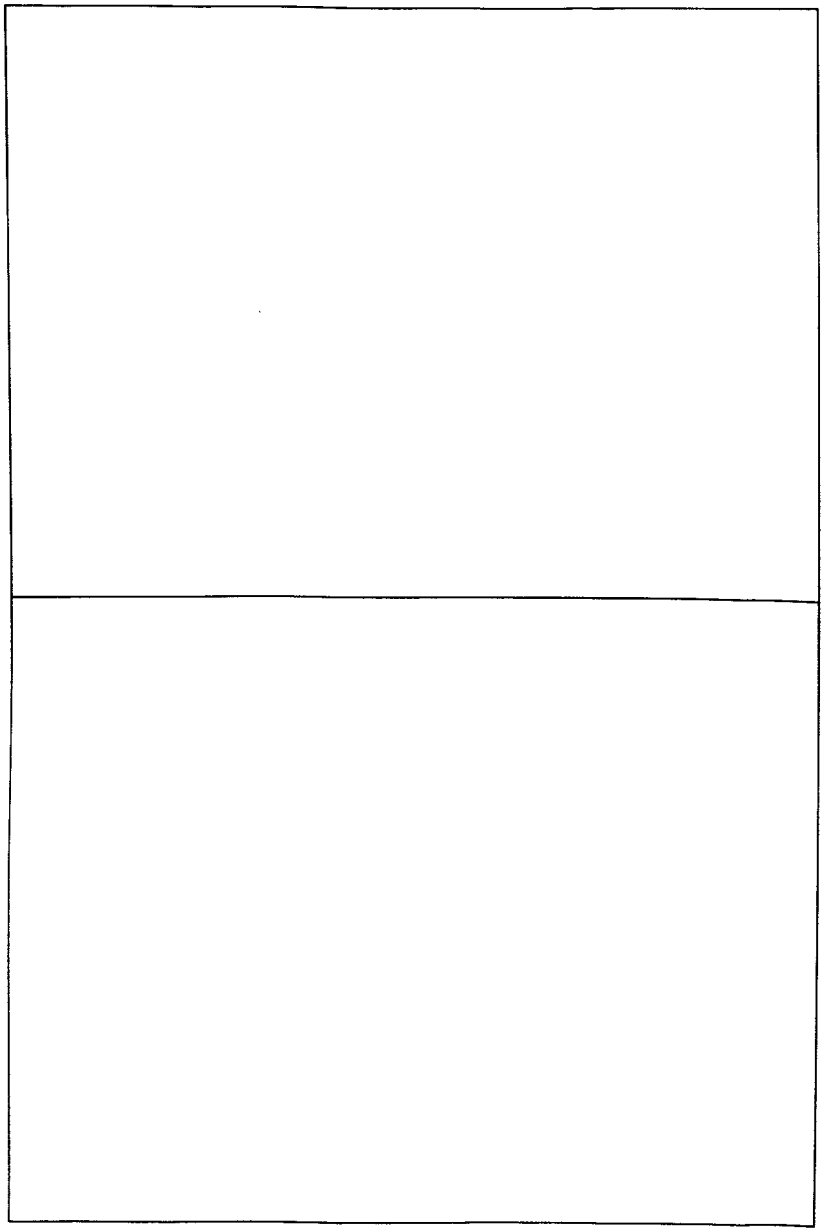
Albin Eser/Michael Kubiciel

Institutions against Corruption

A Comparative Study of the National Anti-Corruption Strategies reflected by GRECO´s First Evaluation Round

Nomos



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Foreword

During the last few years, several international monitoring mechanisms, covering various legal fields, have been developed. The area of corruption is one field in which the number of such mechanisms is among the highest. Both global and regional monitoring mechanisms have been set up. Their characteristics, scope and output therefore vary considerably. Making comparisons and a certain level of competition among them is inevitable. The number of these mechanisms is growing and countries are slowly starting to show some resistance towards involvement in this developing trend in the international legal sphere. Overlapping is present to a certain extent; however, only concrete results count.

It is tempting for all monitoring mechanisms - existing and emerging ones - to attempt to prove their preeminence – if only to ensure regular financing of their activities. They adopt different approaches in order to promote themselves.

