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Second interim report

Third Evaluation Round

Second Interim Compliance Report on Belgium

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

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"Transparency of party funding"

Adopted by GRECO
at its 61st Plenary Meeting
(Strasbourg, 14-18 October 2013)

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I. INTRODUCTION

1. GRECO adopted the Third Round Evaluation Report on Belgium at its 42nd plenary meeting (15 May 2009). The report was made public on 22 June 2009 following authorisation by Belgium (Greco Eval III Rep (2008) 8E, Theme I - "Incriminations" - and Theme II - "Transparency of party funding").

2. As required by GRECO's Rules of Procedure, the Belgian authorities submitted a Situation Report on action taken to implement the recommendations. GRECO selected Andorra and Luxembourg to appoint rapporteurs for the compliance procedure. Ms Clàudia CORNELLA DURANY was appointed in respect of Andorra and Ms Doris WOLTZ in respect of Luxembourg. The GRECO Secretariat assisted them in drawing up the Compliance Report.

3. In the Compliance Report (Greco RC-III (2011) 6E), adopted at its 51st plenary meeting (27 May 2011), GRECO concluded that Belgium had implemented or satisfactorily dealt with only one of the fifteen recommendations contained in the Third Round Evaluation Report. It therefore considered the current very low 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 accordingly decided to apply Rule 32 relating to members found not to be in compliance with the recommendations contained in the mutual evaluation report.

4. In the Interim Compliance Report (Greco RC-III (2012) 5E), adopted at its 55th plenary meeting (16 May 2012), GRECO concluded that there had been virtually no progress, as only recommendation v under Theme II had become partly implemented. It accordingly decided that, in pursuance of Rule 32 para. 2(ii) of its Rules of Procedure, the Chair would send the head of the Belgian delegation a letter, with a 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. In addition, in accordance with Rule 31 para. 8.2, as revised, of its Rules of Procedure, GRECO asked the head of the Belgian delegation to submit, by 28 February 2013, a report on the action taken to implement the outstanding recommendations (recommendations i to iv for Theme I and recommendations ii to xi for Theme II). This information was submitted on 12 June 2013 and complemented on 8 August.

5. This second Interim Compliance Report evaluates the progress made in implementing the outstanding recommendations since the previous interim report, dated May 2012, and provides an overall appraisal of the level of Belgian compliance with these recommendations.

II. ANALYSIS

Theme I – Incriminations

6. It can be recalled that, in the evaluation report, GRECO made 4 recommendations to Belgium under Theme I. In the Compliance Report of May 2011 it concluded that recommendations i to iv had been partly implemented, a situation which was found to be unchanged in the Interim Compliance Report of May 2012.

Recommendation i.

7. *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.

8. GRECO recalls that, to date, this recommendation is still partly implemented. In May 2011 the Belgian authorities had made proposals for a general circular which would address the clarifications called for in the recommendation by including a paragraph to be drawn up by the SPF Justice (the federal ministry). This circular was still at the draft stage in May 2012.

9. The Belgian authorities now indicate that a) the draft circular (including the paragraph on "receipt" of advantages already referred to in May 2012) has not yet been finalised due to the heavy workload of the persons concerned; in any case, as already mentioned, an agreement within the expert network on corruption will be required and b) there has been no new case law on "receipt" and no relevant training activities have taken place since May 2012.

10. GRECO takes note of the lack of progress in implementing this recommendation.

11. GRECO concludes that recommendation i remains partly implemented.

Recommendations ii and iii.

12. *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).

13. GRECO recalls that these two recommendations were deemed "partly implemented". Technical position papers were prepared at the federal ministry level and consultations were initiated with the OECD-GRECO-UN inter-departmental working group in November 2011, but a) this did not result in any real substantive discussion (as bribery in the private sector and trading in influence were not regarded as priorities by the participants in this meeting) and b) no government decision was taken regarding the follow-up to be given to this matter.

14. The Belgian authorities now indicate that new position papers have been prepared and fresh consultations took place with representatives of the prosecution service and the federal police in February and March 2013. GRECO has received a copy of the position papers. During the consultations, possible amendments were presented and the desirable improvements were discussed in substance.[1] Lastly, also in view of the perceived lack of political will in parliament

[11] **Concerning recommendation ii:** The College of Public Prosecutors considers that "in view of adverse publicity's negative impact on an undertaking, forms of action other than criminal proceedings are given preference (for example, discreet

(which did not manage to enact the bill of 2008, aimed at establishing a broader offence of trading in influence, before it was dissolved in May 2010), the justice minister decided that, for the time being, it would be inappropriate to amend the offences of bribery in the private sector and trading in influence. While this political decision was still pending, the Belgian authorities allowed the automatic renewal of the reservations to Articles 7, 8 and 12 of the criminal law convention for a further six-month period (until 31 December 2013). Belgium must therefore decide before 31 December 2013 whether to maintain these reservations. The authorities have announced that, in view of the recent nature of the minister's decision, it is likely that the reservations will be maintained.

