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Evaluation Report on Ukraine
Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

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I. INTRODUCTION

1. Ukraine joined GRECO in 2006. GRECO adopted the Joint First and Second Round Evaluation Report (Greco Eval I/II Rep (2006) 2E) in respect of Ukraine at its 32nd Plenary Meeting (23 March 2007). The aforementioned evaluation report as well as its corresponding compliance report are both 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)[1], 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 Ukraine from 11 to 12 April 2011, was composed of Mr Petr HABARTA, Legal expert, Security Policy Department, Ministry of the Interior (Czech Republic) and Mr Georgi RUPCHEV, State Expert, Directorate of International Cooperation and European Affairs, Ministry of Justice (Bulgaria). The GET was supported by Mr Michael JANSSEN from GRECO's Secretariat. Prior to the visit the GET was provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2011) 1E, Theme I) as well as copies of relevant legislation.

4. The GET met with representatives of the following governmental organisations: Ministry of Justice, General Prosecutor's Office, Ministry of the Interior, Security Service, State Tax Administration, Judges of the Supreme Court, the High Specialised Court on civil and criminal matters, a Court of Appeal and a First Instance Court. The GET also met with representatives of international organisations and Embassies (EU, OECD, OSCE, Embassy of the United States of America), of non-governmental organisations (All-Ukrainian Special Collegium on Counteraction Corruption and Organised Crime, Center of Criminal Research, Center for Political and Legal Reforms, Creative Union "TORO"/Contact group of Transparency International in Ukraine, Public anti-corruption council, Public Committee of national security of Ukraine) and of academia (Institute of Applied and Humanitarian Research, Koretsky Institute of state and law of National Academy of Sciences of Ukraine, Taras Shevchenko National University of Kyiv).

5. The present report on Theme I of GRECO's Third Evaluation Round on 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 Ukrainian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Ukraine in order to improve its level of compliance with the provisions under consideration.

[1] Ukraine ratified the Criminal Law Convention on Corruption (ETS 173) and the Additional Protocol to the Criminal Law Convention (ETS 191) on 27 November 2009. These instruments entered into force in respect of Ukraine on 1 March 2010.

6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2011) 1E-Theme II.

II. INCRIMINATIONS

Description of the situation

7. Ukraine ratified, without any reservations, the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) on 27 November 2009 and they entered into force in respect of Ukraine on 1 March 2010.

8. The Criminal Code of Ukraine (CC) came into force on 1 September 2001. The corruption-related provisions were subject to recent legal amendments, introduced by Law No. 3207-VI "On amendments to several legislative acts concerning liability for corruption offences" – which was adopted on 7 April 2011, together with the Law No. 3206-VI "On the Principles of Preventing and Combating Corruption".[2] The authorities indicate that Law No. 3207-VI was aimed at bringing the national legislation into line with the requirements of the Criminal Law Convention on Corruption and its Additional Protocol and the UN Convention against Corruption (UNCAC). The amendments to criminal legislation included some changes to the definition of public sector bribery offences and to the available sanctions, a redefinition of the concept of "official" employed in the corruption-related provisions – including, in particular, foreign and international public officials –, the criminalisation of trading in influence and the introduction of specific provisions on private sector bribery.

9. The legislation of Ukraine also provides for administrative liability for certain corruption-related acts, which has been further developed by the 2011 legal reform. Law No. 3207-VI introduced a specific chapter, 13-A on "administrative corruption offences", into the Code of Administrative Offences (CAO), see sections 172.2 to 172.9 CAO which include offences such as "breach of legal restrictions concerning the use of official position", "offering or giving an illegal benefit" and "breach of legal restrictions on the receipt of gifts". As the subject of the Third Evaluation Round is the criminalisation of corruption, the present report mainly focuses on corruption offences under the CC.

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

10. Section 368 CC establishes the offence of *passive bribery* and section 369 CC that of *active bribery*.[3] Both sections provide that the sanctions may be increased in aggravated cases. Several terms used in the bribery provisions are defined in "notes" which have, according to the authorities, the same legal force as other parts of the CC. In addition, when it comes to formulating their observations on the subject, the authorities have based themselves on Resolution No. 5 of the Plenum of the Supreme Court of 26 April 2002 "On the judicial practice in bribery cases" which was aimed at ensuring uniform and proper application of the law in cases of bribery, pointing out that while the resolution has no binding force on other courts, the latter

[2] Both Law No. 3207-VI and Law No. 3206-VI entered into force on 1 July 2011.

[3] In addition, the CC contains several other corruption-related provisions, in particular:
(1) section 354 CC which criminalises "illegal receiving of any material consideration or benefits of a significant amount, by way of extortion, by an employee of a State enterprise, institution or organisation who is not an official, in return for performing or refraining from any action through abuse of his/her position in the enterprise, institution or organisation"; and
(2) section 370 CC on "provocation of bribery", i.e. "the deliberate creation, by an official, of circumstances and conditions which cause the offering or receiving of a bribe or illegal benefit in order to subsequently expose the person who gave or received the bribe or illegal benefit".

usually comply with it. The present report takes account of such references to Resolution No. 5 to the extent to which they concern legal concepts which have not been changed by the 2011 amendments.

Section 368 CC: Receiving a bribe

(1) Receiving a bribe of any kind by an official in return for performing or refraining from any action, using his/her authority or official position, in the interests of the person giving the bribe or in the interests of a third person, is punishable by a fine of 500 to 750 times the tax-free minimum income,[4] or by correctional work for up to 1 year, or by up to 6 months' arrest, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years.

(2) Receiving a bribe of a significant sum is punishable by a fine of 750 to 1500 times the tax-free minimum income,[5] or by 2 to 5 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years.

(3) Receiving a bribe either of a large sum, or by an official in a responsible position, or upon prior conspiracy by a group of persons, or if repeated, or if accompanied by extortion of a bribe, is punishable by 5 to 10 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years, and with forfeiture of property.

(4) Receiving a bribe of a particularly large sum, or by an official in a particularly responsible position, is punishable by 8 to 12 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years, and with forfeiture of property.

Note:

1. *A bribe of a significant sum shall mean a bribe equal to or greater than 5 times the tax-free minimum income;[6] of a large sum – a bribe equal to or greater than 200 times the tax-free minimum income;[7] of a particularly large sum – a bribe equal to or greater than 500 times the tax-free minimum income.[8]*
2. *Officials in a responsible position shall mean persons referred to in note no. 1 to section 364, whose positions pursuant to section 25 of the Law on Civil Service are included in the third, fourth, fifth and sixth categories, and also judges, prosecutors and investigators, heads and deputy heads of State government and administrative authorities, and of local self-government bodies and their structural subdivisions and units. Officials in a particularly responsible position shall mean persons referred to in section 9, paragraph 1 of the Law on Civil Service, and persons whose positions pursuant to section 25 of this law are included in the first and second categories.*
3. *In section 368 of this Code a repeated offence shall mean an offence committed by a person who has previously committed any of the offences laid down in sections 368, 368.3, 368.4 or 369 of this Code.*
4. *Extortion of a bribe shall mean a request for a bribe by an official accompanied by a threat to perform or refrain from actions, using his/her authority or official position, which may cause harm to the rights and lawful interests of the person giving the bribe, or the wilful creation by an official of conditions in which a person is compelled to give a bribe in order to prevent harmful consequences with respect to his/her rights and lawful interests.*

[4] Approximately 21,500 to 32,250 EUR. The current amount of the tax-free minimum income – for the period 1 October to 1 December 2011 – was fixed to 467 UAH/approximately 43 EUR.
[5] Approximately 32,250 to 64,500 EUR.
[6] Approximately 215 EUR.
[7] Approximately 8,600 EUR.
[8] Approximately 21,500 EUR.

Section 369 CC: Offering or giving a bribe

(1) Offering a bribe is punishable by a fine of 100 to 250 times the tax-free minimum income[9] or by up to 2 years' restriction of liberty.
(2) Giving a bribe is punishable by a fine of 250 to 750 times the tax-free minimum income[10] or by 2 to 5 years' restriction of liberty.
(3) Giving a bribe, if repeated, is punishable by 3 to 6 years' imprisonment, with a fine of 500 to 1000 times the tax-free minimum income,[11] and with or without forfeiture of property.
(4) Giving a bribe to an official in a responsible position, or upon prior conspiracy by a group of persons, is punishable by 4 to 8 years' imprisonment, with or without forfeiture of property.
(5) Giving a bribe to an official in a particularly responsible position, or by an organised group or a participant in such a group is punishable by 5 to 10 years' imprisonment, with or without forfeiture of property.
(6) A person having offered or given a bribe shall be discharged from criminal liability, if s/he was subject to extortion of a bribe or if, after giving the bribe and prior to the instigation of criminal proceedings against the person, s/he voluntarily makes a statement concerning the acts in question to a body authorised by law to instigate criminal proceedings.

Note: In section 369 a repeated offence shall mean an offence committed by a person who has previously committed any of the criminal offences laid down in sections 368, 368.3, 368.4 or 369 of this Code.

Elements of the offence

"Domestic public official"

11. The bribery provisions of the CC employ the term "official",[12] which is defined in the note to section 364 CC (abuse of authority or office). The first part of this definition concerns domestic public officials[13] (note no. 1) and the second part concerns foreign and international public officials (note no. 2). The 2011 legal reforms introduced some changes to this definition. As regards the amended definition of a domestic official, it now refers more specifically than before to persons acting on behalf of State organs, local self-government organs, central organs of State administration with special status, State or communal enterprises, institutions and organisations.

Note to section 364 CC:[14]

1. *In sections 364, 365, 368, 368.2 and 369 of this Code, officials shall mean persons who permanently, temporarily or by special authority perform the functions of representatives of State power or local-self government, and also persons who permanently or temporarily occupy, in organs of State power, organs of local self-government, State or communal enterprises, institutions or organisations, positions which are related to organisational, managerial, administrative or executive functions, or perform such functions on the basis of*

[9] Approximately 4,300 to 10,750 EUR.
[10] Approximately 10,750 to 32,250 EUR.
[11] Approximately 21,500 to 43,000 EUR.
[12] In this report the term *public official* is used and is to be understood in the sense of "*official*", unless otherwise specified.
[13] "Officials" acting in the private sector are also included in this definition (cf. the description of private sector bribery below).
[14] See also section 18 CC on criminal offenders which contains the same definition of an official (without a specific reference to sections 364, 365, 368, 368.2 and 369 CC).

special authority mandated by a duly authorised organ of State power, organ of local self-government, or central organ of State administration with special status, by a duly authorised body or person of an enterprise, institution or organisation, by a court or by law.

