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**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on Iceland Incriminations (ETS 173 and 191, GPC 2) (Theme I)**

Adopted by GRECO  
at its 37<sup>th</sup> Plenary Meeting  
(Strasbourg, 31 March-4 April 2008)

## **I. INTRODUCTION**

1. Iceland joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 10E) in respect of Iceland at its 6<sup>th</sup> Plenary Meeting (10-14 September 2001) and the Second Round Evaluation Report (Greco Eval II Rep (2003) 7E) at its 19<sup>th</sup> Plenary Meeting (28 June-12 July 2004). 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 Iceland from 5 to 6 November 2007, was composed of Mr Marin MRČELA, Judge at the County Court in Zagreb (Croatia) and Ms Ritva SAHAVIRTA, State Prosecutor, State Prosecutor's Office (Finland). The GET was supported by Ms Laura SANZ-LEVIA from GRECO's Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2007) 11E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: Ministry of Justice, Criminal Law Committee, General Prosecutor's Office, National Police Commissioner (Economic Crime Unit), Court Administration (including judges from District Courts). Moreover, the GET met with academia.
5. The present report on Theme I of GRECO's Third Evaluation Round – "Incriminations" – 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 Icelandic 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 Iceland 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 (2007) 7E, Theme II.

## **II. INCRIMINATIONS**

### **a. Description of the situation**

7. Iceland ratified the Criminal Law Convention on Corruption (ETS 173) on 11 February 2004. The Convention entered into force in respect of Iceland on 1 June 2004. Iceland did not enter any reservation to the Criminal Law Convention on Corruption.

8. The Additional Protocol to the Criminal Law Convention (ETS 191) was signed by Iceland on 15 May 2003; it has not yet been ratified.

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

#### Definition of the offence

9. Active bribery of domestic public officials is criminalised by virtue of the provisions contained in Chapter XII (Offences against the Authorities), Article 109 of the Penal Code, while those concerning passive bribery appear in Chapter XIV (Offences while Exercising a Public Office), Article 128 of the Penal Code, which read:

#### **Article 109, Penal Code: Active bribery**

*Anyone who gives, promises or offers a public official a gift or other advantage to which he/she is not entitled for the benefit of himself/herself or others for the purpose of inducing him/her to do or fail to do something linked to his/her official duties shall be subject to imprisonment for up to 3 years or fines in case of mitigating circumstances.*

*The same penalty shall apply to anyone that directs such a conduct to a foreign official, an employee of an international organisation, a person sitting at the assembly of such an organisation or an official Legislative Assembly in a foreign State, a Judge on the panel of an International Court or an employee of such a Court for the purpose of inducing him/her to do or omit something connected with his/her official duties.*

#### **Article 128, Penal Code: Passive bribery**

*In case a public official demands, accepts or has been promised to himself/herself or others gifts or other advantage to which he/she is not entitled in connection with the performance of his/her work he/she shall be subject to imprisonment for up to 6 years, or fines in case of mitigating circumstances.*

*The same penalty shall apply to anyone that directs such a conduct to a foreign public official, an employee of an international organisation, a person sitting at an assembly of such an organisation or at an official Legislative Assembly in a foreign State, a Judge on the bench of an International Court of Law or an employee at such a Court who demands, accepts or has promised for himself/herself or others gifts or other advantage to which he/she is not entitled in connection with the execution of his/her work.*

#### Elements of the offence

##### *“Domestic public official”*

10. The notion of “public official” is understood broadly: it covers any person engaged in public administration, whether with State or municipal authorities, publicly owned companies and public institutions. It also applies to various other persons who have been officially granted particular rights or licensed for certain occupations that do not come under the definition of public administration. Moreover, the authorities confirmed that the different categories of persons listed in Article 1(a) and (b) of the Criminal Law Convention (mayors, ministers, prosecutors, judges and holders of judicial office) are covered.
11. For passive bribery instances, the term public official is further developed by Article 141a of the Penal Code which reads as follows:

### **Article 141a, Penal Code**

*A public official under Articles 128, 129, 134, 135, 138, 139, 140 and 141 is considered to be a person who on account of his/her position or authority in Law may make or influence decisions concerning the rights and duties of individuals or legal persons or arrange or influence the arrangement of official interests.*

12. The GET was informed that the aforementioned article, which was introduced in 2003, provides a functional definition of “public official” by relying on the public function performed by the person concerned rather than by his/her formal appointment. In this connection, the explanatory notes<sup>1</sup> to the Penal Code state that the concept of “public official” provided in Article 141a is open to closer interpretation by the courts, but consideration is to be given in any case to whether the position of the public official in question is of such a nature that s/he has been charged with taking decisions concerning the rights and obligations of individuals or legal entities or has an influence on the taking of such decisions (e.g. public procurement procedures).