GRECO - The Group of States against Corruption, an Enlarged Partial Agreement of the Council of Europe - was the first monitoring mechanism to strictly ensure the observance of the principle of equality of rights and obligations among all its members, to ensure that follow-up is given to its recommendations and to sanction non-compliance with these recommendations. These all constitute characteristics appreciated by critical experts in the field and, above all, by the governments that finance GRECO. In addition, and in contrast to other monitoring mechanisms, GRECO appointed an independent Scientific Expert with in-depth theoretical and practical knowledge in the field of combating corruption – Professor Dr. ALBIN ESER, at that time director of the world-famous Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. He personally followed the adoption by GRECO of its country Evaluation Reports. He helped GRECO to achieve consistency and scientific objectivity by providing critical comments on proposed texts and suggesting constructive amendments. Due to this expertise, arrangements were made with Prof. ESER and Dr. MICHAEL KUBICIEL, at that time a Research Fellow at the Max-Planck Institut, to produce a comparative study of the findings of GRECO's First Evaluation Round.

The First Evaluation Round dealt with 3 of the guiding principles described in the Council of Europe Resolution (97) 24 on The Twenty Guiding Principles for the Fight against Corruption. Those three guiding principles were Nos. 3, 6 and 7, dealing with anti-corruption institutions and immunities. This book is the result of a thorough and lengthy study of 35 country reports. The authors of the book were successful in accomplishing a task which originally seemed impossible. They have extracted the substantive findings of all the First Round Evaluation Reports, made a comparative analysis of them and included their own critical observations.

Due to the fact that individual national anti-corruption efforts cannot be enhanced through theoretical assessments alone, GRECO's principal aim is not to provide a self-oriented analysis of national legislation and institutional structures. GRECO seeks to prompt change not only in the countries that are evaluated. The comparative study covers even the most detailed elements of an effective fight against corruption. Prof. ESER and Dr. KUBICIEL provide an in-depth analysis of the core criminal law of GRECO member States. They explicitly pinpoint the weaknesses identified by GRECO evaluation teams, provide an unbiased outline of possible solutions and also include their personal and expert assessment of GRECO's recommendations and observations. This study well reflects GRECO's extensive monitoring efforts and will constitute a very useful handbook for anti-corruption policy-makers and practitioners.

The authors should be warmly congratulated for their exceptional work. As President of GRECO I wish to personally acknowledge the invaluable contribution made by Prof. Dr. ESER and Dr. KUBICIEL to our work in the fight against corruption. This book will provide GRECO with invaluable insights.

Strasbourg, August 2005

DRAGO KOS
President of GRECO

Preface

This study presents the first comprehensive analysis of GRECO's work against corruption.

As its full name implies, the "Groupe d'Etats contre la corruption" - "Group of States against corruption" in English - functions as an organisation of states which aims at ensuring respect of international anti-corruption standards within the cooperating States. It focuses, in particular, though not exclusively, on corruption in the public sphere. GRECO is a body of the Council of Europe.

As described in more detail in Chapter I on the subject and methodological approach of this study, GRECO carries out its ambitious task within the framework of distinct Evaluation Rounds. The First Evaluation Round dealt mainly with three topics: basic substantive provisions against corruption and its prosecution, general and/or specialised persons and bodies empowered to prosecute and prevent corruption, and immunities of certain persons and organs which may impede or even bar the investigation and prosecution of corruption.

Due to the fact that no analysis had hitherto been made of the substantial quantity of information provided in the national Evaluation Reports on the law and practise of GRECO member States, it had been difficult to identify convergent or divergent approaches in national corruption policies. In my capacity as Scientific Expert of GRECO, I was therefore mandated to carry out a comparative study of the national anti-corruption strategies examined by GRECO during its First Evaluation Round.

Fortunately, my position at that time as Director of the Max-Planck-Institut for Foreign and International Criminal Law in Freiburg, allowed me to benefit from the excellent assistance of MICHAEL KUBICIEL as co-researcher. I am greatly indebted to him for the thorough research and thoughtful drafts he has contributed during the fulfilment of this challenging task.

