



Groupe d'Etats contre la corruption
Group of States against corruption

DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS
DIRECTORATE OF MONITORING



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 3 December 2010

Public
Greco Eval III Rep (2010) 7E
Theme I

Third Evaluation Round

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

(Theme I)

Adopted by GRECO
at its 49th Plenary Meeting
(Strasbourg, 29 November – 3 December 2010)

I. INTRODUCTION

1. The State Union of Serbia and Montenegro joined GRECO on 1 April 2003. Following the referendum organised in Montenegro on 21 May 2006 and the declaration of independence adopted by the National Assembly of Montenegro on 3 June 2006, and in accordance with Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, the State Union of Serbia and Montenegro ceased to exist. Subsequently, the Republic of Montenegro became an independent and sovereign State¹. GRECO adopted the Joint First and Second Round Evaluation Report on Montenegro (Greco Eval I-II Rep (2005) 4E) at its 30th Plenary Meeting (9-13 October 2006). The afore-mentioned Evaluation Report, as well as its corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current 3rd 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, Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 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 Montenegro from 14 to 18 June 2010, was composed of Mr Dražen JELENIĆ, County State Attorney, County State Attorney’s Office in Zagreb (Croatia) and Mr Björn THORVALDSSON, Public Prosecutor, Special Prosecutor’s Office (Iceland). The GET was supported by Ms Laura SANZ-LEVIA from GRECO’s Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2010) 7E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: Ministry of Justice, Prosecutors Office, Special Prosecutor for the Fight against Corruption and Organised Crime, Supreme Court, Commission for the Prevention of Conflicts of Interest, and Directorate for Anticorruption Initiative (Daci). Moreover, the GET met with members of academia, the Bar Association, the Centre for Development of Non-Governmental Organisations and the Youth Initiative for Human Rights.
5. The present report on Theme I of GRECO’s 3rd 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 effectiveness of measures adopted by the authorities of Montenegro 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 Montenegro in order to improve its level of compliance with the provisions under consideration.

¹ The Committee of Ministers of the Council of Europe agreed in its 967th meeting (14 June 2006) that the Republic of Montenegro's declaration of succession to the Criminal Law Convention on Corruption (ETS No. 173) made it *ipso facto* a member of GRECO.

6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2010) 7E, Theme II.

II. INCRIMINATIONS

a. Description of the situation

7. Montenegro ratified the Criminal Law Convention on Corruption (ETS 173) on 18 December 2002². The Convention entered into force in respect of Montenegro on 6 June 2006. Montenegro did not make any reservations to the Criminal Law Convention on Corruption.
8. The Additional Protocol to the Criminal Law Convention (ETS 191) was ratified by Montenegro on 17 March 2008. It entered into force in respect of Montenegro on 1 July 2008. Montenegro did not make any reservations to the Additional Protocol to the Criminal Law Convention on Corruption.
9. The Criminal Code of Montenegro has been amended several times to, *inter alia*, better comply with international requirements. The latest amendment was adopted on 22 April 2010.

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

Definition of the offence

10. Active bribery is criminalised in Article 424 of the Criminal Code, which establishes two forms of the offence: (1) bribery to induce an official to perform an act s/he should not perform or to omit to perform an act s/he should or could perform within the bounds of his/her official rights (i.e. unlawful acts or omissions); (2) bribery to induce an official to perform an act s/he should or could perform or to omit to perform an act s/he is not authorised in any case to perform (i.e. lawful official acts or omissions).

Article 424, Criminal Code: Active bribery

(1) Anyone who gives, offers or promises a gift or other gain to an official who agrees to perform an official act within the scope of his/her official powers that s/he ought not to perform or to omit to perform an official act s/he ought to perform, or a person who mediates in such bribery of an official, shall be punished by an imprisonment sentence of six months to five years.

(2) Anyone who gives, offers or promises a gift or other gain to an official who agrees to perform an official act within the scope of his/her official powers that s/he is obliged to perform or to omit to perform an official act s/he should not perform or who mediates in such a bribery of an official, shall be punished by an imprisonment sentence not exceeding three years.

(3) Provisions of paras. 1 and 2 of this Article shall also be applied when bribe was given, offered or promised to a foreign official.

(4) The perpetrator of an offence referred to in paras. 1 and 2 of this Article who had reported the criminal offence before s/he found out that the crime was detected, can be acquitted from punishment.

(5) Provisions of paras. 1, 2 and 4 of this Article shall also be applied when the bribe was given, offered or promised to a person in charge of a business organisation, institution or other entity.

² Date of accession by the State Union of Serbia and Montenegro.

11. Criminalisation of passive bribery is provided for under Article 423 of the Criminal Code. The relevant provisions differentiate three types of conduct: if the bribe has been solicited or accepted before the performance of the official act: for an official to perform acts that s/he should not perform or to omit to perform an act s/he should or could perform within the scope of his/her official rights, i.e. unlawful acts or omissions (Article 423(1), Criminal Code); for an official to perform acts that s/he should perform or to omit to perform acts s/he should not in any case perform, i.e. lawful official acts or omissions (Article 423(2), Criminal Code); (3) if the bribe has been solicited or accepted after the performance, or non-performance, of the official act (Article 423(4), Criminal Code).

Article 423, Criminal Code: Passive bribery

(1) *A person acting in an official capacity who requests or receives a gift or any other benefit, or who accepts a promise of gift or any benefit for himself/herself or another for agreeing to perform within the scope of his/her official powers an official act s/he should not perform, or not to perform an official act which s/he should perform, shall be punished by an imprisonment sentence of two to twelve years.*

(2) *A person acting in official capacity who request or receives a gift or other benefit or who accepts a promise of gift or any other benefit for him/herself or another for agreeing to perform within the scope of his/her official powers an official act s/he should perform, or not to perform an official act s/he should otherwise not perform, shall be punished by an imprisonment sentence of two to eight years.*

(3) *A person in official capacity who commits an offence referred to in paras. 1 or 2 of this Article in relation to the detection of a criminal offence, initiating or conducting a criminal proceedings, imposition or enforcement of a criminal sanction, shall be punished by an imprisonment sentence of three to fifteen years.*

(4) *An official who requests or accepts a gift or other benefit after having performed or omitted to perform an official act referred to in paras. 1, 2 and 3 of this Article or in conjunction with it, shall be punished by an imprisonment sentence of three months to three years.*

(5) *A foreign official who commits an offence referred to in paras. 1, 2, 3 and 4 of this Article, shall be punished by a sentence laid down for such an offence.*

(6) *A person in charge of a business organisation, institution or other entity who commits an offence referred to in paras. 1, 2 and 4 of this Article, shall be punished by a sentence laid down for such an offence.*

(7) *The accepted gift or property gain shall be seized.*

Elements/concepts of the offence

“Domestic public official”

12. The definition of domestic public official encompasses:

Article 142 (3), Criminal Code: Public official

Persons in official capacity are deemed to be:

- 1) persons who perform official duties in State bodies;
- 2) elected, appointed or designated persons in a State body, a local self-government body or a person who performs on a permanent or temporary basis official duties or official functions in these bodies;
- 3) persons in an institution, business organisation or other entity who are assigned the performance of public authorisations, who decide on rights, obligations or interests of natural and legal persons or on public interest;
- 4) other persons performing official duties under law, regulations adopted on the basis of laws, contracts or arbitration agreements, as well as persons who are entrusted with the performance of certain official duties or tasks;
- 5) military persons, with the exception of provisions of Chapter Thirty Four of this Code;
- 5a) persons performing in a foreign State legislative, executive, judicial office or another public office for a foreign State, persons performing official duties in an international public organisation and persons performing judicial, prosecutorial or another office in an international court.

