



Groupe d'Etats contre la corruption
Group of States against corruption

DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS
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Third Evaluation Round

Compliance Report on Poland

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

"Transparency of Party Funding"

Adopted by GRECO
at its 49th Plenary Meeting
(Strasbourg, 29 November – 3 December 2010)

I. INTRODUCTION

1. The Compliance Report assesses the measures taken by the authorities of Poland to implement the 13 recommendations issued in the Third Round Evaluation Report on Poland (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 40th Plenary Meeting (1-5 December 2008) and made public on 17 February 2009, following authorisation by Poland (Greco Eval III Rep (2008) 2E, [Theme I](#) and [Theme II](#)).
3. As required by GRECO's Rules of Procedure, the Polish authorities submitted a Situation Report on measures taken to implement the recommendations. This report was received on 21 September 2010 and served as a basis for the Compliance Report.
4. GRECO selected Malta and Azerbaijan to appoint rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Leonard CARUANA on behalf of Malta, and Mr Inam KARIMOV on behalf of Azerbaijan. 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 on the basis of a further Situation Report to be submitted by the authorities 18 months after the adoption of the present Compliance Report.

II. ANALYSIS

Theme I: Incriminations

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

Recommendation i.

7. *GRECO recommended to ensure that foreign arbitrators are fully covered by the bribery provisions of the Penal Code and to sign and ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible.*
8. The authorities of Poland report that after a careful study of the matter, the Ministry of Justice came to the conclusion that all foreign arbitrators, even those who act on the basis of an

agreement between the parties, are covered by Articles 228 (6) and 229 (5) of the Penal Code, as “persons performing public functions in a foreign State or an international organisation” under Article 115(19) of the Penal Code. Persons performing public functions are namely defined *inter alia* as persons “whose rights and obligations within the scope of public activity are defined or recognised by a law”.

9. The authorities furthermore declare that, as a consequence, they see no further obstacle to the signature and ratification of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), to which they intend to proceed in the near future.
10. GRECO welcomes the intention of the Polish authorities to sign and ratify the Additional Protocol to the Criminal Law Convention. However, no concrete steps have been taken yet to give effect to this intention. Moreover, the explanations given regarding the full coverage of foreign arbitrators by the bribery provisions of the Penal Code do not clarify the issue beyond doubt, especially since the relevant articles of the Penal Code have not been amended since the Evaluation Report and no court decisions have been provided to support the position of the Polish authorities.
11. GRECO concludes that recommendation i has not been implemented.

Recommendation ii.

12. *GRECO recommended (i) to finalise the legislative process aimed at amending the Penal Code provisions on bribery in the private sector; and more particularly (ii) to ensure that those provisions are amended in such a way as to cover the full range of persons who direct or work for – in any capacity – private sector entities, as well as all instances implying a breach of duty by the bribed person, and – in the case of passive bribery – the request of an advantage.*
13. The authorities of Poland report that the law of 24 November 2008 amending the Penal Code, which entered into force on 18 December 2008 amended Article 296a¹ of the Penal Code, which covers bribery in the private sector, in order to comply with the recommendation.
14. GRECO notes with satisfaction that the amended version of Article 296a, Penal Code, addresses the concerns expressed in the recommendation.
15. GRECO concludes that recommendation ii has been implemented satisfactorily.

Recommendation iii.

16. *GRECO recommended to review the provision on active trading in influence in order to ensure that all instances of an (asserted or confirmed) improper influence are covered, in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173).*
17. The Polish authorities state that, in the light of Polish law, the revision of Article 230a of the Penal Code requested by the recommendation is not justified. According to them, the term “*improper*”

¹ Article 296a, Penal Code

(1) Whoever, having a leading position within an entity pursuing economic activity or performing duties within the employment, under a freelance agreement or a specific task contract demands or accepts a material or personal benefit or a promise thereof in exchange for abuse of competences or abandonment of duties, which can cause damage to its property, or for an action being an unfair competition act, or an inadmissible preferential act for the benefit of a purchaser or receiver of goods, services or performance, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

influence used in Article 12 of the Criminal Law Convention is ambiguous and conducive to legal uncertainty, as it would entail an obligation for the prosecution authorities to decide in each case whether the influence was improper or not. The Polish authorities take the view that the term “*unlawful*” used in Article 230a of the Penal Code covers not only actions that are contrary to statutory law, but also to internal regulations, which cover the functioning of the relevant institutions and apply not only to public officials but to all persons performing public functions. Finally, they state that they could not find cases which would not be covered by either Article 230a or Article 229 (1), Penal Code, on trading in influence and active bribery, respectively.

