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Third Evaluation Round

Addendum to the Second Compliance Report on Andorra

“Incriminations (ETS 173 and 191, GPC 2)”

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“Transparency of political party funding”

Adopted by GRECO
at its 76th Plenary Meeting
(Strasbourg, 19-23 June 2017)

I. INTRODUCTION

1. The Addendum to the Second Compliance Report assesses further measures taken by the authorities of Andorra since the adoption of the Second Compliance Report in the light of the recommendations made by GRECO in its Third Round Evaluation Report on Andorra. It is recalled that the Third Evaluation Round covers two distinct themes, namely:
 - Theme I – Incriminations: Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - Theme II – Transparency of political party funding: Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
2. The Third Round Evaluation Report was adopted at GRECO's 51st Plenary Meeting (27 May 2011) and made public on 15 June 2011, following authorisation by Andorra (Greco Eval III Rep (2010) 11E, Theme I and Theme II). The Compliance Report (Greco RC-III (2013) 12E) was adopted by GRECO at its 61st plenary meeting (14-18 October 2013) and made public on 22 November 2013 following authorisation by Andorra. The Second Compliance Report was adopted at GRECO's 69th Plenary Meeting (12-16 October 2015) and made public on 14 December 2015 (Greco RC-III (2015) 12E).
3. On 30 September 2016, the Andorran authorities provided additional information on the measures taken to implement those recommendations which, according to the Second Compliance Report, had been partly implemented or had not been implemented. This information, together with the information submitted subsequently, served as a basis to this Addendum to the Second Compliance Report.
4. GRECO selected Austria and Switzerland to appoint rapporteurs for the compliance procedure. The rapporteurs appointed were Mr Christian MANQUET, on behalf of Austria, and Mr Olivier GONIN, on behalf of Switzerland. They were assisted by GRECO's Secretariat in drawing up the Addendum to the Compliance Report.

II. ANALYSIS

Theme I: Incriminations

5. It will be recalled that, in its Evaluation Report, GRECO addressed 10 recommendations to Andorra concerning Theme I. In its subsequent Compliance Report, GRECO concluded that recommendations i, ii and iv had been implemented satisfactorily, that recommendations iii, v, vi, vii, viii and ix had been partly implemented and that recommendation x had not been implemented. In the Second Compliance Report, it was concluded that recommendations v, viii and x had been implemented or dealt with in a satisfactory manner, recommendations iii, vi and vii remained partly implemented and recommendation ix had not been implemented. Compliance with these recommendations is dealt with below.

Recommendation iii.

6. *GRECO recommended (i) to criminalise omissions, whether they are "unjust" or not; and (ii) to clarify the notions of "unjust" actions or omissions and actions or decisions "of a political nature" in Articles 381 and 384 of the Criminal Code.*
7. GRECO recalls that this recommendation was considered partly implemented in the Second Compliance Report. The first part of the recommendation was deemed to have been fully taken into account, following amendments introduced in 2012 to Article 380, paragraph 1, of the Criminal Code (CC) and changes made in September and December 2014 to Article 383, paragraph 1, CC on judicial bribery. GRECO also held, however, that the second part of the recommendation had not been implemented, as no specific measure had been taken to provide the recommended clarifications.
8. The Andorran authorities report that on 15 June 2016, the government presented the Andorran parliament with draft legislation amending the Criminal Code, aimed *inter alia* at implementing some of the outstanding recommendations. This draft legislation was adopted by Parliament on 30 November 2016 and entered into force on 23 December 2016. The wording of Articles 381, paragraph 1, and 384, paragraph 1, CC has been amended, with the adjective "unjust" being replaced by "incompatible with the office" and the term "acts of a political nature" deleted.
9. GRECO welcomes the enactment of the legislation amending the Criminal Code and the removal of the words "unjust" and "acts of a political nature", in line with the second part of the recommendation. Replacing the criminalisation of "unjust" acts by the criminalisation of acts which are "incompatible with the office" poses a problem, however, under Articles 2 and 3 of the Criminal Law Convention on Corruption (ETS 73). For as the Convention's Explanatory Report makes clear, the breach-of-official-duty element is not necessary in order to establish that an offence has occurred. The crucial issue is namely whether the public official requested or received an undue advantage in order to take or refrain from taking an action or decision, whether that action or decision is compatible with his or her office or not. Adding the words "incompatible with the office" restricts the scope of the offence, therefore, and risks making prosecution more difficult, by requiring proof that the public official was expected to act or refrain from acting in a manner incompatible with his or her office. GRECO therefore invites the Andorran authorities to delete the words "incompatible with the office" in order that Articles 381 and 384 CC should be fully compliant with Articles 2 and 3 of the Criminal Law Convention.
10. GRECO concludes that recommendation iii remains partly implemented.