*“Promising, offering or giving” (active bribery)*

13. The elements of “promising”, “offering” and “giving” are expressly contained in the penal provisions concerning active bribery.

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

14. Passive bribery is criminalised in three distinct situations: when a public official “demands”, “accepts” or “has been promised” a gift or other advantage. The term “receive” is not expressly used, but is meant to be comprised in the notion of acceptance.

*“Any undue advantage”*

15. A gift or other advantage to which the public official is not entitled may come under the scope of the offence if its purpose is to induce the public official's action in service. The Ministry of Finance issued, on 15 February 2006, a Circular on the general considerations and values that public officials are expected to observe in the execution of their work. This Circular is based on written and unwritten legal principles regarding the work of public officials and is intended to clarify the obligations of public officials in their work, concerning situations of conflicting interests such as gift giving. With regard to gifts, the Circular reiterates that public officials are to use their positions and power solely in the service of the public interest; they must not accept or demand gifts or other advantages to which they are not entitled in connection with the performance of their work.
16. The concept of “advantage” was reported to be wide enough as to encompass material and immaterial benefits, with or without a pecuniary character (e.g. honorific distinctions, employment or promotion, awarding of titles, preferential loans, etc). In this connection, the court judgement Case No. 393/2002 indicated that the undue advantage does not have to be financial in nature.

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<sup>1</sup> The explanatory notes to the Penal Code are considered a secondary source of legislation providing explicative guidance to facilitate the application of its provisions. They do not comprise an authoritative interpretation of the Penal Code, but they are usually taken into account by the courts and often referred to in their judgements.

*“Directly or indirectly”*

17. The relevant provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. However, the GET was informed during the on-site visit that bribery offences involving intermediaries would be covered by the general provisions on participation in criminal offences.

*“For himself or herself or for anyone else”*

18. Bribery offences also apply where the gift or advantage benefits a third party (*“for the benefit of him/herself or others”*).

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

19. The promise, offer or granting (*active bribery*), as well as the demanding or acceptance (*passive bribery*) of a gift or other advantage are liable to punishment when their purpose is to induce the public official to act or fail to do something in relation to the performance of his/her official duties.
20. The explanatory notes to the Penal Code emphasise that it is punishable to give an undue advantage to a public official in order to induce him/her to use his/her position to influence the outcome of a case, even if the handling of the case lies outside the scope of the official's authority. Furthermore, for a bribery offence to occur, it is not required that the induced act or omission by the official involve a breach of duty or be unlawful as such (for example, if an official in charge of licensing receives a bribe for securing the granting of a licence to which the perpetrator is actually entitled, this would constitute a bribery offence).

*“Committed intentionally”*

21. A basic principle of the Penal Code is that negligently committed acts are not punishable unless specifically provided for in the relevant offence (Article 18 of the Penal Code). Therefore, as the provisions on bribery do not mention that they can be caused by negligence, it can be inferred that they can only be committed intentionally.

### Sanctions

22. Active bribery is punished with imprisonment of up to three years or fines if mitigating circumstances concur. Passive bribery is punished with imprisonment of up to six years or fines in the case of mitigating circumstances. In principle, pursuant to Article 49 of the Penal Code, a fine may be ordered jointly with imprisonment if the perpetrator obtained a financial advantage by the commission of the offence; however this seldom occurs in practice, with the exception of fraud cases.
23. Mitigating circumstances are listed in Article 70 of the Penal Code and include: the importance of the interests affected; the damage caused by the offence; the danger ensuing from the commission of the offence; in particular, when considering the time, place and method of commission; the age of the offender and his/her behaviour; the strength and degree of the offender's resolve; the motive of the offender; and the offender's behaviour following the commission of the offence.

24. In addition, Article 68 of the Penal Code provides that a public official found guilty of an offence can be deprived of authority to exercise his/her public functions for a period of up to five years or for life.
25. The applicable sanctions for other comparable crimes are: up to six years' imprisonment for fraud (Article 248, Penal Code), up to six years' imprisonment for embezzlement (Article 247, Penal Code), up to six years' imprisonment for abuse of power (Article 130, Penal Code).

