Groupe d'Etats contre la corruption
Group of States against corruption

DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS
DIRECTORATE OF MONITORING

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 11 June 2010

Public
Greco RC-III (2010) 5E

Third Evaluation Round

Compliance Report on the Netherlands

"Incriminations (ETS 173 and 191, GPC 2)"

***

"Transparency of Party Funding"

Adopted by GRECO
at its 47th Plenary Meeting
(Strasbourg, 7-11 June 2010)

Secrétariat du GRECO
Conseil de l'Europe
F-67075 Strasbourg Cedex

www.coe.int/greco
☎ +33 3 88 41 20 00

GRECO Secretariat
Council of Europe
Fax +33 3 88 41 39 55

I. INTRODUCTION

1. The Compliance Report assesses the measures taken by the authorities of the Netherlands to implement the 19 recommendations issued in the Third Round Evaluation Report on the Netherlands (see paragraph 2), covering 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 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 38th Plenary Meeting (13 June 2008) and made public on 10 September 2008, following authorisation by the Netherlands (Greco Eval III Rep (2007) 8E, Theme I and Theme II).

3. As required by GRECO's Rules of Procedure, the Netherlands authorities submitted a Situation Report on measures taken to implement the recommendations. This report was received on 24 December 2009 for Theme I and 19 March 2010 for Theme II and served as a basis for the Compliance Report. Additional information was submitted on 19 April and 5 May 2010.

4. GRECO selected Lithuania and Spain to appoint rapporteurs for the compliance procedure. The Rapporteurs appointed were Mrs Ausra Bernotiene, on behalf of Lithuania, and M. Rafael Vaillo Ramos on behalf of Spain. They were assisted by GRECO's Secretariat in drawing up the Compliance Report.

5. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendation (partially or not implemented) will be assessed on the basis of a further situation report to be submitted by the authorities within a given deadline after the adoption of the present compliance report (see paragraph 89).

II. ANALYSIS

Theme I: Incriminations

6. It was recalled that GRECO in its evaluation report addressed 6 recommendations to the Netherlands in respect of Theme I. Compliance with these recommendations is dealt with below.

Recommendation i.

7. *GRECO recommended to analyse if there is a need, for the sake of legal certainty, to clarify which functions are covered by the notion of 'public official' in articles 177, 177a, 362 and 363 of the Criminal Code.*

8. The authorities of the Netherlands report that a study was carried out by the Research and Documentation Centre [Wetenschappelijk Onderzoeks- en Documentatiecentrum] (WODC)[1], in the context of a debate on the implementation of the public officials' duty to report criminal offences under Article 162 of the Code of Criminal Procedure (CCP). The authorities stress that this initiative links up with the present recommendation of GRECO pertaining to the concept of "public official" in the criminal provisions relating to bribery of public officials. The conclusion reached by the study in question is that the term "public official" used in Dutch Criminal Law can lead to misunderstandings. "Public officials" as used in Article 162 comprises both officials falling within the remit of the Civil Service Law and employees of private entities carrying out tasks which are public by nature. The study concludes that in practice, however, a number of public officials of the latter category will not consider themselves to have a reporting duty under Article 162 of the Code of Criminal Procedure.

9. The results of the study were presented to the Lower House on 8 December 2008 and the response of the government emphasised that further information would be provided on the scope of the concept of "public official" as used generally in criminal law. A governmental working group is currently examining how new policy rules could clarify the concept and consultations have been launched to this end. Depending on the outcome, either clarification will be included in the criminal legislation or supplementary provision will be added to the general administrative order pertaining to Article 162 paragraph 4 CCP[2]. The Dutch authorities stress that in both cases, this will bring clarification to the concept of "public official" under the bribery provisions.

10. GRECO takes note of the consultations engaged in respect of a neighbouring area which concerns the concept of "public official" used in the Criminal Procedure Code provisions dealing with their duty to report criminal offences. GRECO notes with interest that these have confirmed the doubts raised in the Evaluation Report as regards the incriminations of bribery of public officials and that measures will be taken to clarify the concept of "public official" used in criminal law more generally. This goes in the direction of the present recommendation

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

Recommendation ii.

12. *GRECO recommended to amend the provision on private sector bribery aligning it more closely to the provisions on public sector bribery, to ensure that it is fully in line with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).*

13. The authorities of the Netherlands report that this recommendation was taken into account in the context of the drafting of the bill *for the partial amendment of the Criminal Code, the Code of Criminal Procedure and a number of related laws* (Parliamentary documents II, 31 391). It was finally adopted on 29 November 2009 and article 328ter, which criminalises passive and active bribery in the private sector, reads now as follows (amendments are in bold):

Article 328ter

1. A person who, in a capacity other than that of a public official, either in the service of his/her employer or acting as an agent, **requests or** accepts a gift **or service,** or promise thereof in relation to something s/he

[1] The WODC is an independent body operating under the umbrella of the Ministry of Justice.

[2] Bulletin of Acts, Orders and Decrees 1987, 141, amended by decree of 23 December 1999 of the Bulletin of Acts, Orders and Decrees 2000, 23

has done or has refrained from doing or will do or will refrain from doing in the service of his/her employer or in the exercise of his/her mandate, and who, in violation of the requirements of good faith, conceals the acceptance **or request in question** from his/her employer or principal, will be sentenced to a term of imprisonment of not more than **two years** or a fine of the fifth category.

2. The same sentence will be imposed on a person who gives a gift, makes a promise thereof, **or offers or provides a service** to another person who, in a capacity other than that of a public official, is employed or acts as an agent, in relation to something that person has done or has refrained from doing or will do or will refrain from doing in his/her employment or in the exercise of his/her mandate, the gift or promise being of such nature or made under such circumstances that s/he might reasonably assume that the latter, in violation of the requirements of good faith, will conceal the acceptance of the gift or promise from his/her employer or principal.

