



DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS
DIRECTORATE OF MONITORING



Strasbourg, 27 May 2011

Confidential
Greco RC-III (2011) 8E

Third Evaluation Round

Compliance Report on Denmark

"Incriminations (ETS 173 and 191, GPC 2)"

"Transparency of Party Funding"

Adopted by GRECO
at its 51st Plenary Meeting
(Strasbourg, 23-27 May 2011)

I. INTRODUCTION

1. The present Compliance Report assesses the measures taken by the authorities of Denmark to implement the 14 recommendations issued in the Third Round Evaluation Report on Denmark (see paragraph 2), covering two distinct themes, namely:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
2. The Third Round Evaluation Report was adopted at GRECO's 43rd Plenary Meeting (2 July 2009) and made public on 25 February 2010, following authorisation by Denmark (Greco Eval III Rep (2008) 9E Theme I / Theme II).
3. As required by GRECO's Rules of Procedure, the Danish authorities submitted a Situation Report on measures taken to implement the recommendations. This report was received on 31 January 2011, it was amended on 19 and 23 May 2011 and served as the basis for the Compliance Report.
4. GRECO selected Albania and the Netherlands to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Ms Helena PAPA, Inspector, Department of Internal Administrative Control and Anti-Corruption, Council of Ministers (Albania) and Ms Nicole VISSCHER, Senior Policy Advisor, Ministry of Justice (Netherlands). They were assisted by GRECO's Secretariat in drawing up the Compliance Report.
5. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendation (partially or not implemented) will be assessed, within a given deadline, on the basis of a further situation report to be submitted by the authorities after the adoption of the present compliance report (cf. paragraph 34).

II. ANALYSIS

Theme I: Incriminations

6. It is recalled that GRECO in its evaluation report addressed 5 recommendations to Denmark in respect of Theme I. Compliance with these recommendations is dealt with below.

Recommendation i.

7. *GRECO recommended to put beyond doubt that all forms of "undue advantages" are covered by the relevant bribery offences concerning foreign public officials and officials of international organisations/assemblies/courts.*

8. GRECO recalls from the Evaluation report (paragraph 67) that Danish legislation was clear in the sense that any form of undue advantage was covered by the provisions of bribery of domestic public officials. However, the situation appeared less clear in respect of different forms of bribery of foreign public officials and possibly *vis-à-vis* officials of international organisations/assemblies/courts. In this context, reference was made to the preparatory work to the law where it was stated that even though the elements are the same for bribery of foreign public officials as in respect of bribery of Danish public officials, *"it cannot be precluded that in some countries such very special conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark. This might even be imagined although the gratuities may have been granted to make the foreign public official act in breach of his duties. Whether such occurrences are non-criminal (not "unlawful") must depend on a concrete assessment in each case, including an assessment of the purpose of granting the gratuity"*. This had been a concern to the OECD Working Group on Bribery in International Business Transactions in its Phase 1 and 2 reports on Denmark. In response to the OECD concern, Denmark had issued, in February 2007, a booklet indicating that facilitation payments in the foreign context are undue and thus punishable. Nevertheless, it was concluded in GRECO's Evaluation report that the law in a strict sense did not exclude small facilitation payments as the custom of the foreign country needs to be taken into account in such situations.
9. The authorities of Denmark refer to the facts described in the Evaluation report (paragraph 67 and summarised above) and state that Denmark already at the time of the adoption of the Evaluation report strongly raised objections to the current recommendation. In addition, the authorities again make reference to the 2007 booklet, according to which traditions of small facilitation payments that occur in certain countries, ie the payment of small sums of money or small gifts to public employees performing their tasks, in relation to, for example, the processing of a passport or the issuing of a permit. In such cases, small facilitation payments may not be criminalised under the Danish Criminal Code even though, when considered in isolation, the act would be criminal in Denmark. The authorities furthermore submit that it is also stated in the booklet that paying sums of money in connection with international business relations for the purpose of making public employees breach their duties will always be undue and thus constitute a criminal offence. Finally, the authorities refer to the Danish reservation in respect of Article 17, Section 1b of the Criminal Law Convention on Corruption (ETS 173), only to prosecute foreign bribery offences acts – including payment of small facilitation payments – where such an offence is also an offence according to the foreign law of the state where it was committed ("dual criminality"). The authorities therefore see no substantive need to clarifying further that all forms of "undue advantages" are covered by the relevant bribery offences concerning foreign public officials and officials of international organisations. In conclusion, the authorities state that the Danish approach – not to sanction criminally cases involving certain types of small facilitation payments abroad – does not run counter to what is the situation in of other member states and urges GRECO to withdraw the recommendation.
10. GRECO takes note of the information provided. Nothing substantial that was not known at the time of the adoption of the Evaluation report has been submitted and no concrete measures have been taken. GRECO therefore concludes that the described discrepancy between domestic and foreign bribery may still give rise to ambiguities as to what is to be considered lawful or not (due or undue advantage) in respect of bribery in the foreign/international context. The "double standards" described between domestic and foreign bribery have no justification in the Criminal Law Convention and, furthermore, provide an unfortunate signal to the wider public. Denmark's reservation in respect of Article 17 of ETS 173 for the sake of "dual criminality" is a separate

