



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

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Theme I

## Third Evaluation Round

### Evaluation Report on Andorra Incriminations

(Theme I)

Adopted by GRECO  
at its 51<sup>st</sup> Plenary Meeting  
(Strasbourg, 23-27 May 2011)

## **I. INTRODUCTION**

1. Andorra joined GRECO in 2005. GRECO adopted the report on the joint first and second evaluation rounds (Greco Eval I Rep (2006) 1E) at its 31<sup>st</sup> meeting (4-8 December 2006). The aforementioned evaluation report, and the corresponding compliance report, are available on the GRECO website (<http://www.coe.int/greco>).
2. The current third evaluation round, which started on 1 January 2007, covers the following themes:
  - **Theme I – Incriminations:** articles 1a and 1b, 2 to 12, 15 to 17 and 19.1 of the Criminal Law Convention on Corruption (ETS 173), articles 1 to 6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (incrimination of corruption).
  - **Theme II - Transparency of Political Party Funding:** articles 8, 11, 12, 13b, 14 and 16 of Recommendation (2003) 4 on common rules against corruption in the funding of political parties and electoral campaigns and – more generally – Guiding Principle 15 on financing of political parties and election campaigns.
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the “GET”), which carried out an on-site visit to Andorra on 15 and 16 November 2010 comprised Ms Muriel BARRELET, Lawyer and, since 1 January 2011, District Judge. (Switzerland) and Mr André MUHLBERGER, Director of Public Safety (Monaco). The GET was assisted by Ms Sophie MEUDAL-LEENDERS and Mr Christophe SPECKBACHER of the GRECO Secretariat. Prior to the visit the GET received replies to the evaluation questionnaire (Greco Eval III (2010) 13F, Theme I) and copies of relevant legislation.
4. The GET met representatives of the following authorities and institutions: the government, the prosecution service, investigating and court judges, lawyers, the police and the public service state secretariat. It also met journalists and members of the employers' association.
5. The current report on Theme I of GRECO's 3<sup>rd</sup> evaluation round – corruption offences – is based on answers to the questionnaire and information supplied during the on-site visit. The main objective is to assess the effectiveness of measures adopted by the Andorran authorities to comply with the provisions referred to in paragraph 2. The report presents a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Andorra on how to improve compliance with the provisions under consideration.
6. The report on Theme II – transparency of political party funding – appears in Greco Eval III Rep (2010) 11E, Theme II.

## **II. INCRIMINATIONS**

### **Description of the situation**

7. Andorra ratified the Criminal Law Convention on Corruption (ETS 173) on 6 May 2008 and it came into force on September 2008. Under Article 37.1 of the Convention, Andorra has entered three reservations concerning the following offences: a. bribery of members of foreign public assemblies (Article 6) and of members of international parliamentary assemblies (Article 10)<sup>1</sup>, b. active and passive bribery in the private sector (Articles 7 and 8)<sup>2</sup> and c. trading in influence (Article 12)<sup>3</sup>.
8. Andorra has not yet ratified, or signed, the additional Protocol to the Criminal Law Convention on Corruption (ETS 191).
9. Andorran law was for long heavily imbued with the oral tradition and legal precedent and the first Criminal Code only dates from 1990. Following the adoption of the Constitution in 1993 and initial experience of the 1990 code, a revised Criminal Code and code of criminal procedure finally came into force in September 2005. Until then, bribery had not been an offence as such, but simply featured in the more general context of subornation of public officials and judges Part XXI of the 2005 Criminal Code is entitled offences against the public service. Chapter IV – bribery and trading in influence – comprises articles 380 to 386. Articles 380 and 381 establish the offences of bribery of a public authority or official. Article 382 extends these provisions to various specific categories of persons. Articles 382 to 385 are concerned with judicial corruption and 386 with trading in influence.
10. Significant amendments were made to the Criminal Code in Act 15/2008 of 3 October 2008, particularly concerning the applicable penalties. With specific regard to corruption offences, the act amended article 382, on other targets of bribery, by adding a new sub-paragraph on bribery of foreign and international public officials and members of foreign or elected international assemblies, and article 383 – judicial corruption – by making it an offence for judges to fail to take certain acts or decisions. Similarly a new article 385b on other targets of bribery extended articles 383 to 385 to officials of international courts, while article 386b established new consequences of and other penalties for the various offences in chapter IV. A consolidated version of the Criminal Code appeared in a legislative decree of December 2008.
11. The Criminal Code also establishes various other corruption offences, such as abuse of official authority (art. 372), extortion by a public official and unlawful levies (art. 378 and 379), unlawful funding of political parties (art. 387), misappropriation of public property (art. 388), misuse of public property for the purposes of personal enrichment or that of others (art. 389), interference of private interests in the public service (art. 391), prohibited negotiations (art. 392) and misuse of privileged information by a public authority or official (art. 393).

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<sup>1</sup> "Andorra reserves its right to apply Articles 6 and 10 to the members of foreign public Assemblies and to the members of international parliamentary Assemblies".

<sup>2</sup> "Andorra declares that it will establish as a criminal offence the conduct referred to in Articles 7 and 8, in accordance with its domestic law, only when it will be qualified as such by the Criminal Code of the Principality of Andorra."

<sup>3</sup> "Andorra reserves its right not to establish as a criminal offence the conduct referred to in Article 12, when it is only an attempt in accordance with its domestic law."

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

### **Definition of the offence**

12. Passive and active bribery of public officials are offences under sub-paragaphs 1 and 2 respectively of Article 380 of the Criminal Code (hereafter CC). The definition implies that the unfair advantage constitutes the remuneration for a future (positive) act or decision. Sub-paragaphs 1 and 2 of Article 381 CC, on passive and active bribery, create aggravated forms of the corruption offences in Article 380 CC when the act or decision in question entails an unjust action or omission, which may involve a future act or decision or one already taken, deliberately delaying an act or decision or an act or decision of a political nature by the authority or official concerned.

#### ***Article 380 CC – [Passive or active] bribery of an authority or official***

1. *Authorities or public officials who, for their personal gain or that of a third party, request or receive, personally or via an intermediary, advantages with a potential financial value or accept an offer or a promise in order to act or take a decision relating to their official position shall be punished by a fine of up to three times the value of the advantage and suspension from a public post of up to three years.*
2. *Individuals who offer, deliver or promise advantages with a potential financial value to an authority or official with a view to securing one of the acts or decisions described in the previous paragraph shall be punished by a fine of up to three times the value of the advantage.*
3. *An absolute excuse is the fact that individuals report the act of bribery to the authorities before being aware that an inquiry has started.*

#### ***Article 381 CC – Aggravated bribery [of an authority or official]***

1. *Authorities or public officials who, for their personal gain or that of a third party, request or receive, personally or via an intermediary, advantages with a financial value or accept an offer or a promise in exchange for an unjust action or omission, delaying an act or decision, or an act or decision of a political nature shall be punished by up to four years' imprisonment, a fine of up to three times the value of the advantage and disqualification from occupying a public post of up to six years.*
2. *Individuals who offer, deliver or promise advantages with a potential financial value to an authority or official with a view to securing one of the acts or decisions described in the previous paragraph shall be punished by up to two years' imprisonment, a fine of up to three times the value of the advantage and disqualification from dealings with the public authorities of up to four years.*

13. Moreover, as stated in the explanatory memorandum to the legislation introducing the 2005 Criminal Code, the latter deals separately with judicial corruption, apparently with the intention of offering a higher level of protection to this key element of democracy, with higher penalties.
14. Thus articles 383 and 384 CC are specifically concerned with the bribery of *battles* (judges at first instance) and appeal, criminal and supreme court judges, but follow the same logic as article 380 and 381 CC, except that abstaining from taking or omitting to take a decision, though not unjustly delaying judgment, are covered by the basic rather than the aggravated form of the offence, on

the grounds that the element of "injustice" required by the aggravated form is deemed to be absent from the other types of omission.

