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Theme I

Third Evaluation Round

Evaluation Report on Denmark on Incriminations (ETS 173 and 191, GPC 2) (Theme I)

Adopted by GRECO
at its 43rd Plenary Meeting
(Strasbourg, 29 June – 2 July 2009)

I. INTRODUCTION

1. Denmark joined GRECO in 2000. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2002) 6E Final) in respect of Denmark at its 10th Plenary Meeting (8-12 July 2002) and the Second Round Evaluation Report (Greco Eval II Rep (2004) 6E) at its 22nd Plenary Meeting (14-18 March 2005). The afore-mentioned 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 Denmark on 8 and 9 December 2008, was composed of Mr Dražen JELENIĆ, Acting County State Attorney (Croatia) and Mr Björn THORVALDSSON, Public Prosecutor (Iceland). The GET was supported by Mr Bjorn JANSON, Deputy to the Executive Secretary of GRECO. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2008) 2E, Theme I), as well as copies of relevant legislation.
4. The GET met with representatives of the following public institutions: Ministry of Justice (Law Department), District Court of Fredriksberg (judges), Director of Public Prosecutions, Public Prosecutor for Serious Economic Crime, State Employer's Authority, University of Aalborg, Moreover, the GET met with representatives of the Danish Chapter of Transparency International.
5. The present report on Theme I of GRECO's 3rd Evaluation Round – "Incriminations" – was prepared on the basis of the replies to the questionnaire and information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Danish 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 Denmark 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 (2008) 9E, Theme II.

II. INCRIMINATIONS

Description of the situation

7. Denmark ratified the Criminal Law Convention on Corruption (ETS 173) on 2 August 2000 and the Convention entered into force in respect of Denmark on 1 July 2002. Denmark has made reservations concerning this Convention, namely in respect of Article 12 (trading in influence), Article 17 (jurisdiction) and Article 26 (mutual assistance). Denmark ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) on 16 November 2006. The Protocol entered into force on 1 March 2006 in respect of Denmark.
8. Active and passive bribery in the public sector, whether domestic or international, are criminalised by virtue of two global provisions of the Criminal Code (CC) in place since 1866 and amended in 2000: Active bribery under Section 122 CC and passive bribery under Section 144 CC, i.e. all bribery offences in the public sector, contain the same basic elements, whether committed in Denmark or abroad. It should be noted, however, that Denmark has made a reservations to the effect that the Convention (ETS 173) and the Protocol (ETS 191) do not apply to the Faroe Islands and Greenland.

Active bribery in the public sector:

Criminal Code

Section 122

Any person who unlawfully¹ grants, promises or offers some other person exercising a Danish, foreign or international public office or function a gift or other advantage in order to induce him to act or refrain from acting in relation to his official duties is liable to a fine or imprisonment for up to three years.

Passive bribery in the public sector:

Criminal Code

Section 144

Any person who, while exercising a Danish, foreign or international public office or function, unlawfully² receives, demands or accepts the promise of a gift or other advantage is liable to a fine or imprisonment for up to six years.

Bribery of domestic public officials (Articles 1-3 and 19.1 of ETS 173)

Elements/concepts of the offence

“Domestic public official”

9. Domestic public officials are covered by the notion “*person exercising a Danish public office*”. The term “public office” is not defined in law as such, however, the preparatory works to this

¹ “unduly” or “unjustifiably” would be a more appropriate translation from the Danish text (Note by the GET)

² “unduly” or “unjustifiably” would be a more appropriate translation from the Danish text (Note by the GET)

legislation provides for a definition. The term public official includes judges and other staff of the judiciary. Employees of the central and local administrations are also included, regardless of whether their functions cover decision making or are limited to the performance of administrative activities. The specific nature of the employment or the function is of no importance for the application of sections 122 and 144 CC. The provisions cover, for example, civil servants, staff appointed under a collective agreement, staff employed on the basis of individual contracts, temporary staff and part-time staff. The term “public function” comprises positions to which people are elected and where the function of a post is based on a contract or service in pursuance of a duty. Therefore, members of the Danish Parliament as well as locally elected representatives and mayors etc are encompassed by the notion public function/office. The exercise of a public function also includes functions which are exercised on behalf of the public in undertakings organised as companies engaged in commerce or industry.

“Promising, offering or giving” (active bribery)

10. Section 122 CC comprises any person who “unlawfully grants, promises or offers” a bribe to a public official. The term “grant” (in Danish “yde”) and “give” have the same meaning within the context of section 122 CC. The term “unlawfully” does not exactly correspond to the Danish wording (“uberettiget”) and a more precise translation would be “unduly” or “unjustifiably”, according to the Danish authorities.