#### Court decisions

26. In the last ten years, there has only been one case of domestic bribery leading to conviction, i.e. Case No. 393/2002 where the Chairman of the National Theatre Construction Committee (who was also a Member of Parliament) was found guilty *inter alia* of a passive bribery offence for demanding and accepting 650,000 ISK<sup>2</sup> (approximately 5,390 EUR). He was initially sentenced to 15 months' imprisonment by the District Court of Reykjavík. The whole case was subsequently appealed to the Supreme Court, which changed the penalty to two years' imprisonment. One of the two persons charged with active bribery was acquitted and the other one was found guilty and sentenced to three months' imprisonment.

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

27. Members of domestic public assemblies are not expressly covered by the provisions on bribery which refer rather to the notion of "public official". While there is general agreement that members of domestic public assemblies, whether elected or appointed, exercising administrative powers are covered by the term "public official", internal debate is ongoing as to whether Members of Parliament would fall under the bribery provisions. Some officials are of the opinion that Members of Parliament are public officials, on account of their position or authority in Law to make or influence decisions concerning the rights and duties of individuals or legal persons, according to Article 141a, but there is no unanimous agreement in this respect.
28. The Icelandic authorities claim that the elements of the offence detailed under bribery of domestic public officials apply to bribery of members of domestic public assemblies. The applicable sanctions on active and passive bribery of domestic public officials concern members of domestic public assemblies. In addition, a person is not eligible as a member of Parliament if he/she has been found guilty in a court of law of an act which is "considered disgraceful" in the public view or has been sentenced to prison for more than four months, unless he/she was granted restoration of his/her civil rights (Article 5 of the Parliament Elections Act No. 24/2000 and Article 85 of the Penal Code).
29. Strictly speaking, there has been no case adjudicated in relation to members of domestic public assemblies. However, as explained in paragraph 26, a Member of Parliament was found guilty of a passive bribery offence in so far as he was considered a public official as Chairman of a public institution (the National Theatre Construction Committee) rather than on account of his position in Parliament. He was sentenced to two years' imprisonment and after having served a year he was released on probation for two years. After that period, he applied for and was granted restoration of his civil rights according to Article 85(3) of the Penal Code. At the time of the on-site visit, he had again been elected to Parliament.

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<sup>2</sup> Exchange rate from ISK to EUR as of 1 April 2008.

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

30. Foreign public officials are expressly covered by the relevant provisions on active and passive bribery (Articles 109 and 128, Penal Code). There is no autonomous definition of the concept “foreign public official” provided in legislation, but the explanatory notes to the Penal Code refer to the need to interpret the term according to the law of the foreign State where the official is employed. The definition in the law of the foreign country is not necessarily conclusive where the person concerned would not have the status of public official under Icelandic law, as provided by Article 1, point (c) of the Criminal Law Convention on Corruption. The elements of the offence detailed under bribery of domestic public officials apply to bribery of foreign public officials. There are no court decisions/case law concerning bribery of foreign public officials.

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

31. Persons sitting at an official legislative assembly in a foreign State are covered by the relevant provisions on active and passive bribery (Articles 109 and 128, Penal Code). The elements of the offence detailed under bribery of domestic public officials apply to bribery of members of foreign public assemblies. There are no court decisions/case law concerning bribery of members of foreign public assemblies.

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

#### **Definition of the offence**

32. Active and passive bribery in the private sector are criminal offences under Chapter XXVII (Miscellaneous Offences Pertaining to Financial Rights), Article 264a, which reads as follows:

#### **Article 264a, Penal Code: Active bribery**

*Anyone giving, promising or offering to a person managing a concern engaged in business operations or discharging work under its auspices, a gift or other advantage to which he/she is not entitled, in his/her favour or that of others, for the purpose of inducing him/her to do or omit something conflicting with his/her professional duties, shall be subject to imprisonment for up to 2 years or fines in case of mitigating circumstances.*

#### **Article 264a, Penal Code: Passive bribery**

*In case a person managing a concern engaged in business operations or discharging work under its auspices demands, accepts or has himself/herself been promised gifts or other advantage to which he/she is not entitled, in his/her favour or that of others, thereby doing or omitting something conflicting with his/her professional duties, he/she shall be subject to imprisonment for up to 2 years or fines in case of mitigating circumstances.*

#### **Elements of the offence**

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

33. With regard to the scope of perpetrators, it is understood in its broadest sense to cover “any person managing a concern engaged in business operations or discharging work under its auspices” and is therefore, independent of the person’s position in the business, from the top to

the bottom, i.e. director or manager of an enterprise, members of the board, persons in the service of a business and persons carrying out a duty of behalf of a business (e.g. legal representatives, lawyers, auditors, financial advisors, etc). Shareholders who are not also managers or employees of the enterprise are not included in this group.

