

Adoption: 18 March 2016  
Publication: 12 July 2016

**Public**  
**GrecoEval3Rep(2016)1**  
**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on San Marino Incriminations (ETS 173 and 191, GPC 2)**

(Theme I)

Adopted by GRECO  
at its 71<sup>st</sup> Plenary Meeting  
(Strasbourg, 14-18 March 2016)

## **I. INTRODUCTION**

1. San Marino joined GRECO in 2010. GRECO adopted the Joint First and Second Round Evaluation Report on San Marino (Greco Eval I-II Rep (20011) 2E) at its 53<sup>rd</sup> Plenary Meeting (9 December 2011). The aforementioned Evaluation Report, as well as its corresponding Compliance Report, is available on GRECO's homepage ([www.coe.int/greco](http://www.coe.int/greco)).
2. GRECO's current 3<sup>rd</sup> Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption, 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).
3. The GRECO evaluation team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to San Marino from 28 September to 2 October 2015, was composed of Mr Martin KREUTNER, Dean and Executive Secretary of the International Anti-Corruption Academy (Austria) and Ms Mariam MAISURADZE, from the Ministry of Justice (Georgia). The GET was supported by Ms Valentina D'AGOSTINO and Ms Laura SANZ-LEVIA from GRECO's Secretariat. Prior to the visit, the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2015) 2E REPQUEST, Theme I).
4. The GET met, at the beginning of the visit, with the Minister of Internal Affairs and Justice and the Minister of Industry. Moreover, the GET met with representatives from the judiciary (President of the Court and Law Commissioners), the Police, academics, media and the Association of Lawyers and Notaries.
5. The present report on Theme I of GRECO's 3<sup>rd</sup> Evaluation Round on Incriminations was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the effectiveness of measures adopted by the authorities of San Marino in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to San Marino in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding, is set out in GrecoEval3Rep(2016)1, Theme II.

## **II. INCRIMINATIONS**

### **a. Description of the situation**

7. San Marino signed the Criminal Law Convention on Corruption (ETS 173) on 15 May 2003; it has not yet been ratified.

8. San Marino signed the Additional Protocol to the Criminal Law Convention (ETS 191) on 15 May 2003; it has not yet been ratified.

### **Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)**

#### Definition of the offence

9. Criminalisation of active and passive bribery of domestic public officials is provided for in Article 373 of the Sammarinese Criminal Code (CC):

**Article 373, Criminal Code: Corruption**

*A public official, who receives any undue advantage for himself/herself or anyone else, or accepts the promise of the advantages with the purpose of omitting or delaying or for having omitted or delayed an act of his/her office or of carrying out or having carried out an act contrary to his/her official duties, is punished by terms of fourth-degree imprisonment and fourth-degree disqualification from public offices and political rights, as well as third-degree daily fine.*

*The punishments are reduced by one degree if the act to be performed forms part of one 's own official duties.*

*The same punishments apply to a public employee who is not a public official.*

*The punishments referred to in the preceding paragraphs also apply to the person giving or promising the advantage.*

10. The relevant provision on passive bribery differentiates between two types of situations, each of which is punished with a different level of sanction as follows:
- (i) Passive bribery for a lawful act: if the expected action/omission of the public official/employee relates to his/her official duties (*corruzione passiva impropria*).
  - (ii) Passive bribery for an unlawful act: if the expected action/omission is in breach of the official duties (*corruzione passiva propria*).
11. The provision on active bribery mirrors that of passive bribery and carries the same level of sanction.
12. The scope of the aforementioned offences is completed by Article 374 CC, which covers those cases where the bribe is accepted once the official act has already been performed (*corruzione impropria susseguente*).

**Article 374, Criminal Code: Acceptance of advantages for an act already performed**

*A public official or public employee who is not a public official, receiving an advantage for an act already performed is punished by terms of first-degree imprisonment or third-degree daily fine.*

*The same punishment applies to the person providing the advantage.*

13. In addition, the autonomous offences of active and passive incitement to corruption are provided in the Sammarinese CC to cover the offer, promise or request of a bribe, both for actions/omissions in breach of official duties (*corruzione propria*) and for actions related to his/her official duties (*corruzione impropria*).

**Article 374 bis, Criminal Code: Incitement to corruption**

*Anyone who offers or promises any undue advantage to a public official, or public employee not holding the position of public official, in order to lead him to omit or delay an act of his office, or to carry out an act contrary to his duties, is punished, when the offer or promise has not been accepted, by terms of third-degree imprisonment and third-degree disqualification from public offices and political rights, as well as second-degree daily fine.*

*If the offer or promise has been made to lead a public official or public employee who does not hold the position of public official to carry out an act of his office, whether the offer or promise has not been accepted, the offender shall be subject to third-degree arrest and second-degree daily fine.*

*The penalty referred to in the first paragraph shall be applied to the public official or public employee who does not hold the position of public official that demands a promise or any advantage from a private citizen for the purposes foreseen in article 373.*

*The punishment referred to in the first paragraph is applied to the public official, or public employee not holding the position of public official, who demands a promise or any advantage from a private individual for the purposes envisaged in Article 374.*

14. Finally, the authorities refer to two other key offences which run counter to the principles of proper functioning and impartiality of public administration, notably, abuse of power (Article 376 CC) and extortion in office (Article 372 CC).

**Article 376 Criminal Code: Abuse of power**

*The public official, who abuses of powers concerning his/her functions in order to receive an advantage, for himself/herself or for anyone else, or to cause damage to others, is punished, unless the fact constitutes a more serious crime, by terms of first-degree imprisonment or third-degree daily fine, as well as third-degree disqualification from public offices.*

15. As to the offence of abuse of powers, the authorities clarified that this applies when the official act is performed not as a result of the commercialisation of public functions, but in order to benefit or to disadvantage someone.

**Article 372 Criminal Code: Extortion in office (so-called *concussione*)**

*A public official who, by abusing his/her quality or functions, intimidating others, secures for himself/herself or for anyone else the giving of any undue advantage or prospect thereof, is punished by terms of third degree imprisonment and daily fine, as well as fourth-degree disqualification from public offices and political rights.*

*The same punishments are applied if the offence is perpetrated by a public employee who is not a public official.*

16. When instances of *concussione* occur, only the public official/employee is liable to a criminal sanction. The individual who has been subject to extortion is considered a victim. During the on-site visit, the authorities explained that the elements of the offence, and in particular the term “intimidating”, are rigorously interpreted, in order to avoid the risk of misuse of *concussione* as a defence mechanism (the bribe-givers might claim that they were forced by public officials in order

to waive liability). According to the jurisprudence, the crime of *concussione* occurs when the private party is overpowered by the action of the public official (or the public employee) and accedes to the unjust pretences of the former in order to avoid a prejudice. Indeed, only in cases where the will of the private party is forced, can the latter be considered as victim of the offence and go unpunished.

