



Group of States against Corruption (GRECO)

Lessons learnt from the three
Evaluation Rounds (2000-2010)

Thematic Articles



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



COUNCIL OF EUROPE
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Introduction

On 1 January 2012, the Group of States against Corruption (GRECO), an enlarged agreement within the Council of Europe, will officially enter into its Fourth Round of mutual evaluations. The three evaluation rounds conducted between 2000 and 2011 assessed GRECO member States' compliance with selected provisions from key Council of Europe legal texts, namely Resolution (97) 24 of the Committee of Ministers on the Twenty Guiding Principles for the fight against corruption, the Criminal Law Convention on Corruption (ETS 173), and Recommendation Rec(2003)4 of the Committee of Ministers on common rules against corruption in the funding of political parties and electoral campaigns. Applying a consistent methodological approach, GRECO adopted In-depth evaluation reports in respect of each of its member States gathering information of primary import from the field, on issues, such as:

- independence, autonomy and powers of persons or bodies in charge of preventing, investigating, prosecuting and adjudicating corruption offences;
- specialisation, means and training of persons or bodies in charge of fighting corruption;
- immunities from investigation, prosecution and adjudication of corruption offences;
- criminalisation of corruption;
- measures for the seizure and deprivation of the proceeds of corruption;
- corruption within public administration;
- measures to prevent legal persons from being used to shield corruption offences; and

- transparency in the funding of political parties and electoral campaigns.

This publication brings for the first time analyses of selected themes on corruption carried out in respect of the entire GRECO membership, as well as individual GRECO member States. Prepared between 2004 and 2011 by invited experts and the Secretariat, the articles initially formed part of GRECO's annual General Activity Reports. The objective of this publication is to consolidate the wealth of information generated by GRECO and its members in the course of the past ten years and to bring this knowledge to a broader readership with a professional or personal interest in the fight against corruption.

The fight against corruption in public administration – emerging themes from GRECO Round II Evaluations*

In its Second Evaluation Round, GRECO evaluates *inter alia* the measures taken by States to address corruption in public administration. GRECO's examination bears on guiding principles 9 and 10 of Resolution (97) 20 laying down the twenty Guiding Principles against Corruption:

- to ensure that the organisation, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness" (GP 9), and
- to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct (GP 10).

The starting-point of GRECO's analysis derives from the observation that ensuring ethical practice in administration and the delivery of a high-quality service to the citizens are inseparable from effective action against corruption. It is necessary to re-emphasise these goals and ensure that they prevail, especially in the present context of change in the public service environment and increased demands of efficiency and performance.

* Prepared by the GRECO Secretariat and first published in GRECO's Sixth General Activity Report (2005) (Greco (2006) 1E Final)
[http://www.coe.int/t/dghl/monitoring/greco/documents/2006/Greco\(2006\)1_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2006/Greco(2006)1_EN.pdf)

The criteria for carrying out an objective evaluation of the measures taken by member States to make ethics prevail in public administration are inspired by the relevant Council of Europe anti-corruption standards, such as Recommendation Rec(2000)10 on codes of conduct for public officials, and were recalled specifically in the second-round evaluation questionnaire (see document Greco (2002) 28E Final).

Scrutiny of the second-round evaluation reports and of the recommendations and observations made to the members that underwent an evaluation makes it possible to identify certain emerging themes which relate either to the organisation, functioning and supervision of the administration or to the status and conduct of public officials. However, the findings adopted by GRECO in the context of individual mutual evaluations cannot be straightforwardly applied as general pronouncements; they often reflect the specificity of each country's administrative, legal and political systems.

Guiding Principle 9 (GP 9)

GRECO has applied a broad construction on the concept of public administration as taking in the services of the entire public sector, such as the State administration, local government and public institutions and enterprises. Thus, ethical and anti-corruption requirements concern public administration as a whole.

Anti-corruption strategies in public administration

GRECO has recommended, for a number of countries (see appended table), that national anti-corruption strategies be developed. In certain cases, specific reference has been made to the desirable scope of these strategies to ensure that they extend to local government. In this context, GRECO has often drawn attention to the "Model initiatives package on public ethics at local level" (of the Steering Committee on Local and Regional Democracy).

These strategies should not amount to mere declarations of intent. In order to be credible they must be co-ordinated and

must comprise definite, measurable objectives. It must be ensured that they are implemented and periodically evaluated and adapted. GRECO has therefore recommended, in certain cases, adopting detailed plans of action and having the strategies and plans of action reviewed and implemented by bodies vested with the authority and the appropriate level of resources for this task.

Prevention and evaluation of risks and vulnerable sectors

The first prerequisite for satisfactory prevention is an objective assessment of risks. GRECO has often noted that systematic analysis of risk factors (e.g. conflicts of interest, securing of improper advantages, absence of rules on reporting of offences committed within the administration, etc.) and of the sectors exposed to corruption (e.g. public procurement, health care provision, issuance of permits and licences) is lacking. It has accordingly recommended in certain cases that a better knowledge of the vulnerable sectors and the relevant practices be achieved, for better prevention and detection of practices such as bribery, influence peddling and favouritism, etc.

GRECO has often noted the lack of adequate information or statistical data concerning criminal convictions or disciplinary measures imposed on public officials for corruption offences or breaches of rules of professional conduct relating to such offences (e.g. failure to report accessory activities which are liable to cause a conflict of interests). In certain circumstances statistical data can be helpful in conducting analysis of trends.

The authorities must take care that the resolve to guard against corruption is reflected in the administration's decision-making process. This is best illustrated by certain recommendations stressing the need to verify that administrative procedures, especially those in which the administration has a substantial margin of discretion, make it possible to avert potential abuses. In practical terms this concerns, for instance, predictability, transparency, speed and efficiency of procedures, collectiveness of decision-making, obtaining prior opinions from

authorised bodies, consultation of the citizens or the individuals concerned, publication of information of value to the public, access to official documents, etc. In some countries, the sluggishness or inefficiency of the procedures has shown itself to be one of the principal causes of corruption. Provision of citizen service centres or service facilities available on the Internet, or reduction of delays in granting certain permits and licences, are regarded as means of curbing corruption.

Transparency and access to official documents

Guiding Principle 9 emphasises transparency in public administration. Transparency enables citizens to check what the administration is doing on their behalf and enhances their trust in their institutions. GRECO has recommended, in a number of cases, adopting suitable rules on administrative openness, particularly as regards access to official documents, by limiting the possible restrictions, and ensuring the effective enforcement of the rules, in particular, by means of an appropriate mechanism for supervising and guaranteeing access to information and for giving independent opinions on whether or not a document can be communicated. However, even where there is a specific law in the matter, the undue delay incurred in ordering the administration to permit the disclosure of administrative documents may at times render the citizens' right of access ineffectual. GRECO has thus occasionally recommended that a proactive policy on access to official documents also be introduced.

Oversight

One of the pivotal means of fighting corruption is the existence of an adequate system of oversight. Oversight may be external (judicial; administrative; financial) and/or internal (line management, internal audits, inspections, etc.), anticipative and/or retrospective, mandatory and/or optional, regular and/or random, etc. The controls instituted should be cap-able – depending on their purview – of detecting corruption offences or related infringements of a criminal, administrative or disciplinary nature. Discoveries of offences or other misconduct should be duly reported case by case either to the prosecuting

authorities or to the administrative or financial courts, or to the inspectorates where they exist or to all these bodies at the same time, and to the competent disciplinary bodies.

For example, the various inspectorates that operate in certain countries should be in a position to detect and report acts of corruption and other abuses. If not, the reasons for their not doing so should be examined (for example: Are the inspectors acquainted with the different possible forms of corruption in the management of public finances, staff and relations with the citizens? Do they receive training? Have they been given directives as to the extent of their supervision and their reporting duty? Are there avenues or obstacles whereby their action could be enhanced or impeded?). In certain cases, GRECO has recommended the strengthening of administrative controls.

The ombudsman is of particular importance in modern democracies as an institution promoting sound management of public affairs. Recourse to the ombudsman is normally open to any person, sometimes even on an anonymous basis, and while his focus is usually on maladministration, his office can be an avenue for detecting and reporting corruption and other abuses. GRECO has recommended the introduction of the office of Ombudsman where it does not exist. In countries where the ombudsman has never been called upon to deal with cases of corruption or like acts, or has never reported such offences to the law enforcement and/or disciplinary authorities, GRECO has encouraged the member countries to review the existing arrangements and if appropriate to ensure that the ombudsman contributes more to the fight against corruption.

Guiding Principle 10 (GP 10)

GRECO has placed a broad construction on the concept of a public official as embracing the staff of all public sector services. Thus ethical and anti-corruption requirements concern all staff who engage in an activity within the administration in a permanent or temporary capacity, whether or not exercising actual prerogatives of state authority.

Effectiveness of statutory rules, codes of conduct and other instruments

One of GRECO's assessment criteria is to verify that all public officials, and not only statutory staff coming under the civil service regulations ("civil servants"), are subject to proper provisions for preventing, reporting and punishing corruption and other misuse of authority or official position. These provisions may be embodied in the constitution, the civil service regulations, laws or special regulations, and may be supported by criminal, administrative or disciplinary sanctions. They may be defined in codes of conduct, possibly contracts. Codes of conduct are generally drafted in less legal language than the above-mentioned laws and regulations and are therefore more approachable.

Recruitment

GRECO has turned its attention to the objectiveness of the selection procedures and to the way in which the integrity of applicants for public sector posts is determined. It is not a matter of laying down the universal obligation to award certificates of good conduct, but chiefly of averting cronyism and nepotism and making sure that corrupt persons are denied entry to public administration. Accordingly, GRECO has recommended such steps as strengthening supervision of the selection process particularly as regards the objectiveness of procedures and the independence of selection boards, checking of applicants' record of convictions and any professional disqualifications. In some particularly vulnerable sectors, tests of ethics or integrity may be used.

Appraisal/Career

Adequate appraisal of the abilities, integrity and performance of public officials is one way to guarantee and enhance their integrity and motivation, improve the performance of the public sector and limit the possibilities of corruption, by guarding against cronyism, favouritism and conflicts of interest.

Appraisal founded on the merit of staff and taking their integrity into consideration is aimed especially at preventing a situation where the less upright staff members climb the promotion ladder most rapidly. Accordingly, GRECO has recommended establishing effective systems of staff performance evaluation incorporating the issue of integrity.

Training

In many cases GRECO has recommended that all public officials benefit from suitable courses on professional ethics, not only upon recruitment but also as part of in-service training and especially for the posts most exposed to risks of corruption. Training should incorporate discussion on the resolution of specific practical examples. GRECO has also emphasised that adequate information to staff on their rights and duties, and on the risks of corruption or malpractice attached to the performance of their functions, together with engagement of their personal commitment through dialogue, help to recall the importance of the ethical conduct expected of every official and to foster a culture of integrity.

