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Third Evaluation Round

Second Compliance Report on Serbia

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

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"Transparency of Party Funding"

Adopted by GRECO
at its 65th Plenary Meeting
(Strasbourg, 6-10 October 2014)

I. INTRODUCTION

1. The Second Compliance Report assesses further measures taken by the authorities of Serbia since the adoption of the Compliance Report in respect of the recommendations issued in the Third Round Evaluation Report on Serbia, covering two distinct themes, namely:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
2. The Third Round Evaluation Report was adopted at GRECO's 48th Plenary Meeting (1 October 2010) and made public on 6 December 2010, following authorisation by Serbia (Greco Eval III Rep (2010) 3E, [Theme I](#) and [Theme II](#)). The subsequent Compliance Report was adopted at GRECO 57th Plenary Meeting (19 October 2012) and made public on 6 March 2013, following authorisation by Serbia ([Greco RC-III \(2012\) 16E](#)).
3. As required by GRECO's Rules of Procedure, the Serbian authorities submitted their Second Situation Report with additional information regarding action taken to implement the recommendations that were partly implemented or not implemented, according to the Compliance Report. This report was belatedly submitted on 8 July 2014, and served as a basis for the Compliance Report.
4. GRECO selected Germany to appoint a rapporteur for the compliance procedure on Theme I. The Rapporteurs appointed was Mr Markus BUSCH, Head of Division, Economic, Computer, Corruption-related and Environmental Crime, Federal Ministry of Justice and Consumer Protection (Germany). He was assisted by GRECO's Secretariat in drawing up the Compliance Report.
5. It is recalled that GRECO in its evaluation report addressed ten recommendations to Serbia in respect of Theme II and all recommendations were assessed as implemented satisfactorily in the Compliance Report. Thus, there are no further recommendations concerning Theme II to be assessed in this report and the focus is on Theme I (see below).

II. ANALYSIS

Theme I: Incriminations

6. It is recalled that GRECO in its evaluation report addressed 5 recommendations to Serbia in respect of Theme I. None of the recommendations had been implemented at the time of adoption of the RC-III report due to the fact that, owing to elections and the dissolution of Parliament, the draft which had been prepared to address the few remaining deficiencies identified by GRECO in the Third Round Evaluation Report had been withdrawn and a Working Group had just been established to resume work in this area. The authorities now report that the Criminal Code was

amended on 24 December 2012¹; it entered into force in April 2013. It introduces a number of reforms to tackle GRECO's concerns, as follows.

Recommendation i.

7. *GRECO recommended to take the legislative measures necessary to ensure that the offence of active and passive bribery in the public sector covers all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the official's competence.*
8. In the absence of any tangible improvement in this area, as per the reasons highlighted in paragraph 6, GRECO concluded in the RC-III report that recommendation i had not been implemented.
9. The authorities of Serbia indicate that the amended Criminal Code (CC) now introduces a new wording of the provisions concerning bribery (Articles 367 on passive bribery and 368 on active bribery) which eliminates the condition that bribery occurs for the performance of, or omission to perform, an official act within the scope of the official's competence². The authorities stress that this wording would cover all acts and omissions in the exercise of the functions of a public official, whether or not within the strict scope of the official's competence, including those resulting from the misuse of the official position.
10. GRECO welcomes the legislative amendments reported, which should allow, in principle, to cover acts and omissions which are made possible in relation to the public official's function, whether or not within the scope of the official's competence.
11. GRECO concludes that recommendation i has been implemented satisfactorily.

Recommendation ii.

12. *GRECO recommended to take the necessary legislative measures in order to ensure that foreign arbitrators and jurors are explicitly covered by the bribery provisions of the Criminal Code in conformity with the Additional Protocol to the Criminal Law Convention on Corruption.*

¹ Official Gazette of the Republic of Serbia No. 121/12.

