FIGHTING CORRUPTION

Incriminations

by Mr Roderick MACAULEY
Criminal law adviser
at the Ministry of Justice of the United Kingdom

Thematic Review of GRECO's Third Evaluation Round

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Introduction

1. The aim of the Council of Europe's Group of States against Corruption ("GRECO"),[1] established by means of an enlarged partial agreement in May 1999, "is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field".[2] This is to be achieved by monitoring "the observance of the Guiding Principles for the Fight against corruption as adopted by the Committee of Ministers of the Council of Europe on 6 November 1997" and "the implementation of international legal instruments to be adopted in pursuance of the Programme of Action against Corruption, in conformity with the provisions contained in such instruments".[3] The twenty guiding principles adopted by the Committee of Ministers on 6th November 1997 constitute a broad range of legal measures, policies and practices designed to counter corruption in all its forms. The Criminal Law Convention on Corruption (European Treaty Series[4] (ETS) No. 173), which was originally agreed on 27th January 1999, and its Additional Protocol (ETS No. 191), which followed on 15th May 2003, create obligations for signatory states in respect of criminalising corruption in both the public and the private sector.

2. Acting upon its mandate as set out above GRECO has launched three evaluation rounds. Evaluation round I, commenced in January 2000 was concerned with the extent to which the legal provisions, administrative structures and practices in member states reflected principles No. 3, 6 and 7 of the twenty guiding principles, dealing with the independence and

1. The acronym is derived from the organisation's name in French (Groupe d'Etats contre la corruption).
2. Article 1 of the Statute of the Group of States against Corruption.
3. Article 2 *ibid.*
4. Council of Europe Conventions and agreements opened for signature between 1949 and 2003 were published in the "European Treaty Series" (ETS No. 001 to 193 included). Since 2004, this Series is continued by the "Council of Europe Treaty Series" (CETS No. 194 and following).

autonomy of bodies that investigated, prosecuted and adjudicated corruption cases, immunities from criminal liability and the specialisation of bodies charged with fighting corruption respectively. The extent that Members States complied with the obligations contained in ETS No. 173 was first broached in the second evaluation round, launched in January 2003, which, in dealing with seizure and confiscation of proceeds of corruption, the connections between corruption and money laundering and organised crime, public administration structures, the rights and duties of public officials, corporate liability and fiscal legislation, examined members states' compliance with Articles 14, 18, 19 and 23 of ETS No. 173 in addition to guiding principles No. 4, 5, 8, 9, 10 and 19. In many respects it is reasonable to suggest that GRECO was "finding its feet" during the first two evaluation rounds. Certainly these two rounds allowed its evaluation procedures to bed down properly.[5] GRECO evaluation rounds extend for as long as it takes to complete the full evaluation process for each of GRECO's member states. This is therefore an ongoing process. For example new membership after all other member states have completed evaluation rounds I and II involves undergoing those first two rounds jointly.[6] Slovenia and Finland were the first GRECO member states to be evaluated under Round III, which was launched in January 2007 and which is still ongoing and will continue in 2012.[7] This process of interconnected and overlapping evaluation rounds allows for the continuing development and refinement of GRECO procedures and standards, endowing GRECO with an ability to couple consistency and equality of treatment with a nuanced and flexible response to particular and special circumstances that may be revealed during individual evaluations.

5. In summary, GRECO evaluation procedures involve a questionnaire, an on-site visit by a selected GRECO Evaluation Team ("GET"), the adoption in plenary session of an evaluation report containing any appropriate recommendations and follow up reports on the extent of compliance with recommendations.
6. San Marino underwent joint I and II Round evaluation in 2011.
7. GRECO's Round IV evaluation is launched in January 2012.

3. GRECO Evaluation Round III comprises two separate themes: Theme I (incriminations) and Theme II (transparency of political party funding). GRECO Round III Theme I evaluation examines compliance with Articles 1a and 1b (definitions); 2-12 (main obligations to criminalise conduct), 15 (participatory acts), 16 (immunity) 17, (jurisdiction), 19 paragraph 1 (effective, proportionate and dissuasive sanctions and measures) of ETS No. 173 and Articles 1 (definitions), 2 – 6 (domestic and foreign arbitrators and jurors) of ETS No. 191 and Guiding Principle 2 (criminalisation of corruption). Round III Theme I evaluations, in the view of many, brings GRECO to the heart of the matter as regards the fight against corruption. Bribery and corruption undermines the rule of law and the ethical values upon which democratic societies and their institutions are founded. It is a problem that spans the world, distorting markets, subverting open competition, acting as a drain on legitimate business and causing serious damage in many developing and emerging economies. It is therefore a serious wrong that should attract criminal liability and condign penalties. To many, therefore, the extent to which GRECO member states comply with ETS No. 173 and No. 191 is a significant measure of their commitment to the fight against bribery.

4. This paper provides a thematic comparative analysis of the GRECO Round III Theme I evaluation reports adopted and published before 21 October 2011.[8] It seeks to identify and elaborate upon themes that have emerged during the course of the evaluations, rather than provide a detailed

8. These are the thirty nine Round III evaluation reports for Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, the Republic of Serbia, the Slovak Republic, Slovenia, Spain, Sweden, "The former Yugoslav Republic of Macedonia", Turkey, and the United Kingdom. Round III Evaluation continues for the remaining ten GRECO members states, which are: Austria, Belarus, Italy, Liechtenstein, Monaco, the Russian Federation, San Marino, Switzerland, Ukraine and the United States of America.

comparative assessment of the varying levels of compliance with ETS No. 173 and No. 191 achieved by each of the laws of GRECO member states. First, this paper sets out a number of observations and expands upon general themes relating to differences of legal systems and compliance with international obligations, the process of reform of the criminal law of bribery generally across GRECO member states and how these reforms relate to the GRECO round III evaluation process. This is followed by the examination of common themes emerging from GRECO's analysis of compliance with the detail of the obligations set out in ETS No. 173 and No. 191. Topics in this section include the scope of the concept of a public official, the extent to which active and passive bribery are autonomous offences, issues relating to the elements of the offences as set out in ETS No. 173 and No. 191, the extent to which bribery in the private sector is criminalised, the very particular conceptual and practical problems associated with criminalising trading in influence, issues arising from the various character and scope of the laws of GRECO member states that address bribery of foreign and international actors, extra-territorial jurisdiction, the penalty regimes in place for bribery offences and the operation of the special defence of "effective regret". Finally this paper looks at the effectiveness of the national laws of GRECO member states and offers one or two conclusions on the relationships between compliance with international standards and achievements in terms of efficient and purposeful application of the power of the state as manifest in criminal justice systems.

5. In referring to the laws of member states as examined in Round III evaluation reports this report uses the present tense as a reflection of the findings of the evaluation teams and GRECO in plenary session when the report was adopted. It is of course recognised that the findings reflected in the evaluation reports may not reflect the current legal position in those states as the relevant law in a significant number of the member states referred to in this report have changed since the Evaluation Report was published. Footnote paragraph references relate to the relevant evaluation report.

General themes and observations

6. As a first proposition GRECO Round III evaluation reports disclose a generally good standard of compliance with the obligations laid down in ETS No. 173 and No. 191. The GRECO evaluation teams ("GET") discovered a very high degree of conformity with those obligations in the laws of Hungary, Malta, and Norway, for example. The reports do not pass judgment on the choice of model of criminal law unless it has a direct impact on the suitability of the law to equip the authorities to tackle corruption. One or two laws attract criticism for being anachronistic and therefore ill-equipped to deal with bribery in the 21st century. The reports for the law of the Greece and the United Kingdom provide good examples in this regard. The report for the United Kingdom noted that the law has been subject to criticism for more than a decade and that there have been several attempts to reform the law, which is considered outmoded by many. The report quotes the views of the OECD Bribery Working Group that "it is widely recognised that the current substantive law governing bribery in the United Kingdom is characterised by complexity and uncertainty".[9] On occasion GRECO, conscious of the ever expanding nature of the global economy, expresses concern about a tendency for some nation states to consider corruption to be a low level problem for their criminal justice systems. This tendency can arise as a result of a history of very low levels of cases of bribery or as a product of the state being smaller in size with an attendant tradition of reliance on informal social cohesion. In the report for Iceland, for example, the GET took the view that the local "perception that Iceland has a very low level of corruption may well have a negative impact on the alertness with regard to possible corruption now or in the future. In this regard the GET heard on several occasions that the potential for corruption is increasing in Iceland due to market liberalisation and the internationalisation of the economy which

9. Paragraph 127.

the country has been experiencing over the last few years. Icelandic companies are now investing large sums of money abroad and are therefore more exposed to societies that may not share the same zero-tolerance approach to corruption".[10]

7. Linguistic norms have to be taken into account when assessing the extent of compliance of national laws with international obligations. In many cases national laws of GRECO member states do not reflect the exact terminology of ETS No. 173 or No. 191. This is to be expected and will not always create a problem. But on a good few occasions the mismatch between English, or French, and other national languages creates uncertainty. The issue that GETs often had to grapple with is the extent to which the national language mismatch with English, or French, either represents a legal lacuna or a genuine linguistic feature with scope to meet the standards of ETS No. 173 and No. 191. This issue occurs frequently in considering national laws against the elements of the active and passive bribery and trading in influence offences dealt with below (for example in the law of Portugal there is no express equivalent to "offering" but this concept is covered by the Portuguese word "*dar*", which also equates to the English word "give").[11]

8. At the time of the adoption of their Evaluation Reports two member states had signed but not ratified ETS No. 173 (Germany and Spain); eleven member states had not signed or ratified ETS No. 191 (Andorra, Azerbaijan, Bosnia and Herzegovina, Czech Republic, Estonia, Finland, Georgia, Lithuania, Poland, Spain and Turkey) and five member states had signed but not ratified (Germany, Hungary, Iceland, Malta, Portugal). A member state's inability or failure to sign or ratify ETS No. 173 or No. 191 is usually governed by concerns relating to the obligations in those instruments relating to ensuring that certain conduct constituted a criminal offence in national laws. These concerns will be explored further in this report but generally where a member state had not signed or ratified

10. Paragraph 71.
11. Paragraph 95.

either ETS No. 173 or No. 191 GRECO evaluation reports would typically include a recommendation that they do so as soon as possible. As a result a number of the states referred to above have signed and ratified either ETS No. 173 or No. 191, or both, since the adoption of their evaluation report.[12]

9. Of those member states that had ratified ETS No. 173 a significant number had, at the time of the adoption of their evaluation reports, in place reservations as a result of concerns about the obligations relating to the criminalisation of bribery. Albania, Andorra, Armenia, Azerbaijan, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Latvia, Luxembourg, Netherlands, Poland, Sweden, and the United Kingdom had ratified ETS No. 173 subject to at least one reservation under Article 37. Bulgaria made a number of reservations when ratifying ETS No. 173 but withdrew all of them in 2003,[13] thus joining Bosnia and Herzegovina, Croatia, Cyprus, Georgia, Iceland, Ireland, Lithuania, Malta, Republic of Moldova, Montenegro, Norway, Portugal, Rumania, Serbia, Slovak Republic, Slovenia, "The former Yugoslav Republic of Macedonia" and Turkey in maintaining no reservations under ETS No. 173. Only the Netherlands has made reservations under Article 9 of ETS No. 191, extending those reservations it has made under Article 37 of ETS No. 173.

10. It was to be expected that GRECO evaluation reports would discover that many member states had made recent or fairly recent amendments to their laws. Approximately 62% of GRECO member states falling within the scope of this report[14] made legislative amendments between 2005 and 2010 with the intention of providing closer compliance with their anti-corruption international obligations. Sometimes it is possible to discern in national laws a preponderance of

12. Spain, for example, ratified both ETS No. 173 and No. 191 after the adoption of its evaluation report and before the adoption of the relevant compliance report.

13. Evaluation report adopted at GRECO 48 in Sept/Oct 2010.

14. Around 24 of the 39 evaluation reports considered. A small number of reports did not provide sufficient information to establish the date of amendments made to the law.

one set of international obligations over another. The practice of using separate pieces of legislation to provide piecemeal compliance with a variety of international obligations often leaves significant gaps in the coverage of the law. There are many examples illustrating this theme, which will be explored further below, but the point was starkly made in Portugal's evaluation report in the passage dealing with bribery of foreign and international officials. The report notes that the purpose of the two relevant and separate provisions relied on by the authorities for the purposes of the GRECO evaluation "is merely to deal with Portugal's obligations in respect of the European Union and those under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions".[15]

11. Despite this clear, if sometimes imperfectly executed, expression of the international consensus to approximate laws in order to address more effectively bribery and corruption, all GRECO evaluation reports adopted before 21 October 2011 included recommendations and most of them included five or more recommendations. It would be reasonable to conclude therefore that the reform effort among GRECO member states prior to evaluation was a particularly abject failure. Such a conclusion would be inaccurate. Whilst it is true that a small number of reports expressly referred to negative impacts of recent reforms,[16] as mentioned above, Round III reports generally reflected a high degree of compliance with ETS No. 173 and No. 191. In addition, GRECO recommendations are not determined in accordance with a fixed set of rules or criteria. A simplistic Member State hierarchy descending from the least to the most recommendations made in any GRECO evaluation round would produce a wholly misleading and unrealistic picture. The number of recommendations is often a matter of drafting technique and a consequence of the way arguments were presented to both the particular GET and at GRECO

15. Paragraph 96.
16. The GET found that the reforms of 2010 in Montenegro had the effect of exacerbating existing inconsistencies in terminology.

plenary meetings before a recommendation was decided upon. So, for example, a number of countries have received very lengthy recommendations in their evaluation reports, which may, in a report dealing with a similar inadequacy be split up into a number of separate recommendations; thus leading to a higher number of recommendations overall. Moreover, GRECO evaluations have typically identified or addressed certain topics that are not, strictly speaking, part of the standards of ETS No. 173 or No. 191. Such issues would include for example the defence of effective regret, limitation periods relating to the institution of criminal proceeding and pre-conditions to be fulfilled before a prosecution can take place, such as the principle of "dual criminality" on the application of extra-territorial jurisdiction or special permission from the prosecutor general's office as a pre-condition to a private sector bribery case prosecution.