14. As can be taken from the above, the reference to the "requesting" and "offering" as basic elements of the offences, and to the notion of "service" as a form of undue advantage have been added (although case law had already confirmed in practice that the undue advantage can take the form of a service)

15. GRECO welcomes the above amendments. It regrets that no further consideration has been given to the possible redrafting of the element of "concealment of the gift ...contrary to the requirements of good faith", which is sometimes found unnecessarily vague by Dutch practitioners, as this was mentioned in the Evaluation Report. Overall, however, GRECO is pleased with the changes made since the main lacuna have been addressed and the private sector and public sector bribery offences have been brought closer; this should limit the risks of misinterpreting the private sector bribery offence of article 328ter of the Criminal Code.

16. Overall, GRECO concludes that recommendation ii has been implemented satisfactorily.

Recommendation iii.

17. *GRECO recommended to consider criminalising trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation relating to this article of the Convention.*

18. The authorities of the Netherlands report that once the Evaluation Report was available after its adoption by GRECO in June 2008, a governmental working group, consisting of both policy makers and legislative experts, has thoroughly discussed this recommendation. The conclusions of this working group were then approved by the Minister of Justice and sent to Parliament for information on 22 January 2009.[3] Moreover, the Government has asked some members of the anti-corruption task force (which was created in 2005 as a consequence of the First Evaluation Round report) for an opinion and all the comments have been taken into account. Furthermore, since one of the members is a lecturer at the Saxion University of Applied Sciences, a conference was organised on 8 and 9 April 2010 entitled: "The Market of Power and Influence"[4]. The various manifestations of trading in influence were comprehensively considered during this international scientific conference, which was attended by renowned scientists from a large number of countries. Representatives of the National Police (Rijksrecherche) also attended this conference. Overall, the participants were unable to define unambiguously at what time influencing becomes illegal. They also were not unanimously of the opinion that criminal action is the most appropriate or desirable means to deal with all forms of undesirable influencing. The findings of the

[3] Document *Tweede Kamer, 2008-2009, 31 700 VI, nº 101*
[4] http://www.corruptie.org/

conference were shared, on the occasion of a "dinner pensant", with representatives of the Dutch Ministry of Justice and members of the Dutch sections of Transparency International.

19. On the basis of the above consultations and the results of the conference, the Dutch authorities conclude that criminalising trading in influence is undesirable. In cases in which illegal influencing can be assimilated to bribery, it is already prosecutable under the provisions on active and passive bribery of Dutch law. The Dutch authorities are aware that there is a large grey area of acts which, although they do not constitute a criminal offence *stricto sensu*, are reprehensible and may lead to socially undesirable results. Because these acts often concern moral-ethical considerations, the Dutch authorities do not consider criminal law to be the appropriate means to deal with the grey area of influencing in its legitimate or non-legitimate forms. The Netherlands therefore sees no reason to withdraw or not renew the reservation made in respect to Article 12 of the Convention. The policy line with respect to the promotion of transparency and integrity within public administration will be continued, including in combination with further scientific initiatives to gain insight into the nature and extent of trading in influence in the Netherlands.

20. GRECO takes note of the information provided. It is pleased to hear that thorough consideration was given to this recommendation on the occasion of various consultations. Although the conference of 8 and 9 April was an initiative geared to a broader subject that just trading in influence, its content has helped the Dutch authorities to formalise further their opinion concerning the possible criminalisation of trading in influence. GRECO concludes that the present recommendation has received sufficiently meaningful consideration and it is pleased to learn that the matter will nevertheless be kept under further review by the Dutch authorities.

21. GRECO concludes that recommendation iii has been implemented satisfactorily.

Recommendation iv.

22. *GRECO recommended to consider abolishing the dual criminality requirement for corruption offences committed abroad and thus withdrawing or not renewing the reservation made to Article 17 of the Criminal Law Convention on Corruption (ETS 173).*

23. The authorities of the Netherlands report that the governmental working group referred to in paragraph 18, also examined the present recommendation; following discussions, it concluded that it was not desirable, for the time being, to abolish the dual criminality requirement. Nevertheless, in the context of a research work commissioned to the WODC about the (validity of the) Dutch legal bases for the execution of (extraterritorial) criminal jurisdiction, the latter was asked to also examine the matter of the dual criminality requirement. The research in question is currently in a concluding phase and depending on its outcome, the existing provisions on jurisdiction will be re-evaluated and this might lead to the conclusion that the reservation made to article 17 of the Convention is not needed anymore.

24. GRECO welcomes that the present recommendation has been considered and that, despite the governmental working group's conclusions, the matter will be examined further in the context of research work initiated recently on the current jurisdiction rules applicable in respect of bribery offences. Satisfactory account of the present recommendation has thus been taken. GRECO notes that it would appear that the reservation made by the Netherlands in respect of article 17 paragraph 1 is in fact more restrictive than what GRECO assumed initially (and that it is not limited to the matter of dual criminality): the reservation acknowledges the principle of territorial competence but it limits the country's jurisdiction to acts committed by nationals and domestic

public officials (whether they are nationals or not); by doing so, it seems to exclude any jurisdiction of the Netherlands over – for instance – bribery acts committed abroad against domestic public officials, by foreign bribe-givers. Therefore, it is even more welcome that the present matter is kept under review by the Dutch authorities. .

25. GRECO concludes that recommendation iv has been implemented satisfactorily.

Recommendation v.

