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Third Evaluation Round

Evaluation Report on "the former Yugoslav Republic of Macedonia" Incriminations (ETS 173 and 191, GPC 2) (Theme I)

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I. INTRODUCTION

1. "The former Yugoslav Republic of Macedonia" joined GRECO in 2000. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2002) 7E) in respect of "the former Yugoslav Republic of Macedonia" at its 12th Plenary Meeting (9-13 December 2002) and the Second Round Evaluation Report (Greco Eval II Rep (2004) 11E) at its 25th Plenary Meeting (10-14 October 2005). The afore-mentioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to "the former Yugoslav Republic of Macedonia" from 21 to 22 September 2009, was composed of Mr José Santiago TORRES PRIETO, Magistrate, Madrid District Court n° 32 (Spain) and Ms Anna HODGSON, Senior Policy Analyst, Ministry of Justice (United Kingdom). The GET was supported by Ms Laura SANZ-LEVIA and Ms Sophie MEUDAL-LEENDERS 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 (2009) 6E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: Ministry of Justice, Ministry of the Interior, judges, prosecutors and members of the Financial Police. The GET also met with representatives of academia and Transparency International.
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 authorities of "the former Yugoslav Republic of Macedonia" in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to "the former Yugoslav Republic of Macedonia" in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – "Transparency of party funding", is set out in Greco Eval III Rep (2009) 6E, Theme II.

II. **INCRIMINATIONS**

a. **Description of the situation**

7. "The former Yugoslav Republic of Macedonia" ratified the Criminal Law Convention on Corruption (ETS 173) on 28 July 1999. The Convention entered into force in respect of "the former Yugoslav Republic of Macedonia" on 1 July 2002. "The former Yugoslav Republic of Macedonia" did not enter any reservation to the Criminal Law Convention on Corruption.
8. The Additional Protocol to the Criminal Law Convention (ETS 191) was ratified by "the former Yugoslav Republic of Macedonia" on 14 November 2005. It entered into force in respect of "the former Yugoslav Republic of Macedonia" on 1 March 2006. "The former Yugoslav Republic of Macedonia" did not make any reservations to the Additional Protocol to the Criminal Law Convention on Corruption.
9. Amendments to the Criminal Code were adopted on 10 September 2009 (and published in the Official Gazette on 14 September 2009) to, *inter alia*, bring corruption-related provisions closer in line. The aforementioned amendments enter into force on 22 March 2010.

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

Definition of the offence

10. Active bribery is criminalised in Article 358 of the Criminal Code, which establishes two forms of the offence: (1) bribery to induce an official to perform an act he/she should not perform or to omit to perform an act he/she should perform within the bounds of his/her official authorisation (i.e. unlawful official acts or omissions); (2) bribery to induce an official to perform an act he/she should or could perform or to omit to perform an act he/she is not authorised in any case to perform (i.e. lawful official acts or omissions).

Active bribery (Article 358, Criminal Code)

(1) A person who directly or indirectly gives, promises or offers a gift or other advantage to an official, for himself or for herself or for anyone else, so that he/she performs within his/her official authorisation an official action which must not be performed or does not perform an official action which must be performed, or a person who acts as intermediary in such process, shall be punished by imprisonment from one to five years.

(2) A person who directly or indirectly gives, promises or offers a gift or other advantage to an official, for himself or for herself or for anyone else, so that he/she performs within his/her official authorisation an official action which must be performed or does not perform an official action which must not be performed, or a person who acts as intermediary in such process, shall be sentenced to a fine or imprisonment of up to three years.

(3) The person who has given or promised a bribe upon request by an official and has reported it before learning that the offence has been disclosed, shall not be punished for the offence from paragraphs 1 and 2.

(4) The provisions of paragraphs (1), (2) and (3) shall also apply when a bribe has been given or promised to a responsible person, a responsible person in a foreign legal entity, a person performing public mandates and a foreign official in connection with the offence of Article 357.

(5) If the crime stipulated in paragraph (1) is performed by a legal entity, it shall be sentenced with a fine.

(6) The given gift or property advantage shall be taken away and, in the case under paragraph 3, they shall be returned to the person who has given the bribe.

11. Criminalisation of *passive bribery* is provided for under Article 357 of the Criminal Code. The relevant provisions differentiate between three types of conduct: if the bribe has been solicited or received before the performance of the official act (1) for an official to perform acts that he/she should not perform or to omit to perform an act he/she should or could perform within the scope of his/her official authorisation (i.e. unlawful official acts or omissions); (2) for an official to perform acts that he/she should perform or to omit to perform acts s/he should not in any case perform (i.e. lawful official acts or omissions); (3) if the bribe has been solicited or received after the performance (or non-performance) of the (lawful or unlawful) official act.

Passive bribery (Article 357, Criminal Code)

(1) An official who directly or indirectly asks or receives a gift or other advantage or receives a promise of a gift or other advantage for him/herself or for another person so as to perform within his/her official authorisation an official activity which must not be performed or fails to perform an official activity which must be performed, shall be sentenced to imprisonment of four to ten years.

(2) An official who directly or indirectly asks or receives a gift or other advantage or receives a promise of a gift or other advantage for him/herself or for another person so as to perform within his/her official authorisation an official activity which must be performed or fails to perform official activity which must not be performed, shall be sentenced to imprisonment of one to five years.

(3) An official who, following the performance or non-performance of the official action noted in paragraphs 1 and 2, requests or takes a gift or other advantage in connection with this, shall be punished by a prison sentence of three months to three years.

(4) If a larger property gain has been obtained through the crime, the perpetrator shall be sentenced to imprisonment of at least four years.

(5) If a significant property gain has been obtained through the crime, the perpetrator shall be sentenced to imprisonment of at least five years.

(6) The sentence referred to in paragraphs 1, 2 and 3 shall be applied for a responsible person who performs activities of public interest, a responsible person in a foreign legal person, as well as a foreign official person if the crime has been performed with violation of his/her authorisation, in relation with the acquisition, exercise or revocation of rights determined by law or for the reason of obtaining gain or inflicting damage on someone else.

(7) The received gift or property advantage shall be taken away.

