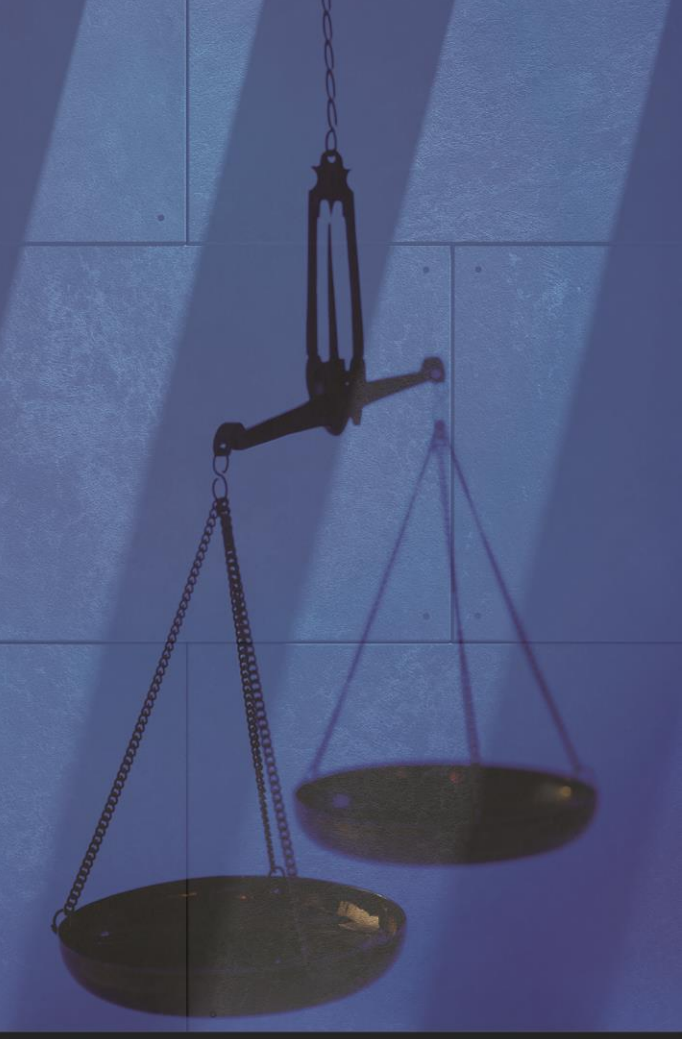
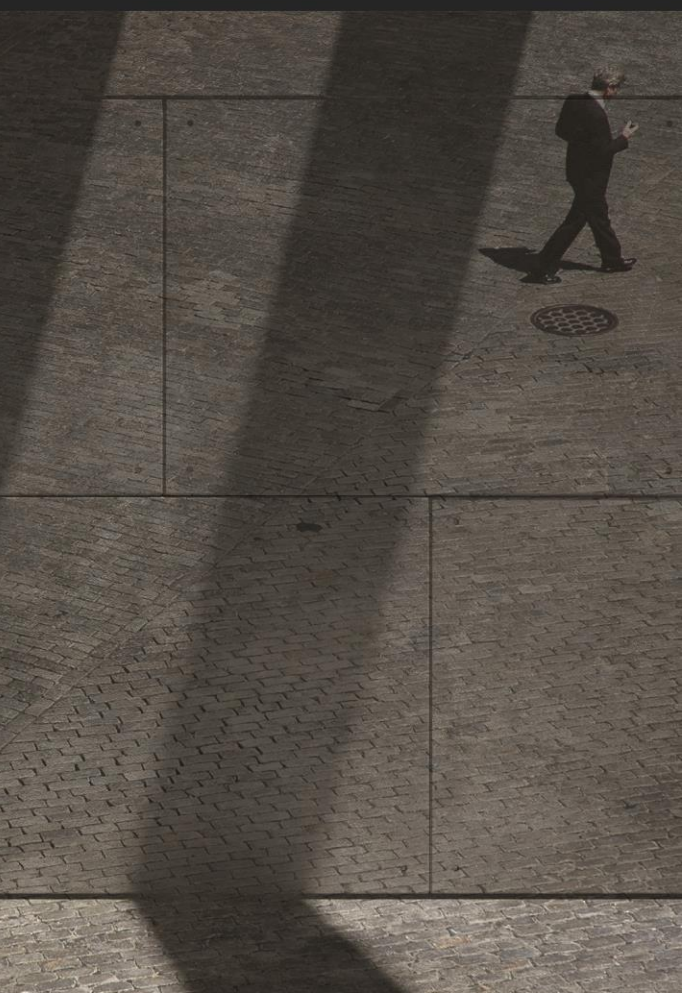


OECD



Implementing the OECD Anti-Bribery Convention

Phase 4 Two-Year Follow-Up Report: Germany

Germany – Phase 4

Two-Year Follow-Up Report

This report, submitted by Germany, provides information on the progress made by Germany in implementing the recommendations of its Phase 4 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 12 March 2021.

The Phase 4 report evaluated and made recommendations on 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. It was adopted by the 44 members of the OECD Working Group on Bribery on 14 June 2018.

Table of Contents

Summary and Conclusions

Summary of main findings[1]

1. In March 2021, Germany presented its two-year written follow-up report to the OECD Working Group on Bribery ("Working Group" or "WGB"), outlining the steps taken to implement the 35 recommendations and to address the follow-up issues contained in its June 2018 Phase 4 evaluation. Based on that report, the Working Group concludes that Germany has fully implemented 10 recommendations, partially implemented 7 recommendations and not implemented 18 recommendations. Germany is pursuing legislative proposals that would appear to implement 11 recommendations currently assessed as "not implemented".

2. Germany has maintained a leading role among the Parties to the Anti-Bribery Convention in investigating, prosecuting and sanctioning foreign bribery cases. Germany's enforcement record since Phase 4 confirms both the trends and the limits to Germany's enforcement identified in the Working Group's Phase 4 evaluation. The Working Group welcomes Germany's continued steady enforcement against natural persons who commit economic offences in the foreign bribery sphere. The Working Group is however concerned that Germany's enforcement of its corporate liability regime remains critically low. Corporate liability has only been established against 2 legal persons in the 22 cases concluded since Phase 4 (9 % of the cases), while 4 legal persons were imposed criminal confiscation measures only and 3 other legal persons received administrative forfeiture orders that do not impose liability or even sanctions on the legal persons. Disconcertingly, the amounts confiscated through these alternative forfeiture orders have by far exceeded the amount imposed through regulatory fines, hence the importance for the Working Group to continue to scrutinise the use of these orders. The continued discrepancy in the prosecutorial approach to holding natural as opposed to legal persons liable across *Länder*, the fragmented investigative approach, coupled with the alternative use of forfeiture orders has continued to greatly hinder Germany's ability to hold companies liable in foreign bribery cases.

3. Against this background, a draft Corporate Liability Act ("Corporate Liability Act", "Act" or "CLA") has been introduced to Parliament *(Bundestag*) in September 2020. The draft Act, if adopted, would overhaul the current corporate liability regime under the Administrative Offences Act (OWiG) and introduce a hybrid criminal and administrative corporate liability regime for corporate criminal offences in Germany. The Working Group commends Germany for the extensive consultations that it has undertaken to transform the conceptual foundation of corporate liability in its legal system and to make its regime more effective. At the time of this written follow-up, Germany informed the Working Group that the bill had yet to be scheduled for the first reading in Parliament. The Working Group strongly encourages Germany to adopt this legislative proposal without delay as it is the precondition for the possible implementation of nine Phase 4 recommendations (recommendations 1.a., 2.c., 3.d., 4.d., 4.f.,

[1] The evaluation team for this Phase 4 two-year written follow-up evaluation of Germany was composed of lead examiners from **Japan** (Mr. Takeyoshi Imai, Professor of Law and Attorney at Law, School of Law of Hosei University, Mr. Jun Yamazaki, Attorney, Criminal Affairs Bureau, Ministry of Justice and Ms. Kumi Sakurai, Deputy Director, OECD Division, International Economy Division, Economic Affairs Bureau, Ministry of Foreign Affairs) and the **Russian Federation** (Mr. Vadim Tarkin, Deputy Director of the Department for the International Law and Cooperation, Ministry of Justice and Ms. Olga Mokhova, Senior prosecutor, Prosecutor General's Office) as well as members of the **OECD Anti-Corruption Division** (Ms. Sandrine Hannedouche-Leric, Evaluation Coordinator and Senior Legal Analyst, Ms. Lise Née, Mr. Brooks Hickman, and Ms. Solène Philippe, Legal Analysts). See Phase 4 Procedures, paras 54-62 on the role of Lead Examiners and the Secretariat in the context of two-year written follow-up reports.

4.g., 6.a., 6.b., 6.d.). The lack of enforcement against legal persons has indeed demonstrated the limits of Germany's administrative liability regime. If the Bill passes into law with the current hybrid corporate liability regime, on the occasion of its next full evaluation of Germany, the Working Group will assess the effectiveness of the new regime as practice develops.

4. Other measures to respond to the Working Group's recommendations also remain a work in progress. Germany has yet to amend its legislation to provide a clear and comprehensive protection for whistleblowers in both the public and private sectors (recommendation 1.b.) and to ensure that the specialised economic chambers have the same jurisdiction over foreign bribery cases as for commercial bribery cases, as proposed in the German government's draft bill of January 2021 (recommendation 2.d.). The Federal Ministry of Justice has developed new tools to improve the collection of case information and maintaining of statistics (recommendations 2.a., 4.a. and 5.). Germany could also do more to ensure the predictability, transparency and accountability of resolutions with natural persons. In particular, given the prevalent use of resolutions under section 153a CCP to sanction individuals, Germany was asked to clarify the criteria for using such resolutions and to publish their key elements (recommendation 3.b.). Because of the complexity of formal negotiated agreements introduced by section 257c CCP, Germany also indicates that informal negotiated agreements remain applied in practice (recommendation 3.c.). The transparency of these agreements thus still raises concerns. Germany reports that a draft amendment to the Guidelines on Criminal Proceedings and Imposition of Fines aims to encourage publication of information on resolutions adopted under section 153a CCP. The impact of the draft amendment cannot be assessed at this stage (recommendation 3.b.). Enhanced efforts could also be made to foster experience sharing across *Länder* to ensure a consistent approach in foreign bribery cases, including on corporate liability, resolving cases through the use of section 153 CCP, and on the quantification of bribe proceeds for confiscation purposes (recommendation 2.b.). The Working Group's summary and conclusions are presented below, and Germany's report is presented in the Annex.

Enforcement since Phase 4[2]

5. Overall, Germany has continued to demonstrate sustained efforts in detecting, investigating and prosecuting foreign bribery cases. Since Phase 4, 62 cases have been investigated, of which 47 were already ongoing at the time of Phase 4. An investigation was still ongoing at the end of 2020 in 16 cases, and 19 cases had been discontinued without sanctions, either for lack of evidence or based on a non-trial resolution – pursuant to section 170 of the Criminal Procedure Code (CCP), section 153 (1) CCP or section 154 (1) CCP. Formal charges were pending in 7 cases against 17 individuals.[3] In addition, proceedings are ongoing against 2 legal persons in 2 cases, although not for foreign bribery in one of these cases because the offence is already time-barred.[4]

In total, 78 cases pertaining to the foreign bribery sphere have resulted in 378 natural and 21 legal persons sanctioned between the Convention's February 1999 entry into force and December 2020. From the 2018 Phase 4 evaluation through December 2020, 50 natural and 2 legal persons have been sanctioned in 22 foreign bribery cases. As in Phase 4, Germany has continued to rely on alternative offences to sanction cases pertaining to the foreign bribery sphere with 92 individuals sanctioned for the foreign bribery offence

[2] The statistical information contained in this report were compiled, tabulated and analysed by the evaluation team based on the information provided in the 2018 and 2019 Länder reports in line with the methodology followed in Phase 4. Case information was also provided by the Länder in 2020 using the new template developed by the MOJ for data collection purposes.

[3] case Hes 2011/4 (3 individuals); case Hes 2012/2 (2 individuals); case Hes 2012/4 (1 individual); case Hes 2014/1 (1 individual) case Bremen 2013/1 (7 individuals); case Bremen 2015/3 (1 individual); and case Bra 2015/1 (2 individuals);.

[4] Case Bav 2013/2, and case Hes 2014/1.

and the 286 other individuals sanctioned for other offences.[5] Since Phase 4, of the 50 individuals sanctioned, 18 individuals were sanctioned for the foreign bribery offence. The remaining 32 individuals were sanctioned for other offences. Germany has since relied on commercial bribery and breach of trust on a more equal basis. Proportionally more individuals have been sanctioned for the foreign bribery offence since Phase 4 and Germany should be encouraged to continue relying on this offence to sanction cases pertaining to the foreign bribery sphere.

6. Germany has also made use of a range of non-trial resolution tools, including under section 153a CCP, which remains the main tool used to sanction individuals in foreign bribery cases. Germany has continued to impose sanctions based on non-trial resolutions under section 153a CCP with 80% of the individuals sanctioned since Phase 4. The proportion of cases settled under this resolution mechanism has significantly increased for the foreign bribery offence, from 59% of the individuals sanctioned for this offence in Phase 4 to 88% since Phase 4. Two individuals were convicted by a court for the foreign bribery offence.

7. In terms of sanctions imposed in practice, the main sentencing features identified in Phase 4 remain valid when analysing the enforcement data provided by Germany for this report. The monetary sanctions imposed against natural persons have remained towards the low end of the available range. The courts have not imposed a fine on any defendant who did not receive a prison sentence after a full trial, and all the prison sentences imposed were suspended with probation. The only case in which a defendant received a fine for foreign bribery without a prison sentence was resolved through a negotiated sentencing agreements under section 257c CCP for foreign bribery. The status of foreign bribery enforcement in Germany from Phase 4 through 31 December 2020 is as follows:

- 50 individuals sanctioned and 1 individual acquitted in 20 cases, of which:
  - 18 natural persons sanctioned foreign bribery (section 334 CC) in 5 cases[6]
  - 9 natural persons sanctioned for commercial bribery (section 299 CC) in 4 cases[7]
  - 11 natural persons sanctioned for breach of trust (section 266 CC) in 5 cases[8]
  - 10 natural persons sanctioned for tax offences in 4 cases[9]
  - 2 natural persons sanctioned for other unknown underlying offence(s)[10]
- 2 legal persons held liable in 2 cases [11] pursuant to section 30 OWiG, of which:
  - 1 entity was held liable for foreign bribery (regulatory fine of EUR 370 000)
  - 1 entity was held liable for tax offences (regulatory fine of EUR 500 000)

[5] Based on the new template used by the MOJ for the collection of the 2020 cases reports by the Lander, it was identified that 9 individuals who were counted as having received a sanction for foreign bribery at the time of Phase 4 were instead sanctioned for commercial bribery. The data have, therefore, been adjusted for this report.

[6] In case Bremen 2013/1 (6 individuals); case Bremen 2013/2 (8 individuals); case Bremen 2015/2 (5 individuals); case Bremen 2015/3 (1 individual); case Hes 2012/2 (3 individuals), and case BW 2007/3 (2 individuals).

[7] In case Bav 2014/5 (4 individuals), in case BW 2007/3 (2 individuals); case Hes 2015/1 (2 individuals); and case Hes 2011/9.

[8] Case Bav 2011/1 (1 individual); case Bav 2012/1 (6 individuals); case Hes 2012/1 (3 individual); case Bremen 2016/1 (2 individuals); and case Bav 2011/3 (1 individual).

[9] Case Bremen 2015/2 (1 individual), case Bav 2012/2 (2 individuals); case Bav 2013/2 (5 individuals); and case Bav 2016/2 (2 individuals).

[10] Case Ham 2013/1 (1 individual); and Case SH 2013/1 (1 individual).

[11] In case Hes 2012/2 and case Bav 2013/2

- Criminal confiscation measures were imposed against 4 legal persons (section 73 CC)[12]
- Administrative forfeiture orders were imposed against 3 legal persons (section 29a OWiG)[13]
- Sanctions under appeal against 3 natural persons in 2 cases[14]

Regarding the detection of foreign bribery:

- *Recommendation 1.a. – Not implemented.* The above-mentioned draft Corporate Liability Act has been submitted to the first chamber of Parliament ("*Bundestag*") for the first reading, but a date has yet to be set. In the absence of other steps taken and pending the adoption of the draft Act, the recommendation remains not implemented. If the Act passes into law, subject to a more in-depth analysis by the WGB of the adopted version of the Act, (i) the principle of legality would govern the regime of liability of legal persons and thus contribute to ensuring a consistent exercise of discretion by the prosecutors across *Länder* although more specific guidance would still be needed, (in particular through an Explanatory Memorandum, also to be adopted); (ii) the nature and degree of co-operation expected from the company, and the sharing of the results of companies' internal investigations would be clarified (section 17); (iii) self-reporting and its consequences could be more directly addressed (to an extent that remains to be seen); and (iv) the expectations in terms of anti-corruption compliance, remedies and monitoring requirements while still succinctly covered could address the recommendation's requirement for clear and transparent guidance on the procedures and criteria attached to self-reporting by companies when concluding a foreign bribery case.

- *Recommendation 1.b. – Not implemented*. Germany has not yet amended its legislation to provide clear, comprehensive protections for whistleblowers in both the public and private sectors. In December 2020, Germany initiated the legislative process for the transposition of European Union (EU) *Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law* into national law. The Directive contains a number of provisions that, once transposed, may contribute to significantly reinforcing Germany's whistleblower protection framework. The transposition deadline for the Directive is 17 December 2021. The German legislative process being at a very early stage, Germany could not share the draft transposition law (currently subject to inter-ministerial discussions) with the evaluation team.

- *Recommendation 1.c. – Partially implemented.* Since the adoption of the Phase 4 report, Germany has revised the Federal Foreign Office (FFO)'s guidelines for all officials posted abroad in order to require the reporting of foreign bribery and explain the reporting channels. However, the revised guidelines do not include specific advice on how to detect foreign bribery. In addition, Germany reported that the FFO, in cooperation with other ministries, recently issued a classified internal handout for German diplomatic missions that "provides further guidance on the fight against corruption". The document could not be shared with the evaluation team, and its precise content could not be assessed.

- *Recommendation 1.d. – Fully implemented*. Germany has given due consideration to promoting the adoption of guidance at EU level in order to clarify the obligation for auditors to report irregularities to external authorities, as set out in EU *Regulation No 537/2014 on specific requirements regarding statutory audit of public-interest entities*. As per article 7 of Regulation

[12] Case BW (old) 2011/1 (2 legal persons); case Hes 2012/2 (1 legal person) and case Hes 2015/1 (1 legal person).
[13] Case Bremen 2015/3 (December 2018) * in this case, one individual was sanctioned; case Bremen 2017/1 and case BW 2017/1 (October 2019).
[14] Cases Hes 2011/4 (2 individuals).; and case Berlin 2017/1 (1 individual).

No 537/2014, auditors must only lift professional secrecy and proceed with external reporting if the company has not investigated the matter in the first place. There is no clarity in the Regulation on the criteria for assessing what constitutes an appropriate internal investigation, and when external reporting should take place. The German Auditor Oversight Body asked the Committee of the European Auditor Oversight Bodies to consider issuing guidance on the reporting requirements for auditors under EU law, including with a view to address the absence of standards on internal investigations.

- *Recommendation 1.e. – Fully implemented.* Concerning the reporting of suspicions of foreign bribery related to Germany's provision of official development assistance, Germany reports that its ODA agency, GIZ, has a Code of Conduct that requires employees to report suspicions of "serious corruption", including foreign bribery. In addition, since October 2020, GIZ requires all managers to report all suspicions of serious compliance infringements using a standard form that provides guidance on the information that should be reported. Since Phase 4, GIZ's Legal Affairs Unit has made it mandatory to refer justified suspicions of foreign bribery to prosecutors, excepted in certain exempted situations set forth in the Code of Conduct involving facilitation payments made under duress. Germany reports that its other ODA agency, KfW, has revised its work instruction authorising the independent "Compliance Unit" to refer substantiated suspicions of criminal offences to prosecutors, including foreign bribery. Under the work instruction, substantiated suspicions of offences committed by German natural or legal persons should "in principle" be referred to German law enforcement authorities.

Regarding enforcement of the foreign bribery offence

Regarding investigation and prosecution:

- *Recommendation 2.a. – Fully implemented.* Germany's Ministry of Justice and Consumer Protection has developed a new case-reporting template to ensure that it collects consistent information about foreign bribery matters from the *Länder*. The template was finalised based on consultations with the *Länder* in November 2020, and has been used to collect 2020 enforcement data. The new template appears to seek all the types of data requested by the Working Group during the Phase 4 evaluation.
- *Recommendation 2.b. – Partially implemented.* Germany reported that law enforcement officials at the federal and *Land* levels have discussed training as part of addressing the Working Group's Phase 4 recommendations. They agreed to integrate topics related to foreign bribery into their conferences. While a foreign bribery discussion occurred in 2019, the onset of the Covid-19 pandemic prevented the planned meeting in 2020. Germany expects to conduct more trainings on foreign bribery once the proposed Corporate Liability Act is adopted. Finally, certain *Länder* continue to organise their own training programs. While these initiatives are all positive, they do not clearly address the Working Group's concern to ensure that knowledge from *Länder* with foreign bribery enforcement experience is transferred effectively to colleagues in other *Länder*.
- *Recommendation 2.c. – Not implemented.* Germany's draft Corporate Liability Act would, as drafted, establish the legality principle for prosecuting corporate liability cases. As the draft law has not yet been adopted, this recommendation remains not implemented.
- *Recommendation 2.d. – Not implemented.* Concerning the regional courts' specialised economic chambers, the German federal government proposed a bill on 20 January 2021, based on an initiative by the Ministry of Justice and Consumer Protection, that would ensure that the specialised economic chambers have the same jurisdiction over foreign bribery cases as for commercial bribery

cases. The proposed bill has been submitted to parliament for deliberation and adoption. If the bill passes into law, subject to a more in-depth analysis by the WGB of the adopted version, it may address the recommendation's requirement.

Regarding resolutions of foreign bribery cases:

- *Recommendation 3.a. – Partially implemented*. Germany reports that it is developing amendments to Guidelines on Criminal Proceedings and the Imposition of Fines in order to help prosecutors in the *Länder* exercise discretion under section 153a CCP to terminate the prosecution of a foreign bribery case. The proposed amendments are undergoing consultation at *Land* level coordinated at federal level. In addition, Germany has raised awareness of the need for greater consistency in a conference organised by the *Länder* justice departments. Finally, Germany believes that its effort to collect data more systematically on foreign bribery cases will help verify that prosecutors consistently apply the criteria for entering into resolutions.

- *Recommendation 3.b. – Not implemented*. In the Phase 4 report, the Working Group recommended that Germany take steps to ensure that key elements of the resolutions under section 153a CCP, are made public where appropriate and in line with Germany's data protection rules and Constitution. Germany reported that none of the 40 resolutions that were adopted under section 153a CCP since the Phase 4 report were made public. Germany is developing draft guideline n° 242b on Criminal Proceedings and the Imposition of Fines, which will provide that prosecutors should always consider whether, and to what extent, elements of section 153a CCP should be made public. . However, the guideline has not been adopted yet. Therefore, its application by prosecutors in practice and its impact on the transparency of resolutions cannot be assessed at this stage.

- *Recommendation 3.c. – Fully implemented.* Germany has completed an extensive empirical evaluation of negotiated agreements (section 257c CCP), which was published on the website of the Ministry of Justice and Consumer Protection ("MOJCP") in November 2020. The study focused on whether the provisions of section 257c CCP have been applied in practice, and seems to have touched upon the issues that concerned the Working Group in Phases 3 and 4, in particular, whether negotiated agreements ensure legal certainty and transparency. Given the conclusion that, although prohibited, informal agreements are still applied in practice, mainly because of the "complexity" of section 257c CCP, the Working Group will follow up on whether Germany takes steps to address this conclusion in order to ensure sufficient predictability, transparency and accountability in all negotiated agreements.

- *Recommendation 3.d. – Not implemented*. Germany reports that the draft Corporate Liability Act currently contains provisions that would authorise certain grounds for disposing of or terminating prosecutions against legal persons as an exception to the legality principle. In some instances, such dispositions or terminations would require judicial approval. Notably, draft section 36 would allow prosecutors to propose a non-prosecution resolution for companies subject to imposed conditions or directions that would eliminate the public interest underlying the prosecution. Depending on the conditions or directions imposed, the company would have a term of one or two years to fulfil the conditions and avoid prosecution. This resolution requires judicial approval unless the consequences caused by the corporate offence are minor.

Regarding sanctions and confiscation:

- *Recommendation 4.a. –Fully implemented.* The Federal Ministry of Justice has developed a new template for the compilation of statistical information on sanctions in foreign bribery cases based on case information provided by the respective *Länder*. The MOJCP's ability to maintain statistics

on sanctions and procedures applied will fully depend on whether the *Länder* provide comprehensive and detailed case information annually. The new form developed by the MOJCP for case reporting may help to collect data more consistently across *Länder*. The form has now been used for the collection of data for 2020 (see recommendation 2a). The WGB should follow-up on whether the form results in a more comprehensive data collection process on the occasion of the next WGB full evaluation of Germany.

