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**Public**  
**Greco Eval III Rep (2009) 4E**  
**Theme I**

## **Third Evaluation Round**

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

(Theme I)

Adopted by GRECO  
at its 45<sup>th</sup> Plenary Meeting  
(Strasbourg, 30 November – 4 December 2009)

## **I. INTRODUCTION**

1. Ireland joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 9E) in respect of Ireland at its 7<sup>th</sup> Plenary Meeting (17-20 December 2001) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 9E) at its 26<sup>th</sup> Plenary Meeting (5-9 December 2005). The afore-mentioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third 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 (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
  - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Ireland from 8 to 9 June 2009, was composed of Ms Vesna RATKOVIC, Director, Directorate for Anti-Corruption Initiative (Montenegro) and Mr William A. KEEFER, Office of Inspector General (United States of America). The GET was supported by 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 (2009) 4E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: Department of Justice, Office of the Director of Public Prosecutions, Department of Enterprise, Trade and Employment, Criminal Assets Bureau and Office of the Director of Corporate Enforcement. Moreover, the GET also met with representatives of Transparency International and media.
5. The present report on Theme I of GRECO's Third Evaluation Round – "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 measures adopted by the Irish authorities 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 Ireland 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 Greco Eval III Rep (2009) 4E, Theme II.

## **II. INCRIMINATIONS**

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

7. Ireland ratified the Criminal Law Convention on Corruption (ETS 173) on 3 October 2003. The Convention entered into force in respect of Ireland on 1 February 2004. Ireland did not enter any reservation to the Criminal Law Convention on Corruption.

8. The Additional Protocol to the Criminal Law Convention (ETS 191) was ratified by Ireland on 11 July 2005. It entered into force in respect of Ireland on 1 November 2005. Ireland did not make any reservations to the Additional Protocol to the Criminal Law Convention on Corruption.

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

#### Definition of the offence

9. The offences of active and passive bribery of public officials are criminalised under two different legal acts, i.e. the Prevention of Corruption (Amendment) Act 2001, as well as the Criminal Justice (Theft and Fraud Offences) Act 2001, which implements the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests. The latter Act is applicable to national officials, including national officials of another EU Member State, as well as officials of the European Communities in so far as the breach of official duties damages or is likely to damage the European Communities' financial interests.
10. In addition, several old statutes (promulgated by the United Kingdom before Ireland's independence) are also applicable in this area, including the Public Bodies Corrupt Practice Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.
11. Moreover, Ireland is a common law jurisdiction and, therefore, the common law offence of bribery also applies, irrespective of the statutory provisions. In this context, bribery is defined as the receiving or offering of any undue reward by or to any person whatsoever, in a public office, in order to influence his/her behaviour in office, and incline him/her to act contrary to the known rules of honesty and integrity. There is also, at common law, the offence of committing or conspiring to commit misconduct in a public office, whereby a person is answerable criminally to the people for misbehaviour in that office. In addition, bribery of a jury is the common law offence of embracery (jury tampering/trying to influence jurors by persuasion or money or otherwise).
12. Legislative amendments to the Prevention of Corruption (Amendment) Act 2001 were ongoing at the time of the on-site visit. In particular, The Prevention of Corruption (Amendment) Bill 2008, was published in 2008. It was awaiting Committee Stage in the Parliament. Its formal adoption is expected to take place in 2010.

#### *The Prevention of Corruption (Amendment) Act 2001*

13. The descriptions of active and passive bribery are set out at Section 2 of the Prevention of Corruption (Amendment) Act 2001, which amends, *inter alia*, the Prevention of Corruption Act 1906. The Explanatory Memorandum of the Prevention of Corruption (Amendment) Act 2001 states that the purpose of the amendments is to strengthen the law on corruption and enable Ireland to ratify three international agreements, namely (i) the Convention drawn up on the basis of Article K 3(2)(c) of the Treaty of the European Union on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union; (ii) the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions; and (iii) the Council of Europe Criminal Law Convention on Corruption (ETS 173).

**Passive bribery (Section 2(1), Prevention of Corruption (Amendment) Act 2001)**

*An agent or any other person who (a) corruptly accepts or obtains, or (b) corruptly agrees to accept or attempts to obtain, for himself or herself, or for any other person, any gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business shall be guilty of an offence.*

**Active bribery (Section 2(2), Prevention of Corruption (Amendment) Act 2001)**

*A person who (a) corruptly gives or agrees to give, or (b) corruptly offers, any gift or consideration to an agent or any other person whether for the benefit of that agent, person or another person, as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business shall be guilty of an offence.*

14. In addition, the Prevention of Corruption (Amendment) Act 2001, provides for the offence of corruption in office. This offence criminalises any act or omission carried out by an Irish office holder, with the intention of corruptly obtaining a gift, consideration or advantage for any person (including the office holder). While the offences of active and passive corruption deal predominantly with situations where a person offers, seeks or accepts a bribe from someone in return for carrying out an act, the offence of corruption in office, covers cases where an office holder or official acts corruptly without the involvement of another person. An example of such corruption would be where an official made a biased decision in order to corruptly benefit a family member. Also relevant here is section 4 of the Act, which provides for a presumption of corruption in respect of domestic office holders, (including judges, public sector employees, the Attorney General and Director of Public Prosecutions) where certain proceedings are being taken against such persons, and there is proof that they received money or benefit from a party with an interest in how they carried out their public role.

