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Theme I

Third Evaluation Round

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

Adopted by GRECO
at its 40th Plenary Meeting
(Strasbourg, 1-5 December 2008)

I. INTRODUCTION

1. Poland joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 11E) in respect of Poland at its 8th Plenary Meeting (4-8 March 2002) and the Second Round Evaluation Report (Greco Eval II Rep (2003) 6E) at its 18th Plenary Meeting (10-14 May 2004). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team (hereafter referred to as the "GET") carried out an on-site visit to Poland from 23 to 27 June 2008. The GET for Theme I (23-24 June) was composed of Ms Cornelia GÄDIGK, Senior public prosecutor (Germany) and Mr Ruslan RIABOSHAPKA, Head of the Department of Legal Issues (Ukraine). The GET was supported by Mr Michael JANSSEN 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 (2008) 1E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental institutions: the Ministry of Justice, the Supreme Court of Justice, the Warsaw Appellate Court and two Warsaw District Courts, the National Prosecutor's Office, the Warsaw Appellate Prosecutor's Office and two District Prosecutors' Offices, the Police and the Central Anti-corruption Bureau. The GET also met with representatives of the Batory Foundation and the University of Warsaw.
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 Polish 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 Poland 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 document Greco Eval III Rep (2008) 2E, Theme II.

II. INCRIMINATIONS

Description of the situation

7. Poland ratified the Criminal Law Convention on Corruption (ETS 173) on 11 December 2002 and the Convention entered into force in respect of Poland on 1 April 2003. Poland has made partial reservations in respect of Articles 7 and 8 (active and passive bribery in the private sector).¹
8. Poland has not signed or ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).
9. The Polish Penal Code (hereafter: PC) entered into force on 1 September 1998. Several corruption-related provisions were subject to legal amendments in 2003² which aimed at adjusting national legislation to the requirements of the Criminal Law Convention on Corruption, in particular with regard to the definition of a “person performing public functions”,³ to the applicability of corruption offences to persons performing public functions in a foreign State or an international organisation⁴ and to the offences of active and passive trading in influence.⁵ The Polish authorities indicated that further amendments, with regard to bribery in the private sector,⁶ are foreseen by current draft legislation.

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

10. *Active bribery* is criminalised in section 229 PC and *passive bribery* in section 228 PC. Both sections contain a basic provision (§ 1) and provisions for less significant (§ 2) or aggravated cases (section 229 §§ 3 and 4, section 228 §§ 3-5). Situations implying an – intended or real – violation of the law by the public official constitute aggravated cases.

Section 229.

§ 1. *Whoever gives a material or personal benefit or promises to provide it to a person performing public functions in connection with the performance of this function shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.*

§ 2. *In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.*

§ 3. *If the perpetrator of the act specified in § 1 strives to induce a person performing public functions to violate the law or gives such a person, or promises to provide, with a material or personal benefit for violation of the law, he shall be subject to the penalty of deprivation of liberty for a term of between one year and 10 years.*

§ 4. *Whoever gives a material benefit of considerable value or promises to provide it to a person performing public functions in connection with his official capacity, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years. (...)*

¹ See Appendix A.

² See Act of 13 June 2003 amending the Penal Code (Journal of Laws No. 111, item 1061), which entered into force on 1 July 2003.

³ Section 115 § 19 PC.

⁴ Sections 228 § 6 and 229 § 5 PC.

⁵ Sections 230 and 230a PC.

⁶ See section 296a PC.

Section 228.

§ 1. *Whoever, in connection with the performance of public functions accepts a material or personal benefit or a promise thereof, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.*

§ 2. *In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.*

§ 3. *Whoever, in connection with the performance of public functions accepts a material or personal benefit or a promise thereof in return for the conduct which violates the provisions of law shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.*

§ 4. *The penalty specified in § 3 shall also be imposed on anyone who, in connection with performing public functions, makes the performance of his official duties conditional upon receiving a material or personal benefit or a promise thereof or who demands such a benefit.*

§ 5. *Whoever, in connection with the performance of public functions accepts a material or personal benefit of considerable value or a promise thereof, shall be subject to the penalty of deprivation of liberty for a term of between 2 years and 12 years. (...)*

11. In addition to the general bribery provisions, section 296b PC penalises the acceptance, “when organising a professional sporting competition or taking part in such a competition, of a material or personal benefit or a promise thereof in exchange for unfair behaviour or abandonment, which can affect the outcome of the competition,” as well as the giving of a benefit under the same conditions (sanction: imprisonment for between 3 months and 5 years, except for cases of lesser significance in which the sanctions are less severe).
12. Moreover, section 250a PC criminalises the acceptance and the request, by a person entitled to vote, of a benefit in return for voting in a certain way, as well as the giving of a benefit to such a person for having voted / in order to make him/her vote in a certain way (sanction: imprisonment for between 3 months and 5 years, except for cases of lesser significance in which the sanctions are less severe).

Elements of the offence

“Domestic public official”

13. The concept of a domestic public official is defined in Chapter XIV – “Explanation of terms of the law”, section 115 §§ 13 and 19 PC. § 13 provides the definition of a domestic public official *sensu stricto*, whereas § 19 defines the broader term “a person performing public functions” which is used in the bribery provisions of sections 228 and 229 PC and which includes domestic public officials in the meaning of § 13 as well as several other categories of officials at home and abroad.⁷ The Polish authorities affirmed that the concept of a public official covers, *inter alia*, ministers, mayors and employees of local or regional administrations (section 115 § 13 (4)). The authorities furthermore indicated that the term employees “performing only service-type work”, who are exempted from the concept of a public official and of a person performing public functions, is to be understood as persons who do not perform statutory duties of the authorities concerned and whose function is limited to rendering services to those persons who perform such duties (e.g. secretaries, drivers, cleaners, typists, porters, persons working in the field of logistics or technical services).

⁷ In order to facilitate the reading, the term *public official* is used in this report and is to be understood in the broader sense of “a person performing public functions”, unless otherwise specified.

Section 115.

§ 13. A public official is:

- 1) the President of the Republic of Poland;
- 2) a deputy to the Parliament, a local councillor;
- 2a) a deputy to the European Parliament;
- 3) a judge, a lay-judge, a State prosecutor, an official of the financial investigation authority or superior authority over the financial investigation authority; a notary public, a bailiff, a professional court probation officer, a person adjudicating in disciplinary authorities operating under the law;
- 4) a person who is an employee in a State administration, other State authority or local government, except when he performs only service-type work, and also other persons to the extent in which they are authorised to render administrative decisions;
- 5) a person who is an employee of a State auditing and inspection authority or of a local government auditing and inspection authority, except when he performs only service-type work;
- 6) a person who occupies a managerial post in another State institution;
- 7) an official of an authority responsible for the protection of public security or an official of the State Prison Service;
- 8) a person performing active military service.

§ 19. A person performing public functions is a public official, a member of the local government authority, a person employed in an organisational unit which has access to public funds, unless this person performs exclusively service type work, as well as another person whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding on the Republic of Poland (...)."

"Promising, offering or giving" (active bribery)

14. The provisions of section 229 §§ 1, 3 and 4 PC use the words "give" and "promise". It was explained to the GET that "*promise*" should be interpreted to include *offer*, the latter term not being used in Polish criminal legislation.

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

15. The provisions of section 228 §§ 1, 3 and 5 PC use the words "accepts a ... benefit or a promise". According to the authorities, "*accepts a benefit*" is meant to comprise the actual *receipt* and "*accepts a promise*" should be interpreted to include the acceptance of an *offer* in the same way as in the case of active bribery. The "request" of a benefit constitutes an aggravated case of passive bribery and is subject to the specific provision of section 228 § 4 PC. This provision contains the same elements as the basic provision on passive bribery (§ 1), complemented by the element of a "demand" or, alternatively,⁸ by the concept that the official "*makes the performance of his official duties conditional upon receiving a ... benefit or a promise*". The authorities indicated that this provision is autonomous in the sense that no actual acceptance of a benefit or promise is required in the case of a demand in order to constitute passive bribery.