*“Promising, offering or giving” (active bribery)*

34. The elements of “promising”, “offering” and “giving” are expressly contained in Article 264a of the Penal Code.

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

35. According to Article 264a, passive bribery is criminalised when gifts or other advantages are “demanded”, “accepted” or “have been promised”. The term “receive” is not expressly used, but is meant to be comprised in the notion of acceptance.

*“In the course of business activity”; “...in breach of duties”*

36. The offence of bribery in the private sector applies to “business operations”. The explanatory notes to the Penal Code stress that the term “business operations” is to be interpreted broadly so as to embrace private commercial activity of any type, irrespective of the nature of the transaction or the corporate structure involved (one-man companies would be covered). The scope of private bribery excludes any non-profit oriented activities carried out by persons or organisations, e.g. by associations or other NGOs.
37. For a bribery offence to occur, a breach of duty is required (*“something conflicting with his/her professional duties”*). The explanatory notes to the Penal Code indicate in this respect that the condition of breach of duty is directly connected with the interests that the provision is intended to protect, i.e. the general duty of confidentiality and honesty in relation to the principal’s affairs or business. Violations of professional duties are not restricted to violations of the provisions of an employment contract or of codified rules of the job, and may therefore include violations of unwritten, but generally accepted, views regarding honesty in dealings and confidentiality at work.

*Other elements of the offence*

38. The other elements/concepts described under bribery of domestic public officials apply accordingly to bribery in the private sector.

Sanctions

39. Bribery in the private sector (both active and passive) is punished with imprisonment of up to two years or fines if mitigating circumstances concur.
40. In addition, pursuant to Article 66 of the Act on Public Limited Companies No. 2/1995 and Article 42 of the Act on Private Limited Companies No. 138/1994, for a person to be a member of the Board of directors or a manager of a public/private limited company, he/she must show that he/she has not been criminally convicted during the immediate past three years. According to Article 52 of the Act on Commercial Banks No. 161/2002, members of Board and managing directors of a financial undertaking must show that they have not been criminally convicted during the immediate past five years.

## Court decisions

41. There are no court decisions/case law concerning bribery in the private sector.

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

42. Officials of international organisations are expressly covered by the relevant provisions on active and passive bribery which refer to “employees” of international organisations, whether permanent, temporary or seconded (Articles 109 and 128, Penal Code). The elements of the offence detailed under bribery of domestic public officials apply to bribery of officials of international organisations, irrespective of whether or not Iceland is a member of the international organisation involved or whether it accepts the jurisdiction of such a body. There are no court decisions/case law concerning bribery of officials of international organisations.

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

43. Members of international parliamentary assemblies are explicitly covered by the provisions on active and passive bribery (Articles 109 and 128, Penal Code), irrespective of whether or not Iceland is a member of the international parliamentary assembly involved or whether it accepts the jurisdiction of such a body. The elements of the offence detailed under bribery of domestic public officials apply to bribery of members of international parliamentary assemblies. There are no court decisions/case law concerning bribery of members of international parliamentary assemblies.

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

44. The provisions on active and passive bribery specifically cover judges on the panel of an international court as well as employees of such courts. The elements of the offence detailed under bribery of domestic public officials apply to bribery of judges and officials of international courts, irrespective of whether or not Iceland is a member of the international court involved or whether it accepts the jurisdiction of such a body. There are no court decisions/case law concerning bribery of judges and officials of international courts.

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

#### Definition of the offence

45. Trading in influence is covered in Article 109 of the Penal Code:

#### **Article 109, Penal Code : Active trading in influence**

*The same penalty [imprisonment for up to 3 years or fines in case of mitigating circumstances] shall furthermore apply to anyone directing such a message at a person maintaining or ascertaining that he/she may exert improper influence on the decision of the person dealt with in paragraphs 1 and 2 of the present Article for the purpose of getting him/her to exert this influence.*

#### **Article 109, Penal Code : Passive trading in influence**

*The same penalty [imprisonment for up to 3 years or fines in case of mitigating circumstances] shall furthermore apply to a person who maintains or ascertains that he/she can exert improper influence on the decision of a person dealt with in paragraphs 1 and 2 of the present Article and*

*who demands, accepts or has been promised for himself/herself or others gifts or other advantage to which he/she is not entitled irrespective of whether the influence is exerted or whether this lead to the goal aimed at.*

#### Elements of the offence

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

46. The provision ‘asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]’ is transposed into Article 109 of the Penal Code by use of the words *“to maintain or ascertain that he/she may exert improper influence on the decision of the public official”*. It is not necessary that the influence is actually exerted and leads to the intended result (*“irrespective of whether the influence is exerted or whether this leads to the goal aimed at”*), the mere assertion of the trader in influence that s/he could exercise such influence would be sufficient for the criminal offence to be committed. Moreover, the explanatory notes to the Penal Code clarify that both real and pretended influence are covered.

