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Interim Report

Third Evaluation Round

Interim Compliance Report on Belgium

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

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“Transparency of Political Party Funding”

Adopted by GRECO
at its 55th Plenary Meeting
(Strasbourg, 14-16 May 2012)

I. INTRODUCTION

1. GRECO adopted the Third Round Evaluation Report on Belgium at its 42nd plenary meeting (15 May 2009). This report was published on 22 June 2009, Belgium having granted its authorisation (Greco Eval III Rep (2008) 8E, Theme I and Theme II).
2. In accordance with the GRECO rules of procedure, the Belgian authorities submitted a Situation Report on the measures taken to implement the recommendations. GRECO instructed Andorra and Luxembourg to appoint Rapporteurs for the compliance procedure. Mr Gérard ALIS EROLES was elected in respect of Andorra and Ms Doris WOLTZ for Luxembourg. Mr Gérard ALIS EROLES was subsequently replaced by Mrs Clàudia CORNELLA DURANY in respect of Andorra. The GRECO Secretariat assisted them in drafting the Compliance Report.
3. In the Compliance Report (Greco RC-III (2011) 6E), which it adopted at its 51st plenary meeting (27 May 2011), GRECO concluded that Belgium had only satisfactorily implemented or addressed one of the fifteen recommendations set out in the Third Round Evaluation Report. It therefore deemed the current minimal level of implementation of the recommendations to be “globally unsatisfactory” within the meaning of Rule 31 paragraph 8.3 of its Rules of Procedure. GRECO consequently decided to apply Rule 32 relating to members found not to be in compliance with the recommendations contained in the mutual evaluation report, and asked the head of the Belgian delegation to submit a report on the state of progress in implementing the outstanding recommendations (ie recommendations i to iv, in respect of Theme I, and recommendations ii to xi, for Theme II), by 30 November 2011, in pursuance of Rule 32 para. 2(i). In agreement with the Secretariat, the information was submitted after this date, viz on 24 February 2012.
4. This Interim Compliance Report evaluates the progress made since the adoption of the Compliance Report in implementing the outstanding recommendations, providing an overall appraisal of the level of Belgian compliance with these recommendations.

II. ANALYSIS

Theme I – Incriminations

5. *Pro memoria*, in its evaluation report GRECO had made four recommendations to Belgium under Theme I. The Compliance Report in May 2011 concluded that recommendations i-iv had been partly implemented.

Recommendation i.

6. *GRECO recommended that necessary measures, such as circulars, interpretative material or training, be introduced to recall that the intentional "receipt" of an advantage, within the meaning of the Criminal Law Convention on Corruption (ETS 173), is unlawful in respect of the various offences of passive bribery.*
7. GRECO recalls that in the Compliance Report it had noted proposals for a circular and training activities and concluded that these proposals should be examined in greater

detail once the final decisions had been taken. It had therefore considered this recommendation partly implemented.

8. The Belgian authorities once again referred to the case-law already quoted in the Situation Report, specifying that: a) the intentional receipt of an advantage within the meaning of the Criminal Law Convention on Corruption is indeed covered by Belgian legislation and that no problem has been noted in practice; and b) no new case-law on “receipt” is currently available.
9. The authorities point out that on 9 November 2011, in connection with the training programmes announced in the Compliance Report, the Judicial Training Institute organised a study day on corruption in Brussels at the request of the network of experts on corruption of the College of Public Prosecutors. This was a hybrid training course aimed at reference judges and prosecutors from the network of experts on corruption of the College of Public Prosecutors, judges and prosecutors with experience in dealing with corruption cases, investigating judges, federal police officers, members of the Central Anti-Corruption Office, and second- and third-year judicial interns. Two trainers gave presentations, one on the general framework of incriminations in Belgian law and the other on the GRECO recommendations. As to the GRECO recommendations, the trainer explained the reasons for, and the scope of, the first recommendation and pointed out that the “receipt” of an undue advantage, even if it is not explicitly provided for in the articles of the Belgian Penal Code, is an integral part of the definition of the various passive bribery offenses. The trainer also analysed the other recommendations and explained in detail why the Belgian situation is not consistent with the relevant articles of the Convention and indicated, with regards to recommendations ii, iii and iv, potential steps to take. Ninety-seven practitioners participated in this study day (among them were 59 federal police officers, 19 prosecutors, four judges and three investigating judges). No other activities with respect to recommendation i are anticipated or planned for 2012.
10. In connection with the draft circular mentioned in the Compliance Report, the Belgian authorities mainly adhere to the information already contained in the Compliance Report. A general criminal policy circular on bribery is currently being finalised and will be submitted to the members of the co-ordinating team for opinion and comments.¹ During these consultations the SPF Justice (the Federal Ministry) will be proposing a text to be incorporated into the circular, specifying that the “receipt of an advantage” is an integral part of the definition of passive bribery². At the present time, pending an agreement