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

"Promising, offering or giving" (active bribery)

15. The elements of "promising", "offering" and "giving" are expressly contained in the penal provisions concerning active bribery.

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

16. Passive bribery is criminalised when a gift or other gain/benefit or promise (in the Montenegrin language: "obećanje") is "requested" "received" or "accepted". The authorities confirmed that the notion of "obećanje" is closer to the English term "proposition" and, therefore, covers both a "promise" and a mere "offer".

"Any undue advantage"

17. The relevant provisions of the Criminal Code concerning bribery do not explicitly use the term "undue". In this connection, the authorities explained that any "gift or other gain/benefit" may come under the scope of the offence if its purpose is to influence a public official's action in service. Despite the heterogeneous use of terms in the different bribery/trading in influence provisions, the authorities stressed that both material and immaterial advantages are covered.

“Directly or indirectly”; “For himself or herself or for anyone else”

18. The relevant provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. According to the authorities, bribery may also be committed indirectly by the bribe-giver or the bribe-taker, and in such cases intermediaries will be held criminally liable on the basis of Article 424 (1) and (2) – which expressly mentions mediators – or Article 423 in conjunction with the general provisions on participation of Article 23(1) Criminal Code).
19. While third party beneficiaries are explicitly covered by Article 423 on passive bribery, Article 424 on active bribery remains silent in this respect.

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

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

“Committed intentionally”

22. A basic principle of the Criminal Code is that an action is punishable only when committed intentionally, subject to provisions to the contrary (Article 13 of the Criminal Code). Therefore, as the provisions on bribery do not mention that they can be caused by negligence, it can be inferred *a sensu contrario* that they can only be committed intentionally.

Sanctions

23. Active bribery with respect to unlawful official acts or omissions is punishable by imprisonment of between six months and five years (Article 424 (1), Criminal Code). In cases where the bribe is given to perform an official act that an official should or may perform/omit to perform in any case (lawful official acts or omissions), the punishment prescribed is imprisonment of up to three years (Article 424 (2), Criminal Code).
24. Passive bribery is punished by imprisonment of from two to twelve years, if the bribe was solicited or accepted in return for performance of acts that the official should not perform or omissions that the official should or could have performed (Article 423 (1), Criminal Code). If the bribe is accepted in return for performance (or non-performance) or an official act that should (or should not) have been performed anyway, the sentence ranges from two to eight years’ imprisonment (Article 423 (2), Criminal Code). Passive bribery after the official act has been performed (or not performed) is punishable by imprisonment ranging from three months to three years (Article 423 (4), Criminal Code). The applicable sanction is increased to up to fifteen years in those cases where the public official has committed the bribery offence in relation to the uncovering of a criminal offence, initiation or conduct of a criminal proceeding, pronouncement or enforcement of criminal sanctions.
25. In addition, the security measures, which are set forth in the general part of the Criminal Code are applicable to both active and passive bribery offences. Accordingly, a person found guilty of an offence can be barred from holding certain positions or exercising certain functions for a period of up to ten years (Article 73, Criminal Code).

26. The applicable sanctions for other comparable crimes are: up to five years' imprisonment for fraud (Article 419, Criminal Code); up to five years' imprisonment for embezzlement (Article 420, Criminal Code); up to five years' imprisonment for abuse of office (Article 416, Criminal Code). The applicable sanction for all of the afore-mentioned offences could be increased if substantial benefit is acquired from the commission of the offence.

Statistics and case law

27. Statistical data for the period 2006-2009 indicate that criminal investigations for corruption-related offences were initiated in 1039 cases (against 1701 persons), out of which a total of 121 (against 139 persons) have reached a last instance decision (64 convictions against 66 persons, out of which 20 sanctions against 20 persons consisted of imprisonment)³. In the period 2007-first half of 2010, a verdict was reached in relation to 29 offences of active bribery of domestic public officials. Out of these, 20 verdicts were final and enforceable, 9 were reached by the court of second instance. In the same period, 8 verdicts were reached for the offence of passive bribery of domestic public officials, out of which 5 were final and enforceable.

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

28. Members of domestic public assemblies are considered public officials in the meaning of Article 142 (3) 2 of the Criminal Code which encompasses "*persons elected, appointed or designated in a State body or a local self-government body, or persons who perform on a permanent or temporary basis official duties or official functions in these bodies*". The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies. There are no court decisions/case law concerning bribery of members of domestic public assemblies.

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

29. Foreign public officials are defined as follows:

Article 142 (3) 5a), Criminal Code: Foreign public official

Persons performing in a foreign State legislative, executive, judicial office or another public office for a foreign State, persons performing official duties in an international public organisation and persons performing judicial, prosecutorial or another office in an international court.

30. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign public officials. There are no court decisions/case law concerning bribery of foreign public officials.

Passive bribery (Article 423 (5), Criminal Code)

(5) A foreign official who commits the offence specified in paragraphs 1, 2, 3 and 4 of this Article shall be punished by the penalty laid down for that offence.

³ Statistics gathered by the National Tripartite Commission as of 31 December 2009.

Active bribery (Article 424 (3), Criminal Code)

(3) Provisions of paragraphs 1 and 2 of this Article shall apply also when the bribe was given, offered or promised to a foreign official.

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

31. Members of foreign public assemblies are considered public officials according to Article 142 (3) 5a) of the Criminal Code, which refers to “*persons performing in a foreign State legislative office*”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of foreign public assemblies. There are no court decisions/case law concerning bribery of members of foreign public assemblies.

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

Definition of the offence

32. Pursuant to the latest amendments of the Criminal Code, bribery in the private sector has been criminalised as an autonomous offence in two new provisions, as follows:

Article 276a, Criminal Code: Passive bribery

(1) A responsible person in a business organisation or another entity engaged in an economic activity who requests or accepts a gift for himself/herself or another person or acquires another unlawful benefit or accepts the promise of a gift or other unlawful benefit to conclude a contract or reach a business agreement or provide a service to the detriment of his/her business organisation or another person, shall be punished by imprisonment for a term of six months to five years.

(2) The perpetrator of the offence referred to in paragraph 1 of this Article, who requests and accepts a gift for himself/herself or another person or acquires another unlawful benefit or accepts the promise of a gift or unlawful benefit after the conclusion of a contract or reaching of business agreement or after the provided service, shall be liable to imprisonment for a term not exceeding two years.

(3) The obtained gift and unlawful benefit shall be confiscated.

Article 276b, Criminal Code: Active bribery

(1) Whoever gives, offers or promises a gift or another unlawful material benefit to a responsible person of a business organisation or to another entity engaged in an economic activity so as to conclude a contract or to reach a business agreement or to provide a service to the detriment of his/her business organisation or another person, shall be liable to imprisonment for a term of three months to three years.