17. Finally, San Marino has a specific offence dealing with electoral corruption (Article 394, CC). There are no court decisions with regard to this type of offence.

**Article 394 Criminal Code: Infringement to the free exercise of voting rights**

*Anyone who, on the occasion of State elections, uses violence, threat or deceit or offers or promises undue advantages, refunds or subsidies for travel or accommodation expenses, to induce a citizen to sign a declaration of candidacy or a bill or a referendum proposal, or to refrain or not from voting, or to vote or not for a specific candidate or symbol, shall be punished with third-degree imprisonment and fourth-degree disqualification from political rights.*

*The same punishment shall apply to any citizen accepting the undue advantages, refunds or subsidies referred to in the previous paragraph, except in case they make a useful and spontaneous admission of guilt.*

*Fourth-degree imprisonment and fourth-degree disqualification from public offices and political rights, increased under Article 93, shall be applied if the offence has been committed by a person vested with public powers, by a public official or a minister of religion, by abusing their powers and in exercising them.*

Elements of the offence

*“Domestic public official”*

18. The notion of public official is developed in Article 149(6) CC as follows:

**Article 149(6) Criminal Code: Public official**

*Anyone who, permanently or temporarily, whether remunerated or not, exercises decision-making, representation, public authority, certification functions, as well as any other public function, to serve the Republic or a public entity.*

19. The authorities further explain that the definition provided in administrative law serves to complement penal legislation. In this connection, Article 2(2) of Law No. 141 of 5 September 2014 (Code of Conduct for Public Officials) establishes that the definition of public official comprises any person who performs a public office or service, employed by the Administration, and any person who performs the function of public official under the Criminal Code. The term "Administration" covers all organisational units, departments, public entities and corporations referred to in Annex A to Law No. 188 of 5 December 2011, as well as any body, authority and commission of the State. Moreover, the concept of public official, public employee or public servant referred to in special rules falls within the aforementioned definition of public official. In addition, public employees who do not hold the position of public officials also fall under the *personae* scope of the relevant bribery provisions of Articles 373, 374 and 374bis.

20. According to the explanations provided during the on-site visit, the notion of public official is to be interpreted to the widest extent possible in the framework of penal legislation: any person who performs a public function is a public official, irrespective of the private/public nature of the entity which employs the person. The decisive factor is the nature of the functions, rather than the status of the entity and the existence of a formal and organic relationship (e.g. the employees of the Post Office, even after privatisation of the society which manages the service, are covered by the definition of public official as they perform a public service; the employees of the Central Bank of the Republic of San Marino<sup>1</sup> are considered public officials as they exert public functions).

*“Promising, offering or giving” (active bribery)*

21. The elements of “promising” and “giving” are transposed by Article 373 CC, which does not explicitly refer to the “offering”. The “offering” and “promising” of an undue advantage are covered in Article 374 bis CC relating to the incitement to corruption, i.e. situations where a bribe is offered or promised to a public official and the latter does not accept such an offer or promise.
22. During the visit, the authorities pointed out that, although article 373 does not explicitly use the term “offering”, in practice there are no differences between “promising” and “offering”, as they both refer to situations where the briber shows his/her availability to give the undue advantage.
23. The offence of incitement to corruption merely requires, for its completion, the offer or promise of the briber or the request of an undue advantage from the public official.

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

24. The elements of “receipt of an undue advantage” or “acceptance of a promise” are explicitly covered in the relevant provisions dealing with passive bribery of a public official in return for a lawful (*corruzione passiva impropria*) or an unlawful act (*corruzione passiva propria*), i.e. Article 373 CC. The “request” (solicitation) of a promise of an undue advantage or the solicitation of the undue advantage itself is covered in Article 374 bis CC relating to the incitement to corruption. The “acceptance of an offer” is not explicitly mentioned in law; the authorities explained that in practice there are no differences between the acceptance of an offer and acceptance of a promise (described in Article 373 CC).

*“Any undue advantage”*

25. Bribes, according to Article 373 CC (active and passive bribery), consist of any “undue advantage”. The law does not specify whether the advantage covers both material and immaterial benefits. The authorities reported and explained during the on-site visit that in the absence of any further specification of the concept, the term is considered as also covering immaterial advantages, such as promotions, career benefits, sexual favours.
26. Rules on acceptable gifts were recently introduced in 2014 (Law No. 141 of 5 September 2014 on Code of Conduct for Public Officials), following a recommendation made by GRECO in the Joint First and Second Evaluation Report on San Marino<sup>2</sup>. Accordingly, public officials may accept conventional hospitality or gifts worth less than 100 €, which shall in any case be occasional (Article 14, Law No. 141/2014). All representatives interviewed (whether within or

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<sup>1</sup> The Central Bank of the Republic of San Marino is a private entity which exerts public functions, among others supervision for banking, financial and insurances services, consultancy to the State, and centralised managing of government securities.

<sup>2</sup> Joint First and Second Evaluation Report on San Marino. [Greco Eval I/II Rep \(2011\) 2E](#).

outside the government) shared the view that the provisions on gifts in administrative law are to be understood in a different context from that punishing bribes in criminal law. The 100 € administrative threshold for hospitality gifts is not meant to be used as a waiver for criminal liability: any gift (irrespective of its value) may come under the scope of the offence if it has a rewarding nature whose purpose is to influence a public official's action in service.

27. Article 374 CC on bribery *a posteriori* (*corruzione impropria susseguente*) introduces a different terminology from that used in the framework Article 373 CC for bribery offences, as it refers to the notion of “remuneration” (*compenso*). The authorities clarified, during the on-site visit, that there are not substantial differences between the expressions; this view was also shared by the practitioners and academics met on-site. They also stressed that article 374 CC refers to cases where the public official has already performed the lawful act and receives an advantage which is related and proportionated to the act committed, thereby the notion of “payment/reward” or “compensation” which is embedded in this particular provision.

*“Directly or indirectly”*

28. The provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. Nevertheless, the authorities explained that bribery may also be committed indirectly by the bribe-giver or the bribe-taker, and in such cases intermediaries would be held criminally liable on the basis of Article 73 CC which regulates the participation in criminal offences.

*“For himself or herself or for anyone else”*

29. Article 373 CC explicitly refers to third party beneficiaries of the bribes with the phrase “*for himself or another person*”. Article 374 bis (incitement to corruption) does not make any mention as to the beneficiary of the bribe.

