



GERMANY: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS

April 2013

This report, submitted by Germany, provides information on the progress made by Germany in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary and conclusions to the report were adopted on 15 April 2013.

The Phase 3 report evaluated Germany's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

Summary of Findings

1. In March 2013, Germany presented its Written Follow-Up Report to the Working Group on Bribery, outlining its responses to the recommendations and follow-up issues identified at the time of Germany's Phase 3 examination in March 2011. Since then, Germany has continued to sanction a large number of individuals in alleged foreign bribery cases. Between March 2011 and March 2013, 33 cases were terminated for lack of grounds while 21 cases resulted in sanctions against individuals and/or legal persons, either after a court decision or by way of a settlement under section 153a of the Criminal Code of Procedure (CCP) (78 percent of sanctions were imposed following such a settlement; as of March 2011, out of the 69 persons sanctioned 35 were sanctioned following an agreement under section 153a CCP). The 21 cases resulted in 141 individuals being sanctioned (61 in one case). Of those individuals, 43 were sanctioned for bribery of a foreign public official, 80 were sanctioned for commercial bribery, and 18 were sanctioned for breach of trust and tax evasion. The 21 cases resulted in 6 legal persons being the subject of an administrative sanction after a court decision (section 153a CCP does not apply to legal persons). Of those legal persons, 2 were sanctioned in a case where related individuals were sanctioned for the offence of foreign bribery. Additionally, 1 legal person was sanctioned in a case where court proceedings against an individual for bribery of a foreign public official are not yet finished.

2. The Working Group welcomed these robust enforcement efforts and a Bill, currently under discussion in Parliament, which, if passed, will increase by ten times the level of administrative sanctions available for legal persons and hence implement one of the core recommendations made in Phase 3 (*recommendation 3d*). The Working Group asked Germany to provide a written report on progress made in this regard within a year. While recognising Germany's efforts to implement a number of Phase 3 recommendations, the Working Group noted that just under half of the recommendations remain partially or not implemented and that limited substantive action has been taken in a number of areas in the two years since Germany's Phase 3 evaluation. The Working Group considers that Germany has satisfactorily implemented 13 out of the 25 Phase 3 recommendations, while 4 recommendations have been partially implemented, and 8 recommendations have not been implemented.

3. With respect to raising awareness, in November 2011, the German authorities organised a conference with the Departments of Justice of all 16 *Länder* to discuss the outcome of Germany's Phase 3 evaluation and appropriate measures to implement the recommendations. Similar discussions were, in turn, held between the Departments of Justice of the *Länder* and Public Prosecutors' offices. The Working Group welcomed this effort which, together with a number of training events for prosecutors and judges, satisfactorily implemented *recommendations 2* (regime of liability of legal persons), *3a* (effective, proportionate and dissuasive sanctions against natural persons), *4a* (training on the foreign bribery offence) and *4c* (criteria to apply a settlement under section 153a CCP). Several initiatives were also undertaken by Germany to raise awareness in the private sector of the treatment of small facilitation payments, the foreign bribery offence, and the development of internal controls, ethics and compliance systems (*recommendations 1c, 5a and 9*).

4. Beyond the above mentioned awareness raising efforts, measures remain to be taken to clarify that the criteria and elements of proof needed to establish the involvement of a foreign public official in a foreign bribery offence should be interpreted broadly (*recommendation 1a* was deemed partially implemented). Similarly, steps remain to be taken to ensure that the treatment of small facilitation payments is clearly defined (*recommendation 1b* was not implemented).

5. With respect to the detection and reporting of suspicions of foreign bribery by company employees, while the possibility of introducing a new law on whistleblowers' protection is being debated at the Bundestag, the Government has not introduced a new Bill in this regard. The Working Group again encouraged Germany to take steps to enhance reporting of suspicions of foreign bribery by company employees by, for example, codifying whistleblowers' protections in the private sector and asked Germany to provide a written report on progress made in this regard within one year (*recommendation 6*). Additionally, the German authorities have issued specific guidance (i) to German missions abroad to strengthen their role in raising awareness and reporting suspicions of foreign bribery (*recommendation 5b*) and (ii) to tax authorities to clarify the treatment of claims for tax deduction for small facilitation payments (*recommendation 10a*). Germany has considered extending exceptions to auditors' duties of confidentiality and has decided to leave those duties unchanged (*recommendation 8*). The Working Group also noted that Germany has completed its assessment of the possible time lag in the performance of tax audits of companies (*recommendation 10b*) and that it has considered establishing a Federal register of unreliable companies and has decided to first await the approval of the directive proposals for reform of EU procurement law currently being debated (*recommendation 11a*).

6. With respect to public advantages, no steps have been taken to implement *recommendations 11b and c*, respectively dealing with public procurement and overseas development aid. With respect to money laundering, no amendments to the legislation have been initiated (*recommendations 7a and 7b*).

7. The Working Group was concerned by the lack of significant action by Germany to make public certain elements of arrangements under section 153a CCP (*recommendation 3c*) and asked Germany to provide a written report on further progress made in this regard within one year. However, the Working Group noted with approval that "Guidelines on Criminal Proceedings and Imposition of Fines" (national uniform instructions binding on the public prosecutors' offices) will be amended to introduce a paragraph dealing with termination of proceedings pursuant to Section 153c. This paragraph will clarify that "in making a decision on whether an offence should be prosecuted, prosecutors have to be comply with Article 5 of the Convention", the latter being quoted in a footnote. *Recommendation 4d* will be considered fully implemented once the amendment enters into force. The Working Group also considered that Germany should further strengthen its efforts to compile statistical information on sanctions and other information relevant to the monitoring and follow-up of enforcement of the German legislation implementing the Convention (*recommendations 3b and 4b*, which were deemed partially implemented).

Conclusions of the Working Group

8. Based on the findings of the Working Group on Bribery with respect to Germany's implementation of its Phase 3 recommendations, the Working Group concluded that Germany has satisfactorily implemented recommendations 1c, 2, 3a and e, 4a and c, 5a and b, 8, 9, 10a and b and 11a; that Germany has partially implemented recommendations 1a, 3b, 4b and 4d; and that Germany has not implemented recommendations 1b, 3c and d, 6, 7a and b and 11b and c.

9. The Working Group further invited Germany to provide a written follow-up report in one year (i.e. by March 2014) on progress made on recommendations 3c, 3d and 6.

PHASE 3 EVALUATION OF GERMANY: WRITTEN FOLLOW-UP REPORT

Instructions

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 3 Evaluation report. Countries are asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process can be found in the Phase 3 Evaluation procedure [DAF/INV/BR(2008)25/FINAL, paragraphs 55-67].

Responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.

Please submit completed answers to the Secretariat on or before 12 February 2013.

Name of country: Germany
Date of approval of Phase 3 Evaluation report: 17 March 2011
Date of information: 12 March 2013

PART I: RECOMMENDATIONS FOR ACTION

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

Text of recommendation:

1. Regarding the foreign bribery offence, the Working Group recommends that Germany:
 - a) Take any appropriate measures to clarify (i) that the criteria in the Convention and its Commentaries defining a foreign public official are to be interpreted broadly, (ii) that no element of proof beyond those contemplated in Article 1 of the Convention is required and (iii) that, in determining whether a public function was being exercised by a person, elements of information available from foreign authorities are given due consideration [Convention, Article 1; 2009 recommendations III. (ii) and V.];

Action taken as at the date of the follow-up report to implement this recommendation:

As a starting point before introducing the actions taken in detail Germany would like to mention that the Federal Ministry of Justice invited the departments of justice of all 16 Länder to a conference to discuss the results of the Phase 3 Evaluation. The conference, which took place in Berlin in November 2011, explicitly dealt with all the Working Group's recommendations and discussed the appropriate measures for complying

with and implementation of the recommendations in a comprehensive and extensive manner.

The Land departments of justice followed up on the Working Group's recommendations and passed them on to the public prosecutors' offices together with an explanatory summary of the report and its recommendations provided by the Federal Ministry of Justice. This emphasised to the prosecution authorities the importance of the recommendations. The feedback from the public prosecutors' offices shows that this form of heightening awareness was productive and that they had taken considerable trouble to deal with the recommendations.

The conference explicitly discussed the Working Group's Recommendation 1 a) and analysed the meaning and scope of an autonomous definition of the term "foreign public official". The conference participants came to the unanimous conclusion that the judgement of the Federal Supreme Court (*Bundesgerichtshof*, BGH) of 29 August 2008 (Ref. 2 StR 587/07; *Neue Juristische Wochenschrift* 2009, p. 89) clarified that the term "foreign public official" is to be interpreted autonomously and thus as broadly as provided by the Convention (Recommendation 1 a) (i)) and that no elements of proof are required over and above those stated in Article 1 of the Convention (Recommendation 1 a) (ii)). In the unanimous opinion of the conference participants this decision of the Federal Supreme Court also cited in the phase 3 report (p. 15) takes account of the requirements of the Convention and the recommendations issued in 2009 in respect of the latter.

In its ruling the Federal Court of Justice held that the term "public official" (*Amtsträger*) as used in Art. 2, Section 1, No. 2 of the Act on Combating International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung* - hereinafter "IntBestG") is to be interpreted not in the sense in which it is used in the respective national legal system, and that instead its interpretation is to be autonomous, based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997. Accordingly, the question of whether a person is to be viewed as a foreign public official in the framework of criminal proceedings has to be decided on the basis of the definitions of the OECD Convention. These requirements are to be interpreted in accordance with the recognised interpretation methods and thus also according to the meaning and purpose of the Convention, and are to be applied to the concrete circumstances of the individual case. In accordance with the purpose of the principle of autonomy of the criminal offence, proof of the main criterion does not depend on whether the respective person is viewed as a public official under the law of the country in which he works. In deciding whether a person is a foreign public official within the meaning of the Convention, information concerning the facts of the case from the country of origin must be taken into account by the German court (Recommendation 1 a) (iii)). Application in this manner of the autonomous definitions of the Convention can lead to a situation where a person is not considered to be a public official in his country of origin, while a German court, conscious of the decision of the country of origin, takes a contradictory view, and vice versa.