15. In addition, Article 385 of the current Criminal Code provides for the mitigation of the offence with reduced penalties when the bribery of a member of the judiciary is intended to protect a family member in criminal (and only criminal) proceedings.

#### ***Article 383 CC – Judicial bribery***

*1. Judges who, for their personal gain or that of a third party, request or receive, personally or via an intermediary, advantages with a potential financial value or accept an offer or a promise in order to take or refrain from taking an action or decision relating to their official position shall be punishable by three months' to three years' imprisonment, a fine of up to three times the value of the advantage and disqualification from occupying a public post for up to six years.*

*2. Individuals who offer, deliver or promise advantages with a potential financial value to a judge with a view to securing one of the acts or decisions described in the previous paragraph shall be punished by detention, a fine of up to three times the value of the advantage and disqualification from dealings with the public authorities of up to four years.*

#### ***Article 384 CC – Aggravated judicial bribery***

*1. In the circumstances described in Article 383.1, if the action or decision in exchange for the advantage consists in handing down an unjust decision, or unjustly delaying a decision, the penalty shall be two to five years' imprisonment, a fine of up to three times the value of the advantage and disqualification from occupying a public post of up to six years*

*2. Individuals who offer, deliver or promise advantages with a potential financial value to a judge with a view to securing one of the acts or decisions described in the previous paragraph shall be punished by three months' to three years' imprisonment and a fine of up to three times the value of the advantage.*

#### ***Article 385 CC – Mitigated judicial bribery***

*When the attempted bribery on behalf of the accused in criminal proceedings is carried out by the latter's spouse or de facto equivalent, or by a natural or adoptive parent, child, brother or sister, the penalty shall be a fine of up to twice the value of the advantage in the circumstances described in Article 383 and detention in the circumstances described in Article 384.*

### **Elements of the offence**

#### *Domestic public officials*

16. The term used in articles 380 and 381 is "authorities and officials", which are defined in Article 32 of the Criminal Code:

### **Article 32 CC – Authorities and officials**

*For the purposes of the Criminal Code, authorities are persons who, whether or not they are public officials, are empowered, individually or collectively, to issue orders or exercise their own jurisdiction. Authorities also include members of parliament, members of municipalities, the judicial service commission, the court of auditors and the prosecution service, the ombudsman and any other persons with statutory powers to exercise institutional functions. Public officials are persons who exercise public duties, whether or not delegated, in accordance with the law, or as a result of election or appointment by a competent authority.*

17. This therefore includes persons with power to issue orders within administrative, judicial, legislative, local and *ad hoc* institutions and members of these institutions in general. Prosecutors, mayors and ministers are included in the definition and are considered to be "authorities". The notion of public official must also be interpreted broadly to include all those exercising public duties by dint of their administrative status, delegation, election or simple appointment. Finally, the notion of public official extends to individuals exercising public duties in accordance with the law, which would include, for example, doctors practising in public hospitals or even in the private sector, when they carry out tasks that pertain to public duties – such as the delivery of a medical certificate for official purposes –, non-established contractual employees of the public service, as well as staff working for enterprises carrying out public services.

#### *Promising, offering or giving (active bribery)*

18. Articles 380.2 and 381.2 CC, which are concerned with the active bribery of authorities or public officials, and 383.2 and 384.2 CC, concerned with that of judges, use similar language to the Convention, namely "offer, deliver or promise".

#### *Request or receipt of any undue advantage, or the acceptance of an offer or a promise (passive bribery)*

19. The first paragraphs of the preceding articles, concerned with passive bribery of authorities, officials or judges, use similar language to the Convention, namely "request or receive ... advantages ... or accept an offer or a promise in order to take an action or decision".

#### *Any undue advantage*

20. The expression used in the aforementioned articles is "advantages with a potential financial value". A strict interpretation, confirmed by the Andorran authorities, would mean that, in contrast to the Convention, which refers to "any undue advantage", Andorran law makes no distinction between advantages that are acceptable, because they are symbolic, formal or otherwise tokens of hospitality or courtesy such as gifts below a certain value, and those that are not.
21. On the other hand, the various provisions refer to advantages with a financial value, which appears to preclude non-material advantages, such as honorary titles, diplomas or sexual favours. During the on-site visit, the authorities stated that even these advantages would be covered, either because they could be attributed a financial value or because non-material advantages might indirectly produce a financial advantage – for example, a diploma might lead to employment.

*Directly or indirectly*

22. Explicit reference is made in articles 380.1, 381.1 and 383.1 CC, on the passive bribery of authorities, officials and judges, to the possible involvement of intermediaries between the two parties – "personally or via an intermediary".
23. On the other hand, the second paragraphs of these articles, on active bribery, and both paragraphs of Article 384 CC, on aggravated judicial bribery, refer back to the previous provisions. The reference in Article 384.1 CC – "in the circumstances described in Article 383.1" – appears to cover all the elements mentioned explicitly in Article 383.1 CC, but this is not the case with the other references, which are expressed in more restrictive terms: "with a view to securing one of the acts or decisions described in the previous paragraph" (articles 380.2, 381.2, 383.2 and 384.2 CC). However, the authorities explained after the visit that in such cases, the author of the offence being a private person – as opposed to an authority, public official, *battle* or judge – s/he would as such be subject to the general provisions of Article 21 CC<sup>4</sup>, which foresee cases in which the author commits the offence "through somebody who s/he uses as an instrument". They mentioned that the drafters of the Andorran Criminal Code drew inspiration from the Spanish model and, as the authors of bribery offences in the public sector belong to special categories of persons (authority, public official, etc.), it had been necessary to be more precise regarding the possible use of intermediaries in these offences.

*For themselves or others*

24. The paragraphs on passive bribery use the term "for their personal gain or that of a third party".
25. However, the more restrictive wording of the second paragraphs of these articles, on active bribery, does not appear to cover the granting or receiving of advantages intended for third parties.

*To perform or refrain from performing actions in the exercise of their duties*

26. Article 380 CC concerns bribery of officials to induce them "to act or take a decision relating to their official position". According to the Andorran authorities, this should be interpreted broadly to include all actions and decisions made possible by the prerogative of the position rather than just duties and responsibilities assigned directly to the official concerned. Nevertheless, it would appear that failure to act or take a decision linked to an official's duties is not a material element of the bribery of authorities or public officials in Article 380 CC, but is an element of the aggravated forms of bribery in Article 381, in the case of an "unjust omission". Article 381 CC also covers delayed actions or decisions.
27. Following the amendments to the Criminal Code in Act 15/2008, the judicial bribery referred to in Article 383 CC makes explicit reference to judges' taking or refraining from taking actions or decisions relating to their official position. Under Article 384 CC, delaying a decision is a material element of the offence of aggravated judicial bribery.

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<sup>4</sup> Article 21 CC applies under the conditions that the author acted with intent and was not incited to act and that the instrument also acted voluntarily.

*Committed intentionally*

28. The notion of intention does not appear in the aforementioned offences but while the Andorran Criminal Code occasionally accepts the principle of offences caused by imprudence Article 13 states that in principle offences must always be intentional.

Sanctions

29. How offences are categorised is considered below, in relation to time limits for prosecution. Bribery and trading in influence are always major or minor (as opposed to petty) offences. The penalties are detention (for lesser offences only), imprisonment, fines and temporary suspension/disqualification from one's post, or even from occupying any public post, or from dealings with the public authorities. The scale of the penalties depends on the value of the advantage and the penalties are cumulative, with a minor exception for active trading in influence. The following table gives an overview of the various penalties for bribery of public officials and – for the purposes of practical presentation – other corruption offences.

