CURBING BUSINESS AND POLITICAL CORRUPTION MAJOR TASK OF GERMAN ELECTIONS 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 labelled Germany's compliance as unsatisfactory and by the German media and civil society. The new data on transparency and public accountability produced by our centre shows that GRECO is right, and Germany falls below the European average at most public accountability regulation. Moreover, while the 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 prompt against a large set of practices amounting to systematic undue profit from political connections. The elections winners 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 autonomous so that investigations are prompt and independent of political considerations. But as the Green Party proposed the only comprehensive plan against corruption this might not happen.

This is a full report authored by a larger team[1]; for the brief version of Alina Mungiu-Pippidi see www.hertie-school.org

[1] This is a report of the European Center for Anticorruption and State-Building (ERCAS). Authored by Alina Mungiu-Pippidi, Maximilian Faour and Roberto Martinez Barranco Kukutschka. Input received also from Luiza Leite de Queiroz, Katherine Wilkins, Débora Ferreira, Christoph Abels and Francesco Bono.

Tip of the iceberg

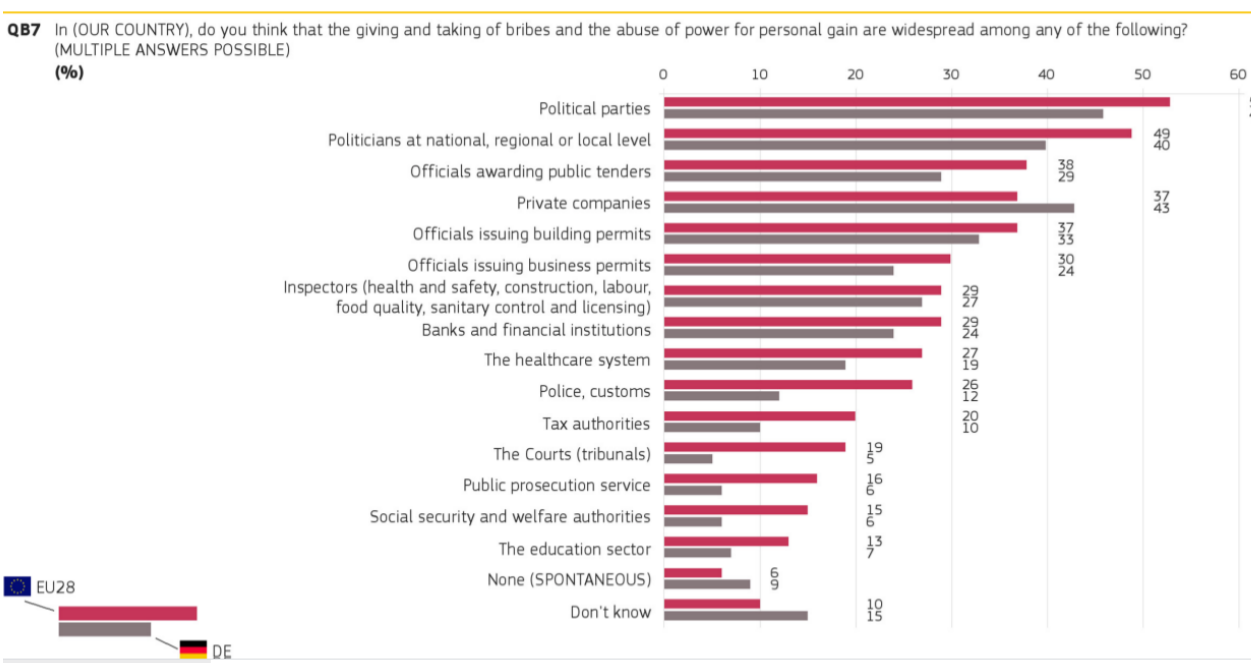
Writing in 2020 in *Foreign Affairs*, Francis Fukuyama wondered why some countries have done better than others in dealing with the pandemic. He concluded that “Countries with … a competent state apparatus, a government that citizens trust and listen to, and effective leaders—have performed impressively, limiting the damage they have suffered”. He went on to praise Germany and South Korea for precisely these qualities.