Elements of the offence

*“Domestic public official”*

15. Irish legislation refers to the term “agent”. In particular, Section 2 of the Prevention of Corruption (Amendment) Act 2001 provides with a non-exhaustive list of persons who are covered by the term “agent” comprising, inter alia, any person employed by or acting on behalf of the public administration of the State, as well as an office holder or director of, and a person occupying a position of employment in, a public body and a special adviser. The term “public body” is defined at Section 7 of the Public Bodies Corrupt Practices Act 1889 as “any council of a county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, money raised by rates in pursuance of any public general Act”. Judges and prosecutors are covered by the term “agent”.

**Agent (Section 2(5)(b), Prevention of Corruption (Amendment) Act 2001)**

*“Agent” includes:*

- (i) *an office holder or director (within the meaning, in each case, of the Public Bodies Corrupt Practices Act 1889, as amended) of, and a person occupying a position of employment in, a public body (within the meaning aforesaid) and a special adviser (within the meaning aforesaid);*
- (ii) *a member of Dáil Éireann or Seanad Éireann;*
- (iii) *a person who is a member of the European Parliament by virtue of the European Parliament Elections Act, 1997;*
- (iv) *an Attorney General (who is not a member of Dáil Éireann or Seanad Éireann);*
- (v) *the Comptroller and Auditor General;*
- (vi) *the Director of Public Prosecutions;*
- (vii) *a judge of a court in the State;*
- (viii) *any other person employed by or action on behalf of the public administration of the State.*

16. The authorities explained that the term “agent” does not entail a requirement for a fiduciary relationship between the parties.

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

17. Any person who gives or agrees to give or offers a bribe commits an offence. The authorities confirmed that the notion of “promise” is covered by the term “agrees to give”.

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

18. An agent or any other person who accepts or obtains, or agrees to accept or attempt to obtain a bribe is guilty of an offence.

*“Any undue advantage”*

19. The passive bribery offence refers to the terms “gift, consideration or advantage”. The active bribery offence only refers to “gift or consideration”. The term “consideration” includes valuable consideration of any kind, whether tangible or intangible. The Prevention of Corruption (Amendment) Bill 2008 will, accordingly, fully harmonise the terms referred to in the active and passive bribery offence to further clarify the issue.

20. Legislation does not qualify the nature of the advantage, but focuses instead on the intention with which the advantage was conferred, the offences being constituted by the offer or acceptance of the bribe (“any gift, consideration [or advantage] as an inducement to, or reward for, or otherwise on account of”).

*“Directly or indirectly”, “for himself or herself or for anyone else”*

21. The bribery offences may be committed directly or indirectly (“an agent or any other person”), regardless of whether the intermediary is aware of the intent of the person for whom s/he acts.
22. The bribe could be for the agent *“himself or herself, or for any other person”*.

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

23. Active and passive bribery are liable to punishment when their purpose is “to induce” the agent to and/or “reward” the agent for acting or omitting to act “in relation to his or her office or position, or his or her principal’s affairs or business”. The latter notion covers any “acts or omissions” (Section 1, Prevention of Corruption (Amendment) Act 2001) which are made possible in relation to the public official’s function, whether or not within the official’s authorised competence. It is not required that the induced act or omission involve a breach of duty or be unlawful as such.

*“Committed intentionally”*

24. The relevant bribery provisions require the gift, consideration or advantage to have either been accepted or proffered *“corruptly”*.
25. There is a presumption of corruption, under Section 4 of the Prevention of Corruption (Amendment) Act 2001, which applies to domestic public officials, where there is proof that he or she received money or other benefit from a person who would have an interest in the way the public functions are exercised. Public functions are widely defined in Section 4; they include the granting of licenses, sale or purchase of property and those actions/decisions relating to the planning process. Where the facts are proven, it is presumed that the donation was given and received corruptly as an inducement or reward for the person acting or refraining from acting in accordance with his or her duties, unless the contrary is proven. The authorities referred to a particular case (High Court [2007] IEHC 365, 1 November 2007), currently subject to appeal, where Section 4 of the Prevention of Corruption (Amendment) Act 2001, on presumption of corruption, has been applied.
26. In another case quoted by the authorities, dating from 1998, the word “corruption” was interpreted by the court as to encompass the “destroying, hindering or perverting the integrity or fidelity of a person in the discharge of his/her duty, or the abuse of influence or power or duty by any person, or to bribe or to induce another to act dishonestly or unfaithfully, or an attempt to do the same, or circumstances of control, influence or involvement with such person to the extent that it gives rise to a reasonable inference of unequal access, or favouritism, or a set of circumstances detrimental to his/her duties”.
27. It is intended, following Government and parliamentary approval, to insert a definition of the term “corruptly” in the Prevention of Corruption (Amendment) Bill 2008 to bring greater clarity to the matter.

### Sanctions

28. Active and passive bribery offences attract penalties not exceeding 2,640 EUR or 12 months’ imprisonment on summary conviction, or an unlimited fine or imprisonment not exceeding 10 years, or both, on conviction on indictment.