(2) The perpetrator of the offence referred to in paragraph 1 of this Article who presented the gift or another unlawful benefit at the request of the responsible person and reported the offence before s/he found out that it has been detected, may be released from the penalty.

(3) The obtained gift and unlawful benefit shall be confiscated.

33. In addition, provisions concerning private bribery apply as laid out in Articles 423 (6) and 424 (5) apply (the authorities explained after the on-site visit that these provisions are applicable with respect to non-commercial organisations and institutions, e.g. primary and secondary schools, hospitals, trade unions, etc.):

Article 423 (6), Criminal Code: Passive bribery private sector

(6) A person in charge of a business organisation, institution or other entity who commits an offence referred to in paras. 1, 2 and 4 of this Article, shall be punished by a sentence laid down for such an offence.

Article 424 (5), Criminal Code: Active bribery private sector

(5) Provisions of paras. 1, 2 and 4 of this Article shall also be applied when bribe was given, offered or promised to a person in charge of a business organisation, institution or other entity.

34. Concerning the scope of perpetrators, Articles 276a and 276b, as well as Articles 423 (6) and 424 (5) of the Criminal Code refer to the notion of a “responsible person”. The definition of a responsible person is provided in Article 142 (4) of the Criminal Code which reads as follows:

Article 142 (4), Criminal Code: Responsible person

Responsible persons are deemed to be owners of a business organisation or other entity, or persons within a business organisation, institution or other entity assigned with, in consideration of his/her function, funds invested on his/her authorisations, a specific scope of affairs in the management of property, production or other trade or in supervision thereof or who is entrusted with the performance of specific affairs. Responsible persons are also deemed to be persons in an official capacity, in the event of criminal offences for which a responsible person is designated as an offender, such offences not being envisaged by this Code in the Chapter dealing with criminal offences against official duties i.e. as criminal offences of a person in an official capacity.

35. The authorities stress that the elements of the offence described under bribery of domestic public officials also apply to bribery in the private sector. Nevertheless, different terminology is used to define bribes, i.e. “gift”, “unlawful benefit”, “unlawful material benefit”. As for the breach of duty requirement, Articles 276a and 276b CC require an act to be detrimental to the business organisation which the bribe-giver/bribe-taker represents or to another person (“to the detriment of his/her business organisation or another person”).

Sanctions

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

Court decisions

37. With reference to active and passive bribery in the private sector, there has been one final and enforceable verdict of the Appellate Court of Montenegro, dated 9 February 2010. The Appellate Court reversed the decision of the High Court in Podgorica, dated 28 April 2009, by which the defendant accused of passive bribery, employed in a construction company, was exempted from charges of receiving a bribe of 25 EUR so as not to perform an official action which he ought to have performed. The Appellate Court found the defendant guilty of passive bribery and imposed a suspended sentence of imprisonment for six months.

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

38. Officials of international organisations are considered foreign public officials according to Article 142 (3) 5a), Criminal Code) which includes “*persons performing official duties in an international public organisation*”. The authorities explained that the aforementioned notion is broad, since it does not refer to any specific contractual relationship between the official and the institution and therefore comprises, in principle, all persons working in the organisation, irrespective of the permanent/temporary nature of their contract, whether officials, contracted employees or seconded agents. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of officials of international organisations. There are no court decisions/case law concerning bribery of officials of international organisations.

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

39. According to the authorities, active and passive bribery of members of international parliamentary assemblies are criminalised under Article 142 (3) 5a), Criminal Code) in so far as they can be considered “*persons performing official duties in an international public organisation*”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of international parliamentary assemblies. There are no court decisions/case law concerning members of international parliamentary assemblies.

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

40. Judges and officials of international courts are considered foreign public officials according to Article 142 (3) 5a), Criminal Code) which refers to “*persons performing judicial, prosecutorial or another office in an international court*”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of judges and officials of international courts. There are no court decisions/case law concerning bribery of judges and officials of international courts.

Trading in influence (Article 12 of ETS 173)

Definition of the offence

41. Trading in influence is a criminal offence in Montenegro and is covered by Article 422 of the Criminal Code as follows:

Article 422, Criminal Code: Passive trading in influence

(1) Anyone who requests or accepts a reward or any other material benefit or accepts the promise of a reward or other benefit for him/herself or another person so as to use his/her official or social position or influence to intercede so that an official act be or not be performed, shall be punished by an imprisonment sentence of three months to three years.

(2) Anyone who uses his/her official or social position or influence, to intercede so that an official act be performed that should not be performed or that an official act not be performed that should be performed, shall be punished by an imprisonment sentence of six months to five years.

(3) If a reward or any other benefit has been received for intercession referred to in paragraph 2 of this Article, the offender shall be punished by an imprisonment sentence of one to eight years.

(4) The reward and material benefit shall be confiscated.

Article 422a, Criminal Code: Active trading in influence

(1) Anyone who gives, offers or promises a reward or any other benefit to a person in official capacity or another person to intercede so that an official act be or not be performed by using his/her official or social position or influence, shall be punished by an imprisonment sentence not exceeding two years.

(2) Whoever gives, offers or promises a reward or another type of benefit to a person in an official capacity or another person to use his/her official or social position or influence to intercede so that an official act be performed that should not be performed or not to perform an official act that should be performed, shall be punished by an imprisonment sentence of three months to three years.

(3) The perpetrator of an offence referred to in paragraphs 1 ad 2 and of this Article who had reported the offence before s/he found out that it has been detected, may be released from the penalty.

(4) The reward and material benefit shall be confiscated.

Elements/concepts of the offence

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

42. The provision 'asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]' is transposed into Article 422 of the Criminal Code by use of the words "to use his/her official or social position or influence to intercede for". The terms "position" or "influence" are understood as an official (including social) position, which enables the influence peddler to have the power of intervention or improper influence; situations implying, intended or real influence, legal and illegal acts or omissions, are covered.
43. It is not necessary that the influence is actually exerted and leads to the intended result, the mere assertion of the influence peddler that s/he could exercise such influence would be sufficient for the criminal offence to be committed.

Other concepts/elements

44. According to the authorities, the constitutive elements of bribery offences largely apply with regard to active and passive trading in influence. However, if reading the relevant provisions on trading in influence in their literal wording, the constitutive elements are somehow different.
45. For example, the action of "receipt" is not explicitly covered in Article 422; it is, however, understood to be comprised by the notion of "acceptance" of an offer/promise (the Montenegrin term "obecanje" is closer to the English term "proposition" and, therefore, covers both a "promise" and a mere "offer").
46. Likewise, there is no explicit reference to the direct/indirect commission of the offence. In this connection, the authorities indicate that the relevant general provisions on participation in criminal offences would apply, and therefore cover trading in influence when committed indirectly.
47. Moreover, different terminology is used to refer to bribes, i.e. "gift", "unlawful benefit", "unlawful material benefit".

