

Strasbourg, 19 October 2007

**Public**  
**Greco RC-II (2007) 10E**

## **Second Evaluation Round**

### **Compliance Report on Spain**

Adopted by GRECO  
at its 34<sup>th</sup> Plenary Meeting  
(Strasbourg, 16-19 October 2007)

## I. INTRODUCTION

1. GRECO adopted the Second Round Evaluation Report on Spain at its 23<sup>rd</sup> Plenary Meeting (20 May 2005). This report (Greco Eval II Rep (2004) 7E) was made public by GRECO, following authorisation by the authorities of Spain, on 5 July 2005.
2. In accordance with Rule 30.2 of GRECO's Rules of Procedure, the authorities of Spain submitted their Situation Report (RS-Report) on the measures taken to implement the recommendations on 14 June 2007.
3. At its 26<sup>th</sup> Plenary Meeting (5-9 December 2005), GRECO selected, in accordance with Rule 31.1 of its Rules of Procedure, Poland and Portugal to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Cezary Michalczuk on behalf of Poland and Mr Jorge Menezes Falcão on behalf of Portugal. The Rapporteurs were assisted by the GRECO Secretariat in drafting the Compliance Report (RC-Report).
4. The objective of the RC-Report is to assess the measures taken by the authorities of Spain, to comply with the recommendations contained in the Evaluation Report.

## II. ANALYSIS

5. It was recalled that GRECO in its evaluation report addressed six recommendations to Spain. Compliance with these recommendations is dealt with below.

### **Recommendation i.**

6. *GRECO recommended that a legal provision be introduced specifically providing for provisional measures to be taken for the purpose of guaranteeing the effective confiscation of the proceeds of corruption.*
7. The authorities of Spain stress that the Criminal Code includes a general provision on confiscation, i.e. Article 127, that is applicable to all kinds of crime, including those related to corruption. They reiterate that detailed legal provisions concerning the seizure and management of seized assets are laid down in Articles 334 to 338 of the Code of Criminal Procedure. In addition, the State Attorney General has issued two circulars (1/2005 and 2/2005), which provide further interpretation of the legal provisions governing confiscation. In the framework of several on-going corruption-related cases (e.g. *Operación Malaya*) provisional measures have been taken at early stages of investigation; these measures include freezing of bank accounts of both physical and legal persons, seizure of tangible and intangible property, etc.
8. Furthermore, in the framework of the ongoing reform of the Criminal Code<sup>1</sup>, amendments have been made to Article 127 to introduce extended confiscation and the possibility of mitigating the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime. In this context, it is considered that any property, the value of which is disproportionate to the lawful income of the convicted person, derives from organised criminal activity. The burden would therefore be on the offender to demonstrate that the assets were obtained lawfully while being involved in the activities of the criminal organisation.

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<sup>1</sup> Draft Law of 15 January 2007 on amendments to the Criminal Code (BOE, No. 119-1).

9. Finally, the recently adopted Law 24/2007 amending the Statute of the State Attorney<sup>2</sup> reinforces the role of the Special Attorney General's Office for the Repression of Economic Offences related to Corruption, which changes its name to Prosecution Office for the Repression of Corruption and Organised Crime in the light of its extended competences in connection with organised crime.
10. GRECO takes note of the information provided concerning confiscation, some of which had already been taken into account when adopting the Second Round Evaluation Report. GRECO welcomes the envisaged amendments relating to extended confiscation and the apportionment of the burden of proof in those cases where the perpetrator is part of a criminal organisation. GRECO is also pleased to learn that the State Attorney General has issued further guidance on the use of confiscation.
11. However, GRECO is not convinced that the measures referred to above sufficiently address the concern expressed in recommendation i. GRECO recalls that the Second Round Evaluation Report noted the co-existence of multiple provisions, which are dispersed in different legal instruments, dealing with seizure depending on the nature of the assets. GRECO also pointed at the specific provision contained in Article 374, paragraph 1.2 of the Criminal Code allowing provisional measures to be taken at early stages of the investigation in order to guarantee the effectiveness of a confiscation order in relation to drug related offences. At the time of the adoption of the Second Round Evaluation Report, GRECO took the view that the introduction of a similar provision in the context of corruption-related offences could prove valuable in further facilitating and better guaranteeing the effective confiscation of corruption proceeds. This concern is still valid.
12. GRECO concludes that recommendation i has been partly implemented.

