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Evaluation Report on the Czech Republic on Incriminations

(Theme I)

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I. INTRODUCTION

1. The Czech Republic joined GRECO in 2002. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2002) 11E) in respect of the Czech Republic at its 13th Plenary Meeting (24-28 March 2003) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 7E) at its 28th Plenary Meeting (Strasbourg, 8-12 May 2006). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (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 the Czech Republic from 11 to 12 October 2010, was composed of Ms Anca JURMA, Chief Prosecutor, International Cooperation Service, National Anticorruption Directorate, Prosecutors' Office attached to the High Court of Cassation and Justice (Romania) and Mr Paulo DE SOUSA MENDES, Professor of law, Faculty of Law of the University of Lisbon (Portugal). The GET was supported by Ms Tania VAN DIJK from GRECO's Secretariat. Prior to the visit the GET was provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2010) 10E, Theme I) as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: Ministry of Justice, Ministry of the Interior, the judiciary (District Court of Prague 2), prosecution service (Supreme Prosecutor's Office, High Public Prosecutor's Office and the Prague Municipal Public Prosecutor's Office), the police and the Institute of Criminology and Social Prevention. The GET also met with representatives of academia, lawyers (bar association) and Transparency International.
5. The present report on Theme II of GRECO's Third Evaluation Round on Transparency of party funding was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Czech authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to the Czech Republic in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2010) 10E-Theme II.

II. INCRIMINATIONS

Description of the situation

7. The Czech Republic ratified the Criminal Law Convention on Corruption on 8 September 2000. It entered into force in respect of the Czech Republic on 1 July 2002. Upon depositing its instrument of ratification the Czech Republic made the reservation that it would establish active and passive bribery in the private sector, as defined by Sections 7 and 8 of the Convention, as a criminal offence under its domestic law only in as far as it would come under any of the definitions of criminal offences laid down in the Criminal Code of the Czech Republic. However, this reservation was not renewed (in 2008) and thus lapsed in 2009.
8. The Czech Republic has not ratified (nor signed) the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).
9. In January 2010, a new Criminal Code, Act No. 40/2009 Coll., entered into force. The changes made to the provisions on bribery include the criminalisation of bribery committed in connection with business activities (to cover private sector bribery), an increase in the level of certain sanctions and some amendments to the definition of a public official. In addition, the defence of effective regret was removed from the provisions on bribery.

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

Definition of the offence

10. Active bribery of domestic public officials is criminalised by Section 332 of the Criminal Code, Act No. 40/2009 Coll. (hereafter: CC). Paragraph 1 of Section 332 criminalises active bribery in connection with either “procuring affairs in the public interest” or “business activities”, regardless of whether the bribe taker is a public official or not. Bribery of a public official is – pursuant to paragraph 2(b) – an aggravated bribery offence.

Section 332 - Active Bribery

- (1) Whoever provides, offers or promises a bribe to or for another person, in connection with procuring affairs in the public interest;
or whoever provides offers or promises a bribe to or for another person in connection with his/her or someone's else's business activities
shall be punished by imprisonment for up to two years or by a fine.
- (2) An offender shall be sentenced to imprisonment of 1 to 6 years, forfeiture of property or to a pecuniary sanction
 - (a) if he/she commits the act given in paragraph 1 with the intent of procuring substantial benefit for him-/herself or for another person or of inflicting substantial damage or other particularly serious consequences to another person; or
 - (b) if he/she commits such act vis-à-vis a public official.

11. Passive bribery of domestic public officials is criminalised by Section 331 CC. As before, the fact that the offender is a public official is a form of aggravated bribery, pursuant to paragraph 3(b).

Section 331 - Passive Bribery

- (1) Whoever, him- /herself or by means of someone else, in connection with procuring affairs in the public interest, accepts a bribe or the promise of a bribe for him-/herself or for someone else; or whoever, him-/herself or by means of someone else, in connection with his/her or someone else's business activities accepts a bribe or the promise of a bribe for him-/herself or for someone else shall be sentenced to imprisonment for up to 3 years or to prohibition to undertake professional activities.
- (2) Whoever under the circumstances given in paragraph 1 asks for a bribe shall be sentenced to imprisonment for 6 months to 5 years or to prohibition to undertake professional activities.
- (3) An offender shall be sentenced to imprisonment for 2 to 8 years or forfeiture of property
 - (a) if he/she commits the act given in paragraph 1 or 2 with the intent of procuring substantial benefit for him-/herself or for another person; or
 - (b) if he/she commits such act as a public official.
- (4) An offender shall be sentenced to imprisonment for 5 to 12 years
 - (a) if he/she commits the act given in paragraph 1 or 2 with the intent of procuring a major benefit for him-/herself or for another person; or
 - (b) if he/she commits such act as a public official with the intent of procuring a substantial benefit for him-/herself or for another person.

Elements/concepts of the offence

"Domestic public official"

12. As indicated above, the offences criminalised by Sections 331 and 332 CC are not limited to bribery of public officials: they deal with any sort of bribery in connection with "procuring affairs in the public interest" or business activities. The fact that a public official is involved is an aggravating circumstance. To this end, Section 127 CC defines who is to be considered a public official, by reference to a list of functions.

Section 127 - Public Official

- (1) Public official is
 - a) Judge;
 - b) Public prosecutor;
 - c) President of the Czech Republic, deputy or senator of the Parliament of the Czech Republic, member of the Government of the Czech Republic or other person holding an office in a body of other public authority;
 - d) Member of a council or responsible official of territorial self-administration, body of state administration or other body of public authority;
 - e) Member of armed forces or security forces or officer of municipality police;
 - f) Judicial executor during execution of his duties and during activities executed by virtue of the court or public prosecutor;
 - g) Notary during execution of acts in probate proceedings as a judicial commissioner;
 - h) Financial arbitrator and his deputy;

- i) Natural person appointed forest guard, nature guard, hunting guard or fishing guard; When fulfilling tasks of the State or the society and applying the vested authority for fulfilment of such tasks.
- (2) For criminal liability and protection of an official in accordance with particular sections of the Criminal Code it is required to commit the criminal offence in relation to its competence and responsibility.
- (3) Official of a foreign state or international organization is, subject to conditions under paragraph 1 and 2, considered as official according to Criminal Code, if stipulated by international convention.

13. Section 127 CC is complemented by Section 334, paragraph 2 CC, which – for the purpose of the bribery provisions – extends the definition of a public official of Section 127 CC to also include persons working in state enterprises, as well as foreign and international public officials (see paragraphs 32, 33 and 39 below).

- Section 334 - Joint Provision**
- (1) (...)
 - (2) A public official pursuant to Sections 331 to 333 means, besides a person as referred to in Section 127, also any person
 - (a) occupying a post in a legislative or judicial authority or any other public authority of a foreign country; or
 - (b) occupying a post in an international judicial body;
 - (c) occupying a post, being employed or hired by an international or supranational organisation, established by countries or other entities of international public law, or in its body or institution; or
 - (d) occupying a post in an enterprise, in which Czech Republic or a foreign country has decisive influenceIf the execution of such a function is connected with authority in procuring the affairs of public interest and the criminal offence was committed in conjunction with such authority.
 - (3) (...).

14. The Czech authorities state that Section 127 CC, paragraph 3, would already cover officials of foreign states and international organisations, if so stipulated by an international convention (such as the Criminal Law Convention on Corruption). It was nevertheless considered to be useful to also have a stand-alone provision for the purpose of bribery of foreign and international public officials, which could cover persons not necessarily covered by international conventions, such as those working for foreign or domestic state-owned enterprises.

15. The Czech authorities report that Section 127 CC (together with Section 334, paragraph 2 CC) covers all terms mentioned in Article 1, paragraphs a and b, of the Criminal Law Convention on Corruption (ETS 173), namely officials/public officers, mayors, ministers, prosecutors, judges and holders of a judicial office. In this regard, the Czech authorities also indicate that the type of contract – whether someone is temporarily employed in this position – is irrelevant. However, to be considered a public official, a person would have certain decision-making capacities: Persons performing ancillary functions in the public sector – such as typists, secretaries, archivists, spokespersons etc. – would not be considered as public officials, according to the Czech authorities, but would be covered by the general offence of Sections 331 and 332 CC, if they

committed bribery in connection with “procuring affairs in the public interest” or business activities.

“Promising, offering or giving” (active bribery)

16. Section 332, paragraph 1 CC on active bribery explicitly includes the terms ‘provides, offers or promises’. The commentary to the new Criminal Code further specifies that the “provision of a bribe is not only the direct, immediate handover of a bribe, but also any indirect provision of a material or other advantage (...)”.¹ The offer of a bribe is furthermore understood as displaying a willingness to provide a bribe and have his/her request for procuring affairs in public interest granted; the promise of a bribe is considered to be an expression of a commitment to provide a bribe in the future, once the act (or omission) has been rendered in return. The Czech authorities indicate that the reaction of the potential bribe-taker to the promise, offer or provision of a bribe is not relevant for the criminal liability of the bribe-giver: the offence is completed by the act of promising, offering or giving a bribe, regardless of whether the other party has accepted the promise, offer or gift.