Elements of the offence

“Domestic public official”

Article 122 (4), Criminal Code

a) the President of the Republic of Macedonia, the appointed ambassadors and other representatives of the Republic of Macedonia abroad and persons appointed by the President of the Republic of Macedonia, officials elected or appointed in and by the Assembly of the Republic of Macedonia, in the Government of the Republic of Macedonia, in the administrative body, in the courts, the public prosecutor, the Judicial Council of the Republic of Macedonia, the Council of Public Prosecutors of the Republic of Macedonia and other bodies and organisations that perform certain technical, administrative and other functions within the framework of the rights and duties of the Republic, in the units of the local self-government, as well as the persons who permanently or temporarily perform an official function in these bodies and organisations;

b) an authorised person in a legal entity who by law or by some other regulation enacted based on the law is entrusted with performing public authority, when he performs the duty within the framework of that authority;

c) a person performing certain official duties, based on the authorisation given by law or by some other regulations enacted based on the law;

d) a military person, when considering crimes in which an official person is cited as offender; and

e) a representative of a foreign country or an international organisation in the Republic of Macedonia.

12. The above-mentioned definition covers persons carrying out official duties or exercising official functions in the state bodies (including mayors and ministers), irrespective of their type of contract and the temporary/permanent character of the functions performed. The wide scope of the definition also allows to cover individuals vested by law with public authority to perform certain duties of state administration (e.g. doctors who fulfil public duties, employees of vehicle inspection services, teachers and professors, driving school instructors, social workers, etc.), employees of public enterprises, etc.
13. Prosecutors and judges are considered public officials. Pursuant to the broad definition of “public official” provided in legislation, holders of judicial office, whether elected or appointed, are also covered.

“Promising, offering or giving” (active bribery)

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

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

15. Passive bribery is criminalised when a gift or other advantage, or the offer of such a benefit, is “requested” or “received”. The authorities confirmed that the acceptance of an offer or promise is also covered since in the Macedonian language the words “accepts” and “receives” are synonymous.

“Any undue advantage”

16. The relevant provisions of the Criminal Code concerning bribery do not explicitly use the term “undue”. In this connection, any “gift or other advantage” may come under the scope of the offence if its purpose is to influence a public official’s action in service. Rules on gifts are laid out in the Law on Prevention of Conflicts of Interest. The maximum value of acceptable gifts is set at 100 EUR. Moreover, a public official cannot accept any money or securities (regardless of their monetary value), gold or other precious item.
17. The authorities clarified during the on-site visit that both material and immaterial advantages are covered in the concept of gift or advantage. There has been no case where the bribe had an immaterial nature; however, in the view of the authorities, the concept of “other advantage” would allow to embrace, for example, honorific titles, scholarships, horizontal transfers of posts in an organisation, sexual favours, etc.

“Directly or indirectly”

18. The latest amendments to the Criminal Code now specify that bribery offences may be committed directly or indirectly.

“For himself or herself or for anyone else”

19. Pursuant to the latest amendments to the Criminal Code, third part beneficiaries are explicitly covered.

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

20. Legislation expressly covers both positive – lawful and unlawful – acts and omissions, on condition that they are in the scope of the official duties.
21. For a bribery offence to occur, it is not required that the act or omission of the official be unlawful as such. However, the commission/omission of an unlawful official act entails more severe sanctions.

“Committed intentionally”

22. Pursuant to Article 11 (2) of the Criminal Code, *“the offender bears criminal responsibility for a crime committed out of negligence only when this is so determined by the law”*. Therefore, as the provisions on bribery do not mention that they can be caused by negligence, it can be inferred *a sensu contrario* that they can only be committed intentionally.

Sanctions

23. Active bribery with respect to unlawful official acts or omissions is punishable by imprisonment between one and five years (Article 358 (1), Criminal Code). In cases where the bribe is given to perform an official act that an official should or may perform/omit to perform in any case (lawful official acts or omissions), the punishment prescribed is imprisonment of up to three years or a fine (Article 358 (2), Criminal Code). Fines for physical persons cannot be less than 5 days or more than 360 days¹ (Article 38, Criminal Code). With respect to legal persons, pursuant to Article 96-a of the Criminal Code, monetary fines may not be less than 100,000 or more than 30,000,000 MKD (approx. 1,640 to 491,000 EUR). If the offence has been committed by a legal entity in order to obtain profit or if it entails substantial material damage, the fine may be doubled or increased in proportion to the damage caused or the profit gained.
24. Passive bribery is punished with imprisonment from four to ten years, if the bribe was solicited or accepted in return for performance of acts that the official should not perform or omissions that the official should or could have performed (Article 357 (1), Criminal Code). If the bribe is accepted in return for performance (or non-performance) or an official act that should (or should not) have been performed anyway, the sentence ranges from one to five years' imprisonment (Article 357 (2), Criminal Code). Passive bribery after the official act has been performed (or not performed) is punishable by imprisonment ranging from three months to three years (Article 357 (3), Criminal Code). The imprisonment penalty may be increased to four or five years, if substantial benefit is acquired.

¹ Fines in “the former Yugoslav Republic of Macedonia” are based on a system of day-fines, the number of days being determined on grounds such as the offender's financial situation. In practical terms, the lowest amount of a daily fine is 1 EUR and the highest 5,000 EUR.

25. In addition, the security measures, which are set forth in the general part of the Criminal Code, are applicable to both active and passive bribery offences. In this context, Article 66 provides that a person found guilty of an offence can be barred from holding certain positions or exercising certain functions for a period between one and ten years. The latest amendments to the Criminal Code provide for the compulsory application of debarment, from one to ten years, whenever there is a conviction for a corruption offence under Articles 357 (passive bribery), Article 358 (active bribery) and Article 359 (trading in influence).
26. The applicable sanctions for other comparable crimes are: up to three years' imprisonment for fraud (Article 355, Criminal Code), up to three years' imprisonment for embezzlement (Article 354, Criminal Code), up to three years' imprisonment for abuse of position (Article 353, Criminal Code). The applicable sanction for all of the afore-mentioned offences could range from one to ten years' imprisonment when aggravating circumstances concur.

Court decisions/case law and statistics

27. There is a vast corpus of court decisions dealing with bribery of several categories of public officials (e.g. customs and police officers, mayors, doctors, professors, managers and employees of private companies carrying out tasks of a public nature, etc). The GET was provided with an extensive list of cases, including details on the categories of persons involved, the relevant corrupt behaviour, the type of undue advantage received and the sanction applied.

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

28. Members of domestic public assemblies, whether with legislative or administrative powers, are considered public officials according to Article 122 (4) of the Criminal Code, which refers to "an elected or appointed officer in the Parliament of the Republic of Macedonia". The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies. There are no court decisions/case law concerning bribery of members of domestic public assemblies.

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

29. Foreign officials are covered by the provisions on bribery (Articles 357 (6) and 358 (4) of the Criminal Code, respectively) insofar the offence has been committed in relation to the acquisition, exercise or taking away of rights defined by law or for the purposes of acquiring an advantage or causing damage.