"Any undue advantage"

16. Sections 228 and 229 PC use the term "material or personal benefit". The authorities indicated that the word "benefit" equals the term "advantage" as contained in Articles 2 and 3 of the Criminal Law Convention on Corruption and that the words "material or personal" correspond to the terms "material and immaterial". There is no concept of "undue" advantage and the amount or value of the benefit is significant only with regard to the applicable penalties which are lower in

⁸ See Supreme Court decision No. II KK 353/04 of 11 March 2005: in case of an official's demand for a benefit, it is not required that the performance of the official's duties be made conditional upon receiving the benefit.

cases of “lesser significance” and more severe in cases of a benefit “of considerable value”. The authorities indicated, however, that due to legal doctrine and jurisprudence⁹ small gifts might be admissible provided that they are of a symbolic character, their value is minimal and there exists a socially accepted custom which allows such a gift in a certain situation.

“Directly or indirectly”

17. The relevant provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. The authorities affirmed that it does not matter whether the bribe is promised or given directly to the official or whether intermediaries are used, as there are no indications to the contrary. However, no case law could be provided to support this view.

“For himself or herself or for anyone else”

18. The provisions on active and passive bribery do not specify whether the advantage must be for the official him/herself, but the terms “material or personal benefit” used in sections 228 and 229 PC are defined in Chapter XIV – “Explanation of terms of the law”, section 115 § 4 PC as a “benefit for the person him/herself or for anyone else”. The authorities made reference to court decisions which confirm that, on the basis of section 115 § 4 PC, it is irrelevant whether the defendant acquired the benefit him/herself or such benefit has been acquired by any other person, including a legal person – e.g. a State enterprise, so that the act shall be considered committed by the perpetrator even if s/he has personally obtained no benefit at all.¹⁰

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

19. The bribery offences do not expressly require a concrete act or omission on the part of the public official. The offence is committed when the bribery occurs “in connection with the performance of public functions”. The authorities stressed that these terms cover situations implying a concrete “acting or refraining from acting” without making it a necessary element of the offence. According to a Supreme Court decision, in order to establish the “connection with the performance of public functions”, “it is sufficient that the person performing the function may have an influence on the final effect of a certain matter and the official act to be made remains – at least in part – in the scope of the perpetrator’s competence.”¹¹ The authorities added that in those cases where an official acts entirely outside the scope of his competence, he can be prosecuted under the criminal offences of abuse of power (section 231 PC) or, depending on the circumstances, trading in influence (sections 230/230a PC), which are sanctioned with similar penalties to those provided for bribery.
20. The specific provisions on aggravated cases implying an – intended or real – violation of the law by the public official use a different wording: in the case of active bribery, section 229 § 3 PC requires the “striving to induce a person performing public functions to violate the law” or the giving or promise of a benefit to such a person “for violation of the law”, instead of the “connection with the performance of public functions”. In the case of passive bribery, section 228 § 3 PC presupposes, in addition to the “connection with the performance of public functions”, that the public official accepts a promise or benefit “in return for the conduct which violates the provisions of law”; in this connection, the authorities quoted a judgment of a Court of Appeal according to which, to fulfil all the elements of the offence of passive bribery referred to in section

⁹ See Supreme Court decision No. VI KZP 34/07 of 26 February 1988.

¹⁰ See Supreme Court decision No. WA 2/05 of 18 March 2005; Supreme Court decision No. III KKN 384/01 of 24th January 2002; Court of Appeal in Szczecin, decision No. II AKz 390/06 of 15 November 2006.

¹¹ Supreme Court decision No. III KK 230/05 of 9 March 2006.

228 § 3 PC, it shall not be necessary to carry out the conduct which violates the provisions of law.”¹² More generally, the authorities indicated that neither the provisions on active nor on passive bribery require that an unlawful act (or omission) is actually carried out, and that future acts are also covered.

“Committed intentionally”

21. The authorities indicated that, in general, the application of the provisions on active and passive bribery of domestic public officials is not restricted by use of the concept of an intentional commission of the offence. However, direct intent is required in the specific (aggravated) case of passive bribery criminalised by section 228 § 4 PC; in this case the awareness of the perpetrator has to encompass “not only the fact of obtaining a benefit in connection with the performance of public functions but also other elements of the offence such as making the performance of the act dependent on obtaining a benefit.”¹³

Sanctions

22. *Active and passive bribery* are punishable by between 6 months and 8 years of imprisonment. In cases of “lesser significance”, sanctions range between a fine, the penalty of “restriction of liberty” and up to 2 years’ imprisonment; in this connection, the authorities referred to a court decision¹⁴ according to which the term “cases of lesser significance” should not be understood only in relation to the amount of money concerned but also to other circumstances which indicate the grade of culpability of the offender, including the motives of the perpetrator. Cases involving an intended or real violation of the law by the public official are punished with imprisonment from 1 to 10 years; the same sanction applies to cases of passive bribery where a public official demands a benefit or makes it a condition for performing his duties. Finally, sanctions further increase to imprisonment between 2 and 12 years when a benefit “of considerable value” is involved; the term “considerable value” is defined in section 115 § 5 PC as “the property whose value at the time of the commission of a prohibited act exceeds two hundred times the level of the lowest monthly salary” (currently 1,126 PLN – 327 Euros). According to section 33 § 2 PC, a fine can also be imposed in addition to imprisonment “if the perpetrator has committed the act in order to gain material benefit or when s/he has gained such benefit.” Fines are imposed in terms of (10 to 360) daily rates the amount of which ranges between 10 and 2,000 PLZ (2.9 – 580 Euros) and is determined on the basis of the offender’s income, his/her personal and family situation, his/her property relationships and earning capacity.¹⁵ The penalty of “restriction of liberty” in the meaning of sections 228 § 2 and 229 § 2 PC which ranges from 1 to 12 months prohibits the sentenced person from changing his/her permanent residence without permission of the court and obliges him/her to perform work designated by the court, with certain exceptions for employees.¹⁶
23. Similar sanctions are available for other comparable criminal offences such as fraud (section 286 PC), embezzlement (section 296 PC) and abuse of power (section 231 PC).
24. Additional “penal measures” as provided by section 39 PC, e.g. the deprivation of public rights, forfeiture, the obligation to redress damage, compensatory damages or a prohibition from occupying specific posts, from exercising specific professions or engaging in specific economic

¹² Court of Appeal in Wrocław, decision No. II AKa 200/07 of 3 October 2007.

¹³ See Supreme Court decision No. WA 30/05 of 8 November 2005.

¹⁴ Decision of the Court of Appeal in Kraków No. II AKa 196/98 KZS 1998/12/31 of 3 December 1998.

¹⁵ Section 33 §§ 1 and 3 PC.

¹⁶ For more details, see sections 34-36 PC.

activities, can also be imposed on perpetrators of bribery offences. The aforementioned prohibitions may be imposed if the perpetrator has abused his/her post or profession or if his/her continuing in the present post or profession would threaten essential interests protected by law.¹⁷ Finally, section 52 PC provides for an obligation to return material benefit resulting from a criminal offence, in whole or in part to the State Treasury.

25. In the case of legal persons, the court may impose a fine of between 1,000 and 20,000,000 PLZ (290 – 5,800,000 Euros) which cannot be higher than 10% of the annual income of the company in question,¹⁸ as well as certain restrictive measures.

Statistics

26. Statistics¹⁹ show that, during the period 2005-2007, 7,390 cases of active bribery of public officials were detected, 6,288 of which lead to an indictment (in 2005: 1,948; in 2006: 2,205; in 2007: 3,135). During the same period 5,012 persons were convicted of active bribery (in 2005: 1,364; in 2006: 1,464; in 2007: 2,184). The large majority (4,845) of offenders concerned were sentenced to imprisonment, mostly of between 1 and 3 years, and in a majority of cases on the grounds of section 229 § 3 PC which requires an – intended or real – violation of the law by the public official. The sentence was suspended in 4,614 of those cases.
27. In respect of passive bribery of public officials, statistics show that 6,588 cases were detected during the period 2005-2007, 6,347 of which lead to an indictment (in 2005: 1,833; in 2006: 2,012; in 2007: 2,502). During the same period 1,303 persons were convicted of passive bribery (in 2005: 361; in 2006: 447; in 2007: 495). As with active bribery, the large majority (1,276) of passive bribery offenders concerned were sentenced to imprisonment, mostly of between 1 and 3 years, and in a majority of cases on the grounds of section 228 § 3 PC which requires an – intended or real – violation of the law by the public official. The sentence was suspended in 1,126 of those cases.

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

28. The authorities indicated that members of domestic public assemblies are covered by sections 228 and 229 PC in conjunction with section 115 §§ 13 and 19 PC which define the term “public official” as well as the broader term “a person performing public functions” used in the aforementioned bribery provisions. Clauses 2 and 4 of § 13 include deputies to Parliament, local councillors, employees in a State administration, in another State authority or local government – except when performing only service-type work – and other persons to the extent in which they are authorised to render administrative decisions. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of domestic public assemblies. There is no case law/court decision concerning bribery of members of domestic public assemblies.