#### *Other concepts/elements*

47. The constitutive elements of bribery offences largely apply with regard to active and passive trading in influence.

#### Sanctions

48. Trading in influence is punished with imprisonment of up to three years or fines if mitigating circumstances concur.
49. Additionally, certain categories of persons (e.g. lawyers, members of boards, managing directors) can be subject to professional bans (Article 68, Penal Code).

#### Court decisions

50. The authorities of Iceland did not report any court decision or case law on trading in influence.

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

51. Domestic arbitrators are considered public officials within the meaning of Article 141a in so far as their decisions would have an impact on the rights and obligations of individuals. Bribery of domestic arbitrators is therefore covered in Articles 109 (active bribery) and 128 (passive bribery) of the Penal Code. The elements of the offence detailed under bribery of domestic public officials apply accordingly to bribery of domestic arbitrators. There are no court decisions/case law concerning bribery of domestic arbitrators.

#### **Bribery of foreign arbitrators (Article 4 of ETS 191)**

52. Foreign arbitrators are not covered by the relevant bribery provisions included in the Penal Code (i.e. Articles 109 and 128).

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

53. Iceland does not have a jury system. However, in certain cases (e.g. labour or civil law matters), there could well be lay assessors acting as members of collegial bodies with the responsibility of deciding on the guilt of an accused person in the framework of a trial. Such persons would be considered public officials within the meaning of Article 141a in so far as their decisions would have an impact on the rights and obligations of individuals. The elements of the offence detailed under bribery of domestic public officials apply accordingly to bribery of domestic jurors.

### **Bribery of foreign jurors (Article 6 of ETS 191)**

54. Foreign jurors are not covered by the relevant bribery provisions included in the Penal Code (i.e. Articles 109 and 128).

### **Other questions**

#### Participatory acts

55. Article 22 of the Penal Code contains general provisions on participation in criminal offences, which are applicable to the afore-mentioned bribery offences. In particular: *“Any person who in word or deed provides aid in the commission of a punishable act defined in this Act, or takes, by persuasion, exhortation or otherwise a part in committing such act, shall be punished as provided for in the provision applying to the offence”*. It is possible to lower the penalty ordered in cases of participatory acts *“if the role of a participant in the commission of an offence is of minor nature, or if it involves the strengthening of another person’s resolve already formed, if the offence has not been completed, or if the planned participation has failed”*.
56. It is possible to punish an attempt to commit a criminal act according to Article 20 of the Penal Code, which provides for the possibility of a lower penalty in certain cases, and even the cancellation of the penalty, if the attempt does not lead to the completion of the offence.

#### Jurisdiction

57. The rules of criminal jurisdiction concerning corruption offences are laid down in Article 6 of the Penal Code which establishes universal jurisdiction: *“penalties shall also be imposed in accordance with Icelandic criminal law, even if the offences have been committed outside the Icelandic territory and irrespective of the offender’s identity”*. Offences are deemed to be committed both where a criminal act has taken place and where the consequence of an offence becomes apparent (Article 7, Penal Code). Article 6 on universal jurisdiction has never been applied in practice.

#### Statute of limitations

58. The period of limitation depends on the maximum term of imprisonment which can be imposed for the crime in question (Article 81, Penal Code). On this basis, a limitation period of 5 years is provided for active bribery in the public sector, both active and passive bribery in the private sector and trading in influence<sup>3</sup>. In the case of passive bribery of public officials, the limitation period is 10

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<sup>3</sup> A limitation period of 5 years is provided for offences punishable by a maximum period of imprisonment of between 2 and 4 years (Article 81 (2), Penal Code).

years<sup>4</sup>. The following table illustrates the applicable (relative) limitation periods for bribery and trading in influence offences:

Article CC	Offence	Sanction (imprisonment)	Relative statute of limitation
<b>Bribery in public sector</b>			
109	Active bribery	3 years	5 years
128	Passive bribery	6 years	10 years
<b>Bribery in private sector</b>			
264a	Active bribery	2 years	5 years
264a	Passive bribery	2 years	5 years
<b>Trading in influence</b>			
109	Active trading in influence	3 years	5 years
109	Passive trading in influence	3 years	5 years

59. According to Article 82(4) of the Penal Code, the period of limitation starts at the time of the commission of the offence and normally lapses with the initiation of criminal investigations. The following cases are not taken into account for the calculation of the time limit: if the investigation is discontinued or suspended for an indefinite period or if the prosecutor decides not to prosecute the suspected offender or revokes the indictment (Article 82(5), Penal Code).
60. If a person is found guilty of a conduct, which is punishable under more than one penal provision, the limitation period is to be based on the provision for the heaviest penalty.