¹ The circular focuses on various aspects including public and private sector corruption offences, extortion, illegal gains, the statute of limitations, mutual legal assistance, access to case law, as well as the scope, competencies and inter-relations of the various bodies and authorities involved in the fight against corruption, etc.

² The proposed wording is as follows: “*Various international instruments (including the Council of Europe’s Criminal Law Convention on Corruption of 27 January 1999 and the 26 May 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union) also mention the receipt of an advantage as a component element of the offence of passive bribery. Even though this element was not explicitly incorporated into Article 246§1 of the Code of Criminal Investigation, the “receipt” concept is very clearly an integral part of the definition of passive bribery. We might mention a judgment of 21 March 2005 from the 56th Criminal Chamber of Brussels District Court in a criminal case [Notice BR25.F1.112305/03], which reads “whereas, concerning accusation A, **the receipt** of gifts or presents by the accused is not demonstrated beyond a reasonable doubt to his advantage...”*. Although the case was dismissed, the offence clearly involved the “receipt” of an advantage. Judgments from the Court of Cassation confirm this

within the network of experts on corruption, no finalised version of the circular can be transmitted.

11. GRECO takes note of the information provided. GRECO recalls that existing case-law, already considered at the adoption of the Evaluation Report, has not so far provided sufficient clarity. A day of general training on corruption was held in November 2011 and in this context, it was recalled that under Belgian law the offence of passive bribery of public official covers the receipt of an undue advantage. GRECO doubts, however, that this has provided the necessary clarity to a sufficient number of practitioners (especially prosecutors and investigating judges). This highlights the increased importance of the circular that the Belgian authorities proposed in May 2011. However, the circular is still in draft form and whether its content will fulfill the expectations of recommendation i remains uncertain. Given the above GRECO can not conclude that recommendation i has been fully implemented.
12. GRECO concludes that recommendation i remains partly implemented.

Recommendations ii and iii.

13. *GRECO recommended that consideration be given to i) revising the offence of bribery in the private sector in Article 504bis of the Criminal Code to ensure that the requirement that managers or employers not be aware of or approve the offender's actions cannot be misused to permit agreements between different organisations or bodies or enable them to exonerate persons being prosecuted after the event, and therefore ii) withdrawing or not renewing the reservation concerning articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173). (recommendation ii)*

GRECO recommended that consideration be given to i) establishing an offence of trading in influence that is compatible with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173), by specifying that the "influence peddler" need not be a public official, that the categories of person targeted are those specified in the Convention and that it is irrelevant whether or not the influence is exercised or achieves the intended result, and therefore ii) withdrawing or not renewing the reservation concerning Article 12 of the Convention. (recommendation iii)

14. GRECO recalls that these two recommendations were considered "partly implemented". In connection with recommendation iii, the Minister for Justice left it to Parliament to legislate in this field, and the legislative process was already under way before the visit to investigate the extension of the incrimination of influence-peddling. A January 2010 memorandum from SPF Justice on the four GRECO recommendations once again drew the Justice Minister's attention to the situation of this proposed legislation and the deadlock in its adoption owing to a lack of political will. Where recommendation ii is concerned, the Ministry of Justice Strategy Unit initially ordered the preparation of an amendment modifying the incrimination of private corruption. The political crisis, however, meant that this intra-ministerial work was halted at an early stage, thus preventing the Government (and possibly even Parliament) from reaching a final decision.

interpretation, even if they were issued prior to the adoption of the Law on 10 February 1999 (Cass. 9 December 1997 and 23 December 1998)."