Our work has not been limited to a comparative study. Although we were not mandated to formulate recommendations ourselves, we have at times identified deficiencies in national anti-corruption systems. Where we have transgressed from mere description to critical evaluation, it should be noted that the views expressed are our own and not those of GRECO.

This is not the place to anticipate what will be dealt with later on in this study. I do, however, wish to address two features of GRECO's efforts here: First, as expressed in the title of this study, an efficient fight against corruption requires more

than merely improving old or introducing new "norms". It rather needs "institutions" which provide an integral set of substantive and procedural rules and appropriate means of practical implementation, capable of approaching corruption from various angles and on different levels are also needed. Therefore, GRECO quite correctly does not content itself with solely analysing penal provisions on corruption but also pays attention to administrative safeguards and organisational structures, in particular those of the prosecution and tax authorities. Second, GRECO serves as an excellent example of the remarkable potential of the Council of Europe to promote standards for the protection of this region's citizens and institutions.

Finally, I would like to take this opportunity to express my sincere thanks to GRECO, its President, Secretariat and national delegates, for the confidence they have shown me in electing me as GRECO's Scientific Expert and mandating me with this study, and for their invaluable co-operation throughout this transnational comparative enterprise.

Freiburg, August 2005 ALBIN ESER

Table of Contents

I. Subject and Methodological Approach

A. Empirical background

Ever since society has been organised by the division of labour and the decision-making process has been realised in a structured way, people have tried to influence this process in their favour by means of corruption. Thus, corruption has become a constant companion in the development of humankind. The silent and discrete nature of this companionship may have led to the underrating of its influence on the goals and directions of society. Aside from a few truly grand decisions, perhaps even on war or peace, that have been influenced by corruption, it is a multitude of petty bribes which can cause a society to tumble and to deprive it of its stable fundament: Where the prosecution of a crime, the participation in public procurement or, in general, political benevolence of decision makers can be bought, distortion of single proceedings is not the only result; even more dangerous appear subliminal alterations as their symptoms often only come to the awareness of an affected society once a cure, if not impossible at all, can be accomplished only with the most painful efforts.

Susceptible to corruption are all levels of social systems: individuals as well as parties, public administration as well as private economy. For this reason it is inevitable to fight corruption in the entire social system. To not only prevail in an occasional skirmish, but for winning a sustainable victory, it is necessary – not at least due to the progressing internationalisation of trade and the globalisation of the European countries and beyond – to establish an international alliance in the spirit of common values and by way of coordinated actions.

To be sure, countering corruption requires clear and realistic goals. Since human profit-seeking as *conditio humana* is not fundamentally amendable, corruption will never be completely eradicated in a society. Nevertheless, it appears possible and therefore should at any rate be attempted to create an environment where corruptive cancer cannot ulcerate and may more easily be detected and controlled.

B. GRECO's goals and procedures

On the European level, it is in particular the Council of Europe that joined the fight against corruption.[1] At their 19th Conference, held in Valletta/Malta in 1994, the European Ministers of Justice recommended to set up a *Multidisciplinary Group on*

1 See the GRECO website: www.greco.coe.int.

Corruption (GMC) with the task of preparing an international programme of action and examining the possibility of drafting legal instruments in this field. After the adoption of such a programme by the Committee of Ministers in 1996 and the instruction of the GMC to implement it until the end of 2000, a further decisive step was taken by the *Second Summit of Heads of State and Government of the Member States of the Council of Europe,* held in Strasbourg in October 1997, by adopting an Action Plan against corruption and instructing the Committee of Ministers to develop Guiding Principles for domestic legislation and practice, to secure the rapid completion of international legal instruments and to establish an appropriate and efficient mechanism for monitoring the observance of the guiding principles and the implementation of the said international instruments. Main products of this common determination to take action against the dangers of corruption are the *Resolution (97) 24 on 20 Guiding Principles for the Fight against Corruption (GPC)* of 6 November, 1997, the *Criminal Law Convention on Corruption* of the Council of Europe[2] (Criminal Law Convention), as well as the *Civil Law Convention on Corruption*[3] and the *Recommendation R (2000) 10 on the Codes of Conduct for Public Officials.*[4] In an organisational context, the most decisive measure based on the resolutions of the Council of Europe (98) 7 and (99) 5,[5] was the establishment of the *"Group of States against Corruption/Groupe d'Etats contre la Corruption" (GRECO).* According to its statute, the principal aim of GRECO is to monitor, by a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the fight against corruption and the implementation of international legal instruments.[6] Up to now 39 nations have joined GRECO, and although the absence of Italy leaves a gap, the participation of the United States of America signals the opening of these pan-European efforts to a transatlantic reach.