“Request or receipt, acceptance of an offer or promise” (passive bribery)

17. Section 331, paragraph 1 CC on passive bribery refers to “accepts a bribe or the promise of a bribe” and in paragraph 2 refers to the request for an undue advantage by use of the words “asks for a bribe”, which is an aggravating circumstance. The Czech authorities indicate that the phrase “accepts a bribe” assumes that the bribe taker has received the undue advantage: The timing of the acceptance is reportedly irrelevant: the bribe may have been accepted prior to, during or after “procuring the affair in public interest”, even without prior agreement. Furthermore, as regards “accepts (...) the promise of a bribe” the Czech authorities indicate that this is understood to include the acceptance of an offer of a bribe. Moreover, the offence is considered to be completed when the bribe-taker does not refuse the promise of a bribe.² It is reportedly beside the point whether the promise of a bribe has been fulfilled (i.e. whether the bribe has actually been handed over).
18. In addition, paragraph 2 of Section 331 CC refers to the request for an undue advantage with the words “asks for a bribe”, which is an aggravated form of the passive bribery offence. The GET initially understood the wording of the phrase “under the circumstances given in paragraph 1” to mean that the request for a bribe was only criminalised if it was followed by the acceptance of a bribe or the acceptance of a promise of a bribe. However, the jurisprudence clarifies that the mere request for an undue advantage is a completed offence.³ In addition, under this section it is not required that the offender explicitly asks for a bribe: any conduct from which it is evident that the offender expects a bribe is sufficient.⁴

“Undue advantage”

19. The term ‘advantage’ is not used in the provisions on bribery in the Czech Criminal Code, instead the term ‘bribe’ is used, which is defined in Section 334, paragraph 1 CC.

¹ Commentary to the new Criminal Code, Vol. II, p. 2892.

² Resolution of the Supreme Court No. 8, Tdo 864/2006.

³ Decision No. 3/1978, *Collection of Criminal Decisions*.

⁴ Decision No. 46/1983, *Collection of Criminal Decisions*.

Section 334 - Joint Provision

- (1) A bribe means an unwarranted advantage consisting in direct material enrichment or other advantage received or having to be received by the person bribed or with his/her consent to another person, and to which there is not entitlement.
- (2) (...)
- (3) (...)

20. The Czech authorities indicate that this definition includes both material and immaterial advantages, as confirmed in jurisprudence.⁵ Furthermore, the value is not of relevance to differentiate whether something is to be considered a due or undue advantage, but only comes into play when determining the seriousness of the crime committed. If a bribe represents a “substantial benefit” (which pursuant to Section 138 CC would be at least 500,000 CZK / approximately €20,000) or a “major benefit” (which pursuant to Section 138 CC would be at least 5,000,000 CZK / approximately €200,000) for the bribe-taker, it would be an aggravating circumstance leading to a higher sanction.⁶ The Czech authorities indicate that if the value of the bribe cannot be estimated financially – i.e. if the bribe only has specific value for the receiver – it will not amount to an aggravating circumstance.

“Directly or indirectly”

21. The phrase ‘directly and indirectly’ is covered by the use of the terms “him-/herself or by means of someone else” in the provision on passive bribery (Section 331 CC). In the Section 332 CC on active bribery the reference is less straightforward. The Czech authorities indicate that active bribery through intermediaries is covered by the phrase “to or for another person”: if the bribe is *for* someone else, it will have been provided indirectly. In addition, the commentary to the new Criminal Code explains: “A person, to whom the bribe is provided, offered or promised, may be the person providing things in the public interest or *an intermediary* between the offender and such a person. Similarly this applies to the provision, offer or promise of a bribe in connection with his/her someone else’s business activities”.⁷

“For himself or herself or for anyone else”

22. The phrase “for himself or herself or for anyone else” is explicitly mentioned in Section 331 CC on passive bribery. This phrase is absent from Section 332 CC. However, the Czech authorities refer to the Joint Provision of Section 334 CC (see paragraph 19 above), which in its first paragraph refers to the bribe being “received or having to be received by the person bribed *or with his/her consent to another person*”.

⁵ The Supreme Court ruled in Judgment Rt 25/75 6 Tz 73/74 that an advantage “is not limited to property, but also includes any other advantage, to which there is no entitlement”.

⁶ Section 138 CC: “(1) *Not so insignificant damage* shall mean damage amounting to at least 5,000 CZK; *not so small damage* shall mean damage amounting to at least 25,000 CZK; *larger damage* shall mean damage amounting to at least 50,000 CZK; *substantial damage* shall mean damage amounting to at least 500,000 CZK and *major damage* shall mean damage amounting to at least 5,000,000 CZK.

(2) The amounts as specified in paragraph 1 shall apply to assess the amount of benefit, cost for liquidation of environmental damage, value of a thing or other property value.”

⁷ Commentary to the new Criminal Code, Vol. II, p. 2892.

“To act or refrain from acting in the exercise of his or her functions”

23. The Czech authorities report that Sections 331 and 332 CC cover both acts and omissions on the side of the bribe-taker. In this connection a reference is made to Section 112 CC, which provides that “the conduct is also understood as an omission of such conduct, to which the offender is bound by another law, administrative decision or contract, in consequence to acceptance of a duty to act (...) or if she/he was, according to circumstances and his/her situation, bound to such conduct for another reason”.
24. As regards bribery of public officials (as an aggravated form of the general offence of bribery in connection with procuring affairs in the public interest), Section 127 CC, paragraphs 1 and 2 (see under paragraph 12 above), provide respectively “(...) when fulfilling tasks of the State or the society and applying the vested authority for fulfilment of such tasks” and “For criminal liability and protection of an official in accordance with particular sections of the Criminal Code it is required to commit the criminal offence in relation to its competence and responsibility.” The Czech authorities indicate that this means that there should be some connection to the execution of his/her authority: It is not required that the specific act or omission of the public official is within his/her specific competence and responsibility, it is only required that his/her position enabled him/her to carry out (or omit to carry out) the desired act.

“Committed intentionally”

25. Pursuant to Section 13 CC, a person can only be held liable for committing a criminal offence by negligence if this is explicitly stipulated in the Criminal Code. As the provisions on bribery (Sections 331 and 332 CC) do not stipulate that these offences can be committed by negligence, they can only be committed intentionally.⁸ However, from paragraphs 17-18 above it becomes clear that ‘intent’ is not a very strict requirement.

Other elements

26. As already indicated above, the phrase “in connection with procuring affairs in the public interest” is a central part of Sections 331 and 332. This phrase was already used in the old Criminal Code, but has not been defined in legislation.⁹ Extensive case-law has been built up on the interpretation of this expression. From these cases it becomes clear that “procuring affairs in the public interest” is to be understood broadly: it not only refers to the decision-making of public authorities, but covers “all tasks on whose proper execution the whole society – or at least a bigger group of citizens – has an interest”.¹⁰ Furthermore, a number of judgments clarify that it is not necessary that the bribe-giver obtains a matter of public interest him/herself or that the public official him/herself deals directly with a matter of public interest: there should be on a general level some connection with affairs in the public interest.¹¹

⁸ Czech law recognises two types of intent (direct and indirect intention); *dolus eventualis* is not recognised in Czech legal doctrine.

⁹ In this context, the Constitutional Court has remarked that “the attempt to provide a closer definition could mean such a conceptual limitation that it would not be able to cover all conceivable forms of this crime. Society’s complexity makes it impossible to produce an objectively (in legislation) formulated law covering by its specifications and definitions the entire variability of its manifestations” (Decision 123/1998 Usn.Č. 123 Usn of the Constitutional Court).

¹⁰ Resolution 4 (Tdo 77/2002) of the Supreme Court of 26 November 2002. See in this context in a similar vein: Decision No. 1/1978, *Collection of Criminal Decisions*; Decision 16/1988, *Collection of Criminal Decisions*; Decision No. 20/1998, *Collection of Criminal Decisions*.

¹¹ Decision 123/1998 Usn.Č. 123 Usn of the Constitutional Court.

27. Over the years, the following have *inter alia* been deemed by the courts as being connected to “procuring affairs in the public interest”:
- Allowing someone to practice gambling in a restaurant (by an employee of that restaurant) (1987)¹²;
 - The decision of a medical doctor to hospitalise and operate on a certain patient (even if the medical doctor could not be considered as a public official) (1990)¹³;
 - The work done by a bank employee, when processing loans and credits (1998)¹⁴.
- More recently, in 2009, in one of the much-debated cases relating to bribery in a football competition, the Supreme Court considered that “football affects a huge number of people in society” and “influenced results may have an unfortunate financial impact”.¹⁵ For these reasons, the intentional undue influence of persons in the football world over the results of game should be deemed as being connected to “procuring affairs in the public interest” (as well as being connected to business activities).
28. In addition – even though as indicated before the concept of “procuring affairs in the public interest” is not defined as such in the Criminal Code – the aforementioned Joint Provision of Section 334 CC, paragraph 3, extends the concept to cover specific cases of corruption in the private sector (even if since January 2010 “in connection with business activities” was included in the new Criminal Code to criminalise private sector bribery).