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

29. Sections 229 § 5 PC (active bribery) and 228 § 6 (passive bribery) extend the scope of application of the bribery provisions to persons “performing public functions in a foreign State or an international organisation”. The authorities affirmed that this expression entirely covers the

¹⁷ For more details, see section 41 PC.

¹⁸ See the Act of 28.10.2002 on the Liability of collective entities for acts prohibited under penalty.

¹⁹ The statistical data provided by the authorities – including data concerning the offences of bribery in the private sector and of trading in influence – is attached as Appendix B to the present report.

concept of a “foreign public official” as used in the Criminal Law Convention on Corruption. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of foreign public officials. There is no case law/court decision concerning bribery of foreign public officials.

Section 229. (...)

§ 5. Accordingly, subject to the penalties specified in § 1-4 shall be also anyone who gives a material or personal benefit or promises to provide it to a person performing public functions in a foreign State or an international organisation in connection with these functions. (...)

Section 228. (...)

§ 6. The penalties specified in § 1-5 shall be also imposed on anyone who, in connection with performing his public functions in a foreign State or in an international organisation, accepts a material or personal benefit or a promise thereof or who demands such a benefit, or on anyone who makes the performance of his official duties conditional upon receiving such a benefit. (...)

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

30. The authorities indicated that members of foreign public assemblies are covered by the Polish bribery provisions, as section 115 §§ 19 and 13 (clauses 2 and 4) PC includes members of public assemblies in the concept of “a person performing public functions” and sections 229 § 5 and 228 § 6 PC extend the scope of application of the bribery provisions to persons “performing public functions in a foreign State”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of foreign public assemblies. There is no case law/court decision concerning bribery of members of foreign public assemblies.

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

31. Active and passive bribery in the private sector have been criminal offences under Polish law since 1 July 2003 when section 296a PC entered into force. This section contains provisions on *active* (§ 2) and *passive bribery* (§ 1), on less significant (§ 3) and aggravated cases (§ 4). Poland has made reservations in respect of Articles 7 and 8 of the Criminal Law Convention on Corruption which were first introduced in 2003 and partially withdrawn in April 2006. The remaining partial reservations concern Poland’s right to apply Articles 7 and 8 only in cases where the bribe taker has a specific position in or influence on a private sector entity (see Appendix A). However, the Polish authorities informed the GET about a draft Act amending the Penal Code and other laws which is currently under parliamentary scrutiny and includes a new version of section 296a PC, aiming at extending the scope of application of the provisions on bribery in the private sector.²⁰ At the time of the adoption of the present report, section 296a PC read as follows:

²⁰ The amended section 296a § 1 PC as foreseen by the draft legislation submitted to the GET read as follows:

“Whoever, having a leading position within an entity pursuing economic activity or working for such an entity by way of employment contract, commission contract or work contract, demands or accepts a material or personal benefit or a promise thereof in exchange for acting or abandonment, which can cause damage to its property, or for action being an unfair competition act, or inadmissible preferential act for the benefit of purchaser or receiver of goods, services or performance shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.”

However, the GET was informed after the visit that this draft provision had been further amended and adopted by Parliament on 18 November 2008.

Section 296a.

§ 1. Whoever, having a leading position within an entity pursuing economic activity or having, due to his/her position or function, an actual influence on taking decisions connected with activity of such an entity, accepts a material or personal benefit or a promise thereof in exchange for acting or abandonment, which can cause damage to its property, or for action being an unfair competition act, or inadmissible preferential act for the benefit of purchaser or receiver of goods, services or performance, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

§ 2. The same penalty shall also be imposed on anyone who, under conditions specified in § 1 gives a material or personal benefit or a promise thereof.

§ 3. In the event that the act is of a lesser significance, the perpetrator of the acts specified in § 1 or 2 shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 4. In case the perpetrator of the act specified in § 1 causes a significant material damage shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. (...)

Elements of the offence

32. The elements described under bribery of domestic public officials also apply to bribery in the private sector – however, concerning passive bribery, the “request” is not covered, in contrast to section 228 § 4 PC –, in accordance with the following particular elements:

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

33. The concept of “persons who direct private sector entities” is transposed into section 296a § 1 PC by use of the words “Whoever, having a leading position within an entity pursuing economic activity or having, due to his/her position or function, an actual influence on taking decisions connected with activity of such an entity”. In contrast, the concept of “persons who work for, in any capacity, private sector entities” is not transposed into Polish legislation, and Poland has made a reservation in this respect.

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

34. Section 296a § 1 PC makes reference to “an entity pursuing economic activity” and to the perpetrator’s influence “on taking decisions connected with activity of such an entity”. According to the authorities, this does not mean that the offence must be committed “in the course of business activity”, even if the following words in this provision strongly suggest that in most cases, the bribery will take place in a business context: in fact, the benefit or promise must be accepted (or given) “in exchange for acting or abandonment, which can cause damage to its property, or for action being an unfair competition act, or inadmissible preferential act for the benefit of purchaser or receiver of goods, services or performance”. This wording also suggests that the bribe taker’s act or abandonment (not the acceptance of the benefit or promise itself) will normally imply a breach of duties, but the latter is not a constitutive element of the offence. According to the authorities, section 296a § 1 PC also covers situations where the bribe taker’s act or abandonment lies in the future or is not carried out at all.

Sanctions

35. Active and passive bribery in the private sector are punishable by between 3 months and 5 years of imprisonment. In cases of “lesser significance”, sanctions range between a fine, the penalty of “restriction of liberty” and up to 2 years’ imprisonment. Cases of passive bribery leading to a

“significant material damage” caused by the bribe taker are punishable by between 6 months and 8 years of imprisonment. The authorities indicated to the GET that the terms “lesser significance” and “significant material damage” are to be understood in the same way as the terms “lesser significance” and “considerable value” in sections 228 and 229 PC. According to section 33 § 2 PC, a fine can also be imposed in addition to imprisonment “if the perpetrator has committed the act in order to gain material benefit or when s/he has gained such benefit.” Additional “penal measures” (section 39 PC) as well as the obligation to return material benefit in whole or in part to the State Treasury (section 52 PC) as detailed under bribery of domestic public officials also apply to bribery in the private sector.

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

36. The authorities indicated that officials of international organisations are covered by the Polish bribery provisions, provided that Poland is a party to the agreement constituting the organisation concerned. Sections 229 § 5 and 228 § 6 PC extend the scope of application of the bribery provisions to persons “performing public functions in an international organisation”. The definition of “a person performing public functions” provided by section 115 § 19 PC includes, *inter alia*, persons “whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding on the Republic of Poland”. The authorities concluded that bribery offences involving an official of a public international or supranational organisation or body are covered by sections 228 and 229 PC. They added that contracted employees as well as any persons, whether seconded or not, carrying out functions corresponding to those performed by officials or agents, are also covered provided that they perform public functions in an international organisation in the aforementioned meaning. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of officials of international organisations. There is no case law/court decision concerning bribery of such officials.

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

37. The authorities indicated that members of international parliamentary assemblies of international or supranational organisations are covered by the Polish bribery provisions, provided that Poland is a party to the agreement constituting the organisation concerned. They again referred to sections 229 § 5 and 228 § 6 PC, in conjunction with section 115 § 19 PC which includes persons “whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding on the Republic of Poland” in the concept of a “person performing public functions”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of international parliamentary assemblies. There is no case law/court decision concerning bribery of members of international parliamentary assemblies.

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

38. The authorities indicated that the Polish bribery provisions also apply to judges and officials of international courts, provided that Poland is a party to the agreement constituting the court concerned. They again referred to sections 229 § 5 and 228 § 6 PC in conjunction with section 115 § 19 PC and explained that judges and officials of international courts are covered by the concept of persons “performing public functions in an international organisation” or, in the case of international courts who do not belong to international organisations, by the concept of persons “performing public functions in a foreign State”, employed by sections 229 § 5 and 228 § 6 PC. According to the authorities, the elements of the offence and the applicable sanctions

detailed under bribery of domestic public officials also apply to bribery of judges and officials of international courts. There is no case law/court decision concerning bribery of such judges and officials.

