FATF

3RD FOLLOW-UP REPORT

Mutual Evaluation of Germany

June 2014

FINANCIAL ACTION TASK FORCE

The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

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ACRONYMS

AML/CFT	Anti-money laundering / Countering the financing of terrorism
BaFin	Federal Financial Supervisory Authority *(Bundesanstalt für Finanzdienstleistungsaufsicht)*
CDD	Customer due diligence
CTR	Cash transaction report
DNFBP	Designated non-financial business or profession
EU	European Union
FIU	Financial intelligence unit
GwG	Anti-money laundering law *(Geldwäschegesetz)*
GwGOptG	Law to Optimise the Prevention of Money Laundering (*Gesetz zur Optimierung der Geldwäscheprävention*)
InvG	Investment Law (*Investmentgesetz)*
KAGB	Capital Investment Code (*Kapitalanlagegesetzbuch*)
KWG	Banking Law *(Kreditwesengesetz)*
LC	Largely compliant
MER	Mutual evaluation report
ML	Money laundering
MLA	Mutual legal assistance
MVTS	Money value transfer services
NC	Non-compliant
PC	Partially compliant
PEP	Politically exposed person
OWiG	Administrative Offences Law (*Ordnungswidrigkeitsgesetz*)
R	Recommendation
RBA	Risk-based approach
SR	Special Recommendation
StGB	Criminal Code *(Strafgesetzbuch)*
STR	Suspicious transaction report
TCSP	Trust and company service provider
TF	Terrorist financing
UN	United Nations
UNSCR	United Nations Security Council Resolutions
VAG	Insurance Supervisory Law *(Versicheringsaufsichtsgesetz)*
ZAG	Payment Services Supervisory Law (*Zahlungsdiensteaufsichtsgesetz)*

MUTUAL EVALUATION OF GERMANY: THIRD FOLLOW-UP REPORT

Application to exit from regular follow-up

Note by the Secretariat

I. INTRODUCTION

The relevant dates for the mutual evaluation report and subsequent follow-up reports of Germany are as follows:

- Date of the Mutual Evaluation Report: 19 February 2010.
- Date of previous follow-up reports: 26 January 2012, and 31 January 2013. This is the third follow-up report by Germany.

In total, Germany was rated partially compliant (PC) or non-compliant (NC) on 20 Recommendations[1]. Four core Recommendations were rated PC (R.1, R.5, R.13 and SR IV), and no core Recommendations were rated NC. Three key Recommendations were rated PC (R.35, SR.I and SR III), and no key Recommendations were rated NC. On this basis, the Plenary decided in February 2010 that Germany should be placed under the regular follow-up process.

Core Recommendations[2] rated NC or PC
R.1 (PC), R.5 (PC), R.13 (PC), SR.IV (PC)
Key Recommendations[3] rated NC or PC
R.35 (PC), SR.I (PC), SR.III (PC)
Other Recommendations rated PC
R.6, R.7, R.11, R.15, R.17, R. 21, R. 25, R.32
Other Recommendations rated NC
R.12, R.16, R.24, R.33, R.34

As prescribed by the Mutual Evaluation procedures, Germany provided the Secretariat with a full report on its progress. The Secretariat has drafted a detailed analysis of the progress made for R.1, R.5, R.13, R.35, SR.I, SR.III, and SR.IV (see rating above), as well as an analysis of all the other Recommendations rated PC or NC. A draft analysis was provided to Germany (with a list of additional questions) for its review, and comments received; comments from Germany have been taken into account in the final draft. During the process, Germany has provided the Secretariat with all information requested.

1 This report refers to the 40 Recommendations and IX Special Recommendations as adopted in 2004.

2 The core Recommendations of the 2004 FATF Recommendations and Special Recommendations, as defined in the FATF procedures are R.1, SR.II, R.5, R.10, R.13 and SR.IV.

3 The key Recommendations of the 2004 FATF Recommendations and Special Recommendations are R.3, R.4, R.23, R.26, R.35, R.36, R.40, SR.I, SR.III, and SR.V.

II. MAIN CONCLUSION AND RECOMMENDATIONS TO THE PLENARY

CORE RECOMMENDATIONS

R.1 (ML offence): Germany amended the Criminal Code by including insider trading and market manipulation and also counterfeiting and piracy of products as predicate offences to ML. The issue of criminalisation of self-laundering has not been addressed. Nevertheless, horizontal comparison with other countries in similar situation makes it possible to consider rating at a level equivalent to LC.

R.5 (CDD): Amendments of the AML Law made it possible to remedy all technical deficiencies, thus bringing the compliance with R.5 to a level equivalent to LC.

R.13 and SR.IV (STR): Most of the technical deficiencies were addressed by amendments to the AML Law, thus bringing the compliance with R.13 and SR.IV to a level equivalent to LC.

Therefore, it can be stated that Germany has demonstrated sufficient progress with respect to all core Recommendations previously rated PC.

KEY RECOMMENDATIONS

R.35 (Conventions): The deficiencies in this Recommendation are essentially the same as in R.1. Consistently, the level of compliance has been brought to a level equivalent to LC.

SR.I (UN Instruments): Most of the technical deficiencies in this Recommendation were related to shortcomings in the TF offence and the freezing regime (SR.III). None of those elements has been addressed; therefore the compliance remains at PC level.

SR.III (Freezing of terrorist assets): Germany has not yet addressed the main technical deficiencies with respect to the freezing regime which lack provisions for the so-called “EU internals” and have a too broad interpretation of legal privilege; therefore it was not possible to consider rating at LC level.

As Germany has not yet demonstrated sufficient progress concerning all key Recommendations, analysis with respect to all other Recommendations that were rated NC/PC was undertaken to assess the overall level of progress made by Germany.

OTHER RECOMMENDATIONS

The progress in relation to the following Recommendations can be considered as substantial and achieving a level of compliance equivalent to LC: R.6, R.7, R.11, R.12, R.15, R. 21, R.24 and R.25. The progress with the remaining 5 Recommendations (R.16, R.17, R.32, R.33 and R.34), however, was considered to be insufficient.

CONCLUSION

Germany has addressed the deficiencies related to all core Recommendations that were rated PC in the MER, and brought the level of technical compliance with these Recommendations up to a level of LC. However, Germany has not demonstrated sufficient progress with regard to two key Recommendations (SR.I and SR.III). According to the mutual evaluation procedures, the Plenary

does retain some limited flexibility with regard to the key Recommendations if substantial progress has also been made on the overall set of Recommendations that have been rated PC or NC. Since Germany has remedied deficiencies in a considerable number of the remaining (non-core and key) Recommendations and, overall, the majority of all Recommendations that were rated NC/PC have been brought to a level of compliance essentially equivalent to LC (13 out of 20), the overall progress achieved by Germany can be considered sufficient to be removed from the regular follow-up process.

III. OVERVIEW OF THE GERMANY'S PROGRESS

GENERAL NOTE

For core and key Recommendations that were rated PC in the 2010 MER (namely, R.1, R.13, R.35, SR.I, SR.III and SR.IV), there are a number of deficiencies that are common for several of them thus having a "cascading effect" on the compliance. These deficiencies can be roughly combined into the following groups:

- absence of criminal liability for self-laundering (relevant for R.1 and R.35);
- deficiencies in the TF offence (relevant for SR.I, R.13 and SR.IV)[4];
- deficiencies in the TF freezing regime (relevant for SR.I, SR.III);
- insufficient level of sanctions for ML and TF (relevant for R.1, R.35, SR.I), which is an effectiveness element.

Germany indicated that its Government would work to address the first two deficiencies in the course of 2014, but was unable to provide more detailed timeline. Addressing the third deficiency depends on defining (or creating) a legal basis for EU Internal terrorist listings. Such decision most likely would be taken as a Council Regulation based upon Article 75 of the Treaty on the Functioning of the European Union; however, it is not clear when exactly it can be done. See further explanation and analysis below under relevant sections.

As far as effectiveness element is concerned not much progress has been reported either. Germany has neither revised the level of sanctions for ML and TF, nor has it demonstrated dissuasiveness of sanctions for ML (sentences of more than 1 year of imprisonment are handed down in 4% of cases of ML, as opposed to 9% of criminal cases generally). Though effectiveness is normally taken into account only to a limited extent for the purposes of a desk-based review, it might play a certain role since the progress in the TC area has not been quite clear.

OVERVIEW OF THE MAIN CHANGES SINCE THE ADOPTION OF THE MER

Since the adoption of the Mutual Evaluation report Germany has taken a comprehensive approach to address the deficiencies identified in the report. This approach comprised both legislative action and building of institutional framework. Furthermore, thematic and sectorial guidelines and explanatory notes have been constantly developed and published over the past four years. Also, on 1

[4] These important deficiencies in the TF offence have a direct effect on the rating of these other Recommendations even though the Plenary agreed to an LC rating for SR.II.

July 2012, the new Interstate Gambling Agreement (*Glücksspielstaatsvertrag der Länder*) entered into force which introduced important changes with regard to the legal framework concerning on-line casinos.

Among the key legislative actions are the following:

- Amendments of the Criminal Code (*Strafgesetzbuch,* hereinafter *StGB*);
- Amendments of the AML Law (*Geldwäschegesetz,* hereinafter *GwG*);
- Amendments of the Banking Law (*Kreditwesengesetz,* hereinafter *KWG*), Insurance Supervisory Law (*Versicheringsaufsichtsgesetz,* hereinafter *VAG*) and Payment Services Supervisory Law (*Zahlungsdiensteaufsichtsgesetz,* hereinafter *ZAG*);
- Amendments of the Administrative Offences Law (*Ordnungswidrigkeitsgesetz,* hereinafter *OWiG*);
- Replacement of Investment Law (*Investmentgesetz,* hereinafter *InvG*) with Capital Investment Code (*Kapitalanlagegesetzbuch*, hereinafter *KAGB*). Accordingly, capital investment companies and investment stock corporations as defined in the *InvG* ceased to exist, and instead, external investment management companies and investment funds were created which are also subject to the AML Law.

Germany has also taken steps to enhance the cooperation between relevant ministries, regulatory and supervisory authorities as well as other bodies involved in combating money laundering and terrorist financing.