Passive bribery (Article 357, Criminal Code)

(6) The sentence referred to in paragraphs 1, 2 and 3 shall be applied for a responsible person who performs activities of public interest, a responsible person in a foreign legal person, as well as a foreign official person if the crime has been performed with violation of his/her authorisation, in relation with the acquisition, exercise or revocation of rights determined by law or for the reason of obtaining gain or inflicting damage on someone else.

Active bribery (Article 358, Criminal Code)

(4) The provisions of paragraphs (1), (2) and (3) shall also apply when a bribe has been given or promised to a responsible person, a responsible person in a foreign legal entity, a person performing public mandates and a foreign official in connection with the offence of Article 357.

30. Article 122(5) of the Criminal Code includes a definition of a foreign official:

Article 122 (5), Criminal Code

A foreign official: shall be considered a person who in a foreign State, an international organisation or public institution performs some of the functions or duties listed under the definition of domestic public official contained in Article 122 (4), subparagraphs a) to d).

31. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of foreign public officials. In this context, the authorities indicated that even though paragraph 4 of Article 358 of the Criminal Code only refers to the “giving or promising of a bribe”, it is understood that the “offering” is also covered by direct remittance/reference to the basic comprehensive definition of the offence contained in paragraphs 1 and 2 of Article 358, which explicitly cover the “offering”. Moreover, the authorities highlighted that, in the national language, there is no conceptual difference between the terms offering and promising. There are no court decisions/case law concerning bribery of foreign public officials.

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

32. Members of foreign public assemblies are considered to be foreign officials and thus covered by the passive and active bribery provisions of Articles 357 (6) and 358 (4) of the Criminal Code, respectively. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials (with the particularities concerning bribery of foreign public officials described in paragraphs 29-31) apply to bribery of foreign public assemblies. There are no court decisions/ case law concerning bribery of members of foreign public assemblies.

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

33. Bribery in the private sector is criminalised under Articles 357 (passive bribery) and 358 (active bribery) of the Criminal Code.

Passive bribery (Article 357, Criminal Code)

(6) The sentence referred to in paragraphs 1, 2 and 3 shall be applied for a responsible person who performs activities of public interest, a responsible person in a foreign legal person, as well as a foreign official person if the crime has been performed with violation of his/her authorisation, in relation with the acquisition, exercise or revocation of rights determined by law or for the reason of obtaining gain or inflicting damage on someone else.

Active bribery (Article 358, Criminal Code)

(4) The provisions of paragraphs (1), (2) and (3) shall also apply when a bribe has been given or promised to a responsible person, a responsible person in a foreign legal entity, a person performing public mandates and a foreign official in connection with the offence of Article 357.

34. In addition, the authorities indicated that, with respect to corruption in the private sector, other provisions of the Criminal Code apply, including Article 252 on abuse of trust, Article 253 on the unauthorised reception of gifts, Article 275 on securities and share fraud, Article 353 on abuse of position, etc.

Elements of the offence

35. The elements described under bribery of domestic public officials also apply to bribery in the private sector. In this context, the authorities indicated that even though paragraph 4 of Article 358 of the Criminal Code only refers to the “giving or promising of a bribe”, it is understood that the “offering” is also covered by direct remittance/reference to the basic comprehensive definition of the offence contained in paragraphs 1 and 2 of Article 358, which explicitly cover the “offering”. Moreover, the authorities highlighted that, in the national language, there is no conceptual difference between the terms offering and promising. In addition, a number of specific features apply to this offence:

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

36. Articles 357 and 358 of the Criminal Code refer to the notion of a “responsible person”. The definition of a responsible person is provided in Article 122 (7) of the Criminal Code which reads as follows:

Article 122 (7), Criminal Code

A responsible person within a legal entity shall be considered to be a person within the legal entity, who considering his/her function or based on special authorisation in the legal entity, is entrusted with a certain circle of matters which concern the execution of legal regulations, or regulations that are enacted on the basis on a law or a general act of the legal entity, in the management, use and disposition of property, the management of the production or some other economic process, or the supervision over them. An official person is also considered to be a responsible person, when this concerns crimes where a responsible person is found to be perpetrator, and where crimes are not foreseen in the chapter on crimes against official duty, i.e. crimes by an official person foreseen in some other chapter of this Code. When this code specifically stipulates, a responsible person shall also be considered the person who performs a special function or an authorisation or is entrusted to independently perform certain operations within the foreign legal entity, as well as the person who is a representative of the foreign legal entity within the Republic of Macedonia.

37. Article 122 (6) of the Criminal Code contains a detailed definition of the notion of “legal person”:

Article 122 (6), Criminal Code

A legal entity shall mean: the Republic of Macedonia, units of local self-government, political parties, public enterprises, companies, institutions and other associations, funds, financial organisations, and other organisations specified by law, which are registered as legal entities, and other communities and organisations to which have been recognised as having the property of a legal entity. A foreign legal entity shall mean: a public enterprise, institution, fund, bank, company or any other form of organisation in accordance with the laws of a foreign country pertaining to the performance of economic, financial, banking, trade, service or other activities, and which has a headquarters in another country or a branch office in the Republic of Macedonia or has been founded as an international association, fund, bank or institution.

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

38. Articles 357 and 358 of the Criminal Code punish the offence of passive and active bribery in the private sector, respectively, if the offence has been committed in relation to the acquisition,

exercise or taking away of rights defined by law or for the purposes of acquiring an advantage or causing damage on another person.

Sanctions

39. The applicable sanctions in respect of active and passive bribery of domestic public officials apply to the offences of bribery in the private sector.

Court decisions

40. Details on several cases of corruption in the private sector (including, categories of persons involved, corrupt behaviour, type of undue advantage received, sanction applied) were provided; they were all adjudicated on the basis of Article 353 on abuse of position by the responsible person in the private entity concerned. In all cases the corrupt behaviour of the responsible person (whether a manager or an employee of the legal entity) entailed a detriment to the private company concerned and an advantage to the briber.

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

41. Officials of international organisations are explicitly covered in Article 122 (5) of the Criminal Code and thus covered by the passive and active bribery provisions of Articles 357 (6) and 358 (4) of the Criminal Code, respectively. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials (with the particularities concerning bribery of foreign public officials described in paragraphs 29-31) apply to bribery of officials of international organisations. There are no court decisions/ case law concerning bribery of officials of international organisations.