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

11. Passive bribery (section 144 CC) is covered in three distinct situations, i.e. when a public official receives, demands or accepts the promise of a gift or other advantage, section 144 CC.

“Undue advantage”

12. Both sections 122 and 144 CC comprise the expression “a gift or other advantage”. This includes both pecuniary and other advantages, such as the promise of personal return services, which follows from the preparatory works to the law (section 4.6.2.). According to the Danish law the gift or advantage in itself does not need to be qualified as “undue”; any gift or advantage would in principle be covered. However, as noted above, the granting promising or offering is qualified as undue or unjustified in the Danish law. According to section 144 CC acceptance of a bribe is liable to punishment, irrespective of whether the acceptance takes place after the duty concerned has been carried out without any prior promise of remuneration. The GET was informed that there are two forms of certain gifts or advantages that are considered “due” or “justified” in Denmark. Firstly, the granting of a gift as a reward for an act already carried out without any prior promise thereof will fall outside the scope of application of section 122 CC. Secondly, traditional gifts in relation to anniversaries, retirement or for Christmas etc, fall outside the scope of the application of sections 122/144 CC.
13. The State Employer’s Authority published, in June 2007, the Code of Conduct in the Public Sector, which deals with fundamental values and principles of public administration, such as “impartiality” and includes a separate chapter dealing with “acceptance of gifts”. The question of whether public employees are allowed to accept gifts or other benefits that are offered to them in connection with their work is dealt with at length in the Code of Conduct. It is inter alia stated that the principle governing the acceptance of gifts is closely linked to the impartiality of the public employee: “Employees should in general be extremely reluctant to accept gifts in connection with their work”; “An employee who has been offered a gift [...] should abstain from accepting the gift if

it has any bearing on the person in question's employment in the public sector. This is also the case even if the donor has not had any matter attended to by the authority". The Code also states that employees may, accept minor gifts in connection with events of a personal nature (special birthdays, anniversaries or when taking permanent leave of the workplace). Similarly, it is possible according to the Code, to accept minor gifts at Christmas or New Year, for example from the business sector. Employees may furthermore accept minor gifts of gratitude in situations where it may seem impolite to refuse and where it would be a disappointment to the donor if the gift was returned. Customary gifts in connection with official visits from abroad are also acceptable, according to the Code of Conduct, which is also supplemented with practical examples on how to act in certain situations. There is no fixed value for what would constitute a "minor" gift and different interlocutors met on-site indicated values of considerable differences as acceptable gifts.

"Directly or indirectly"

14. The elements *"directly or indirectly"* are not explicitly mentioned in the provisions. However, the GET was informed that this would not be an obstacle for the prosecution of active or passive bribery through, for example, an intermediary as this would be covered by the general rules on complicity, provided for in the Criminal Code. It follows from section 23 CC concerning complicity that any person who has contributed to the execution of a wrongful act by instigation, advice or action, is criminally liable in accordance with the same rules as the principal offender. Moreover, the GET was informed that complicity may exist also in relation to the planning of a bribery offence.

"For himself or herself or for anyone else"

15. "For himself or herself or for anyone else" is not reflected in the wording of sections 122 and 144 CC. However, it is clearly spelled out in the preparatory works to the law (section 4.6.2.) that it is of no importance for the criminal responsibility whether the advantage is to benefit the public official himself/herself or other persons, for example his/her spouse, children or others.

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

16. *"To act or refrain from acting in the exercise of his or her functions"* is referred to explicitly by section 122 CC and as a result action as well as omissions by the public official are covered by the law. Section 144 CC does not contain this qualification as it is the mere receipt, demand or acceptance of the advantage that is punishable as passive bribery.

"Committed intentionally"

17. Criminal responsibility under sections 122 and 144 CC can be imposed only if the intent is present, according to section 19 CC. Intent comprises direct intention, negligence (probability intent) and malice (dolus eventualis). In respect of active bribery it is, as stated above, sufficient that the gift or the advantage is unduly (*"uberettiget"*) granted, promised or offered to induce the public official to do or fail to do anything in relation to his/her official duties. There is no requirement that the action or omission involve a breach of duty or that the briber has such intention.

