

Anticorruption: a case of 'good, but could do better'

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Corruption and Anti-Corruption in Germany

A case of ‘good, but could do better’

Abstract

This article outlines the corruption challenges that Germany faces before explaining what German elites have done to try to counteract them. It utilises a neo-institutionalist framework to argue that whilst Germany’s anti-corruption infrastructure remains strong, resilient path dependent tendencies often make it difficult to meet the challenge of reform. The article puts three specific areas under the analytical microscope; the state’s attitude to regulating German business, meeting international anti-corruption commitments and doing justice to the rising transparency agenda. It illustrates that high profile examples of German-based multinational businesses being caught – by both American and German prosecutors – engaging in corruption prompted these companies to make significant changes to their compliance regimes. This critical juncture prompted reform, in larger German companies at least, in a way that hasn’t happened across much of the *Mittelstand*. Germany’s preparedness to do justice to its international commitments, meanwhile, has been strongly dependent on whether those commitments fitted the internal logic of German politics and indeed German law. Where they did, change has been efficient and effective. Where they didn’t, and in the absence of any critical junctures, change has only infrequently been forthcoming. Finally, the rise of an international transparency agenda has not fitted with the path dependent logics of German public life, and change in this area has subsequently been minimal. The article concludes by arguing that whilst Germany has a generally strong anti-corruption record, German elites would nonetheless benefit from being a little more proactive in thinking about where corruption may be lurking and what they might want to do about it.

Keywords

Germany, Corruption, Anti-Corruption, Transparency

Introduction

Germany has traditionally been viewed as a country where corruption is under control. It has never been viewed as non-existent, but for much of the post-war period it was still seen as something that happened largely elsewhere. Where it did occur, it was viewed as a case of isolated individuals enriching themselves but where systems of oversight, compliance and cultures of 'doing the right thing' would ultimately prevail. Indeed, these attitudes were traditionally not just evident in Germany, they were the norm across much of the western world.

Only in the 1980s was the popular perception that Germany didn't have a corruption problem questioned. Since then attitudes have changed considerably and corruption is now recognised as a major-policy challenge. This article subsequently looks at what Germany's corruption problems are and what it has done to try and tackle them. It argues that in many ways Germany's institutional framework remains well set to meet corruption challenges when they arise. But, as and when reform of that framework happens it is largely of a path-dependent nature. That does not necessarily need to be a problem. However, it has ensured that there has often been a resistance to what in effect would be path-changing reform. Sometimes this resistance is strong enough to resist reform completely, sometimes it ensures that when reforms do happen that is as they take on a logic that fits the German context. Only rarely do 'path-changing' reforms take place. This could plausibly be storing up a range of problems for the future.

The article begins by outlining how corruption in Germany has traditionally been analysed. As inferred above, much of this analysis centred round praising how rigorous Germany's institutional framework was. The article then moves on to explaining how the academic analysis of corruption, once itself a largely peripheral occupation, experienced something

of a revival in the 1980s and 1990s. It did so largely as political economists developed a powerful set of causal explanations that purported not only to explain corruption's existence but also to offer intellectually consistent solutions for counteracting it. Whilst this approach remains pervasive, the article goes on to explain that a neo-institutionalist focus has risen to challenge it. This focus stresses that institutions (in a broad sense) shape not only the type of corruption that exists but also perceptions of what is (and isn't) appropriate behaviour. This applies both to understandings of what corruption is as well as to what appropriate responses to it might be. When corruption is understood in these contingent terms we can understand more about when change happens and why it happens in some areas but not in others. The article then outlines three specific corruption challenges that Germany faces and explains why reform has come at different times, in different ways and to different effect in these areas. Given that, the conclusion is a sobering one. While the Federal Republic generally performs admirably in international corruption comparisons, the conservatism that still shapes German anti-corruption thinking leaves the country poorly placed to react to corruption challenges. Many German politicians have failed to show enough urgency in addressing corruption issues and Germany would benefit from its leaders thinking just a little more about where corruption may be lurking and what it might want to do about it rather than assuming that its institutional framework is apt to deal with whatever corruption challenges may lurch suddenly in to the public sphere.