For the purposes of sections 364, 365, 368, 368.2 and 369 of this Code, legal entities in which the share of the authorised capital owned by the State or community, respectively, exceeds 50% or is of a value which provides the State or local community with the right of decisive influence on the economic activity of such an enterprise, are deemed to be State or communal enterprises.

2. *Officials shall also mean public officials of foreign States (persons who occupy positions in a legislative, executive or judicial organ of a foreign State, including members of jury panels, and other persons who perform functions of State on behalf of a foreign State, in particular for a State body or a State enterprise), and also foreign arbitrators, persons authorised to settle civil, commercial or labour disputes in foreign States in alternative ways, officials of international organisations (employees of an international organisation or any other persons authorised by such an organisation to act on its behalf), members of international parliamentary assemblies of which Ukraine is a participant, and judges and officials of international courts.*

12. The definition of a domestic official (note no. 1) thus includes (1) persons who perform the functions of representatives of State power or local-self government; and (2) persons who occupy in organs of State power, organs of local self-government etc. positions related to organisational, managerial, administrative or executive functions or perform such functions on the basis of special authority. The authorities indicate that according to the explanations provided by Resolution No. 5 of the Supreme Court, (1) the first category of persons refers, in particular, to "employees of public organs and their establishments who are entitled, within their competence, to set demands and make decisions binding on natural and legal persons regardless of their departmental affiliation or subordination"; and (2) the terms "organisational, managerial, administrative or executive functions" employed in respect of the second category of persons imply a certain degree of responsibility which is entrusted, in particular, to heads of ministries and other central executive bodies, State or communal enterprises, institutions or organisations and to their deputies; to heads of departments and their deputies; to persons who manage areas of work such as supervisors, team leaders, etc.; to heads of planning, maintenance, supply and financial departments and services and their deputies; to departmental inspectors and controllers, etc. The authorities furthermore affirm that the first category of persons is now defined more precisely by section 4, part 1, paragraph 1 of the 2011 Law "On the Principles of Preventing and Combating Corruption" which contains an extensive list of "persons authorised to perform functions of State or of organs of local self-government", including both civil servants and other public officials regardless of any organisational, managerial, administrative or executive functions.

13. The bribery provisions of sections 368 and 369 CC furthermore use the concepts of "officials in a responsible position" and "officials in a particularly responsible position" to define aggravated cases of bribery. These categories of persons, which are sub-categories of the concept of "officials", are defined in note no. 2 to section 368 CC.

***Note* to section 368 CC:**

(…)

2. *Officials in a responsible position shall mean persons referred to in note no. 1 to section 364, whose positions pursuant to section 25 of the Law on Civil Service are included in the third, fourth, fifth and sixth categories, and also judges, prosecutors and investigators, heads and deputy heads of State government and administrative authorities, and of local self-government bodies and their structural subdivisions and units. Officials in a particularly responsible position shall mean persons referred to in section 9, paragraph 1 of the Law on Civil Service, and persons whose positions pursuant to section 25 of this law are included in the first and second categories.*[15]

(…)

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

14. The passive bribery provisions use the words "receiving a bribe", see section 368 CC. The request for a bribe is mentioned only in the meaning of extortion ("accompanied by a threat to perform or refrain from actions…"), as an aggravating circumstance. As regards the simple "request" of a bribe and the "acceptance of an offer or promise", the authorities affirm that such acts are punishable under sections 14 or 15 CC in conjunction with section 368 CC as preparation of or attempt at bribery. There is no case law/court decision confirming this affirmation. The authorities referred to Resolution No. 5 of the Supreme Court, according to which the unsuccessful endeavour by an official to extort a bribe may qualify as attempted bribery, depending on the merits of the case. It is to be noted that the preparation of a crime is not incriminated in cases of minor criminal offences, which are defined as offences punishable by up to two years' imprisonment or a more lenient penalty.[16] Section 14 CC is therefore not applicable to bribery offences in the absence of aggravating circumstances under section 368, paragraph 1 CC. Moreover, pursuant to section 17 CC, the perpetrator of a prepared or attempted crime is not criminally liable if s/he voluntarily refuses to complete the crime. Under the provisions of section 68 CC, punishment for crime preparation or for criminal attempt may not exceed half of the maximum limit or two thirds of the maximum limit of the severest kind of punishment prescribed for the completed offence respectively.

Section 14 CC: Preparation of a crime

(1) Preparation of a crime shall mean seeking or adapting means and tools, or looking for accomplices, or conspiring to commit an offence, removing of obstacles to an offence or otherwise intentional conditioning of an offence.
(2) Preparation to commit a minor criminal offence does not give rise to criminal liability.

Section 15 CC: Criminal attempt

(1) A criminal attempt shall mean a directly intended act (action or omission) made by a person and aimed directly at the commission of a criminal offence prescribed by the relevant section of the special part of this Code, where this criminal offence has not been concluded for reasons beyond that person's control.

[15] E.g. deputies to the ministers and other central organs of State executive authority, first deputy heads of regional, Kyiv, and Sevastopol city State Administrations, heads of the administration of the President of Ukraine and of the Secretariat of Parliament, etc.
[16] See section 12, paragraph 2 CC.

(2) A criminal attempt shall be concluded where a person has completed all such actions as s/he deemed necessary for the conclusion of an offence, however, the offence was not completed for reasons beyond that person's control.
(3) A criminal attempt shall be not concluded where a person has not completed all such actions as s/he deemed necessary for the conclusion of an offence for reasons beyond that person's control.

Section 17 CC: Voluntary renunciation in a criminal offence that is not concluded

(1) Voluntary renunciation shall mean the final discontinuation of the preparation of a crime or a criminal attempt by a person of his/her own will, where that person has realised that the criminal offence may be concluded.
(2) A person who voluntarily renounced to conclude a criminal offence shall be criminally liable only if the actual act committed by that person comprised elements of any other offence.

"Promising, offering or giving" (active bribery)

15. Section 369 CC uses the words "offering" and "giving". The "offering" was introduced by the 2011 amendments and gives rise to lower sanctions than the "giving" of a bribe. As for the "promising" of a bribe, the authorities indicate that such an act is punishable under sections 14 or 15 CC in conjunction with section 369 CC as preparation of or attempted bribery. There is no case law/court decision confirming this affirmation. It is also to be noted that the preparation of a crime is not incriminated in cases of minor criminal offences and that section 14 CC is therefore not applicable to bribery offences without aggravating circumstances under section 369, paragraphs 1 and 2 CC.

"Any undue advantage"

16. Sections 368 and 369 CC employ the word "bribe". There is no legal definition of this concept. The element "undue" is not explicitly transposed. The authorities indicate that in accordance with the explanations provided by Resolution No. 5 of the Supreme Court, bribery is an acquisitive crime and therefore limited to property (money, valuables and other things), the right to property (documents providing the right to obtain property, use it or to enforce the obligations, etc.) and actions of a proprietary nature (transfer of property benefits, their waiving, waiver of rights to property, free provision of services, resort or travel packages, construction or repair works, etc.). By contrast, services, privileges and benefits that are not of a proprietary nature (e.g. positive coverage in the press, providing a prestigious job, etc.) can not be recognised as a bribe. According to the authorities, in cases of such advantages the provisions of section 364 CC on abuse of authority or office may apply.[17]

17. By contrast, the 2011 legal amendments introduced the concept of "illegal benefit" into the administrative corruption offences (sections 172.2 CAO on "breach of legal restrictions concerning the use of official position" and 172.3 CAO on "offering or giving an illegal benefit") and into the criminal provisions on private sector bribery (sections 368.3 and 368.4 CC) and trading in influence (section 369.2 CC). This concept is defined in the note to the new section

[17] This offence is defined as "the wilful use of authority or official position contrary to the official interests by an official for mercenary motives or other personal benefit or benefit of any third persons, where it causes any significant damage to legally protected rights, freedoms and interests of individual citizens, or State and public interests, or interests of legal entities".

364.1 CC and includes both material and non-material advantages, which are considered "illegal" if the bribe-taker has no legal entitlement to receive them for free or under the minimum market price.[18]

> ***Note to section 364.1 CC:***
>
> *1. For the purposes of sections 364.1, 365.2, 368.2, 368.3, 368.4 and 369.2 of this Code, illegal benefit shall mean money or other property, benefits, privileges, services, non-material assets which are, without any legal entitlement, promised, offered, given or taken for free or under the minimum market price.*
>
> *(…)*

18. The above-mentioned administrative offences only capture illegal benefits whose value does not exceed the tax-free minimum income by more than 100 times (approximately 4,300 EUR). According to the authorities, following the 2011 amendments cases of active bribery lead to criminal liability only if the value of the bribe exceeds this threshold – whereas passive bribery always constitutes a crime.

"Directly or indirectly"

19. The relevant provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. The authorities explain that according to Resolution No. 5 of the Supreme Court and court practice,[19] bribery may also be committed indirectly through an intermediary. They furthermore refer to the general rules on complicity[20] and to the fact that section 368, paragraph 3 and section 369, paragraphs 4 and 5 CC provide for aggravated sanctions for bribery committed upon prior conspiracy by a group of persons or – in the case of active bribery – by an organised group.[21]

"For himself or herself or for anyone else"

20. The provisions on active and passive bribery do not specify whether the advantage must be for the official him/herself (section 369 CC only specifies that the act or omission *by the official* may be for the benefit of the bribe-giver or of a third person). The authorities indicate that according to Supreme Court Resolution No. 5, bribery also occurs in cases where the official receives an advantage not for him/her personally but for the benefit of close persons (relatives, acquaintances, etc.).

