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Addendum

Second Evaluation Round

Addendum to the Compliance Report on Spain

Adopted by GRECO
at its 44th Plenary Meeting
(Strasbourg, 6-8 October 2009)

I. INTRODUCTION

1. GRECO adopted the Second Round Evaluation Report on Spain at its 23rd Plenary Meeting (20 May 2005). This report Greco Eval II Rep (2004) 7E, which contains 6 recommendations addressed to Spain, was made public on 5 July 2005.
2. Spain submitted the Situation Report required under the GRECO compliance procedure on 14 June 2007. On the basis of this report, and after a plenary debate, GRECO adopted the Second Round Compliance Report (RC-Report) on Spain at its 34th Plenary Meeting (19 October 2007). This last report was made public on 19 October 2007. The Compliance Report (Greco RC-II (2007) 10E) concluded that recommendations iv and vi had been implemented satisfactorily and recommendations i, ii, iii and v had been partly implemented; GRECO requested additional information on their implementation. This information was provided on 30 April 2009.
3. The purpose of this Addendum to the Second Round Compliance Report is, in accordance with Rule 31, paragraph 9.1 of GRECO's Rules of Procedure, to appraise the implementation of recommendations i, ii, iii and v in the light of the additional information referred to in paragraph 2.

II. ANALYSIS

Recommendation i.

4. *GRECO recommended that a legal provision be introduced specifically providing for provisional measures to be taken for the purpose of guaranteeing the effective confiscation of the proceeds of corruption.*
5. GRECO recalls that it was not sufficiently convinced at the time of adoption of the RC-report that the reported measures concerning seizure guaranteed the effective confiscation of the proceeds of corruption. It therefore assessed recommendation i as partly implemented.
6. The Spanish authorities now stress that the application of Article 127 of the Penal Code (confiscation), in conjunction with Articles 334 to 338 of the Criminal Procedure Code (seizure) allow judges, *ex officio* or upon request of the relevant prosecutor, to effectively seize corruption proceeds. Even though, as recognised in the Second Round Evaluation Report, a specific provision does not exist in the Penal Code tackling seizure in relation to corruption offences, as may be the case in Article 374 of the Penal Code in so far as drug offences are concerned; this has reportedly not hampered, in practice, the attachment of corruption proceeds at very early stages of the investigation. Several examples of seizure orders (concerning the freezing of bank accounts, the attachment of both tangible and intangible property, etc.) in ongoing cases are furnished to support this point. The authorities further report on a number of legislative measures introduced or ongoing to transpose the EU *acquis* in this area, which would allow for extended confiscation and a certain apportionment of the burden of proof (for offences related to organised crime), as well as a more effective execution in the European Union of orders freezing property or evidence.
7. GRECO takes note of the explanations provided by the authorities; it would appear, from the information submitted concerning the effective seizure of proceeds in corruption cases, that the competent law enforcement authorities do not encounter any obstacle in practice to order, on the

basis of the available legislative tools at their disposal, preventive attachment, at early stages of the investigation, to subsequently guarantee confiscation.

8. GRECO concludes that recommendation i has been dealt with in a satisfactory manner.

Recommendation ii.