² Article 367 (1) and (2) CC – passive bribery in the public sector:

(1) *An official who, directly or indirectly, solicits or accepts a gift or other benefit, or promise of a gift or other benefit for himself/herself or another to perform an official act within his/her competence, or in relation to it, that should not be performed or not to perform an official act that should be performed, shall be punished by imprisonment of two to twelve years.*

(2) *An official who, directly or indirectly, solicits or accepts a gift or other advantage or a promise of a gift or advantage for himself/herself or another to perform an official act within his/her competence, or in relation to it, that s/he is obliged to perform or not to perform an official act that should not be performed, shall be punished by imprisonment of two to eight years.*

Article 368 (1) and (2) CC – active bribery in the public sector:

(1) *Whoever makes or offers a gift or other advantage to an official, or another person, to within his/her official competence, or in relation to it, perform an official act that should not be performed or not to perform an official act that should be performed, or who acts as intermediary in such bribing of an official, shall be punished by imprisonment of six months to five years.*

(2) *Whoever makes or offers a gift or other advantage to an official, or another person, to within his/her official competence, or in relation to it, perform an official act that s/he is obliged to perform or not to perform an official act that s/he is obliged not to perform, or who acts as intermediary in such bribing of an official, shall be punished by imprisonment of up to three years.*

13. In the absence of any tangible improvement in this area, as per the reasons highlighted in paragraph 6, GRECO concluded in the RC-III report that recommendation i had not been implemented.
14. The authorities of Serbia now explain that the amended CC contains a reworked (extended) definition of foreign official where foreign arbitrators and jurors are explicitly covered³.
15. GRECO takes note of the information provided by the authorities as to the explicit coverage of bribery of foreign jurors and arbitrators in the amended CC, in line with what is requested by recommendation ii. Consequently, GRECO concludes that recommendation ii has been implemented satisfactorily.

Recommendation iii.

16. *GRECO recommended to clarify in an appropriate manner that legislation concerning bribery in the private sector covers the full range of persons who direct or work for – in any capacity – private sector entities.*
17. In the absence of any tangible improvement in this area, as per the reasons highlighted in paragraph 6, GRECO concluded in the RC-III report that recommendation i had not been implemented.
18. The Serbian authorities stress that the amended CC broadens the definition of “responsible person” (Article 112(5) CC)⁴ so as to cover any persons who direct or work for, in any capacity, a private sector entity (“a person who on basis of law, regulation or authorisation”...” as well as the person to whom performance of such duties is delegated in practice”), persons entrusted with management responsibilities (*persons entrusted or authorised to perform management or supervisory duties*), as well as other categories of posts (*persons entrusted or authorised to perform other duties and persons to whom performance of such duties is delegated in practice*). The authorities explain that the notion of “responsible person” therefore covers the employer-employee relationship from the top to the bottom, as well as persons who do not have the status of employee or do not work permanently for the company (e.g. consultants, commercial agents, etc.), and also other types of relationships in which there is no contract of employment (e.g. partners, lawyer, etc.).
19. GRECO is satisfied that the reworked definition of “responsible person” in the amended CC covers all persons working for/in a private sector entity, without necessarily presupposing a certain degree of supervisory/management responsibility in the entity concerned.
20. GRECO concludes that recommendation iii has been implemented satisfactorily.

³ Article 112 (3)4 CC – definition of foreign official:

(4) *Foreign official is a person who is a member, official or officer of a legislative or executive body of a foreign State, a person who is a judge, juror, member, official or officer of a court of a foreign country or an international court, a person who is a member, official or officer of an international organisation and its bodies, as well as a person who is an arbitrator in foreign or international arbitration.*

⁴ Article 112 (5) CC – definition of responsible person:

(5) *A responsible person in a legal entity is a person who on basis of law, regulation or authorisation performs certain management, supervisory or other duties from the purview of the legal entity, as well as the person to whom performance of such duties is delegated in practice. A responsible person shall also mean an official when the issue relates to criminal offences where a responsible person is designated as perpetrator, which are not provided under this Code in the Chapter on criminal offences against official duty and/or as criminal offences of an official.*

Recommendation iv.