- The "Forum for the Prevention of Money Laundering and Terrorist Financing" (*Forum für Geldwäscheprävention und Verhinderung der Terrorismusfinanzierung*) was set up in August 2011 and is chaired by the Federal Ministry of Finance (*Bundesministerium der Finanzen*). The Forum is responsible for the strategic orientation of the Federal Government´s AML/CFT policy. The main tasks of the Forum are 1) to regularly assess effectiveness of the national AML/ CFT system; 2) to discuss and develop legislative measures in order to remedy shortcomings and 3) to prepare national risk assessments to analyse new trends and methods of ML.
- The "Federal-*Länder* exchange on money laundering prevention and the prevention of terrorist financing" (*Bund-Länder-Austausch Geldwäscheprävention und Verhinderung der Terrorismusfinanzierung*), which was institutionalised in 2011, normally meets three times a year, with the Federal Ministry of Finance acting as chair, to discuss interregional AML/CFT issues at policy level; such issues include questions regarding the interpretation of the *GwG*, as well as guidance and supervisory issues that are relevant to the *Länder*. The meeting provides for a platform for discussing specific legal questions and for giving the *Länder* advice to ensure a harmonised application of the *GwG* in the DNFDP sector.

- Since March 2010 the "Darmstadt Working Group" (*Darmstädter Kreis*) has been holding regular meetings providing a forum for exchange between the people responsible for AML supervision in the States (*Länder*) and representatives of the Federation. In contrast to the aforementioned "*Bund-Länder-Austausch Geldwäscheprävention*", its focus is on a more practical exchange of experience as well as the harmonisation and optimisation of common administration practices.

IV. REVIEW OF THE MEASURES TAKEN IN RELATION TO THE CORE RECOMMENDATIONS

RECOMMENDATION 1 – RATING PC

R.1 (Deficiency 1): Counterfeiting and piracy of products, and insider trading and market manipulation are not predicate offenses to ML.

Article 1 of the Law to Improve the Combating of Money Laundering and Tax Evasion (*Gesetz zur Verbesserung der Bekämpfung der Geldwäsche und Steuerhinterziehung, SchwGBG*) complemented Section 261 of the *StGB* by adding the references to insider trading and market manipulation and also counterfeiting and piracy of products as predicate offences to ML. Thus it can be concluded that this particular deficiency has been fully addressed by Germany.

R.1 (Deficiency 2): The ML offense cannot be applied to persons who commit and are convicted for the predicate offense. The inability to do this is not supported by principles that amount to fundamental principles under the FATF standards.

The German authorities advised that in the Coalition Agreement the current Government committed to several measures in order to comply with the FATF Standards. One of those measures envisages that the offence of money laundering should be amended in order to provide for criminalisation of self-laundering. According to the German authorities, the draft legislation should be presented to the *Bundestag* by the end of 2014. This should be noted as a positive development since the last follow-up report, though the deficiency remains still unaddressed.

R.1 (Deficiency 3): Issues of effectiveness: (i) The comparatively low level of sanctions for the offense and the burden of proof required to establish that proceeds relate to a predicate crime encourage the use of charges other than ML to pursue serious and organized crime or situations of third party ML; (ii) The restriction on applying the ML offense to persons who are convicted of the predicate offense tends to result in ML investigations being dropped in favour of investigations into the predicate offense.

With regard to the issue of ML sanctions, it should be noted that the deficiency identified seems to be more related to the Recommendation 2 (more specifically, criterion 2.5), than to the Recommendation 1. Therefore, it appears that this particular element would have limited impact on the compliance with the Recommendation 1. Concerning the substance of the deficiency, Germany argues that the range of punishment of imprisonment (from three months to five years) is broader than the average for such offences as "fraud" (section 263 of the *StGB*), "theft" (section 242 of the

StGB), "receiving stolen goods" (section 259 of the *StGB*) and "accessory after the fact" (section 257 of the *StGB*), in which case the range of punishment is either imprisonment of up to 5 years or fine. Further, Germany states that the proportion of cases in which a term of imprisonment has been imposed for money laundering is higher than the average for all sentences (for all types of offences) involving a term of imprisonment.

According to official statistics, 17.64% of all sentences (all crimes) handed down involved a term of imprisonment, while the share of all sentences imposed for ML and involving a term of imprisonment was 19.6%. On the other hand, these statistics could be viewed at a different angle, namely, if one looks at the proportion of all sentences which involved a term of imprisonment of more than 1 year (9%) and then at the proportion of ML sentences which involved a term of imprisonment of more than 1 year (4%), it becomes apparent that ML offences are punished less severely than on the average.

As noted above, the issue of the absence of the criminal liability for self-laundering stays as such, therefore the second element of the effectiveness remains unaddressed. Overall, the deficiency has not been addressed, but as noted above it appears that it has limited impact on the overall compliance.

RECOMMENDATION 1, OVERALL CONCLUSION

As appears from the analysis above, the main technical deficiency (incomplete list of predicate offences) has been addressed. Horizontal comparison with other countries in a similar situation, namely, with the remaining technical deficiency (absence of self-laundering) and the effectiveness issue, shows that the Plenary has previously accepted an LC rating in this case. It should be emphasised that this conclusion does not mean that the issue of self-laundering should not be addressed in the future.

RECOMMENDATION 5 – RATING PC

R.5 (Deficiency 1): Reasonable measures to verify beneficial ownership are not required in all cases.

The Law to Optimise the Prevention of Money Laundering (*Gesetz zur Optimierung der Geldwäscheprävention, GwGOptG*) amended the section 4 (5) sentence 1 of the *GwG*, which deals with the verification procedure regarding the beneficial owner, by inserting a requirement that financial institutions and DNFBPs have "always" to satisfy themselves of the veracity of the information collected by taking risk-adequate measures. This amendment ensures that in all cases not only is the beneficial owner identified, but also verified, and that institutions and persons covered by the *GwG* only have discretion with regard to the scope of the measures necessary for this purpose given the level of risk. This is also supported by the new edition of the section 4 (6) where the last sentences require the contracting party to prove the identity of the beneficial owner to the financial institution or DNFBP.

In addition to that, the wording of the section 4 (5) second sentence of the *GwG* has been changed to add that the day of birth, place of birth and the address of the beneficial owner "may be gathered regardless of the risk of the individual case". Although this does not impose any requirement per se;

however, the new wording allows for more discretion for financial institutions when they undertake due diligence measures with regard to beneficial owners.

Overall, the deficiency appears to have been addressed.

R.5 (Deficiency 2): Definition of beneficial ownership of a trust is incomplete.

Regarding the beneficial owner in the context of a trust arrangement, Germany has adopted a much broader definition, which now refers explicitly to a settlor (*Treugeber*) (section 1(6) no. 2 a) of the *GwG*). Furthermore, according to this definition any natural person who otherwise directly or indirectly exercises a controlling influence on the management or distribution of assets or property is also deemed a beneficial owner by the virtue of the new no. 2 d). Additionally, according to the *GwGOptG*, a new number 3 in section 1 (6) sentence 2 of the *GwG* has been inserted which covers cases that do not fall under nos. 1 and 2, where a person other than the contracting party is nevertheless deemed the actual beneficial owner by virtue of that party's (beneficial) control of the business relationship. This deficiency has been addressed.

R.5 (Deficiencies 3 and 4): Broad exemptions from CDD given for low risk customers without apparent risk assessment.

Low risk exemptions result in absence, in certain circumstances, of any obligation (i) to undertake ongoing monitoring of transactions and (ii) to undertake CDD when doubts arise about the veracity of existing customer identification.

The amendments of the section 5 of the *GwG* by the *GwGOptG* had the aim of addressing both the issue of CDD exemptions without risk assessment as well as the absence of certain obligations in case of situations that are deemed to present low risk. First of all, section 5 (1) now stipulates that financial institutions and DNFBPs must take into account the circumstances of the individual case and make sure that the preconditions for simplified customer due diligence are not outweighed by other risk factors. By rephrasing "dispense with complying with the due diligence requirements…" (former section 5 (1) sentence 1 of the *GwG*) and saying instead "adopt simplified due diligence measures…" (new section 5 (1) sentence 1 of the *GwG*), it becomes apparent that a minimum level of due diligence must be carried out even in cases of lower risk, and identification/verification and monitoring requirements with regard to the business relationship cannot be completely dispensed with. It should also be noted that section 5 (2) of the *GwG* together with the relevant provisions of the *KWG*, *VAG*, *ZAG* and the *KAGB* exclusively define the circumstances when simplified CDD could be applied.

A new sentence 2 of section 5 (1) of the *GwG* now refers to the scope of simplified due diligence as a legal consequence of a lower level of risk and provides for the obligations 1) to identify the contracting party and, in the case of business relationships, 2) to monitor continuously the business relationship as minimum requirements in lower risk cases while the scope of measures to verify the identity and to monitor may be reduced as appropriate. In this context the *GwGOptG* deleted the former reference to section 3 (2) sentence 1 no. 4 in section 5 (1) sentence 1 of the *GwG*. This reference had allowed the application of simplified CDD also in cases of doubts about the veracity of the information gathered in the course of identifying the contracting party.

Thus, the provisions set out above do not allow for the exemption of financial institutions and DNFBPs from the obligation of conducting their own risk assessment of the individual case and taking adequate measures. Therefore, it may be concluded that these two deficiencies have been addressed.

R.5 (Deficiency 5): No requirement to consider filing STR in case of failure to complete CDD.

According to the new sentence 2 in the section 11 (1) of the *GwG*, as amended by the *GwGOptG*, all financial institutions are obligated to file an STR where factual circumstances indicate that the contracting party failed to comply with its duty of disclosure. This deficiency has been addressed.

R.5 (Deficiency 6): No clear evidence of the overall level of implementation due to relatively recent enactment of new obligations.

It should be noted that the relevant provisions can no longer be considered as new ones, however, it is not possible to make any conclusions in that respect due to the desk-based nature of this analysis. Germany reported that the *BaFin* and the *Länder* authorities had taken several measures to raise awareness on the issue of money laundering and to inform the financial institutions and DNFDPs about their obligations, followed by annually checks of external auditors.

RECOMMENDATION 5, OVERALL CONCLUSION

As appears from the analysis above, Germany has taken sufficient steps to bring the level of compliance with R.5 to a level essentially equivalent to LC.

RECOMMENDATION 13 – RATING PC

R.13 (Deficiencies 1 and 3): Scope of reporting relates to ML only and not to proceeds of criminal activity.

Reporting obligation does not cover insider dealing and market manipulation, nor counterfeiting and piracy of products as these are not predicate offenses for ML.

In order to address the deficiencies in the reporting system Germany has undertaken a major revision of the section 11 of the *GwG* (as introduced by the *GwGOptG*). It should be noted, however, that the references in the revised text are still made to "the funds … that are object of the Section 261 of the Criminal Code" (which is ML) and not to proceeds of crime in general. On the other hand, this particular deficiency is effectively remedied by the fact that the list of predicate offences for ML now includes all designated categories of offences as set out in the FATF Glossary (see Recommendation 1 above). It should also be noted that in the explanatory memorandum of the *GwGOptG* the legislator highlighted that it is sufficient for the purpose of establishing a reporting obligation if "on objective assessment, factual circumstances exist to indicate that the assets are the proceeds of criminal activity or the assets are connected with terrorist financing". Therefore these deficiencies have been addressed.