This is exactly how Germans think of themselves and like to be seen by the rest of the world: a benchmark in good governance, the country of a perfect social contract on which trust is based. The World Bank’s (WB) Control of Corruption (CoC) and Government Effectiveness (GE) indicators rank the German government among the most effective and 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%) [2]. 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.

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

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.

Figure 1. Public perception of corruption in Germany[3]



[3] Source: EB 2020 (520) accessible at https://europa.eu/eurobarometer/surveys/detail/2247

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. Transparency International Germany claims that the belatedly introduced lobbying register for the Bundestag has too many exemptions to go far 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%)[4]. "Government efforts to combat corruption are seen as effective in Germany only by a minority (27% 'agree' vs. 47% 'disagree').

Data regarding German enforcement of anti-corruption rules, while not publicly transparent, reveals modest efforts. The German federal police registered a total of 5,428 corruption offences in 2019. Most cases of bribery in 2019 (33%) were associated with the public service sector (40% in 2018; 48% in 2017). The increase in offences committed in the automotive industry to 14.7% in 2019 is mainly due to preliminary proceedings in Baden-Württemberg and Saxony in connection with the illegal registration of vehicles and the preparation of false general inspections and safety checks for motor vehicles[5]. Only 21% of all cases had identifiable monetary damages. The average amount of damages determined in 2019 was approximately 41,000 Euros per corruption offence. For unknown reasons, the Federal Ministry of Justice does not publish transparently the enforcement statistics on opened investigations, cases commenced, cases concluded. Similarly, it does not publish requests for mutual legal assistance (MLA) submitted and received on the basis of the *OECD Anti-Bribery Convention*. However, it does compile this information for the OECD WGB and makes it available to Transparency International Germany on a confidential basis. During the period 2016-2019, Germany opened 27 investigations, commenced 15 cases, and concluded

[4] Same source, pages 27-30.
[5] Same source, p. 19

46 cases with sanctions[6]. Germany is thus rated as a 'Moderate' enforcer (yellow code colour) by Transparency International[7].

Deep Waters

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 – the latest editions of the Global Corruption Barometer and the Eurobarometer report bribery rates of 6 and 3% respectively – 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). Last year, GRECO found an "overall very low level of compliance" with recommendations dating from 2015. Only three of eight recommendations were implemented satisfactorily, three were partially implemented, and two were not implemented at all. Among GRECO's targets, better management of conflict of interest of Bundestag members featured prominently.

Loose accountability regulation

The latest generation of fact-based data on corruption and anti-corruption produced by our Centre and its partners in the last decade allows us to dig deeper. According to EuroPAM, the European offshoot of the Public Accountability Mechanisms Initiative (PAM) of the World Bank[8], Germany is below the European

average in practically all public accountability mechanisms (see Figure 2). The

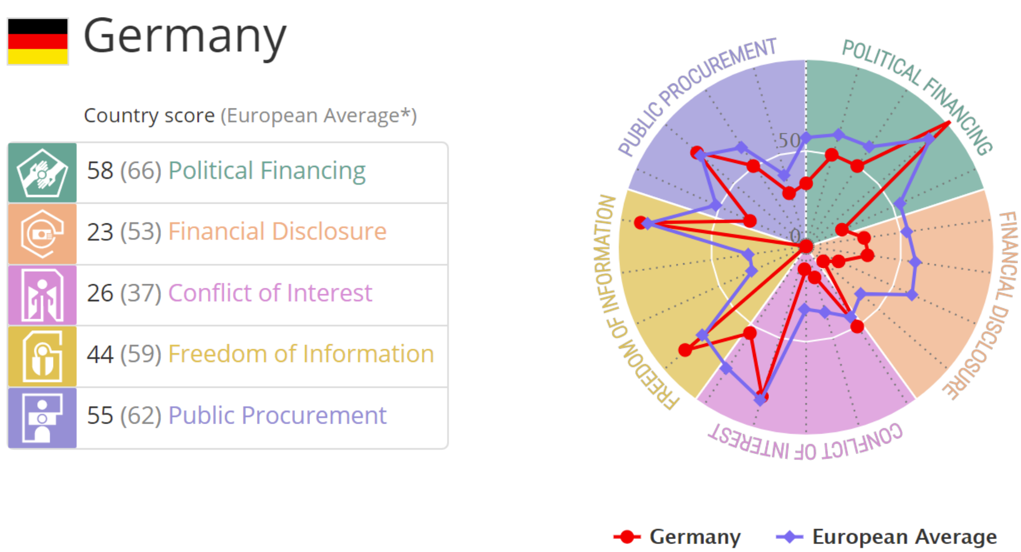
[6] Transparency International, *Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*, 2020, Berlin: 62-64

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

[8] 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.