29. In addition, depending on the facts of a particular case, where a public official is a director of a company, an application can be made to the High Court by the Director of Corporate Enforcement, under Section 160(2) of the Companies Act 1990, against such an individual, seeking to disqualify him/her on the grounds that his/her conduct as a director makes him/her unfit to be concerned in the management of a company. This provision is not limited to directors, but includes a person acting as a promoter, officer, liquidator or examiner of a company. These are civil sanctions, the effect of which means that for the duration of the disqualification term that person would be excluded from acting as a company director. In a case, where a person is convicted under non-company law legislation in relation to corruption/bribery/fraud, the person concerned is deemed to be disqualified as a company director for a period of 5 years or other such period as the court may direct under Section 160(1) of the Companies Act 1990. This provision is applicable even where the person concerned was not a director, auditor or officer of a company.
30. By way of comparison, the offence of theft under Section 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (which replaces the old common law offences of larceny, embezzlement and fraudulent conversion), carry out a maximum penalty of 5 years' imprisonment and/or an unlimited fine. False accounting attracts a maximum penalty of 10 years' imprisonment and/or an unlimited fine.

#### Court decisions/case law and statistics

31. In all, 17 prosecutions were directed in the years 2005-2008 under the Prevention of Corruption Acts. Prosecutions on indictment were directed in 12 of these cases. Ten cases resulted in convictions on indictment, one person was acquitted, and one case could not proceed due to a serious illness on the part of a key witness. Imprisonment sentences were handed out in four cases, typically in the 18 month/30 month range. In the remainder there were suspended sentences usually in the 6/12 month range and in some of the cases a fine. The maximum fine imposed was 20,000 EUR. Summary disposal on a plea of guilty only, was directed in 4 cases pursuant to section 13 of the Criminal Procedure Act 1997, i.e. the Office of the Director of Public Prosecutions allowed the case to be disposed of in the lowest court, the District Court, as the person pleaded guilty. Two less serious cases were disposed of summarily in the local District Court.
32. The authorities provided some illustrative examples concerning bribery cases involving public officials and the range of sanctions (imprisonment and fines) imposed on the convicted persons. For example, a member of the Gardaí (Irish police) was sentenced to four and a half years' imprisonment when he was convicted of receiving a bribe amounting to 18,000 EUR. Details were also provided concerning another case where the accused person was convicted to one year's imprisonment, but the conviction was overturned in appeal. More recently, in 2007, and widely reported in the newspapers, three domestic officials and a law agent were convicted of active bribery; they received suspended prison terms and a collective fine of 50,000 EUR. The authorities further indicated that the typical length of jail sentence is in the 18/30 month range.
33. The authorities further referred to other court decisions concerning other offences under the ethics legislation, including a case under the Electoral Acts, whereby a person in public office was prosecuted under the Electoral Act 1997, for failing to disclose a political donation; a public official (former Minister) knowingly or wilfully declaring false information in relation to his taxation affairs, by failing to declare income - sentenced to 6 months in prison; a local councillor in breach of the ethics legislation as regards re-zoning of lands, pleaded guilty to seeking to influence a decision of the Local Council; and charges were successfully brought under Sections 177, 181

and 182 of the Local Government Act 2001; another official convicted of fraud, attempted theft, deception and false accounting for the misappropriation of council funds, and given a one year jail sentence and fined 75,000 EUR.

*The Criminal Justice (Theft and Fraud Offences) Act 2001*

34. The Criminal Justice (Theft and Fraud Offences) Act 2001, contains relevant provisions implementing the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests. Therefore, the provisions on active and passive bribery of the Criminal Justice (Theft and Fraud Offences) Act 2001 are applicable with respect to domestic public officials in so far as the breach of official duties damages or is likely to damage the European Communities' financial interests.

**Passive bribery (Part 6, Section 40, the Criminal Justice Act 2001)**

*"Passive corruption" has the meaning given to it by Article 2(1) of the First Protocol<sup>1</sup>.*

**Active bribery (Part 6, Section 40, the Criminal Justice Act 2001)**

*"Active corruption" has the meaning given to it by Article 3(1) of the First Protocol<sup>2</sup>.*

35. In this connection, there are some differences as compared to the active and passive bribery provisions included in the Prevention of Corruption (Amendment) Act 2001. In particular, the Criminal Justice (Theft and Fraud Offences) Act 2001 refers to the term "official" (instead of agent), "advantage of any kind whatsoever" (instead of gift, consideration [or advantage]), and the "corrupt" intent is not required. Moreover, the applicable sanctions – on conviction on indictment – for active and passive bribery, under the Criminal Justice Act, consist of a fine and/or imprisonment for a term not exceeding five years (the imprisonment sanctions under the Prevention of Corruption Act are set at higher levels, i.e. 10 years on conviction on indictment).

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

36. The term "agent", under Section 2 of Prevention of Corruption (Amendment) Act 2001, specifically comprises members of Parliament, i.e. Dáil Éireann (House of Representatives), and Seanad Éireann (Senate), as well as, more generally, office holders and persons employed with public bodies. Moreover, in Ireland, local authority members, all of who are paid, and whether elected or appointed, come within the definition of "agent" by virtue of their office. Section 38 of the Ethics in Public Office Act 1995 broadens the relevant definitions. The elements/concepts described under bribery of domestic officials (above) also apply to bribery of members of

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<sup>1</sup> Article 2(1), First Protocol to the Convention on the Protection of the Communities' Financial Interests: For the purposes of this Protocol, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute passive corruption.

<sup>2</sup> Article 3(1), First Protocol to the Convention on the Protection of the Communities' Financial Interests: For the purposes of this Protocol, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute active corruption.



domestic public assemblies. The sanctions described under bribery of domestic public officials (above) also apply to bribery of members of domestic public assemblies.