Sanctions

18. The criminal sanction in respect of active bribery in the public sector is a fine or imprisonment of up to three years and in respect of passive bribery in the public sector a fine or imprisonment of up to six years. (As a way of comparison, sanctions foreseen in respect of fraud are imprisonment of up to one year and six months, and in aggravated circumstances up to eight years. The sanctions regarding embezzlement are the same (sections 279, 285 and 286 CC). According to section 289 CC, tax fraud may render imprisonment of up to eight years.)
19. According to the Criminal Code, as a main rule, a criminal offence shall not lead to the suspension of civil rights, including business under an ordinary trade licence. However, a person who has been convicted of a criminal offence may be barred from an activity that requires special public authorisation or approval, or be deprived of continuing it in certain forms, if the offence committed gives reason to expect an obvious risk that the convicted would abuse this position or office. Moreover, a convicted person may be deprived of the right to be a promoter or managing director or member of a board of a limited liability company an association or a foundation (sections 78-79 CC).
20. Public officials convicted for passive bribery may also be subject to disciplinary sanctions, according to the Public Service Act in the form of a fine, change of functions or work place, demotion or dismissal.
21. The Danish authorities have referred to 10 criminal cases over the years 1969-2007, indicating the following sanctions in respect of offenders convicted for active bribery of domestic public officials (section 122 CC): 20, 40 and 50 days and 4 months respectively of imprisonment, 20 days simple detention and 30 days suspended imprisonment. Public officials convicted for passive bribery had been sentenced in one case to a fine only, in two cases to suspended imprisonment 2 and 4 months respectively and in one case to 8 months of imprisonment.

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

22. Active and passive bribery of members of domestic public assemblies are criminal offences under section 122 and 144 CC, as covered by the notion "Danish...public office or function", which comprises persons elected to the office/function. These, and all other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
23. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

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

24. Active and passive bribery of foreign public officials are criminal offences under sections 122 and 144, as such officials are covered by the notion "foreign...public office or function". These, and all other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
25. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

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

26. Active and passive bribery of members of foreign public assemblies are criminal offences under sections 122 and 144 CC as such officials are covered by the notion “*foreign...public office or function*”. All other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
27. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

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

28. Active and passive bribery in the private sector is dealt with in section 299 CC. This section, dated 1930, was amended in 2000.

Criminal Code

Section 299

Any person who, in circumstances other than those covered by section 280 of the Danish Criminal Code

1)...

2) in his capacity as trustee of any property of another person in breach of his duty claims or accepts a promise of a third party, for the benefit of himself or of others, a gift or any other advantage, as well as any person who grants, promises or offers such an advantage, shall be liable to a fine or to imprisonment for up to one year and six months.

Elements/concepts of the offence

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

29. Section 299.2, comprises “any person” in respect of the active side of private sector bribery. The bribe taker is defined in this section as any person who, in circumstances other than those covered by section 280 CC (“breach of trust”) acts in the “capacity as trustee of any property of another person”. The concept of “capacity as trustee of any property of another person” is not directly explained in the preparatory works of this provision. However, it was explained to the GET that the preparatory works in respect of section 280, to which section 299.2 refers would provide that section 299.2 is wide in scope and that it would cover any person who takes care of someone’s property.

“Promising, offering or giving” (active bribery)

30. Section 299.2 CC comprises any person who “grants, promises or offers” an advantage to a “trustee”

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

31. Passive bribery in the private sector is covered when a person “claims or accepts” a promise, a gift or any other advantages.

“Undue advantage”

32. Section 299.2 CC comprises *“a gift or any other advantage”*. This term includes both pecuniary and other advantages such as the promise of personal return service. The advantage must not be *“undue”*, but on the passive side, the claim or acceptance of the advantage need to be qualified as a breach of duty between the bribe taker and his/her principal.

“Directly or indirectly”

33. The element *“directly or indirectly”* is not explicitly mentioned in section 299.2 CC. However, the GET was informed that this would not be an obstacle for the prosecution of the active or passive offence through, for example, an intermediary as this would be covered by the general rules on complicity, provided for in the Criminal Code: it follows from section 23 CC that any person who has contributed to the execution of a wrongful act by investigation, advice or action, is criminally liable in accordance with the same rules as the principal offender. Moreover, complicity may be at stake also in relation to the planning of a bribery offence.

“For themselves or for anyone else”

34. Section 299.2 CC comprises the term *“for the benefit of himself or of others”*.

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

35. The requirements of action or omission in respect of the passive side of this offence are not explicitly included in section 299.2 CC. It was explained to the GET that this offence is fulfilled whether or not the receiver of the bribe acts or refrains from acting as a result of the advantage.

“In the course of business activity”...“in breach of duty”

36. Section 299.2 CC limits this offence to business situations only in respect of the passive side of the offence; the offender in his/her *“capacity as trustee of any property of another person”*. But there is no requirement that the *“active offender”* is operating in the course of business activity. As stated above, the claim or acceptance of the advantage needs to be qualified as a breach of duty between the bribe taker and his/her principal.