Section 334 - Joint Provision

- (1) (...)
- (2) (...)
- (3) Procurement of affairs in the public interest also means maintaining the duty imposed by legal regulations or a contract whose purpose is to ensure that there is no abuse or unjustified advantage of participants in business relations or persons acting on their behalf.

Sanctions

29. The applicable sanction for active bribery of public officials (Section 332 CC, paragraph 2, sub b CC), as an aggravated form of the general bribery offence, is 1 to 6 years’ imprisonment, forfeiture of property¹⁶ and/or a fine¹⁷ (a so-called “pecuniary penalty”). The applicable sanction for passive bribery of public officials (Section 331, paragraph 3, sub b CC), as aggravated bribery, is 2 to 8 years’ imprisonment and/or forfeiture of property (in addition to a possible prohibition of

¹² Decision No. 13/1987, *Collection of Criminal Decisions*.

¹³ Decision No. 13/1990-II, *Collection of Criminal Decisions*.

¹⁴ Decision No. 20/1998, *Collection of Criminal Decisions*.

¹⁵ Resolutions 6 (Tdo 1297/2007) and 7 (Tdo 932/2009) of the Supreme Court of respectively 29 November 2007 and 14 October 2009 (www.nsoud.cz).

¹⁶ Pursuant to Section 66 CC, forfeiture of property applies either to the whole property of the offender or part of the property as determined by the court. It may be imposed as the only sanction, if the court does not consider any other sanctions necessary, due to the nature of the offence and the type of offender.

¹⁷ Pursuant to Section 68 CC, a fine is imposed in daily rates, which is the net income the offender had or could have had in one day (as determined by the court) and is not less than 100 CZK (approximately €4) and not more than 50,000 CZK (approximately €2,000). A fine will be no less than 20 daily rates (depending on the income of the offender this would thus range from 2,000 CZK/approximately €80 to 1,000,000 CZK/approximately €40,000) and not more than 730 daily rates (depending on the income of the offender this would thus range from 7,300 CZK/approximately €292 to 36.5 million CZK/approximately €1.46 million). Furthermore, it may be imposed as the only sanction, if the court does not consider any other sanction necessary, due to the nature of the offence and the type of offender (Section 66 CC).

activities, pursuant to paragraph 1 of the same Section).¹⁸ Under aggravating circumstances – i.e. in case the public official has committed bribery “with the intent of procuring a substantial benefit¹⁹ for him/herself or another person” (pursuant to paragraph 4, sub b, of Section 331 CC) – the public official can be sentenced to 5 to 12 years’ imprisonment (in addition to forfeiture of property and/or prohibition of activities).

30. The applicable sanctions for some other comparable crimes are as follows:
- Two to ten years’ imprisonment, the prohibition of certain activities, forfeiture of a ‘thing’²⁰ or other property value²¹ for fraud (Section 209 CC);
 - Two to ten years’ imprisonment, prohibition of certain activities, forfeiture of a ‘thing’ or other property value and/or a fine for embezzlement (Section 248 CC);
 - Six months to 12 years’ imprisonment, prohibition of activities and/or forfeiture of property for abuse of power by a public official (Section 329 CC).

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

31. As indicated before, bribery of members of domestic assemblies would already be covered by the general bribery offence in the first paragraphs of Sections 331 and 332, if the bribery relates to “procuring affairs in the public interest” or “business activities”. However, they would also be covered by the aggravated offence of bribery of public officials, as pursuant to Section 127 CC, paragraph 1(c) and (d) (see paragraph 12 above), a deputy or senator of the parliament of the Czech Republic and members of councils of the so-called territorial self-administration are also considered to be public officials. To illustrate *inter alia* that the concept of public official also covers members of domestic public assemblies, the Czech authorities refer to a ruling of 2001 (not a bribery case), in which the Supreme Court established that an elected member of a municipal council would be a public official, “even if he acted in the capacity of a member of an *ad-hoc* statutory body set up by the municipal council, defrauding partially the funds he had legally drawn from the municipal safe as a member of the municipal council and deputy mayor”.²² The elements of the offence and the applicable sanctions detailed above under bribery of domestic public officials thus also apply to members of domestic public assemblies.

Bribery of foreign public officials (Article 5 of ETS 173)

32. Section 127, paragraph 3 CC (see paragraph 12) above, provides that an “official of a foreign state or international organisation is, subject to the conditions under paragraph 1 and 2, considered as an official according to the Criminal Code, if stipulated by an international convention”. The Czech authorities indicate that the Criminal Law Convention on Corruption (ETS 173) would be considered such a convention. In addition, the so-called Joint Provision of Section 334 (see paragraph 13 above) extends the definition of a public official for the purpose of the

¹⁸ Section 53 of the Criminal Code provides that sanctions may be imposed separately and concurrently. Other sanctions, such as house arrest, fines (“pecuniary punishments”), community service (etc.), may also be imposed even if the specific section on the offence does not mention these sanctions.

¹⁹ See paragraph 20 above: A ‘substantial benefit’ would pursuant to Section 138 CC be at least 500,000 CZK (approximately €20,000).

²⁰ The Czech authorities explain that a thing is considered to be a manageable material object (whether moveable or immovable). In addition, Section 134, paragraph 1 CC provides: “Thing shall also be understood as a controllable natural force. Provisions on things shall also relate to live animals, processed separated parts of the human body, assets on bank accounts and bond, unless otherwise indicated by specific provisions of the Criminal Code”.

²¹ Pursuant to Section 134, paragraph 2 CC, other property value is to be understood as “a property right or other value appraisable in money, which is not a thing and when the provision on things under paragraph 1 is not applicable”.

²² Judgment 4 Tz 17/2001.

provisions on bribery to also include persons “occupying a post in (...) any other public authority of a foreign country”, if this is “connected with the authority in procuring the affairs of public interest and the criminal offences have been committed in conjunction with such authority”. Accordingly the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply to bribery of foreign public officials. The GET was not provided with any examples of cases of bribery of foreign public officials.

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

33. The above-mentioned Joint Provision of Section 334, in paragraph 2(a) (see paragraph 13 above), extends the definition of a public official to also include persons “occupying a post in a legislative (...) authority (...) of a foreign country” (as before, with regard to foreign public officials, a reference is made to “authority in procuring the affairs of public interest” and the crime having been committed in connection with such affairs). The elements and sanctions, as described for bribery of domestic public officials (and foreign public officials, as appropriate), thus apply accordingly to bribery of members of foreign public assemblies. There have not been any bribery cases involving members of foreign public assemblies.

Bribery in the private sector (Articles 7 and 8 of ETS 173)

Definition of the offence

34. The Czech authorities indicate that Sections 331 and 332 CC are also applicable to bribery in the private sector. To this end, Section 331, paragraph 1 and Section 332, paragraph 1 CC refer to the commission of bribery “in connection with his/her or someone else’s business activities”.²³

Elements/concepts of the offence

“Persons who direct or work for, in any capacity, private sector entities”

35. With regard to the scope of perpetrators, the text of Sections 331 and 332 CC does not specify who can commit this offence: As such it intends to cover all types of offenders who commit bribery in connection with their or someone else’s business activities.

“In the course of business activity”

36. As already indicated above, both Section 331 CC on passive bribery and Section 332 CC on active bribery refer to bribery committed in connection with business activities. The Czech authorities indicate that the term “business activities” refers – pursuant to Section 2 of the Commercial Code – to any type of systematic activity to generate profit. As such it also comprises certain public services (telecommunications, public transport), if they are profit-making activities.

²³ In addition, the Czech authorities refer to paragraph 3 of Section 334 CC, which states: “procurement of affairs in public interest also means maintaining the duty imposed by legal regulations or a contract whose purpose is to ensure that there is no abuse or unjustified advantage of participants in business relations or persons acting on their behalf”. Procurement of affairs in the public interest thus also refers to maintaining the duties deriving from a contract or legal regulation, in the private sector. The Czech authorities explain that the text of paragraph 3 of Section 334 CC was already included in the old Criminal Code, which otherwise did not deal with private sector corruption. It overlaps with “business activities”, but still retains some significance in relation to persons, who are not directly involved with business activities, but whose activities have an impact on the business environment (e.g. arbitrators, see further paragraph 53 below).

“In breach of duties”

37. Sections 331 and 332 CC do not limit the applicability of the provisions on private sector bribery to cases in which there has been a breach of duty.

Other elements of the offence and sanctions

38. Other than as regards the reference to business activities (instead of “the procurement of affairs in public interest”), the description of the elements of the offence and the sanctions detailed in the paragraphs above concerning bribery of domestic public officials also apply to bribery in the private sector.

Bribery of officials of international organisations (Article 9 of ETS 173), bribery of members of international parliamentary assemblies (Article 10 of ETS 173) and judges and officials of international courts (Article 11 of ETS 173)

39. As before, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts are equated to public officials, pursuant to the Joint Provision of Section 334 CC. Section 334, paragraph 2(c) CC extends the definition of a public official to persons “occupying a post, being employed or hired by an international organisation, established by countries or other entities of international public law, or its body or institution”, thereby covering officials of international organisations and – by reference to the body of an international organisation – also members of international parliamentary assemblies. Furthermore, paragraph 2(b) refers to persons “occupying a post in an international judicial body”, which – together with the aforementioned paragraph 2(c) – covers judges and officials of international courts. The elements of the offence and the applicable sanctions detailed under bribery of public officials (as an aggravated form of the general bribery offence of Section 331 and 332 CC) thus also apply to bribery of officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts. To date there have not been any court decisions concerning bribery of officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts.

