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Groupe d'États contre la corruption

COUNCIL OF EUROPE



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Third Interim Report

Third Evaluation Round

Third Interim **Compliance Report** **on Denmark**

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

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"Transparency of Party Funding"

Adopted by GRECO
at its 65th Plenary Meeting
(Strasbourg, 6-10 October 2014)

I. INTRODUCTION

1. The Third Round Evaluation Report on Denmark 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).
2. As required by GRECO's Rules of Procedure, the authorities submitted a Situation Report on measures taken to implement the fourteen recommendations contained in the Evaluation Report. GRECO selected Albania and the Netherlands to appoint Rapporteurs for the compliance procedure.
3. In the Compliance Report, which was adopted by GRECO at its 51st Plenary Meeting (Strasbourg, 23-27 May 2011), it was concluded that out of the five recommendations under Theme I - Incriminations three (iii-v) had been implemented satisfactorily or dealt with in a satisfactory manner, recommendation ii had been partly implemented and recommendation i had not been implemented. In respect of Theme II – Transparency of Party Funding, none of the nine recommendations had been implemented. Despite discernible progress achieved under Theme I, GRECO concluded that the non-implementation of the recommendations under Theme II made the overall level of compliance “globally unsatisfactory” in the meaning of Rule 31, paragraph 8.3 of the Rules of Procedure. It therefore decided to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the Evaluation Report and asked the Head of Delegation of Denmark to provide a situation report on the implementation of pending recommendations by 30 November 2011, pursuant to paragraph 2(i) of that Rule.
4. In the Interim Compliance Report, which was adopted by GRECO at its 55th Plenary Meeting (Strasbourg, 14-16 May 2012), the level of compliance was assessed again as “globally unsatisfactory” since the rating of pending recommendations had not been upgraded compared to the Compliance Report. Therefore GRECO, in accordance with Rule 32, paragraph 2 subparagraph (ii), instructed its President to transmit a letter to the Head of Delegation of Denmark, drawing his attention to the non-compliance with the relevant recommendations and the need to take determined steps with a view to achieving decisive progress as soon as possible. GRECO had also requested the Head of Delegation of Denmark to provide a report, regarding the action taken to implement the pending recommendations (i.e. recommendations i and ii under Theme I and recommendations i-ix under Theme II) by 28 February 2013.
5. In the Second Interim Compliance Report, adopted by GRECO at its 61st Plenary Meeting (Strasbourg, 14-18 October 2013), it was concluded that recommendation ii under Theme I had been dealt with in a satisfactory manner; yet recommendation i under Theme I and the nine recommendations under Theme II had remained not implemented. The rating of Denmark's performance as “globally unsatisfactory” had therefore been maintained and, in accordance with Rule 32, paragraph 2 subparagraph (ii) c), the Secretary General of the Council of Europe, invited by GRECO, had sent a letter to the Minister of Foreign Affairs of Denmark, drawing his attention to the non-compliance by Denmark with relevant recommendations.¹ Furthermore, GRECO had requested the Head of the Danish Delegation to provide a report regarding action taken to implement the pending recommendations by 31 July 2014. This report was submitted on 17 July 2014 and served as the basis for this Third Interim Compliance Report.
6. This Third Interim Compliance Report was drawn up by Ms Edlira NASI, Inspector, Unit on Internal Administrative Control and Anti-corruption, Prime Minister's Office (Albania) and Mr Don

¹ Such a letter had been signed by the Secretary General on 27 November 2013.

O'FLOINN, Policy Advisor, Ministry of Security and Justice, Law Enforcement Department (Netherlands), with assistance from the GRECO Secretariat. It evaluates further steps made by the authorities to comply with the pending recommendations and underscores the progress achieved since the adoption of the Second Interim Compliance Report.