48. Third party beneficiaries are explicitly covered (“for him/herself or another person”; “to another person”).

Sanctions

49. The sanction applicable to passive trading in influence is up to three years’ imprisonment (Article 422 (1), Criminal Code). This sanction increases to a prison sentence of up to five years, if the trader in influence exploits his/her position or influences and intervenes for the purpose that an official act that should not have been performed is performed, or that an official act that should or could have been performed is not performed – illegal official acts (Article 422 (2), Criminal Code). Moreover, the aggravation of the punishment applies if the perpetrator accepts the advantage; the applicable sanction in this case consists of imprisonment of between one and eight years (Article 422 (3), Criminal Code). The sanction applicable to active trading in influence is up to two years’ imprisonment (Article 422a (1), Criminal Code); the sanction increases to a prison sentence of up to three years for illegal official acts.

Court decisions

50. The authorities of Montenegro did not report any court decision or case law on trading in influence.

Bribery of domestic arbitrators (Articles 1-3 of ETS 191)

51. The latest amendments to the Criminal Code have provided for specific coverage of domestic arbitrators. In particular, Article 142 (3) 4 of the Criminal Code on the definition of public officials refers to *“persons performing official duties under law, regulations adopted on the basis of laws, contracts or arbitration agreements, as well as persons who are entrusted with the performance of certain official duties or tasks”*. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic arbitrators. There are no court decisions/case law concerning bribery of domestic arbitrators.

Bribery of foreign arbitrators (Article 4 of ETS 191)

52. According to the authorities, foreign arbitrators would be covered by Article 142 (3) 4 of the Criminal Code on the notion of public official which specifically refers to *“persons performing official duties under law, regulations adopted on the basis of laws, contracts or arbitration agreements, as well as persons who are entrusted with the performance of certain official duties or tasks”*. The authorities indicate that this definition of public official is to be understood irrespective of the nationality of the person concerned. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic arbitrators. There are no court decisions/case law concerning bribery of domestic arbitrators.

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

53. There are no jurors in Montenegrin criminal proceedings. As far as lay judges are concerned, the new Criminal Procedure Code does not provide for mixed panels, i.e. the participation of jurors or lay judges in the proceedings. An individual judge adjudicates in the first instance court in relation to offences punishable by a fine or imprisonment of up to ten years, save the offences adjudicated by a high court. In the second instance, the matter is adjudicated by a panel of three

judges, and in the third instance by a panel of five judges. Therefore, the Criminal Procedure Code does not provide grounds for the participation of lay judges in criminal proceedings. Likewise, the figure of juror is unknown to other areas of law in Montenegro.

Bribery of foreign jurors (Article 6 of ETS 191)

54. Foreign jurors are not explicitly covered by existing legislation. However, according to the authorities, the Criminal Code covers this category of persons when it refers to “*persons performing in a foreign State legislative, executive, judicial office or another public office for a foreign State*” (Article 142 (3) 5a), Criminal Code), in conjunction with the definition of public official defined under Article 142 (3) 4) concerning “*persons performing official duties under law, regulations adopted on the basis of laws, contracts or arbitration agreements, as well as persons who are entrusted with the performance of certain official duties or tasks*”.

Other questions

Participatory acts

55. In its general part, the Criminal Code, distinguishes between: co-perpetration (Article 23, Criminal Code); incitement (Article 24, Criminal Code); as well as aiding and abetting (Article 25, Criminal Code). These types of participation are punishable as principal offences.
56. Accomplices are liable within the limits of their intent or negligence. Those soliciting or supporting a crime are liable within the limits of their respective intents (Article 26 (1), Criminal Code).
57. If the perpetration of a criminal offence does not result in the intended consequence, those who solicited or supported the offence are punishable for the attempted offence (Article 27, Criminal Code). If the accomplice, the person soliciting or the person supporting the criminal attempt has voluntarily prevented the intended criminal offence from being accomplished, the court may refrain from imposing a sentence (Article 22, Criminal Code).
58. Personal relations, attributes and circumstances on the basis of which criminal liability is excluded or a sentence is withdrawn, reduced or extended are to be taken into account only in relation to the accomplice, the person soliciting or the person supporting the criminal attempt in whom such relations, attributes and circumstances inhere (Article 26 (3), Criminal Code).

Jurisdiction

59. Jurisdictional rules are laid down in Title Twelve of the Criminal Code; they apply to all bribery and trading in influence offences. Jurisdiction is established over acts committed, whether partially or in whole, within the territory of Montenegro (principle of territoriality, Article 134 of the Criminal Code), as well as acts committed abroad by nationals of Montenegro, when they have been apprehended in or extradited to Montenegro (principle of nationality, Article 136). The authorities indicated that only Montenegrin citizens can be public officials or members of a domestic public assembly.

Article 134: Applicability of criminal legislation in the territory of Montenegro

(1) *Criminal legislation of Montenegro shall be applicable to anyone who commits a criminal offence on its territory.*

(2) *Criminal legislation of Montenegro shall also be applicable to anyone who commits a criminal offence on board a national ship, regardless of where the ship was located at the time of commission of a criminal offence.*

(3) Criminal legislation of Montenegro shall also be applicable to anyone who commits a criminal offence in a domestic civil aircraft while in flight or in a domestic military aircraft regardless of where the aircraft was located at the time of commission of a criminal offence, if the offender is a national of Montenegro.

Article 136: Applicability of criminal legislation of Montenegro to a national who commits a criminal offence abroad

(1) Criminal legislation of Montenegro shall also be applicable to a national of Montenegro if s/he commits abroad a criminal offence other than those referred to in Article 135 of this Code, should s/he be caught in the territory of Montenegro or extradited to Montenegro.

2) Under the terms referred to in paragraph 1 of this Article, the criminal legislation of Montenegro shall also apply to an offender who became a national of Montenegro after the commission of a criminal offence.

60. In addition, jurisdiction extends to criminal offences committed abroad by foreigners against Montenegro or its nationals (Article 137 (1), Criminal Code) or against a foreign State or another foreign citizen for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied (Article 137 (2), Criminal Code) when these foreigners have been apprehended in Montenegro and are not extradited to a foreign State.

Article 137: Applicability of criminal legislation of Montenegro to foreigners who commit a criminal offence abroad

(1) Criminal legislation of Montenegro shall also be applicable to a national or a foreigner who commits a criminal offence outside the territory of Montenegro against Montenegro for criminal offences other than those referred to in Article 135 of this Code, should s/he be caught in the territory of Montenegro or extradited to Montenegro.

(2) Criminal legislation of Montenegro shall also be applicable to a foreigner who commits abroad, against a foreign country or a foreigner, a criminal offence punishable under the law of the country it was committed in by an imprisonment sentence of five years or more, should s/he be caught in the territory of Montenegro but not extradited to a foreign country. Unless otherwise provided by this Code, a court of law may not in such a case impose a sentence more severe than the one provided for under the law of the country in which the criminal offence was committed.

61. Dual criminality is required to establish jurisdiction in respect of acts committed abroad. In this connection, the perpetrator of a criminal offence may be prosecuted insofar as his/her conduct constitutes a criminal offence in the country where the offence is committed; criminal proceedings may be instituted only upon the permission of the Supreme Public Prosecutor (Article 138 (4), Criminal Code).

Article 138: Special conditions for prosecution

(1) In the event referred to in Article 134 of this Code, where criminal proceedings have been instituted or completed in a foreign country, prosecution in Montenegro shall be taken solely upon the approval of the Supreme Public Prosecutor of Montenegro.