“Committed intentionally”

37. Criminal responsibility under section 299.2 CC can be imposed only if the intent is present, cf. section 19 of the Danish Criminal Code. Intent comprises direct intention, negligence (probability intent) and malice (*dolus eventualis*). Moreover, it is sufficient that the gift or the advantage is granted, promised or offered to induce the trustee to breach his/her duty.

Sanctions

38. The sanction in respect of this private sector offence is a fine or imprisonment of up to one year and six months.

Case law

39. The Danish authorities have referred to the following cases concerning bribery in the private sector (Section 299.2):
- 2005 (UfR 2005.1388V): A lessor agreed with a master painter, who was renovating the apartments in case of a tenant's moving, that the lessor should obtain a 15 % bonus. The tenant paid the lessor full price for the renovation. The lessor was acquitted.
 - 1974 (UfR 1974.955Ø): Employee in a limited company, who was responsible for buying and selling wine, secretly received agent's commission from a wine. His profit was appr. EUR 30 000. He was sentenced 4 months suspended imprisonment.

Bribery of officials of international organisations (Article 9 of ETS 173)

40. Active and passive *bribery of officials of international organisations*, are criminal offences under sections 122 and 144 CC as such officials are covered by the notion "*international public office or function*", including elected officials. All other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
41. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

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

42. Active and passive bribery of members of international parliamentary assemblies are criminal offences under sections 122 and 144 CC as such officials are covered by the notion "*international public office or function*". All other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
43. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

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

44. Active and passive *bribery of judges and officials of international courts*, are criminal offences under sections 122 and 144 CC as such officials are covered by the notion "*international...public office or function*". All other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
45. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

Trading in influence (Article 12 of ETS 173)

46. Trading in influence is not as such included in the criminal legislation and Denmark has made a reservation in this respect, see Annex A to this report.

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

47. Active and passive *bribery of domestic arbitrators* are criminal offences under section 304 a CC which entered into force in 2005 and reads:

Criminal Code

Section 304 a

(1) Any person who unlawfully grants, promises or offers a gift or other advantage to any person who acts as an arbitrator in Denmark or abroad in order to induce him to act or refrain from acting in relation to the exercise of such function is liable to a fine or imprisonment for up to one year and six months.

(2) The same penalty applies to any person who, in Denmark or abroad, acts as an arbitrator, and who unlawfully, in the exercise of such function, receives, demands or accepts the promise of a gift or other advantage.”

48. The provision refers explicitly to “any person who acts as an arbitrator in Denmark”. All other elements/concepts of the offence, except the penal sanctions, described under bribery of domestic public officials (above) are equally applicable in respect of bribery of domestic arbitrators, which follows from the legal provisions themselves and the preparatory work to the law.
49. The sanctions foreseen in respect of bribery of domestic arbitrators (whether active or passive offence) are a fine or imprisonment of up to one year and six months.
50. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

Bribery of foreign arbitrators (Article 4 of ETS 191)

51. Active and passive *bribery of foreign arbitrators* is criminalised under section 304 a CC, see above. The provision refers explicitly to “any person who acts as an arbitrator...abroad”. All other elements/concepts of the offence, except the penal sanctions, described under bribery of domestic public officials (above) are equally applicable in respect of bribery of foreign arbitrators, which follows from the legal provisions themselves and the preparatory work to the law.
52. The sanctions foreseen in respect of bribery of foreign arbitrators are a fine or imprisonment of up to one year and six months.
53. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

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

54. Active and passive *bribery of domestic jurors* are criminal offences under sections 122 and 144 CC by the notion “Danish...public office or function”. All other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of this offence.

55. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

Bribery of foreign jurors (Article 6 of ETS 191)

56. Active and passive *bribery of foreign jurors* are criminal offences under sections 122 and 144 CC by the notion “foreign public...office or function”. These and all other elements/concepts, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of these offences.
57. The authorities informed the GET that there were no statistics or specific case law available in respect of these offences.

Other questions

Participatory acts

58. In accordance with section 23 CC on complicity, “*any person who has contributed to the execution of a wrongful act by instigation, advice or action*”, is liable to a penalty according to the same rules as the principal offender. Complicity may exist both in relation to the planning of an offence and to the actual execution thereof. It is of no importance for the criminal responsibility whether the person contributing to the bribery himself/herself has prospects of getting a share of the advantage intended to be gained from the offence (bribery). However, the fact that the contributor gets a share in the advantage gained by the bribery may constitute an aggravating circumstance to be considered when determining the penalty.