The challenge of dealing with corruption in Germany

Until relatively recently corruption in the domestic context was not seen as much of a problem at all in Germany.¹ This prompted one of Germany's most-well respected analysts of corruption, Ulrich von Alemann, to note that the "notion of corruption" was an "almost unknown term" in domestic political analysis.² Such thinking prompted Theodor Eschenburg to claim in 1970 that the German people had been "spoiled by an

extremely honest public administration”, and were subsequently very sensitive to administrative malpractice.³ The lack of perceived corruption was, according to Eschenburg, important in helping Germans remain particularly sensitive to situations where ‘black sheep’ might appear to abuse the country’s system of good governance. A decade and a half later, and this approach appeared to be very much intact, as was exemplified by another leading German political scientist, Paul Noack, when he claimed that Germans continued to believe that “theirs is one of those nations that has proved to be most resistant to corruption”.⁴

These impressions no longer hold much water. Yet, awareness of corruption took a long time to filter into legal and procedural changes, and until 1999 it was, for example, perfectly legal for companies in Germany to bribe foreign officials to gain contracts. Furthermore, these bribes were even tax deductible. By the turn of the 21st Century German attitudes were on the way to moving full circle (see below), as Germans became highly critical of their public servants. However, Transparency International’s (TI) most recent (2012) National Integrity System Report notes that Germany does still come “at the top end of the NIS assessment system” and scores very well across “all analysed areas and government levels”.⁵ Indeed, TI further adds that Germany has a “very good integrity system” that is well equipped “for preventing and repressing corruption”.⁶ Recent governments have therefore been acting within the confines of a democratic, legal, institutional and economic system that is generally seen to work well and to be well suited to dealing with corruption challenges.

It is perhaps worth remembering this when looking at the specific activities of German governments, mainly as the bulk of the most recent anti-corruption activity came well over a decade ago, in the mid-late 1990s.⁷ The measures that are currently in place remain highly

diverse, although they centre around the ‘Concept of Corruption Prevention’ developed by the Standing Conference of Federal State Ministers and Senators of the Interior (IMK) held in May 1995.⁸ A number of specific anti-corruption initiatives have been put forward since then, the most prominent of which was the 1998 Anti-Corruption Act. The 1998 Act remains the last to be implemented without clearly discernible external influence, indicating the reactive nature of policy-making in this area. Other pieces of legislation have certainly followed (in 1999, for example, the Act Against International Corruption and the EU Anti-Corruption Acts were both passed, whilst further amendments were made to bribery laws in 2002 and 2015), but they have all, for better or worse, “originated in international legal instruments”.⁹ Be that as it may, these new laws “greatly expanded Germany’s anticorruption focus” and signalled a step change in how corruption was viewed.¹⁰ The German criminal code subsequently now lays down detailed provisions in sections 331-338 concerning bribery in public office, sections 299-302 (focusing on bribery in the business sector) and sections 108b-198e (bribery in and around the democratic process).¹¹

Gerhard Schröder’s centre-left government (1998-2005), Angela Merkel’s ‘Grand Coalition’ (2005-2009) and her governments since have nonetheless tended to drag their respective feet in terms of prioritising anti-corruption initiatives. The Ministry of Justice did draft a second Anti-Corruption Act (*Zweites Gesetz zur Bekämpfung der Korruption*) in 2006, with the stated intention of factoring new international agreements in to Germany’s criminal code. Ultimately, the draft got nowhere near the statute book, mainly as there was, and is, no consensus that Germany’s first anti-corruption law actually needs radically changing. A significant number of German policy-makers remain, as Nick Lord has persuasively argued, confident that “national provisions on corruption-related criminal offences” are already located in existing legal statutes and there is therefore little reason to

set out on wholesale changes.¹²

What, where and how much corruption is there in Germany?

What, therefore, is the nature of Germany's corruption challenge? Given the clandestine nature of corruption this question remains inherently difficult to answer. Indeed, it is impossible to know exactly how much corruption exists and all the forms that it is taking. In terms of the scale of the problem, a number of organisations have nonetheless developed tools to compare and contrast levels of perceived corruption across national boundaries. The most well-known (although not uncontroversial) of these comes via Transparency International's Corruption Perceptions' Index (CPI).¹³ The CPI is a composite index and a variety of data sources are used to create what is in effect a poll of polls on perceptions of corruption in a given country. Data is gathered from surveys of business people and country experts with the aim of measuring "perceptions ... of corruption in the public sector including corruption involving public officials, civil servants or politicians".¹⁴ TI provides a detailed account of where its data comes from and also how it uses it, and this is accessible via TI's own website.

Over the last 20 years Germany's performance in the CPI has been passable. But it has not been outstanding. In 2001, for example, Germany was a mere 20th out of 91 countries (with a score of 7.4 out of 10). By 2010 Germany's score had improved to 7.9 (14th out of 180) and by 2014 Germany registered 79 (now out of 100), leaving it joint 12th out of 175. There have been improvements since the nadir of the post-Kohl-donations scandal era, but Germany has never been top of the class (the Scandinavian countries and New Zealand traditionally compete for that title).

