Hertie School
The University of Governance in Berlin

Addressing Germany's governance challenges

Policy brief

Curbing business and political corruption major task for election winners

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Summary

Recent evidence shows that Germany is a laggard on anticorruption policies in Europe. This is acknowledged by OECD, as Germany's implementation of the anti-bribery convention is no longer convincing, by the Council of Europe, whose GRECO body has labeled Germany's compliance as unsatisfactory and by the German media and civil society. The new data on transparency and public accountability produced by our center shows that GRECO is right, and Germany falls below European average at most public accountability regulation. Moreover, while EU asks accession countries to have a pro-active policy related to corruption scandals, Germany repeatedly failed to do so. The new government should propose a comprehensive anticorruption policy plan, implement GRECO recommendations on conflict of interest for politicians in full and revive the attempt to make businesses truly responsible for corruption. The new majority in the Bundestag should also move decisively to have anticorruption institutions truly independent and acting far more decisively and promptly against a large set of practices amounting to systematic undue profit from political connections.

Key figures

46%

of Germans in the latest Eurobarometer think corruption is widespread within political parties*.

62%

of Germans are worried that businesses have undue influence over politics in Global Corruption Barometer.

1/3

of spending goes into public procurement, and non-competitive tenders are three times as many than in Sweden**.

23/53

Is Germany's regulatory strength for assets disclosures against the European average of assets, and 26/37 the one on conflict of interest***.

**Source:* EB 2020 (520) accessible at https://europa.eu/eurobarometer/surveys/detail/2247
** *Source*: www.opentender.eu
*** *Source:* www.europam.eu

Germany is no longer the public integrity champion it once was

Germans think of themselves and like to be seen by the rest of the world as a benchmark of good governance. Our fact-based Index for Public Integrity ranks the German government among the least corrupt in the world. While around a quarter of Europeans are personally affected by corruption in their daily lives, on average in Germany just 9% claim to be affected, and only 2% say they have personally experienced or witnessed a case of corruption in the last 12 months (European average is 5%) [1]. But 2020-2021 saw also a very different press for Germany. The most influential anti-corruption blog, the FCPA (Foreign Corrupt Practice Act) blog remarked that "Since 2008, the DOJ (Department of Justice) and SEC (Securities Exchange Committee) have prosecuted ten German firms for FCPA offenses, imposing total financial penalties of $1.4 billion". The enforcement started with Siemens, and was then followed by FCPA cases against SAP, Allianz, Linde Group, Zimmer Biomet, Bilfinger, Deutsche Telekom, Daimler, Fresenius and Deutsche Bank – the flagships of the German economy. Also in 2020, the *Wall Street Journal* remarked that the BaFin (the Federal Financial Supervisory Authority) dismissed a decade of warnings about the fraudulent Wirecard company instead of exercising proper oversight – and prosecutors even went after *Financial Times* journalists who blew the whistle instead of the culprits. Various investigations are currently underway in Germany examining the conflicts of interest behind this inaction. The Wirecard scandal reveals structural problems in the German legal system, Transparency International Germany said, calling for a fundamental reform of financial supervision and a comprehensive whistleblower protection law fully in agreement with new EU standards.

Finally, and rather belatedly, the European Commission fined Daimler, BMW and Volkswagen group (Volkswagen, Audi and Porsche) for colluding to breach EU antitrust rules. All parties acknowledged their involvement in the cartel and agreed to settle the case. BMW and the Volkswagen group alone were fined 1 billion USD. But this is only the latest in a string of scandals related to collusion in the German car industry. The German government has always treated the situation leniently, culminating in the infamous "Diesel Summit" in 2017. Similarly, the follow-up of the famous Siemens bribery case in Greece, sometimes cited as a textbook example of a friendly settlement in court, has never been thoroughly investigated: by 2015, Siemens faced investigations on similar practices in 25 jurisdictions, while at the same time funding anticorruption research projects of little potential to change the rules of the game. In the words of the WSJ: "Germany has a patchy record in fighting corporate crime. Volkswagen AG's giant emissions-cheating scandal was uncovered by California. The U.S. has imposed more money-laundering fines on troubled German lender Deutsche Bank AG than Germany has". In the new *Global Corruption Barometer – European Union 2021*, 62 per cent of people reported their concern over private interests controlling German politics.