18. GRECO takes note of the information provided, which repeats arguments already exposed in the Evaluation Report. It recalls that this recommendation meant to ensure that cases in which the influence peddler is not a public official and thus does not have to comply with official regulations, would be covered. In such cases, the actions of the public official – or person performing public functions – him/herself are irrelevant, as the offence is meant to address the relation between the person who supplied an undue advantage and someone having an influence on a public official, such as a relative or a friend. As explained in the Evaluation Report (paragraph 66), there appears to be no guidance as to how to determine the relevant legal standard according to which the influence of the relative or friend of the public official would be found “*unlawful*” and this may make prosecution more difficult. The explanation submitted by the Polish authorities does not remove these concerns and no action has been taken to address them.
19. GRECO concludes that recommendation iii has not been implemented.

Recommendation iv.

20. *GRECO recommended to establish jurisdiction over offences of bribery and trading in influence committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens.*
21. The Polish authorities explain that they do not share the view exposed in the Evaluation Report, according to which Poland is not obliged directly by the Criminal Law Convention on Corruption to prosecute offences of bribery and trading in influence committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens. According to them, Article 113, Penal Code², provides that Polish criminal law shall be applied to an alien staying in Poland in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements. In the absence of any court decision in this respect, they make reference to commentaries on Article 113 written by legal professionals, according to which this Article “provides for the rule of unconditional prosecution and punishment on the basis of Polish law, of the perpetrators to whom the international agreements refer”³. According to another source of doctrine, “the State has the right and obligation to involve its law enforcement authorities in the prosecution of those offences without any limits stemming from the lack of dual criminality. [...] The ratification of a convention which recognises particular activities as offences means the obligation to protect from such activities, *i.e.* the obligation to prosecute them”⁴.

² Article 113, Penal Code

Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.

³ Marek Andrzej, komentarz LEX 2007, Komentarz do art.113 kodeksu karnego (Dz.U.97.88.553), [w:] A. Marek, Kodeks karny. Komentarz, LEX, 2007, wyd. IV.

⁴ Giezek Jacek, Kłaczyńska Natalia, Łabuda Grzegorz, komentarz, LEX 2007

22. GRECO takes note of the information provided. In the absence of any court decision in this respect, GRECO accepts the explanations provided by the Polish authorities to substantiate that offences of bribery and trading in influence committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens would be covered by Polish jurisdiction as provided under Article 113, Penal Code.

23. GRECO concludes that recommendation iv has been dealt with in a satisfactory manner.

Recommendation v.

24. *GRECO recommended to clarify the conditions for invoking the special defence of effective regret available under the provisions on active bribery and active trading in influence of the Penal Code.*

25. The Polish authorities explain that the conditions for applying the defence of effective regret are: a) accepting a financial benefit or the promise thereof by a person performing a public function; b) informing the law enforcement authorities of the offence before they receive such information from a different source and c) informing the authorities about all essential aspects of the offence. They provide various clarifications on these conditions, using past case-law and doctrine as references, as well as a commentary to the Penal Code, an extract of the Polish Central Anticorruption Bureau anticorruption manual and a doctrinal article, all published in 2010s. They mention in particular that knowledge of the law enforcement authorities of the offence should be assessed on the basis of actions taken within the criminal proceedings. Information about all the relevant aspects of the offence provided officially by the perpetrator during the police operations, before the criminal proceedings are initiated, is sufficient for the application of the clause. The Polish authorities add that the courts do not apply the defence of effective regret automatically and that they assess on a case-by-case basis whether all the conditions for non-punishment are met. They conclude that the conditions of application of the special defence of effective regret are sufficiently elaborated in the case-law and doctrine and that there is no need to amend this legal provision.

26. The authorities add that the National School for Judges and Prosecutors conducted in 2010 a training course for legal practitioners on corruption offences in national and international law. This training focused *inter alia* on the methodology of carrying out criminal proceedings for bribery and trading in influence offences and the conditions for invoking the special defence of effective regret were explained during this training.