R.13 (Deficiencies 2 and 5): Threshold for reporting requires a high degree of certainty of an offense, and the report constitutes a criminal complaint.

High threshold for reporting creates the need for investigation which in turn makes prompt reporting of suspicions impracticable.

Concerning the issue of high suspicion threshold, Germany indicates that by changing the wording of the section 11(1) of the *GwG*, namely, from "reason to be believe" to "if factual circumstances exist", the legislative amendment seeks to clarify that it is sufficient for the purpose of establishing a reporting requirement that, on objective assessment, factual circumstances exist to indicate that the assets are the proceeds of criminal activity or the assets are connected with terrorist financing. Thus it is not necessary for the person subject to the reporting requirement to review whether the legal prerequisites for an offense under section 261 *StGB* have been met, but rather to assess the facts based on the person's general and professional experience, looking particularly at the unusualness and conspicuousness of the transaction or business relationship in the respective commercial context. To some extent this reasoning can also be supported by the fact that the German term that designates an STR has been changed from "*Anzeige*" (which is closer to the term "criminal complaint") to "*Meldung*" (which is more neutral and closer to the term "report"). The increase of the reporting numbers might serve as an indicator of the effect of the amendments on the reporting system (see also Deficiency 6 below). Both deficiencies appear to have been addressed.

R.13 (Deficiency 4): Material deficiencies in the TF offense limit the reporting obligation.

Please see discussion below under SR.I (Deficiencies 1, 2 and 3). This deficiency has not been addressed.

R.13 (Deficiency 6): Low level of reporting suggests that not all aspects of the regime are working effectively.

Germany has provided statistics in relation to the level of reporting from 2008 to 2013 which is given below. It should be noted, however, that it is practically impossible to make any meaningful judgements about the effectiveness of the system without putting those figures in the context.

Table 1. **Number of suspicious transaction reports**

{ TC \f t \l 2 "Table 1. Number of suspicious transaction reports" }Year	Number
2008	7 349
2009	9 046
2010	11 042
2011	12 868
2012	14 361
2013	19 095

RECOMMENDATION 13, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.13 has been brought to a level equivalent to LC.

SPECIAL RECOMMENDATION IV – RATING PC

SR.IV (Deficiency 1 and 3): Threshold for reporting requires a high degree of certainty of an offense, and the report constitutes a criminal complaint.

High threshold for reporting makes prompt reporting of suspicions impracticable.

Please see the explanations provided with relation to the Deficiencies 2 and 5 under Recommendation 13 above. The comments made there apply equally to Special Recommendation IV.

SR.IV (Deficiency 2): Material deficiencies in the TF offense limit the reporting obligation.

Please see discussion below SR.I (Deficiencies 1, 2 and 3). This deficiency has not been addressed.

SPECIAL RECOMMENDATION IV, OVERALL CONCLUSION

Overall, it appears that the level of compliance with SR.IV has been brought to a level equivalent to LC.

V. REVIEW OF THE MEASURES TAKEN IN RELATION TO THE KEY RECOMMENDATIONS

RECOMMENDATION 35 – RATING PC

R.35 (Deficiency 1): The ML offense cannot be applied to persons who commit and are convicted for the predicate offense. The inability to do this is not supported by principles that amount to fundamental principles under the FATF standards.

Please see the discussion above under Deficiency 2 of the Recommendation 1. This deficiency has not been addressed.

R.35 (Deficiency 2): Insider trading and market manipulation, and counterfeiting and piracy of products are not predicate offenses to ML.

Please see the discussion above under Deficiency 1 of the Recommendation 1. This deficiency has been addressed.

R. 35 (Deficiency 3): Natural and legal persons are not subject to effective, proportionate and dissuasive sanctions for basic ML.

As far as sanctions for ML are concerned, please see the discussion above under Deficiency 3 of the Recommendation 1. Overall, this deficiency does not appear to have been addressed.

RECOMMENDATION 35, OVERALL CONCLUSION

Consistent with the conclusions on Recommendation 1 and based on horizontal comparison with other countries in a similar situation, it is possible to consider the rating for this Recommendation at a level equivalent to LC.

SPECIAL RECOMMENDATION I – RATING PC

SR.I (Deficiencies 1, 2 and 3): The definition of serious violent act endangering the state is not fully consistent with the CFT Convention as it does not extend to all acts that constitute offenses within the scope of, and as defined in the treaties annexed to the CFT Convention and it does not cover serious bodily injuries.

The definition of the term funds in connection with the financing of a terrorist act or individual terrorist is not fully in line with the requirements of the CFT Convention, as it imposes a requirement for the funds to be of a certain minimum value (i.e., not merely insubstantial).

The financing to carry out a terrorist act and the financing of an individual terrorist are not fully consistent with the CFT Convention.

It should be noted that all these three deficiencies are related to the shortcomings in the TF offence, which was raised on numerous occasions in the MER, not only under SR.I, but also under the SR.II, R.13, and SR. IV. The rating for the SR.II itself, however, was LC. In order to understand the nature of those deficiencies, the Secretariat analysed the TF legislation in place once again.

As noted in the MER, there are three main articles in the *StGB* that are intended to address the requirements of the SR.II. These are Article 89a (Preparation of a serious violent act endangering a state), Article 129a (Formation of terrorist organisations) and Article 129 (Formation of criminal organisations). As described in the MER, articles 129 and 129a fully cover the financing of terrorist organisations regardless of whether or not the funds were actually used to carry out or attempt a specific terrorist act[5].

The case of the Article 89a is less clear though. For better understanding of the subsequent analysis it is worth citing the text of the relevant passages of the Article:

> *(1) Whosoever prepares a serious violent act endangering a state shall be liable to imprisonment from six months to ten years. A serious violent act endangering a state is a criminal offence against life within the meaning of article 211 or article 212, or against personal freedom within the meaning of article 239a or article 239b, which under the circumstances is intended and able to interfere with the existence or security of a state or an international organisation or to do away with, suspend the application of or undermine the constitutional principles of the Federal Republic of Germany.*
>
> *(2) Subs. 1 shall apply only if the offender prepares a serious violent act endangering a state by*
>
> *[…]*

5 See paras. 213-223 of the 2010 Mutual Evaluation Report of Germany

4. collecting, accepting or making available not merely insubstantial assets for its commission.

This article is supposed to cover financing of an individual terrorist as well as of a terrorist act in general. Careful analysis of this article, however, leads to the conclusion that its provisions have a number of deficiencies with regard to the requirements of the FATF standards.

First of all, the article does not seem to cover the financing of an individual terrorist "for any purpose", i.e. in the absence of any link to a specific terrorist act (as identified under Deficiency 2). Indeed, if one looks at the point 4 of the subs. 2, it is evident that the article only covers the case when assets were collected, accepted or made available for "its commission [that is, of a serious violent act endangering a state]". This appears to indicate that there should be an explicit link to a specific act.

Further, the definition of "a serious violent act endangering a state" in the subs. 1 of the article does not fully cover the substance of the FATF definition of a terrorist act as set out in the Glossary (Deficiency 1). The FATF definition covers two types of acts: those that are described in the Annex to the TF Convention ("annex offences"), and those that are "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act" ("general offence").

In the case of the annex offences, the definition is too restrictive as it requires additionally that the act 1) be "against life … or against personal freedom" and 2) be "intended and able to interfere with the existence or security of a state or an international organisation or to do away with, suspend the application of or undermine the constitutional principles of the Federal Republic of Germany".

In the case of a general offence, the article again falls short of the requirement as it does not cover the instances where the act caused only serious bodily injury, and the additional condition of being "intended and able to interfere with the existence or security of a state …" further limits the coverage of this article.

It should also be noted that the article introduces a potential monetary threshold by referring to "not merely insubstantial assets", which again is not fully in line with the FATF standards (Deficiency 3). The effect of this "threshold" might not be that important, as argued by Germany, however this element adds to the overall picture concerning this article. Finally, it should be pointed out that since its introduction in 2009 article 89a has never been used in practice which makes it difficult to judge its effectiveness and might potentially serve as a negative indicator of its relevance.

The table below summarises what is covered and not covered by the German TF offence.

Table 2. **Analysis of TF offence in German criminal law**

Financing of	Meaning of Terrorist Act	
	Offences within the scope of the Annex to TF Convention	*Any other act to cause death or serious bodily injury for the purpose to intimidate/ compel*
Terrorist Act *(fully covered by §129 and §129a, if committed by a terrorist organisation; if committed by an individual terrorist then analysis on the right applies)*	**Partly covered** by §89a: • only when it caused death or involved deprivation of liberty and • only when intended and able to interfere with the existence or security of a state or IO • monetary threshold	**Partly covered** by §89a • exception of serious bodily injury and • only when intended and able to interfere with the existence or security of a state or IO • monetary threshold
Terrorist Organisation *(financing for any purpose)*	**Covered** by combination of §129 and §129a	**Covered** by §129a
Individual Terrorist *(financing for any purpose)*	**Not covered**	**Not covered**

Drawing conclusion, it may be stated that none of the deficiencies under SR.I concerning TF offence have been addressed so far. However, it should be emphasised that the Federal Ministers of Justice and Finance have committed in a written joint statement to amend the Criminal Code in order to bring TF provisions into compliance with the international standards. According to the German authorities, the relevant legislative procedure should be initiated in 2014.

SR.I (Deficiency 4): Natural and legal persons are not subject to effective, proportionate and dissuasive sanctions.

Germany has not reported any progress besides the amendment of the *OWiG* which raised the scale of fines for criminal offenses (including TF) by the management of legal persons from one million to up to ten million euros (section 30 (2), first sentence of the *OWiG*). This deficiency has not been fully addressed.

SR.I (Deficiencies 5, 6 and 7): Except for credit institutions, financial services institutions and investment companies, no other person is subject to directly applicable requirements for the freezing of assets for EU-internals under S/RES/1373.

Lack of effective procedures making it possible to freeze assets other than funds for EUinternals where the Banking Act applies.

There are no appropriate measures to monitor effectively the compliance with freezing obligations by persons and entities other than financial institutions and companies.

These deficiencies are a spill-over from SR.III, thus they are discussed below under the relevant Recommendation. None of those deficiencies has been addressed.

SPECIAL RECOMMENDATION I, OVERALL CONCLUSION

Overall, it appears that the compliance with SR.I has not yet reached a level equivalent to LC.

SPECIAL RECOMMENDATION III – RATING PC

SR.III (Deficiencies 1 and 2): Except for credit institutions, financial services institutions and investment companies, no other person is subject to directly applicable requirements for the freezing of assets for EU-internals under S/RES/1373.

Lack of effective procedures to freeze assets other than funds for EU-internals where the Banking Act applies.