II. ANALYSIS

Theme I: Incriminations

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. This recommendation had been assessed as not implemented in the Second Interim Compliance Report. The authorities had explained the lack of action by making reference to similar approaches being pursued by other member States, which had not received this recommendation from GRECO.
9. The authorities of Denmark now stress that domestic and foreign bribery alike are criminalised by virtue of Section 122 of the Criminal Code (CC), which also applies to domestic and foreign small facilitation payments. In accordance with the general principle of "material atypicality" of the Danish law, the *travaux préparatoires* of the Criminal Code suggest that it cannot be excluded that certain token gratuities will fall outside the scope of Section 122 CC, including those causing a foreign public official to act contrary to his/her duties. In such instances, in order to ascertain whether or not the act is "undue", an assessment is to be made *inter alia* of conditions prevailing in the country and the purpose of the gift/advantage.² Such situations, in the opinion of the authorities, have the character of defence of necessity or attempt to avoid the consequences of breaches of fundamental rights. The *travaux préparatoires* however only provide interpretative aid, (they are not statutory provisions). The authorities furthermore recall that amendments introduced into the Criminal Code in 2000 had ensured its compliance with the Criminal Law Convention on Corruption, in light of which Section 122 CC must be interpreted.
10. Furthermore, on 4 February 2014, the Director of Public Prosecution had issued guidelines to all police districts and state prosecutors on handling criminal cases concerning bribery. The Guidelines are binding and mandatory for execution when investigating and prosecuting foreign bribery. In the aftermath of this publication, the Ministry of Justice now intends to amend or withdraw its booklet "Avoid Corruption"³. There is also an intention to co-ordinate guidance provided by various authorities regarding the rules on bribery of foreign public officials with the aim of addressing the concern that conflicting guidance had been given on this matter.
11. GRECO takes note of the interpretation of Section 122 CC, which states the original position held by the authorities and subject to criticism in the Evaluation Report. As regards the Guidelines by

² The only concrete example mentioned therein concerns the payment of a sum of money to a prison officer to get access to visit an incarcerated family member in a country where it is necessary to pay money "under the table" to visit inmates and possibly bring along food, blankets, medicine or the like to the inmate.

³ Reference to this booklet is made in paragraph 67 of the Evaluation Report. The booklet was produced in February 2007, in response to the OECD's concerns. It indicates that facilitation payments in a foreign context are always undue and thus punishable.

the Director of Public Prosecution, these were prepared in order to respond to an OECD report and specific recommendations adopted in respect of Denmark in March 2013, their intention being to further orient the implementation and enforcement of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. The Guidelines – the text of which was provided to GRECO – thoroughly describe the criminal content of the active (bribery) offence with regard to small facilitation payments; however, while recalling the main rule under Section 122 CC – that small facilitation payments will be “undue” and thus constitute criminal bribery – reference is made again to the exemptions outlined in the *travaux préparatoires*, the only novel element there being the explicit exclusion from such exemptions of payments in the context of international business transactions made with a view to inducing a foreign public official to breach his/her duties, which under all circumstances are to be qualified as unlawful and punishable under Section 122 CC⁴. More generally, the Guidelines state that Section 122 CC must be interpreted in light of Denmark’s obligations under the OECD Convention and make no reference to the Criminal Law Convention, which has a much broader scope. In view of the foregoing, GRECO cannot but underscore yet again that not all forms of “undue advantages” are covered by the relevant bribery offences concerning foreign public officials. Moreover, two contradictory sets of guidelines have now been adopted and co-exist, which is confusing, particularly in the continued absence of any court cases. Furthermore, the situation concerning the different forms of bribery of officials of international organisations/assemblies/courts has not been clarified. It is concluded that the recommendation remains not implemented and further guidelines/court cases are needed in order to establish compliance with the Criminal Law Convention on Corruption.