15. First of all, the Belgian authorities point out that during the 9 November training day mentioned in paragraph 9 the attention of the specialist judges, prosecutors and police officers present was drawn to these recommendations and to the fact that the various international instruments (not just the Council of Europe Convention but also, for instance, the UN Convention) go beyond what is provided for in Belgian legislation concerning private sector corruption and trafficking in influence. Secondly, in October 2011 and January 2012, SPF Justice sent position papers on the four recommendations to the Ministry of Justice explaining the problems with these GRECO recommendations and suggesting the appropriate action. The paper contained an in-depth analysis of recommendations ii and iii and a detailed explanation of the reason why the Belgian situation does not comply with the corresponding articles of the Criminal Law Convention on Corruption, and suggested measures to tackle the problem. The representative of the Ministry of Justice Strategy Unit finally took the initiative of convening the OECD-GRECO-UN inter-departmental working group on 29 November 2011 to a meeting chaired by the Criminal Policy Department. The main subject on the agenda was a discussion of the various Greco recommendations. On this occasion, the head of the Belgian delegation to GRECO presented the different proposed measures and requested the opinions of the representatives attending the meeting.
16. However, there was little discussion of recommendations i and ii, and the participants in the aforementioned meeting did not consider influence-peddling and bribery in the private sector as priorities for new legislation. Moreover, very few cases have emerged in practice. A further memorandum sent to the new Justice Minister's Strategy Unit on 20 January 2012 contained a request for a formal decision by the minister on the requisite action. The document also contained a proposal and some practical suggestions for future legislation. The memorandum was finally examined by the Strategy Unit and the Minister of Justice has subsequently requested that the document be updated.
17. GRECO notes that the situation has not changed since the Compliance Report where implementation of recommendations ii and iii is concerned, and that the country has taken no decision on the possible follow-up to the latter. GRECO would strongly urge Belgium to show greater determination in implementing these recommendations, and for the moment agrees to uphold its opinion set out in the Compliance Report regarding their "partial" implementation.
18. GRECO concludes that recommendations ii and iii remain partly implemented.

Recommendation iv.

19. *GRECO recommended i) to take the necessary steps in order to clarify, notably for practitioners, the scope of Article 12bis of the Code of Criminal Procedure, which enables Belgium to assume jurisdiction on the basis of Article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) in any case where the domestic rules of law fail to satisfy that provision, and make it clear that dual criminality is not a requirement in cases of bribery and trading in influence; ii) to consider withdrawing or not renewing the reservation concerning Article 17 of the Convention.*
20. GRECO recalls that this recommendation was considered "partly implemented" because the reservation to Article 17 of the Convention had been withdrawn – the Belgian

authorities pointed out that the reservation was no longer justified in the current state of interpretation of the texts – and a draft circular on Article 12bis of the Code of Criminal Investigation (hereafter CCI) was being prepared. Nevertheless, the discussion on this project highlighted a number of theoretical and practical problems connected with the question of the application/applicability of the said article outside the context of humanitarian protection (this provision assigns Belgium universal jurisdiction in this matter), which problems were liable ultimately to cast doubt on the adoption of such a text.