The pandemic revealed another vulnerable area: politicians. Profit from conflicts of interest seems to have been rather frequent but under-reported for years until the masks scandal erupted, when a few MPs acted unethically. Lobbying on behalf of companies, even on behalf of one's own company, is not forbidden, and whatever self-constraint from politicians existed for past generations, it seems to be gone by now. Furthermore, some MPs were exposed for lobbying in Berlin and Brussels on behalf of authoritarian regimes such as Azerbaijan and North Macedonia, in exchange for financial recompense. Some local governments also behaved controversially, engaging in Gazprom funded lobby for the North Stream. The Green candidate had to defend herself from accusations of plagiarism, and important newspapers consider that the leading contender, Olaf Scholz does not have clear answers regarding his involvement in letting Cum-Ex fraud scandal perpetrators escape without returning the money to the investors. Transparency International Germany claims that the belatedly introduced lobbying register for the Bundestag has too many exemptions to go far

[1] Special Eurobarometer 502 (Fieldwork December 2019; Publication June 2020), pages 5-6.

enough to provide effective public oversight. Germans interviewed by the Eurobarometer survey think that the giving and taking of bribes and the abuse of power for personal gain are widespread especially among 'political parties' (46%), 'private companies' (43%) and 'politicians at national regional or local level' (40%). The least bribing is perceived among 'the courts' (5%), 'public prosecution service' (6%) and 'social security and welfare authorities' (6%)[2]. "Government efforts to combat corruption are seen as effective in Germany only by a minority (27% 'agree' vs. 47% 'disagree').

The media scandals, the fines levied by international organizations and the public perception contrast severely with the modest enforcement figures. It is enough to compare the billions defrauded in financial scandals against an average of 41,000 Euros in fines for 'social loss' per convicted crime to understand that law enforcement misses the big picture altogether. They obviously target – or hit – just the tip of the iceberg. It looks like Germany, while largely free of petty corruption lives with corrupt practices at higher levels. In fact, warnings existed from both the international bodies dealing with implementation of United Nations Convention against Corruption (UNCAC) and the European one (GRECO, the Council of Europe anticorruption arm). GRECO found an "overall very low level of compliance" with recommendations dating from 2015.Among GRECO's targets, more transparency and better management of conflict of interest of Bundestag members featured prominently.[3]

According to our data[4], Germany is below the European average in practically all public accountability mechanisms (see Figure below). The obligations of officials to disclose their assets and interests are fewer than half the European average of other member states. Civil servants are subject to strict regulations compared to elected officials, which are practically free to exercise influence in their own benefit. Evidence exists that the extent of regulation is generally conducive to higher integrity in procurement, but even German procurement is regulated below average.[5] The European Public Procurement Scoreboard, which includes corruption risk factors also ranks Germany as a medium performer, below the UK or Scandinavian countries[6].

Despite recent money laundering scandals related to its banks, Germany does not yet have sufficient transparency or digitalization of the financial sector. The lack of integration of various databases makes it practically impossible to uncover beneficial ownership, despite the existence of a Transparency Register (Transparenzregister) introduced in 2017. Germany has of yet not fully implemented the EU Anti-Money Laundering Directives[7].

In April 2020, the Ministry of Justice published major new draft legislation on corporate liability, the Act on Association Sanctions (Verbandssanktionengesetz), remedying deficiencies in the existing framework, but stopping short of criminal liability. The law would have required prosecutors to investigate cases against legal persons on initial suspicion of a crime and would have allowed sanctions of up to 10 per cent of turnover against companies with a turnover of more than €100 million (US$114 million). However, the draft collapsed in the government coalition in June 2021 before even reaching the floor.

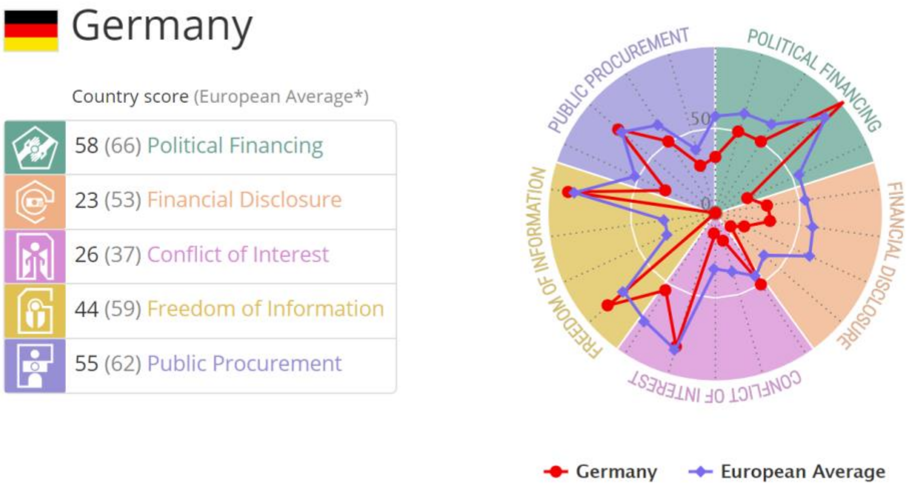
[2] Same source, pages 27-30.