Jurisdiction

59. The rules of Danish criminal jurisdiction are laid down in sections 6 and 7 CC: As a main rule, crimes committed in the territory of Denmark are subject to Danish jurisdiction (section 6). Crime committed outside Denmark (in a foreign state or a territory not belonging to any state) is dealt with, inter alia, in section 7 CC which reads:

“(1) Any act committed within the territory of another state by a person who is a Danish national or has his abode or other habitual residence within the territory of the Danish state when the charge is preferred is subject to Danish criminal jurisdiction, if:-

(i) the act is also a criminal offence under the legislation of the country in which the act was committed (dual criminality); or

(ii) the offender also had such relations to Denmark when the act was committed, and the act:-

(a) comprises sexual abuse of children or female circumcision; or

(b) is aimed at someone having such relations to Denmark when the act was committed.

(2) Any act committed outside the territory of another state by a person having such relations to Denmark as referred to in subsection (1) hereof when the charge is preferred is also subject to Danish criminal jurisdiction, provided that acts of the kind concerned are punishable by a sentence exceeding imprisonment for four months.

(3) Subsections (1)(i) and (2) hereof apply correspondingly to acts committed by a person who is a national of or has his abode in Finland, Iceland, Norway or Sweden when the charge is preferred, and who is present in Denmark”.

60. It should be noted that Denmark has reserved the right to apply Article 17, paragraph 1, b CC in cases where the offender is one of its nationals only if the offence is also a criminal offence according to the law of the state where the offence was committed (dual criminality).
61. The GET was informed that there was no specific case law in connection with questions concerning jurisdiction of bribery offences.

Statute of limitations

62. The period of limitation is determined by the length of imprisonment which can be imposed for the offence in question according to section 93 CC. It follows that this section compared with the pertinent provisions on the various bribery offences (i.e sections 122, 144, 299 and 304a CC) provides that the limitation period in respect of bribery offences is five years, except for passive bribery in the public sector (domestic, foreign and international) in which cases the limitation period is 10 years.
63. There is no specific case law of relevance in this respect.

Defences

64. The Criminal Code does not contain rules on special defences. However, according to section 82 CC, circumstances, such as that the offender has denounced himself/herself voluntarily and made a full confession or has given information crucial to the detection of crime committed by others, should be taken into consideration by the court when deciding on the sentence of a convicted offender.

III. ANALYSIS

65. Danish criminal legislation covers all forms of corruption offences contained in the Criminal Law Convention on Corruption (ETS 173) and the Additional Protocol thereto (ETS 191), except trading in influence. Overall the Danish legislation is in conformity with the requirements of these instruments. Having said that, the bribery provisions emanate from a century-old legislation, which has been amended in the light of Denmark's obligations when acceding to international conventions against corruption³. It is to be noted that the relevant criminal provisions are not always explicit in terms of the particular elements required by the Convention and the Protocol. Moreover, very few corruption cases have been prosecuted/adjudicated in Denmark to date and, consequently, the case law available in respect of such offences is limited. It is therefore necessary to interpret the legislation in the light of further details as provided for in the preparatory works to the law, which carry a considerable weight before the courts.
66. The bribery provisions of the Criminal Code – sections 122, 144 and 304a - do not require that the advantage as such be "undue" as provided for in the Criminal Law Convention; any gift or advantage is in principle meant to be covered by these provisions. Consequently, Danish legislation is wider in scope in respect of this particular element. However, the same sections of the Criminal Code require that the granting, promise or offer as well as the receipt, demand or acceptance of a gift or advantage be "unlawful" (or rather "undue", which corresponds better to the Danish wording "*uberretiget*"). In this respect it is explained in the preparatory works to the law that, firstly, the granting of a gift as a reward for an act already performed without any prior

³ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Council of Europe Criminal Law Convention on Corruption and the Protocol thereto.

promise thereof will not be covered by the active bribery offence, however it may be covered by the passive bribery offence and that, secondly, bribery offences do not cover certain gifts which are offered in connection with anniversaries, departures, retirement, Christmas and the like as such gifts are not granted with the intention to induce the recipient to do anything in relation to his/her official duties. It does not follow from the preparatory works that the value of the gifts plays a role in this respect, however, the Code of Conduct in the Public Sector refers to "minor gifts". The GET learned during the on-site visit that the value of such gifts in practice may vary considerably in different situations and the various interlocutors indicated different levels of value that would be acceptable. However, it was stressed that the value of such gifts would not primarily have an impact in respect of bribery, but rather for the obligation to declare them for tax reasons. The GET takes the view that the Danish legislation in this respect is principally clear and the fact that any value of an advantage could qualify as bribery ensures that the legislation is broad enough in this sense. At the same time, the GET could not disregard the exceptional gifts for certain occasions, mentioned above and that it is common practice that, for example, representatives of the business community offer such gifts to public officials. In the view of the GET, the principle exclusion of these types of gifts/advantages, in conjunction with the other exception of gifts/advantages provided as a reward for an act already carried out, may open up opportunities to cover up situations of bribery in practice. Moreover, the Code of Conduct in the Public Sector although its principle rule is that an employee should abstain from accepting offered gifts if it has any bearing on his/her employment in the public sector - also provides for a list of situations where public officials may exceptionally accept gifts/advantages, which is not very restrictive in the view of the GET. Having said that, the GET nevertheless maintains its view that the legislation itself (sections 122, 144 and 304a CC) is sufficiently broad to comply with the requirements of the pertinent provisions of the Criminal Law Convention.