26. *GRECO recommended to increase the sanctions for private sector bribery (article 328ter of the Criminal Code) and to consider increasing the sanctions for public sector bribery not involving a breach of duty (articles 177a and 362, paragraph 1, of the Criminal Code), ensuring that the sanctions for these offences are effective, proportionate and dissuasive in practice, as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173).*

27. The authorities of the Netherlands recall that in accordance with Article 328ter of the Dutch Criminal Code, the sanction for active and passive bribery in the private sector was, until recently, imprisonment for up to one year and a fine in the fifth category (up to € 76,000 for natural persons, and up to € 760,000 € for legal persons by virtue of the general provisions of article 23 paragraph 7 CC). In accordance with the recommendation, it has been decided to raise the maximum sanctions for private sector bribery so as to bring them more into line with those applicable to bribery of public officials. This was done through the bill *for the partial amendment of the Criminal Code, the Code of Criminal Procedure and a number of related laws* (see also paragraph 13), which was finally adopted on 29 November 2009 and has raised the maximum penalty to two years' imprisonment. At the same time, the maximum fine for violating article 177a CC on active bribery of public officials without a breach of duties (which is punishable by a sentence of up to two years' imprisonment or a fine in the fourth category) was raised to the fifth category (up to € 76,000 instead of € 19,000); the sanction provided for this kind of offences was thus aligned on those applicable to passive bribery offences under article 362 paragraph 1. The working group referred to in paragraph 18, examined the present recommendation and it considered it not desirable to further increase the penalties for the above offences in order not to disrupt the current balance between the sanctions for private sector bribery offences and those for public sector bribery offences. The Dutch authorities take the view that the penalties are effective and dissuasive in the context of the Netherlands and in view of the absence of early release from imprisonment; they stress that, in addition, cumulating a fine and imprisonment has been possible under Dutch Law since 1995.

28. GRECO takes note of the information provided. It welcomes the fact that the maximum sanction for private sector bribery offences under article 328ter was raised from up to one year to up to two years' imprisonment and that consideration was given to increasing the sanctions for public sector bribery offences not involving a breach of duty . Although it regrets that the maximum level of penalties for private and public sector bribery offences still remains low compared to many other GRECO member States, it concludes that overall, account has been taken of the present recommendation.

29. GRECO concludes that recommendation v has been dealt with in a satisfactory manner.

Recommendation vi.

30. *GRECO recommended to give high priority, in the process of political reform currently underway in the Kingdom of the Netherlands, to bringing the legislation of all countries of the Kingdom into line with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191).*

31. The authorities of the Netherlands report that the Kingdom of the Netherlands is currently engaged in a process in which a number of political reforms are being implemented. The Netherlands Antilles will cease to exist as a separate administrative entity (the dissolution of the Netherlands Antilles, which was planned to occur in December 2008, has been put off to 10 October 2010). The islands of Bonaire, Sint Eustatius and Saba, which currently belong to the Netherlands Antilles, are to become integral parts of the Netherlands' territory (as special municipalities). Although they will have to introduce most of the Dutch legislation, as far as criminal law is concerned an amended version of the Netherlands Antilles Criminal Code has been prepared for these three future municipalities to be able to fulfil the requirements of various international conventions, including those on corruption. The scope of the conventions will automatically be extended to these territories. The provisions concerning active and passive bribery in the new Criminal Code for these three islands are exactly the same as those in the Criminal Code for The Netherlands and it will enter into force on 10 October 2010. As regards the other two islands – Curaçao and Sint Maarten – they are each to be given the status of constituent states within the Kingdom of the Netherlands. Aruba, which was not part of the Netherlands Antilles, is not affected by the reform. For several years, the Netherlands Antilles and Aruba have been working on new revised Criminal Codes. The same legal provisions as those mentioned above have also been proposed for the respective Criminals Codes for Aruba, St Maarten and Curaçao. However, it is up to the governments of these islands to decide about the date for the introduction of their Code.

32. GRECO recalls the existence of the declaration of the Netherlands contained in the instrument of its acceptance of the Convention and the Additional Protocol in which the territorial application of the Convention and its Additional Protocol is restricted to the Kingdom of the Netherlands in Europe: the Convention and Additional Protocol thus do not apply to the Netherlands Antilles and Aruba[5]. GRECO is pleased to see the evolution reported by the Dutch authorities as regards the future criminal legislation for the islands of Bonaire, Sint Eustatius and Saba. GRECO understands that the Netherlands has a more limited capacity to influence the legislation of Curaçao, Sint Maarten and Aruba but in their case too, the draft criminal codes that have been prepared would reflect the requirements of the Convention and the Protocol (at least to the same extent as the Netherlands' legislation itself does). The exact date of entering into force of these last three codes remains to be determined and the Netherlands have obviously no control over

[5] As indicated in paragraph 94 of the mutual evaluation report, "*Article 34 of the Convention explicitly allows states to specify the territory to which the Convention shall apply. Nevertheless, the GET was not made aware of the reasons why the Netherlands Antilles and Aruba had not acceded to the Convention and the Additional Protocol. The GET merely notes that the Civil Law Convention on Corruption (ETS 174), which was recently ratified by the Netherlands, is also applicable to the Netherlands Antilles (but not Aruba) and that other Council of Europe Conventions, such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141), apply to both the Netherlands Antilles and Aruba. In view of this, and also considering the priorities formulated by the current Dutch government to work together with Aruba, Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba on an administration that is efficient, transparent and upright and the process of political reform currently underway in the Kingdom, the GET would find it advisable that efforts are made to ensure that the legal provisions on corruption in all countries of the Kingdom of the Netherlands comply with the requirements of the Convention and the Additional Protocol.*"

this; GRECO concludes, nevertheless, that high priority was given to adapting the legislation of the Netherlands Antilles and Aruba along the lines of the present recommendation.

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

Theme II: Transparency of Party Funding

34. It was recalled that GRECO in its evaluation report addressed 13 recommendations to the Netherlands in respect of Theme II. Compliance with these recommendations is dealt with below.

Recommendation i.