Germany as a member of the European Union is bound by the EU Regulation No. 2580/2001 which governs the freezing regime and which has the deficiencies identified in the MER. The work is under way in the EU to provide for financial sanctions for "EU-internal terrorists" as well as for the freezing of assets other than funds of EU-internals. Therefore Germany advised that priority is currently given to resolving the issue at the EU rather than the national level. These two deficiencies remain unaddressed.

SR.III (Deficiency 3): Professional secrecy is interpreted broadly by the liberal professions, and there are strict conditions for obtaining or compelling information subject to it, which hinder the possibility for law enforcement authorities to locate and trace terrorist funds or other assets.

The substance of this deficiency comes down to the following issues[6]: 1) the auditors, chartered accountants, and tax advisors seem to interpret "legal privilege" in a way that goes beyond the discretion provided for in the FATF standards; 2) serious restrictions on obtaining CDD information from the relevant professions (a court order is required in each instance) prevent transactions records and information from being available on a timely basis to domestic competent authorities.

Germany has not provided any information as to how any of those issues have been addressed; therefore the situation with regard to this deficiency remains unchanged.

SR.III (Deficiency 4): No appropriate measures to monitor effectively the compliance with obligations under SRIII by persons and entities other than financial institutions and companies.

Germany has not reported any information with regard to measures to monitor effectively the compliance with obligations under SRIII by persons and entities other than financial institutions and companies. The deficiency is not addressed.

SPECIAL RECOMMENDATION III, OVERALL CONCLUSION

Overall, it appears that the compliance with SR.III has not yet reached a level equivalent to LC.

6 See paras. 902-905 of the 2010 Mutual Evaluation Report of Germany

VI. REVIEW OF THE MEASURES TAKEN IN RELATION TO THE OTHER RECOMMENDATIONS RATED NC OR PC

RECOMMENDATION 6 – RATING PC

R.6 (Deficiency 1 and 2): No requirements with respect to PEPs when they are the beneficial owners of the contracting party.

Provisions do not apply to foreign PEPs residing in Germany.

These two deficiencies have been addressed by the amendment of the section 6 (2) no. 1 sentence 1 of the *GwG* which *i)* extended the obligation of financial institutions and DNFDPs to check whether the beneficial owner of the contracting party is a politically-exposed person (PEP), and *ii)* deleted the reference to "based outside the country" thereby expanding the scope of the provision.

R.6 (Deficiency 3): Approval to commence or continue the business relationship is not specified to be at senior management level.

After the amendment of the *GwG* by the *GwGOptG* the wording of section 6 (2) no. 1 sentence 4 a) of the *GwG* reads now as follows: "the establishment of a business relationship by a person acting on behalf of institutions and persons covered by the Law shall be subject to the approval of one of the person's superior". It should be noted that the notion of "a superior" (*Vorgesetzte* in German) is not quite the same as that of "a senior management" (usually translated as *Geschäftsführung* or *Geschäftsleitung*) as envisaged by the FATF Standards. However, the explanatory memorandum regarding section 6 (2) no. 1 of the *GwG* states that: "The amendment ensures that the establishment of a business relationship always requires the approval of a superior who must also belong to 'senior management'." Since the explanatory memorandum does not have the force of "other enforceable means"[7], it appears that this deficiency has only been addressed partly.

RECOMMENDATION 6, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.6 has been brought to a level equivalent to LC.

RECOMMENDATION 7 – RATING PC

R.7 (Deficiency 1): Special measures apply only to non-EU correspondent relationships.

The Law to Implement the Second E-Money Directive (*Gesetz zur Umsetzung der Zweiten E-Geld-Richtlinie, 2.EGeldRLUG*) extended section 25k (1) first sentence of the *KWG* so that financial institutions must apply enhanced CDD measures also in the case of respondent institutions domiciled in an EEA state subject to being assessed as higher risk by the financial institution. This deficiency has been addressed.

[7] See para. 548 of the 2010 Mutual Evaluation Report of Germany

R.7 (Deficiency 2): Approval to commence the business relationship is not specified to be at senior management level.

The *2.EGeldRLUG* included an amendment of the provision in section 25k (2) no. 3 of the *KWG*. The new wording reads: "institutions shall make sure that before establishing such a relationship by a person acting on behalf of the obliged institution approval from one of the person's superior is obtained". As noted above in R.6, the notion of "a superior" is not quite the same as that of "a senior management" as envisaged by the FATF Standards. However, the explanatory memorandum regarding section 25k (2) no. 3 of the *KWG* states that: "The amendment ensures that the establishment of a business relationship always requires the approval of a superior who must also belong to 'senior management'." Since the explanatory memorandum does not have the force of "other enforceable means", it appears that this deficiency has only partly been addressed.

RECOMMENDATION 7, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.7 has been brought to a level equivalent to LC.

RECOMMENDATION 11 – RATING PC

R.11 (Deficiency 1 and 2): Uncertainty about the ability of institutions to monitor statutory "low risk" customers effectively.

No obligation to record and retain an analysis of transactions that have no apparent or visible economic or lawful purpose.

The *GwGOptG* amended section 5 (1) sentence 2 of the *GwG*. In accordance with this amendment financial institutions and DNFBPs are now required when performing simplified customer due diligence measures to identify and verify the contracting party and monitor business relationships in order to be able to detect complex and unusually large transactions which have no apparent economic or visible lawful purpose and, if applicable, to file an STR in accordance with section 11 (1) of the *GwG*.

The record-keeping requirement under section 8 (1) of the *GwG* also applies to the CDD measures under section 5 (1) sentence 2 of the *GwG* as described above. Therefore, these two deficiencies have been addressed.

RECOMMENDATION 11, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.11 has been brought to a level equivalent to LC.

RECOMMENDATION 15 – RATING PC

R.15 (Deficiency 1): The compliance officer measures do not apply to the insurance intermediaries sector.

The *GwGOptG* amended section 9 (4) sentence 1 of the *GwG* enabling the competent supervisory authorities to require the appointment of an AML/CFT compliance officer also from insurance

intermediaries. However, it is not clear whether this was done in practice and to what extent. Therefore, this deficiency remains unaddressed.

R.15 (Deficiency 2): No legal obligation to ensure that the compliance officer has timely access to relevant CDD information.

A number of amendments were introduced into sector-specific laws to address this deficiency. Section 25h (4) of the *KWG*, section 80d (3) of the *VAG* and section 22 (2) of the *ZAG* now provide the following obligation for credit institutions, financial services institutions, external investment management companies, insurance companies, payment services institutions and e-money institutions: "The AML/CFT compliance officer must be given unrestricted access to all information, data, records and systems which may be of significance in fulfilling his/her tasks. He must be given sufficient powers to fulfil his function". In Circular 1/2012 from 6 March 2012 BaFin published the updated interpretation note of the German Banking Industry (*Auslegungs- und Anwendungshinweise der Deutschen Kreditwirtschaft*), including detailed advice regarding the appointment and duties of AML/CFT compliance officers.

As it appears from the Section 18 (6) of the *KAGB*, investment funds (as defined in the Section 17(2) no.2 of the *KAGB*) are not subject to this requirement. According to the German authorities, this is an inadvertent exemption due to an editorial failure of the legislator. Germany reported that this issue had already been identified and it is now in the process of fixing it. Thus, subject to this observation, the deficiency has been largely addressed.

R.15 (Deficiency 3): No obligation to provide training to staff other than those involved in dealing with customers or carrying out transactions.

The wording of section 9 (2) no. 3 of the *GwG*, as amended by the *GwGOptG*, broadens the scope of the training requirement by deleting the former limitation to staff that is involved "in dealing with customers or carrying out transactions". The provision now only refers to "employees" without any restrictions. This deficiency has been addressed.

R.15 (Deficiency 4): No legal obligations imposed on financial institutions requiring them to put in place screening procedures to ensure high standards when hiring employees.

In section 9 (2) no. 4 of the *GwG* the obligation to carry out reliability checks with regard to employees has been imposed by law requiring "appropriate risk-based measures for reliability screening of employees". Section 9 (2) no.4 sentence 2 of the *GwG* contains a definition of reliability according to which the personality of employees must offer assurance that they will comply with the provisions of the *GwG* and other legislation relevant to money laundering, as well as the internal principles established in order to prevent money laundering and terrorist financing. Additionally, *BaFin* has issued guidance in cooperation with the private sector to provide support in assessing the reliability of employees. The deficiency has been addressed.

R.15 (Deficiency 5): Application of measures across corporate groups is new and effectiveness could not be assessed.

Germany reported that in 2012, *BaFin* analysed audit reports in order to get a clearer picture of how financial institutions apply section 25g of the *KWG* (group-wide implementation of the CDD measures, now section 25l). Based on these findings, *BaFin* made use of its power under section 30 of the *KWG* and ordered certain financial institutions with less than satisfactory results to be audited with a main focus, *inter alia*, on what internal controls regarding group-wide AML/CFT programs are put in place and how are these documented.

The audit and following analysis showed that financial institutions had partially practical and legal problems in implementing section 25l of the *KWG*: German institutions, *inter alia*, faced data protection rules in other countries that impeded the application of group-wide measures. Though it is difficult to make any meaningful conclusions concerning effectiveness in the framework of the desk-based review, these efforts seem to be indicative of positive developments.

RECOMMENDATION 15, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.15 has been brought to a level equivalent to LC.

RECOMMENDATION 17 – RATING PC

R.17 (Deficiency 1): Administrative fines in place are not proportionate (very low number of administrative fines available under the AML Act) nor sufficiently dissuasive (more serious violations of the AML Act attract lower levels of administrative fines); and the maximum amounts of fines under the AML Act are low (especially considering the large size of many German financial institutions); and, due to the criminal nature of the penalties, high penalties can only be applied for gross negligence or deliberate intent).

In accordance with the *GwGOptG* section 17 of the *GwG* has been amended by combining the previous subsections (1) and (2). Thus a standard fine of up to EUR 100 000 now applies for all offences, also to those offences, that could only be fined up to EUR 50 000 before.

Furthermore, new offences were added to the catalogue of section 17 of the *GwG* and thereby broadened the possibilities of the BaFin to impose a fine, namely:

- failure to establish the identity the contractual partner, or the client when accepting or delivering cash, in the prescribed manner or in due time (section 17 (1) no. 1 of the *GwG*)
- failure to provide information and documents on request of the supervisory authority in the prescribed manner or in due time (section 17 (1) no. 16 of the *GwG*);
- failure to comply with the measures taken by the supervisory authority (section 17 (1) no. 17 of the *GwG*);
- failure to observe the key due diligence requirements in connection with online gambling (section 17 (1) no. 7 – 13 of the *GwG*).