15. GRECO notes that an examination in substance and a political decision have in the end taken place, as called for by the recommendations. It is unfortunate that Belgium did not seize this opportunity to bring its definitions of the offences of bribery in the private sector and trading in influence more closely into line with the requirements of the Criminal Law Convention on Corruption (and also the United Nations Convention). This is all the more regrettable in that the practitioners with whom discussions were held are apparently not really hostile to a reform of the offence of bribery in the private sector (their reservations seem primarily to concern the wording proposed by the SPF Justice);[2] some of them even seem to be rather in favour of a reform – as is the case, for instance, of the public prosecutors with regard to trading in influence. GRECO hopes that Belgium will continue to give active consideration to these questions.

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dismissal of the dishonest employee). The proposed amendment consisting in adding the word *"*prior" would not seem to be consistent with the intentions of the GRECO recommendation. In addition, should the proposed amendment be adopted there would continue to be a problem of proof."

The federal police reacted in the same vein: "The proposed addition will apparently deprive the management body of the possibility to redress a situation of bribery. However, it must not be overlooked that, in some cases, the damage to an undertaking's reputation will be so significant that simulating a 'prior authorisation' will be considered the only option. If the proposal is enacted, the focus of the entire issue of the criminal law response to bribery in the private sector will shift from the material act committed to the production of convincing evidence of the prior nature of an authorisation. For example, there is no reason why an authorisation cannot be given orally, thereby posing a problem of legal certainty. Lastly, it must not be forgotten that the payment (by a Belgian undertaking) of sums of money to the person accepting a bribe (even if the whole episode takes place following prior authorisation and criminal proceedings are therefore precluded) still results in application of the special tax rate of 309%, which can nonetheless be considered to constitute a real sanction or a deterrent, and may even prove more dissuasive than a criminal penalty.*"*

Concerning recommendation iii: The College of Public Prosecutors states "a bill to supplement the Criminal Code with an offence of trading in influence committed by private individuals in respect of persons holding public office was tabled in the Senate by Mr Francis Delpérée on 14 January 2008. This bill (Senate document 4-507/1) was examined by the Senate and adopted, on 12 February 2008, by the Senate's Justice Committee and, on 14 February 2008, by the Senate in plenary session. It was transmitted to the Chamber of Representatives the same day. The Conseil d'Etat issued an opinion (No. 44.206/2) on 3 April 2008. It is to be regretted that this bill, which fell into abeyance after the Chambers were dissolved, has remained untouched since 7 May 2010." The College does not comment on the proposed legislation's appropriateness in the sheet on recommendation iii. However, it makes additional observations concerning the numbering of the bill and the terminology utilised.

The federal police expressed a frankly negative viewpoint: "According to the adage, no one can be penalised for an act that was not an offence at the time of its commission, which also implies that the forbidden act must be clearly defined. It nonetheless appears very difficult to arrive at a precise definition of the acts that should be covered by the criminal offence in question. What is the material act involved in trading in influence? The implication is that there is also a "lawful" use of influence, but where is the line drawn and how can this limit be foreseeable for the public*?* We also consider that an offence of 'trading in influence' would take things too far from a practical standpoint. It would pose huge risks for Belgian 'civil society' organisations campaigning for improved accessibility of public buildings, victims' rights and so on. And what about trade unions seeking to influence employers so as to bring the status of manual workers into line with that of office workers? Would that be a punishable act? And what would be a punishable act insufficiently covered by the offences of active and passive bribery, conflict of interest, misappropriation of public funds, etc.?

[2] The proposal is to retain the current wording, which GRECO regards as problematic, but to add an adjective aimed at criminalising acts of bribery perpetrated without the knowledge and the **prior** authorisation of the manager or employer (the Criminal Law Convention uses the concept of acts committed "in breach of [one's] duties").

16. GRECO concludes that recommendations ii and iii have been implemented satisfactorily.

Recommendation iv.

17. *GRECO recommended i) taking 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) considering withdrawing or not renewing the reservation concerning Article 17 of the Convention.*

18. GRECO recalls that this recommendation was deemed "partly implemented" since the reservation to Article 17 of the Convention had been withdrawn – the Belgian authorities in fact indicated that it was no longer justified in the current state of interpretation of the provisions – and that a draft circular on Article 12bis of the Code of Criminal Investigation (hereafter the CCI) was being prepared. The discussion on this draft nonetheless highlighted a number of theoretical and practical problems linked to the question of the application/applicability of that article outside the context of humanitarian protection (the provision indeed assigns Belgium universal jurisdiction in this matter), which were liable ultimately to jeopardise the circular's adoption. Belgium seemed in the end to be moving more towards the solution of amending the legislation.