Conflicts of interest

GRECO has scrutinised the existing arrangements for preventing, detecting and penalising conflicts of interest between the service and the personal benefit of a public official. Among these arrangements, reference should be made to the existence of general provisions on conflicts of interest, incompatibilities and accessory activities, stating the principle that it is forbidden to place oneself in a position of conflicting interests and to hold incompatible functions or illicitly engage in accessory activities. There are arrangements for verifying such conflicts of interest, incompatibilities or accessory activities, such as the obligation to inform one's official superior or some other authority designated by law, obtain their approval, disclose the resultant emoluments or other gains, and even to make declarations of assets and interest.

Declarations of assets and interest

In those countries where there is an obligation for public officials to declare their assets and interest, GRECO has looked at the suitability and the effectiveness of the system established. In certain cases it has recommended increasing the effectiveness and stringency of the procedures for verifying these declarations.

Improper migration to the private sector (pantouflage)

In some countries, the improper migration of public officials from the public to the private sector ("pantouflage") carries criminal sanctions. Moreover, several countries have systems of vetting and authorisation prior to a public official's engagement by a private-sector agency. GRECO has paid special attention to this phenomenon to guard against the decisions of officials being influenced by the hope of obtaining a job in an enterprise they deal with or have control over, or to prevent their releasing inside information to their new private-sector employer improperly and in a manner distorting competition. GRECO has made recommendations to a large number of countries that they adopt the appropriate provisions and set up a suitable system of control.

Rotation

Rotation is often viewed as a means of limiting inducements to and effects of corruption arising from protracted incumbency in sectors of administration particularly exposed to a risk of corruption, such as award of public contracts, taxation, town planning, customs, human resources, traffic police, etc. GRECO has recommended, in a number of cases, that the introduction or the more general use of rotation for public officials be envisaged, particularly in the most vulnerable sectors.

Gifts

In some countries, bestowing any kind of gift on a public official is deemed an act of corruption. It is nevertheless easier

to substantiate in principle, for instance in a context of disciplinary action, the conferment of a gift on an official, than to prove during criminal proceedings that the said gift constitutes an improper advantage for the official with a view "to act(ing) or refrain(ing) from acting in the exercise of his or her functions". According to GRECO, the criminal law provisions are of a general nature, and specific rules on this question are usually needed to give officials clear guidance in the matter. GRECO has therefore recommended laying down adequate rules or guidelines concerning gifts and the conduct expected of officials when offered gifts.

Reporting offences and protecting whistle-blowers

An important means of breaking the corruption spiral is to introduce an effective system for reporting suspicions of corruption and other abuses. GRECO has recommended in certain cases the adoption of adequate rules compelling officials to make such reports, particularly in the presence of acts of corruption or other criminal offences. GRECO has noted in some cases that the existing rules enabled officials to make such reports and shielded them from possible retaliation or defamation suits, but nonetheless this state of affairs did not occasion many reports. Thus there may be problems as regards, the knowledge of the obligation and the reporting channels the application of these rules, the required evidence, and the effectiveness of the existing procedures. In such cases, GRECO has recommended, for example, auditing the effectiveness of the procedures in question. In addition, GRECO has observed that the creation of specific reporting procedures, for example instituting "persons of trust", could prove particularly effective. Close attention has also been paid to taxation officials' reporting duty.

GRECO has recommended the establishment of systems to ensure "whistle-blowers" (i.e. those who report suspicions of corruption in good faith) are fully protected against reprisals. In general, public officials are protected by the applicable law against all wrongful prejudice. Additional protection of

whistle-blowers is intended to protect the officials concerned from any form of “disguised” discrimination and damage as a result of having made allegations of corruption or other infringements in public administration. In this connection, some countries have specific provisions that prohibit all defamation proceedings against a public official or an inspector who has given unfavourable opinions about an official and reported such acts to the authorities responsible for prosecution or disciplinary action.

Disciplinary action

GRECO has endeavoured to verify “*that the rules relating to the rights and duties of public officials (...) provide for appropriate and effective disciplinary measures*”. Disciplinary action is an essential means of giving an act of corruption the appropriate sequel (which may go as far as dismissing the official from the public service) and of punishing related acts that may not be liable to criminal sanctions. Still, the ineffectiveness – often noted – of disciplinary proceedings creates the feeling that the system is corrupt overall. It presupposes and induces a tolerant attitude to corruption as also to other similar abuses of office.

The effectiveness of disciplinary action may depend, *inter alia*, on the existence of specific disciplinary bodies, on the provision of adequate means of investigation, on speedy and effective disciplinary procedures and dissuasive sanctions. GRECO has concluded that the effectiveness of the procedures, and the imposition of appropriate penalties, should assist in emphasising the goal of zero tolerance to any form of corruption or unethical conduct in the administration.

GRECO has found that some administrations lacked information on disciplinary proceedings and measures taken against their staff. It considered in certain cases that to improve the effectiveness of, and the follow up to, such proceedings and to evaluate the relevance of the penalties, provisions should be made for establishing an appropriate system for registering

disciplinary proceedings and sanctions and for centralising the relevant information, at least when they concern acts of corruption or related infringements.

Table on emerging themes from GRECO Round II Evaluations on Public administration and corruption*

Topics	Anti-corruption Strategy	Risk evaluation/Prevention	Transparency	Control including by the Ombudsman	Statutory Rules/Code of Ethics	Recruitment	Evaluation/career	Training/Awareness	Conflicts of interest, Incompatibilities – Accessory activities	Declaration of asset and interests	Rotation	« Pantouflage »	Gifts	Reporting/Protection of whistle-blowers	Disciplinary proceedings
Countries															
Albania	+		+		+			+			o	+	+	+	+
Andorra ¹															
Armenia		+			+			+	+	+	+		+	+	+
Azerbaijan ¹															
Belgium		+			+			+	+		+	+	+	+	+
Bosnia and Herzegovina															
Bulgaria	+			o				+			+	+		+	
Croatia			+	+	+		+	+	+		+		+	+	
Cyprus ¹															
Czech Republic ¹															
Denmark					+				+			+			+

Topics	Anti-corruption Strategy	Risk evaluation/Prevention	Transparency	Control including by the Ombudsman	Statutory Rules/Code of Ethics	Recruitment	Evaluation/career	Training/Awareness	Conflicts of interest, Incompatibilities – Accessory activities	Declaration of asset and interests	Rotation	« Pantouflage »	Gifts	Reporting/Protection of whistle-blowers	Disciplinar proceedings
Countries															
Estonia	+	+		+				+		+				+	
Finland		o		o								+		+	
France				+				+	+						
Georgia ¹															
Germany		o	+					+	+		o	+		+	
Greece			+				+						+		
Hungary ¹															
Iceland	+			o				+	+			+	+	+	
Ireland ¹			+					+							
Latvia	+	+	+	+					o					+	
Lithuania	+							+			+		+	+	
Luxembourg			+	+							+	+	+	+	
Malta		+	+		o			+			o	+		+	

Topics	Anti-corruption Strategy	Prevention/Risk evaluation	Transparency	Control including by the Ombudsman	Statutory Rules/Code of Ethics	Recruitment	Evaluation/career	Training/Awareness	Conflicts of interest, Incompatibilities – Accessory activities	Declaration of asset and interests	Rotation	« Pantouflage »	Gifts	Reporting/Protection of whistle-blowers	Disciplinar proceedings
Countries															
Moldova ¹					+										
Netherlands					+				+						
Norway											+	+			
Poland		+						+				+			
Portugal ¹															
Romania	o		+		+		+	+	+	+		+	+	+	
Serbia and Montenegro ¹															
Slovakia	+	+	+	+	+			+			+				
Slovenia	+	+	+					+	+	+					o
Spain		+	+	o	+				o						
Sweden					+			+						+	
the "former Yugoslav Republic of Macedonia"	+		+	+	+										+

Topics	Anti-corruption Strategy	Prevention/ Risk evaluation	Transparency	Control including by the Ombudsman	Statutory Rules/ Code of Ethics	Recruitment	Evaluation/career	Training/Awareness	Conflicts of interest, Incompatibilities – Accessory activities	Declaration of asset and interests	Rotation	« Pantouflage »	Gifts	Reporting/Protection of whistle-blowers	Disciplinary proceedings
Countries															
Turkey ¹															
Ukraine ¹															
United Kingdom		+			+			+						+	
United States ¹															

* + = themes emerging from recommendations; 0 = themes emerging from observations.

The total number of + and 0 does not reflect the total number of recommendations and observations addressed to the country concerned. Even if some recommendations have been addressed only to some countries they may be of relevance to others as well.

¹ The Second Round Evaluation Report on this country has not yet been adopted by GRECO or published.

Revolving doors/pantouflage*

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New approaches in public sector management such as public/private partnerships, contracting out, privatization, and civil service reform, along with expanded employment opportunities and the increase in the use of lobbyists, have changed the relationships of the public service and the private sector and the public's perception of those relationships. The need to maintain the public's trust particularly during periods of change, emphasizes the importance of developing and maintaining systems that address conflicts of interest including those that arise from the movement of public officials to the private sector. GRECO approached this movement of public officials during the Second Evaluation Round through the evaluation of recruitment, retention, codes of conduct and conflicts of interest in public administration.

By the end of the second round, a majority of the members evaluated (26 of 40) had received recommendations to establish or enhance their systems for regulating the movement of officials to the private sector. Few members had designed systems to specifically address this movement, although a number had laws that prohibited the disclosure of certain types of information both during and after public service and/or criminal laws that could reach the acceptance of private employment in exchange for an official act.

* First published in GRECO's Eighth General Activity Report (2007) (Greco (2008) 1E Final)
[http://www.coe.int/t/dghl/monitoring/greco/documents/2008/Greco\(2008\)1E.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2008/Greco(2008)1E.pdf)

Of the fifteen members who received a recommendation on regulating the movement of public officials to the private sector and who have now gone through a compliance review, only two have satisfied the recommendation. In part, this rate of compliance reflected the time required to develop, adopt and implement appropriate legislation or guidelines. This compliance rate also reflected the difficulties members were encountering in determining how best to approach the issue.

At the end of 2007, as a part of an effort to assist members in compliance, GRECO used this topic for a *tour de table* so that members would have an opportunity to share good practices as well as pitfalls. Representatives of members with four different systems made presentations about their systems. France described its system to address *pantouflage* including the role of ethics committees which are to advise administrative bodies on the compatibility of the proposed private activities of their civil servants and subordinate staff. The UK described its general employment prohibitions for Crown Servants that included a prior approval system for individually-tailored modifications to that general prohibition. The U.S. described its criminal and administrative regulation of all executive branch officials for the full range of revolving door concerns: entry into public service with agreements to return to a specific employer; seeking and negotiating for employment while in government service; and representational bars for former public officials. Latvia described its limitations on official acts for officials who have come into public service from a private sector enterprise and its restrictions on ownership of and activities with entities who hold public contracts. The type, length, and specific purpose for as well as the range of officials covered by each system differed and each member was able to identify both strengths and weaknesses in their systems.

What is clear from discussions during the consideration of evaluation and compliance reports and during the *tour de table* is that tailoring a regulatory system to the legal framework and needs of each member presents significant challenges. There is no best model. There are, however, some common

considerations in the development or enhancement of any such system.