12. Nevertheless, whilst the detailed scope of ETS No. 173 and No. 191 is greater than some other international anti-corruption instruments, their requirements in respect of the elements of offences, penalties and jurisdiction and so forth are not considered to be fixed at a level that is significantly higher than those established by other international instruments, nor are the standards modelled on the most comprehensive and robust of existing national laws. It is thereof worthy of note, as a general proposition, that the Round III evaluations found the criminal law of a number of GRECO member states in need of significant further revision in some form or other despite recent reform.[17]

13. GETs also often found that the authorities of member states, having recognised the deficiencies in their law, whilst

17. For example, Turkey's law on bribery and corruption was completely revised in 2005, with the latest changes in 2009. Nevertheless Turkey's evaluation report adopted in March 2010 included eight recommendations. Despite making a number of amendments between 2000 and 2007 France still attracted six recommendations in its report adopted in February 2009. Similarly Iceland made amendments in 2003 designed to align its laws with ETS No. 173 but attracted six recommendations in its evaluation report of March/April 2008.

not having recently completed reform of the law had either initiated or at least started to consider amendments. Examples of this theme would include the information received in the Republic of Moldova by the GET that amendments to the Criminal Code to improve the provisions for bribery were under consideration. At the time of the visit of the GET to Portugal an Ad Hoc Commission of Parliament was in the process of preparing fundamental amendments to the criminal legislation concerning corruption offences. When the GET visited Romania in June 2010 it was informed that the authorities expected a draft law on the application of a new criminal code, including revised bribery provisions, to be finalised by the end of the year. In Spain the GET was made aware of reforms to the Penal Code relating to bribery and corruption and after the visit was provided with draft texts. The Swedish authorities informed the GET that the Government was considering whether to establish terms of reference for an enquiry which may lead to a complete revision of the existing legislation. The United Kingdom had embarked on the process of completely replacing its existing anachronistic and fragmented laws at the time of its evaluation under Round III. In Latvia the GET welcomed the fact that the provisions on bribery underwent an extensive review by a working group set up by the Minister of Justice. In Greece, measures to improve the provision against bribery were included in the Prime Ministers "road map" for recovery. At the time of the GET visit to Ireland the 2008 Prevention of Corruption (Amendment) Bill was before Parliament. The report for the Slovak Republic refers to changes to the Criminal Code planned for 2008 and in "The former Yugoslav Republic of Macedonia" reforms, adopted just before the visit of the GET, were due to come into force a few months after the visit.

14. The Round III GETs encountered a wide range of approaches to criminal law generally and to anti-bribery legislation in particular. The most fundamental distinction reflected in reports is perhaps that between those member states that adhere to what is usually referred to as the "common law" tradition and those that subscribed to what is often referred to as the "civil" or "continental" model of criminal law. It is reasonable

to suggest, as the Round III evaluation reports confirmed, that the former tend to rely on a more global approach providing the maximum scope in reliance upon a small number of non-codified, non-specific and very flexible provisions. Typically the latter are characterised by a tendency towards a higher degree of specificity in reliance upon criminal or penal codes that present a range of offences each covering offending of a particular kind. The states that fall most clearly within the former group are Ireland and the United Kingdom. There are many examples of those that fall within the latter but examples of member states where GETs found codified law with moderate to high degrees of specificity included Albania, Armenia, Belgium, Croatia, France, Germany, Hungary, Malta, Republic of Moldova and Romania. But GETs did not find that either side of this particular dichotomy provided a better basic model for the establishment of effective anti-bribery laws. Moreover there are a significant number of states that do not conveniently or naturally fall within one camp or the other. Denmark, for example, has codified criminal law but relies on a very small number of bribery offences with very broad scope. Similarly, the Netherlands employs "a pragmatic and flexible approach to anti-corruption legislation. The offences covered by articles … CC [criminal code] cover a wide range of corrupt behaviour".[18] "Lithuanian lawmakers have chosen to keep the provisions incriminating corruption as concise and inclusive as possible".[19] Two 'global' offences in the Swedish Penal Code are "applicable in respect of all types of bribery offences".[20]

15. Whilst avoiding judgmental comment on the choice of criminal law models, Round III evaluations have commented and made recommendations in recognition of the distinction between compliance in the strict sense and alignment with the requirements of ETS No. 173 and No. 191 in a meaningful and effective manner. On occasion evaluation reports reflect a tendency to provide compliance in a formalistic sense only,

18. Paragraph 80.
19. Paragraph 63.
20. Paragraph 8.

which has little real legal impact domestically. The starkest examples in this theme are provided by the method of compliance adopted in Cyprus and Greece. The authorities in Cyprus and Greece, conscious that exiting laws were inadequate in certain key aspects chose to ratify international instruments through the wholesale adoption of the provisions of the instruments without rational replacement of existing law, resulting in the co-existence of "old" and "new" laws in uneasy parallel characterised by duplication, inconsistency and lack of clarity. Whilst accepting that this legislative methodology does in a strict legal sense provide a high degree of consistency between the "new" laws and the requirements of ETS No. 173 and No. 191 the evaluation report for Cyprus adopts the view that "mere ratification of the Convention and its Protocol is not a sufficient measure to this end [establishment of criminal offences under domestic law] as the Convention and its Protocol are not "self executing" and are "not meant to be applied directly by the contracting parties as criminal legislation".[21] The creation of a scheme in which the relevant criminal law is contained in various old laws with two international treaties bolted on top "creates obvious difficulties for the law enforcement authorities when investigating corruption offences as the elements of these offences in the old legislation are not fully compatible with the elements of the new legislation …".[22] In Greece the necessary adjustment of Greek legislation to reflect anti-corruption international obligations has been effected by successive laws of ratification that superimposed not only new law but also amended previous ratification laws with outmoded versions of relevant provisions not being repealed. The GET's impression, endorsed in the evaluation report, was that the legal framework created by "these successive layers of ratification laws co-existing in parallel with the Penal Code and other relevant national laws is one of excessive complexity. If no actual gap in incriminations

21. Paragraph 118.
22. Paragraph 123.

was detected by the GET several significant inconsistencies and legal uncertainties were identified".[23]

16. Excessive complexities leading to patchy compliance with the obligations of ETS No. 173 and No. 191, inconsistency, and lack of clarity were found, of course, to result from a variety of causes. When evaluating Romanian law the GET found it necessary to consider three different sets of provisions[24] that produced a legislative entanglement that was "characterised by occasional overlapping and redundancies".[25] "The GET found the Turkish legal framework for the criminalisation of corruption quite complex"[26] and expressed its concern "about the complicated structure and the narrow concept of bribery offences, which makes it necessary to draw on …numerous other criminal offences".[27] In Bosnia and Herzegovina it is the federal structure that challenges the effectiveness of the criminal law of bribery and corruption. Whilst some adjustments have been made to align some provisions of the four applicable criminal codes "inconsistencies remain across the penal provisions at the different levels of Government" resulting in the criminalisation of corruption to be "even contradictory at times" and "in clear contravention of one of the main purposes of the Criminal Law Convention on Corruption …, as well as Guiding Principle 2…".[28] The Round III report for Spain when analysing the public sector provision comments that "A large number of interlocutors suggested that the provisions on bribery could be restructured and reworded to create a simpler and more coherent framework,"[29] and noted that the draft amendments to the Penal Code were advancing the law in that direction.

17. The Round III evaluation reports reveal that the systems of many member states rely heavily on materials other than

23. Paragraph 109.
24. Provisions of the Criminal Code, Law No. 78/2000 and the draft New Criminal Code, which, *inter alia*, amended Law No. 78/2000.
25. Paragraph 95.
26. Paragraph 58.
27. Paragraph 63.
28. Paragraph 81.
29. paragraph 91.

legislative provision itself in order to achieve the standard required of ETS No. 173 and No. 191. Of course all laws will require a degree of interpretation and where there is effective enforcement of bribery the courts give corruption laws interpretative guidance in the form of case law, which is recognised as part of the legitimate legal framework in all jurisdictions. France, Germany, Hungary, the Netherlands and the UK (where some jurisprudence is rather old) for example, have a body of jurisprudence and recently states such as "The former Yugoslav Republic of Macedonia", which incidentally was one of the minority of states to provide excellent criminal justice statistics for the Round III evaluation,[30] and Norway are also starting to build up such jurisprudence. On occasion a law that upon first reading appears to be restrictive can turn out to be much more compliant when interpreted by the courts through the extension of its natural meaning in order to provide the scope required by ETS No. 173 and No. 191. The Georgia definition of a "public official", for example, appears to be quite restrictive but is interpreted by the courts in a much broader way than a natural reading of the language would suggest.[31] Generally, but not always, this type of judicial interpretative correcting mechanisms are met by an evaluation report recommendation to ensure unambiguous clarity.

18. But where, as the GET found in many member states, prosecutions were much more rare, there is a need to rely on other forms of guidance. The Round III evaluation reports revealed a number of examples of this theme. To highlight a few, Denmark's reliance on a relatively old law combined with a low level of prosecutions, makes it "difficult to foresee all consequences of the current legislation" despite reliance on the "preparatory works" associated with the passage of the legislation, which carry considerable interpretative weight before the courts. In Iceland the report discloses that there has been one conviction for domestic bribery in the last 10 years resulting in heavy reliance on the Explanatory Notes to the

30. Another is Belgium.
31. Paragraph 71 and footnote 17.

Penal Code, which are considered a secondary form of legislation. Luxembourg, in the near complete absence of any case law, relies heavily for inspiration on the application of their bribery laws from the laws of their neighbours. This tendency for interpretative mechanisms to occupy lacuna left by bad or inadequate legislation does on occasion lead to lack of clarity and inconsistency accompanied by no common understanding of the law amongst practitioners. The report on Iceland noted that "due to the lack of investigations and court practice …, the interpretation of the constituent elements of … offences varied significantly among the interlocutors met and was at times contradictory".[32] Luxembourg's reliance on its neighbours' laws for inspiration leads to the adoption of the "weaknesses of the other systems"[33] as well as their strengths.

19. Reliance on interpretative guidance other than jurisprudence, does not however, always attract adverse criticism in Round III reports. Norway and Sweden's reliance on preparatory works, in the Scandinavian tradition, has no significant negative impact. The report relating to Spanish law, to give another example, noted the role of practitioners in promoting a wide interpretative approach by the courts. "In Spain, the legislative framework providing for the incrimination of corruption offences suffers from a number of important shortcomings... That said, a non-negligible number of corruption cases have been prosecuted in Spain in the last two decades on the basis of the existing Penal Code; not only have practitioners acquired significant expertise in this type of cases, but they have also greatly added to the interpretation of the criminal provisions in force in a broad and pragmatic manner. The subsequent role of the Supreme Court to further expand and consolidate a flexible interpretation of the existing corruption-related provisions (which in many instances goes beyond their strict literal wording) has enabled extensive jurisprudence to emerge in this area. In this connection, the GET wishes to acknowledge the valuable explanatory contribution

32. Paragraph 62.
33. Paragraph 74.

provided by the practitioners met during the evaluation visit, who clearly demonstrated their in-depth understanding of the relevant criminal provisions on corruption – and the related jurisprudence – on the basis of their practical experience of prosecuting and adjudicating this category of offences".[34]

Specific Themes

Public/private distinctions

20. The Round III Evaluation reports published before 21 October 201 reveal that, of the 39 member states evaluated, only five (Bosnia and Herzegovina, Lithuania, Norway, the Slovak Republic and Sweden) have offences that did not reflect a clear demarcation between the public and the private sector. The laws of Ireland and the United Kingdom were found to be hybrid in this respect as a number of offences relate only to the public sector while another related to both the public and the private sectors.[35] The reports generally respect the preference for no public/private distinction but in the case of Bosnia and Herzegovina, although the GET could not conclusively attribute the lack of prosecutions in the private sector to the lack of clarity in the law in this respect, it did have concerns about the "confusing legal situation" and concluded that the legal framework "would doubtless benefit from the introduction of separate and clearly identifiable provisions designed specifically to cover private sector bribery…"[36] and recommended accordingly.