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.[9] The European Public Procurement Scoreboard, which includes corruption risk factors also ranks Germany as a medium performer, below the UK or Scandinavian countries[10].

Figure 2. Germany's public accountability framework compared with the rest of Europe[11]



However, not every piece of regulation necessarily delivers better governance: it is the over-regulated countries in EU 28 (now 27) who tend to be the ones struggling with corruption the most. Still, Germany's conflict of interest is not more comprehensive than Greece's. By most charts, the best performers in controlling corruption in Europe are Scandinavian countries, the Netherlands and the UK. Their specific approach, highlighted by *EuroPAM* for Finland, for instance, is through extensive transparency (80 against European average of 59), while keeping other legal accountability tools at a moderate or even low level. Corruption is best

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

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

[11] Source: www.europam.eu. Legend: Higher scores show more comprehensive regulation

prevented by transparency: in a country where everybody's income, assets and tax returns are public, and all government transactions are online it is quite difficult to hide extra income or practice abuse of power.

Mediocre transparency

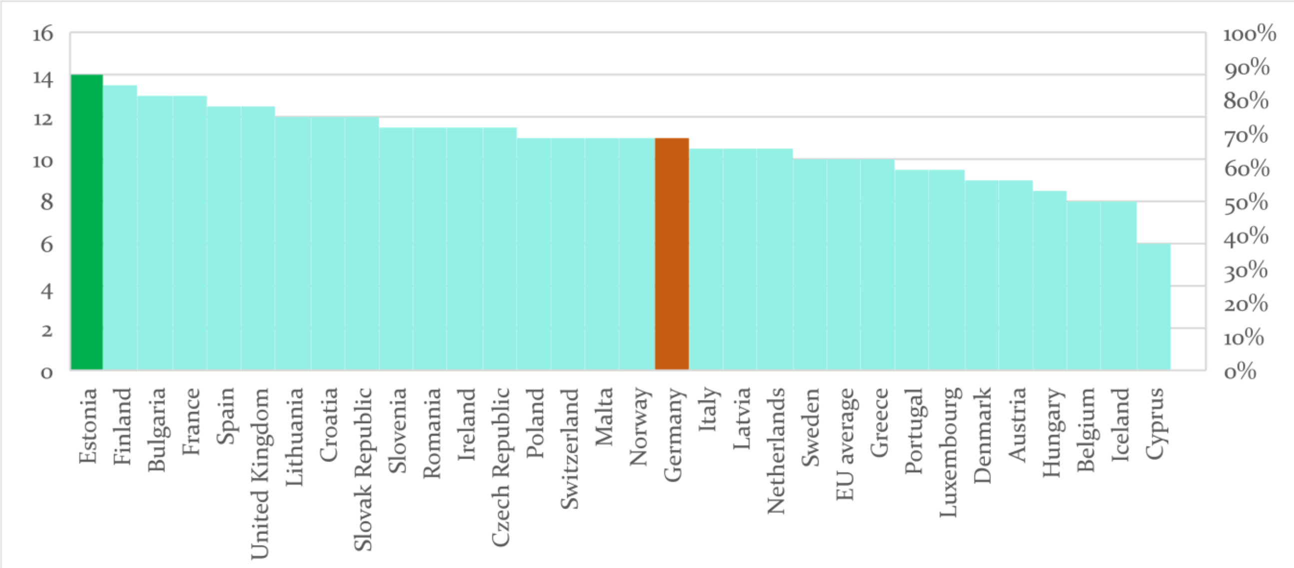
The problem of Germany is that it cannot compensate – as Finland does – for lax public accountability mechanisms (for instance, on public financial disclosures for officials or criminalization of conflict of interest) with high transparency, as transparency and digitalization are quite mediocre. The freedom of information legislation shows Germany under the European average, and the de facto transparency index (T index) which measures computer mediated transparency shows that Germany is not amongst the top European performers, fulfilling under 70% of requirements (see Figure 3).