35. *GRECO recommended to require all entities represented in parliament (political parties and other groupings) to submit an annual financial report.*

36. The authorities of the Netherlands recall that in recognition of the fact that the law in force - the Political Parties Subsidisation Act (hereafter: PPSA) of 1999 - does not constitute a satisfactory legal framework to ensure transparency of party funding, the new Financing of Political Parties Act (WFPP) was drafted to replace the PPSA, and at the time of the on site visit, the evaluators had an opportunity to examine a version dated 10 October 2007. The draft WFPP was further amended to include the recommendations contained in the Third Evaluation Round report and the revised text was then discussed several times with the chairmen of the political parties as well as in the cabinet. The bill aims at improving the status of donations and increasing the transparency of party funding, *inter alia* in respect of the publication of donations and the creation of an independent supervisory authority. However, the draft WFPP has not yet been submitted to parliament and before the government managed to send it to the Council of State for a new opinion, the Dutch government was dissolved on 20 February this year. Until early elections are held, the current temporary government is dealing only with daily house-keeping matters and in principle it will be for the new government to take the WFPP legislative proposal up again.

37. The Dutch authorities indicate that for the implementation of recommendation i, the current draft WFPP (article 24) foresees that all political parties with seats in parliament will have to send before 1 July of each calendar year, a financial annual report to the Election Council (which would replace the Ministry of the Interior as the supervisory authority in the area of political financing). The authorities also stress that further rules will not be set about other groupings; at the time of the on-site visit, there were such informal groupings represented in Parliament, but since then, all those represented in parliament are or have become associations with full legal capacity. Moreover, the new law will apply to all parties and groupings constituted as associations. The electoral law does give the possibility for independent candidates to participate in elections. In that case, the regulations on donations will apply to the participating candidates (the first on the list would send information on donations to the Election Council), in accordance with article 31 WFPP.

38. GRECO takes note of the delays in the adoption of the new legislation, the draft Financing of Political Parties Act (WFPP). According to the information submitted, the situation as regards the matters addressed in the present recommendation has not changed in the current revised version of the draft as compared to the draft available at the time of the on-site visit[6]. This does not

[6] As indicated in paragraph 77 of the Evaluation Report, "*If the draft Financing of Political Parties Act is adopted as foreseen, it will provide for some improvements in this respect, at least in the context of an election campaign: political parties in parliament as well as those participating in elections of the Second Chamber but not yet represented in parliament as well as*

respond to the expectations of the present recommendation ("*to require all entities represented in parliament (political parties and other groupings…)".* Moreover, despite the fact that currently there are no informal groupings represented in Parliament, one may not exclude that the situation that existed at the time of the on-site visit would occur again. In any event, for the reasons explained above by the Dutch authorities, the draft WFPP has not yet entered into force and there has in fact been no real progress in the adoption process, since the on-site visit. Overall, GRECO cannot conclude that any meaningful improvement has taken place.

39. GRECO concludes that recommendation i has not been implemented.

Recommendation ii.

40. *GRECO recommended (i) to require all entities represented in parliament to report on their financial situation in appropriate detail, including information on income, expenditure, debts and assets, and (ii) to establish a standardised format (accompanied by appropriate guidelines, if necessary) for the financial reports to be submitted by all entities represented in parliament.*

41. The authorities of the Netherlands indicate that in the revised draft WFPP, it is provided that by ministerial regulation, requirements can be set as regards the structure of the financial annual report.

42. GRECO takes note of the information provided above and regrets that no concrete progress has been accomplished on the present matter, since the Political Parties Subsidisation Act (PPSA) of 1999 already provided for the possibility to establish by ministerial regulation further requirements for the structure of the financial report as well as the activities report. In view of this, GRECO considers that, with a view to the delays experienced in the adoption process of the draft WFPP, further measures – along the lines suggested by the recommendation - could already have been taken, at least as far as those political parties already required to submit a financial report under the present legislation are concerned. Finally, as indicated under recommendation i, the obligations under the draft WFPP do not apply to all entities.

43. GRECO concludes that recommendation ii has not been implemented.

Recommendation iii.

44. *GRECO recommended (i) to require all entities represented in parliament to disclose, at least annually, all donations and bequests received from natural persons (including party members) and legal persons, including information on the source of these donations (at least above a certain threshold), their nature and value; (ii) to lower the current disclosure threshold of €4,537.80 for (corporate) donations in the Political Parties Subsidisation Act to an appropriate level and (iii) to prohibit donations from donors whose identity is not known to the political party/grouping/candidate.*

45. The authorities of the Netherlands report as regards the first and second part of the recommendation that the draft WFPP (article 20) will prescribe political parties to maintain records of contributions received with a value of more than € 750. This obligation will concern

---

lists of candidates, which do not have the status of associations with full legal capacity, will have to report on donations (above €3,000) received in the sixth month period before the elections. The GET welcomes this, but also considers that it would be in the interest of the electorate to be able to receive information about the finances of political parties and other groupings in parliament outside the context of an election campaign."

both donations in money and in kind. The details of the donor, both natural persons and legal persons, will have to be included in these records. This threshold has been debated and it was considered that donations below this threshold are not seen as substantial and therefore not a source of risks. Furthermore, the debts of the party will also have to be recorded in the financial records. In principle, under article 1 of the draft WFPP, membership fees are all payments made regularly by party members; all their other payments are to be treated as donations. Bequests (legacies) are still excluded from the concept of donations since it is understood that only deceased can make legacy donations. Details of donations worth more than €4,500 will have to be sent to the Election Council, as well as the details of debts in excess of € 25,000. The Election Council will be required to publish the details of the donations and in the Government Gazette and on the internet. Finally, as regards the third part of the recommendation, the draft WFPP will prescribe that if a party receives an anonymous donation with a value of more than €750, it is to transfer the amount in excess of €750 to the Electoral Council (or if this is not possible, as regards in-kind donations, to destroy the donation). According to article 29 WFPP, the rules on donations – at least those of article 20 (record keeping requirements) and article 22 (on ceiling on donations) apply accordingly to ancillary institutions of a political party (political science institutes, youth organisations or other entities which can be attributed to a party according to certain criteria).