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

42. Members of international parliamentary assemblies are considered to be foreign officials and thus covered by the passive and active bribery provisions of Articles 357 (6) and 358 (4) of the Criminal Code, respectively. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials (with the particularities concerning bribery of foreign public officials described in paragraphs 29-31) apply to bribery of members of international parliamentary assemblies. There are no court decisions/ case law concerning bribery of members of international parliamentary assemblies.

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

43. Judges and officials of international courts are considered to be foreign officials and thus covered by the passive and active bribery provisions of Articles 357 (6) and 358 (4) of the Criminal Code, respectively. The elements/concepts of the offence and the applicable sanctions detailed under bribery of domestic public officials (with the particularities concerning bribery of foreign public officials described in paragraphs 29-31) apply to bribery of judges and officials of international courts. There are no court decisions/ case law concerning bribery of judges and officials of international courts.

Trading in influence (Article 12 of ETS 173)

Definition of the offence

44. Only passive trading in influence is criminalised in Article 359 of the Criminal Code.

Article 359, Criminal Code: Unlawful mediation

(1) A person who receives a reward or some other advantage by using his/her official or social position and influence, in order to mediate for some official action to be performed or not, shall be punished by a fine or by a prison sentence of up to three years.

(2) A person who, by using his/her official or social position or influence, mediates for certain official action which must not be performed to be performed or certain official action which must be performed not to be performed, shall be punished by a prison sentence of six months to five years.

(3) If the offence of paragraph (2) has been committed in connection with the initiation or conduct of criminal proceedings against a person, the perpetrator shall be punished by a prison sentence of one to five years.

(4) If a reward or some other advantage has been received for the mediation of paragraphs (2) and (3), the perpetrator shall be punished by a prison sentence of one to ten years.

Elements/concepts of the offence

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

45. This concept is transposed in Article 359 of the Criminal Code which refers to the use of the official or social position and influence so that an official act is or is not performed. The term “improper” is not explicitly transposed and Article 359 covers both situations implying lawful and unlawful acts or omissions.
46. For the offence of trading in influence to occur, the influence must be real and effectively enable the influence peddler to have the power of intervention or improper influence on the decision-making process; otherwise the perpetrator can be prosecuted for fraud. However, it is not necessary that the influence is actually exerted and leads to the intended result.

Other concepts/elements

47. The constitutive elements of bribery offences broadly apply with regard to trading in influence. However, Article 359 of the Criminal Code does not cover the different material acts comprised in Article 12 of the Convention concerning trading in influence; it merely refers to the “receipt” of a reward or some other advantage. In particular, Article 359 does not refer to the “request or the acceptance of the offer or the promise of an undue advantage”. Likewise, although the latest amendments to the Criminal Code now explicitly cover third party beneficiaries, as well as the direct/indirect commission of bribery offences, similar specific wording has not been introduced with respect to the trading in influence provision. Finally, there is no criminalisation of active trading in influence.

Sanctions

48. The sanctions applicable to passive trading in influence are imprisonment from 6 months to 5 years in cases implying an unlawful official act or omission and a fine or imprisonment of up to 3 years in cases implying a lawful act or omission.

Statistics and court decisions

49. Five convictions have been secured for infringements of Article 359. In addition, second instance decisions (confirming first instance decisions) have been taken against four individuals. Charges have been pressed against six individuals and another six individuals are being investigated for the commission of trading in influence offences.

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

50. According to the authorities, domestic arbitrators would be covered by bribery/trading in influence provisions since they are “persons performing certain official duties, based on the authorisation given by law or by some other regulations enacted based on the law”. In this context, domestic arbitrators are defined and regulated in “the former Yugoslav Republic of Macedonia” by virtue of the Law on the Chamber of Commerce² (Articles 20, 21 and 22) and the Law on Mediation³. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic arbitrators. There are no court decisions/case law concerning bribery of domestic arbitrators.

Bribery of foreign arbitrators (Article 4 of ETS 191)

51. According to the authorities, foreign arbitrators would be covered by bribery/trading in influence provisions since they are “persons performing certain official duties, based on the authorisation given by law or by some other regulations enacted based on the law”. In this context, foreign arbitrators are defined and regulated in “the former Yugoslav Republic of Macedonia” by virtue of Law on International Trade Arbitration⁴. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign arbitrators. There are no court decisions/case law concerning bribery of foreign arbitrators.

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

52. The figure of a juror is unknown to the domestic legal system. In “the former Yugoslav Republic of Macedonia”, there are lay judges who are appointed by the Judicial Council (Article 42 of the Law on Courts) and they are considered to be comprised in the notion of public official which refers to “elected or appointed officials...in the courts”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic jurors. There are no court decisions/case law concerning bribery of domestic jurors.

² Official Gazette No. 89/04.

³ Official Gazette No. 60/06.

⁴ Official Gazette No. 79/05.

Bribery of foreign jurors (Article 6 of ETS 191)

53. Foreign jurors are not covered by existing legislation. However, according to the authorities, the Criminal Code covers this category of persons when it refers to a “foreign official working in a court”, as well as “persons performing certain official duties, based on the authorisation given by law or by some other regulations enacted based on the law”.

Other questions

Participatory acts (Article 15 of ETS 173):

54. In its general part, the Criminal Code, distinguishes between: complicity (Article 22, Criminal Code); criminal solicitation (Article 23, Criminal Code); and criminal support (Article 24, Criminal Code). These types of participation are punishable as principal offences.
55. Accomplices are liable within the limits of their intent or negligence. Those soliciting or supporting a crime are liable within the limits of their respective intents (Article 25 (1), Criminal Code).
56. If the perpetration of a criminal offence does not result in the intended consequence, those who solicited or supported the offence are punishable for the attempted offence (Article 19, Criminal Code). If the accomplice, the person soliciting or the person supporting the criminal attempt has voluntarily prevented the intended criminal offence from being accomplished, the court may refrain from imposing a sentence (Article 25 (2), Criminal Code).
57. Personal relations, attributes and circumstances on the basis of which criminal liability is excluded or a sentence is withdrawn, reduced or extended are to be taken into account only in relation to the accomplice, the person soliciting or the person supporting the criminal attempt in whom such relations, attributes and circumstances inhere (Article 25 (3), Criminal Code).

Jurisdiction (Article 17 of ETS 173)

58. The rules of criminal jurisdiction are laid down in Chapter 12 of the Criminal Code; they apply to bribery and trading in influence offences. Jurisdiction is established over acts committed within the territory of “the former Yugoslav Republic of Macedonia” (principle of territoriality, Article 116, Criminal Code), as well as for offences committed aboard a domestic vessel, military or civil aircraft while in flight, regardless of the location of such a vessel or aircraft at the time the criminal offence is committed.