Recommendation vi.

11. *GRECO recommended that consideration be given to (i) making bribery in the private sector an offence, in accordance with articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) and, thus, (ii) withdrawing or not renewing the reservation to these articles of the Convention.*
12. GRECO recalls that this recommendation was considered partly implemented in the Compliance Report. Andorra had maintained the general reservation to Articles 7 and 8 of the Convention and had not introduced any amendments. But the authorities had clearly discussed the matter and reached decisions and had carried out a review of only some of the implications and benefits of extending incrimination to the private sector. GRECO had encouraged the authorities to continue giving consideration to the recommendation in relation to all the expectations of Articles 7 and 8.

13. The Andorran authorities now report that there have been no new developments and that the country's position has not changed since the Compliance Report. The Principality remains committed, politically speaking, to not punishing private sector corruption, unless the acts in question already constitute a criminal offence under the country's criminal law.
14. GRECO takes note of the lack of any new developments. It refers to its previous comments in the Compliance Report. It therefore calls on Andorra once again to look more closely at the possible benefits to be derived from making bribery in the private sector a criminal offence, more in keeping with all the recommendations contained in Articles 7 and 8 of the Criminal Law Convention on Corruption.
15. GRECO concludes that recommendation vi remains partly implemented.

Recommendation vii.

16. *GRECO recommended that consideration be given to (i) bringing the offence of trading in influence into line with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173), by including, in particular, the notions of remuneration and intermediaries and by extending the offence to cases in which influence has not been clearly demonstrated and/or exercised and ones involving foreign public officials, members of foreign public assemblies, international public officials, members of international parliamentary assemblies and judges and officials of international courts; and, thus, (ii) withdrawing or not renewing the reservation to this article of the Convention.*
17. GRECO recalls that this recommendation was considered partly implemented in the Second Compliance Report. In point of fact, while retaining its reservation to Article 12 of the Criminal Law Convention, Andorra had introduced a new Article 386bis in the Criminal Code extending the incrimination of trading in influence (Article 386 CC) to the various categories of persons representing the targets of influence set out in Article 12 of the Criminal Law Convention. GRECO nevertheless noted that not all the relevant aspects had been discussed/examined in the examination of expediency advocated in the first part of the recommendation, in particular the concept of remuneration for influence, and the reference to trading in influence directly or via an intermediary.
18. As regards the first part of the recommendation, the authorities explain that the law amending the Criminal Code has introduced a new paragraph 4 in Article 386 CC, criminalising trading in influence in line with the recommendation. This paragraph provides that:

Article 386. Trading in influence

"(...) 4. Persons who promise, give or offer, directly or indirectly, any undue advantage to anyone who asserts or confirms that he or she is able to exert an influence over the decision-making of an authority or official, whether the undue advantage is for himself or herself or for a third party, or who request, receive or accept the offer or the promise of such an advantage, in consideration of that influence, shall be liable to a prison sentence of up to one year.

For the purposes of this paragraph, it is immaterial whether the influence is exerted or not, or whether or not the supposed influence leads to the intended result or not."

19. As regards the second part of the recommendation, the authorities report that the government decided on 25 January 2017 not to renew the reservation to Article 12. This decision was officially transmitted to the Council of Europe's Treaty Office.
20. GRECO welcomes the introduction of a paragraph 4 in Article 386 CC, which supplements the offence of trading in influence with a reference to the concepts of remuneration and intermediary. The first part of the recommendation has now been implemented satisfactorily therefore. GRECO also welcomes the Andorran authorities' decision not to renew the reservation to Article 12 of the Criminal Law Convention. The Andorran authorities have thus gone beyond the requirements of the recommendation, as they have not only considered the opportunity of incriminating trading in influence and withdrawing the corresponding reservation, they have actually taken such measures.
21. GRECO concludes that recommendation vii has been implemented satisfactorily.
- Recommendation ix.
22. *GRECO recommended that steps be taken to (i) ensure that Andorra has jurisdiction to deal with cases of bribery or trading in influence committed abroad by one of its public officials or involving one of its public officials or any other persons referred to in Article 17.1.c of the Criminal Law Convention on Corruption and (ii) repeal the dual criminality requirement concerning bribery and trading in influence offences committed abroad.*
23. GRECO recalls that this recommendation was deemed not to have been implemented in the Second Compliance Report. After amendments were introduced in 2012 and deemed to constitute progress in the implementation of the first part of the recommendation, further amendments introduced in 2013 to Article 8, paragraph 6, of the Criminal Code restored the article to its previous wording, which had been examined in the Evaluation Report. Under a new paragraph, moreover, the application of this article was confined to certain Council of Europe conventions, of which the Criminal Law Convention on Corruption was not one. With regard to the second part of the recommendation, GRECO concluded that it had not been implemented, Andorra having argued that the dual criminality principle was of fundamental importance for Andorran law. The country, however, has not entered any reservations in this respect.
24. The Andorran authorities report, with regard to the first part of the recommendation, that the law amending the Criminal Code has once again amended Article 8, paragraph 6, CC, which now reads as follows (the additions appear in bold):