(2) In the event referred to in Article 134 of this Code, prosecution of a foreigner may, under the condition of reciprocity, be ceded to a foreign country.

(3) In cases referred to in Art. 136 and 137 of this Code, prosecution shall not be taken if:

- 1) an offender has completed serving a sentence adjudicated to him/her abroad;
- 2) an offender has been released abroad by a legally-binding judgment or if his/her sentence has been statute-barred or pardoned;
- 3) an appropriate security measure has been applied abroad against a mentally incapacitated offender;
- 4) under the foreign law, prosecution could be undertaken for a criminal offence upon request of the injured party, but such a request has not been filed.

(4) In cases referred to in paras. 136 and 137 of this Code, prosecution shall take place solely when the criminal offence in question is also punishable under the law of the country in which the offence was committed. In the case referred to in Art. 136 and 137, paragraph 1 of this Code, when the criminal offence in question is not punishable under the law of the country in which it was committed, prosecution shall take place solely upon the approval of the Supreme Public Prosecutor.

(5) In the case referred to in Article 137, paragraph 2 of this Code, if at the time of commission the offence in question was considered a criminal offence under the general legal principles recognized by the international law, prosecution may be undertaken in Montenegro upon the approval of the Supreme Public Prosecutor, regardless of the law of the country in which the criminal offence was committed.

62. There are no court decisions/case law in connection with jurisdiction over bribery offences.

Statute of limitations

63. The period of limitation depends on the maximum term of imprisonment which can be imposed for the offence in question (Article 124, Criminal Code)⁴. These (relative) periods of limitation are presumed to run from the time of the commission of the offence. The statute of limitations may be interrupted (a new period will start) or be suspended, but criminal prosecution is barred when twice the limitation period has elapsed (absolute statute of limitation). The following table illustrates the applicable limitation periods for bribery and trading in influence offences.

Article CC	Offence	Sanction (imprisonment)	Relative statute of limitations
Bribery in the public sector			
Passive bribery			
423 (1)	Unlawful official acts/omissions	2 – 12 yrs	15 yrs
423 (2)	Lawful official acts/omissions	2 – 8 yrs	10 yrs
423 (3)	In connection with conduct of criminal investigation, criminal proceeding, pronouncement/enforcement of criminal sanction	3 – 15 yrs	15 yrs
423 (4)	Bribe accepted after commission/omission of official act	3 months – 3 yrs	3 yrs

⁴ A limitation period of 15 years is provided for offences punishable by a maximum period of imprisonment exceeding 10 years (Article 124 (3), Criminal Code). A limitation period of 10 years is provided for offences punishable by a maximum period of imprisonment exceeding 5 years (Article 124 (4), Criminal Code). A limitation period of 5 years is provided for offences punishable by a maximum period of imprisonment exceeding 3 years (Article 124 (5), Criminal Code). A limitation period of 3 years is provided for offences punishable by a maximum period of imprisonment exceeding 1 year (Article 124 (6), Criminal Code). A limitation period of 2 years is provided for offences punishable by a maximum period of imprisonment of less than 1 year or a fine (Article 124 (7), Criminal Code).

Article CC	Offence	Sanction (imprisonment)	Relative statute of limitations
Active bribery			
424 (1)	Unlawful official acts/omissions	6 months – 5 yrs	5 yrs
424 (2)	Lawful official acts/omissions	Up to 3 yrs	3 yrs
Bribery in the private sector			
Passive bribery			
276a (1)	Bribe accepted to favour briber <i>before</i> conclusion of business deal	6 months – 5 yrs	5 yrs
276a (2)	Bribe accepted to favour briber <i>after</i> conclusion of business deal	Up to 2 yrs	3 yrs
Active bribery			
276b	Bribe made to favour briber	3 months – 3 yrs	3 yrs
Trading in influence			
Passive trading in influence			
422 (1)	Lawful official acts/omissions	3 months – 3 yrs	3 yrs
422 (2)	Unlawful official acts/omissions	6 months – 5 yrs	5 yrs
422 (3)	For the trader in influence to intervene in unlawful official acts/omissions, if reward accepted	1 – 8 yrs	10 yrs
Active trading in influence			
422a (1)	Lawful official acts/omissions	Up to 2 yrs	3 yrs
422a (2)	Unlawful official acts/omissions	3 months – 3 yrs	3 yrs

Defences

64. Criminal liability may be waived in cases of effective regret of the briber (Articles 424 (4), 276b and 422a (3) of the Criminal Code concerning active bribery in the public and private sectors and active trading in influence, respectively). The recent amendments to the Criminal Code have abolished the possibility provided by the former Criminal Code, ex-Article 424 (6), to return the bribe to the briber, who has declared the offence before it is uncovered.

Articles 424 (4), Criminal Code: Effective regret, active bribery public sector

(4) The perpetrator of an offence referred to in paragraphs 1 and 2 of this Article who had reported the criminal offence before s/he found out that the crime was detected, can be acquitted from punishment.

Article 422a, Criminal Code: Effective regret, active trading in influence

(3) The offender referred to in Paragraphs 1 and 2 of this Article who had reported the criminal offence before he found out that the crime was detected, can be acquitted from punishment.

Article 276b, Criminal Code: Effective regret, active bribery private sector

(2) The perpetrator of the offence referred to in paragraph 1 of this Article who presented the gift or another unlawful benefit at the request of the responsible person and reported the offence before s/he found out that it has been detected, may be released from the penalty.

65. The defence of effective regret has never been applied/granted in practice.

III. ANALYSIS

66. In Montenegro, 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 (hereafter: CC) has been recently amended (the amendments were adopted on 22 April 2010; they entered into force in May 2010) reportedly to bring the CC closer to international standards in the anti-corruption arena, in particular with regard to bribery of foreign/international officials, private sector bribery and trading in influence. The GET considers that the framework for the criminalisation of corruption is generally in line with the standards of the Criminal Law Convention on Corruption – ETS 173 (hereafter: the Convention) and its Additional Protocol (ETS 191) under evaluation. That said, the GET also found that some of the amendments introduced have brought about a number of inconsistencies, the content of which will be described below. In Montenegro the main challenge in fighting corruption lies with the actual enforcement of legislation.
67. As already pointed out above, the very first issue the GET wishes to raise concerns the lack of consistency of some of the key elements upon which the offences of bribery and trading in influence are construed. The recent amendments to the Criminal Code have, far from adjusting the different corruption-related provisions, added yet more incongruity in the terminology used. In particular, the concept of undue advantage varies from one provision to the other: it refers to "gift", "other benefit", "gain" or "reward"; some provisions explicitly qualify it as unlawful (Articles 276a and 276b CC on active bribery in the private sector), other provisions do not. Moreover, some provisions (which were introduced/reworded by the recent amendments) only, and specifically, refer to "material benefit" (i.e. Article 276b CC on active bribery in the private sector; request or acceptance of a bribe in Article 422 CC on passive trading in influence). With respect to the "lawful"/"unlawful" nature of the advantage, the authorities explained that all sorts of advantages are covered, irrespective of their value, in so far as the purpose of such advantages would be to influence a public official's action in service. The GET was also told that, despite the inconsistent use of wording, all different terms would indeed cover both material and immaterial advantages, as allegedly recognised by legal doctrine⁵. The GET is not convinced by this argument, all the more so in the absence of any concrete experience with the enforcement of the latest amended provisions (and the lack of concrete judgments dealing with immaterial benefits prior to the reform), and anticipates potential problems if strictly adhering to the text of the law. Likewise, the GET noted that concerning the indirect commission of bribery/trading in influence offences, only Article 424 (1) and (2) CC on active bribery in the public sector explicitly provides for the commission of the offence by intermediaries. With respect to all other bribery/trading in influence provisions, the authorities referred to the general rules on participation in criminal offences (aiding and abetting). In the absence of practical experience, it is difficult for the GET to assess at this stage whether the general provisions on participation will prove to be suitable legal tools to effectively cover instances of bribery through intermediaries. Disparity was also observed with respect to third party beneficiaries who are specifically covered in most, but not all provisions (i.e. Article 424 CC on active bribery in the public sector remains silent in this respect).
68. The latest reform of the Criminal Code had taken place only a month before 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 realised that the majority of the inconsistencies resulting from the amendments had not been detected before. While the GET