Trading in influence (Article 12 of ETS 173)

Definition

40. Trading in influence is criminalised by Section 333 CC.

Section 333 – Trading in influence

- (1) Whoever requests or accepts a bribe for exerting his/her influence or by means of someone else on the execution of the authority of a public official or for having done so, shall be sentenced to imprisonment for up to 3 years.
- (2) Whoever shall provide, offer or promise a bribe to another person for the reason given in paragraph 1 shall be sentenced to imprisonment for up to 2 years.

Elements/concepts of the offence

"Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]"

41. Section 333, paragraph 1 CC refers to the exertion of influence. A judgment of the Supreme Court rules that the request or acceptance of a bribe for the mere assertion that s/he is able to exert improper influence, when s/he is not in a position to do so would be prosecutable as fraud (Section 209 CC) and not as passive trading in influence.²⁴ The Supreme Court did not, however, clarify how the active side of this offence (i.e. the person giving an undue advantage to another, who has claimed to be able to exert improper influence without being able to do so) would be criminally liable.
42. Furthermore, the Czech authorities explain that the delineation of this offence with that of bribery of Sections 331 and 332 has been further clarified by the same decision of the Supreme Court: if an offender accepts or requests a bribe to influence a public official in the execution of his duties and acts without co-operation of the public official concerned, s/he will be prosecuted for passive trading in influence under 162, paragraph 1 CC [now Section 333, paragraph 1 CC] whereas if s/he acts in co-operation with the public official concerned s/he will be an accomplice to the passive bribery offence.²⁵

"Promising, offering or giving"

43. The elements "promise, offer or promise" are explicitly mentioned in paragraph 2 of Section 333 CC.

"Request or receipt, acceptance of an offer or promise"

44. Section 333, paragraph 1 CC refers to the request and acceptance of a bribe for the exertion of influence, but does not extend this to the acceptance of an offer or a promise.

"Any undue advantage"

45. Section 333 CC makes reference to a bribe, which as before (see paragraphs 19 and 20 above), is understood to mean any advantage "received or to be received, to which there is not entitlement" (Section 334, paragraph 1 CC).

"Directly or indirectly"

46. The Czech authorities indicate that Section 333 CC does not make explicit whether the offence of trading in influence can be committed indirectly; this is to be deduced from the interpretation of Section 333 CC in case law and commentaries. Even though Section 333 CC makes reference to "by means of someone else", this reportedly relates to the way the influence is exerted and not to the provision or receipt of the undue advantage through intermediaries.

²⁴ Judgment (Rt 32/87) 11 Tz 25/86 and Decision No. 11/1986, Collection of Criminal Decisions.

²⁵ *Id.*

For himself or herself or anyone else”

47. Section 333 CC does not specify whether the undue advantage (or the bribe) can be for the person exerting the influence or someone else, but - as before, see paragraph 22 above - the Czech authorities refer to the Joint Provision of Section 334, which in its first paragraph refers to the bribe being received by another person (which reportedly covers third party beneficiaries of the advantage).

“Committed intentionally”

48. As before, see paragraph 25 above, a person can only be held liable for committing a criminal offence by negligence if this is explicitly stipulated in the Criminal Code. As Section 333 does not stipulate that this offence can be committed by negligence, it can only be committed intentionally (direct or indirect intention).

Other elements

49. The Czech authorities state that it is irrelevant whether the influence is exerted or not or whether it leads to the intended result or not. Case law has clarified that the criminal offence of passive trading in influence has been completed once a person requests or accepts a bribe to exert his/her influence. It is not required that the offender exerts his/her influence or that the influence leads to the intended result, but both elements may have a bearing on the sanction imposed.²⁶
50. It furthermore appears that Section 333 CC is in one respect broader than Article 12 of the Convention: it is not limited to influence over the decision-making of a public official, but any ‘execution of authority’ by the public official concerned.

Sanctions

51. The sanction applicable to the offence of trading in influence is up to 3 years’ imprisonment for passive trading in influence and up to 2 years’ imprisonment for active trading in influence.

Court decisions

52. As indicated in the statistics below (see paragraph 66), there have been a number of cases in the Czech Republic concerning trading in influence. The summaries of several decisions under the old Criminal Code were provided to the GET, which as indicated in paragraphs 41, 42 and 49 above, have clarified various key elements of the trading in influence offence.

Bribery of domestic arbitrators (Article 1 paragraphs 1 and 2, and Articles 2 and 3 of ETS 191)

53. As indicated above (paragraph 7), the Czech Republic has not ratified the Additional Protocol to the Criminal Law Convention (ETS 191). However, bribery of domestic arbitrators would be covered by the provisions on bribery in Sections 331 and 332 CC, if bribery is committed in connection with “procuring affairs in the public interest” or “business activities”. The Czech authorities indicate that as dispute resolution is in the interest of society as a whole, the work of a domestic arbitrator would be regarded as being connected to “procuring affairs in the public

²⁶ Decision 16/1981, *Collection of Criminal Decisions*. In this context, the Czech authorities also refer to Section 39 CC on “Sentencing guidelines”, stipulating the various circumstances to be taken into account by the court when deciding on the sanction to be imposed.

interest”.²⁷ In addition, paragraph 3 of the above-mentioned Joint Provision of Section 334 CC reportedly applies to arbitrators (by providing that “procurement of affairs in the public interest also means maintaining the duty imposed by legal regulations or a contract whose purpose is to ensure that there is no abuse or unjustified advantage of participants in business relations or persons acting on their behalf”). The elements of the offence and the applicable sanctions detailed in paragraphs 10-11 and 16-30 above, in as far as these relate to the general offence of the first paragraph of Section 331 and 332 CC, thus also apply to bribery of domestic arbitrators.

54. To date there have not been any cases concerning bribery of domestic arbitrators.

Bribery of foreign arbitrators (Article 4 of ETS 191)

55. Foreign arbitrators would, according to the Czech authorities, be covered by the general provisions on bribery in connection “with procuring affairs in the public interest”, just as bribery of domestic arbitrators is covered (see above). In addition, the Czech authorities state that in certain cases foreign arbitrators would be considered as foreign public officials or in other words occupy “a post in a legislative or judicial authority or any other public authority of a foreign country” as stipulated by Section 127, paragraph 1(a) CC (in which case the elements of the offence and the applicable sanctions described under bribery of public officials would apply to bribery of foreign arbitrators). To date, there have not been any court decisions concerning bribery of foreign arbitrators.

Bribery of domestic jurors (Article 1 paragraph 3 and Article 5 of ETS 191)

56. The concept of trial by jury is not known in the Czech legal system. However, the Czech authorities indicate in this context that their legal system does provide for lay judges, who are members of the public, elected by municipal or regional government for a period of 4 years. The position of lay judge is, pursuant to Section 201, paragraph 2 of the Labour Code No. 262/2006 Coll., a public function. Lay judges would be considered to be public officials, by reference to “judge” in Section 127, paragraph 1(a) and “person holding an office in a body of public authority” in Section 127, paragraph 1(c). The elements of the offence and the applicable sanctions described under bribery of public officials thus also apply to bribery of lay judges. There have not been any cases of bribery of lay judges to date.

Bribery of foreign jurors (Article 6 of ETS 191)

57. The Czech authorities report that foreign jurors would be considered to be foreign public officials, pursuant to the Joint Provision of 334, paragraph 2(a) CC, which regards as a public official also any person “occupying a post in a (...) judicial authority (...) of a foreign country”. Accordingly, the elements of the offence and the applicable sanctions detailed under bribery of public officials (and foreign public officials, as appropriate) would apply to bribery of foreign jurors. There have not been any cases concerning bribery of foreign jurors.

²⁷ In addition, Section 127, paragraph 1(h) CC stipulates that a “financial arbitrator and his deputy” are public officials. It should, however, be noted that there is only one financial arbitrator in the Czech Republic. Pursuant to Act No. 229/2002 Coll. on the financial arbitrator, such an arbitrator is meant to resolve disputes between providers of payment services and users of these services and between entities issuing electronic money and holders of electronic money in the Czech Republic. The elements of the offence and the applicable sanctions described under bribery of public officials thus apply to bribery of the financial arbitrator.