21. *GRECO recommended (i) to abolish the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad; (ii) to establish jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts who are, at the same time, Serbian nationals.*
22. In the absence of any tangible improvement in this area, as per the reasons highlighted in paragraph 6, GRECO concluded in the RC-III report that recommendation i had not been implemented.
23. The Serbian authorities inform that the amended CC does not require dual criminality, nor the need for authorisation of the Republic Public Prosecutor to instigate prosecution, when so provided by an international ratified agreement⁵ (Article 10 (2) CC). The Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) are considered to be such international agreements.
24. With respect to the second part of the recommendation, the authorities now clarify that, pursuant to Article 10 (3) CC, it would be possible to establish jurisdiction over offences committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts – who are at the same time Serbian nationals –, according to “general legal principles of international law”, and even if the relevant offence does not cause a detriment to a third country or one of its citizens, if it is not proved that the offence was directed against Serbia or one of its citizens or if the offence in question carries a punishment of less than 5 years’ imprisonment⁶.
25. GRECO takes note of the developments reported with respect to the first part of the recommendation, which establish extraterritorial jurisdiction as regards criminal offences committed outside the territory of Serbia in cases provided for by international agreements binding upon Serbia. Regarding the second part of the recommendation, i.e. the possibility to establish extraterritorial jurisdiction over offences committed by foreigners, but involving an international official of Serbian nationality, irrespectively of the punishment that the offence carries in the country where the offence was committed, or whether a detriment was caused to the Serbian State or any of its citizens (cases covered by Article 17, paragraph 1.b of the

⁵ Article 10 (2) CC – special conditions for prosecution of crimes committed abroad

(2) In the case referred to in Articles 8 and 9, paragraph 1, of this Code criminal prosecution may be undertaken only if a criminal offence is also punishable under the law of the country where it was committed, unless there is a permission by the Republic Public Prosecutor, or when so provided by a ratified international agreement.

⁶ Article 10 (3) CC – special conditions for prosecution of crimes committed abroad

(3) In the case referred to in Article 9, paragraph 2, if the act at the time of the commission of the offence was considered a criminal offence under general legal principles of international law, prosecution may be undertaken in Serbia following the permission of the Republic Public Prosecutor, regardless of the law of the country where the offence was committed.

Article 9 CC - applicability of criminal legislation of Serbia to foreigners who commit a criminal offence abroad

(1) Criminal legislation of Serbia shall also apply to a foreigner who commits a criminal offence against Serbia or its citizen outside the territory of Serbia other than those defined in Article 7 hereof, if they are found on the territory of Serbia or if extradited to Serbia.

(2) Criminal legislation of Serbia shall also apply to a foreigner who commits a criminal offence abroad against a foreign state or foreign citizen, when such offence is punishable by five years' imprisonment or a more severe penalty, pursuant to laws of the country of commission, if such person is found on the territory of Serbia and is not extradited to the foreign State. Unless otherwise provided by this Code, the court may not impose in such cases a penalty more severe than set out by the law of the country where the criminal offence was committed.

Convention), GRECO remains dubious as to whether it could be inferred that the particular jurisdiction provisions established by the Convention and its Protocol constitute general legal principles of international law. GRECO notes that the relevant provision of the CC, Article 10 (3), is worded in the same terms as it was in the former legislation which was considered by GRECO as not fully in line with the Criminal Law Convention on Corruption (ETS 173). There are no court decisions/case law in connection with extraterritorial jurisdiction over bribery offences which would have helped to bring further light into this outstanding matter. GRECO concedes that this shortcoming refers to very specific situations but it does, however, represent a lacuna as compared to the standards under review.