21. In the fresh information submitted, the Belgian authorities supply extensive details mainly based on the information already set out in the Compliance Report, including the substance of the discussions between 2009 and 2011 and the pros and cons of recourse to Article 12bis CCI³. The Belgian authorities confirm that recourse to Article 12bis CCI requires the intervention of the Federal Prosecutor's Office, which gives it a *de facto* monopoly on prosecution. Both the Criminal Policy Department and SPF Justice's DG of Legislation have shown willingness to continue analysing the circular – meetings were held on 7 September 2011 and 29 November 2011 with the OECD-GRECO-UN interdepartmental working group. However, this meeting clearly highlighted the scant enthusiasm for continuing to examine and finalise the circular.
22. Consequently, the Belgian authorities once again refer to the alternative solution of conducting legislative adjustments in order to fulfil the requirements of Article 17 paragraph 1 of the Criminal Law Convention (which solution was already mentioned in the Compliance Report) and the proposals to that end forwarded to both the former and current Justice Ministers⁴. According to the authorities, this does not fully comply with the recommendation, which is highly specific and explicitly refers to Article 12bis CCI, but on the other hand it would overcome the current legal problems noted by GRECO. This is apparently a substantial extension of the extraterritorial jurisdiction of the Belgian courts, which would also require a determination to remove the long-standing dual incrimination condition. These suggestions were also outlined at the meeting of the OECD-GRECO-UN working group on 29 November 2011. The Justice Minister's Strategy Unit has considered the various possible measures proposed and as indicated earlier, the Minister of Justice has subsequently asked that the memorandum be updated.

³ Article 12bis enables the national authorities to refer directly to the rules on jurisdiction contained in the treaties. In this case, no dual incrimination, complaint or official opinion criterion is required, and the condition for admissibility of the public action as provided for in Article 12 (perpetrator found in Belgium) is not stipulated.

⁴ The detailed memorandum on the four recommendations relating to incriminations, which was sent on 14 October to the Strategy Unit of the former Minister for Justice, and the memorandum of 20 January 2012 forwarded to the new Justice Minister's Strategy Unit both suggested the other option of amending legislation to bring the rules on extraterritorial jurisdiction into line with Article 17 of the Convention. The memorandum contained a legal analysis of the reasons why the current rules on extraterritorial jurisdiction fall short of the requirements of the Convention. Furthermore, it also presented possible amendments under the preliminary Part of the Code of Criminal Procedure to remove the obstacles to the Belgian courts' extraterritorial jurisdiction. Such a legislative amendment would require in-depth study, including its practical consequences, but a number of fundamental principles can already be singled out to bring Belgian legalisation into line with the Convention. The easiest way to meet the requirements of the Convention would be to observe the following basic rules: a) the provisions on private bribery might be included among the specific regulations on jurisdiction set out in Article 10quater. This article could therefore regulate extraterritorial jurisdiction for both private and public bribery. Thus complaints from a foreigner, his family or from a foreign authority would no longer be a criterion for private bribery; b) the dual incrimination condition could be deleted from Article 10quater para. 2. This would solve the problem for both private and public bribery; c) Article 10quater could be incorporated into Article 12 of the Preliminary Part as an exception. This would also eliminate the condition that the accused must be in Belgian territory.

23. The authorities once again recall that the 9 November 2011 training day mentioned in paragraph 9 drew the attention of the specialist judges, prosecutors and police officers present to this recommendation, and the different proposals for amending the relevant legislation were presented.
24. GRECO takes note of the information provided and of the fact that in substance the situation has not progressed since the Compliance Report. Evidently, internal discussions in Belgium are a reflection, so to speak, of the discussions which GRECO and its evaluators themselves originally held with the Belgian authorities and of the former's initial doubts regarding the theoretical solution proposed by Belgium backing the application/applicability of Article 12bis CCI in relation to cases of bribery and corruption. GRECO had finally accepted Belgium's explanations in the light of further clarifications – which are the subject of the present recommendation. Nevertheless, it is obvious that Belgium is not bound by the wording of the recommendation, whose aim may also be achieved by means of legislative amendments. GRECO stresses also that since the Belgian authorities confirmed that the Federal Prosecutor's Office has a monopoly on prosecuting cases involving recourse to Article 12bis CCI, a legal amendment would ultimately be the best solution, both in its own eyes and in the context of the need for effective action against corruption. Moreover, GRECO stresses that deleting the dual incrimination condition, which is highlighted as an item for separate discussion, no longer has the same exceptional dimension in the European context as in the past; GRECO has addressed recommendations to this effect to a fair number of countries.
25. GRECO recalls that in terms of recommendations ii, iii and iv, the presentation given as part of the study day on November 9, 2011, concentrated on a general discussion rather than the specific implementation of recommendation iv.
26. GRECO concludes that recommendation iv remains partly implemented.