⁵ Commentary to the Criminal Code ("Criminal Law of Montenegro", OBOD 2009, authors: Branko Vučković and Vesna Vučković): "In terms of this criminal offence, other advantages should be deemed as all the gains of material or immaterial nature, which are obtained by the perpetrator, and which cannot be deemed a gift, such as, for example, groundless loan approval under rather favorable conditions, promotion in service as a bribe, groundless scholarship awarding, international travels as reward for unlawful official acts, unlawful provision of home, and other".

understands that previous court judgments and legal doctrine may be of relevance to ensure uniform interpretation of some key concepts of corruption offences, it considers that the current conceptual divergences may seriously hamper legal certainty, to the detriment of not only practitioners, but also the public at large. The GET can definitely see challenges, which may well emerge in the not too distant future, in reconciling strict adherence to the principle of legality – as enshrined in Article 2 CC – and a somehow more extensive/far-reaching interpretation of corruption-related provisions. This point of view was shared by virtually all practitioners. Moreover, the representatives of the Working Group amending the Criminal Code, with whom the GET met, anticipated that it would not be too complicated in practical terms to revise the amended law once again in order to fully align bribery and trading in influence provisions, as appropriate. Consequently, the GET recommends to harmonise the provisions relating to bribery (in the public and private sector) and trading in influence offences with a view to enhancing their consistency and clarity, in particular by unambiguously covering: (a) immaterial/intangible advantages; (b) the indirect commission of the offence; and (c) third party beneficiaries.

69. More particularly, when analysing the offence of bribery in the public sector (Articles 423 and 424 CC), the GET noted that with respect to the type of acts to be performed or omitted by the public official, these have to fall “within the scope of his/her official powers”. This could mean in practice that acts and omissions which are completely outside the official’s competence, or his/her statutory remit, but that s/he has the opportunity to commit because of the function s/he occupies, would not be covered directly by the bribery provisions (e.g. making confidential information available to which the public official has access in the exercise of his/her function when the gathering or disclosure of such information is not strictly within the scope of competence of the official concerned). In the GET’s view, and as recognised by GRECO’s previous pronouncements on this matter, this concept is clearly more narrow than the requirements of Articles 2 and 3 of the Convention which refer to acts and omissions which are made possible in relation to the public official’s function, even if the act is a misuse of the official position. The GET was told that such cases could be prosecuted under the offence of abuse of office (Article 416 CC)⁶. The GET is doubtful that all cases of bribery in the meaning of Articles 2 and 3 of the Convention would indeed be covered by the aforementioned offences: for example, it is highly questionable whether cases where a person unsuccessfully asks a public official to act outside his/her competence would indeed fall under the scope of Article 416 CC. Moreover, the GET notes that Article 416 CC appears to require that the act or omission of the official actually leads to a concrete result (whether a gain for himself/herself or another, or damage to a third party). In this connection, the authorities explained that any attempt at obtaining the undue advantage would be punishable under the general provision of Article 20 CC on attempted offences; no case law was provided to further substantiate this statement. The GET has difficulty in accepting the explanation provided by the authorities, since it considers that, rather than attempt, the mere offering/acceptance of a promise (of an undue advantage) could well be regarded by the court as instigation (active side) or/and preparatory acts to the perpetration of a

⁶ Article 416 CC on abuse of office :

(1) A person in official capacity who obtains for him/herself or another person any benefit, causes damage to another or gravely violates the rights of another by unlawfully using his/her official position or authorizations, overstepping the limits of his/her official authorization or omitting to perform his/her official duty, shall be punished by an imprisonment sentence of six months to five years.

(2) Where the commission of the offence referred to in paragraph. 1 and 2 of this Article resulted in acquiring material benefit in the amount exceeding three thousand euro, the perpetrator shall be punished by an imprisonment sentence of one to eight years.

(3) If the value of acquired material benefit exceeds the amount of thirty thousand euro, the offender shall be punished by an imprisonment sentence of two to ten years.

criminal offence of abuse of office (passive side). Preparatory acts are not punishable under the Montenegrin CC and would, therefore, fall outside the scope of Article 416 CC on abuse of office. Finally, the notion of “official power” adds an – excessively restrictive – element to the criminalisation of bribery, which is bound to make prosecution of the offence more difficult, i.e. by requiring proof that the official was expected to act within his/her official statutory competence. The GET, therefore, recommends **to ensure that the provisions concerning active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of his/her official powers.**

70. Concerning the scope of perpetrators, the description of the term “official” contained in Articles 142 (3) CC (domestic public officials) and 142 (3) 5a) CC (foreign public officials) appears to be broad enough to capture the different categories of persons covered by the Convention. The GET was told that the definition of foreign public official has been reworked to better target the different categories of officials envisaged by both the Convention and its Additional Protocol. In connection with corruption of jurors and arbitrators, the GET notes that the recent amendments have provided for explicit coverage of the latter under the definition of a public official in Article 142 (3) 4) CC, i.e. “persons performing official duties under arbitration agreements”. Jurors are unknown to the Montenegrin legal system. As for the international dimension of these terms, the authorities explained that foreign jurors and arbitrators would be captured by the definition of foreign public official of Article 142 (3) 5a) CC, in conjunction with Article 142 (3) 4) CC on domestic public officials. The interpretation provided by the authorities was not substantiated by any relevant case law or court decision in this respect. The GET notes that the definition of Article 142 (3) 5a) CC referring to foreign public officials appears to be autonomous; it does not refer back to the definition of official provided in Article 142 (3) 4) CC. If specifically analysing the coverage of Article 142 (3) 5a) CC concerning foreign public officials, foreign jurors would be covered to the extent that they are considered in the foreign jurisdiction as “persons performing judicial or another public office for a foreign State”. This interpretation departs from the Additional Protocol, which criminalises bribery of foreign jurors irrespective of their status in the foreign jurisdiction. This would also be questionable with respect to foreign arbitrators who would not necessarily be considered as persons performing “judicial” or other “public” office in a foreign State (arbitrators do frequently settle private law matters). The GET recommends **to ensure that foreign arbitrators and jurors are explicitly covered by the bribery provisions of the Criminal Code, in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).**
71. With respect to the offence of bribery in the private sector, the GET was told that one of the key reforms in this area was the introduction of separate provisions dealing with bribery in the private sector, i.e. Articles 276a (passive bribery) and 276b CC (active bribery). Prior to the amendments, public and private sector bribery were criminalised by the same provisions: Articles 423 (passive bribery) and 424 CC (active bribery), paragraphs 6 and 5, respectively. Paradoxically, the GET noted that this continues to be the case: while the latest amendments have introduced two new articles dealing with private sector bribery, the former provisions dealing with the same matter have not been repealed. This technical problem had not been noticed by the responsible authorities before the on-site visit. The interlocutors interviewed conceded at that time that this inconsistency needed to be addressed and did not anticipate any problem in making the necessary technical adjustments to that effect. However, the authorities explained, after the on-site visit, that the provisions of Articles 423 and 424 CC were still necessary to cover bribery of responsible persons in non-commercial organisations and institutions (e.g. schools, hospitals, trade unions). The GET notes that Articles 423 and 424 CC not only refer to non-commercial legal entities, but also to business organisations and other entities engaged in an economic activity. This means, in practical terms, that, for organisations