	Passive bribery/trading in influence	Active bribery/trading in influence
Article 380 CC – bribery of an authority or official	- fine of up to three times the value of the advantage and up to three years' suspension from public duties	- fine of up to three times the value of the advantage
Article 381 CC – aggravated form of Article 380 CP bribery	- 1 to 4 years' imprisonment, fine of up to three times the value of the advantage and up to six years' disqualification from exercising public duties	- up to 2 years' imprisonment, fine of up to three times the value of the advantage and up to four years' disqualification from entering into contracts with the public authorities
Article 382.1 CC - bribery of foreign of international public officials and members of international parliamentary assemblies		Same as articles 380 and 381 CC
Article 382.2 CC – bribery of jurors, arbitrators, experts, interpreters and other persons undertaking public duties		Same as articles 380 and 381 CC, though suspension from public duties replaced by disqualification from exercising the profession or post
Article 383 CC – bribery of a judicial authority	- 3 months' to 3 years' imprisonment, fine of up to three times the value of the advantage and up to six years' disqualification from exercising public duties	- detention, fine of up to three times the value of the advantage and up to four years' disqualification from entering into contracts with the public authorities
Article 384 CC – aggravated form of Article 383 CC bribery	- 2 to 5 years' imprisonment, fine of up to three times the value of the advantage and up to six years' disqualification from exercising public duties	- 3 months' to 3 years' imprisonment, fine of up to three times the value of the advantage
Article 385 CC – mitigated form of Article 383 CC bribery	not applicable.	- fine of up to twice the value of the advantage for Article 383 CC offences - detention for Article 384 CC offences
Article 385b CC – other targets of bribery (officials of international courts)	- penalties for articles 383 to 385 CC	- penalties for articles 383 to 385 CC
Article 386 CC – trading in influence	- detention, fine of up to twice the value of the advantage and up to three years' suspension from public duties	- detention, fine of up to twice the value of the advantage - optional: up to three years' disqualification from entering into contracts with the public authorities
Article 386.3 CC – aggravated trading in influence	- 3 months' to 3 years' imprisonment, fine of up to twice the value of the advantage sought or obtained and up to five years' suspension from public duties	

30. Detention entails measures to restrict liberty as alternatives to prison. They are listed in articles 39 ff of the Criminal Code. The period concerned is specified in Article 36 CC. Adjustments or equivalences are specified in the other relevant articles: a. weekend detention of up to twenty-four weekends or equivalent units of time; b. domiciliary detention of up to six months; and c.

partial daily detention of up to six months. With the exception of domiciliary detention this penalty is normally carried out in a special prison.

31. Penalties are normally higher for passive than for active bribery. The maximum sentence for passive bribery is up to five years' imprisonment, in the case of aggravated judicial bribery. The maximum term of imprisonment for two or three types of active bribery is two or three years. In the two types of "basic" bribery of an authority or official under Article 380 CC, imprisonment is not an option.
32. By way of comparison, under articles 197 ff of the Criminal Code, the penalty for simple larceny is up to two years' imprisonment or detention. The penalties for aggravated theft and robbery with violence or intimidation are, respectively, 3 months' to 3 years' and 2 to 6 years' imprisonment. Under articles 208 ff CC, simple fraud is punishable by 3 months' to 3 years' imprisonment. Under Article 208 CC, the penalty for agreements and bribery to distort the outcome of public tendering or procurement proceedings is also 3 months' to 3 years' imprisonment, as well as exclusion from participation in future proceedings for up to six years. Falsifying company accounts is punishable by 1 to 4 years' imprisonment, and dishonest management of an undertaking (Article 240 CC) by 18 months to 3 years, where there are elements of corruption. In the case of offences against the public service, misappropriation of documents (Article 374 CC), extortion or dishonest receipt of money by an official (Article 378 CC), and simple misappropriation of public property (Article 399 CC) are all punishable by 3 months' to 3 years' imprisonment, generally in combination with temporary professional disqualification. The interference of private interests in the public service (Article 391 CC), prohibited negotiations (Article 392 CC) and simple misuse of privileged information (Article 393 CC) are punishable by detention accompanied by temporary professional disqualification, and sometimes a fine.
33. The application of confiscation measures and the legal liability of legal persons in relation to the various bribery and trading in influence offences are dealt with in Article 386b CC.

#### Statistics and judicial decisions, case-law

34. The courts have not handed down any decisions under articles 380 to 386 CC concerning bribery of and trading in influence with public officials. However, the GET is aware of two cases raising such issues. The first concerned a police officer who failed to carry out checks on a person in exchange for favours from that individual's brother. The case was discontinued by a judge on the grounds that as the favours in question could not be valued financially, no offence had been committed. A second case was being investigated at the time of the on-site visit.

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

35. The bribery of members of domestic public assemblies is an offence under the previously mentioned articles 380 and 381 of the Criminal Code on the bribery of authorities and officials, since under Article 32 the notion of authority applies to the following categories of persons: "authorities are persons who, whether or not they are public officials, individually or collectively are empowered to issue orders or exercise their own jurisdiction. Authorities also include members of parliament, members of municipalities, the judicial service commission, the court of auditors and the prosecution service, the ombudsman and any other persons with statutory powers to exercise institutional functions". The offences therefore apply to members of public legislative and administrative assemblies. Moreover, Andorran members of parliament and members of municipal assemblies and of certain other collegial bodies are referred to explicitly.

36. The elements of the offence of bribing a public official apply equally to members of assemblies. There are no relevant judicial decisions or case-law on the subject.

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

37. The relevant provisions are those of Article 382 of the Criminal Code, which extends the application of articles 381 and 382 on the bribery of authorities or public officials to various other categories of persons. The October 2008 amendments introduced a new paragraph 1, which includes foreign public officials:

##### ***Article 382 CC – Other active subjects of bribery***

*The offence in the two preceding articles concerning the authorities or public officials also applies to situations in which the actions or decisions described are taken against or by a foreign or international public official or a member of an international or supranational parliamentary assembly.*

*This applies also to jurors, arbitrators, experts, interpreters or any other persons exercising public authority, with the penalty of disqualification from occupying a public post replaced by disqualification from exercising the profession or post concerned.*

38. The elements of the offence in articles 380 and 381 CC on bribery of authorities or public officials therefore also apply in the same way to situations involving foreign public officials. As described earlier in paragraph 16, under Article 32 of the Criminal Code, "public officials are persons who exercise public duties, whether or not delegated, in accordance with the law, or as a result of election or appointment by a competent authority". The notion of foreign public official is therefore based on a functional criterion, that of exercising public duties for another state, irrespective of nationality.
39. There are no relevant judicial decisions or case-law on the subject.

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

40. As noted in paragraph 7, Andorra entered several reservations when it ratified Convention 173, including one in which it "reserves its right to apply Articles 6 and 10 to the members of foreign public Assemblies and to the members of international parliamentary Assemblies". So although Article 382.1 of the Criminal Code extends the scope of articles 380 and 381 to various other categories of persons, members of foreign public assemblies are not among those mentioned in this article.

##### ***Article 382 CC – Other active subjects of bribery***

*The offence in the two preceding articles concerning the authorities or public officials also applies to situations in which the actions or decisions described are taken against or by a foreign or international public official or a member of an international or supranational parliamentary assembly.*

*(...)*

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

### **Definition of the offence**

41. One of the other reservations entered when Andorra ratified Convention 173 concerns corruption in the private sector: "Andorra declares that it will establish as a criminal offence the conduct referred to in Articles 7 and 8, in accordance with its domestic law, only when it will be qualified as such by the Criminal Code of the Principality of Andorra." The answers to the questionnaire indicate that, to date, corruption in the private sector has not been made an offence. Nevertheless, the GET notes that corruption in relations between financial and commercial bodies is not entirely absent from the Criminal Code. The October 2008 amendments introduced a new Article 240 CC establishing a new offence of dishonest management of an undertaking. Paragraph 2 of this article makes passive bribery (and only passive bribery) an aggravating circumstance of the offence of dishonest management, liable to a sentence – 18 months' to 3 years' imprisonment – comparable to that applicable to aggravated judicial bribery.