- *Recommendation 4.b. – Partially implemented.* Germany has taken some steps to raise awareness of the *Länder* prosecutors of the need to ensure that functional equivalence is achieved when alternatives offences to foreign bribery are applied, including when foreign bribery cases are resolved through a resolution under section 153a CCP. However, as in Phase 4, the sanctions imposed in practice for alternative offences continue to show differences in individual cases between the sanctions imposed for foreign and commercial bribery. As a result, functional equivalence in the level of sanctions imposed might not always be achieved. The issue of lower sanctions imposed in cases sanctioned for commercial bribery dates back since Phase 3.. Since Phase 4, Germany has also increasingly relied on tax offences to sanction individuals in foreign bribery cases. However, the WGB did not assess whether such offence would be considered functionally equivalent to foreign bribery in its past evaluation. This should be considered on the occasion of the next WGB full evaluation of Germany.

- *Recommendation 4.c. – Fully implemented.* Steps have been taken to raise awareness of the importance of making full use of the range of criminal sanctions available in law.

- *Recommendation 4.d. – Not implemented.* Germany's draft Corporate Liability Act would introduce the possibility to impose a maximum monetary sanctions corresponding to up to 10% of the company's average annual turnover if that company's annual turnover exceeds EUR 100 million. In addition, the draft Act would introduce sanctioning criteria including mitigating factors. These would include significant contribution by the legal person to investigating the corporate offence and corporate liability and the existence of measures to prevent corporate offences. Germany indicates that more detailed guidance is available in the Explanatory memorandum to the draft Act. Pending the adoption of the draft Act, this recommendation remains not implemented.

- *Recommendation 4.e. –Fully implemented.* Regarding training and detailed written information to investigators and prosecutors on the quantification of bribe proceeds for confiscation purposes, Germany has reported trainings on the new confiscation regime and asset recovery organised at Federal and *Länder* levels. The quantification of bribe proceeds has been addressed as part of some of these trainings. .

- *Recommendation 4.f. – Not implemented.* Regarding the need to ensure that independent forfeiture orders are not used instead of imposing a regulatory fine, the Corporate Liability Act would prevent the use of confiscation orders as an alternative to holding a corporate entity liable as it would introduce the principle of mandatory prosecution against legal person. Since Phase 4, section 29a OWiG has been used against 3 more legal persons in 3 cases. Pending the adoption of the draft Act, this recommendation remains not implemented.

- *Recommendation 4.g. – Not implemented.* The proposed increase of the maximum monetary sanctions available against legal persons in the draft Corporate Liability Act would address, to some extent, the need to ensure that sanctions imposed on legal persons are effective, proportionate and dissuasive, including when taking into account the tax treatment of confiscation in Germany. However, pending the adoption of the draft Act, this recommendation remains not implemented. It

also remains to be seen whether sanctions imposed in practice, and in particular the punitive component of regulatory fines, are necessarily effective, proportionate and dissuasive, especially when taking into account the tax treatment of confiscation. In practice, the regulatory fines and forfeiture orders imposed since Phase 4 continues to raise serious concerns that the sanctions imposed on legal persons are not effective, proportionate and dissuasive. The amount of the confiscation imposed has, in each case, exceeded by far the amount imposed as part of the regulatory fines.

Regarding international co-operation:

- *Recommendation 5 – Fully implemented.* The new case data collection template reported under Recommendation 2.a. above will also collect data on MLA requests, including information about aspects that the Working Group could not obtain during the Phase 4 evaluation.

Regarding the liability of legal persons:

- *Recommendation 6.a. – Not implemented.* Concerning the use of independent forfeiture orders to resolve foreign bribery cases against legal persons, Germany refers to its efforts to modify the relevant legislation through the draft Corporate Liability Act. As this draft Act has not yet been adopted, this recommendation remains not implemented.

- *Recommendation 6.b. – Not implemented.* Germany's draft Corporate Liability Act would, as drafted, establish the legality principle for prosecuting corporate liability cases. As the draft Act has not yet been adopted, this recommendation remains not implemented.

- *Recommendation 6.c. – Partially implemented.* The Working Group recommended that Germany enhance training for prosecutors concerning corporate liability in foreign bribery cases, as well as sharing experience across *Länder*, including the use of administrative resolutions. Germany has reported that foreign bribery issues have been incorporated into some national conferences and that some *Länder* have their own training programmes. Germany plans to conduct training on corporate liability after the new Corporate Liability Act is adopted. While this is a reasonable approach, Germany could be doing more in the meantime to ensure that experience and knowledge from *Länder* with foreign bribery case experience involving companies is more effectively transferred to *Länder* with less experience and to raise awareness about the use of non-trial resolution mechanisms to resolve foreign bribery matters against companies.

- *Recommendation 6.d. – Not implemented.* Germany's draft Corporate Liability Act would, as drafted, establish the legality principle for prosecuting corporate liability cases. As the draft Act has not yet been adopted, this recommendation remains not implemented.

Regarding other measures affecting implementation of the Convention

Foreign bribery in the defence sector:

- *Recommendation 7.a. – Not implemented*. Germany indicated that it examined possibilities to take steps to establish formal guidelines on the conduct of due diligence in the granting of defence export and marketing licences, including the consultation of international debarment lists and the review of companies' corruption-related compliance programmes. No information was provided about the nature and timing of such examination. While Germany reported that formal guidelines on due diligence in granting defence-related export licences already exist, the evaluation team could not review their content as they are not public. Based on the information available, the guidelines

do not seem to request the consultation of international debarment lists and the review of applicants' anti-corruption compliance programmes.

- *Recommendation 7.b. – Not implemented*. Germany has not taken specific steps to ensure that the application of the *Federal Government's Principles for vetting exporters of weapons of war and arms related goods*, adopted in 2001, duly considers foreign bribery legislation. Germany reported that the *Principles* and the guidelines on due diligence in granting defence-related export licences are being reviewed, which will be an opportunity to consider including such a reference.

- *Recommendation 7.c. – Not implemented*. Germany has not taken clear steps to train relevant Office of Export Control staff on *Federal Government's principles for vetting exporters of weapons of war and arms related goods*, foreign bribery risks and red flags. While Germany reported that information on foreign bribery risks and red flags have been disseminated to Ministry officials, it is unclear whether this is a new development since the adoption of the Phase 4 report and, in any case, whether such information has been specifically shared with, or designed for, export control staff. Similarly, it is unclear whether training provided to the Office for Export Controls' staff and the internal guidelines on due diligence in granting defence-related export licences cover the *Federal Government's principles for vetting exporters of weapons of war and arms-related goods*, or refer to foreign bribery risks or red flags.

Regarding the Federal Debarment Register:

- *Recommendation 8.a. – Not implemented*. Germany has not taken steps to ensure that legal entities cannot avoid being listed in the new Federal Debarment Register that is being set up, by resorting to corporate restructuring and the rules providing for the non-inclusion of successor companies in the Register. As was the case at the time of the adoption of the Phase 4 report, in case of successor liability, neither the law establishing the Register nor its official explanatory memorandum provide that, in principle, successor legal persons should be listed in the Register.

- *Recommendation 8.b. – Not implemented*. Germany has started developing, but not yet adopted, guidelines on the requirements for companies to prove that measures have been taken to remediate foreign bribery risks in order to be removed from the new Federal Debarment Register. The intention to issue this document had been announced by the Federal Cartel Office's at the time of the adoption of the Phase 4 report. When in force, which is scheduled for the second quarter of 2021, the new guidelines will, according to Germany, include details on the criteria and obligations for requesting removal from the Register, as well as on measures to address and prevent bribery risks. The draft guidelines have not been shared with the evaluation team, and their precise content could not be assessed.

- *Recommendation 8.c. – Partially implemented*. The Phase 4 report highlighted the lack of detection by Germany's export credit agency (Euler Hermes) and official development assistance (ODA) providers (GIZ and KfW), and noted that direct access to the new Federal Debarment Register would provide an effective due diligence tool for these agencies and enhance their detection capacities. Germany reported that it is now planned that GIZ and KfW, as contracting authorities, will have access to the Federal Debarment Register, although this assertion has not been substantiated. At this stage, Euler Hermes is not expected to be given access to the Register, but Germany reported that this could be re-assessed.

- *Recommendation 8.d. – Not implemented*. Germany has not taken steps to raise awareness amongst procuring authorities of the existence of international debarment lists and the need to take such lists into consideration as a basis for vetting applicants. Germany indicated that it is willing to raise awareness of existing international debarment, possibly through a circular, but such steps have yet to be taken.

Regarding Official Development Assistance:

- *Recommendation 9.a. – Fully implemented*. To enhance the sharing of information between their two agencies, GIZ and KfW have instituted biannual exchanges between their anti-corruption and compliance units in addition to ad hoc exchanges of information potentially concerning corruption cases.

- *Recommendation 9.b. – Partially implemented*. Germany reports that GIZ has created a sanctioning committee for internal cases that will ensure consistent application of its existing zero-tolerance policy for corruption among GIZ staff. The committee adopted its rules of procedure in December 2020 and thus is now operational. The committee will have jurisdiction to hear matters involving violations committed by GIZ staff. The sanctioning regime for third parties follows a different logic. As at the time of the Phase 4 evaluation, the sanctions for corruption would depend on the anti-corruption clauses in the relevant contracts. If a matter arose, the appropriate sanction would depend on the scope of the relevant contracts and other applicable laws, in consultation with local lawyers and GIZ Legal Affairs department. Germany maintains that this is the most effective approach for sanctioning third parties, given the various countries and stakeholders involved. However, in Phase 4, the WGB did not consider that this contractual approach was sufficient to implement the 2016 Recommendation for Development Co-operation Actors on Managing the Risks of Corruption.

- *Recommendation 9.c. –Fully implemented*. GIZ reports that it revised its Code of Conduct to address foreign bribery. An e-training programme went online in November 2020. All GIZ staff will need to complete anti-corruption e-training every three years. In addition, managers must take specific modules to account for their specific risks. The introduction of periodic training is an important step, but GIZ could do more to ensure that all employees – not just managers – receive training about specific risks when operating in high-risk environments and sectors, as per the 2016 Recommendation for Development Co-operation Actors on Managing the Risks of Corruption.

Dissemination of the Phase 4 Report

- The MOJCP disseminated the Phase 4 evaluation report to all *Land* departments of Justice in September 2018. Furthermore, the contents of the Phase 4 evaluation report were presented and discussed at a "*Bund-Länder*-Conference on the Implementation of the Phase 4 Recommendations – Evaluation by the OECD Working Group on Bribery" held by the MOJCP with representatives from all Land departments of Justice on 20. September 2018.

- The Federal Ministry of Economics also published a report about the outcomes of the Phase 4 evaluation November 2018. This report contains a link to the OECD webpage where the Phase 4 report is accessible both in English and in German.

Conclusions of the Working Group on Bribery

Based on these findings, the Working Group concludes that of Germany's recommendations, 10 have been fully implemented (recommendations 1.d., 1.e., 2.a., 3.c., 4.a., 4.c., 4.e., 5., 9.a., and 9.c.); 7 have been partially implemented (recommendations 1.c., , 2.b., 3.a., 4.b., 6.c., 8.c., 9.b., and); and 18 have not been implemented (recommendations 1.a., 1.b., 2.c., 2.d., 3.b., 3.d., 4.d., 4.f., 4.g., 6.a., 6.b., 6.d., 7.a., 7.b., 7.c., 8.a., 8.b., and 8.d.).

Germany is invited to provide an additional written report to the Working Group in one year in order to update the Working Group on the status of its draft Corporate Liability Act. The level of implementation of related recommendations (recommendations 1.a., 2.c., 3.d., 4.d., 4.f., 4.g., 6.a., 6.b., 6.d.) could be reassessed at that time.

Written Follow-Up Report by Germany

Instructions

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 4 evaluation report. Countries are asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process is in the Phase 4 Evaluation Procedure (paragraphs 51-59 and Annex 8) as updated in December 2019.

Please submit completed answers to the Secretariat on or before 17 December 2020.

Name of country:	**GERMANY**
Date of approval of Phase 4 evaluation report:	**14 June 2018**
Date of information:	**17 December 2020**

PART I: RECOMMENDATIONS FOR ACTION

Regarding Part I, 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.

Recommendations regarding detection of foreign bribery

Recommendation 1(a):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Germany:

a. In line with the intention expressed in the 2018 Coalition Agreement, introduce clear and transparent guidance on the procedures and criteria attached to self-reporting by companies when concluding a foreign bribery case, including the nature and degree of co-operation expected from the company, the sharing of the results of companies' internal investigations, considerations of anti-corruption compliance, remedies and monitoring requirements, with a view to ensuring a consistent exercise of discretion by the prosecutors across *Länder*. [2009 Recommendation III.iv and Annex I.D]

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

As provided for in the Government's 2018 Coalition Agreement and positively noted by the examiners in the phase 4 evaluation report, in June 2018, the Government adopted a draft bill on corporate liability. The government bill for strengthening the integrity of business conduct (*Gesetz zur Stärkung der Integrität in der Wirtschaft*) was discussed in the *Bundesrat* (the second chamber) and was submitted to parliament (*Deutscher Bundestag*) for deliberating and adoption.

The bill provides for the creation of a new act for sanctioning of corporate offences (*Gesetz zur Sanktionierung von verbandsbezogenen Straftaten* – hereinafter "Corporate Liability Act", "Act"). The Corporate Liability Act will replace existing provisions for corporate liability for criminal offences in the Administrative Offences Act (Ordnungswidrigkeitengesetz - hereinafter "OWiG").

The Act will provide a new legal framework for the liability of legal persons and associations (operating with a commercial purpose) for corporate offences. The investigation and prosecution of corporate offences will be subject to the principle of legality, making it mandatory to initiate and conduct investigations also against the concerned company or companies, and not only the natural person. The principle of legality will insofar replace the principle of discretionary prosecution that governs existing OWiG provisions for corporate liability and will hence ensure a uniform level of prosecution also against companies across the 16 federal states ("Länder").

A set of appropriate sanctions for corporate offenses – including bribery of foreign public officials – will be introduced. Moreover, the Corporate Liability Act will promote effective compliance measures and incentivize companies to detect and internally investigate criminal offences.

Section 15 paragraph 3 number 7 of the Corporate Liability Act provides that actions taken by the company to detect corporate offences are to be taken into account as a mitigating factor and thus also incentivizes self-reporting.

Moreover, the Corporate Liability Act will provide incentives for companies to carry out internal investigations in order to assist investigation authorities in detecting and prosecuting corporate offences, e.g. foreign bribery offences. In sections 16 and 17, the Act draws up precise conditions under which a company's internal investigations can be considered as a mitigating factor by the courts:

Section 16
Internal investigations
Internal investigations may be conducted both by the corporation itself and by third parties commissioned by it.

Section 17
Mitigation of corporate sanction following internal investigations
(1) The court is, as a rule, to mitigate a sanction imposed for a corporate offence where
1. the corporation or the third party commissioned by it has made a significant contribution to investigating the corporate offence and corporate liability,
2. the commissioned third party and those acting on behalf of the commissioned third party in the internal investigations are not representing, as defence counsel, the corporation or an accused whose corporate offence forms the basis for the proceedings to impose sanctions,
3. the corporation or the third party commissioned by it cooperates continuously and fully with the prosecuting authorities,
4. the corporation or the third party commissioned by it, following conclusion of the internal investigation, makes available to the prosecuting authorities the outcome of the internal investigation, including all those documents which were relevant to the internal investigation and on which that outcome is based, as well as the final report and
5. the principle of fair procedure is applied to the interviews conducted as part of the internal investigation, in particular (…)
(2) The conduct of the internal investigation is to be documented in line with the principles set out in subsection (1) no. 5 and that documentation is to be made available to the prosecuting authorities.
(3) When taking the decision referred to in subsection (1), the court must, in particular, take account of the nature and extent of the facts disclosed and their relevance in regard to investigating the offence, the time of their disclosure and the extent of assistance which the corporation renders to the prosecuting authorities. Mitigation pursuant to subsection (1) is ruled out if the corporation does not

disclose the outcome of the internal investigation until after the main proceedings have been opened (section 203 of the Code of Criminal Procedure).

Section 17 paragraph 1 numbers 1 and 3 define the degree of co-operation expected from companies. Section 17 states that the concerned company's internal investigations need to have "considerately contributed to solving the case" and that, in addition, the company's management or representative in charge of the investigations is required to fully collaborate with enforcement authorities throughout their investigations. The requirement to considerately contribute to the success of the official investigations clearly points out that internal investigations can only be considered as a mitigating factor if conducted efficiently.
The appropriate concrete level of cooperation required by these provisions has to be determined by the courts on a case by case basis, taking into account, e.g., the size of the company and the severity of the charge.

The requirements of section 17 also ensure that the findings of internal investigations can be brought to the best possible use for the official investigations: Section 17 paragraph 1 number 4 specifies that, when internal investigations are concluded, the company is required to hand over all results and related documents including a final report on the investigation's findings to the competent enforcement authorities. In order to guarantee that the results of internal investigations remain legitimate sources for legal authorities, section 17 para 1 number 5 stipulates that internal investigations must be conducted in respect of the guarantees of a fair trial, specifying e.g. that, when employees are questioned, they need to be previously cautioned that their answers can be used in a criminal proceeding.

According to section 17 paragraph 1, the courts "shall mitigate" the sanction against the legal person when the requirements set up in section 17 are met. In case the conditions laid out in section 17 are met and the court decides to mitigate the sanction, section 18 prescribes that the applicable maximum sanction for corporate offences (see section 9 paragraph 1 to 3) is to be reduced by half and that the publication of any information on the sanction imposed on the legal person (according to section 14) is prohibited. Within the reduced sanctions framework, section 17 paragraph 3 gives further guidance to the courts by providing them with a non-exhaustive list of criteria. These criteria include the nature and scope of the facts revealed by the internal investigations, their importance for solving the case and the timing of the revelations made to enforcement authorities. The criteria of timing make self-reporting one of the decisive aspects for the mitigating decision.

If the company cooperates but the conditions of sections 16 and 17 paragraph 1 and 2 are not (fully) met, a mitigated sanction is nevertheless possible according to the general criteria on the level of the sanction, albeit at a lower level.

These clear requirements for the consideration of internal investigations as mitigating factors for sanctioning send a clear signal for companies to ensure the effectiveness, comprehensiveness, independence and fairness of internal investigations. If all conditions imposed by section 17 are met, the results of internal investigations can become a valuable source of information for enforcement authorities. In particular, the cooperation with enforcement authorities requires full disclosure of the results of their investigations. The new provisions on internal investigations will also incentivise self-reporting that is a crucial part of the internal investigation process.

Moreover, the Corporate Liability Act introduces rules for the consideration of **compliance measures** in determining

- the liability of the company for offences committed by non-managerial staff

- whether the conditions for dispensing with prosecution against a legal person are met (sections 36, 37; see below recommendation 3d); specifically, section 36 allows the prosecution with the approval of the court to refrain from the prosecution of companies subject to the imposition of conditions and/or directions if the severity of the crime does not make a sanction indispensable. Where appropriate, the company can also be directed to introduce and/or improve its compliance measures as a condition for dispensing with prosecution.
- the appropriate type and level of sanctions for a corporate offence (section 10 paragraph 1 numbers 1 and 2, section 15 paragraph 3 numbers 6 and 7). Specifically, section 10 paragraph 1 of the draft law allows the courts to refrain from sanctioning the legal person with reservation of a fine if the following cumulative conditions are met:
  "1. it is to be expected that issuing the warning is sufficient to prevent future corporate offences for which that corporation is responsible in accordance with section 3 (1),
  2. the overall assessment of the corporate offence and its consequences indicate that special circumstances exist which obviate the need to impose a corporate fine, and
  3. the defence of the legal system does not necessitate imposition of a corporate fine."

In this case, the court can issue a warning to the responsible legal person and can impose conditions e.g. the payment of a compensation to the treasury (section 12) or directions (section 13). Section 13 paragraph 2 expressly introduces the possibility for the court to direct the legal person to design and implement measures for the prevention of corporate crimes and to provide proof of their implementation through certification by a competent authority. The authority selected to monitor the company's efforts has to be approved by the court. Such directions will become an important tool in promoting effective compliance, including anti-corruption compliance.

Section 13 para 2 and the possibility for the court to direct the legal person to design and implement compliance measures and to supply proof by an expert institution to be approved by the court of their implementation are also applicable in conjunction with the provision on deferred prosecution in section 36.

Furthermore, like in the existing legal framework, the existence of appropriate compliance measures can dispense the company from liability for corporate crimes committed by their non-management staff. Section 3 paragraph 1 states:

Section 3
Corporate liability
(1) A corporate monetary sanction is imposed against a corporation where someone
1. has committed a corporate offence in their capacity as a member of that corporation's managing staff or
2. has committed a corporate offence in handling the corporation's affairs if the corporation's managing staff could have prevented the offence or made its commission significantly more difficult by taking measures to prevent corporate offences, for instance in regard to organisational structure, recruitment, instructions and supervision.

Section 3 paragraph 1 number 2 of the Corporate Liability Act establishes the liability of legal persons for corporate crimes committed by members of their non-managerial staff. On the basis of section 3 of the Act, the legal person's liability for the crime committed by non-managerial staff can be established if the management could have prevented the crime by implementing appropriate compliance measures. Thus, effective compliance measures are the key factor for preventing liability for corporate offences committed by employees. In light of the increased sanctions and the principle

of legality, the introduction of effective compliance measures will become even more important for companies.

The Corporate Liability Act addresses compliance as a cross cutting issue and provides for compliance to be taken into account in different situations. The Act lists the company's internal organisation, selection, management and control duties as presumptive examples for the aspects appropriate compliance measures should generally cover. These aspects constitute core elements of an appropriate compliance management system as is also stated in the explanatory memorandum provided with the Act. The list of criteria in section 3 paragraph 1 number 2 provides companies with a general guidance for designing and implementing appropriate and effective compliance measures.

Due to the fact that corruption is a significant compliance-risk in all kinds of businesses, such measures necessarily include anti-corruption compliance in most cases. Further guidance on the required compliance measures is included in the bill's explanatory memorandum.

If no action has been taken to implement recommendation 1(a), 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:

Recommendation 1(b):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Germany:

b. Urgently amend its legislation to provide clear, comprehensive protections for whistleblowers for example by enacting a dedicated whistleblower protection law which applies across the public and private sectors. [2009 Recommendation IX.iii; Phase 3 recommendation 6]

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

Clear and comprehensive protections for whistleblowers across the public and private sectors will be provided by transposing the EU directive 2019/1937 on the protection of persons who report breaches of Union law of 23 October 2019 ("whistle-blower directive") into German law.

The whistle-blower directive entered into force on 16. December 2019 and sets up minimum standards for the protection of whistle-blowers who report on breaches of EU law that fall within the scope of the Union acts set out in Annex I to the directive. Among the areas of law concerned are e.g. public procurement, financial services and prevention of money laundering and terrorist financing. The laws, regulations and administrative provisions necessary to comply with the whistle-blower directive have to be fully enacted by 17 December 2021.

The new national legislations on whistle-blower protection will apply across the public and the private sector as this is required for a complete implementation of the directive. The Ministry of Justice and Consumer Protection (MOJCP) is currently preparing the necessary legislative provisions for transposing the directive into the German legal framework and has circulated a draft law within the government in December 2020 that is now subject to intra-governmental discussions. The scope of application of the draft law comprises criminal law but the scope of application is also subject to these discussions.

If no action has been taken to implement recommendation 1(b), 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:

Recommendation 1(c):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Germany:

c. Ensure that the MFA develops guidelines for all officials posted abroad to require the reporting of foreign bribery, explain the reporting channels, and provide advice on how to detect foreign bribery, e.g. through enhanced media monitoring and alerts. [2009 Recommendation III.iv and IX.ii]

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

The Federal Foreign Office developed guidelines for all officials posted abroad to prevent foreign bribery. These guidelines are summed up in an annually updated document for all employees, not only regarding the staff posted abroad.

These guidelines provide an overview of measures to prevent and handle cases of suspected foreign bribery, especially in the context of diplomatic missions or consular offices. Every suspicion of foreign bribery has to be reported immediately to a special contact for corruption matters at the embassies abroad. Furthermore, a written report has to be sent to internal division 506 at the Federal Foreign Office in Berlin.

These guidelines are also implemented as content in the fields of education and training of prospective and current diplomats of the German Federal Foreign Office.

Embassies are also obliged to point out to companies that bribery of foreign public officials is illegal under German law. The individual embassies decide, based on the local situation, whether to undertake further awareness raising activities or provide advice on compliance issues. Internet sites of embassies and brochures published by the MOE provide additional guidance abroad.