*“To act or refrain from acting in the exercise of his or her functions”*

30. The bribery offences expressly cover “acts” and “omissions” committed relating to the exercise of official duties/functions. As already stressed, for a bribery offence to occur, it is not required that the induced act or omission by the public official involves a breach of duty or is unlawful; however, the commission/omission of an unlawful official act entails more severe sanctions. The authorities explained that these elements of the offences are interpreted in a broad manner, in order to cover all possible violations of the principles of transparency and impartiality of the public administration. The criminal provisions also apply to cases where the bribe is offered/promised or given in order to accelerate a given task. Moreover, the bribery offences also include cases where the public official requests or accepts a bribe in order to exert improper influence over a different public official, who is competent for the specific task.

*“Committed intentionally”*

31. Bribery offences, according to the Sammarinese CC, only include intentional commission.

### Sanctions

32. Sanctions depend upon the nature of the act (or omission) for which the bribe is intended, i.e. whether in accordance with the public official's duties (lawful acts or omissions) or whether in breach of his/her official duties (unlawful acts or omissions). The penalties for active and passive

bribery in connection with unlawful acts (*corruzione propria*) are 4<sup>th</sup> degree imprisonment (from 4 to 10 years) and 3<sup>rd</sup> degree daily fine (from 20 to 60 days). Moreover, the law provides for 4<sup>th</sup> degree disqualification from public offices and political rights (from 2 to 5 years). The penalties for active and passive bribery in connection with lawful acts (*corruzione impropria*) are: 3<sup>rd</sup> degree imprisonment (from 2 to 6 years); 2<sup>nd</sup> degree daily fine (from 10 to 40 days) and 3<sup>rd</sup> degree disqualification from public offices and political rights (from 1 to 3 years). The sanction is reduced for bribes accepted after the commission of the official act (Article 374 CC); in this case the penalties are 1<sup>st</sup> degree imprisonment (from 3 months to 1 year) or 3<sup>rd</sup> degree daily fine (from 20 to 60 days).

33. Likewise, for the offence of incitement to corruption, the applicable sanctions are formulated depending upon the nature of the act or omission for which the bribe is intended. For unlawful acts, the sanctions are 3<sup>rd</sup> degree imprisonment (from 2 to 6 years); 2<sup>nd</sup> degree daily fine (from 10 to 40 days) and 3<sup>rd</sup> degree disqualification from public offices and political rights (from 1 to 3 years). For lawful acts the punishments are 3<sup>rd</sup> degree arrest (from 1 to 3 months) and 2<sup>nd</sup> degree daily fine (from 10 to 40 days).
34. The application of sanctions depends upon the discretion of the judge, who is to indicate in the judgement the reasons for the sanctions imposed. When deciding the sanction, consideration must be given to the objective gravity of the offence and the subjective conditions of the offender (Articles 88 and 89 CC). In particular, admission of guilt can be considered as a mitigating circumstance. The table next page illustrates the available sanctions and statutes of limitation for bribery and other corruption-related offences against the public administration.

#### Court decisions

35. According to the Report on the State of Justice submitted annually by the Head Magistrate to the Great and General Council (Parliament) of the San Marino Republic<sup>3</sup>, the registered cases of corruption were: 2 in 2009, 1 in 2010, 0 in 2011, 4 in 2012 (1 closed case, 1 pending and 2 sent to trial), 5 in 2013 (2 closed and 3 pending cases) and 2 in 2014 (both pending).
36. A recent court decision in this field was issued by the Law Commissioner (*Commissario della Legge*), on 19 September 2014, concerning a case widely covered by Sammarinese media and well-known in the country<sup>4</sup>. The case concerned the bribery of public officials working in the accident-prevention sector, for the omission of security checks in the construction sites belonging to some real estate companies, managed by a single professional. The authorities report that two bribed public officials were sentenced to 5 years' and 6 months' imprisonment, 4 years' disqualification from public offices and political rights, 50 days of fine (25 000 €); bribers were sentenced to 4 years' and 2 months' imprisonment, 3 years' disqualification from public offices and political rights, 40 days of fine (8 000 €). One briber was punished with a milder penalty, thanks to his useful and spontaneous admission of guilt, which was considered as a mitigating circumstance.

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<sup>3</sup> The Report is published on the website of the General Council.

<sup>4</sup> Decision No. 203/14.



Summary table on sanctions and statute of limitations for corruption-related offences

Article CC	Offence	Sanction	Statute of limitation
<b>Active and passive bribery in the public sector (domestic/foreign/international officials)</b>			
Art 373 Article 374 ter	Unlawful official acts	4 to 10 years' imprisonment and 2 to 5 years' disqualification from public office and political rights and 20 to 60 days daily fine	5 years
	Lawful official acts	2 to 6 years' imprisonment and 1 to 3 years' disqualification from public office and political rights and 10 to 40 days daily fine	4 years
Article 374	Bribery <i>a posteriori</i>	3 months' to 1 year imprisonment or 20 to 60 days daily fine	2 years
<b>Incitement to corruption</b>			
Article 374 bis	Unlawful official acts	2 to 6 years' imprisonment and 1 to 3 years' disqualification from public office and political rights and 10 to 40 days daily fine	4 years
	Lawful official acts	1 to 3 months' arrest and 10 to 40 days daily fine	2 years
<b>Extortion in public office</b>			
Article 372	<i>Concussione</i> (extortion in office)	2 to 6 years' imprisonment and 2 to 5 years' disqualification from public office and political rights and 20 to 60 days daily fine	4 years
<b>Other corruption-related offences</b>			
Article 375	Abuse of public office for private gain	6 months' to 3 years' imprisonment and 1 to 3 years' disqualification from public offices and political rights and 10 to 40 days daily fine	3 years
Article 376	Abuse of power	3 months' to 1 year imprisonment or 20 to 60 days daily fine and 1 to 3 years' disqualification from public office and political rights	2 years
Article 199 bis	Money laundering	4 to 10 years' imprisonment and 1 to 3 years' disqualification from public office and political rights and 10 to 40 days daily fine	5 years
Article 197	Misappropriation	6 months' to 3 years' imprisonment and 10 to 40 days daily fine	3 years
Article 371	Embezzlement by public official	2 to 6 years' imprisonment and 2 to 5 years' disqualification from public office and political rights	4 years
Article 204	Fraud	6 months' to 3 years' imprisonment and 10 to 40 days daily fine or 9 months' to 2 years' disqualification from public offices and political rights	3 years

### **Bribery of members of domestic public assemblies (Article 4 of ETS 173)**

37. Members of domestic public assemblies are considered public officials in the meaning of Article 149(6) CC which includes “*anyone who, permanently or temporarily, whether remunerated or not, exercises decision-making, representation, public authority, certification functions, as well as any other public function, to serve the Republic or a public entity.*” Therefore, the definition of public official is wide enough to also cover members of any other public representative body whose members are elected or appointed and which exercises legislative or administrative powers. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies.
38. The authorities report that there are no court decisions concerning this offence. However, there are some on-going criminal procedures regarding some former members of national public assemblies who have recently been charged with, *inter alia*, bribery in their capacity as members of the Congress of State (Government) and of the Great and General Council (Parliament) and subject to pre-trial detention.

