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Third Evaluation Round

GUIDELINES for GRECO Evaluators

Memorandum prepared
by the Secretariat

Guidelines for GRECO Evaluators

I. PROCEDURAL GUIDELINES

1) Preparatory stage

1. Prepare yourself well before the on-site visit¹:
 - Read thoroughly the Council of Europe legal instruments/standards under scrutiny;
 - Examine the replies to the questionnaire and the draft descriptive part of the report (DDP), legislation/regulations and other relevant texts that have been provided;
 - Do not hesitate to inform the Secretariat if additional material is necessary (do not contact the country to be evaluated directly!);
 - Mark issues that need to be clarified and formulate preliminary questions;
 - Read up on the political context of the country to be evaluated and, where possible, gather further information in addition to the information provided by the Secretariat;
 - Read through GRECO's First and Second Round Evaluation and Compliance Reports on the country to be evaluated, to get some background information and a general understanding of GRECO's proceedings;
2. You will be asked to submit your opinion on the draft programme of the visit: check that the programme is well-balanced and that it includes meetings with all relevant institutions/actors at the level most appropriate to reply to your questions;
3. You are expected to respect the confidential nature of the evaluation, documents and information provided;
4. The Secretariat will make all practical arrangements, travel tickets, accommodation, etc, in consultation with you.

2) On-site visit

1. At the start of the visit, a preparatory meeting will be organised (GRECO Evaluation Team/GET and Secretariat), during which you should be ready to discuss the DDP, replies to the questionnaire and issues that need further clarification and divide tasks/issues among members of the GET according to respective fields of competence;
2. Please keep the following in mind during the meetings:
 - Respect the collective approach of the GET (act as a team)
 - Act with courtesy and diplomacy, but do not hesitate to insist on obtaining the necessary information;
 - Stay neutral (avoid issuing personal opinions during official meetings) and demonstrate a certain level of empathy (not concession-making);
 - Participate actively in discussions, but respect the time available for each meeting and make sure that there is enough time for all team members to ask questions;
 - Questions should, generally, be complementary to the DDP and reply to the questionnaire and cover both theory and practice;
 - Take notes during all meetings, including on topics which are not your primary responsibility;

¹ It should be borne in mind that a GRECO evaluation requires a considerable amount of preparation, in particular when examining the written material provided to prepare for the visit. Investment of time at this stage of the proceedings is crucial and allows efforts to be concentrated on what is essential during the on-site visit, which is short and very intensive (working days are long!). Such preparation also facilitates the drafting of the analytical part of the report.

- Be flexible: people might not turn up for meetings – be ready to adapt to possible changes in the programme;
 - Keep in mind the confidentiality of the information provided, in particular, during meetings with civil society representatives;
 - Do not provide information concerning the evaluation to journalists. If necessary, the Secretariat will respond to questions from the media concerning the purpose of the visit, the work of GRECO etc, but no statements on the substance of the evaluation can be made.
3. Internal debriefing sessions will be organised by the Secretariat at the end of each working day and/or at the end of the visit, where you will have an opportunity to provide your preliminary opinion and suggestions for recommendations.

3) Follow-up to the on-site visit

1. You are expected to provide your analysis in writing to the Secretariat within two weeks after the visit: take care not to repeat information already available in the DDP, be concise and factual and provide solid reasoning for your conclusions;
2. On the basis of your contribution, the Secretariat will prepare a draft report, the so-called P1-version of the report;
3. You are invited to comment on the P1-version, (preferably) within 1 week from receiving it;
4. The Secretariat will prepare an amended version of the report (P2-version), reflecting your comments on the P1-version, which will be sent to the country in question;
5. Following comments provided by the country on the P2-version, the Secretariat will make suggestions for further amendments to the report (P3-version).
6. You are invited to comment on the P3-version without delay, after which the report will be sent – for information - to the country in question and to GRECO.

4) Adoption process

1. You are expected to assist in the adoption process of the report during a GRECO plenary meeting (1-2 days) in Strasbourg;
2. During the plenary you are expected to briefly introduce your part of the report and to be able to explain your findings, conclusions and recommendations, whenever necessary;
3. Your presence may also be requested during preliminary meetings before² and drafting meetings after the discussion of the P3-version of the report in the plenary.
4. In all meetings, you are expected to uphold the opinion of the GET, whenever this appears to be justified.
5. You should bear in mind that the entire evaluation procedure is confidential: the adopted report remains confidential until the country decides to make it public.

² Information which may require changes to the analytical part of the report – and even to the recommendations – will often be made available only at a very late stage of the proceedings. In principle, you will limit your comments to the information you have gathered during the on-site visit, but - in consultation with the GRECO Secretariat – you may find that there is a need to modify your analysis in light of new information provided.

II. GUIDELINES ON SUBSTANTIVE ISSUES

Part I: "Incriminations"

The following notes provide a brief summary of the main points discussed during the training workshop held on 29 May 2007 in the context of GRECO 33. The notes are intended as an *'aide-mémoire'*, rather than a definitive list of matters to be explored, to assist evaluators in their work, especially in the context of the on-site visits. They indicate a number of issues to which evaluators should be particularly attentive in their discussions with the authorities and other interlocutors met during the visit. Evaluators may, of course, raise other issues. Care should be taken, however, not to repeat questions for which appropriate information is already available in the replies to the questionnaire.