27. GRECO takes note of the information provided and considers that the authorities have provided sufficient clarifications regarding the conditions for invoking the special defence of effective regret.

28. GRECO concludes that recommendation v has been dealt with in a satisfactory manner.

Theme II: Transparency of Party Funding

29. It was recalled that GRECO in its evaluation report addressed 8 recommendations to Poland in respect of Theme II. Compliance with these recommendations is dealt with below.

Recommendation i.

30. *GRECO recommended to harmonise the provisions on political financing contained in the Political Parties Act, in the election laws and in the relevant ordinances of the Minister of Finance and, in particular, to align the relevant provisions of the Statute on the Election of the President of the Republic of Poland with the standards set by the other election laws.*
31. The authorities of Poland indicate that amendments to the Statute on the Election of the President of the Republic of Poland, the Law on Elections to Local Self-Governments and the Statute on Direct Election of the Village, Town and City Administrators entered into force on 16 December 2009⁵ and 24 December 2009⁶, respectively. As a result, the provisions of the Statute on the Election of the President of the Republic of Poland have been aligned on the stricter standards set by other election laws. In particular, donations from legal persons and donations in kind are not allowed during presidential elections anymore (Article 85 of the Statute on the Election of the President of the Republic of Poland, as amended) and public collections have been rendered illegal during presidential campaigns (Article 87 of the Statute on the Election of the President of the Republic of Poland, as amended).
32. The authorities add that a draft Electoral Code has passed first reading at the Sejm and is currently being examined in second reading. It is expected that this new Code will enter into force in February 2011. The aim of this Code is to align all relevant provisions of the different electoral laws – elections to the Sejm, the Senate, the European Parliament, presidential elections and local elections – including their financial aspects, into one single instrument, modelled upon the Statute on the Election of the President of the Republic which has already been brought into conformity with GRECO's recommendations. However, according to a verdict of the Polish Constitutional Tribunal of 3 November 2006⁷, any significant changes in the electoral laws should take place at least six months before the following elections, understood not only as the actual voting day but as counting the entire election process as included in the election calendar. Consequently, all future amendments of the election laws will have to take this constitutional requirement into account.
33. GRECO takes note of the information provided, which indicates that some progress has been made in the implementation of the recommendation, in particular as regards an alignment of the relevant provisions of the Statute on the Election of the President of the Republic with the standards set by the other election laws. The preparation of a single Electoral Code is also a positive step, which, if adopted by Parliament, will almost certainly meet the other concerns raised by the recommendation.
34. GRECO concludes that recommendation i has been partly implemented.

Recommendation ii.

35. *GRECO recommended to entrust the National Electoral Commission with the responsibility to assist political parties and election committees to observe the political financing regulations, inter alia, by providing advice upon request of parties and election committees.*

⁵ See Act of 12 February 2009 amending the Statute on the Election of the President of the Republic of Poland, on the national referendum and on the Election to the European Parliament (OJ No. 202, item 1547).

⁶ See Act of 19 November 2009 amending the Statute on the Election of the President of the Republic of Poland and other statutes (OJ No. 213, item 1652).

⁷ TK (K31/06)

36. The Polish authorities explain that, in accordance with the principles of operation of public authorities, the National Electoral Commission is obliged to provide information to anyone who requests it, namely political parties, election committees, other entities and citizens. As an example, during the currently ongoing election campaign for self-government elections, more than 300 explanations in writing have been provided, as well as several thousand answers to telephone requests.
37. GRECO takes note of the information provided and of the possibility for the National Electoral Commission to provide information in writing or by telephone to anyone interested. Even if it accepts that political parties and election committees may have been able to obtain relevant advice in this way, GRECO takes the view that this general duty to inform the public does not constitute a substitute for the provision of advice and/or training targeting specifically political parties and election committees, in order to help them deal with difficulties in interpreting the law, as highlighted by the Evaluation report (paragraph 79).
38. GRECO concludes that recommendation ii has been partly implemented.

Recommendation iii.