Trading in influence (Article 12 of ETS 173)

39. *Active trading in influence* is criminalised in section 230a PC and *passive trading in influence* in section 230 PC.²¹ Both sections contain a basic provision (§ 1) as well as a provision for less significant cases (§ 2).

Section 230a.

§ 1. *Whoever gives a material or personal benefit or promises to provide it in return for mediation in the settling of a matter in a State or local institution, national or international organisation, or a foreign organisational unit governing public funds, consisting in an unlawful exertion of influence on a decision, action or abandonment of action of a person performing public functions, in connection with these functions shall be subject to the penalty of deprivation of liberty between 6 months and 8 years.*

§ 2. *In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. (...)*

Section 230.

§ 1. *Whoever, claiming to have influence on a State or local government, a national or international organisation or a foreign organisational unit governing public funds, or making any person believe or confirming this person to believe that such influence exists, undertakes to intercede in the settling of a matter in return for a material or personal benefit or for a promise thereof, shall be subject to the penalty of deprivation of liberty for a term of between 6 months to 8 years.*

§ 2. *In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.*

Elements of the offence

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

40. This concept is implemented with regard to *passive trading in influence* in section 230 § 1 PC by use of the words “claiming to have influence on a State or local government, a national or international organisation or a foreign organisational unit governing public funds, or making any person believe or confirming this person to believe that such influence exists”; the element “improper influence” is not transposed. The authorities stated that the aforementioned concept covers the whole range of domestic, foreign and international public officials, of members of domestic, foreign or international public assemblies and of judges and officials of international courts. Section 230 § 1 PC furthermore requires that the influence peddler “undertakes to intercede in the settling of a matter”. According to the authorities, however, this does not mean that the influence peddler actually has to intercede, and it is not relevant whether the influence was actually exerted or if it led to the intended result; they stated that the term “undertake” means that the perpetrator declares his/her readiness to intercede in the settling of a certain matter.

41. As regards *active trading in influence*, section 230a § 1 PC refers to the “mediation in the settling of a matter in a State or local institution, national or international organisation, or a foreign

²¹ Section 230 was amended and section 230a was inserted in the Penal Code by the amendment to the Penal Code of 13.06.2003.

organisational unit governing public funds, consisting in an unlawful exertion of influence on a decision, action or abandonment of action of a person performing public functions, in connection with these functions". The element "improper influence" is transposed by "unlawful exertion of influence". The authorities affirmed that it is not relevant whether the influence was actually exerted or if it led to the intended result.

Other constitutive elements

42. "Request or receipt, acceptance of an offer or promise" is transposed into section 230 § 1 PC by use of the words "in return for a ... benefit or promise". The "request" in itself is not expressly mentioned; however, the authorities indicated that demanding a benefit in return for undertaking to intercede in the settling of a matter would be covered by the concept of undertaking the function of an intermediary. "Promising, offering or giving" is transposed into section 230a § 1 PC by reference to "give" and "promise".
43. Sections 230 and 230a PC use the terms "material or personal benefit" instead of the term "advantage", in accordance with the other bribery-based offences, and there is no concept of "undue" advantage.
44. "Directly or indirectly" is not explicitly transposed, as with the provisions on bribery mentioned above.
45. By contrast, trading in influence in the interests of a third person is covered by sections 230 and 230a PC, as the terms "material or personal benefit" are defined in section 115 § 4 PC as a "benefit for the person him/herself or for anyone else".

Sanctions

46. Active and passive trading in influence are punishable by between 6 months and 8 years of imprisonment. In cases of "lesser significance", sanctions range between a fine, the penalty of "restriction of liberty" and up to 2 years' imprisonment.

Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191)²²

47. According to the authorities, the bribery offences provided for in sections 228 and 229 PC apply to domestic arbitrators, as the definition of "a person performing public functions" provided by section 115 § 19 PC includes, *inter alia*, persons "whose rights and obligations within the scope of public activity are defined or recognised by a law". The rights and obligations of arbitrators are defined in Chapter 5, sections 1154 – 1217, of the Code of Civil Procedure, e.g. the right to convene meetings, to analyse documents and other evidence and to render binding decisions. Arbitrators may, by virtue of an arbitration agreement, be called upon by the parties to render a legally binding decision in a dispute between them. The authorities stressed that such a decision is rendered instead of a court judgment and its legal force is equal to that of a judicial decision, so that the functions carried out by arbitrators can be considered as public activity in the sense of section 115 § 19 PC.
48. The authorities stated that the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to domestic arbitrators. There is no case law/court decision concerning bribery of domestic arbitrators.

²² As for the offences of bribery of arbitrators and jurors, it has to be noted that Poland is not party to ETS 191.

Bribery of foreign arbitrators (Article 4 of ETS 191)

49. The authorities indicated that bribery of foreign arbitrators is possibly covered by the bribery provisions, on the condition that such arbitrators can be considered to be performing “public functions in a foreign State” in the meaning of sections 228 § 6 and 229 § 5 PC. However, they could not provide any case law/court decision to support this view. Provided that foreign arbitrators are covered by sections 228 and 229 PC, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials would also apply to foreign arbitrators.

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

50. Domestic jurors are covered by the Polish bribery provisions, as section 115 §§ 19 and 13 (clause 3) PC explicitly includes lay judges in the concept of “a person performing public functions” referred to in sections 228 and 229 PC. The authorities indicated to the GET that lay judges take part in adjudicating criminal cases on the basis of section 3 of the Code of Criminal Procedure and that legislation concerning lay judges is to be found in various acts and regulations issued by the Minister of Justice. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply to domestic jurors. There is no case law/court decision concerning bribery of domestic jurors.

Bribery of foreign jurors (Article 6 of ETS 191)

51. The authorities indicated to the GET that the bribery offences provided for in sections 228 to 229 PC apply to foreign jurors, as section 115 §§ 19 and 13 (clause 3) PC includes lay judges in the concept of “a person performing public functions” and sections 229 § 5 and 228 § 6 PC extend the scope of application of the bribery provisions to persons “performing public functions in a foreign State”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of foreign jurors. There is no case law/court decision concerning bribery of foreign jurors.

Other questions

Participatory acts

52. Aiding and abetting the commission of all of the abovementioned criminal offences is criminalised under section 18 PC.

Section 18. (...)

§ 2. *Whoever, willing that another person should commit a prohibited act, induces the person to do so, shall be liable for instigating.*

§ 3. *Whoever, with an intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for aiding and abetting.*

In accordance with section 19 §§ 1 and 2 PC the same sanctions can be imposed on aiders and abettors as on the principal offender but the court may apply extraordinary mitigation of punishment (see section 60 § 6 PC).

Jurisdiction

53. According to section 5 PC which applies to all offences criminalised by the Penal Code, jurisdiction is established over acts committed – in whole or in part – within the territory of Poland, or on a Polish vessel or aircraft, unless an international agreement to which Poland is a party stipulates otherwise (principle of territoriality). Furthermore, section 109 PC stipulates that the Polish penal law is to be applied to Polish citizens who have committed an offence abroad (principle of nationality). Finally, in the event of specific types of offences committed abroad, the Polish penal law also applies to aliens; those offences are enumerated in sections 110 § 1 and 112 PC and comprise, *inter alia*, offences against the interests of Poland, terrorist offences, offences against Polish public officials or offences from which any material benefit has been obtained, even indirectly, within the territory of Poland. Pursuant to section 111 § 1 PC dual criminality is generally required to establish jurisdiction in respect of acts committed abroad, but this requirement is lifted by sections 111 § 3 and 112 PC in certain cases, *inter alia* in the case of Polish public officials performing their duties abroad and in the case of offences committed against Polish public officials.
54. The GET was informed that there was no case law/court decision in connection with jurisdiction over bribery offences.

Statute of limitations

55. The period of limitation is determined by the length of imprisonment which can be imposed for the offence in question (see section 101 PC). On this basis, the limitation period provided for active and passive bribery offences is 15 years; in cases of lesser significance the limitation period is 5 years; in aggravated cases, 15 years and in cases involving a person performing public functions in a foreign State or in an international organisation, 5 to 15 years depending on the circumstances of the offence. The limitation period provided for offences of active and passive trading in influence is 15 years or, in cases of lesser significance, 5 years. Finally, a limitation period of 10 years is provided for active and passive bribery in the private sector; in cases of lesser significance it is 5 years and in aggravated cases, 15 years. Pursuant to section 102 PC, the period of limitation is prolonged in case of criminal proceedings instituted against the offender.