If we look at data from another of the most prominent attempts to measure corruption

worldwide we see a similar picture. The World Governance Indicators (WGI) are the most ambitious attempts to measure the quality of governance generally.¹⁵ First published in 1996, they are composite indices that seek to measure perceived levels of governance quality across six specific dimensions, one of which is ‘control of corruption’. The WGI now use data on 212 countries and territories, based on 35 data sources from 33 different organisations. The data reflects the perceptions of a wide array of ‘informed stakeholders’, whether they are country experts, households, representatives from NGOs or members of the business community. Dan Kaufmann and his colleagues are quick to recognise the limitations of the WGI as perception-based indicators, but they have nonetheless developed in to some of the most widely respected data on governance that’s available.¹⁶ The high point for Germany in terms of that particular indicator came back in 1998 (2.16; 2.5 would be the highest score), but Germany hasn’t managed to record a score of 2.0 or above since then. Over time Germany’s control of corruption scores have been good, but there is also clearly still room for improvement.

If we move from attempts to measure how much corruption exists to what types of corruption problem there are then we find a similar picture. The 2013 Global Corruption Barometer (GCB), a global survey of individuals, revealed that a mere 8 per cent of Germans thought that the level of corruption in Germany had decreased over the last two years. 57 per cent thought that it had *increased*.¹⁷ Only 13 per cent of Germans thought corruption was either ‘not really a problem’ or ‘not a problem at all’, whilst 28 per cent believed that ‘it is a problem’ and a worrying 37 per cent a ‘serious problem’. Furthermore, 65 per cent of Germans thought political parties were in general corrupt, 54 per cent thought the same of the media whilst 49 per cent thought civil servants were either ‘corrupt’ or ‘extremely corrupt’. Managers of German firms have a similarly downbeat view on the role that corruption plays in public life in Germany with a 2014 survey from

Ernst and Young revealing that 26 per cent feel that corruption is pervasive. If that figure isn't worrying enough, it is actually an improvement on the 2012 figure of 30 per cent.¹⁸

It is therefore impossible to know exactly how much corruption there is in Germany (or indeed anywhere else). But it is also clear that Germany doesn't perform quite as well as many of its neighbours in international indices and Germans themselves clearly perceive there to be a corruption problem evident in their state. The specific nature of the 'corruption problem' is often left vague and undefined, but Germans nonetheless appear to think something is wrong. Before analysing whether Germans' pessimism is warranted, it is important to take a step back and understand a little more about how corruption is conceptualised in a broader sense.

Understanding corruption

Approaches to understanding corruption have evolved considerably over time. Traditionally corruption was understood as something that happened when organisations or individuals moved away from a 'pure' state of being. In a political sense the emphasis in early works on corruption tended to be on its role in causing state failure or moral decay. One of the key reasons for the fall of the Roman Empire, for example, was the apparent corruption that became endemic in the way that the state was governed; moral decay led ultimately to the end of the Empire itself.¹⁹ Less emphasis was subsequently placed on individuals abusing their own pre-defined roles for private gain, and more on the impact of their behaviour on the systems of which they were a part.

By the end of the 20th Century a different consensus had emerged. An array of international organisations not only discovered corruption as a policy challenge, but began to understand the nature of that challenge in strikingly similar ways; Transparency

International, the leading NGO in the field, talked of corruption as “the abuse of entrusted power for private gain”, whilst the Organisation for Economic Co-operation and Development (OECD) believed corruption to be “the active or passive misuse of the powers of public officials (appointed or elected) for private financial or other benefits”.²⁰ Christian Schiller from the International Monetary Fund (IMF) believed corruption to be “the abuse of public power for private benefit” whilst the World Bank began using almost identical language (“the abuse of public office for private gain”).²¹

These understandings were not conjured out of thin air. On the contrary, the World Bank and IMF in particular have traditionally been keen to base their anti-corruption agendas on the evidence produced by political economists. It should not therefore be too much of a surprise that much of the international anti-corruption discourse fits nicely with the language of those working in that tradition. Mushtaq Khan, for example, sees corruption as “behaviour that deviates from the formal rules of conduct governing the actions of someone in a position of public authority because of private-regarding motives” whilst Andrei Shleifer and Robert Vishny argue that corruption is “the sale by government officials of government property for personal gain”.²² Susan Rose-Ackerman, in her seminal contribution from 1999, talks of the use of public office for “private economic gain”, whilst Robert Klitgaard sees corruption simply as “the misuse of office for unofficial ends”.²³

Political economists embraced the notion of corruption being about individuals consciously taking decisions that were in one way or another an abuse of their public roles. Their aim in doing this was nothing short of creating an intellectually coherent theory of corruption. This theory-building became part of an “economic turn” in political analysis more broadly, and was premised on a decidedly negative understanding of human nature.²⁴