### **Bribery of foreign public officials (Article 5 of ETS 173)**

39. Article 374 ter was introduced in the Sammarinese CC with a view to extending the criminalisation of (active and passive) bribery, as well as the offences of *concussione* and embezzlement, when involving foreign public officials. The Republic of San Marino has not signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).

**Article 374 ter Criminal Code: Embezzlement, extortion in office (*concussione*), corruption and incitement to corruption of officials of foreign States or international public organisations**

*The provisions of Articles 371, 372, 373 paragraphs 1, 2 and 3, 374 paragraph 1, and 374 bis paragraphs 3 and 4, shall also be applied to those who exercise functions or activities equivalent to those of a public official, or public employee who is not a public official, in foreign States or within international public organisations as well as officials and agents recruited by contract in foreign States or in international public organisations.*

*The provisions of Articles 373 paragraph 4, 374 paragraph 2, 374 bis paragraphs 1 and 2, shall be applied even if the advantage has been given, offered or promised to the persons foreseen in the first paragraph of this Article.*

40. An autonomous definition of “foreign public official” is not provided in the CC; however, Article 374 ter CC uses the same terms as for domestic bribery (public official or public employee who is not a public official) and explicitly refers to the exercise of functions or activities equivalent to those of a domestic public official (or public employee who is not a public official).
41. According to the authorities, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply to foreign officials. There is one proceeding currently pending against a foreign public official.

### **Bribery of members of foreign public assemblies (Article 6 of ETS 173)**

42. The authorities report that members of foreign public assemblies would be regulated under the relevant provisions of Article 374 ter CC, as they are considered public officials. The notion of “member of a public assembly” is to be interpreted in the light of the domestic law of the foreign State. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply to foreign officials. There is one proceeding currently pending against a member of a foreign public assembly, in cooperation with the French and Swiss Prosecutor’s Offices.

### **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

43. Bribery in the private sector is not criminalised in San Marino.

### **Bribery of officials of international organisations (Article 9 of ETS 173)**

44. The San Marino CC criminalises active and passive bribery of officials within international organisations under the provision of Article 374 ter CC (see above), which applies to any person carrying out functions or activities corresponding to those performed by a public official – or a public employee not holding the position of public official – within international organisations. There are no court decisions in this regard.

### **Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)**

45. The authorities report that members of international parliamentary assemblies are covered by the relevant provisions of Article 374 ter CC. There are no court decisions in this regard.

### **Bribery of judges and officials of international courts (Article 11 of ETS 173)**

46. The authorities report that judges and officials of international courts are covered by the relevant provisions of Article 374 ter CC. There are no court decisions in this regard.

### **Trading in influence (Article 12 of ETS 173)**

47. Trading in influence is not considered a specific offence under the San Marino CC. The authorities reported that the only provision which, in some way, takes on board certain features of the trading in influence offence is Article 204 CC in so far as it refers to fraudulent conduct by public officials wielding influence (Article 204(3) CC on aggravation of punishment in certain cases of fraud). That said, the authorities themselves recognise that the latter provision falls short of the requirements of the Convention.

#### **Article 204 Criminal Code : Fraud (truffa)**

*Anyone who, deceiving another by means of a trick or artifice, secures an unjust profit for himself/herself or for a third party shall be punished by terms of second-degree imprisonment as well as second-degree daily fine or disqualification.*

*The punishment above shall also apply to anyone who, imposing on a physically or mentally disabled or minor person, has such person perform acts detrimental to himself/herself or to another.*

*The punishment above shall be increased by one degree:*

- 1) *If the conduct occurred to the detriment of the Republic of San Marino or public bodies;*
- 2) *If the conduct occurred to secure the price of insurance or induce someone to purchase an insurance policy;*
- 3) *If the conduct occurred by false pretences involving a public official or power of the Republic of San Marino;*
- 4) *If the conduct occurred to obtain a victory in a sports competition or other public competition or in authorised betting related thereto. Where the conduct under the first paragraph occurred dissimulating a state of insolvency, the offender shall be punished, following action brought by the offended, by terms of first-degree imprisonment or daily fine. In the event envisaged in the preceding paragraph, fulfilment of the obligation by the offender before a first-degree judgement is rendered shall extinguish the offence.)*

*The provisions of Articles 373 paragraph 4, 374 paragraph 2, 374 bis paragraphs 1 and 2, shall be applied even if the advantage has been given, offered or promised to the persons foreseen in the first paragraph of this Article.*

#### **Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191)**

48. Bribery of domestic arbitrators is not criminalised in San Marino. The authorities explain that, as bribery is punished only in the public sector, the relevant provisions apply to arbitrators only in so far as their duties are of a public nature.

#### **Bribery of foreign arbitrators (Article 4 of ETS 191)**

49. Bribery of foreign arbitrators is not criminalised in San Marino. As stressed above, the authorities explained that, as bribery is punished only in the public sector, the relevant provisions of Article 374 ter CC cover foreign arbitrators in so far as their functions have a public nature.

#### **Bribery of domestic jurors (Article 1, paragraph 3 and Article 5 of ETS 191)**

50. The judicial system in San Marino does not provide for jurors or lay judges.

#### **Bribery of foreign jurors (Article 6 of ETS 191)**

51. According to the authorities, foreign jurors would be covered by the relevant provisions of Article 374 ter CC, which applies to any person carrying out functions or activities corresponding to those performed by a public official – or a public employee not holding the position of public official – within international organisations or foreign member states.

#### **Other questions**

##### **Participatory acts (Article 15 of ETS 173)**

52. According to Article 73 CC, the general rule is that participatory acts (complicity) are punishable as principal offences.

**Article 73 Criminal Code: Complicity and collaboration**

*All those who have in any way taken part in committing a fact envisaged as a misdemeanour are subject to the punishment established for that misdemeanour.*

*When the fact is an offence and the event has been determined by the interdependent conduct of several persons, each of these persons is subject to the punishment established for that offence.*

*Depending on the case in question, abettors are responsible for offences by way of complicity or collaboration.*

53. Although the law does not specify what complicity consists of, according to case-law, it includes both material and psychological aiding and abetting.

Jurisdiction (Article 17 of ETS 173)

54. Jurisdiction is established over acts committed within the territory of San Marino, according to the principle of territoriality, as laid out in Article 5 CC.