46. GRECO takes note of the information provided. As regards the first part of the recommendation, the Evaluation Report had considered that the former draft of the WFPP, if adopted as foreseen, would already address part of the concerns it had as regards the disclosure provisions of the Political Parties Subsidisation Act (for instance the recording of donations both from natural and from legal entities, as well as in-kind donations). It would appear that the issue of donations from party members has been addressed but questions remain in respect of other matters such as legacies remaining outside the scope of the WFPP. As regards the second part of the recommendation, GRECO recalls that the disclosure threshold for donations foreseen by the (old) draft of the WFPP, as examined by the GET, stood at €3000 for donations (both natural persons and legal persons). In the new draft of the WFPP this has been raised to €4,500 for all donations, which means the disclosure threshold remains almost at the same level as in the Political Parties Subsidisation Act currently in force.

47. As for the last part of the recommendation, it addresses the current situation as it results from the Political Parties Subsidisation Act (PPSA) of 1999[7]; in the Evaluation Report, it was already noted that under the future WFPP, donors will not anymore be able to refuse to be identified. This being said, the Dutch authorities confirm that under the WFPP as amended recently in the light of the findings of the Evaluation Report, there will still be a possibility to accept anonymous monetary and in-kind donations insofar as their value is less than €750. In fact, it is not entirely clear whether donations below this threshold need to be registered at all. GRECO considers that these issues still need to be addressed; moreover, it appears that the version of the WFPP available at the time of the visit provided for stricter prohibitions (all anonymous monetary donations above 150€ and anonymous in-kind donations above €700 could not be kept by the beneficiary). GRECO also notes that the rules applicable to ancillary institutions and party sections also continue to raise further questions as there are several derogations to the applicability of the rules on transparency; for instance, under article 23 WFPP, all the provisions of articles 19 to 22 on

[7] In particular the fact that the PPSA even explicitly provides for an escape clause: if the legal person objects to having its name mentioned in the report only a description of the type of entity it is would have to be included. Furthermore, anonymous donations are not prohibited, although from the interviews conducted by the GET it would appear that a number of political parties have internal regulations not to accept donations from persons whose identity is not known to the party (paragraph 79 of the Evaluation Report)

transparency (including record-keeping) are still not applicable to territorial sections of a party, as at the time of the visit.

48. Overall, it would appear that the very modest progress in the implementation of this recommendation is counterbalanced by new amendments which go in the opposite direction, and in any event, the WFPP which is not meant to apply to a broad range of entities, is still to be adopted.

49. GRECO concludes that recommendation iii has not been implemented.

Recommendations iv and vii.

50. *GRECO recommended (i) to extend the applicability of the future provisions on donations (and possible limits on donations) to local and regional/provincial units of political parties and (ii) to ensure that the accounts of political parties are consolidated to include the accounts of local and regional/provincial units, in line with Article 11 of Recommendation Rec (2003)4 on common rules against corruption in the funding of political parties and electoral campaigns.* (**recommendation iv**)

51. *GRECO recommended to take measures to enhance transparency of income and expenditure of political parties at local level..* (**recommendation vii**)

52. The authorities of the Netherlands indicate that for the time being, the (draft) WFPP only provides rules on donations to political parties with seats in parliament and that the country has no experience with the supervision of the financing of political parties. It is foreseen that after 5 years following its introduction, the Act will be subject to an assessment as regards its practical implementation, and the possible need to broaden its scope will be examined on this occasion.

53. GRECO can only note that no concrete measures have been taken in respect of these two recommendations; it very much regrets that such important aspects are left entirely to (hypothetical) future consideration in at least 5 years' time. As indicated in paragraph 48, article 23 of the draft WFPP (article 23) still excludes the applicability to territorial party sections of the main provisions on transparency provided under articles 19 to 22. This is a serious deficiency, besides the fact that the legal requirements would be applicable only to parties with seats in Parliament.

54. GRECO concludes that recommendations iv and vii have not been implemented.

Recommendation v.

55. *GRECO recommended to take measures to enhance the transparency of fundraising activities by entities related, directly or indirectly, to political parties and other groupings in parliament.*

56. The authorities of the Netherlands inform that the transparency requirements of the draft WFPP will apply equally to political parties and institutions affiliated to them. These include scientific institutes, youth organisations, training institutions and other organisations that carry out activities for the benefit of the political party.

57. GRECO recalls that the draft WFPP available at the time of the on-site visit aimed at improving considerably the situation as regards the transparency of political parties and related entities. This

was acknowledged in the Evaluation Report[8] and the purpose of the present recommendation was to ensure the WFPP would be adopted with the inclusion of such rules; in this respect, GRECO notes that the current draft of the WFPP seems to have retained these, in particular under article 29. GRECO again regrets that not more progress has been made in the adoption process of the WFPP; but as there is still a draft law in existence, which would – if implemented as foreseen – have the potential to introduce significant improvements, this recommendation cannot be assessed as completely unimplemented.

58. GRECO concludes that recommendation v has been partly implemented.

Recommendation vi.

59. *GRECO recommended to take measures to ensure that the annual reports of political parties, as well as financial information on parties and other groupings represented in parliament currently not under any reporting requirement, are disclosed to the public.*

60. The authorities of the Netherlands report that in accordance with article 24 of the (draft) WFPP, political parties represented in parliament will have to send the annual financial report mentioned earlier (see paragraph 43) to the Electoral Council; the annual reports submitted to the Electoral Council will be public. In the (draft) explanatory report to the draft WFPP, it is explicitly stated that these reports will have to be published on-line.