Article 116, Criminal Code: Application of the criminal legislation to everyone who commits a crime on the territory of the Republic of Macedonia

(1) The criminal legislation is applicable to everyone who commits a crime on the territory of the Republic of Macedonia.

(2) The criminal legislation is also applicable to everyone who commits a crime on a domestic ship, regardless where the ship is at the time the crime is committed.

(3) The criminal legislation is also applicable to everyone who commits a crime in a domestic civil aircraft during flight, or on a domestic military aircraft, regardless where the aircraft is at the time the crime is committed.

59. Jurisdiction also covers acts committed abroad by citizens of “the former Yugoslav Republic of Macedonia”, when they have been apprehended in or extradited to “the former Yugoslav Republic of Macedonia” (principle of nationality, Article 118, Criminal Code). In addition, jurisdiction extends to criminal offences committed abroad by foreigners against “the former Yugoslav Republic of Macedonia” or any of its citizens (Article 119 (1), Criminal Code) or against a foreign State or another foreign citizen for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied (Article 119 (2), Criminal Code) when these foreigners have been apprehended in or extradited to “the former Yugoslav Republic of Macedonia”.

Article 118, Criminal Code: Application of the criminal legislation to a citizen of the Republic of Macedonia who commits a crime abroad

The criminal legislation is also applicable to a citizen of the Republic of Macedonia when he/she commits some crime abroad, except for the crimes listed in article 117, if he/she finds himself/herself on the territory of the Republic of Macedonia or is extradited.

Article 119, Criminal Code: Application of the criminal legislation to a foreigner who commits a crime abroad

(1) The criminal legislation is applicable also to a foreigner who commits a crime outside the territory of the Republic of Macedonia but directed against it or against its citizens, also when this does not concern crimes listed in article 117, if he/she finds himself/herself on the territory of the Republic of Macedonia or is extradited.

(2) The criminal legislation is also applicable to a foreigner who commits a crime abroad, against a foreign country or a foreigner, who according to that legislation may be sentenced to five years of imprisonment or to a more severe punishment, when he/she finds himself/herself on the territory of the Republic of Macedonia, and when he/she is not extradited to the foreign country. If not otherwise determined by this Code, in such a case the court may not pronounce a punishment more severe than the punishment that is prescribed by law of the country in which the crime was committed.

60. If in the cases specified in Articles 118 and 119 of the Criminal Code - jurisdiction in respect of acts committed abroad, the act does not constitute a criminal offence under the law in force in the country of perpetration (dual criminality), criminal proceedings may be instituted only upon the approval of the Chief Public Prosecutor (Article 120 (3), Criminal Code).

Article 120, Criminal Code: Special conditions of prosecution

(1) If in the cases from article 116, the criminal procedure is violated or completed in a foreign country, the prosecution in the Republic of Macedonia shall be initiated only after approval from the Public Prosecutor of the Republic of Macedonia.

(2) In the cases from articles 118 and 119, no prosecution shall be initiated if:

- 1) the offender has served out the punishment to which he/she was sentenced abroad;*
- 2) a safety measure involving imprisonment has been applied with regard to the perpetrator abroad;*
- 3) the offender was acquitted abroad with a sentence that has come into effect, or his/her punishment has become null and void or it was pardoned;*
- 4) according to the foreign law a crime is prosecuted upon request from the damaged and no such request was submitted.*

(3) In the cases from articles 118 and 119, prosecution shall be initiated only when the crime is punishable according to the law of the country in which the crime was committed. When in the cases from article 118 and article 119, item 1, there is no punishment for that crime according to the law in the country in which it was committed, prosecution may be initiated only after approval from the Public Prosecutor of the Republic of Macedonia.

(4) Only after approval from the Public Prosecutor of the Republic of Macedonia may prosecution be initiated in the Republic of Macedonia in the cases from article 119, item 2, regardless of the law of the country in which the crime was committed, if this concerns a crime which, at the time it was perpetrated, was considered to be a crime according to the general legal principles, recognised by the international community.

(5) In the cases from article 116, the prosecution of a foreigner may be handed over to a foreign country, under the condition of reciprocity.

Statute of limitations

61. The period of limitation depends on the maximum term of imprisonment which can be imposed for the offence in question (Article 107 (1), Criminal Code)⁵; if several punishments are prescribed for a criminal offence, the statute of limitations is determined according to the most severe punishment prescribed (Article 107 (2), Criminal Code). These periods are presumed to run from the time of the commission of the offence. The statute of limitations may be interrupted (a new period will recommence) or suspended, but criminal prosecution is barred when twice the limitation period has elapsed (Article 111, Criminal Code).
62. The following table illustrates the applicable limitation periods for bribery and trading in influence offences:

| Article CC | Offence | Sanction (imprisonment) | Relative statute of limitations |
|--|--|-------------------------|---------------------------------|
| Bribery in the public and private sectors | | | |
| Active bribery | | | |
| 358 (1) | Unlawful official acts/omissions | 1 – 5 yrs | 5 yrs |
| 358 (2) | Lawful official acts/omissions | Up to 3 yrs | 3 yrs |
| Passive bribery | | | |
| 357 (1) | Unlawful official acts/omissions | 4 – 10 yrs | 10 yrs |
| 357 (2) | Lawful official acts/omissions | 1 – 5 yrs | 5 yrs |
| 357 (3) | Bribe accepted after commission/omission of official act | 3 months – 3 yrs | 3 yrs |
| Bribery in the private sector (idem as in public sector, see above) | | | |
| Trading in influence | | | |
| Passive trading in influence | | | |
| 359 (1) | Lawful official acts/omissions | Up to 3 yrs | 3 yrs |
| 359 (2) | Unlawful official acts/omissions | 6 months – 5 yrs | 5 yrs |
| 359 (3) | In connection with conduct of criminal proceeding | 1 - 5 yrs | 5 yrs |

⁵ A limitation period of 10 years is provided for offences punishable by a maximum period of imprisonment exceeding 5 years (Article 107 (1) 3), Criminal Code). A limitation period of 5 years is provided for offences punishable by a maximum period of imprisonment exceeding 3 years (Article 107 (1) 4), Criminal Code). A limitation period of 3 years is provided for offences punishable by a maximum period of imprisonment exceeding 1 year (Article 107 (1) 5), Criminal Code).

| Article CC | Offence | Sanction (imprisonment) | Relative statute of limitations |
|--|----------------------------------|-------------------------|---------------------------------|
| 359 (4) | If reward received for mediation | 1 – 10 yrs | 10 yrs |
| Active trading in influence (not criminalised) | | | |

Defences

63. Criminal liability may be waived in cases of effective regret of the briber (Article 358 (3), Criminal Code - active bribery in public sector). In such a case, the court must return the confiscated bribe to the briber (Article 358 (6), Criminal Code).