If, based on an autonomous interpretation, a German court should reach the conclusion that the person bribed is not to be viewed as a public official of a foreign country within the meaning of Article 2 Section 1 IntBestG, a functionally equivalent prosecution is guaranteed under Section 299 of the Criminal Code (*Strafgesetzbuch*, StGB, hereinafter "CC") (taking and giving bribes in commercial practice) which makes it a crime to give a benefit to an employee or agent of a business in commercial practice for competitive purposes with the aim of gaining unfair advantage. The provision also applies to acts in competition abroad (cf. Section 22 Paragraph 3 CC).

Text of recommendation:

1. Regarding the foreign bribery offence, the Working Group recommends that Ger many:

b) Ensure, through any appropriate means, that its legal treatment of facilitation payments is clearly defined and that it complies with the requirement of Commentary 9 that such payments be “small” [Convention, Article 1; 2009 recommendations III. (ii) and VI. (i) and (ii)];

Action taken as at the date of the follow-up report to implement this recommendation:

At the above mentioned conference (Recommendation 1 a) the legal treatment of facilitation payments was comprehensively addressed. It was explained that payments made to foreign public officials exceeding what can be considered to be “small facilitation payments” can under no circumstances be qualified as payments for entirely legitimate official activity. Instead the legal situation was unanimously understood by the conference participants to be that anything larger than an insignificant payment is in all cases intended to promote official activity in breach of duty or in abuse of discretion and should thus be classified as bribery punishable under Article 2 Section 1 IntBestG, Section 334 CC. By contrast, minor payments merely intended to speed up execution tasks the public official is legally bound to perform are not deemed to constitute bribery.

Section 334 CC applies if the official activity in respect of which the public official is being bribed is in breach of the official’s duties. However, pursuant to Section 334 Paragraph 3 Number 1 CC it is sufficient if the bribe giver attempts to induce the public official to violate his duty by the act. Where the intended action is within the public official’s discretion, it is sufficient if there is intent to influence the public official’s exercise of discretion (Section 334 Paragraph 3 Number 2 CC). Thus a breach of duty is already deemed to have taken place if the decision-making process is not correct, even though the result itself might not be unlawful. At the same time failure to carry out an official activity is equivalent to execution, pursuant to Section 336 CC.

By contrast, if the bribe giver merely intends the public official to carry out his official duty, then only an offence of giving bribes as defined by Section 333 CC comes into consideration.

This distinction in the criminality of acts of bribery in respect of lawful official activities on the one hand and official activities in breach of duty and abuse of discretion on the other hand is in accordance with Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (cf. explanatory note Number 3 in respect of Article 1).

Text of recommendation:

1. Regarding the foreign bribery offence, the Working Group recommends that Germany:
 - c) Encourage companies to prohibit or discourage the use of facilitation payments.

Action taken as at the date of the follow-up report to implement this recommendation:

Since publication of the Phase 3 report the German Federal Government has undertaken a large number of measures to increase awareness amongst companies of the prohibition of foreign bribery. These activities are presented below (see Germany’s statement on Recommendation 5a). In the course of these actions the issue of facilitation payments was frequently addressed. The companies were at the same time informed that, irrespective of the amount of the bribe, foreign bribery is criminally punishable and accordingly consideration of the same is necessary in the framework of existing internal control mechanisms.

Text of recommendation:

2. Regarding the responsibility of legal persons, the Working Group recommends that Germany further increase the effectiveness of the liability of legal persons including by means of raising awareness among the prosecuting authorities at Länder level to ensure that the wide range of possibilities available in the law triggering the liability of legal persons for foreign bribery offences is understood and applied consistently in all Länder [Convention, Article 2, Phase 2 Evaluation, Recommendation 7];

Action taken as at the date of the follow-up report to implement this recommendation:

Germany established the liability of legal persons under the Administrative Offences Act (*Ordnungswidrigkeitengesetz* - hereinafter "OWiG"). This includes liability for foreign bribery offences. According to the Act, an administrative fine may be imposed against a legal person in cases where a member of the management has committed a criminal offence or an administrative offence and if, thereby, duties incumbent upon the legal person have been breached or the legal person gained or was to gain a "profit" (Section 30 OWiG). In the case of criminal offences committed by non-management staff, the legal person may be held liable if at management level the management's duties of supervision have been neglected (sections 30, 130 OWiG). In sum, German law provides for the possibility of imputing legal persons for offences committed by

- (1) a member of the management and
- (2) other employees on account of failure to take supervisory measures at management level.

The "Guidelines on Criminal Proceedings and Imposition of Fines" (*Richtlinien für das Straf- und Bußgeldverfahren* - hereinafter "RiStBV") are nationally uniform instructions binding on the public prosecutors' offices. They stipulate that where the accused persons are members of a legal person's management, the Public Prosecutor must always examine whether imposing a fine against the legal person can be considered (No. 180a RiStBV). Therefore, public prosecutors are generally made aware of the possibilities for, and the obligation of, enforcing laws stipulating the liability of legal persons.

Under Germany's federal system, the prosecution of criminal offences generally lies within the jurisdiction of the Länder. Their responsibility in particular includes the prosecution of both natural and legal persons in foreign bribery offences.

The conference mentioned in our reply to Recommendation 1 a) explicitly discussed possibilities for raising the existing level of awareness amongst the prosecution authorities when it comes to prosecuting legal persons.

The Land departments of justice unanimously declared that they shared the objective of prosecuting legal persons effectively, particularly in regard to foreign bribery offences, and that it was in their own interests to achieve this objective. It was the common understanding that great sensitivity was required on the part of the prosecution authorities in this area. Furthermore, the Länder emphasised that there is a clear trend towards more pro-actively prosecuting and sanctioning legal persons in foreign bribery cases. This trend, of which explicit mention had been made in Germany's Phase 3 report, has been continuing since the report's publication. According to the Länder, awareness of the responsibility of legal persons has noticeably improved in recent years and clear progress could be shown. Establishing specialist units and holding advanced training courses have contributed significantly to that. The statistics on preliminary investigations conducted in 2010 into foreign bribery offences which Germany has forwarded to the OECD Secretariat confirm that general

impression.

It was also agreed with the Land departments of justice that the recommendation will be placed on the agenda of upcoming training courses for corruption experts and meetings of public prosecutors dealing with white collar crime. The Land departments of justice and the public prosecutors' offices were also explicitly asked to address the issue of prosecuting the implicated legal persons in their annual reports on foreign bribery offences which form the basis for the Federal Ministry of Justice's reports to the OECD Secretariat. This, too, will no doubt contribute to further heightening awareness of the issue.

On 4 July 2012 a national meeting of public prosecutors dealing with white collar crime and other top level experts in this area took place in Lower Saxony. At this conference, a staff member of the Federal Ministry of Justice gave a presentation about the international provisions in the field of criminal law on corruption. In this connection, specific mention was made of the Working Group's recommendations to Germany and the importance of taking into account the prosecution of implicated legal persons when conducting investigations in foreign bribery cases was highlighted.

The foreign bribery cases prosecuted by the Land departments of justice and reported to the Federal Ministry of Justice show that awareness by the law enforcement authorities in respect of sanctions against legal persons has been steadily increasing. Thus in the 2011 reporting period a fine pursuant to Section 30 OWiG in the amount of approximately EUR 140,000,000 was imposed against a company by the Munich I Public Prosecutor's Office in a foreign bribery case. In a further foreign bribery case prosecuted by the Munich I Public Prosecutor's Office a fine in the amount of EUR 3,250,000 was imposed on a company due to the actions attributable to its management body. In foreign bribery prosecution by the Hanover Public Prosecutor's Office a fine pursuant to Section 30 OWiG in the amount of EUR 400,000 was imposed against a company.

Text of recommendation:

3. Regarding sanctions, the Working Group recommends that Germany:
 - a) Raise awareness among prosecuting authorities of the importance of (i) requiring sanctions against natural persons that are effective, proportionate and dissuasive, including in cases of solicitation, and (ii) making full use of the range of criminal sanctions available in law [Convention, Article 3];

Action taken as at the date of the follow-up report to implement this recommendation:

At the conference mentioned in our reply to Recommendation 1 a) the importance of effective sanctions against natural persons and for making full use of the available sanctions was explicitly and accordingly highlighted by all participants.

In principle it should also be pointed out that in German law the penalties vary depending on the importance of the of legal interests protected by the respective criminal offence. The offence of bribery of foreign public officials carries a sentence of imprisonment of 3 or 6 months up to 5 years (Article 2 Section 1 IntBestG in conjunction with Section 334 CC). The criminal offence of bribery of foreign members of parliament in connection with international business transactions (Article 2 Section 2 IntBestG) carries a sentence of imprisonment of up to five years or a fine. Compared to similar offences such as taking and giving bribes in commercial practice (Section 299 CC), giving bribes (Section 333 CC) or giving bribes as an incentive to the recipient's violating his official duties (Section 334 CC) it is clear that the range of penalties

provided for bribery of foreign public officials and members of parliament is very extensive in its scope. Thus in principle sections 299 and 333 CC only provide for penalties of imprisonment of up to three years or a fine. For embezzlement and abuse of trust (Section 266 CC), which frequently also occurs in foreign bribery cases, provision is similarly made for imprisonment of up to five years or a fine.