issue, concerning jurisdiction, which is dealt with below and which should not be blurred with the elements of the particular offences.

11. GRECO concludes that recommendation i has not been implemented.

Recommendation ii.

12. *GRECO recommended (i) to increase the maximum criminal sanctions in respect of active and passive bribery in the private sector (section 299.2 of the Criminal Code) as well as active and passive bribery of arbitrators (section 304a); (ii) to consider increasing the maximum criminal sanction in respect of active bribery offences in the public sector (domestic, foreign and international) covered by section 122 of the Criminal Code.*
13. The authorities of Denmark report that the Ministry of Justice has considered this recommendation together with the Director of Public Prosecutions and the Public Prosecutor of Serious Economic Crime. The authorities involved have carefully contemplated how to increase the penalties in respect of all the offences covered by the recommendation without creating imbalances in comparison with the existing penalties of other pertinent offences and thus breaking with the legal tradition in Denmark. As a result of the considerations, it has been concluded within the Ministry of Justice that there are grounds for addressing the recommendation in its entirety. Thus, it is foreseen that the maximum penalty for violation of Section 122 of the Criminal Code (CC) (active bribery offences in the public sector) is to be increased to imprisonment for up to 6 years (compared to 3 years in the current law) and that the maximum penalty for violation of Section 299.2 CC and 304a CC (active and passive bribery in the private sector and of arbitrators) is to be increased to imprisonment for up to 4 years (compared to 1½ years currently). To this end, the Ministry of Justice will present a bill with the described amendments to Parliament possibly late 2011 or early 2012.
14. GRECO welcomes that the Danish authorities have considered the recommendation and that increased penalties appear to be underway. However, the foreseen legislative amendments have not yet been drafted. Therefore, while the first part of the recommendation, which calls for legislation, has not been implemented, the second part of the recommendation, which only calls for consideration, has been implemented.
15. GRECO concludes that recommendation ii has been partly implemented.

Recommendation iii.

16. *GRECO recommended to consider criminalising trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation relating to this Article of the Convention.*
17. The authorities of Denmark submit that this recommendation has been considered by the Ministry of Justice in collaboration with the Director of Public Prosecutions and the Public Prosecutor of Serious Economic Crime on the basis of a memorandum including arguments whether to criminalise trading in influence as a separate offence as well as an analyses of relevant case law; meetings took place on 28 September 2009 and 13 September 2010. In addition, on 19 January 2011 representatives of the Ministry of Justice and the Danish delegation to GRECO met to discuss the recommendation. However, due to the complex nature of the offence "trading in influence", as well as to the fact that this offence is already covered to a large extent through the

bribery provisions in conjunction with the general provisions on complicity under the Criminal Code, criminalising “trading in influence” as a separate offence is not desirable in Denmark and, accordingly, there is no intention to withdraw or not review the reservation made in this respect to Article 12 of the Criminal Law Convention.

18. GRECO regrets that Denmark maintains its previous position in respect of the offence “trading in influence”. It notes that this position is the result of formal considerations by the authorities. Consequently, this recommendation has been considered by the authorities. Furthermore, GRECO wishes to stress that there appear to be moves in other countries, with similar legal traditions as Denmark, to reconsider the possibility of establishing trading in influence as a separate offence and hopes that Denmark might consider doing the same in the future.
19. GRECO concludes that recommendation iii has been implemented satisfactorily.