Other questions

Participatory acts

58. Aiding and abetting the commission of all of the above-mentioned criminal offences is criminalised by Section 24 CC.

Section 24 CC – Participant

- (1) A participant in a completed criminal offence, or in an attempt to commit a criminal offence, is a person who intentionally
 - a) organised or directed the commission of a criminal offence (an organiser),
 - b) instigated another person to commit a criminal offence (an instigator),
 - c) granted another person assistance in committing a criminal offence, particularly by providing the means for committing such criminal offence, removing obstacles, enticing a victim to the scene of the crime, guarding when the offence is committed, giving advice, strengthening the person's intent, or promising assistance after the commission of a criminal offence (an assistant).
- (2) The criminal liability and punishability of a participant shall be governed by the provisions on the offender's criminal liability and punishability, unless this Code provides otherwise.
- (3) Criminal liability of a participant in a criminal offence shall terminate if he voluntarily abandons any further participation in a criminal offence and
 - a) eliminates the threat to the interest protected by this Code, represented by his participation, or
 - b) reports his participation at a time when the threat represented by it to the interest protected by this Code could still be eliminated; such a report must be made to a prosecutor or the police, a soldier may report to his commander instead.
- (4) In case several people participate in such criminal offence, the termination of criminal liability of a participant thus acting shall not be prevented, if such criminal offence is completed by other offenders independently of his previous contribution to the offence or despite of his early report.
- (5) However, the provision of paras. 3 and 4 shall not affect the criminal liability of the participant for any completed criminal offence which he had already committed by his conduct.

Jurisdiction

59. By virtue of Section 4 CC, the Czech authorities have established jurisdiction over (*inter alia*) all bribery and trading in influence offences committed on its territory (territoriality principle). Furthermore, Section 6 CC establishes jurisdiction over (*inter alia*) all bribery and trading in influence offences committed abroad by Czech citizens (nationality principle).

Section 4 - Territoriality Principle

- (1) Liability to punishment of an act committed on the territory of the Czech Republic shall always be considered under the law of the Czech Republic.
- (2) A crime shall be considered as having been committed on the territory of the Czech Republic, if:

- a) an offender acted on its territory, even if the violation of, or threat to, an interest protected under Criminal Code resulted, or was to result, completely or partly abroad; or
 - b) an offender violated or threatened on its territory an interest protected under Criminal Code, or if the consequence of such act was to occur at least partly on its territory, even though the crime was committed abroad.
- (3) Participation is considered to have been committed on the territory of the Czech Republic, if
- a) the act has been committed on its territory, where the place of the commitment of such act is assessed as in paragraph 2; or
 - b) if a participant acted on its territory but the criminal act was completed abroad.
- (4) If the participant acted on the territory of Czech Republic, participation will be punished according to the law of Czech Republic, irrelevant whether the criminal act is deemed punishable abroad.

Section 6 - Personality Principle

The liability to punishment of an act committed abroad by a citizen of the Czech Republic or by a stateless person with a permanent residence permit in the Czech Republic shall also be considered under Czech law.

60. In addition, the Criminal Code allows the Czech Republic to assume jurisdiction over *inter alia* all bribery and trading in influence offences committed abroad by a foreigner, (1) if this offence is also criminalised by the law of the jurisdiction where it was committed (dual criminality) (Section 8, paragraph 1 (a) CC), (2) if the offence was committed for the benefit of a legal person or an individual entrepreneur in the Czech Republic (Section 8, paragraph 2 CC) or (3) in cases stipulated in an international treaty (Section 9, paragraph 1 CC). According to the Czech authorities, by virtue of the latter section, paragraph 17 of the Criminal Law Convention on Corruption (ETS 173) would be a sufficient basis for the Czech authorities to assume jurisdiction over bribery and trading in influence offences committed abroad involving Czech public officials, including members of Czech public assemblies (who are not at the same time Czech nationals).

Section 8 Subsidiary Principle of Universality

- (1) The Czech law shall be applied to determine the liability to punishment for an act committed abroad by a foreign national or a stateless person with no permanent residence permit on the territory of the Czech Republic, if:
- a) the act is also punishable under the law in force on the territory where it was committed; and
 - b) the offender is apprehended on the territory of the Czech Republic and was not extradited or surrendered for criminal prosecution to a foreign state or other subject authorised to criminal prosecution.
- (2) The Czech law shall be applied to determine the liability to punishment for an act committed abroad by a foreign national or a stateless person with no permanent residence permit on the territory of the Czech Republic, if the offence was committed in the benefit of a legal person or its structural component with a seat on the territory of the Czech Republic; or in the benefit of a natural person who is an entrepreneur and his enterprise, its organisational part has a seat on the territory of the Czech Republic or has its registered office here.
- (3) However, such offender shall not be sentenced to a more severe punishment than that stipulated under the law of the state on whose territory the crime was committed.

**Section 9
Jurisdiction under International Treaty Obligation**

- (1) The liability to punish an act shall also be considered under Czech law in cases stipulated in a promulgated international agreement which is part of the legal order (further on “international treaty”).
- (2) The provisions of Sections 4 to 8 shall not apply if it is not admitted under a promulgated international treaty.

Statute of limitations

61. Section 34 CC sets out the different limitation periods, which are dependent on the maximum prison sentence.

Section 34

- (1) Criminal liability to punishment for a criminal act shall become extinct upon expiry of the period of limitation, which is
 - a) twenty years, in the case of a crime for which the Criminal Code permits imposition of an exceptional punishment, and in the case of a crime committed while preparing or approving a privatisation project in accordance with another legal norm;
 - b) fifteen years, if the upper limit of the criminal sanction is at least ten years of imprisonment;
 - c) ten years, if the upper limit of the criminal sanction is at least five years of imprisonment;
 - d) five years, if the upper limit of the criminal sanction is at least three years of imprisonment;
 - e) three years, in the case of other crimes.
- (2) – (5)...

62. The limitation periods are thus as follows:

Section CC	Type of offence	Max. sentence	Limitation period
331 (1)	Passive bribery	3 years	5 years
331 (2)	Passive bribery (asking for a bribe)	5 years	10 years
331 (3)	Passive bribery (substantial benefit <i>or</i> by a public official)	8 years	10 years
331 (4)	Passive bribery (major benefit <i>or</i> by a public official for a substantial benefit)	12 years	15 years
332 (1)	Active bribery	2 years	3 years
332 (2)	Active bribery (substantial benefit <i>or</i> inflicting substantial damage <i>or vis-à-vis</i> a public official)	6 years	10 years
333 (1)	Passive trading in influence	3 years	5 years
333 (2)	Active trading in influence	2 years	3 years

63. Section 34, paragraph 2 CC provides that the limitation period is calculated from the day “the consequence of a crime arises” or from the date the offence has been completed. Bribery and trading in influence offences fall under the latter category. Pursuant to paragraph 4 of this

Section, the limitation period shall be interrupted when “criminal proceedings (...) have been opened” (i.e. when a decision has been made to prosecute the offender), or when “the offender has been taken into custody, an arrest warrant was issued, a criminal action has been brought [i.e. submission of criminal charges to the court, a proposal to punish has been filed, the guilty verdict has been carried out or the criminal order [i.e. a simplified procedure for conviction with the same character as a judgment] for such crime is delivered to the person accused of a crime” or if the offender commits a new crime before the limitation period has expired and this crime is subject to an equal or stricter sanction. Each of these actions interrupts the limitation period, after which a new limitation period begins.

Defences

64. The old Criminal Code, which was in force until the end of 2009, contained in Section 163 a provision on the defence of so-called effective regret: “The punishability of the passive bribery (Section 160) and active bribery (Section 161) shall disappear if the offender has provided or promised a bribe solely because s/he had been requested to do so and reported the fact voluntarily and without any delays to the prosecutor or policy authority”. This provision has been repealed by the new Criminal Code, which entered into force on 1 January 2010. The new Criminal Code thus does not provide for any special defences; only for cases which are still handled under the provisions of the old Criminal Code does the defence of effective regret still have significance.

Statistics

65. The Czech authorities provide the following information on cases, which have been adjudicated under the old Criminal Code, which was in force until the end of 2009:

Section 160 (Passive bribery)	2007	2008	2009
<i>Criminal offences</i>	51	48	43
- persons prosecuted	48	44	37
- persons accused	37	42	31
<i>Criminal offences decided by courts</i>	52	34	30
- persons convicted	51	26	26
- imprisonment	0	1	5
- conditional sentence	48	22	19
- prohibition of activity	27	15	8
Section 161 (Active bribery)			
<i>Criminal offences</i>	75	88	86
- persons prosecuted	74	84	72
- persons accused	65	78	68
<i>Criminal offences decided by courts</i>	64	64	52
- persons convicted	51	50	42
- imprisonment	2	4	2
- conditional sentence	38	33	32
- prohibition of activity	15	21	7
Section 162 (Trading in influence)			
<i>Criminal offences</i>	7	6	4
- persons prosecuted	6	6	3
- persons accused	2	6	3

<i>Criminal offences decided by courts</i>	2	0	1
- persons convicted	1	0	1
- imprisonment	0	0	0
- conditional sentence	1	0	1
- prohibition of activity	0	0	0