Determination of a proportionate penalty in individual cases is carried out by the independent courts on the basis of Section 46 CC. On this basis the guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender's future life in society shall be taken into account. When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to the circumstances listed in Section 46 Paragraph 2 Sentence 2 CC, for example the motives and aims of the perpetrator, the modus operandi and the consequences caused by the offence, the offender's prior history, as well as his or her efforts to make restitution, come into consideration.

Among the penalties imposed in foreign bribery cases on the basis of these criteria, in a disproportionately large number of cases a conviction to imprisonment was handed down, which is highlighted by a comparison with the total number of convictions in Germany in 2010 (704,802¹). Thus in 2010 imprisonment was imposed in 18.4% of all convictions. Of these sentences 2.6% involved a term of 6 months, 2.9% between 6 and 9 months, 2.4% between 9 and 12 months, and 3.1% between 1 and 2 years. On isolated examination of the convictions imposed in 2010 (78) due to taking and giving bribes in commercial practice (Section 299 CC) it can be seen that 30.8% of the convictions led to imprisonment. Of these sentences 1.3% was under 6 months, 3.8% of 6 months, 3.8% between 6 and 9 months, 14.1% between 9 and 12 months, and 6.4% between 1 and 2 years. Of the convictions (283) imposed in 2010 for taking and giving bribes and taking and giving bribes meant as an incentive to violating one's official duties (Sections 331-335 CC), imprisonment was imposed in 35% of the convictions. Respectively 3.2% of the convictions involved imprisonment of 6 months or less. In 4.2% of the convictions imprisonment of 6 to 9 months was imposed. In 8.4% of the cases imprisonment of between 9 and 12 months was imposed. In 9.8% of the convictions the term of imprisonment amounted to 1 to 2 years.

By comparison it is apparent that a disproportionately large percentage of the convictions in foreign bribery cases involved imprisonment. Of the total of five cases in 2010, imprisonment of between one and two years was imposed four times (80%). In the 2011 reporting period imprisonment was imposed in 15 of the total of 20 cases. In two cases (10%) this involved imprisonment of six months. In 9 cases (45%), by contrast, imprisonment between 9 and 12 months was imposed. Five cases (25%) resulted in convictions to imprisonment of between 1 and 2 years. In the remaining five convictions heavy fines were imposed.

Text of recommendation:

3. Regarding sanctions, the Working Group recommends that Germany:

b) Compile statistical information on sanctions of natural persons in a manner that differentiates between (i) sanctions imposed for the offence of foreign bribery and for other criminal offences, in particular commercial bribery and breach of trust, (ii) procedures applied (court decision with a full hearing, arrangement under Section 153a CCP, penalty order under Section 407 CCP, or negotiated sentencing agreement under Section 257c CCP) [Convention, Article 3];

¹ Source: German Federal Statistics Office, Criminal Prosecution, Technical Series 10, Series 3 - 2010; can be consulted at <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/AlteAusgaben/StrafverfolgungAlt.htm>
1

Action taken as at the date of the follow-up report to implement this recommendation:

The above conference (Recommendation 1 a) explicitly discussed the need for comprehensive statistical information. The Land departments of justice followed up on the Working Group's recommendation and explicitly expressed their willingness to submit statistical information about foreign bribery cases within their area of jurisdiction to the Federal Ministry of Justice.

Every year the Federal Ministry of Justice asks the Land departments of justice for reports on foreign bribery investigations in their area of responsibility, the latest request having been made in November 2012. Besides the underlying facts of the case the reports also state the outcome of the investigations (termination of proceedings as defined by Section 170 Paragraph 2 of the Code of Criminal Procedure (*Strafprozessordnung*, StPO, hereinafter "CCP"), termination of proceedings as defined by Section 153a CCP, indictment, application for a penal order) and of the legal proceedings (acquittal, conviction, penal order, termination of proceedings as defined by Section 153a CCP). In addition any negotiated agreements under application of Section 257c CCP are stated. Furthermore, the reports in principle include information as to whether the judicial conviction took place for foreign bribery or for other offences. In the same way the type and size of the sanctions against natural and legal persons pursuant to the Administrative Offences Act (OWiG) are stated. Finally the reports discuss confiscation and forfeiture respectively absorption of the economic advantage. The Federal Ministry of Justice analyses the reports in order to obtain a continuous and comprehensive overview of foreign bribery investigations and to have better statistical data in this area.

Text of recommendation:

3. Regarding sanctions, the Working Group recommends that Germany:

c) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements under Section 153a CCP, such as the reasons why they were used in a specific case and the terms of the arrangements [Convention, Article 3];

Action taken as at the date of the follow-up report to implement this recommendation:

The above conference discussed the importance of public relations work in foreign bribery cases in general and the publication of elements of arrangements under Section 153a CCP in particular. The Land departments of justice followed up on the Working Group's recommendation and submitted it to the departments responsible for press and public relations work (head of office, press spokesman) within the public prosecution authorities.

Proceedings due to suspicion of bribery of foreign public officials are regularly covered by the media. The media report in particular on the outcome of the proceedings and the reasons for the final judgement or a termination of proceedings based on the principle of prosecutorial discretion ("opportunity principle") pursuant to Section 153a CCP. Therefore, already by now a wide level of transparency regarding such decisions and judgements is guaranteed within the existing framework of the constitutional and data protection limits.

Where termination of proceedings takes place in the course of the main hearing as defined by Section 153a Paragraph 2 CCP, the principle of publicity (Section 169 of the German Judicature Act (*Gerichtsverfassungsgesetz*, GVG)), already ensures the required transparency. According to this principle,

the main hearing before the sentencing court including the announcement of the judgement and other rulings is to be held in public. In appropriate cases the court also publishes press releases, in which the reasons for the termination of proceedings subject to a condition pursuant to Section 153a Paragraph 2 CCP and the type and size of the condition, for example a cash payment to a non-profit institution, are also regularly listed. By way of example reference is made to the attached press release of the press office of the Public Prosecutor at the Munich Higher Regional Court.

If, by contrast, in the framework of a non-public investigation by the Public Prosecutor termination of proceedings takes place as defined by Section 153a Paragraph 1 CCP, there are — especially in view of the assumption of innocence pursuant to Article 6 Paragraph 2 ECHR — tighter constitutional and data protection limits for provision of information to the public. The public relations and press work of the judiciary in these cases is restricted in that the right to information of the media representatives under the Land press laws, which right enjoys constitutional status (Article 5 of the Basic Law (*Grundgesetz* - hereinafter “GG”)), is not guaranteed without limit, but instead is subject to reservations, under which in particular the fundamental rights of the defendant are protected (especially the general right of personality, Article 2 Paragraph 1 in conjunction with Article 1 Paragraph 1 GG). In connection with a termination of proceedings pursuant to Section 153a CCP it should be noted that the latter does not refute the assumption of innocence and the Public Prosecutor’s Office must also at the same time take into account the negative effect on the defendant resulting from the public reporting. The question of publication of the details of a termination of proceedings pursuant to Section 153a Paragraph 1 CCP therefore always requires careful consideration on a case by case basis.

This leads to the conclusion that for public relations work by the Public Prosecutor’s Office in instances of termination of proceedings pursuant to Section 153 Paragraph 1 CCP, in the event of concrete media enquiries press information is routinely possible and will be provided by the Public Prosecutor’s Office. If, by contrast, in an individual case there is no concrete press enquiry and if the defendant is not in agreement with publication of the prosecutorial decision, independent media publication is only possible in exceptional cases and subject to restrictions.

Text of recommendation:

3. Regarding sanctions, the Working Group recommends that Germany:

d) Increase the maximum level of the punitive component of administrative fines available in law for legal persons to a level that is effective, proportionate and dissuasive [Convention, Articles 2 and 3; 2009 Recommendation V.; Phase 2 Evaluation, Recommendation 7];

Action taken as at the date of the follow-up report to implement this recommendation:

In the framework of the 8th Amendment of the Act Against Restraints of Competition (*Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, GWB*) the German Federal Government has proposed an amendment of the Act on Regulatory Offences (OWiG). Inter alia the bill makes a provision for raising the scale of fines for criminal offences by the management of legal persons from one million to up to ten million euros (Section 30 Paragraph 2 Sentence 1 OWiG-Draft). At the same time it is foreseen that the maximum fine for other administrative offences of legal persons is multiplied by ten, provided that a reference to this new provision is made in the corresponding statute (Section 30 Paragraph 2 Sentence 3 OWiG-Draft). Such a reference is put in place by the newly inserted Section 130 Paragraph 3 Sentence 2 OWiG-Draft increasing the maximum fine to be imposed on legal persons for the offence of omitting supervisory measures (Sections 130 and 30 OWiG) from one million euros to up to ten million euros if the omission leads to a breach of duty carrying a criminal penalty; this new provision would apply, for example, in a case where the

omission of supervisory measures by management leads to the commission of a a foreign bribery offence by staff.

The 8th Amendment of the Act Against Restraints of Competition including the amendments to the OWiG was passed in law by the German Parliament (*Bundestag*) on 18 October 2012 and submitted to the Upper House (*Bundesrat*). The *Bundesrat* called upon the mediation committee on 23 November 2012 and the bill is currently in conciliation proceedings. The mediation committee was not called upon due to the amendments planned for the OWiG, but instead due to reasons relating to other parts of the bill.

Annexe: Amendment of the Act on Regulatory Offences (excerpt)

Section 30 Regulatory Fine Imposed on Legal Persons and on Associations of Persons

(2) The regulatory fine shall amount

1. in the case of a criminal offence committed with intent, to not more than *ten million euros*,
2. in the case of a criminal offence committed negligently, to not more than *five million euros*.

Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. *Where an act makes reference to this provision, the maximum fine pursuant to the second sentence is multiplied by ten for the offence described in the act.* The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.