67. Danish legislation makes it clear that any form of undue advantage is covered by the provisions of bribery of domestic public officials. However, in the view of the GET, the situation appears less clear in respect of different forms of bribery of foreign public officials and possibly *vis-à-vis* officials of international organisations/assemblies /courts. In this context, in the preparatory work to the legal amendments in 2000, it is stated *inter alia*, that "*even though the actus reus of the proposed amendment is the same as bribery of foreign public officials, etc., as bribery of Danish public officials, it cannot be precluded that in some countries such very special conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark. This might even be imagined although the gratuities may have been granted to make the foreign public official act in breach of his duties. Whether such occurrences are non-criminal (not "unlawful") must depend on a concrete assessment in each case, including an assessment of the purpose of granting the gratuity.*" In this respect, the GET recalls that this latter issue was an area of concern to the OECD Working Group on Bribery in International Business Transactions in its Phase 1 and 2 reports concerning Denmark's implementation of the OECD Convention. In response to the OECD's concern, the Ministry of Justice issued in February 2007 a booklet, indicating that facilitation payments in the foreign context are always undue and thus punishable. While generally satisfied with this clarification, the OECD Working Group continues to monitor whether Danish courts will actually follow this approach. So far, no such cases have been adjudicated. The GET concludes that the law in a strict sense does not exclude small facilitation payments. However, the preparatory works make it clear that such payments are criminalised in respect of bribery of domestic public officials, but not in respect of foreign public officials. The new guidelines of the Ministry of Justice imply that facilitation payments in the foreign context would also be criminalised, however, the Ministry guidelines have not yet been confirmed by case law. Moreover, the Danish authorities have stated that the provision of certain facilitation payments

that would be considered bribery in Denmark may not necessarily be covered by the bribery provisions if committed abroad as the customs/law of that foreign country needs to be taken into account in such situations. The GET takes the view that the Danish position, as described above, can give rise to ambiguities regarding bribery of foreign public officials and possibly also regarding bribery of officials of international organisations/assemblies/courts in respect of what is exactly to be considered unacceptable or undue advantage. The GET therefore recommends **to put beyond doubt that all forms of “undue advantages” are covered by the relevant bribery offences concerning foreign public officials and officials of international organisations/assemblies/courts.**

68. Another area of some concern to the GET is related to the offence of private sector bribery which is contained in section 299.2 CC. As a starting point, the GET notes that this provision on the one hand, is wider in scope in respect of several of the elements contained in Articles 7 and 8 of the Convention; for example, the active side of this type of bribery must not necessarily occur “*in the course of business activities*”. Furthermore, it is not a requirement under Danish law that the gift or advantage be “*undue*” and it is not a requirement that the briber has the intention of making the bribee act or not act in a certain way. On the other hand, the passive bribery offence is limited to situations where the bribee is in his/her “*capacity as trustee of any property of another person*”. At first glance, the GET perceived this expression as limiting the scope of the provision more than foreseen in the Convention. However, the interlocutors met by the GET made credible claims that this expression is to be interpreted in a wide sense and would cover “*any person who direct[s] or work[s] for, in any capacity, private sector entities*” as required by the Convention. This position is supported in the preparatory works to the law. There is no case law available to bring more clarity to this interpretation and the GET could not think of any category of persons that - contrary to the requirements of Articles 7 and 8 of the Convention - would not be covered by the latter wording. Therefore, it can be concluded that Denmark complies with these requirements of private sector bribery as provided for in the Criminal Law Convention.
69. The GET has misgivings about the sanctions available in respect of bribery offences in Denmark. Active bribery of public officials (whether domestic, foreign or international) under section 122 CC, no matter how grave, cannot lead to a more severe sanction than imprisonment of up to three years. This appears rather soft in comparison with other countries. The GET furthermore notes that both active and passive forms of private sector bribery (section 299.2 CC) and bribery of arbitrators (section 304a CC) may only lead to a maximum sanction of imprisonment of one year and six months. Consequently, this is significantly lower than the sanctions foreseen in respect of public sector corruption and the GET has serious doubts whether these sanctions are sufficiently effective, proportionate and dissuasive as required by the Convention and its Protocol. Even if the level of the sanctions does not exclude the use of measures such as confiscation of corruption proceeds or the extradition of non-Danish nationals, the GET firmly believes that the sanctions mentioned provide for the presumption that private sector corruption is a much less serious offence than public sector corruption. In this connection the GET wishes to stress that the Explanatory Report to the Criminal Law Convention⁴ expresses a clear preference for limiting the difference between public and private sector bribery as corruption also in this form may cause significant damage to society at large, not least in respect of public functions being carried out increasingly by the private sector, a trend that can be seen in many countries. The GET is fully aware that the sanctions provided for cannot be taken out of the context of the Danish criminal law tradition, but need to be assessed in the light of the general level of criminal sanctions in Denmark. However, these sanctions appear rather low even in such a perspective; for example, aggravated fraud may result in up to eight years’ imprisonment. Consequently, the GET