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[12].

The information in the Transparency Register and the Commercial Register has been made publicly available only from 2020, subject to some exceptions, e.g., where the beneficial owner can prove a danger of blackmail, kidnap, or similar threats. Registration is required, with a penalty of up to €100,000 (US$116,000) for failure to register, and a fee is payable for each access to the register. Access is not automatic for the Transparency Register, which uses a manual check for each case. Access is automatic for the Commercial Register.

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

Figure 3. Computer-mediated transparency (T-index)[13]



Legend: 1 to 14 scale with 14 (100%) fully functional, free and comprehensive online information on: Last year expenditures (annual budget); Current public expenditures (tracking system); Company ownership via Register of Commerce; e-Public Procurement Portal; Annual General Audit Report; Supreme Court Online Hearings Schedule; Supreme Court Online Sentences; Asset, Online Gift and Income Declarations for Public Officials; Online Conflict of Interest Declarations for Public Officials; ODA Resources Allocation; Mining Concessions; Building Permits; Official Gazette fully online.

Business integrity or impunity?

To be certain, Germany as a society enjoys some of the best conditions in the world to control corruption: a remarkably free press, a largely independent judiciary, many economically autonomous citizens able to exercise oversight and enforce vertical accountability through elections. Its fiscal transparency is very good and the quality of regulation in general is among the best in the world, according to the World Bank. But this framework, good as it is and placing Germany as number 14 (out of 117 countries) in the Index for Public Integrity, can hardly cope with **increasing opportunities for corruption** that the **very high public spending and intensive trading across borders** present. **Corruption is a balance between opportunities and constraints[14].** Furthermore, **close ties**

[13] Source: ERCAS 2021, www.againstcorruption.eu

[14] Mungiu-Pippidi, A. (2017). The time has come for evidence-based anticorruption. *Nature Human Behaviour*, 1(1), 1-3.

between business and politics are traditional in Germany. It was only about twenty years ago, and due to US pressure, that Germany outlawed kickbacks paid by German companies abroad or at home to win contracts. Before that, they were tax deductible as legitimate business expenses unless the person who made the pay-out was found out and convicted of bribery.

In 2016, the Council of Europe passed a resolution asking Member States to consider applying legislative and other measures to ensure that business enterprises can be held liable for the commission of offences under, inter alia, the UN Convention against Corruption, which includes foreign bribery. Investigations into foreign bribery and MLA requests are complex and time-consuming. The five-year statute of limitations period has, been in several cases, too short for the prosecution of criminal acts such as foreign bribery. **Whistleblower protection** in Germany is insufficient, especially in the private sector, where laws are lacking and protection is dependent on relevant court decisions. The EU Whistleblower Protection Directive requires protection for persons reporting breaches of EU law in a work-related context, but not for breaches of national law. Germany is reportedly trailing behind other EU MS with the implementation of this directive.

German enforcement authorities have not to date prioritized the prosecution of legal persons involved in **foreign bribery** cases. The maximum financial sanction is €10 million (US$11 million) for intentional commission of criminal offences, and €5 million (US$5.5 million) for negligent commission. This is inconsistent with the OECD Anti-Bribery Convention requirement of proportionality for legal persons, particularly large companies. Prosecution of offences is at the discretion of the prosecuting authority, allowing possible violation of the principles of effective, proportionate and deterrent sanctions against companies. Foreign bribery has been treated so far as a victimless crime in Germany. However, foreign bribery committed by business enterprises may well cause serious human rights violations, for which there is currently no remedy. Criminal prosecution of foreign bribery in Germany is hampered above all by the still outstanding law on corporate sanctions, the lack of public access to court rulings, deficits in the transparency register and the inadequate protection of whistleblowers. In the words of Angela Reitmaier, member of the board of directors of TI Germany: “It is alarming that Germany, the world ‘s third largest export country, is dropping in the prosecution of foreign bribery. The prosecution of companies must no longer be left to the discretion of the public prosecutor's office and thus violate the OECD Convention on Foreign Corruption."[15]

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.