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(3) Where the breach of duty carries a criminal penalty, the regulatory offence may carry a regulatory fine not exceeding one million Euros. *Section 30 paragraph 2, third sentence applies.* Where the breach of duty carries a regulatory fine, the maximum regulatory fine for breach of the duty of supervision shall be determined by the maximum regulatory fine imposable for the breach of duty. The third sentence shall also apply in the case of a breach of duty carrying simultaneously a criminal penalty and a regulatory fine, provided that the maximum regulatory fine imposable for the breach of duty exceeds the maximum pursuant to the first sentence.

Text of recommendation:

3. Regarding sanctions, the Working Group recommends that Germany:
 - e) Consider making available to courts additional sanctions for legal persons to ensure effective deterrence [Convention, Articles 2 and 3; 2009 recommendations III. (vii) and XI. (i)];

Action taken as at the date of the follow-up report to implement this recommendation:

If no action has been taken to implement Recommendation 3e, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Already now, besides the sanctioning of legal persons pursuant to Section 30 OWiG, German law provides for further measures which exert a dissuasive effect on legal persons.

Where the legal person is a joint-stock company, Section 396 of the German Stock Corporation Act (*Aktiengesetz, AktG*) makes provision for the possibility of judicial dissolution if due to unlawful conduct by its directors the company jeopardises public welfare and the supervisory board and the shareholders' meeting do not ensure dismissal of the directors. Unlawful conduct here includes cases of foreign bribery. Judicial dissolution proceedings require a petition to the highest competent authority in the Land in which the company has its registered offices.

In the case of a limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*), Section 62 of the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*) allows the competent administrative authority to effect dissolution of the company by means of an administrative act. Section 62 of the Limited Liability Companies Act can be applied where a company jeopardises public welfare in that its shareholders adopt unlawful resolutions or knowingly allow the directors to take unlawful actions. In order to be considered as unlawful actions of the directors and shareholder resolutions have to contravene the statutory provisions, Therefore cases of foreign bribery come under consideration here. If the shareholders deliberately turn a blind eye on such activity, this is equivalent to having knowledge.

Besides these legal sanctioning powers, procurement law also includes powers to react to foreign bribery cases. In the event of previously committed acts of bribery companies are regarded as unreliable and, therefore, have to be debarred from the awarding of public-sector contracts (see also Germany's reply to recommendation 11, below).

Text of recommendation:

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Germany:

- a) Further ensure that judges and prosecutors in those Länder with less experience in foreign bribery cases be offered specific training with regard to the technicalities linked to the complexity of the foreign bribery offence in Germany for both natural and legal persons [2009 recommendations III. (ii) and V.];

Action taken as at the date of the follow-up report to implement this recommendation:

At the conference mentioned in our response to Recommendation 1 a) all participants stressed the great importance of specific training for judges and prosecutors dealing with foreign bribery cases.

In this connection the participants indicated that a growing number of opportunities exist for judges and public prosecutors to obtain continuing training in the specialist area of "prosecution of foreign bribery cases". The following events are worth highlighting:

- From 18 to 23 November 2013 the German Academy of Judges (*Deutsche Richterakademie*) in Wustrau is organising a continuing training event entitled “Manifestations of Corruption and Combating Them”. The conference is intended for judges and public prosecutors and will in particular deal with the subject areas of “manifestations and criminal offences”, “special substantive problems” and “investigation tactics”.
- Each year the European Law Academy (Europäische Rechtsakademie) in Trier stages conferences which deal with effective methods of exposure, investigation and prosecution of cases of corruption, inter alia the Annual Conference on Combating Corruption and Fraud in the EU on 16 to 17 February 2012 and the Conference on White Collar Crime in the EU in a Global Perspective on 25 and 26 October 2012.
- Besides participation in continuing training events at the German Academy of Judges, judges and public prosecutors have the opportunity of participating in the events of the Federal Academy of Finance. Furthermore, a seminar on the subject of “Recognising Corruption and Taking Action – Co-operation Between Audit/Tax Investigation and Police/Public Prosecutor’s Office” is to be held from 25 February to 1 March 2013.
- Besides this the Federal Academy of Public Administration in the Federal Ministry of the Interior (BaKöV), being the main continuing training institution of the Federal Government, holds regular continuing training events on “Prevention and Combating of Corruption”. The purpose is to instruct participants in how to combat corruption, in particular how to recognise and eliminate conducive conditions. The main subject areas are the international dimension of corruption and criminal consequences for participants in corruption.
- On 4 June 2012 an event entitled “Exchange of Experience in Cases of White Collar Crime” was held in Brunswick. This involved a national meeting of public prosecutors and other high-ranking specialists in white-collar crime which takes place every year and where current problems in white-collar criminal law are addressed. A representative of the Federal Ministry of Justice held a presentation on “International Rules on Corruption Law – Phase 3 Evaluation of Germany by the OECD Working Group on Bribery Issues”. It is also intended once again to address and consolidate the subject of foreign bribery at the next exchange of experience to be held on 3 to 5 June 2013 in Düsseldorf.

In addition to the main continuing training service of the German Academy of Judges, some of the Land departments of justice have also included the subject of “foreign corruption” in their continuing training programmes for 2013.

- In Bavaria public prosecutors concerned with cases of white-collar crime participate in regular introductory events which also address how to deal with foreign bribery cases.
- In North-Rhine Westphalia public prosecutors concerned with foreign bribery proceedings participate in the workshop on “corruption” staged annually by the State Criminal Investigation Department (LKA) of North-Rhine Westphalia, at which proceedings in connection with bribery of foreign public officials are also discussed.
- Besides this, also in North-Rhine Westphalia an interdisciplinary working group initiated by the State Criminal Investigation Department entitled “Corruption and Environmental Crime” meets

twice each year and discusses known cases of foreign bribery.

On 16 and 17 October 2012 in Lower Saxony an inter-ministerial workshop of the “Central Department of Organised Crime and Corruption (ZOK)” of the Chief Public Prosecutor’s Office in Celle was held, at which foreign bribery cases were discussed among other things.

Text of recommendation:

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Germany:

b) Strengthen its efforts to compile at federal level, for future assessment, information and statistics relevant to monitoring and follow-up of the enforcement of the German legislation implementing the Convention [Convention, Article 12; 2009 recommendations III. (ii) and V.];

Action taken as at the date of the follow-up report to implement this recommendation:

The above mentioned conference (Recommendation 1 a) discussed the importance of the submission of comprehensive information on enforcement by the Land departments of justice to the Federal Ministry of Justice in foreign bribery cases. The Land departments of justice reiterated their willingness to support the Federal Ministry of Justice in compiling statistical and other enforcement information in foreign bribery cases. Additionally, reference is made to the explanations under Recommendation 3 b).

Text of recommendation:

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Germany:

c) Clarify the criteria by which the prosecutors may dispense with prosecutions, with a view to ensuring uniform application of Section 153a CCP [2009 recommendations III. (ii) and V.; Phase 2 Evaluation, Recommendation 8];

Action taken as at the date of the follow-up report to implement this recommendation:

During its Oral Follow-Up Report in March 2012 the German Federal Government already had the opportunity to report on the implementation of this recommendation to the Working Group on Bribery in the framework of an oral follow-up report.

I. Introduction

Under Section 153a CCP, proceedings against the defendant may be provisionally terminated if measures are taken which satisfy the public interest in prosecution.

Various conditions and instructions may, with the defendant’s consent, be imposed on the defendant to that end, for example that a specific service be performed to make reparations for the damage caused or a sum of money be paid to a non-profit institution or to the Treasury.

It has to be highlighted that the provision set out in Section 153a CCP already contains criteria which the public prosecutors' offices must observe and which limit their discretionary powers. For example, termination is not possible if the degree of guilt presents an obstacle or if the public interest in the prosecution cannot be satisfied by imposing conditions and instructions.

The consent of the competent court must generally be obtained before proceedings can be terminated. The court's consent is always necessary where the consequences of the offence are not merely negligible.

II. Action taken

The Working Group's Recommendation 4 c) was likewise discussed at the conference involving the Federal Ministry of Justice and the Land departments of justice (see our response to Recommendation 1 a). The latter share the Working Group's wish that Section 153a CCP be applied as consistently as possible. As a starting point it has to be pointed out once again that the provision set out in Section 153a CCP already contains criteria which the public prosecutors' offices must observe and which limit their discretionary powers.

Additionally, there are various approaches to ensure that termination of proceedings is as consistent as possible in practice. Firstly, the public prosecutors' offices report foreign bribery offences to the Land department of justice and also address intended terminations in accordance with Section 153a CCP in those reports. The Land departments of justice are thus informed of ongoing preliminary investigations in their jurisdiction and have the opportunity to counter potentially inconsistent practice in regard to the termination of proceedings. Such reporting mechanisms are in place already today in most of the Land jurisdictions. The Federal Ministry of Justice took the opportunity afforded by the Working Group's recommendation to encourage the Land departments of justice to explicitly establish the duty to report such cases where they had not already done so.

The fact that the consent of the competent court must generally be obtained before proceedings can be terminated further contributes to consistent application of Section 153a CCP. It means that a further supervisory body is involved, which examines whether the criteria for termination are met and also whether the principle of equal treatment is being complied with. As already mentioned, the court's consent is always necessary where the consequences of the offence are not merely negligible. This is generally the case in foreign bribery cases — with the exception of a few de minimis cases — which is why the court's consent generally needs to be obtained.

Finally, the annual reports drawn up by the Land departments of justice guarantee that they are all kept informed about each other's preliminary investigations and the practice of terminating proceedings in foreign bribery cases, and that action can be taken to counter any inconsistent application of Section 153a CCP in Germany. With regard to the Working Group's recommendation, the Federal Ministry of Justice has thus once more explicitly asked the Land departments of justice to address the issue of terminating proceedings in accordance with Section 153a CCP in their respective reports.