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

#### Elements of the offence

##### *“Foreign public official”*

#### **Agent (Section 2(5)(c), Prevention of Corruption (Amendment) Act 2001)**

*“Agent” includes:*

- (i) a member of the Government of any other State;*
- (ii) a member of a Parliament, regional or national, of any other State;*
- (iii) a member of the European Parliament (other than a person who is a member by virtue of the European Parliament Elections Act, 1997);*
- (iv) a member of the Court of Auditors of the European Communities;*
- (v) a member of the Commission of the European Communities;*
- (vi) a public prosecutor in any other State;*
- (vii) a judge of a court in any other State;*
- (viii) a judge of any court established under an international agreement to which the State is a party;*
- (ix) a member of, or any other person employed or acting for or on behalf of, any body established under an international agreement to which the State is a party; and*
- (x) any other person employed by or acting on behalf of the public administration of any other State.*

37. The provisions concerning active and passive bribery of domestic public officials are applicable also in respect of bribery of foreign public officials in accordance with Section 2 of the Prevention of Corruption (Amendment) Act 2001. In particular, the authorities confirmed that the term “agent” covers the concept of “foreign public official” as used in the Criminal Law Convention on Corruption. The elements/concepts described under bribery of domestic officials (above) also apply to bribery of members of foreign public officials. The sanctions described under bribery of domestic public officials (above) also apply to bribery of members of foreign public officials. There is no case law/court decision available in respect of these offences.
38. In addition, the provisions on active and passive bribery of the Criminal Justice (Theft and Fraud Offences) Act 2001 are applicable with respect to foreign officials of Member States of the European Union and in so far as the breach of official duties damages or is likely to damage the European Communities’ financial interests (for details, see paragraphs 34 and 35).
39. The Prevention of Corruption (Amendment) Bill 2008 introduces an important change in this area, notably, the scope of the definition of foreign public officials is enlarged to explicitly cover persons under the direct or indirect control of a foreign government.

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

40. Members of foreign public assemblies are considered agents according to Section 2 of the Prevention of Corruption (Amendment) Act 2001, which explicitly covers “a member of a Parliament, regional or national, of any other State”. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign public assemblies. There are no court decisions/ case law concerning bribery of members of foreign public assemblies.

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

41. Active and passive bribery in the private sector is an offence covered by the general provisions of Section 2 of the Prevention of Corruption (Amendment) Act 2001. Therefore, the elements/concepts described under bribery of domestic public officials also apply to bribery in the private sector, in accordance with the following particular features:

*“Persons who direct or work for, in any capacity, private sector entities”*

42. The offences in the Prevention of Corruption (Amendment) Act 2001 were originally premised on the corruption of the relationship of an “agent” to his/her “principal”. However, the term “agent” as described within the corruption legislation is broader than the ordinary meaning of the word, and includes “any person acting for another”, as well as the Attorney General, the Director of Public Prosecutions, employees, members of public administration within the State and abroad, judges within Ireland and abroad, and other parties where the relationship is not predicated on the traditional agent/ principal connection.

*“In the course of business activity”, “...in breach of duties”*

43. The offences in the Prevention of Corruption (Amendment) Act 2001 are not restricted to a breach of duty or, directly, business activity. Instead the impact of the bribe can be the doing or the abstention from doing “any act in relation to his or her principal’s affairs or business”.

### **Sanctions and case law/court decisions**

44. The applicable sanctions in respect of active and passive bribery of domestic public officials apply to the offences of bribery in the private sector. There have been no convictions for corruption in the private sector to date.

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

45. Active and passive bribery of officials of international organisations is covered by Section 2 of the Prevention of Corruption (Amendment) Act 2001 which refers to “a member of, or any other person employed by or acting for or on behalf of, any body established under an international agreement to which the State is a party”. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of officials of international organisations. There are no court decisions/ case law concerning bribery of officials of international organisations.

46. In addition, the provisions on active and passive bribery contained in the Criminal Justice (Theft and Fraud Offences) Act 2001 apply to officials of the European Communities<sup>3</sup> in so far as the breach of official duties damages or is likely to damage the European Communities' financial interests (for details, see paragraphs 34 and 35).
47. In the Prevention of Corruption (Amendment) Bill 2008, the scope of the definition of officials of international organisations is enlarged to cover officials of international organisations, irrespective of whether Ireland is a party to these organisations.

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

48. Although the law does not explicitly refer to members of an international parliamentary assembly, other than those persons working in the European Parliament, the authorities explained that this category of persons would indeed be covered since members of an international parliamentary assembly would necessarily be members of domestic Parliament. Moreover, members of international parliamentary assemblies would also be covered by Section 2 of the Prevention of Corruption (Amendment) Act 2001 which refers to "a member of, or any other person employed by or acting for or on behalf of, any body established under an international agreement to which the State is a party". The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of international parliamentary assemblies. There are no court decisions/ case law concerning bribery of members of international parliamentary assemblies.
49. In addition, the provisions on active and passive bribery contained in the Criminal Justice (Theft and Fraud Offences) Act 2001 apply to officials of the European Parliament in so far as the breach of official duties damages or is likely to damage the European Communities' financial interests (for details, see paragraphs 34 and 35).