61. GRECO takes note of the information supplied above. It would appear that since the evaluation visit, the rules provided in article 24 WFPP are exactly the same as at the time of the on site visit; the annual reports are public in principle but the Council will itself be required to publish only the overviews of donations above € 4500 and debts in excess of € 25 000 in the Government Gazette. As regards the financial reports as such, the law itself is silent as to which arrangements will be made to facilitate access by the public, but the (draft) explanatory report to the draft WFPP makes it clear, at present, that these reports will have to be made available on-line; this is an important step in the right direction. Finally, these publication requirements will be limited to political parties present in Parliament and the process of drafting new legislation is still underway..

62. GRECO concludes that recommendation vi has been partly implemented.

[8] As indicated in paragraph 85 of the Evaluation Report, "*Another deficiency of the current legal framework is the issue of entities related, directly or indirectly, to political parties and/or other groupings in parliament. In order to be eligible for tax deductibility of donations, entities have to be registered with the tax authorities as 'institutions for the general benefit'. The GET understood that often not (only) the central party organisation is registered as an institution for the general benefit, but also other associations and foundations which have the objective – amongst others – to raise funds for the party (or for a particular grouping in parliament)). Some financial reports provided to the GET included an extensive description of entities related to the party (indicating the extent to which the party had a controlling influence in such an entity which was a decisive influence on whether the finances of such an entity would be presented in the financial report). Other reports however contained very little information of this kind (with the exception of information on the parties' scientific institutes and youth organisations, as is necessary for the determination of state subsidies). The draft Financing of Political Parties Act addresses this issue by requiring the party to designate legal entities which "systematically or structurally carry out activities or work for or on behalf of the party of which the party enjoys an advantage" as subsidiary institutions.[…] These subsidiary institutions are furthermore also bound by the provision to submit to the Electoral Council a summary report of contributions received in excess of €3,000. The GET commends the Dutch authorities for including this provision in the draft law, which would go a long way in addressing the challenging issue of entities related, directly or indirectly, to a political party. However, as the current legal framework forms the main basis for its recommendations, the GET can only recommend*".

Recommendation viii.

63. *GRECO recommended (i) to establish independent monitoring of political funding, including electoral campaigns, in line with Article 14 of Recommendation Rec (2003)4 and (ii) to provide the body to be entrusted with carrying out this monitoring (which is most likely to be the Electoral Council) with adequate powers and financial and human resources.*

64. The authorities of the Netherlands recall that one of the objectives of the WFPP is to transfer to the Electoral Council the supervision of compliance with the WFPP by political parties and their affiliated institutions. The Electoral Council will be authorised to investigate the accuracy of the data sent in by the political parties. It also provides for the possibility to impose administrative fines. The Electoral Council has its own secretariat. The Election Council will receive extra budget for the new duties in the field of the financing of political parties.

65. GRECO takes note of the information provided. Since the draft WFPP has not been adopted yet, the body responsible for the supervision of political financing is still the Ministry of the Interior. Certain issues, such as the concrete means of the Council will probably need to be determined more precisely at the moment of the entering into force of the WFPP. As before (see recommendation v above), GRECO regrets that not more progress has been made in the adoption process of the WFPP and thus towards implementing this recommendation, but as there is still a draft law in existence, which would – if implemented as foreseen – have the potential to address recommendation v in a satisfactory manner, this recommendation cannot be assessed as completely unimplemented.

66. GRECO concludes that recommendation viii has been partly implemented.

Recommendation ix.

67. *GRECO recommended to take further measures to safeguard the independent and impartial functioning of the Electoral Council and its Secretariat in the future supervision of political finance rules.*

68. The authorities of the Netherlands report that the Electoral Council is an independent institute. The (draft) WFPP provides further rules to guarantee this independence. This concerns in particular rules on ancillary positions held by members of the Electoral Council. Its secretariat falls under the authority of the Council. In their additional information, the Dutch authorities stress that article 40, paragraph A 5 of the draft law stipulates that the Election Council will set further rules concerning its structure and working methods; these rules will provide for a separation between the exercise of duties in connection with the WFPP, and all other duties. Furthermore, consideration is currently being given to the opportunity of including additional provisions to guarantee an un-biased decision-making process and to prevent conflicts of interest in that context.

69. GRECO takes note of the information supplied above. It appears that no additional measures have been taken, compared to the guarantees of independence that existed already in the draft WFPP available at the time of the on site visit[9]. GRECO notes, for instance, that the issue of

[9] As indicated in paragraph 92 of the Evaluation Report, "*As regards the independence and impartiality of the Electoral Council, the GET welcomes the articles in the draft Financing of Political Parties Act, amending the Elections Law, which seek to ensure impartiality of the Electoral Council and further diminish possibilities of outside influence over its activities. The proposed amendments to the Elections Law will inter alia prohibit members of the Electoral Council from holding any*

political affiliation of members of the Electoral Council, and the Council's Secretariat, has not received further attention. Additional measures are reportedly under consideration, which is to be welcome, but these appear either not to introduce meaningful changes compared to the earlier situation or they are at a very early stage for the time being; GRECO can therefore not conclude that any tangible progress has taken place.

70. GRECO concludes that recommendation ix has not been implemented.

Recommendation x.

71. *GRECO recommended to clearly define infringements of political finance rules and to introduce effective, proportionate and dissuasive sanctions for these infringements.*

72. The authorities of the Netherlands report that the draft WFPP provides for sanctions if the rules on donations received are violated. The intention is for the Election Council to be able to impose administrative fines; the introduction of criminal sanctions was also examined in the drafting process but the preference goes currently to administrative penalties only.