If no action has been taken to implement recommendation 1(c), 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:

Recommendation 1(d):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Germany:

d. Consider taking appropriate steps, including through encouraging guidance on EU level for the application of the new requirements under EU law for reporting to competent authorities in order to ensure more legal security for auditors when they report to external competent authorities, including law enforcement authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure auditors making such reports reasonably and in good faith are protected from legal action as appropriate. [2009 Recommendation III.iv, v and X.B iii, v]

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

The Federal Ministry for Economic Affairs and Energy had asked the German Auditor Oversight Body (the "Abschlussprüferaufsichtsstelle" – APAS) which is a member of the Committee of European Auditor Oversight Bodies (CEAOB), to suggest in the CEAOB that it should issue guidance on EU level of the requirements under EU law for reporting to competent authorities. The CEAOB issues guidance on a broad range of questions on the application of the new provisions of EU law. APAS has suggested

such guidance to the other members of the CEAOB at the plenary meeting in November 2019, but unfortunately the CEAOB has decided against issuing the requested guidance.

The German government is currently considering a draft bill to strengthen the integrity of the financial and capital markets (Finanzmarktintegritätsstärkungsgesetz) which includes a provision to clarify further which authorities are the competent external authorities to which auditors shall report cases of foreign bribery or other cases of irregularities, in order to foster legal security for auditors.

If no action has been taken to implement recommendation 1(d), 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:

Recommendation 1(e):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Germany:

e. Take steps to ensure that GIZ and KfW staff report suspicions of foreign bribery arising in the context of projects commissioned by the German Federal Government and involving German companies or individuals to German law enforcement authorities, and issue guidelines to staff on the reporting procedure. [Convention Article 3(4); 2016 Recommendation for Development Cooperation Actors, 7, iii.]

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

According to GIZ's code of conduct, all employees are required to report on bribery and other serious corruption cases or their suspicion. For the reporting, GIZ's whistleblowing system is available, also providing an anonymous whistleblowing opportunity. In addition, there is a formal reporting scheme for managing staff including a reporting form. As a reaction to the OECD recommendations, GIZ's Legal Affairs Unit introduced a binding mechanism for reporting cases of foreign bribery involving or affecting German companies or individuals to the German criminal prosecution authorities.

According to KfW´s work instruction for the prevention of fraud and corruption, all employees are obliged to report all cases of fraud, bribery and other corruption or their suspicions to the independent Compliance Unit. For the reporting, KfW's whistleblowing system is available, also providing an anonymous whistleblowing opportunity. Based on its own work instructions for managing suspicious cases, the Compliance unit reports cases of foreign bribery involving or affecting German companies or individuals to the German criminal prosecution authorities.

If no action has been taken to implement recommendation 1(e), 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:

Recommendations regarding enforcement of the foreign bribery offence

Recommendation 2(a):

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

a. Compile at Federal level, or ensure consistent compilation at *Länder* level of information and statistics relevant to the monitoring and follow-up of the enforcement of the German legislation implementing the Convention. [Convention, Article 12; Phase 3 recommendation 4b.]

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

In order to ensure a consistent and comprehensive compilation of data allowing for a follow-up on the enforcement of German legal provisions implementing the OECD Anti-Bribery Convention, the MOJCP in consultation with the Länder ministries of justice developed a new data collection template for enforcement data relating to foreign bribery cases. The form is designed as a "check-list" covering all relevant aspects of criminal and administrative investigations, prosecutions and other proceedings in the area of foreign bribery. It requests data on all procedural steps from the initiation of investigations concerning foreign bribery allegations to the conclusion of the case, including e.g. on the main investigative measures applied, the reasons for terminations of (parts of) proceedings, charges brought to an indictment and imposed sanctions.

The form is designed to retrieve detailed information while ensuring a high level of consistency. Regarding sanctions, the form includes questions on the exact criteria for determining the amount of an imposed regulatory fine – expressly asking for information on any consideration given to self-reporting, assistance in resolving the case and compliance measures – or the measures taken to secure asset recovery.

In preparation of the annual report on law enforcement activities in foreign bribery cases, the law enforcement authorities will be asked to fill in a form for each relevant investigation or court proceeding. All information gathered on an individual case throughout the different stages of the criminal proceeding will be aggregated in the form and new developments will be highlighted. Information on statistical data reported to the WGB will be noted at the end of the table to ensure the completeness of information provided in the annual report. This method facilitates the data retrieval at *Länder* level and enables the MOJCP to verify the completeness and consistency of information transferred by the *Land* departments of justice. A high consistency of the data retrieved from the *Länder* is further secured by a number of explanatory notes to the table pointing out aspects which are of particular importance for statistics on foreign bribery cases.

The new method of data collection was presented and discussed at a "*Bund-Länder*-Conference on the Implementation of the Phase 4 Recommendations – Evaluation by the OECD Working Group on Bribery" held by the MOJCP with representatives from all *Land* departments of Justice on 20. September 2018. This conference also aimed on raising awareness for the importance of the compilation of complete and correct statistical data on law enforcement activities in foreign bribery cases. A first version of the form was used as a pilot in the data collection for the 2019 enforcement report. After evaluation of the quality of data collected through the new form and the feedback from the *Länder*, the data collection form has been adapted and improved and sent again to the *Länder* for their comments. The deadline for *Länder* comments ends on 1st of October 2020. Please find the current version of the data collection form attached to this report as Annex A. The finalized version is to be used for the collection of the 2020 data.

If no action has been taken to implement recommendation 2(a), 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:

Recommendation 2(b):

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

b. Continue to ensure that prosecutors in those *Länder* with less experience in foreign bribery cases be offered guidance and specific training including by more experienced prosecutors from other *Länder*, with regard to the complexity of the foreign bribery offence and its investigation and prosecution for both natural and legal persons. [2009 Recommendation III.ii and V.]

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

The "*Bund-Länder*-Conference on the Implementation of the Phase 4 Recommendations – Evaluation by the OECD Working Group on Bribery" in September 2018 was also used to raise awareness of the complexity of the foreign bribery offence and the need for specific training of prosecutors among the representatives of the *Land* departments of justice. The participants agreed that existing training events in the field of foreign bribery should be extended and improved. The participants also welcomed the idea to consider integrating specific sessions on the offence of foreign bribery into existing regular expert meetings like e.g. the "Conference for Exchange of Experience between Specialist Public Prosecution Offices Responsible for Combating Economic Crime" ("*Erfahrungsaustausch der Schwerpunktstaatsanwaltschaften für die Bekämpfung der Wirtschaftskriminalität*"). This annual exchange could not take place in 2020 due to the corona pandemic. The planning for next year's exchange has not yet started.

In 2019, the findings of the OECD WGB's Phase 4 Evaluation were presented at the Experience Sharing Conference by a representative of the MOJCP and a senior prosecutor who had also participated in a panel during the on-site visit. Following the presentations, prosecutors shared their experience with foreign bribery cases and discussed ways to best implement WGB recommendations.

After the entry into force of the Corporate Liability Act, a special focus will be put on training sessions regarding the enforcement of foreign bribery charges against legal persons. . The recommended dissemination of specialist knowledge is implemented in some *Länder* via their own training programmes, conferences and seminars. For example, one Land runs a seminar entitled "Foreign corruption" which highlights the practical significance of foreign corruption offences, presents indicators for such activity, and explains the basic system of German criminal law on corruption and its applicability to foreign bribery. With in-person attendance at events being restricted due to the Corona pandemic, there has been greater use of online training events this year.

Some *Länder* have also taken organisational steps such as creating a "Specialist Public Prosecution Office for Economic Offences" or a relevant "Special Department". This bundling of proceedings has enabled the pooling of considerable knowledge and expertise, which has subsequently been consolidated and expanded. Moreover, the experience gained in practice is increasingly passed on through lecturing at internal judicial training courses such as those run by the German Judicial Academy, but also at training courses offered by non-judicial institutions such as the *Evangelische Akademie* (Protestant Academy), in which corruption offences are examined in an international context.

In addition, the MOJCP will use the new improved data collection form for sharing the more meaningful and comprehensive enforcement data on foreign bribery cases with the respective ministries of justice of the *Länder*. When analysing the data collected for the OECD enforcement data report, the MOJCP

will select cases which can serve as examples for typical challenges in foreign bribery cases. Thanks to the clear-cut structure of the new data collection form, the relevant aspects of the selected cases can be highlighted and made accessible to the Land departments of justice for distribution among law enforcement authorities.

Furthermore, the MOJCP will again reach out the *Länder* regarding the implementation of the phase 4 recommendations after the WGB's follow up.

If no action has been taken to implement recommendation 2(b), 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:

Recommendation 2(c):

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

c. If not implementing recommendation 6b on removing the principle of prosecutorial discretion applicable to corporate liability, alternatively ensure that the Public Prosecutor's Office role in the instigation of investigations and prosecutions of legal persons, is exercised independently of the executive in order to guarantee that these investigations and prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention (i.e. considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved). [Convention Article 5]

Action taken as of the date of the follow-up report to implement this recommendation:
The Corporate Liability Act provides for the introduction of the principle of legality, please see our explanations regarding recommendation 6b below.

If no action has been taken to implement recommendation 2(c), 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:

Recommendation 2(d):

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

d. Align regional court jurisdiction for both foreign bribery and bribery in business transactions (section 299/300 CC). [Convention, Article 5; 2009 Recommendation, Annex I.D.]

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

Germany is implementing recommendation 2d by establishing functional competence of the Economic Criminal Chamber at the regional court for the offence of foreign bribery. Section 74c of the Courts Constitution Act (CCA) contains provisions on the functional competence of Economic Criminal Chambers at the regional courts for certain crimes that typically have references to economic life. At the time of the phase 4 evaluation, there was no distinct provision for foreign bribery in section 74c CCA.; section 74 c (1) (6) (a) CCA only established the functional competence of the Economic Criminal Chamber for the offenses of bribery, granting of advantages and bribery, under the condition that special knowledge of economic life is required to assess the case.

As pointed out in the phase 4 evaluation report, this caused the risk that cases of bribery of foreign public officials could be heard by regular criminal chambers without consolidated knowledge in the field of white collar crime. Procedures in foreign bribery cases are typically very extensive and complex and often require recourse to international legal assistance as well as assessing domestic and foreign economic processes. In order to align regional court jurisdiction for both foreign bribery and bribery in business transactions. The MOJCP has drafted an amendment to section 74c CCA, which will integrate the offense of foreign bribery into section 74 c paragraph 1 number 5a:

"(1) For criminal offences (…)

5a. involving agreements in restriction of competition upon invitations to tender, the taking and offering of a bribe in business transactions, the taking and offering of a bribe in the health sector, the taking of a bribe by and offering of a bribe to foreign and international officials, as well as under the Act to Combat International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung*) (…),

a criminal chamber acting as a chamber responsible for economic crime matters is competent insofar as the regional court is competent in accordance with section 74 (1) as the court of first instance and in accordance with section 74 (3) in respect of the hearing and decision on an appeal on points of fact and law (*Berufung*) against a judgment rendered by a court with lay judges (*Schöffengericht*). Sections 120 and 120b remain unaffected."

The proposed new text of section 74 c paragraph 1 number 5a CCA establishes the functional competence of the Economic Criminal Chamber for the offence of foreign bribery (sections 332, 334 in conjunction with section 335a of the Criminal Code) without the additional condition that special knowledge of economic life is required to assess the case. The amendment to section 74c CCA has been drafted as a part of a law proposing comprehensive amendments to the CCP and will shortly be undergoing the inter-departmental consultations process. After the consultation process, the bill will be published and undergo stakeholder consultation**.**

If no action has been taken to implement recommendation 2(d), 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:

Recommendation 3(a):

3. Regarding **resolutions** of foreign bribery cases, the Working Group recommends that Germany:

a. Clarify, through any appropriate means, including building on the body of concluded foreign bribery cases, the criteria by which the prosecutors may dispense with prosecution, including the level of cooperation expected from the defendants throughout the investigation, with a view to ensuring a consistent exercise of discretion by the prosecutors across *Länder* and to enhance predictability and transparency regarding the application of section 153a CCP. [Convention Article 5; 2009 Recommendation III.ii and V and Annex I D.]

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

In order to comply with recommendation 3a, Germany has taken different measures for ensuring a consistent exercise of discretion by the prosecutors across *Länder* and to enhance predictability and transparency regarding the application of section 153a CCP.

Firstly, recommendation 3a will be implemented by integrating guidance on relevant criteria for the application of section 153a CCP in foreign bribery cases into the "Guidelines on Criminal Proceedings and Imposition of Fines" (*Richtlinien für das Straf- und Bußgeldverfahren* - hereinafter "RiStBV*"*). These guidelines are nationally uniform instructions binding for the public prosecutors' offices. They

provide prosecutors with general guidance on the practical application of provisions of the Criminal Code (CC), the CCP and the OWiG. Due to the prosecutors' necessary margin of discretion in solving individual cases it is not possible to establish an exhaustive list of criteria for the decision to conclude foreign bribery cases by ways of a resolution according to section 153a CCP.

However, the MOJCP has drafted a new guideline stating a non-exhaustive list of criteria to be considered by prosecutors in applying the procedure of section 153a CCP:

Number 242b paragraph 1:

"When dispensing with prosecution concerning bribery of foreign and international officials pursuant to section 153a of the Code of Criminal Procedure, the public prosecutor also takes account, at his or her duty-bound discretion, of whether, to what extent and at which stage of the proceedings the accused contributed to investigating the offence. When taking the decision to terminate proceedings account is, further, to be taken of the amount of the benefit granted to the foreign or international official and the significance of the official act intended as counter-performance."

The text of the draft guideline specifies that the level and timing of the defendant's cooperation with law enforcement authorities need to be taken into account as criteria for a termination pursuant to section 153a CCP. The importance of a consistent application of section 153a CCP has also been stressed at the before-mentioned *Bund-Länder*-Conference in 2018.

Moreover, the new data collection form (see recommendation 2a) for foreign bribery cases will serve as a tool for verifying whether the criteria for entering into resolutions according to section 153a CCP are being applied uniformly by the prosecutors across *Länder*. For cases which are (partly) concluded by a resolution with sanctions, the data collection form explicitly asks for grounds for termination. In addition, in the before-mentioned conference with the *Land* departments of justice in September 2018, during which recommendations from the phase 4 report relevant to the investigation and prosecution of foreign bribery cases were addressed, the MOJCP pointed out that the uniform application of section 153a CCP should be promoted among prosecutors and courts. The importance of a consistent application of this provision was also affirmed by the representatives of the *Land* departments of justice. The uniform application of the provision may also be addressed when MOJCP invites *Länder* representatives to another conference after the phase 4 follow-up.

The above-mentioned draft guideline number 242b paragraph 1 RiStBV was shared with the *Land* departments of justice for comments and referred to the committee responsible for amendments to the Guidelines on Criminal Proceedings and Imposition of Fines for consideration and adoption. The next meeting of the committee will take place in spring 2021.

If no action has been taken to implement recommendation 3(a), 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:

Recommendation 3(b):

3. Regarding **resolutions** of foreign bribery cases, the Working Group recommends that Germany:

b. Ensure, through any appropriate means, that certain elements of the resolutions under Section 153a CCP, such as the legal basis for the choice of procedure, the facts of the case, the natural persons sanctioned (anonymised if necessary), and the sanctions imposed, are made public where appropriate and in line with Germany's data protection rules and the provisions of its Constitution. [Convention, Article 3 and 5; 2009 Recommendation III.ii; Phase 3 recommendation 3c]

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

In addition to the list of criteria to be considered when terminating a case pursuant to 153a CCP, the new draft guideline number 242b RiStBV also prescribes that prosecutors should always consider whether, and if so to which extent, elements of a resolution should be made available to the public. Paragraph 2 of the draft guideline states:

"When dispensing with prosecution pursuant to section 153a of the Code of Criminal Procedure, the public prosecutor examines, at his or her duty-bound discretion, whether and, where relevant, to what extent it appears appropriate to inform the public. In doing so, the public prosecutor takes account of the right of privacy of the accused, the rights of other persons concerned, the public's general interest in being informed and the obligation to effectively combat bribery of foreign public officials resulting from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Germany has ratified (Federal Law Gazette 1998 II, p. 2327)."

The before-mentioned conference between the MOJCP and the *Land* departments of justice in September 2018 has also been dedicated to the question of publication of elements of resolutions according to section 153a CCP. Recommendation 3b and the reasons stated in the phase 4 evaluation report were explained to and discussed with the participants. The representatives of the MOJCP emphasised that the prosecutor's offices should be encouraged to release press statements publishing certain elements of resolutions according to 153a CCP where appropriate and in line with fundamental rights and applicable data protection regulations.

If no action has been taken to implement recommendation 3(b), 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:

Recommendation 3(c):

3. Regarding **resolutions** of foreign bribery cases, the Working Group recommends that Germany:

c. Proceed with the announced extensive empirical evaluation of negotiated agreements in Germany. [Convention Article 5; 2009 Recommendation III.ii and V and Annex I D.]

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

From March 2018 to February 2020, a research network established between the universities of Düsseldorf, Frankfurt am Main and Tübingen has conducted a comprehensive study on the theoretical legal framework and practical application of the provisions regarding negotiated agreements in in criminal proceedings pursuant to section 257c CCP. In particular, the study aimed at verifying whether the courts and prosecutions services still take part in informal negotiated agreements although the conditions for negotiated agreements are now clearly stipulated in section 257c CCP.

The final report has now been published on the MOJCP's website in November 2020 and is available as an open access document: (https://www.bmjv.de/SharedDocs/Artikel/DE/2020/110420_Evaluation_Verstaendigung.html).

In summary, the study found that despite the entry into force of section 257c CCP and the prohibition of informal agreements by Federal Constitutional Court jurisprudence, in practice, informal agreements are still applied and outlines possible reasons for those findings. Against the background of the results, the Ministry will now examine whether further legal regulations are necessary to effectively counter

deficits in the judicial practice. The findings from the study will allow for a comprehensive legal policy discussion.

If no action has been taken to implement recommendation 3(c), 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:

Recommendation 3(d):

3. Regarding **resolutions** of foreign bribery cases, the Working Group recommends that Germany:

d. Consider introducing a system of resolution for legal persons as part of its efforts to increase enforcement against legal persons. [Convention Article 2 and 3; 2009 Recommendation III.]

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

Within a comprehensive set of new procedural rules, the Corporate Liability Act will introduce a system of resolution for proceedings against legal persons. The provisions of sections 35 to 42 of the Act allow the prosecution services, in some cases with the consent of the court, to dispense with or terminate prosecutions against legal persons as an exception to the principle of legality.
The applicable provisions reference corresponding CCP provisions on resolutions for suspected/ accused natural persons (Sections 153 CCP et seqq.) as a model and adapt them to legal persons. Section 36 of the Corporate Liability Act includes a particularly important provision with regards to foreign bribery cases. This provision parallels section 153a CCP which allows for the non-prosecution subject to the imposition of conditions or directions:

Section 36 - Non-prosecution subject to imposition of conditions and directions

(1) Section 153a (1) sentence 1 of the Code of Criminal Procedure applies, with the provision that the prosecuting authority, with the consent of the court competent to open the main proceedings and of the corporation, may temporarily dispense with preferring public charges and may at the same time impose on the corporation conditions pursuant to section 12 (2) and directions pursuant to section 13 (2) and (3) if these are suited to eliminating the public interest in prosecution and if the significance of the corporate offence, in the cases under section 3 (1) no. 2 including the severity and the extent of the omission, to take measures to prevent corporate offences does not present an obstacle thereto. The consent of the court is not required if the consequences of the corporate offence are minor.

(2) In respect of fulfilment of the conditions and directions, the prosecuting authority imposes a deadline on the corporation which is no more than one year in the case of conditions and no more than two years in the case of directions. The prosecuting authority may subsequently revoke conditions and directions and extend the deadline once by six months. With the corporation's consent, it may also subsequently impose and amend conditions and directions. If the corporation complies with the conditions and directions, it can no longer be prosecuted. If the corporation does not comply with the conditions and directions, none of the payments made in respect of compliance is repaid.

(3) Where charges have already been preferred, the court may, with the consent of the prosecuting authority and of the corporation, temporarily terminate the proceedings up until conclusion of the main proceedings in which the findings of fact can be examined for the last time and at the same time impose conditions pursuant to section 12 and directions pursuant to section 13. (…)

According to section 36 paragraph 1, the prosecutor can, with the court's approval, impose conditions pursuant to section 12 paragraph 2 and directions pursuant to section 13 paragraphs 2 and 3. As explained with regards to recommendation 1a (above), section 13 allows the prosecutors and the court to direct the responsible legal person to implement compliance measures and to supply a proof of the implementation of those measures by an expert institution to be approved by the court.

If no action has been taken to implement recommendation 3(d), 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:

Recommendation 4(a):

4. Regarding **sanctions**, the Working Group recommends that Germany:

a. 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; and

ii. procedures applied (court decision with a full hearing, negotiated sentencing agreement under section 257c CCP, penal order under section 407 CCP, resolution under section 153a CCP). [Convention Article 3; 2009 Recommendation III.ii; Phase 3 recommendation 3b].

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

In order to comply with recommendation 4a, the MOJCP has developed a new matrix for the compilation of statistical information on sanctions in foreign bribery cases respectively for enforcement actions against natural and against legal persons. This matrix will be filled with data collected in the new form described under recommendation 2a.

The matrix names the type of procedure and the corresponding procedural provision according to which a case has been concluded. It also indicates which alternate charges besides the charge of foreign bribery were investigated and – possibly – prosecuted. If the case was concluded with sanctions, the matrix also contains information on the type and amount of the sanctions imposed, presented both per year and in a table with aggregated data on all years included in the matrix.

For natural persons, the applicable procedures for concluding a foreign bribery case include the different types of resolutions (with termination prior to indictment/after indictment and with/without sanctions), convictions (possibly based on a negotiated agreement pursuant to section 257c CCP), court proceedings resulting in an acquittal and penalty orders. Regularly applied alternative charges are: Commercial bribery (section 299 CC), breach of trust (Section 266 CC), breach of administrative duties (sections 30, 130 OWiG) and tax fraud (section 370 tax code).

Regarding corporate liability, the matrix differentiates between the imposition of a monetary penalty – with a punitive and a confiscatory component – pursuant to sections 30, 130 OWiG, a confiscation order in a criminal proceeding pursuant to section 73 - 76 CC or an independent regulatory confiscation order pursuant to section 29a OWiG. Besides the sanctions imposed on the concerned legal persons, data on the amount of confiscation orders are also presented (per year and in an overview) in the matrix. Please see Annex B (template of the matrix filled with 2019 data).

If no action has been taken to implement recommendation 4(a), 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:

Recommendation 4(b):

4. Regarding **sanctions**, the Working Group recommends that Germany:

b. Take steps to continue to achieve functional equivalence, in particular through ensuring that foreign bribery cases result in effective, proportionate and dissuasive sanctions, including when alternative offences to foreign bribery, in particular commercial bribery, are applied and when cases are resolved through a resolution under section 153a CCP. [Convention Article 3; 2009 Recommendation III.ii]

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

Recommendation 4b on taking steps to achieve functional equivalence when alternative offences to foreign bribery are applied was also discussed at the before-mentioned conference between MOJCP and the *Land* departments of justice in September 2018. The MOJCP emphasized that such functional equivalence can be ensured if proceedings with alternative charges also result in effective, proportionate and dissuasive sanctions. In addition, the question of functional equivalent and the need for adequate sanctions in the case of alternative sanctions was discussed with senior prosecutors at the Experience Sharing Conference in 2019 referred to under recommendation 2b

Moreover, it was pointed out that the OECD is only able to assess whether alternative charges can still constitute a functional equivalent if the prosecution offices provide the necessary information for the annual enforcement data report. The new data collection form is an important step in the implementation of recommendation 4b. The form requests information on prosecutions or convictions for alternative offences where investigations concerning foreign bribery did, e.g. due to a lack of proof, not lead to the prosecution or conviction regarding this offence. The Land departments of justice are explicitly asked to provide information on the facts of the case which are relevant for the prosecution of alternative offences and also to explain why the concerned case should be counted as a case of foreign bribery. The data collection form contains the following explanatory note:

"*Cases where the charges of bribery of foreign public officials were not pursued any further (e.g. due to the expiry of limitation periods or challenges in requesting MLA) but where other charges (e.g. breach of trust pursuant to section 266 CC, bribery in business transactions under section 299 CC, or tax evasion) are possible, can, in principle, also be classified as foreign bribery cases. However, it must be demonstrated that valid indications remain that the bribe-taker can be considered as a foreign public official and that, therefore, the offence may be classified as a case of foreign bribery (see OECD Phase 4 Report on Germany, para. 26f).*"

This data is further collected in the matrix described above (see recommendation 4a) which provides a clear overview on sanctions imposed based on alternative charges in foreign bribery cases.

If no action has been taken to implement recommendation 4(b), 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:

Recommendation 4(c):

4. Regarding **sanctions**, the Working Group recommends that Germany:

c. Raise awareness among prosecuting authorities on the importance of making full use of the range of criminal sanctions available in law;[Convention Article 3; 2009 Recommendation III.ii]

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

Please see our explanations regarding recommendation 4b.