It should be noted, however, that even after its expansion, the list given above still does not include some of the offences for breaches of specific AML/CFT requirements, as set out in the MER (such as failures to obtain information on the purpose and intended nature of the business relationship; to continuously monitor the business relationship, etc.) [8].

Gross negligence is now sufficient in order to meet the subjective element for all infringements (pursuant to the previous law gross negligence was sufficient for offences under subsection (1), while wilful intent was required for the offences under subsection (2)).

A new offence was introduced in the *KWG* (section 56(2) no.3(h)) for contravening an enforceable order by the supervisory authority to comply with the internal controls requirements. In addition, the maximum amount of fines for breaches of AML/CFT requirements under the *KWG* was raised from 150 000 to 200 000 EUR. Besides that, however, no specific administrative fines for AML violations were added into the *VAG* or *KAGB* (as a successor of the *InvG*), as recommended in the MER[9].

Overall, this deficiency has partly been addressed.

R.17 (Deficiency 2): Administrative fines are not applied effectively – the BaFin has only ever applied one administrative fine many years ago.

Germany provided updated statistics concerning administrative fines related to breaches of AML/CFT requirements in 2009-2014[10] as follows:

Table 3. **Administrative fines**

Year	2009	2010	2011	2012	2013	2014
Number	-	3	12	20	60	26

Table 4. **Written warnings**

Year	2009	2010	2011	2012	2013	2014
Number	10	8	9	14	14	6

Germany reported that the increase of numbers, especially in Table 3, is due to the fact that since April 2011 agents as defined in section 1 (7) of the *ZAG* and e-money agents as defined in section 1a (6) of the *ZAG* are subject to the *GwG* and the supervision by *BaFin*. As it appears from the statistics above, Germany has demonstrated the practical availability of sanctions and its willingness to apply them. This seems to be a positive development, however, it is not possible to make any meaningful judgement with regard to effectiveness in the context of the desk-based review.

8 See page 199, para. 838 of the 2010 Mutual Evaluation Report of Germany.

9 See page 202, para. 855, 1st bullet point of the 2010 Mutual Evaluation Report of Germany.

10 As of 30 April 2014.

R.17 (Deficiency 3): Due to the constitutional principle of specificity, there are no administrative fines for violations of obligations to establish appropriate internal safeguards under all sector-specific laws; and apply enhanced due diligence in specific additional circumstances listed in the Banking and Investment Acts.

Germany has not reported any progress due to fundamental principles of the German constitution, namely the principle of legal certainty (*Bestimmtheitsgebot*) anchored in Article 103 (2) of the Basic Law (*Grundgesetz*) prevents Germany from sanctioning some violations of obligations under the *GwG* or sector-specific laws with administrative fines. The deficiency remains unaddressed.

R.17 (Deficiency 4): Failure by the supervisory boards to comply with their obligation to supervise management may result in uncertainty as to whether administrative fines apply to individual members of such boards.

Concerning this deficiency, Germany reiterated the arguments previously expressed in the MER and which were not accepted by the Plenary. The deficiency remains unaddressed.

RECOMMENDATION 17, OVERALL CONCLUSION

Overall, it appears that the compliance with R.17 has not yet reached a level equivalent to LC.

RECOMMENDATION 21 – RATING PC

R.21 (Deficiency 1): No explicit obligation to pay special attention to relationships and transactions involving countries with inadequate AML/CFT standards.

According to the new section 25k (5) sentence 1 of the *KWG*, *BaFin* is empowered to decree vis-à-vis credit and financial services institutions the mandatory application of enhanced CDD and certain additional safeguard measures with respect to business relationships and transactions if information is available (e.g. from the analysis of national or international bodies being involved in combating money laundering and terrorist financing) that the country involved poses an enhanced money laundering or terrorist financing risk, in particular in connection with adhering to CDD requirements.

According to section 22 (2) of the *ZAG* and section 18 (6) of the *KAGB* the aforementioned changes also apply to payment services institutions, e-money institutions, and external investment management companies. A provision mirroring section 25k (5) of the *KWG* has been included in section 80g of the *VAG*. As it appears from the Section 18 (6) of the *KAGB*, investment funds (as defined in the Section 17(2) no.2 of the *KAGB*) are not subject to this requirement. According to the German authorities, this is an inadvertent exemption due to an editorial failure of the legislator. Germany reported that this issue had already been identified and it is now in the process of fixing it.

For the financial sector, *BaFin* calls attention to these provisions on a regular basis by sending out Circulars with information and special orders pertaining to countries or territories with weaknesses in their AML/CFT regime to all financial institutions under its supervision. In particular requirements are set up to give special attention to business relationships and transactions with persons (including legal persons and other financial institutions) from or in those countries which do not or insufficiently apply the FATF Recommendations.

Overall, it appears that this deficiency has largely been addressed.

R.21 (Deficiency 2): No obligation to record and retain an analysis of transactions that have no apparent or visible economic or lawful purpose.

According to section 25k (5) sentence 2 of the *KWG* credit and financial services institutions are now obliged to "record and retain appropriate information with regard to the measures applied with respect to the first sentence of section 25k (5) of the *KWG* according to section 8 of the GwG". Section 8 (1) of the *GwG* describes specific requirements of keeping records; section 8 (3) sentence 1 of the *GwG* determines, that records and other evidence pertaining to business relationships and transactions shall be kept for at least five years.

According to section 22 (2) of the *ZAG* and section 18 (6) of the *KAGB*, the aforementioned changes also apply to payment services institutions, e-money institutions, and external investment management companies. A provision mirroring section 25k (5) second sentence of the *KWG* was included in section 80g second sentence of the *VAG* applying to insurance companies pursuant to section 2 (1) no. 4 of the *GwG*. As it appears from the Section 18 (6) of the *KAGB*, investment funds (as defined in the Section 17(2) no.2 of the *KAGB*) are not subject to this requirement. According to the German authorities, this is an inadvertent exemption due to an editorial failure of the legislator. Germany reported that this issue had already been identified and it is now in the process of fixing it.

It appears that this deficiency has largely been addressed.

RECOMMENDATION 21, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.21 has been brought to a level equivalent to LC.

RECOMMENDATION 25 – RATING PC

R.25 (Deficiency 1): Very poor specific feedback on STRs filed with the Länder authorities.

In November 2012, the Federal Ministry of Justice wrote to the departments of justice of the *Länder* to point out to them that they had notification duties under section 11(8) of the *GwG*. A preliminary evaluation performed by the FIU has shown that the number of instances in which the public prosecutor's offices provided feedback has been increasing constantly since 2010.

Germany reported that the Federal Ministry of Justice and the Forum for the Prevention of Money Laundering and Terrorist Financing would continue reaching out to the *Länder* authorities in order to improve the specific feedback on STRs filed with individual state prosecutors.

Since this particular deficiency relates rather to the effectiveness aspect of the Recommendation it is difficult to make a definitive judgement as to whether it has been fully addressed. However, the data provided by Germany seems to be indicative of positive developments.

R.25 (Deficiency 2): Uncertainty in some parts of the financial sector on the status of abrogated circulars.

A number of sector-specific guidance documents have been issued by the relevant private sector associations. The umbrella association for German credit institutions (*Deutsche Kreditwirtschaft* - DK) together with *BaFin* and the Ministry of Finance developed a revised version of the DK guidance. The guidance was adopted in November 2013 and was published on 1 February 2014. A revised version of the guidance for the insurance sector (3rd edition) was published in December 2012. The umbrella association for German leasing companies BDL (*Bundesverband Deutscher Leasingunternehmen*) published for the first time guidance on administrative practice for the leasing sector in April 2010. The guidance was approved by *BaFin* and the Ministry of Finance and was updated in December 2012.

Concerning the status of the abrogated circulars, Germany reported that since the MER 9 laws came into force providing amendments in the AML/CFT regime and the guidance published for the financial sector is aiming to cover nearly all relevant areas. Germany considers that none of the abrogated circulars has any relevant scope with regard to the existing laws and they are all obsolete in total. According to German authorities, this is the common understanding in the financial sector which is underlined by the fact that *BaFin* as the competent supervisory authority is never asked any more to provide help in the interpretation and understanding of one of these abrogated circulars. Therefore, it appears that this deficiency has largely been addressed.

R.25 (Deficiency 3): New (replacement) private sector guidance (approved by the BaFin and the MoF) is limited in scope.

As mentioned under the previous deficiency, the association for German credit institutions (DK) issued a revised version of the guidance. The guidance incorporated new chapters on the background checks for employees, IT-supported monitoring and the obligation to examine dubious or unusual transactions. Furthermore it revises in particular provisions concerning the beneficial owner. This deficiency appears to have been addressed.

R.25 (Deficiency 4): Lack of comprehensive guidance in place for the insurance intermediaries sector.

All the *Länder* and their competent authorities developed a common information note for enterprises of the non-finance sector and financial institutions: "Do you know your customer? – Duties pursuant to the AML Law" (*Gemeinsames Merkblatt der Länder der Bundesrepublik Deutschland für Unternehmen aus dem Nichtfinanzsektor und Finanzunternehmen "Kennen Sie Ihren Kunden? – Pflichten nach dem Geldwäschegesetz"*). The information note provides the institutions with guidance on how to implement the due diligence requirements, internal controls and safeguards, reporting obligations, etc. of the AML Law. The information note is available on the websites of competent supervisory authorities and was published on July 2012. The guidance is explicitly applicable to the insurance intermediaries sector. This deficiency appears to have been addressed.

R.25 (Deficiency 5): Guidelines for lawyers, auditors have not been updated, no guidelines for dealers in precious metals and stones and real estate agents.

The information note mentioned under the previous deficiency is equally applicable to dealers in precious metals and stones as well as to real estate agents.

Regarding the legal professions, the German Federal Bar Association (*Bundesrechtsanwaltskammer*) issued recommendations to attorneys on how to conduct themselves in typical risk situations in which money laundering could occur and how to identify these situations. These recommendations are currently in the process of being revised; it is not clear when this may be completed. The Federal Chamber of German Civil Law Notaries (*Bundesnotarkammer*) issued recommendations for the application of the *GwG* which have been revised several times (most recently in April 2012). In addition, the Federal Ministry of Finance's interpretive notes from March 2014 regarding the obligation to report suspicions were published in the association's journal.

Concerning auditors, the Board of Management of the *Wirtschaftsprüferkammer* (an oversight body for public accountants) released new guidelines on the implementation and interpretation of the *GwG* in April 2012. They contain guidance and information on how to apply the *GwG* correctly, in particular on how to implement the due diligence requirements, internal controls and safeguards, reporting obligations etc. They replace the guidance issued by the German Chamber of Auditors on applying the *GwG* as amended on 13 August 2008.

Overall, this deficiency appears to have been addressed.