III. ANALYSIS

66. In January 2010 a new Criminal Code entered into force in the Czech Republic. The new Criminal Code preserves the general characteristics of the provisions on bribery and trading in influence of the old Criminal Code, but introduces some amendments with a view to bringing these provisions closer to international standards. The main innovations of the new Criminal Code as regards bribery and trading in influence include a new definition of 'public official', including foreign and international public officials, the unequivocal criminalisation of private sector bribery and an increase in the level of sanctions.
67. The GET noted with satisfaction that all practitioners met were well-informed of the changes introduced by the new Criminal Code (hereafter: CC) and were unanimous in their positive assessment of the new corruption provisions with one important exception: the fact that under the new CC bribe-givers can no longer rely on a defence of effective regret, a decision which was much-regretted by almost all practitioners met on site, even if it would appear that this provision were rarely used in practice. In stark contrast to the positive assessment of the legislation stood the assessment of the application of these provisions in practice. Several of the GET's interlocutors (and not just civil society representatives) painted a rather bleak picture as regards the effectiveness of the investigation, prosecution and adjudication of corruption cases in the Czech Republic. Even after discussing recent high-profile cases, such as the case involving the former mayor of Brno and the so-called football competition cases (which reportedly involved five premier league teams, 44 instances of corruption and 26 convicted offenders), different interlocutors claimed that most cases involved petty corruption (this appears to be confirmed by the statistics on sanctions). High-profile cases allegedly rarely reached the courts. In general, the detection and conviction rate for corruption offences was regarded to be too low. In this context, various practitioners spoke of difficulties in building a corruption case: insufficient investigative means (including changes made to the Criminal Procedure Code, which have limited the cases in which wire-tapping could be used) and alleged political influence over the investigation and prosecution of corruption.²⁸ Other interlocutors also expressed criticism of the lack of specialisation and independence of the prosecution service and of problems regarding continuity of the expertise in investigating corruption in various sections of the police. Given the fact that the current government listed the fight against corruption among its priorities when it took office in May 2010, these issues warrant some critical reflection on the side of the Czech authorities. The GET therefore noted with satisfaction that after the visit, in January 2011, an anti-corruption strategy was adopted by the Czech government, in which various actions to address the above-mentioned problems are announced.²⁹
68. Turning more in detail to the legal framework, the Czech Republic's criminal law provisions on corruption are principally contained in three articles: Section 331 CC on passive bribery, Section 332 on active bribery and Section 333 on passive and active trading in influence. These articles

²⁸ One of the examples provided related to the recent investigation and prosecution of the former mayor of Vsetín.

²⁹ These actions include the drafting of amendments to the Criminal Procedure Code on the use of wire-tapping, an analysis of the effectiveness of corruption investigations (including proposals for measures to amend potential deficiencies) and the drafting of amendments to relevant laws to reinforce the independence and accountability of the prosecution service.

are complemented by two further provisions: Sections 127 and 334, which define the categories of persons that are included in the notion of ‘public’ official and explain other key elements of the aforementioned criminal offences. The GET welcomes that it was provided with more than a few summaries of court decisions to explain the scope of these provisions. As only just over one year has passed since the new CC entered into force, there is no related jurisprudence. The cases made available to the GET were therefore based on the previous CC. In the opinion of the GET, with the entry into force of the new Criminal Code in January 2010, the Czech provisions on bribery and trading in influence appear to be to a large extent in line with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). That said, the GET has identified a few quite specific deficiencies, which will be outlined below.

69. A singular feature of the provisions on bribery is that they cover bribery of everyone, as long as it is “in connection with procuring affairs in the public interest” or “his/her or someone else’s business activities”. Bribery of a public official (including a member of a domestic public assembly) would be considered, according to Section 331, paragraph 3 and Section 332, paragraph 2 CC, as an aggravating circumstance of bribery committed in connection with procuring affairs in the public interest (or with someone’s business activities), as would bribery of the various categories of foreign and international officials be (pursuant to Section 334, paragraph 2 CC, which equates these officials with domestic public officials for the purpose of the bribery offences). The concept “in connection with procuring affairs in the public interest” was discussed at length during the on site visit, in order to clarify whether it does not unduly limit the scope of the bribery provisions as compared to the Convention. From the information provided, it became clear that this concept already existed under the old Czechoslovakian legislation and no legal definition of this concept has ever been established, because – in the words of the Czech Constitutional Court – “the attempt to provide a closer definition could mean such a conceptual limitation that it would not be able to cover all conceivable forms (...)”.³⁰ Extensive jurisprudence has therefore been built up over the years, clarifying that it not only covers decision-making by public authorities but “all tasks in whose proper execution the whole society – or at least a bigger group of citizens – has an interest”.³¹ From the examples provided (see paragraph 27 above) it would indeed seem that a wide array of activities would be covered by this concept. The exact limits of the concept “in connection with procuring affairs in the public interest” nevertheless continue to be debated. Some of the GET’s interlocutors found, for example, that a recent much-discussed decision of the Supreme Court, which *inter alia* stated that bribing football referees should be considered as bribery in connection with procuring affairs in the public interest (as fairness in sport would be a public interest, also for gambling purposes), went too far.
70. In this connection, the Czech authorities also explained that acts carried out by a public official in the exercise of his/her functions would likely always be connected to procuring affairs in the public interest. However, as the definition of a public official in Section 127 CC is rather narrow (in that it only refers to relatively high-ranking categories of functions, see paragraph 12 above), the GET had to explore whether the acts (or omissions) carried out by ordinary employees in the public service in the exercise of their functions would indeed always be covered by the concept “in connection with procuring affairs in the public interest”. In this connection, the GET took note of several references to cases in which it was determined that bribing someone “in connection

³⁰ Decisions No. 123/1998 Usn.Č. 123Usn (Constitutional Court). The Constitutional Court specified “*society’s complexity renders it impossible to produce an objectively formulated law covering, by its specifications and definitions the entire variability of its manifestations*”. However, it should be noted that even though Although Section 334, paragraph 3 extends the undefined concept

³¹ Resolution 4 (Tdo 77/2002) of the Supreme Court of 26 November 2002. See in this context in a similar vein: Decision No. 1/1978, *Collection of Criminal Decisions*; Decision 16/1988, *Collection of Criminal Decisions*; Decision No. 20/1998, *Collection of Criminal Decisions*.

with procuring affairs in the public interest” would usually refer to “a person deciding or co-deciding on the affair in the public interest”.³² However, in addition it would also cover “a person, who does not have any decision-making authority but – for example – prepares background information for a decision” or conducts other activities which have the ability to “fundamentally influence the final decision”.³³ The GET concludes from these decisions that ordinary employees – such as secretaries, spokespersons, archivists etc. – in public service who are not able to “fundamentally influence the final decision” will not be considered as subjects of the passive bribery offence or as targets of the active bribery offence. Consequently, the GET recommends **to clarify that bribery of all categories of employees in the public sector is covered, regardless of whether they are able to fundamentally influence a final decision in connection with procuring affairs in the public interest or not.**

71. The GET noted that the relevant provisions do not explicitly refer to the bribe-taker acting or refraining from acting in return for the undue advantage. However, even if the wording of the Convention is not expressly reflected in Sections 331 and 332 CC, during the on-site visit it was explained to the GET that bribery – as understood by Czech legislation and dealt with in case law – did in fact presuppose a specific conduct (or refraining from such conduct) on the side of the passive party. As regards ‘refraining from acting’, a reference was furthermore made to Section 112 CC, which provides that “the conduct is also understood as an omission of such conduct (...)”.³⁴
72. Concerning more specifically bribery of public officials, the GET noted that, as regards acts (or omissions) rendered by the public official in return for the bribe, Section 127, paragraph 2 CC (on the definition of a public official) provides that “for criminal liability and protection of an official in accordance with particular sections of the Criminal Code it is required to commit the criminal offence in relation to his/her competence and responsibility”. The same limitation is extended to the different categories of officials of a foreign state and/or international organisation (paragraph 3 of Section 127 CC). Discussions held on site clarified that as long as a public official has – because of his/her function or position – the ability to perform the act required from him/her, even if the act falls outside the scope of his/her direct competence and responsibility, this situation would be covered by the provisions on bribery (as well as those on abuse of authority). This interpretation would appear to be supported by a judicial decision provided to the GET.³⁵
73. As follows from the paragraphs above, bribery in the private sector is not criminalised as a separate offence. Under the old Criminal Code this was covered by Section 162a CC, which provided that “procurement of affairs in the public interest also means maintaining the duty imposed by legal regulations or a contract whose purpose is to ensure that there is no abuse or unjustified advantage of participants in business relations or persons acting on their behalf”. This wording has been retained in Section 334, paragraph 3 of the new Criminal Code. In addition, however, Sections 331 and 332 CC now also criminalise bribery committed “in connection with

³² Resolution of the Supreme Court of 26 November 2002, no. 4 Tz 77/2002; Judgment RNs T 723/2004 (Supreme Court).

³³ Resolution of the Supreme Court of 15 July 2004, no. 5 Tdo 796/2004, www.nsoud.cz; Judgment RNs T 723/2004 (Supreme Court).

³⁴ See paragraph 23 above.

