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Second Compliance Report

Third Evaluation Round

Second Compliance Report on Portugal

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

"Transparency of Party Funding"

Adopted by GRECO
at its 67th Plenary Meeting
(Strasbourg, 23-27 March 2015)

I. INTRODUCTION

1. The Second Compliance Report assesses further measures taken by the authorities of Portugal, since the adoption of the Compliance Report, in respect of the recommendations issued by GRECO in its Third Round Evaluation Report on Portugal. It is recalled that the Third Evaluation Round covers two distinct themes, namely
 - **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).
2. The Third Round Evaluation Report was adopted at GRECO's 49th Plenary Meeting (29 November – 3 December 2010) and made public on 8 December 2010, following authorisation by Portugal (Greco Eval III Rep (2010) 6E, [Theme I](#) and [Theme II](#)). The subsequent Compliance Report was adopted at GRECO's 58th Plenary meeting (3-7 December 2012) and made public on 17 December 2012, following authorisation by Portugal ([Greco RC-III \(2012\) 20E](#)). In view of the low level of compliance with the recommendations issued in the Third Evaluation Report, GRECO decided to apply Rule 32 of its Rules of Procedure, regarding action in respect of non-complying members, and invited the Portuguese delegation to provide a report on the progress made in implementing the pending recommendations. The Interim Compliance Report was adopted at GRECO's 61st Plenary meeting (18 October 2013) and made public on 24 October 2013, following authorisation by Portugal ([Greco RC-III \(2013\) 18E Interim Report](#)). On the basis of the progress substantiated by Portugal in the Interim Compliance Report, GRECO decided not to continue applying Rule 32 concerning members found not to be in compliance with the recommendations contained in the evaluation report.
3. As required by GRECO's Rules of Procedure, the Portuguese authorities submitted their Second Situation Report with additional information regarding action taken to implement the recommendations that were partly implemented or not implemented, according to the Interim Compliance Report. This report, which was received on 30 July 2014, served as a basis for the Second Compliance Report.
4. GRECO selected the Netherlands and Monaco to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed for the Second Compliance Report were Mr Hans ABMA, Senior Policy Advisor, Law Enforcement Department, Ministry of Security and Justice (the Netherlands) and Mr Jean-Marc GUALANDI, Technical Advisor, Financial Information and Monitoring Department (SICCFIN), Ministry of Finance and Economy (Monaco). They were assisted by GRECO's Secretariat in drawing up the Second Compliance Report.

II. ANALYSIS

Theme I: Incriminations

5. It is recalled that GRECO in its evaluation report addressed six recommendations to Portugal in respect of Theme I. One of these – recommendation vi – was assessed as implemented

satisfactorily in the Compliance Report. Recommendations i to v were assessed as partly implemented in the Interim Compliance Report.

Recommendations i to v.

6. *GRECO recommended:*

- *to enlarge the scope of application of the legislation concerning active and passive bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies as well as judges and officials of international courts, in order to fully comply with the requirements of Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (recommendation i);*
- *to criminalise active and passive trading in influence in respect of foreign/international officials in conformity with Article 12 in conjunction with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (recommendation ii);*
- *to ensure that bribery of foreign arbitrators and jurors is criminalised under Portuguese law in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and to proceed swiftly with the ratification of this Instrument (recommendation iii);*
- *(i) to increase the criminal sanctions in respect of bribery in the private sector and trading in influence in order to ensure effective, proportionate and dissuasive sanctions as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173); (ii) to criminalise trading in influence (active form for "licit" act) in conformity with Article 12 of the same Convention and (iii) to adjust the limitation period for trading in influence to that of public sector bribery (recommendation iv) and*
- *to analyse and accordingly revise the mandatorily total exemption from punishment granted to perpetrators of bribery offences in the public sector which is conceded in consequence of effective regret (recommendation v).*