9. *GRECO recommended to conduct a review of the legal provisions that provide the public with rights to access Government information and the implementation practices that have been developed to determine if the law(s) and/or current implementation practices are inappropriately limiting the public's access to information that would help support the Government in its fight against corruption.*
10. GRECO recalls that, while acknowledging the steps taken in the area of e-government, it concluded in the RC-report that, in the absence of concrete information as to implementation practices concerning the right to access Government information, recommendation ii was partly implemented.
11. The Spanish authorities recall the legislative provisions in this field, notably Article 105b of the Constitution as well as Article 37 of Law 30/1992 on the Legal Regime governing Public Administrations and Common Administrative Procedures. The authorities add that amendments to the latter law are envisaged in order to improve access to information (e.g. by strengthening internal control of public administration and thereby assessing denials or omissions to respond to information requests, procedures based on communication rather than authorisation channels, principle of "silence consent", etc.). Likewise, in the framework of the Spanish Presidency of the European Union in the first half of 2010, the authorities intend to further explore this matter in the Council's Group on Transparency and Access to Documents; data is being gathered to assess the implementation in practice of the relevant access to information provisions in Spanish legislation.
12. GRECO can only conclude that very limited action has been taken to date to comply with recommendation ii and takes note of the reported plans to carry out an assessment of the implementation practices concerning the right to access Government information. GRECO is hopeful that this survey will allow the identification of patterns, including by determining whether the public's right to access information is being inappropriately limited in practice (at present, access to information is subject to several conditions, including that of having a "direct and legitimate" interest in the information being requested¹) and by assessing which measures would need to be developed to improve the current system. In this connection, GRECO wishes to draw the attention of the Spanish authorities to the Council of Europe Convention on Access to Official Documents (CETS n° 205), which sets forth some minimum standards to be applied in the processing of requests for access to official documents and lays down a general right of access to information. In particular, according to Article 4, paragraph 1 of the aforementioned Convention, an applicant for an official document shall not be obliged to give reasons for having access to the official document.
13. GRECO concludes that recommendation ii has been partly implemented.

¹ For further details, see paragraphs 29, 45 and 46 of the Second Round Evaluation Report.

Recommendation iii.

14. *GRECO recommended that a full evaluation of the effectiveness of the current system of criminal/disciplinary sanctions that substitute for an enforceable code of conduct for public officials/employees be conducted and that the study be made public. It recommended further that Spain compile the current criminal/disciplinary provisions and make them available to public officials and employees and publish the compilation for public information.*
15. In its RC-report, GRECO welcomed the introduction of ethical guidance for high ranking members of the Government, as well as the adoption of a common legal framework for public officials and employees concerning their rights and duties. However, it noted that no steps had been taken to conduct a full evaluation of the effectiveness of the system of criminal/disciplinary sanctions in respect of misbehaviour of public officials/employees. Moreover, a compilation of the criminal/disciplinary provisions in force had not been developed. Consequently, GRECO assessed recommendation iii as partly implemented.
16. The Spanish authorities refer to Act 7/2007 on the Basic Statute of Public Employment, which contains provisions on the types of misconduct that may give rise to disciplinary proceedings and lays down procedural rules for disciplinary sanctions. Moreover, the General Secretariat for Public Administration (*Secretaría General para la Administración Pública*) issued a resolution on 21 June 2007 to provide additional interpretative guidance to the responsible human resources services across public administration which are to apply the Basic Statute of Public Employment. Further provisions, encompassing disciplinary sanctions when infringements occur, are laid out in insofar conflicts of interest of members of the Government and high officials are concerned. Finally, the authorities indicate that, in Spain, disciplinary powers rest both at central and Autonomous Community levels; currently, the Autonomous Communities are in the process of developing their corresponding disciplinary frameworks. For this reason, the authorities state that the development of a compilation of the existing criminal/disciplinary provisions (in line with the last part of recommendation iii) depends on the completion of the relevant regulatory action being taken at Autonomous Community level.
17. The authorities also refer to a number of training seminars provided for public officials in 2009, which deal, specifically, with ethics within public administration, including practical examples on corruption risks, good practice and malpractice in the public sector, situations giving rise to conflicts of interest, misconduct and applicable (disciplinary/penal) sanctions in case of infringements. The authorities add that training on deontological principles within public administration is an ongoing exercise intended to better address the concerns raised by recommendation iii, notably, by increasing awareness of public officials and employees as to their obligations and the sanctions that may apply in the event of breaches of the relevant administrative/penal provisions in this area.
18. GRECO welcomes the efforts made by the authorities to raise awareness on, and thereby promote, ethical principles within public administration. GRECO nevertheless notes that a full evaluation of the effectiveness of the current system of criminal/disciplinary sanctions in respect of misbehaviour of public officials/employees has not been conducted. Moreover, a general written compilation of the existing criminal and disciplinary standards is yet to be developed.
19. GRECO concludes that recommendation iii has been partly implemented.