26. Finally, GRECO recalls its remark as to the coverage of Article 17, paragraph 1, subparagraph b of the Convention, which not only requires the establishment of jurisdiction for offences committed by nationals abroad but also the extension of nationality jurisdiction to public officials and members of domestic public assemblies of member States – i.e. not necessarily nationals. This extension is not fully reflected in Serbian criminal law which generally requires citizenship of Serbia. Domestic officials and members of domestic public assemblies, who are not at the same time citizens of Serbia, would therefore not be covered. In the Third Round Evaluation Report (paragraph 72), GRECO noted that, at present, this does not constitute a problem in Serbia, since all public officials have to be Serbian citizens. GRECO, therefore, refrained from issuing a recommendation in this respect, but stressed that in the case of future legislative changes to this nationality requirement of public officials the jurisdictional rules would have to be adjusted accordingly. In particular, adjustments may be needed if Serbia adheres to the European Union, in which case citizens from other EU countries would be able to serve as Serbian officials or as elected representatives in a Serbian municipal assembly.
27. The Serbian authorities may wish to keep the aforementioned jurisdiction-related points in mind. GRECO concludes that recommendation iv has been partly implemented.

Recommendation v.

28. *GRECO recommended to abolish the possibility provided by the special defence of effective regret, pursuant to Article 368 (6) of the Criminal Code, to return the bribe to the bribe-giver who has reported the offence before it is uncovered.*
29. In the absence of any tangible improvement in this area, as per the reasons highlighted in paragraph 6, GRECO concluded in the RC-III report that recommendation i had not been implemented.
30. The authorities of Serbia now report that the amended CC has abolished the possibility to return the bribe to the bribe-giver who has reported the offence before it is uncovered.
31. GRECO welcomes the action taken by the authorities in respect of recommendation v and concludes that recommendation v has been implemented satisfactorily.

III. CONCLUSIONS

32. **In view of the above, GRECO concludes that Serbia has implemented satisfactorily fourteen of the fifteen recommendations contained in the Third Round Evaluation Report. Only one recommendation remains partly implemented.**
33. With respect to Theme I – Incriminations, recommendations i, ii, iii and v have been implemented satisfactorily. Recommendation iv is partly implemented. With respect to Theme II – Transparency of Party Funding, all recommendations have been implemented satisfactorily (recommendations i to x).
34. Concerning the criminalisation of corruption offences, the Criminal Code amendments address virtually all issues raised by GRECO, notably concerning the abolishment of dual criminality for the offences covered by the Criminal Law Convention (ETS 173) and its Additional Protocol and the defence of effective regret, as well as expanding the range of persons covered in the relevant bribery offences to encompass all public officials, whether acting or omitting to act within or in relation to their duties, including foreign arbitrators and jurors (bribery and trading in influence in the public sector), as well as all categories of persons working in/for private legal entities (bribery in the private sector). GRECO is not unequivocally convinced that the law provisions on jurisdiction over corruption offences fully meet all possible situations covered by the Convention. In the area of political financing, GRECO acknowledges the positive steps taken by Serbia to improve transparency and accountability regarding political finances following new legislation issued in 2011. With the adoption of the new Law on Financing Political Activities (LFPA), Serbia has now in place a detailed and comprehensive legal framework broadly inspired by and abiding to the principles contained in Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns. The Serbian authorities anticipated work to progress concerning the use of public facilities during election periods, an area identified as particularly prone to abuse in Serbia.
35. GRECO congratulates Serbia on the legislative reforms introduced in recent years to suitably address its recommendations. Despite these achievements, corruption continues to be a prevalent concern in Serbia. While a great number of corruption-related prosecutions have been initiated, more must be done to secure final convictions – not only for petty bribery, but also high-level corruption when this occurs. Time and experience will show whether the recent amendments in law efficiently serve their purpose and prevent corruption and malpractice from occurring, and whether further improvements, of either a legislative or a practical implementation nature, are still necessary. Moreover, it is crucial that the relevant institutions entrusted with anticorruption responsibilities are provided with adequate resources and powers to effectively fulfil their tasks.
36. The adoption of the Second Compliance Report terminates the Third Round compliance procedure in respect of Serbia.
37. Finally, GRECO invites the authorities of Serbia 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.