The activities of GRECO, however, are only part of the growing international attention directed toward the dangers of insufficient actions against corruption. Aside from the *UN Convention against Corruption* adopted by the General Assembly on 12 November, 2003, the measures taken by the OECD are particularly worth mentioning, although they still fall short of the scope and intensity of GRECO's investigation.[7] In contrast to the comprehensive scope of the European instruments, as in particular the 20 Guiding Principles, the Criminal Law Convention, the Civil Law

2 Criminal Law Convention on Corruption (ETS No. 173) opened for signature on 27 January, 1999.

3 Civil Law Convention on Corruption (ETS No. 174) opened for signature on 4 November, 1999.

4 Available at cm.coe.int/ta/rec/2000/word/2000r10.doc.

5 Resolution (98) 5 adopted on May 5, 1998; Resolution (99) 7 adopted on 1 May, 1999.

6 See Art. 1 Statute of GRECO: "The aim of the Group of States against Corruption is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field".

7 In particular with regard to the similar methodology of the so-called "peer review" see *Fabrizio Pagani*, Peer Review: A Tool for Co-ordination and Chance, OECD SG/LEG(2002)1, OECD (ed.).

Convention and the Recommendation on the codes of conduct, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction* comprises the relatively limited sector of the criminal prosecution of border crossing corruption. As a consequence, the monitoring programme of the OECD Working Group on Bribery[8] is substantially restricted to this issue. This limited task makes plain that the monitoring by the OECD, at least in its beginning, confined itself to comparing all components of the national criminal law provisions with the requirements of the OECD Convention.[9]

The more comprehensive task of GRECO makes it possible to gain a broad as well as thorough insight into the legal systems and the organisation of the participating countries. The knowledge to be expected from this comparison is not only necessary and adequate for understanding a problem as complex as corruption, but may also provide advice for the participating countries in their fight against corruption. As it would be impossible to perform the entire monitoring programme of GRECO in one step, it was decided to carry it out in various consecutive evaluation rounds, in which each time various aspects of national anti-corruption strategies are investigated and evaluated with regard to their compliance with the legal standards set up by the aforementioned instruments of the Council of Europe and its organs.

The **First Evaluation Round**, began on 1 January, 2000, and by March 2003 finally covered 35 member states: these are Albania, Belgium, Bosnia and Herzegovina,[10] Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, „Former Yugoslav Republic of „The Former Yugoslav Republic of Macedonia", United Kingdom and the United States of America. This round was to explore in which way and to what degree the legal provisions as well as the factual structures and practice in these countries is in compliance with the aims pronounced in the Guiding Principles Nos. 3, 6 and 7.[11] Within this reach of the GRECO evaluation, the obligations to be complied with by the member states are the following:

Guiding Principle 3: to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the

8 Provided for by Art. 12 of the OECD Convention.

9 Meanwhile, however, in its second evaluation round the OECD monitoring was opened to further questions, such as "awareness arising", "whistle-blowing" or intra-administrative co-operation, as exemplified by Germany, Phase 2 Report on the Implementation of the OECD Anti-Bribery-Convention of 3 July, 2003.

10 When here and in the following the criminal law of Bosnia and Herzegovina is referred to, this applies to the criminal codes of the Federation (FBiH) and the Republic Srbsca, but not the district Brzko as so called "Third Entity". Cf. GRECO Report on Bosnia and Herzegovina, para. 8.

11 *Resolution (97) 20* adopted by the Committee of Ministers on 6 November 1997 at the 101st session of the Committee of Ministers.

authorities in combating corruption and preserving the confidentiality of investigations;

Guiding Principle 6: to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society;

Guiding Principle 7: to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks.