Articles 358 (3) and (6), Criminal Code: effective regret

(3) The person who has given or promised a bribe upon request by an official and has reported it before learning that the offence has been disclosed, shall not be punished for the offence from paragraphs 1 and 2.

(6) The given gift or property advantage shall be taken away, and in the case under paragraph 3, they shall be returned to the person who has given the bribe.

64. If the effective regret defence is successfully invoked, the perpetrator would become witness in the relevant criminal proceeding; he/she would be exempted from punishment.

III. ANALYSIS

65. “The former Yugoslav Republic of Macedonia” has made important efforts to transpose the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) through several amendments to its Criminal Code, the latest of which were adopted in September 2009 and entered into force in March 2010. Moreover, the effective transposition of the Council of Europe standards has been coupled with a non-negligible number of successful prosecutions of both active and passive bribery, which show that the authorities are taking determined steps to tackle corruption. There are, however, particular aspects of the law which fall short of the Council of Europe requirements under review, as will be described below.
66. The offences of active and passive bribery in the public sector closely follow the wording of the Criminal Law Convention on Corruption (hereinafter the Convention). The definition of the relevant bribery offences is contained in two central provisions: Article 357 (passive bribery) and Article 358 (active bribery) of the Criminal Code, respectively. The aforementioned provisions cover all types of acts of active and passive bribery provided for in the Convention. The authorities stressed that the object of bribery includes material and immaterial advantages in so far as the purpose of such advantages would be to influence a public official’s action in service; however, the practical examples of bribery cases provided to the GET only dealt with material advantages. The latest amendments to the Criminal Code have further contributed to greater alignment of domestic law with the Convention by expressly referring to certain elements of the active/passive bribery offence which were missing in previous legislation, e.g. direct/indirect commission, third party beneficiaries. As far as the scope of perpetrators is concerned, the definition of “public official” contained in Article 122 (4) of the Criminal Code appears to be reasonably broad and to encompass the different categories of persons covered by Article 1.a and b. of the Convention.

67. The Criminal Code criminalises active and passive bribery for the performance of, or omission to perform, an “official act within the scope of the official authorisation” of a public official. In the GET’s opinion, this concept is more narrow than the requirements of Articles 2 and 3 of the Convention which refer to acts and omissions by public officials “in the exercise of his/her functions”, thus covering acts and omissions which are made possible in relation to the public official’s function, even if the act or omission is a misuse of the official position (e.g. the case of an official who is bribed to put an official stamp on a document in circumstances where putting stamps on documents is not within the official’s ordinary scope of duties, but where s/he has access to official stamps). Although the authorities indicated that acts and omissions falling outside the scope of the official’s authorisation could be prosecuted under other criminal offences such as fraud (Article 355, Criminal Code) or abuse of office (Article 353, Criminal Code), the GET seriously doubts that all cases of bribery in the meaning of Articles 2 and 3 of the Convention would indeed be covered by the aforementioned offences (e.g. cases where a person unsuccessfully asks a public official to act outside his/her competences or normal functions). Therefore, the GET is of the clear opinion that the narrow notion of “within the scope of his/her official authorisation” adds an – excessively restrictive – extra element to the criminalisation of bribery, which may make prosecution of the offence more difficult, i.e. by requiring proof that the official was expected to act within his/her authorised competences. The GET recommends **to take the legislative measures necessary to ensure that the offences of active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of a public official, whether within the scope of the official’s duties or not.**
68. Bribery of foreign public officials is also covered under Articles 357 (passive bribery) and 358 (active bribery) of the Criminal Code. However, the formulation of the offence is different if the official is foreign. For example, Article 358 (4) of the Criminal Code only refers to the “giving or promising of a bribe”, and not to its “offering”. In this connection, the authorities indicated that it is understood that the “offering” is also covered by direct remittance/reference of Article 358 (4) to the basic comprehensive definition of the offence contained in paragraphs 1 and 2 of Article 358, which explicitly cover the “offering”. Moreover, the authorities highlighted that, in the national language, there is no conceptual difference between the terms offering and promising. The GET accepts this explanation. That said, a difference that poses greater concern to the GET is that Article 357 (6) of the Criminal Code contains additional elements which would need to be proved for an offence to have occurred, i.e. the offence is to be committed in relation to the acquisition, exercise or taking away of rights defined by law, or for the purposes of acquiring an advantage or causing damage to another person. Whilst the GET accepts that, in practice, most acts of bribery may well fall within the scope of the offence, the need to prove these elements is an additional hurdle in the prosecution of the offence. The GET finds it unusual that the offence of bribery of a foreign public official differs to such an extent from bribery of a domestic public official and that it is identical to the offence of private sector bribery (see also paragraph 70). This could potentially cause legal and evidential problems where a foreign and domestic public official are both implicated in an act of bribery (for example where a person bribes border guards on both sides of the border of “the former Yugoslav Republic of Macedonia” in the same corrupt transaction). Finally, the GET wishes to stress that, in the Convention, apart from the persons who are bribed, i.e. foreign public officials, the substance of the bribery offence contained in Article 5 is identical to the one defined under Articles 2 and 3 concerning active and passive bribery of domestic public officials – a deliberate choice by the drafters of the Convention in order to dispel any possible misunderstandings regarding the constitutive elements of the bribery offence. The GET therefore recommends **to reformulate the offence of bribery of foreign public officials contained in Article 357 (6) of the Criminal Code with the relevant provisions pertaining to the bribery of domestic public officials, in accordance with Article 5 of the Criminal Law Convention on Corruption (ETS 173).**