RECOMMENDATION 25, OVERALL CONCLUSION

Overall, it appears that the level of compliance with R.25 has been brought to a level equivalent to LC.

RECOMMENDATION 32 – RATING PC

R.32 (Deficiency 1): No evidence that overall reviews of effectiveness of the German AML/CFT system have been undertaken.

Concerning this deficiency, Germany reported that a *Study to Evaluate the Act on Prosecuting the Preparation of Serious Violent Offenses Endangering the State (GVVG)* was conducted. The study nevertheless came to conclusion that it was not possible to make a definitive assessment of the effectiveness of the *GVVG* in respect of the threats from international terrorism until a broader data basis was available.

However, bearing in mind that the original recommendation in the 2010 MER was to "put in place formal mechanisms to review the effectiveness of Germany's AML/CFT system", it may be concluded that this deficiency has not been addressed.

R.32 (Deficiency 2): Comprehensive annual statistics are not maintained, were not available, or both in relation to: sanctions imposed for ML convictions; the number of STRs analysed or disseminated; the value of transactions associated with STRs; provisional measures; ML investigations; reports filed on international wire transfers; the amount of property

confiscated broken down in relation to ML, TF, and other criminal proceeds; international cooperation; the structure, activities or both of the financial sector (including in relation to the number of foreign branches of domestic FIs), nor the DNFBP sector; and the exercise of supervisory powers in the DNFBP sector.

Regarding annual statistics in relation to ML investigations and sanctions imposed for ML convictions, Germany reported that the relevant data is published by the Federal Statistical Office[11] (*Statistisches Bundesamt*).

As far as the other types of statistics are concerned, in February 2011, the Federal Ministry of Justice made proposals to the *Länder* which were aimed at improving and expanding the statistics on criminal justice. However, no information is available as to whether these efforts have led to any practical results.

Therefore, as it appears from the above, this deficiency has not been fully addressed.

RECOMMENDATION 32, OVERALL CONCLUSION

Overall, it appears that the compliance with R.32 has not yet reached a level equivalent to LC.

RECOMMENDATION 12 – RATING NC

R.12 (Deficiency 1): No arrangements for casinos to link identification-on-entry data to individual transactions within the casino.

According to section 3 (3) of the *GwG*, as amended by the *GwGOptG*, casinos have to verify the identity of customers who buy or sell gambling chips with a value of EUR 2 000 or more. This obligation can also be fulfilled by verifying the costumer's identity upon entry to the casino. In this case an amendment of section 3 (3) of the *GwG* additionally stipulates that casinos have to ensure that a transaction of EUR 2 000 or more is linked to the identified customer in order to ensure a link between the respective person and the transaction.

Moreover, important changes have taken place with regard to the legal framework concerning on-line casinos. On 1 July 2012, the new Interstate Gambling Agreement (*Glücksspielstaatsvertrag der Länder*) entered into force. Though the Agreement provides for a general ban on on-line gambling, there are a number of exemptions. First of all, pursuant to section 10a (3) and (4) of the Treaty, 20 concessions may be granted for providers of online sports betting and online intermediaries of lotteries. Moreover, when the new agreement became effective in 2012 only 15 of the 16 *Länder* signed the agreement. Schleswig-Holstein chose a different approach and granted 25 concessions for providers of sports betting and 23 concessions for online casinos. After a change of government Schleswig-Holstein decided to sign the Inter-State Treaty on Gambling as well. The Treaty became effective in Schleswig-Holstein on 8 February 2013, although the already granted concessions remained valid. The state of Hesse created a central competent authority for all matters regarding these concessions (section 9a (2) no 3 of the Treaty) and is therefore the authority for administering the existing concessions of Schleswig-Holstein and the new concessions issued under the Inter-State Treaty on Gambling.

11 Please see (available in German only, for the period 2009 – 2012): www.destatis.de/.

Accordingly, the *GwG* was amended, which now includes operators of online gambling and their intermediaries as obliged entities. The Law to Extend the AML Law (*Gesetz zur Ergänzung des Geldwäschegesetzes, GwGErgG*) entered into force 26 February 2013. The *GwGErgG* introduced, inter alia, the following measures: the operators of online gambling have to apply specific CDD measures, establish appropriate risk management processes and procedures as well as internal controls (section 9a of the *GwG*), identify and verify the identity of the player (section 9b) and set up a gaming account of the player prior to allowing him to participate (section 9c). The competent authorities have the right to request information about payment accounts of online gambling operators and players (section 9a (7)). The sanctions provision of the *GwG* (section 17) was also amended accordingly. Online gambling operators and intermediaries have to request a license.

Considering the information above, it may be concluded that this deficiency has been addressed.

R.12 (Deficiency 2): Low awareness of CDD obligations and ML vulnerability among real estate agents and no oversight of compliance with CDD obligations of real estate agents and dealers in precious metals and precious stones.

Concerning awareness of CDD obligations and ML vulnerability among real estate agents Germany reported that in August 2012 the Federal Association of Real Estate Agents (*IVD*) developed an information note and work instruction for employees of real estate offices (*Merkblatt und Arbeitsanweisung für Mitarbeiter des Maklerbüros*). This information note explained the AML/ CFT obligations that apply to real estate agents and focused on when real estate agents have to identify and verify the costumer. Beside that the information note includes a list of red flags for potential ML/TF in connection with real estate transactions.

Besides that, the Darmstadt Working Group (*Darmstädter Kreis*) developed guidance for the CDD process in autumn 2013, namely *Advice of Interpretation and Application of the AML Law for Real Estate Agents* (*Auslegungs- und Anwendungshinweise nach dem GwG für Immobilienmakler*). This guidance was approved by the Ministry of Finance and the *Länder* in October 2013. The paper seeks to clarify when exactly and which identification and verification requirements need to be fulfilled by describing them in some typical business situations of a real estate agent. This guidance was published by several *Länder* (Baden-Württemberg, Hesse, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland, Saxony, Berlin and Brandenburg) in November 2013.

In addition to the guidance material described above, relevant authorities in all 16 *Länder* conduct various awareness-raising campaigns and outreach programmes to inform real estate agents about their ML/TF vulnerabilities and CDD requirements. The website of the Darmstadt Working Group[12] makes available all other guidelines and papers published to date; these materials reflect the uniform AML/CFT supervision practices of the *Länder*.

As far as the oversight of compliance with CDD obligations of real estate agents and dealers in precious metals and precious stones is concerned, no information was provided by Germany.

[12] See Regierungspräsidium Darmstadt (n.c.), Bekämpfung von Geldwäsche und Terrorismusfinanzierung, www.rp-darmstadt.hessen.de/irj/RPDA_Internet?uid=eea09a31-620f-b01a-3b21-71765bee5c94 (accessed June 2014).

It should be noted that this deficiency appears to be related to effectiveness rather than technical compliance. Therefore, it is difficult to make any firm conclusions in the framework of a desk-based review, though there are indications of positive developments in this area.

R.12 (Deficiency 3): No arrangements to promote and ensure AML/CFT compliance by TCSPs.

TCSP functions in Germany are usually performed by lawyers, notaries, independent legal professionals or accountants. They are covered by the *GwG* (section 2 (1) no. 7, 7a, and 8) and they are supervised by their respective Chambers in accordance with section 16 (2) of the *GwG*. The new sections 16 (3) and (5) provide that the relevant Chambers have the authority to conduct compliance monitoring (information request and on-site examination) as well as the responsibility to provide guidance on the implementation of their CDD obligations and internal control measures. At the same time, according to the Section 16 (4) supervised entities may refuse to respond to information requests by citing either legal privilege or a general provision of the Civil Process Code (*Zivilprozessordnung, ZPO*) that protects against self-incrimination. Theoretically, this could undermine the effectiveness of the above mentioned provisions.

Insofar TCSP are not covered through the application of the *GwG* to lawyers, notaries, independent legal professions and accountants, they offer office services and are subject to the supervision of the *Länder* (section 16 (2) no. 9 of the *GwG*). The guidance paper for non-financial businesses and financial enterprises *(Gemeinsames Merkblatt der Länder der Bundesrepublik Deutschland für Unternehmen aus dem Nichtfinanzsektor und Finanzunternehmen – „Kennen Sie Ihren Kunden? Pflichten nach dem Geldwäschegesetz"*) mentioned above (see deficiency 4 under R.25 above) was published. The guidance is addressed to TCSPs too and lists them expressly in the section on scope. The *Länder* authorities inform the TCSPs for example via flyers during their business registration, information notes or newsletters about the AML/ CFT obligations. Germany also reported that several *Länder* sent information requests to businesses in 2013 to check their business model. On the basis of that, some *Länder* intend to conduct on-site visits in 2014.

Again this deficiency seems to be more related to the effective implementation of the requirements of the Recommendation 12 than to the technical compliance. Although certain progress can be noted in this area, it is difficult to make an informed judgement as to whether it was fully addressed without conducting an onsite visit.

R.12 (Deficiency 4): Inadequate awareness of ML and TF risk by casino operators, real estate agents, lawyers, notaries and auditors; underdeveloped risk assessment procedures.

It should be highlighted that the 2010 MER gave specific recommendations with regard to this particular deficiency. These are: *i)* casino staff and managers should be given additional training in ML techniques and risks; *ii)* CDD training requirements for real estate agents and dealers in precious metals and dealers in precious stones should be implemented; *iii)* CDD training programs for lawyers, notaries, and auditors should be intensified.

With regard to casino operators, Germany did not report any information concerning training, other than that many operators regularly develop risk assessments in order to update their internal safeguards and train their staff. Also, Germany stated that the activities of the Casino supervision

authority (*Spielbankenaufsicht*), such as on-site visits, had contributed to the awareness-raising among casino operators, however no further details were provided.

With regard to real estate agents, no information was provided about training on CDD. Germany only reported information concerning awareness-raising campaigns and outreach programmes as described under deficiency 2 above.

With regard to lawyers, notaries and auditors, Germany reported that German Federal Bar Association (*Bundesrechtsanwaltskammer*) issued recommendations on appropriate conduct with a view to combating money laundering and had instructed that the 27 regional bar associations appoint money laundering officers in order to raise awareness of this risk with its members. Likewise, the Federal Chamber of German Civil Law Notaries (*Bundesnotarkammer*) has issued recommendations on how to apply the *GwG*. However, no information on the actual training programmes was provided.

This is another deficiency that relates to the issue of effectiveness. As noted previously, it is difficult to make any meaningful conclusions concerning effectiveness in the framework of the desk-based review, though it appears that there is still room for improvement in this particular area.

R.12 (Deficiency 5): Registered legal advisers are not subject to professional secrecy, they should not be included in the carve-out for legal and professional privilege.