#### ***Article 240 CC - Dishonest management of an undertaking***

*The de facto or de jure directors and managers of a company or undertaking who, for their own benefit or that of a third party and taking advantage of their position and responsibilities, undertake improper operations that compromise the competitiveness of that company or undertaking shall be liable to three months' to three years' imprisonment.*

*When the aforementioned actions have been taken by the de facto or de jure director or manager, as part of the ordinary activities of the company or undertaking, as a result of having requested or received, personally or via an intermediary, advantages with a potential financial value for his or her own benefit or that of a third party, or having accepted such an offer or promise, the penalty shall be in the upper half of that prescribed in the first paragraph.*

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

42. Paragraph 1 of Article 382 of the Criminal Code, in combination with articles 380 and 381, refers explicitly to the bribery of international public officials:

#### ***Article 382 CC – Other active subjects of bribery***

*The offence in the two preceding articles concerning the authorities or public officials also applies to situations in which the actions or decisions described are taken against or by a foreign or international public official or a member of an international or supranational parliamentary assembly.*

*(...)*

43. The elements discussed with reference to articles 380 and 381 therefore apply in this case. There are no relevant judicial decisions or case-law on the subject.

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

44. As noted in paragraph 7, when it ratified Convention 173 Andorra entered several reservations including one in which it "reserves its right to apply Articles 6 and 10 to the members of foreign public Assemblies and to the members of international parliamentary Assemblies". Despite this reservation, steps have been taken to transpose Article 10 of the Convention via Article 382 of the Criminal Code, which extends the scope of articles 380 and 381 to members of international or supranational parliamentary assemblies:

#### ***Article 382 CC – Other active subjects of bribery***

*The offence in the two preceding articles concerning the authorities or public officials also applies to situations in which the actions or decisions described are taken against or by a foreign or international public official or a member of an international or supranational parliamentary assembly.*

*(...)*

45. The elements discussed with reference to articles 380 and 381 CC therefore apply in this case. There are no relevant judicial decisions or case-law on the subject.

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

46. Bribing judges and officials of international courts is an offence under the specific provisions of Article 385b of the Criminal Code, which like Article 382 CC extends certain basic provisions, in this case those of articles 383 to 385 CC on judicial bribery, to these other categories of persons.

#### ***Article 385 CC – Other active subjects of bribery***

*The provisions of the three preceding articles relating to judges are also applicable when the acts described are committed against or by an official of an international court.*

47. The elements discussed with reference to articles 383 and 385 CC (see paragraphs 13 ff) therefore apply in this case. There are no relevant judicial decisions or case-law on the subject.

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

48. The third and last reservation entered by Andorra when it ratified Convention ETS 173 concerned Article 12 – trading in influence: "Andorra reserves its right not to establish as a criminal offence the conduct referred to in Article 12, when it is only an attempt in accordance with its domestic law." Nevertheless, the Andorran Criminal Code does recognise the offence of trading in influence, which at least partially includes the elements of Article 12 of the Convention. However, the offence is conceived in a different way, since it is concerned firstly with the relationship between two persons, the one exerting influence and the one who is influenced, who are in direct contact when the influence is being used. Article 386 CC does not, as such, envisage the hypothesis – as in the Convention - of a three way relationship in which an intermediary who sells his or her influencing services to a purchaser stands between that person and the person in the public sector who is the target of the influence.

### **Article 386 CC – Trading in influence**

1. Persons who exercise influence on an authority or official in connection with any situation on the basis of their personal relationship with that or another official or authority to obtain a decision that could entail, directly or indirectly, a financial advantage for them or for third parties shall be liable to detention and a fine of up twice the advantage sought or obtained. The court may also order disqualification from dealings with the public authorities of up to three years.
2. The authority or official concerned shall be liable to the same penalties and suspension from a public post of up to three years.
3. When the perpetrator is an authority or official and the influence and the influence derives from the powers inherent in the post or any personal or hierarchical relationship, he or she shall be liable to three months' to three years' imprisonment, a fine of up twice the advantage sought or obtained and suspension from a public post of up to five years.

#### Elements and aspects of the offence

*"Asserts or confirms that he or she is able to exert an improper influence over the decision-making, whether or not the influence is exerted or the supposed influence leads to the intended result"*

49. Paragraph 1 of Article 386 CC establishes an offence of active trading in influence, that is to say the fact of any individual exercising influence on an authority or official. Some of the basic elements of Article 12 of the Convention, such as the promising, giving or offering, directly or indirectly, of any undue advantage for a consideration, are absent, because the key element of the offence is the objective sought, namely obtaining a decision – abstention is not covered – that could lead directly or indirectly to a financial advantage. However, it is of little importance whether or not this result was obtained. On the other hand the influence must be clearly demonstrated and must have been exercised for the offence to have occurred. The target of the influence, who is the same as the perpetrator of the passive trading in influence covered by paragraph 2 of this article (see below), is the authority or official. Article 386 CC does not specify whether this can only be a national authority or official, as in articles 380, 381, 383, 384 and 385 CC, or whether it includes counterparts working for other governments or at international level, as covered by articles 382 and 385b CC. As far as the beneficiary of the effects of the influence is concerned, s/he can be a third party.
50. Article 386.2 CC establishes the offence of passive trading in influence, meaning authorities or public officials once they allow themselves to be influenced. As undue advantage is not a necessary material element of the offence, the notions of requesting, receiving or accepting the offer or the promise of such an advantage are absent.
51. Paragraph 3 makes it an aggravating circumstance if the perpetrator of the offence is him or herself an authority or official, and is therefore concerned with trading in influence occurring entirely within the public sector.
52. The notion of intermediary is absent from the offences in Article 386 CC, even though it does use the term "directly or indirectly", which actually refers to the means of obtaining the financial advantage sought. The influence must therefore be exercised directly.

## Sanctions

53. The penalties are the same for those who request undue influence and those who exercise it: detention and a fine of up twice the advantage sought or obtained. The court also has the additional option of ordering disqualification from dealings with the public authorities or professional suspension of up to three years. In the case of aggravated trading in influence, however, when the person seeking influence for his or her benefit is a public official, the penalty of detention is replaced by up to three years' imprisonment and the maximum period of suspension is raised to five years.

## Statistics and judicial decisions

54. There are no relevant judicial decisions or case-law on the subject.

## **Bribery of domestic and foreign arbitrators (ETS 191, articles 1-3 and 4)**

55. As noted in paragraph 8, Andorra has not yet ratified, or signed, the additional Protocol to the Criminal Law Convention on Corruption (ETS 191). Article 382.2 of the Criminal Code, in combination with articles 380 and 381, make the active and passive bribery of national arbitrators an offence. The elements discussed in relation to articles 380 and 381 are therefore applicable to the bribery of arbitrators, subject to an adjustment of the penalties, with disqualification from occupying a public post replaced by disqualification from exercising the profession or post concerned.

### ***Article 382 CC – Other active subjects of bribery***

*The offence in the two preceding articles concerning the authorities or public officials also applies to situations in which the actions or decisions described are taken against or by a foreign or international public official or a member of an international or supranational parliamentary assembly.*

*This applies also to jurors, arbitrators, experts, interpreters or any other persons exercising public authority, with the penalty of disqualification from occupying a public post replaced by disqualification from exercising the profession or post concerned.*

56. There are no further details concerning the notion of arbitrators, in particular whether it covers those carrying out their duties in accordance with domestic law on arbitration. Bribing foreign arbitrators is not currently an offence.
57. There are no relevant judicial decisions or case-law on the subject.