In addition to the fundamental goal of promoting public trust, the most common goals of a system to address the movement of public officials from public service to the private sector are: (1) ensure that specific information gained while in public service is not misused (2) ensure that the exercise of authority by a public official is not influenced by personal gain, including by the hope or expectation of future employment; and, (3) ensure that the access and contacts of current as well as former public officials are not used for the unwarranted benefits of the officials or of others. In some degree, almost any individual who carries out a public function, whether he or she is elected, appointed, or hired under contract, whether serving full-time or part-time, whether paid or unpaid, should be accountable to some standards designed to help meet these goals.

During public service

Effective systems that address the movement of public officials into the private sector must pay attention to the activities of current public officials. A current public official has access to the most up-to-date information, has the most access to other public officials, has official authority and power, and is under more internal and public scrutiny. It is during current service that official information, authority and access can readily be used by an official in hopes of securing a position from a prospective employer or to benefit a future employer. Conflicts of interest can arise, but may not necessarily do so, with an official's agreement to return to or move to a specific private employer, the process of an official's seeking private employment (submitting applications for advertised positions, sending inquiries, proposals or resumes in an attempt to try to develop opportunities), or an official's responding to unsolicited approaches by private employers. A variety of standards and procedures can address these types of potential conflicts and need to be considered in an overall system that addresses the conflicts of current officials. Further, as a part of an integrated

system of standards for both current and former officials and in order to promote general acceptance of both, care should be taken to ensure that standards and procedures for the outside employment or non-official activities of current employees logically complement the standards and procedures for the activities for former officials. For example, is it logical to allow (or not prohibit) a current official to have outside employment with a specific enterprise yet prohibit the public official after leaving public service to continue the very same job he had been doing for the enterprise? Or should a current public official be allowed to represent (or not be prohibited from representing) private clients or employers to a public agency, but prohibited from making those same representations after leaving government service? Rarely would standards for the same private employment or activity properly be less restrictive while in public service than after public service.

Post public service (post-service) restrictions

The establishment of any public policy almost always requires a balance of interests. The development of post-service restrictions is no different. During discussions, members indicated that public policies in addition to those involving integrity of public officials, had been or needed to be taken into consideration in developing their approaches to post-service restrictions. These included the desirability of promoting the recruitment and retention of the most qualified individuals to public service, the ability to access those with specific technical expertise that might not always be immediately available in the civil service, the need for short-term assistance, the expectation of public service as a career, the expectation of periodic changes of senior political personnel as a result of changes in government, the promotion of an exchange of understanding of the public and private sector vis-à-vis one another, and the high value a particular country's society places on free movement in the labour force. Other public policy interests included the need to require some specific commitment to a length of public service in exchange for educational opportunities, the receipt

of severance payments for early termination, and/or payments under a pension system. Experience of members shows that systems designed to meet one public policy need not preclude others. The challenge is to strike an appropriate balance.

In general, GRECO members used three approaches (or a combination) to address post-service activities. These are (1) prohibitions on employment, either general or for narrowly defined groups; (2) restrictions on representations of private entities by former public officials back to public entities (representational bars); and (3) prior approval of and/or reporting of intended or current post-service activities. Which public officials were subject to the various prohibitions/restrictions/reporting requirements, the type and length of a prohibition/restriction/requirement, and the penalties/enforcement mechanisms varied among the approaches and, in some cases, within each approach.

From information in evaluation and compliance reports, at least fifteen members indicated that they utilized employment prohibitions of varying natures and seven members indicated they used representational bars. At least 7 members indicated they had some system that required prior approval, notice and/or reporting of post-service activities. Most, but not all, required that the post-service activity be compensated in order to be restricted or require approval (a probable reflection of the difference in theory between a system that prohibits employment and a system that restricts representations). Most restrictions or reporting requirements lasted from 1 to 3 years, although at least one member had restrictions that could extend to 5 years. The United States noted a representational bar ("switching sides") that could extend for a substantially longer period because bar is tied to the life of the matter that is the subject of the representation.

In general, employment prohibitions and representational bars serve somewhat different concerns. Employment prohibitions typically focus on who a former public official can be employed by, not the type of activities in which the person can engage. A general employment prohibition can be used to actually

create individually crafted restrictions by requiring officials to seek case-by-case approvals before engaging in employment. Most often, however, employment prohibitions are used to address concerns that arise with the type of function that the individual had engaged in as a public servant. For example members noted specific employment prohibitions for officials who carry out such functions as procurement or contracting oversight, tax officers, inspectors or controllers of banks and members of securities services. Targeted employment prohibitions are described by the type of function carried out by the former official (or employing public agency/department) and the type of entity the individual is prohibited from being employed by. Thus, procurement officials might be prohibited from being employed by any businesses with contracts the officials supervised or controlled, or bank examiners prohibited from being employed by the banks they had audited or reviewed in the past two years. Broadly applied as opposed to targeted employment prohibitions have a more serious effect on recruitment and retention particularly where public service salaries and benefits are not competitive with the private sector or if there is a high degree of uncertainty about whether prior approval for a modification of a general prohibition will be granted.

Representational bars focus on what a former official does after public service, not for whom it is. Whether the former official receives compensation for his representational activities is not a necessary element of the restriction. Representational bars that describe which public entities or which position, level or type of public official a former public official may not make representations to can be useful for elected officials, political assistants and senior civil servants when addressing the concern regarding influence and access to current public officials. Subject matter-targeted representational bars can be written to apply broadly across the public service but yet have little impact on the actual post-service activities of most of the public officials to whom it applies. If the former official participated in certain types of matters regardless of where in the public service he or she was employed, then there is a

representational bar on those matters (no switching sides). These matters are typically described in general terms but encompass those matters where there is often access to specific information about individuals or businesses or the government's strategy (i.e. investigations; administrative cases; procurement negotiations; audits). The U.S. describes these types of matters as "particular matters involving specific parties in which [the official] has personally and substantially participated [in his official capacity]". Representational bars, while helping to accommodate recruitment and retention concerns, do not directly address the behind-the-scenes assistance that can be offered by former officials. They may also require more education and training so that officials and potential employers can fully understand the extent of the restrictions.

Establishing an appropriate length of time for the duration of either an employment prohibition or a representational bar is also a challenge and requires a balance of considerations. Length should be reasonable and tied to the purpose of the restriction. How long is it before certain types of information become stale or available to the public generally, or before the special access or treatment that might be shown a former senior official reasonably will no longer occur, or before specific types of matters which were under the former official's supervision should be expected to be resolved? If the length of the restriction is unreasonably long, it has the real possibility of affecting recruitment and retention; it may easily promote cynicism regarding public service conduct standards in general, and may affect enforcement.

Penalties/Enforcement

A variety of penalties and enforcement systems are used and/or are available for the conduct of current as well as former officials. These include, individually or in combination: criminal sanctions, civil forfeiture, administrative and judicially imposed fines, and specific penalties set forth in employment contracts. In addition, disciplinary sanctions are available for current and

in some instances for former officials; reduction or elimination of early termination (severance) payments or pensions could be available for former officials. Current and former officials who engage in activities requiring a license (such as the practice of law) may be subject to sanction from the licensing authority and both can be struck from eligibility lists. Damage to personal reputation through unflattering attention of the press and public opprobrium is always a possible consequence for any public official but it may be the only consequence for public officials subject to aspirational codes of conduct with no formal enforcement mechanisms.

The need for appropriate systems to address the movement of individuals in and out of public service is and will continue to be a concern for all members. The complexity and the changing nature of modern governments assure that. Experiences of GRECO members show that there is no "best" solution to addressing this movement; there are significant challenges in creating and maintaining any appropriate system that meets this need. GRECO continues to watch with interest as members develop their systems; those with systems in place can always learn from the creative solutions of others.

The protection of whistleblowers*

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Introduction

Laws and practices which encourage people to question or challenge corruption they see or suspect in their workplace can be valuable tools in the fight against corruption. First, they create a culture which helps to deter corruption, in that for most people the fear of being caught is a greater deterrent than the fear of any particular sanction. Secondly, corruption as a secret bargain between two or more people often remains undetected until internal “whistleblowers” speak up.

Yet, despite the widespread existence of requirements for officials to report corruption, GRECO has rarely found that these have helped change the culture of silence that corruption can breed. The main reasons for this appear to be fear of repercussions at work and doubt as to whether action will be taken internally to address the problem. Hence the *Council of Europe’s Civil Law Convention on Corruption* (ETS 174) requires parties to ensure appropriate protection against any unjustified sanction for employees, both in the public or private sectors, who report their suspicion in good faith internally to responsible persons or externally to authorities (Article 9). *The UN Convention Against Corruption* also contains a provision encouraging states to protect responsible whistleblowers (Article 33).

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[http://www.coe.int/t/dghl/monitoring/greco/documents/2007/Greco\(2007\)1_act.rep06_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2007/Greco(2007)1_act.rep06_EN.pdf)

For these reasons and following the widely publicised Enron, WorldCom and Parmalat scandals, whistleblowing now has a high profile, and a number of GRECO member States are working on new laws. In 2006 the European Union's Data Protection Working Party published an opinion about how to reconcile whistleblowing laws with EU data protection requirements, particularly in the context of the US Sarbanes-Oxley Act, which requires any company listed on the US stock markets to establish procedures for staff to report concerns about accounting.

This is the background against which GRECO's Second Round evaluations took place. This section looks at what GRECO has said in its reports about whistleblower protection as a tool for combating corruption in public administration, and at the issues for Member States who are seeking to create a whistleblowing culture.

GRECO's Second Evaluation Round

Recommendations

Recommendations to introduce or enhance protection for whistleblowers were made to about half of the countries whose Second Round Evaluation Reports had been published by the end of 2006 (Albania, Armenia, Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Greece, Iceland, Ireland, Latvia, Moldova, Portugal, Serbia, Turkey).

GRECO has not been prescriptive about the nature of the protection that should be given to whistleblowers. However certain points have been stressed:

It is not enough to provide that officials cannot be disciplined or dismissed for making such reports. There are more subtle types of retributive action (Croatia).

Whistleblowers may be uncertain about how to proceed and there may be a need for confidential advisers to guide and assist them (Belgium).

The law may need to address any possible contradiction between the obligation of whistleblowing and the disclosure

of facts which the official is required to keep confidential (Luxembourg).

Once a whistleblowing law is in place, it needs to be properly promulgated to ensure officials are aware of it (United Kingdom).

Compliance Reports

Action is still pending on most Second Evaluation Round recommendations. An interesting new point emerging from GRECO's compliance reports published by the end of 2006 is that:

A provision to the effect that an official reporting in good faith to the authorities will not have his identity revealed is not sufficient to fully protect whistleblowers from retaliatory acts (Estonia).

This recognises that confusion about confidential and anonymous reporting can raise expectations that a whistleblower's identity will not be discovered, when in fact others may be able to deduce the person's identity.

The compliance reports furthermore record that Latvia has drafted a law "On the Prevention of Conflicts of Interest", which also covers reporting obligations and protecting those who report. The United Kingdom has committed itself to promote awareness of a new Civil Service Code, and its whistleblowing law. Estonia, Latvia and the United Kingdom were held to have only partly implemented the recommendations addressed to them, so further action is expected from them.