Article 8 CC – Geographical application of the criminal law

(...)

6. a) Andorran criminal law shall apply to any offences attempted or committed outside of Andorran territory if an international agreement grants jurisdiction to the Andorran courts.

b) For the purposes of the agreements and offences referred to under sub-paragraph d) below, Andorran criminal law shall also apply to offences attempted or committed outside the territory of Andorra by a foreign national lawfully resident in the Principality or where the victim is a foreign national lawfully resident in the Principality, or by a foreign national – whether he or she is lawfully resident in Andorra or not – where an Andorran official or authority is involved in the offence.

c) In the cases provided for in the agreements in connection with the offences referred to in the following sub-paragraph, the requirements of paragraph 4 a) and c) shall not apply where the perpetrator of the offence is an Andorran national, a lawfully resident foreign national or a non-resident who is on Andorran territory and

where this person cannot be extradited on account of his or her nationality, or a foreign national – whether he or she is lawfully resident in Andorra or not – where an Andorran official or authority is involved in the offence.

d) the agreements and offences referred to in the previous sub-paragraphs are the following:

- Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, done in Lanzarote on 25 October 2007 relating to sexual offences against children.
- Council of Europe Convention on preventing and combating violence against women and domestic violence, done in Istanbul on 11 May 2011, relating to physical and sexual violence against women and family relationships.
- Criminal Law Convention on Corruption, done in Strasbourg on 27 January 1999, relating to bribery and trading in influence offences. (...)

25. The authorities further explain, with regard to the second part of the recommendation, that the dual criminality requirement set out in Article 8.4 a) has been removed in the case of bribery and trading in influence offences.
26. GRECO welcomes the new wording of Article 8, paragraph 6, of the Criminal Code which allows the Principality to prosecute bribery and trading in influence offences committed abroad if they involve an Andorran official or authority. It reiterates that the concept of authorities and officials is defined in Article 32 CC and covers the persons referred to in Articles 9 to 11 of the Convention (officials, members of an international assembly, judges or officials of an international court) irrespective of the nationality of the person concerned. The first part of the recommendation has therefore been implemented.
27. As regards the second part of the recommendation, GRECO welcomes the abolition of the dual criminality requirement, as it appears from the amendments to Article 8.6 c).
28. GRECO concludes that recommendation ix has been implemented satisfactorily.

Theme II: Transparency of political party funding

29. It will be recalled that GRECO in its Evaluation Report addressed 10 recommendations to Andorra in respect of Theme II. The Compliance Report concluded that recommendations i, ii, iii, v, ix and x had been partly implemented and that recommendations iv, vi, vii and viii had not been implemented. In the Second Compliance Report, GRECO concluded that recommendations ii, iii, iv, v, vii, ix and x had been implemented satisfactorily and that recommendations i, vi and viii had been partly implemented. Compliance with the outstanding recommendations is dealt with below.

Recommendation i.

30. *GRECO recommended that (i) regulations be introduced to ensure transparency in the financing of political parties, on an equal basis, consistent with the regulations on campaign financing and in accordance with Recommendation (2003) 4 on common rules against corruption in the funding of political parties and electoral campaigns; (ii) the relations between, on the one hand, the financing of parliamentary groups and, on the other, that of political parties and election campaigns be regulated.*
31. GRECO recalls that previous compliance reports found this recommendation to have been partly implemented. The passing of the *Political Parties and Election Financing Act No. 19/2014* (hereafter Act No. 19/2014) was welcomed, as it filled significant gaps, especially the fact that the rules in force prior to its enactment related exclusively to election financing and did not cover

political party funding. A mixed system of political funding (public and private) had been introduced, together with a ban on donations from legal entities and foreigners, and ceilings on the amount of election expenditure. GRECO also welcomed the commitment of the legislature to ensure as uniform a treatment as possible in respect of political groupings and the financing of political life (political parties and election campaigns/candidates), as advocated in the first part of the recommendation, which it therefore deemed to have been implemented, while at the same time inviting the Principality to remain attentive to the risk for transparency potentially posed by candidates' expenses being directly borne by political parties. In respect of the second part of the recommendation, however, no action had been taken.