In addition to our explanations regarding recommendation 4b, representatives of the MOJCP and the Federal Ministry of Economics jointly published an article on the WGB's phase 4 recommendations to Germany in 2019 ("*Burkhart/Fratzky, Die Empfehlungen der OECD zur Bekämpfung der Auslandsbestechung in Deutschland*", Wistra 2/20019 pp. 41). The article outlines the content of the OECD Anti-Bribery Convention and the 2009 Anti-Bribery Recommendations. The authors summarize and explain the recommendations of the phase 4 evaluation report i.e. the importance of making full use of the available sanctions in law.

The judges and prosecutors entrusted with handling the relevant cases are made aware of the principles of sentencing and the related question of exhausting the applicable sentencing ranges. Awareness-raising takes place through various events and conferences at the *Land* level on criminal sentencing law.
The basis for determining the sentence is always the offender's guilt; this is explicitly stated in section 46 (1) sentence 1 of the Criminal Code. In determining the sentence, the courts must weigh the circumstances which speak for and against the offender. The (final) decision on the concrete sentence is made by the courts, whose independence has constitutional rank in accordance with Article 97 of the Basic Law.

If no action has been taken to implement recommendation 4(c), 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:

Recommendation 4(d):

4. Regarding **sanctions**, the Working Group recommends that Germany:

d. Proceed with the intention stated in the 2018 Coalition Agreement to:

i. Introduce the possibility of an administrative fine of up to 10% of a company's turnover to ensure that sanctions are effective, proportionate and dissuasive including for large companies; [Convention, Article 3(1), 2009 Recommendation III.i]

ii. Develop and make available to prosecutors, judges and companies rules and guidance on the aggravating and mitigating factors and the possible impact each factor has on the effective, proportionate and dissuasive nature of sanctions; [Convention Article 3(1), Article 5, 2009 Recommendation III.ii]

Action taken as of the date of the follow-up report to implement this recommendation:
Recommendation 4d (i) is to be implemented by section 9 of the Corporate Liability Act which introduces the possibility of imposing an administrative fine of up to 10 % of the company's turnover for a corporate offence in case the yearly turnover of this company exceeds 100 million euros. The provisions of section 9 ensure that sanctions against legal persons, including for the charge of foreign bribery, have a dissuasive effect also for large multinational companies. At the same time, the

proportionality of the applicable sanction is guaranteed due to the graduated sanctioning system which takes into account the different economic capacities of small or medium-sized and large companies.

The company's average turnover of the past three years will constitute the basis for calculating the maximum amount of the fine imposed on large companies in cases of section 9 paragraph 2, whereas section 9 paragraph 1 contains maximum amounts for companies with a turnover lower than 100 million euros.

For intentional corporate offences, the maximum fine for small and medium-sized companies with an annual turnover lower than 100 million euros remains fixed at 10 million euros, which corresponds to a relative maximum sanction of at least 10% of the company's annual turnover. For cases of negligence the maximum monetary sanction is limited to the amount of 5 million euros for small and medium-sized companies. For companies with an annual turnover of more than 100 million euros, the maximum amount in cases of negligence is fixed at 5% of the company's turnover. The reduced maximum amount in case of negligence ensures that sanctions remain appropriate with regard to the severity of the offence the legal person is held liable for.

Section 9

Amount of corporate monetary sanction

(1) The corporate monetary sanction imposed

1. in the case of an intentional corporate offence is at least 1,000 euros and at most 10 million euros,

2. in the case of a negligent corporate offence is at least 500 euros and at most 5 million euros.

(2) In the case of a corporation with an average annual turnover of more than 100 million euros, the corporate fine, in derogation from subsection (1),

1. in the case of an intentional corporate offence is at least 10,000 euros and at most 10 per cent of its average annual turnover,

2. in the case of a negligent corporate offence is at least 5,000 euros and at most 5 per cent of its average annual turnover.

The global turnover of all natural persons and corporations over the last three business years preceding the conviction is to be used as the basis for determining average annual turnover, insofar as these persons and corporations operate as an economic unit with the corporation. The average annual turnover may be estimated. No account is taken of the turnover of corporations which are not engaged in business operations.

Recommendation 4d (ii) is to be implemented by section 15 of the Corporate Liability Act which, in accordance with the coalition agreement, provides for a list of clear and coherent sentencing criteria including aggravating and mitigating circumstances tailor made for corporate liability such as compliance and self-reporting. Reference is also made to the implementation of recommendation 1a.

Section 15

Determining the amount of the corporate monetary sanction

(1) The basis for determining the amount of the corporate monetary sanction are

1. the severity of the corporate offence,

2. in the cases referred to in section 3 (1) no. 2 also the gravity and extent of the failure to take appropriate precautions to prevent corporate offences.

(2) In determining the amount of the corporate monetary sanction, consideration is to be given to the corporation's financial circumstances. In the cases referred to in section 9 (2), no consideration is to be given to turnover.

(3) In determining the amount, the court weighs the circumstances insofar as they speak in favour and against the corporation. In particular, it may take the following into account:

1. the accusations faced by the offender who committed the corporate offence,

2. the motives and objectives of the offender who committed the corporate offence,

3. the severity, dimension and duration of the corporate offence,

4. the modus operandi of the corporate offence, including the number of offenders and their position within the corporation,

5. the consequences caused by the corporate offence,

6. previously committed corporate offences for which the corporation is responsible in accordance with section 3 (1) and precautions taken prior to the corporate offence to prevent and detect corporate offences,

7. efforts undertaken by the corporation to detect the corporate offence, compensation afforded for damage caused and precautions taken following commission of the corporate offence to prevent and detect corporate offences,

8. consequences of the corporate offence which the corporation suffered.

(4) Section 51 (2) of the Criminal Code applies accordingly.

If no action has been taken to implement recommendation 4(d), 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:

Recommendation 4(e):

4. Regarding **sanctions**, the Working Group recommends that Germany:

e. Regularly provide detailed written information and training to investigators and prosecutors on how to quantify the proceeds of bribery for the purpose of calculating the confiscatory component of the fine. [Convention, Article 3(3)]

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

Germany regularly undertakes various measures to provide enforcement authorities with guidance on how to quantify the proceeds of financial and economic crimes, including foreign bribery, for the purpose of calculating the amount subject to confiscation. Especially since the implementation of a comprehensive reform of the legal framework for asset recovery in criminal proceedings in 2017, prosecution services regularly provide prosecutors on all levels with practical guidance for the correct application of the relevant provisions of sections 73 et seqq. CC as well as the calculation of the amount to be confiscated. In addition, many prosecution services hand out general guidelines outlining the relevant criteria for the decision on the confiscation of proceeds.

On the national level, the topic of confiscation of proceeds of crimes regularly constitutes an agenda item of professional congresses on criminal economic law organized by the German Judicial Academy, e.g. in August 2018 in Trier and in September 2019 in Wustrau. The Academy's congresses are designed as training events for judges and prosecutors and focus on practical questions of criminal investigations and prosecutions i.e. regarding asset recovery (i.e. "*Asset recovery under criminal law*", "*Current developments in economic criminal law*", "*Foundations of economic criminal law*"). These events are held on a regular basis. The German Judicial Academy has further training events planned for 2021 i.e. on "Confiscation of proceeds of crime", "International cooperation in criminal matters" (with a focus on "cross-border asset recovery"), "Economic criminal law in practice", "Joint Investigation Teams – new possibilities and opportunities for cross-border crime fighting" and "Organised crime". In addition, the Federal Academy of Finance in Brühl offers a regular (annual) seminar entitled "Recognising corruption and taking action: cooperation between tax auditors/investigators and police/prosecutors". Apart from tax officials, the event is regularly attended by experienced judges and prosecutors (members of the specialised public prosecution units in particular) who have already dealt with cases of international bribery and who pass on their experiences, including their experiences in the sanctioning of companies and in asset recovery. The OECD's Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors is also regularly discussed.

The range of options is complemented by supplementary courses from the ERA (Academy of European Law) and the EJTN (European Judicial Training Network) as well as individual offerings from third-party providers (e.g. the EURO-Institut in Kehl with a regular series of seminars on cross-border cooperation in criminal matters, and the *Nordverbund für Rechtspfleger* (Northern Network of Judicial Officers) with its training course on the law related to sentence enforcement). In addition, the *Länder* conduct their own training courses and seminars (e.g. basic training on asset recovery in digital format, a training course on asset recovery under the law relating to administrative offences and a seminar on "Manifestations of corruption and how to combat them") and conferences/events for the sharing of experiences. Due to the pandemic, however, these and all other training courses were only held to a reduced extent in 2020 or had to be postponed.

In 2018, the legal framework for the confiscation of proceeds in criminal proceedings and the application of the corresponding CCP provisions were discussed both at the annual Experience Sharing Conference referred to under recommendation 2(b) and at a three-days expert meeting for prosecution services organised by the *Land* department of justice of Bremen. The *Land* of Bremen regularly organises an inter-regional exchange of experience between the prosecutors within the *Nordverbund* who deal with asset recovery – which most recently took place in September 2020. The confiscation of proceeds in cases of corporate liability also constituted one agenda item. At the occasion of such expert meetings between prosecutors from different prosecution offices, the participants also have the opportunity for informal exchanges regarding experiences in the prosecution of foreign bribery.

If no action has been taken to implement recommendation 4(e), 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:

Recommendation 4(f):

4. Regarding **sanctions**, the Working Group recommends that Germany:

f. Ensure that independent forfeiture orders are not used instead of imposing a regulatory fine which includes a punitive component. [Convention Article 3, 2009 Recommendation II]

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

The introduction of the principle of legality by section 3 paragraph 1 of the Corporate Liability Act (please see recommendation 6b) will ensure that a confiscation order can no longer be used as an alternative to a monetary sanction (where the conditions for imposing such a sanctions are met).

This is an important modification of to the current legal framework: Pursuant to section 29a OWiG prosecutors can currently impose a confiscation order (equivalent of a forfeiture order in the new legal framework since 2017) based on the administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG) against a legal person without having to establish corporate liability. The application of section 29a OWiG precludes the cumulative imposition of a regulatory fine, which would include a punitive component.

If no action has been taken to implement recommendation 4(f), 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:

Recommendation 4(g):

4. Regarding **sanctions**, the Working Group recommends that Germany:

g. Ensure that sanctions imposed on legal persons are effective, proportionate and dissuasive, including when taking into account the tax treatment of confiscation in Germany. [Convention Article 3(1); 2009 Recommendation III.ii]

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

Regarding effective, proportionate and dissuasive sanctions, please consider our explanations regarding recommendations 4f and 4d. As described in our explanations regarding the implementation of recommendation 4d, the Corporate Liability Act will introduce a graduated sanctioning system which will allow for higher monetary sanctions for big companies (up to 10% of the annual turnover). This significantly increases the maximum sanction for companies with an average annual turnover of more than 100 million euros and thus improves the dissuasive effect of sanctions for corporate offences. Moreover, the criteria for sanctioning laid out in section 15 of the Corporate Liability Act, which are tailor made for corporate liability, will help the courts in determining appropriate sanctions.
In addition to sanctioning, the Corporate Liability Act also provides for the possibility of publicising the conviction of the corporation (section 14). The court is to decide on the modalities of the publication.

If no action has been taken to implement recommendation 4(g), 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:

Recommendation 5:

5. Regarding **international co-operation**, the Working Group recommends that Germany develop tools to collect data to measure MLA performance, to systematically gather information on the number of requests made and received, and the amount of time taken to execute incoming MLA requests and follow up on the status of outgoing MLA requests in relation to foreign bribery and related offences. [Convention Article 9(1)]

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

The new data collection form described in our explanations regarding the implementation of recommendation 2a also serves as a tool for collecting data to measure mutual legal assistance performance. It is designed to gather information on the number of requests made and the amount of time taken for outgoing mutual legal assistance requests in relation to foreign bribery and related offences to be executed. The section of the data collection form relative to investigative proceedings specifies that the following questions have to be answered in case a MLA request has been issued:

To which state was the request made?
Which measures were requested?
Which were the dates of the request and of the response?
Was the request complied with (indication of reasons for denial, where applicable)?

Thanks to the new uniform data collection method, the MOJCP will be able to quickly verify whether all relevant information has been provided by the enforcement authorities and thus ensure a consistent data compilation also regarding MLA performance.

If no action has been taken to implement recommendation 5, 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:

Recommendations regarding liability of, and engagement with, legal persons

Recommendation 6(a):

6. Regarding **liability of legal persons**, the Working Group recommends that Germany:

a. Ensure that, in a foreign bribery case, an independent forfeiture order is not used as a mean to dispose of cases when all possible measures to hold a company liable have not been explored, in particular in the absence of clear policy regarding self-reporting. [Convention Article 2 and 5; 2009 Recommendation III.iii and V]

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

Regarding the implementation of this recommendation 6a please refer to our explanations concerning recommendation 4f (as regards the decision on confiscation orders) and recommendation 1a (as regards incentives for self-reporting by companies).

If no action has been taken to implement recommendation 6(a), 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:

Recommendation 6(b):

6. Regarding **liability of legal persons**, the Working Group recommends that Germany:

b. Review its overall approach to enforcement of corporate liability in order to effectively combat foreign bribery and proceed with the 2018 Coalition Agreement to remove the principle of prosecutorial discretion applicable to corporate liability. [Convention Article 2 and 5; 2009 Recommendation III.iii and V]

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

The Corporate Liability Act will introduce the principle of legality (i.e. mandatory prosecution) for corporate liability. As a consequence, prosecution will have the legal obligation to investigate any allegations of corporate offences including foreign bribery. Moreover, they will, in principle, be bound to bring prosecutions if the facts gathered during the investigation constitute sufficient suspicion that the conditions for establishing the legal person's liability can be proven.

The introduction of the principle of legality aligns the procedural rules for the prosecution of corporate offences set up in the Corporate Liability Act with those applicable in criminal prosecutions against natural persons (see sections 170 para 1, 203 CCP). As in proceedings against natural persons, there are exceptions to the general obligation to prosecute according to the principle of opportunity. As stated before (please also see recommendation 3d), sections 35 to 42 of the Corporate Liability Act allow the prosecution services (with approval of the court) or – if the case has already been brought to an indictment – the court to dispense with or terminate prosecutions against legal persons as an exception to the principle of legality. Such exception may apply in particular in cases where companies have taken compliance measures, self-reported and conducted internal investigations. The exemptions from the principle of legality are necessary to provide prosecutors and courts with the tools to adequately react to cases involving the liability of legal persons while at the same time ensuring a more uniform approach to enforcing liability of legal persons. However, only if the requirements of one of the above-mentioned provisions are fulfilled, the competent prosecutor or court may refrain from bringing a suspected corporate offence to an indictment.

If no action has been taken to implement recommendation 6(b), 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:

Recommendation 6(c):

6. Regarding **liability of legal persons**, the Working Group recommends that Germany:

c. Strengthen training programs available for prosecutors on corporate liability in foreign bribery cases, and further facilitate the sharing of expertise across *Länder* prosecutors' offices as appropriate, including on the use of purely administrative resolutions to hold legal persons liable under section 30 in conjunction with section 130 OWiG. [Convention Article 2; 2009 Recommendation III.ii and V, Annex I B]

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

The regular training activities offered to enforcement authorities on a national, regional and *Länder* level (see recommendation 4e) also include seminars and presentations/discussions on questions of corporate liability. The German Judicial Academy is planning to dedicate several training courses for judges and prosecutors to the new rules on liability of legal persons which will be introduced by the Corporate Liability Act.

The Act will broaden the range of sanctions available against legal persons. Besides the possibility of imposing a fine, the draft act also allows the court to issue a warning to the responsible legal person and to impose conditions e.g. the payment of a compensation to the treasury (please also see recommendation 1a). In addition, the introduction of the principle of legality will oblige prosecutors to prosecute companies for corporate offence, including foreign bribery where the facts allow for sufficient suspicion that the conditions for the legal person's liability according to section 3 of the Act are met.

If no action has been taken to implement recommendation 6(c), 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:

Recommendation 6(d):

6. Regarding **liability of legal persons**, the Working Group recommends that Germany:

d. Prioritise the prosecution of legal persons involved in foreign bribery cases and prosecute both natural and legal persons in a foreign bribery case whenever appropriate and even when based on the conviction of an individual for an alternative offence to foreign bribery. [Convention Article 2; 2009 Recommendation III.ii and V, Annex I B]

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

Please refer to our explanations regarding recommendation 1a and 6b regarding the introduction of the principle of legality also for the prosecution of legal persons.

If no action has been taken to implement recommendation 6(d), 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:

Recommendations regarding other measures affecting implementation of the Convention:

Recommendation 7(a):

7. Regarding **foreign bribery in the defence sector**, the Working Group recommends that Germany:

a. Examine possibilities to take steps to establish formal guidelines on the conduct of due diligence in the granting of defence export and marketing licences, including the consultation of international debarment lists and confirmation and verification of a company's corruption-related compliance programme. [2009 Recommendation X.C and Annex II]

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

If no action has been taken to implement recommendation 7(a), 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:

Formal (internal) guidelines on the conduct of due diligence in granting defence-related export licences already exist; they are subject to continuous and on-going review, including which sources of information need to be taken into account, such as possibly the register on sanctions against associations due to be established as soon as the relevant legislation has been passed.

Recommendation 7(b):

7. Regarding **foreign bribery in the defence sector**, the Working Group recommends that Germany:

b. Ensure by any appropriate means that the application of the Federal Government's principles for vetting exporters of weapons of war and arms related goods includes due consideration of foreign bribery legislation. [2009 Recommendation X.C.vi and Annex II]

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

If no action has been taken to implement recommendation 7(b), 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 Federal Government's principles for vetting exporters of weapons of war and arms related goods already stipulate that breaches of criminal law (including bribery-related offences) need to be taken into account. There is currently an on-going review of the internal guidelines for the vetting of exporters of war weapons that examines whether or not further clarifications are needed for the vetting process.

Recommendation 7(c):

7. Regarding **foreign bribery in the defence sector**, the Working Group recommends that Germany:

c. Train relevant Office of Export Control staff on these principles, foreign bribery risks and red flags. [2009 Recommendation X.C and Annex II]

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

If no action has been taken to implement recommendation 7(c), 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 staff of the German licensing office (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*) is subject to continuous training, including on red-flag indicators concerning the reliability of both the exporter and the end-users of defence-related goods. The reviewed internal guidelines (see answer to 7 (b)) be disseminated to all Ministry Export Control staff. Information on foreign bribery risks and examples of red-flag indicators have been disseminated among Ministry officials in order to raise awareness for the issue.

Recommendation 8(a):

8. Regarding the **Federal Debarment Register**, the Working Group recommends that Germany:

a. Clarify the grounds for inclusion on the register to ensure that legal entities cannot avoid being listed therein by resorting to corporate restructuring and the rules providing for the non-inclusion of successor companies in the register. [Convention Article 3(4); 2009 Recommendation III.ii and vii and V]

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

Section 2 paragraph 4 sentence 2 of the Act establishing a Competition Register already stipulates that the later termination of a legal entity does not preclude the entity from being listed in the Competition Register. If a legal person terminates, changes its business name or goes into bankruptcy, the ground for exclusion continues to apply to the legal successor or the company in liquidation. Based on the listing of such predecessor entities, contracting authorities are in a position to find out whether a successor company is affected by a ground for exclusion(see the official explanatory memorandum to the Act establishing a Competition Register (Official Journal 18/12051 page 28). Hence, a clarification of the rules is not necessary.

If no action has been taken to implement recommendation 8(a), 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:

Recommendation 8(b):

8. Regarding the **Federal Debarment Register**, the Working Group recommends that Germany:

b. Proceed with its intention to issue guidelines on the necessary requirements for companies to prove that measures have been taken to remediate foreign bribery risks. [Convention Article 3(4); 2009 Recommendation III.ii and vii and V]

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

According to Section 8 paragraph 5 of the Act on establishing a Competition Register, the registry authority shall adopt guidelines in view of the requirements for the self-cleaning of enterprises).

The Competition Register is scheduled to start operating in Q1/2021. There have been slight delays due to technical issues and the on-going pandemic. The guidelines are currently being drafted.

If no action has been taken to implement recommendation 8(b), 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:

Recommendation 8(c):

8. Regarding the **Federal Debarment Register**, the Working Group recommends that Germany:

c. Ensure that export credit and official development assistance providers be granted access to the Federal Debarment register. [Convention, Articles 2 and 3.4 2009 Recommendation, XI.i, ii and XII]

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

If no action has been taken to implement recommendation 8(c), 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 purpose of the Competition Register (Act on establishing a Competition Register – Wettbewerbsregistergesetz) is to facilitate gathering of information about grounds for an exclusion from a procurement procedure for contracting authorities. The Act is designed to strengthen the integrity of public procurement and its regulations are tailored to the specificities of procurement procedures. Therefore, in accordance with the legal requirements of the Act on establishing a Competition Register only contracting authorities are allowed to have access to the register. The Competition Register is designed as a non-public register due to the sensitivity of the data and its purpose. Under these circumstances granting export credit and official development assistance providers access, would in general be difficult. GIZ and KfW as ODA providers are contracting authorities and will have access to the Competition register.

Germany also considers that there is no need to grant the export credit provider (Euler Hermes) access to the Competition Register. Sufficient information on bribery-related incidents with regard to the applicants, e.g. convictions for a breach of anti-corruption provisions, is already available through the anti-bribery declaration and the monitoring of other sources, e.g. press releases, information from specific compliance-software tools and the debarment list of the Monetary Financial Institutions (MFIs).

Recommendation 8(d):

8. Regarding the **Federal Debarment Register**, the Working Group recommends that Germany:

d. Take advantage of the setting up of the new Federal Register to raise awareness amongst procuring authorities of the existence of international debarment lists and the need to take such lists into consideration as a basis for due diligence of applicants. [Convention Article 3(4); 2009 Recommendation III.ii and vii) and V] [Phase 3 recommendation 11b]

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

The Competition Register only refers to certain exclusion grounds in award procedures based on binding EU public procurement law (EU- Directives on Public Procurement). This includes violations against provisions in the German criminal code which prohibit granting of benefits and bribery in relation to foreign and international public employees.
Contracting authorities in Germany are not obliged to take international debarment lists into account. But they are free to do this particularly in cross-border cases.
Nevertheless, the German government is ready to raise awareness amongst procuring authorities of the existence of international debarment lists as well.

If no action has been taken to implement recommendation 8(d), 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:

Recommendation 9(a):

9. Regarding **Official Development Assistance**, the Working Group recommends that Germany:

a. Improve the sharing of information between GIZ and KfW on corruption, investigations, findings and/or sanctions within the limits of confidentiality and/or legal requirements. [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 9.vi]

Action taken as of the date of the follow-up report to implement this recommendation:
As a reaction to the OECD recommendations the compliance units of GIZ and KfW established a biannual exchange mechanism to exchange information on the compliance management and anticorruption system. In addition, ad-hoc exchanges are scheduled once current questions arise, e.g. on how to deal with corruption cases of external partners. Due to the Covid-19 pandemic, lately, these meetings have taken place virtually.

If no action has been taken to implement recommendation 9(a), 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:

Recommendation 9(b):

9. Regarding **Official Development Assistance**, the Working Group recommends that Germany:

b. Ensure that GIZ put in place a sanctioning regime that is effective, proportionate and dissuasive and includes clear and impartial processes and criteria for sanctioning. [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 9.iii]

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

In 2020, a sanctioning committee was established in order to make sure that GIZ's zero-tolerance approach towards corruption is respected and an adequate reaction can be guaranteed. The committee currently develops an appeal mechanism and clear criteria for sanctioning. Before the implementation of legal consequences, the case and the planned measures must be approved by the committee. The objective is to ensure comparability and appropriate handling of sanctions as well as protecting staff against arbitrary decisions. First cases will be dealt with in a pilot phase in 2021/2022.

If no action has been taken to implement recommendation 9(b), 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:

Recommendation 9(c):

9. Regarding **Official Development Assistance**, the Working Group recommends that Germany:

c. Ensure that GIZ provide additional training on the risks of foreign bribery for staff in high risk areas. [2009 Recommendation XI.ii and 2016 Recommendation for Development Cooperation Actors 3.ii]

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

GIZ has made the issue of 'bribery of foreign public officials' an even stronger part of this year's update of the 'code of conduct' which is binding for all employees and forms part of their employment contract. A comprehensive compliance e-learning prioritizes anticorruption and explicitly bribery of foreign officials and will train all staff in repeating intervals. The requirement to repeat the e-learning on compliance in intervals of three years was introduced in early 2020. There are special modules for managers who are exposed to specific risks. These modules will address issues such as dealing with compliance cases, drawing consequences, creating a compliance culture and preventing corruption. The e-learning went online in November 2020.