7. GRECO recalls that in the Interim Compliance Report, the Portuguese authorities had made reference to draft amendments to the Criminal Code and other criminal legislation, contained in draft Law 453/XII that had been submitted to the Parliament. GRECO welcomed these draft amendments as they would, if adopted in the version it had examined, satisfy the requirements of all the recommendations. In particular, the scope of the bribery and trading in influence offences would be enlarged to cover foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts and foreign arbitrators and jurors, as required by recommendations i, ii and the first part of recommendation iii. Criminal sanctions for private sector bribery and trading in influence would be increased, active trading in influence for "licit" acts would be criminalised and the limitation period for trading in influence would be aligned to that of public sector bribery, as required by recommendation iv. The provision on effective regret would also be amended, in order to give the judge the possibility to review the circumstances of the case before exempting a perpetrator from punishment, according to recommendation v. Finally, the authorities had announced their intention to proceed with ratification of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), as required by the second part of recommendation iv.

8. The authorities of Portugal now report that draft Law 453/XII was approved by all political parties represented in a final Plenary voting session of the Parliament on 20 February 2015¹. The adopted law will be published soon in the Official Gazette, after its enactment by the President of the Portuguese Republic.
9. Moreover, as regards the second part of recommendation iii, the Portuguese authorities indicate that, by Decree of the President of the Republic No. 1/2015 of 2 January 2015, Portugal approved ratification of the Additional Protocol to the Criminal Law Convention on Corruption and that the instruments of ratification were deposited with the Secretary General of the Council of Europe. Ratification was officially registered on 12 March 2015 and the Additional Protocol will enter into force with respect to Portugal on 1 July 2015.
10. GRECO welcomes the adoption by Parliament of draft Law 453/XII. It looks forward to assessing the final text of the law, which it expects will still satisfy the requirements of recommendations i to v. GRECO also welcomes the ratification of the Additional Protocol to the Criminal Law Convention. However, it notes that a reservation was made to the Protocol, according to which Portugal “reserves the right not to establish the bribery of foreign arbitrators and foreign jurors as criminal offences as described in Articles 4 and 6 of the Protocol, except for infractions committed fully or partially in Portuguese territory”. According to explanations provided by the Portuguese authorities, this reservation is only temporary, pending the entry into force of Law 453/XII, after which the reservation will be withdrawn. GRECO points out that, according to Article 9.2 of the Protocol, a reservation to Articles 4 and 6 is only possible if the Party has made a similar reservation to Article 5 of the Criminal Law Convention. Such a reservation was made by Portugal, but it expired on 1 March 2009. GRECO therefore urges the Portuguese authorities to withdraw the reservation to the Additional Protocol as soon as possible, as it is contrary to the aim of recommendation iii which is to criminalise bribery of foreign arbitrators and jurors. Pending this and the entry into force of Law 453/XII, GRECO cannot yet conclude that the recommendations have been fully implemented.
11. GRECO concludes that recommendations i to v remain partly implemented.

Theme II: Transparency of Party Funding

12. It is recalled that GRECO in its evaluation report addressed seven recommendations to Portugal in respect of Theme II. In the Interim Compliance Report, recommendations i-iii and vii were assessed as implemented satisfactorily and recommendation vi was assessed as dealt with in a satisfactory manner. Compliance with the remaining recommendations is dealt with below.

Recommendation iv.

13. *GRECO recommended that a study be carried out on political financing in respect of financial flows outside the regulated area, in particular, concerning various forms of third party contributions to various political stakeholders, including election candidates and to seek ways to increase the transparency concerning political financing from third parties.*
14. GRECO recalls that this recommendation was considered as not implemented in the Interim Compliance Report, as the recommended study had not been carried out and contradictory information had been received on whether it would be in the future.