69. Turning to bribery of jurors and arbitrators, the GET notes that a definition of these terms is not explicitly provided by law. With respect to jurors, it was explained to the GET during the on-site visit that there are no jurors in the domestic legal system. There are lay judges who are considered to be public officials since they are persons appointed by the Judicial Council working in the courts. Concerning bribery of foreign jurors, when exploring the issue on-site, the authorities expressed the opinion that they would be able to prosecute cases where foreign jurors were bribed because the notion of a public official referred to “elected or appointed officials...in the courts”, as well as “persons performing official duties, based on the authorisation given by law or some other regulation enacted based on the law”. Concerning bribery of arbitrators, the initial responses of the authorities to GRECO’s Third Evaluation Round questionnaire indicated that bribery of domestic/foreign arbitrators is not criminalised in “the former Yugoslav Republic of Macedonia”. However, when interviewed at the time of the on-site visit, the authorities were of the opinion that arbitrators could be deemed to be covered by the definition of public officials referring to “persons performing official duties, based on the authorisation given by law or by some other regulation enacted and based on the law” (Article 122 (4) c) of the Criminal Code). The authorities later submitted three key legislative instruments in this field, i.e. the Law on the Chamber of Commerce (Articles 20, 21 and 22 on arbitration), the Law on Mediation and the Law on International Trade Arbitration, which confirm that domestic and foreign arbitrators fall under the definition of public official contained in Article 122 (4) c) of the Criminal Code. The GET is, however, troubled that diverging opinions concerning the applicability of bribery provisions to domestic/foreign arbitrators exist in practice and consequently recommends **to make it clear to practitioners that active and passive bribery of domestic and foreign arbitrators are covered by reference to the concept of public official as construed under Article 122 of the Criminal Code.**
70. Bribery in the private sector is criminalised both in its active (Article 358 (4), Criminal Code) and passive form (Article 357 (6), Criminal Code). The GET notes that criminalisation is not limited to the involvement of private business entities *stricto sensu*, but applies also to funds, public enterprises, political parties, institutions and other associations, as well as units of local self-government. As regards the range of possible perpetrators, the Criminal Code refers to “responsible persons within a legal entity”. The concept of legal entity, as defined by Article 122 (6) of the Criminal Code, requires legal personality, whereas the Explanatory Report to the Convention clarifies in its paragraph 54 that Articles 7 and 8 of the Convention concerning bribery in the private sector also cover entities without legal personality, as well as individuals. The authorities clarified that, in “the former Yugoslav Republic of Macedonia”, it is not possible to have a legal entity operating without legal personality. The GET noted that the concept of “responsible persons *within* a legal entity” seems to exclude entity representatives if they are neither employed by nor managers of the entity. In particular, the definition of a “responsible person” contained in Article 122 (7) of the Criminal Code, limits the application of the offence of private sector bribery to a person who acts under “special authorisation *in* the legal entity, is entrusted with a certain range of matters which concern the execution of legal regulations, or regulations that are enacted on the basis of a law or a general act of the legal entity, in the management, use and disposition of property, the management of the production or some other economic process, or the supervision over them”. This definition does, therefore, not appear to cover all possible perpetrators of private sector bribery, such as low-level employees not entrusted with managerial powers or functions (e.g. a secretary working, for example, in a privatised utilities company who gives information to a business taking part in a tender procedure about the identity of the other competing businesses), or other types of relationships such as partners, lawyers and client and others in which there is no contract of employment. This is not in line with Articles 7 and 8 of the Convention which refer to “any persons who direct or work, in any

capacity, private sector entities". In light of the shortcomings identified above, the GET recommends **to ensure that legislation concerning bribery in the private sector covers in an unequivocal manner the full range of persons who direct or work for – in any capacity – private sector entities.**

71. Only passive trading in influence is criminalised in Article 359 of the Criminal Code. According to the authorities, the constitutive elements of the bribery offence, as established under Article 357 of the Criminal Code, largely apply to Article 359 as well; however, the GET is concerned that the current wording of the offence of passive trading in influence does not include a number of key elements spelled out in Article 12 of the Convention. In particular, Article 359 only refers to the "receipt" of a reward or some other advantage by the influence peddler; it does not refer to the "request or the acceptance of the offer or the promise of an undue advantage". Moreover, while the latest amendment to the Criminal Code involves specific references to third party beneficiaries and intermediaries in bribery offences, this is not reflected in the offence of trading in influence. Although it may be premature to anticipate practical problems emerging from the lack of harmonisation of bribery and trading in influence provisions (since the latest amendments of the Criminal Code became enforceable in March 2010 and, therefore, no experience with the practical application of its provisions has been developed yet), the GET wishes to stress the importance of all corruption offences containing the same basic elements for the sake of consistency, clarity and legal security. Finally, the Criminal Code does not criminalise active trading in influence, i.e. the promising, giving or offering of an undue advantage to the influence peddler. Consequently, the GET recommends **to (i) criminalise active trading in influence as a principal offence; (ii) review the provision on passive trading in influence to unambiguously cover a) the request or the acceptance of the offer or the promise of an undue advantage by the influence peddler; b) the direct and indirect commission of the offence; and c) those instances where the advantage is not intended for the briber him/herself but for a third party.**
72. Punishment for bribery ranges from 3 months' to 10 years' imprisonment and for trading in influence to a maximum of 5 years' imprisonment. The range of penalties is the same irrespective of whether the relevant bribery offences were committed in the public or private sector. The sanctions appear to conform to the requirements established by Article 19(1) of the Convention. The period prescribed by the statute of limitations regarding the institution of criminal proceedings with respect to bribery and trading in influence offences generally ranges from 3 to 5 years from the day the offence is committed (relative statute of limitations). The statute of limitations may be interrupted and suspended, but the absolute limitation period expires when twice the prescribed time lapses. The authorities met during the on-site visit indicated that they had not been faced with any situation where the prescribed limitation periods had hampered the prosecution and trial of corruption offences. During the on-site visit, the GET was presented with a large number of successful prosecution cases involving both petty and grand corruption: in the period 2007-2009 a total of 54 corruption cases were tried, 184 persons were prosecuted and 168 convicted; imprisonment sentences were imposed in first instance court decisions in a number of high-profile cases, involving, *inter alia*, a former Prime Minister, a former Deputy Prime Minister and the former mayor of a Skopje municipality).
73. "The former Yugoslav Republic of Macedonia" has established jurisdiction over bribery and trading in influence offences when committed, in whole or in part, within its territory (territorial jurisdiction). Jurisdiction also covers acts committed abroad by citizens of "the former Yugoslav Republic of Macedonia" (nationality jurisdiction). However, if the act does not constitute a criminal offence under the law in force in the country of perpetration (dual criminality), criminal