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[16].

Germany's public procurement framework is defined by its federalism[17]. Most of the contracts are awarded through the local and state authorities and are not accessible through digital platforms. Even if the *Länder* (municipalities) are not actively seeking to favour certain providers, fair and open competition can be threatened by the lack of transparency and the existence of multiple procurement regulations at the national level, as potential bidders then face additional costs to compete for tenders because they must be acquainted with different state or local legislation. The Courts of Auditors frequently report that contractors come from the same state or nearby, often rotating on geographically limited areas.[18] The legal

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[15] Germany's anti-foreign bribery measures fall short… - Transparency.org
[16] 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
[17] Same source previous note.
[18] Sächsischer Rechnungshof (2012). "Beratende Äusserung: VOB- Vergaben im Unterschwellenbereich- Hinweise und Empfehlungen an Kommunen". Dresden: Sächsischer Rechnungshof. Sächsische Rechnungshof 2012: 13-14

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[19]. This has an obvious and significant negative impact on transparency and increases the risks of corruption by obstructing bidders, media or civil society organizations from monitoring procurement decisions. The task of scrutinizing the awarding of public contracts thus falls solely in the hands of the federal and state Courts of Auditors. Given the nature and the scope of their tasks they are not able to conduct systematic, in-depth analysis of the procurement spending on a regular basis and can only detect issues after the contracts have already been awarded and, in many cases, after the goods have already been bought or the projects concluded. Germany has always lagged on e-procurement. The use of e-procurement could bring several advantages, by tackling several issues at the same time: it could enhance competition by ensuring that public tenders reach a maximum number of potential bidders while at the same time increasing the transparency of the awarding process by improving the traceability of both procurement spending and of the decision-making processes. It is therefore important to promote the use of the heavily underused e-procurement platforms in the country. This could help document procurement procedures and improve the data-collection process, which is currently labour intensive. The central website of the public administration (www.bund.de) would be the ideal platform to achieve this.

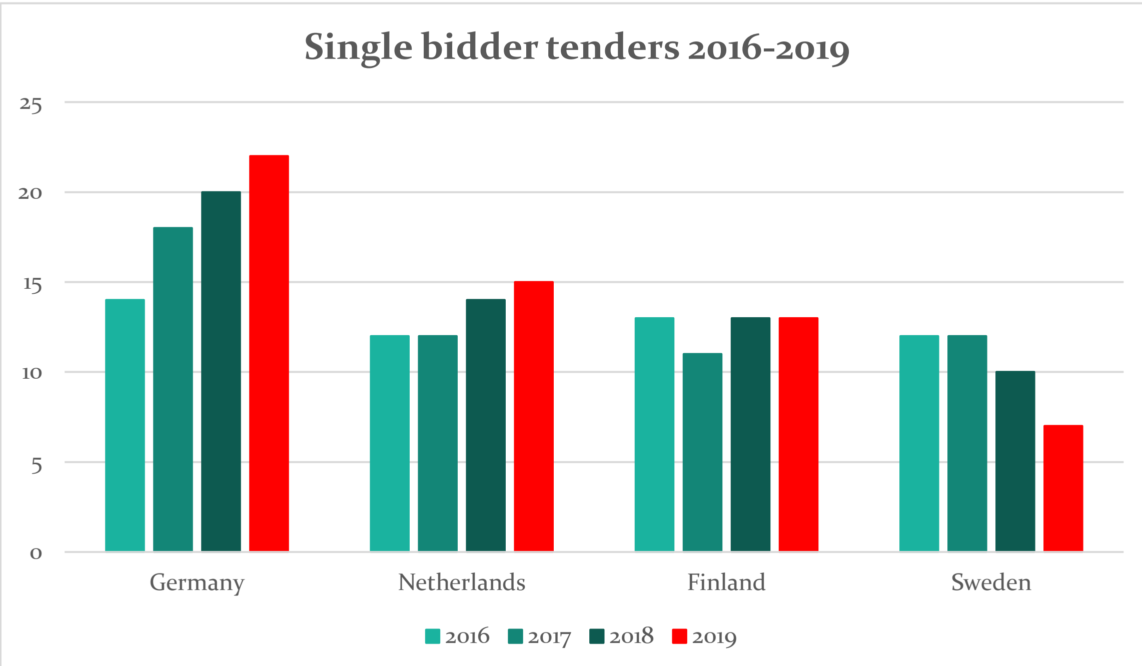
In conclusion, since the German procurement system is ruled by two different sets of legislation, one for contracts above the EU thresholds and one for contracts below, each of these two branches has different levels of corruption risks associated with them.[20] On one hand, the system in place for the award of contracts at the European level seems associated with less risk. However, even there Germany underperforms certain EU Member States, such as Scandinavian states and the Netherlands (see Figure 4). The data scrapped by Opentender.eu shows that single bidding, the main corruption risk indicator (also in the EU Public Procurement Scoreboard), is significantly higher - 1.5-3 times - compared to