Uniform treatment of the opportunity requirement of Section 153a CCP is also encouraged in that in some German Länder specialised public prosecutors' offices are responsible for centralised prosecution of cases of corruption and thus also of foreign bribery.

Text of recommendation:

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group

recommends that Germany:

d) Clarify, by any appropriate means, that the “predominant public interest” provided under Subsection 153c (3) among the grounds for dispensing with prosecution does not include factors contrary to Article 5 of the Convention such as the national economic interest [Convention, Article 5];

Action taken as at the date of the follow-up report to implement this recommendation:

The “Guidelines on Criminal Proceedings and Imposition of Fines” (*Richtlinien für das Straf- und Bußgeldverfahren, RiStBV*) are national uniform instructions binding on the public prosecutors’ offices. The Guidelines were supplemented in Number 95 Paragraph 2 — which deals with termination of proceedings pursuant to Section 153c Paragraph 3 CCP — by a provision stipulating that in making a decision on whether an offence should be prosecuted prosecutors have to be comply with Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business . In a footnote to this new guideline the wording of Article 5 is reproduced. The amendment will enter into force shortly.

Annexe: Extract from Guidelines on Criminal Proceedings and Imposition of Fines (RiStBV)

No. 95 (2):

“In the decision on whether an offence is to be prosecuted, Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (ratifying and implementing legislation: Combating of International Bribery Act of 10 September 1998; Federal Law Gazette 1998 p. 2,327)* has to be complied with.”

Footnote to No. 95 (2) of the Guidelines on Criminal Proceedings and Imposition of Fines (RiStBV):

“Article 5 of the OECD Convention is worded as follows: (...)”

Recommendations for ensuring effective prevention and detection of foreign bribery

Text of recommendation:

5. Regarding raising of awareness the Working Group recommends that Germany:
- a) Continue its efforts to raise awareness among companies, especially SMEs, about foreign bribery offences [2009 Recommendation X.C];

Action taken as at the date of the follow-up report to implement this recommendation:

The German Federal Government was encouraged by the recommendation of the Working Group to reassess its strategy on sensitisation of the public to the criminality of bribery of foreign public officials. As a

result various government departments have taken measures to make companies even more aware of this.

- Following the Phase 3 Evaluation employees of the German Federal Government have reported in specialist publications, in particular those targeted at companies, on the results of the Evaluation and the resulting recommendations for action (Dörrbecker/Stammler, OECD Anti-Korruptionskonvention: Folgerungen aus der Evaluierung Deutschlands - Auswirkungen auf die Compliance im Unternehmen (OECD Anti-corruption Convention: Conclusions from the Evaluation of Germany – Effects on Compliance in Companies), “Der Betrieb” 2011, p. 1,093 et seq.; Stammler, Bestechung verboten – Die Bekämpfung der Auslandsbestechung durch die OECD (Bribery prohibited! Combating of Foreign Bribery by the OECD), BMWi-Schlaglichter der Wirtschaftspolitik, July 2011, p. 16 et seq.) (both annexed).
- The Federal Ministry of Transport, Building and Urban Development organised a conference on 8 March 2012 to raise awareness about the prevention of corruption with a special focus on the construction sector (“Prevention of Corruption – Public Sector and Business Join Forces against Corruption”) with Mr Peter Ramsauer, Federal Minister of Transport, Building and Urban Development, opening the conference. The conference was attended by about 200 participants from the public and private sectors.
- The Federal Ministry of Economics and Technology together with the Federation of German Industry (BDI) and the German Federation of Chambers of Industry and Commerce (DIHK) hosted a conference on foreign bribery and compliance which was addressed, among many others, by the WGB’s Chair, Mark Pieth. The conference’s main objective was to raise awareness among SMEs about foreign bribery and compliance mechanisms. Nearly 200 representatives of the private sector attended this conference in Berlin.
- The Federal Ministry for Economic Cooperation and Development launched its new anti-corruption policy at a conference titled “Transparenz. Integrität. Entwicklung” (“Transparency. Integrity. Development”) on 13 June 2012 in Berlin. The new concept is designed to guide all measures under Germany’s development policy.
- Representatives of the German Federal Government have also given presentations at private sector events on the prohibition of foreign bribery, thus for example the Federal Minister of Justice, Mrs. Sabine Leutheusser-Schnarrenberger, spoke in November 2011 at the “Forum Compliance und Unternehmenssicherheit” (“Compliance and Corporate Security Forum”) in Frankfurt/Main, while other ministry representatives gave presentations at an event of the German Engineering Federation (VDMA) on 16 May 2011, at “C5’s 5th Annual Conference on Anti-corruption” on 24 and 25 January 2012 in Munich, and at the “Fraud Management Conference 2012” on 5 and 6 December 2012 in Hamburg.
- In December 2011 the Federal Ministry of Home Affairs jointly with business representatives and other federal ministries published a brochure on “FAQs about accepting gifts, hospitality or other benefits”.
- In the same context the Federal Ministry of Home Affairs jointly with business representatives and other federal ministries put together best practices on internal control programmes for businesses which are about to be published in a brochure in the near future and which is mainly directed at SMEs.

- Jointly with ministries from six other countries the German Federal Ministry of Economic Co-operation and Development (BMZ) operates an internet portal, targeted in particular at SMEs, which is designed as a practical aid to dealing with risks of corruption (<http://www.business-anti-corruption.com/>).
- Various German diplomatic missions have made references on their internet sites to the prohibition of bribery of foreign public officials (e.g. http://www.pressburg.diplo.de/Vertretung/pressburg/de/02/Korruptionspr_C3_A4vention/Korruptnspraevention.html).

Besides these efforts on the part of the government, Germany would also like to point out a multitude of initiatives by the private sector. These highlight that in large parts of the German corporate landscape a clear awareness of the prohibition of foreign bribery now prevails. Many companies — including a growing number of small and medium-sized businesses — are taking precautionary measures in this respect. Below are just a few examples of the multitude of activities that have taken place with respect to this:

- The national associations of German industry have started a joint initiative for the promotion of corporate social responsibility. In this connection they also provide information on measures to combat and prevent corruption (http://www.csrgermany.de/www/csr cms_relaunch.nsf/id/anti-korruption-de).
- The German Industry Federation (BDI) and the Association of German Chambers of Industry and Commerce (DIHK) continue to actively promote their brochures targeted at SMEs in which they provide information about the great importance of measures by industry to fight corruption (<http://www.bdi.eu/korruptionsbekaempfung.htm> and <http://www.dihk.de/themenfelder/recht-steuern/oeffentliches-wirtschaftsrecht/sicherheit-wirtschaftsstrafrecht/korruptionsbekaempfung>).

In addition there is a large number of private roadshows and conferences either devoted exclusively to the subject of foreign bribery or in the broader context in connection with compliance. Following is a small selection from the much higher number of events:

- “Unternehmensrisiko Korruption” (Entrepreneurial Risk: Corruption”) an annual conference held by daily newspaper “Handelsblatt” (most recently on 20 and 21 September 2012 in Düsseldorf);
- also held annually in different German cities is the “C5 European Forum on Anti-Corruption” (most recently Sixth European Forum held on 29 and 30 January 2013 in Frankfurt with the participation of several German public prosecutors);
- “Symposium Compliance und Unternehmenssicherheit” (“Symposium on Compliance and Corporate Security”) held annually in Frankfurt/Main (most recently on 15 November 2012);
- on 11/12th January 2013 the University of Bremen organised a Conference titled “Transnationale Korruptionsbekämpfung – Bricht das Strafrecht mit seinen Prinzipien? (“The Transnational Fight against Corruption - Is it moving beyond the means of criminal law?”) which brought together members from academia as well as from businesses and the public sector;
- also annually, the German Institute for Internal Auditing (Deutsches Institut für Interne Revision) organises its Anti-Fraud-Management-Conference,. The next to be held on 14/15th March 2013 in Berlin,

- one month later, on 15/16th April 2013, the Steinbeis-University Berlin jointly with the German Institute for Compliance (Deutsches Institut für Compliance) holds its second Conference on “Fraud and Compliance” in Berlin.

Besides this reports in the press on foreign bribery cases, compliance and debates in the political sphere about combating corruption ensure that public awareness continues to be focused on the issue.

Text of recommendation:

5. Regarding raising of awareness the Working Group recommends that Germany:

- b) Strengthen the role of German missions abroad in raising awareness and reporting suspicions of foreign bribery [2009 Recommendation IX. (ii)];

Action taken as at the date of the follow-up report to implement this recommendation:

The German Foreign Office has for several years been keeping its diplomatic missions informed by means of a memorandum on foreign bribery. Subsequent to the completion by the Working Group on Bribery of its Phase 3 Evaluation of Germany, this “Runderlass zur Rolle der Auslandsvertretungen bei der Bekämpfung der Korruption im internationalen Geschäftsverkehr” (“Memorandum on the Role of the Diplomatic Missions in Combating Corruption in International Commercial Practice”) (RES 53-8 from 7 June 2012) has already been updated once. This update took place in 2012. In this connection the duties of the German embassies and consulates general were respecified subsequent to the results of the Phase 3 Evaluation. Attached to the memorandum is a summary of the relevant criminal offences under German law, also including the Act on Combating International Bribery (IntBestG).

One of the main duties of the German diplomatic missions in this connection is to support German companies in acting in a “compliant” manner, thus in accordance with German laws and the laws in force in the receiving country. The diplomatic missions are in particular encouraged to use suitable means to sensitise small and medium-sized German companies to compliance issues and to advise them in this respect. At the same time it is explicitly clear that no provision is made for legal counselling in individual cases. The duty of companies to obtain legal advice in cases of doubt is not therefore removed.