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

21. Ukrainian legislation expressly covers both positive acts and omissions by a public official "using his/her authority or official position, in the interests of the person giving the bribe or in the interests of a third person". According to Supreme Court Resolution No. 5, the element "using his/her authority or official position" requires that the official makes use of his/her administrative-

[18] The same definition is contained in section 1 of the Law "On the Principles of Preventing and Combating Corruption".
[19] For example, the authorities refer to a decision by the Berezan District Court of Mykolaiv oblast, case No.1-2 of 5 April 2011. The court convicted two officials who had received a bribe indirectly through an intermediary for passive bribery. The intermediary himself was convicted for participation in passive bribery.
[20] See sections 26 to 31 CC.
[21] These concepts are defined in section 28 CC.

organisational or administrative-economic responsibilities either directly or indirectly through other officials (in case s/he is not authorised to perform the intended act him/herself). Regarding acts which lie outside the scope of competences of the official but which s/he nevertheless performs him/herself, the authorities indicate that in such cases the official would be liable for passive bribery and, if the act committed caused substantial damage to the rights and interests of citizens, the State or legal persons, for using excessive authority or official powers as well (section 365 CC). Finally, as concerns the element "in the interests of the person giving the bribe or in the interests of a third person", the Supreme Court explains that the official act may be performed to the benefit of the bribe-giver or any other natural or legal person.

"Committed intentionally"

22. The authorities indicate that both active and passive bribery can only be committed with intention.

Sanctions

23. Passive bribery offences are punishable by a fine of approximately 21,500 to 32,250 EUR, or by correctional work for up to 1 year or up to 6 months' arrest, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years. Section 368 CC provides for several degrees of aggravated sanctions. The most serious cases are receiving a bribe of a particularly large sum, or by an official in a particularly responsible position, which are punishable by 8 to 12 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years, and with forfeiture of property. Active bribery is punishable by (1) a fine of approximately 4,300 to 10,750 EUR or up to 2 years' restriction of liberty (cases of offering a bribe); or (2) a fine of approximately 10,750 to 32,250 EUR or 2 to 5 years' restriction of liberty (cases of giving a bribe). Section 369 CC provides for several degrees of aggravated sanctions. The most serious cases are giving a bribe to an official in a particularly responsible position, or by an organised group or a participant in such a group, which are punishable by 5 to 10 years' imprisonment, with or without forfeiture of property. It is to be recalled that only the offering, giving and receiving of a bribe constitute completed offences of bribery. By contrast, according to the authorities, promising, requesting and accepting an offer or promise are punishable as preparation of or attempted bribery. Pursuant to section 68 CC, the term of punishment for preparation of a crime or for criminal attempt may not exceed half of the maximum term or two thirds of the heaviest kind of punishment prescribed for the completed offence.

24. The different types of sanctions are defined in sections 51 to 64 CC. "Arrest" is defined as holding a convicted person in custody (namely in arrest houses, in isolated conditions), "restriction of liberty" as holding a person in an open penitentiary institution without isolation from society but under supervision and with compulsory engagement of the convicted person in work, and "imprisonment" as confinement of a convicted person in a penitentiary institution for a specified period of time.

25. According to section 65 CC, in determining the punishment, the court has to take account of the degree of gravity of the committed offence, the character of the perpetrator, the method and motives, the nature and extent of damages as well as mitigating or aggravating circumstances. Mitigating and aggravating circumstances are listed in sections 66 and 67 CC, the former including situations of surrender, sincere repentance, active assistance in detecting the offence and voluntary compensation of losses or repairing of damages.

26. Similar sanctions are available for other comparable criminal offences such as fraud (section 190 CC), misappropriation, embezzlement or conversion of property by abuse of an official post (section 191 CC), receiving illegal benefits by an employee of a State enterprise, institution or organisation (section 354 CC), abuse of authority or office (section 364 CC), excess of authority or official powers (section 365 CC), forgery in office (section 366 CC), neglect of official duty (section 367 CC) or provocation of bribery (section 370 CC).

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

27. The authorities explain that bribery of members of domestic public assemblies is criminalised as follows. Bribery of MPs constitutes aggravated bribery under sections 368, paragraph 4 and 369, paragraph 5 CC – i.e. bribery of "officials in a particularly responsible position" – and bribery of heads and deputy heads of local government organs and of departments, divisions and units of such organs constitutes aggravated bribery under sections 368, paragraph 4 and 369, paragraph 4 CC – i.e. bribery of "officials in a responsible position" –, see the definitions in note no. 2 to section 368 CC. Bribery of other members (and officials) of local self-government bodies are covered by the general definition of an "official" in note no. 1 to section 364 CC and therefore by the basic bribery provisions. The authorities indicate that in 2010, for example, 54 such persons were convicted for passive bribery and one person for active bribery. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of domestic public assemblies.

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

28. Bribery of foreign public officials is covered by sections 368 and 369 CC, as the definition of an "official" in its amended form expressly includes "officials of foreign States" i.e. "persons who occupy positions in a legislative, executive or judicial organ of a foreign State, including members of jury panels, and other persons who perform functions of State on behalf of a foreign State, in particular for a State body or a State enterprise", see note no. 2 to section 364 CC. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of foreign public officials. There is no case law/court decision concerning bribery of foreign public officials.

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

29. Bribery of members of foreign public assemblies is covered by the Ukrainian bribery provisions, as the definition of an "official" in its amended form includes "persons who occupy positions in a legislative, executive or judicial organ of a foreign State", see note no. 2 to section 364 CC. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of foreign public assemblies. There is no case law/court decision concerning bribery of members of foreign public assemblies.

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

30. The 2011 amendments introduced two sections into the CC which criminalise bribery of persons who are not public officials, i.e. (1) section 368.3 CC on commercial bribery of officials of legal entities of private law; and (2) section 368.4 CC on bribery of persons who provide public services, such as auditors, notaries, arbitrators, etc. Before the legal reforms, the general provisions on bribery in the public sector also applied to bribery in the private sector, as the

definition of an "official" in note no. 1 to section 364 CC includes persons who occupy specified positions in private entities.

Section 368.3 CC: Commercial bribery of an official of a legal entity of private law, regardless of its organisational and legal form

(1) Offering, giving or transferring an illegal benefit to an official of a legal entity of private law, regardless of its organisational and legal form, in return for performing or refraining from any action, using his/her authority, in the interests of the person giving or transferring the benefit or in the interests of a third person, is punishable by a fine of 100 to 250 times the tax-free minimum income,[22] or by up to 2 years' restriction of liberty.

(2) The same acts, if repeated, or if committed upon prior conspiracy by a group of persons or by an organised group, is punishable by a fine of 350 to 700 times the tax-free minimum income,[23] or by up to 4 years' restriction of liberty, or by up to 4 years' imprisonment.

(3) Receiving an illegal benefit by an official of a legal entity of private law, regardless of its organisational and legal form, in return for performing or refraining from any action, using his/her authority, in the interests of the person giving or transferring the benefit or in the interests of a third person, is punishable by a fine of 500 to 1000 times the tax-free minimum income,[24] or by up to 5 years' restriction of liberty, or by up to 3 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 2 years.

(4) The acts prescribed in paragraph 3 of this section, if repeated, or if committed upon prior conspiracy by a group of persons, or if accompanied by extortion of an illegal benefit, is punishable by 3 to 7 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years, and with forfeiture of property.

(5) A person having offered, given or transferred an illegal benefit shall be discharged from criminal liability, if s/he was subject to extortion of an illegal benefit or if, following the offer, giving or transfer of the illegal benefit and prior to the instigation of criminal proceedings against the person, s/he voluntarily makes a statement concerning the acts in question to a body authorised by law to instigate criminal proceedings.

Note:

1. *For the purposes of sections 368.3 and 368.4 of this Code, a repeated offence shall mean an offence committed by a person who has previously committed any of the criminal offences laid down in these sections or in sections 368 or 369 of this Code.*
2. *In paragraph 4 of sections 368.3 and 368.4 of this Code, extortion shall mean a request by a person for an illegal benefit accompanied by a threat to perform or refrain from actions, using his/her authority or official position, with respect to the person giving or transferring the illegal benefit, or the wilful creation, by a person performing administrative functions in a legal entity of private law, of conditions in which a person is compelled to give or transfer an illegal benefit in order to prevent harmful consequences with respect to his/her rights and lawful interests.*

[22] Approximately 4,300 to 10,750 EUR.
[23] Approximately 15,050 to 30,100 EUR.
[24] Approximately 21,500 to 43,000 EUR.

Section 368.4 CC: Bribery of a person who provides public services

(1) Offering, giving or transferring an illegal benefit to an auditor, notary, appraiser or other person, who is not a civil servant or a local government official but undertakes professional activities related to the provision of public services, including those of an expert, insolvency practitioner, independent mediator, member of labour arbitration, or arbitrator (when performing these functions), in return for performing or refraining from any action, using his/her authority, in the interests of the person giving or transferring the benefit or in the interests of a third person, is punishable by a fine of 100 to 250 times the tax-free minimum income,[25] or by up to 2 years' restriction of liberty.

(2) The same acts, if repeated, or if committed upon prior conspiracy by a group of persons or by an organised group, is punishable by a fine of 350 to 700 times the tax-free minimum income,[26] or by up to 5 years' restriction of liberty, or by up to 3 years' imprisonment.

(3) Receiving an illegal benefit by an auditor, notary, expert, appraiser, arbitrator or other person who undertakes professional activities related to the provision of public services, or by an independent mediator or member of labour arbitration, in return for performing or refraining from any action, using his/her authority, in the interests of the person giving or transferring the benefit, is punishable by a fine of 750 to 1500 times the tax-free minimum income,[27] or by 2 to 5 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 2 years.

(4) The acts prescribed in paragraph 3 of this section, if repeated, or if committed upon prior conspiracy by a group of persons, or if accompanied by extortion of an illegal benefit, are punishable by 4 to 8 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years, and with forfeiture of property.

(5) A person having offered, given or transferred an illegal benefit shall be discharged from criminal liability, if s/he was subject to extortion of an illegal benefit or if, following the offer, giving or transfer of the illegal benefit and prior to the instigation of criminal proceedings against the person, s/he voluntarily makes a statement concerning the acts in question to a body authorised by law to instigate criminal proceedings.

Elements of the offence

31. The elements described under bribery of domestic public officials largely apply to bribery in the private sector in accordance with the particular elements detailed below. As was mentioned above, sections 363.3 and 368.4 CC employ the concept of "illegal benefit" instead of "bribe". Moreover, they include the element "transferring" an advantage in addition to the "offering" and "giving". According to the authorities, the term "transferring" refers to acts involving intermediaries/third persons.