¹ <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=37941>

15. The Portuguese authorities indicate that the Entity for Accounts and Political Financing (EAPF) has carried out a study on the “informal financing of political parties”, in order to respond to those situations in which individual candidates to the elections, third parties included, are not covered by the legislation on transparency currently in force. This study, which was completed in July 2014, analyses the electoral expenses and political propaganda effectively made in the field and not comprised in electoral accounts, during all electoral campaigns between 2005 and 2014 – a period which comprises two elections for the Presidency of the Republic, three elections for the Assembly of the Republic, one election for the European Parliament, two elections for the Legislative Assembly of the Autonomous Region of Azores, two elections for the Legislative Assembly of the Autonomous Region of Madeira, three general elections for local government and some interim elections – together with annual political parties’ financial reports from 2005 to 2012. The analysis related to the year 2013 is to be concluded soon. The study highlights areas that are not regulated, matters which are not controlled by the EAPF, as well as its collaboration with other entities (banks and suppliers, law enforcement and judicial authorities, tax entities) and in particular with the Council for the Prevention of Corruption.
16. The study identifies some problems, such as third party (natural and legal persons) funding of individual candidates to internal party elections, a situation not regulated by the legislation in force, payment of political party membership fees by third persons seeking to be elected, as well as funding provided by political associations and foundations. The study also analyses Law No. 55/2010 of 24 December 2010 and situations resulting from it, such as regional subventions used to finance political parties, which have been deemed illegal by the Constitutional Court. The study concludes that legal amendments are necessary to strengthen the rules on political parties’ internal elections, financing outside the EAPF’s control remit, informal fundraising at parties’ events, donations in kind and voluntary work. On other aspects, such as the increase of subventions outside the state framework, the use of public subventions for non-party purposes and the extension without limits of the possible categories of party revenues, the EAPF considers that the 2010 legal amendments should be reversed. The authorities add that the problem has been solved with a Constitutional Court decision No. 801/2014 of 26 November, by which the Court declared as unconstitutional articles 3(3) and 5(8) of Law No. 55/2010.
17. GRECO welcomes the fact that the study of non-regulated financing to political parties has finally been carried out. The study appears thorough and offers useful conclusions and ideas on several phenomena contributing to the considerable financial flows outside the regulated area, which had been highlighted by the Evaluation Report. GRECO encourages the Portuguese authorities to continue acting upon these ideas in order to reinforce the transparency of political financing.
18. GRECO concludes that recommendation iv has been implemented satisfactorily.

Recommendation v.

19. *GRECO recommended (i) to ensure that the Constitutional Court and the Entity for Accounts and Political Financing (EAPF) are provided with appropriate resources for carrying out their tasks in an efficient and expedient manner; and (ii) to reduce considerably the time of the monitoring process of annual party accounts and election accounts.*
20. GRECO recalls that it had assessed this recommendation as partly implemented in both the Compliance and the Interim Compliance Report. It also recalls that the monitoring process of annual party accounts and election accounts is shared between the EAPF and the Constitutional Court. The EAPF appeared to be equipped with adequate resources and had cleared its

monitoring backlog. The timeframe of its monitoring now appeared satisfactory. Such was not the case, however, for the Constitutional Court which still had a substantial backlog. At the time of adoption of the Interim Compliance Report in October 2013, the Constitutional Court was namely still occupied with the final validation of the annual and campaign accounts for the year 2009. Even taking into account that 2009 was a multiple-election year, GRECO found that the Constitutional Court had not yet been able to demonstrate a considerable reduction in its own monitoring timeframe, as requested by the second part of the recommendation.