**Article 5 Criminal Code: Offences committed in San Marino**

*Anyone, even a foreigner or a stateless person, committing an offence within the territory of the State is subject to the provisions of this Criminal Code, subject to the exceptions established by international conventions.*

*For the purposes of the Criminal Law, territory of the State means the territory of the Republic, San Marino ships, vessels for pleasure boating and aircrafts wherever they are, unless they are subject to a foreign law.*

*The offence is considered to be committed in the territory of the State when the offender has committed unlawful acts or the event has taken place in said territory.*

55. In order to apply San Marino jurisdiction to an offence of bribery, it is sufficient that only a part of the offence, e.g. the agreement, the promise, the offer, the acceptance of advantages, takes place in San Marino.
56. The law of San Marino also applies to anyone who commits abroad any of the offences specifically listed in Article 6 CC, paragraphs 1 and 2 (e.g. various offences against public bodies, against the Republic, against the sovereignty of the Republic, offences impinging on personal freedom, such as trafficking in human beings, offences against public safety and security, etc.). The aforementioned list includes Article 374 ter CC, which extends the incrimination of serious crimes against the public administrations when involving officials of foreign States or international public organisations. The list includes embezzlement, extortion in office, passive and active corruption and incitement to corruption of officials (or public employees who are not public officials) of foreign States or international public organisations.

**Article 6 Criminal Code: Offences committed abroad**

*Anyone who commits one of the misdemeanours envisaged by Articles 170, 185, 196, 204 bis, 204 ter, 284, 285, 305, 305 bis, 324, 325, 326, 328, 329, 331, 332, 333, 334, 337, 337 bis, 337 ter, 338, 339, 341, 342, 343, 344, 346, 347, 374 ter, 400, 401, 401 bis, 403, 403 bis, 405, outside the territory of the State, is subject to the provisions established by this Criminal Code.*

*Also subject to this Criminal Code are persons who commit the misdemeanours envisaged by Articles 167, 168, 244 and 268, the misdemeanours envisaged by Articles 237 and 239 if*

*committed by hijacking aircraft, the first destination of which is the territory of the State, or that has departed from this latter; all other crimes for which international agreements or conventions oblige the Republic to suppress unlawful acts committed abroad.*

*The Law of San Marino also applies to anyone who commits, outside the territory of the State to the detriment of a San Marino citizen, misdemeanours punishable with imprisonment of no less than the second degree.*

57. Finally, Article 6 (3) CC establishes that the San Marino jurisdiction applies to anyone who commits an offence abroad punishable with no less than 2nd degree imprisonment, when the offence entails a detriment to a Sammarinese citizen. During the visit the authorities explained that this expression is interpreted extensively, in order to include all offences which entail detriment to the interests of the State (not only to a Sammarinese citizen). According to this interpretation, Sammarinese jurisdiction also applies to corruption offences committed abroad entirely and which do not involve foreign officials or officials of international organisations.

The rule enshrined in article 6 (3) does not apply when one of the following conditions is met (Article 7 CC):

- 1) *The San Marino citizen or foreigner was tried and acquitted abroad;*
- 2) *The individual, sentenced abroad, fully served the sentence imposed on him/her upon conviction, though the punishment was less severe than that applied by the San Marino Code;*
- 3) *The individual, sentenced abroad, served a part of the sentence imposed on him/her upon conviction, if said part is equivalent to the entire punishment applied by the San Marino Code.*

#### Statute of limitations

58. The period of limitation for the conclusion of a prosecution with a final judgement depends on the maximum term of the sanctions which can be imposed for the offence in question (Article 54 CC). The limitation period for prosecution of bribery offences is:
- Five years for unlawful act (Article 373, paragraph 1);
  - Four years for lawful act, when the bribe is given or promised before the act (Article 373, paragraph 2);
  - Two years for the offence enshrined in Article 374 (lawful act when the bribe is given after the act).
  - Four years for incitement to corruption for unlawful acts and two years for lawful acts.
59. The limitation period commences when the offender completes the offence or, in the case of an attempt, when s/he ceases to perform the activities that constitute an attempt (Article 55 CC).
60. The limitation period may be suspended or interrupted in certain circumstances (Articles 56 and 57 CC). A suspension merely stops the running of time temporarily. An interruption resets the limitation period and time runs anew from the end of the event causing the interruption. The effects on an interruption are limited in time. In particular, Article 57, paragraph 3 CC establishes the maximum limit (absolute statute of limitation). According to this provision, the statute of limitation cannot be extended by more than half. Both the base and the absolute limitation periods commence at the same time. The only difference between the two periods is that no suspensions or interruptions apply to the absolute limitation period. A limitation period can always be expressly waived by a defendant.

61. During the visit the authorities indicated that there has never been a case where the statute of limitation was reached during the investigative phase, although the Police highlighted that this issue could be at times challenging, notably, in the framework of transnational investigations involving mutual legal assistance requests. All interlocutors interviewed concurred that the length of the statute of limitations was short when dealing with cases of illegal political financing, a specific recommendation has been made in the report on Theme II – Transparency of party funding, as set out in Greco Eval III Rep (2015) 2E, Theme II.

Statistics: *Data on judicial decisions concerning offences against public administration (2010 - 2015)*

**Total number of criminal cases in 2010: 8**

SUBJECT	REGISTERED CASES	CLOSED CASES	PENDING IN PRELIMINARY INVESTIGATION
Abuse of power	3	3	
Violation of official secrecy	3	3	
Bribery	1		1
Refusal to provide official services	1	1	

**Total number of criminal cases in 2011: 6**

SUBJECT	REGISTERED CASES	CLOSED CASES	PENDING IN PRELIMINARY INVESTIGATION
Refusal to provide official services	1	1	
Violation of official secrecy	1	1	
Failure to carry out official duties	3	3	
Abuse of power	1	1	

**Total number of criminal cases in 2012: 21**

SUBJECT	REGISTERED CASES	CLOSED CASES	PENDING IN PRELIMINARY INVESTIGATION	SENT TO TRIAL PENDING BEFORE THE COURT
Bribery	4	1	1	2*
Violation of official secrecy	4	4		
Failure to carry out official duties	2	2		
Abuse of power	10	8	2	
Embezzlement by public official	1	1		

\* For the two criminal cases sent to trial (two files put together, i.e. no.677-678/2012), a judgment of conviction was rendered in 2014 and they are now under appeal.

**Total number of criminal cases in 2013: 17**

SUBJECT	REGISTERED CASES	CLOSED CASES	PENDING IN PRELIMINARY INVESTIGATION
Abuse of power	3	3	
Incitement to corruption	1	1	
Bribery	5	2	3 (2 connected with a money laundering case)
Failure to carry out official duties	1	1	
Violation of official secrecy	5	4	1
Embezzlement by public official	2		2

**Total number of criminal cases in 2014: 5**

SUBJECT	REGISTERED CASES	CLOSED CASES	PENDING IN PRELIMINARY INVESTIGATION	SENT TO TRIAL PENDING BEFORE THE COURT
Bribery	2	2 (1 connected to a money laundering case)		
Failure to carry out official duties	1			1*
Violation of official secrecy	1		1	
Abuse of power	1		1	

\* The criminal case sent to trial has now entered the hearing phase and the hearing has yet to take place.