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

32. Section 363.3 CC uses the words "an official of a legal entity of private law, regardless of its organisational and legal form". Private entities without legal personality are excluded from the scope of this provision. The concept of "official" refers back to the definition given in section 18 CC, which includes persons who perform organisational, managerial, administrative or executive

[25] Approximately 4,300 to 10,750 EUR.
[26] Approximately 15,050 to 30,100 EUR.
[27] Approximately 32,250 to 64,500 EUR.

functions on the basis of special authority mandated "by a duly authorised body or person of an enterprise, institution or organisation". As for section 363.4 CC, its provisions refer to "an auditor, notary, appraiser or other person, who is not a civil servant or a local government official but undertakes professional activities related to the provision of public services, including those of an expert, insolvency practitioner, independent mediator, member of labour arbitration, or arbitrator (when performing these functions)".

"In the course of business activity"; "…in breach of duties"

33. Both sections 363.3 and 368.4 CC refer to actions or omissions by the bribe-taker "using his/her authority, in the interests of the person giving or transferring the benefit or in the interests of a third person". According to the authorities, they do not require that the offence be committed during "business activities" or with "breach of duties". They added that in cases of illegal acts or omissions by the bribe-taker, other offences such as abuse of authority may be applied cumulatively.

Sanctions

34. Under section 368.3 CC, active bribery in the private sector is punishable by a fine of approximately 4,300 to 10,750 EUR, or by up to 2 years' restriction of liberty, and passive bribery is punishable by a fine of approximately 21,500 to 43,000 EUR, or by up to 5 years' restriction of liberty, or by up to 3 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 2 years. More severe sanctions are provided for in aggravated cases, including up to 4 years' or 7 years' imprisonment respectively. Under section 368.4 CC, active bribery is punishable by a fine of approximately 4,300 to 10,750 EUR or by up to 2 years' restriction of liberty, and passive bribery is punishable by a fine of approximately 32,250 to 64,500 EUR, or by 2 to 5 years' imprisonment, with deprivation of the right to occupy certain positions or engage in certain activities for up to 2 years. More severe sanctions are provided for in aggravated cases, including up to 3 years' or 8 years' imprisonment respectively.

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

35. Bribery of officials of international organisations is covered by sections 368 and 369 CC, as the definition of an "official" in its amended form expressly includes "officials of international organisations" i.e. "employees of an international organisation or any other persons authorised by such an organisation to act on its behalf", see note no. 2 to section 364 CC. The authorities indicate that this definition is broad enough to also cover seconded personnel and persons carrying out functions corresponding to those performed by public officials. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of officials of international organisations. There is no case law/court decision concerning bribery of officials of international organisations.

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

36. Bribery of members of international parliamentary assemblies is covered by the Ukrainian bribery provisions, as the definition of an "official" in its amended form expressly includes "members of international parliamentary assemblies in which Ukraine is a participant", see note no. 2 to section 364 CC. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of international parliamentary

assemblies. There is no case law/court decision concerning bribery of members of international parliamentary assemblies.

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

37. Bribery of judges and officials of international courts is covered by sections 368 and 369 CC, as the definition of an "official" in its amended form expressly includes these categories of persons, see note no. 2 to section 364 CC. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of judges and officials of international courts. There is no case law/court decision concerning bribery of judges and officials of international courts.

Trading in influence (Article 12 of ETS 173)

38. Active and passive trading in influence were criminalised by the 2011 legal amendments, under the new provisions of section 369.2 CC.

> ***Section 369.2 CC: Trading in influence***
>
> *(1) Offering or giving an illegal benefit to a person who, in return for such a benefit, offers or promises (agrees) to influence a decision by a person authorised to perform functions of State, is punishable by a fine of 200 to 500 times the tax-free minimum income,[28] or by 2 to 5 years' imprisonment.*
>
> *(2) Receiving an illegal benefit in return for influencing a decision by a person authorised to perform functions of State, or offering to exercise influence in return for the provision of such a benefit, is punishable by a fine of 750 to 1500 times the tax-free minimum income,[29] or by up to 5 years' imprisonment.*
>
> *(3) Receiving an illegal benefit in return for influencing a decision by a person authorised to perform functions of State, if accompanied by extortion of such a benefit, is punishable by 3 to 8 years' imprisonment, with forfeiture of property.*
>
> *Note: Persons authorised to perform functions of State shall mean persons specified in section 4, part 1, paragraphs 1-3 of the Law "On the Principles of Preventing and Combating Corruption".*

Elements of the offence

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

39. This concept is implemented in section 369.2 CC by use of the words "offers or promises (agrees) to influence a decision". The authorities indicate that it is not relevant whether the influence was actually exerted or if it led to the intended result. The term "improper" is not explicitly transposed. The influence must be exerted (or promised to be exerted) on a "person authorised to perform functions of State" in the meaning of section 4, part 1, paragraphs 1-3 of the Law "On the Principles of Preventing and Combating Corruption". These provisions contain extensive lists of categories of persons which include, in particular, domestic public officials at

[28] Approximately 8,600 to 21,500 EUR.
[29] Approximately 32,250 to 64,500 EUR.

national and local level, members of domestic public assemblies, foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts (as well as jurors and arbitrators).

Other constitutive elements

40. The constitutive elements of bribery offences largely apply with regard to active and passive trading in influence. As in the provisions on bribery in the private sector, the concept of "illegal benefit" is used instead of "bribe".

Sanctions

41. Passive trading in influence is punishable by a fine of approximately 32,250 to 64,500 EUR, or by up to 5 years' imprisonment; in aggravated cases, it is punishable by 3 to 8 years' imprisonment, with forfeiture of property. The sanctions applicable to active trading in influence are a fine of approximately 8,600 to 21,500 EUR, or 2 to 5 years' imprisonment. The authorities indicate that contrary to the passive bribery provisions, section 369.2 CC does not foresee the additional penalty of deprivation of the right to occupy certain positions or engage in certain activities, as the influence peddler is not necessarily a public official. However, under the general provision of section 55 CC, the court can impose such an additional penalty having regard to the nature of the offence committed by an official, the character of the person convicted and other circumstances of the case.

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

42. Bribery of domestic arbitrators is covered by the specific new provisions on "bribery of a person who provides public services", as "independent mediators, members of labour arbitration and arbitrators (when performing these functions)" are explicitly mentioned in section 368.4 CC among the categories of persons to whom these provisions apply. The authorities indicate that arbitrators are defined by the Law on the Court of Arbitration as physical persons appointed or elected in accordance with the procedure agreed between the parties or with the procedure established for solving disputes by arbitration. Independent mediators are defined by the Law on the Procedure of Solving Disputes between Employers and Groups of Employees of the Enterprise as persons who act as mediators in solving disputes arising from labour relations between employers and groups of employees working for the same enterprise and who are appointed or elected by joint decision of the parties with the aim of supporting communication between the parties, conducting negotiations and participating in developing jointly accepted decisions by conciliation commissions. Members of labour arbitration are defined by the same law as specialists, experts or other persons involved in the structure and in the decision-making of labour arbitration processes, i.e. a body established by the parties with the aim of resolving labour disputes and initiated by a party or an independent mediator.

43. As explained under bribery in the private sector, the constitutive elements of the public sector bribery offences largely apply with regard to the offence of "bribery of a person who provides public services"; however, section 368.4 CC includes the specific elements "illegal benefit" (instead of "bribe") and "transferring" such a benefit. The applicable sanctions are detailed under bribery in the private sector. There is no case law/court decision concerning bribery of domestic arbitrators.

Bribery of foreign arbitrators (Article 4 of ETS 191)

44. Bribery of foreign arbitrators is covered by sections 368 and 369 CC, as the definition of an "official" in its amended form expressly includes "foreign arbitrators" and "persons authorised to settle civil, commercial or labour disputes in foreign States in alternative ways", see note no. 2 to section 364 CC. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of foreign arbitrators. There is no case law/court decision concerning bribery of foreign arbitrators.

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

45. According to the authorities, the notion of "official" as defined in the note (no. 1) to section 364 CC – including persons who perform the functions of representatives of State power or local-self government – is broad enough to capture domestic jurors. The participation in the Ukrainian justice system of "jurors" and "people's assessors" was introduced by the 1996 Constitution and their status was defined by sections 63 and 57 of the Law on the Judicial System and Status of Judges. "Jurors" are defined as Ukrainian citizens who in situations prescribed by procedural law are engaged in the performance of justice, providing for direct participation of the public in the performance of justice, i.e. members of jury panels, lay persons acting as members of a collegial body with responsibility for deciding on the guilt of an accused person in the framework of a trial. "People's assessors" are defined as Ukrainian citizens who in situations prescribed by procedural law adjudicate cases, providing for direct participation of the public in the performance of justice, i.e. members of court panels trying specified criminal and civil cases together with a judge. According to the authorities, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of domestic jurors. There is no case law/court decision concerning bribery of domestic jurors.

Bribery of foreign jurors (Article 6 of ETS 191)

46. The authorities indicate that bribery of foreign jurors is covered by sections 368 and 369 CC, as the definition of an "official" in its amended form includes "persons who occupy positions in a (…) judicial body of a foreign State, including members of jury panels", see note no. 2 to section 364 CC. According to the authorities, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of foreign jurors. There is no case law/court decision concerning bribery of foreign jurors.

Other questions

Participatory acts

47. Aiding and abetting the commission of all of the above-mentioned criminal offences is criminalised under Ukrainian legislation.[30] The same sanctions can be imposed on aiders and abettors – and on "organisers" who organise or supervise the preparation or commission of a crime – as on the principal offender.

Jurisdiction

48. Under the relevant provisions of the general part of the CC, which apply to all criminal offences, jurisdiction is, firstly, established over acts committed within the territory of Ukraine (principle of

[30] See sections 26 to 31 CC.

territoriality), see section 6 CC which also includes offences which have only begun or been completed in Ukraine.