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

50. Active and passive bribery of judges of international courts is covered by Section 2 of the Prevention of Corruption (Amendment) Act 2001 which explicitly refers to "a judge of any court established under an international agreement to which the State is a party". Holders of judicial office and other officials of international courts would also be covered by Section 2 of the Prevention of Corruption (Amendment) Act 2001 since they are "members of, or any other persons employed by or acting for or on behalf of, any body established under an international agreement to which the State is a party". The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of judges of international courts. There are no court decisions/ case law concerning bribery of judges of international courts.
51. In addition, the provisions on active and passive bribery contained in the Criminal Justice (Theft and Fraud Offences) Act 2001 apply to officials of the European Court of Justice and the Court of

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<sup>3</sup> Article 1(b), First Protocol to the Convention on the Protection of the Communities' Financial Interests: The term "Community official" shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of employment of other servants of the European Communities; and any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants. Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of the European Communities or the Conditions of employment of other servants of the European Communities do not apply to them.

Audit of the European Communities in so far as the breach of official duties damages or is likely to damage the European Communities' financial interests (for details, see paragraphs 34 and 35).

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

#### **Definition of the offence**

52. According to the Irish authorities, the offence of trading in influence is covered by the relevant provisions contained in Section 2 of the Prevention of Corruption (Amendment) Act 2001 concerning active and passive bribery. In this connection, the authorities have argued that while the exact wording of the Criminal Law Convention of Corruption concerning the offence of trading in influence does not appear in the Prevention of Corruption (Amendment) Act 2001, the wording of the offence of corruption contained in this Act, i.e. "any person... who corruptly agrees to accept for himself or herself, or for any other person, any gift, consideration or advantage as an inducement to or reward for, or otherwise on account of, the agent [a third party] doing any act or making any omission in relation to his or her office shall be guilty of an offence..." imply that trading in influence is envisaged under this offence. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to trading in influence. There are no court decisions/ case law concerning trading in influence.

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

53. The term of domestic arbitrator is not explicitly referred to in the bribery offences. Nevertheless, the authorities indicate that active and passive bribery of a domestic arbitrator is covered in so far as this category of persons can be considered "agents", i.e. "any other person employed by or acting on behalf of the public administration of the State" (Section 2(5)(b)viii of the Prevention of Corruption (Amendment) Act 2001), as well as "any person employed by or acting for another" (Section 2(5)(a) of the Prevention of Corruption (Amendment) Act 2001). The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic arbitrators. There are no court decisions/case law concerning bribery of domestic arbitrators.

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

54. Foreign arbitrators are not explicitly covered; however, pursuant to Section 2(5)(b)viii of the Prevention of Corruption (Amendment) Act 2001, they fall under the definition of "agent" which refers to "any other person employed by or acting on behalf of the public administration of the State" (bribery of an arbitrator working in a public arbitration body), as well as Section 2(5)(a) of the Prevention of Corruption (Amendment) Act 2001, which refers to "any person employed by or acting for another" (cases of private arbitration). The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign arbitrators. There are no court decisions/case law concerning bribery of foreign arbitrators.

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

55. Although there is no explicit reference in statutory law to the term juror, bribery of domestic jurors is covered in so far this category of persons can be considered "agents", i.e. "any other person employed by or acting on behalf of the public administration of the State" (Section 2(5)(b)viii of the Prevention of Corruption (Amendment) Act 2001).

56. In addition, bribery of a juror is the common law offence of embracery. Embracery is defined (in Murdoch's Law Dictionary) as the common law offence of any improper endeavour or attempt corruptly to influence or instruct a jury by money, promises, threats, or by other persuasions or fraudulent devices, other than the strength of evidence and the arguments of counsel in open court. Moreover, jurors fall under the term "agent" comprising "any other person employed by or acting on behalf of the public administration of the State"
57. The penalty in respect of common law offences are not provided for by statute. When a prosecution is brought on indictment, the maximum penalty is an unlimited fine or life imprisonment. However, principles of sentencing in Ireland would require the sentence passed to reflect relevant mitigating circumstances. A variety of non-custodial penalties will also be available – such as, community penalties and disqualification from company directorship.
58. Regarding the common law offence of embracery, in 2005, a person was convicted of trying to influence a juror, and was sentenced to four years imprisonment in the Circuit court. His sentence was upheld following his appeal to the Court of Criminal Appeal.

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

59. The authorities indicate that although bribery of foreign jurors is not specifically provided for in legislation, the Prevention of Corruption (Amendment) Act 2001 covers "any other person employed by or acting on behalf of the public administration of any other State". This provision could, therefore, cover bribery of foreign jurors. Accordingly, the elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials apply to bribery of foreign jurors. There are no court decisions/ case law concerning bribery of foreign jurors.

#### **Other questions**

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

60. Section 7(1) of the Criminal Procedure Act 1997 provides that a person who aids, abets, counsels or procures the commission of an indictable offence is punished as a principal offender.

##### Jurisdiction (Article 17 of ETS 173)

61. By virtue of Section 6 of the Prevention of Corruption (Amendment) Act 2001, Ireland has established jurisdiction over bribery offences when committed – in whole or in part – within its territory (territorial jurisdiction).
62. Section 7 of the Prevention of Corruption (Amendment) Act 2001 lays out the conditions for extra-territorial jurisdiction over bribery offences, which can only be established in respect of Irish public officials. In other words, Ireland cannot, at present, establish jurisdiction over a national who committed the bribery offence abroad (nationality jurisdiction), if s/he is not a domestic public official. In the Prevention of Corruption (Amendment) Bill 2008, jurisdiction is extended to cover virtually all persons having a connection with the State, including Irish citizens, individuals who are ordinarily resident in the State, registered companies and corporate bodies.
63. The scope of extra-territorial jurisdiction under the Criminal Justice (Theft and Fraud Offences) Act 2001 is broader than under the Prevention of Corruption Act 2001. The Criminal Justice (Theft and Fraud Offences) Act 2001 establishes jurisdiction for bribery offences committed

abroad, where the offender is an Irish citizen (nationality jurisdiction), a public official of an EU Member State or an official of the European Communities.