This deficiency concerns the implementation of the requirements on terminating a relationship in cases where CDD cannot be completed (R.5) as they relate to legal advisers. It was addressed by amending the section 3 (6) of the *GwG* which now applies only to the professions in Section 2 (7) and 2(8) and is no longer extended to registered legal advisers who are now specified in Section 2(7a) of the *GwG*.

R.12 (Deficiency 6): No requirements for procedures to identify PEPs, or to consider filing an STR in cases where CDD cannot be completed, or to establish beneficial ownership in all cases.

Section 6 (2) no. 1 of the *GwG*, as amended by the *GwGOptG*, determines that all obliged entities have to adopt appropriate risk based procedures to determine whether the contracting party or the beneficial owner is a PEP or an immediate family member or person known to be a close associate of a PEP. See also the analysis on R.6 above, as obligations concerning PEPs apply equally to DNFDPs as to financial institutions.

The *GwOptG* also amended the provisions with respect to the requirements for filing an STR. Pursuant to section 11 (1) second sentence of the *GwG* all institutions and persons covered by the *GwG* (including DNFBPs) are obligated to file an STR where factual circumstances indicate that the contracting party failed to comply with its duty of disclosure.

The amended the section 4 (5) sentence 1 of the *GwG*, which deals with the verification procedure regarding the beneficial owner, contains a requirement that financial institutions and DNFBPs have "always" to satisfy themselves of the veracity of the information collected by taking risk-adequate measures. See also discussion of the deficiency 1 under R.5 above.

Overall, this deficiency appears to have been addressed.

R.12 (Deficiency 7): Professional secrecy provisions are interpreted broadly by the liberal professions, and pose a significant impediment to their ability to provide records as evidence for prosecution of a crime (as called for under c 10.1.1) or keep findings available for competent authorities (as called for under c. 11.3).

As mentioned earlier (see above under SR.III), the deficiency related to the professional secrecy has two dimensions: 1) the auditors, chartered accountants, and tax advisors seem to interpret "legal privilege" in a way that goes beyond the discretion provided for in the FATF standards; 2) serious restrictions on obtaining CDD information from the relevant professions (a court order is required in each instance) prevent transactions records and information being available on a timely basis to domestic competent authorities. Germany did not report any information concerning any of those aspects, therefore this deficiency remains unaddressed.

RECOMMENDATION 12, OVERALL CONCLUSION

As R.12 is a composite one and covers several different economic sectors, the progress in each of them appears to be uneven. At the same time, it should be noted that almost all technical compliance issues were addressed, except the issue of broad carve-outs for professional secrecy; however, it does not have a direct impact on the technical compliance with the CDD requirements per se. Most of the outstanding issues relate to the effective implementation of the AML/CFT provisions, particularly as far as training programmes and risk awareness in the DNFBPs sector are concerned. Since the effectiveness is considered only to a limited extent within a desk-based review, it may be concluded that the progress achieved can be deemed sufficient to consider the compliance at a level equivalent to LC.

RECOMMENDATION 16 – RATING NC

R.16 (Deficiency 1): No requirement to have compliance management arrangements.

A direct requirement to appoint an AML/CFT compliance officer can be found in the amended section 9(2) no. 1 of the *GwG* which applies only to physical and on-line casinos.

As far as the rest of DNFBP sectors are concerned, there is a general requirement in the section 9(2) no. 2 of the *GwG* to develop and update appropriate business- and customer-related safeguards and controls in order to prevent being abused for money laundering and terrorist financing. Section 9(4) further states that a competent authority (as defined by the section 16 for each of the relevant sectors) *can* obligate the remaining institutions and persons to appoint an AML/CFT compliance officer when it deems appropriate. Germany did not provide further information as to what the criteria to impose such obligations are and how many entities in each relevant sector were actually obliged to appoint a compliance officer.

There is a special approach to traders in high-value goods (e.g. gold, precious metals, precious stones, jewellery, antiques, automobiles, ships, aircrafts). According to the section 9(4) sentence 3 of the *GwG* such traders *should* be obligated by the competent authority to appoint a compliance officer. In 2012 the *Länder* jointly prepared and agreed a model general decree (*Muster-Allgemeinverfügung*) to determine under which conditions authorities have to oblige the traders by individual order to appoint an AML/CFT compliance officer, namely their principal business

consists of dealing with high-value goods amounting to more than 50 % of total turnover, they have employed at least ten members of staff at the record date and engaged in at least one cash transaction with a customer equal to or above the threshold of EUR 15 000 during the previous fiscal year. It is not clear, however, on which basis these criteria were selected, whether this was a result of some sector risk assessment or an arbitrary designation. 12 of the 16 *Länder* issued relevant decrees in line with the model (the exceptions were Saxony, Saarland, Brandenburg and Berlin). Therefore, implementation of this requirement remains uneven across Germany.

Overall, this deficiency seems not to have been fully addressed.

R.16 (Deficiency 2 and 3): Discretionary exemption of most professions from safeguards based on firm size but not risk of ML or TF.

No risk assessments to justify safeguards exemptions or simplified measures.

Germany reported that the discretionary exemption of some professions from AML/CFT obligations represents the result of legislature's ML/ TF risk assessment with respect to their typical business activities. It is questionable, however, whether the legislative body is best-placed to perform ML/TF risk assessments, and whether such an assessment was conducted in a firm evidence-based framework. Given the analysis set out in the deficiency 1 above, it appears that these two deficiencies have not been addressed.

R.16 (Deficiency 4): In absence of safeguards, no training requirement.

The *GwGOptG* established a training requirement for all institutions and persons covered by the *GwG*, including DNFBPs. Pursuant to section 9 (2) no. 3 of the *GwG* they have to keep their employees informed of typologies, including information on current money laundering and terrorist financing techniques, methods and trends, and are obliged to manage and mitigate money laundering and terrorist financing risks by taking appropriate measures. This deficiency has been addressed.

R.16 (Deficiency 5): No requirement to screen to insure high standards when hiring.

Section 9 (2) no. 4 of the *GwG*, as amended by the *GwGOptG*, established a screening requirement for employees. DNFBPs always have to put in place adequate risk-sensitive measures to assess the reliability of their all employees. The background checks of employees must offer assurance that they will comply with the provisions of the *GwG* and other legislation relevant to money laundering, as well as the internal principles established in order to prevent money laundering and terrorist financing. This deficiency has been addressed.

R.16 (Deficiency 6): No audit function for DNFBPs.

Germany did not report any progress with regard to this deficiency.

R.16 (Deficiency 7): No specific requirement for casinos to have AML/CFT internal controls or to have an audit function.

Section 9 (2) no. 2 of the *GwG*, as amended by the *GwGOptG*, established a requirement for physical casinos to develop and update appropriate business- and customer-related safeguards and controls in order to prevent being abused for money laundering and terrorist financing. A similar requirement for on-line casinos is included in the new section 9a of the *GwG*.

Furthermore, section 9(2) no. 1 of the *GwG* requires both physical and on-line casinos to appoint a compliance officer. The compliance officer should be directly subordinate to the management and should act as contact person for the prosecution authorities, the FIU, and the competent authorities. A deputy compliance officer should be appointed, and the appointment and removal of such compliance officer should be reported to the competent authorities. The compliance officer should have unrestricted access to all information, data, records and systems that may be of relevance in the performance of his/ her functions. He or she should have adequate powers for performing these functions.

As far as the audit function for casinos is concerned, on-line casinos are obliged to have an internal audit function by virtue of the section 9a(2) of the *GwG*. As far as physical casinos are concerned, Germany did not report any progress. Therefore, this deficiency has not been fully addressed.

R.16 (Deficiency 8): No supervisory framework for real estate agents and dealers in precious metals and stones and, hence, no specific requirements for internal policies and controls and screening and audit.

Concerning the supervisory framework for real estate agents and dealers in precious metals and stones, please see deficiency 1 under R.24 below. The legislative basis for it has been established, however, there are concerns with regard to its effective implementation.

As mentioned above, both professions have to develop and update appropriate business and customer-related safeguards and controls as stipulated in section 9 (2) no. 2 of the *GwG*. Pursuant to section 9 (2) of the *GwG*, as amended by the *GwGOptG*, dealers in precious goods *must* appoint an AML/CFT compliance officer, whereas real estate agents *may* do so on a case by case decision. However, Germany did not report any information whether this had been done in practice.

As noted above under deficiency 5, section 9 (2) no. 4 of the *GwG*, as amended by the *GwGOptG*, established a screening requirement for employees of DNFPBs. However, requirements for an audit function were not implemented.

Overall, it appears that this deficiency has not been fully addressed.

R.16 (Deficiencies 9 and 10): Inadequate awareness of potential ML vulnerabilities contributing to underreporting.

Inadequate risk assessment procedures among professions, leading to inadequate monitoring and underreporting.

The issues of ML/TF vulnerabilities awareness and risk assessment have already been discussed under deficiencies 2 and 4 in the R.12 above. As noted previously, it is difficult to make any

meaningful conclusions concerning effectiveness in the framework of the desk-based review, though it appears that there is still room for improvement in this particular area.

R.16 (Deficiency 11): Broad carve-out for legal and professional privilege combined with strict professional secrecy requirements place significant impediments to STR reporting.

First of all, it should be noted that the section 11(3) of the *GwG* (which provides for a carve-out) now applies only to the professions in Section 2(7) and 2(8) and is no longer extended to registered legal advisers who are now specified in Section 2(7a) of the *GwG*. Furthermore, the phrasing of the professional secrecy provisions in the Section 11(3) has been redefined so as to constrain the range of the privilege. The reporting requirement continues to exist if the privileged persons know that the contracting party has used or is using their legal advice for the purpose of money laundering or terrorist financing. It is no longer required that the contracting party has used or is using their legal advice "consciously".

On the other hand, the issue of the auditors, chartered accountants, and tax advisors interpreting the concept of "*legal privilege*" in a way that goes beyond the discretion provided for in the FATF standards has not been addressed and therefore still poses a problem. Germany states that constitutional reasons prevent any stronger constraints from being imposed on the professional secrecy provisions.

Overall, it may be concluded that this deficiency has not been fully addressed.

RECOMMENDATION 16, OVERALL CONCLUSION

Germany has addressed a number of issues concerning technical compliance with the Recommendation and has undertaken certain steps in the effectiveness domain. It should be noted, however, that some important technical deficiencies have not been addressed so far, including the implementation of compliance management arrangements in most professions and audit functions in all DNFBPs. The issue of broad carve-outs for legal privilege has not been fully addressed. These issues along with the apparent limited awareness of risks lead to the conclusion that the compliance with R.16 has not yet reached a level equivalent to LC.

RECOMMENDATION 24 – RATING NC

R.24 (Deficiencies 1 and 5): Inadequate supervisory authority and capacity with respect to oversight of real estate agents and persons trading in precious metals and stones.