21. The authorities of Portugal report that the Constitutional Court has made a very substantial effort in order to reduce its backlog. It has now validated all party and election accounts for 2009. The annual accounts of political parties for the years 2010 to 2012 have also been validated and the validation for the 2013 accounts is in progress.² As for the accounts of the election campaigns that took place in 2011, the Constitutional Court has validated the accounts of the election campaign for the Parliament (Decision No. 175/2014 of 19 February 2014) and for the election of the President of the Republic (Decision No. 744/2014 of 5 November 2014). The validation of accounts for the Legislative Assembly of the Autonomous Region of Madeira is still pending, as well as the validation of accounts of the only campaign that occurred in 2012, concerning the Legislative Assembly of the Autonomous Region of the Azores.
22. GRECO takes the view that the information reported shows that serious efforts have been made to reduce the timeframe for the final validation of annual and campaign accounts by the Constitutional Court. Although this reduction does not appear “considerable” as required by the second part of the recommendation, GRECO thinks that taking into account that the process involves two levels of control, first by the EAPF and then by the Constitutional Court, the current timeframe appears reasonable.
23. GRECO concludes that recommendation v has been dealt with in a satisfactory manner.

III. CONCLUSIONS

24. **In view of the above, GRECO concludes that Portugal has now implemented satisfactorily or dealt with in a satisfactory manner eight of the thirteen recommendations contained in the Third Round Evaluation Report.** The remaining five recommendations have been partly implemented.
25. More specifically, with respect to Theme I – Incriminations, recommendations i-v remain partly implemented. With respect to Theme II – Transparency of Party Funding, recommendations i-iv and vii have been implemented satisfactorily and recommendations v and vi have been dealt with in a satisfactory manner.
26. Concerning incriminations, GRECO welcomes Portugal’s ratification of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). It notes, however, that a temporary reservation was made to Articles 4 and 6 of the Protocol regarding bribery of foreign jurors and arbitrators, pending the entry into force of a law which will render it unnecessary. GRECO urges

² Annual Accounts of 2010 - Decision No. 393/11, of 20 September 2011 (failure to provide report on the accounts) and Decision No. 87/2012, of 15 February 2012 (sanctions applied); Annual Accounts of 2011 - Decision No. 508/12, of 30 October 2012 (failure to provide report on the accounts) and Decision No. 345/13, of 18 June 2013 (sanctions applied); Annual Accounts of 2012 - Decision No. 533/14, of 1 July 2014 (failure to provide report on the accounts) and Decision No. 44/2015 of 20 January 2015 (sanctions applied); Annual Accounts of 2013 – Decision No. 605/2014, of 23 September 2014 (failure to provide report on the accounts).

the Portuguese authorities to withdraw this reservation as soon as possible, as it is contrary to the aim of recommendation iii. It also takes note of the adoption of draft Law 453/XII which, in the wording it reviewed at the stage of the Interim Compliance Report, appeared to satisfy the requirements of all recommendations. GRECO recalls that the Interim Compliance Report had noted that the scope of the bribery and trading in influence offences would be enlarged to cover foreign and international officials, that criminal sanctions for private sector bribery and trading in influence would be increased, that active trading in influence for “licit” acts would be criminalised and that the limitation period for trading in influence would be aligned to that of public sector bribery. The provision on effective regret would also be amended, in order to give the judge the possibility to review the circumstances of the case before exempting a perpetrator from punishment.

27. As regards the transparency of political funding, GRECO is pleased to note that the study of the financial flows outside the regulated area has finally been carried out by the Entity for Accounts and Political Financing and that it has delivered interesting conclusions. Moreover, serious efforts have been made by the Constitutional Court to reduce the timeframe for the final validation of political accounts. These positive developments are to be added to the actions already acknowledged at the stage of the Compliance and Interim Compliance Reports, which lead GRECO to assess all recommendations under this theme as satisfactorily implemented or dealt with in a satisfactory manner.
28. In view of the fact that all five recommendations concerning incriminations are yet to be fully implemented, GRECO in accordance with Rule 31, paragraph 9 of its Rules of Procedure asks the Head of the delegation of Portugal to submit additional information, namely regarding the implementation of recommendations i to v (Theme I – Incriminations) by 31 December 2015 at the latest.
29. Finally, GRECO invites the authorities of Portugal to translate the report into the national language and to make this translation public.