If no action has been taken to implement recommendation 9(c), 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:

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

Regarding Part II and as per the procedures agreed by the Working Group in December 2019, countries are invited to provide information with regard to any follow-up issue identified below where there have been relevant developments since the Phase 4 report. Please also note that the Secretariat and the lead examiners may also identify follow-up issues for which it specifically requires information from the evaluated country.

10. The Working Group will follow up on the issues below as case law, practice, and legislation develops:

Issue for follow-up 10(a):

a. The ability of Germany's new FIU to:

i. detect foreign bribery through information received by the FIU including suspicious transaction reports, information from law enforcement agencies and co-operation with international counterparts;

ii. effectively disseminate relevant information to law enforcement agencies;

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

Bribery is a predicate offence to money laundering, regardless of whether it has been committed in Germany or in another jurisdiction, provided that this jurisdiction criminalizes the act. In cases where the FIU – while analysing ML / TF relevant information - detects facts indicating cases of bribery, they will be disseminated to national law enforcement agencies in the case of national relevance and / or to the respective foreign FIU in the case of international relevance.
Furthermore, the FIU is strongly engaged in international FIU information exchange, cooperation and projects to address the cross-border dimension of bribery. E.g., the FIU was making extensive contributions to a joint paper published in July 2019 by the Egmont Group of FIUs: "FIU Tools and Practices for Investigating Laundering of the Proceeds of Corruption", which is used in the daily analysis by the FIU. To provide this crucial information and tools for further use to our reporting entities and law enforcement agencies, the FIU has had substantial parts of this work professionally translated to German and published it on the FIU's protected website (available for reporting entities).
On this website, stakeholders can as well find a typology paper on corruption, published by the FIU on the basis of its strategic analysis. All papers published are regularly reviewed and updated to address developments and to provide up-to-date information.

Issue for follow-up 10(b):

b. Whether existing sources of foreign bribery allegations (including the information referred to Germany by the Working Group) are properly used in due time by the competent authorities to ensure that Germany further continues to detect and open investigations based on media reports;

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

The Federal Ministry of Economics provides the competent authorities with information on possibly relevant foreign bribery allegations whenever such appear in the WGB case matrix. Furthermore, if the

Federal Ministry of Economics becomes aware of foreign bribery allegations for which Germany's jurisdiction could be established during a WGB meeting, e.g. a tour de table, it transmits this information to the competent national authorities after consultation with the MOJCP. Additionally, the margins of the tour de table have been used to establish informal contacts between German enforcement authorities and authorities for example from the US, South Africa and Denmark. The contacts are established via the German representatives to the WGB. Also, Germany has started in 2019 to enlarge the network of prosecutors from the federal states that attend OECD networks, in particular the meeting of the LEO, in order to enable the informal international exchange for prosecutor's offices across the country dealing with foreign bribery cases.

Moreover, in 2019, the MOJCP has distributed the WGB matrix to the Land departments of justice in order to increase the awareness of the importance of this tool among law enforcement authorities. The planned transfer of the matrix to a database will likely facilitate the distribution of the matrix and the handling of the rich information contained therein by the *Länder* authorities. The new database will also be discussed at with *Länder* representatives after the phase 4 follow-up report.

Issue for follow-up 10(c):

c. 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;

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

Pursuant to section 335a CC, the offence of bribery of domestic public officials under 334(1) CC also applies to the bribery of foreign public officials. As the new section 335a CC only entered into force on 26 November 2015, the definition of foreign public officials according to this provision has not yet been subject of a court decision.

Issue for follow-up 10(d):

d. The effect of the new Act to Reform Criminal Law on the Proceeds of Crime;

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

Issue for follow-up 10(e):

e. Whether the jurisdiction rules in Section 5(15) provide sufficient basis to apply to the alternative offences of commercial bribery or breach of trust;

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

Issue for follow-up 10(f):

f. The possibility for an individual (i) to negotiate the terms of a "penal 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;

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

Issue for follow-up 10(g):

g. Whether the bribery of foreign and international Members of Parliaments is, in practice, available as a predicate offence for money laundering, making sure that this predicate offence is aligned with the standards in the Convention;

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

Issue for follow-up 10(h):

h. Whether tax authorities systematically re-examine the tax returns of taxpayers convicted of foreign bribery to determine whether bribes have been deducted.

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

Information that the tax authorities receive about an ongoing or completed foreign bribery proceeding by a taxpayer require to be examined for its tax relevance. This includes examining whether bribes have been deducted in the tax return as operating expenses or in some other way. The scope of the examination depends on the circumstances of the individual case and external tax audits may be conducted. The information exchange between tax authorities and investigative authorities (in both directions) is based on sec. 4 para. 5 of the Law on Income Tax.

PART III: DISSEMINATION OF EVALUATION REPORT

Please describe the efforts taken to publicise and disseminate the Phase 4 evaluation report:

The MOJCP disseminated the Phase 4 evaluation report to all *Land* departments of Justice in September 2018. Furthermore, the contents of the Phase 4 evaluation report were presented and discussed at a "*Bund-Länder*-Conference on the Implementation of the Phase 4 Recommendations – Evaluation by the OECD Working Group on Bribery" held by the MOJCP with representatives from all *Land* departments of Justice on 20. September 2018.

The Federal Ministry of Economics also published a report about the outcomes of the Phase 4 evaluation November 2018. This report contains a link to the OECD webpage where the Phase 4 report is accessible both in English and in German (please refer to https://www.bmwi.de/Redaktion/DE/Downloads/Monatsbericht/Monatsbericht-Themen/2018-11-bestechung.pdf?__blob=publicationFile&v=6).

ANNEX I - OECD Phase 4 follow-up Germany – Additional Information Provided by Germany to the Evaluation Team.

1. ***Draft law on the transposition of the Whistleblower Protection Directive (recommendation 1.b)***

   The draft law cannot be shared at this point. The leading Federal Ministry of Justice and for Consumer Protection has circulated a draft law within the government in December. The draft is currently discussed internally between the ministries before it is sent to the Länder and associations for consultation. The draft law can only be submitted to the evaluation team once a decision has been made to start this consultation process. This procedure follows the rules of procedure of the federal ministries.

2. ***Date of issuance of the Federal Foreign Office Guidelines on the prevention of foreign bribery for public agents posted abroad and relevant extracts + number of cases detected by public agents posted abroad (recommendation 1.c)***

   The following information contains updated and enhanced information on implementation of rec. 1.c. It contains extracts of relevant guidelines. More detailed information could be provided if necessary.
   The Federal Foreign Office deals with and seeks to prevent attempts of corruption against its own employees. It does not systematically register corruption in the context of enterprises.
   However, the Federal Foreign Office developed guidelines for all officials posted abroad to prevent corruption, including foreign bribery. These guidelines implemented in 2011 are summed up in an annually updated comprehensive document for all employees, not only regarding the staff posted abroad.
   The specific internal circular RES 53-8 (German version provided to the evaluation team) informs about guidelines and measures for awareness raising and advising German companies abroad in the field of combatting corruption. In general, economic counselors at German diplomatic missions are the contact persons for compliance issues. Diplomatic missions play a key role in combatting corruption abroad: They are the point of contact for German companies and gain first-hand information about the economic and legal framework in the host country. Due to that fact, German companies are supposed to get suitable support in acting "compliantly" in accordance with German (domestic) laws and the host country's laws as well. The circular highlights in particular the following principles:
   - only compliant acting in terms of international business is supported by the diplomatic mission
   - Corruption harms the host country's national economy and Germany as well
   - The individual embassies decide, based on the local situation, whether to undertake further awareness raising activities or provide advice on compliance issues.
   - This includes for example an enhanced cooperation with German-Bilateral Chambers of Commerce ("Auslandshandelskammern", AHK) in anti-corruption matters

   All guidelines provide an overview of measures to prevent and handle cases of suspected foreign bribery, especially in the context of diplomatic missions or consular offices. Every suspicion of foreign bribery has to be reported immediately to a special contact for corruption matters at the embassies abroad. Furthermore, according to circular RES 53-8 a written report has to be sent to internal division 506 at the Federal Foreign Office in Berlin.
   These guidelines are also implemented as content in the fields of education and training of prospective and current diplomats of the German Federal Foreign Office.
   An additional 23-page supplementary (classified) internal handout for German diplomatic missions, updated December 2020, provides further guidance on the fight against corruption. The

comprehensive handout has been developed in collaboration between MFA and other relevant ministries and is updated regularly. The handout includes the following information for diplomatic missions.

- Definitions and effects of corruption as well as legal frameworks and international requirements
- References to country-specific information on corruption
- Information on the activities of the Federal Government in the fight against corruption
- Contact information in the relevant Federal ministries regarding corruption
- Information on reporting requirements
- Information on how to address corruption issues in partner countries
- Best practices and guidance for diplomatic missions on how to prevent corruption
- References to further information

No data is yet available for cases reported since June 2018. Such data will be forwarded immediately as soon as available.

3. Timeline for the adoption of the envisaged draft bill to strengthen the integrity of the financial and capital markets and relevant provision clarifying to which external authorities auditors should report (recommendation 1.d)

On December 16, 2020 the German Federal Cabinet adopted a resolution on introducing the legislation on a draft bill to strengthen the integrity of the financial markets (Finanzmarktintegritätsstärkungsgesetz - FISG). The draft bill now has been submitted to the German Bundesrat. The Bundesrat is entitled to make initial comments on the bill before it is submitted to the German Bundestag, where the bill will be examined in three readings. It depends on the Bundestag when the bill will be finally adopted.

The clarification to which external authorities auditors should report pursuant to Article 7(2) of Regulation (EU) No 537/2014 reads: "The information pursuant to Article 7 paragraph 2 of Regulation (EU) No. 537/2014 shall be addressed to the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht), in case of suspicion of a criminal or administrative offense also to the respective competent authority responsible for prosecution" (Article 11 Nr. 8 FISG amending § 323 of the German Commercial Code).

4. Elements of the two resolutions adopted under Section 153a CP that have been made public (recommendation 3.b)

We would be grateful for clarification which concrete resolutions (or elements thereof) under section 153a CCP the question refers to.

5. Main findings of the "extensive empirical evaluation" of negotiated settlements (to allow the evaluation team to understand whether the recommendation has been addressed by the publication of this study) (recommendation 3.c)

From March 2018 to February 2020, a research network established between the universities of Düsseldorf, Frankfurt am Main and Tübingen has conducted a comprehensive study on the theoretical legal framework and practical application of the provisions regarding negotiated agreements in in criminal proceedings pursuant to section 257c CCP. In particular, the study aimed at verifying whether the courts and prosecutions services still take part in informal negotiated agreements although the conditions for negotiated agreements are now clearly stipulated in section 257c CCP.

The final report has now been published on the MOJCP's website in November 2020 and is available as an open access document (https://www.bmjv.de/SharedDocs/Artikel/DE/2020/110420_Evaluation_Verstaendigung.html).

In summary, the study found that despite the entry into force of section 257c CCP and the prohibition of informal agreements by Federal Constitutional Court jurisprudence, in practice, informal agreements are still applied. Based on anonymous interviews with judges, prosecutors and defence lawyers, the study concluded that a higher percentages of prosecutors than of judges confirmed to have heard of (prosecutors: 59,3%; judges: 44,4%) or participated in (prosecutors: 46,7%; judges: 29,4%) informal agreements. The study also found that, among judges, the percentage of local court judges confirming to have heard of or participated in informal agreements was higher than the one of regional court judges. Among defence lawyers, 81,2% of the lawyers interviewed confirmed to have heard about informal agreements, 80,4% to have participated in informal agreements. The study outlines possible reasons for those different perceptions among the three groups and also for the fact, that informal agreements are still taking place. Amongst others, one of the reasons why informal agreements are still resorted to in practice was found to be the high complexity of the rules for formal negotiated agreements. Against the background of the results, the Ministry will now examine whether further legal regulations are necessary to effectively counter deficits in judicial notification practice. The findings from the study will allow for a comprehensive legal policy discussion.

The translation of the study's summary can be found in Annex V.

6. ***Date of adoption of relevant extracts of the "formal (internal) guidelines on the conduct of due diligence in granting defence-related export licences" and relevant provisions (recommendation 7.a)***

As already stated, these internal guidelines are under continuous and on-going review; specific dates cannot be attributed. These internal guidelines are classified under national confidentiality rules according to which these guidelines cannot be shared with persons outside the administration. Relevant provisions currently provide that the reliability of the exporter must be checked (e.g. Section 6 para 3 War Weapons Control Act). For example, for the specific category of weapons of war and in accordance with the corresponding checking routine for each licensing decision, officials in charge are obliged to check if there are any indications that the exporter is not reliable, e.g. information provided by investigation authorities, media reports etc. In this regard, existing information on on-going criminal investigations needs to be taken into account; in case of doubt, relevant registers are checked in cooperation with the Ministry of the Interior.

7. ***Relevant extracts of the Act establishing a Competition Register and of the official explanatory memorandum to the Act establishing a Competition Register (Official Journal 18/12051 page 28) (recommendation 8.a)***

See Annex IV on the translation of the Act establishing a Competition Register and of page 28 of the explanatory memorandum.

8. ***Timeline for the adoption of draft Guidelines on the removal of companies from the Register and relevant provisions (recommendation 8.b)***

The Guidelines are currently being consolidated. They will subsequently be subject to a consultation procedure involving Germany's federal states (Länder) and business associations, scheduled for the first trimester of 2021. The Guidelines will be released once the Register is operational and contains entries of companies, scheduled for the second trimester of 2021.

The Guidelines will detail formal and substantial requirements for companies to submit a request for deletion from the Register and the steps to be taken into account in the assessment by the Registry Authority. Taking stock of the relevant legal provisions and court rulings on self-cleaning in the field of public procurement, the Guidelines shall provide companies with practical guidance on, inter alia, what measures are expected from them to prevent further infringements. This also applies to measures addressing and preventing bribery risks, especially in cases where a company has been found guilty in this regard. The Guidelines will be subject to continuous assessment and development once they are applied in practice.

9. Clarification on the nature of confiscation measures in the three following cases listed in the enforcement data

We can confirm that in all three cases mentioned a forfeiture order according to section 29a OWiG has been applied, not a criminal confiscation according to section 73 CC.

10. Excerpts of the explanatory memorandum to the draft Corporate Liability Act

See translated excerpts of the explanatory memorandum in Annex III.

11. Agenda for the approval of the draft Corporate Liability Act

The draft law has been submitted to parliament in September 2020. The second chamber ("Bundesrat") has issued its opinion on the draft law on 19 September 2020. The Federal Government has commented on the opinion on 21 October. The draft law has then been submitted to the first chamber of Parliament ("Bundestag") for the first reading. A date for the first reading has not yet been set. Such delay is not unusual given the complexity and comprehensiveness of the draft law.

ANNEX II - Federal Government Bill - Draft of an Act to Strengthen Integrity in Business

A. Problem and objective

Under applicable law, the only penalty which can be imposed against corporations (legal entities and associations) for criminal offences committed from within a corporation is a fine under the Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten* – OWiG). This provides no means of responding adequately to corporate criminality. The upper limit for the punitive component of a corporate fine of 10 million euros applies regardless of the size of the corporation. That does not allow for the imposition of effective sanctions against, in particular, financially strong multinational groups and thus discriminates against small and medium-sized enterprises. There are no concrete and transparent rules for determining corporate fines or legally sound incentives to invest in compliance measures. Furthermore, under applicable law the investigation and prosecution of even the most serious corporate crimes is left solely to the discretion of the competent authorities, which has led to their being punished inconsistently and inadequately. In many cases it is not possible to prosecute corporate offences committed by German businesses abroad. The Act on Regulatory Offences, which was designed only with administrative wrongdoing in mind and therefore contains no procedural law, no longer provides a suitable basis for prosecuting and punishing criminal corporate conduct.

The objective of this Bill is to establish a separate legal basis for sanctioning corporations engaged in business operations, to subject them to the principle of mandatory prosecution and make available an improved range of tools which enables the proper prosecution of corporate offences. At the same time, it aims to promote compliance measures and to offer incentives so that businesses contribute to the investigation of criminal offences by conducting their own internal investigations.

B. Solution

The Act on the Sanctioning of Criminal Offences Relating to Corporations (Article 1) establishes a new basis for punishing corporate offences. It applies to corporations engaged in business operations, provides the prosecuting authorities and courts with a sufficiently strong and flexible set of sanctions, and for the first time establishes corporation-specific criteria for determining sanctions as well as a register of corporate sanctions. Proceedings relating to corporate offences, which have so far been rudimentarily regulated under the law on regulatory offences, are thus restructured. Corporation-specific provisions relating to the termination of proceedings guarantee the flexibility which the prosecuting authorities require in practice and, in particular, allow account to be taken of any compliance measures which businesses put in place. Rules are also introduced in relation to a corporation's cooperation in the proceedings on account of its conducting internal investigations, and these are linked to the possible mitigation of the sanction.

These new rules benefit the vast majority of businesses in the Federal Republic of Germany which act fairly and in accordance with the law. Businesses which do not act accordingly are gaining an advantage for themselves at the expense of law-abiding businesses as well as their owners and employees. They damage the reputation of business as a whole and, if no suitable response is forthcoming, also weaken trust in the rule of law. These new rules aim to counteract that.

Federal Government Bill

Draft of an Act to Strengthen Integrity in Business

of...

The Bundestag has adopted the following Act with the approval of the Bundesrat:

Article 1
Act on the Sanctioning of Criminal Offences Relating to Corporations (Verbandssanktionengesetz – VerSanG)

Table of contents

Part 1 - General provisions

Section 1
Scope

This Act regulates the sanctioning of corporations which are engaged in business operations for criminal offences which breach obligations incumbent upon a corporation or by means of which a corporation was or was to be enriched.

Section 2
Definitions; offences committed abroad

(1) For the purposes of this Act

1. a 'corporation' is
   a) a legal person under public or private law,
   b) an association without legal capacity,
   c) partnership commercial partnership,

2. a 'member of the managing staff' is
   a) a member of an organ authorised to represent a legal entity,
   b) a member of the management board of an unincorporated association,
   c) a partner in an incorporated partnership who is authorised to represent that partnership,
   d) a general agent (*Generalbevollmächtigter*) and, if he or she holds a managerial position, a person holding general commercial power of representation (*Prokurist*) and a person holding commercial power of attorney (*Handlungsbevollmächtigter*) in a corporation,
   e) any other person responsible for the management of the operation or enterprise forming part of a corporation, which also includes supervision of the conduct of business or the exercise of other controlling powers in a managerial position,

3. a 'corporate offence' is a criminal offence which breaches obligations incumbent upon a corporation or by means of which a corporation was or was to be enriched.

(2) An offence to which German criminal law is not applicable is equal to a corporate offence if:

1. the offence would be a criminal offence under German criminal law,
2. the offence is punishable at the place of its commission or that place is subject to no criminal law jurisdiction,
3. the corporation is domiciled in Germany at the time of commission of the offence and
4. the other conditions of subsection (1) no. 3 are met.

Part 2 Preconditions for sanctioning; liability in event of default

Section 3
Corporate liability

(1) A corporate sanction is imposed against a corporation where someone:

1. has committed a corporate offence in their capacity as a member of that corporation's managing staff or
2. has committed a corporate offence in the handling of the corporation's affairs if the corporation's managing staff could have prevented the offence or made its commission

significantly more difficult by taking measures to prevent corporate offences, in particular in regard to organisational structure, recruitment, instructions and supervision.

(2) The court may find that an offence represents an especially serious case. An especially serious case typically occurs where the corporate offence evinces particular circumstances which speak against the corporation and

1. the corporate offence was committed by a member of the managing staff or
2. the corporate offence is subject to an increased minimum sentence of imprisonment and
   a) was committed by a high-ranking member of the corporation's managing staff or several members of the managing staff were involved in its commission; and
   b) it was preceded by corporate offences committed by members of the corporation's managing staff for whom the corporation is liable in accordance with subsection (1) no. 1.

(3) Sections 1, 2 and 8 of the Criminal Code (*Strafgesetzbuch*) apply accordingly.

Section 4
Application, authorisation and request to prosecute

(1) If the corporate offence can only be prosecuted upon application, authorisation or request to prosecute, the corporation is only prosecuted if an application has been made in relation to the corporation, an authorisation has been issued in relation to the corporation or a request to prosecute has been made in relation to the corporation.

(2) Section 158 (2) of the Code of Criminal Procedure (*Strafprozeßordnung*) and sections 77 to 77e of the Criminal Code apply accordingly.

Section 5
Non-imposition of corporate sanctions

No corporate sanction is imposed

1. for a corporate offence which cannot be prosecuted because punishment is ruled out or withdrawn,
2. for a corporate offence for as long as provisions relating to immunity pose an obstacle to its prosecution,
3. for a corporate offence which was committed in the performance of sovereign tasks.

Section 6
Legal succession

In the case of universal succession or of partial universal succession on account of splitting up (section 123 (1) Transformation Act (*Umwandlungsgesetz*)), corporate sanctions as referred to in section 8 may be imposed against the legal successor or successors.

Section 7
Liability in event of default

(1) If the corporation ceases to exist following the announcement that sanctions proceedings have been instituted, or if assets are transferred following that point in time, with the consequence that it is no longer possible to impose an appropriate corporate monetary sanction as referred to in section 8 no. 1 against the corporation or its legal successor, or it is likely that it cannot be fully enforced, then liability in the amount of the corporate monetary sanction may be imposed against corporations

1. which formed an economic unit with the corporation concerned at the time when the announcement was made that sanctions proceedings have been instituted and which have, either directly or indirectly, exerted a controlling influence on the corporation concerned or on its legal successor; or

2. which have taken on essential material assets belonging to the corporation concerned and have essentially continued its activities (individual legal succession).

(2) Section 6 applies accordingly if universal succession or partial universal succession ensues in respect of a corporation which can be held liable in accordance with subsection (1). Subsection (1) no. 2 applies accordingly if individual legal succession has ensued in respect of a corporation which can be held liable in accordance with subsection (1).

(3) The period of limitation relating to the assessment begins to run as soon as the corporation has ceased to exist or the transfer of assets has been concluded. In all other respects, sections 21 and 22 apply accordingly to limitation.

Part 3- Legal consequences

Division 1 - Corporate sanctions

Section 8
Corporate sanctions

The following are corporate sanctions:

1. a corporate monetary sanction and
2. a warning with a corporate monetary sanction reserved.

Section 9
Amount of corporate monetary sanction

(1) The corporate monetary sanction imposed

1. in the case of an intentional corporate offence is at least 1,000 euros and at most 10 million euros,
2. in the case of a negligent corporate offence is at least 500 euros and at most 5 million euros.

(2) In the case of a corporation with an average annual turnover of more than 100 million euros, the corporate monetary sanction, in derogation from subsection (1),

1. in the case of an intentional corporate offence is at least 10,000 euros and at most 10 per cent of its average annual turnover,
2. in the case of a negligent corporate offence is at least 5,000 euros and at most 5 per cent of its average annual turnover.

The global turnover of all natural persons and corporations over the last three business years preceding the conviction is to be used as the basis for determining the average annual turnover, insofar as these persons and corporations operate as an economic unit with the corporation. The average annual turnover may be estimated. No account is taken of the turnover of corporations which are not engaged in business operations.

(3) If an offence constitutes both a corporate offence and a regulatory offence, the maximum amount of the corporate monetary sanction is determined on the basis of the maximum amount of the fine provided for the regulatory offence if this exceeds the maximum amount which would otherwise be applicable.

(4) If, given the corporation’s economic circumstances, it would be unreasonable to expect the corporation to pay the corporate monetary sanction immediately, the court grants it a payment period or permits it to pay the corporate monetary sanction in specified instalments. It may order that the privilege of paying the corporate monetary sanction in specified instalments lapses if the corporation fails to pay an instalment on time.

Section 10
Warning with corporate monetary sanction reserved

(1) The court may issue the corporation with a warning, determine a corporate monetary sanction and reserve its imposition if:

1. it is to be expected that the warning is sufficient to prevent future corporate offences for which that corporation is liable in accordance with section 3 (1),
2. following an overall evaluation of the corporate offence and its consequences, particular circumstances are deemed to exist which render the imposition of a corporate monetary sanction unnecessary and
3. imposition of a corporate monetary sanction is not deemed necessary in order to defend the legal system.

(2) The court determines the period of time for which imposition of the corporate monetary sanction is to be reserved. The period of reservation may not be more than five years and less than one year.
(3) The period of reservation begins to run when the decision on the warning with corporate monetary sanction reserved becomes final. It may subsequently be shortened up to the minimum period or extended, prior to its expiry, up to the maximum period.
(4) The court may issue a warning with corporate monetary sanction reserved in combination with conditions pursuant to section 12 and directions pursuant to section 13. The court may also subsequently give, amend or revoke the decision on conditions and directions.
(5) The court sentences a corporation which has been issued with a warning to pay the corporate monetary sanction reserved if

1. a corporate offence for which the corporation is liable in accordance with section 3 (1) has been committed during the period of reservation and that offence shows that the expectation on which the reservation of the corporate monetary sanction was based has not been fulfilled or
2. the corporation grossly or persistently breaches conditions imposed or directions issued.