39. *GRECO recommended to take appropriate measures to ensure that loans granted to political parties for statutory purposes and to election committees of voters are not used to circumvent political financing regulations, by ascertaining in particular whether loans are reimbursed in conformity with the terms under which they were granted.*
40. The Polish authorities report that the government requested, in a decision of 24 June 2009, the inclusion in the above-mentioned draft Electoral Code of provisions according to which: a) loans may be paid off only from means originating from earmarked subsidies or by natural persons guaranteeing the loan within the limit of the maximum amounts stipulated in the draft regarding donations; b) in the event that the loan has not been reimbursed by the date of presentation of the financial report on election campaigns, that subsequent dates are set for the filing of subsequent reports, as appropriate, on the full repayment of the loan and c) the writing off of a loan is regarded as a payment in the amount of the sum being written off. The government also requested that, after the dissolution of election committees, loan guarantees are inalienable, in order to avoid that such guarantees are taken over by persons – foreigners and legal persons – whose donations to political parties are not allowed.
41. GRECO welcomes the inclusion in the draft Electoral Code of provisions ensuring that loans granted to election committees of voters would be – if the Electoral Code is adopted – regulated in a manner meeting the requirements of the recommendation. However, it would appear that no measures have been taken to regulate in a similar manner the loans granted to political parties for statutory purposes, outside election campaigns.
42. GRECO concludes that recommendation iii has been partly implemented.

Recommendation iv.

43. *GRECO recommended to require that the financial reports of political parties which are subject to supervision by an independent monitoring body also cover those expenses for statutory activities which are not charged to subventions received from the State budget.*

44. The authorities of Poland state that the National Electoral Commission is able to supervise the political parties' expenses for statutory activities which are not charged to subventions received from State budget, although this exceeds the Commission's tasks and aims.
45. GRECO takes note of this statement. However, in the absence of more precise information on the exact remit and practice of the National Electoral Commission as regards supervision over the complete accounts of political parties, it would appear that no concrete measures have been taken to implement this recommendation.
46. GRECO concludes that recommendation iv has not been implemented.

Recommendation v.

47. *GRECO recommended to take appropriate measures to ensure that the financial reports of political parties and election committees are made public in a coherent and comprehensible manner and thus make the data on political financing more accessible.*
48. The authorities of Poland indicated that the government requested the extraordinary parliamentary commission, in the above-mentioned decision of 24 June 2009, to include in the draft Electoral Code regulations on the compulsory publication on internet websites of information contained in financial reports, in a manner which can be understood by citizens with no experience in reading accounting documentation.
49. GRECO takes note of the information and welcomes the government's intention to introduce a publication requirement on internet of the information contained in financial reports, in an intelligible form. Such a requirement would undoubtedly improve the transparency and accessibility of such information. Moreover, GRECO must stress that the recommendation requires that the transparency and intelligibility of financial information be enhanced not only as regards reports on election campaigns, but also as regards political parties' routine activities.
50. GRECO concludes that recommendation v has been partly implemented.

Recommendation vi.

51. *GRECO recommended to require more frequent declarations on donations received by political parties and election committees as well as their publication, at regular intervals to be defined by law.*
52. The Polish authorities state that a new Article 87ea was introduced in the Statute on the Election of the President of the Republic by the amendments referred to in paragraph 30. According to this Article, election committees must maintain records on bank loans taken and donations received. These records must be published by the committees regularly, within seven days of the loan being granted or the payment being made, until the day on which the National Election Commission makes its general report on elections available to the public.
53. GRECO takes note of the information provided. However, this information only concerns a publication requirement applicable to election committees during campaigns for presidential elections. It does not refer to any such requirement concerning other election campaigns, nor to

any obligation for political parties to publish relevant information outside the context of election campaigns.

54. GRECO concludes that recommendation vi has been partly implemented.

Recommendation vii.

55. *GRECO recommended to increase the financial and personnel resources dedicated to the National Electoral Commission's unit responsible for the control of political financing.*
56. The Polish authorities report that the team in charge of the financial control of political parties and election campaigns has been reinforced by one person between 2007 and 2010. It now comprises 7 persons working full-time, 4 of whom examine financial reports as their main activity (compared to 6 persons plus 1 person on a quarter-time job in 2007, 3 of whom dealt mainly with financial reports). As regards financial resources, the authorities add that the teams of the National Electoral Commission's unit responsible for the control of political financing do not have their own budget. The expenses of the relevant part of the state budget as a whole have reportedly increased by 22,6% between 2007 and 2010. However, the expenditure connected with the examination of electoral financial reports is only a small part of this budget and its amount varies in any given year depending on the elections calendar.
57. GRECO takes the view that the increase in the personnel resources dealing with the control of political financing is only marginal, especially considering that at the time of the evaluation visit (see Evaluation Report, paragraph 85), the team was composed of 8 persons, which was considered by representatives of the Commission themselves as insignificant for a country the size of Poland. Besides, there is no indication that the financial resources of the responsible units have been increased substantially, if at all. GRECO reiterates that in order to carry out pro-active and substantial monitoring, more qualified staff are clearly needed.
58. GRECO concludes that recommendation vii has not been implemented.