73. GRECO recalls the relevant findings contained in paragraphs 93 and 94 of the Evaluation Report[10]. It recalls also that the (draft) new WFPP would introduce important improvements to the system of sanctions, which goes in the direction of the present recommendation. GRECO notes that in the current version of the draft WFPP, the rather dissuasive criminal sanctions foreseen in the draft provisions available at the time of the visit[11] have all been replaced by an administrative fine. This fine is applicable for a series of infringements, including failure to comply i.a. with the requirements on record keeping (article 20), on thresholds for donations and for accepting

---

positions which could interfere with the proper performance of tasks and/or (confidence in) the impartiality and independence of the Council, provide that membership of the Council is incompatible with certain other functions and positions (amongst which positions in a political party, its subsidiary institutions or as a member of parliament, state secretary or minister) and foresee the publication of the external positions held by members of the Electoral Council. However, the GET also notes that members of the Electoral Council and its Secretariat can be (and are) members of political parties, and may have carried out important functions in or on behalf of these parties. Although the GET accepts that some political experience could be beneficial to the work of the Electoral Council, it also has some concerns that party affiliations may affect confidence in its impartiality. The GET finds it important that a supervisory body not only operates in an impartial manner but is also seen to be operating in such a way. This is crucial for the public's trust. Therefore, the GET would find it advisable that further measures are introduced to enhance, as much as possible, confidence in the non-partisan approach of the Electoral Council in the monitoring of the political finance rules, for example by requiring that the composition of the Council does not include a disproportionate number of members of the same party affiliation (membership), by having members of the Council abstain from deliberations on the party with which it has an affiliation and/or by establishing clear rules on actual and potential conflicts of interest for both the Council and its Secretariat."

[10] *" The PPSA currently does not provide for a comprehensive sanctioning mechanism for violations of the provisions of the act. The only sanctions stipulated in the law itself are the loss of state subsidy for the period of one to four years, if the party has been held liable for discrimination in accordance with articles 137c to g or article 429quater of the Criminal Code. Furthermore, the GET understood that the relevant articles of the General Act on Administrative Law are also applicable to the provision of subsidies to parties, which entails that if the party does not comply with the requirements of the subsidy (if – for example – it lists too many members), the subsidy can be withheld or (partly) reclaimed. However, if a party does not comply with the requirements unrelated to the subsidy, for example on the disclosure of accurate information on donations, no measures can be taken against the party*."

"*The draft Financing of Political Parties Act, if adopted as foreseen will go a long way in meeting the aforementioned recommendation, by – in addition to the sanctions already foreseen in the current system (i.e. discontinuation of subsidies pursuant to the General Act on Administrative Law and in case of a conviction for discrimination) – introducing criminal sanctions for, inter alia, the requirement to ensure a sound financial administration, to not accept anonymous donations above a certain threshold, to submit an annual financial report as well as a summary report of contributions received in the context of elections."*

[11] Depending on the case: up to 6 months' or two years' imprisonment, community service, fines in the fourth or fifth category

anonymous donations (article 22), on disclosure and reporting (article 24), on cooperation with the controlling/investigative body designated by the Election Council, on the disclosure of a financial overview (including donors) pertaining to the campaign financing of elections to the lower House (article 27). Even though the Netherlands now seem to opt for a system of administrative fines as opposed to criminal sanctions, there seem to be possibilities for sending files to criminal investigation bodies, which are the ones that have access to broader information and investigative powers. For the time being, GRECO concludes that, overall, the draft legislation – which still needs to be adopted – does contain improvements compared to the legislation currently in force, which was the main concern underlying the present recommendation.

74. GRECO concludes that recommendation x has been partly implemented.

Recommendation xi.

75. *GRECO recommended to clarify the provisions on sanctions in the draft Financing of Political Parties Act, ensuring that sanctions for violations of political funding rules can be imposed upon all entities on which the draft law imposes obligations.*

76. The authorities of the Netherlands indicate in the Situation Report that the possibility to impose sanctions, under article 34 of the draft WFPP, will apply to political parties and affiliated organisations to which these rules apply. In their additional comments, they stress that in accordance with article 34, sanctions can be imposed on any legal body (party or affiliated organisation), but also on natural persons subject to the rules on donations. It will be up to the Election Council to pronounce the fine against the person found to be responsible. Moreover, the sanctions can also be applied to natural persons who participate in parliamentary elections as candidates of an entity which is not a political party.

77. GRECO recalls the relevant findings contained in paragraph 94 of the Evaluation Report[12], bearing in mind that the draft criminal sanctions have been replaced in the meantime by a (draft) system of administrative sanctions (see paragraph 73 above) GRECO takes note that the wording of article 34 paragraph 3 of the current version of the WFPP clearly states that "The fine will be imposed on political parties, ancillary institutions, associations (…) and candidates (…) [to the lower house]". It would thus appear that some progress has been made on this matter. For the time being, the aforementioned article merely represents a draft.

78. GRECO concludes that recommendation xi has been partly implemented.

[12] *"(…) As criminal liability of legal entities is already provided for under Dutch law, the GET would assume that it will be possible to impose these sanctions also on political parties (and not only on natural persons), although the reference in the draft law to community service and prison sentence is slightly confusing in this regard. The draft law is even more unclear when it comes to infringements of the obligations placed upon non-party entities. The GET would assume that all entities on which the draft law imposes obligations can be held criminally liable, but it also notes that article 34 of the draft law (on sanctions) does not refer to the provisions on other (non-party) entities (apart from the provisions on individual candidates of a political party and subsidiary institutions of a political party to register contributions received etc.). It is thus unclear if – for example – associations registered to participate in elections of the Second Chamber but not yet represented in parliament (as referred to in Article 30 of the draft law) or natural persons leading the lists of candidates participating in the elections on so-called blank lists (as referred to in Article 31 of the draft law) can be penalised for not submitting a summary report of their contributions in the context of an election campaign."*

Recommendation xii.