Insufficient resources and capacity for supervisors of real estate agents and dealers in precious metals and precious stones.

First of all, it should be noted that the new section 16 (3) of the *GwG* expands the authority of supervisory bodies (including those for real estate agents and persons trading in precious metals and stones) to request accounts, records and other documents and to perform on-site inspections at the supervised entities. In addition to that, Section 9(4) states that a supervisory authority *may* obligate real estate agents to appoint an AML/CFT compliance officer when it deems appropriate. As far as the dealers in precious metals and stones are concerned, according to the section 9(4) sentence 3 the supervisory authority *must* obligate such dealers to appoint a compliance officer.

Furthermore, Germany reported that the *Länder* authorities had increasingly been giving more relevance to the AML/CFT matters which had led to the significant increase in the total number of employees in full-time employment from 0,2 persons in 2009 to 48,05 persons in 2013. Also, the number of employee training sessions on AML/CFT issues organised by *Länder* authorities increased considerably since 2010. Relevant figures are provided below.

Table 5. **Number of employees in AML/CFT supervision in full-time employment in individual *Länder* { TC \f t \l 2 "Table 5. Capacity of Länder authorities" }**

	2009	2010	2011	2012	2013
Brandenburg					2.2
Baden-Württemberg		2	8	8	8
Bavaria				2	2
Berlin			2	2	2
Bremen				0.7	0.25
Hesse	0.2	1.8	1.6	3.85	4.1
Hamburg			2	2	2
Mecklenburg-Western Pomerania		0.2	2	1.6	1.7
Lower Saxony			3.35	5.17	6.5
North Rhine-Westphalia				n/a	n/a
Rhineland-Palatinate		0.45	1.08	8.87	9.6
Saxony-Anhalt				2	1.4
Schleswig-Holstein					2
Saarland				1.3	2.3
Saxony				1	2
Thuringia		1	2	2	2
Total	**0.2**	**5.45**	**22.03**	**40.49**	**48.05**

Table 6. **Number of staff training sessions for AML/CFT issues in individual Länder**

	2009	2010	2011	2012	2013
Brandenburg					
Baden-Württemberg		13	36	17	6
Bavaria					1
Berlin			3	3	2
Bremen					
Hesse				3	
Hamburg					
Mecklenburg-Western Pomerania					
Lower Saxony			7	25	16
North Rhine-Westphalia					
Rhineland-Palatinate			3	25	26
Saxony-Anhalt					1
Schleswig-Holstein			1	1	1
Saarland				1	4
Saxony					
Thuringia				2	1
Total	**0**	**13**	**50**	**77**	**58**

Though the statistics seem to indicate positive developments, it should be noted that the numbers of employees vary considerably from one *Land* to another, and, more importantly, do not seem to correspond to the levels of economic activity in each of them (for instance, it is difficult to imagine that the real estate market would be bigger in Saarland than in Bavaria). Moreover, the relatively low number or absence of training events in some important *Länder* (such as Bavaria, North Rhine-Westphalia, Hesse) raises concerns as to the real capacity of the authorities to exercise their supervisory functions in practice.

Nevertheless, it is worth mentioning that the relevant supervisory authorities have already started conducting on-site inspections. The statistics is provided below.

Table 7. **Number of on-site inspections**

	2011	2012	2013
Real estate agents	206	466	1691
Traders in high-value goods	63	3549	1309

If one considers the total number of on-site inspections and the total number of employees (all of whom, according to the German authorities, conduct on-site visits) in 2012, for instance, one will get the average of 100 on-site visits per year per an employee. Given the average of 260 working days in a calendar year an average employee would have the workload of an on-site visit every 2,5 working days. Given the non-uniform distribution of employees across the *Länder*, as discussed above, it is conceivable that in some of them the frequency might be even higher which, taken together with the concerns about the practical capacities, might still raise resource issues.

These two deficiencies relate to the effectiveness of AML/CFT regime, therefore it is challenging to make any firm conclusions. It should be noted, however, that, overall, there have been positive developments which mark noticeable progress since the mutual evaluation.

R.24 (Deficiency 2): Insufficient supervisory oversight of AML compliance by casino operators.

As far as this deficiency is concerned, the 2010 MER identified the following issues. First, at the time of the assessment, responsibility for AML/CFT compliance had not been definitively decided in three *Länder*[13]. And second, the supervisory attention focuses mostly on identification procedures, while policies and controls to monitor, detect, and report suspicious activities appear to be overlooked[14].

Concerning the first issue, Germany reported that now all 16 *Länder* have competent authorities which are equipped with an appropriate number of employees and the necessary legal instruments. It should be noted that two *Länder,* Saxony-Anhalt and Mecklenburg-Western Pomerania, closed the last casinos on their territory in May 2011 and the second half of 2013, respectively, though they still have staff who are responsible for this issue.

Concerning the second issue, Germany reiterated its arguments previously expressed in the MER, thus the Secretariat maintains its findings. Overall, the deficiency has only partly been addressed.

R.24 (Deficiency 3): No authority for Chambers of Lawyers, Chamber of Patent Attorneys, and Chambers of Tax Advisors to conduct routine compliance monitoring of members.

The new Section 16(3) of the *GwG*, as amended by the Law Implementing Directive 2009/65/EC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (*Gesetz zur Umsetzung der Richtlinie 2009/65/EG zur Koordinierung der Rechts- und Verwaltungsvorschriften betreffend bestimmte Organismen für*

13 See para. 974 of the 2010 Mutual Evaluation Report of Germany

14 See paras. 979 and 1002 of the 2010 Mutual Evaluation Report of Germany

gemeinsame Anlagen in Wertpapieren, OGAW-IV-UmsG), provides that the relevant Chambers have the authority to conduct compliance monitoring, which includes requesting information and conducting on-site inspections. At the same time, according to the Section 16 (4) the supervised entities may refuse to respond to the information requests either citing legal privilege, or a general provision of the Civil Process Code (*Zivilprozessordnung, ZPO*) that protects against self-incrimination. Theoretically, this could undermine the effectiveness of the above mentioned requirements. Therefore, this deficiency does not appear to be fully addressed.

R.24 (Deficiency 4): Compliance monitoring and enforcement generally ineffective, including: Lack of awareness of ML risks in casinos; Risk assessments have not been developed by the competent authorities responsible for monitoring and ensuring compliance with AML/CFT requirements.

With regard to this deficiency, Germany reported that many operators regularly develop risk assessments in order to update their internal safeguards and train their staff. It is not clear, however, whether the competent authorities conducted their own risk assessments and shared them with the operators.

Also, Germany stated that the activities of the Casino Supervision Authority (*Spielbankenaufsicht*), such as on-site visits, had contributed to awareness-raising among casino operators. 9 *Länder* provide, at least once a year, up-to-date guidance for interpretation and application regarding due diligence requirements and internal controls and safeguards (pursuant to section 16 (5) of the *GwG*). These guidance notes, which take into consideration new money laundering trends and vulnerabilities detected in the casino sector, set out requirements for IT systems to detect unusual or criminal models of gambling or for the analysis of payments and transactions. However, it is not clear whether any training was given by the competent authorities for the casino operators.

As noted previously under R.12 and R.16, it is difficult to make any meaningful conclusions concerning effectiveness in the framework of the desk-based review, though it appears that there is still room for improvement in this particular area.

RECOMMENDATION 24, OVERALL CONCLUSION

Most of the deficiencies identified with regard to this Recommendation are related in one way or another to effectiveness, thus it is practically impossible to come to any firm conclusions about progress in that area. On the technical compliance side, however, the progress has been more convincing, with almost all technical deficiencies having been addressed. Also, in the view of the efforts made by Germany to address the supervision resources and capacity issues, it is possible to arrive at a conclusion that a level of compliance equivalent to LC has been achieved.

RECOMMENDATION 33 – RATING NC

R.33 (Deficiencies 1 and 2): No mechanisms in place to ensure in all cases access in a timely fashion to information on the control and beneficial ownership of legal entities other than publicly listed stock corporations.

Complete lack of transparency over stock corporations that issue their shares in bearer form, and over private foundations.

Germany reported that a proposal for an amendment of the German Stock Corporation Law (*Aktiengesetz, AktG*) was adopted by the German parliament in June 2013. According to that proposal, bearer shares may only be issued if (1) the shares of the stock corporation are publicly listed or (2) if the shares have been immobilised. In the latter case, the law will require them to be held with a regulated financial institution or professional intermediary. If the stock corporation does not comply with these rules, the bearer shares will be treated as registered shares. Moreover, the rules applicable to registered shares will also become stricter: According to the proposal, stock corporations issuing registered shares will have to keep a shareholder register irrespective of whether the shares are securitised or not.

Secondly, Germany has published a National Action Plan following the G8-summit in Lough Erne in June 2013. By that Plan, Germany has committed itself to pass legislation improving the access to beneficial ownership information in the near future. More specifically, according to that legislation, shareholders with a certain controlling influence will be required to inform their company about whether they hold their respective shares on their own or on someone else's behalf. The companies will have to hold this information.

Also, Germany actively supports a similar approach on EU level (4th EU AML Directive) to ensure that corporate and other legal entities incorporated within their territory obtain and hold adequate, accurate and current information on their beneficial ownership. Combined with Germany´s automated account data retrieval system, such requirements for companies are intended to broaden the basis and enhance accessibility to beneficial ownership information for obliged entities and relevant authorities.

However, as those initiatives have not yet been implemented in national legislation, both deficiencies remain unaddressed.

R.33 (Deficiency 3): No risk assessment undertaken by the authorities to ascertain the risk of ML/TF in the case of joint stock companies which have issued bearer shares.

Germany reported that its G8 Action Plan envisages conducting a national risk assessment of which risk of misuse of bearer shares issued by joint stock companies will be part. However, no measures have been taken in practice yet. This deficiency remains unaddressed.

RECOMMENDATION 33, OVERALL CONCLUSION

Since the proposed amendments have not yet been adopted, the compliance with R.33 has not yet reached a level equivalent to LC.

RECOMMENDATION 34 – RATING NC

R.34 (Deficiency 1): Insufficient measures in place to ensure transparency over Treuhand.

Besides a general obligation in Section 4 (6) of the *GwG* for contracting parties to disclose the fact that a business relationship or a transaction is being established or conducted on behalf of a

beneficial owner (which might indirectly affect the duties of *Treuhänder*), no measures have been undertaken to ensure transparency over *Treuhand* per se. It should be noted, however, that no sanctions are foreseen for breach of this obligation. This deficiency has not been addressed.

RECOMMENDATION 34, OVERALL CONCLUSION

From the analysis above it may be concluded that the compliance with R.34 has not yet reached a level equivalent to LC.