⁴ Explanatory report to the Criminal Law Convention, paragraph 52.

recommends **(i) to increase the maximum criminal sanctions in respect of active and passive bribery in the private sector (section 299.2 of the Criminal Code) as well as active and passive bribery of arbitrators (section 304a); (ii) to consider increasing the maximum criminal sanction in respect of active bribery offences in the public sector (domestic, foreign and international) covered by section 122 of the Criminal Code.**

70. Denmark has entered a reservation (c.f. Appendix A) in respect of trading in influence, which is not an offence as such under Danish law. It appears that the main reasons for not criminalising trading in influence as a separate offence are the complicated structure of this offence and the view that trading in influence is considered to be partly covered by the general rules on complicity in conjunction with private sector bribery (section 299.2 CC). Nevertheless, some interlocutors met by the GET on-site expressed the opinion that such an offence could be a useful complement to the bribery legislation in place. The GET recalls that the establishment of trading in influence as a criminal offence permits the authorities to reach the close circle of officials and to tackle so-called “background corruption”, which undermines the trust of citizens in the fairness of public administration⁵. The GET recommends **to consider criminalising trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation relating to this Article of the Convention.**
71. The GET is also concerned that Denmark applies the jurisdictional principle of dual criminality for bribery offences and has made a reservation in this respect (Appendix A). This means that Danish residents may be prosecuted for bribery offences committed abroad only if the offence is punishable in the foreign State and, if so, Danish courts may not apply sanctions which are more severe than those applicable under the law of the foreign state. The GET believes that this legal obstacle to the prosecution of bribery offences committed abroad significantly weakens Denmark’s possibilities to fight corruption committed in certain foreign states and, thus, spreads the wrong message regarding its commitment to fight corruption in a determined manner. This is particularly critical in Denmark, where, according to civil society representatives met by the GET on-site, there is a general perception that bribery is more of a problem in foreign relations than it is domestically. Consequently, the GET recommends **to consider abolishing the requirement of dual criminality in respect of bribery offences when committed abroad and thus withdrawing or not renewing the reservation relating to Article 17 of the Criminal Law Convention on Corruption (ETS 173).**
72. Finally, the GET notes that Denmark has entered a reservation in respect of the Criminal Law Convention on Corruption and its Protocol, according to which both instruments do not apply to the Faroe Islands and Greenland which are part of Danish territory (Appendix A). The GET is aware that new criminal legislation is under preparation in respect of Greenland and that certain legislative changes are also considered concerning the Faroe Islands which eventually may make it possible to withdraw this reservation. The GET encourages Denmark to pursue this matter and recommends **to give high priority to the taking of such steps as would allow to introduce legislation in conformity with the Criminal Law Convention on Corruption (ETS 173), and the Additional Protocol thereto (ETS 191), in Greenland and the Faroe Islands and thus withdrawing or not renewing the reservations to these instruments in respect of the territories concerned.**

⁵ Explanatory report of the Criminal Law Convention, paragraph 64.