#### Defences

61. There are no special defences provided for in the Icelandic Penal Code with regard to corruption offences.

### **III. ANALYSIS**

62. Icelandic criminal legislation is largely consistent with the provisions under evaluation. The Penal Code was amended in 2003 to *inter alia* align domestic legislation with the requirements of the Council of Europe Criminal Law Convention on Corruption (ETS 173). The letter and spirit of the aforementioned amendments have been developed mainly through the explanatory notes to the Penal Code, which are considered a secondary source of legislation and are meant to provide explicative guidance on the reviewed offences, subject to subsequent interpretation by the courts. However, jurisprudence in this particular area remains very limited with only one conviction for a domestic bribery offence in the last ten years and no single corruption case dealt with by the courts under the new regime in force following the 2003 amendments to the Penal Code. In this context, it emerged from the interviews held by the GET that, due to the lack of investigations and court practice in respect of corruption offences, the interpretation of the constitutive elements of such offences varied significantly among the interlocutors met and was at times contradictory.
63. In particular, the GET was confronted with discordant opinions on whether the bribery of Members of Parliament is covered by current legislation. Some interlocutors thought that the term “public official” was broad enough to cover Members of Parliament. In this connection, they cited Article

<sup>4</sup> A limitation period of 10 years is provided for offences punishable by a maximum period of imprisonment of between 4 and 10 years (Article 81 (3), Penal Code).

141a of the Penal Code, which was introduced in 2003 and defines public officials on the basis of their powers “to make decisions on the rights and duties of individuals or influence the arrangement of official interest”. These interlocutors were of the opinion that the definition provided by Article 141a could be interpreted to cover instances where Members of Parliament act as legislators in so far as the decisions made throughout the legislative process would have an impact on the rights and obligations of individuals. Other interlocutors were hesitant on the latter interpretation and referred to the criterion used by the court in Case No. 393/2002 involving a Member of Parliament, whose status as public official was derived from the administrative functions of the person in question as a member of a public institution (i.e. Chairman of the National Theatre Construction Committee).<sup>5</sup> Furthermore, the GET notes that even if the courts interpret in the future the term “public official” as broadly so as to cover Members of Parliament, the scope of application of the definition provided under Article 141a only deals with those offences under Chapter XIV of the Penal Code. It would therefore only apply to bribery of public officials (i.e. Article 128 on passive bribery), but not to trading in influence offences falling under Article 109, Chapter XII of the Penal Code. In the light of the conflicting views of the professionals interviewed, and in the absence of any court decision after the 2003 amendments to the Penal Code, the GET is not convinced that Members of Parliament would indeed be covered by the definition of “public official” in respect of bribery and trading in influence. Consequently, the GET recommends **to ensure that Members of Parliament are covered by the provisions on bribery and trading in influence of the Penal Code.**

64. With respect to members of foreign public assemblies, the bribery provisions of the Penal Code refer to “persons sitting in an official legislative assembly in a foreign State”. However, the GET notes that the scope of application of the Article 6 of the Convention goes further as it does not only cover members of public assemblies exercising legislative powers, but also those exercising administrative powers. The GET discussed the matter with the authorities, who admitted that there was indeed a gap in current legislation. Therefore, the GET recommends **to ensure that members of a foreign public assembly exercising administrative powers are covered by the provisions on bribery and trading in influence of the Penal Code.**
65. Domestic arbitrators and jurors<sup>6</sup> are considered public officials within the meaning of Article 141a in so far as their decisions would have an impact on the rights and obligations of individuals. No court practice exists in this respect. As far as foreign jurors and arbitrators are concerned, these categories of professionals are not covered by Articles 109 (active bribery) and 128 (passive bribery) of the Penal Code which exhaustively list the different categories of foreign officials subject to these bribery provisions. Iceland has not ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). In this connection, the GET was pleased to learn that there were no legal obstacles to proceed with the ratification of this Instrument and that the Icelandic authorities intended to do so in the near future. The GET recommends **to ensure that foreign arbitrators and jurors are covered by the provisions on bribery of the Penal Code and to ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible.**
66. The GET discussed at length the concept of undue advantage with the authorities. According to the explanatory notes to the Penal Code, the term “undue advantage” is to be understood as a gift or advantage that the public official is not entitled to accept or receive. The GET was also made aware of a Circular issued in 2006 by the Ministry of Finance concerning public officials’ good management, professionalism and conduct. The document submitted to the GET for analysis

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<sup>5</sup> This case was initiated prior to the 2003 Penal Code reform and therefore before the introduction of Article 141a.