Elements of the offence (in domestic legislation and court decisions/case law)

Active and passive bribery

- Definitions of briber/bribee
- Prohibited conduct and punishability of preparatory acts leading to commission of the offence (differentiation between bribery and other general offences of abuse and misuse of position)
 - *Active bribery*: promising, offering or giving
 - *Passive bribery*: request or receipt, acceptance of an offer or promise
- Object of bribery: material and immaterial advantages
- Bribes for the benefit of third parties
- Bribes through intermediaries (e.g. local agents) and the level of knowledge required on the part of the intermediary
- Connection between the offered/promised/granted advantage and the intended/performed or omitted act
 - "Corruption agreements"
 - Standard of evidence to prove existence of a corruption agreement
- Restrictions
 - (a) Public and private sector:
 - Intentional element of the offence
 - Meaning of term "undue" advantage
 - (b) Private sector:
 - In the course of business activity
 - In breach of duties

Trading in influence

- Improper influence: the element of corrupt intent
- Borderline between lawful and unlawful forms of lobbying

Sanctions

- Range of sanctions in law and in practice
 - Effectiveness, proportionality and dissuasiveness
 - Ratio initiated proceedings and obtained convictions
 - Effects of plea-bargaining
 - Possibility of concurrence of different types of sanctions

Statute of limitations

- Effect of statute of limitations:
 - Definition/calculation of the statute of limitations
 - Possible interruption or suspension of the statute of limitations

Jurisdiction and international aspects

- Territoriality jurisdiction:
 - How to determine the territory in which the offence has taken place?
 - Application to preparatory acts or complicity
- Nationality jurisdiction:
 - Possibility to prosecute corruption cases occurring outside territory of a State Party, involving its nationals, its public officials and members of its public assemblies
 - Restrictions on the application of nationality jurisdiction³
- Possible application of other forms of jurisdiction

Defences

- Scope of defences available under substantive criminal law e.g. effective regret, coercion, solicitation etc.)
- Application of special defences in practice: automatic effect, subject to the discretion of the prosecutor and/or judicial review; possible safeguards against misuse
- Consequences in case of successful invocation (non-punishability/reduction of sentence of briber)

Reservations and declarations

- Rationae and content of relevant reservations/declarations

³ For example, in the form of a double criminality requirement.

Part II: "Transparency of Party funding"

The following notes provide a brief summary of the main points discussed during the training workshop held on 22-23 March 2007 in the context of GRECO 32. They are based on the conclusions prepared by Ms Patricia PEÑA. The notes are intended as an *'aide-mémoire'*, rather than a definitive list of matters to be explored, to assist evaluators in their work, especially in the context of the on-site visits. They signal a number of issues to which evaluators should be particularly attentive in their discussions with the authorities and other interlocutors met during the visit. Evaluators may, of course, raise other issues. Care should be taken, however, not to repeat questions for which appropriate information is already available in the replies to the questionnaire.

General part

- Links between corruption and political financing
 - Perceptions vs. reality
 - Recent controversies
- Great diversity in political cultures, systems and regulatory practices:
 - Public vs. private financing
 - Limits vs. unlimited spending/donations
 - Partisan vs. non-partisan supervision
- All sources of political financing taken into account (in law and possible monitoring):
 - Government subsidies
 - Membership fees
 - Donations (including non-cash donations / benefits-in-kind)
 - Benefits of public office (particularly prior to elections)
 - Income from business and other activities
- International dimension of political financing

Transparency

- Challenges of ensuring full disclosure by parties
 - All income⁴ (loans, membership fees, in-kind donations etc.) and spending⁵
 - 'Parties regular expenditure' and campaign spending
 - Dependent (connected entities) vs. (semi-)autonomous specialised structures⁶
 - Income details: donor, date, amount etc., and spending details
 - Documentary requirements
 - Timeliness of disclosure
- Audit functions
 - Sound operational management, risk analysis, and internal control systems
 - Status (independence), power⁷ and responsibility⁸ of auditors
 - Scope of audit
 - Implications of audit

⁴ For example, public subsidies, indirect public funds, cash donations, in-kind donations, membership fees, loans etc.

⁵ Problems of over- and underbilling, third party expenditures in election campaigns etc.

⁶ Training entities, parliamentary groups, local structures etc.: Are these considered to be independent of the party or is information on their income/expenditures also disclosed by the party?

⁷ For example, do they have access to all documents (contracts, invoices etc.) and components of the party?

⁸ For example, to whom do they report irregularities? Are auditors sufficiently aware of international audit standards, such as ISA 240 and 315?

- Balance between transparency/disclosure and privacy rights

Supervision

- Monitoring function – varied national approaches⁹:
 - Independence
 - Powers and resources
 - Remit
 - Role in ensuring transparency
 - Reporting mechanism
 - Role in enforcement
 - Role in guidance and training
- The functioning in theory and in practice (e.g. pro-forma vs. in-depth control)

Sanctions

- Range of sanctions (from small administrative fines to dissolution of political parties)
 - Completeness of the sanction provisions
 - Effectiveness, proportionality (need to reflect nature of infringement) and dissuasiveness
 - Application in practice
- Involvement of various entities¹⁰ in investigations and cross-over with other legislation¹¹
- Varied national prosecution records
 - Number of investigations and/or prosecutions is not an indicator of corruption levels
 - Liability of legal persons vs. natural persons
- Appeal mechanisms

Other issues

- Compliance with the spirit of the law vs. the letter of the law
- Implementation of the law vs. paper tiger

⁹ Electoral commission, special regulatory body, parliamentary commission, government department, supreme audit institution etc.

¹⁰ Are investigations into infringements of political financing rules investigated by the monitoring body, law enforcement authorities or another entity? Is there co-operation between various entities on these matters (for example with tax authorities)? Etc.

¹¹ Administrative vs. criminal law.