#### Statute of limitations

64. There is no statutory limit on the passage of time between the commission of the offence and the institution of criminal proceedings.
65. However, judges have, the authority to dismiss any case when the length of time between the offence and the institution of formal charges prejudices the defendant. Furthermore, the Public Prosecutor has issued formal prosecution guidelines stating that the prosecutor should, in any case where there has been a long delay since the offence was committed, consider in the light of the case law of the courts whether that delay is such that the case should not proceed. Among the considerations which may be relevant and which the prosecutor should bear in mind are the following: (1) whether any delay was caused or contributed to by the suspect; (2) whether the fact of the offence or of the suspect's responsibility for it has recently come to light; (3) where any delay was caused or contributed to by a long investigation, whether the length of the investigation was reasonable in the circumstances; (4) whether there is a real and serious risk of an unfair trial; (5) where the victim has delayed in reporting the offence, the age of the victim both when the offence was committed and when it was reported; (6) where there has been a delay in making a complaint, whether the complainant was emotionally and psychologically inhibited from or incapable of making the complaint, and, if so, to what extent and in what manner, and whether this was by reason of behaviour that could be attributed to the suspect, whether by overt actions or threats or a more subtle form of dominion or psychological control; (7) whether there is specific prejudice caused to the alleged offender by reason of any delay or lapse of time; (8) whether the suspect has admitted the offence.

#### Defences

66. There are no special defences available for corruption offences.

### **III. ANALYSIS**

67. Overall, the legislation of Ireland complies with the relevant public/private bribery provisions of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). In particular, the material components of the offence, i.e. corrupt acts performed, material and immaterial undue advantages, third party beneficiaries and commission through intermediaries, are covered. As far as the scope of perpetrators is concerned, the broad, and non-exhaustive, description of the term "agent" allows the Irish statutes to embrace the different categories of persons covered by the Convention and its Additional Protocol. Ireland covers bribery in the public and the private sector under the same set of provisions.
68. That said, Irish bribery statutes are the product of more than a century of incremental change. As a result, the relevant statutes dealing with corruption offences – the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, as well as the older statutes promulgated by the United Kingdom before Ireland's independence, i.e. the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 – sometimes overlap, contain differing and unusual terminology, prescribe dissimilar punishments, and have proved to be difficult to fully reconcile with the exact wording of other European/international conventions. For example, the use of "advantage" varies by statute. In particular, the passive bribery offence under the 2001

Prevention of Corruption (Amendment) Act refers to “gift, consideration or advantage”, while the active bribery offence only refers to “gift or consideration” (the Prevention of Corruption (Amendment) Bill 2008 proposes to add the term “advantage to further clarify matters in this respect). The Criminal Justice (Theft and Fraud Offences) Act 2001 refers to “advantage of any kind whatsoever”. The interlocutors interviewed by the GET confirmed convincingly that, despite the inconsistent use of wording, all different terms would indeed cover both material and immaterial advantages.

69. In addition, the small number of bribery prosecutions and the paucity of Irish legal decisions construing some important statutory terms leave both outside observers and Irish practitioners unable to say with certainty what challenges may emerge concerning the laws’ scope and reach. For example, the term “corruptly,” which is an element of the offence for both active and passive bribery in both the 1906 and 2001 Prevention of Corruption Acts, has been defined by the courts to require an intent to enter into a “corrupt bargain”, but this rather circular definition has not been further examined. The authorities, nevertheless, indicated that it is intended, following Government and parliamentary approval, to insert a definition of the term “corruptly” in the Prevention of Corruption (Amendment) Bill 2008 to bring greater clarity in this area. Likewise, the scope of the term “agent” has proven to be a challenging matter when interpreted by the courts. In one case, the offender was a former Government Press Secretary who left government service to become a public relations consultant in 1986. He testified at the Mahon Tribunal that he paid bribes to city and county councillors in 1992 and 1997 for their votes in a number of property development and zoning transactions. According to the Irish authorities, these councillors were elected but unpaid officials during the period of the offences. The offender was charged with active bribery in 2008; however, he was not charged under the 2001 Prevention of Corruption Act or its 1906 predecessor, because that legislation was not applicable at the time he committed the offences. Rather, the offender was charged under an older statute, the Public Bodies Corruption Act of 1889, which does not use the agent - principal terminology and which contains a more expansive definition of “public body.” The offender was charged with bribing eight different councillors, and pled guilty to five of the sixteen charges against him. He was sentenced to two years’ incarceration, with six months suspended because of his cooperation with the authorities. At the time of this report, no other person has been prosecuted. The GET was, nevertheless, told that, pursuant to legislative amendments, in particular Section 38 of the Ethics in Public Office Act 1995, it is now clear that officials are subject to the relevant legislation by virtue of their office, rather than whether they are in receipt of emoluments.
70. To bring greater clarity in this area, the 2008 Prevention of Corruption (Amendment) Bill is now being considered by the Oireachtas (the Irish Parliament); it is expected to be adopted in 2010. When enacted, the Bill will, *inter alia*, continue to utilise the “agent” terminology of the 2001 Prevention of Corruption Act, refer to the term “consideration” to harmonise the active and passive bribery provisions in the statute, and increase the statute’s extraterritorial jurisdiction. Moreover, a codification project has been launched in order to consolidate criminal law into a single criminal act; a Criminal Law Codification Advisory Committee was established to this effect<sup>4</sup>. The GET was told that the codification process will entail a restatement and harmonisation of criminal law. Furthermore, the authorities indicated that a consolidation of the legislation on corruption is being carried out by the Law Reform Commission with a view to better clarifying the scope of the existing legislation and thereby further assisting practitioners in this