32. The Andorran authorities now report that *Act No. 4/2017 modifying the Political Parties and Election Financing Act No. 19/2014* (hereinafter Act 4/2017) was adopted in final reading by the Andorran parliament on 16 March 2017 and entered into force on 6 April 2017¹. This act is primarily intended to implement the recommendations made by GRECO, but it also introduces some clarifications. It likewise amends certain articles of the Court of Auditors Act.
33. With regard to the second part of the recommendation, the above-mentioned act amends Sections 26.4 a) and 44.3 a) of Act No. 19/2014 in order to make it clear that parliamentary groups are among those entities which are not permitted to make donations to political parties and election candidates.
34. GRECO welcomes the amendments brought by Act No. 4/2017, which meet the objectives of the second part of the recommendation.
35. GRECO concludes that recommendation i has been implemented satisfactorily.

Recommendation vi.
36. *GRECO recommended that the regulations specify (i) the arrangements for taking account of the various forms of financial support and support in kind from parties to their candidates and, where relevant, the need to include corresponding amounts in candidates' accounts and (ii) the requirement that as far as possible all support and expenditure must pass through election agents and thus the relevant campaign accounts.*
37. GRECO recalls that, in the Second Compliance Report, this recommendation was considered to have been partly implemented. With regard to the first part of the recommendation, it noted an inconsistency: on the one hand, Section 44.3 of Act No. 19/2014 prohibited donations from legal entities to lists of candidates – which seemed to include political parties – yet on the other hand, Section 37.1 b) established as an offence the fact of political parties making contributions to candidates' accounts, but only in excess of the limits laid down for election expenditure. In addition, the forms of accounts to be maintained by political parties and the lists of candidates merely referred to “public subsidies” and “contributions from natural persons”. The second part of the recommendation was considered to have been implemented, however, thanks to the appointment and role of managers responsible for dealing with income, expenditure and accounts in connection with political funding.
38. The authorities explain that under the terms of Act No. 4/2017, it is still an offence to make contributions to candidates' accounts in excess of the limits laid down for election expenditure. The act further clarifies the rules which prohibit legal entities from making donations to electoral lists. The new version of Section 44.3 a) states that legal entities and in particular associations,

¹ https://www.bopa.ad/bopa/029021/Pagines/CGL20170330_12_55_11.aspx

foundations and parliamentary groups are not permitted to make donations to political parties. The second paragraph of this provision contains an exception, whereby political parties may make financial contributions to cover a shortfall in the electoral accounts, within the maximum limits laid down for election expenditure. Such contributions must be made to the specific accounts stipulated in Section 42 of the Act and must be mentioned in the accounts of the parties and candidates concerned. The model forms of accounts will be revised by the Court of Auditors after the entry into force of the act.

39. GRECO is satisfied with the clarification provided by Act No. 4/2017, which remedies the inconsistency noted in the previous report. The first part of the recommendation is now, therefore, implemented satisfactorily. GRECO notes that the second part had already been deemed to have been implemented satisfactorily in the previous report.

40. GRECO concludes that recommendation vi has been implemented satisfactorily.

Recommendation viii.

41. *GRECO recommended (i) parties and/or candidates be required to publish individual donations above a certain minimum level, together with the identity of donors; (ii) the future regulations on the financing of political parties provide for the regular and timely publication of political party accounts, accompanied by the identity of major donors.*

42. GRECO recalls that the Second Compliance Report found that both parts of this recommendation had been partly implemented, given the uncertainty over the publication of political parties' accounts and campaign accounts. The publication of donations to political parties/election candidates and of the identity of the donors was welcomed as a significant improvement, however.