**Total number of criminal cases in 2015: 1**

SUBJECT	REGISTERED CASES	PENDING IN PRELIMINARY INVESTIGATION
Embezzlement by public official	1	1

**Judgments issues in the last five years**

Year	Number of judgments	Offence
2010	1	Embezzlement by public official
2014	1	Bribery



### III. ANALYSIS

62. San Marino is one of the few GRECO members which have not ratified the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) nor the Additional Protocol thereto (ETS 191). Nevertheless, San Marino, like any other member of GRECO, is subject to peer review according to the standards of the Convention and its Additional Protocol, which are under examination in the Third Evaluation Round (for details, see paragraph 2).
63. When the GET explored the outstanding issue of the ratification of the Convention and its Additional Protocol, the authorities expressed their intention to become Party to these instruments. They indicated that, prior to ratification, they wanted to ensure that national law was in line with international requirements, and considered that this report would be used as a roadmap for such alignment, which thereby would pave the way to ratification. The authorities, nevertheless, wished to underscore the many different steps taken so far to increase the level of transparency in the public sector, as well as the awareness within civil society of corruption risks. In particular, the authorities made reference to several concrete measures introduced in recent years, including the adoption of a Code of Conduct for Public Officials, the adoption of a new public procurement law, the activation of a telephone line for anonymous reporting of corruption suspicions, etc. The authorities also pointed out that a holistic training programme on ethics and corruption offences, in cooperation with magistrates and academia representatives (Urbino University) had been put in place. Likewise, important measures were taken in 2013, pursuant to a reform of criminal procedures, to allow for the creation of a pool of magistrates who would work together, under the leadership of an investigating magistrate and the coordination of the Head magistrate, in complex cases, i.e. generally those relating to economic crime, including corruption.
64. The GET was told on several occasions that the growing number of investigations of corruption-related offences has substantially raised the awareness, concern and sensitivity of the Sammarinese population in respect of the issue. A criminal investigation (so-called *Conto Mazzini*), broadly covered by the media, has been sent to trial for offences of conspiracy to commit corruption, money laundering and other crimes; the investigation involved, among others, several members of the Congress of State, politicians and representatives of the financial and bank sectors.
65. The GET acknowledges the efforts deployed by the Sammarinese authorities to date to sharpen its legislative and institutional framework for fighting corruption. It further welcomes the reported intention of the authorities to promptly ratify the Convention and its Additional Protocol and to bring the anticorruption domestic legislation into line with international standards. Accordingly, **GRECO recommends proceeding swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191)**. In this context, attention is drawn to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. On the same occasion, the Committee of Ministers appealed to States “which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible.” The recommendations contained in paragraphs 73 to 79 of this report are without prejudice to the right of San Marino to enter declarations and reservations pursuant to Article 37 of the Convention and Article 9 of its Additional Protocol.

66. In San Marino, the law providing for the criminalisation of corruption offences, i.e. the Criminal Code (hereinafter CC), dates back to 1974. Although some amendments were introduced in 2008 in order to broaden the scope of the incriminations and align the law to the international instruments<sup>5</sup>, there are still several key gaps in respect of the Convention and its Additional Protocol, as detailed below.
67. The criminalisation of bribery in the public sector, as provided by Articles 372-374 ter CC, generally meets the requirements of the Convention. The corruption offences are formulated in rather complex – and in some areas inconsistent – terms and the legislative definition of corruption is influenced by the Italian Criminal Code. The law differentiates between: bribery for unlawful act, i.e. an act/omission against the official duties (*corruzione propria*), bribery for a lawful act, i.e. an act in conformity with and related to the official duties (*corruzione impropria*) and incitement to bribery (*istigazione alla corruzione*). The offence of extortion in office (*concussione*) is criminalised in Article 372, according to which only the public official is liable to criminal sanctions and not the bribe-giver, as the individual who has been subject to extortion is considered a victim. On the basis of the explanations of the authorities, the elements of the offence, and in particular the term “intimidating”, are rigorously interpreted, in order to avoid the risk of misuse of *concussione* as a defence mechanism (the bribe-givers might claim that they were forced by public officials in order to waive liability). According to the jurisprudence, the crime of *concussione* occurs when the private party is overpowered by the action of the public official (or the public employee) and accedes to the unjust pretences of the former in order to avoid a prejudice. Indeed, only when the will of the private party is forced, can the latter be considered as victim of the offence and go unpunished. The level of sanctions for corruption offences varies according to the type of bribery.
68. The Sammarinese CC goes beyond the requirements of the Convention, insofar as it also criminalises the acceptance and giving of remuneration after the act has been performed by the public official (*corruzione impropria susseguente*), without prior offer, promise or request. The scope of the incrimination is to sanction any possible violation, which would undermine the principle of impartiality of the public administration, provided that the remuneration is related to the specific official act. The GET noted that the term used to refer to the undue advantage in this particular provision was different to that used elsewhere in the CC for corruption offences. In particular, the GET expressed its concern as to whether the term remuneration (*compenso*) could be understood *stricto sensu* as to merely covering bribes consisting of money. The GET was reassured by virtually all interlocutors that this difference in terminology emanated from a lack of harmonisation when the latest 2008 reform of the CC was made, but that in no way was it tantamount to a narrower definition of a bribe, as evidenced by consistent jurisprudence on the matter. While refraining from issuing a formal recommendation on this point, the GET takes the view that this issue deserves appropriate follow-up by the authorities, as they proceed with legislative amendments pursuant to the recommendations issued in this report. For the GET, it is important to ensure consistency regarding the wording of the bribery offences as this can only enhance legal certainty vis-à-vis practitioners and the public at large.
69. As far as the category of persons falling under the scope of bribery offences in the public sector is concerned, the law expressly refers to public officials as well as to public employees who are not public officials. The notion of public official is developed by Article 149(6) CC, pursuant to which a public official is “*anyone who, permanently or temporarily, whether remunerated or not, exercises decision-making, representation, public authority, certification functions, as well as any other public function, to serve the Republic or a public entity*”. This definition includes members of

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<sup>5</sup> Law No. 92 of 17 June 2008.

domestic public assemblies, whether legislative or administrative, members of the government, judges or prosecutors. The GET was told that the notion of public official is to be interpreted to the widest extent possible in the framework of criminal legislation: any person who performs a public function is a public official, irrespective of the private/public nature of the entity where the person develops his/her functions. The decisive factor is the nature of the functions, rather than the status of the employer and the existence of a formal contractual relationship. Even persons who are employed by private entities can fall under the relevant bribery provisions, in so long as they perform public functions; specific examples, based on case-law, were provided throughout the visit in this respect (employees of the postal services which are now privatised, bank employees of the Central Bank of the Republic of San Marino, etc.). It is irrelevant whether the person performing the public function is hired on a permanent or a temporary basis (e.g. consultants), whether free of charge or remunerated. The objective criteria of the nature of the functions performed is complemented by the subjective criteria of the relationship with the public administration, as the criminal provisions on bribery expressly apply as well to public employees who are not public officials. The authorities reiterated that the aim of such a broad and flexible interpretation regarding the category of persons covered by the bribery offence in the Sammarinese CC is to afford effective protection to public office, as well as to the interests of public administration in its different facets and modes of operation. The GET is, in general, satisfied with these explanations and considers that the notion of public official, as understood in the Sammarinese Criminal Code and case-law, effectively covers the different categories of persons of Articles 1(a) and (b) (public official) and Article 4 (members of domestic public assemblies) of the Convention.