and entities performing business activities, two sets of rules co-exist, at present, for the same offence. This inconsistency needs to be promptly rectified.

72. As regards the subject of bribery in the private sector, the relevant provisions refer to the term of “responsible persons” which is defined under Article 142 (4) CC as: “...owners of a business organisation or other entity, or persons within a business organisation, institution or other entity assigned with, in consideration of his/her function, funds invested on his/her authorisations, a specific scope of affairs in the management of property, production or other trade or in supervision thereof or who is entrusted with the performance of specific affairs...”. During the on-site visit, the authorities clarified that the notion of “responsible person” would cover persons discharging duties and carrying out responsibilities within the company resulting from either a contract of employment or any other contractual relationship with the private entity. Other types of relationships in a legal entity, for example, partners, lawyers and client, and other persons who are not subject to a contract of employment would allegedly also be covered. The GET is not convinced that the current provisions on private sector bribery would indeed apply to the full range of persons who direct or work for, in any capacity, private sector entities – as required by Articles 7 and 8 of the Convention, since the definition of “responsible person” in Montenegrin legislation appears to presuppose a certain degree of responsibility within the entity concerned. Doubts were also cast by interlocutors on-site as to whether lower employees would indeed be covered by the relevant bribery provisions. The GET further notes that Title 22 CC dealing with offences against property (e.g. fraud, embezzlement, abuse of trust), Title 23 CC on offences against payment transactions and business operations (e.g. tax evasion, money laundering), and even Title 34 CC dealing with offences against official duty (i.e. Articles 420 on embezzlement and 421 on unauthorised use of money, securities or other movable items entrusted by virtue of an official duty) establish that the perpetrator of the relevant offences could be “anyone”/“a person” who performs the illegal action/omission in question.
73. Furthermore, while the Convention allows private sector bribery to be treated differently from public sector bribery in so far as the element of breach of duty is concerned, the GET has misgivings as to the concrete articulation of the breach of duty requirement in the Criminal Code of Montenegro. Whereas Articles 7 and 8 of the Convention cover all cases where bribe-takers /bribe-givers act or refrain from acting in breach of their duties, Articles 276a and 276b CC require an act which is detrimental to the business organisation which s/he represents or to another person (“*to the detriment of his/her business organisation or another person*”). In the GET’s view, there could well be situations where the offence is committed to benefit the organisation where the bribe-giver/bribe-taker works. The authorities argued that, in any event, the offence would be applicable since there will always be “another person” whose interest will be damaged as a result of the corrupt bargain. Whilst the GET accepts that, in practice, most acts of bribery may well fall within the scope of the offence, the need to prove these elements may well result in an additional hurdle in the prosecution of the offence. The GET further notes that very limited experience exists in this area: private sector bribery provisions have hardly ever been applied in practice. In light of the shortcomings identified above, the GET recommends **(i) to provide for a consistent definition of bribery in the private sector; (ii) to cover in an unequivocal manner the full range of persons who direct or work for – in any capacity – private sector entities; (iii) to capture unambiguously all instances implying a breach of duty by the briber/bribed person.**
74. Concerning trading in influence, the amendments of the Criminal Code have regulated in two separate provisions active (Article 422a CC) and passive (Article 422 CC) trading in influence. The authorities explained that the aforementioned provisions are particularly broad in scope in so far as they do not refer to the concept of “improper” influence, but to the concept of “using the

official or social position or influence". The GET was told that it is not required that the influence is actually exerted and leads to the intended result and that the relevant trading in influence provisions cover both situations implying (intended or real) legal and illegal acts or omissions. Third party beneficiaries are explicitly covered. The GET recalls, however, its misgivings concerning some conceptual discrepancies in the constitutive elements of the offence already detailed in paragraph 67 and the recommendation made in this respect in paragraph 68 (notably, with respect to the coverage of immaterial/intangible advantages, as well as the indirect perpetration of the offence).

75. The sanctions available for bribery in the public sector vary depending on the action or inaction by the official concerned resulting from a bribe and his/her duties, and more particularly, the lawful or unlawful nature of this action/inaction (i.e. whether duties are breached or not). Likewise, the available sanctions for passive bribery (whether in the public or private sector) and trading in influence are more severe than those provided for the active side of the offence. Sanctions generally range from 3 to 5 years for bribery (including in the private sector) and trading in influence offences; these sanctions are in line with those applicable to other comparable offences, such as fraud or embezzlement. The maximum penalties for passive bribery in the public sector may range up to 8-12 years' imprisonment, and even 15 years' imprisonment if the public official committed the bribery offence in relation to the uncovering of a criminal offence, initiation or conduct of a criminal proceeding, pronouncement or enforcement of criminal sanctions. Security measures, including professional disqualification, can be cumulatively imposed. The available sanctions for bribery/trading in influence offences conform, on paper, to the requirements of Article 19, paragraph 1 of the Convention. As for the period prescribed by the statute of limitations regarding the institution of criminal proceedings with respect to bribery and trading in influence offences, it generally ranges from 3 to 5 years (for aggravated offences it can run up to 15 years). The GET is of the opinion that the current corruption provisions provide a proper basis for prosecution. The GET also notes that positive steps have been taken to improve the efficiency of the criminal legal framework and, on the basis of the statistics provided, a track record of investigations and convictions is being built. The authorities (as well as some non-governmental experts interviewed) pointed at some particular features, which have been recently introduced, to increase the overall efficiency of the prosecution of this type of offence, including, legislative amendments (notably, to the Criminal Code and the Criminal Procedure Code) providing for extended confiscation, application of special investigative techniques, leading role of prosecutors in pre-trial procedures, etc. Likewise, efforts have been made in the last two years (2008-2010) to ameliorate the institutional set-up for investigating and adjudicating corruption cases through specialisation of courts, prosecutors and the police. Improvements were also reported in tackling the serious backlog of courts, which sometimes resulted in corruption cases being time barred; in this connection, the GET was assured that corruption cases are now given absolute priority by the responsible courts. Despite all these legislative/institutional reforms, it was obvious to the GET that there was widespread mistrust in civil society as to the effective determent of corruption in the country, the general view being that most investigations dealt with petty bribery (bribes of no more than 20 EUR) of low and middle ranking officials and that there was no real will to fight grand corruption and to tackle corruption in particularly vulnerable sector areas (e.g. public procurement, urban planning). The GET wishes to stress that the practical measures already initiated by the authorities to improve the efficiency of corruption-related investigations (as described above) need to be pursued with determination and further developed in order to support the implementation of the recently amended penal provisions concerning bribery and trading in influence offences and to regain public trust in the system.