Public Official

21. As regards the public sector, a very large proportion of the member states are found to have the application of the public

34. Paragraph 88.
35. The United Kingdom's new law (The Bribery Act 2010) does not distinguish between the public and private sectors at all.
36. Paragraph 93.

sector offences, which would include of course those that made no distinction between the public and private sectors, governed by very broad concepts covering "public official"[37] and "any person who is a member of any domestic public assembly exercising legislative or administrative powers" referred to in ETS No. 173.[38] There are, however, a number of reported deficiencies in scope of the various forms of public sector offence. Albania and Bosnia and Herzegovina, for example, lack any clear definition. The report for the Czech Republic finds that the courts need to stretch the meaning of the legislative definition in an unnatural manner. The Estonian definition is found to exclude members of parliament and there are similar doubts expressed about the scope of the public sector offence in Iceland. Members of Parliament are catered for under the law of bribery and corruption in Germany but the scope is limited to bribery relating to the legislative process only. Hungarian law is shown to employ a relatively narrow scope of definition that excludes, for example, public sector doctors and professors but the wide scope of the private sector offence more than makes up for this limitation. The law of the Netherlands is considered flexible but complicated in this respect. Although the law is broad in that it extends beyond most laws by covering former officials and those whose appointment is pending, there is a general lack of clarity that attracted a recommendation.

22. There is a degree of commonality as regards the failure of a number of laws to embrace lower-level administrative public sector workers, through a reference to persons who occupy decision making positions. Strictly speaking this failure does not represent non-compliance with ETS No. 173 as Article 1(a) does not contain an autonomous definition of "public official". This issue provides a good illustration, however, of the continuing developmental standard-setting of the GRECO peer review process. In a number of instances evaluation reports reflect the view of successive GETs and of GRECO in plenary session that it is important that the public sector offences reach

37. Articles 2 and 3.
38. Article 4.

down to the lower echelons of public administration. The GET considered the law in Armenia to be unclear in this respect and the recommendation made is typical of others made in similar circumstances.[39] The recommendation is replicated, for example in the report on Azerbaijan. The relevant law of the Czech Republic uses the concept "in connection with procuring affairs in the public interest" and a resolution of the Supreme Court made it clear that this would usually be a reference to "a person deciding or co-deciding on the affair in the public interest". The GET therefore concluded that ordinary employees … such as secretaries, spokespersons, archivists, etc. – in public service who are not able to "fundamentally influence the final decision" will not be considered "subjects"[40] for the public sector bribery offences. As regards Latvian law the GET noted that the relevant provision, at least as regards active bribery "only covers state/local government employees with certain very specific and relatively high-ranking positions".[41] The report for the law of the Republic of Moldova reflects the findings of the GET that the scope of persons to which the public sector offences apply is limited by the qualifications "person holding a position of responsibility" and "person holding a position of high responsibility".[42] The former only covers those assigned a decision making function and the latter, as to be expected, covers only very high ranking officials such as the speaker and deputy speaker and members of parliament, the President, Prime Minister, members of the government, etc. Other administrative posts are therefore covered only by lesser offences with weaker sanctions. Private sector laws that "mirror" the public sector in this respect and thereby replicate this problem are considered below.

23. Where national laws deal separately with bribery in the parliamentary context, Round III reports sometimes note a

39. "… to take measures to make it clear that bribery of all categories of employees in the pubic sector is criminalised, including those without official decision making authority."
40. Paragraph 70 and footnote 32.
41. Paragraph 88.
42. Paragraph 50.

tendency for national laws to be more restrictive than those applying to other "public officials". The report on the law of Finland for example notes that the law covers situations where a Member of Parliament "in exchange for the benefit and in his/her parliamentary mandate, act[s] so that a matter being considered or to be considered by Parliament would be decided in a certain way".[43] Similarly German law, although providing for broad provisions in respect of bribery of foreign parliamentarians in international business transactions, is found to be "very narrow and limited to the buying and selling of a vote for an election or ballot"[44] as regards domestic members of parliamentary assemblies. Article 4 of ETS No. 173 envisages no such restrictions and both the Finnish and German reports included recommendations to broaden the scope of the law.

Exercise of functions

24. The explanatory report to ETS No. 173 makes it clear that the reference to "in the exercise of his or her functions" at Articles 2 and 3 is to be distinguished from the notion of a "breach of duty", which should not be required for public sector offences.[45] The intention of the drafters of ETS No. 173 was that it does not matter whether the official in question is induced to act or omit to act in breach of his or her duties; the essential facts are that it was the bribe that induced the official to act or refrain from acting. This is important for a number of reasons. For example it is quite likely that the briber has no knowledge at all of the scope of the official duties or the official's discretion. Secondly officials will often by virtue of their positions have opportunities to do or omit to do something that is outside the scope of their duties but which may be of a value that is sufficient to attract active or passive bribery. In contrast, Articles 7 and 8 of ETS No. 173 expressly restrict the obligations regarding private sector bribery to acts or omissions that amount to a breach of duty. As regards

43. Paragraph 97.
44. Paragraph 107.
45. Paragraph 39.

the public sector the GETs quite often found that the laws of member states limited the scope of public sector offences to acts or omissions that amount to a breach of duty; or made a distinction between illegal and legal acts or omissions. In such laws an act or omission would typically be "legal" because it is an act that the official has no authority to carry out and an "illegal act" either because it is not or because it amounts to the commission of another offence. A related issue is that, where a member state's law does make the distinction between offences on the basis of a breach or non-breach of duty or on the basis of a legal or illegal act or omission, the GETs found that legal and non-breach of duty circumstances are usually treated as lesser offences and subject to weaker sanctions.

25. A significant number of Round III evaluation reports deal with this particular topic. By way of illustration the report for Bosnia and Herzegovina notes that for the purposes of the relevant offence the conduct must fall "within the scope of the official's power and authority". In the GETS view "and as recognised by GRECO's previous pronouncements on this matter, this concept is narrower than the requirements of Articles 2 and 3 of the Convention …".[46] The relevant provisions of the law of Croatia contain almost the exact wording, which the report concluded was "an excessively restrictive extra element to the criminalisation of bribery, which may make the prosecution of the offence more difficult".[47] The evaluation report for Germany notes that the relevant public sector offences "always imply that the behaviour of the official involves (effectively or potentially) a breach of duty … Therefore cases which do not involve a breach of duty would need to be prosecuted under [offences] dealing with the taking and granting of a benefit, since these constitute a "safety net" [lesser]…".[48] The Greek report notes the law's requirement for the act or omission to be "pertaining to the duties or being contrary to them", which GRECO viewed once more as being "excessively restrictive".[49]

46. Paragraph 89.
47. Paragraph 51.
48. Paragraph 102.
49. Paragraph 110.

The law in Lithuania as set out in the Round III evaluation report, provides a good example of the practice of making a distinction between bribery involving legal and illegal acts. For example, Article 227 of the Criminal Code deals with active bribery and contains two separate provisions; one dealing with legal acts, a conviction in respect of which attracts a penalty of a term of up to two years and another that deals with illegal acts that attracts a term of 4 years.[50] This situation formed part of a wider picture that prompted the making of a recommendation in respect of the adequacy of sanction provision in Lithuania.[51] Spain is found to employ a scheme for passive public sector bribery comprising "five central provisions based on the different types of expected actions/omissions of the public official concerned and their lawful or unlawful nature"[52] with "mirror offences" dealing with active bribery. The laws of the Republic of Moldova and Montenegro are found to include very similar restrictions as regards the scope of conduct caught by the relevant provision. The restriction is phrased as within the scope of his or her "authority" in the Republic of Moldova and "official powers" in Montenegro. Both of these restrictions attract recommendations in the respective evaluation reports. The offences dealing with bribery in the public sector in the Netherlands are also found to reflect a distinction between a breach of duty on the part of the official on the one hand and conduct that was lawful on the other, the latter attracting a lesser penalty. In this instance GRECO appears content that "this distinction … would not lead to unnecessary complications"[53] and no recommendation is made. The relevant Romanian law reflects this theme with a provision that requires the act to relate to the "duty allocation" as does Serbia with a reference to "within the scope of the officials competence". Similarly the GET considered the requirement in Slovenian law that conduct relate to an "official act within the scope of the rights" of a public official "adds an extra element to the

50. Paragraph 9.
51. Paragraph 78.
52. Paragraph 91.
53. Paragraph 88.

criminalisation of bribery, which may make prosecution of the offence more difficult".[54] In "The former Yugoslav Republic of Macedonia" the relevant offence is restricted to conduct that is in the "scope of official authorisation", whilst Turkish law defines a bribe as "the securing of a benefit by a public officer by his/her agreeing with another to perform, or not to perform, a task in breach of the requirements of his/her duty".[55]

Autonomous offences

26. It is clear from the Explanatory Report to ETS No. 173 that the active and passive offences, both in the public and private domain, are intended to be autonomous offences. Whilst it is of course recognised that "the two types of bribery are, in general, two sides of the same phenomenon"[56] the offences are to be considered separate with no evidential or legal requirement of a nexus between them necessary in order to prove either offence. The GRECO Round III evaluations disclose that in the laws of the vast majority of those published before 21 October 2010 the offences are autonomous in accordance with the intention of the drafters of ETS No. 173. The evaluations did, however, reveal a small number of member states whose laws were not entirely clear on this point so that at least in practice if not in strict legal theory some kind of nexus between the active and passive offences is required. The laws of France and Luxembourg provide useful illustrations of this point. The evaluation report for France shows that, despite reforms in 2000 which specifically sought to address this point, "a recurrent problem that emerged from discussions with those professionally involved was that, in practice, to prosecute corruption cases successfully it was necessary to establish, *in every case*, that there had been prior agreement between the corrupt parties".[57] Moreover, "the most recent Edition of Dalloz (commentary on the Criminal Code …) states that the offence

54. Paragraph 80.
55. Section 252 TPC: Bribery at paragraph 12.
56. Paragraph 32.
57. Paragraph 78.

of bribery is only established if the agreement between the persons offering and receiving the bribe preceded the act or failure to act that it was intended to reward".[58] The GET was informed that no judgments have confirmed that the 2000 reform has had the intended effect. The report suggests the French authorities may wish to provide guidance to make it clear that agreement between the parties is no longer necessary for the purposes of prosecuting bribery.

27. The report for Luxembourg refers to a similar problem in that "the simple fact of giving or receiving was closely associated with other elements that were explicitly referred to and implied that there was a direct link between the bribe and the service rendered, evidence for which probably required the existence of an underlying agreement that would show that both parties accepted the transaction". The GET noted that "as explained in paragraph 43 of the Explanatory report to the Convention, a corrupt pact is not an automatic element of the offence, since a bribe may be requested unilaterally".[59] The GET concluded that in the absence of persuasive case law there was no means of knowing how the law would be applied in practice and accordingly a recommendation was adopted. The evaluation of Turkey found that evidence of an agreement between the parties is an essential ingredient of the offence, save in respect of foreign and international public officials. On occasion the nexus between the passive and the active offences manifests itself as the passive offence "completing" the active offence. In Latvia the GET uncovered a series of ambiguities concerning the extent to which bribery offences would be considered incomplete due to the absence of key elements. For example "most interlocutors regarded the offence of bribery to be completed only if the bribe-taker …. has at least received part of the bribe or has explicitly accepted the offer of a bribe".[60] In the absence of an acceptance or receipt the bribe giver can only be charged with attempted bribery.

58. Footnote 14 page 21.
59. Paragraph 78.
60. Paragraph 84.

Some interlocutors thought that an acceptance of an offer would also be an incomplete offence if at least a part of the bribe had not reached the bribe taker and that a request of an advantage would amount to attempted acceptance of a bribe. The report for Montenegro refers to a similar requirement for a concrete nexus in the context of which an offer or promise would be regarded as an attempt. The Netherlands report reveals that the GET discussed at length the extent to which there needed to be a causal link between the advantage and the act or omission. In the case of the Netherlands, the introduction of the concept of "reasonable suspicion" on the part of an official that advantages were being given in order to induce him or her to act improperly and reference to a recent decision of the Supreme Court establishing that circumstances in which "a gift is provided or a promise made to a public official to form and/or maintain a relationship with the public official with the aim of obtaining preferential treatment" would amount to bribery, resolves any ambiguity.

Elemental Deficiencies and Consistency

28. The thrust of the message contained in the following observation taken from the Croatian evaluation report and replicated almost verbatim in, for example, that of Azerbaijan, the Slovak Republic and "The former Yugoslav Republic of Macedonia" featured in a significant number of evaluation reports published before October 31st 2011: "The GET wishes to stress, once again, how important it is for the sake of consistency, clarity and legal security that all corruption offences contain the same basic elements".[61] Each GET scrutinised very closely the constituent elements of the offences established in national laws against the requirements and language of ETS No. 173 and No. 191. This resulted in a large amount of detailed analysis and a large number of correspondingly specific reservations. We are concerned here with the failure

61. Paragraph 50 Croatia (third party beneficiaries); paragraph 59 Azerbaijan.

of offences established in national laws to cover all of the basic elements as set out in Articles 2, 3, (public sector bribery) and 12 (trading in influence) of ETS No. 173. Member states' compliance with the obligations under Articles 7 and 8 (private sector bribery), the offences under ETS No. 191 and member states' conceptual approaches to Article 12 (trading in influence) are considered separately below.

