Integrity, Propriety, Equality and Competence and Diligence as enshrined in the Bangalore Principles. Interviews with stakeholders and national judges were able to reveal (in part) where those principles in criminal or administrative proceedings might be askew with favouring state policies or institutions. Ongoing legal reforms to improve the transparency and quality of the judiciary or trainings for judges on judicial conduct were accessed and potentially adjusted according to recommendations made. Furthermore, the scan was able to identify needs for financial resources to support access to law by citizens e.g. through fees that are requested for beginning any criminal proceedings. Most interviewees in all scans displayed strong commitment to tackle corruption in the judicial sector. Finally, the scan helped to identify where collaboration with German development cooperation could be fruitful in future endeavours.

VIII. Conference on Judicial Ethics and the fight against Corruption:

There is a broad consensus that corruption in the court system is to be addressed. The need to develop a set of adequate corruption-combating policies in the justice system, nowadays, finds itself reflected in a comprehensive international legal framework, a body of

⁵ Available on <http://www.judicialintegritygroup.org/index.php/jig-resources/jig-documents>.

Germany: Additional submission in preparation of the 8th meeting of the UNCAC working group on prevention; subject: Integrity in criminal justice institutions (Arts. 7, 8 and 11)

jurisprudence as well as transnational model laws like the Bangalore Principles of Judicial Conduct and the Ibero-American Model Code of Judicial Ethics and its specialized bodies, the Judicial Group Integrity Group and the Ibero-American Ethics Commission. It is to that extent that practitioners that work in this field⁶ and experts from the United Nations System, Organization of American States, programmes of German cooperation as well as Judicial Group Integrity Group and the Ibero-American Ethics Commission shared their experience in respect to the long term impact of mechanisms to balance between the afore mentioned values of judicial ethics, independence and measures of judicial accountability.⁷ The conference took place in the premises of the Inter-American Court of Human Rights.

The conference allowed for professional exchange between the attendees and included comparison of regional legal similarities, developments and differences to work out challenges for the future, and discuss possible future collaboration (especially peer-to-peer learning) beyond existing regional boundaries. In addition, the strategic exchange with international partners such as UNODC and the planned Global Judicial Integrity Network were considered to be an integral part to assist judiciaries across the globe in strengthening judicial integrity and preventing corruption in the justice sector.⁸

IX. Expressed interest on further collaboration in the field of judicial integrity:

The aim of future exchange should be to find out which reforms are successful and which tools are being applied in the judicial sector specifically including obstacles to their implementation. Today there is still only a partial picture where and what support exactly is needed due to yet few corruption risk assessment tools adapted for the judiciary and other justice sector institutions.⁹ This is especially valid for assessments of prosecution services, procedures governing asset declarations by judges and how they are used to prevent conflicts of interest, including in relation to the assignment of cases as well as ethical guidance or advice to officials of criminal justice institutions in relation to the performance of their duties, their relationship with actors outside the judicial process, such as the media and non-governmental organizations, or with regard to their use of new technologies and social media.

One focus of increased German Development cooperation will be supporting integrity measure for judiciaries in African countries, supporting the implementation of the Agenda 2063 and African Union (AU) Convention on Preventing and Combating Corruption as well as considerations on how to best support the Global Judicial Integrity Network before and after its launch (planned 1st quarter 2018). Germany invites other State Parties to share their similar experience made with international cooperation, welcomes any interest for details on its practices or assessment tools regarding the judicial sector and recommendation on how to address the obstacles and gaps presented before.

⁶ E.g. Chief justices from Latin America and Africa, ethic commissioners, justices of the Inter-American Court of Human Rights, International Commission against Impunity in Guatemala or Mission to Support the Fight against Corruption and Impunity in Honduras.

⁷ The conference's communiqué and the list of participants is available in Spanish and English, see here: http://www.corteidh.or.cr/docs/comunicados/cp_16_17.pdf

⁸ For further information on the Global Judicial Integrity Network, see here: <https://www.unodc.org/dohadecaration/en/topics/judicial-integrity.html>

⁹ See also Jennett 2015, Corruption Risks in the Criminal Justice Chain and Tools for Assessment, U4 Issue 2015 No 5.