The court dispenses with such sentencing if it is sufficient to issue further directions, to impose further conditions or to extend the period of reservation.

(6) Payments which the corporation has already made in the fulfilment of conditions or directions are not to be reimbursed. However, in the event of the court sentencing the corporation which it has issued with a warning to pay the corporate monetary sanction reserved, it may credit against the corporate monetary sanction those payments which the corporation has made in the fulfilment of conditions pursuant to section 12 (2) sentence 1 no. 2.
(7) If a corporation which has been issued with a warning is not sentenced to pay the corporate monetary sanction reserved, then following expiry of the period of reservation the court finds that the warning is sufficient.

Section 11
Reservation of part of corporate monetary sanction

(1) If the conditions under section 10 (1) are not met, the court may reserve imposition of up to 50 per cent of the corporate monetary sanction if it is to be expected that imposition of part of a corporate monetary sanction is sufficient to prevent future corporate offences for which the corporation is liable in accordance with section 3 (1).
(2) Section 10 (2), (3) and (5) to (7) applies accordingly. Section 10 (4) applies accordingly, with the stipulation that reserving imposition of part of the corporate monetary sanction can be

linked to conditions pursuant to section 12 (2) sentence 1 no. 1 and directions pursuant to section 13.

Section 12
Conditions in case of corporate monetary sanction reserved

(1) The court may impose conditions on the corporation which serve to make amends for the wrong committed.
(2) The following conditions may be considered:
1. making every effort at restitution for the harm caused by the corporate offence,
2. payment of a sum of money to the Treasury.

The court is, as a rule, only to impose the condition of payment of a sum of money to the Treasury as far as fulfilment of this condition poses no obstacle to restitution for harm caused.

Section 13
Directions in case of corporate monetary sanction reserved

(1) The court may issue the corporation with directions for the duration of the period of reservation if these are necessary to counteract the commission of corporate offences.
(2) The court may, in particular, direct the corporation to take specific precautions to prevent corporate offences and to provide proof of those precautions by submitting a certificate issued by a competent agency. The corporation's choice of competent agency requires the consent of the court.

(3) The directions may not unreasonably interfere with the corporation's operation or enterprise.

Section 14
Public announcement of sentencing of corporation

Where there is a large number of aggrieved parties, the court may, in addition to imposing a corporate sanction in accordance with section 8, order that the persons aggrieved by the corporate offence be informed by means of public announcement about the sentencing of the corporation. The manner and extent of the announcement are to be determined in the judgment. If the announcement is made by publication of the sentencing in the Internet, then the announcement is to be deleted no later than one year following its publication.

Division 2- Determining of sanction

Section 15
Determining amount of corporate monetary sanction

(1) Determination of the amount of the corporate monetary sanction is based on
1. the severity of the corporate offence,
2. in the cases referred to in section 3 (1) no. 2 also the gravity and extent of the failure to take appropriate precautions to prevent corporate offences.

(2) In determining the amount of the corporate monetary sanction, consideration is to be given to the corporation's financial circumstances. In the cases referred to in section 9 (2), no consideration is to be given to turnover.
(3) In determining the amount, the court weighs the circumstances which speak in favour and against the corporation. In particular, it may take the following into account:
1. the accusations faced by the offender who committed the corporate offence,
2. the motives and objectives of the offender who committed the corporate offence,
3. the severity, dimension and duration of the corporate offence,
4. the manner of commission of the corporate offence, including the number of offenders and their position within the corporation,

5. the consequences caused by the corporate offence,
6. previously committed corporate offences for which the corporation is liable in accordance with section 3 (1) and precautions taken prior to the corporate offence to prevent and detect corporate offences,
7. efforts undertaken by the corporation to detect the corporate offence, compensation afforded for damage caused and precautions taken following commission of the corporate offence to prevent and detect corporate offences,
8. consequences of the corporate offence which the corporation suffered.

(4) Section 51 (2) of the Criminal Code applies accordingly.

Section 16
Internal investigations

Internal investigations may be conducted both by the corporation itself and by third parties commissioned by it.

Section 17
Mitigation of corporate sanction following internal investigations

(1) The court is, as a rule, to mitigate a corporate sanction where

1. the corporation or the third party commissioned by it has made a significant contribution to investigating the corporate offence and corporate liability,
2. the commissioned third party and those acting on behalf of the commissioned third party in the internal investigations are not representing, as defence counsel, the corporation or an accused whose corporate offence forms the basis for the proceedings to impose sanctions,
3. the corporation or the third party commissioned by it cooperates continuously and fully with the prosecuting authorities,
4. the corporation or the third party commissioned by it, following conclusion of the internal investigation, makes available to the prosecuting authorities the outcome of the internal investigation, including all those documents which were relevant to the internal investigation and on which that outcome is based, as well as the final report and
5. the principle of fair procedure is applied to the interviews conducted as part of the internal investigation, in particular
   a) that interviewees are made aware, prior to their interview, that any information which they give may be used against them in criminal proceedings,
   b) that interviewees are given the right to legal assistance or to have a member of the works council present during interviews, and that interviewees are made aware of that right prior to their interview and
   c) that interviewees are given the right to refuse to answer any questions the reply to which would subject them or one of the relatives indicated in section 52 (1) of the Code of Criminal Procedure to the risk of being prosecuted for a criminal offence or regulatory offence, and that interviewees are made aware of that right prior to the interview.

(2) The conduct of the internal investigation is to be documented in line with the principles set out in subsection (1) no. 5 and that documentation is to be made available to the prosecuting authorities.

(3) When taking the decision referred to in subsection (1), the court must, in particular, take account of the nature and extent of the facts disclosed and their relevance in regard to investigating the offence, the time of their disclosure and the extent of assistance which the corporation renders to the prosecuting authorities. Mitigation pursuant to subsection (1) is ruled out if the corporation does not disclose the outcome of the internal investigation until after the main proceedings have been opened (section 203 of the Code of Criminal Procedure).

Section 18
Extent of mitigation

If the court mitigates the corporate monetary sanction pursuant to section 17 (1), the maximum amount provided for under section 9 (1) to (3) is reduced by half and the minimum amount provided for no longer applies. The ordering of public announcement of the sentencing of the corporation in accordance with section 14 is ruled out.

Section 19
Several offences committed by one act

Only one sanction is imposed against a corporation where

1. one and the same act by the offender who committed the corporate offence violates more than one criminal statute or the same criminal statute more than once; or
2. the corporate offence was committed by several members of the corporation's managing staff or by several persons in the handling of the corporation's affairs.

Section 20
Joinder of offences

(1) An aggregate sanction is imposed against a corporation where several corporate offences have been committed.
(2) If each of the individual sanctions only constitutes a corporate monetary sanction pursuant to section 8 no. 1 or only a warning with corporate monetary sanction reserved pursuant to section 8 no. 2, then the aggregate sanction is formed by increasing the highest individual sanction. In doing so, the circumstances of which account is to be taken in accordance with section 15 are evaluated together. The aggregate sanction may not equal the sum of the individual sanctions. It may not exceed twice the highest applicable maximum amount as set out in section 9 (1), (2) or (3) or section 18 sentence 1.
(3) If corporate monetary sanctions pursuant to section 8 no. 1 are imposed in addition to warnings being issued with corporate monetary sanctions reserved pursuant to section 8 no. 2, then the aggregate sanction is formed by increasing the corporate monetary sanction under the terms of subsection (2).
(4) Section 55 (1) and section 59c (2) of the Criminal Code apply accordingly.

Part 4 - Limitation

Section 21
Limitation on prosecution

(1) The imposition of corporate sanctions is ruled out if the period of limitation has expired. The period of limitation for prosecution of a corporation is equal to the period of limitation for the corporate offence. The period of limitation begins to run at the start of the period of limitation for the corporate offence.

(2) The period of limitation is stayed
1. as long as the period of limitation for the corporate offence is stayed,
2. as long as prosecution of the corporation cannot, pursuant to a law, begin or be continued, unless the only reason why the corporation cannot be prosecuted is because there is no application, authorisation or request to prosecute,
3. as long as the prosecuting authority refrains from prosecution in accordance with section 41.

(3) Section 78b (3) of the Criminal Code applies accordingly to judgments issued against the corporation by a court of first instance.

(4) The period of limitation is interrupted on account of one of the actions listed in section 78c (1) of the Criminal Code being taken against the corporation. Section 78c (2) to (5) of the Criminal Code applies accordingly.

Section 22
Limitation on enforcement

(1) A corporate sanction imposed by final decision may no longer be enforced following expiry of the period of limitation on enforcement.

(2) The period of limitation is
1. 20 years if the court has found, in accordance with section 3 (2), that an especially serious case exists,
2. 10 years in all other cases.

(3) The period of limitation begins to run when the decision becomes final.

(4) The period of limitation is stayed as long as
1. the enforcement cannot, pursuant to a law, begin or be continued,
2. the enforcement is deferred or interrupted,
3. the imposition of a corporate monetary sanction or part of a corporate monetary sanction has been reserved by judicial decision or an act of clemency,
4. relaxation of payment conditions has been granted.

(5) The court may, upon application by the enforcing authority, extend the period of limitation once before its expiry by one half of the statutory period of limitation if the corporation against which a corporate sanction was imposed, or its legal successor, moves its administrative headquarters to a country outside of the European Union after the decision becomes final and no international assistance or administrative assistance is rendered.

Part 5 - Provisions on jurisdiction and procedural provisions

Section 23
Jurisdiction

Jurisdiction for prosecuting a corporation (sanctions proceedings) lies with that prosecuting authority which is competent to prosecute the corporate offence.

Section 24
General provisions

(1) Unless otherwise provided under this Act, general legal provisions relating to criminal proceedings, in particular the Code of Criminal Procedure and the Courts Constitution Act (*Gerichtsverfassungesetz*), apply accordingly to the sanctions proceedings.

(2) The seizure of postal items and telegrams as well as requests for information concerning facts which are subject to the secrecy of post and telecommunications is not permissible in the course of sanctions proceedings.

Section 25
Connected proceedings

The following proceedings are also deemed to be connected within the meaning of section 3 of the Code of Criminal Procedure:

1. sanctions proceedings and proceedings concerning a corporate offence, and

2. sanctions proceedings and independent confiscation directed against the corporation pursuant to section 76a of the Criminal Code.

Section 26
Venue at seat or branch office

Venue is also established in the court in whose district the corporation has its seat or a branch office.

Section 27
Status in proceedings

The provisions of the Code of Criminal Procedure concerning the accused apply accordingly to the corporation concerned during the sanctions proceedings.

Section 28
Representation of corporation

(1) A corporation is represented in sanctions proceedings by its legal representatives.
(2) Persons who are accused of having committed a corporate offence are barred from representing a corporation.
(3) Section 51 (2) of the Code of Civil Procedure (*Zivilprozessordnung*) applies accordingly.

Section 29
Special representative

(1) If the corporation has no legal representative or if all the corporation's legal representatives are barred from representing it, then the presiding judge at the court seised of the case appoints a special representative until a legal representative enters the proceedings. The special representative has the status of a legal representative in the proceedings. He or she may take all procedural measures necessary for defence purposes with effect for the corporation and may give and receive statements.
(2) Where the absence of the sole or all of the corporation's legal representatives poses an obstacle to the opening or conduct of the main proceedings or main hearing for a prolonged period, or another obstacle exists in the person of those legal representatives, then the presiding judge at the court may appoint a special representative as referred to in subsection (1) for the corporation if the interest in conducting the proceedings outweighs the rights of the corporation.
(3) If public charges have not yet been preferred, the special representative is appointed upon application by the prosecuting authority. Competence for making the appointment lies with that Local Court

1. in whose district the prosecuting authority or its branch office making the application has its seat,
2. in whose district the corporation has its seat or a branch office or
3. which is competent to conduct the judicial hearing applied for by the prosecuting authority pursuant to section 162 (1) sentence 3 of the Code of Criminal Procedure if the prosecuting authority deems this to be necessary in order to expedite the proceedings.

Section 30
Joinder of legal successors

In the case of legal succession (section 6), the corporation's legal successors take the procedural position in the proceedings which the corporation was in when the legal succession became effective.

Section 31
Proceedings to determine amount of liability

(1) Liability in the event of default (section 7) is determined and enforced in independent proceedings. The provisions applicable to the imposition and enforcement of the corporate monetary sanction apply accordingly to those proceedings. An amount of liability may only be determined if the conditions necessary for the imposition of a corporate sanction would have been met for the corporation which was prosecuted in the first instance.
(2) The corporation which was found liable has the same rights as the corporation which was prosecuted in the first instance. The rights of that corporation remain unaffected in all other respects.
(3) In the proceedings to determine the amount of liability, the legal representatives of that corporation which was prosecuted in the first instance are entitled to remain silent as per section 33 (1). This also applies where the corporation which was prosecuted in the first instance has ceased to exist.

Section 32
Alert to determine whereabouts

An order for the issuing of an alert to determine the whereabouts of one of the corporation's legal representatives may be made if that legal representative's whereabouts are not known.

Section 33
Hearing of legal representative

(1) A corporation's legal representative is free to make statements or to remain silent in the sanctions proceedings. The provisions of the Code of Criminal Procedure concerning the hearing of the accused apply accordingly to the hearing of the corporation's legal representative. Section 134 of the Code of Criminal Procedure does not apply.
(2) In other proceedings, the corporation's legal representative may, in the capacity as a witness, also refuse to answer those questions the reply to which would subject the corporation to the risk of being held liable for a corporate offence (section 3). Section 55 (2) and section 56 of the Code of Criminal Procedure apply accordingly

Section 34
Use of personal data from investigative measures

(1) Personal data which were obtained on the basis of measures to investigate the corporate offence or a regulatory offence under section 130 of the Act on Regulatory Offences which was committed in connection with the corporate offence may not be used in sanctions proceedings.
(2) Personal data which were obtained on the basis of measures to investigate other criminal offences or under other statutes may be used in sanctions proceedings if, under the Code of Criminal Procedure, they may also be used in the proceedings relating to the corporate offence.

Section 35
Non-prosecution of petty offences

(1) Section 153 (1) of the Code of Criminal Procedure applies, with the proviso that the prosecuting authority may, with the consent of the court competent to open the main proceedings, dispense with prosecuting the corporation if the significance of the corporate offence – in the cases referred to in section 3 (1) no. 2 also the gravity and extent of the failure to take appropriate precautions to prevent corporate offences – would be regarded as minor and there is no public interest in the prosecution. The consent of the court is not required if the

consequences caused by the offence are minor. It is not possible to dispense with the prosecution in the cases referred to in section 3 (2) no. 2.
(2) If charges have already been preferred, the court may, with the consent of the prosecuting authority and of the corporation, terminate the proceedings at any stage under the conditions of subsection (1). The corporation's consent is not required if the main hearing cannot be conducted for the reasons referred to in section 40 or it is conducted in the absence of its representatives in accordance with section 45. The decision is given by way of an order. The decision is non-appealable.

Section 36

Non-prosecution subject to imposition of conditions and issuing of directions

(1) Section 153a (1) sentence 1 of the Code of Criminal Procedure applies, with the proviso that the prosecuting authority, with the consent of the court competent to open the main proceedings and of the corporation, may provisionally dispense with preferring public charges and may at the same time impose conditions on the corporation pursuant to section 12 (2) and issue directions pursuant to section 13 (2) and (3) if these are suited to eliminate the public interest in prosecution and if the significance of the corporate offence – in the cases under section 3 (1) no. 2 also the gravity and extent of the failure to take appropriate precautions to prevent corporate offences – does not pose an obstacle thereto. The consent of the court is not required if the consequences caused by the corporate offence are minor.
(2) In respect of fulfilment of the conditions and directions, the prosecuting authority imposes a deadline on the corporation which is no more than one year in the case of conditions and no more than two years in the case of directions. The prosecuting authority may subsequently revoke conditions and directions and extend the deadline once by six months. With the corporation's consent, it may also subsequently impose or amend conditions and issue directions. If the corporation complies with the conditions and directions, it can no longer be prosecuted. If the corporation does not comply with the conditions and directions, none of the payments made in respect of compliance are to be repaid.
(3) If charges have already been preferred, the court may, with the consent of the prosecuting authority and of the corporation, provisionally terminate the proceedings up until conclusion of the main proceedings in which the findings of fact can be examined for the last time and at the same time impose conditions pursuant to section 12 and issue directions pursuant to section 13.
(4) The period of limitation is suspended whilst the period determined for the fulfilment of conditions and directions runs.
(5) If the court has terminated the proceedings, a court order is required in order to reopen them.

Section 37

Non-prosecution in case of serious consequences for corporation

(1) Section 153b (1) of the Code of Criminal Procedure applies, with the proviso that the prosecuting authority may, with the consent of the court competent to open the main proceedings, dispense with prosecuting the corporation if the corporation has suffered consequences as a result of the corporate offence which are so serious that imposition of a sanction would be manifestly inappropriate.
(2) If charges have already been preferred, the court may, with the consent of the prosecuting authority and the corporation, terminate the proceedings up until the start of the main hearing.

Section 38

Non-prosecution in case of expected sanctioning abroad and for other reasons

(1) The prosecuting authority may dispense with prosecuting the corporation if it is expected that a sanction will be imposed against the corporation abroad on account of the corporate offence

1. and the corporate sanction which may be the outcome of the prosecution is not particularly significant in comparison to that sanction or
2. which appears sufficient to have an influence on the corporation and in order to defend the legal system.

(2) The prosecuting authority may, with the consent of the corporation, make dispensing with the prosecution subject to the condition that the corporation must notify the prosecuting authority at regular intervals and in a suitable manner of the status of the proceedings being conducted abroad.
(3) If public charges have already been preferred, the court may, upon application by the prosecuting authority, provisionally terminate the proceedings at any stage. Subsection (2) applies accordingly, with the proviso that the court decides on the issuing of, and monitoring of compliance with, the condition imposed.
(4) If the court has provisionally terminated the proceedings, a court order is required in order to reopen them.
(5) Sections 153c to 154a and section 154d of the Code of Criminal Procedure remain unaffected.

Section 39
Non-prosecution in case of insolvency

(1) The prosecuting authority may dispense with prosecuting a corporation if insolvency proceedings have been opened against the corporation's assets or an application to open insolvency proceedings has been rejected for lack of assets.
(2) If public charges have already been preferred, the court may, upon application by the prosecuting authority, provisionally terminate the proceedings at any stage.
(3) If the insolvency proceedings

1. are discontinued pursuant to section 212 or section 213 of the Insolvency Code (*Insolvenzordnung*) or
2. terminated pursuant to section 258 of the Insolvency Code,

and the period of limitation has not expired in the meantime, then the proceedings may be reopened within three months following the entry into force of the discontinuation or termination.

(4) If the court has terminated the proceedings, then a court order is required in order to reopen them.

Section 40
Termination of proceedings in case of temporary obstacles and procedural obstacles

(1) Sections 154f and 205 of the Code of Criminal Procedure apply accordingly to the sanctions proceedings if the absence of the corporation's only legal representative or all of the corporation's legal representatives poses an obstacle to the opening or conduct of the main proceedings or main hearing for a prolonged period, or another obstacle exists in the person of those legal representatives.
(2) Sections 206a and 206b of the Code of Criminal Procedure remain unaffected.

Section 41
Non-prosecution in case of internal investigations

(1) If a corporation notifies the prosecuting authority that it is conducting an internal investigation in accordance with section 17, then the prosecuting authority may dispense with

prosecuting the corporation up until completion of the internal investigation. The prosecuting authority may set a deadline for submission of the final report on the internal investigation. The corporation and the person leading the investigation are to be notified of that deadline. It may be extended upon application.
(2) The reopening of the proceedings is to be documented in the files.

Section 42
Non-prosecution in case of anti-trust corporate offences

(1) If the competition authority is conducting proceedings to impose a fine against a legal entity or partnership pursuant to section 82 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) on account of a matter which provides reason to believe that corporate liability is also established in accordance with section 3 (1), then it immediately notifies the prosecuting authority competent in respect of the sanctions proceedings about whether it intends to prosecute the corporation pursuant to section 47 (1) of the Act on Regulatory Offences or to terminate the proceedings. The competition authority competent in accordance with section 50 (1) of the Act against Restraints of Competition also notifies the prosecuting authority if the European Commission, in application of Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), intends to prosecute the legal entity or partnership in proceedings to impose a fine or to terminate the proceedings.
(2) If the prosecuting authority is conducting sanctions proceedings on account of a matter which provides reason to believe that the the condition of section 81 (1), (2) no. 1 or (3) of the Act against Restraints of Competition is also established, then before beginning the first formal investigative measure it immediately requests notification in accordance with subsection (1) above from the competition authority competent in accordance with section 48 or section 50 (1) of the Act against Restraints of Competition.[15]
(3) If the competition authority competent in accordance with section 48 or section 50 (1) of the Act against Restraints of Competition16 gives notification that it is prosecuting the legal entity or partnership in proceedings to impose a fine in accordance with section 82 of the Act against Restraints of Competition under section 47 (1) of the Act on Regulatory Offences or it terminates the proceedings, then the prosecuting authority is required to dispense with prosecuting the corporation. The same applies if the competition authority competent in accordance with section 50 (1) of the Act against Restraints of Competition17 gives notification that the European Commission, in the application of Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), is prosecuting the legal entity or partnership in proceedings to impose a fine or it terminates the proceedings.
(4) If, in the case referred to in subsection (3), the prosecuting authority has already preferred public charges, then the court is required to terminate the sanctions proceedings at any stage.

Section 43
Presence at main hearing

(1) A corporation with several legal representatives is deemed to be present at the main hearing even if only one of its legal representatives is present.
(2) The corporation may be represented by a defence counsel with a documented power of attorney.

[15] Account is taken in the further course of the proceedings of the amendment to sections 48 and 50 of the Act on Restraints of Competition provided for under Article 1 no. 23 of the Draft of a Tenth Act to Amend the Act against Restraints of Competition regarding a focussed, proactive and digital competition law 4.0 *(GWB-Digitalisierungsgesetz)*.

[16] See previous footnote.

[17] See footnote 1.

Section 44
Order for personal appearance of legal representative

The court may, to clarify the facts or in the cases referred to in section 329 (3) or (4) of the Code of Criminal Procedure, order that one or several of the corporation's legal representatives appear in person. If the person concerned fails to appear without sufficient excuse, the court may order to bring that person in front of the court if his or her attention has been drawn to that possibility by service thereof.

Section 45
Main hearing despite failure of corporation's legal representative to appear in court

The main hearing may be conducted even if all of the corporation's legal representatives fail to appear in court if the corporation was properly summoned and the summons referred to the fact that the main hearing may be held if its legal representatives fail to appear in court. In all other cases, section 232 (2) to (4) of the Code of Criminal Procedure applies accordingly.

Section 46
Reading out of records

(1) Section 254 of the Code of Criminal Procedure applies accordingly to testimony given or statements made by the corporation's legal representative.
(2) If the corporation is a co-accused, section 251 and section 420 (1) and (3) of the Code of Criminal Procedure apply accordingly to the reading out of testimony given or statements made by the corporation concerned's legal representative.
(3) Where one of the corporation concerned's legal representatives only avails himself or herself of the right to remain silent pursuant to section 33 (1) at the main hearing, any testimony given or written statement made previously by that legal representative in his or her capacity as a witness may be read out.

Section 47
Provisions applied

The list of provisions applied which is included in the judgment in accordance with section 260 (5) sentence 1 of the Code of Criminal Procedure must include section 3 as well as the provisions applied to the corporate offence.

Section 48
Effect of res judicata

(1) A final and binding judgment against a corporation relating to the imposition of a fine pursuant to section 30 of the Act on Regulatory Offences poses an obstacle to the prosecution of that offence under this Act. A final and binding judgment relating to the imposition of a fine against the corporation pursuant to section 30 of the Act on Regulatory Offences for failure to take precautions to prevent a corporate offence also poses an obstacle to the prosecution of that offence pursuant to section 3 (1) no. 2 above. An order made pursuant to section 72 of the Act on Regulatory Offences and an order issued by a court hearing a complaint concerning an offence under sentences 1 and 2 are equal to a final and binding judgment against the corporation.
(2) Where a fine has been imposed under section 30 of the Act on Regulatory Offences and a corporate sanction is subsequently imposed against the corporation for the same offence, the regulatory fine notice is rescinded to that extent. The same applies where a fine has been imposed against the corporation under section 30 of the Act on Regulatory Offences for failure to take precautions to prevent a corporate offence and a corporate sanction is subsequently imposed for that corporate offence pursuant to section 3 (1) no. 2 above.

(3) If the sanctions proceedings do not result in a conviction, the regulatory fine notice is also rescinded to the extent that the determinations made by the court in the final decision conflict with the regulatory fine notice.
(4) Sums of money which have been paid or recovered on the basis of the rescinded regulatory fine notice are first credited against any corporate sanction imposed, then against any incidental legal consequences ordered which entail the obligation to pay a sum of money and, lastly, against the costs of the sanctions proceedings.
(5) The decisions referred to in subsections (2) to (4) are given in the judgment or other final decision.