29. On many occasions the GETs typically found that whilst active bribery offences would perhaps expressly refer to "giving" or "promising" there would, for example, be doubts about the extent to which "offering" was covered. Conversely there would, for example, be express references in passive bribery offences to "requesting" and "acceptance" (of an offer or promise) but doubts about whether the simple receipt of a bribe is covered. There were also a significant number of reports that noted deficiencies as regards the extent to which the law covered both the direct and indirect commission of bribery offences, the transferring of advantages to third party beneficiaries and bribes that did not take the form of tangible assets. Often the discrepancy was at least partially resolved by reference to linguistic nuances at the interface of the national language and English or French. These were indeed circumstances that the GET noted in respect of the law of Croatia where the absence of an express references to "offer" and "receiving" is explained by the fact that this was covered by features of the Croatian language in which "promising" and "offer" on the one hand and "acceptance" and "receipt" on the other are synonymous. The scope of the French word "*proposer*" is accepted as an explanation of the absence of an express reference to "giving" under the relevant French law but it was considered "debatable" whether the term agreeing (in French *agréer*) … covers the simple notion of receiving an advantage…".[62] As regards active bribery German law

62. Paragraph 81.

uses the term "granting" rather than "giving"[63] and omits an express reference to "receipt" in preference for the terms "demanding, allowing oneself to be promised or accepting a benefit" in respect of passive bribery. In the Hungarian language an "offer" is synonymous with "giving", which explains the absence of an express reference to the latter in the relevant provision. The evaluation report for Latvia notes the absence of both "promise" and "acceptance of a promise" from the active and passive offences respectively and accordingly includes a recommendation to fill this gap. As regards Luxembourg it is not clear if "giving" and "receiving" are covered, whilst "offering" is missing from the law in the Slovak Republic. The report for Portugal notes that "offering" and "acceptance of an offer" are not expressly covered but it is satisfactorily explained that the Portuguese word "*dar*" encompasses both "giving" and "offering". The relevant Polish law omits express references to "offers" and "receipt" but the GET was satisfied that the terms "promising" and "accept" were linguistically inclusive of the two omissions. In the case of Norway reliance is placed on Preparatory Works in order to clarify that Norwegian bribery law embraced "promising" and "acceptance", despite the absence of express references. One or two jurisdictions sought to comply with the requirements of the various elements of the standards established by ETS No. 173 through provisions other than substantive bribery offences. Under the law examined for the Maltese report, all active bribers are considered accomplices to the basic "model" passive offence and the refusal of a bribe offered by the passive actor results in the active bribery element being prosecutable only as an attempt, which carries a lesser sanction. The law applying in Turkey at the time of the evaluation provides that, with the exception of bribery that involved a breach of duty, a variety

63. An interesting feature of German law is the retention of the offence of attempted bribery despite the fact that, for example, an offer of a bribe amounts to a full offence under the standards of ETS No. 173. The attempt offence under German law enables the prosecution of unilateral initiatives when they have not reached the other party (e.g. an offer included in a letter that is despatched but that never reaches the intended recipient). The GET was informed that the attempt provision is never used in practice.

of alternative (lesser) offences could apply depending on the official in question and the nature of the conduct. For example, "promising" and "offering" a bribe are treated as an attack on the honour and dignity of the public official and are therefore penalised under a separate "insult" offence, which carries a lesser penalty than bribery. Moreover, Turkish jurisprudence clearly suggested that "giving" a bribe constituted secondary participation in a "misuse of public duty" offence and requests "of a compelling character"[64] are treated as extortion. It is interesting to note that of the states publishing evaluation reports before 21 October 2011, a significant number have provisions in the national law that exceed the standards of ETS No. 173 by criminalising advantages that are transferred to an official as rewards after the act or omission has taken place.[65]

Undue advantage

30. An "undue" advantage for the purposes of ETS No. 173 and No. 191 "should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective undue aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts".[66] Generally speaking, the Round III evaluation did not reveal any significant problems with this element other than the question of materiality. An exception in this regard is perhaps the evaluation of Andorra. Andorra is a small state where one needs to balance the effects of a relatively close knit community that is generally regarded as providing a high degree of social cohesion which discourages bribery with the acknowledgement that the presence of the very same close social and familial relationships could also be a negative constraint on the reporting of corruption. The report notes that "according to the study resulting from the recommendations

64. Paragraph 61.
65. Including: Belgium, Bosnia and Herzegovina, Bulgaria (in a limited number of circumstances), Greece, Latvia (although not entirely clear) and the United Kingdom.
66. Paragraph 38 of the Explanatory Report to ETS No. 173.

of the second round evaluation report … it would appear that corruption affecting public institutions mainly takes the form of exchanges of services and favours. Such exchanges seem to be fairly widespread and generally accepted, since they are not associated in people's minds with corruption or treated as such in the Criminal Code".[67] The Round III evaluation reports disclose many different permutations of expression employed by member states but overall the intention as regards the "undue" nature of the advantage, as expressed in the Explanatory Report, referred to above, is found to be manifest in national laws. In one or two instances a lack of clarity or inconsistencies between different parts of national laws attracts criticism. The term "not entitled" is, for example, considered insufficiently clear in Icelandic law. Under the law of the United Kingdom various terms are employed across the three sources of law: the common law offence concerns "any undue reward", while the statute of 1889 refers to "any gift, loan, fee, reward or advantage" and that of 1906 deals with "any gift or consideration". The undue nature of the advantage in the latter two provisions is endowed by other elements of the offences. Laws that potentially include any advantage within the scope of bribery offences is a point that was taken up in the evaluation report on German law. The lack of any qualification so that all advantages of any nature could potentially give rise to a corruption transaction is recognised as an effective pragmatic approach but is criticised for possibly creating problems for gift givers if they are dependent on the receiver to obtain the necessary authorisation to receive the gift. There is a similar conclusion drawn in the report on the law of Finland, in which GRECO perceives "a 'grey zone' between due and undue benefits and that public officials must use their 'common sense' when dealing with such situations".[68] In Norway the solution to this problem is provided by a full explanation of impropriety in the Preparatory Works and detailed codes of conduct in various sectors.

67. Paragraph 72.
68. Paragraph 99.

31. As to the materiality the Explanatory Report to ETS No. 173 makes it clear that the notion of an advantage extends beyond those of an economic nature[69]. GRECO finds that the majority of member states have established bribery laws that recognise nonmaterial advantages or benefits.[70] There are, however, a number of instances where the issue prompted some debate and those where recommendations are made usually prompted by a lack of clarity on the point. In some cases the GET considered that nonmaterial advantages are not covered sufficiently at all. This is the case, for example, in Andorra, Georgia and the Republic of Moldova. In Bulgaria the GET was informed that although some interlocutors supported the theoretical possibility of the law covering nonmaterial advantages, Supreme Court and prosecution representatives expressed the view that in practice only material advantages could be used as the basis of a prosecution since the advantage had to be valued against market criteria. The laws of Finland and Lithuania are unclear and attract recommendations. Polish law relies on the phrase "material or personal benefit" in order to encapsulate the notion of both material and nonmaterial advantages. In Spain it is another case of conflicting views. Whilst a "gift or present" could be nonmaterial in nature, if a fine was to be levied in Spain it has, with striking similarity to the Bulgarian position, to be assessed by reference to the value of the advantage. GRECO considers that the matter requires clarification and recommends accordingly. In some cases the authorities of the evaluated member state are able to rely on case law to make up for any lack of definitional provision or other lack of clarity. The report on the Swedish law notes that the authorities' representation that although the term "bribe or improper reward" ("*muta*" in Swedish) is not statutorily

69. Paragraph 37.

70. Throughout GRECO Round III reports the distinction was made between material and *immaterial* advantages. Although English dictionaries attribute *incorporeal* as a secondary meaning for the word *immaterial,* the more common English usage of that word stems from its primary meaning as *irrelevant* or *inconsequential*. The word *nonmaterial* would usually be the preferred option in common English usage for the purpose of expressing a non-pecuniary advantage and is adopted for the purpose of this report.

defined, "any transaction which on objective grounds is likely to influence the bribee's professional behaviour is to be considered improper"[71] is supported by a Supreme Court decision.

32. Similarly, most member states evaluated were shown to have ensured appropriately that their national laws covered the transfer of advantages directly and indirectly, although there were some exceptions. This is variously achieved by reliance for example on express provision in bribery legislation, which for example, is the approach in Serbia amongst others, through the law relating to intermediaries specifically (e.g. Bulgaria) or by reference to generally applicable rules of complicity and secondary participation (Iceland). The report on Poland reveals that there is no express reference to bribery committed indirectly but it is explained that the Polish word meaning "giving" incorporates the idea of transfers that may be effected directly or indirectly. Similarly the Andorran authorities explained that although the use of intermediaries is not expressly catered for in the bribery provision, the general provision of the Criminal Code provides for cases in which the author commits the offence "through somebody who s/he uses as an instrument".[72]

33. As regards the requirement under ETS No. 173 and No. 191 that member states laws embrace the transfer of bribes "for himself or herself or for anyone else", GRECO again finds a generally good standard of compliance, with some deficiencies emerging here and there. Doubts are raised, for example, in respect of the provision in Andorra, Bulgaria, Croatia, Cyprus, the Czech Republic, Georgia, Greece, Hungary, Latvia, Lithuania, the Republic of Moldova, Romania, and Turkey. GETs often found that there were inconsistencies between offences in this regard. The law of Estonia for example, is found to provide for circumstances involving a third party beneficiary only in respect of the offence of trading in influence.

71. Paragraph 77.
72. Paragraph 75.

Private Sector

34. The reasons that ETS No. 173 includes obligations on the criminalisation of bribery in the private sector and the importance that must be attached to addressing this form of corruption are eloquently set out in the Explanatory Report. First, private sector bribery "undermines values like trust, confidence or loyalty, which are necessary for the maintenance and development of social and economic relations". Second, addressing private sector bribery ensures "respect for fair competition". Third, there has over the years been a transfer of some important public functions (education, health, transport, telecommunications, etc.) from the public sector to the private sector and it is therefore "logical to protect the public from the damaging effects of corruption in businesses as well, particularly since the financial or other powers concentrated in the private sector, necessary for their new functions, are of great social importance".[73]

35. Despite the importance GRECO publicly placed on tackling private sector corruption,[74] the Round III evaluations disclose quite a varied degree of compliance with Articles 7 and 8 ETS No. 173, ranging from the legal frameworks in Andorra and Spain that do not criminalise private sector bribery at all to those in Armenia, Portugal, Sweden, Hungary and Lithuania that have very comprehensive measures to deal with this type of bribery. In quite a significant number of states GETs were aware of a perception that private sector bribery is a less serious form of corruption than public sector, which is viewed as a gross breach of the trust that the public places on public institutions, in particular judicial and legislative institutions. This characterisation is more commonly encountered in Eastern Europe and reflects the historic preponderance of

73. Paragraph 52.

74. See paragraph 95 of the Evaluation Report for Spain "In the view of the GET criminalising private sector bribery in accordance with Articles 7 and 8 of [ETS No. 173] is essential as pubic and private functions seem to be, to an increasing degree, intertwined with each other and the distinction between sectors is becoming more and more blurred."

official power over the citizen but it is also found elsewhere. The Andorran report, for example, reflects a clear view by the majority of interlocutors there that private sector bribery is less serious than that in the public sector. This is often reflected in disparity between the sanctions available for bribery for public and private sector bribery, which is considered below. Sometimes evaluation reports reflect the situation in which national laws include private sector provisions, albeit imperfectly perhaps, but an absence of any cases accompanied by a prevailing view drawn from interlocutors met by the GET strongly suggests that it is very doubtful that the law, either through legal lacunae or lack of understanding, would really catch private sector bribery. This is for example the case in Bosnia and Herzegovina.[75]

36. The better regimes in place to deal with private sector bribery are often found to exceed the requirements of Article 7 and 8 of ETS No. 173 by, for example, not being restricted to business activities (Armenia, Portugal, Hungary, France,) or because a breach of duty is immaterial (Hungary) but by far the most significant theme that emerges from the Round III evaluation reports is the extent to which laws covered "any persons who direct or work for, in any capacity, private sector entities" as required by Articles 7 and 8. Some member states employ very wide concepts to ensure that all those working in the private sector are covered. Portugal for example employs the concept of a "private sector worker", while Sweden relies on the term "employee" supplemented by a list of categories, which although the GET considered it a little complex and potentially susceptible to becoming outmoded without updating, was regarded as being exhaustive. Lithuanian law is found to use the concept of person of a status equivalent to a public servant to very comprehensive effect. Deficiencies in this respect bear a high degree of commonality and typically restrict the offence to bribery of persons in a "responsible" position thereby excluding from the scope of the law lower level private sector workers. This group includes Bosnia and

75. See paragraph 94.

Herzegovina ("… and responsible persons"), Serbia ("responsible person"), "The former Yugoslav Republic of Macedonia" ("responsible person within a legal entity"), Latvia ("responsible person") and Montenegro ("responsible person"). Evaluation of the law of Estonia finds an approach based on a statutory list of duties, which has the effect of excluding most agents and consultants as well as low level employees. The Polish law is found to cover only persons in leading positions or who have actual influence in decision making. Romanian law exceeds the requirement of Articles 7 and 8 by not being limited to bribery in business transactions but restricts the scope of the offences to persons under a labour contract. The Spanish authorities suggested that the scope of the term "official" in the public sector offences is in Spanish law so broad that it would embrace many persons who would be included within the scope of private sector offences in other states. The GET found that in Turkey, although the law did exceed the obligations under Articles 7 and 8 because it was not restricted to business activity, it is, however, limited to persons acting "on behalf of" business entities, which is much more restrictive than "any persons who direct or work for, in any capacity, private sector entities".