The issues for policy makers

Is a specific law needed?

Some countries have taken the view that a specific law is not needed: general employment law usually prohibits unfair dismissal, and claims can be made in respect of unfair treatment. Other aspects of protection in practice – for example the appointment of confidential advisers – do not require legislation.

In Lithuania, a Whistleblowers Bill was considered and rejected by Parliament in 2004. The authorities believed that there was no need for a separate law as it would repeat the effect of provisions in other laws. In Ireland, a general Whistleblowers Protection Bill was rejected by the Government in 2006, in favour of a "sectoral approach". They have not clearly explained their grounds for this decision, for reasons of confidentiality, but they have referred to Article 30 (1) of Directive 2000/12/EC of 20 March 2000 as imposing professional secrecy obligations on those working in credit institutions.

On the other hand Norway, Romania, the United Kingdom and the United States have introduced specific laws, which we refer to below in so far as they may help to focus the issues.

Public/Private

GRECO's Second Round recommendations are only concerned with the public sector. However the Civil Law Convention requires protection to be available for all employees, whether in the public or private sector. Corruption is likely to occur where these sectors inter-react.

One option is to provide for the 2 sectors separately. Romania's law 571/2004 applies only to the public sector, very broadly defined. The United States' federal Whistleblower Protection Act 1989 applies only to the public sector, but the private sector is covered by separate United States law.

On the other hand, Norway and the United Kingdom have decided it is preferable to cover both private and public sectors in a single piece of law.

Reporting lines

The United Kingdom's Public Interest Disclosure Act 1998 sets out in some detail what responsible whistleblowing looks like. It is based on a "stepped" approach, which tends to encourage, firstly, internal disclosures where possible and secondly, disclosures to the independent regulators appointed by statute to oversee particular areas – such as the Serious Fraud

Office. While it then also sets out circumstances where wider disclosures (including to the media) are protected, the tests here are harder to meet.

At the end of 2006 Norway passed amendments to its Working Environment Act on whistleblowing ("*varsling*" in Norwegian, meaning strictly "notification"). These give all employees a right to notify suspicions of misconduct in their organisation. The key is whether the procedure followed by the whistleblower is "justifiable": it is assumed that internal reporting or reporting to public authorities will always be justifiable. In justifying other external reporting, it is expected that elements of relevance would be the employee's good faith and whether the information is of public interest. The law states that the burden of proof in showing that the procedure was unjustified rests with the employer.

Romanian law sets out a list of the persons or bodies officials can send reports to: these include "mass-media" and NGOs, so that it appears from the face of the law that an official can go direct to the media with his concern.

Degree of suspicion

As mentioned above, the United Kingdom has a stepped approach: for an internal report, the law requires only genuine suspicion. For a report to a regulator there is a slightly higher test: that the whistleblower reasonably believes the information is true.

Romanian law sets out the "principle of responsibility" according to which the whistleblower must "sustain that complaint with information or evidence concerning the act committed".

Respect for the whistleblower's confidentiality

There is a distinction between confidentiality (where the whistleblower's identity is known to the authority to which he reports) and anonymity (where his identity is entirely unknown). Anonymity is widely perceived as undesirable as anonymous complaints are harder to investigate, and may

sometimes be – or appear to be – the cloak for malice. In corruption cases the ideal of open reporting may well not be practicable, but the preferable fallback position is confidential disclosure – that is, where the recipient knows the identity of the person making the disclosure but agrees not to reveal the identity when the information is used. GRECO notes the European Union’s Data Protection Working Party’s opinion that those making a disclosure should be assured their identity will be kept confidential, but that anonymous reports should be accepted only under extraordinary circumstances.

Romanian law gives officials the right to have their identity withheld when denouncing a superior. It is also desirable to respect whistleblowers’ confidentiality in other cases, if they request it. But they should understand that the fact the identity of a whistleblower is not known tends to focus attention and speculation on his identity – and, as mentioned above, it may be that his identity can be discovered from the circumstances. It may also be required to be made known in any eventual legal proceedings.

In good faith

There is, as with any law, a risk of abuse or misuse and the introduction of a good faith requirement is helpful to signal that whistleblowing legislation is not to be abused. In particular this can make plain that the law is not a means by which a wrongdoer can seek immunity for his crime. It is worth noting here that a good faith requirement is not consistent with a legal duty on officials to blow the whistle.

The international instruments and most of the national provisions require that the report be made “in good faith”, but do not define what that means. Romanian law states there is a presumption of good faith which the whistleblower will benefit from until demonstrated otherwise.

There can be arguments about “good faith” – does it mean “honestly” or that the whistleblower’s motives are wholly virtuous? It is important to recognise that a good faith test does

not require that the information is correct. While, naturally, nobody wants to receive reports that are known to be untrue, it is important that the law does not require the whistleblower to investigate and prove the corrupt act. Equally, if a true report is made in bad faith – because for example the employee holds a grudge against the manager – it will nevertheless be in the employer’s or public interest that the report should be made. In Norway any “bad faith” in the whistleblower’s motives will not prevent lawful reporting, as long as the information is in the public interest.

In Germany a Federal Labour Court decision of 2003 set out the conditions under which an employee could disclose evidence of criminal acts by his employer. It reversed a decision of the lower court, which had not looked into the motives of the whistleblower at all. It upheld the right to blow the whistle in so far as the employee is not motivated to injure the employer with the disclosure. If that is his main motivation then he is not acting in good faith. Germany plans to clarify their civil code in line with the decisions of the Federal Labour Court.

In the United Kingdom, the term has a similar meaning to that in Germany though as in Romania it is assumed the whistleblower will be acting in good faith and the employer must challenge this clearly, openly and with cogent evidence.

Disclosing confidential information

Whistleblowers may need reassurance that they cannot be disciplined for revealing confidential information. In several member states the law makes clear that officials who make reports through the proper channels cannot be accused of breaching any duty of confidentiality (e.g. France, Spain). United Kingdom law states that any contractual duty of confidentiality is void in so far as it prevents a worker from making a protected disclosure. However if a whistleblower commits an offence in making the disclosure it is not protected. The main effect of this is to disbar disclosures which endanger national security in breach of the Official Secrets Act.

Obligations on employers

There are specific obligations in Norwegian and Romanian law for employers to establish whistleblowing procedures. (In Romania, this does not apply to the private sector).

As mentioned above, United States law requires any company listed on the US stock markets to establish procedures for staff to report concerns about accounting. This therefore affects companies in GRECO member states who wish to be listed on the US stock market.

There is no such requirement in United Kingdom law but the law obliges the tribunals to take into account whether the whistleblower complied with any scheme operated by the employer. In practice this encourages employers to establish such schemes.

Enforcing protection

The United States has a powerful enforcement mechanism set out in law, in the federal Whistleblower Protection Act 1989: it enables a whistleblower who suffers a reprisal to file a complaint with an independent investigative and prosecutorial agency (the Office of Special Counsel), who will investigate the case and, if they find it proved, may seek corrective action from the employing agency.

In other countries, it is for the whistleblowers themselves to take their own case to a court or tribunal. In Norway, that means the civil court; in the United Kingdom, the employment tribunal.

Compensation

Under the new Norwegian law, if whistleblowers suffer retaliation, they can claim compensation from the courts regardless of the guilt of the employer. This is similar to the system in the United Kingdom, which operates through the employment tribunals. The employer has to pay any compensation awarded, which in both countries can be unlimited.

Conclusion

Although GRECO does not have a final prescriptive solution to the issues mentioned above, it is confident that this discussion will provide some pointers for countries who are considering possible means of enhancing the protection for whistleblowers. Interesting rules and practices in this respect can be found in quite a few GRECO member States which “newcomers” to this discussion might like to explore in greater detail.

Immunities of public officials as possible obstacles in the fight against corruption*

Introduction

Preventing corruption and bringing those involved in corrupt practices to justice might be seriously hampered by immunities enjoyed by certain categories of holders of public office and/or elected representatives. This is why the Committee of Ministers reflected, in its Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption, the objective “to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society” (Principle 6). As a consequence, from the beginning of its First Evaluation Round, GRECO has placed considerable emphasis on this matter, which has also permitted further clarification of the meaning of the aforementioned Principle.

The following represents a brief summary of the main results of GRECO’s findings regarding this subject, as well as a succinct account of Members’ overall compliance with GRECO recommendations on immunity – without referring to any particular country. The ideas expressed in this summary do not have any legal implications for GRECO, its Members or the Council of Europe.

“Immunity” is a term with no universally recognised legal definition. It is used to cover a variety of measures with the overall purpose to provide for the separation of powers between the legislature, the executive and the judiciary. In a democracy,

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immunity primarily seeks to protect the freedom of expression of elected representatives (parliamentarians, etc.) and the independence of officials from undue interference when performing their duties. Immunity has become a burning issue in recent years, particularly in the context of the fight against corruption.

Different types of immunity apply to different categories of officials with more or less far-reaching effect. However, immunity always implies exemption – in one way or another – from being subject to the ordinary justice process. Immunity may be absolute with regard to any legal action (civil, criminal or administrative) or it may be limited, for example, to exemptions from criminal liability. Furthermore, immunity may be perpetual or limited in time, e.g. until the end of a period of office in an official position. Immunity may be of a general nature, or specifically connected to the performance of defined duties.

Immunity is dealt with differently in various States and, as a consequence, the terminology used is not always consistent. This causes problems when performing international comparisons. GRECO agreed at an early stage on a general classification of what should be understood by the term “immunity”. This is the main subject of the following section.

Definitions in GRECO reports

As a starting point, immunity can be divided into two main categories: “non-liability” and “inviolability”. GRECO has refrained from using the term “professional immunity” as it would fall under both of the aforementioned categories. Similarly, “procedural immunity” has been avoided as it could be interpreted as “inviolability immunity”, as well as “privileged jurisdiction”; the latter falling outside the scope of the First Evaluation Round.

“Non-liability immunity”

“Non-liability immunity” (“*freedom of speech*”, “*irresponsabilité*”, “*Indemnität*”, “*insindacabilità*”, “*inviolabilidad*”, etc.) usually applies to parliamentarians with regard to opinions

expressed or votes cast in parliament. Its purpose is to guarantee independence and freedom of expression, especially vis-à-vis the Executive, but also the majority opinion in parliament itself. Most often this protection affords exemption from all court proceedings, but can also be limited, for example, to criminal liability.

Exceptionally, "non-liability immunity" may apply also to ministers for opinions expressed in the exercise of their duties. It may be argued that judges enjoy "non-liability immunity" (judicial immunity) when performing judicial functions. This type of immunity could well be considered as a prerequisite of judicial independence.

"Non-liability immunity" is perpetual in character. For parliamentarians, with regard to the opinions expressed, this is the case in several countries. However, in a number of States, this type of immunity can be lifted, usually by simple/qualified majority in parliament.

"Inviolability-immunity"

"Inviolability", or immunity in the strict sense, sometimes also referred to as "procedural immunity" ("*Immunität*", "*freedom from arrest*", "*improcedibilità*", "*immunidad*", etc.), is more complex in essence and requires a variety of legal arrangements for its application. It is this type of immunity, which may apply to any action (linked to official functions or not), and this fact raises serious problems in respect of an effective fight against corruption.