## **Bribery of domestic and foreign jurors (Articles 1.3, 5 and 6 of ETS 191)**

58. The situation regarding the bribery of domestic and foreign jurors is the same as for arbitrators. The list of categories of persons in Article 382.2 CC explicitly includes national jurors. These provisions do not cover foreign jurors. There are no relevant judicial decisions or case-law on the subject.

## **Other issues**

### **Participatory acts**

59. Under Article 20 of the Criminal Code perpetrators and their accomplices are liable for criminal offences. The perpetrator of an offence is deemed to be the individual who committed it personally, jointly or through the agency of a person whom he or she used as an instrument. Under Article 21 CC, persons who directly and knowingly incite one or more other persons to commit an offence are considered to be perpetrators. Accomplices to offences are persons who knowingly co-operate by prior or simultaneous action or omission in the commission of an offence (Article 23). Under Article 53 CC, accomplices are liable to half the relevant sentence provided for in the legislation.

### **Jurisdiction**

60. The rules governing jurisdiction in Andorra appear in Article 8 of the Criminal Code.

#### ***Article 8 CC – Geographical application of the criminal law***

1. *Andorran criminal law applies to offences attempted or committed in the territory of the Principality and related or indivisible offences committed outside Andorran territory. Andorran criminal law applies to offences attempted or committed aboard Andorran ships and aircraft, and in Andorran airspace. It also applies when aircraft land on Andorran soil.*
2. *Andorran criminal law applies to any offences attempted or committed outside of Andorran territory by persons of Andorran nationality.*
3. *Andorran criminal law applies to any offences attempted or committed outside of Andorran territory if the victim is of Andorran nationality.*
4. *In the circumstances covered by paragraphs 2 and 3, the criminal offence will only be prosecuted if the following conditions are met:*
  - a. *The offence is more than a petty offence in the country where it was committed and is not time-barred;*
  - b. *The offender has not been acquitted, pardoned or convicted of the offence or, in the last-named case, has not completed the whole of the sentence. In the latter case, the sentence served cannot exceed the maximum specified in the Criminal Code for the same offence, and the time served abroad must be deducted.*
  - c. *The prosecution service has lodged a complaint.*
5. *Andorran criminal law applies to any offence attempted or committed outside of Andorran territory against the Constitution, the security of the Principality and its institutions or authorities, and to the offences of the forgery or counterfeiting of Andorran documents, currency or official seals.*
6. *Andorran criminal law applies to any offences attempted or committed outside of Andorran territory if an international agreement grants jurisdiction to the Andorran courts.*
7. *The heads of foreign states enjoy immunity during their presence on Andorran territory for offences committed during the exercise of their functions, other than war crimes, crimes against humanity and other offences provided for in international treaties in force in Andorra.*

*Accredited foreign diplomatic representatives enjoy the immunities provided for in international treaties in force in Andorra.*

*8. Andorran criminal law applies to offences attempted or committed outside of Andorran territory for which the maximum sentence, under Andorran law, is more than six years' imprisonment and which can be classified as genocide, torture, terrorism, drug trafficking, arms trafficking, counterfeiting, money and securities laundering, piracy, aircraft hijacking, slavery, trafficking in children, sexual offences against minors and the other offences provided for in international treaties in force in Andorra, so long as the offender has not been acquitted, pardoned or convicted of the offence or, in the last-named case, has not completed the whole of the sentence. If the offender has served part of the sentence, this must be taken into consideration and the sentence reduced proportionately.*

61. Paragraph 1 therefore establishes the Principality's jurisdiction for all offences committed fully or in part in Andorran territory, whatever the perpetrator's or perpetrators' nationality. Paragraphs 2 and 3 establish the principle of jurisdiction for offences committed outside the country by Andorran nationals or by foreign nationals against Andorran citizens. It should be noted that Andorran public officials who do not have Andorran nationality have an Andorran service passport and are thus deemed to be Andorran nationals. However, for offences committed abroad paragraph 4 specifies certain prior conditions that must be met, namely dual criminality and the initiation of proceedings by the prosecution service.
62. In addition, paragraph 5 establishes the principle of extended jurisdiction for offences committed outside of Andorra against the country's authorities or institutions, among other circumstances. Finally, paragraph 6 refers to the rules governing jurisdiction provided for in treaties to which Andorra is a party, which is the case with Convention ETS 173 but not Protocol ETS 191. However, the Andorran authorities consider that this article would not permit the direct application of the Convention's rules of jurisdiction, since its Article 17 leaves it to the contracting parties to give effect to the rules it lays down.
63. There is currently no relevant case-law.

#### Time limit for prosecution

64. Article 12 of the Andorran Criminal Code distinguishes between three categories of offences: major, lesser and petty. The last category of offences, which are listed in part III of the code, does not include any of the ones considered here. The distinction between major and lesser offences is based on the dual criterion of the type and the level of penalty applicable, as specified in articles 36 and 37 CC.
65. It emerges from the foregoing description that all the types of active bribery listed are lesser offences, with the exception of aggravated bribery of a judicial authority (Article 384.2 CC) and active bribery of officials of international courts (Article 385b CC). Passive bribery is more frequently a major offence: a. aggravated bribery of an authority or official (Article 381 CC), including foreign and international officials and members of international parliamentary assemblies (Article 382.1 CC) and jurors, arbitrators, experts, interpreters and other persons undertaking public duties (Article 382.2 CC); b. all cases of bribery of judicial authorities (articles 383.1 and 384.1 CC) and officials of international courts (Article 385b CC). Trading in influence is only a major offence in its aggravated form (Article 386.3 CC).

66. Under Article 81 on the time limits for criminal liability, the limitation periods for the offences listed above are four years for lesser offences and ten years for major ones. Under articles 82 and 83 CC, the period starts when the action or omission in question ceases and in certain cases once the results have occurred. In the case of continuous offences the period starts on the day of the last offence. Investigative and procedural measures and the appearance of the accused in court interrupt the limitation period. After each interruption, the period restarts from zero and there is no absolute maximum time limit for prosecution. There is currently no relevant case-law.

### Defences

67. Article 380 on the active and passive bribery of authorities and officials, described in paragraphs 12 ff of this report, includes a paragraph 3 which provides that if offenders report the act of bribery to the authorities before being aware that an inquiry has started this is a ground for exemption from punishment.

#### ***Article 380 CC – Passive or active bribery of an authority or official***

(...)

*3. Individuals who report the act of bribery to the authorities before being aware that an inquiry has started shall be granted exemption from punishment.*

68. According to information received on site, it is the courts that decide whether this ground for exemption applies. However, certain persons spoken to thought that it could also be applied at the preliminary stage of the investigation if the investigating judge and the prosecution service both agreed that the conditions had been met.
69. Finally Article 385 of the Criminal Code, considered in paragraph 15, provides for reduced sentences for persons bribing judges on behalf of a spouse, partner or close relative facing criminal charges.