Defences

56. The provisions on active bribery in the public and in the private sector as well as on active trading in influence contain special defences for the bribe giver which exempt him/her from punishment if the material or personal benefit or promise thereof were received and the perpetrator had reported this fact to the law-enforcement authority, revealing all essential circumstances of the offence before this authority was notified of the offence. In this connection, the Supreme Court stated that “this provision refers to information of an evidentiary character and not of an operational character”.²³ According to explanations provided by the authorities, no exemption from punishment can be granted if the law-enforcement authority has already obtained the relevant information, by any person, in the form necessary for evidentiary purposes in court (including written records of witness statements or interviews of the accused, or documents indicated in section 393 of the Code of Criminal Procedure).

²³ Supreme Court decision No. II KK 89/06 of 7 September 2006.

Section 229. (...)²⁴

§ 6. *The perpetrator of the act specified in § 1-5 shall not be liable to punishment if the material or personal benefit or a promise thereof were accepted by the person performing public functions and the perpetrator had reported this fact to the law-enforcement agency, revealing all essential circumstances of the offence before this authority was notified of the offence.*

57. If such a defence is successfully invoked, the sentencing court adjudicates that the offence has been committed but that the penalty will not be imposed on the defendant concerned. The authorities explained that the reason for introducing these defences was to obtain a useful tool to break the conspiracy between the briber and the bribe taker and to introduce an incentive for those who would be willing to report an offence to the law enforcement authorities.

IV. ANALYSIS

58. The GRECO Evaluation Team (GET) found the Polish legal framework for the criminalisation of corruption largely compliant with the standards of the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) and its Additional Protocol (ETS 191) under review. The GET was pleased to note that several corruption-related provisions of Polish criminal law were subject to legal amendments in 2003 which aimed at adjusting national legislation to the requirements of the Convention, *inter alia*, with regard to the scope of application of the existing bribery provisions and to the criminalisation of trading in influence; further amendments, with regard to bribery in the private sector, were foreseen by draft legislation at the time of the on-site visit. The Polish authorities apparently consider that once the aforementioned draft amendments have been adopted as planned, all the requirements of the Convention will have been transposed into Polish law. Moreover, the practitioners interviewed during the visit considered the existing criminal laws, as complemented by a number of non-binding but generally respected Supreme Court decisions, sufficient. It should be added that the relevant provisions appear to be interpreted broadly and pragmatically by prosecutors and judges. Nevertheless, the GET has identified a limited number of issues, specified below, which would warrant further consideration.
59. During the visit on-site, some interlocutors suggested that the dispersed bribery provisions could be restructured in order to create a simpler and more coherent system. In addition to the general provisions on public sector bribery (sections 228 and 229 of the Penal Code, hereafter: PC), the Penal Code currently comprises, in different chapters, specific provisions on corruption in the private sector (section 296a PC), in sport (section 296b PC) and relating to elections (section 250a PC). It was pointed out that a reform of this system would be beneficial for legal practitioners as well as for the wider public in terms of visibility and clarity but also for distinct legal reasons. For example, it was highlighted that the provisions on public sector bribery are broader than those on private sector bribery and that it would be more consistent, for example, to simply extend the scope of application of those provisions to include private sector bribery. However, the authorities informed the GET of specific reasons leading to the current system of separate bribery provisions and stated, more particularly, that provisions on private sector bribery had to be placed in Chapter XXXVI of the Penal Code (offences against business transactions) and provisions on public sector bribery in Chapter XXIX (offences against the functioning of State and local government institutions). The GET is of the opinion that, even if the visibility of bribery offences could be enhanced by further legal amendments, such amendments are not strictly

²⁴ See also sections 230a § 3, 296a § 5 and 296b § 4 PC; cp. section 250a § 4 PC.

necessary with regard to the Convention, and that deficiencies in the provisions on private sector bribery may be addressed without restructuring the whole system (see paragraph 65 below).

60. Concerning the categories of persons covered by public sector bribery offences, it was indicated to the GET by numerous interlocutors that the concept of “a person performing public functions” which is employed in sections 228 and 229 PC and which is defined in section 115 § 19 PC, is extremely wide and flexible and encompasses not only public officials in the strict sense (as defined in section 115 § 13 PC) but all categories of persons referred to in Article 1.a of the Convention. It was explained on the basis of Supreme Court decisions that a person performs public functions if s/he either works for an organisational unit which has access to public funds or makes decisions in the public sphere, independently of whether s/he is bound to a public entity by an employment contract; thus, for example, mayors are covered by this concept, as well as teachers working in a private school. Moreover, it was explained on the basis of the relevant provisions of the Code of Criminal Procedure and the Code of Civil Procedure that jurors and (domestic) arbitrators, who are addressed by the Additional Protocol to the Convention, equally perform public functions.
61. As regards the international dimension of the bribery offences, the authorities referred to sections 228 § 6 and 229 § 5 PC in conjunction with section 115 §§ 13/19 PC. Sections 228 § 6 and 229 § 5 PC extend the scope of application of the bribery provisions to persons “performing public functions in a foreign State or an international organisation”; the authorities explained that the Polish term translated as “in a foreign State” does not mean that the persons concerned must be physically present in a foreign State but that they were assigned the status of a public official in that State. Section 115 § 19 PC contains a definition of the concept of “a person performing public functions”, which covers *inter alia* “persons whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding on the Republic of Poland.” This legislation appears unnecessarily complicated and the interrelation of sections 228 § 6 / 229 § 5 and 115 § 19 PC appears to be questionable (some interlocutors affirmed that sections 228 § 6 and 229 § 5 PC were superfluous, whereas the authorities stated that those provisions were wider than section 115 § 19 PC which requires an international agreement binding on Poland). However, the GET noted that various interlocutors agreed on the comprehensive scope of application of the bribery provisions which would cover foreign public officials, members of foreign public assemblies, members of international parliamentary assemblies, judges and officials of international courts as well as foreign jurors. By contrast, they could not give a clear answer to the question of whether foreign arbitrators, who are addressed by Article 4 of the Additional Protocol to the Convention, are also covered, and there was no case law available in this respect either. After the on-site visit, the authorities indicated that foreign arbitrators were covered to the extent that they could be considered as persons whose rights and obligations within the scope of their public activity in a foreign State are defined or recognised by the law of the foreign State. They added that cases of institutionalised arbitration abroad (for example, by the Court of Arbitration for Sport, which is a body of the International Olympics Committee) were also covered, to the extent that the rights and obligations of the arbitrators concerned are defined by an international agreement binding on Poland. The authorities concluded that any other cases – like foreign arbitrators acting on the basis of an arbitration agreement between private persons – were left outside the scope of application of the bribery provisions. The GET shares this view, as there are no clear indications that foreign arbitrators can generally be considered as performing public activity in the meaning of section 115 § 19 PC; in addition, the GET notes that the Additional Protocol has not been signed or ratified by Poland. Therefore, the GET recommends **to ensure that foreign arbitrators are fully covered by the bribery provisions of the Penal Code and to sign and ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible.**