In short, the First Evaluation Round dealt mainly with three topics:

- basic substantive provisions against corruption and its prosecution and practice,
- general and/or special persons and bodies empowered to prosecute and prevent corruption,
- immunities of certain persons and organs by which the investigation and prosecution of corruption may be impeded or even barred.

The evaluation by GRECO is basically performed in the following way: After the country to be evaluated has turned in its "Reply to the Mutual Evaluation Questionnaire" (cf. Art. 11 GRECO Statute), which was developed by GRECO in a standardised manner and sent to all countries concerned, the respective country will be visited by a "GRECO Evaluation Team" (GET, cf. Arts. 12, 13 GRECO Statute), regularly consisting of at least three experts from different countries and accompanied by a member of the GRECO Secretariat, then a "Draft Evaluation Report", prepared by the GET in communication with representatives of the country concerned, is submitted to a Plenary Meeting of all GRECO members (Art. 14 GRECO-Statute) which in two readings – again assisted by the experts of the GET and in consultation with the representatives of the country concerned – finalise the "Evaluation Report" which upon the agreement of the country concerned is made public (Art. 15 GRECO Statute).[12]

After introductory notes to the composition of the GET and its proceedings, each GRECO Report consists of (i) a descriptive part of the factual situation and the existing provisions with regard to the subjects of the Guiding Principles concerned, (ii) an analytical part providing the evaluation by GRECO and (iii) final conclusions containing the recommendations and observations of GRECO, ending with the determination of the time period (of regularly 18 months) within which the country is expected to report on the implementation of the recommendations made by GRECO (Art. 15 [6] GRECO Statute). This statement is the basis for a "Compliance Report", in which the measures taken by the state concerned to implement the recommendations are analysed and evaluated (Rule 31 Rules of Procedure). After again having been finalised in a GRECO Plenary Meeting, this report is made public as well.

As may already be stated at this point, the GRECO Reports of the First Evaluation Round, the analysis and comparison of which are the subject of this study, are – not at least due to the coordinating hand of the GRECO Secretariat – of remarkable coherence. In describing and analysing the situation they do not narrowly restrict

12 These reports are available at www.greco.coe.int/evaluations/Default.htm.

themselves to the main subjects of the three Guiding Principles in question here, but present a far reaching impression of the institutions that are employed by the various members of GRECO in their fight against corruption. Thus, they provide a solid base for this inquiry into the national anti-corruption strategies.

C. *Theoretical and methodological aspects*

Obviously, this study does not pretend to present a comprehensive description and analysis of the GRECO Member States' fight against corruption. For as the GRECO's First Evaluation Round was focused on and, thus, limited to three of its general principles only, a full picture cannot be available until all the guiding principles with regard to their implementation in national law are described and analysed by further evaluation rounds. Although the Second Evaluation Round, dealing with GPC 4 and 19 on "Proceeds of Corruption", GPC 9 and 10 on "Public Administration and Corruption" and GPC 5 and 8 on "Legal Persons and Corruption", is already on its way since December 2003,[13] it appeared appropriate to present a comparative analysis of the First Evaluation Round without waiting for further reports: first, for substantive reasons as the subject matters of the First Evaluation Round are of basic importance for the whole evaluation process, and second in expecting that further evaluation rounds could learn from the lessons learned in the First Evaluation Round.

Focussing on the subject of the Guiding Principles 3, 6 and 7 does not mean, however, that this comparative analysis is strictly following the sequence of the country reports, as well as it does not pretend to take notice of every detail and national pecularity therein. For as expressed in the title of this study, it rather aims at presenting the main features of institutions and strategies a country is employing, or may lack, in fighting corruption.

When talking of "institution" this is not meant in the narrow sense of public authorities or organisation, but rather as the entirety of legislative and administrative-organisational means and measures the existence of which may influence a person who takes corruption into account of its decision making.[14]

This approach therefore encompasses both the norms and all authorities in charge of the supervision and enforcement of norms. Drawing on terminology of game theory, an institution can be understood as a "collectively perceived summary representation of an equilibrium of the game and the players and the rules of the game

13 To the extent finalised and made public, these reports are available on internet in the same way as those of the First Evaluation Round.