#### ***Article 385 CC – Mitigated judicial bribery***

*When the subornation on behalf of the accused in criminal proceedings is carried out by the latter's spouse or de facto equivalent, or by a natural or adoptive parent, child, brother or sister, the penalty shall be a fine of up to twice the value of the benefit in the circumstances described in Article 383 and detention in the circumstances described in Article 384.*

70. There are no relevant judicial decisions concerning the application of these grounds of defence.

### **III. ANALYSIS**

71. The law in Andorra was for long heavily influenced by the oral tradition and precedent and has only recently been codified. The first Criminal Code dates from 1990 and the new one from 2005, most recently amended in 2008. This codification was particularly the consequence of Andorra's accession to various international institutions and ratification of international treaties, including the Criminal Law Convention on Corruption (ETS 173). However, it has not yet ratified, or signed, the additional Protocol to the Criminal Law Convention (ETS 191). Andorran law is also influenced by that of its neighbouring countries, in particular Spain. There are few criminal cases, other than ones involving money laundering and drug trafficking, which is possibly explained by the country's size. There is no case-law on bribery and trading in influence, or any cases pending. The Andorran authorities and the relevant professions therefore have no practical experience as yet of the application of the 2005 Criminal Code provisions on bribery and trading in influence. In the absence of such experience, the following analysis is based on an examination of the legislation and discussions with specialists on how that legislation could or should be applied by the courts and the prosecution authorities.
72. Generally speaking, the GET believes that Andorra is legally equipped to respond in large measure to the requirements of the Criminal Law Convention. However, although the legislation on corruption is of recent date and based on the main international instruments there are still gaps and Andorra has made use of the maximum number of reservations permitted by the Convention. Nor does the absence of cases signify that corruption is totally absent from the Principality. The GET wondered why there had been no criminal prosecutions or convictions for corruption offences. Admittedly, as some of those spoken to on the visit pointed out, the small size of the Andorran community probably gives social control a greater role than elsewhere and apparently helps to reduce certain criminal tendencies. At the same time though, they also acknowledged that the closeness of social ties was a negative constraint on the reporting of corruption. Problems of managing information were also reported to the GET<sup>5</sup>. Moreover, according to the study of corruption resulting from the recommendations of the second round evaluation report, which is currently being finalised, it would appear that corruption affecting public institutions mainly takes the form of exchanges of services and favours. Such exchanges seem to be fairly widespread and generally accepted, since they are not associated in people's minds with corruption or treated as such in the Criminal Code. This issue, together with other gaps in the legislation, will be considered in more detail below.
73. The categories of persons covered by bribery and trading in influence offences in the public sector are "authorities and officials", a notion taken from Spanish law and defined in very broad terms in Article 32 of the Criminal Code. According to this article, "authorities are persons who, whether or not they are public officials, individually or collectively are empowered to issue orders or exercise their own jurisdiction." This definition includes members of domestic public assemblies, whether legislative or administrative. Members of the Andorran parliament and members of municipal councils are also referred to specifically in the remainder of the article. The notion of authorities also includes members of the government, mayors and prosecutors. Meanwhile, judges are the subject of specific articles of the Criminal Code on judicial bribery, on the grounds that judicial impartiality merits extra protection. The notion of public official must also

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<sup>5</sup> For example, between 2000 and 2009, disciplinary records were partly held centrally and partly individually by various government departments. Most of the centralised files held by the secretariat of the public service (which manages the most serious cases, including corruption, directly) disappeared in 2009, when the government changed. The secretariat is currently trying to restore order and to centralise the management of the various cases but it cannot say with certainty whether or not there are disciplinary procedures for cases of corruption.

be interpreted broadly to include all those exercising public office by dint of their administrative status, delegation, election or simple appointment. The Andorran authorities said that the courts interpreted the term public official broadly, so as to include, for example, employees of public enterprises or private enterprises performing public functions. The GET is satisfied with these explanations and considers that the notion of authority or public official as understood in the Andorran Criminal Code and case-law is compatible with articles 1(a) and (b) of the Convention on the notion of public official and judge.

74. The definition of bribery of domestic public officials appears in articles 380 (simple bribery) and 381 (aggravated bribery), and in articles 383 and 384 of the Criminal Code in the case of the simple and aggravated bribery of judges. The notions of active bribery - promising, offering or giving an advantage – and passive bribery – requesting, receiving or accepting the offer of an advantage – use similar language to the Convention and do not call for any particular comments. However, this is not the case with the other elements of the offence of bribery, as defined in these articles. Firstly, these provisions, like Article 386 CC on trading in influence, which will be considered later, make it an offence to give or receive "advantages with a potential financial value". Admittedly, this definition potentially covers all the advantages to which a material value can be attributed, including formal and courtesy gifts. The Andorran authorities confirmed that there was no case-law on the admissible value of such gifts, even though the issue is raised in the recent central government code of ethics, distributed in June 2010. In this respect, the offences of bribery and trading in influence go beyond the Convention requirements, which only refer to giving or receiving an "undue advantage", a notion that does not appear in the Andorran legislation. On the other hand, restricting the offences to advantages with a potential financial value has the much more serious consequence that non-material advantages, such as awarding honorary titles or granting favours of various sorts, including sexual ones, are not covered. Even though some of those met on the visit tried to maintain that a financial value could be attributed to any advantage, the GET does not agree and considers in contrast that there are some to which no financial value can be attached. Examples include advantages of a unique sort, or that only have a value for the recipient, such as certain collectors' items. It is also difficult to place a financial value on admission to a school, the award of a diploma or honorary distinction or using one's position to give someone special treatment, in the expectation that this will be returned in the future. Others did agree that non-material advantages were not covered by the current legislation and that this even constituted the most significant gap in the law, since as noted earlier exchanges of favours are very widespread and even generally accepted in Andorra. They thought that this approach had practical consequences for the prosecution of corruption cases. For example, a case was cited involving an exchange of favours involving the customs service where proceedings had to be dropped because what took place could not be classified as corruption. The GET notes that the Convention requires the granting or receipt of any undue advantage, even if it is non-material, to be an offence. It therefore recommends **that the notion of advantage in the offences of bribery and trading in influence be extended to take clear account of all forms of benefit, material and non-material and whether or not they have a calculable financial value, in accordance with the notion of "any undue advantage", as it appears in the Criminal Law Convention on Corruption (ETS 173).**
75. The active bribery offences in articles 380.2, 381.2, 383.2 and 384.2 CC raise another problem, owing to the excessively restrictive wording of the referrals back to the previous paragraphs of these articles, on passive bribery. These make it an offence to give an advantage "with a view to securing one of the acts or decisions described in the previous paragraph". The wording chosen for this referral back therefore only covers acts or decisions taken in exchange for the advantage, and not the whole of the previous paragraph. The effect is that the use of intermediaries and the

granting of a benefit to a third party are not made specific active bribery offences. As regards the use of intermediaries, the Andorran authorities explained that it was not explicitly provided for as the author of the offence is a private person – as opposed to an authority, a public official, a *battle* or a judge – and is subject as such to the general provisions of article 21 of the Criminal Code, which provides for cases in which the author commits the offence “through somebody who s/he uses as an instrument”. Even though it may accept this explanation, the GET notes that, in the absence of any bribery case decided upon in court to date, it has not been confirmed by case-law (nor in any other appropriate source, such as a general circular from the prosecution service or an explanatory memorandum to the legislation<sup>6</sup>). The GET is therefore concerned about the risk of uncertainty caused by the explicit mention made of intermediaries for passive bribery offences but not for active bribery offences. It therefore recommends, **as regards active bribery offences, (i) to criminalise the granting of advantages to third party beneficiaries and (ii) to ensure that the use of intermediaries is unambiguously covered.**

76. The GET also notes that the simple form of bribery in articles 380 and 383 of the Criminal Code only appears to cover positive actions and not omissions. Omissions only appear to be offences when they are elements of aggravated bribery under articles 381 and 384 CC and can be deemed to be "unjust". The GET is also concerned about the notion of "unjust" action or omission, which seems fairly imprecise. The term is not defined in the legislation. There is no case-law on the subject and those whom the team met on the visit were unable to throw any light on it. It also appears to be too restrictive to cover actions and decisions appertaining to officials' discretionary powers, such as certain land-use planning decisions or awarding a public contract to one firm rather than another, when both satisfy the minimum conditions. Similarly, one of the elements of aggravated bribery in Article 381 is the taking of actions or decisions "of a political nature", another notion that is not defined in the legislation. The GET therefore recommends **(i) to criminalise omissions, whether they are "unjust" or not; and (ii) to clarify the notions of "unjust" actions or omissions and actions or decisions "of a political nature" in Articles 381 and 384 of the Criminal Code.**
77. Bribing foreign and international public officials is an offence under Article 382 of the Criminal Code, which extends the application of articles 380 and 381 on the bribery of domestic public officials to certain other categories of persons, namely foreign and international officials and members of international or supranational parliamentary assemblies. Similarly bribing judges and officials of international courts is a specific offence under Article 385b of the Criminal Code, which extends the coverage of certain basic provisions, namely articles 383 to 385 CC on judicial bribery, to officials of international courts, a notion that here includes judges. Members of foreign public assemblies, in contrast, are not mentioned in either of articles 382 or 385 CC, and are therefore not covered by Andorran legislation. Andorra has also entered two reservations to the Convention, concerning its articles 6 (members of foreign public assemblies) and 10 (members of international parliamentary assemblies). With regard to the latter, the GET notes that bribing members of international parliamentary assemblies criminalised by Andorran legislation in the same terms as the Convention (“member of an international or supranational parliamentary assembly”). The reservation concerning article 10 of the Convention seems therefore superfluous and may furthermore cast unnecessary doubts about whether bribery of members of international parliamentary assemblies is an offence under Andorran legislation. The GET consequently recommends **that consideration be given to (i) establishing an offence of bribing members of foreign public assemblies, in accordance with article 6 of the Criminal Law Convention**