"Inviolability immunity" protects various categories of officials when discharging their duties from legal procedures, such as arrest, detention and prosecution as well as, in some countries, even from police investigations and the use of special investigative means (search, telephone tapping, etc.). The implications of this type of immunity differ very much from country to country. It is often the case that there are limitations regarding arrest and prosecution, but not in respect of investigation. In some systems "inviolability immunity" does

not apply to the prosecution of offences exceeding a certain level of gravity and/or arrest in situations of *flagrante delicto*.

Usually “inviolability immunity” is limited in time and can be lifted by the competent authority/body, the request emanating from the competent authority (often the public prosecutor), the injured party, or members of parliament themselves.

Heads of State generally enjoy “inviolability-immunity” against any judicial proceedings. It may be limited to activities strictly connected to the performance of their duties, but it may also be of a general character.

In several systems parliamentarians are protected from almost any legal action that could be brought against them. This type of protection has been subject to much public debate and has now been abolished in several countries. By contrast, under the common law system, inviolability covers only civil proceedings. The inviolability immunity of parliamentarians is limited to the duration of parliamentary sessions – or the complete term of the legislature.

In some systems ministers may enjoy immunity similar to that of parliamentarians; sometimes, it is restricted to their functions as members of government. Proceedings against ministers with such protection must normally be based on a decision/consent by Parliament and can often only be brought before special jurisdictions.

Findings and recommendations

During its First Evaluation Round, GRECO scrutinised two main aspects of Guiding Principle 6, namely the various categories of officials enjoying immunity, and, secondly, the procedures for lifting immunity.

As regards the categories of officials, GRECO’s member States can be roughly divided into three groups. The largest group – more than half of Members – provides only a very limited range of immunities and the persons enjoying immunity are primarily parliamentarians (“non-liability immunity”) and Heads of State

(“inviolability immunity”). These particular countries meet the requirements of Guiding Principle 6.

The second largest group – almost half of Members – offers comprehensive immunity to Heads of State, parliamentarians and members of government, but also to candidates to parliament, judges, prosecutors, examining magistrates, bailiffs, court registrars, state auditors, officials of state banks, or even, in some cases, almost all heads of State authorities. The aforementioned categories are covered by the far-reaching “inviolability immunity” (immunity from arrest, investigation, prosecution, etc.). As a consequence of this state of affairs, which can seriously hamper any credible effort to curb corruption, GRECO has recommended to reduce the list of professional categories benefiting from “inviolability immunity”.

There is also a small group of countries – situated in between the two main groups described above – where “inviolability immunity” is enjoyed by a relatively limited range of persons such as Heads of State, parliamentarians and some other specific categories of holders of public office, e.g. high-ranking judges or judges in general. GRECO has not criticised these arrangements.

Compliance with Guiding Principle 6 requires that the categories of professionals benefiting from immunity be limited to a minimum. This means that Heads of State, parliamentarians (not including candidates for parliament), as well as some other officials, such as judges, may well be covered by immunity. However, according to GRECO’s standing practice each Member has been assessed on its own merits and, as a consequence, a few exceptions to the aforementioned rather strict interpretation of General Principle 6 have been accepted.

The second important aspect of Guiding Principle 6, i.e. the procedures for lifting immunity, was found to be relevant to most of the countries where immunities are provided to a wide range of officials. Systems lacking objective criteria for the procedure of lifting immunities have been considered as less secure against potential risks of the exercise of undue personal

or political influence in the context of decisions to lift or not to lift immunity in given cases. GRECO has also emphasised that the procedure should be transparent and comprehensible to the public. Complex procedures, sometimes requiring several consecutive decisions by different bodies – and significant delays in the initiation of investigations – have been addressed by GRECO in a number of recommendations. Compliance with Guiding Principle 6 therefore requires that the process of lifting immunities should be clear, objective, swift and transparent.

Compliance with GRECO's recommendations

It is encouraging to note that, according to the vast majority of First Round compliance reports, recommendations concerning immunities have generally been implemented, either fully or partially, or otherwise dealt with in a satisfactory manner. In a number of cases, amendments to the Constitution and/or other relevant legislation have been introduced. Some countries are in the process of initiating relevant changes and, on occasion, GRECO's recommendations have been incorporated as key-elements in domestic anti-corruption strategies.

However, regulations concerning immunities are in fact almost exclusively dealt with in member States' Constitutions, which complicates – and often slows down – the implementation of GRECO's recommendations on this matter. The limit of 18 months accorded by GRECO for the implementation of recommendations may sometimes be insufficient for introducing the necessary constitutional changes.

GRECO's recommendations concerning immunity have been fairly uniform and consistent throughout the First Evaluation Round and they appear to have had a rather strong impact in terms of effectively limiting immunity from investigation, prosecution or adjudication of corruption offences, as provided for by Guiding Principle 6. Thus GRECO has been able to contribute to the development of democratic systems where "privileges", such as immunity from full accountability under criminal law, be it for corruption or other charges, are granted in a more parsimonious and controlled manner throughout Europe.

Experience with the criminal offence of trading in influence in France*

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While France is not the only Council of Europe member State where trading in influence is now a criminal offence, it was at a very early stage, in the final years of the 19th century, under pressure following a number of scandals that left their mark on judicial history, that it added this offence to its legislative arsenal, which had made corruption a punishable offence since the 1791 and 1810 codes.

Trading in influence is covered by three conventions in the international legal system.

The first is the Criminal Law Convention on Corruption, Article 12 of which requires signatory States to establish as criminal offences the trading of national,¹ foreign² or international³ public influence in both active form (the undue advantage is given to “anyone”) and passive form (the undue advantage may be received by anyone). However, Article 37

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<http://www.coe.int/t/dghl/monitoring/greco/documents/2010/>

Greco(2010)1_GenActRep2009_EN.pdf

1. Through reference to Article 2, on “domestic public officials”, and Article 4, on “members of domestic public assemblies”.

2. Through reference to Article 5, on “foreign public officials”, and to Article 6, on “members of foreign public assemblies”.

3. Through reference to Article 9, on “officials of international organisations”, Article 10, on “members of international parliamentary assemblies”, and Article 11, on “judges and officials of international courts”.

of the Convention allows any State to reserve its right not to establish as a criminal offence, in part or in whole, the conduct referred to in Article 12.

The second is the United Nations Convention against Corruption, known as the Merida Convention, which calls on every State Party to consider making the trading of national public influence⁴ a crime in its active form (the undue advantage is given to a "public official" or "any other person")⁵ and in its passive form (the undue advantage is received by a "public official" or "any other person").⁶

The third and last is the African Union Convention on Preventing and Combating Corruption, which requires signatory States, albeit allowing possible reservations,⁷ to make trading of public or private national influence⁸ – an offence termed "related to corruption" – a crime in its active and passive form, committed by perpetrators not specified.

If we confine ourselves solely to the objective elements of corruption,⁹ the definition of corruption is the gaining of an undue advantage in return for the performance or non-performance of an act of the official position held. In France a distinction is made between "corruption" and a concept known as "paracorruption", defined as the obtaining of an undue advantage in return for the performance or non-performance of an act facilitated by the official position held. For its part, trading of influence is distinct from corruption and "paracorruption"

4. The only other authorities concerned are "an administration or public authority of the State Party". Cf *Article 18a and b*.

5. Cf *Article 18a*.

6. Cf *Article 18b*.

7. Cf *Article 24*.

8. Under Article 4 (1) f, the third authority is effectively a person performing functions in the public or private sector. "Private sector", under Article 1 of the same Convention, means "the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government".

9. Deliberately leaving out of consideration the subjective elements of corruption offences, active and passive.

in that undue advantage is obtained in return for improper use of actual or supposed influence in order to obtain a favourable decision from a third authority.

If we supplement the objective elements of the trading of influence with its subjective elements, we can consider the offence in both its active and its passive form. In its active form, trading of influence means the promising, offering or giving to anyone of an undue advantage in return for his or her improper use of his or her actual or supposed influence in order to obtain a favourable decision from a third authority. In its passive form, trading of influence means the requesting, acceptance or receipt of an undue advantage by a person in return for improper use of actual or supposed influence in order to obtain a favourable decision from a third authority.

De lege ferenda, active trading of influence may be committed vis-à-vis a private or a public person. *De lege ferenda*, again, passive trading of influence may be committed by a private or a public person, this difference in status having the potential to justify aggravated responsibility, as decided by the legislature.

The need for trading of influence to be established as a crime

Trading of influence was made an offence under criminal law in France for two reasons: to punish conduct which undermines public trust and to comply with the rule forbidding courts to extend the meaning of a criminal statute, a corollary of the principle of strict definition by the law of offences and punishments.

Among the scandals most widely talked about in judicial circles in the late 19th century, the most spectacular was probably the "decorations scandal": several members of parliament, including the then French President's son-in-law, openly made money by using their powers of influence to have decorations awarded to other persons. Prosecuted and convicted by the court of first instance for fraud and corruption, they were ultimately acquitted by the Paris Court of Appeal, reflecting

the incompleteness of the texts on corruption, which made the trafficking of acts of an official position an offence, but not the exerting of influence on public authorities, with a view to obtaining a favourable decision for the benefit of third parties, by well-connected persons (officials, members of parliament or ordinary individuals) in return for payment or advantages.

This acquittal, required by the principle of strict definition by the law of offences and punishments, and the great agitation which it generated led to the tabling of numerous bills, culminating in the Act of 4 July 1889.

The French legislature had a choice between creating a specific offence and including the trading of influence in either fraud or corruption. When the decision was made, it was to make an addition to Article 177 of the then Penal Code against corruption. It could be argued that this was not the right place for the trading of influence, since Article 177 of the then Penal Code was in a section entitled "Abuse of office and crimes and offences committed by public officers in the exercise of their duties", whereas passive trading of public influence may be done by an ordinary individual. This objection did not stop the legislature: as an offence which undermined public trust, the trading of influence would have been perfectly well placed in Title I of Book III of the former Penal Code, on "Crimes and offences against the State".

In the new Penal Code, the trading of public influence is still linked to corruption offences. This drafting option has the advantage of highlighting the common elements of the offences of corruption and trading of influence (in their passive form, the act of seeking or accepting an undue advantage; in their active form, the act of offering or granting an undue advantage), as well as the differentiation elements associated with the specific nature of their aims¹⁰ (an act of an official position or an act facilitated by an official position, on the one hand, and improper use of influence, on the other hand). Thus the structure of the drafting relating to these offences in French

10. Cf Y Mayaud, *"Code pénal commenté"*, Dalloz, 1996, p 717.

law makes it clear that, legally speaking, the two offences have something in common, but are not one and the same.