Recommendation iv.

20. *GRECO recommended to consider abolishing the requirement of dual criminality in respect of bribery offences when committed abroad and thus withdrawing or not renewing the reservation relating to Article 17 of the Criminal Law Convention on Corruption (ETS 173).*
21. The authorities of Denmark report that this recommendation has also been considered by the Ministry of Justice in cooperation with the Director of Public Prosecutions and the Public Prosecutor of Serious Economic Crime; meetings took place on 28 September 2009 and 13 September 2010. In addition, on 19 January 2011 representatives of the Ministry of Justice and the Danish delegation to GRECO met to discuss the recommendation. However; it has been concluded not to refrain from the view of an expert committee which in 2008 considered the issue of “dual criminality” within the framework of a general revision of the Criminal Code. As a consequence, Denmark will not abolish the requirement of dual criminality in respect of bribery offences when committed abroad and thus not to withdraw or not renew the reservation relating to Article 17 of the Criminal Law Convention on Corruption (ETS 173).
22. GRECO takes note of the information provided; it regrets that Denmark maintains its requirement concerning dual criminality and that it has not in this respect strengthened its capacity to prosecute cases of corruption committed in countries where the criminalisation of bribery is less developed than in Denmark. GRECO also notes that the current reservation has a much broader impact than the situation discussed under recommendation i (above). Following the same rationale as in the previous recommendation, GRECO takes the view that also this recommendation has been duly considered by the authorities.
23. GRECO concludes that recommendation iv has been implemented satisfactorily.

Recommendation v.

24. *GRECO recommended to give high priority to the taking of such steps as would allow to introduce legislation in conformity with the Criminal Law Convention on Corruption (ETS 173), and the Additional Protocol thereto (ETS 191), in Greenland and the Faroe Islands and thus withdrawing or not renewing the reservations to these instruments in respect of the territories concerned.*
25. The authorities of Denmark report that the new Greenlandic Criminal Code (GCC) (Act No. 306 of 30 April 2008) came into force on 1 January 2010. The GCC criminalises bribery in the same way

as the corresponding provisions in the Danish Criminal Code. It is to be noted, however, that the GCC, following the legal tradition in Greenland, does not provide for specific sanctions in the particular provisions of the individual offences. Instead, the GCC contains a number of diverse sanctions such as cautions, fines, suspended imprisonment, supervision, community service and imprisonment, which might be applied in respect of any offence. According to chapter 24 and Section 147 GCC the maximum penalty is imprisonment for up to 10 years. The authorities furthermore report that by a Royal Decree (Royal Decree No. 1139 of 4 December 2009) a large number of changes in the Criminal Code of the Faroe Islands (FCC) entered into force on 1 January 2010. The provisions of bribery of the FCC are also equivalent to the corresponding provisions in the Danish CC. Therefore, the authorities will consider lifting the territorial reservation to the Criminal Law Convention on Corruption in respect of Greenland and the Faroe Islands.

26. GRECO welcomes the positive developments reported, which are in line with what was required by this recommendation. It is to be noted, however, that GRECO has not assessed the compliance of the new provisions in Greenland and the Faroe Islands with the provisions of the Criminal Law Convention and its Additional Protocol.
27. GRECO concludes that recommendation v has been dealt with in a satisfactory manner.

Theme II: Transparency of Party Funding

28. It is recalled that GRECO in its evaluation report addressed 9 recommendations to Denmark in respect of Theme II. Compliance with these recommendations is dealt with below.

Recommendation i: *GRECO recommended. to introduce a ban on donations from donors whose identity is not known to the political party/election candidate;*

Recommendation ii: *GRECO recommended that the accounting/reporting obligation in respect of donations exceeding the threshold stipulated in the Accounts of Political Parties Act, be complemented with an obligation upon political parties to report the total value of donations provided by each donator, in addition to the identity of the donors;*

Recommendation iii: *GRECO recommended to provide further guidance on the reporting and valuation of in-kind contributions to political parties;*

Recommendation iv: *GRECO recommended to consider introducing more frequent reporting on income and expenditure relating to election campaigns and to make sure that relevant information is disclosed in a way that provides for access by the public;*