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<sup>6</sup> During the discussions on this report, the Andorran authorities indicated that such measures aimed at clarifying the use of intermediaries could be taken in the future when implementing the recommendations, rather than by introducing a legislative amendment which would perturb the Criminal Code's logic.

**on Corruption (ETS 173) and, thus, (ii) withdrawing or not renewing the reservations to this article, as well as to article 10 of the Convention concerning members of international parliamentary assemblies.**

78. Andorra has not signed or ratified the additional Protocol to the Criminal Law Convention and is not therefore bound by its provisions. Nevertheless, Andorran legislation does make it an offence to bribe domestic arbitrators and jurors, who are referred to explicitly in Article 382.2 CC and to whom, by extension, the basic bribery provisions therefore apply. However, the bribery of foreign arbitrators and jurors is not an offence. In this context, the GET was pleased to learn during its visit that there was no obstacle in principle to the signature and ratification of this instrument, but that the Andorran authorities had simply not yet been able to consider the matter because of the significant number of international issues currently outstanding, a situation aggravated by the limited number of personnel available. Since part of the subject matter of the Additional Protocol is already included in the legislation, the GET encourages Andorra to give higher priority to this subject and recommends that **an offence be established of the bribery of foreign arbitrators and jurors and Andorra ratifies the additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible.**
79. Another of the reservations entered by Andorra when it ratified the Convention concerned articles 7 and 8 CC on bribery in the private sector. This is not explicitly an offence in Andorran legislation, although under Article 240.2 of the Criminal Code, on the dishonest management of an undertaking, it is an offence liable to an aggravated penalty for a *de facto* or *de jure* director or manager of a company to take wrongful or improper management decisions "as a result of having requested or received, personally or via an intermediary, advantages with a potential financial value for his or her own benefit or that of a third party, or having accepted such an offer or promise". Those whom the GET met said that the reason for the current situation, particularly the fact that Article 240 CC makes no reference whatever to active bribery, was that this type of bribery was perceived as being less serious than the bribery of public officials. The GET wishes to stress that corruption in the private sector is inimical to values such as confidence and fairness that are necessary means of maintaining and developing social and economic relations. Such corruption also has an adverse effect on the principle of fair competition between businesses, especially as the sums – and potential bribes - involved in commercial transactions are often considerable. Such concerns are not entirely ignored by the Andorran Criminal Code, as shown by Article 240 CC, which makes the active and passive bribery of directors and managers of a company an aggravating circumstance of the lesser offence of dishonest management of an undertaking. The GET therefore recommends that **consideration be given to (i) making bribery in the private sector an offence, in accordance with articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) and, thus, (ii) withdrawing or not renewing the reservation to these articles of the Convention.**
80. The final reservation entered by Andorra when it ratified the Criminal Law Convention concerns Article 12, on trading in influence. The Andorran Criminal Code does include an offence in Article 386 CC entitled trading in influence. However, this is conceived differently to the one in the Convention. It only covers certain aspects of the latter, which may explain the reservation. Thus the Convention establishes an offence involving a relationship between three persons, in which an intermediate individual exerts influence on behalf of a person wishing to benefit from this influence on someone in the public sector, who is thus the target of this influence. In contrast, the offence in Article 386 of the Criminal Code is primarily concerned with a relationship between two persons – the one wielding influence and the one who is influenced – who are in direct contact. The notion of remuneration does not appear in this article. The offence consists of the person

exerting influence obtaining from the authority or public official who is the target of that influence a decision – abstention is not covered – that could lead to a direct or indirect financial benefit. The Article 386 offence, like the Convention, includes both active and passive elements. The two also agree that it is of little importance whether or not the decision sought is actually obtained. However, other basic elements of the Article 12 offence are missing. As has been shown, this is the case with the notion of remuneration – the fact of promising, giving or offering an undue advantage and of requesting, receiving or accepting it, in exchange for the influence. This is also the case with the notion of an intermediary. Moreover, unlike Article 12, the influence must be clearly demonstrated and must have been exercised for the offence to have occurred. Finally, articles 382 and 385b of the Criminal Code, which deal with the international dimension of bribery (see paragraph 77), make no reference to Article 386, so it appears that this does not apply to foreign public officials, members of foreign public assemblies, international public officials, members of international parliamentary assemblies and judges and officials of international courts. In view of these significant variations from Article 12 of the Convention, the GET recommends that consideration be given to (i) bringing the offence of trading in influence into line with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173), by including, in particular, the notions of remuneration and intermediaries and by extending the offence to cases in which influence has not been clearly demonstrated and/or exercised and ones involving foreign public officials, members of foreign public assemblies, international public officials, members of international parliamentary assemblies and judges and officials of international courts; and, thus, (ii) withdrawing or not renewing the reservation to this article of the Convention.

81. The sanctions provided for in the Andorran Criminal Code for bribery and trading in influence are detention, which consists of measures to restrict liberty that are alternatives to prison and last a maximum of six months, imprisonment, fines and temporary suspension or disqualification from a post or the entire public service or from dealings with the public authorities. The penalties are always cumulative, apart from those for active trading in influence, and are higher for judicial bribery than for bribing public officials, which the Andorran authorities explained by the particular need to protect judicial impartiality. They vary according to the value of the advantage requested or given and the seriousness of the actions or decisions concerned, such as the "unjust" actions, delayed decisions and actions or decisions of a political nature that come within the scope of aggravated bribery of public officials (Article 381 CC) and aggravated judicial bribery (Article 384 CC). The penalties range from a simple fine of three times the value of the advantage for "simple" bribery of an authority or public official, accompanied by up to three years' suspension from public duties in the case of simple passive bribery, to up to five years' imprisonment for aggravated judicial bribery. The GET is concerned that articles 380 and 386.1 of the Criminal Code on simple bribery and trading in influence of an authority or public official do not carry a penalty of imprisonment. Given the lack of clarity surrounding the notions of actions and decisions that are unjust, or of a political nature, (see paragraph 76), which may make it difficult to apply Articles 381 and 384 CC, the articles on simple bribery appear to be the ones that would apply in the majority of corruption cases. The GET thinks that the fact that such cases cannot be punished by imprisonment, and that in the case of active bribery of an authority or public official the penalty is simply a fine, sends out the wrong signal about the gravity of such conduct. A similar problem arises with Article 385 CC, under which if bribery on behalf of the accused in criminal proceedings is carried out by the latter's spouse or partner, or by a parent, child, brother or sister, the penalty for the briber is simply a fine, in the case of simple bribery, or detention, if it is aggravated. This seems to be incompatible with parliament's stated aim, as expressed in articles 383 and 384 CC, to impose heavier penalties for judicial bribery. In the light of the foregoing, the GET has serious reservations about whether the penalties in articles 380, 385 and 386.1 are

sufficiently effective, dissuasive and proportionate and therefore recommends **that the penalties provided for in articles 380, 385 and 386.1 of the Criminal Code be increased.**