Recommendation v.

20. *GRECO recommended 1) to introduce an adequate system of liability of legal persons for acts of corruption, including effective, proportionate and dissuasive sanctions, and subsequently, 2) to consider to establish a registry of legal persons which have been subject to corporate sanctions.*
21. GRECO recalls that it concluded in the RC-report that the recommendation was partly implemented since the reported legislative initiatives to introduce corporate liability for acts of corruption had not been adopted. GRECO also urged the authorities to give consideration to the establishment of a registry of convicted legal persons.
22. The Spanish authorities report that, due to the dissolution of Parliament preceding the last general elections in March 2007, the adoption of the draft amendments to the Penal Code is still pending. In this connection, on 14 November 2008, the Council of Ministers passed the Draft Organic Bill on the Reform of the Penal Code; the aforementioned draft was then transmitted to the General Council of the Judiciary and the Attorney General's Office for comments and is now to be sent to the Council of State. The Draft Bill contains provisions allowing the establishment of corporate criminal liability for a *numerus clausus* of offences, which include corruption-related offences. In particular, legal persons (companies, associations and foundations) can be held liable for crimes committed, on their behalf or for their benefit, by any natural person, who has a leading position within the legal person, based on a power of representation of the legal person; or the authority to take decisions on behalf of the legal person; or the authority to exercise control within the legal person. Corporate criminal liability would also apply in those cases where lack of supervision within the legal person makes it possible to commit the offence. Liability of the legal person does not exclude criminal liability of the physical perpetrator. Sanctions for corruption-related offences include fines (which may be increased depending on the financial advantage gained or intended to be gained through the criminal act), dissolution of the legal person, suspension of its activities for a maximum period of five years, winding-up of the legal entity for a maximum period of five years, permanent or temporary prohibitions for up to 10 years on activities similar to those that gave rise to the conviction, exclusion from public tender procedures, etc.
23. GRECO takes note of the draft amendments to the Penal Code designed to introduce corporate liability. In this connection, it is obvious that the adoption of the aforementioned amendments is taking longer than initially expected; it is to be hoped that the process will be promptly concluded, so that the reported legislative initiatives become enforceable measures in this area of concern. Moreover, once the draft amendments are effectively adopted, active consideration should be given to the establishment of a registry of legal persons which have been subject to corporate sanctions.
24. GRECO concludes that recommendation v has been partly implemented.

III. CONCLUSION

25. In addition to the conclusions contained in the Second Round Compliance Report on Spain and in view of the above, GRECO concludes that recommendation i has been dealt with in a satisfactory manner; recommendations ii, iii and v remain partly implemented. With the adoption of this Addendum to the Second Round Compliance Report, GRECO concludes that out of the six recommendations issued to Spain, half of them have been implemented or dealt with in a satisfactory manner. GRECO urges the authorities to increase the transparency and

accountability of public administration, in particular, by reviewing the existing provisions on access to information and the corresponding implementation practice, as well as by assessing the effectiveness of the criminal and disciplinary sanctions in the public service. Furthermore, GRECO hopes that the envisaged amendments to the Penal Code, providing, *inter alia*, for a system of liability of legal persons for acts of corruption, will be promptly adopted.

26. The adoption of this Addendum to the Compliance Report concludes the Second Evaluation Round compliance procedure concerning Spain. The authorities of Spain may, however, wish to inform GRECO of further developments with regard to the implementation of recommendations ii, iii and v.
27. Finally, GRECO invites the Spanish authorities to authorise, as soon as possible, the publication of the Addendum, to translate it into the national language and to make the translation public.