37. GRECO has also found that the law applying in the private sector suffers from the same kind of deficiencies in the basic elements as are encountered in the public sector. The passive offence in Polish law, for example, does not cover a simple request and relates to a limited set of intended acts/omissions. The report for the Republic of Moldova reveals that the private sector offence only covers "giving" and "receiving" and lacked an explicit provision for indirect bribery or for third party beneficiaries. The special offence in French law relating to bribery to secure a declaration or certificate containing incorrect information employs the word "attempt", which the GET thought was incompatible with the general principle that attempted bribery should generally constitute a full offence. The evaluation of the law of the Netherlands found reliance on an offence that was very different to that dealing with public sector bribery. Many aspects of the public sector offences are

missing in the private sector offence, and although it is claimed that the general law of complicity and participation in crime would cover, for example, a request for a gift the GET was not convinced that the law was sufficiently clear. The United Kingdom conscious of a lacuna in the law has made a reservation in respect of third party beneficiaries pending the reform of the law. In other members states reports include detail of laws which do not embrace all private sector entities or all business transactions. This is the case with the law of Turkey and Azerbaijan. German criminal law governing bribery in the private sector focuses on anti-competitive conduct and the subversion of transparent procurement procedures. German law also requires a complaint for a prosecution of bribery in the private sector. Proceedings can be initiated "ex officio" but only if the case involves "special public interest". In light of the fact that despite these restrictions Germany prosecutes a not insignificant number of cases of private sector bribery no recommendation was made.[76] On some occasions the GET found that national laws are restricted by the need to show the conferring of a benefit to the briber and other restrictions about the nature of the relationship between the active and passive actors. Turkish law, for example, only covers bribery where a benefit is conferred in order to establish a legal relationship or in order to continue an existing one and under the law of Latvia there is a requirement that the bribery resulted in a benefit to the bribe giver only.

38. Unlike the provision in ETS No. 173 dealing with public sector bribery Article 7 and 8 makes allowance for law of member states to require a breach of duty in any offences dealing with bribery in the private sector. The laws of some member states are found, however, to include requirements that go beyond a mere breach of duty. The laws of Croatia and Montenegro, for example, both require the conduct induced by the briber to be of detriment to the entity in question. The GET heard from the interlocutors it met in Croatia that this is the main reason for the rarity of prosecutions for private sector

76. See below.

bribery. The reports for Belgium and Luxembourg detail the existence of "principal's consent" type provisions that entail proof that the private sector bribery was "unbeknown to and without the authorisation of the board of directors or annual general meeting, the principal or employer".[77] GRECO concludes that there is a clear risk of this kind of provision being abused; allowing, for example, the leaders of two organisations to lawfully enter into a corrupt agreement to fix markets or sporting events or employees being exonerated ex post facto by employers.

Trading in influence

39. There are very few Round III evaluation reports that do not refer to any deficiencies with the provision relied on to provide compliance with the obligations set out in Article 12 of ETS No. 173 dealing with "trading in influence". An example of a deviation from this trend is Croatian law, where the offence is known as "illegal intercession", which the GET assessed as compliant in all respects. As referred to above, the laws of a number of member states are found to suffer from the same types of elemental deficiencies and inconsistencies of the type found in laws relied on in respect of Articles 2 and 3 relating to active and passive bribery of public officials. In the case of trading in influence it is also noted in addition that for example, although the law does provide for an offence of trading in influence, the national law does, on occasion, not cater for the active form. This deficiency is noted in the reports, for example, for Bosnia and Herzegovina, the Czech Republic, Estonia, Greece, Lithuania, the Republic of Moldova, Poland and Spain. Another fairly commonly encountered problem by the GETs is a failure of the relevant provision, or at least a lack of clarity, as regards circumstances in which either the influence that the peddler purported to wield is in fact not real but supposed or bogus, or where the influence is not in fact applied or is applied unsuccessfully. This is the situation reported for the applicable law in Belgium, the Czech Republic, Hungary,

77. Luxembourg paragraph 82.

Luxembourg, Romania, the Slovak Republic, and Slovenia. The report for Turkey notes in contrast that the provision relied on would not cover a true influence peddler.

40. The report on the law in Turkey also touches on a significant theme disclosed by the Round III evaluation reports regarding trading in influence. The GET for Turkey concludes that, quite apart from missing crucial elements, the "qualified theft by deception" offence advanced by the Turkish authorities as a means of compliance with Article 12 had "little to do with trading in influence …".[78] In a number of reports it is clear that the authorities and practitioners are not entirely clear about the exact nature of the offence of trading in influence. The offence as set out in Article 12 and in the Explanatory Report[79] is clearly trilateral in nature involving a briber, an influence peddler and the party the peddler purports to exercise influence over. The essential relationship in this trilateral framework is that of the briber and the influence peddler. However, in for example the law of Andorra, which includes a provision dealing ostensibly with "trading in influence" despite that state's reservation in respect of Article 12, the offence is conceived as a bilateral offence with the focus on the relationship between the peddler and the person being influenced. As regards the law of Hungary the authorities sought to convince the GET that the active bribery offences of the Criminal Code covered trading in influence as they cover cases in which a bribe is transmitted by the influence peddler to the influenced official. The report notes, however, that "it is not a condition that the public official should be bribed by the influence peddler"[80] reflecting the position intended by the drafters of ETS No. 173, that so long as the there is an offer, promise or giving of an undue advantage by the briber (or a request, receipt or acceptance of a promise or offer by the influence peddler) and an assertion on the part of the influence peddler that he or she can exert influence over an official the active (or passive offence)

78. Paragraph 71.
79. Paragraphs 64 to 67.
80. Paragraph 92.

is made out, irrespective of the authenticity of the influence, the success of its application or the transfer of any advantage to the influenced official. A similar discussion is included in the report on the law in Ireland where the GET noted that the purpose of the offence of trading in influence is to "reach background corruption".[81] In the laws of other states the offence requires a violation of some kind of norm; this is the case in, for example, the law in Poland and Estonia. This requirement is clearly not envisaged by the drafters of Article 12 and is closely linked to the view of some member states that the offence is unnecessary and that as conceived in Article 12 it is so broad that it would infringe free speech or criminalise legitimate activity. The report for Denmark (which has a reservation in respect of Article 12) and Germany reflect the view that the offence is too complicated and difficult to define and moreover is unnecessary as the more mainstream bribery offences, or other provisions dealing with for example, breach of trust, deal with the principle problems posed by bribery. The view expressed in these reports is that when one takes into account the law of complicity and secondary participation the most serious parts of trading in influence at least are catered for. These arguments also appear in the report on the law in Finland but alongside concerns that the offence may be in "conflict with the principle of freedom of speech and the rule of law as guaranteed under the Constitution".[82] Other concerns include that put forward by the authorities of France, where trading in influence is criminalised in the active and passive forms, for not applying the offence of trading in influence to decision making by a foreign public official or by a member of a foreign public assembly. The justification is reported as concerns that "trading in influence is little known in the other Council of Europe states and that, in these circumstances, making it an offence in France would have placed French businesses and nationals at a disadvantage vis-à-vis nationals of other countries where it was not an offence".[83]

81. Paragraph 71 – referring to the Explanatory Report to ETS No. 173.
82. Paragraph 105.
83. Paragraph 89.

41. A few member states supplement the view that other bribery offences capture the most reprehensible aspects of trading in influence with the argument that there is a clear risk that an offence fully compliant with Article 12 would risk criminalising the lobbying profession. This reasoning is perhaps most fully developed in the report on the law in the Netherlands, which notes that the authorities "maintained that certain forms of influence (whether financial or not) over decisions of public officials or politicians maybe lawful and to regulate this matter would encroach upon legitimate lobbying and free speech".[84] The GET, however, noted that the representatives of civil society in the Netherlands are clearly in favour of the introduction of a criminal offence. The reports for both Sweden and the United Kingdom reveal that the authorities there take the same view as those in the Netherlands. The authorities of the Netherlands, Sweden and the United Kingdom have all entered reservations in respect of Article 12 on the basis that they do not intend to create a separate criminal offence. The reports for the Netherlands, Sweden and the United Kingdom all contain a reference to the section of the Explanatory Report to ETS No. 173 dealing with trading in influence where it is stated that Article 12 relates to the exertion of "improper" influence, which "must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion".[85] Despite this clear intention that member states are free to exclude legitimate lobbying from the scope of the offence of trading in influence, states like the Netherlands, Sweden and the United Kingdom, as reported under Round III, believe that an offence that is compliant with Article 12 will nevertheless risk catching such conduct. Much of civil society and a large proportion of practitioners, and Governments, believe however that there is a role for the offence of trading in influence in tackling the background corruption that permeates circles close to power, allowing the accrual of improper benefits and advantages to a privileged few. The challenge therefore for the states that

84. Paragraph 91.
85. Paragraph 65.

have the concerns set out above would therefore appear to be the selection of a formulation for the offence that gives added value beyond mainstream bribery offences without creating too broad a scope of criminality.

Bribery of foreign and international actors

42. Articles 5, 6 and 9 to 11 of ETS No. 173 require member states to ensure that their laws embrace bribery of those performing a variety of foreign and international public functions. The evaluation of member states' compliance with obligations under ETS No. 191 regarding bribery of foreign jurors and arbitrators is considered below. Generally the Round III reports reveal, that a large proportion of states have taken steps to ensure that their laws can cater for the increasingly international reach of corruption in the context of the global economy and every expanding aspects of interaction between states across a range of diplomatic, administrative and judicial spheres. The reports disclose a variety of ways in which member states have sought to comply. One very common method is to extend the definition of "public official" for domestic purposes to embrace the various international actors. This method has been adopted successfully, for example in Latvian, Croatian, Lithuanian and Norwegian law. In the latter case, the preparatory works for the legislation make specific reference to the purpose of compliance with ETS No. 173. The GET also welcomed the fact that the law extended beyond the requirements of ETS No. 173 in embracing persons working for international non-government organisations such as Amnesty International and the Red Cross. A similar method is that employed in Bulgarian law and in that of Belgium, Article 250 of which simply provides that "the bribery specified in Articles 246 to 249 concerns a person performing public duties in a foreign state or an organisation governed by international law, the penalties shall be as provided for [domestic officials]".[86] Other states, such as Hungary, have opted for a series of

86. Paragraph 32.

separate offences, though these are invariably closely modelled on "domestic" offences.[87]

43. Some member states have not been as successful as others in achieving compliance. The laws of a few member states are shown to have no, or very few, explicit references to foreign and international actors. In these cases the authorities sought to rely on the application of general principles, often in combination with jurisdictional provision. This is the case, for example, in Moldovan and Albanian law, in respect of which the GET wished to stress that "jurisdiction rules are not relevant to the question of whether foreign or international public officials are covered by the elements of the bribery offences".[88] More commonly deficiencies manifest themselves as a failure to cover particular functions. The reports for Andorra, Estonia and Iceland for example disclose lacunae in respect of members of foreign and international public assemblies, whilst that for Luxembourg, despite the "elegant approach"[89] reveals that officials of international organisations are not adequately covered. Spanish law also displayed deficiencies as regards these functions and also as regards judges and officials of international courts (with the exception of those working for the International Criminal Court).