Conventional legal theory has enabled the offences of public corruption to be specified vis-à-vis the offences of trading of public influence. It has highlighted the fact that it was the intention that French law should punish, under the heading of corruption, the *trading of an act of "the official position itself and not the trading of the influence which it brings"*. Corruption, according to the same legal theory, "occurs only as a result of an act of the official position, i.e. an act which is part of the duties of the person carrying it out or refraining from carrying it out".¹¹ In contrast, if a person "in return for money, places his or her direct or indirect influence at the service of a person so requesting, he or she *makes improper use of his or her status, but not his or her official position*".¹² Thus the Criminal Division of the Court of Cassation criticised the trial and appeal courts which had found a person guilty of passive trading of public influence, whereas the person concerned had accepted an undue advantage for supplying information about forthcoming public works contracts. According to the Court of Cassation, the offence of trading of influence is committed if the person concerned "is considered, or describes him or herself, as an intermediary whose actual or supposed influence is such as to be able to obtain an advantage or a favourable decision from a public authority or government department".¹³ The undue advantage is not the consideration for the favourable decision obtained or likely to be obtained from the public authority, but solely for the improper use of actual or supposed influence. The trading of influence relates to a "favourable decision" which the perpetrator of the offence him or herself does not have the power to take.¹⁴

11. Cf R Garraud, *op cit*, p 387, n° 1526; Adde A Chauveau and H Faustin, "Théorie du Code pénal", 1872, 5ème éd., Tome II, p 602. The same definition principle is found in contemporary legal theory: W Jeandidier, "Droit pénal des affaires", Dalloz, 6ème éd., 2005, p 42, n° 35.

12. Cf R Garraud, *op cit*, p 391, n° 1527.

13. Cf Cass. crim., 1er oct. 1984 : B n° 277.

14. Cf M Delmas-Marty and G Giudicelli-Delage, "Droit pénal des affaires", PUF, 2000, 4ième éd., p 294.

Unlike the offence of public corruption (which presupposes that the person corrupted or likely to be so has the status of a public official), the trading of influence “does not presuppose the exercise of any official position”,¹⁵ so may be committed actively or passively, and whether or not the person has the status of a public official.

The different degrees of the offence of trading of influence

The penalties for trading of national public influence, considered in both its passive and its active form, differ according to whether the offence was committed “by a person holding public office”¹⁶ or by “private persons”.¹⁷ In the first case, the primary penalties are ten years’ imprisonment and a fine of € 150 000, while in the second, the primary penalties are five years’ imprisonment and a fine of € 75 000.

Statistics collected by the Ministry of Justice and Liberties show that convictions for offences of trading of influence (active or passive, committed by private individuals or public officials) numbered 51 in 2004, 56 in 2005, 41 in 2006, 40 in 2007 and 20 in 2008.

Case-law shows how varied the conduct encompassed by the offence can be. Some examples are given below:

- payment, via circuitous routes, of over 5 million Deutschmarks in return for improper use of influence by two French nationals, comprising the “smoothing out” with various public departments of the difficulties associated with the performance by a company incorporated under foreign law of a contract connected with an arms

15. Cf E Garçon, “Code pénal annoté”, Sirey, 1953, Tome I, art. 177, n° 203.

16. The terms used in the section containing Article 432-11 (2) of the Penal Code, the article concerned making explicit reference to persons holding public authority or discharging a public service mission or holding a public electoral mandate.

17. The term used in the section containing Article 433-2, paragraph 1 of the Penal Code.

deal, to the benefit of the foreign company. The latter's representatives were prosecuted for active trading of influence, while the first French national was prosecuted for trading of influence by a public official (a status that he held in various respects), and the second as the first's accomplice (Cass.crim., 19 March 2008);

- a private individual who believed that he had committed an offence against currency exchange regulations and told another person about this, handing over to him 1 million francs to "hush up the case" and to make use of the influence which the individual concerned supposed him to have (Cass.crim., 20 March 1997);
- a private individual who asked persons wishing to obtain social housing to give him various sums of money in return for his intervention with a municipal councillor who was chairman of a semi-public social housing company (Cass.crim., 7 February 2001);
- various executives of private companies who, in application of prior agreements, had received funds from firms which had obtained public contracts, in remuneration for their intervention with elected representatives responsible for awarding those contracts, who were members of political parties financed by the companies managed by the accused (Cass.crim., 16 December 1997).

Where improper use of influence to the detriment of public international organisations is concerned, with effect from the Act of 13 November 2007, the improper use of actual or supposed influence, in return for an undue advantage, with a view to securing the obtaining of something from a person holding public authority or discharging a public service mission or holding a public electoral mandate in a public international organisation, has been an offence, in both its passive and its active form.

There is no difference in the punishment for the passive offence of trading of international public influence according to whether it is committed by a person holding public office or a private

person. The primary penalties for which Article 435-2 of the Penal Code provides are in all cases five years' imprisonment and a fine of € 75,000.

Nor is there any difference in the punishment for the active offence of trading of international public influence according to whether it is committed for a person holding public office or a private person. The primary penalties for which Article 435-4 of the Penal Code provides are identical to those for which Article 435-2 provides.

It has, however, been decided not to make the trading of influence to the detriment of another State an offence under French law, thus confirming French case-law,¹⁸ but conflicting with the provisions of Article 12 of the Criminal Law Convention on Corruption, in respect of which France decided to make a reservation relating to application.¹⁹ It is clear from the *travaux préparatoires* relating to the Act of 13 November 2007 that there were two reasons for this: firstly, that the offence of trading of influence is not recognised by the law in all Council of Europe member States and that it is preferable not to expose French businesses to distortion of competition against businesses in countries which do not apply the same rules, and, secondly, the difficulty of distinguishing between mere lobbying and activity of the nature of trading of influence.²⁰

The arguments put forward may not be convincing, because not only is trading of influence not an offence in French law alone (more than three-quarters of the States which have ratified the Criminal Law Convention on Corruption recognise the offence of trading of influence), but also, as pointed out by the National Assembly rapporteur, "the lack of a sufficiently clear distinction between 'business introducers' and persons who trade in influence could probably be resolved if precise

18. Cf CA Paris, 15 February 1941: RSC 1941, p 192, obs. Hugueney.

19. Cf J Lelieur, "La loi du 13 novembre 2007 relative à la lutte contre la corruption : quelles avancées du droit français par rapport aux exigences du droit international?": *Dr. pén.* 2008, étude 25, n° 13.

20. In respect of this whole debate, cf. M Segonds, "A propos de la onzième réécriture des délits de corruption", *D.* 2008, p 1068, sp. p. 1073 n° 30.

terminology for commercial mediation could be established”.²¹ There is indeed no reason to be afraid that lobbying activity might be undermined by the existence of the criminal offence of trading of influence. Lobbying is not intended to exert influence on a decision covertly, in return for money, but to provide information and convince a public decision-maker by fully transparent means. Provided that lobbying activity takes place within a clear framework and is not perceived as a “shadowy activity”, the issue of the boundary between it and trading of influence should no longer be an obstacle to making the trading of influence vis-à-vis a foreign public official a criminal offence.

The extent of the challenge is doubtless commensurate with the expansion of international trade, providing opportunities to win new markets by any means, in an area where public decision-making must remain impartial and above suspicion. The obstacles referred to can be overcome.

21. Cf M Hunault, *Rapport A.N.*, n° 243, p 38.

Sponsorship and corruption: the German model*

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Introduction

The Winter Olympics in Vancouver, the Football World Cup in South Africa, the European Handball Championships in Austria, all three major sporting events in 2010 provided ample opportunity for firms to demonstrate their qualities as promoters and thus “good corporate citizens” to the public. Sponsorship has now become a widely accepted part of company activity. An idea of the economic extent of this form of private – and above all private-sector – economic involvement may be obtained from dipping into a study by the US market research corporation IEG. It states that world spending on sport, culture and entertainment sponsorship amounted to 46.3 billion dollars in the year 2010 (IEG Sponsorship Report dated 4/1/2011). The trend is upward. Only recently has sponsorship become an issue as a new form of cooperation between business firms and the public authorities too. In particular, the area of sponsorship of pharmaceutical and medical products in support of clinics or faculties of medicine may be seen as a

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[http://www.coe.int/t/dghl/monitoring/greco/documents/2011/Greco\(2011\)1_Act.Report2010_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2011/Greco(2011)1_Act.Report2010_EN.pdf)

sensitive onesince the decision of the BGH (Federal Court of Justice) in the so-called "cardiac valve" case (BGHSt 47, 295).

However, alongside the desired promotional effects, such a system of financing can also lead to corruption. Under the guise of sponsorship, it appears easier to exploit the covetousness of decision-makers and influence their future actions in the interests of the donor. Consequently, every system of national legislation has to confront the difficulties of setting the boundaries between permissible sponsorship and criminal behaviour.

Based on a prior definition of the notion of "sponsorship", the following outlines the manner in which it is dealt with by the criminal law in Germany, and discusses the problems arising from it.

The starting-point: what is sponsorship?

At first sight, the concept of sponsorship is shifting and hard to grasp. However, in order to form a view of its relevance to criminal law we must begin by examining the sponsorship phenomenon and clarifying its conceptual content.

Nowadays we speak of "conventional" sponsorship where "firms hand over money or monetary advantages in order to promote individuals, groups and/or organisations in sporting, cultural, religious or similar important socio-political areas, while at the same time pursuing their own entrepreneurial aims in advertising or publicity work" (BGHSt 47, 187, 193). By contrast, donations to charitable institutions as well as patronage do not generally involve any expectation of an immediate return but rather stem from altruistic motives. In order to avoid a narrow, purely conceptual approach to the question, a broad concept of sponsorship is used as the basis for the following analysis. Thus, alongside sponsorship contracts in the "conventional" sense – including funds obtained from third parties for the purpose of academic research – donations (to parties) and contributions by way of patronage will also be considered.

So-called hospitality invitations occupy a special position in the range of sponsorship measures. While under a typical sponsorship arrangement the sponsor's donation goes to the organiser of a sporting or cultural event, who in return provides the donor with advertising opportunities, in the case of hospitality sponsorship the benefit accrues not to the organiser, but to a party who is not involved in the sponsorship agreement and who is able to influence technical decisions favourable or unfavourable to the inviting sponsor. Though they do not fit the usual pattern, these invitations on the part of decision-makers, when set in a sponsorship framework, will also be considered as sponsorship measures for our present purposes.

Analysis in light of German criminal law

The relevant penal rules

In order to understand the manner in which sponsorship in the above sense is seen against the background of German criminal law, a brief account of the relevant penal rules is called for at this point.

If we begin by taking a look at the interests of the sponsoring asset-holder – usually a company – sponsorship payments from company assets invariably raise the question whether the management may be committing the offence of breach of trust under § 266 StGB (Criminal Code). This may be presumed if a person entrusted with another's assets (the trustee) deliberately fails in that duty and thereby causes deliberate prejudice to the assets for which he or she is responsible. The determining factor in establishing such prejudice is that the outflow from the company's assets is not compensated by an asset inflow of equal value, that is to say that the sponsorship reveals an unbalanced *do ut des*.

On the other hand, where there is an appropriate benefit in return for the sponsorship payment, there is not infrequently a risk of committing the criminal offence of corruption of a public official under §§ 331 *et seq* StGB or of taking and offering a bribe in business transactions under § 299 StGB. These rules

lay down, as preconditions for the unwritten material criterion of an “unlawful agreement”, that an advantage must accrue in return for a tangible service provided (§§ 332, 334 StGB) or at least a duty performed (§§ 331, 333 StGB) by an official, or preferential treatment “in the competitive purchase of goods or commercial services” (§ 299).