79. *GRECO recommended (i) to introduce appropriate (flexible) sanctions for less serious violations of political financing rules, as a complement to the criminal sanctions foreseen under the draft Financing of Political Parties Act, and (ii) to consider providing the Electoral Council with the authority to impose sanctions for the less serious violations of political financing rules.*

80. According to the authorities of the Netherlands, the current draft WFPP provides for administrative fines to be imposed by the Election Council.

81. GRECO recalls the relevant findings contained in paragraph 95 of the Evaluation Report[13]. As indicated in respect of recommendation xi, article 34 of the (new draft of the) WFPP now provides for a system of administrative sanctions (together with possibilities for sending files to criminal investigation bodies, as indicated under recommendation x) which have the potential to offer some flexibility compared to criminal law sanctions . Furthermore, GRECO notes that under the same article, these fines are to be imposed by the Election Council directly. It would thus appear that there has, indeed, been some progress in respect of this recommendation, even if the WFPP remains a draft for the time being.

82. GRECO concludes that recommendation xii has been partly implemented.

Recommendation xiii.

83. *GRECO recommended to provide advice and training to political parties and election candidates on the applicable political funding regulations.*

84. The authorities of the Netherlands report that Political parties will be informed of and instructed on the WFPP and the practical application of the rules. They refer to earlier information initiatives, when the current legislation came into force in 1999 (a brochure was published and distributed to all political parties in Parliament, including a revised version in 2007). In their additional comments, it is indicated that when the new legislation comes into force, a new brochure will be published and distributed.

85. GRECO welcomes the intention to produce a new brochure when the new legislation comes into force. It regrets that no additional efforts have been undertaken for the time being. Although the evaluation report had pointed out that advice and training were of particular importance in a context of legal changes, it observed that such a need existed already in the context of compliance with the current regulations and awareness of the rules in general (a particularly striking example mentioned in the report was the fact that certain political factions represented in

[13] *"(…) While the draft law provides for criminal sanctions for intentional or negligent violations of the provisions of the (draft) Financing of Political Parties Act, the GET has some concerns that this sanctioning regime would not be sufficiently flexible to deal with less severe infractions of the (draft) law, such as late submission of reports, incompleteness of the reports or acceptance of an anonymous donation only slightly above the threshold. The GET was informed on-site that in cases of minor violations of the law, which would not be criminally prosecuted, the Electoral Council would make a public announcement on these violations. Whereas the GET agrees that in cases of minor violations of the law the institution of criminal proceedings may well be disproportionate – also considering that a criminal sanction should be an ultimum remedium – and perhaps also involve an unnecessarily slow and cumbersome procedure, it considers the mere publication of a violation to be disproportionately soft and by no means dissuasive. In the GET's view the sanctioning regime as foreseen in the draft Financing of Political Parties Act would be made more efficient and effective if small or procedural violations of the law would not only be brought to the attention of the public (or in more severe situations be referred to law enforcement authorities), but could also directly be addressed by the Electoral Council itself by imposing – for example – administrative sanctions.*"

parliament had not applied for a state grant because they were not aware of such possibilities). Against this background, it is clear that the production of the future brochure on the new legislation will also need to be complemented with additional measures for a broad range of political actors.

86. GRECO concludes that recommendation xiii has not been implemented.

III. CONCLUSIONS

87. **In view of the above, GRECO concludes that the Netherlands has implemented satisfactorily or dealt with in a satisfactory manner six of the nineteen recommendations contained in the Third Round Evaluation Report.** With respect to Theme I – Incriminations, recommendation ii, iii, iv and vi have been implemented satisfactorily and recommendations i and v have been dealt with in a satisfactory manner. With respect to Theme II – Transparency of Party Funding, recommendations v, vi, viii, x, xi and xii have been partly implemented and recommendations i, ii, iii, iv, vii, ix and xiii have not been implemented.

88. As regards Theme I – Incriminations, GRECO is pleased to see that all recommendations have been implemented. For instance, the Netherlands has confirmed that the concept of "public official" used in the incriminations of corruption needs clarification. The Netherlands has also managed to amend the provision on private sector bribery in its Criminal Code in order to align it with that of the Criminal Law Convention on Corruption and the provisions in its Criminal Code on bribery of public officials. Furthermore, the introduction of provisions to criminalise trading in influence has received appropriate consideration and the draft criminal codes for the Netherlands Antilles and Aruba have been amended to take into account the requirements of the Convention and the Protocol.

89. Insofar as Theme II – Transparency of party funding is concerned, the overall picture is rather disappointing: no tangible progress has been made in respect of any of the recommendations. The draft new Financing of Political Parties Act (WFPP), which already existed at the time of the on-site visit, is still in the very early stages of the adoption phase. It would appear that the new draft of the WFPP had not even been approved by the former government (dissolved on 20 February of this year). It is therefore awaiting an uncertain fate under a new government (elected in June 2010) and only after the approval of the government can it be submitted to the Council of State and (ultimately) to parliament. The draft WFPP was revised to some extent to take into account the recommendations addressed by GRECO and if adopted, it would introduce many important improvements to the rudimentary legislation currently in force. However, more than half of the recommendations have received no consideration at all and GRECO urges the Dutch authorities to vigorously pursue their efforts to address all the recommendations and thus to improve the legal framework on political financing.

90. In view of the above, GRECO notes that the Netherlands has been able to demonstrate that reforms with the potential of achieving an acceptable level of compliance with the pending recommendations within the next 18 months are underway. GRECO invites the Head of the Dutch delegation to submit additional information regarding the implementation of recommendations i to xiii regarding Theme II by 31 December 2011 at the latest.

91. Finally, GRECO invites the authorities of the Netherlands to authorise, as soon as possible, the publication of the present report, to translate it into the national language and to make this translation public.