<sup>6</sup> Since Iceland does not have a jury system, the term juror is to be understood in its broader sense, i.e. lay assessors acting as members of collegial bodies with the responsibility of deciding on the guilt of an accused person in the framework of a trial.

consists of a summary list of bullet points; with respect to gifts, it only reiterates the language of the Penal Code, but provides no further interpretative guidance as to which type of gifts/advantages public officials would be entitled to receive. It was clear to the GET that undue advantages would cover unlawful gifts or advantages. However, when exploring during the on-site visit the type of gift/advantage to which a person may be entitled, the GET could not get a conclusive answer. Although the officials met stressed that, in Iceland, there is a culture of zero tolerance to bribes, they indicated that minimum gifts, gifts of a very low value or socially acceptable gifts fall outside the scope of application of the relevant bribery provisions. The authorities recognised, however, that there are no rules or court practice which would establish value thresholds above which a gift or other advantage would clearly be unacceptable; they also stressed that one must use “common sense” when considering what constitutes an undue advantage. In view of the above, the GET recommends **to clarify in an appropriate manner what should be considered “due” and/or “undue” gift/other advantage for all forms of bribery offences.**

67. The Penal Code does not expressly refer to the indirect commission of corruption offences. When questioned by the GET in this respect, the authorities invoked the general rules on aiding and abetting laid down in Article 22 of the Penal Code. If an intermediary commits the offence intentionally, the person for whom the intermediary acts would be charged for complicity/solicitation. If the intermediary is not aware that the benefit granted is intended to bribe, the person behind the intermediary would be considered the perpetrator of a bribery offence, irrespective of the good faith of the intermediary involved. The GET accepts this explanation since – in principle – the lack of an explicit reference to offenders acting through intermediaries in bribery/trading in influence cases would not exclude such perpetrators from being investigated and prosecuted in accordance with the general provisions on participation.
68. The maximum level of sanctions provided by the Penal Code for active bribery in the public sector (up to three years’ imprisonment) and both active and passive bribery in the private sector (up to two years’ imprisonment) appears to be rather weak. That said, the GET is aware that the aforementioned levels of penalties cannot be taken out of the domestic legal context, but must be assessed in the light of the general level of penal sanctions in Iceland. In this respect, the GET noted that, with the sole exception of passive bribery in the public sector, the penalties provided for corruption offences were lower than those applicable to similar crimes (e.g., fraud, embezzlement or abuse of power are punished with up to six years’ imprisonment). Moreover, the GET found that a practical consequence of the lenient character of the available sanctions for corrupt behaviour is that for special investigative techniques to be used in this type of offence, it must be shown that an important or private interest so demands (as such interventions are otherwise only possible for offences with a maximum sanction of eight years’ imprisonment).
69. The GET is particularly concerned about the maximum penalties for bribery in the private sector, which are noticeably lower than those foreseen for public sector corruption; this may well lead to the presumption that private sector corruption is in any case a less serious offence than corruption in the public sector, contrary to the intention pursued by the drafters of the Convention. The GET recalls that, as underlined in the Explanatory Report to ETS 173 (paragraph 52), the differences between the rules applicable to public and private sector bribery are to be limited, especially since the latter form of corruption may cause significant damage to society at large given the value of the sums (and potential bribes) involved in business transactions. Moreover, the GET notes that the explanatory notes to the Icelandic Penal Code specifically acknowledge “*the need to tackle the damaging social and competition effects of active and passive bribery in the private sector, in particular, in view of the privatisation of what used to be public activities in important social spheres*”. Yet, the explanatory notes further stress that “*bribery in business is in many ways*

*comparable with bribery in public life*". The GET is not convinced that the current penalties are proportionate and dissuasive enough to effectively deter private sector entities from engaging in corrupt practices. This is of utmost importance in a domestic context of rapid economic growth - with large investments of private Icelandic companies being made both at home and abroad, market liberalisation and ongoing privatisation.