12. GRECO concludes that recommendation i remains not implemented.

Theme II: Transparency of Party Funding

13. It is recalled that GRECO in the Evaluation Report had addressed nine recommendations to Denmark in respect of Theme II and that all of them had been considered not implemented in the Second Interim Compliance Report.
14. GRECO recommended:
- *to introduce a ban on donations from donors whose identity is not known to the political party/election candidate (recommendation i);*
 - *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 ii);*
 - *to provide further guidance on the reporting and valuation of in-kind contributions to political parties (recommendation iii);*
 - *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 iv);*

⁴ Such an approach is in contradiction with the position previously expressed by the Ministry of Justice in its booklet “Avoid Corruption” – see footnote No. 2.

- 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 v);

- 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 vi);

- 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 vii);

- 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 (recommendation viii); and

- 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 (recommendation ix).

15. It is recalled that, in the beginning of 2013, a review of the national rules on party funding had reportedly been initiated by the Speaker of Parliament. Since this work had only been incipient and no information on its potential scope was available, GRECO had concluded in the Second Interim Compliance Report that all the pending recommendations had remained not implemented.
16. The authorities of Denmark now report on the appointment by Government in March 2014 of a Committee of experts on the transparency of financial contributions to the Danish political parties. The Committee will review national rules on party funding, as planned by the Speaker of Parliament above, and draw up models for a possible future regulation of public and private financing of the country's political parties. As part of its work, the Committee is expected to give due consideration to GRECO's recommendations. The Committee's work is to be completed by October 2014.
17. GRECO welcomes the setting up of a Committee of experts as the first concrete step towards examining and – potentially – implementing the recommendations emanating from the Evaluation Report adopted in 2009. Up until now, however, no further details have been provided on the Committee's composition, remit, the progress achieved so far nor the likely legislative process in parliament. In view of the foregoing, it is concluded that the pending recommendations remain not implemented. GRECO seizes the opportunity to call upon the Committee and all other relevant stakeholders in this process to contribute in the most active fashion to finding prompt and constructive solutions to the problems identified in the Evaluation Report and to carry out the necessary reforms.

III. CONCLUSIONS

18. **In light of the above, GRECO concludes that only very marginal progress has been achieved by Denmark as regards the implementation of the ten recommendations found not to be implemented in the Second Interim Compliance Report (out of the fourteen included in the Third Round Evaluation Report).**
19. With respect to Theme I – Incriminations, recommendation i remains not implemented as are all nine recommendations under Theme II – Transparency of Party Funding.
20. GRECO remains concerned by the lack of decisive steps that would ensure beyond doubt that small facilitation payments offered to foreign public officials and officials of international organisations/assemblies/courts (except when these are made in the context of international business transactions) are covered by the relevant bribery offences of the Criminal Code.
21. With regard to transparency of political financing, the establishment in March 2014 of a Committee of experts tasked to review the national party funding rules and draw up models for a possible future regulation in this area is a welcome development. Nonetheless, GRECO remains concerned by the lack of more detailed information on the Committee's deliberations up until now as well as its remit, which at first sight appears to be limited to revising the rules on funding of political parties but not those on the financing of election campaigns. While lending its full support to the on-going reform process, GRECO calls for these to be accelerated and for all the lacunae, pinpointed by the Evaluation Report, to be addressed.
22. GRECO concludes that the current level of compliance with the recommendations remains "globally unsatisfactory" (within the meaning of Rule 31, paragraph 8.3 of the Rules of Procedure) and that tangible progress is still to be achieved.
23. Pursuant to Rule 32, paragraph 2 subparagraph (i) of the Rules of Procedure, GRECO requests the Head of Delegation of Denmark to provide a report regarding the action taken to implement the pending recommendations (i.e. recommendation i under Theme I and recommendations i-ix under Theme II) by 31 July 2015.
24. Having considered, in accordance with Rule 32, paragraph 2(iii), requesting the authorities of Denmark to receive a high-level mission in order to discuss on the spot with all stakeholders concerned the ways of expediting the legislative and policy changes highlighted by this Report, GRECO decided to postpone that decision until the examination of the progress report mentioned in paragraph 23 above.
25. GRECO invites the authorities of Denmark to authorise, as soon as possible, the publication of the present report, to translate it into the national language and to make this translation public.