44. As touched on in the section dealing with general trends above, some evaluation reports revealed that member states prayed in aid of provision that is more relevant to other narrower international obligations and therefore was insufficient to provide compliance with ETS No. 173. GETs commonly encountered, for example laws that were put in place to meet EU obligations or those under the *OECD* Convention on Bribery of Foreign Public Officials in International Business Transactions, which invariably restricted the scope of provisions to the commercial sphere only. This is a feature of the reports for Germany, Portugal, Slovak Republic, Spain and Turkey. Bulgarian law contains an autonomous definition of a

87. For example, Section 258/B CC at paragraph 28.
88. Paragraph 51.
89. Paragraph 81.

"foreign official" for the purpose of the OECD convention but the GET was satisfied that this does not have any adverse impact on other express provision on foreign actors, which also does not raise any significant issues. Other features noted in reports include a reference to the law of Denmark being too permissive of foreign cultures, which was also a concern noted by the OECD Working Group on Bribery,[90] and the significant differences between the offence for foreign public officials and that for domestic officials in the law of "The former Yugoslav Republic of Macedonia", which also required that the offence be "in relation to the acquisition, exercise or taking away of rights defined by law, or for the purposes of acquiring an advantage or causing damage to another person".[91]

ETS No. 191 (Jurors and Arbitrators)

45. Round III evaluations of the obligations regarding bribery of domestic and foreign jurors and arbitrators as set out at Articles 1 (definitions), 2 – 6 (domestic and foreign arbitrators and jurors) of the Additional Protocol to ETS No. 173 (ETS No. 191) expose less than comprehensive compliance among GRECO member states. There are reports that refer to no major difficulties, such as France, Ireland, the Netherlands, Norway, Slovenia, Croatia, Sweden and the United Kingdom but these are the exceptions to the rule. To a certain extent this is not surprising because, as set out above, at the time of the evaluation eleven member states had not signed or ratified ETS No. 191[92] and five member states had signed but not ratified.[93] Of the thirty-nine reports published before 21 October 2011, twenty-one include recommendations concerning compliance with, and/or signature and ratification of ETS No. 191. A number of member states are hampered by the fact that the functions of jurors and, to a lesser extent, arbitrators are conceptually alien to their systems and institutions. While in

90. Paragraph 67.
91. Paragraph 68.
92. Andorra, Azerbaijan, Bosnia and Herzegovina, Czech Republic, Estonia, Finland, Georgia, Lithuania, Poland, Spain and Turkey.
93. Germany, Hungary, Iceland, Malta, Portugal.

a few states, such as Croatia and Serbia a similar function is provided by "lay judges", the criminal justice systems of Bosnia and Herzegovina, Lithuania, Luxembourg and "The former Yugoslav Republic of Macedonia", for example, do no rely on jurors at all. The reports for many GRECO states exhibit concerns caused by no express provision or doubts about the clarity of the way the law dealt with both the active and passive forms of bribery of domestic jurors and arbitrators.[94] In a number of member states the discussion between the GET and interlocutors focused on whether the definition of "official" is broad enough to embrace arbitrators and jurors. The report for Hungary reveals that jurors are covered by the definition of an "official" but it is less clear if arbitrators are, which was also the case with the law in Latvia and Bosnia and Herzegovina. The Serbian definition of "official", which naturally covers jurors as lay-judges, also embraces arbitrators.

46. Turning to foreign jurors and arbitrators, the problems identified by Round III reports are again, to a large extent, matters of clarity and a patchwork of coverage and lacunae. The reports for Bulgaria, and Finland, for example, disclose a lack of clarity on foreign arbitrators, while German law covers foreign jurors only to the extent of obligations under EU instruments and the OECD bribery convention. The law of Turkey and the Slovak Republic have similar restrictions and the latter only covers actors that are employed by international judicial institutions. Icelandic and Latvian law have no provision for foreign jurors or arbitrators, while these functions are only covered in Montenegro if they are judicial or those of a public official. There are severe doubts about the law's ability to deal with this kind of bribery in Poland and in Serbia; the application of the law is reliant on arbitrators being officials in foreign states, which GRECO considers very unlikely. Spanish law provides non-express and imperfect coverage for foreign jurors and arbitrators and the laws of Latvia and Serbia in

94. Albania, Andorra, Azerbaijan, Cyprus, Czech Republic, Greece, Lithuania, Republic of Moldova, Montenegro, Slovak Republic, Spain, "The former Yugoslav Republic of Macedonia" and Turkey.

addition to the above issues also seek to rely on their law governing extra-territorial jurisdiction in order to secure compliance with ETS No. 191. The report on Serbian law makes it clear that "general jurisdictional principles have no bearing on the criminalisation of the offence as such".[95]

Extra-territorial jurisdiction

47. The extent to which the courts of any state have powers to try cases committed outside its borders is obviously a key factor in any law's effectiveness in dealing with bribery involving international actors and therefore in combating bribery generally. Article 17 of ETS No. 173, like many international instruments, requires signatory states to ensure their courts have jurisdiction over the commission of the offences described in earlier Articles when they are committed in whole or in part in the territory of the state and also when they are committed outside the territory if committed by nationals (active nationality jurisdiction). The extent to which the laws of GRECO member states covered these aspects of Article 17 are rarely the subject matter of Round III evaluation reports, save for those laws where the principle of "dual criminality" applies (this is considered below). ETS No. 173 also, however, rather unusually requires jurisdiction over offences committed extra-territorially by public officials of a signatory state or by a member of its domestic public assemblies (Article 17.1.b) and over offences that are committed with the involvement of one of its public officials, or a member of one of its domestic public assemblies. It is this provision that exercised the GETs and which is considered often in some detail in evaluation reports. The high degree of complexity involved in both the provision itself and the task of assessing its compliance with Article 17.1.b and c is outside the scope of a thematic report such as this which focuses on the commonality across the range of observations and recommendations detailed in the evaluation reports. First it is important to note that a number of states have made formal reservations in respect of Article 17.

95. Paragraph 67.

These reservations are quite similar. Denmark, Luxembourg and the United Kingdom restrict the jurisdictional rule at Article 17.1.b, in so far as it applies to public officials or members of domestic public assemblies, to nationals only. Luxembourg also extends that limitation to Article 17.1.c. Sweden, France and the UK all reserve the right not to apply the rule at Article 17.1.c. at all (reservations as regards dual criminality are referred to below).

48. Generally the reports reveal that all states have some provision affording extra-territorial jurisdiction but its effectiveness as regards the obligations under Article 17 of ETS No. 173 is in many GRECO states quite patchy and often rather unclear as to scope and the nature of any restrictions. The difficulties are exacerbated by the fact that there are very few prosecutions generally among GRECO member states that require reliance on extra-territorial jurisdiction. This results in a lack of jurisprudence that deprives any assessment of relevant laws of a key interpretative tool. The Round III reports reveal deficiencies in various forms.[96] A recurring theme, however, in the reports is the fact that the laws of a number of states prayed in aid of compliance with Article 17.1.b and c are in some way linked to their international obligations. Such a link does not necessarily have any adverse impact on the effectiveness generally of the jurisdiction of the courts in respect of bribery offences, as is the case for example with the reference in the law of Croatia. The GETs have, however, criticised provision which in their view relies on ETS No. 173 being a "self executing" instrument, which it clearly is not.[97] Another feature that is common to a number of laws is the requirement that the offence must in some way be directed against or be detrimental to the interests of the GRECO mem-

96. A few random examples would include omissions in the law of "The former Yugoslav Republic of Macedonia" in respect of both Article 17.1.b and Article 17.1.c; the lack of clarity in the law of Poland are regards compliance with Article 17.1.b; doubts expressed about omissions and restrictions in the laws of Turkey, Lithuania and Albania; the complexity of the law that applies in Germany.
97. See the report for Georgia paragraph 83.

ber state if extra-territorial rules are to apply. Restrictions of this type are detailed in the reports for Montenegro, Serbia and Albania. Some reports also detail a requirement that in certain circumstances the law requires a complaint to be made by the victim (Belgium), which must also be accompanied by a request for a prosecution from the state in which the offence occurred (France). Some states under evaluation have argued that they comply with all aspects of Article 17.1.b because only nationals can be public officials or members of parliamentary assemblies. GRECO has on occasion accepted such arguments, which have been advanced for example by Serbia, Slovenia and Estonia, but has commented that this reasoning will soon be unacceptable as it is no longer unusual to find that official posts in GRECO member states are filled by members of other states.

49. By far the most common issue that emerges from the Round III reports is that of the incidence of the principle of "dual criminality. ETS No. 173 does not provide for the application of this principle. A number of states have therefore entered reservations in this regard.[98] Typically, under such provision, a prosecution for an offence committed in another state is predicated upon the conduct in question amounting to an offence in the state where it was committed. GRECO has made it clear that such restrictions are potentially very limiting in terms of the effectiveness of member states' contribution to tackling international bribery. In at least 21 of the 39 Round III evaluation reports GRECO has made a recommendation that dual criminality provisions relating to different aspects of Article 17 be removed and any reservation be withdrawn or not renewed.[99]

98. Finland (17.1.b nationality), Denmark (17.1.b nationality), France (17.1.b).
99. Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Denmark, Estonia, Finland, France, Georgia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Serbia, Slovenia, Spain, Sweden, "The former Yugoslav Republic of Macedonia", and Turkey.

Sanctions

50. It is important that the courts have the necessary powers to impose condign sentences where appropriate for bribery offences. It is worth recalling the intentions underlying ETS No. 173 and No. 191 "according to which corruption does not only represent a mere economic offence, but may, in some of its more serious forms, threaten the rule of law, the stability of democratic institutions and the moral foundations of society, undermine good governance, security, health, fairness and justice".[100] Article 19 obliges states party to ETS No. 173 to provide "effective, proportionate and dissuasive" sanctions and measures including levels of imprisonment that facilitate extradition. This objective is broadly achieved by most GRECO states, but the assessment of member states' laws governing sanctions has also revealed that there is a tendency to treat some types of bribery as being more serious than others. A few member states' sanction regimes for bribery suffer from some systemic inadequacies and inconsistencies, for example the federal structure in Bosnia and Herzegovina is a special case. It results in the four criminal codes varying considerably and often contradictorily in the levels and availability of sanctions; only harmonisation can bring about a consistent and effective approach. Generally however the principle criticisms of the sanctions available in the states reflected in Round III evaluation reports are twofold: disparity between penalties either side of three dichotomies and a tendency towards excessive complexity and the attendant risk of inconsistencies.

51. Dealing first with the former, the three dichotomies are the division between basic or simple bribery offences that are characterised typically by bribery to induce what would other-wise be a lawful act or omission and what can be termed aggravated offences involving a breach of duty or an unlawful act or omission. The offence of trading in influence would normally fall within the scope of the former while offences that are made more serious by the fact that the passive actor is in

100. Croatia paragraph 56, see also Netherlands paragraph 93.

an elevated position or cases in which the bribe is large would typically fall into the latter. The Round III reports often reveal quite a large range in severity of penalties available where a scheme of offences incorporated this kind of dichotomy. This does not in itself of course constitute grounds for criticism as for example in the case of the law in Norway, where the maximum term of imprisonment for the basic bribery offences (active and passive) and trading in influence is 3 years while that for the aggravated offence is 10 years imprisonment. Similar disparity is found in the sanctions regime in Hungarian law, where the basic active offence attracts a maximum of 3 years while that for passive aggravated offence is 8 years. It is sometimes the case, however, that the sanction for the lesser offences is set too low to be effective, proportionate and dissuasive, as for example in the report for Armenia. In Maltese law the maximum penalty for trading in influence, 18 months imprisonment, is considered too low. The maximum penalty for the basic offence in the law of the Netherlands (2 years imprisonment) is also considered too low. The report for Spain was critical of the fact that some of the "lawful" offences do not attract penalties of imprisonment at all.

52. The second dichotomy is the division between active and passive bribery. It is clear from ETS No. 173 and its Explanatory report that active and passive bribery are to be treated as equally serious. It is very quickly clear, however, when examining the Round III evaluation reports that the sanction frameworks of many states reflect the commonly held view, that passive bribery, particularly in the public sector is much more serious than active bribery. The reason for this would appear to be that the breach of trust that is vested in public officials is a greater wrong than that of inducing it. In many cases, particularly those member states in Eastern Europe, although this phenomenon is not exclusively located in this region, this is perhaps due to historical and socio-economic factors associated with the emergence from totalitarian state controls and is an expression of opprobrium of the blight of public sector corruption perpetrated largely by officialdom itself. In any event, the maximum sanctions for active bribery

offences in a number of evaluated legal systems are deemed to be too low. It was criticism of this trend that prompted the observation referred to above in the evaluation report for Croatia. The laws of Serbia, Lithuania and the Czech Republic provide similar examples.

53. The most notable disparity, however, occurs either side of the third dichotomy, which is the divide between the public and private sector. The substantive point is made eloquently in the Round III report on the law in Portugal, in which the GET recalls that, for the reasons referred to above on the section dealing with private sector bribery, "the Explanatory Report to the Convention expresses a clear preference for limiting the difference between the sanctions of public and private sector bribery, which is also a trend that can be seen in many GRECO member states".[101] This trend is evidenced in many Round III reports and prompted similar comment terms. A good example is provided by the report for Albania where the disparity in the maximum penalty between public and private sector bribery is nine years' imprisonment. The report for Finland contains a similar comment to that referred to above regarding the tendency in some States to consider bribery, particularly that in the private sector, to be an "economic crime". Even when the general comparatively low level of penalties in Finland is taken into account GRECO takes the view that a maximum penalty of two years imprisonment for bribery in the private sector is too low when gauged against a possible 6 year maximum for public sector bribery.

54. Some GRECO states have legal systems that favour detailed structured hierarchical penalty systems that limit the margin of discretion left to the court while the traditions of others dictate reliance on rather high global maximum penalties, with the final sentence from low to very high entirely within the discretion of the sentencing court. There are within GRECO states more examples of the former than of the latter, of which the most obvious examples are the common law

101. Portugal paragraph 101.

jurisdictions of the United Kingdom and Ireland. The common law tradition tends to result in less complicated penalty regimes while the "civil law" tradition has a tendency for more structured penalty regimes that can sometimes produce relatively complex layered provisions,[102] or that provide a very wide range of penalty levels.[103] Perhaps one of the more complex schemes of sanctions the GETs discovered is that which operates in Turkey, where the legal system does not fall naturally into either the "common law" or "civil" camp. The sanctions scheme in Turkish law reflects a division along basic/aggravated lines that is embellished with further aggravating factors that can raise the sentence by a third or a half depending on the type of person (judiciary, arbitrator, expert witness, public notary or professional auditor) involved in the offence. There is also provision for reductions, so that a conviction for an attempt will reduce the sentence by a quarter to a third.