70. In the light of the preceding paragraphs, the GET recommends **(i) to increase the penalties for bribery offences in the private sector and (ii) to consider increasing the penalties for active bribery in the public sector.**
71. Turning to the practical application of the Icelandic bribery and trading in influence provisions, the incriminations contained in the Penal Code appear to provide a solid basis for the prosecution and adjudication of corruption offences (with the exception of the lacunae mentioned in the paragraphs above). The experience with the use of the law has been so far limited with only one offence prosecuted in the last ten years (i.e. Case No. 393/2002 – bribery in the public sector). The representatives met during the on-site visit were of the opinion that one of the reasons for the lack of cases could well be the fact that corruption is not seen as a widespread problem in Iceland. Nevertheless, in the GET's view the perception that Iceland has a very low level of corruption may well have a negative impact on the alertness with regard to possible corruption now or in the future. In this regard, the GET heard on several occasions that the potential for corruption is increasing in Iceland due to market liberalisation and the internationalisation of the economy which the country has been experiencing over the last few years. Icelandic companies are now investing large sums of money abroad and are therefore more exposed to societies that may not share the same zero-tolerance approach to corruption. The GET further notes that the small size of the country (about 313,000 inhabitants), which was frequently invoked during the interviews as a guarantee of transparency in the conduct of affairs, does also entail risks of corrupt behaviour in terms of nepotism, close links between Government and business community, etc. Suspicions of such instances have been reported by the press over the last months.
72. Finally, during the evaluation visit, the GET was under the impression that there was no proactive approach to identifying/investigating corruption in Iceland. Furthermore, it emerged from the different interviews held during the on-site visit that the law enforcement authorities, who are to apply the law, are not always well versed in the existing bribery/trading in influence provisions. Some of the law enforcement representatives interviewed regretted that no specialised training on corruption had been dispensed following the 2003 amendments to the Penal Code. The GET notes that it serves no purpose that the Convention provisions are mirrored in national legislation, if they are not effectively applied in practice. In the particular context of Iceland, where only one single case of corruption has been prosecuted in the last ten years and where the amendments to the Penal Code in relation to bribery/trading in influence offences have not been coupled with any targeted guidance to the officials who are to enforce legislation, the GET recommends **that the law enforcement authorities receive specialised training on the content of the existing incriminations of corruption offences, so that they become better prepared to detect, investigate and prosecute instances of corruption.**

#### IV. CONCLUSIONS

73. Icelandic criminal legislation in respect of bribery/trading in influence offences is largely consistent with the provisions of the Criminal Law Convention on Corruption (ETS 173) under evaluation. A few deficiencies have nevertheless been identified. The lack of court decisions in this area results in discordant interpretations of the existing corruption offences, which entail the risk of not fully reflecting the requirements of the Convention (e.g. regarding the application of bribery/trading in influence provisions with respect to Members of Parliament, the proper use of the concept of “undue advantage”, etc). The perception that Iceland has a very low level of corruption may have a negative impact on alertness with regard to possible corruption now or in the future. This is of outmost importance in a domestic context of rapid economic growth - with large investments by Icelandic companies being made both at home and abroad, market liberalisation and ongoing privatisation. In this respect, it is important that the current sanctions for bribery in the private sector be increased to effectively deter private sector entities from engaging in corrupt practices. Moreover, the lack of specialised knowledge concerning the relevant provisions on corruption contained in the Penal Code of the authorities who are to enforce the law, calls for targeted training in this area. It is crucial that a more proactive approach in the detection, prosecution and punishment of corruption starts being pursued in Iceland. Finally, it is desirable that Iceland proceeds promptly with the ratification of the Additional Protocol to the Criminal Law Convention of Corruption (ETS 191), as planned.
74. In view of the above, GRECO addresses the following recommendations to Iceland:
- i. **to ensure that Members of Parliament are covered by the provisions on bribery and trading in influence of the Penal Code (paragraph 63);**
  - ii. **to ensure that members of a foreign public assembly exercising administrative powers are covered by the provisions on bribery and trading in influence of the Penal Code (paragraph 64);**
  - iii. **to ensure that foreign arbitrators and jurors are covered by the provisions on bribery of the Penal Code and to ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible (paragraph 65);**
  - iv. **to clarify in an appropriate manner what should be considered “due” and/or “undue” gift/other advantage for all forms of bribery offences (paragraph 66);**
  - v. **(i) to increase the penalties for bribery offences in the private sector and (ii) to consider increasing the penalties for active bribery in the public sector (paragraph 70);**
  - vi. **that the law enforcement authorities receive specialised training on the content of the existing incriminations of corruption offences, so that they become better prepared to detect, investigate and prosecute instances of corruption (paragraph 72).**
75. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Iceland to present a report on the implementation of the above-mentioned recommendations by 31 October 2009.
76. Finally, GRECO invites the authorities of Iceland 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.