Humans were assumed to be rational actors looking to maximise their utility.²⁵ Actors in positions of power would subsequently evaluate the benefits that they were likely to accrue through abusing their public role for private gain and compare these potential benefits with the potential costs; namely, what are the chances of being caught and what are the potential scope and extent of sanctions if that happens. For these analysts corruption analysis subsequently offered an opportunity not just to illustrate that the state was wasteful but also that the rent-seeking tendencies of politicians could, and indeed would, lead to an escalation in the number of corrupt practices.²⁶ The notion that state could provide efficient and effective (and by definition corruption-free) services was dismissed by the more strident as nothing more than idealistic “romanticism”.²⁷ It became clear that for many, corruption was seen as the product of incentive structures that the state provided. Getting the institutional setting right was, for these thinkers, subsequently the key to tackling corruption.

Influential though this paradigm still was, and indeed still is, it has not been without criticism. Indeed, a group of what Hellmann (2016) calls neo-institutionalists have developed a powerful critique of this approach.²⁸ The focus of much of the neo-institutionalists’ analysis is the non-western world, and the (often radically) different context within which politics can often take place there. The key assumptions that the neo-institutionalists make, however, undoubtedly have wider implications; in a theoretical sense they reject the notion that actors’ interests and subsequently actors’ behaviour are exogenously fixed. On the contrary, individuals’ behaviour is shaped and influenced by their interactions with other individuals and with the institutions within which decisions are made, and this applies as much to advanced industrial democracies as it does to, for example, economically under-developed dictatorships.²⁹ Context, in other words, matters. It matters in shaping not just what corruption is understood to be, but also whether sets

of proposed reforms appear logical and coherent. Context will be crucial in understanding whether proposed reforms ultimately see the light of day.

The neo-institutionalist critique implies that change is difficult to enact, and that where it does happen it occurs for specific reasons. Understanding the factors that enable this to happen remains one of the key challenges that corruption scholars everywhere are currently grappling with. To be more precise, the neo-institutionalist approach to understanding corruption reform argues that institutions shape and structure the actions of individuals without determining them. Given that reforming both formal and informal institutional frameworks takes time it should be no surprise that change often only takes place very slowly. Michael Koß subsequently argues that change happens for three reasons. Firstly, he talks of institutional conservatism, or a deliberative acceptance of change that has actually already happened.³⁰ Secondly, change takes the form of path dependent development that accepts and works with the internal logic of the current institutional setting. History, geography and cultural contingency inform contextually determined change. Finally, there are what Koß describes as ‘path-changes’. These aren’t context-related and they often happen as a reaction to an external shock or changed set of exogenous circumstances.

This understanding of when change happens stresses “the endogenous character of preference formation” and emphasises that context is an important determinant in facilitating (or not, as the case may be) change.³¹ The preferences of actors will be continually shaped (although not determined) not by pre-given sets of interests, but by the context within action takes place. Change is often likely to be evolutionary in style and piecemeal in nature. Given this, we should expect to see context-friendly, evolutionary changes in Germany’s anti-corruption setting much more than path-breaking departures.

The latter should only happen when exogenous shocks cause actors to respond directly to given challenges. Given that Germany has a generally well-functioning anti-corruption framework that won't happen frequently. The following section outlines applies this neo-institutionalist approach in more detail to the German case.

The German challenge

Anti-corruption reforms differ (often considerably) from country to country and will be dependent on the type of corruption challenge to hand and the quality of governance that a state already exhibits.³² Germany's challenges fit in to three distinct dimensions of corruption. There are linkages across dimensions and they do rise and fall in domestic salience, but taken together they have represented the broad base of issues that have needed to be confronted. The first dimension centres round the relationship between German business and the state. Secondly, Germany remains reluctant to do justice to many of the international commitments that it has signed up to, particularly if that involves updating its legal framework. Finally, there is a gap between Germany's rhetoric on the merits of transparency and openness and its willingness to do justice to this rhetoric in practice.

German business and the challenge of dealing with corruption

The first of these dimensions concerns corruption in and around the German business community. Whilst the behaviour of private entities is something that they and they alone have to answer for, it is also true that German policy-makers have a responsibility to ensure that companies that are nominally active in their jurisdiction are encouraged to behave appropriately. In other words if the German government believes that corruption has negative effects not just on economic growth but also on an array of other social and political phenomena, then it is morally obliged to try and stamp it out. The focus here is

not just on the leading lights of German business, but also on the much-vaunted *Mittelstand*. Indeed, given the strong export performance of many sectors of the German economy, vigilance of the corruption risks that small and medium-sized as well as large enterprises face when conducting affairs abroad is also necessary.