proceedings may be instituted only upon the approval of the Chief Public Prosecutor. This means in practice that, if such approval is not granted, citizens of “the former Yugoslav Republic of Macedonia” could only be prosecuted for bribery offences committed abroad when the offence is also punishable in the foreign state. In addition, the GET notes that the Criminal Law Convention on Corruption not only establishes (active) jurisdiction for offences of nationals committed abroad, but also extends nationality jurisdiction to public officials and members of domestic public assemblies of member States – i.e. not necessarily nationals (Article 17, paragraph 1.b of the Convention). In this connection, the authorities indicated that, although public officials/persons performing official duties are normally nationals, it is, in theory, also possible to recruit foreigners into the public service. Jurisdiction over the latter group of persons (officials of the “the former Yugoslav Republic of Macedonia” who are not at the same time nationals) would, therefore, not be possible; this is not in line with the Convention. Finally, as per the applicable jurisdictional rules covering offences committed abroad by foreigners when nationals are involved, it would appear that Article 119 of the Criminal Code does not meet the requirements of Article 17, paragraph 1.c of the Convention. In particular, Article 119 of the Criminal Code would not be applicable to offences committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies, judges or officials of international courts who are, at the same time, nationals of “the former Yugoslav Republic of Macedonia”. In this connection, Article 119 establishes jurisdiction over offences committed abroad by a foreigner in so far as the offence is directed against the country or any of its nationals (Article 119 (1), Criminal Code) or if the offence carries a punishment of at least five years’ imprisonment (Article 119 (2), Criminal Code). In light of the foregoing considerations, the GET recommends to **(i) abolish the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad; (ii) establish jurisdiction over offences of bribery and trading in influence committed abroad by domestic public officials and members of domestic public assemblies of “the former Yugoslav Republic of Macedonia” who are not nationals; and (iii) establish jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies, judges or officials of international courts who are, at the same time, nationals of “the former Yugoslav Republic of Macedonia”.**

74. Finally, the Criminal Code provides for the special defence of “effective regret” (Article 358 (3) and (6), Criminal Code) whereby if a person promises or gives a bribe – after being solicited – and subsequently and spontaneously reports that act to the authorities, he/she is not punished for the offence and the bribe, where paid, is returned to him/her. The GET understood from the discussions held on-site that there need be no element of duress on the side of the bribe recipient and that there is no investigatory or prosecutorial discretion not to apply the provision. The GET’s interlocutors generally stressed that the defence of effective regret was very helpful in terms of uncovering and prosecuting bribery. Examples were cited of small bribes being solicited by doctors or teachers where individuals feel they have no option but to give the bribe in order to receive what is legitimately due (e.g. where a doctor tells a person that he/she will not provide treatment to that person’s child unless given a bribe) - but then report the bribe to the police. Frequent reference was made to the strong deterrent effect that the effective regret provision had in corruption cases and that many fewer cases would be brought without such a possibility. In such cases, the court is entitled to restore the seized bribe to the briber. While understanding the potential advantages of effective regret as highlighted by the authorities, the GET has concerns in this area. In particular, the GET has misgivings about the automatic nature of this defence. There is no possibility for review of the situation and motives of the bribe-giver: if s/he reports the offence before the investigative body learns of the offence, the competent court must remit his/her punishment. Moreover, the fact that it is mandatory to return the bribe to the briber if he/she

employs the defence of “effective regret” (Article 358 (6), Criminal Code) is highly questionable. The GET therefore recommends **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery in the public and in the private sector who report to law enforcement authorities, and to abolish the mandatory restitution of the bribe to the bribe-giver in such cases.**

IV. CONCLUSIONS

75. The criminal legislation of “the former Yugoslav Republic of Macedonia” provides an effective basis for the investigation, prosecution and adjudication of corruption offences. With recent reforms of the relevant provisions of the Criminal Code, the country has shown a serious will to meet the requirements of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Moreover, the transposition of the Council of Europe standards in this area goes in tandem with a significant number of successful prosecutions of both active and passive bribery, which show that the authorities are taking determined steps to tackle corruption. There are, however, several aspects of the law which fall short of the standards under review. In particular, it must be ensured that the offences of active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the official’s duties. Furthermore, the range of possible perpetrators of private sector bribery is narrower than foreseen by the Convention and therefore needs to be extended. Likewise, shortcomings exist in relation to the trading in influence offence; in particular, under current rules, active trading in influence (the promising, giving or offering of an undue advantage to the influence peddler) is not criminalised. Moreover, the legal basis for nationality jurisdiction is to be reviewed in order to abolish the requirement of double criminality regarding the offences of bribery and trading in influence and to extend jurisdiction to domestic public officials and members of domestic public assemblies of “the former Yugoslav Republic of Macedonia” who are not at the same time nationals, as well as to nationals who are, at the same time, officials of international organisations, members of international parliamentary assemblies or judges/officials of international courts. Finally, the possibility provided by the special defence of effective regret to exempt the bribe-giver, who, if solicited by the public official, declares the offence before it is uncovered, should be reviewed in order to limit the risks of abuse.
76. In view of the above, GRECO addresses the following recommendations to “the former Yugoslav Republic of Macedonia”:
- i. **to take the legislative measures necessary to ensure that the offences of active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of a public official, whether within the scope of the official’s duties or not (paragraph 67);**
 - ii. **to reformulate the offence of bribery of foreign public officials contained in Article 357 (6) of the Criminal Code with the relevant provisions pertaining to the bribery of domestic public officials, in accordance with Article 5 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 68);**
 - iii. **to make it clear to practitioners that active and passive bribery of domestic and foreign arbitrators are covered by reference to the concept of public official as construed under Article 122 of the Criminal Code (paragraph 69);**

- iv. to ensure that legislation concerning bribery in the private sector covers in an unequivocal manner the full range of persons who direct or work for – in any capacity – private sector entities (paragraph 70);
 - v. to (i) criminalise active trading in influence as a principal offence; (ii) review the provision on passive trading in influence to unambiguously cover a) the request or the acceptance of the offer or the promise of an undue advantage by the influence peddler; b) the direct and indirect commission of the offence; and c) those instances where the advantage is not intended for the briber him/herself but for a third party (paragraph 71);
 - vi. to (i) abolish the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad; (ii) establish jurisdiction over offences of bribery and trading in influence committed abroad by domestic public officials and members of domestic public assemblies of “the former Yugoslav Republic of Macedonia” who are not nationals; and (iii) establish jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies, judges or officials of international courts who are, at the same time, nationals of “the former Yugoslav Republic of Macedonia” (paragraph 73);
 - vii. to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery in the public and in the private sector who report to law enforcement authorities, and to abolish the mandatory restitution of the bribe to the bribe-giver in such cases (paragraph 74).
77. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of “the former Yugoslav Republic of Macedonia” to present a report on the implementation of the above-mentioned recommendations by 30 September 2011.
78. Finally, GRECO invites the authorities of “the former Yugoslav Republic of Macedonia” 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.