> ***Section 6 CC: Operation of the law on criminal liability in regard to offences committed on the territory of Ukraine***
>
> *(1) Any person who has committed an offence on the territory of Ukraine shall be criminally liable under this Code.*
> *(2) An offence shall be deemed to have been committed on the territory of Ukraine if it has been initiated, continued, completed or discontinued on the territory of Ukraine.*
> *(3) An offence shall be deemed to have been committed on the territory of Ukraine if the principal to such offence, or at least one of the accomplices, has acted on the territory of Ukraine.*
> *(4) In cases where a diplomatic agent of a foreign State or another citizen who commits an offence on the territory of Ukraine when, under the laws of Ukraine or international treaties the consent to the binding effect of which has been granted by the Parliament of Ukraine the Ukrainian court is not the competent jurisdiction, the issue of his criminal liability shall be settled diplomatically.*

49. As regards offences committed abroad, section 7 CC sets forth the principle that citizens of Ukraine as well as stateless persons permanently residing in Ukraine who commit a criminal act outside the territory of Ukraine are subject to criminal liability unless they have been criminally punished for such acts abroad (principle of nationality). Moreover, on the basis of section 8 CC, foreign citizens and stateless persons not residing permanently in Ukraine who commit a criminal act outside the territory of Ukraine are subject to criminal liability in either of the following two cases: (1) if criminal liability is provided for by international treaties; (2) if such persons have committed grave or particularly grave offences punishable under the CC against the rights and freedoms of Ukrainian citizens or the interests of Ukraine. Since grave offences are defined by section 12 CC as offences punishable by up to 10 years' imprisonment, only the most aggravated cases of bribery in the public sector[31] (and no cases of private sector bribery or trading in influence) are covered by the second part of section 8 CC. Concerning the first part of this provision, relating to criminal liability provided for by international treaties, the authorities affirm that this clause also applies to bribery and trading in influence and covers the obligations set forth in Article 17, paragraph 1.b and 1.c, of the Criminal Law Convention on Corruption. By contrast, legal practitioners interviewed during the on-site visit opined that certain situations envisaged by the aforementioned Article – e.g. bribery committed by a foreigner abroad and involving a Ukrainian public official – would not be covered by the jurisdictional rules of the CC.

> ***Section 7 CC: Operation of the law on criminal liability in regard to offences committed by citizens of Ukraine or stateless persons outside Ukraine***
>
> *(1) Citizens of Ukraine and stateless persons permanently residing in Ukraine, who have committed offences outside Ukraine, shall be criminally liable under this Code, unless otherwise provided by the international treaties of Ukraine, the consent to the binding effect of which has been granted by the Parliament of Ukraine.*
> *(2) Where the persons referred to in the first paragraph of this section have been subject to criminal sanctions for the committed criminal offences outside Ukraine, they shall not be criminally liable for these criminal offences in Ukraine.*

[31] See sections 368, paragraph 3 and 369, paragraph 5 CC.

Section 8 CC: Operation of the law on criminal liability in regard to offences committed by foreign nationals or stateless persons outside Ukraine

Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code as provided for by the international treaties, or if they have committed grave or particularly grave offences punishable under the present Code against rights and freedoms of Ukrainian citizens or interests of Ukraine.

Statute of limitations

50. The period of limitation is determined by the classification of crimes[32] – into minor criminal offences, medium grave offences, grave criminal offences and particularly grave offences – on the basis of the severity of the sanctions which can be imposed for the offence in question.[33] On this basis, the limitation period provided for active and passive bribery offences both in the public and private sectors, as well as for trading in influence is 3 years. If there are aggravating circumstances, the period of limitation increases to 5, 10 or 15 years.

Defences

51. Provision is made for a special defence for active bribery offences committed in the public or in the private sector in two cases, i.e. where the bribe was extorted by the bribe-taker and in cases of voluntary reporting to the authorities:

Section 369, paragraph 6 CC

A person having offered or given a bribe shall be discharged from criminal liability, if s/he was subject to extortion of a bribe or if, after giving the bribe and prior to the instigation of criminal proceedings against the person, s/he voluntarily makes a statement concerning the acts in question to a body authorised by law to instigate criminal proceedings.

Section 368.3, paragraph 5 CC / section 368.4, paragraph 5 CC

A person having offered, given or transferred an illegal benefit shall be discharged from criminal liability, if s/he was subject to extortion of an illegal benefit or if, following the offer, giving or transfer of the illegal benefit and prior to the instigation of criminal proceedings against the person, s/he voluntarily makes a statement concerning the acts in question to a body authorised by law to instigate criminal proceedings.

52. According to the authorities, in the first case the term "extortion" is to be understood in accordance with the definition given in note no. 4 to section 368 CC, i.e. as a request for a bribe "accompanied by a threat to perform or refrain from actions, using his/her authority or official position, which may cause harm to the rights and lawful interests of the person giving the bribe, or the wilful creation by an official of conditions in which a person is compelled to give a bribe in order to prevent harmful consequences with respect to his/her rights and lawful interests." In cases of extortion, the defence provisions do not require that the bribe-giver voluntarily reports to

[32] See section 12 CC.
[33] See section 49 CC.

the competent authority. As concerns the second form of this special defence, the authorities indicate that the denunciation can be made orally or in writing to the police, prosecutors or other public bodies vested with the right to initiate criminal investigations. These authorities are listed in section 98 of the Code of Criminal Procedure (CPC) and include prosecutors, investigators,[34] inquiry bodies[35] and judges. The denunciation by the bribe-giver can be made for any reason unless the offence had already come to the knowledge of the authorities. If the authorities had already learned of the offence before the denunciation but the bribe-giver was unaware of that fact, s/he could still be released from criminal liability.

53. The authorities furthermore indicate that according to the explanations provided by Resolution No. 5 of the Supreme Court, the discharge of the bribe-giver from criminal liability does not mean that there the elements of a crime are absent. The bribe-giver can therefore not be regarded as a victim and cannot claim restitution of the bribe, which is confiscated to the benefit of the State[36] – except where the bribe was extorted from the bribe-giver who then reports to the authorities. According to section 44, paragraph 2 CC the court has exclusive jurisdiction over relasing a person from criminal liability. The authorities explain that in cases of corruption where the conditions for the special defence are fulfilled, the prosecutor – or the investigator upon approval by the prosecutor – must send the criminal case to the court together with a petition to close the case rather than indict. According to Resolution No. 5 of the Supreme Court, the petition must contain evidence of the commission of the crime and of the grounds for releasing the bribe-giver from criminal liability. In such cases, the bribe-giver does not face any charges or conviction. The decision on his/her discharge from criminal liability may also be taken by the Court of Appeal if it finds the relevant circumstances in the reasoning provided at the appeal hearing.

Statistics

54. The authorities have provided the following data on the number of detected crimes, on the number of cases considered by the courts and on the number of administrative protocols on corruption during the period 2008-2010, i.e. before the 2011 legal amendments; during this period, traffic in influence was not criminalised and bribery in the private sector was criminalised under the general bribery provisions (sections 368 and 369 CC).

Information on the number of detected crimes

Section of the CC	2008	2009	2010 (during 11 months)
Section 368 ***Taking a bribe***	1910	1855	2530
Section 369 ***Giving a bribe***	386	247	414

[34] I.e. investigators from the prosecution service, the police, the tax police and the security service, see section 102 CPC.
[35] *Inter alia*, the police, the tax police, the security service and chiefs of divisions of the military service of law and order in the armed forces of Ukraine, see section 101 CPC.
[36] See section 81, paragraph 4 CPC.

Information on the number of cases considered by the courts

Section of the CC	2008		2009		2010	
	Number of persons	Number of sentences	Number of persons	Number of sentences	Number of persons	Number of sentences
Section 368 ***Taking a bribe***	543	658	612	728	774	964
Section 369 ***Giving a bribe***	149	--	78	--	57	--
Section 370 ***Provocation of bribery***	--	--	--	--	--	--

Information on the number of administrative protocols on corruption

2008	2009	2010
2200	1423	1477

IV. ANALYSIS

55. In Ukraine, bribery in the public and private sectors as well as trading in influence are criminalised both in their active and passive form. The Criminal Code (CC) has been recently amended reportedly to bring the CC closer to international standards in the anti-corruption arena, in particular those of the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) and its Additional Protocol (ETS 191) which entered into force in respect of Ukraine in March 2010. Law No. 3207-VI "On amendments to several legislative acts concerning liability for corruption offences", which was adopted – together with Law No. 3206-VI "On the Principles of Preventing and Combating Corruption" – on 7 April 2011 and entered into force on 1 July 2011, introduced some changes to the definition of public sector bribery offences and to the available sanctions, a redefinition of the concept of "official" employed in the corruption-related provisions – including, in particular, foreign and international public officials –, the criminalisation of trading in influence and the introduction of specific provisions on private sector bribery. The GET notes, however, that these amendments are incomplete and can only be seen as a first step towards implementing the standards of the Convention. In some respects, they have even added yet more incongruity to the terminology used in the corruption-related provisions. In the firm opinion of the GET, a more comprehensive revision is needed in order to remove any ambiguity or loopholes in the legal framework and its implementation.

56. The authorities base their interpretation of Ukrainian bribery law primarily on Resolution No. 5 of the Plenum of the Supreme Court of 26 April 2002 "On the judicial practice in bribery cases" which was aimed at ensuring uniform and proper application of the law, pointing out that while the resolution has no binding force on other courts, the latter usually comply with it. The GET takes due note of this resolution to the extent to which it concerns legal concepts which have not been changed by the 2011 amendments. The GET wishes to stress that the latest reform of the CC was not yet in force at the time of the on-site visit. The amended provisions are therefore new to practitioners and yet to be tested. The GET carefully explored this state of affairs with the

interlocutors met and noted that uniform interpretation of some key concepts of corruption offences could possibly be expected from developing court practice, a possible new resolution replacing Resolution No. 5 of the Supreme Court[37] or other tools of interpretative guidance. That said, the GET considers that the actual wording of the legislation on bribery must be unambiguous and a clear, foreseeable, coherent and comprehensive legal framework put in place, in keeping with the Convention. The current conceptual divergences and shortcomings identified in the corruption-related provisions – which will be explained further below – may seriously hamper legal certainty, to the detriment not only of practitioners, but also the public at large.