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

[20] Apud Kukutschka 2015, see note 21.

better performers like the Netherlands, Finland or Sweden and that the trend is negative: procurement does not seem to become more competitive.

Figure 4. Non-competitive tenders in Germany versus selected countries[21]



Auditors have also criticized the **cost runoffs** which have become customary in Germany, otherwise a country with a great reputation for the effectiveness of public works. Politically endorsed infrastructure projects seem to backfire exactly as they do in the poor countries where everybody expects them to be corrupt. Research by Hertie School shows that large-scale public projects in Germany have proven, on average, 73 percent more expensive than estimated. In a recent notable example, the Berlin Brandenburg airport (BER)'s budget started at €2.8 billion ($3.3 billion), but it ended up costing over €4 billion more. Authorities identified – though late – corruption too. A department head was jailed in 2016 for accepting bribes from a contractor that went bankrupt. Projects have varying cost overruns across sectors – the highest per project occurring in the ICT and energy sectors, with 394 percent and 136 percent respectively, followed by the defence sector with 87 percent. It may be that Germany lacks the capacity for adequate planning and cost estimation, but that is unlikely. In any other country, this would raise suspicions of clientelism: extra spending driven by the need to boost the income of private suppliers connected with (and therefore favourites of) sub-national governments.

[21] Source: Opentender.eu by ERCAS and partners, self-computation

What could be done and will it?

Beyond scandals, which have often been treated in public discussion as 'Einzelfälle' or isolated cases, the German electoral debate has been missing examination of why Germany lags behind in anti-corruption and what to do about it. This includes debate on conflict-of-interest regulation and enforcement, on the implementation of the OECD anti-bribery convention, on whistleblower protections, and on transparency of financial transactions, implementation of EU anti-money laundering directives, and digital transparency more generally.

What is needed is a broader debate about culture: why impunity seems to reign for many business and political leaders. This later issue is really striking, seeing that Germany was and remains a country where most citizens are extremely rule abiding and which prides itself on its public integrity. First and foremost, the existing culture needs to be publicly acknowledged, and then there can be debate about what it means for Germany's social and economic future.

Anticorruption as an electoral topic generally brings advantages to anti-system parties, which have governed less or not at all, especially if those manage to stay clear of other reputational issues. The German Greens are the most active party in the European Parliament on issues of corruption and rule of law. The Greens have been the only party to devote more attention to the topic domestically and have the only comprehensive program devoted to curbing corruption. While the CDU has faced losses in opinion polls following scandals in recent months, major political change does not appear to be on the table. The main favourite, Olaf Scholz is seriously questioned by media, not just rivals, on his handling of the Cum-Ex fraud.

As an economic engine in Europe, influential player in Union-wide policymaking and governance, and core partner in the transatlantic relationship, the centrality of anticorruption in German domestic politics also has broad implications within the EU and among western democracies. Ignoring weaknesses in the anticorruption architecture carries broad risks, not in the least by the double standards it creates versus some EU new member states still monitored on corruption by Brussels.

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 neighbourhood. 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. **Digitalize 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.