This unfortunate dilemma for those involved is in no way affected by the fact that donations are tax-deductible in accordance with §§ 10b EStG (Income Tax Act), § 9 I Nr. 2 KStG (Corporate Income Tax Act) and § 9 Nr. 5 GewStG (Trade Tax Act), so that sponsorship as such is legitimate and supported by legislation.

Consequently, financial support to art, science, sport and social welfare in Germany occupies a sphere in which the criminal law risks are often very difficult to assess.

Criminal law problem areas in the types of offence considered

This grey area between prohibited (unlawful) influence and socially accepted – and, with declining public resources, even desirable – sponsorship is examined more closely in the following paragraphs.

Breach of trust under § 266 StGB

In the context of breach of trust, difficulties arise in particular in determining the necessary dereliction of duty on the part of the trustee. Such a person acts unlawfully only if legal or actual action within his or her sphere of duties is no longer covered by the legal authority that he or she enjoys in the particular relationship with the person transferring the assets.

The starting point for active dereliction of duty by the management of a company in sponsorship cases is an actual donation which has to be seen as a waste of company assets. Of course, the decision whether to support institutions or events in this way is a business decision, in respect of which decision-makers, in principle, enjoy a wide margin of action (see, *inter*

alia, BGHSt 50, 331, 336 – “Mannesmann”). This margin is justified by the fact that business decisions have constantly to be taken on the basis of an overall assessment of future risks and opportunities which, because of its predictive character, carries the danger that they will prove to have been mistaken only at a later stage. The limits on business activities are essentially set by the civil law rules applicable at a given time (breach of duty being ancillary to the civil law). However, not every infringement of civil law suffices for dereliction of duty within the meaning of § 266 StGB: rather, the BGH requires “grave” dereliction of duty for a criminal offence in the area of sponsorship to have been committed (e.g. BGHSt 47, 187; 47, 148). In order to give established authority to this liability qualification – which is not undisputed in respect of its scope or starting-point, the BGH developed a number of criteria in its landmark decision “SSV Reutlingen” (BGHSt 47, 187, 197). According to that decision, the boundaries of internal authority are likely to have been overstepped if the following is established: “Lack of concern for the interests of the company, inappropriateness in view of the net assets and results of operations, lack of transparency within the company or the presence of unrelated motives, namely the pursuit of purely personal preferences”. Whenever all these criteria are met, according to the BGH “grave” and therefore unlawful dereliction of duty within the meaning of § 266 StGB is to be presumed.

It remains unclear what weighting is to be given to the said criteria when assessing the overall picture. The fact that the problem has to be solved by reference to a list of indicators illustrates the practical difficulties of drawing clear boundaries in the field of breach of trust involving sponsorship.

With regard to damage, the BGH is already aware that the desired image enhancement or publicity effect of sponsorship “can by no means always be assessed in monetary terms and certainly not reflected in the balance-sheet” (BGHSt 47, 187, 194), so that approximate compensation is sufficient. Any remaining doubt goes in favour of the accused, *in dubio pro reo*.

Corruption of officials under §§ 331 et seq StGB

Furthermore, the persons concerned may have committed a corruption offence under §§ 331 *et seq* StGB where an official (or third party) is offered, promised or given, or where he or she demands, obtains a promise of or accepts an advantage in return for a tangible act of service contrary to his or her duty (§§ 332, 334 StGB) or performance of service contrary to his or her duty (§§ 331, 333 StGB).

a) Difficulties over the concept of advantage

Initial difficulties in the area of sponsorship arise over the concept of advantage. Essentially, German criminal law considers this notion as covering any benefit to which the official has no lawful entitlement and which objectively improves his or her financial, legal or merely personal situation.

Uncertainty may arise where a corresponding benefit accrues to the official (or third party) by way of reward. For example, the 1st civil chamber of the BGH, which has competence in competition cases, decided that a PC donated to a school by a photographer in return for the possibility of carrying out photographic work as part of the school's operations, rooms being made available for that purpose, was not to be considered as a (third-party) advantage within the meaning of §§ 331 *et seq* StGB because of the appropriate relationship between the benefit and that granted in return (BGH NJW 2006, 225, 228). The question as to the effects of such a benefit in return has also taken on topical significance in connection with the obtaining of funds from third parties for academic research, since research programmes are conducted and paid for on the basis of contracts. The prevailing view in criminal law literature and case-law – and indeed shared by the Celle appeal court in its criminal-law judgment in the case of the above-mentioned school photographic work (OLG Celle, NJW 2008, 164) – does regard the conclusion of the sponsorship contract (and at the very latest its execution) as a potentially corrupt advantage, because the official had no legal right whatever to that contract.

In cases concerning the obtaining of third-party funds, the case-law does exclude the commission of a criminal offence as the next step by restricting the objective requirements for it, in so far as the legal rules, administrative instructions and procedural rules in force have been complied with (essentially BGHSt 47, 295, 303). This idea can also be applied to good effect to sponsorship in general public administration: the federation and the *Länder* have issued so-called sponsorship guidelines (e.g. the "general administrative instruction for the promotion of federal activities through private services (sponsorship, donations and other gifts)" issued in 2003; for a detailed account of these guidelines, see *Schröder*, NJW 2004, 1353 *et seq*) which meet the requirements of the BGH. The federal guidelines on sponsorship decisions in public administration require above all transparency, objective and impartial selection from among several sponsors, limits on the benefit accorded by the authorities in return and the observance of certain procedural steps (e.g. compiling of file notes, agreement of higher authorities). Over and beyond the abstract instructions, the administrative instruction also gives practical examples of permissible sponsorship such as the "full or partial financing of apparatus by a promotional association" or "events in the framework of local and non-local sports, cultural and educational policy". Adhering to these guidelines does at least afford officials assistance in appropriate cases.

b) Use of indicators in the framework of illicit agreements

An illicit agreement is the nucleus of any offence involving corruption. Generally, it is here that the illegality or legality of the act is decided. In German law, the characteristic of a corruptive agreement is the combination of giving and taking: both partners must regard the service they provide as something given in exchange for that of the other person ("*do ut des*" – "I give in order that you give"). The advantage offered must, therefore, be clearly regarded as the equivalent of a tangible official act or performance of an official function (cf. "in return for" in the wording of §§ 331 *et seq* StGB).

However, it is a question of fact whether such an objective is pursued: the limit between still permissible and already prohibited behaviour is drawn – at all events if a “looser” unlawful agreement is sufficient as under §§ 331, 333 StBG – according to the circumstances of the particular case, and especially the overall interests of the parties involved. Special importance attaches in this connection – with a view to the basic principle of the BGH judgment in the “Utz Claassen – EnBW” case (BGHSt 53, 6, 16 f.) – to the plausibility of a different objective, the position of the official and the relationship of the person offering the advantage to the latter’s official duties, the manner of making the offer (especially secrecy or transparency) and the nature, value and number of advantages. Partly, even the specific way of life of the donee is taken into consideration. Here again – as with breach of trust – case-law makes use of a list of indicators, which can only with difficulty help to establish the unclear distinction between what is allowed and what is forbidden in the context of corruption offences; the predictability of what constitutes criminal behaviour – a requirement under the Constitution serving as a reference point for individual conduct – can often no longer be established in this context.

The limits of what is still permissible are particularly unclear in the case of hospitality sponsorship, mentioned above (see also BGHSt 53, 6 *et seq*). In principle, it is permitted for high-ranking officials to be invited to cultural and sporting events as representatives of the state, thus highlighting the importance of the occasion. The performance of official duties is often necessarily linked to a representative function; the donation then takes place not “for” the exercise of the office but as a “means of” exercising it. However, if at the same time the official has an obligation to supervise or oversee a company from a public law standpoint, or if there are other points of contact with entrepreneurial activity (for example in the granting of building permits), then invitations by the company verge on punishable offences. The question as to which of such cases may involve the permissible discharge of a representative task without any suspicion of corruptive behaviour still awaits a definite answer.

In any case, invitations are questionable whenever they are unrelated to a social event but are intended rather to serve the recreational interests of the official.

As with breach of trust, the case-law criteria used in corruption cases are plausible and do provide at least some guidance for differentiation. Though, in the individual case, the multiplicity and uncertainty of the indicators lead to rather casuistic solutions: in the end, the task of determining the limits is largely shifted to the trier of fact, with the result that the criminal liability of those involved in partial areas can hardly be assessed with any certainty.

Taking and offering a bribe in business transactions under § 299 StGB

The statutory definition of the offence of taking and offering a bribe in business transactions in accordance with § 299 StGB constitutes another hurdle for sponsorship to overcome. Besides giving financial support to public institutions, companies often assist private-law associations, mostly in the sporting and cultural fields. Thus, the question arises as to the criminal law risks of such behaviour. Like §§ 331 *et seq* StGB, § 299 StGB covers both the active and the passive aspects of corruptive agreements. Unlike corruption of officials, however, this rule requires that the advantage to an employee or representative of a company (or a third party) accrues in exchange for preferential treatment of the donor in the purchase of goods or services in a competitive situation. So the required illicit agreement links the advantage not to the – broadly interpreted – performance of duties as under §§ 331, 333 StGB, but covers only dishonest preferential treatment in connection with an actual future commercial decision. Therefore, the criminal scope is markedly less extensive with regard to business decisions than with corruptive offers to officials; in particular, the granting of advantages – including invitations – in the private sector for the general purpose of assisting the business climate is entirely permissible. An illicit agreement strictly interpreted in this sense requires the sponsorship contract to be closely

linked to a palpable preferential treatment, e. g. the awarding of a contract the sponsor has bid on. And the limits on the value of socially appropriate and therefore permissible donations are markedly higher in the commercial sphere by reason of the much less sensitive legally protected principle of “fair competition (in the provision of services)”.²²

Conclusion

In Germany, private sponsorship – although basically desirable at a time when public coffers are empty – entails a considerable risk of criminal penalties, against the background of the corruption and breach of trust offences. The broad compass of the relevant rules renders it vital, in practice, to distinguish unlawful from socially appropriate behaviour, on the basis of lists of indicators which are further developed if the case requires so. That is rather damaging to a system of criminal law (especially a predictable one) in a state based on the rule of law. Even well-intentioned sponsors find it hard to tailor their behaviour to the rules: all they can do is ensure that they comply with as many indicators as possible which preclude the commission of an offence. In this legal situation, sponsorship beneficial to both sides is often obstructed. The only salvation can come from legislation, or strong guidelines set by other authorities, the observance of which will preclude any offence.

22. Reference may be made here to the fact that in many fields § 299 of the Criminal Code, in accordance with customary interpretation, establishes criminal liability which is difficult to justify – for example in the case of an employee negotiating discounts for his or her principal as a third party.