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<sup>4</sup> The Criminal Law Codification Advisory Committee was set up in February 2007. It is composed of representatives of the judiciary, legal profession, legal academia, Department of Justice, Office of the Attorney-General, and Office of the Director of Public Prosecutions.

field<sup>5</sup>. The GET welcomes these ongoing legislative developments which can only contribute to bringing greater clarity to the way in which the relevant bribery provisions are to be understood and applied to the benefit of not only practitioners, but also the public at large. Consequently, the GET recommends **to continue with efforts to revise existing criminal law in the field of corruption with a view to enhancing its consistency and clarity.**

71. Ireland does not have a criminal statute specifically prohibiting trading in influence. Irish authorities recently advised the GET in writing that, after further consideration, they have concluded that the Prevention of Corruption (Amendment) Act 2001 and its key provision on bribery (Section 2) brings trading in influence within the “scope” of criminal activity envisioned in Article 12 of the Criminal Law Convention on Corruption. They indicated that the broad wording of Section 2 and, in particular, the reference to “for any other person”, would reach trading in influence. The GET notes that the relevant bribery provisions in the Convention also refer to third party beneficiaries, but that this is different from the trading in influence offence, which – as the Explanatory Report to the Convention explains – aims to tackle the corrupt behaviour of those persons who are close to power and who try to obtain advantages from their situation by influencing the decision-maker. Article 12 of the Convention requires States to establish as a criminal offence the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any public official, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or leads to the intended result. In contrast to bribery, trading in influence addresses a corrupt trilateral relationship. Moreover, the GET notes that the Convention’s Explanatory Report stresses that the trading in influence offence is designed to reach “background corruption,” a phenomenon similar to that referred to in Transparency International’s 2009 Country Study of Ireland as “legal corruption<sup>6</sup>.” Because an influence peddler may be acting only for himself/herself, the 2001 Act’s use of agent - principal terminology calls into question, in the GET’s opinion, whether a person merely purporting to be an agent could be convicted under the 2001 Act. The GET further notes that Ireland has not entered any reservation in respect of Article 12 of the Convention; moreover, the Second Round Evaluation Report on Ireland already identified this lacuna. The authorities indicated that they were actively considering the introduction of an autonomous offence of trading in influence in the context of clarifying the law on corruption. The GET recommends **to clarify the law by establishing an autonomous offence of trading in influence in line with Article 12 of the Criminal Law Convention on Corruption (ETS 173).**
72. Pursuant to the Prevention of Corruption (Amendment) Act 2001, the available sanctions for bribery offences are 12 months’ imprisonment or a fine not exceeding 2,640 EUR on summary conviction, or an unlimited fine or imprisonment not exceeding 10 years, or both, on conviction on indictment. The Criminal Justice (Theft and Fraud Offences) Act 2001 provides for a less severe sanction, i.e. 5 years’ imprisonment and/or an unlimited fine; this Act is applicable in so far as the breach of official duties damages or is likely to damage the European Communities’ financial interests. The differences in penalties is due to the fact that the Criminal Justice (Theft and Fraud Offences) Act 2001 in relation to corruption gives effect to a European Community instrument<sup>7</sup>

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<sup>5</sup> The authorities indicated after the on-site visit that they expected the consolidation of the legislation on corruption to be available very soon.

<sup>6</sup> “While no laws may be broken, personal relationships, patronage, political favours, and political donations are believed to influence political decisions and policy to a considerable degree” (page 16, National Integrity Systems, Transparency International Country Study Report on Ireland, 2009).

<sup>7</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities’ Financial Interests.



whose terms it reflects, whereas the Prevention of Corruption Act 2001 is a domestic statute. The GET was nevertheless told that this does not cause any difficulty in practice as the prosecution services can select the legislation they consider most appropriate in the light of the facts of each case. The representatives from the Office of the Director of Public Prosecutions met by the GET indicated that they are free to decide the selection of the offence with which to charge; this matter is rather linked to the state of the evidence and how to dovetail it with the appropriate offence. Given the small number of bribery and corruption cases that have been prosecuted by the Irish authorities, it is difficult for the GET to draw any conclusions about the effectiveness of legal sanctions. There have been very few prosecutions of bribery in the public sector, and the Irish authorities stated that they were not aware of any convictions for corruption in the private sector or for trading in influence. The statistics and other information made available to the GET indicate that, for a number of reasons, bribery prosecutions are an uncommon feature of Irish criminal law. It is noticeable that Ireland employs a number of sanctions and measures in addition to bribery prosecutions to address corruption, including: public inquiries, civil sanctions, and alternative criminal charges. With respect to public inquiries: the Oireachtas establishes Tribunals of Inquiry to investigate certain matters of public importance, such as the Mahon Tribunal involving the aforementioned bribery of several local councillors by a former Government Press Officer. The tribunals make public the testimony and other evidence they gather, but that evidence may not be used in a criminal prosecution. The work of the Tribunals is widely followed in Ireland. With respect to civil actions: the Criminal Assets Bureau (CAB), with its broad jurisdiction and highly-effective team of police, lawyers and forensic accountants, uses civil actions and forfeiture proceedings to wring profits from corrupt wrongdoers. In 2005, the Parliament enacted legislation permitting the CAB to bring actions for "unjust enrichment"; this now forms part of the statutory remit of the CAB. The Office of Corporate Enforcement uses its staff of police, lawyers and accountants to disqualify corrupt corporate managers and regulate the liquidation of their companies. The law provides an additional sanction in certain cases that a convicted person may not serve as an officer of a company. Insofar as these are State bodies which are not companies, the State does not nominate a person who has been convicted of a corruption offence to serve on such bodies. With respect to alternative criminal charges, the GET was advised that a number of criminal cases brought against corrupt public officials have been for revenue and tax-related offences, rather than for the underlying bribery or corruption offences. The use of these other charges reflects the inherent difficulty in proving the elements of bribery offences. This unusual combination of public inquiries and alternative criminal prosecutions, combined with a small number of bribery charges and the aggressive use of civil sanctions to deny wrongdoers the proceeds of corruption, is the unique model used by authorities to address the problem of corruption in Ireland.