55. The Round III reports also disclose that the law of nearly all states provides measures other than imprisonment that can be applied upon conviction of a bribery offence and which can be very effective in reflecting the nature of the mischief in cases of bribery. The most common of these is a fine. Malta is very unusual in that the only penalty available for bribery is imprisonment; fines cannot be levied, even if the offence is minor. In some jurisdictions the level of fines is somewhat low. The report on Lithuanian law, for example, notes that fine levels are not likely to be effective, proportionate or dissuasive to wealthy offenders (€11 400 max). Spanish law adds disqualification from holding certain positions, as does German, Serbian and Moldovan law and the regime operating in Luxembourg. In the Republic of Moldova, a fine and public sector disqualification is mandatory upon conviction. French law provides for loss of civic, civil or family rights, as well as disqualification from public office or profession in addition to confiscation and publication of the judgment. Greek

102. See the reports for Estonia, Lithuania, Montenegro, Norway and Spain.
103. See "The former Yugoslav Republic of Macedonia" and Serbia with maxima ranging from – 3 months to 10 years and 3 months to five years imprisonment respectively.

law provides similar tools as regards disqualification while Hungarian law adds community service and suspension of driving licence to those measures already referred to above.

Effective Regret

56. In a significant number of the laws of GRECO member states it is a defence to a charge of bribery that the defendant reported the act of bribery to the authorities. This defence, commonly known as "effective regret", comes in a number of different variations as will be considered below but as regards the Round III evaluations embraced by this report its incidence in national laws reflects a clear geographical focus. Incidence is high in the national laws of Eastern European states, from the north to the south, but the defence is not known at all in the more western European States save for those in the Iberian peninsular. The paradigm here appears to be a private individual reporting an offence in circumstances in which a corrupt public official has made a demand for bribe.[104] This is perhaps the explanation for the geographical focus of the incidence of the defence in states where historically in all sectors of the socio-economic apparatus there has been a preponderance of power in the hands of the state and officialdom.[105] Indeed the defence reflects the view in many states that, as referenced in the report on Georgia, where the reporting of corruption in reliance on the defence accounts for seventy to eighty percent of public sector cases, that the active party in the public sector " is a victim of the bribee due to an unequal distribution of power between the two…".[106] It should be noted that the Czech Republic is alone among the Eastern European states that fall

104. But its incidence is not wholly restricted to the public sector. In the laws of Armenia, Latvia, Republic of Moldova and Poland, for example, the defence applies in the private and public sectors.
105. It is interesting to observe that the defence was introduced relatively recently in Poland (2003) and, anecdotally as the evaluation report is outside the scope of this paper, having been adopted after 31 October 2011, in Austria (2008).
106. Paragraph 80.

within the scope of this report in having repealed relevant provision on "effective regret" in its entirety.[107]

57. The application of the defence is most predominant in cases of active public sector bribery but it is also founding relation to passive bribery in a number of national laws.[108] In those states with criminal laws that include the defence it is perceived by many as a means of bringing corruption to light. Many reports reflect the view that without it certain types of corruption could not be addressed effectively. In view of the fact that the defence is considered to varying degrees to be of some assistance in tackling bribery, GRECO has generally taken a relatively indicative approach. Save for the case of two reports where the defence is assessed by the GET as not presenting any real threat to the effectiveness of the bribery provisions, all reports dealing with this issue include a recommendation, but the recommendation has been of the "review and monitor" type rather than the more obligatory "ensure", etc. type of recommendation. The recommendations included in evaluation reports addressing this issue are all drafted in very similar terms.[109]

58. GRECO's concern about this defence stems in essence from its potential to be abused, which is a product of some of the recurring key features of its operation. Many reports dealing with this issue refer to its automatic and mandatory nature, which in its most susceptible form means that so long as the relevant reporting conditions are met the accused is automatically exonerated and, moreover, in cases of active bribery, is quite often entitled to an award of funds that is equal in value to the bribe. In the manifestations that cause the most concern there are no procedures in place that would allow an examination of the motives of the reporting party or which

107. paragraph 64.
108. See paragraph 97 of the report for Hungary.
109. Paragraph 57 of the report for Croatia is typical – "…to analyse and accordingly revise the automatic and – mandatorily (*sic*) total – exemption from punishment granted to perpetrators of active bribery in the public sector and private sector who report to law enforcement authorities; and to abolish the restitution of the briber to the bribe-giver in such cases."

party to the corrupt transaction instigated it. In the report on the law of the Republic of Moldova, for example, the GET noted that the authorities had decided to maintain the defence in order to stimulate the reporting of bribery, but expressed the view that "In principle, very serious cases of active corruption could go totally unpunished by reference to this defence." The report goes on to record the GET's view that "this tool could be misused by the bribe-giver, for example as a means of exerting pressure on the bribe-taker to obtain further advantages, or in situations where a bribery offence is reported long after it was committed, since there is no statutory time-limit …".[110]

59. In a number of laws there is provision that requires the report of the corruption to precede the prosecution investigation into the offence. This issue came up in the report on the law in Armenia, where the scope and application of the defence illustrates many of the different permutations found in other evaluated laws. In the public sector the defence only applies to active bribery, whereas it applies to both active and passive bribery in the private sector. In the public sector it is a complete defence, whereas in the private sector it is a mandatory and total form of mitigation, which results in no punishment whatsoever. The GET was concerned about these aspects but also noted that the law "does not specify a time frame in which the offence is to be reported, as long as the person reporting *thinks* that the law enforcement authorities do not yet know about the offence …".[111] Similarly as regards the law in Romania, GRECO's concerns focus on, amongst other aspects, evidence that "bribe-givers often turn to the authorities at a late stage when they can feel the presence of the investigating bodies (which goes against the sprit of the provisions)".[112] In some instances, where the GET is satisfied that there are sufficient safeguards, the evaluation report recommendations focus on one particular aspect of the defence rather than address the existence of the defence itself. This category

110. Paragraph 64.
111. Paragraph 90.
112. Paragraph 112.

would include reports, such as that for the laws of Bosnia and Herzegovina and Serbia, where the recommendation referred only to the possibility that a sum equal to the value of the bribe be returned to the bribe-giver.[113] The concerns, and hence the recommendation, reflected in the report on the law of Poland focus on the lack of clarity in the pre-conditions to be met before the defence is available. In other reports GRECO has recommended review and where appropriate a revision of the relevant law where although there appear to be some safeguards in place the defence has remained relatively unused and is of dubious added value.[114] The two national laws that do not attract a recommendation at all were those of Montenegro and the Slovak Republic. In the former case, the report reflects doubts about the effectiveness of the defence as it has never been used, but declines to make a reservation because the defence is only applicable at the discretion of the court, which is considered a powerful bulwark against abuse. In the latter the evaluation report reflects the view that the pre-conditions are clear, that there is an element of prosecutorial discretion and that the GET did not receive any adverse comment about the application of the defence in practice from interlocutors during the on-site visit.

Limitation periods

60. Procedural rules concerning the amount of time following the commission of an offence within which a prosecution for an offence of bribery must take place are obviously of vital importance within the context of offending that may take a considerable amount of time to come to light. Some jurisdictions, such Ireland and the United Kingdom in the "common law" tradition, and Cyprus, for example do not have such "limitation periods". This means that a prosecution can not be "time barred" but a long period of time that has lapsed since the commission of the offence may have an impact on the probity and weight of the available evidence and could be

113. Paragraphs 108 and 74, respectively.
114. See the evaluations reports for Greece, Hungary and Spain.

relevant as to whether a fair trial is feasible or if a prosecution would amount to an abuse of process. Where limitation periods do apply Round III reports indicate that the "GRECO standard" is established as a range of limitation periods between three and fifteen years. Meaning that, as commonly found amongst GRECO member states, the limitation period will vary in accordance with the maximum penalty for the offence. This can lead to some complex provisions. According to the law in Croatia, for example, the limitation period for active bribery, in the public and private sectors, is three years, while the period for passive bribery in the public sector is ten years where the offence relates to an illegal act or omission on the part of the public official and five years in cases involving a legal act or omission. The limitation periods for private sector bribery are ten years for passive bribery, where there are "acts detrimental to the private entity"; otherwise the period is five years. Trading in influence is subject to a limitation period of three years, or 5 years where it is a passive case. Under the law of the Czech Republic, there are four different periods ranging from three to fifteen years spread across eight offences with six different maximum sentences.

61. As noted above sanctions for passive bribery, particularly in the public sector, outstrip those for active bribery on the public sector, trading in influence and bribery in the private sector. Thus, as the rules in Croatia and the Czech Republic illustrate to varying degrees, limitation periods for the latter types of offending tend to be shorter in many GRECO member states. In some legal systems the law provides for the limitation periods to be interrupted and restarted for an extension. This is the case in the Czech Republic, France, Romania and "The former Yugoslav Republic of Macedonia". Round III recommendations relating to limitation periods are relatively rare. In the report on the law in Portugal, which includes limitation periods ranging from five to fifteen years for all bribery offences, save for passive trading in influence involving no breach of duty, the report recommends that the period of two years for that offence be increased. The law in Lithuania provides, uniquely among GRECO member states, that the

limitation period runs to the very end of proceedings, rather than to their initiation. In addition the law does not provide for an interruption and restarting of the limitation period, apart from circumstances in which the defendant has taken steps to evade the consequences of his actions (such as hiding). The GET was told that this combination of rules encourages unscrupulous defendants and lawyers to use delaying tactics. GRECO therefore recommends that the law on limitations be made more flexible so as in particular to allow for the interruption or suspension of the limitation period upon the institution of proceedings. The Round III report for Hungary includes a recommendation that the limitation period of three years for a number of bribery offences be increased. The special law as regards limitations incorporated in the law relating to liability of members and former members of government attracted criticism in the evaluation report for Greece. This law provides a five-year limitation period for both misdemeanours and felonies in contrast to the five and fifteen respectively that applies in the general scheme.

Enforcement and effectiveness

62. "…[E]ven the most comprehensive laws do not assist combating corruption if they are not effectively applied in practice; legislation must be coupled with follow-up measures to promote its enforcement." This quote from the evaluation report for Slovenia,[115] one of the first Round III evaluation reports, may be somewhat axiomatic but it expresses a truth that a number of GETs have felt the need to repeat in one way or another. The message appears in the reports, for example, for Greece (which rehearsed the opinion expressed in the Slovenian report almost verbatim), Bosnia and Herzegovina, Luxembourg and Portugal. There are on the other hand a few reports that are more optimistic on this issue and reflect a trend of improved enforcement in recent times; Norway and the "The former Yugoslav Republic of Macedonia" are

115. Paragraph 87 of the report, which was adopted, like that for Finland, at GRECO 35 in December 2007.

examples in this category. Bearing in mind, however, that the reports for a significant number of other member states including, Albania, Andorra, Azerbaijan, Denmark, Finland, Iceland, Ireland, Latvia, revealed either only a small number, or indeed, no successful prosecutions for bribery and that a significant number of others, including those for Bulgaria, the Czech Republic, Lithuania, the Republic of Moldova, Montenegro and Serbia disclosed a preponderance of petty public sector bribery coupled with a generally weak or non-existent showing for serious high profile "politically exposed" cases, trans-national prosecutions or prosecutions in the private sector, it is somewhat surprising that the message spelt out so eloquently in some reports is not more systematically applied.

63. The reason for the rather patchy coverage of the "effectiveness" issue in GRECO Round III reports is the absence of any clear agreement in GRECO as to whether it fell squarely within the scope of the Round III remit. Some consider that Round III is concerned with the letter of the law and not with its application and that bearing in mind that the criminal justice statistics, when available can be misleading and unreliable, the better course is to adhere to an examination of compliance with the obligations of ETS No. 173 and No. 191, the primary objective of Round III, rather than on the work of the investigative and prosecutorial authorities. This rather legalistic approach fails, however, to acknowledge three important aspects of the peer evaluation process. The first is that a requirement that the laws of contracting parties to any international convention ensure "effective" compliance can be reasonably read into the obligations of such instruments because otherwise the achievement of the aims of such instruments would be severely hampered. Second, member states are not obliged to adopt the exact terminology and framework of ETS No. 173 and No. 191 when undergoing the ratification process. In an assessment therefore of national laws against the standards of these instruments, the extent to which they prove to be effective in practice is one criterion in determining the extent of compliance. The absence of cases is therefore a legitimate factor to be taken into account. Third, one purpose of any peer

evaluation round is to assist in determining the effectiveness of the multi-lateral obligations themselves in order to inform future developments in intentional co-operation in this area.