Independent Monitoring of Party Funding*

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Introduction

The relationship between political financing and corruption has been a longstanding area of concern for countries around the world. A number of trends have brought it to the forefront in recent years: increasing costs of election campaigns, concerns about inappropriate influence on political decisions, growing linkages with wider corruption issues affecting politics and government, and greater public demand for political transparency and accountability. At the centre of this issue lies the role of supervisory bodies in identifying, monitoring and addressing corruption in political financing.

In an effort to address these challenges, the Committee of Ministers of the Council of Europe has adopted Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and election campaigns which provides the basis of one of the two themes of GRECO's Third Evaluation Round.²³ Pursuant to Article 14 of the Recommendation "*States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns... [and the]... independent monitoring should include supervision over the accounts of political parties and the expenses*

* First published in GRECO's Ninth General Activity Report (2008) (Greco (2009) 1E Final).

[http://www.coe.int/t/dghl/monitoring/greco/documents/2009/Greco\(2009\)1_ActRep2008_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2009/Greco(2009)1_ActRep2008_EN.pdf)

23. For details cf. paragraphs 4-6 of this report.

involved in election campaigns as well as their presentation and publication."

GRECO is currently well into its Third Evaluation Round, with evaluation reports having been adopted²⁴ in respect of ten member states – Estonia, Finland, Iceland, Latvia, Luxembourg, Netherlands, Poland, the Slovak Republic, Slovenia and the United Kingdom. These, together with the further evaluations underway – including Albania, Belgium, Denmark, France, Spain, Sweden and Norway – reflect virtually the full range of issues and practices regarding the independent monitoring of political financing, and serve as a useful starting point for drawing lessons on the fight against corruption in connection with political financing.

One size does not fit all

What is clear from the very beginning of the Third Round of GRECO evaluations is that there is no single model for ensuring oversight of political financing regulations. A variety of monitoring approaches exists across the member states of GRECO, with varying levels of independence from Government or political actors. Each has its own benefits and drawbacks. A common feature is, however, that effective monitoring is closely related to the general level of transparency of political financing.

In several countries the monitoring function sits within public administrations. Where there is public funding of political parties and elections, monitoring often falls under the remit of the Ministry of Finance, Ministry of the Interior or a similar body. Monitoring in these cases usually concentrates on public spending reporting requirements and does not operate with full independence from government. Sometimes the monitoring function exists elsewhere in the state bureaucracy. State audit offices and tax authorities are seen to carry out their work with a degree of impartiality and autonomy, and have experience in monitoring compliance in the public domain, often with overlapping legislative provisions. In most cases

24. At end 2008.

where monitoring bodies or mechanisms exist, however, the monitoring is channelled through a Minister who is an elected member of the political party in power. As such, the monitoring mechanism is not truly independent; there is, for example, a risk – real and perceived – that campaign finance regulations are used to favour the party in power by harassing or sanctioning opposition parties. The effect is to undermine the credibility and effectiveness of monitoring efforts.

Other countries turn to legislatures to perform a supervisory role, building on the scrutiny and oversight role of assembly members or parliamentarians. Electoral financing law can require, *inter alia*, that election campaign and party financing accounts be tabled in parliament, submitted to the Assembly Leader, or be considered by a cross-party committee of elected officials. Legislatures are seen to reflect the will of citizens and can offer a good measure of independence in comparison to public administrations. There is nonetheless a drawback to this approach: elected members are effectively regulating themselves and thus potentially in a position of conflict of interest. It can be argued that there is no incentive for elected members, even though from opposition parties, to truly probe political financing issues and corruption can remain undetected.

Elsewhere the judiciary plays a key role in the independent oversight of political financing. A court of audit or an electoral court can consider political party and election campaign financing matters and assess whether they comply with electoral law. A well-functioning judicial system can provide the ultimate means of ensuring fair and equal consideration before the law. While general courts in some countries can be quite rigid institutions and often deal with a wider range of matters, it may prove difficult to establish systems where these courts would fully consider the wide range of matters relating to political financing in addition to their basic judicial functions. On the other hand, courts of audit, which are often vested with investigative powers, resources and specialisation, may have a potential to supervise political financing in some countries in an effective manner.

In recent years, many GRECO member states have taken steps to situate the supervision of political financing within a permanent independent body. The most common form is a commission, which also undertakes broader functions in the management of electoral processes – for example: the registration of political parties/candidates, voter awareness activities, and planning for and administering elections. Independence takes various forms – non-partisan staff, direct funding from central budget, no links to public administration or reporting through a particular minister, high budgetary autonomy albeit usually with rigorous reporting and high transparency requirements. Anti-corruption bodies – sometimes similar to law enforcement agencies with various degrees of independence – are also favoured mechanisms, given their ability to draw linkages between interrelated areas of corruption, watchdog function and role in promoting greater accountability and transparency, particularly in the political and economic spheres. In order to undertake their role effectively, electoral commissions (or similar) and anti-corruption bodies need to remain free from political influence; this can be difficult and at times officials, including those at senior level, may be subject to extreme professional and personal pressure to submit to external influences. They can also be vulnerable to changes in policy direction under new governments. Under certain circumstances this can lead to existing legislation being repealed or the introduction of new provisions that fundamentally curtail the supervisory function. The requirement for political parties to have their accounts verified by independent auditors is also a valuable component of a supervisory system to reinforce the financial discipline and decrease possibilities for corruption.

While the establishment of monitoring mechanisms or bodies normally requires regulations, and current global trends point towards greater regulation of political financing in general, it must be acknowledged that some countries, including from GRECO's membership, have opted not to follow this path to date. Drawing on their historical and cultural traditions, their positions are informed by a philosophy that political parties are

private entities, distinct from public administration and control, and that individuals have a fundamental right to privacy about their political affiliations, including, for example, the privacy of political financing contributions. These are also often countries with longstanding traditions of transparency and accountability in respect of public administration, but without detailed regulatory systems in respect of political parties and election candidates. Nevertheless, faced with increasing international and domestic calls for more formalised disclosure, one approach has been voluntary disclosure agreements between political parties. In such systems, reaching a fair balance between the legitimate interest of the independence of political parties and election candidates as well as their supporters' integrity on the one hand and the legitimate interest of the public to know more in detail who they vote for on the other hand, is a major challenge.

Characteristics of effective independent monitoring

The effectiveness of monitoring mechanisms will depend, generally speaking, on a number of interconnected elements. Impartiality is paramount. The body authorised with supervising political party and election campaign financing must be free from political influences in order to maintain public trust and confidence. This can be achieved by adopting a deliberately non-political approach whereby the officials have no direct political affiliations. In other cases the choice has been made to establish multi-partisan governance structures, whereby no single party is seen to dominate others and in ideal circumstances, decisions are taken by consensus. In all cases it is crucial to have procedures in place to ensure transparency and accountability in the appointment and dismissal of senior officials charged with monitoring political financing. Several GRECO reports to date have highlighted problems in this area. Moreover, truly independent and impartial monitoring bodies may, in addition to their primary monitoring function, also exercise an advisory function, for example, to guide political parties on how to comply with funding and reporting rules.

Such a pro-active approach can prove particularly useful in systems where the regulations are far-reaching and complex.

Effective monitoring requires a clear mandate. Across GRECO member states there are a variety of challenges in this area. In some countries the monitoring function is not recognised by state and non-state (e.g. political parties) actors due to weak legislation or differing legal interpretations. In other cases, mandates are contested and no organisation can claim to have the leading role in monitoring political financing. Shared responsibilities between tax authorities, state audit officials, Ministry of Finance, Ministry of Interior, etc. often lead to a lowest common denominator outcome. Each agency does the bare minimum to fulfil its legal obligations, but there are no effective means of coordinating monitoring activities and ensuring that all elements of political financing are captured. Some of the most effective monitoring systems are those where a single agency has a comprehensive mandate to supervise all areas of political financing. The monitoring of annual political party accounts only tells part of the political financing story. The identification of corruption issues necessitates a broad supervisory mechanism, including oversight of donations, election campaign income and expenditure by parties and candidates, as well as that of related organisations and “third parties”.

A comprehensive mandate can only be put into practice if monitoring bodies are granted adequate powers and resources. These powers can include the ability to require political parties and candidates to submit additional information, have access to information held by others (such as banks, media companies, tax authorities), perform full audits and/or investigations, and make binding regulations. Monitoring bodies also need effective and flexible procedures and sanctions to enforce their decisions by themselves and, when necessary, for forwarding cases for prosecution by the relevant judicial authorities.

The lack of financial and staff resources is one of the most frequently cited reasons for underperforming supervisory bodies, regardless of whether the monitoring is undertaken by an electoral commission, audit body, anti-corruption agency,

parliamentary committee, or within a government department. These bodies require sufficient staff with skills and experience to undertake compliance checks, identify risks and report findings. Regulating campaign finance, especially actual expenditure, is costly and time consuming. In order to verify accounts properly, monitoring bodies need to do more than merely rubber stamp the parties' and candidates' balance sheets. They must take time to scrutinise party records adequately, verify that declared expenditure and income correspond with receipts and invoices, and consult other sources of information about income and spending (e.g. media and civil society reporting of campaign activities, independent data about campaign advertising).

Here too there are large variations amongst GRECO member states. While some countries have put in place monitoring bodies with permanent offices and secretariats, others rely on informal arrangements whereby a few officials are deployed to temporary offices on an ad-hoc basis to carry out compliance checks, normally just around the election period. Effective monitoring depends on stable, predictable organisational funding, procedures and sufficient budgetary autonomy to allow for work planning and a flexible use of human and other resources. In practice, funding delays very quickly translate into incomplete or delayed compliance monitoring, drastically reducing the impact of supervisory efforts in corruption in political financing.

Conclusions

A key issue facing Governments today is the need for a practical framework for the effective regulation of political party and election campaign financing in order to maintain and build public confidence in this important aspect of the electoral process. Independent monitoring is at the centre of this issue.

In the last two decades there has been a substantial increase in the number of countries with new constitutions, electoral and political party laws. Several of the Third Round evaluations completed to date note the recent drafting or introduction of

new legislative frameworks on political financing. This is a promising finding, demonstrating that a greater number of GRECO member states are taking the issue of corruption in political financing seriously.

Nevertheless, the relative “newness” of political financing regulation also raises the likelihood of errors and unforeseen challenges as knowledge and practice develop internationally. There is often a considerable difference between having a legal framework for disclosure and the actual practice of disclosure. Evidence from the initial tranche of Third Round GRECO evaluations supports the view that despite numerous laws on their books, many states lack effective monitoring and enforcement mechanisms. New monitoring systems often suffer from loopholes and unanticipated shortcomings, stemming in part from the inability to draw on historical practice to inform their direction. The relevant legal provisions will almost certainly require further changes in the near future in order to be in line with the above-mentioned Council of Europe Recommendation and to comply with the specific recommendations resulting from GRECO’s Third Round country evaluations.

In this ever-changing environment it is important to remember that, while effective monitoring bodies share common elements, there is no ideal political finance regime that can be transposed from country to country. Regulations and organisational structures need to build upon a country’s specific constitutional, legal and democratic traditions and to ensure, above all, an appropriate level of transparency. If they succeed in doing so, their efforts to address political financing corruption issues will stand a much better chance of succeeding.

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