IV. CONCLUSIONS

73. Overall, the Danish legal framework for the criminalisation of corruption complies with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Having said that, the applicable bribery provisions are not always explicit in terms of the particular elements required by the Convention; however, the legislation is to be interpreted in the light of further details provided for in the preparatory work to the law which carries a considerable weight when it is to be interpreted by the courts. Nevertheless, as a result of the generally low number of corruption cases in Denmark, it is difficult to foresee all consequences of the current legislation.
74. The offence trading in influence is not criminalised as such under Danish Law. Moreover, criminal sanctions in respect of bribery offences are generally low and particularly low in respect of active bribery in the public sector (domestic, foreign and international), active and passive bribery in the private sector as well as in relation to bribery of arbitrators. Moreover, Denmark should improve its possibilities to tackle bribery of foreign public officials and possibly in respect of officials of international organisations/assemblies/courts *inter alia*, through making it clear that all forms of “undue advantages” are covered by the bribery provisions, and by abolishing the requirement of dual criminality for bribery offences.
75. In view of the above, GRECO addresses the following recommendations to Denmark:
- i. **to put beyond doubt that all forms of “undue advantages” are covered by the relevant bribery offences concerning foreign public officials and officials of international organisations/assemblies/courts** (paragraph 67);
 - ii. **(i) to increase the maximum criminal sanctions in respect of active and passive bribery in the private sector (section 299.2 of the Criminal Code) as well as active and passive bribery of arbitrators (section 304a); (ii) to consider increasing the maximum criminal sanction in respect of active bribery offences in the public sector (domestic, foreign and international) covered by section 122 of the Criminal Code** (paragraph 69);
 - iii. **to consider criminalising trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation relating to this Article of the Convention** (paragraph 70);
 - iv. **to consider abolishing the requirement of dual criminality in respect of bribery offences when committed abroad and thus withdrawing or not renewing the reservation relating to Article 17 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 71);
 - v. **to give high priority to the taking of such steps as would allow to introduce legislation in conformity with the Criminal Law Convention on Corruption (ETS 173), and the Additional Protocol thereto (ETS 191), in Greenland and the Faroe Islands and thus withdrawing or not renewing the reservations to these instruments in respect of the territories concerned** (paragraph 72).
76. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Denmark to present a report on the implementation of the above-mentioned recommendations by 31 January 2011.

77. Finally, GRECO invites the authorities of Denmark to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.

APPENDIX A

Reservation contained in a Note verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000 - Or. Engl.

With regard to Article 37, paragraph 1, of the Convention, Denmark reserves the right not to establish as a criminal offence under Danish law, in part or in whole, the conduct referred to in Article 12.

[Note by the Secretariat: The Government of Denmark has informed the Secretary General of its intention to uphold this reservation, wholly, for a period of three years (Article 38 of the Convention):

- by a letter from the Permanent Representative of Denmark, dated 31 March 2005, registered at the Secretariat General on 1 April 2005 - Or. Engl.

- by a letter from the Permanent Representative of Denmark, dated 31 March 2008, registered at the Secretariat General on 1 April 2008 - Or. Engl.]

Period covered: 1/7/2002 -

The preceding statement concerns Article(s) : 12, 37

Reservation contained in a Note verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000 - Or. Engl.

With regard to Article 37, paragraph 2, of the Convention, Denmark reserves the right to apply Article 17, paragraph 1b, in cases where the offender is one of its nationals, only if the offence is also a criminal offence according to the law of the Party where the offence was committed (dual criminality).

[Note by the Secretariat: The Government of Denmark has informed the Secretary General of its intention to uphold this reservation, wholly, for a period of three years (Article 38 of the Convention):

- by a letter from the Permanent Representative of Denmark, dated 31 March 2005, registered at the Secretariat General on 1 April 2005 - Or. Engl.

- by a letter from the Permanent Representative of Denmark, dated 31 March 2008, registered at the Secretariat General on 1 April 2008 - Or. Engl.]

Period covered: 1/7/2002 -

The preceding statement concerns Article(s) : 17, 37

Reservation contained in a Note verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000 - Or. Engl.

With regard to Article 37, paragraph 3, of the Convention, Denmark reserves the right to refuse mutual legal assistance under Article 26, paragraph 1, if the request concerns an offence which according to Danish law is considered a political offence.

[Note by the Secretariat: The Government of Denmark has informed the Secretary General of its intention to uphold this reservation, wholly, for a period of three years (Article 38 of the Convention):

- by a letter from the Permanent Representative of Denmark, dated 31 March 2005, registered at the Secretariat General on 1 April 2005 - Or. Engl.

- by a letter from the Permanent Representative of Denmark, dated 31 March 2008, registered at the Secretariat General on 1 April 2008 - Or. Engl.]

Period covered: 1/7/2002 -

The preceding statement concerns Article(s) : 26, 37

Declaration contained in a Note verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000 - Or. Engl.

In accordance with Article 29, paragraph 2, of the Convention, the Government of Denmark has designated the Ministry of Justice, Slotsholmsgade 10, DK-1216 Copenhagen K, Denmark, as competent authority.

Period covered: 1/7/2002 -

The preceding statement concerns Article(s) : 29

Declaration contained in a Note verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000 - Or. Engl.

In pursuance to Article 34 and until notification to the contrary, the Convention shall not apply to the Faroe Islands and Greenland.

Period covered: 1/7/2002 -

The preceding statement concerns Article(s) : 34