73. At common law, there is no limitation period regarding the instigation of proceedings, nor is there any statutory provision which would limit the institution of proceedings in respect of indictable offences. Summary or minor offences are normally tried in the District (lowest) Court. Indictable offences are tried in higher courts. In respect of time limits for minor offences, the Criminal Justice Act 2006 (at section 177) set out that there is a six month time limit which applies to some offences which can only be tried summarily. However, no time limit applies in respect of initiating proceedings in respect of offences which can be tried either summarily or on indictment. For these reasons, the GET was told that, in practice, there is no time limit for offences under the Prevention of Corruption Acts, unless culpable delay by the prosecution prejudices the right of the accused person to a fair trial.
74. With respect to jurisdiction, there is an important shortcoming of Irish legislation as compared to the Convention. Ireland has established jurisdiction over bribery offences when committed, in whole or in part, within its territory (territorial jurisdiction). Under the Prevention of Corruption

(Amendment) Act 2001, Ireland can establish jurisdiction over a bribery offence committed abroad if any element of the offence (any overt act) occurred in the country. Ireland can also establish jurisdiction over an agent within the meaning of Section 1, subsection 5(b) of the Act when corruption involves one of them. This means that although Ireland is able to establish jurisdiction over one of its public officials, a member of one of its domestic public assemblies, as well as members of international organisations, parliamentary assemblies and courts, it cannot at present establish jurisdiction over Irish nationals who do not hold an “official” status. This is clearly not in line with Article 17(1)b of the Convention. The scope of nationality jurisdiction under the Criminal Justice (Theft and Fraud Offences) Act 2001 is broader since it extends to bribery offences committed abroad, where the offender is an Irish citizen, a public official of an EU Member State or an official of the European Communities. However, as mentioned before, this Act only applies in so far as the breach of official duties damages or is likely to damage the European Communities’ financial interests. In order to comply with international standards in this area, the 2008 Prevention of Corruption (Amendment) Bill when enacted will extend nationality jurisdiction to: (a) an Irish citizen; (b) an individual who is ordinarily resident in Ireland; (c) a company registered under the Companies Act; (d) any other body corporate established under a law of Ireland. The GET welcomes this development and further recommends **to establish jurisdiction over offences of bribery and trading in influence committed abroad by/or involving an Irish national, in accordance with Article 17, paragraph 1, subparagraph b, of the Criminal Law Convention on Corruption (ETS 173).**

#### **IV. CONCLUSIONS**

75. Overall, the Irish legal framework for the criminalisation of bribery offences complies with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Nevertheless, the current legislation, which is drawn from a number of sources and does not always use consistent terminology, would further benefit from reform in order to bring greater clarity to the way in which the relevant bribery provisions are to be understood and applied. This would no doubt be beneficial for legal practitioners as well as for the wider public. Consequently, the ongoing legislative reform in this area is very much welcomed. This could be an opportunity for tackling directly the few shortcomings of the system. In particular, an important lacuna refers to the lack of jurisdiction of Irish authorities over a national who commits a bribery offence abroad, when this person does not have the status of a public official. It is noted that this matter is being addressed in the Prevention of Corruption (Amendment) Bill 2008. There is a need to establish an autonomous offence of trading in influence which unequivocally comprises the different elements of Article 12 of the Convention in order to specifically target the corrupt behaviour of those persons who are close to power and who try to obtain advantages from their situation by influencing the decision-maker (so-called background corruption). In so far as sanctions are concerned, the use of public inquisitions and alternative criminal prosecutions, combined with a small number of bribery charges and the aggressive application of civil penalties to deny wrongdoers the proceeds of corruption, is the unique model used by authorities to address the problem of corruption in Ireland.
76. In view of the above, GRECO addresses the following recommendations to Ireland:
- i. **to continue with efforts to revise existing criminal law in the field of corruption with a view to enhancing its consistency and clarity** (paragraph 70);
  - ii. **to clarify the law by establishing an autonomous offence of trading in influence in line with Article 12 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 71);

- iii. **to establish jurisdiction over offences of bribery and trading in influence committed abroad by/or involving an Irish national, in accordance with Article 17, paragraph 1, subparagraph b, of the Criminal Law Convention on Corruption (ETS 173) (paragraph 74).**
77. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Ireland to present a report on the implementation of the above-mentioned recommendations by 30 June 2011.
78. Finally, GRECO invites the authorities of Ireland 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.