The diplomatic missions are urged to point out in particular to smaller and medium-sized German companies in the course of their co-operation with them that

- bribery of foreign public officials is a crime under German law and bribery of foreign public officials in international commercial practice is equivalent to corruptive action in Germany,
- only lawful behaviour in international commercial practice will be supported by the diplomatic mission,
- corruptive conduct is not in the interests of the companies as it can lead to considerable, even existence-threatening, consequences for the individual companies, such as criminal prosecution of management and employees, and

- corruption harms the national economies of both the receiving country and of Germany.

With this in mind the diplomatic missions are also required to reinforce their co-operation ventures locally with the partner organisations for foreign trade promotion and development co-operation in matters concerning the fight against corruption.

In concrete terms the commercial departments of the diplomatic missions are available to German companies for issues relating to the fight against corruption in international commercial practice. Internet sites of some diplomatic missions make interested companies aware of this (for example see the internet sites of the German Embassies in Cotonou: http://www.cotonou.diplo.de/Vertretung/cotonou/de/05-Wirtschaft/Aussenwirtschaftsfoerderung/s__korruption_d.html and in Bangkok: <http://www.bangkok.diplo.de/Vertretung/bangkok/de/02/Korruptionspraevention.html> - see also Germany's reply to recommendation 5a, above).

If a German diplomatic mission becomes aware that there is cause for suspicion of a case of foreign bribery, it is obliged to make contact with the headquarters of the German Foreign Office in Berlin. The circumstances will be materially and legally investigated there. If the suspicion is substantiated the German Foreign Office will notify the competent German public prosecutor's office.

Text of recommendation:

6. Regarding whistleblower protection, the Working Group recommends that Germany enhance reporting of suspicions of foreign bribery by company employees by any appropriate means, e.g. by codifying the protection identified by jurisprudence and disseminating information on such protection [2009 recommendations IX. (iii) and X.C (v)];

Action taken as at the date of the follow-up report to implement this recommendation:

In March 2012 the German Federal Government had the opportunity to report on the implementation of this recommendation to the Working Group on Bribery in the framework of an oral follow-up report. As on that occasion the German Federal Government would also like to point out in the course of the written follow-up process that explicit statutory rules for the protection of whistleblowers already exist in individual sectors. Public sector employees, for example, are granted legal protection under German law if they report suspicions of foreign bribery cases. In addition, a number of other laws contain specific rules on the protection of whistleblowers for all employees (Federal Data Protection Act, Labour Protection Act, Money Laundering Act, and Hazardous Materials Directive).

As the Working Group correctly established in its Phase 3 report (Para. 198 et seq.), there is no explicit statutory ruling beyond this in German law for the protection of employees who notify external authorities about foreign bribery cases in their companies. However, as reported to the Working Group orally in March 2012, German labour law in general grants employees a high level of protection against dismissals which are deemed to be based on unfair grounds (Basic Law, legal provisions on termination, the prohibition of victimisation under Section 612a of the Civil Code). This generally high level of employee protection against unfair dismissal puts employees in a strong position vis-à-vis employers and, therefore, the overall legal environment seems to be different from the situation in countries with a lower level of protection of employees' rights where specific rules for the protection of employees reporting about their company's

misconduct might compensate for this record.

The highest German Court, the Federal Constitutional Court, recognises a constitutional right to report suspicions of illegal acts. Based on this ruling, the highest court for German labour law, the Federal Labour Court, has ruled that employees who report in good faith on their company's misconduct generally enjoy protection from dismissal (see German phase 3 report, Paragraph 198). The European Convention on Human Rights is also important for the protection of whistleblowers in Germany. The European Court of Human Rights explicitly established this in 2011 (judgement of 21 July 2011, 28274/08). German labour courts must take this judgement into account when making their rulings in future.

In the light of this, additional specific rules on the protection of whistleblowers have not been adopted so far. However, there are voices in Germany which advocate enacting a special law on whistleblower protection. The German Parliament, the Bundestag, explored the possible advantages of such rules in 2008 and is currently continuing discussion of this topic. In the current legislative period an opposition party introduced a bill on whistleblower protection to parliament which was discussed in parliament in February 2012 in first reading and was the subject of an experts' hearing by the Bundestag committee on labour policies in March 2012. Neither the bill nor a further petition by an opposition party have yet been conclusively debated.

Text of recommendation:

7. Regarding money laundering, the Working Group recommends that Germany:

- a) Amend Section 261(9) of the Criminal Code which precludes the simultaneous conviction of a person for money laundering and foreign bribery [Convention, Article 7; 2009 Recommendation III. (ii)];

Action taken as at the date of the follow-up report to implement this recommendation:

The question of whether Section 261 Paragraph 9 CC can be changed with the effect that so-called "self laundering" comes within the scope of the criminal offence of money laundering so that simultaneous conviction of a person for money laundering and bribery of foreign public officials is possible, has again been intensively examined. Prof. Dr. Christian Schröder, professor at the Chair of Criminal Law and Procedure at the Martin-Luther-University Halle-Wittenberg, was commissioned by the Federal Ministry of Justice with a legal opinion entitled "The constitutional and criminal law basis of the impunity of 'self money laundering' as defined by Section 261 Paragraph 9 Sentence 2 CC".

The expert report comes to the conclusion that "self-laundering", as regulated under Section 261 Paragraph 9 Sentence 2 CC, must remain un-criminalized for dogmatic and constitutional principles which form part of the basis of the German legal system. In short, the comprehensive report comes to the conclusion that, the act of self laundering in itself, i.e. without taking into account the predicate offence, such as hiding money in a safe place, is in general no socially unacceptable or criminal behaviour. Only in relation with the predicate offence (self) laundering can be considered as a criminal act. However, the self launderer is already been punished for the predicate offence and this sanction already takes into account self laundering activities that typically follow the given predicate offence. Section 261 Paragraph 9 Sentence 2 CC addresses this situation by stipulating that whoever is liable because of his participation in the predicate offence shall not be liable for money laundering.

Text of recommendation:

7. Regarding money laundering, the Working Group recommends that Germany:
- b) Amend its money laundering legislation to include the bribery of foreign and international MPs in the list of predicate offences to money laundering [Convention, Art.7; 2009 Recommendation III. (ii)];

Action taken as at the date of the follow-up report to implement this recommendation:

If no action has been taken to implement Recommendation 7b, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

The list of predicate offences to the criminal offence of money laundering is to be extended in the course of implementation of the requirements of Article 23 Paragraph 2 b) of the United Nations Convention Against Corruption (UNCAC), which Germany has signed but not yet ratified. Before ratification takes place, broadening of the criminal offence of bribery of members of parliament is necessary. A bill on this would have to be introduced from the floor of the German Bundestag (lower house of parliament). When this will take place is not yet known.

Text of recommendation:

8. Regarding accounting and auditing requirements, the Working Group recommends that Germany consider extending exceptions to auditors' duty of confidentiality to include the reporting of suspected acts of foreign bribery to law enforcement authorities [2009 recommendations III. (v) and X.B (v); Phase 2 Evaluation, Recommendation 3];

Action taken as at the date of the follow-up report to implement this recommendation:

The German Federal Government took the recommendation of the Working Group to again evaluate the advantages and disadvantages of the creation of an exemption from the obligation to maintain confidentiality by the auditors of financial statements in foreign bribery cases (cf. phase 3 report, paragraph 163 et seq.). As a result the German Federal Government came to the conclusion that it did not intend to introduce any further exemption from the principle of confidentiality.

The obligation of auditors to maintain confidentiality is a fundamental principle and protects the required relationship of trust between an auditor and his client. A trusting approach by an auditor to his relationship with his client as the "master of secrets" is necessary in the same way as in the relationship between a solicitor and his client, for example. The special importance of this relationship of trust is reflected not only in Germany's national law, but also in EU law. Under Article 23 of the Audit Directive (2006/43/EC) the EU member states must ensure that auditors are subject to the rules on the obligation to maintain confidentiality and on professional secrecy. No provision is made in the Directive for any exemption from confidentiality in respect of reporting suspected cases of bribery of foreign public officials to law enforcement authorities.

In its investigation the German Federal Government carefully weighed the advantages of exemption from the obligation to maintain confidentiality for the exposure of foreign bribery cases against the potential disadvantages which could arise due to the consequent adverse effect on the relationship of trust between client and auditor. At the same time the Federal Government also took into account in particular that as the law stands auditors are obliged to notify the legal representatives and the supervisory board of an audited company of any breaches of the law (Section 321 of the German Commercial Code (*Handelsgesetzbuch, HGB*)).

Furthermore, the growing trend among German companies in recent years to establish compliance mechanisms was taken into account. The practice demonstrates that a steadily growing number of companies are taking precautionary measures for the prevention of foreign bribery and that when suspected cases occur the companies are themselves taking measures to solve them – also in co-operation with investigating authorities. This indicates that the auditor’s duty to report to management board and supervisory board is already having a positive impact on the exposure of foreign bribery cases.

This has reinforced the federal government’s intention not to create an additional exemption to the auditors’ obligation to maintain secrecy.

Text of recommendation:

9. Regarding internal controls, ethics, and compliance, the Working Group recommends that Germany continue encouraging companies, especially SMEs, to develop internal controls, ethics and compliance systems [2009 Recommendation X.C];

Action taken as at the date of the follow-up report to implement this recommendation:

In its Opinion on Recommendation 5 a) Germany listed the measures the Federal Government has taken since adoption of the Phase 3 report to raise even greater awareness among companies of the prohibition of foreign bribery. In connection with these activities not only the criminal law dimension of the issue was addressed. Instead, with consideration to this Recommendation the companies were at the same time regularly also reminded of the necessity of implementing mechanisms for the prevention of foreign bribery.