62. Pursuant to section 229 § 1 PC, active bribery in the public sector may be committed by “giving” or “promising” a benefit; the same terms are employed in the provisions on active bribery in the private sector (section 296a § 2 PC) and on active trading in influence (section 230a § 1 PC). The authorities indicated that the term “promising” was also meant to cover the act of “offering” and that cases of a refused offer would have to be understood as an attempt to “give” a benefit; by contrast, several interlocutors interviewed by the GET indicated that even a refused offer would constitute a promise. Given the fact that according to section 14 § 1 PC the same sanctions can be imposed for an attempt as for an accomplished offence, the GET sees no need to further examine this question and is satisfied that all acts of “offering” are punishable under Polish law. As for passive bribery, the GET takes the view that the word “accept” in section 228 § 1 PC – as well as in section 296a § 1 PC – covers the simple “receipt” in the meaning of Article 3 of the Convention, as this Article only applies to acts committed intentionally and therefore supposes at least some kind of tacit acceptance. Furthermore, the GET notes that the “request” of a benefit constitutes an aggravated case of passive bribery in the public sector and is subject to the specific provision of section 228 § 4 PC, which does not require the actual acceptance of a benefit.
63. Sections 228 and 229 PC – as well as sections § 296a §§ 1/2 and 230/230a PC – use the term “material or personal benefit” which, according to the authorities’ explanations, is to be understood as material or immaterial benefit or advantage and therefore equals the term “advantage” as contained in Articles 2 and 3 of the Convention. On the basis of a strict reading of the bribery provisions, there is no concept of “undue” advantage and the amount or value of the benefit is significant only with regard to the applicable penalties which are lower in cases of “lesser significance” and more severe in cases of a benefit “of considerable value”. Nevertheless, the authorities indicated that due to legal doctrine and jurisprudence small gifts do not constitute a bribe provided that they are of a symbolic character, their value is minimal and there exists a socially accepted custom which allows such a gift in a certain situation. They quoted a Supreme Court decision²⁵ according to which a material benefit does not relate to such objects which only symbolically express the gratitude of the giver and are of such a value that does not exceed such a symbol. The GET considers that this rule is in line with the concept of “undue advantage” as employed in the Convention and notes that the interlocutors met on-site reported not to meet any problems in practice, as they could refer to case law and to codes of conduct (at least for certain categories of persons) providing for further guidance.
64. Neither sections 228/229 PC nor sections § 296a §§ 1/2, 230/230a PC expressly mention third party beneficiaries, but the terms “material or personal benefit” used in those provisions are clearly defined in section 115 § 4 PC as a “benefit for the person him/herself or for anyone else”. Furthermore, the GET notes that none of the provisions on bribery and trading in influence contained in the Penal Code provides expressly for indirect commission of such offences, i.e. bribery or trading in influence committed through intermediaries, and no case law could be referred to in this regard. Nevertheless, the authorities affirmed that in the Polish language the word “giving”, as employed in those provisions, means in this context a “transfer” between the giver and the ultimate bribe taker, which may be effected directly or indirectly. The interlocutors met during the visit unanimously confirmed this view as “evident” and not necessitating any clarification by the Supreme Court. The GET acknowledges the legal situation as described by the authorities. In the absence of any clear indications to the contrary, the GET considers that the lack of an express reference to offenders acting indirectly in the various bribery provisions would not exclude such perpetrators from being investigated and prosecuted.

²⁵ Supreme Court decision No. VI KZP 34/07 of 26 February 1988.

65. Bribery in the private sector was criminalised by the 2003 amendments, but the GET noticed three shortcomings which need to be remedied. Firstly, as regards the range of possible perpetrators, section 296a § 1 PC makes reference to persons having “a leading position within an entity pursuing economic activity” or having, due to their position or function, “an actual influence on taking decisions connected with activity of such an entity”. Because of this relatively narrow technical definition, low-level employees are not covered and the GET can only conclude that the scope of section 296a §§ 1/2 PC does not fully meet the requirements of Articles 7 and 8 of the Convention which refer to “any persons who direct or work for, *in any capacity*, private sector entities”. It should be noted that Poland has made a partial reservation in this respect (see Appendix A), however, the GET was informed during the visit that a draft Act amending the Penal Code and other laws was under parliamentary scrutiny and could be adopted by the end of 2008, and that it was planned to withdraw the aforementioned reservation as soon as the draft Act has been adopted. According to the draft Act, the scope of section 296a §§ 1/2 PC would be extended also to persons “working for such an entity by way of employment contract, commission contract or work contract.” A second lacuna in the current legislation concerns specifically the passive bribery provision (section 296a § 1 PC) which does not criminalise the simple *request* of a benefit, in contrast to Article 8 of the Convention. According to the authorities, it is planned to eliminate this shortcoming through the aforementioned draft amendment as well. A third area of concern is related to the – intended or real – behaviour of the bribe taker. Whereas Articles 7 and 8 of the Convention cover all cases where bribe takers are intended “to act or refrain from acting in *breach of their duties*”, section 296a PC contains a limited list of intended acts or omissions, namely those “which can cause damage to its property, or for action being an unfair competition act, or inadmissible preferential act for the benefit of purchaser or receiver of goods, services or performance”. In the GET’s view this formulation unnecessarily narrows down the requirement of the Convention and adds an extra element to the criminalisation of private sector bribery, which may make prosecution of the offence more difficult. To conclude, it appears to the GET that, overall, the draft changes go in the right direction but need to be complemented by extending the offences of private sector bribery to all cases implying a breach of duty by the bribe taker. Consequently, the GET recommends **(i) to finalise the legislative process aimed at amending the Penal Code provisions on bribery in the private sector; and more particularly (ii) to ensure that those provisions are amended in such a way as to cover the full range of persons who direct or work for – in any capacity – private sector entities, as well as all instances implying a breach of duty by the bribed person, and – in the case of passive bribery – the request of an advantage.** Once the requirements of this recommendation are fulfilled, the partial reservations to Articles 7 and 8 of the Convention will become obsolete.²⁶
66. The GET notes that trading in influence is criminalised both in its active and passive form. Section 230 PC (passive trading in influence) was amended and section 230a PC (active trading in influence) was inserted in the Penal Code in 2003. As regards passive trading in influence, the GET notes that section 230 PC does not expressly mention the simple *request* of a benefit. However, the interlocutors met on-site concurred that the concept of “whoever ... undertakes to intercede in the settling of a matter in return for a ... benefit or for a promise” means that the perpetrator declares his/her readiness to intercede and therefore covers situations where a benefit or promise is only requested but not actually offered or promised. The GET has no reasons to doubt these explanations. By contrast, the GET is concerned about the provision on active trading in influence (section 230a PC) in that it employs the term “*unlawful exertion of influence*” instead of the term “improper influence” as contained in Article 12 of the Convention.

²⁶ The GET was informed after the visit that the above-mentioned draft legislation had been further amended in order to take account of the GET’s concerns and was adopted by Parliament on 18 November 2008.

Even though not all interlocutors interviewed during the visit gave an unambiguous and concurring answer to the question whether the term “unlawful” is to be understood in this context as “improper” or rather as “illegal”, most officials pleaded for the latter interpretation which implies the violation of a norm. The authorities argued that the transposition of the broader concept of “improper influence” into Polish law would be difficult as it did not constitute a clear legal concept. However, the GET is concerned that section 230a PC narrows down the requirement of the Convention and might make prosecution of the offence more difficult. The GET is particularly concerned about those cases where the influence peddler is not a public official and thus does not have to comply with official regulations; there appears to be no guidance as to how to determine the relevant legal standard. In the light of the foregoing, the GET recommends **to review the provision on active trading in influence in order to ensure that all instances of an (asserted or confirmed) improper influence are covered, in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173).**

67. The jurisdictional principles of territoriality and of nationality apply to all bribery and trading in influence offences. As regards nationality jurisdiction, section 109 PC establishes that the Polish penal law is applicable to Polish citizens having committed an offence abroad. In addition, section 111 § 1 PC requires dual criminality for offences committed abroad, but this requirement is lifted by sections 111 § 3 and 112 PC in certain cases, *inter alia* in the case of Polish public officials performing their duties abroad and in the case of offences committed against Polish public officials. Therefore, no dual criminality is required for offences committed by or involving Polish public officials and the GET concludes that these rules are in line with Article 17, paragraph 1.b and c of the Convention, as far as Polish citizens are concerned.
68. By contrast, the GET wishes to stress that Article 17, paragraph 1.b extends (active) nationality jurisdiction to public officials and members of domestic public assemblies who are not at the same time nationals. The GET notes that Poland has not made a reservation in this respect. Nonetheless, this extension is not reflected in section 109 PC which generally requires Polish citizenship. The GET discussed the issue at length with the authorities, with practitioners and scientific experts met during the on-site visit who made contradictory statements in this respect. The authorities claimed that section 112 PC could be applied to those cases where Polish public officials/persons performing public functions without Polish citizenship committed offences of bribery or trading in influence abroad. By contrast, other interlocutors stressed that section 112 PC did not concern offences committed abroad by aliens in general but only against a limited number of persons or interests (e.g. against Polish offices or public officials); furthermore, it was stated that this section was only meant to lift the dual criminality requirement set by section 111 § 1 PC. After the visit, the authorities furthermore referred to section 113 PC, according to which Polish penal law also applies to those offences committed abroad “which the Republic of Poland is obligated to prosecute under international agreements”. However, the GET wishes to stress that such a condition narrows down the requirement of the Convention and that the Convention itself does not directly oblige Poland to prosecute such offences. Therefore, in the light of the conflicting views of the professionals interviewed and in the absence of any court decision in this respect, the GET is not convinced that such instances of corruption or trading in influence as described above would indeed be covered by Polish nationality jurisdiction. In this connection, it should be added that according to the authorities, Polish public officials/persons performing public functions are normally required to have Polish citizenship, but there are exceptions to this rule (during the interviews, the authorities mentioned local councillors and bailiffs). Consequently, in order to fully meet the requirements of Article 17, paragraph 1.b of the Criminal Law Convention on Corruption (ETS 173), the GET recommends **to establish jurisdiction over offences of bribery and trading in influence committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens.**