³⁵ Judgment *Rt 15/81 6 TZ 28/80* (even though this is an active bribery case and does provide further information on the liability of the public official concerned) provides “if the offender bribes the public officials in order that such official, for undue benefit of briber, performs his power in a way contravening a law, or transgresses his power, it shall result in one-time concurrent commission of criminal offence of bribery and of instigation to misuse power of public officials, if the public official has at least attempted this offence”. This case was, as indicated above, adjudicated under the old Criminal Code, but as the old Criminal Code contained a similar reference to the competence and responsibility of a public official as Section 127, paragraph 2 does, the GET assumes this cases continues to be relevant.

his/her or someone else's business activities". The fact that this provides for a more comprehensive and clear criminalisation of private sector bribery is welcomed by the GET.³⁶ The GET is furthermore satisfied that the relevant provisions cover all persons "who direct or work for, in any capacity, private sector entities" and notes that it is not explicitly required that the offender acts or refrains from acting in breach of his/her duties (thus going somewhat beyond the requirements of the Convention).

74. Turning to the key substantive elements of the bribery offence of Sections 331 and 332, the GET welcomes that providing, offering and promising on the one hand and accepting, accepting a promise and requesting on the other hand are truly seen as autonomous offences (and would not be systematically dependent on the existence of a corrupt agreement between the bribe-taker and bribe-giver). In this context, the GET noted that the active bribery offence of Section 332 CC refers to "provides, offers or promises a bribe", in accordance with the Convention. Section 331 CC, on the other hand, criminalises the acceptance of a bribe or of a promise of a bribe as the basic form of the passive bribery offence (paragraph 1) and refers to "asks a bribe" as an aggravating circumstance (paragraph 2). As regards the latter the GET appreciates the various cases it was provided with in which unfulfilled requests for a bribe were seen as completed offences and noted with satisfaction that this would also include implicit requests.³⁷ The choice of the Czech legislator to criminalise passive bribery in different gradations, depending on the act of the bribed person, is of no consequence in relation to the Convention. More problematic, however, is the fact that Section 331 CC does not contain any reference to "the acceptance of an offer". The Czech authorities explained that as Section 331 explicitly covers "the acceptance of a promise", which is a less specific act than accepting an offer, the "acceptance of an offer" must be understood to be covered by this phrase too. In light of the fact that interlocutors met on site by the GET were unanimous in their understanding that accepting an offer would indeed be criminalised by Section 331 CC, the GET is led to conclude that "the acceptance of a promise" also covers "the acceptance of an offer" in the Czech legal context.
75. Turning to the indirect commission of bribery offences and third party beneficiaries of a bribe, the GET noted that the provision on passive bribery in the new Criminal Code (Section 331 CC) now explicitly refers to bribery "by means of someone else" and uses the phrase "for him-/herself or for someone else" (specifications that were absent from Section 160 CC on passive bribery in the old Criminal Code). However, Section 332 CC on active bribery does not perfectly mirror this provision. The GET was provided with various slightly differing translations of this section, which either excluded the indirect commission of bribery offences or the third party beneficiary, which complicated discussions held on site and the GET's understanding thereof after the visit. As regards third party beneficiaries of the bribe, it was explained to the GET (after the visit) that these were not explicitly mentioned in Section 332 CC but were covered by the explanation of what is to be considered a bribe in Section 334 CC. This section refers to advantages which are either (to be) received by the bribe-taker or "with his/her consent to another person". While in light of this one may wonder why it was nevertheless considered to be necessary to include the phrase "for him-/herself or for someone else" in the provision on passive bribery, the GET accepts the explanation that situations in which the bribe is for the benefit of someone else than the passive party would be covered by the reference to Section 334 CC. As regards indirect

³⁶ Even though "in connection with his/her or someone else's business activities" now overlaps with Section 334, paragraph 3, the GET does not expect this to lead to any particular problems in practice: Bribery in connection with his/her or someone else's business activities and bribery in connection procuring the affairs in the public interest (to which Section 334, paragraph 3 CC refers) are criminalised in the same section and the elements of the offence thus apply uniformly regardless of how it is categorised.

³⁷ See Decisions No. 3/1978 and No. 46/1983, *Collection of Criminal Decisions*.

commission of bribery offences, the most recent translation of Section 332 CC received by the GET refers to a bribe being provided, offered or promised “to or for another person”, which according to the explanation provided after the visit (see paragraph 21 above) was included to cover situations in which the bribe-giver entrusts the bribe to someone else to ultimately be given to the bribe-taker. This appears to be confirmed by the Commentary to the new Criminal Code, which explains: “A person, to whom the bribe is provided, offered or promised, may be the person providing things in the public interest, or *an intermediary* between the offender and such a person”.³⁸ Nevertheless, the GET takes the view that the absence of the intermediary element in the provision on active bribery, could be problematic, bearing in mind that this has been explicitly included in the provision on passive bribery. It would not be difficult to argue that if the legislator had wanted to punish indirect active bribery, this would have been made as clear in the new provision on active bribery as has been done in the provision on passive bribery. Bearing in mind the problems the GET has had in having this point clarified, the fact that the only example of jurisprudence presented to the GET in relation with indirect bribery (under the old Criminal Code) was related to “participation in a criminal offence of *passive* bribery”, the ambiguous wording of Section 332 CC in this respect and the inconsistency between Section 331 CC and Section 332 CC, the GET would find it advisable if due consideration were to be given to bringing Section 332 CC into line with Section 331 CC for the sake of coherence and legal certainty, as far as the indirect commission of bribery offences is concerned.³⁹ Consequently, the GET recommends **to consider amending Section 332 of the Criminal Code to ensure that it unambiguously covers instances of active bribery committed through intermediaries.**

76. As regards the definition of a bribe, as used both in the provisions on bribery and trading in influence, the wording of Section 334, paragraph 1 CC (see paragraph 19 above), as evidenced by various cases (including one of the football competition cases, in which sexual favours were reportedly used as a bribe), leaves the GET with no doubt that undue advantages – material and immaterial –, irrespective of their monetary value, are properly captured by the relevant provisions.
77. Turning to trading in influence, Section 333 criminalises active and passive trading in influence: the promising, offering and giving and the requesting or accepting of a bribe for the exertion of influence on the execution of the authority of public officials. In some respects this provision goes beyond the requirements of the Convention, in that the target of the influence is not limited to decision-making of public officials and it is not explicitly required that the influence is of an improper character. However, in two important respects Section 333 CC falls short of the requirements of the Convention. First of all, while paragraph 2 of Section 333 CC covers the material elements of active trading in influence in that it explicitly includes providing, offering and promising, the mirroring elements in the paragraph on passive trading influence only refer to requesting and accepting. During the on-site visit the Czech authorities admitted that the absence of any reference to the acceptance of an offer/promise of an undue advantage was indeed a shortcoming. Second, on site the GET discussed at length situations in which the influence was not exerted or did not lead to the intended result. In the opinion of practitioners, as confirmed by case-law, it was irrelevant whether the offender actually influenced the public official or not (and whether this influence led to the intended result or not).⁴⁰ However, if the influence peddler had no intention or possibility to influence the public official in the first place, the influence peddler would be prosecuted for fraud, which was also confirmed after the on-site visit by jurisprudence.⁴¹

³⁸ Commentary to the new Criminal Code, Vol. II, p. 2892.

³⁹ Judgment (Rt32/87) 11TZ 25/86.

⁴⁰ Decision No. 16/1981, *Collection of Criminal Decisions*.

⁴¹ Decision No. 11/1986, *Collection of Criminal Decisions*

As regards the active party – i.e. the person giving or offering an undue advantage to the presumed influence peddler – the situation appears less clear: some interlocutors seemed to regard this as an attempt at trading in influence, whereas others questioned whether s/he could be held criminally liable at all, either because it would be an impossible attempt or because s/he would be regarded as a victim of fraud. This approach diverges considerably from the Convention, which requires the criminalisation of both active and passive trading in influence, irrespective of whether this influence is pretended or real. In the view of the GET, a person who merely claims – based on his/her professional position or social status that make him/her appear to be able to influence the targeted public official – to have the possibility to influence the public official's decision in exchange of an undue advantage, even if s/he has no ability to do so, is as detrimental to the fairness and impartiality of the decision-making processes in public administration as the action by the person who has a real influencing power over the official. Therefore, the GET recommends **to amend Section 333 of the Criminal Code on trading in influence, ensuring that all the requirements of Article 12 of the Criminal Law Convention on Corruption (ETS 173) are met, in particular as regards the acceptance of an offer or promise of an undue advantage and instances of supposed influence.**

78. As indicated in the descriptive part of the report, the Czech Republic has not ratified (or signed) the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). However, the authorities claim that the matters addressed by the Protocol are already covered in the Criminal Code. As regards domestic and foreign arbitrators, the authorities state that this category of persons would be captured by the general bribery provisions: as arbitration is an alternative to the judicial process and impartial dispute resolution is in the interest of society as a whole, these activities would be regarded as being “in connection with procuring affairs in the public interest”.⁴² Furthermore, foreign arbitrators would according to the authorities also be considered as foreign public officials, as they occupy “a post in (...) a judicial authority or any other public authority of a foreign country”.
79. As regards domestic jurors, it should be recalled that the Czech Republic does not have a jury system.⁴³ As regards foreign jurors, the authorities indicate that these would be regarded as foreign public officials as, pursuant to Section 334, paragraph 2(a) CC, they would occupy “a post in a (...) judicial authority of a foreign country”. The GET accepts that arbitration and the activities carried out by jurors can be considered as being connected to “procuring affairs in the public interest” and finds that, as regards commercial arbitration, the latter may also be connected to “business activities”. However, it can not accept the argument that foreign arbitrators and foreign jurors can be considered as foreign public officials. In the opinion of the GET it will not often be the case that foreign arbitrators hold a post in a judicial or other public authority, as mentioned in Section 334 CC. Members of a foreign jury are furthermore not ‘employed’ by the court and might not even be paid for their service to the community, contrary to what the notion of “occupying a post” in Section 334 CC would suggest. Furthermore, as the Czech legislator has found it necessary to separately mention foreign public officials in relation to the bribery provisions, while one could make a similar argument – as has been done in respect of foreign jurors and arbitrators – that these would already be covered by the general bribery offence in connection

⁴² In addition, the Czech authorities refer to Section 334, paragraph 3 CC, which includes adherence to legal and contractual regulations in business relations as also being “procurement of affairs in the public interest”. Furthermore, the financial arbitrator and his/her deputy – whose competence, in accordance with Law No. 229/2002 Coll., relates to disputes between providers and users of financial services – would be covered by the aggravated form of bribery of public officials (as they are specifically mentioned in Section 127, paragraph 1(h) CC on public officials).