Section 49
Duty of disclosure

(1) If the imposition of a corporate monetary sanction is being considered as a possibility, then the corporation must, upon request, disclose to the prosecuting authority or to the court its annual turnover in the last three business years and must present supporting documents. Section 27 does not apply to that extent.
(2) To the extent that the corporation is obliged to disclose information and to present documents in accordance with subsection (1), the corporation's legal representative is heard as a witness. Provisions concerning witnesses, in particular sections 48 to 71, 95, 161a and 163 of the Code of Criminal Procedure, apply accordingly to that extent. Section 33 does not apply to that extent.

Section 50
Sanctions notice

(1) Upon the written request of the prosecuting authority, the court may determine the legal consequences referred to in subsection (2) by way of written sanctions notice without a main hearing. Section 407 (1) sentence 2 to 4 of the Code of Criminal Procedure applies accordingly.
(2) The sanctions notice may only determine the following:
1. corporate sanctions in accordance with section 8 and, in addition,
2. confiscation, destruction or rendering unusable.

(3) If the corporate monetary sanction can be reduced pursuant to section 18 sentence 1, then it is to be determined by way of sanctions notice if the corporation consents thereto.
(4) Section 407 (3), section 408 (2) and (3), section 408a and sections 409 to 412 of the Code of Criminal Procedure apply accordingly. Section 411 (2) sentence 2 in conjunction with section 420 (4) of the Code of Criminal Procedure does not apply.

Section 51
Participation of aggrieved person

(1) Even in cases in which the corporate offence constitutes an offence which is open to private prosecution, the corporation's liability may not be prosecuted by way of private prosecution.
(2) An aggrieved person may participate in the proceedings against the corporation and exercise powers and rights pursuant to sections 395 to 406l of the Code of Criminal Procedure to the extent that he or she would be entitled to do so on the basis of the underlying corporate offence.

Section 52
Securing enforcement

Section 111e (2) to (5) of the Code of Criminal Procedure applies accordingly to the securing of enforcement of corporate monetary sanctions.

Section 53
Enforcement

(1) Provisions relating to the enforcement of a fine apply accordingly to the enforcement of a corporate monetary sanction. If the corporate monetary sanction cannot be recovered or if

enforcement is dispensed with in accordance with section 459c (2) of the Code of Criminal Procedure, then the prosecuting authority makes an application to open insolvency proceedings against the corporation's assets. In the case of universal succession as referred to in section 6, enforcement may begin or be continued against the legal successor or successors.
(2) Provisions relating to the enforcement of a warning with sentence reserved apply accordingly to the enforcement of a warning with corporate monetary sanction reserved.
(3) An order for the public announcement of the judgment is executed ex officio. In all other respects, section 463c (3) and (4) of the Code of Criminal Procedure applies accordingly.

ANNEX III - Excerpt from the Explanatory Memorandum to the Act on the Sanctioning of Criminal Offences Relating to Corporations

Government Draft of an Act to Strengthen Integrity in Business *(Verbandssanktionengesetz – VerSanG)*

Regarding section 3 (1) no. 2

If a corporate offence is committed not by a member of the corporation's managing staff but by another person in the handling of the corporation's affairs, a corporate sanction may be imposed if members of the corporation's managing staff could have prevented the offence or made its commission significantly more difficult by taking measures in regard to organisational structure, recruitment, instructions and supervision. The perpetrator of a corporate offence must have acted in the handling of the corporation's affairs. This does not necessarily have to be a staff member of the corporation – a perpetrator can also be someone who was only temporarily entrusted with the task of handling the corporation's affairs.

However, the perpetrator does have to be subject to the recruitment, instructions and supervision of members of the corporation's managing staff. This means that a person who is not subject to powers of direction and instruction cannot be the perpetrator of a corporate offence. If the member of the managing staff fails to justify the requisite powers of direction and instruction, this may constitute an organisational error (see commentary on section 130 of the Act on Regulatory Offences [*Ordnungswidrigkeitengesetz* – OWiG], Göhler-Gürtler, *OWiG*, 17th edition, section 130, margin number 19).

In cases involving persons who are not members of the corporation's managing staff, the person concerned must have acted with full criminal liability (like when members of the corporation's managing staff commit an offence under section 30 OWiG) in order for the offence to be categorised as a corporate offence (for details on section 30 OWiG see Engelhart, *Sanktionierung von Unternehmen und Compliance*, 2nd edition, p. 399). It follows that a contravention of duties, the violation of which carries a criminal penalty, is not necessarily sufficient within the meaning of section 130 (1) OWiG since a contravention of this nature does not have to be committed with full criminal liability but only needs to exhibit the outward characteristics of a criminal offence (see KK-Rogall, *OWiG*, 5th edition, section 130, margin number 79). If an offence is committed without full criminal liability, the available penalty remains a corporate fine in accordance with sections 30 and 130 OWiG.

As regards the appropriate measures of organisational structure, recruitment, instructions and supervision, the principles developed for section 130 OWiG are generally applicable here (see KK-Rogall, *OWiG*, 5th edition, section 130, margin numbers 39 ff.). Like the "required" and "proper" form of supervision under that provision, the measures of organisational structure, recruitment, instructions and supervision must be legally permissible, suitable and necessary for preventing criminal offences without exceeding what is reasonable. This includes duties of management, coordination, organisational and monitoring, whereby supervision also includes the duty to intervene in the event of criminal conduct and to threaten, and where necessary impose, sanctions (see KK-Rogall, *OWiG*, 5th edition, section 130, margin number 42).

In this context, the limits of what is reasonable for a manager with supervisory duties must be borne in mind, the personal responsibility of non-members of the managing staff must be taken into consideration, and it must be taken into account that overly intrusive supervisory measures characterised by excessive mistrust can disturb industrial relations and violate the dignity of the employee (see Federal Court of Justice, decision of 11 March 1986 – KRB 7/85, wistra 1986, 222). Where compliance rules impose obligations to cooperate on employees (such as an obligation to report suspicions of criminal offences committed by other employees), these rules must not undermine the legitimate interests of the employees. The requisite management, coordination, organisational and monitoring duties can be fulfilled via specific compliance measures, without the legislation stipulating any direct obligation to create an entire compliance programme. Conversely, the existence of a compliance programme does not automatically guarantee exemption from sanctions (see commentary on section 130 OWiG in Engelhart,

Sanktionierung von Unternehmen und Compliance, 2nd edition, p. 403; KK-Rogall, *OWiG*, 5th edition, section 130, margin number 58). Rather, the decisive factor is whether the care that can be expected of a prudent member of the respective field was duly exercised (see KK-Rogall, *OWiG*, 5th edition, section 130, margin number 43). Which specific measures and precautions are necessary depends on the individual case and particularly on the type, size and organisation of a company, the degree of danger involved in its business, the number of employees, the regulations to be observed and the risk of their violation (see Hauschka/Moosmayer/Lösler-Pelz, *Corporate Compliance*, 3rd edition, section 5, margin number 16; Hauschka/Moosmayer/Lösler-Greeve, *Corporate Compliance*, 3rd edition, section 25, margin number 189). For small and medium-sized enterprises with a low risk of legal violations, a few simple measures may be sufficient; it is in such cases not usually necessary to buy a compliance programme or certifications.

However, it must be borne in mind that complete protection against criminal offences can never be guaranteed and that compliance measures have their limits, especially where a perpetrator is driven by motives extraneous to the corporation and is resolutely determined to commit the crime so that even the most far-reaching compliance programme would be ineffective. When it comes to "excessive" offences of this nature, additional compliance measures are incapable of preventing crimes (see KK-Rogall, *OWiG*, 5th edition, section 130, margin numbers 45 f.). Furthermore, crimes aimed exclusively against the concerned corporation do not qualify as corporate offences (see above explanation regarding section 3 (1) no. 1).

Compliance measures can also be taken into account when determining the type and amount of a sanction (section 10 (1) nos. 1 and 2; section 15 (3) nos. 6 and 7) and when examining whether the conditions for dispensing with prosecution have been met (sections 36 and 37). The above-mentioned principles also apply to measures and precautions, so that even a few simple measures can suffice in order to ensure that adequate consideration has been taken.

The failure to take precautions must objectively violate a duty, and the resulting risk of a criminal offence must be objectively recognisable. In contrast to section 130 OWiG, it is not necessary for the member of the corporation's managing staff to have intentionally or negligently omitted to take the supervisory measure. Corporate liability is linked to a corporate offence being committed with full criminal liability. The failure to take precautions must be objectively ascertained.

Regarding section 13 (Directions in case of corporate monetary sanction reserved)

The court may issue the corporation with directions for the duration of the period of reservation if these are suitable and necessary to prevent the commission of corporate offences from within the corporation. Such directions should pursue a special preventive objective. The court has a wide margin of discretion in this respect.

In particular, the court may instruct a corporation to take certain precautions in order to prevent corporate offences in the future. These can particularly include certain compliance measures which are designed to help improve the prevention of corporation-related offences within the corporation. As the processes and organisational structures inside corporations can be highly varied and complex, the court may direct the corporation to provide proof of the precautions taken by submitting certification issued by a competent agency. The court may determine how frequently and, if necessary, at what intervals such certification is to be submitted.

Where the measures in question are extensive, several different reports might be advisable, whereas for simple measures one report is sufficient. Depending on the type of measures ordered and the nature of the corporation, the possible competent agencies will include auditors, lawyers and management consultancies, for example. The corporation in question selects the competent agency and tasks it with drawing up certification, which should normally include a short report.

The court has to approve the choice of a competent agency in order to ensure its professional suitability. The costs of the certification are borne by the corporation as principal. The issued instructions may not constitute an unreasonable interference in the corporation's affairs.

Regarding section 15 (2) no. 6

Number 6 allows previous corporate offences to be taken into account as aggravating factors. Meanwhile a clean track record can be taken into account as a mitigating factor, as can precautions taken prior to the offence to prevent and detect corporate offences. The concept of "precautions" used here is broader than the concept of "supervision" in section 130 OWiG. This reflects the fact that the scope of compliance goes beyond sections 30 and 130 OWiG (see Rotsch in Rotsch (ed.), *Criminal Compliance*, section 2, margin number 10). With precautions, elements of compliance not necessary for observing the rules stipulated in section 3 may be taken into account in the corporation's favour when sanctions are being determined. If a corporate offence is nevertheless committed, this does not in itself prove that the efforts made to prevent corporate offences were not adequately serious, since even an ideal level of compliance is not capable of preventing individual members of the managing staff from committing offences. In such cases, the sanction may be substantially reduced (see Engelhart, *Sanktionierung von Unternehmen und Compliance*, 2nd edition, p. 441).

If, on the other hand, there are genuine deficits in the compliance system and proper compliance would have prevented the corporate offence or made it significantly more difficult, only fundamental efforts to ensure compliance can be weighed in the corporation's favour and any reduction in sanctions will be minor at most.

Where ostensible compliance measures only serve to cover up delinquent structures, this can (considering i.e. the corporation-related nature of the offence) have an aggravating effect on the sanctions imposed (see Engelhart, *Sanktionierung von Unternehmen und Compliance*, 2nd edition, p. 442, Rotsch, *Criminal Compliance*, section 35A, margin number 39). In cases where the management itself (such as the board of a public company) is involved in corporate offences (see also number 3) and therefore clearly does not support the compliance regulations it has itself laid down, the mitigating impact of such regulations is not generally taken into consideration. The explanation regarding section 3 (1) no. 2 (compliance measures) applies accordingly.

Regarding section 15 (3) no. 7

This provision deals with conduct following the commission of an offence and is itself based on section 46 of the Criminal Code [*Strafgesetzbuch* – StGB], the interpretation of which is referred to in this respect. The provision also stipulates that compliance measures taken after the offence (in particular measures to rectify the compliance deficits exposed by the offence) are to be taken into account as mitigating factors. The provision furthermore provides that any compensation afforded for damage caused and any efforts undertaken by the corporation to investigate the corporate offences are to be taken into account as mitigating factors. In particular, it weighs in the corporation's favour if it voluntarily discloses the corporate offence and helps with clarifying the facts of the case. If the sanction is imposed on a legal successor, the prime focus is on the post-offence conduct of the legal successor from the time of the legal succession taking effect. The explanation regarding section 3 (1) no. 2 (compliance measures) applies accordingly.

ANNEX IV - Act on the Establishment and Operation of a Register for the Protection of Competition for Public Contracts and Concessions

(Competition Register Act – Wettbewerbsregistergesetz, WRegG)
Full citation: Competition Register Act of 18 July 2017 (Federal Law Gazette I p. 2739)
Source: http://www.gesetze-im-internet.de/englisch_wregg/englisch_wregg.html#p0110

Section 1
Establishment of the Competition Register for public procurement

(1) A register for the protection of competition for public contracts and concessions (Competition Register) shall be established and maintained at the Federal Cartel Office (*Bundeskartellamt*) (registry authority).
(2) The Competition Register shall provide contracting authorities within the meaning of Section 98 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) with information on grounds for exclusion as set out in Sections 123 and 124 of the German Competition Act.
(3) The Competition Register shall be maintained in the form of an electronic database.

Section 2
Conditions leading to an entry in the Competition Register

(1) The following information shall be entered in the Competition Register:
1. Final convictions and penalty orders issued by criminal courts due to one of the following criminal offences:
a) criminal offences listed in Section 123(1) of the German Competition Act,
b) fraud pursuant to Section 263 of the German Criminal Code (*StGB*) and subsidy fraud pursuant to Section 264 of the German Criminal Code, provided that the criminal offence affects public budgets,
c) withholding and misappropriating wages and salaries pursuant to Section 266a of the German Criminal Code,
d) tax evasion pursuant to Section 370 of the German Fiscal Code (*AO*), or
e) collusive tendering pursuant to Section 298 of the German Criminal Code;
2. Final convictions and penalty orders issued by criminal courts as well as final fining decisions issued due to one of the following criminal or administrative offences if the penalty incurred is imprisonment for a term exceeding three months or a criminal fine exceeding 90 daily rates or a minimum administrative fine of two thousand five hundred euros:
a) pursuant to Section 8(1) no. 2, Sections 10 to 11 of the German Act to Combat Undeclared Work and Unlawful Employment (*SchwarzARbG*) of 23 July 2004 (Federal Law Gazette I p. 1842), last amended by Article 1 of the Act of 6 March 2017 (Federal Law Gazette I p. 399),
b) pursuant to Section 404(1) and (2) no. 3 of the German Social Code, Book III (*SGB III*) – promotion of employment – (Article 1 of the Act of 24 March 1997, Federal Law Gazette I pp. 594, 595), last amended by Article 6(8) of the Act of 23 May 2017 (Federal Law Gazette I p. 1228),
c) pursuant to Sections 15, 15a, 16(1) nos. 1, 1c, 1d, 1f and 2 of the German Temporary Employment Act (*AÜG*) in the version promulgated on 3 February 1995 (Federal Law Gazette I p. 158), last amended by Article 1 of the Act of 21 February 2017 (Federal Law Gazette I p. 258),
d) pursuant to Section 21(1) and (2) of the German Minimum Wage Act (*MiLoG*) of 11 August 2014 (Federal Law Gazette I p. 1348), last amended by Article 6(39) of the Act of 13 April 2017 (Federal Law Gazette I p. 872), or
e) pursuant to Section 23(1) and (2) of the German Law on the Posting of Workers (*AEntG*) of 20 April 2009 (Federal Law Gazette I p. 799), last amended by Article 6(40) of the Act of 13 April 2017 (Federal Law Gazette I p. 872), or
3. Final fining decisions issued pursuant to Section 30 of the German Administrative Offences Act (*OWiG*), also in conjunction with Section 130 of the German Administrative Offences Act, due to criminal offences as set out under no. 1 or criminal and administrative offences as set out under no. 2.

(2) In addition, fining decisions issued due to administrative offences pursuant to Section 81(1) no. 1, (2) no. 1 in conjunction with Section 1 of the German Competition Act shall be entered in the Competition Register if a minimum fine of fifty thousand euros has been imposed. Fining decisions issued pursuant to Section 81(3) a to c of the German Competition Act shall not be entered.
(3) Decisions issued by criminal courts and fining decisions pursuant to (1) nos. 1 and 2 and decisions against a natural person pursuant to (2) shall be entered in the Competition Register only if the conduct of the natural person can be attributed to an undertaking. This is the case if the natural person has acted as the person responsible for managing the undertaking, which also covers supervision of the conduct of business or other exercise of controlling powers in a managerial position.
(4) An undertaking within the meaning of this Act is any natural or legal person or group of such persons offering the supply of goods, the execution of construction works or the provision of other services to the market. If a legal person or an association of persons constituting an undertaking ceases to exist after the entry has been included in the Competition Register, the entry shall remain unaffected.

Section 3
Content of the entry in the Competition Register

(1) The registry authority shall store the following data transmitted by an authority required to communicate information pursuant to Section 4 in an electronic database:
1. the name of the authority communicating the data,
2. the date of the decision that is to be entered and the date on which such decision became final,
3. the file number assigned by the authority communicating the data,
4. with respect to the undertaking concerned,
a) the company name,
b) the legal form,
c) the surnames and first names of the undertaking's legal representatives,
d) with regard to partnerships, the surnames and first names of the managing partners,
e) the postal address of the undertaking,
f) the registration court and the commercial register number and,
g) if available, the VAT number,
5. with respect to the natural person against whom the decision that is to be entered in the Competition Register was issued or who is named in the fining notice pursuant to Section 30 of the German Administrative Offences Act,
a) the surname and first name of the natural person,
b) the date and place of birth of the natural person,
c) the postal address of the natural person concerned and
d) the circumstances establishing the attribution of the misconduct to an undertaking pursuant to Section 2 (3) sentence 2 and
6. the criminal or administrative offence, including the penalty imposed, leading to the entry in the Competition Register.
(2) If an undertaking informs the registry authority after it has been entered in the Competition Register that it can prove the implementation of self-cleaning measures within the meaning of Section 123(4) sentence 2 or Section 125 of the German Competition Act, the registry authority shall store the transmitted data in the Competition Register.
(3)The data stored in the Competition Register and the registry authority's case files are confidential.

Section 4
Communications

(1) The prosecuting authorities and the authorities competent for the prosecution of administrative offences shall in the event of decisions pursuant to Section 2(1) and (2) communicate the data specified in Section 3(1) to the registry authority without delay. Section 30 of the German Fiscal Code does not

preclude the communication of decisions pursuant to Section 2(1) no. 1d and pursuant to Section 2(1) no. 3 in conjunction with (1) no. 1d.
(2) The registry authority shall check the data transmitted and refrain from making an entry if the data are manifestly incorrect. If after making an entry the data turn out to be incorrect, the registry authority shall rectify or delete the relevant data of its own motion. Section 8(3) shall apply accordingly.
(3) If the prosecuting authorities or the authorities competent for the prosecution of administrative offences become aware of circumstances conflicting with the continued storage of the transmitted data in the Competition Register, these authorities shall notify the registry authority without delay.

Section 5

Opportunity to comment prior to an entry in the Competition Register; right to information

(1) Before including an entry in the Competition Register, the registry authority shall inform the undertaking concerned in text form of the content of the intended entry and shall give such undertaking the opportunity to comment within two weeks following the receipt of such information. If the undertaking concerned proves that the data transmitted are incorrect, the registry authority shall refrain from making an entry or rectify the incorrect data. The registry authority may extend the period for submitting comments. Section 8(3) shall apply accordingly.
(2) Upon request, the registry authority shall provide undertakings or natural persons information on the content of the Competition Register relating to such undertakings or persons. With the consent of the relevant undertaking, the registry authority shall upon request provide information on the content of the Competition Register relating to the undertaking to a body that maintains an official list satisfying the requirements provided for in Article 64 of Directive 2014/24/EU.
(3) Undertakings entered in the Competition Register or undertakings affected by a planned entry may request that an authorised lawyer be granted unrestricted access to the files for the purpose of enforcing or defending their legal interests relating to the entry.

Section 6

Contracting authorities' obligation to consult the register; decision on the exclusion from the procurement procedure

(1) A public contracting authority pursuant to Section 99 of the German Competition Act is obligated to consult the Competition Register prior to awarding a contract in a public procurement procedure involving an estimated order value, excluding value-added tax, of EUR 30,000 or more on whether there are any entries in the Competition Register relating to the bidder to whom the public contracting authority intends to award the contract. In the event the threshold values set out in Section 106 of the German Competition Act are reached, a sector contracting entity pursuant to Section 100(1) no. 1 of the German Competition Act or a concession grantor pursuant to Section 101(1) nos. 1 and 2 of the German Competition Act is obligated to consult the Competition Register prior to awarding a contract on whether there are any entries in the Competition Register relating to the bidder to whom they intend to award the contract. By way of derogation from sentences 1 and 2, the obligation to consult the register does not apply in cases with regard to which public procurement law provides for any exemptions from the applicability of public procurement law. By way of derogation from sentences 1 and 2, German agencies abroad are not required to consult the Competition Register. The contracting authority may refrain from consulting the register again if this authority has already received the information contained in the Competition Register relating to the relevant undertaking within the last two months.
(2) In addition, contracting authorities pursuant to (1) may consult the Competition Register
1. in the context of awarding public contracts and concessions with an estimated order or contract value below the value thresholds set out in (1) on whether there are entries in the Competition Register relating to the bidder to whom the contracting authority intends to award the contract or the concession, and
2. in the context of a restricted procedure (competitive tender) on whether there are entries in the Competition Register relating to the bidders the contracting authority intends to invite to submit tenders.

(3) The registry authority shall provide the contracting authority consulting the Competition Register with the stored data relating to the undertaking specified in the search form. If an undertaking has not been entered in the Competition Register, the registry authority shall communicate this to the contracting authority.
(4) The information retrieved from the Competition Register may be brought to the attention of only those members of staff who are responsible for accepting information or processing the procurement procedure.
(5) The contracting authority shall on its own responsibility and in accordance with the provisions under procurement law decide on the exclusion of an undertaking from participating in the procurement procedure. Section 7(2) shall remain unaffected.
(6) Contracting authorities may request prosecuting authorities or authorities competent for the prosecution of administrative offences to provide additional information if the contracting authorities consider such information necessary for the award decision. The prosecuting authorities and the authorities competent for the prosecution of administrative offences may transmit the information upon request of the contracting authority.
(7) The data transmitted pursuant to (3) and (6) and pursuant to Section 8(4) sentence 5 are confidential and may be used by the contracting authority for award decisions only. The data are to be deleted after the expiry of the legally required storage periods.

Section 7
Deletion of entry from the Competition Register after expiry of period for deletion; legal effect of deletion

(1) Entries regarding criminal offences pursuant to Section 2(1) no. 1 a, c and d shall be deleted at the latest after the expiry of five years from the day on which the decision became final. Entries regarding fining decisions pursuant to Section 2(2) shall be deleted at the latest after the expiry of three years from the day on which the fining decision was issued. Apart from that, entries shall be deleted at the latest after the expiry of three years from the day on which the decision became incontestable. In the event there are several entries due to the same misconduct, all entries concerning an undertaking shall be deleted if the deletion requirements are met with regard to one entry and the periods for deletion are the same; in the event of differing periods for deletion, the longer period shall be decisive. The provisions of Section 4(2) sentence 2 and Section 8(1) sentence 3 shall remain unaffected.
(2) If an entry in the competition register has been deleted pursuant to (1) or Section 8, the criminal or administrative offence which led to the entry may no longer be used in procurement procedures to the disadvantage of the undertaking concerned. The contracting authority is not bound by the registry authority's rejection of a request for the deletion of an entry pursuant to Section 8(1).

Section 8
Premature deletion of entry from the Competition Register due to self-cleaning; fees and expenses

(1) If an undertaking has been entered in the Competition Register, it may submit an application to the registry authority for the deletion of the entry from the Competition Register prior to the expiry of the period for deletion set out in Section 7(1) due to self-cleaning. The application is admissible if the undertaking demonstrates a legitimate interest in the premature deletion in a satisfactory way. The entry is to be deleted if the undertaking has proven to the registry authority that for the purposes of the procurement procedure it has implemented self-cleaning measures in accordance with Section 123(4) sentence 2 of the German Competition Act in the case of Section 2(1) no. 1 c and d, and in accordance with Section 125 of the German Competition Act in all other cases.
(2) After the application has been filed, the registry authority shall examine the facts of its own motion. In doing so, it may limit itself to the facts presented by the applicant or to facts of which it can be reasonably expected to be aware. The applicant may be required
1. to submit the decision issued by the criminal court or the fining decision,

2. to provide expert opinions or other documents suitable for evaluating the self-cleaning measures.
Sections 57 and 59 of the German Competition Act shall apply accordingly.
(3) In preparation for the decision regarding the application, the registry authority may request the prosecuting authority that has communicated the data or the authority competent for the prosecution of administrative offences to transmit information which according to the assessment of the registry authority may be necessary for the evaluation of the application. The requested authority shall provide such information.
(4) The registry authority shall evaluate the self-cleaning measures adopted by the undertaking, taking into account the seriousness and special circumstances of the criminal offence or misconduct. If the authority considers the self-cleaning measures adopted by the undertaking to be insufficient, it shall request additional information from the undertaking or reject the application. If the registry authority rejects the application, it shall justify its decision to the undertaking. The decision regarding the application for premature deletion of an entry is to be noted in the Competition Register. The registry authority shall transmit the decision regarding the application for deletion and other documents to the contracting authority upon its request.
(5) The registry authority shall adopt guidelines regarding the application of (1) to (4).
(6) In order to cover the administrative costs incurred by the registry authority, applications for the premature deletion of entries from the Competition Register due to self-cleaning are subject to fees and the reimbursement of expenses. Section 80 of the German Competition Act and any statutory instruments based on this section shall be applied accordingly; the charging framework is determined based on Section 80(2) sentence 2 no. 2 of the German Competition Act.