Theme II – Transparency of political party funding

27. *Pro memoria*, in its Evaluation Report GRECO had addressed 11 recommendations to Belgium on Theme II. The Compliance Report in May 2011 concluded that recommendation i had been implemented satisfactorily and that recommendations ii to xi had not been implemented. The fresh information submitted by Belgium prompts the Group to conduct a further overall examination of these recommendations.

Recommendations ii to xi.

28. *GRECO recommended:*

that the Act of 4 July 1989 and other relevant legislation be amended i) to extend their coverage to parties that do not receive federal public financing and ii) to introduce criteria for extending more systematically the scope of the consolidated accounts of parties and political groups to include associated structures, in particular the party's local sections, so that oversight is also exercised in respect of the local level. (recommendation ii)

that the federal legislation on the respective obligations and responsibilities of parties and their components be further clarified, to ensure that financial transactions are

effected to the highest extent possible through each party's financial association. (recommendation iii)

i) the registration of donations of less than EUR 125 to parties and candidates be made a formal obligation; ii) the use of modern and more secure means of payment for donations be encouraged to make them more traceable; iii) the notion of donation be clarified or defined so as to better address services rendered free of charge or below market value on the one hand, and to ensure consistency as regards sponsorship by legal persons and the existing rules governing donations on the other hand; iv) if appropriate, the regions be invited to amend their legislation in accordance with this recommendation. (recommendation iv)

i) to examine the advisability of extending the financial and accounting reference period applicable to election campaigns so that declarations reflect more closely the resources and expenditure devoted to these campaigns; ii) if appropriate, to invite the regions to amend their legislation in accordance with this recommendation. (recommendation v)

i) the retention period for supporting documents be extended beyond two years; ii) where it does not exist, particularly at provincial, district and municipal levels under the Act of 7 July 1994, such an obligation be introduced; iii) if appropriate, the regions be invited to amend their legislation in accordance with this recommendation. (recommendation vi)

i) parties and/or candidates be obliged – within the limits of the Constitution – to declare individual donations above a certain minimum value, together with the donors' identity; ii) if appropriate, the regions be invited to amend their legislation in accordance with this recommendation. (recommendation vii)

i) to set up a system – unified if possible – to supervise the financing of parties and election campaigns, that would be as independent as possible from the political parties and be allocated the means needed to exercise adequate substantive control; ii) to invite the regions to take this recommendation into account should the creation of a unified system prove too difficult in the national institutional context. (recommendation viii)

i) agreement be reached with the Institut des Réviseurs d'Entreprise (institute of company auditors) on more stringent standards for auditing the accounts of political parties, including rules for ensuring the auditors' necessary independence and ii) consideration be given to extending audit obligations beyond the parties' annual accounts so as to cover notably their reports on electoral expenditure. (recommendation ix)

i) steps be taken to ensure that if a party fails to meet its obligations under the Act of 4 July 1989, or other relevant legislation, and this would normally entail the loss of federal funding, it should lose all the services and benefits it receives in the form of public assistance throughout the country; ii) if appropriate, the regions be invited to amend their legislation in accordance with this recommendation. (recommendation x)

i) the powers of the authorities responsible for ordering sanctions for breaches of the rules on political financing be clarified; ii) steps be taken to ensure that there is a more proportionate and dissuasive scale of sanctions in place for the various infringements by parties and candidates, for example by making ineligibility generally applicable,

diversifying the available penalties, establishing more severe criminal penalties and establishing rules on repeat offending; iii) if appropriate, the regions be invited to amend their legislation in accordance with this recommendation. (recommendation xi)