Recommendation viii.

59. *GRECO recommended (i) to ensure more substantial and pro-active auditing and monitoring of political parties' and election committees' financial reports, including a material verification of the information submitted as well as investigation of financing irregularities and (ii) to take adequate measures to enhance the cooperation between the authorities responsible for the enforcement of political financing legislation.*
60. The authorities of Poland state that according to Article 118 of the draft Electoral Code, the electoral body to which a financial report is submitted must reject it if relevant provisions of the Code on allowed resources and expenses are violated. In case of doubt about the correctness of the report, the body concerned can ask the electoral committee for clarification. It may also order an expert analysis or opinion on the report. Public administration bodies will be obliged to provide the National Electoral Commission, upon its request, with assistance concerning the analysis of a financial report. Likewise, the government and local administration bodies performing financial verifications and inspections are obliged to cooperate with the National Electoral Commission and provide it, upon request, with the results of their control procedures.

61. GRECO takes note of the information provided. However, as regards the first part of the recommendation, the provisions of the draft Electoral Code do not appear to establish the necessary conditions for a more substantial and proactive monitoring of financial reports. The monitoring body still lacks investigation powers and does not appear able to proceed to a material verification of the information contained in the reports, nor to verify whether an election campaign may have been financed by non-declared means. As regards the second part of the recommendation, the current draft Electoral Code seems to go some way towards enhancing co-operation between the authorities responsible for the enforcement of political financing regulations, which is a welcome development.
62. GRECO concludes that recommendation viii has been partly implemented.

III. CONCLUSIONS

63. **In view of the above, GRECO concludes that Poland has implemented satisfactorily or dealt with in a satisfactory manner three of the thirteen recommendations contained in the Third Round Evaluation Report.** With respect to Theme I – Incriminations, recommendation ii has been implemented satisfactorily, recommendation iv and v have been dealt with in a satisfactory manner and recommendations i and iii have not been implemented. With respect to Theme II – Transparency of Party Funding, recommendations i, ii, iii, v, vi and viii have been partly implemented and recommendations iv and vii have not been implemented.
64. As regards incriminations, Poland has finalised the legislative process – already started at the time of the on-site visit – aimed at amending the Penal Code provisions on bribery in the private sector. The issue of jurisdiction over offences of bribery and trading in influence committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens has been clarified, as well as the conditions for invoking the special defence of effective regret. As regards the other recommendations, GRECO regrets that insufficient consideration has been given to the other improvements recommended in the Evaluation Report.
65. Insofar as transparency of party funding is concerned, the information provided by the Polish authorities clearly indicates that, although some progress has been made to align the relevant provisions of the Statute on the Election of the President of the Republic with the standards set by the other election laws, the process of implementation of the majority of recommendations is still in its initial stages. Even though the draft Electoral Code would appear, if adopted, to go some way towards meeting a number of GRECO’s concerns, it does not address all the issues contained in the pending recommendations. In particular, more determined action needs to be taken to ensure a more pro-active and substantial monitoring.
66. In view of the above, GRECO notes that Poland has been able to demonstrate that reforms with the potential of achieving an acceptable level of compliance with the pending recommendations, within the next 18 months, are underway and urges the authorities to vigorously pursue their efforts to address all recommendations. GRECO therefore concludes that the current low level of compliance with the recommendations is not “globally unsatisfactory” in the meaning of Rule 31, paragraph 8.3 of GRECO’s Rules of Procedure. GRECO invites the head of the Polish delegation to submit additional information regarding the implementation of recommendations i and iii regarding Theme I, and recommendations i – viii regarding Theme II by 30 June 2012 at the latest.

67. Finally, GRECO invites the authorities of Poland 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.