Even the most cursory look at the behaviour of some of the biggest names in German business over the last decade will reveal that there were corruption challenges to be faced. The cases of Siemens, Daimler and BASF (to name but three) illustrate that there are occasions when companies act in a fashion that can certainly be termed corrupt. The fact that Siemens used a wide-ranging system of bribes to help it achieve its business goals is well known, leading to a \$1.6bn legal settlement in the USA in 2008 and total costs to the company of €2.5bn.³³ Daimler, meanwhile, paid \$185 million to settle charges that it used bribery as a fundamental part of its business model when trying to win government contracts in no less than 22 countries between 1998 and 2008. BASF was caught fixing the prices of vitamins and subsequently paid fines in both North America and Europe totalling over half a billion dollars.³⁴ These are not just drops in the ocean; this is the type of behaviour that is planned, orchestrated and in some cases part of and parcel of particular business models.

There has in recent times been a move to prosecute more of those caught behaving in a corrupt fashion. This has been the case both within Germany and abroad, and has prompted many German multi-nationals to re-think their attitudes to corruption. Both Volkswagen and Siemens saw high-ranking officials sent to prison for their roles in the corrupt practices that their companies had indulged in, whilst the fines dished out to those who've been caught have clearly been substantial. Prosecutions for corruption in the German business world have, in the words of the New York Times, "soared" and in 2011

the OECD praised Germany for the fact that 70 individuals and six companies had been successfully prosecuted over the previous six years. Germany prosecutors' increasingly proactive behaviour, often in tandem with authorities in the USA, has subsequently led to something of a change of tone and in 2012 Markus Funk and Jess Dance bluntly advised "companies doing business in Germany or with German companies" to make themselves very "familiar with Germany's anticorruption laws".³⁵ German authorities recognised the challenge and have attempted to rise to it.

Large companies have subsequently given some serious thought to how compliance programmes should be set up. Both BASF and Siemens have been praised for the way they developed their compliance programmes following their corruption scandals, and both are quick to illustrate how seriously they now take these issues. These developments have still not stopped some German companies from transgressing. If compliance programmes were working perfectly across the board then Rheinmetall wouldn't have been fined Euro37 million for indulging in bribery whilst selling its anti-aircraft defence system and in 2015 Volkswagen wouldn't have been uncovered massaging the emissions figures for the diesel cars that it sold in the USA.³⁶

The area of compliance is nonetheless an area where German companies have carried through what Koß would describe as a path-change. This path-change stems not only from the increased willingness of German prosecutors to go after potentially corrupt firms, but also as US authorities have used Foreign Corrupt Practices Act (FCPA) to levy heavy fines on miscreants. The FCPA has existed since 1977, but only a relatively small number of prosecutions made under it until the late 1990s. This, however, changed in the 1990s and 2000s, and any company that does business that touches American soil (defined, for example, as simply using a US bank) realised that it might come in the line of fire.

Exogenous factors subsequently prompted a number of large German companies to radically change the way that they did things. Indeed, this has been acknowledged by the European Commission, and it argued in 2014 that in Germany “compliance systems in the private sector have become more elaborate in recent years, especially in global companies dealing with international business transactions”.³⁷ The Commission noted further that this had “happened as a result of high-profile cases which triggered a significant change in attitudes towards corruption in particular among German multinational corporations”.³⁸ The rise in the importance of compliance can, in other words, be led back to the high-profile compliance failings of some of the leading lights of German industry – a classic path-change scenario.

Despite more proactive US behaviour and a willingness on the German part to work with their American colleagues, the traditional criminal law focus on individual wrongdoing in a given territorial jurisdiction nonetheless becomes ever more challenging to do justice to.³⁹ The nature of this changing environment has seen more enforcement cooperation across jurisdictions and requires significant harmonisation of domestic legal systems and approaches.⁴⁰ It is for this very reason that the OECD’s much vaunted anti-bribery treaty exists. It is subsequently a logical extension of Germany’s strongly legalistic culture to try and expand the scope and impact of criminal law to try and catch miscreants in the act. Attempts to generate more prosecutions at home subsequently represent path dependent evolution in Germany’s anti-corruption practice.

However, the importance of exports to the German economy means that policy-makers need to be vigilant in making sure that the complexity of corruption transactions doesn’t leave its law enforcement officers behind. Germany has not followed the American and particularly British lead in criminalising the failure to prevent bribery offences. Both the

American Foreign Corrupt Practices Act (FCPA) and the UK's Bribery Act (UKBA) have sent strong, clear statements to those doing business from, in and with the USA and the UK that bribery will not be tolerated. The UKBA is particularly clear on the illegality of facilitation payments and also on the responsibilities that companies have to educate their workforces and those who are working for them as contractors. A German version of such an Act would be a good way to emphasise how seriously Germany takes these concerns and to how globalisation cannot be used as an (often indirect) excuse for indulging in corrupt activity and of building on the strong foundations that already exist.