43. The Andorran authorities have now indicated that Act No. 4/2017 revises the rules governing the publication of donations and of political party and election candidate accounts along the lines advocated in the recommendation. The technical error noted by GRECO in the reference made in Section 26 of the Act has thus been corrected. The time-limits for publication stipulated in Sections 26.12 and 44.12 of the Act have been amended. As from the date on which the amending legislation enters into force, all donations made to parties and election candidates must be reported to the Court of Auditors within eight days. The Court of Auditors then publishes the list of ordinary donations to political parties twice a year in the Official Gazette of the Principality of Andorra (BOPA). As to election campaign donations, the Court of Auditors publishes them within one month of the campaign.

44. At the same time, Act No. 4/2017 amends Section 36.10 of Act No. 19/2014 in such a way as to explicitly state that the Court of Auditors annual report must include a copy of the political parties' annual accounts, and be published in the General Council's Official Gazette, in response to GRECO's criticism that the Act did not explicitly address the question of the publication of political parties' annual accounts, nor the publication of the campaign accounts. Likewise, Section 50.5 of the Act has been amended to make it clear that the Court's monitoring report on the electoral accounts must include a copy of the accounts of the lists of candidates, and must be published in the Official Gazette of the General Council (the parliament) within one month as from the date on which the latter receives the report.

45. GRECO takes note of the various changes to the rules on publication, which have been introduced through the amending legislation. With regard to the first part of the recommendation,

GRECO welcomes the correction of the technical error and the clarification of the time-limits for reporting donations and the identity of donors, as well as the time-limits within which the Court of Auditors is required to publish donations.

46. As regards the second part of the recommendation, GRECO welcomes the changes to Sections 36.10 and 50.5 of the Act, under which the Court of Auditors is required to publish the parties' accounts and the campaign accounts in a regular and timely manner. In view of the above, GRECO concludes that both parts of the recommendation have been implemented satisfactorily.

47. GRECO concludes that recommendation viii has been implemented satisfactorily.

III. CONCLUSIONS

48. In view of the conclusions contained in the previous Third Round Compliance Reports on Andorra and in light of the foregoing, GRECO concludes that to date, Andorra has implemented satisfactorily, or dealt with in a satisfactory manner, eighteen of the twenty recommendations contained in the Third Round Evaluation Report. The remaining two recommendations remain partly implemented.

49. More specifically, with respect to Theme I – Incriminations, recommendations vii and ix can be added to recommendations i, ii, iv, v and viii which have been implemented or dealt with satisfactorily. Recommendations iii and vi remain partly implemented. In respect of Theme II – Transparency of political party funding, all recommendations have now been implemented satisfactorily.

50. With respect to Theme I (Incriminations), further amendments to the Criminal Code have widened the scope of the offence of influencing trading and the rules governing the jurisdiction of Andorran courts over bribery and trading in influence offences committed abroad. The Andorran authorities have likewise decided not to renew their reservation to Article 12 of the Criminal Law Convention. Such progress is to be welcomed. As regards the bribery offences referred to in Articles 381 and 384 of the Criminal Code, while the abolition of the concepts of “acts of a political nature” and “unjust” actions or omissions is a positive move, replacing the adjective “unjust” with “incompatible with the office” unfortunately restricts the scope of the offences in a way that is not compliant with the Convention. GRECO also regrets Andorra’s decision not to extend the offence of private sector bribery and to maintain its reservations to Articles 7 and 8 of the Convention. GRECO notes that in its previous reports, it had welcomed Andorra’s ratification of the Additional Protocol to the Criminal Law Convention and various other improvements, in particular the introduction of the offence of bribery of members of foreign public assemblies and the decision to increase the penalties for bribery and trading in influence offences.

51. With respect to Theme II (Transparency of political party funding), Act No. 4/2017 amending Act No. 19/2014 on political parties and election financing builds on the progress previously noted by GRECO, by establishing the principle that parliamentary groups cannot finance political parties and election campaigns, by clarifying the arrangements for taking account of the financial support provided by parties to candidates in elections, and by providing for the regular and timely publication of political party and election candidate accounts and donations. GRECO notes that in its previous reports, it had welcomed the passing of Act No. 19/2014 as a major achievement, in that it provided Andorra with comprehensive and consistent rules on the financing of political parties and election campaigns and in particular on sources of funding, consistency and oversight. GRECO congratulates the Principality of Andorra for the substantial reforms carried out under this theme.

52. The adoption of this Addendum to the Second Compliance Report terminates the Third Round compliance procedure in respect of Andorra.
53. GRECO invites the authorities of Andorra to authorise, as soon as possible, the publication of this report, to translate it into the national language and to make this translation public.