57. A particular feature of Ukraine's legal framework is the existence of two parallel systems of corruption offences, i.e. the criminal and the administrative systems. Under the CC, bribery in the public sector is criminalised by virtue of sections 368 CC (passive bribery) and 369 CC (active bribery). In addition, following the 2011 amendments, the Code of Administrative Offences (CAO) contains a specific chapter (13-A) on "administrative corruption offences" (sections 172.2 to 172.9 CAO). The GET was concerned to note that legal practitioners and other interlocutors interviewed were not able to clearly determine the dividing line between both systems. In this connection, it recalls the concerns expressed by GRECO, in its Joint First and Second Round Evaluation Report on Ukraine, that the existence of such parallel systems afforded opportunities for manipulation, for example, to escape from the justice process.[38] GRECO had therefore recommended "*to review the system of administrative liability for corruption in order to clearly establish that cases of corruption are to be treated as criminal offences as a main rule, or, at the very least to establish a clear cut distinction between the requirements for applying these two distinct procedures".* In the Addendum to the corresponding Compliance Report (May 2011), GRECO concluded that this recommendation had not been implemented,[39] given that the 2011 amendments had developed the administrative system even further and failed to ensure that, in practice, cases of corruption are to be treated as criminal offences as a main rule. As the Third Evaluation Round focuses on the criminalisation of corruption, the GET refrains from further examining the administrative corruption offences which can not be regarded as a proper implementation of the requirements of the Convention.

58. Turning more in detail to the criminal legislation in place, the GET notes, firstly, that the term "official" is used to determine the possible perpetrators of corruption offences. This term is defined in the "note" to section 364 CC which has – according to the authorities – the same legal force as other parts of the CC, and in section 18 CC on criminal offenders which is identical in this respect. The GET welcomes the clarity with which this definition in its amended form covers foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts as well as foreign jurors and arbitrators (see note no. 2). As regards domestic public officials, note no. 1 uses a more functional approach, referring to (1) persons who perform the functions of representatives of State power or local-self government and (2) persons who occupy in organs of State power, organs of local self-government etc. positions related to organisational, managerial, administrative or executive functions or perform such functions on the

[37] In this connection, it is to be noted that the competence for adopting such resolutions of recommendational nature has recently been transferred from the Supreme Court to the High Specialised Court on civil and criminal matters which became operational in November 2010.

[38] Cf. GRECO's Joint First and Second Round Evaluation Report on Ukraine, document Greco Eval I-II Rep (2006) 2E, paragraph 34.

[39] Cf. the Addendum to GRECO's Joint First and Second Round Compliance Report on Ukraine, document Greco RC-I-II (2009) 2E Addendum Ukraine, paragraphs 14 to 18. – In the Addendum, GRECO asked Ukraine to submit additional information on the implementation of this and several other recommendations by 31 December 2011.

basis of special authority. The GET is satisfied with the explanation provided by the authorities that this definition covers mayors, ministers, prosecutors, judges, jurors as well as members of Parliament and of local assemblies – most of which are expressly included in the sub-categories of "officials in a responsible position" and "officials in a particularly responsible position" as defined in note no. 2 to section 368 CC. Moreover, persons providing public services, including domestic arbitrators, are captured by the new specific bribery provisions of section 368.4 CC.

59. As regards 'ordinary' public officials, the GET notes that according to the explanations provided by Resolution No. 5 of the Supreme Court, the concept of "official" implies a certain degree of responsibility or of decision-making authority. However, the authorities affirm that following the recent legal reforms the definition of an "official" – in particular, the element "persons who perform the functions of representatives of State power or local-self government" – is to be understood by reference to section 4, part 1, paragraph 1 of the Law "On the Principles of Preventing and Combating Corruption" which contains an extensive list of "persons authorised to perform functions of State or of organs of local self-government", including both civil servants and other public officials regardless of any organisational, managerial, administrative or executive functions. Although the GET finds the system of definitions of civil servants and employees in the public sector under various legal acts unnecessarily complicated,[40] it has no reason to doubt the explanations provided by the authorities according to which the concept of "official" employed in the bribery provisions of the CC is consistent with the concept used in the Law "On the Principles of Preventing and Combating Corruption" and that it covers all categories of public officials in the meaning of the Convention.

60. Before the legal reforms, the general provisions on bribery in the public sector also applied to bribery in the private sector, as the definition of an "official" in note no. 1 to section 364 CC includes persons who occupy specified positions in private entities. By contrast, following the 2011 reform, bribery of persons who are not public officials is now criminalised by virtue of two specific sections: (1) section 368.3 CC on "commercial bribery of an official of a legal entity of private law, regardless of its organisational and legal form" and (2) section 368.4 CC on "bribery of a person who provides public services", such as an auditor, notary, arbitrator etc. The authorities explain that private entities without legal personality are excluded from the scope of section 368.3 CC. Bribery of persons working for entities without legal personality (including persons working for natural persons) is therefore only criminalised on condition that they provide public services in the meaning of section 368.4 CC. The authorities furthermore indicate that the concept of "official" in section 363.3 CC refers back to the definition given in section 18 CC. This definition includes persons who perform organisational, managerial, administrative or executive functions on the basis of special authority mandated "by a duly authorised body or person of an enterprise, institution or organisation". Persons who do not perform such specific functions are therefore not captured by section 368.3 CC. By contrast, Articles 7 and 8 of the Convention unambiguously refer to "any persons who direct or work for, in any capacity, private sector entities" without any restrictions as to the functions or responsibilities of the person[41] or the legal status of the entity concerned.[42] Consequently, the GET recommends **to amend current criminal legislation in respect of bribery in the private sector in order to clearly cover the**

[40] In particular, the definition of "officials in a (particularly) responsible position" in note no. 2 to section 368 CC refers to the Law on Civil Service and the corruption provisions of the CAO refer to the Law "On the Principles of Preventing and Combating Corruption" (see, for example, the notes to sections 172.2, 172.3 and 172.5 CAO).

[41] Including persons in auxiliary positions and persons such as consultants or commercial agents working for the private entity without having the status of employee: see paragraph 54 of the Explanatory Report on the Criminal Law Convention on Corruption.

[42] Including entities with no legal personality and individuals: see paragraph 54 of the Explanatory Report on the Criminal Law Convention on Corruption.

full range of persons who direct or work for, in any capacity, any private sector entity as provided for in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173). According to the authorities, the provisions on private sector bribery do not require that the offence be committed during "business activities" or with "breach of duties". Further elements of these provisions are dealt with together with the other corruption offences in the paragraphs below.

61. The GET welcomes the criminalisation of active and passive trading in influence by virtue of the new section 369.2 CC. Possible perpetrators of these offences may be any persons, officials or not. The – intended or real – influence must be directed towards decision-making by "persons authorised to perform functions of State". The note to section 369.2 CC makes it clear that the latter concept is to be understood by reference to the definition given in section 4, part 1, paragraphs 1-3 of the Law "On the Principles of Preventing and Combating Corruption". This definition includes an extensive list of persons – in particular domestic, foreign and international officials. It would therefore appear that the requirements of Article 12 of the Convention in this respect are met. Moreover, the GET is satisfied with the authorities' explanations that it is not relevant whether the influence on decision-making by such persons was actually exerted or if it led to the intended result. Further elements of the trading in influence provisions are dealt with together with the other corruption offences in the paragraphs below.

62. As to the various forms of corrupt behaviour, section 369 CC on active bribery in the public sector and section 369.2 CC on trading in influence use the terms "giving" and "offering". The element "offering" was introduced by the 2011 legal amendments, whereas the element "promising" remains absent. The same is true for the provisions of sections 368.3 and 368.4 CC on bribery in the private sector which employ the terms "giving", "offering" and "transferring". According to the authorities, the term "transferring" covers acts involving intermediaries/third persons. On the passive side, section 368 CC on passive bribery in the public sector as well as sections 368.3, 368.4 and 369.2 CC only mention the "receiving". "Requesting" is mentioned only in the meaning of extortion, as an aggravating circumstance but not as stand-alone conduct, in the bribery provisions – but not in the trading in influence provisions. The elements of a simple "request" of an advantage and "acceptance of an offer or promise" are absent. The authorities claim that such acts are punishable under sections 14 or 15 CC in conjunction with the corruption provisions as preparation of a crime or as attempt, but there is no case law or court decision supporting this view. They refer to Resolution No. 5 of the Supreme Court, according to which the unsuccessful endeavour by an official to extort a bribe may qualify as attempted bribery, depending on the merits of the case. Legal practitioners interviewed on site agreed with the authorities but could not report on specific cases. Observers explained to the GET that such acts as, for example, requests for a bribe might be punishable as the preparation of a crime, but not as attempted bribery which would require more concrete acts (e.g. the bribe-giver and bribe-taker agree on the transfer of an advantage but the bribe-taker falls ill and is physically hindered from taking the bribe).

63. The GET has serious doubts that sections 14 and 15 CC cover in an unambiguous manner the promise, request and acceptance of an offer or promise as referred to in Articles 2, 3, 7, 8 and 12 of the Convention. In particular, under these provisions uncompleted crimes are punishable only if the perpetrator has not voluntarily abandoned the performance of his or her acts.[43] This condition will almost certainly not be fulfilled in cases where a person withdraws his or her offer or promise, e.g. before it is clearly refused by the bribe-taker. Furthermore, it must be noted that in cases of

[43] See section 17 CC.

uncompleted crimes the maximum sanctions are reduced.[44] The punishment for crime preparation or attempted crime cannot exceed half of the maximum limit or two thirds of the maximum limit of the severest punishment provided for the completed crime respectively. The GET has misgivings about the considerable reduction of penalties in the case of several basic types of corrupt conduct. Moreover, the preparation of a crime is not incriminated in cases of minor criminal offences[45] and section 14 CC is therefore not applicable to bribery offences in the absence of aggravating circumstances.[46] Finally, the GET wishes to stress that under the Convention, corruption offences are to be considered completed once any of the above-mentioned unilateral acts is carried out by the bribe-giver or the bribe-taker. The GET therefore takes the view that the promise, the request and the acceptance of an offer or promise need to be explicitly criminalised in order to clearly stigmatise such acts, submit them to the same rules as the giving, offering and receiving of a bribe and avoid loopholes in the legal framework. In this core area, bribery law must be unambiguous. In light of the foregoing, the GET recommends **to introduce the concepts of "promising" and "requesting" an advantage and "accepting an offer or a promise" in the provisions of the Criminal Code on active and passive bribery in the public and private sectors and trading in influence.**