Such an Act would, however, be path-changing rather than path-dependent. Over decades German exporters have been actively encouraged to invest in developing markets, with €71bn of German products going to China alone in 2015.⁴¹ The high cost, high quality exports that *Mittelstand* companies have produced have subsequently been the very backbone of the German economy. Yet these markets are frequently based in environments where corruption is more problematic than it is in Germany. The German business community is likely to be wary of new legislation that looks like it could place onerous administrative and bureaucratic burdens on their business activities. The strong voice of German business is therefore likely to lobby hard to prevent such legislation from being enacted. Smaller, *Mittelstand* companies did also not experience the compliance shock that larger companies did, and many of them have either poorly developed compliance programmes or indeed no programmes at all. As the European Commission (2014) noted “when it comes to small and medium sized enterprises, corporate governance programmes and compliance structures are not yet widespread”.⁴²

Meeting international commitments

Change in the area of aligning German law and practices to the international commitments

that the country has signed up to has been much less path-changing and much more path dependent. Indeed, at times German elites have actively campaigned against path-breaking change when it went against the conventional ethos of public life in Germany. Indeed, on occasion it was only after at times years of prevarication that German policy-makers agreed to update their national frameworks to do justice to international anti-corruption commitments.

Since the 1990s Germany has needed to adapt its domestic legal framework to meet international obligations in a number of areas. Whilst Germany generally does ratify and then implement the international treaties that it signs, its relationship with some of the key parts of the international anti-corruption architecture has at times been an uncomfortable one. On the one hand Germany has received glowing recommendations from organisations such as TI for its attempts to actively enforce the OECD's anti-bribery treaty. Given that only four (Switzerland, the UK and the USA were the others) out of the 41 signatories were put in to this category, this can be seen as evidence that Germany can and will meet its commitments when it wants to.⁴³ Germany has also transposed the European Union's Framework Decision 2003/568/JHA on corruption in the private sector in to domestic law. This is further evidence that where obligations reflect pre-existing German norms, German politicians have been able to act quickly and decisively to ensure that their domestic rules and practices have adapted accordingly.

On the other hand Germany has also shown a tendency to implement just the minimum requirements when meeting other international obligations.⁴⁴ On occasion it has also taken a (very) long time to even meet some of the most basic obligations; Germany, for example, only ratified the UN Convention against Corruption (UNCAC) in November 2014 (making it the 173rd state to do so) and this despite long-standing, significant pressure from

German business and civil society to put its house in order.⁴⁵ This unseemly delay in signing the UNCAC was due more to procedural than substantive factors centring largely around (predominantly conservative) parliamentarians' unwillingness to change legislation on bribing MdBs (members of Parliament) but that it took over a decade to sort out was a classic result of external agreements fitting uneasily with national ways of thinking.

Germany has also failed to adopt a number of the specific anti-corruption measures recommended to it by the Council of Europe and OECD and it could have easily embraced the monitoring processes within the UNCAC before ratifying it.⁴⁶ Furthermore, the Council of Europe's Group of States against Corruption (GRECO) noted in 2012 that Germany had paid "limited attention" to recommendations it made in the area of party funding. GRECO argued that there was a need "to ensure timely publication of campaign accounts, to make direct donations to parliamentarians and candidates who are political party members more transparent, and to make further resources available to the Bundestag administration for supervising party funding". The German authorities have chosen simply to ignore this. This prompted GRECO to conclude that "the level of compliance with the recommendations ... remained 'globally unsatisfactory'".⁴⁷ In 2011 GRECO also criticised the exemptions that parliamentarians enjoy from criminal liability for certain acts related to corruption.⁴⁸

Making national law align with international law is not always straightforward. The ramifications of one change can have knock on effects on other parts of the legal infrastructure. It is not surprising that Parliamentarians have often shied away from embracing anything but the most contextually straightforward proposals for change. Path dependent change, in other words, was often not an immediate option. Too much change was required to Germany's legal provisions to have made that a viable route forward.

Germany also hasn't had anything akin to a critical juncture that could prompt path-changes; unlike with large multi-nationals and the urgent need to adopt more effective compliance regimes, parliamentarians had little compelling them to come up with new ways forward in terms of aligning Germany's domestic framework with international best practice.