29. The Belgian authorities state that since the adoption of the Compliance Report by GRECO in May 2001 the Parliamentary Working Group on Political Parties, which is responsible for evaluating legislation on party funding and ensuring action on GRECO recommendations, met on 22 June, 13 July, 26 October and 8 November 2011, as well as on the 6 March and 17 April, 2012. On 22 June and 13 July 2011 the working group discussed the opinions of the political parties on the eleven GRECO recommendations. This discussion was based on a synoptic table breaking down these viewpoints by recommendation.
30. However, no final conclusions have yet been drawn. It was decided to organise a hearing of academics and representatives of the Institute of Corporate Auditors. The private hearings of nine persons took place on 26 October and 8 November 2011. Minutes were kept of these hearings (63 pages), but they cannot be made public for the moment. In any case, the hearings showed that the academics do not agree on the implementation of the recommendations. This being the case, only a gradual approach can possibly lead to further progress; separate bills will therefore be drawn up on each partial subject. It was decided, therefore, to initiate a discussion of the possible consensus between the Presidents of the working group and the secretariat at the meeting of 17 April. Following this meeting, the secretariat was instructed to prepare draft legislation. On 9 May 2012, the working group started to discuss such projects for those items for which a consensus is in progress. A meeting with the seven assembly presidents (of the federal, community and regional levels) is also scheduled on 30 May 2012, in particular to examine ways to involve the regions in the implementation of expected changes, in accordance with the recommendations.
31. GRECO notes that discussions are continuing on the implementation of the recommendations issued under Theme II. These discussions confirm the current dynamic for legislative reform, in accordance with recommendation i (which is why GRECO had already deemed the latter satisfactorily implemented in its Compliance Report). All the outstanding recommendations ii to xi have been discussed, which constitutes welcome progress over the situation in May 2011. However, the decision-making process on the recommendations is clearly still at a very early stage, as Belgium is planning to take future decisions on a case-by-case basis on the action to be taken on each recommendation, such that no date for adopting legislative proposals can be put forward. So, where virtually all the recommendations are concerned, there can still be no talk of tangible progress. Recommendation v on examining the advisability of extending the reference period is the only exception: the fact that the different party opinions have now been grouped together can be seen as a credible first step towards the examination and implementation of the first part of this recommendation. But, GRECO cannot conclude that the other recommendations have been implemented, even partly.
32. GRECO concludes that recommendation v has been partly implemented and that recommendations ii to iv and vi to xi have still not been implemented.

III. CONCLUSIONS

33. **In the light of the foregoing, GRECO concludes that Belgium has made very slight progress in implementing only one of the recommendations which were deemed non-implemented or partly implemented by the Third Round Compliance Report.** Under Theme I (Incriminations), recommendations i to iv are still at the stage of partial implementation. Under Theme II (Transparency of political party funding), recommendation v has now been partly implemented and recommendations ii to iv and vi to xi have still not been implemented.
34. GRECO takes note of this disappointing result. It notes that discussions are continuing at federal ministerial level on implementing the recommendations relating to Theme I. Similarly, discussion in Parliament on implementing the recommendations under Theme II have clearly been intensified but no political decision or relevant action has been taken so far on the improvements advocated, the plan being to resort to case-by-case decisions. There is therefore currently little sign that the current discussions will result in concrete action. GRECO urges Belgium to show greater determination in implementing the various outstanding recommendations.
35. As a consequence of the foregoing, GRECO concludes that the current level of implementation of the recommendations is still “globally unsatisfactory” within the meaning of Rule 31 paragraph 8.3 of its Rules of Procedure.
36. GRECO further decides that in pursuance of Rule 32 para. 2(ii) of its Rules of Procedure, the Chair will send the head of the Belgian delegation a letter, with copy to the Chair of the Statutory Committee, drawing his attention to this non-compliance with the relevant recommendations and the need to take firm action to ensure tangible progress as soon as possible.
37. In accordance with Rule 31 para. 8.2 revised of its Rules of Procedure, GRECO asks the head of the Belgian delegation to submit, by 28 February 2013, a report on the measures adopted to implement the outstanding recommendations (recommendations i to iv for Theme I and recommendations ii to xi for Theme II).
38. Lastly, GRECO invites the Belgian authorities to authorise the publication of the present report as soon as possible, to translate it into Dutch (and possibly German), and to make this (these) translation(s) public.