64. The GET also notes that the concept of undue advantage as understood by the Convention is transposed inconsistently in the relevant provisions of Ukrainian bribery law. Firstly, sections 368 and 369 CC employ the notion of a "bribe" which is not defined by law. The authorities indicate that in accordance with the explanations provided by Resolution No. 5 of the Supreme Court, bribery is an acquisitive crime and therefore limited to property, property rights, etc. By contrast, services, privileges and benefits that are not of a proprietary nature – e.g. positive coverage in the press, providing a prestigious job, etc. – cannot be recognised as a bribe. According to the authorities, in cases of such advantages the provisions of section 364 CC on abuse of authority or office may apply. However, the GET is not convinced that all cases of bribery in the meaning of Articles 2 and 3 of the Convention would indeed be covered by this offence which contains several restrictive elements as compared to the bribery provisions, *inter alia*, the causing of significant damage to legally protected rights, freedoms and interests of individual citizens, or State and public interests, or interests of legal entities. Secondly, it is to be noted that the 2011 legal amendments introduced the concept of "illegal benefit" into the CC provisions on private sector bribery and trading in influence. This concept is defined in the note to the new section 364.1 CC and includes "money or other property, benefits, privileges, services, non-material assets", which are considered "illegal" if the bribe-taker has no legal entitlement to receive them for free or under the minimum market price.[47] It would therefore appear that, as far as the provisions on private sector bribery and trading in influence are concerned, the definition given is broad enough to cover any material and non-material advantages, whether such benefits have an identifiable market value or not. That said, the GET has misgivings about the use of different concepts in the aforementioned corruption provisions, namely those on public sector bribery on the one hand and those on private sector bribery and trading in influence on the other. It wishes to stress how important it is for the sake of consistency, clarity and legal security that all corruption offences contain the same basic elements. It will therefore be necessary to align the bribery provisions to the standards established by the Convention so as to clearly cover any kind of (undue) advantage.

[44] See section 68 CC.

[45] Minor criminal offences are defined as offences punishable by up to two years' imprisonment or a more lenient penalty, see section 12, paragraph 2 CC.

[46] I.e. bribery offences under sections 368, paragraph 1, 368.3, paragraph 1, 368.4, paragraph 1 and 369, paragraphs 1 and 2 CC.

[47] The same concept is used in the administrative corruption offences and the same definition is contained in section 1 of the Law "On the Principles of Preventing and Combating Corruption".

65. Another area of concern is related to the parallel existence of criminal and administrative corruption offences, mentioned above. Following the 2011 reform, some of the corruption offences under the CAO refer to a value threshold of 100 times the tax-free minimum income (approximately 4,300 EUR), *inter alia*, section 172.3 CAO on "offering or promising an illegal benefit". According to the authorities, active bribery therefore constitutes a criminal offence only if the value of the bribe exceeds this threshold – whereas cases involving smaller amounts would only lead to administrative liability. As indicated above, the GET will not analyse in detail the administrative legislation which does not fall within the scope of the Third Evaluation Round. However, it must stress that the Convention unequivocally requires that acts of bribery involving any undue advantage be established as criminal offences – the element "undue" excluding only advantages permitted by law, gifts of very low value, etc.[48] The GET is of the firm opinion that this requirement is not fulfilled when all corruption acts involving advantages of a value of up to 4,300 EUR are considered as mere administrative offences, as this amount probably represents several times the monthly salary of many public officials in Ukraine. At the same time, the GET was concerned to note significant confusion among its interlocutors about the dividing line between criminal and administrative liability. Some referred to the above-mentioned value threshold – sometimes without distinguishing between active and passive bribery, as did the authorities – whereas others pointed to further distinctive elements such as the official act or omission which is not generally required under CAO provisions. Against this background, it is obvious that the situation needs to be clarified by law in order to ensure that all corruption provisions of the CC cover clearly any form of benefit, in line with the concept of "undue advantage" used in the Convention. Consequently, the GET recommends **to take the legislative measures necessary to ensure that the provisions of the Criminal Code on active and passive bribery in the public sector cover clearly any form of (undue) advantage (in the meaning of the Criminal Law Convention on Corruption, ETS 173), including material and non-material advantages – whether they have an identifiable market value or not – and advantages of low value.**

66. The relevant provisions contained in the CC do not expressly provide for indirect commission of corruption-related offences, i.e. bribery or trading in influence committed through intermediaries. However, the authorities state that according to Resolution No. 5 of the Supreme Court and court practice,[49] situations involving indirect commission of corruption offences are criminalised. They refer, in this respect, to the general rules of the CC on complicity. In particular, section 27, paragraph 2 CC makes it clear that criminal offences under the CC can be committed by the principal offender "directly or through other persons, who cannot be criminally liable".[50] If the intermediary knows about the bribery, s/he is regarded as an accomplice pursuant to section 27 CC. In the absence of any indications to the contrary, the GET has no reason to doubt the explanations provided by the authorities.

67. As regards the recipients of the advantage, the provisions on bribery and trading in influence do not specify whether the advantage must be for the official or influence peddler him/herself or may be intended for a third party as well. The wording of the relevant provisions raises serious doubts as to whether such offences are criminalised where the beneficiary of the advantage is a third person, e.g. where the official or influence peddler would solicit an advantage for one of his/her relatives, a political party or a company. The authorities refer in this connection to aggravated

[48] See paragraph 38 of the Explanatory Report on the Criminal Law Convention on Corruption.

[49] For example, the authorities refer to a decision by the Berezan District Court of Mykolaiv oblast, case No.1-2 of 5 April 2011. The court convicted two officials who had received a bribe indirectly through an intermediary for passive bribery. The intermediary himself was convicted for participation in passive bribery.

[50] In addition, the authorities refer to section 28 CC which regulates offences committed "upon prior conspiracy by a group of persons" (under the corruption provisions, such cases constitute agravated cases of bribery).

cases of bribery committed upon prior conspiracy by a group of persons or by an organised group, which are irrelevant to the question of third party beneficiaries. They furthermore indicate that according to Resolution No. 5 of the Supreme Court, bribery also occurs in cases where the official receives an advantage not for him/her personally but for the benefit of close persons (relatives, acquaintances, etc.). The GET is concerned, however, that this formulation unnecessarily narrows down the requirement of the Convention which more broadly refers to an advantage "for himself or herself or for anyone else". Moreover, it is to be noted that the new sections 172.2 and 172.3 CAO explicitly include the concept of a third party beneficiary in the administrative corruption offences. The GET must stress again how important it is for the sake of consistency and clarity that all corruption offences contain the same basic elements. In this connection, it should also be noted that the new provisions on bribery in the private sector contain the element "transferring" an illegal benefit which, according to the authorities, is meant to cover cases involving intermediaries or third party beneficiaries. However, such an understanding of this additional element, which is absent from all the other corruption-related offences, was not clearly confirmed during the on-site visit.[51] In light of the above, and in order to establish a fully coherent legal framework, in conformity with Articles 2, 3, 7, 8 and 12 of the Convention, the GET recommends **to ensure that the criminal offences of active and passive bribery in the public and private sectors and trading in influence are construed in such a way as to cover, unambiguously, instances where the advantage is not intended for the official him/herself but for a third person, whether natural or legal.**

68. The provisions on bribery in the public and private sectors contain some extra elements which are not mentioned in the Convention but which, according to the authorities, do not entail any restriction to the criminalisation of bribery. In particular, the relevant provisions refer to positive acts or omissions by a public official "using his/her authority or official position, in the interests of the person giving the bribe or in the interests of a third person". It was explained to the GET, on the basis of Supreme Court Resolution No. 5, that the element "using his/her authority or official position" is to be understood as making use of his/her administrative-organisational or administrative-economic responsibilities either directly or indirectly through other officials and that an official who performs acts lying outside his/her scope of competences would be liable for passive bribery. Moreover, if the act committed caused substantial damage to the rights and interests of citizens, the State or legal persons, the official concerned could also be prosecuted for using excessive authority or official powers (section 365 CC). Finally, as concerns the element "in the interests of the person giving the bribe or in the interests of a third person", the Supreme Court indicates that the official act may be performed to the benefit of the bribe-giver or any other natural or legal person. Although this element is not mentioned in the Convention, the GET has no reasons to doubt the explanations provided by the authorities according to which this element does not contain any restriction to the scope of the bribery provisions.

69. Notwithstanding the rather high sanctions available for *aggravated* cases of bribery and trading in influence (e.g. 8 to 12 years' imprisonment for passive bribery committed by receiving a bribe of a particularly large sum, or by an official in a particularly responsible position), the GET is concerned about the low level of penalties provided for *basic bribery offences* i.e. bribery offences without aggravating circumstances. In particular, basic passive bribery offences committed in the public sector are punishable by not more than 6 months' "arrest"[52] and basic active bribery offences by not more than 2 years' "restriction of liberty" (cases of "offering" a bribe) or 5 years'

[51] Some of the GET's interlocutors opined that the element of "transferring" an illegal benefit only leads to criminal liability of the intermediary him/herself but not of the person using him or her.
[52] See section 368, paragraph 1 CC.

restriction of liberty (cases of "giving" a bribe).[53] Basic active bribery offences committed in the private sector are punishable by up to 2 years' restriction of liberty.[54] It is to be noted that "arrest" is defined as holding a convicted person in custody (namely in arrest houses, in isolated conditions) and "restriction of liberty" as holding a person in an open penitentiary institution without isolation from society but under supervision and with compulsory engagement of the convicted person in work – as opposed to "imprisonment" i.e. the confinement of a convicted person in a penitentiary institution for a specified period of time. Under Ukrainian law extradition is granted only for offences which are punishable by imprisonment for a maximum period of not less than 1 year or by a more severe penalty[55] – which excludes the above-mentioned basic bribery offences, contrary to the requirements of Article 19, paragraph 1 of the Convention. In addition to these shortcomings, the GET has misgivings about the fact that under section 369 CC the "offering" of a bribe is subject to less severe sanctions than the "giving" and that an increase in the level of sanctions in aggravated cases is only provided for the "giving" of a bribe. The GET is of the firm opinion that such different treatment of basic forms of corrupt behaviour is not in line with the standards established by the Convention which calls for effective, proportionate and dissuasive sanctions for all corruption acts. In light of the foregoing, the GET recommends **to increase in a consistent manner the criminal sanctions available for basic offences of active and passive bribery in the public and private sectors and to ensure full compliance with Article 19, paragraph 1 of the Criminal Law Convention on Corruption (ETS 173).**

70. The bribe-giver is exempted from punishment in cases of active bribery in the public as well as the private sector if the bribe is extorted from him/her or the latter turns himself or herself in.[56] During the visit, the GET was able to clarify several specific questions relating to this special defence. It emerged from the interviews that in the second case – effective regret – the defence may be applied in situations where the bribe-giver reports the offence either before it is discovered or before he or she learns that the offence has already been discovered. Furthermore, the authorities explained that according to the general rules on confiscation of proceeds of crime, in cases of effective regret the bribe is not returned to the bribe-giver but is mandatorily confiscated. Finally, it was indicated that the decision on release from criminal liability is in principle taken by the court upon petition by the public prosecutor. If the conditions of the defence are met, the prosecutor may not indict the bribe-giver but has to request the closing of the case.