70. The material elements of active bribery - promising, offering or giving an advantage – and passive bribery – requesting, receiving or accepting the offer of an advantage – use similar language to the Convention. Even though Article 373 CC does not use the term “offer”, but only refers to the promising or giving, the authorities explained that offering is considered as included in the notion of promising and that between the two terms, as interpreted by the legal practitioners, there are not substantial differences. However, the code does not seem to be consistent as regards the elements of the offence of corruption: the fact that Article 374 bis explicitly refers to the element of “offering” as well as “promising” creates confusion as to whether these two terms in fact have identical meaning as indicated by the authorities. If they do have the same meaning, then it is not clear why Article 374 bis mentions both of them and not only “promising” as does Article 373 CC. While refraining from issuing a formal recommendation on this point, the GET takes the view that this issue deserves appropriate follow-up by the authorities, as they proceed with legislative amendments pursuant to the recommendations issued in this report.
71. Regarding the notion of “undue advantage”, the GET deems it to be in conformity with the requirements of the Convention: it goes beyond material gain and also extends to immaterial advantages, such as promotions, career benefits or sexual favours. The GET was told that, in criminal law, advantages of a low value (even if below the 100 € maximum threshold for occasional customary gifts provided for in administrative law) can be considered bribes in so far as their purpose is to influence the public official’s action in service.
72. While Article 373 CC covers, unambiguously, cases where the undue advantage is not intended for the official him/herself but for a third party, the offence of incitement to corruption, in Article 374 bis, does not refer to third party beneficiaries. The authorities explain that this is so because Article 374 bis on incitement to bribery mirrors Article 373 CC, the latter being the framework bribery offence against which all other provisions are crafted and should be understood; consequently, even if Article 374 bis does not explicitly refer to the beneficiary of the

bribe (whether that be the official him/herself or a third party), that aspect is covered by referring back to Article 373, which does expressly provide for third party beneficiaries.

73. As regards the use of intermediaries, the Sammarinese authorities explained that it was not explicitly provided for as the bribery offences committed through third persons would fall under the general rules on participation in criminal offences, as laid out in Article 73 CC. While participation requires intentional fault by the intermediary (accomplice), the Explanatory Report of the Convention (paragraph 42) indicates that in order to identify the criminal nature of the official's conduct, it is immaterial whether the intermediary used to indirectly carry out the offence was acting in good or bad faith. Hence, to punish instances of bribery committed indirectly and/or when the bribe is intended for a third party beneficiary, the GET still believes that it remains important for the sake of consistency and clarity that all corruption offences contain the same basic elements and that those elements are clearly spelled out in the terms provided for in Articles 2 and 3 of the Convention. Consequently, **GRECO recommends ensuring that all bribery offences are construed in such a way as to explicitly cover instances of bribery committed through intermediaries, as well as instances where the advantage is not intended for the official him/herself but for third parties.**
74. Concerning foreign public officials and officials of international organisations, Article 374 ter was introduced in the Sammarinese CC with a view to extending the criminalisation of (active and passive) bribery, incitement to corruption, as well as the offences of *concussione* and embezzlement, when involving foreign public officials. An autonomous definition of "foreign public official" is not provided in the CC; however, Article 374 ter CC uses the same terms as for domestic bribery (public official or public employee who is not a public official) and explicitly refers to the exercise of functions or activities equivalent to those of a domestic public official (or public employee who is not a public official). Pursuant to that broad definition, the various categories of non-nationals specified in the Convention (foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts) are covered.
75. Turning to the persons covered by the Additional Protocol to the Convention, i.e. domestic/foreign arbitrators and jurors, the CC does not include any specific provision in this respect and there are no relevant court decisions on the matter. San Marino does not have a system of jurors or lay judges. For this reason, the GET considers that no measures to ensure the coverage of domestic jurors are required at present, but that they will become necessary if the use of jurors within the meaning of Article 1, paragraph 3, of the Additional Protocol was to be introduced in the future. The situation is different with respect to foreign jurors, as well as arbitrators. Regarding foreign jurors, many of those interviewed concurred that these would be covered by Article 374 ter referring to foreign officials because the nature of their work, in whichever system, is always public. With respect to the domestic/foreign arbitrators, the authorities explained that as bribery is punished only in the public sector, the relevant provisions apply to arbitrators when the nature of their functions is public; if, for example, they operate under an *ad hoc* agreement between two private companies or operate outside the framework of a permanent arbitration court, they would fall out of the scope of the bribery provisions in the CC. The GET notes that, in the absence of explicit provisions or case-law concerning the persons covered by the Additional Protocol, the opinions expressed by those interviewed on-site was at variance. Therefore, on grounds of legal certainty, **GRECO recommends explicitly criminalising active and passive bribery of domestic and foreign arbitrators and of foreign jurors in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption.**