Recommendation v: *GRECO recommended to consider expanding political parties' accounting/reporting obligations to include income from the parties' own activity and property at central, and to the extent possible, regional and local levels and to seek ways to increase the transparency of contributions by "third parties" (e.g. related entities and interest groups etc) to political parties;*

Recommendation vi: *GRECO recommended to ensure through appropriate regulations that, to the extent feasible, donations to lists of candidates and individual candidates above a certain threshold (including the identity of the donor and the total of donations by the same donor) are to be disclosed;*

Recommendation vii: *GRECO recommended to ensure independent and consistent auditing in respect of all political parties registered for national elections, elections to the European Parliament and as appropriate those involved at regional and local level; and to establish clear rules / guidelines ensuring the necessary independence of auditors who are to audit the accounts of political parties;*

Recommendation viii: *GRECO recommended to ensure independent and substantial monitoring in respect of the funding of political parties and electoral campaigns, in line with Article 14 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns; and*

Recommendation ix: *GRECO recommended that yet-to-be-established rules on financing of political parties and electoral campaigns be accompanied by flexible sanctions, for example of an administrative nature, which are effective, proportionate and dissuasive.*

29. The Danish authorities report that the issues raised in recommendations i, ii, iv and vi have been subject to a debate in Parliament on 20 May 2010 following a motion by members of an opposition party. However, the debate did not trigger any further measures and the motion, which was subsequently referred to a parliamentary committee lapsed with the end of the 2009-2010 legislative session. In respect of recommendation i (ban on anonymous donations) the authorities also refer to Section 6A(1) of the Accounts of Political Parties Act, according to which it is an offence to report a donation exceeding the stipulated threshold of DKK 20.000 (EUR 2,700) as anonymous in case the party is aware of the identity of the donor. Concerning all recommendations under Theme II, the Danish authorities submit that the authorities see no need for any measures to be taken in order to amend the current legislative framework of political financing.
30. GRECO recalls its conclusions in the Evaluation report (paragraphs 68 and 69) that the Danish system of transparency of political financing has improved in recent years and that, currently, there are rules in place in Denmark to provide for some transparency of political party funding at the national level contained in the Accounts of Political Parties Act and in the Public Funding Act; *inter alia*, an obligation upon political parties to report donations over a certain value and that Parliament makes party accounts available to public scrutiny. That said, the Evaluation report calls for further improvements of the current system in respect of transparency as well as regarding the efficiency of the supervisory mechanism. GRECO regrets that the information provided does not contain any concrete measures in this respect and that there appear to be no plans to remedy the shortcomings identified in the Evaluation report, Theme II.
31. GRECO concludes that recommendations i – ix have not been implemented.

III. CONCLUSIONS

32. **In view of the above, GRECO concludes that Denmark has implemented satisfactorily or dealt with in a satisfactory manner three of the fourteen recommendations contained in the Third Round Evaluation Report.** With respect to Theme I – Incriminations, recommendations iii, iv and v have been implemented satisfactorily or dealt with in a satisfactory manner, recommendation ii has been partly implemented and recommendation i has not been implemented. With respect to Theme II – Transparency of Party Funding, none of the recommendations (i – ix) has been implemented.

33. GRECO notes that some important progress appears to be underway in respect of Theme I; the strengthening of sanctions for a number of bribery offences under the Criminal Code and the possible withdrawal or non-renewal of the reservation in respect of the territories of Greenland and the Faroe Islands as a result of new criminal legislation regarding these territories. However, the lack of any concrete measures in respect of the recommendations under Theme II is disappointing; nothing substantial at all has been achieved in respect of the nine recommendations which all aim at further improving the Danish regulations in this area, in line with the requirements of the pertinent provisions of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns concerned. GRECO wishes to stress that all the recommendations addressed to Denmark do not necessarily require legislative measures.
34. In view of the above and despite the progress noted in respect of Theme I, GRECO concludes that the total non compliance with the recommendations under Theme II makes the overall response to the recommendations “globally unsatisfactory” in the meaning of Rule 31, paragraph 8.3 of the Rules of Procedure. GRECO therefore decides to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the mutual evaluation report, and asks the Head of the Danish delegation to provide a report on the progress in implementing the pending recommendations – at the latest – by 30 November 2011, pursuant to paragraph 2(i) of that Rule.
35. GRECO invites the authorities to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.