71. The GET takes note of the decision by the authorities to maintain this tool for the purpose of stimulating reporting which, according to several interlocutors, needs to be actively encouraged in Ukraine. The GET does, however, have misgivings about the defence provisions in their present form, in particular about the automatic nature of the exemption from liability. There is no possibility for the prosecutor to take into consideration the particular situation at stake, for example, the motives that the perpetrator may have for reporting the offence and invoking effective regret. In principle, very serious cases of active corruption could go totally unpunished by reference to this defence. The effective regret provisions apply in respect of the bribe-giver, whether or not the initiative for committing the offence comes from himself or herself; s/he could even act as an instigator and afterwards be exonerated, as a result of having reported the crime. The GET notes that this tool could be misused by the bribe-giver, for example as a means of exerting pressure on the bribe-taker to obtain further advantages, or in situations where a bribery

[53] See section 369, paragraphs 1 and 2 CC.
[54] See sections 368.3, paragraph 1 and 368.4, paragraph 1 CC.
[55] See section 451 of the Criminal Procedure Code. Accordingly, Ukraine has made a reservation to Article 2 of the European Convention on Extradition (ETS 024), according to which "Ukraine shall grant extradition only for offences which are punishable by imprisonment for a maximum period of not less than 1 year or by a more severe penalty."
[56] See sections 368.3, paragraph 5, 368.4, paragraph 5 and 369, paragraph 6 CC.

offence is reported long after it was committed, since there is no statutory time-limit (it is even sufficient that the confession occurs after the authorities became aware of the offence, if the informer is unaware of that fact). The GET is all the more concerned about the defence provisions in their present broad form as according to statistics submitted no convictions for active bribery have been secured at all during the last three years. According to several interlocutors met on site, the bribe-giver is generally treated as a victim and the active bribery provisions are therefore rarely applied.[57] In the light of these concerns and in the absence of safeguards against misuse of the defence of effective regret in the present context (e.g. immediate reporting of the offence, limitation of the defence of effective regret to cases where the offender was solicited), the GET recommends **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery who report to law enforcement authorities.**

72. The jurisdictional principles of territoriality and nationality apply to all bribery and trading in influence offences. As regards offences committed abroad, the provisions of section 7 CC establish jurisdiction over criminal offences committed by citizens of Ukraine and stateless persons permanently residing in Ukraine, without establishing a dual criminality requirement. The GET considers that the above-mentioned jurisdictional rules are fairly broad. That said, the GET notes, firstly, that the Convention not only requires jurisdiction for offences committed by nationals abroad but also for offences committed abroad by public officials and members of domestic public assemblies of member States – i.e. not necessarily nationals (Article 17, paragraph 1.b). The authorities indicated, however, that such situations could not arise as under the legislation of Ukraine all public officials and members of national or local public assemblies have to be citizens of Ukraine. The GET accepts this explanation but wishes to stress that, in the case of future legislative changes to this nationality requirement for public officials, the jurisdictional rules would have to be adjusted accordingly.

73. Secondly, the GET wishes to draw attention to the fact that Article 17, paragraph 1.c of the Convention requires jurisdiction for offences *involving* domestic public officials, members of domestic public assemblies and nationals who are, at the same time, members of international parliamentary assemblies, officials of international organisations or judges or officials of international courts. It would appear that section 8 CC covers some but not all of the relevant cases. This provision establishes jurisdiction over offences committed abroad by foreigners or stateless persons (1) if criminal liability is provided for by international treaties or (2) in the case of grave or particularly grave offences directed against rights and freedoms of Ukrainian citizens or the interests of Ukraine. Since grave offences are defined by section 12 CC as offences punishable by up to 10 years' imprisonment, only the most aggravated cases of bribery in the public sector[58] (and no cases of private sector bribery or trading in influence) are covered by the second part of section 8 CC. Concerning the first part of section 8 CC, relating to criminal liability provided for by international treaties, the authorities claim that these terms would apply to Ukraine's obligations under Article 17, paragraph 1.c of the Convention. They affirm that the Convention is directly applicable, on the basis of section 19 of the Law on International Treaties according to which international treaties of a binding nature are part of domestic legislation and are also to be applied in cases of legal conflicts with domestic legislation. By contrast, legal practitioners interviewed during the on-site visit opined that certain situations envisaged by the aforementioned Article of the Convention (e.g. bribery committed by a foreigner abroad and

[57] According to further statistics submitted by the authorities, during the period January 2009 to March 2011 2902 out of 3228 cases submitted to court under sections 368 to 370 CC concerned section 368 CC. In other words, passive bribery accounted for 89.9%.

[58] See sections 368, paragraph 3 and 369, paragraph 5 CC.

involving a Ukrainian public official) would not be covered by the jurisdictional rules of the CC. In the view of the GET, the Criminal Law Convention is not a self-executing treaty and as such does not "provide" for criminal liability, as supposed by section 8 CC. Consequently, the GET can only conclude that the legislation of Ukraine is not fully compatible with Article 17, paragraph 1.c of the Convention and it therefore recommends **to ensure that Ukraine has jurisdiction over all bribery and trading in influence offences committed abroad by non-citizens, involving Ukrainian public officials, members of Ukrainian public assemblies, Ukrainian officials of international organisations, Ukrainian members of international parliamentary assemblies and Ukrainian judges or officials of international courts.**

74. Finally, the GET wishes to stress that necessary (current and future) legislative reforms should be coupled with tangible measures to support their practical implementation. For it emerged from the different interviews held during the on-site visit that the authorities who are to apply the law are not always well versed in the existing legislation (see the paragraphs above) and that its effective application remains a matter of concern, with prosecution and adjudication of corruption offences mainly focusing on petty corruption cases, in particular through the administrative procedure. The GET is highly concerned that during the period 2008-2010 no convictions for active bribery were secured at all. Bearing in mind, firstly, the specific situation in Ukraine where corruption is perceived as being a worrying phenomenon and, secondly, the current legal amendments, the GET considers that further efforts are necessary with regard to the implementation in practice of the corruption provisions. Such practical measures could include, in particular, specialised training, provision of interpretative guidance, awareness raising initiatives and case management supervision, aimed at ensuring that full use is made of the criminal law provisions on the offences of bribery and trading in influence in practice.

V. CONCLUSIONS

75. The legal framework of Ukraine for the criminalisation of bribery and trading in influence was amended in April 2011 with the aim of aligning the national legislation with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Despite some important improvements such as the coverage of foreign and international officials and the criminalisation of trading in influence, Law No. 3207-VI "On amendments to several legislative acts concerning liability for corruption offences" has failed to achieve this goal. The current amendments are incomplete and, in some respects, they have even added yet more incongruity to the terminology used in the corruption-related provisions. A more comprehensive revision is needed in order to remove any ambiguity or loopholes which exist in the legal framework and its implementation. At present, the concept of a "bribe" as contained in the provisions on bribery in the public sector is not broad enough to capture any non-material advantages. The promise of, and request for, an advantage as well as the acceptance of an offer or a promise of such an advantage do not constitute completed criminal offences. Advantages given or offered to a third party are not sufficiently taken into account. The criminalisation of bribery in the private sector – which does not cover all persons working in any type of private sector entity – and of trading in influence reveals several lacunae, partly identical to those identified in the public sector bribery provisions. Improvements are also necessary as regards the level and consistency of sanctions. Furthermore, the possibility provided by the special defence of effective regret to exempt the bribe-giver who voluntarily declares the offence should be reviewed in order to limit the risks of abuse. Given the seriousness of the problem of corruption in Ukraine, it is crucial to keep the reform of the legal framework high on the political agenda and to remove the remaining shortcomings. Moreover, measures need to be taken to enhance the implementation of the criminal legislation which suffers from a series of inconsistencies as identified in the present

report and whose effectiveness is hampered by the existence of a parallel system of administrative corruption offences.

76. In view of the above, GRECO addresses the following recommendations to Ukraine:

i. **to amend current criminal legislation in respect of bribery in the private sector in order to clearly cover the full range of persons who direct or work for, in any capacity, any private sector entity as provided for in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 60);

ii. **to introduce the concepts of "promising" and "requesting" an advantage and "accepting an offer or a promise" in the provisions of the Criminal Code on active and passive bribery in the public and private sectors and trading in influence** (paragraph 63);

iii. **to take the legislative measures necessary to ensure that the provisions of the Criminal Code on active and passive bribery in the public sector cover clearly any form of (undue) advantage (in the meaning of the Criminal Law Convention on Corruption, ETS 173), including material and non-material advantages – whether they have an identifiable market value or not – and advantages of low value** (paragraph 65);

iv. **to ensure that the criminal offences of active and passive bribery in the public and private sectors and trading in influence are construed in such a way as to cover, unambiguously, instances where the advantage is not intended for the official him/herself but for a third person, whether natural or legal** (paragraph 67);

v. **to increase in a consistent manner the criminal sanctions available for basic offences of active and passive bribery in the public and private sectors and to ensure full compliance with Article 19, paragraph 1 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 69);

vi. **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery who report to law enforcement authorities** (paragraph 71);

vii. **to ensure that Ukraine has jurisdiction over all bribery and trading in influence offences committed abroad by non-citizens, involving Ukrainian public officials, members of Ukrainian public assemblies, Ukrainian officials of international organisations, Ukrainian members of international parliamentary assemblies and Ukrainian judges or officials of international courts** (paragraph 73).

77. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Ukraine to present a report on the implementation of the above-mentioned recommendations by 30 April 2013.

78. Finally, GRECO invites the authorities of Ukraine 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.