64. Setting that debate to one side, however, the observations and the small number of recommendations that are made about this issue in the Round III reports, and in particular the causes of inadequacies in effectiveness, where they were found, are interesting and instructive. A small number of reports detail very particular circumstances. The evaluation of Norway, whilst revealing recent improvement in enforcement, gave rise to very particular concerns that "the offence of 'gross' corruption can be hampered by its rules of criminal procedure. Specifically, these concerns relate "to situations in which a verdict on gross or aggravated corruption being appealed. … [I]n a case of 'gross' corruption the Court of Appeal … is composed of a jury of ten persons (without special expertise)" with the prosecuting authorities requiring at least a seven to three majority in favour of upholding the appeal.[116] As regards for the position in Bosnia and Herzegovina, a cause for concern "was the departure of international judges and prosecutors working in the war crimes as well as in the organised crime and corruption chambers of the State Court and the … Prosecutors Office. These international officials were conducting high-level corruption investigations. The authorities are to gradually provide for the replacement of international judges and prosecutors, but at the time of the on-site visit, most interlocutors pointed at the scarcity of human and material resources to perform successful investigations of corruption cases".[117] The evaluation report for Ireland refers to the role of the published findings of Tribunals of Inquiry, such as the Mahon Tribunal that examined alleged bribery of several local councillors by a former Government Press Officer, the work of the Criminal Assets Bureau in the confiscation of profits from corrupt wrongdoers, the office of Corporate Enforcement and the use of alternative charges before concluding that this

116. Paragraph 74.
117. Paragraph 104.

"unusual combination of public inquisitions 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".[118]

65. Some legal systems, more typically the common law systems allow the tribunal of fact, be it a jury or non-jury trial, to make inferences of intent, etc. from circumstantial evidence. The reports for Germany, Ireland and the United Kingdom, where the law in this regards is given statutory effect, comment on the favourable impact that such rules have on the effectiveness of the enforcement of the law. By contrast systems that epitomise the "civil" law approach or are modelled on such systems tend to have more restrictive evidential rules. The Round III reports on the law of Bosnia and Herzegovina, Greece, and Lithuania, for example, all comment on the difficulties this creates for those seeking to enforce the substantive law. The report on the last of these three examples comments that "prosecution authorities are apparently confronted with a standard of evidence which is excessive." Despite progressive provision in some aspects of the law "the discussions held on site showed that there is a need in practice to obtain evidence for the criminal intent and the concrete act of bribery".[119] This would require in practice, for example, evidence not only of the acceptance of a bribe but also that "s/he should also have performed the act for which the bribe was given in order to be prosecuted".[120]

66. The Round III evaluation reports reveal that in some cases the law of member states draws on provisions, such as those dealing with breach of trust, abuse of power, or misuse of corporate assets, that may not directly relate to compliance with the obligations contained in ETS No. 173 and No. 191 in seeking an effective response to bribery or trading in influence.

118. Paragraph 72.
119. Paragraph 65.
120. Paragraph 65 footnote 14.

This is indeed the case in Lithuania where prosecutors turn to an abuse of office offence as a means of circumventing the more stringent bribery law evidential requirements, only to be confronted with the hurdle of satisfying the element of "major damage to the state".[121] In France, where enforcement of bribery of foreign public officials, "despite the economic weight of France and its close historical links with certain regions of the world considered to be rife with corruption"[122] is found to be entirely lacking, and where more general enforcement is bedevilled by various procedural and evidential hurdles, there is often reliance on charges such as misuse and concealment of company property, under Article 241 of the Commercial Code, which unlike the law pertaining to bribery itself is interpreted very liberally.

67. The Round III evaluation report for Germany, whilst detailing a number of failures to comply fully with the obligations contained in ETS No. 173, nevertheless, acknowledges the internationally recognised success of the German authorities in prosecuting large-scale and trans-national bribery. The report reveals that this is due, not only to the highly developed and effective administrative law mechanisms for addressing unethical conduct on the part of corporate bodies but also to the fact that "many corruption cases (particularly those which have an international dimension) are prosecuted as breach of trust due to the easier way to substantiate the offence without mutual legal assistance from other countries".[123] As a result the number of convictions obtained in Germany for offences "labelled" as bribery or corruption, although not insignificant in themselves, does not reflect the whole picture of the country's anti-corruption efforts.

68. A number of reports examine in some detail the causes of the generally poor enforcement levels. Occasionally GRECO Round III evaluation reports reflect unease among many of the interlocutors with which the GET engaged during the compiling

121. Paragraph 66.
122. Paragraph 76.
123. Paragraph 117

of the report and the on-site visit about political interference in the effectiveness of legislation and enforcement. The report for Romania, for example, unflinchingly refers to evidence of a "strong politicisation of the legislative process and amendments were sometimes passed in a way that they [*sic*] were perceived to be disguised amnesties or to hinder the prosecution of corruption or corruption related offences; for instance a number of proceedings have been initiated in recent years against senior officials and a large part of the political class who had used undue influence and complicity in the financial institutions to obtain loans that did not correspond to their financial capacity; the provisions of Law 78/2000 which provided for a specific offence in this area was repealed shortly before the on-site visit and the offenders were released from liability despite efforts by the anti-corruption bodies to obtain a recognition of the applicability of other, less specific criminal offences (fraud, etc.)".[124] Similar concerns were expressed in the report in respect of the law in Belgium, in which it was suggested that "the close links that [nepotism, patronage and political and other friendships] create may sometimes have a real influence on the course of prosecutions in particular cases, sometimes culminating in no further action when an accused person is politically or economically influential".[125] These extracts serve as a stark illustration of the hurdles faced by the investigative and prosecuting authorities in seeking to effectively address corruption in some GRECO member states.

69. In the evaluation report for Luxembourg, the emphasis is on the practical difficulties that result in "the number of cases coming before the courts … [being] …very small." Despite a large number of complaints concerning government departments received by the police, "the law … is probably fairly ineffective in practice".[126] Whilst noting excessively strict rules on the burden of proof in criminal law, similar to those referred to above, the report notes that the Luxembourg police attrib-

124. Paragraph 95 footnote 31.
125. Paragraph 106.
126. Paragraph 87.

ute the lack of enforcement to a catalogue of procedural and administrative failings such as limited police access in law and/or practice to administrative and financial information at the preliminary stage, tax data base scattered over several local authorities, lack of investigating authorities staff, no "whistle blowing" arrangements and lack of effective liaison between prosecution and investigating judges. In the report for Bosnia and Herzegovina, the GET observes that "[a] decisive challenge in fighting corruption in Bosnia and Herzegovina lies with effective application of legislation. There is a general impression in the country that perpetrators of corruption offences often go unpunished. Statistics show rather alarming data on prosecution and adjudication of this type of offence: most cases end up in acquittals or suspended sentences... The GET takes the view that the legislative adjustments recommended in this report will be an important, but not in itself sufficient, contribution to more efficiently fighting corruption. The legislative framework needs to be accompanied by measures to promote its use in practice. The GET is firmly convinced, that the difficulties in investigating and adjudicating corruption offences highlighted above warrant further analysis and reflection on possible solutions".[127] As regards the position in Slovenia, the GET considered that the hesitant and reactive rather than proactive approach of the authorities was caused by "[a] variety of factors… including the reluctance to report instances of corruption, the difficulty of proving the illegitimate origin of corruption proceeds and the intent of the perpetrators, the high level of proof required by the investigative judge to open a judicial investigation and to admit evidence in court, the need of greater specialisation of prosecutors and judges, etc.".[128]

70. A small number of reports note that the establishment of centralised specialised investigative and prosecution capacity is often an effective means of enhancing enforcement of laws criminalising bribery and corruption. The report for the

127. Paragraphs 101 and 106.
128. Paragraph 87.

Slovak Republic, for example, notes that the establishment "of a chain of specialist institutions and practitioners in the police, prosecution and judiciary (who are subject to particular screening measures) …" has greatly reduced lapses in security that had occurred when cases were dealt with at the local level. The report refers to the "existence of a Special Court for Corruption and other Serious Crimes, which has reportedly led to an increase in the number of cases processed and a more harmonised approach in dealing with corruption cases".[129] The report for Serbia notes that various steps had been taken to enhance enforcement of corruption cases including "ongoing amendments to the Code of Criminal Procedure, providing, *inter alia*, for a leading role of prosecutors throughout the different stages of criminal proceedings. Efforts were also reported concerning the establishment (and reinforcement) of specialised anti-corruption structures within the law enforcement bodies".[130] In Albania the GET was advised that the number of detected and adjudicated cases of corruption had been increasing over recent years due to the establishment of the 'Joint Unit for the Investigation of Economic Crime and Corruption' in the Tirana Prosecution Office".[131]

71. On a significant number of occasions GRECO has, in its Round III reports, taken the view that enforcement of the criminal law of bribery and corruption is hindered by a lack of awareness raising and training among investigators, prosecutors and judiciary; particularly where member states have recently adopted new laws that are unfamiliar to the courts, which have no or little experience in applying these rules. Despite the measures, referred to above, to enhance capacity, the report for Serbia, for example, advises "the authorities [to] take additional measures, including through specialised training and other awareness raising activities concerning the precise content of the existing incriminations of corruption offences, so that law enforcement authorities

129. Paragraph 101.
130. Paragraph 75.
131. Paragraph 58.

become better prepared to detect, investigate and prosecute instances of corruption, including other crimes than classic/ petty bribery".[132] The Albanian report "raises the question of whether law enforcement officials and judges are sufficiently aware and informed about these relatively new provisions (which were introduced and/or amended in 2004) and have the requisite skills to investigate and adjudicate the various corruption offences." Interlocutors suggested that "specialised training on corruption would be needed in order to develop a common understanding of legal concepts which are defined neither by law nor by binding court decisions." Although the GET was told that some training is provided for police officers, GRECO concludes that "such practical measures need to be pursued and further developed in order to support the full implementation of the existing incriminations of corruption offences".[133] The GET compiling the report for Bosnia and Herzegovina discerned "an absence of a common understanding of key aspects of corruption incriminations among practitioners." Although the report makes reference to a number of ongoing or planned technical assistance projects to provide training to law enforcement authorities it concludes that "[m]uch more needs to be done in this respect… and recommends additional measures (e.g. training, guidelines, circulars, etc.) to raise the awareness of the professionals who are to apply the criminal legislation on corruption".[134] As regards Iceland the report notes that it "emerged … during the on-site visit that the law enforcement authorities … are not always well versed in the existing bribery/trading in influence provisions".[135] Some interlocutors regretted a lack of specialised training on corruption following the 2003 amendments to the law. Bearing in mind that there had been only one single case of corruption prosecuted in the last ten years in Iceland GRECO considered there was an urgent need for targeted guidance to the officials who are to enforce the legislation and recommended accordingly.

132. Paragraph 75.
133. Paragraph 58.
134. Paragraph 107.
135. Paragraph 72.

A few reports call for guidance, awareness raising or training in respect of very specific aspects of the law. The report on Greece, for example, details a specific lacuna as regards the autonomous nature of the bribery offences as set out in ETS No. 173 and recommends that the Greek authorities "take the appropriate measures, such as circulars or training, to make it clear or to remind those concerned that the offences of active and passive bribery are autonomous and do not necessarily require an agreement between parties".[136] Similarly, the GET finds that in Latvia there is a "lack of common understanding … among practitioners [which] creates doubts whether offering, promising and/or requesting an undue advantage as well as accepting an offer or promise of such an advantage are criminalised in a satisfactory manner".[137] In the evaluation report for Portugal "the GET takes the view that the [new] legislative framework needs to be accompanied by measures to promote its use in practice and to analyse to what extent it would require further adjustments …". The report concludes "the development of guidelines and training appears to be necessary for, in particular, the law enforcement bodies and the prosecution but also with regard to the judiciary".[138]

Conclusions

72. As the above observations, comments and extracts demonstrate, GETs and GRECO in plenary session have undertaken, and will continue to undertake, through the programme of the Round III Theme I evaluations a very thorough and comprehensive study of the criminal laws of GRECO member states. GRECO has very effectively assessed the criminalisation of bribery in the laws of member states against the standards of key aspects of ETS No. 173 and No. 191, and to a certain extent beyond those standards. Given the scale of GRECO

136. Paragraph 111.
137. Paragraph 98.
138. Paragraph 104.

membership and the variety of legal systems represented therein, this is a very considerable achievement. Overall, the reports reflect a relatively high degree of compliance with these standards, with a few exceptions and subject to a series of particular specific and often very technical deficiencies. In addition, GRECO recommendations do have a practical impact in increasing the levels of compliance with ETS No. 173 and No. 191, although there is evidence that levels of compliance with GRECO recommendations are tending to reduce over time. Of course laws do not in themselves solve any problems except, perhaps, those of a political and presentational nature. Although the Round III Theme I reports reflect a general recognition among the authorities of GRECO member states that they require robust and flexible laws and criminal justice systems if the threats posed by bribery in all the various forms in which it manifests itself are to be addressed effectively, the evaluations have also demonstrated that there is no clear correlation between compliance with ETS No. 173 and No. 191 and effective enforcement of those very national laws in place to provide compliance. In fact the state that is properly regarded as the most effective state in Europe in terms of the significant number of high profile and large cases of bribery that it prosecutes is reliant upon a law that is, upon examination under the GRECO Round III evaluation, deficient to a significant degree in terms of meeting the standards of ETS No. 173 and No. 191.[139] This is not a problem faced by GRECO alone. All bodies that monitor compliance with international corruption instruments, ultimately reliant on intergovernmental consensus, have similar experiences. There is, of course a need to ensure that authorities of all states seek to have comprehensive laws to deal with bribery and corruption but this exercise should not become the ultimate goal. The legal tools needed to bring those committing bribery offences to justice are not enough. States must also commit both political will and considerable resources if their investigating authorities, prosecutors and courts are to tackle the threats

139. Germany.

posed by bribery and corruption in a serious, determined and effective manner.

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