82. The time limit for bringing prosecutions is four years for most bribery and trading in influence offences – the "lesser" ones – and ten years for the "serious" ones. Any procedural measure interrupts this limitation period and there is no absolute maximum time limit for prosecution. The GET could not ascertain whether, in the absence of criminal proceedings or of sentences in bribery cases, the time limit of four years was in practice an obstacle for prosecution; in the Andorran context – smooth relations between the relevant authorities and no major backlog of criminal cases – the situation does not appear problematic in practice. The GET also notes that the stiffer penalties recommended above may also lead to an extension of the relevant time-limit.
83. Article 8 of the Criminal Code lays down the rules governing the jurisdiction of Andorran courts. This extends to all offences committed wholly or in part on Andorran territory and ones committed outside the country by Andorran nationals or by foreign nationals against Andorran citizens, institutions or authorities. The Andorran authorities explained that – in principle – all Andorran public officials without Andorran nationality hold Andorran service passports and are thus deemed to be Andorran citizens for the purposes of the rules governing jurisdiction. However, the GET notes that there have been no judicial decisions to verify this explanation. Moreover, the GET has been unable to establish with certainty which paragraph of Article 8 CC would enable Andorra to prosecute not acts of violence or threats to the country's security but the active bribery of an Andorran public official by a foreign national when the events themselves occurred abroad, a situation provided for in Article 17 paragraph 1c of the Convention. This issue needs to be re-examined in depth and must be clarified. Finally, one clear problem arises from the fact that Andorra only claims jurisdiction for offences committed abroad if the offence in question is also an offence in the country where it was committed – the dual criminality requirement. This condition, about which, the GET notes, Andorra has not entered any reservations, restricts the jurisdiction of the Andorran courts in a manner incompatible with Article 17 of the Criminal Law Convention. The GET therefore recommends **that steps be taken to (i) ensure that Andorra has jurisdiction to deal with cases of bribery or trading in influence committed abroad by one of its public officials or involving one of its public officials or any other persons referred to in Article 17.1.c of the Criminal Law Convention on Corruption and (ii) repeal the dual criminality requirement concerning bribery and trading in influence offences committed abroad.**
84. Finally Article 380 of the Andorran Criminal Code provides a special ground of defence or for exemption from punishment, also known as "effective regret", for individuals who report acts of bribery to the authorities before being aware that they are the subject of inquiries. It appears that this provision has never been used in practice, which leads the GET to suspect that it is of little value in detecting corruption. Moreover, there seemed to be some disagreement among those it spoke to about the conditions governing the application and effects of this ground of defence. For example, it was impossible to establish with certainty up to what point in the procedure this ground could be invoked. It would appear that the relevant court can assess the circumstances of the case but that, if the conditions for the application of this special defence are met, it would necessarily lead to total exemption from liability or punishment for the individual concerned. It would appear that such exemption is not automatic and that the relevant court can assess the circumstances of the case. Where such provisions exist in other countries, the GET has so far stressed the need to see how they are applied in practice. Given Andorra's circumstances and the fact that, in the short term, there are few cases to serve as a basis for such an enquiry, there should be further consultations with experts and professionals in the field. The GET therefore

recommends (i) to clarify the conditions for invoking the special defence of effective regret and accordingly revise the mandatory exemption from liability or punishment and (ii) in the event of the application of this special defence, that the conditions for its applicability be studied as regards its possible uses and the risks of abuse.

#### **IV. CONCLUSIONS**

85. Generally speaking, Andorra is legally equipped to respond to a certain extent to the requirements of the Criminal Law Convention on Corruption, which it has ratified. On the other hand it has not signed or ratified the Additional Protocol to the Criminal Law Convention on Corruption (STE 191), which it should do as soon as possible. Although the legislation on corruption is of recent date and based on the main international instruments there are still gaps, as shown by the fact that Andorra has made use of the maximum number of reservations permitted by the Convention. The absence of prosecutions and convictions, and even of cases pending, can be at least partly explained by the restrictive nature of the bribery and trading in influence offences, which are only concerned with advantages with a potential financial value, thus excluding non-material benefits. The offences also lack certain other elements required by the Convention, such as abstaining from action in exchange for bribes. The international dimension of the law on corruption also leaves something to be desired, since members of foreign and international public and parliamentary assemblies and foreign arbitrators and jurors are not covered by Andorran legislation. Another significant gap in the legislation concerns corruption in the private sector. This is not an offence as such, which could have an adverse effect on the principle of fair competition between businesses. The offence of trading in influence also needs to be re-examined to ensure that all the elements required by the Convention are included. Finally it is necessary to provide for stiffer penalties for bribery and trading in influence, to abolish the prior conditions for prosecuting these offences when they are committed abroad by or against Andorran citizens and to clarify the conditions for invoking the special defense of effective regret, where individuals giving or receiving bribes can avoid a penalty if they report the offence to the authorities before it is uncovered.
86. In the light of the above, GRECO addresses the following recommendations to Andorra:
  - i. that the notion of advantage in the offences of bribery and trading in influence be extended to take clear account of all forms of benefit, material and non-material and whether or not they have a calculable financial value, in accordance with the notion of "any undue advantage", as it appears in the Criminal Law Convention on Corruption (ETS 173) (paragraph 74);
  - ii. as regards active bribery offences, (i) to criminalise the granting of advantages to third party beneficiaries and (ii) to ensure that the use of intermediaries is unambiguously covered (paragraph 75);
  - iii. (i) to criminalise omissions, whether they are "unjust" or not; and (ii) to clarify the notions of "unjust" actions or omissions and actions or decisions "of a political nature" in Articles 381 and 384 of the Criminal Code (paragraph 76);
  - iv. that consideration be given to (i) establishing an offence of bribing members of foreign public assemblies, in accordance with article 6 of the Criminal Law Convention on Corruption (ETS 173) and, thus, (ii) withdrawing or not renewing the

reservations to this article, as well as to article 10 of the Convention concerning members of international parliamentary assemblies (paragraph 77);

- v. that an offence be established of the bribery of foreign arbitrators and jurors and Andorra ratifies the additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible (paragraph 78);
  - vi. that consideration be given to (i) making bribery in the private sector an offence, in accordance with articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) and, thus, (ii) withdrawing or not renewing the reservation to these articles of the Convention (paragraph 79);
  - vii. that consideration be given to (i) bringing the offence of trading in influence into line with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173), by including, in particular, the notions of remuneration and intermediaries and by extending the offence to cases in which influence has not been clearly demonstrated and/or exercised and ones involving foreign public officials, members of foreign public assemblies, international public officials, members of international parliamentary assemblies and judges and officials of international courts; and, thus, (ii) withdrawing or not renewing the reservation to this article of the Convention (paragraph 80);
  - viii. that the penalties provided for in articles 380, 385 and 386.1 of the Criminal Code be increased (paragraph 81);
  - ix. that steps be taken to (i) ensure that Andorra has jurisdiction to deal with cases of bribery or trading in influence committed abroad by one of its public officials or involving one of its public officials or any other persons referred to in Article 17.1.c of the Criminal Law Convention on Corruption and (ii) repeal the dual criminality requirement concerning bribery and trading in influence offences committed abroad (paragraph 83);
  - x. (i) to clarify the conditions for invoking the special defence of effective regret and accordingly revise the mandatory exemption from liability or punishment and (ii) in the event of the application of this special defence, that the conditions for its applicability be studied as regards its possible uses and the risks of abuse (paragraph 84).
87. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the Andorran authorities to present a report on the implementation of the above-mentioned recommendations by 30 November 2012.
88. Finally, GRECO invites the country's authorities to authorise publication of this report as soon as possible, translate it into the country's official language and publish this translation.