69. The sanctions available for bribery offences committed in the public sector – up to 12 years of imprisonment – as well as for bribery offences committed in the private sector and for trading in influence offences – up to eight years of imprisonment – under Polish law appear to conform to the requirements established under Article 19, paragraph 1 of the Convention. When looking at the overall statistics for the years 2005 to 2007, it would appear that the Polish authorities have managed to obtain a non negligible number of convictions, the vast majority carrying a sentence of between one and three years of (suspended) imprisonment. However, the GET is concerned that during the same period, only five convictions on the grounds of section 296a PC (bribery in the private sector) have been registered, which raises the question whether law enforcement officials are sufficiently aware and informed about those relatively new provisions (which were introduced in 2003) and have the requisite skills to investigate private sector corruption offences. In the view of the GET, this question deserves an accurate analysis, possibly followed by measures such as training and advice for officials concerned, especially in the context of current plans to amend section 296a PC.
70. Finally, the GET is concerned about the possible effects of special defences which exempt the bribe giver from punishment, in cases of active bribery in the public as well as the private sector and of active trading in influence, “if the material or personal benefit or promise thereof were received and the perpetrator had reported this fact to the law-enforcement authority, revealing all essential circumstances of the offence before this authority was notified of the offence.”²⁷ The GET explored with the interlocutors interviewed both the advantages of provisions on effective regret (detection of bribery cases) and the potential risks of misuse (e.g. blackmailing the bribed persons, abuse of a false defence). It emerged, on the one hand, that law enforcement authorities considered these provisions as a useful and effective incentive for reporting instances of corruption. On the other hand, several interlocutors criticised the automatic and total exemption from punishment, without any margin of discretion for the competent court, and they reported on false accusations made in practice. Furthermore, it appeared to the GET that practitioners were uncertain about the correct interpretation of the term “before this authority was notified of the offence” as employed in the defence provisions. Despite some indications given by the Supreme Court,²⁸ it still appears not to be entirely clear whether only information obtained by the law enforcement bodies *in the course of criminal investigations* hinder the exemption from punishment. For these reasons, the GET is concerned about the provisions on effective regret in their present form. The current legislation needs to be clarified in order to remedy interpretation difficulties and to limit the risks of abuse. Therefore, the GET recommends **to clarify the conditions for invoking the special defence of effective regret available under the provisions on active bribery and active trading in influence of the Penal Code.**

V. CONCLUSIONS

71. The Polish criminal law provides a sound basis for the investigation, prosecution and adjudication of corruption offences. With recent reforms of the relevant provisions of the Penal Code, Poland has shown a serious will to adopt the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). In this connection, current legislative initiatives aimed at amending the provisions on private sector bribery should be encouraged. As regards the incriminations on bribery in the public sector, the GET did not identify any major shortcomings and noted, in addition, that the relevant provisions appear to be interpreted broadly and pragmatically by prosecutors and judges. Nevertheless, a limited number of quite specific

²⁷ See sections 229 § 6, 230a § 3 and 296a § 5 PC; see also sections 296b § 4 and 250a § 4 PC.

²⁸ Supreme Court decision No. II KK 89/06 of 7 September 2006; see paragraph 56 above.

deficiencies were identified, regarding *inter alia* the applicability of corruption offences to foreign arbitrators as defined by the Additional Protocol to the Convention – to which Poland should, as soon as possible, become a Party –, and the jurisdiction over corruption offences committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens. Moreover, despite the recent upgrading of Polish legislation and despite major improvements – reported by both the authorities and representatives of civil society – with regard to the establishment of specialised anti-corruption structures within the law enforcement bodies, it would appear that corruption still remains a problem and that further efforts are needed to significantly reduce its occurrence, all the more so as new types of corruption have recently been identified in areas such as sport – a specific provision on bribery in sport has been introduced into the Penal Code – and the private sector, where only a few cases have been investigated during the first years since its criminalisation in 2003. The introduction, in the same year, of effective regret defences in cases of active bribery and trading in influence has reportedly contributed to an increase of detected cases of corruption, but the conditions for invoking these defences need to be clarified in order to remedy interpretation difficulties and to limit the risks of abuse.

72. In view of the above, GRECO addresses the following recommendations to Poland:
- i. **to ensure that foreign arbitrators are fully covered by the bribery provisions of the Penal Code and to sign and ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) as soon as possible** (paragraph 61);
 - ii. **(i) to finalise the legislative process aimed at amending the Penal Code provisions on bribery in the private sector; and more particularly (ii) to ensure that those provisions are amended in such a way as to cover the full range of persons who direct or work for – in any capacity – private sector entities, as well as all instances implying a breach of duty by the bribed person, and – in the case of passive bribery – the request of an advantage** (paragraph 65);
 - iii. **to review the provision on active trading in influence in order to ensure that all instances of an (asserted or confirmed) improper influence are covered, in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 66);
 - iv. **to establish jurisdiction over offences of bribery and trading in influence committed abroad by Polish public officials and members of domestic public assemblies who are not Polish citizens** (paragraph 68);
 - v. **to clarify the conditions for invoking the special defence of effective regret available under the provisions on active bribery and active trading in influence of the Penal Code** (paragraph 70).
73. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Polish authorities to present a report on the implementation of the above-mentioned recommendations by 30 June 2010.
74. Finally, GRECO invites the authorities of Poland 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

ETS 173:

Partial withdrawal of reservation contained in a letter from the Permanent Representative of Poland, dated 29 September 2006, registered at the Secretariat General on 29 September 2006 - Or. Engl.

In accordance with Article 37, paragraph 1, of the Convention, the Republic of Poland reserves its right to apply Article 7 only in such case when the benefit or its promise is received by a person who has a leading position within an entity pursuing economic activity or by a person who, due to his/her position or function, has an actual influence on taking decisions connected with activity of such an entity, in exchange for acting or abandonment, which can cause damage to its property, or for inadmissible preferential act, or actions being unfair competition act.

Period covered: 1/4/2006 -

The preceding statement concerns Article(s) : 37, 7

Partial withdrawal of reservation contained in a letter from the Permanent Representative of Poland, dated 29 September 2006, registered at the Secretariat General on 29 September 2006 - Or. Engl.

In accordance with Article 37, paragraph 1, of the Convention, the Republic of Poland reserves its right to apply Article 8 only in such case when the benefit or its promise is given to a person who has a leading position within an entity pursuing economic activity or by a person who, due to his/her position or function, has an actual influence on taking decisions connected with activity of such an entity, in exchange for acting or abandonment, which can cause damage to its property, or for inadmissible preferential act, or actions being unfair competition act.

Period covered: 1/4/2006 -

The preceding statement concerns Article(s) : 37, 8

APPENDIX B

**Statistical data – extract from the Police Criminality Statistical System „Temida”
– specific offences
(-2005-)**

Legal classification	Proceedings instituted for the first time	Offences detected	Outcome of proceedings					
			Indictment	Discontinuance				
				Section 11 § 1 of the Code of Criminal Procedure	Conditional discontinuance	Reasons excluding prosecution	Lack of sufficient evidence	Perpetrator not uncovered
Section 228 §§ 1 – 4 of the Penal Code (PC)	474	1852	1830	-	-	1	3	18
Section 228 § 5 PC	2	3	3	-	-	-	-	-
Section 228 § 6 PC	1	-	-	-	-	-	-	-
Section 229 §§ 1- 2 PC	348	672	654	-	3	3	-	11
Section 229 §§ 3 - 4 PC	577	1305	1292	-	-	2	1	6
Section 229 § 5 PC	1	2	2	-	-	-	-	-
Section 230 PC	104	472	460	-	4	-	3	5
Section 230a PC	2	-	-	-	-	-	-	-
Section 231 §§ 1 – 3 PC	3212	1790	1690	1	23	16	7	53
Section 250 a PC	7	5	5	-	-	-	-	-
Section 296 a PC	21	10	10	-	-	-	-	-
Section 296 b PC	14	15	15	-	-	-	-	-