19. In the fresh information submitted, the Belgian authorities indicate in substance that, following the discussions which continued in 2012 and early 2013, it was finally deemed preferable to abandon, in principle, the idea of a circular and therefore to amend the articles governing Belgium's jurisdiction, in accordance with Article 17 of the Convention and with recommendation iv. A draft text amending Articles 10 quater and 12 of the CCI, produced in January 2013, is currently being discussed at the ministerial level and consultations are taking place with practitioners. It is underlined that these amendments would substantially broaden the Belgian courts' extra-territorial jurisdiction and also require a willingness to eliminate the long-standing dual criminality requirement.

20. The authorities again refer to the fact that, at the one-day training course of 9 November 2011 mentioned in the previous reports, the attention of the specialist judges, prosecutors and police officers present was drawn to this recommendation and to the scope of the relevant articles of the CCI with regard to the prosecution of offences committed abroad.

21. GRECO takes note of the information provided and of the current change of approach regarding the follow-up to be given to this recommendation. It encourages Belgium to identify the best solution to this end and to ensure that the condition of eliminating the dual criminality requirement is taken into account.

22. Concerning the presentation given at the training session on 9 November 2011, GRECO reiterates that it seemed to focus on providing general information on the recommendations made by GRECO rather than dealing with the question of their implementation. Furthermore, as a result of the approach currently taken by Belgium, it is no longer a matter of ensuring that the existing provisions (Article 12bis) are interpreted in a manner consistent with this recommendation, but rather of amending the CCI. The information concerning this training session held in 2011 is therefore no longer relevant.

23. GRECO concludes that recommendation iv remains partly implemented.

Theme II – Transparency of political party funding

24. It is recalled that in its Evaluation Report GRECO addressed 11 recommendations to Belgium on Theme II. The Compliance Report of May 2011 concluded that recommendation i had been implemented satisfactorily and that recommendations ii to xi had not been implemented. In the Interim Compliance Report of May 2012 GRECO noted the lack of any progress but, since the general consultations had moved forward and recommendation v had been discussed in this context, it concluded that recommendation v had been partly implemented.

25. The information submitted in June 2013 by Belgium is of a general nature and does not recapitulate – recommendation by recommendation – the follow-up action taken or envisaged by Belgium. Nor do the appended documents (in particular an intermediary report of 5 June 2013 – see paragraph 27 below) provide such an overview or any precise information on each recommendation. GRECO accordingly continues to deal with the recommendations en bloc rather than individually.

Recommendations ii to xi.

26. *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);

*the federal legislation on the respective obligations and responsibilities of parties and their components be further clarified so as to ensure that financial transactions are effected as far as 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) consideration be given to 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, the regions be invited 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) a system – unified if possible – be set up 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) the regions be invited 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 breaching 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).

27. The Belgian authorities indicate that, since May 2012 (the date of the previous report in this conformity procedure), a working paper dated 21 November 2012 has been produced, including a draft bill amending the Act of 4 July 1989 on limiting and monitoring expenditure on elections to the federal parliament and the open financing and accounting of political parties. The meetings have continued: at the level of the political groups in December 2012 and February 2013, and to obtain the views of members of the Constitutional Court, the Conseil d'Etat and the Court of Auditors in March 2013. An interim report dated 5 June 2013 and entitled "Incorporation into law of GRECO's recommendations" (Chamber of Representatives document 2854/001, Senate document 5-2133/1) has been drawn up and is accessible on line.[3] This bilingual document is 250 pages long and contains an account of the successive parliamentary procedures since 2010, the working paper including the draft bill referred to above and the respective positions of the political groups on that paper (as gathered during the first half of 2013).

28. The authorities also draw attention to two factors that will doubtless influence the evaluation of Belgium's party funding legislation in the near future, namely:

a) the sixth reform of state institutions, in particular the proposed reform of the Senate (which is likely to affect the composition of the control commission, the calculation of donations and so

[3] http://joseph-george.be/partis-politique/item/111-la-transposition-des-recommandations-du-grego-groupe-d-etats-contre-la-corruption-conseil-de-l-europe

on); there are indeed plans for senators no longer to be elected by direct suffrage and the question of the possible financing of parties by the Senate will arise;

b) the proposal of 12 September 2012 for a Regulation of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations (COM(2012) 499 final 2012/0237 (COD)).

29. GRECO observes that the discussions on implementation of the recommendations made under Theme II are continuing. In the light of the content of the interim report of 5 June 2013, GRECO notes that, although a draft bill currently exists, it is still difficult to make a precise assessment as the decision process is at a very early stage and the proposals are not sufficiently advanced and accepted. Since the consultations with the parties and institutions are continuing, GRECO also cannot make findings concerning given proposals without running a risk of interfering in the ongoing process, even if in some areas, such as reform of the supervisory mechanism, it is clear that parliament must be more ambitious.