In the framework of the above, the legislative amendment to the Act Against Restraints of Competition (GWB) (see above Opinion on Recommendation 3 d), and, in particular, the explanatory memorandum on the increase in fines on companies foreseen in Section 30 Paragraph 2 OWiG it is to be explicitly pointed out. In this memorandum it is mentioned that the existence of compliance programmes can have a mitigating effect when fines are imposed. Thus companies are given a further incentive to introduce internal control systems.

Practice in recent years shows that the trend towards introduction of such mechanisms already prevalent at the time of adoption of the Phase 3 report has continued to grow steadily. This is also demonstrated by a representative study carried out in 2011. According to this, in 2011 52% of the companies surveyed in Germany had already introduced compliance programmes (830 German companies with at least 500 employees were surveyed). This was a considerable increase compared to 2007, when it was only true of 41% of the companies surveyed (White-collar Crime in 2011 (Wirtschaftskriminalität 2011), a study by PWC and Martin-Luther-Universität Halle-Wittenberg, <http://www.pwc.de/de/risiko-management/studie-zur-wirtschaftskriminalitaet-2011-kommissar-zufall-deckt-am-meisten-auf.jhtml>).

Text of recommendation:

10. Regarding tax measures for combating foreign bribery, the Working Group recommends that Germany:

- a) Clarify the policy on dealing with claims for tax deductions for facilitation payments [2009 recommendations VI. (i) and VIII. (i); 2009 Tax Recommendation I. (ii)];

Action taken as at the date of the follow-up report to implement this recommendation:

If no action has been taken to implement Recommendation 10a, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Based on the recommendation of the Working Group the Federal Ministry of Finance, which is responsible for tax law, carried out a careful review of the current legal situation and its application in practice. Nevertheless, the Federal Government sees no reason for any change to the legal situation as a result. The Federal Government is furthermore of the view that a change to the legal situation will not lead to any improvement of clarity within the meaning of the recommendation of the Working Group on Bribery.

The Working Group had established that at the occasion of the on-site visit certain company representatives were said to have made contradictory statements about the deductibility of bribes paid abroad (phase 3 report, paragraph. 178). However, after renewed examination the Federal Government comes to the conclusion that the legal situation is unambiguous and no further clarification is required. In this connection it also took into account that the auditors questioned in the Phase 3 Evaluation had expressed no doubt about the prohibition on deducting bribes.

The Federal Government bases its judgement on the following specific considerations: The law as it stands (Section 4 Paragraph 5 Sentence 1 Number 10 of the Income Tax Act (*Einkommensteuergesetz - hereinafter "EStG"*)) states that in principle bribes cannot be deducted as business expenses. On this basis the tax authorities investigate in each individual case whether any payments made are permissible or constitute illegal bribery. The tax laws do not regulate which payments are allowed and which are prohibited. Instead this is derived from the circumstances of the corruption as seen by criminal law. In the view of the Federal Government it is important that this subordination relationship between criminal and tax law continue to be preserved. It is not tax law which should determine which payments are permissible and which have crossed the threshold of bribery. This standard should be defined by criminal law. To the extent that tax law takes account of the rules of criminal law, it is guaranteed that the two areas of law do not drift apart.

At the same time this also guarantees that changing legal concepts of which types of benefit are allowed and which should be dealt with as corruption can be taken into account in the application of law. The companies are also called upon to take account of reassessments of the law in their business dealings. The Federal Government believes there to be a danger that inflexible legal stipulations will not adequately take account of this situation.

In its assessment the Federal Government has taken into account that under certain circumstances the tax authorities do not have the specialised skills required to judge in each individual case whether a given payment was lawful. However, it has taken into account in this connection that the tax authorities are obliged

to notify the public prosecutors' offices in suspected cases (Section 4 Paragraph 5 Sentence 1 Number 10 Sentence 3 EStG). In such cases the latter can initiate criminal investigation proceedings. After completion of such proceedings the financial authority is notified by the Public Prosecutor's Office of the outcome of the proceedings and the underlying facts (Section 4 Paragraph 5 Sentence 1 Number 10 Sentence 4 EStG). On the basis of these observations the financial authority can judge whether the payment was based on an illegal action and cannot therefore be deducted as a business expense.

Text of recommendation:

10. Regarding tax measures for combating foreign bribery, the Working Group recommends that Germany:

- b) Complete its assessment of whether there is a time lag in the performance of tax audits of companies and take measures, where necessary, to reduce time lags [2009 Tax Recommendation I. (ii); Phase 2 Evaluation, Recommendation 3];

Action taken as at the date of the follow-up report to implement this recommendation:

In the Phase 3 Evaluation the assessors established that a survey by the Federal Government in 2007 found that tax audits in the various federal states were predominantly being carried out in a timely manner. Nevertheless, there was no uniform national standard for the execution of timely audits. The assessors also established that at the point in time of the Phase 3 Evaluation the Federal Government was still working on the creation of a uniform standard (phase 3 report, paragraph 176).

This work was completed in 2011. The standard was defined in July 2011 in the Tax Audit Regulation (*Betriebsprüfungsordnung*), a general administrative regulation (Annexe). The definition of the standard was introduced as a measure complementing the 2011 Tax Simplification Act (*Steuervereinfachungsgesetz*). This standard provides the local tax offices with a sufficient range of options for working with companies in order to find individual and pragmatic solutions that would reduce the time lag for the audits.

Text of recommendation:

11. Regarding public advantages, the Working Group recommends that Germany:

- a) Consider establishing a national register of unreliable companies and improve co-ordination among Land registers [2009 recommendations II. and XI.];

Action taken as at the date of the follow-up report to implement this recommendation:

In principle the Federal Government has an open-minded attitude to the introduction of a national register of unreliable companies. The introduction of such a register has been examined. As a result it was decided not to submit a bill for the introduction of a national corruption register in this legislative period (lasting until autumn 2013). The reason for this is that the directive proposals for reform of EU procurement law announced by the Commission of the European Union in December 2011 also contain stipulations on the debarment of companies from award procedures due to corruption offences as well as rules on "self-purging". These directive proposals are currently being debated intensively in Brussels. It is expected that they will be

approved in the first half of 2013. Germany is obliged to implement the new EU rules. The introduction of a register of unreliable companies can logically only take place in combination with the implementation of the new EU rules in national law.

Even though the manner of the implementation of the new directive guidelines in German federal law can only be decided after approval of the directives, the German Federal Government is in principle positively disposed to the establishment of a national register of unreliable companies. At the same time the view that corruption registers in individual German federal states are not sufficient to record all companies suspected of corruption in the whole of Germany will play an important role. A national register could increase the efficiency of the fight against corruption in public-sector procurement. However, before the establishment of such a register we must wait for the new EU rules and clarify certain complex issues. On 25 February 2013 the German Bundestag will hold a public hearing on possible measures in respect of a national corruption register.

Regarding the recommendation to the German Federal Government to improve the co-ordination of corruption registers existing in individual federal states, the Federal Government points out the following: Several German federal states have introduced — differently organised — registers for public procurement-related information which among other things relates to the debarment of companies for corruption offences. The co-operation between these federal state registers is governed by the general rules on co-operation between the German federal states. It is not the task of the Federal Government to intervene in co-ordination between federal state registers. This does not fall within the scope of competence of the Federal Government, as this is exclusively the business of the federal states.

Text of recommendation:

11. Regarding public advantages, the Working Group recommends that Germany:

b) Issue guidelines to public procurement authorities to take the following measures, where they are not already in place: (i) take international debarment into consideration during the tender process; (ii) take debarment listings as a possible basis for enhanced due diligence of applications for public tenders; (iii) establish mechanisms for the verification, when necessary, of the accuracy of information provided by applicants; (iv) include, within public procurement contracts, termination and suspension clauses in the event of (a) the discovery by procurement units that information regarding compliance with foreign bribery legislation provided by the applicant was false, or (b) the contractor subsequently engaging in foreign bribery during the course of the contract [2009 recommendations II. and XI.];

Action taken as at the date of the follow-up report to implement this recommendation:

On Recommendation 11 b (i and ii):

In any case, given the existence of debarment listings which are generally accessible by electronic means — of the World Bank for example — the issuing of this type of guideline appears useful in principle. Practical implementation has to be examined intensively. The awarding authorities could be required, in any case with contracts of considerable value, to use debarment listings of this type as a basis for particularly careful verification of bids in public calls for tender, though without being subjected to any strict obligation.

On Recommendation 11 b (iii):

Under current German law, if suspicion exists that an applicant has supplied false information in his bid, for example about his reliability, an awarding authority can demand official proof from the applicant. For example, where there is suspicion of a criminal act the awarding authority can obtain an extract from the federal register. Generally Section 8 EC Paragraph 13 VOL/A (Contract Awards for Public Supplies and Services – Part A) governs verification of fitness: “Contractors can call upon companies to supplement or explain the verifications submitted.” By contrast, an obligation to verify the accuracy of the information submitted by all bidders without grounds for suspicion would appear to be an unnecessary bureaucratic burden.

On Recommendation 11 b (iv):

Bidders who have submitted wilfully inaccurate declarations in respect of their reliability in the award procedure can be debarred from the award procedure (cf. for example Section 16 Paragraph 1 Number 1 g VOB/A, Section 6 EC Paragraph 6 Letter e VOL/A). Following award of the contract the General Contractual Terms and Conditions for the Execution of Work Contracts (VOL/B) and of Construction Work (VOB/B) take effect together with general contract law. General contract law stipulates the conditions under which the awarding authority has a right of withdrawal and termination if the inaccuracy of information supplied by the contractor is established retrospectively or the company commits an act of corruption during the term of the public contract. The directive proposals of the European Commission currently under discussion provide for the possibility of revocation of the contract in the event that it becomes apparent that grounds for debarment existed on conclusion of the contract, for example due to an act of corruption.