The challenge of transparency

In recent times there have been a series of international moves to embrace notions of transparency in public affairs. These initiatives have come in wide and varied form, and range from moves to bring more transparency to the extractive industries (EITI) to open data initiatives and movements to allow citizens greater access to information held by the state on them (FoI). Governments and international organisations are increasingly moved to embrace this burgeoning transparency agenda.

Whilst Germany has supported these initiatives in public, at times they do still represent a movement away from previous ways of doing things. This clash between new ideas and institutional conservatism has ensured that Germany has at times been slow in moving to embrace the move towards greater transparency in public affairs. Indeed, this is in many ways where Germany faces the most diverse set of challenges and also where there appears to be the most unwillingness to move forward. Path dependency remains a powerful force mitigating against implementing much of this agenda.

In 2014, for example, as a member of the G20 Germany made a series of commitments to try and tackle money laundering. All G20 members agreed to adopt legislation on what were termed "high priority" issues on the beneficial ownership of companies.⁴⁹ Beneficial ownership legislation allows the wider world to see not just who officially runs a company,

but also who takes home the profits. One of the tricks of the money launderer is to make a company look legitimate, whilst covertly taking home (or re-introducing and/or re-cycling) the profits surreptitiously. Although the EU has been active in trying to expand the scope of beneficial ownership legislation, Germany has tried to limit public access to information on who exactly takes home these profits. Germany has subsequently tended to be one of the first countries to stress the problems inherent in the EU's transparency disclosure rule that would compel all member states to make publicly accessible the real owners of companies and trusts.⁵⁰

That becomes even more obvious if one looks at how Germany has tried to do justice to the promises it made in this area. By the middle of November 2015 Germany only had a framework of "average" quality to deal with questions of beneficial ownership, lagging behind the UK, France, Italy and also Argentina. Furthermore Germany was only fully compliant with one of the ten principles that it had signed up to.⁵¹ There is, for example, no requirement in Germany that systematic information is maintained on beneficial ownership (principle 3) and there is no centralised database that competent authorities can consult (principle 8).⁵² Germany is by no means the worst offender in the G20, but that shouldn't deflect from the fact there is subsequently still work to be done. That these ideas would represent a change in how German authorities dealt with data has ensured that resistance to change has remained considerable.

Transparency problems also need to be addressed elsewhere. This is particularly true at the sub-national level where many incidences of corruption take place. Whilst a federal freedom of information law has existed since 2005, as of 2015 four *Laender* had resisted passing such an Act in their jurisdictions. Only three of the sixteen federal states (Thuringia, Lower Saxony and Rhineland-Palatinate) have committed themselves to follow

Hamburg's lead in enacting transparency laws, whilst the 2015 case of Bayer AG and the University of Cologne is a good indication that transparency as a culture is a long way from being genuinely embraced.⁵³ In this particular instance Bayer AG and the University of Cologne agreed in 2008 to work together on a pharmaceuticals project. A number of external observers were worried that the agreement may contravene the norms of academic freedom and asked to see the details of the deal. This was rejected by the signatories, as well as ultimately by the judicial authorities. A transparency law would not only ensure that many cases of this nature wouldn't have to end up in courts, but would help the public keep abreast of who was agreeing to do what for whom.

In terms of the broader relationships between the private sector and those in positions of political power, Germany's lobbying practices – and the lack of transparency that underpins them – have also come in for criticism. Lobbying is a clearly a fundamental part of democratic politics, but in order to prevent the rich and powerful skewing the system to suit their own interests regulation of lobbying practices is generally regarded as being important. Getting lobbying rules right is tricky, as the UK case has revealed⁵⁴, but Germany's inaction in this area nonetheless remains noteworthy. Indeed, in a formal sense lobbying is not regulated at all in Germany and public officials are under no obligation to report meetings with lobbyists. A voluntary register exists within parliament where associations themselves may choose to register, but, firstly, this remains voluntary and, secondly, the term association is narrowly understood. As the European Commission has bemoaned “self-employed lobbyists, lawyers, think tanks or NGOs” need not tell anyone anything about the lobbying that they may do.⁵⁵ Furthermore, German policy-makers are not obliged to be open about who they meet to discuss policy with and very few have taken the initiative in revealing this information unilaterally.⁵⁶ Germany's attempts at doing justice to the problem of undue influence occurring through the lobbying process have

subsequently been met with some scepticism, one report placing it in the bottom third of countries within the EU in terms of how strong its safeguards are on preventing undue influence.⁵⁷

A further example of German recalcitrance concerns data on anti-corruption law enforcement across the 16 *Länder*. As things stand, it is very difficult indeed to find comparable data on which people and which companies have been subject to legal proceedings. Making such information publically available in an accessible format could lead to a publically available list of companies that have fallen foul of corruption legislation. This could then lead to barring them from bidding for future contracts. If transparency in these areas is seen as the best disinfectant, then Germany still doesn't appear particularly interested in thoroughly cleansing itself. There hasn't, furthermore, been an external shock that might have acted as a catalyst for change; without that, Germany is likely to remain a few steps behind the leaders in this particular field.