#### **Recommendation ii.**

13. *GRECO recommended to conduct a review of the legal provisions that provide the public with rights to access Government information and the implementation practices that have been developed to determine if the law(s) and/or current implementation practices are inappropriately limiting the public's access to information that would help support the Government in its fight against corruption.*
14. The authorities of Spain reiterate that the right to access administrative documents is enshrined in Article 105 b of the Constitution and developed in Articles 35 and 37 of Law 30/1992 on the Legal Regime governing Public Administrations and Common Administrative Procedures. Further measures are in the process of being introduced to increase the transparency and efficiency of public administration, including the promotion and implementation of the concept of e-government at all levels (central, Autonomous Communities, municipalities). In this context, Law 11/2007 of 22 June on Electronic Access of Citizens to Public Services establishes a new category of citizen's rights, the so-called "digital rights". The aforementioned law allows citizens to access by electronic means all the services delivered by public administrations and obliges all public administrations to set up the channels and means to guarantee such electronic access. Moreover, the Ministry of Public Administration has created Network 060, which enables the interaction of citizens with public administration in three different ways: over 2,800 information points, more than 500 websites, and 1,000 telephone lines. The Internet portal of Network 060<sup>3</sup>, which comprises a citizen and a business section, presents information on administrative

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<sup>2</sup> Law 24/2007 amending "the Statute of the State Attorney" (BOE, No. 243)

<sup>3</sup> [www.060.es](http://www.060.es)

procedures (e.g. public employment, scholarships, grants and subsidies etc). It also provides a forum for public consultation and discussion of legislation and administrative decisions under preparation (e.g. urban planning, environment etc).

15. GRECO takes note of the measures reported in the area of e-government, which are ultimately geared towards increasing transparency and efficiency of public administration. The ongoing developments in the area of e-governance, in particular, the framework provided by Law 11/2007 on Electronic Access of Citizens to Public Services, are positive steps to introduce a more proactive information policy which enhances access to public information.
16. However, GRECO recalls its concern that a narrow interpretation of the legal provisions addressing the release of Government administrative information (namely, Articles 35 and 37 of Law 30/1992 on the Legal Regime governing Public Administrations and Common Administrative Procedures) would hamper the obtaining of information that is not a part of specific administrative proceedings or simply general administrative information (Second Round Evaluation Report, page 15, paragraphs 45 and 46). In this particular context, GRECO notes that no concrete action has been undertaken to address the substance of the recommendation, i.e. in particular, to conduct a review of the implementation practices concerning the right to access Government information to determine whether the legal provisions are read in a restrictive manner and, therefore, the citizens' right to access public information is being limited in practice. GRECO would have welcomed more concrete information (e.g. cases of denials of requests for information) in order to be able to form a clear view regarding the implementing practices of the Government. On the basis of the information at its disposal, GRECO considers that the concerns expressed in its Second Round Evaluation have not yet been fully addressed.
17. GRECO concludes that recommendation ii has been partly implemented.

### **Recommendation iii.**

18. *GRECO recommended that a full evaluation of the effectiveness of the current system of criminal/disciplinary sanctions that substitute for an enforceable code of conduct for public officials/employees be conducted and that the study be made public. It recommended further that Spain compile the current criminal/disciplinary provisions and make them available to public officials and employees and publish the compilation for public information.*
19. The authorities of Spain report that Act 7/2007 on the Basic Statute of Public Employment was adopted on 12 April 2007. Its scope of application covers both public officials and employees hired under contract. It includes provisions dealing with recruitment and professional career advancement, rights and obligations, conflicts of interest, acceptance of gifts, initial and ongoing training, disciplinary measures etc. In particular, Title III, Chapter VI on Duties of public officials and employees – Code of Ethics, is exclusively devoted to the ethical standards, which are to be followed when carrying out public functions (impartiality, public accountability, non-discrimination, efficiency, professional loyalty etc). Title VII specifies the types of misconduct that may give rise to disciplinary proceedings and lays down procedural rules for disciplinary action.
20. In addition, a Code of Good Governance of Members of the Government and High Officials within the General State Administration was adopted on 7 March 2005. It applies to all members of the Government, Secretaries of State and any other high-ranking officials in public administration, as well as presidents, directors and managers of public entities. It aims at establishing closer ties between the citizens and the Government (in particular higher positions within the Government)