⁴³ The Czech legal system knows the concept ‘lay judge’, which can be equated to judges or any other person “holding an office in a body of public authority” in Section 127, paragraph 1(c), thus making the provisions on bribery of public officials apply to lay judges.

with procuring affairs in the public interest, the GET takes the view that it would need to be made clear, for the sake of legal certainty, if and how bribery of foreign arbitrators and foreign jurors is exactly to be covered (at the very least to specify whether foreign arbitrators and foreign jurors are automatically to be considered by the investigative and judicial authorities as being foreign public officials or not). The GET therefore recommends **to clarify in an unequivocal manner the way in which bribery of foreign arbitrators and foreign jurors is criminalised in the Czech Republic and to sign and ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible.**

80. The sanctions provided by the Criminal Code for bribery and trading in influence are imprisonment, forfeiture of part or the whole of the offender's property and/or a fine (or in the words of the Criminal Code: "a pecuniary penalty"⁴⁴) as well as certain additional sanctions – such as disqualification or "prohibition of activity". The maximum prison sentence for 'basic' passive bribery, including passive bribery in the private sector, is 3 years (or in cases where the passive party requested the bribe: 5 years) and for 'basic' active bribery, including active bribery in the private sector, 2 years. The maximum term of imprisonment for these offences is raised to 8 and 12 years for passive bribery – including passive private sector bribery – if respectively a substantial benefit⁴⁵ or major benefit⁴⁶ is involved, and raised to 6 years for active bribery – including active private sector bribery – if the bribe-giver intended to procure a substantial benefit or inflict substantial damage or other serious consequence. As mentioned before, bribery of public officials, including foreign and international officials is, however, already an aggravated form of the above-mentioned 'basic' bribery offence, thus allowing higher sanctions to be imposed: namely 6 years' imprisonment for active bribery and 8 years' imprisonment for passive bribery (and up to 12 years' imprisonment if the public official intended to acquire a "substantial benefit"). The sanctions for trading in influence are similar to those of the 'basic' bribery offence, namely 2 years for active trading in influence and 3 years for passive trading in influence. As aggravating circumstances may apply and thus higher sanctions may be imposed and as the sanctions for all bribery offences have recently been raised following the entry into force of the new Criminal Code, the GET considers the present sanctions having the potential of being effective, proportionate and dissuasive, as required by the Convention. From the information provided to the GET (see the table in paragraph 65), it would in any case appear that, in practice, prison sentences are rarely imposed, which corroborates criticisms heard on site that most adjudicated cases involved petty corruption and that more high-profile cases rarely reach the courts.
81. The limitation period is related to the maximum sanction that can be imposed for corruption offences and ranges from 3 years for active trading in influence and 'basic' active bribery to 15 years for passive bribery of a public official for a substantial benefit. The limitation period runs from the commission of the offence. It is interrupted (and restarted) by various steps in the proceedings (such as a decision to prosecute). Expiry of the limitation period is thus unlikely to pose an obstacle in bribery and trading in influence cases. The GET welcomes this state of affairs.
82. Finally, as stated in the descriptive part of the report (see paragraphs 59 and 60 above), Section 4 CC establishes jurisdiction of the Czech Republic over offences committed on its territory, as required by Article 17, paragraph 1a of the Convention. Section 4 CC has a wide scope and

⁴⁴ The amount of this fine or pecuniary penalty depends on the income of the offender and consequently ranges from €80 to €1.46 million. See footnote 17 above.

⁴⁵ Pursuant to Section 138 CC, a substantial benefit would amount to at least 500,000 CZK (approximately €20,000).

⁴⁶ Pursuant to Section 138 CC, a major benefit would amount to at least 5 million CZK (approximately €200,000).

allows the Czech Republic to also assume jurisdiction if the offence has only in part been committed on its territory or if the consequences of the offence have in part occurred on its soil. In addition, the Czech Republic has jurisdiction, pursuant to Section 6, over all offences committed abroad by one of its citizens (or stateless persons with a Czech permanent residence permit). However, Section 6 CC neither covers offences committed abroad by Czech public officials and members of Czech public assemblies who do not have Czech citizenship (as foreseen by Article 17, paragraph 1b of the Convention) nor offences committed abroad by foreigners *involving* a Czech public official or a member of a Czech public assembly or a national who is at the same time an official of an international organisation, a member of an international parliamentary assembly or a judge or an official of an international court (as foreseen by Article 17, paragraph 1c). Whereas Section 8 CC would provide for Czech jurisdiction over such offences, this is limited to situations in which the act is also punishable under the law of the territory on which the offence was committed (dual criminality) or in which the offence was committed for the benefit of a company in the Czech Republic. However, it was pointed out to the GET that Section 9 CC establishes that the Czech Republic has jurisdiction “in cases stipulated in a promulgated international agreement, which is part of the legal order”. One could argue that this only refers to self-executing treaties ratified by the Czech Republic (and thus not the Convention). However, as representatives of the judiciary, the Ministry of Justice and academics were all of the firm opinion that Section 9 does not only relate to self-executing treaties, the GET accepts that this provision would allow the Czech Republic to assume jurisdiction in the various situations foreseen by Article 17, paragraphs 1b and 1c of the Convention.

IV. CONCLUSIONS

83. Following the entry into force of the new Criminal Code in January 2010, the relevant legal provisions on corruption are largely in line with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Nevertheless, a limited number of quite specific deficiencies need to be addressed. An important novelty of the new Criminal Code is the criminalisation of bribery “in connection with business activities”, which addresses corruption in the private sector more clearly and comprehensively than under the old Criminal Code. However, as regards corruption in the public sector, the central element of the previous bribery provisions, the commission of bribery “in connection with procuring affairs in the public interest or not” has been retained. In this connection, it needs to be clarified that bribery of all categories of employees in the public sector is covered, regardless of whether they are able to fundamentally influence a final decision “in connection with procuring the affairs in the public interest” or not. Further minor deficiencies can be found in Section 333 of the Criminal Code on trading in influence, which needs to be amended to fully align it with Article 12 of the Criminal Law Convention on corruption (ETS 173), by criminalising the acceptance of an offer or promise of an undue advantage and covering instances of supposed influence. Furthermore, consideration should be given to amending Section 332 of the Criminal Code, to unambiguously cover instances of active bribery committed through intermediaries (as has been done in Section 331 on passive bribery). Finally, the Czech Republic should as soon as possible become a party to the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) and ensure, in this context, that bribery of foreign arbitrators and foreign jurors is adequately covered.
84. To conclude, the new Criminal Code provides a sound basis for the investigation, prosecution and adjudication of corruption offences. The main challenge in fighting corruption in the Czech Republic lies with the effective application of the legislation. In this context, GRECO noted with satisfaction that the Czech government listed the fight against corruption as one of its priorities upon taking office in May 2010 and has announced various measures to increase the

effectiveness of the legal provisions on corruption in practice in its anti-corruption strategy of January 2011.

85. In view of the above, GRECO addresses the following recommendations to the Czech Republic:
- i. **to clarify that bribery of all categories of employees in the public sector is covered, regardless of whether they are able to fundamentally influence a final decision in connection with procuring affairs in the public interest or not** (paragraph 70);
 - ii. **to consider amending Section 332 of the Criminal Code to ensure that it unambiguously covers instances of active bribery committed through intermediaries** (paragraph 75);
 - iii. **to amend Section 333 of the Criminal Code on trading in influence, ensuring that all the requirements of Article 12 of the Criminal Law Convention on Corruption (ETS 173) are met, in particular as regards the acceptance of an offer or promise of an undue advantage and instances of supposed influence** (paragraph 77);
 - iv. **to clarify in an unequivocal manner the way in which bribery of foreign arbitrators and foreign jurors is criminalised in the Czech Republic and to sign and ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible** (paragraph 79).
86. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of the Czech Republic to present a report on the implementation of the above-mentioned recommendations by 31 October 2012.
87. Finally, GRECO invites the Czech authorities to authorise the publication of this report as soon as possible, to translate it into the national language and to make this translation public.