**Statistical data – extract from the Police Criminality Statistical System „Temida”
– specific offences
(-2006-)**

Legal classification	Proceedings instituted for the first time	Offences detected	Outcome of proceedings						Overall Number of suspects
			Indictment	Discontinuance					
				Section 11 § 1 of the Code of Criminal Procedure	Conditional discontinuance	Reasons excluding prosecution	Lack of sufficient evidence	Perpetrator not uncovered	
Section 228 §§ 1 – 4 Penal Code (PC)	564	2098	2009	-	-	-	3	68	527
Section 228 § 5 PC	1	3	3	-	-	-	-	-	6
Section 228 § 6 PC	-	-	-	-	-	-	-	-	-
Section 229 §§ 1- 2 PC	563	702	688	-	2	-	-	4	561
Section 229 §§ 3 - 4 PC	918	1535	1516	1	-	4	2	1	1094
Section 229 § 5 PC	4	1	1	-	-	-	-	-	1
Section 230 PC	134	737	718	-	8	1	-	1	260
Section 230a PC	-	-	-	-	-	-	-	-	-
Section 231 §§ 1 – 3 PC	4093	1385	1237	-	50	21	6	71	581
Section 250 a PC	62	18	17	-	-	-	-	-	13
Section 296 a PC	32	36	36	-	-	-	-	-	18
Section 296 b PC	12	2	2	-	-	-	-	-	2

**Statistical data – extract from the Police Criminality Statistical System „Temida”
– specific offences
(-2007-)**

Legal classification	Proceedings instituted for the first time	Offences detected	Outcome of proceedings						Overall Number of suspects
			Indictment	Discontinuance					
				section 11 § 1 of the Code of Criminal Procedure	Conditional discontinuance	Reasons excluding prosecution	Lack of sufficient evidence	Perpetrator not uncovered	
Section 228 §§ 1 – 4 of the Penal Code (PC)	485	2596	2466	1	108	7	6	8	527
Section 228 § 5 PC	5	36	36	-	-	-	-	-	4
Section 228 § 6 PC	-	-	-	-	-	-	-	-	-
Section 229 §§ 1- 2 PC	619	1105	1088	-	2	1	3	8	858
Section 229 §§ 3 - 4 PC	1137	2042	2023	-	-	6	3	9	1554
Section 229 § 5 PC	2	26	24	-	1	-	-	1	26
Section 230 PC	129	545	513	-	1	21	-	5	302
Section 230a PC	-	-	-	-	-	-	-	-	-
Section 231 §§ 1 – 3 PC	4108	2118	1981	-	68	5	6	57	626
Section 231 § 2 PC	29	878	787	1	47	261	14	680	48
Section 250 a PC	20	99	92	-	4	-	-	3	93
Section 296 a PC	35	169	169	-	-	-	-	-	74
Section 296 b PC	6	5	5	-	-	-	-	-	6

Convictions – offences of corruption (2005)

Legal classification	Overall number of convicted persons	Measures (Penalties)													Extraordinary mitigation of penalty
		fine		Restriction of liberty		Deprivation of liberty		According to the level of penalty imposed							
		overall	Susp.	overall	Susp.	overall	Susp.	Up to 11 months		1 year		Between 1 and 3 years		Between 3 and 5 years	
								overall	Susp.	overall	susp.	overall	Susp.		
Section 228 § 1 PC	116	3	1	-	-	113	96	19	17	42	39	52	40	-	1
Section 228 § 2 PC	3	1	-	-	-	2	1	1	1	-	-	1	-	-	-
Section 228 § 3 PC	227	1	-	-	-	226	205	5	5	66	61	1551	139	-	-
Section 228 § 4 PC .	14	-	-	-	-	14	13	-	-	2	2	11	10	1	-
Section 228 § 5 PC	1	-	-	-	-	1	-	-	-	-	-	1	-	-	-
Section 229 § 1 PC	294	7	1	1	-	286	275	98	94	128	126	60	55	-	2
Section 229 § 2 PC	38	18	1	1	-	19	18	12	11	7	7	-	-	-	-
Section 229 § 3 PC	1027	9	2	1	-	1017	970	57	56	588	561	371	353	1	5
Section 229 § 4 PC	5	-	-	-	-	5	3	-	-	-	-	5	3	-	-
Section 230 PC	10	-	-	-	-	10	9	3	3	5	4	2	2	-	-
Section 230a PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Section 231 § 1 PC	76	8	-	1	-	63	62	29	29	21	20	13	13	-	8
Section 231 § 2 PC	105	2	-	-	-	103	92	7	6	37	34	59	52	-	1
Section 231 § 3 PC	2	-	-	-	-	2	2	1	1	1	1	-	-	-	-
Section 250a PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Section 296a PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Section 296b PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

Convictions – offences of corruption (2006)

Legal classification	Overall number of persons standing trial	Overall number of convicted persons	Measures (Penalties)													Extraordinary mitigation of penalty	
			fine		Restriction of liberty		Deprivation of liberty		According to the level of penalty imposed								
									Up to 11 months		1 year		Between 1 and 3 years		Between 3 and 5 years		
			overall	Susp.	overall	Susp.	overall	Susp.	overall	Susp.	overall	Susp.	overall	Susp.			
Section 228 § 1 PC	158	153	-	-	2	-	150	141	34	34	47	44	67	61	2	2	
Section 228 § 2 PC	8	3	1	-	1	-	1	-	-	-	-	-	1	-	-	-	
Section 228 § 3 PC	263	263	-	-	-	-	263	223	6	5	57	52	200	166	-	-	
Section 228 § 4 PC	23	23	-	-	-	-	23	21	-	-	9	9	14	12	-	-	
Section 228 § 5 PC	5	5	-	-	-	-	5	3	-	-	-	-	4	3	1	-	
Section 229 § 1 PC	318	309	9	1	2	-	298	291	133	132	102	98	63	61	-	2	
Section 229 § 2 PC	54	42	16	1	7	1	18	17	13	12	3	3	2	2	-	-	
Section 229 § 3 PC	1 099	1 099	8	-	1	1	1 090	1025	60	58	578	545	452	422	-	11	
Section 229 § 4 PC	14	14	1	-	-	-	13	6	1	1	-	-	12	5	-	-	
Section 230 PC	11	11	2	1	-	-	9	9	4	4	4	4	1	1	-	2	
Section 230a PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Section 231 § 1 PC	245	99	8	-	-	-	87	86	51	51	24	23	12	12	-	7	
Section 231 § 2 PC	117	111	4	-	-	-	107	97	10	10	57	52	39	34	1	4	
Section 231 § 3 PC	12	2	-	-	-	-	2	2	2	2	-	-	-	-	-	-	
Section 250a PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Section 296a PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Section 296b PC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	

Convictions (sentences of the I instance courts) – offences of corruption (2007)

Legal classification	Overall number of persons standing trial	Overall number of convicted persons	Measures (Penalties)									
			fine		Restriction of liberty		Deprivation of liberty		According to the level of penalty imposed			
			overall	Susp.	overall	Susp.	overall	Susp.	Up to 1 year	Between 1 and 2 years	Between 2 and 5 years	More than 5 years
Section 228 § 1 PC	210	168	3	-	4	-	161	143	80	75	5	1
Section 228 § 2 PC	26	20	8	-	1	-	11	10	5	6	-	-
Section 228 § 3 PC	303	272	1	1	-	-	271	242	111	150	10	-
Section 228 § 4 PC	35	29	-	-	-	-	29	23	11	16	2	-
Section 228 § 5 PC	8	3	-	-	-	-	3	2	1	1	-	1
Section 228 § 6 PC	3	3	-	-	-	-	3	3	2	1	-	-
Section 229 § 1 PC	480	440	21	3	2	-	417	404	309	105	3	-
Section 229 § 2 PC	117	95	42	4	1	-	52	50	50	2	-	-
Section 229 § 3 PC	1675	1646	15	2	4	1	1627	1552	992	623	11	1
Section 229 § 4 PC	4	3	-	-	-	-	3	3	3	-	-	-
Section 229 § 5 PC	-	-	-	-	-	-	-	-	-	-	-	-
Section 229 § 6 PC	7	-	-	-	-	-	-	-	-	-	-	-
Section 230 PC	107	97	3	-	3	1	91	78	47	41	3	-
Section 230a § 1 PC	83	82	4	-	-	-	77	77	62	15	-	-
Section 230a § 2 PC	44	39	29	-	-	-	10	9	10	-	-	-
Section 231 PC	666	283	29	5	2	1	252	234	192	58	2	-
Section 296a PC	5	5	1	-	-	-	4	3	-	3	1	-