by promoting: (i) independency (conflict of interests' safeguards, including restrictions concerning parallel private activities, prohibition to accept gifts, etc); (ii) transparency (e.g. obligation to promptly reply to citizens' requests for information); and (iii) legal equality (e.g. refusal of privileged treatment, including suppression of honorary titles to bring members of the public administration closer to the public). The Ministry of Public Administration is to report annually to the Council of Ministers concerning the implementation of the Code of Good Governance, including potential infringements of its ethical principles, in order to ascertain the reasons for such breaches and subsequently to propose effective ways to ensure a correct functioning of the system. The Ministry of Public Administration has indicated that it has not yet reported on implementation of the Code of Good Governance, since no infringement of its provisions has been detected to date.

21. The afore-mentioned legal instruments have been/are in the process of being promoted through different channels: publication in the Official Journal, conferences and symposia, press releases, targeted training events, etc.
22. GRECO welcomes the introduction of ethical guidance for high ranking members of the Government in the performance of their duties. It further acknowledges the positive developments reported to provide a common and consolidated framework for public officials and employees concerning their responsibilities and rights, as well as the disciplinary action that follows misbehaviour. These are both steps in the right direction for which the authorities must be commended. GRECO nevertheless recalls that in its Second Evaluation Round Report, it pointed out the need to develop and widely disseminate a general written compilation of the criminal and disciplinary standards. GRECO is of the opinion that such a compilation would prove beneficial in order to meet Guiding Principle 10 and in particular, to establish shared expectations between those in the public service and the public they serve regarding the ethical standards to be followed, with a view to strengthening citizens' confidence in public administration. This concern has not yet been addressed.
23. Moreover, GRECO notes that no steps have been taken to conduct a full evaluation of the effectiveness of the system of criminal/disciplinary sanctions in respect of misbehaviour of public officials/employees as recommended. GRECO considers that such an evaluation is still pertinent in the framework of the recently introduced legal framework for public officials and employees as it will enable to identify in an objective and precise manner potential weaknesses and problems that may exist in concrete spheres of public administration. The need to analyse trends in the types of inappropriate behaviour and to seek channels for corrective action has so far only been addressed with respect to high-ranking members of the Government through the reporting mechanisms established by the Code of Good Governance, although the system has not yet been tested.
24. GRECO concludes that recommendation iii has been partly implemented.

#### **Recommendation iv.**

25. *GRECO recommended that consideration be given to drafting guidelines for public officials/employees addressing situations where interests or activities of the public official/employee are not prohibited but may still create a conflict of interest with his/her actual duties and responsibilities.*

26. The authorities of Spain state that the Basic Statute of Public Employment includes guidance for public officials/employees concerning situations that may create a conflict of interest in public service. For example, it is recommended that public officials/employees refrain from acting/deciding in any matter where they may hold a personal or familial interest and, therefore, their impartiality could be called into question. Public officials/employees must not accept gifts (other than socially or customarily acceptable gifts), favours or services in advantageous conditions, which may influence the performance of their public functions.
27. Furthermore, Law 5/2006 on Conflicts of Interest of Members of the Government and High Officials within the General State Administration includes detailed provisions to prevent situations that may give rise to conflicts of interest. These include recusal and routine withdrawal from public duty whenever there is a potential conflict of interest, limitations to engage in certain types of activities or holding certain positions in the private sector that may give rise to a potential conflict of interest, absolute restriction on ancillary employment, declarations of personal income and assets, declarations of private interests, restrictions and control of post-employment business activities (two-year “cooling-off” period), prohibition to accept gifts, etc. Sanctions for infringements of the law range from reprimand, suspension of salary and bans on holding a public position for a period of 5 to 10 years to dismissal. Moreover, business contractors who hire a former high-ranking official during the two-year “cooling-off” period could be banned from public procurement procedures.
28. GRECO concludes that recommendation iv has been implemented satisfactorily.