Conclusion

This article has illustrated that in many ways Germany's institutional framework remains well set to meet corruption challenges as and when they arise. The institutional framework remains strong, the legal framework robust and the willingness to prevent corruption from becoming embedded genuine.

Germany has, however, not always been at the forefront of embracing new and potentially challenging anti-corruption reform agendas. This article has analysed three particular areas where reform has been called for but where resistance to change has been significant. Indeed, the neo-institutionalist approach adopted here illustrates that path-changing reform happens only infrequently and path dependent reforms that talk to the logic of

German political life are much easier to enact. The problem for German policy-makers is that contemporary anti-corruption challenges do not fit easily with this logic. This has prompted German policy-makers to be slower to enact reform and to meet their commitments than they might otherwise have been. Sometimes resistance has been strong enough to stop any reform from happening, sometimes it has ensured that reform has been piecemeal and patchy. Only rarely, such as the increasing threat that (in particular) large companies face of prosecution in both Germany and particularly the USA do 'path-changing' reforms take place.

Academic analysis of corruption has come a long way in the last decade. The dominance previously exerted by political economists utilising rational choice models of human behaviour has been challenged by neo-institutionalists arguing that institutions shape not only the type of corruption that exists but also perceptions of what is (and isn't) appropriate behaviour. The neo-institutionalist paradigm is also useful in illustrating that responses to perceived corruption problems are contingent on the institutional context. This approach helps us understand when change is likely to happen and why it happens in some areas but not in others.

The conservatism that instinctively shapes much German anti-corruption thinking leaves the country poorly placed to react to corruption challenges. Many German politicians have failed to show enough urgency in addressing corruption issues and Germany would benefit from its leaders thinking just a little more about where corruption may be lurking and what it might want to do about it rather than assuming that its institutional framework is apt to deal with whatever corruption challenges may lurch suddenly in to the public sphere.

Notes

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- ³ T. Eschenburg, “The Decline of Bureaucratic Ethos in the Federal Republic”, in A. J. Heidenheimer (ed.), *Political Corruption: Readings in Comparative Analysis* (New York: Holt, Rinehart and Winston, 1970), 259.
- ⁴ P. Noack, *Korruption – die andere Seite der Macht* (Munich: Kindler, 1985), 113.
- ⁵ Transparency International Germany (2012), *National Integrity System Report* (Berlin: TI), 6.
- ⁶ Transparency International Germany (2012, see note 5), 6.
- ⁷ For more on this see M. Möhrenschrager, “Der strafrechtliche Schutz gegen Korruption,” in D. Dölling (ed.), *Handbuch der Korruptionsprävention* (Munich: Verlag C. H. Beck, 2007), 377-561.
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- ⁹ S. Wolf, “Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions”, *German Law Journal* 7, no 9 (2006), 785. For more on the 1999 laws see F. Zieschang, “Das EU-Bestechungsgesetz und das Gesetz zur Bekämpfung internationaler Bestechung”, *NJW*, (1999), 105-107.
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- ¹³ For a good analysis of some of the methodological challenges inherent in TI’s approach to measuring corruption see S. Andersson and P. M. Heywood, “The politics of perception: use and abuse of Transparency International’s approach to measuring corruption”, *Political Studies* 57, no 4 (2009), 752-753.
- ¹⁴ <http://www.transparency.ie/resources/cpi-2011>, last accessed 13 November 2015.
- ¹⁵ Daniel Kaufmann and colleagues have produced a significant number of documents on WGI approaches, methods and findings. Some of the most significant include D. Kaufmann, A. Kraay and P. Zoido-Lobaton, *Aggregating Governance Indicators* (Washington D.C.: World Bank, Policy Research Working Paper 2195, 1999); D. Kaufmann, A. Kraay and M. Mastruzzi, *The Worldwide Governance Indicators Project: Answering the Critics* (Washington D.C.: World Bank, 2007); D. Kaufman and A. Kraay, “Governance indicators: where are we, where should we be going?”, *The World Bank Research Observer*, 23 no 1 (2008): 1-30.
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- ²⁹ O. Hellmann, 2017 (see note 28), p.3
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- ³² For more see D. Hough, *Corruption, Anti-Corruption and Governance* (London: Palgrave, 2013), chapter two.
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