Section 9
Electronic data transmission

(1) Any communication between the registry authority and the prosecuting authorities, the authorities competent for the prosecution of administrative offences, the contracting authorities, the undertakings and the bodies maintaining an official list that meets the requirements provided for in Article 64 of Directive 2014/24/EU shall generally take place in electronic form.
(2) Data may be transmitted to contracting authorities by way of an automated on demand process that enables the transfer of personal data. The processing of personal data shall be subject to general data protection regulations, unless this Act or the statutory instrument based on this Act contains specific provisions.

Section 10
Authorisation to issue statutory instruments

The Federal Government shall with the consent of the Federal Council (*Bundesrat*) issue a statutory instrument to regulate the following:
1. the technical and organisational requirements for
a) storing data in the Competition Register,
b) transmitting data to the registry authority or to contracting authorities, including the automated data retrieval process, and
c) communicating with undertakings and bodies maintaining an official list that meets the requirements provided for in Article 64 of Directive 2014/24/EU,
2. the necessary data protection requirements for electronic communication with the registry authority,
3. the content and scope of the data pursuant to Section 3(1) and the communication pursuant to Section 6(3),
4. a standard form to be used by undertakings for the communication pursuant to Section 3 (2),
5. requirements regarding the content of the communication pursuant to Section 4, including a standard form to be used by the bodies obligated to communicate data, and the details of the entry procedure,
6. more detailed provisions concerning the additional information that may be requested pursuant to Section 6(6) sentence 1, and

7. requirements relating to suitable expert opinions and documents to be submitted by the applicant pursuant to Section 8(2) sentence 3 no. 2 and especially also to the registry authority's approval of systems of independent bodies based on which suitable precautionary measures taken in order to prevent future misconduct can be proven for the purposes of the procurement procedure.

Section 11
Recourse to legal action

(1) Complaints shall be admissible against decisions of the registry authority. Section 63(1) sentences 2 to (4) sentence 2, Section 66(1) sentences 1, 2 and 4, (2), (3) sentences 1, 4 and 5, (4) and (5), Section 67(1) nos. 1 and 2, Sections 68, 70(1) to (3), Sections 71 to 73 and 171(3) of the German Competition Act shall apply accordingly, unless otherwise stipulated.
(2) The appellate court shall rule by one of its members as a single judge. The single judge shall transfer the proceeding to the appellate court to decide in the composition required by the stipulations of the German Courts Constitution Act (*GVG*) if:
1. the case shows particular factual or legal difficulties, or
2. the legal matter has fundamental significance.
Any re-transfer to the single judge is ruled out.
(3) The decision on the complaint may be delivered without an oral hearing, unless one of the parties to the proceedings requests that an oral hearing be held. Section 69(2) of the German Competition Act shall apply accordingly.

Section 12
Rules of application; promulgation of statutory instruments

(1) Sections 2, 4 and 6 shall be applicable only from the day on which the first statutory instrument pursuant to Section 10 enters into force. Prior to the applicability of the provisions specified in sentence 1, the Länder regulations regarding the establishment and operation of a register corresponding to the one provided for in Section 1 shall continue to apply. The Federal Ministry for Economic Affairs and Energy shall announce the day pursuant to sentence 1 in the Federal Law Gazette.
(2) Statutory instruments pursuant to this Act may in deviation from Section 2(1) of the German Promulgation and Announcement Act (*VkBkmG*) be promulgated in the Federal Law Gazette.

ANNEX V - Official Explanatory Memorandum to the Act Establishing a Competition Register (Official Journal 18/12051 page 28)

EN text (convenience translation)
"The objective of paragraph 4 sentence 2 is to capture cases, in which a legal person to be listed or an association of individuals cease to legally exist due to subsequent action. Sentence 2 clarifies that an inclusion in the register will be carried out also in these cases and no deletion can be requested. Where a legal person or an association of individuals forming a company are terminated, change their business name or go into bankruptcy subsequently to their inclusion in the register, relevant exclusion grounds can be asserted against their legal successor, new firm or company in liquidation. An entry in the register ensures that procuring entities obtain information on whether a predecessor company has been listed so as to being able to consider possible exclusion grounds towards a successor company."

ANNEX VI - Summary of the Main Findings of the Empirical Evaluation of Negotiated Settlements in Criminal Proceedings Pursuant to Section 257c CCP

H. Overall findings

III. Key findings

1. Informal agreements continue to play a part in criminal proceedings

A key question in this research project was to determine whether informal agreements are still being made even after the judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) of 19 March 2013. The first step in Module 4 was to ask judges, prosecutors and criminal defence lawyers how often they had heard of informal agreements from hearsay. 44.4% of judges replied "yes" (responding "rarely", "frequently" or "very frequently"), same as 59.3% of prosecutors and a remarkable 81.2% of criminal defence lawyers. Asked about the frequency of informal agreements in their own practice, 29.4% of judges surveyed in Module 4 responded that they had come across informal agreements in their own practice (responding "rarely", "frequently" or "very frequently"). Prosecutors and criminal defence lawyers estimate the numbers of informal agreements in their own practice to be significantly higher (46.7% and 80.4%, respectively).

The telephone interviews in Module 5 provided differentiated figures on the difference between judges at the local court (*Amtsgericht*) and the district court (*Landgericht*). According to the judges, the average proportion of informal agreements in relation to all agreements is 31.7% in local courts (prosecutors: 21.1%, criminal defence lawyers: 45.4%), while it is only 7.0% in district courts (prosecutors: 7.5%, criminal defence lawyers: 20.2%).

These numbers raise two questions: first, why is there a difference in the frequency of informal agreements between local courts and district courts? And second, why do the estimations of judges, prosecutors and criminal defence lawyers vary to such a degree? One possible explanation for the fact that the legal provisions are complied with to a lesser degree in local courts than in district courts is likely to be that, due to the greater number of proceedings, local court judges are more inclined to disregard rules that they consider to be too "time-consuming" and too "complicated. A previous study also concluded that proceedings in the local courts are generally described as being "informal or less formal". The reason is that there are so many criminal proceedings to be dealt with in the local courts that it is not possible to conduct each and every one of them in the proper form in the time available and, in particular, to comply fully with the obligation to establish the facts of the case.

The fact that the three professions arrive at different estimations of the number of informal agreements is likely to primarily be due to judges, in particular, giving socially desirable responses. It is mainly the judges who are responsible for compliance with the rules on reaching a negotiated agreement. In addition to the judges, prosecutors are responsible for checking compliance with the rules as part of their role as guardians. It can therefore be assumed that they, too, are less willing to concede breaches of the law and tend to regard, whether consciously or unconsciously, their own conduct as law-abiding. Criminal defence lawyers, by contrast, have a different role which is why, on the one hand, their answers appear more credible although, on the other, they may also be exaggerated at the top end of the scale, whether consciously or unconsciously. Overall, however, the results clearly indicate that there is still a considerable number of informal agreements involving all three professions.

In addition to this circumvention of or, at the very least, disregard for criminal procedural provisions regarding negotiated agreements, is should be noted that procedural violations of statutory provisions regarding negotiated agreements, of which the parties are unaware, also occur. For example, in Module 5, judges have stated that they do not enter into any informal agreements. At the same time, however, it can be concluded from their answers to questions regarding compliance with procedural rules, that not all of these judges comply with all relevant procedural rules. In addition, more than 20% of judges state in Module 4 that they have frequently or very frequently found themselves in a situation where they were unsure how to comply sufficiently with transparency and documentation requirements. This

uncertainty may also be reflected in decisions concerning appeals, which were analysed in Module 1. Transparency and documentation obligations, for example, account for 58.6% of infringements detected. In all, it can be seen across all Modules that all provisions regarding negotiated agreements are being breached.

2. Reasons for the practice of using informal agreements

The most common reasons cited by judges and prosecutors for entering into informal agreements are the unsuitability of statutory provisions on negotiated agreements in practice and the complexity of those statutory provisions as well as the possibility to avoid the lengthy process of taking evidence and the reduction in workload. For example, judges and prosecutors who have in the past entered into an agreement on what they considered to be a too lenient sentence cited as reasons for this that it removed the need to take further evidence and accelerated proceedings. For the defence lawyers, the most important reason for such an approach was that informal agreements resulted in more favourable outcomes for the defendant. Moreover, all professions point out that the respective other parties to the proceedings want to take an informal approach.

3. Problematic levels of complexity of the rules on negotiated agreements

A recognition closely linked to the reasons given for informal agreements is that many of those involved perceive the rules on negotiated agreements and, in part, the interpretation of supreme court judgments as too complex. This is particularly evident in the fact that more than 30% of the judges surveyed reported in Module 4 that they had previously been in a situation where they were uncertain whether the negotiated agreement was admissible or not. This finding is consistent with the fact that 22% of judges said in Module 5 that they enter into informal agreements because they are unsure how to correctly enter into a negotiated agreement. 35.6% of judges also enter into informal agreements as they consider the legal position to be insufficiently clear.

4. Transparency and documentation requirements are not consistently followed

The notification obligations in accordance with section 243(4) of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO) are not always complied with or not always fully complied with. This applies both to the notification at the start of the main hearing that discussions regarding a negotiated agreement have taken place as well as notification to the contrary, i.e. that there have been no such discussions. The required notifications are both not always recorded and not always fully recorded in the court minutes. Similarly, a negotiated agreement entered into in the main proceedings is not always recorded. While the finding that no such discussions have taken place is usually recorded in the minutes according to the judges, this is not the case in the view of prosecutors and criminal defence lawyers. Finally, a negotiated agreement is not mentioned in the judgment in all cases. However, despite the shortcomings described, the parties surveyed consider that the documentation obligations are more likely to be observed.

5. Confession in return for a reduced sentence

In the context of a (formal or informal) agreement, the procedural act of the defendant usually consists of a confession. In 94.1% of the files of criminal proceedings involving negotiated agreements analysed in Module 3, a confession was the agreed action to be taken by the defendant. In an online survey of Module 4, 65.3% of judges stated that, in the context of negotiated agreements, it is always a confession that is agreed upon. This result is supported by the telephone interviews conducted in Module 5, in which 72% of judges believed that a confession was always the subject of the discussions about negotiated agreements.

In exchange for a confession made in accordance with the negotiated agreement, the defendant is granted a reduced sentence in the majority of cases. A file analysis of Module 3 shows that in 94.1% of successful negotiated agreements, an agreement was also reached about the sentence. In the context of discussions about negotiated agreements, 76.7% of judges state in Module 5 that they always talk about the sentence. In the case of informal agreements, the sentence seems to play a minor role; here, only 44.0% of judges surveyed in Module 5 consider that the sentence is always or often agreed upon.

6. An exact sentence is still being agreed openly or covertly

As part of a negotiated agreement, the court is required according to section 257c(3) sentence 2 StPO to indicate a minimum or maximum limit of the proposed sentence. Exact sentences must not be part of a negotiated agreement. Nevertheless, it has become clear that such exact sentences are being passed in practice. For example, 14% of judges, 23.5% of prosecutors and 50% of defence lawyers surveyed in Module 5 have called for an exact sentence or have witnessed such a call. An even higher number, namely 34.6% of judges, 51.5% of prosecutors and 71.4% of defence lawyers responded that this was only true for calls for a certain maximum sentence. Likewise, Module 3 showed that in five of the analysed proceedings only a maximum sentence was agreed, which was then passed.

However, there is the phenomenon that even if the courts merely refer to a range of sentences the parties to the proceedings are well aware of the exact sentence to expect. Within the online survey in Module 4, 58.1% of respondents said that despite the indication of a maximum and minimum sentence, all parties are "frequently" or "very frequently" aware of which sentence to expect in the event of a negotiated agreement. Module 5 also shows that, according to 20% of judges and a quarter of prosecutors and defence lawyers, a reference to a range of sentences typically constitutes a disguised exact sentence.

7. Negotiated agreements usually require a defence lawyer

Within Module 5, 51.3% of local court judges stated that they do not enter into any negotiated agreements with clients who are not represented by a lawyer. This leads to a situation that negotiated agreements are not entered into with defendants who are not legally represented even where judges are generally willing to enter into such agreements. Similarly, the findings from Module 3 are that being represented by a lawyer increases the likelihood of a successful negotiated agreement. That means that a defendant who is not represented by a lawyer does not have the same chance of reaching a negotiated agreement as a defendant who is represented by a lawyer. This seems particularly remarkable and indeed problematic in the light of the fact that the defendant benefits most from a successful negotiated agreement, particularly in the opinion of the judges.

8. The waiver of the right to appeal is still the subject of a negotiated agreement

The results of the analysis show that oftentimes, despite a negotiated agreement, at least one of the parties agrees to waive their right to appeal. This is already suggested by the legal analysis of Module 1, which showed that there were five complaints of a breach of the exclusion of a waiver of the right to appeal. No breach of the exclusion of a waiver of the right to appeal was found to exist in Module 3. While, on the one hand, this might be due to the small number of cases analysed, on the other hand it might also be due to the fact that mainly files that were preceded by a negotiated agreement were analysed. In the online survey of Module 4, 11.3% of judges surveyed stated that a waiver of the right to appeal or a limitation of the right to appeal is also dealt with by way of negotiated agreements. Under Module 5, 47.7% of local court judges and 16.4% of district court judges stated that the prosecutor, the defendant or the defendant's legal representative had, at times, declared a waiver of the right to appeal. This is consistent with the fact that 38.5% of judges surveyed in Module 5 rated the suitability of section 302(1) sentence 2 StPO in practice as "poor". Moreover, in the survey of parties at the Federal Supreme Court and the Federal Prosecutor General's Office (in the "Federal Supreme Court Questionnaire"), when asked about the unsuitability of various provisions in practice, the exclusion of the waiver of the right to appeal in section 302(1), sentence 2 StPO was the one that was cited by far the most (71.4%).

9. There are differences in the compliance with the provisions of the German Act on Negotiated Agreements in Criminal Proceedings (*Verständigungsgesetz*) between local courts and district courts

According to the participants, informal agreements occur more frequently at local courts compared to district courts. In the view of district court judges, informal agreements are a rare or practically non-existent phenomenon. Based on the information provided by public prosecutors and defence lawyers it is noticeable that, although district court judges tend to make fewer informal agreements than local court judges, informal agreements are not as rare as they seem to be according to the information provided by district court judges. On the whole, however, district court judges – by their own account – show a greater degree of observance of the rules on negotiated agreements than local court judges. According

to the judges' own account, both the examination of the confession made following a negotiated agreement and compliance with instruction, information and reporting obligations occurs more readily and more frequently at district courts than at local courts.

10. The department of public prosecution only partially fulfils its role as guardian

In the online survey in Module 4, only 70.5% of public prosecutors, 51.6% of judges and 24.1% of criminal defence lawyers agreed "predominantly" or "to a great extent" with the statement that the department of public prosecution fulfils its role as guardian. In the telephone survey in Module 5, 62.9% of criminal defence lawyers stated that they had not noticed any change in the behaviour of public prosecutors since the Federal Constitutional Court ruling. The impression that the role of guardian is not being fulfilled is confirmed by the responses to the surveys carried out with public prosecutors in Module 5 and the senior public prosecutors in Module 6. In most public prosecutors' offices there are no general guidelines on what to look for in a negotiated agreement, how to proceed in the trial if the court breaches the law, and to what extent the court's compliance with the legal provisions on negotiated agreements must be documented. Only slightly more than half of public prosecutors' offices have guidelines on how to react to breaches of the law by the court. For the most part, they only provide for the filing of appeals but not for any action to be taken against those responsible. In this area, the case law analysis in Module 1 also showed a low number of prosecutorial appeals, which might also indicate that the prosecution's role as "guardian of the law" – which also includes the willingness to appeal against decisions that are based on an unlawful agreement – is only being fulfilled to a limited extent.

For the most part, public prosecutors are not subject to any control as to whether they are fulfilling their role as guardian and hardly face any consequences or even sanctions in the event of a breach of law. Overall, the public prosecutors' offices thus meet the demands of the Federal Constitutional Court to a very limited extent only, namely in their role as "guardians of the law" and guarantors "for the rule of law and lawful procedural processes" to watch over compliance with the laws on negotiated agreements and to "establish and enforce uniform standards for the granting of consent to negotiated agreements and for the exercise of the right to appeal". No less than two-thirds of senior public prosecutors surveyed in Module 6 are of the view that the measures taken by them – where they are taken at all – tend not to lead to an increase in the detection of procedural errors. This corresponds to the fact that there are also no significant statistical records of negotiated agreements by the public prosecutors' offices and the attorney generals' offices.

ANNEX VII – Collection Template for Enforcement Data Relating to Foreign Bribery Cases

For reasons of efficiency, please use track changes to insert any new information in this table and do not delete any of the information already contained in it. Before forwarding these tables to the OECD and TI, the Federal Ministry of Justice and Consumer Protection will carry out additional anonymization (in particular, the "JS" file number will be deleted). If possible, please complete all rows!

Federal state/public prosecution office:	
Case number (where known):	
Investigation proceedings file num… reference):	
Status of proceedings:	

Where any parts of the proceedings were severed, please number them (set of investigations (1), set of investigations (2) ...) and retain this numbering in the following lines.

A) General information

I. Institution of proceedings:	
1. Month/year in which the investigation proceedings were instituted	
2. Source of initial suspicion ☐ whistle-blowers ☐ self-reporting ☐ requests for mutual legal assistance ☐ tax proceedings ☐ reports of suspected money laundering ☐ Other investigations ☐ criminal complaints filed by third parties ☐ Other (Please shortly describe)	
3. Brief description of the subject matter of the investigation	
II. Details on the facts of the case:	
1. Sector/business area of the company of the accused/indicted/defendant	
2. Position and rank of the accused/indicted/defendant	
3. Country and position of the bribed foreign public official	
4. Date/time of the act of bribery	
5. Type and, where applicable, amount of the bribe	

In particular, the OECD distinguishes between the sources of detection in A.I.2 Please mark with a cross.

Important: Please number all involved accused (accused 1, 2 etc.) and retain this numbering in the following lines. This will allow for the individual procedural steps and decisions to be attributed correctly where several accused persons are involved.

6. Date/time of the official act to be performed in return for the bribe	
7. Type and value of the official act to be performed in return for the (e.g. awarding of a contract)	
8. Factual information pertaining to related charges	
9. Legal persons involved	
III. Investigation proceedings:	
1. Main investigative measures (e.g. financial investigations, searche examination of accused persons, setting up of joint investigation tean (JIT))	
2. Request for mutual legal assistance (To which state? Which measures were requested? Date of the request and the response? Was the request complied with? Reasons for denial, where applicable)	
3. Measures to secure asset recovery (where applicable, please specify which measures)	
4. Investigation proceedings fully concluded (yes/no)	

Cases where the charges of bribery of foreign public officials were not pursued any further (e.g. due to the expiry of limitation periods or challenges in requesting) but where other charges (e.g. breach of trust pursuant to section 266 CC, bribery in business transactions under section 299 CC, or tax evasion) are possible, can, in principle, also be classified as foreign bribery cases. However, it must be demonstrated that valid indications remain that the bribe-taker can be considered as a foreign public official and that, therefore, the offence may be classified as a case of foreign bribery (see OECD Phase 4 Report on Germany, para. 26f).

Important: Where several legal persons are involved, please number them (legal person 1, 2 etc.) and retain this numbering in the following lines. This will to allow for the individual procedural steps and decisions to be attributed correctly.

B) Formal Proceedings

All the information requested under items I. – II. are to be provided separately for each natural / legal person	
I) Regulatory offence proceedings (pertaining to the breach of supervisory duties) under sections 130, 30, 29a of the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*, OWiG):	
1. Termination of proceedings pursuant to section 47 OWiG, including the date of termination	
2. Grounds for termination	
3. Where an administrative fine was imposed:	
a) Date of the administrative order	
b) Amount of the fine (asset recovery element / sanctioning element)	
c) Criteria for determining the fine (asset recovery element/sanctioning element); where applicable, consideration given to any self-reporting, assistance in resolving the case, compliance	

Part I only includes information on proceedings by the prosecutor's office with the aim to issue an administrative fine pursuant to sections 130 or 130, 30 OWiG and independent confiscation orders pursuant to section 29a OWiG.
Information on court proceedings with the aim to issue an administrative fine are to be included in part II.

d) Final and binding since:	
4. Where a decision was made pursuant to section 29a OWiG:	
a) Date of the decision	
b) Amount confiscated (incl. calculation)	
c) Final and binding since:	
5. Where applicable, press release published by the public prosecution office (with date)	
I) Criminal proceedings	
1) Termination of proceedings <u>prior to</u> the indictment:	
a) Date of and legal basis for termination (e.g. sections 170(2), 153a(1), 154(1) CCP as well as exact designation of the charges in respect of which the proceedings were terminated	
b) Grounds for termination	
c) Where proceedings relating to the charge of foreign bribery were terminated: Are there still any remaining indications that the bribe-taker might have been a foreign public official? If so, please state.	Please also see comment regarding item A. II.8 in this context.
d). Where section 153a CCP was applied:	
aa) Type of the conditions and instructions imposed, in particular the amount and the criteria for determining the sum paid in exchange for the termination (where applicable, consideration given to any self-reporting, assistance in solving the case, compliance)	
bb) Were the conditions/instructions complied with?	
e) Where applicable, press release published by the public prosecution office (with date)	
2) Indictment/application to issue a penalty order::	
a) Date of indictment/application to issue a penalty order	
b) Court (local court/regional court and place)	
c) Exact designation of the charges on which the indictment/application to issue a penalty order is based	

d) In the absence of an indictment/application to issue a penalty order for foreign bribery: Are there still any remaining indications that the bribe-taker might have been a foreign public official (cf. comment regarding item B. 8)? If so, please state.	Please also see comment regarding item A. II.8 in this context.
e) Application for ordering the participation of a company as a secondary party to the proceedings (section 444 CCP)	
f) Date of the order opening main proceedings (section 203 CCP)	
g) Where main proceedings were (partially) not opened: charges concerned and grounds (where applicable, information on any appeal filed against the decision not to open main proceedings)	
h) Date of main hearing	
3) Termination of proceedings <u>following</u> the indictment:	
a) Date of and legal basis for termination (e.g. sections 153(2), 153a(1), 154(1) CCP) as well as exact designation of the charges in respect of which the proceedings were terminated	
b) Grounds for termination	
c) Where proceedings relating to the charge of foreign bribery were terminated: Are there still any remaining indications that the bribe-taker might have been a foreign public official (cf. comment regarding item B. 8)? If so, please state.	Please also see comment regarding item A. II.8 in this context.
d) Where section 153a CCP was applied:	
aa) Conditions and instructions imposed, in particular the amount and the criteria for determining the sum paid in exchange for the termination (where applicable, consideration given to any self-reporting, assistance in solving the case, compliance)	
bb) Were the conditions/instructions complied with?	
e) Where applicable, press release published by the public prosecution office/court (with date)	
4) Judgment/penal order/confiscation orders:	
a) Date of judgment/final decision	

b) Where a judgment/penal order was issued:	
aa) Exact designation of the charges in respect of which the person concerned was convicted/acquitted	
bb) Where the person concerned was acquitted of the charge of foreign bribery: Are there still any remaining indications that the bribe-taker might have been a foreign public official (cf. comment regarding item B. 8)? If so, please state.	Please also see comment regarding item A. II.8 in this context.
cc) Negotiated agreement pursuant to section 257c CCP	
dd) Sanction (level of the sanction imposed and, where applicable, criteria for determination of the prison term or fine)	
ee) Where the execution of the sanction was suspended on probation: probation period, conditions and instructions	
ff) Confiscation orders (including orders pursuant to sections 73b, 76a CC, calculation of the amount; where applicable, grounds for dispensing with confiscation	
gg) Amount of the fine imposed on companies ordered to participate in the proceedings as secondary parties (asset recovery element/sanctioning element) (where applicable, consideration given to any self-reporting, assistance in resolving the case, compliance)	
c) Date on which the decision(s) became final; where applicable, status of appellate proceedings	
d) Where applicable, press release published by the public prosecution office/court (with date)	Please do not delete any data entered here! These data are to be entered by the Federal Ministry of Justice and Consumer Protection.
Comments on the statistical recording	

www.oecd.org/corruption