#### **Recommendation v.**

29. *GRECO recommended 1) to introduce an adequate system of liability of legal persons for acts of corruption, including effective, proportionate and dissuasive sanctions, and subsequently, 2) to consider to establish a registry of legal persons which have been subject to corporate sanctions.*
30. The authorities of Spain report that amendments to the Criminal Code have been proposed with a view to establishing corporate criminal liability for a *numerus clausus* of offences, which include corruption-related offences. In particular, a new Article 31 *bis* holds legal persons (companies, associations and foundations) liable for crimes committed, on their behalf or for their benefit, by any natural person, who has a leading position within the legal person, based on a power of representation of the legal person; or the authority to take decisions on behalf of the legal person; or the authority to exercise control within the legal person. Corporate criminal liability would also apply in those cases where lack of supervision within the legal person makes it possible to commit the offence. Liability of the legal person does not exclude criminal liability of the physical perpetrator.
31. Pursuant to the proposed amendments to the Criminal Code, sanctions for corruption-related offences include fines (which may be increased depending on the financial advantage gained or intended to be gained through the criminal act), dissolution of the legal person, suspension of its activities for a maximum period of five years, winding up the legal entity for a maximum period of five years, permanent or temporary prohibitions for up to 10 years on activities similar to those that gave rise to the conviction, exclusion from public tender procedures, etc.

32. The afore-mentioned proposed amendments were published in the Official Journal on 15 January 2007<sup>4</sup> and they have been submitted to Parliament for consultation (their debate in the Congress of Deputies took place on 13 September 2007, further discussion in the Senate is to take place in the last quarter of 2007).
33. GRECO welcomes the initiatives reported to amend the Criminal Code by, *inter alia*, introducing criminal liability of legal persons and takes the view that Spain has come a long way in order to comply with recommendation v. However, as the draft legislation has not yet been adopted, GRECO cannot at this stage anticipate the final result. Furthermore, GRECO urges the Spanish authorities to give consideration to the establishment of a registry of convicted legal persons, in line with recommendation v.
34. GRECO concludes that recommendation v has been partly implemented.

#### **Recommendation vi.**

35. *GRECO recommended that the Spanish authorities encourage through all possible means the Chamber of Commerce to play a more active role in promoting ethics in business.*
36. The authorities of Spain report that the Chamber of Commerce has been encouraged to promote ethics in business, with the result of a large number of seminars on transparency and social responsibility of the private sector being held since the adoption of the Second Evaluation Round Report. The list of seminars includes, but is not limited to, the following:
  - 21-22 February 2007 “Good Governance in Business and Corporate Liability ” (Madrid);
  - 9-10 October 2006 “Good Governance in Business and Corporate Liability ” (Cádiz);
  - 2-6 October 2006 “Corporate Governance and Liability” (Barcelona);
  - 1 June 2006 “Corporate social responsibility and business ethics” (Barcelona, Galicia, Madrid, Valencia);
  - 17-21 May 2004 “Corporate Governance: social responsibility, good governance and transparency in the private sector” (Barcelona).
37. GRECO takes note of the series of seminars on corporate governance co-organised by the Chamber of Commerce and the Spanish authorities. GRECO earnestly hopes that the promotion of ethics in business continues to be actively pursued in Spain and will lead to positive results in the prevention of, and the fight against, corruption.
38. GRECO concludes that recommendation vi has been implemented satisfactorily.

### **III. CONCLUSIONS**

39. **In view of the above, GRECO concludes that Spain has implemented satisfactorily one third of the recommendations contained in the Second Round Evaluation Report.** Recommendations iv and vi have been implemented satisfactorily. Recommendations i, ii, iii and v remain partly implemented. In this connection, GRECO very much hopes that specific provisions concerning provisional measures to be taken for the purpose of further facilitating and guaranteeing the effective confiscation of corruption proceeds will be introduced in the near future. Further, Spain has recently adopted a number of laws aimed at strengthening the transparency of public administration (e.g. e-governance, common and consolidated framework

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<sup>4</sup> Draft Law of 15 January 2007 on amendments to the Criminal Code (BOE, No. 119-1).

for public officials and employees concerning their rights and responsibilities, targeted ethical guidance for high-ranking officials); these are steps in the right direction for which the Spanish authorities should be commended. That said, GRECO urges the authorities to persist in their efforts to increase transparency and accountability of public administration by reviewing the implementation practices concerning the right to access Government information, as well as by developing a general written compilation of the criminal and disciplinary standards in the public function coupled with a full evaluation of the effectiveness of the system. Finally, there remains a clear need for the authorities to pursue actively the envisaged amendments to the Criminal Code with a view to establishing an adequate system of liability of legal persons for acts of corruption.

40. GRECO invites the Head of the Spanish delegation to submit additional information regarding the implementation of recommendations i, ii, iii and v by 30 April 2009.
41. Finally, GRECO invites the authorities of Spain to translate the report into the national language and to make this translation public.