76. The Sammarinese criminal code does not criminalise trading in influence. The authorities reported that the only provision which, in some way, takes on board certain features of the trading in influence offence is Article 204 CC in so far as it refers to fraudulent conduct of public officials wielding influence (Article 204(3) CC on aggravation of punishment in certain cases of fraud). The GET wishes to stress the importance of criminalising the corrupt trilateral relationship which involves a person having real or supposed influence on public officials or other persons referred to in Articles 4, 5, and 9-11 of the Convention and the “influence peddler”, in order to tackle the corrupt behaviour of those who are in the neighbourhood of power (paragraphs 65 and 66, Explanatory Report to the Convention). Therefore, **GRECO recommends criminalising active and passive trading in influence in line with Article 12 of the Criminal Law Convention on Corruption.**
77. Turning to bribery in the private sector, the Republic of San Marino has not established this conduct as an offence. The GET recalls the importance of the criminalisation of private sector corruption, which may cause significant damage to society at large, given the value of the sums (and potential bribes) often involved in business transactions, and calls upon the authorities to eliminate such a lacuna, in order to ensure a comprehensive strategy to fight corruption. Consequently, **GRECO recommends criminalising bribery in the private sector in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption.**
78. The sanctions available for corruption offences under the Sammarinese legislation appear to conform to the requirements of Article 19, paragraph 1 of the Convention. The level of penalties for bribery offences depends on whether they imply a lawful or unlawful act or omission by the official. In their most serious forms, i.e. in cases of illegal acts or omissions, bribery offences carry prison sentences of up to ten years, a daily fine and the disqualification from public offices and political rights for up to five years. The penalties for active and passive bribery in connection with lawful acts are imprisonment for up to six years, daily fine and disqualification from public offices and political rights for up to three years. The authorities provided details as to the range of penalties which have been imposed in already adjudicated cases, which have consisted of imprisonment of five years, professional disqualification, fines of up to 25 000 € and compensation for damage amounting to 70 000 € (the latter measure being under appeal at present). The GET was further told that it was rare in San Marino to overturn sentences in appeal, all the more so, given that not too many cases go to appeal (in 2014, from 223 first instance judgments, 48 were subject to appeal). Moreover, the GET heard that appellate judgements do not review in a substantial way the sanction imposed in first instance, in order not to dilute the effectiveness of the sanction initially imposed.
79. San Marino has quite broad jurisdiction to prosecute corruption offences. With regard to the principle of territoriality, it is laid out in Article 5 CC and applies over acts committed within the territory of San Marino. It is sufficient that only a part of the offence, e.g. the agreement, the promise, the offer, the acceptance of advantages, takes place in San Marino. The law of San Marino also applies to anyone who commits abroad any of the offences specifically listed in Article 6 CC, paragraphs 1 and 2 (e.g. various offences against public bodies, against San Marino and its sovereignty, offences impinging on personal freedom, such as trafficking in human beings, offences against public safety and security, etc.). The aforementioned list includes Article 374 ter CC on bribery of foreign public officials. Finally, Article 6 (3) CC establishes that the San Marino jurisdiction applies to anyone who commits an offence abroad punishable with no less than 2nd degree imprisonment, when the offence entails detriment to a Sammarinese citizen. During the visit, the legal practitioners explained that the latter expression is interpreted extensively, in order to include all offences which entail detriment to the interests, the honour or the image of the State and not only to a Sammarinese citizen; two specific examples were

provided in this respect<sup>6</sup>. The authorities went further in stressing that, as a matter of fact and pursuant to such a broad interpretation, San Marino would be able to establish “universal jurisdiction” over bribery offences. According to this interpretation, Sammarinese jurisdiction also applies to corruption offences entirely committed abroad and which do not involve foreign officials or officials of international public organisations. The GET has doubts that the full range of scenarios envisaged in Article 17, paragraph 1, subparagraphs b and c of the Convention are indeed covered in San Marino. In particular, it would appear that the Sammarinese jurisdiction does not apply to acts committed abroad if not involving the categories of persons listed in Article 374 ter CC (for example, the case of a Sammarinese public official who takes a bribe abroad) or if the act in question does not result in detriment to a Sammarinese citizen. It is questionable whether the latter requirement – even if understood as the Sammarinese authorities do as causing detriment to the country itself and not merely one of its citizens – would indeed be easy to prove in an international context. This limitation is in no way contemplated by the Convention which aims at facilitating the prosecution of corruption beyond national borders. Furthermore, the jurisprudence provided in this respect (see footnote 6) refers to domestic cases. Moreover, it is unclear whether all cases “involving” any of the persons listed under Article 17, paragraph 1, subparagraph c (offences committed abroad by foreigners, but involving public officials, members of domestic public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts who are – at the same time – Sammarinese nationals), will be covered (for example, in a case of incitement to corruption when the Sammarinese official does not accept the bribe, it would not be possible to apply the Sammarinese jurisdiction). In line with previous GRECO’s pronouncements on the same matter, **GRECO recommends ensuring jurisdiction over all offences of bribery committed abroad (i) by Sammarinese nationals, Sammarinese public officials or members of public assemblies, in accordance with Article 17, paragraph 1, subparagraph b; (ii) or involving Sammarinese public officials or any other person referred to in Article 17, paragraph 1, subparagraph c of the Criminal Law Convention on Corruption.**

#### **IV. CONCLUSIONS**

80. The Sammarinese legal framework for the incrimination of corruption in the public sector complies to a large extent with the requirements of the Criminal Law Convention on Corruption (ETS 173). The legal reforms of the Criminal Code in 2008, which introduced revised provisions on public sector bribery, as well as new provisions with regard to the international aspect of bribery, are proof of the willingness of the Republic of San Marino to align its law to the relevant international instruments in the anticorruption field. Nevertheless, some key gaps remain in respect of the Convention, the most remarkable being the absence of provisions regarding trading in influence and bribery in the private sector. Some adjustments will also be needed as San Marino proceeds with ratification of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) regarding jurors and arbitrators. It is important that, as the authorities proceed with ratification of these two key international instruments in the anticorruption struggle, they pay due attention to the issue of harmonisation in the wording of the offences in the Sammarinese Criminal Code and their basic elements, and make further readjustments on jurisdiction requirements so as to allow for the most effective tools for the prosecution of corruption in its international dimension too.

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<sup>6</sup> Judgment of criminal case 81/2012 135 regarding an offence of forgery of a public document (2005) and ongoing *Conto-Mazzini* case whereby a State agency is given the status of damaged party in the proceedings.

81. In view of the above, GRECO addresses the following recommendations to San Marino:
- i. **proceeding swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) (paragraph 65);**
  - ii. **ensuring that all bribery offences are construed in such a way as to explicitly cover instances of bribery committed through intermediaries, as well as instances where the advantage is not intended for the official him/herself but for third parties (paragraph 73);**
  - iii. **explicitly criminalising active and passive bribery of domestic and foreign arbitrators and of foreign jurors in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (paragraph 75);**
  - iv. **criminalising active and passive trading in influence in line with Article 12 of the Criminal Law Convention on Corruption (paragraph 76);**
  - v. **criminalising bribery in the private sector in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (paragraph 77);**
  - vi. **ensuring jurisdiction over all offences of bribery committed abroad (i) by Sammarinese nationals, Sammarinese public officials or members of public assemblies, in accordance with Article 17, paragraph 1, subparagraph b; (ii) or involving Sammarinese public officials or any other person referred to in Article 17, paragraph 1, subparagraph c of the Criminal Law Convention on Corruption (paragraph 79).**
82. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of San Marino to present a report on the implementation of the above-mentioned recommendations by 30 September 2017.
83. Finally, GRECO invites the authorities of San Marino 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.