30. In addition, it seems that many of the recommendations have not yet been taken into account, as the authors of the draft bill themselves and the parties and institutions consulted sometimes drew attention to a risk that the proposals may be inadequate. Some parties moreover pointed out that the goals of the legislative reform need to be clarified and that certain recommendations made in the Evaluation Report need to be more clearly acted upon. It should perhaps be recalled that for each recommendation addressed to Belgium the body of the evaluation report includes an underlying analysis, which should give those devising and deciding on the reform a better grasp of GRECO's expectations. GRECO also noted that page 150 of the parliamentary report of 5 June 2013 states that the draft bill draws in part on an earlier bill dating from 2002 and therefore without direct relevance to GRECO's evaluation of 2009. Elsewhere it is stated that the draft should in principle indicate for each recommendation made by GRECO whether it has been followed up, which is not the case at present.

31. A time-table for the adoption of the proposed legislation is still not available, and it seems that the consultations with the seven speakers of the legislative assemblies (at the federal, community and regional levels) to consider in particular how the regions could be involved in implementing the recommendations (as called for in the text of the majority of the recommendations) have not yet taken place, although they were scheduled for 30 May 2012. In any case, this is not apparent from the report of 5 June 2013. This may explain why the draft bill covers only part of the expected reforms and only part of the relevant legislation,[4] that is to say the Act of 4 July1989.

32. In view, firstly, of the many uncertainties surrounding the proposed reform (now supplemented by new variables linked to a possible reform of the Senate and to EU rules) and, secondly, of the lack of even the start of a reform that might constitute a satisfactory response to its recommendations, GRECO considers that it is not possible to say that any tangible progress has been made since the previous interim compliance report.

[4] To mention just the statute laws (to which the orders and decrees at regional and community level and the electoral codes must be added): a) the Act of 4 July 1989 on limiting and monitoring expenditure on elections to the federal houses of parliament and the open financing and accounting of political parties; b) the Act of 19 May 1994 on limiting and monitoring expenditure on elections to the European Parliament; c) the Act of 19 May 1994 governing election campaigns and on limiting and declaring spending on elections to the Walloon, Flemish, Brussels-Capital Region and German-speaking Community parliaments, and establishing the review criteria for official communications of the public authorities; d) the Act of 7 July 1994 on limiting and monitoring expenditure on elections to provincial, municipal and district councils and the direct election of social assistance councils (this last Act is variable in its application and is not applicable throughout the country).

33. GRECO concludes that recommendation v remains partly implemented and that recommendations ii to iv and vi to xi have still not been implemented.

III. CONCLUSIONS

34. **In the light of the foregoing, GRECO concludes that Belgium has made very slight progress, with the implementation of two further recommendations that were deemed partly implemented in the last interim report of May 2012.** Under Theme I – Incriminations – recommendations ii and iii have now been implemented satisfactorily and recommendations i and iv remain partly implemented. Under Theme II – Transparency of political party funding - recommendation v remains partly implemented and recommendations ii to iv and vi to xi remain unimplemented (recommendation i was deemed to have been satisfactorily implemented in the first compliance report). This means that, so far, only three recommendations of the 15 contained in the Evaluation Report have been implemented. Three other recommendations have been partly implemented and the remaining nine have not been implemented.

35. As a consequence of the slow progress, notably regarding reform of the transparency of political funding, the overall outcome is still highly unsatisfactory. GRECO notes that work is continuing at the ministerial level to implement the two remaining recommendations under Theme I. As regards Theme II, no political decision or relevant practical measure has apparently been taken in respect of the outstanding recommendations, taken individually. GRECO reiterates its call on Belgium to show greater determination in implementing the various outstanding recommendations.

36. As a consequence of the foregoing, GRECO concludes that the current level of implementation of the recommendations remains "globally unsatisfactory" within the meaning of Rule 31, paragraph 8.3, as revised, of its Rules of Procedure.

37. Pursuant to Rule 32, paragraph 2 (i) of the Rules of Procedure, GRECO asks the head of the Belgian delegation to submit to it, by 31 July 2014, a report regarding action taken to implement the outstanding recommendations (recommendations i and iv under Theme I and recommendations ii to xi under Theme II).

38. GRECO further decides that, in pursuance of Rule 32, paragraph 2 (ii) c) of its Rules of Procedure, it will request the Secretary General to send a letter to the Foreign Minister of Belgium, drawing his attention to the non-compliance with the relevant recommendations and the need to take firm action so that tangible progress can be made as expeditiously as possible.

39. 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.