76. A special defence of effective regret is provided for active bribery committed in the public sector. In particular, Article 424 (4) CC (active bribery public sector), Article 276b (active bribery private sector) and Article 422a (3) CC (active trading in influence) stipulate that the perpetrator may be remitted from punishment if s/he reports the offence before its detection. The decision to exempt the perpetrator from punishment is at the discretion of the court. The GET was told that, in theory, the special defence of effective regret was meant to cover cases of solicitation (including an element of constraint on the bribe-giver), to encourage the reporting and thus, facilitate, the uncovering of bribery offences; however, the defence has so far never been invoked/granted in practice. The GET takes note of the explanations provided by the authorities on the necessity of this type of defence and the safeguards provided by law against its potential misuse since the relevant provisions on effective regret are rather limited in scope and have a discretionary nature, which the court may decide to apply or not to apply. The GET further welcomes the fact that the possibility provided by the former CC (ex-Article 424(6) CC) to return the bribe to the briber, who has declared the offence before it is uncovered, has been abolished by the recent amendments to the CC.
77. Rules on jurisdiction are laid down in Article 134 CC (territoriality jurisdiction: offences committed, in whole or in part, in Montenegro), Article 136 CC (nationality jurisdiction for offences committed abroad by Montenegrin citizens) and Article 137 (1) CC (nationality jurisdiction for offences committed abroad by foreigners against Montenegro). Article 137 (2) CC regulates situations where the offence is committed abroad by a foreigner against a foreign State or a foreign citizen. In these cases, Montenegro retains jurisdiction provided that two conditions are met: 1) the foreign offence is punishable by 5 years' imprisonment or a heavier penalty and 2) the perpetrator is found on the territory of Montenegro and s/he is not extradited to the foreign State concerned. For offences committed abroad under Articles 136 and 137 (1) CC, Article 138 (4) CC requires dual criminality. When the law of the country where the offence was committed does not provide for the criminal prosecution of such offences, prosecution can be instigated only with the authorisation of the Supreme Public Prosecutor. The authorisation by the Supreme Public Prosecutor is a formal requirement, discretionary in nature and not automatic. The GET considers that the requirement of dual criminality under Article 138 (4) CC constitutes an unnecessary restriction which is not in line with the Convention.
78. Moreover, the GET notes that Article 17, paragraph 1.b of the Convention not only establishes jurisdiction for offences committed by nationals abroad but also extends 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 Montenegrin criminal law which generally requires citizenship of Montenegro. Domestic officials and members of domestic public assemblies who are not at the same time citizens of Montenegro would therefore not be covered. The authorities indicated, however, that such situations could not arise as in Montenegro public officials have to be citizens of Montenegro. The GET accepts this explanation but wishes to stress that in the case of future legislative changes to this nationality requirement on public officials the jurisdictional rules would have to be adjusted accordingly.
79. Finally, with particular reference to certain situations covered by Article 17, paragraph 1.c of the Convention, i.e. 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 – Montenegrin nationals, it appears that Montenegro would retain nationality jurisdiction only if the offence is directed against the country (Article 137 (1) CC) or if the offence carries a punishment of at least 5 years' imprisonment (Article 137 (2) CC). The GET is concerned that these additional requirements do not cover the different situations foreseen in Article 17, paragraph 1.c of the Convention: for example, there may well be cases

where it is difficult to prove that the offence was directed against Montenegro. Likewise, some bribery/trading in influence offences carry a punishment of less than 5 years' imprisonment. In light of the foregoing considerations, the GET recommends (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, Montenegrin nationals.

IV. CONCLUSIONS

80. Following various amendments to Montenegrin criminal legislation in order to comply with developing international standards, that legislation is largely in line with the requirements of the Criminal Law Convention on Corruption (ETS 173). That said, the applicable bribery and trading in influence provisions are not always explicit in terms of the particular elements required by the Convention (e.g. direct/indirect commission of the offence, advantages intended for a third person, international dimension of scope of perpetrators) or they comprise inconsistent terminology (for example, with respect to the notion of undue advantage). The current legislation would clearly benefit from further adjustments to prevent possible problems in the application of the law in practice and to fine-tune the existing provisions for the sake of legal certainty. It must also be ensured that the offences of active and passive bribery in the public sector cover all acts/omissions occurring in the exercise of the function of a public official, whether or not within the scope of his/her official competence. Furthermore, with respect to bribery in the private sector, the range of possible perpetrators needs to be extended to cover all persons who direct or work for – in any capacity – private sector entities, as well as to include unambiguously all instances implying a breach of duty. Further steps need to be taken to fully align Montenegrin legislation with the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), notably, by ensuring that foreign arbitrators and jurors are fully captured by the relevant bribery/trading in influence provisions. In addition, Montenegro has restricted its jurisdiction and its ability to prosecute cases with an international dimension, including by requiring dual criminality; this state of affairs is not in line with the Convention and needs to be remedied.
81. Moreover, despite the recent upgrading of Montenegrin legislation and despite notable improvements with regard to the institutional set-up for fighting corruption, in particular through the establishment of specialised anti-corruption structures within the law enforcement bodies, it would appear that corruption remains a critical problem in Montenegro which meets with great public concern and that further efforts are still needed to significantly reduce its occurrence. Above all, the main challenge in fighting corruption in Montenegro lies with the effective application of legislation; a sound track record of investigations and convictions, including that of high-level corruption, is to be accomplished as a matter of priority in order to regain public trust in the system.
82. In view of the above, GRECO addresses the following recommendations to Montenegro:
 - i. to harmonise the provisions relating to bribery (in the public and private sector) and trading in influence offences with a view to enhancing their consistency and clarity, in particular by unambiguously covering: (a) immaterial/intangible advantages; (b) the indirect commission of the offence; and (c) third party beneficiaries (paragraph 68);

- ii. to ensure that the provisions concerning active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of his/her official powers (paragraph 69);
 - iii. to ensure that foreign arbitrators and jurors are explicitly covered by the bribery provisions of the Criminal Code, in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) (paragraph 70);
 - iv. (i) to provide for a consistent definition of bribery in the private sector; (ii) to cover in an unequivocal manner the full range of persons who direct or work for – in any capacity – private sector entities; (iii) to capture unambiguously all instances implying a breach of duty by the briber/bribed person (paragraph 73);
 - v. (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, Montenegrin nationals (paragraph 79).
- 83. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Montenegro to present a report on the implementation of the above-mentioned recommendations by 30 June 2012.
- 84. Finally, GRECO invites the authorities of Montenegro 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.