[4] This data collection exercise produced quantifiable full reviews on the comprehensiveness of de jure and de facto rules used to ensure the accountability of public officials in 35 European countries. Accessible at www.europam.eu, updated 2021.

[5] https://europam.eu/?module=country-profile&country=Germany

[6] https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm

[7] Transparency International, *Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*, 2020, Berlin: 62-64



Aside from bribing across borders, domestic **public procurement** is generally a sector where the public and the private interests collide, and as such is particularly attractive for rent-seeking activities. This is exacerbated by the amount of money allocated through public procurement. Roughly a third of total German government spending is allocated through public procurement, and the country responds to economic crises with increased public spending as default policy. The temptation to resort to illegal practices to secure government contracts can be high. This is proven by the fact that, according to the BKA, most of the bribes paid in Germany are indeed intended to secure public contracts or buy competitive advantages[8].The Courts of Auditors frequently report that contractors come from the same state or nearby, often rotating on geographically limited areas.[9] The legal protection for bidders in Germany is weak, which makes it easier for contracting entities to abuse their power: the review system in Germany only applies to contracts above the EU thresholds. Below these thresholds, bidders are generally restricted to administrative complaints or civil claims for compensation against the awarding body. But the chief problem is the lack of transparency in awarding contracts at the national level. The EU encourages Member States to publish tenders underneath the EU thresholds in the Tender Electronic Daily database as a good practice. Germany, however, has one of the lowest publication rates across the EU[10]. And even if the system in place for the award of contracts at the European level seems associated with less risk, even there Germany underperforms certain EU Member States, such as Scandinavian states and the Netherlands, according to our big data portal www.opentender.eu

The new Bundestag and government should acknowledge the problem and take decisive steps

In the new European rule of law framework corruption and money laundering are central issues. So are they for accession countries. This means that currently the European Commission strongly enforces conditions on poor countries which are inconceivable in Germany. Such double standards cannot last forever without an important loss of credibility. Germany should become again the champion that it once was. Here are a few steps of what should be done:

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[8] Roberto Martínez B. Kukutschka (2015). A Look Inside the Black Box: Corruption Risks in the German Public Procurement System. Berlin: ERCAS. Accessible on www.anticorrp.eu

[9] Sächsischer Rechnungshof (2012). "Beratende Äusserung: VOB- Vergaben im Unterschwellenbereich- Hinweise und Empfehlungen an Kommunen". Dresden: Sächsischer Rechnungshof. Sächsische Rechnungshof 2012: 13-14

[10] TED Structured Dataset (2014), Tenders Electronic Daily, supplement to the Official Journal of the European Union. DG Internal Market and Services, Brussels: European Commission

1. **Make anticorruption institutions truly independent of government and endow them with strong powers as well as strict conflict of interest rules**

The United Nations Convention against Corruption UNCAC) asks for anticorruption agencies independent from the government, a condition that EU also enforces in the European neighborhood. Germany should also follow this recommendation which already features in its UNCAC review. Results should show in more prompt enforcement of OECD regulation as well as German one. The recent debate on where the anti-money laundering unit should be is part of this issue. All agencies should be one step remote from the executive and create a working group of their own to exchange information fast and be able to act promptly.

2. **Revise and upgrade legislation on conflict of interest, money laundering, business criminal responsibility and so forth**

Adopted in the last day of the last session of the Bundesrat, this law addresses some of the GRECO recommendations related to MPs. However, there is still much to do to implement EU, OECD, UNCAC and GRECO recommendations. Using Europam.eu as a benchmark we suggest that Germany upgrades regulation at least to the European average. This should include private corruption, as well as public, and all statements of integrity (assets as well as interests) should be posted on Internet by default, without special requests from the media or public.

3. **Digitalise public procurement in full and monitor risk indicators at both federal and land level**

As many German reports suggested already digitalization and administrative simplification would help a lot. Germany should entirely digitalize its public procurement both at federal and land level and implement a unique set of corruption risk indicators that we developed on Opentender.eu and the European Commission has adopted in the public procurement scoreboard to monitor competitiveness and value for money. This would go a long way to rebuild public trust shaken by project such as the BER airport.

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