Text of recommendation:

11. Regarding public advantages, the Working Group recommends that Germany:

c) Ensure that ODA-funded contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery and that this prohibition also applies to sub-contractors and contracted local agents [2009 Recommendation XI.];

Action taken as at the date of the follow-up report to implement this recommendation:

The Federal Ministry for Economic Cooperation and Development as well as the implementing agencies, the Development Bank (KfW) and the Agency for International Co-operation (GIZ), have been made aware of the Working Group’s recommendation. Possible ways of how to give it effect are under consideration.

PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

Text of issue for follow-up:

- a) Germany's interpretation of the definition of a foreign public official "exercising a public function for a public agency or public enterprise" to ensure it fully implements Article 1 of the Convention [Articles 1 and 4 a)];

With regard to the issue identified above, describe any new case law or legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Before we look at the developments in respect of the follow-up points it should first be pointed out that the follow-up points were also discussed at the conference referred to in Germany's reply to Recommendation 1 a). The Federal Ministry of Justice sent the Land ministries of justice a breakdown which also contains the follow-up points. The Land ministries of justice passed this breakdown on to the criminal prosecution practice in order to be able to notify the Federal Ministry of Justice of future developments in these areas. The Land ministries of justice have also declared their agreement that in the reports on foreign bribery supplied annually to the Federal Ministry of Justice they will also deal with the developments relating to the follow-up points and thus also cases in which interpretation of the term "foreign public official" was problematic within the meaning of the Convention.

In the 2011 reporting period there are no cases of foreign bribery in which the application of the concept of public official caused problems. Due to the overlap with Recommendation 1 a) we would in addition refer to the observations therein.

Text of issue for follow-up:

- b) The trend to prosecute and sanction foreign bribery by means of the offence of commercial bribery (Section 299 CC) and breach of trust (Section 266 CC) rather than by means of the offence of foreign bribery (Section 334 CC) to ensure that functional equivalence is achieved by these means, in particular with regard to the level of sanction applied for these alternative offences [Convention, Articles 1 and 3.];

With regard to the issue identified above, describe any new case law or legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

In the 2011 reporting period, in the vast majority of foreign bribery cases convictions took place under the Act on Combating International Bribery (IntBestG). Thus 11 persons in foreign bribery cases were sentenced under the IntBestG. At the same time, in nine cases prison sentences were given, with the vast majority being between 1 and 2 years. Heavy fines were imposed in two cases. By comparison the remaining nine convictions in foreign bribery cases were for criminal acts of embezzlement or taking and giving bribes in commercial practice. The prison sentences imposed in these cases were of between 9 and 12 months'

duration. Fines were imposed in two cases.

Text of issue for follow-up:

- c) The use of the new general provision regarding witness co-operation under Section 46b CC [Convention, Article 5.];

With regard to the issue identified above, describe any new case law or legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The general state witness ruling of Section 46b CC valid since 1 September 2009 is in principle mainly positively evaluated in the jurisprudential literature.

Nevertheless, the ruling has a wide area of application, which also allows reduction of a sentence if a perpetrator discloses a criminal act which is not connected to his own act (cf. BGH, judgement of 19 May 2010, Reg. 5 StR 182/10, published in BGHSt 55, 153). The regulation can therefore make reductions of sentences possible which not only are viewed by the victims of the state witnesses as no longer proportionate, but which also can diminish the confidence of the population in the inviolability of the law; it has therefore repeatedly been criticised on this point (cf. the verifications in *Bundestagsdrucksache* (Bulletin of the German Parliament) 17/9695, page 6).

In order to restrict this wide area of application of Section 46b, on 28 March 2012 the Federal Government adopted a bill which amending for Section 46b CC in such a way that it would only apply if the information of the state witness relates to an act “which is in connection with his own act” (see again *Bundestagsdrucksache* 17/9695). This amendment is justified by the supposition that the connection with the perpetrator’s own act and the connection with his own culpability is also more strongly emphasised and thus the provision is brought more into line with the general sentencing rules and the principle of proportionate penalties. The provision is additionally said to be tailored more to cases in which the perpetrator has special proximity to the disclosed act because he is part of a criminal structure for the exposure of which the state is dependent in particular on support in its detection and prevention efforts.

As far as the connection is concerned, according to the rationale of the bill it is not necessary for the disclosed act to be part of the procedural act for which the state witness is being prosecuted. However, there must therefore be a connection between the two acts because they form part of a sequence of criminal events. For the rest, the state witness ruling remains unchanged. In particular, the corruption offences continue to fall within the area of application of the state witness provision. Moreover, analysis of the published body of case law reveals that in almost all cases there was a connection between the act of the state witness and the act of disclosure. Besides this, disclosures by the perpetrator of extraneous acts can also be taken into consideration pursuant to the intended legislative change in the framework of the general principles of sentencing under Section 46 CC.

In an expert hearing in the Judiciary Committee of the German Bundestag in December 2012 a clear majority of the experts declared themselves in favour of the intended revision. At the same time it was emphasised by the majority that the practical effects of the planned restriction are considered to be small. A decision by the German Bundestag on the bill is still outstanding.

Text of issue for follow-up:

- d) The possibility for an individual (i) to negotiate the terms of a “penalty order” with the prosecutors (Section 407 CCP) or (ii) to enter into negotiated sentencing agreements with the courts (Section 257c CCP) to ensure that it follows the principles of predictability, transparency and accountability [Convention, Article 3];

With regard to the issue identified above, describe any new case law or legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Even before the effective date of the legislation governing negotiated agreements in criminal proceedings (i.e. 4 August 2009) a phenomenon had existed for more than twenty years whereby the court and the participants in the proceedings would try to reach agreement on the further progress of the proceedings and in particular the result of the criminal proceedings.

Thus in 2009 the legislature did not create for the first time the possibility of reaching negotiated agreements in criminal proceedings. Instead it adopted a provision which set tighter limits on the agreements found in practice than those the Federal Supreme Court had previously required and which in addition to this put in place explicit recording requirements. The intention of this was to achieve the highest possible level of predictability, transparency and accountability accompanied by retention of the principles of criminal proceedings.

On i)

It is not possible for the defendant, the defence and the Public Prosecutor to negotiate with legally binding force the conditions of a penal order pursuant to Section 407 CCP. Section 160b Sentence 1 CCP merely enables the Public Prosecutor to discuss the status of the investigation proceedings with the defendant and the defence. The main points of the consultation are to be put on record in accordance with Section 160b Sentence 2 CCP.

Even if the defendant, the defence and the Public Prosecutor have discussed the potential legal consequences of a penal order, the court is not bound by this. Instead the judge may only comply with the application for a penal order as defined by Section 408 Paragraph 3 Sentence 1 CCP if there are no objections to issue of the latter.

On ii)

It is not possible for the defendant, the defence, the Public Prosecutor and the court to agree on a specific sentence. Under Section 257c Paragraph 3 Sentence 2 CCP the court can merely reach an understanding to set an upper and lower sentence limit.

In addition to this Section 257c Paragraph 1 Sentence 2 CCP makes it clear that even in the event of an agreement to investigate the truth the court must extend the hearing of evidence ex officio to all facts and evidence that are of importance to the judgement. As in any other criminal proceedings the basis for the judgement is not the agreement, but the formation of the opinion of the court based on the hearing of evidence. The ruling in Section 257c CCP is supplemented by extensive notification and recording requirements.

Whether negotiated agreements in criminal proceedings are compatible with the Constitution was discussed on 7 November 2012 in the course of several constitutional complaint hearings before the Federal Constitutional Court. The decision has not yet been made in these proceedings and is still outstanding.

Text of issue for follow-up:

- e) The confiscation of the instrument of the bribe and the proceeds of foreign bribery from both individuals and legal persons, including the quantification of the confiscatory component of administrative fines [Convention, Article 3];

With regard to the issue identified above, describe any new case law or legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The conference mentioned in our response to Recommendation 1 a) explicitly dealt with this issue for follow-up and discussed possibilities for raising the existing level of awareness amongst the prosecution authorities when it comes to the confiscation of the instrument of the bribe and the proceeds of foreign bribery from both individuals and legal persons when prosecuting legal persons.

The conference participants came to the unanimous realisation that public prosecutors are increasingly taking a more proactive approach in applications for and consequently also in the enforcement of court orders for forfeiture.

By way of example we would like to bring the Working Group's attention to investigation proceedings by the Munich I Public Prosecutor's Office in 2011. The proceedings are based on the suspicion that in respect of a company operating throughout the world and with registered offices in Munich bribes were paid to competent persons representing the principal and to public officials for a series of projects up to and including 2010. There is suspicion that consultants employed abroad for the purpose of acquiring and executing contracts passed on parts of their fees — with the full knowledge of managers of the company — to persons representing the contract awarding organisations and to public officials in order to win the contracts for the company in violation of the principles of free competition.

Seven sets of investigations are currently under way against a total of 65 persons due to suspicion of taking and giving bribes in commercial practice and bribery of foreign public officials in international commerce. In six further cases, following examination of the respective project documents submitted by the affected companies, given the absence of grounds for suspicion no investigation proceedings as defined by Section 152 Paragraph 2 CCP were initiated.

On 8 June 2011 the Munich I Public Prosecutor's Office issued against a company, with the approval of the latter, a judgement in independent forfeiture proceedings under which — as defined by Section 29a Paragraphs 2-4, 130 Paragraph 1 OWiG (given the absence of suitable supervisory measures at group level) — a profit of EUR 35,000,000 was declared to have been forfeited.