14 *E. Furubotn/R. Richter,* Institutions and economic theory. The contribution of the new institutional economics, Ann Arbor 1998, p. 6 define an institution as a set of formal and informal rules, including their enforcement arrangements, with the purpose to steer individual behaviour in a particular direction.

can be contoured as essential components of this game.[15] This institutional understanding calls for both a broad view on the institutions and an individual approach to the addressees of these institutions: Whether the fight against corruption will be promising cannot be answered with an abstract and normative "ideal state" of society as decisive criterion for the evaluation of national anti-corruption strategies. Such an evaluation would neglect that the state of society is merely a reflection of individual behaviour. The decisive scale is therefore whether the implemetation or modification of certain institutions can motivate an individual to refrain from intended corruption.[16]

The analysis of the impact of institutions on the behaviour of individuals starts from the assumption of rational choices made by a *homo oeconomicus*. The figure mentioned, the *homo oeconomicus*, does not claim to represent the nature of man in its entire complexity. However, it is a solid heuristics to predicate decision-making in a field – such as economic crime – where acteurs opt rationally since irrational decisions may lead to unwanted consequences. Consequently, we can assume, that – facing the choice between lawful and unlawful behaviour – a rational individual would realise that the costs of unlawful behavior rise the tighter the "net" of institutions is woven. Beyond a certain degree of marginal costs lawful, that is non-corrupt, behaviour would be the economically rational choice.[17] This institutional approach leads to an understanding of criminal law and its enforcement as a mean to prevent criminal behaviour. Certainly, the issue of prevention is not an unique explanation for punishing, but can, for example, be accompanied or substituted by the purpose of retribution. However, since GRECO's work aims to help nations to combat corruption, the approach mentioned above seems to be justified: Institutions, such as criminal law and the law enforcement bodies, are understood as tools in steering the individual and the society as a whole in the direction defined by democratic legislation.

With respect to corruption the direction is clear: Corruption shall be prevented as it is incompatible with the essential standards of a democratic society. According to the Criminal Law Convention of the Council of Europe the prohibition of corruption subserves the protection of standards such as "the rule of law, democracy, human rights, good governance, fairness and social justice, competition, economic devel-

15 Cf. *Masahiko Aoki*, What are Institutions and how should we approach them, in: Gudrun Kochendörfer-Lucius/Boris Pleskovic (ed.), The Institutional Foundations of a Market Economy, Berlin 2001, pp. 31, 33.

16 This relates to the doctrine of "methodological individualism", that is to say, all social phenomena are explained only in terms of individuals – their properties, goals and beliefs; fundamental Joseph A. Schumpeter, Das Wesen und der Hauptinhalt der theoretischen Nationalökonomie, Wien 1908, pp. 88 ss.

17 Background of this economic approach is the "rational choice". According to this theory individuals adjust their behaviour to the expected profit (cf. *Gary S. Becker*, A Theory of Social Interactions, 82 Journal of Political Economy (1974), pp. 1063-1091), and, consequently, evaluate a possible illegal action pursuant to the trade-off between expected advantages and disadvantages.

opment, stability of democratic institution and the moral foundation of society".[18] Since there are more obvious threats to democracy, social justice and fairness than corruption, the enumeration does not highlight the specific corruption-related risks for these values. To understand this connection one has to adopt a more abstract level: The ban of the corruption aims at the protection of social procedures and the trust of the citizens in their functioning and their neutrality. So the institutions against corruption safeguard the required confidence of the people in the functioning of the procedures, or – metaphorically speaking – in the game and the rules of the game. This confidence is the essential basis for the cohabitation of people in a society: People are willing to delegate decisions affecting their own concerns to rules and procedures only as long as they trust the "proposal of acceptable results" reflected by these rules and procedures. Acceptable results essentially depend on the observance of the rules defining the procedure. It is therefore necessary to impose corruption bans on these persons who make decisions in the procedures or observe these decisions, in order to safeguard that these people do not serve their own welfare but the functioning of the system. Consequently, the anti-corruption norms protect the normative requirements of procedures, in order to ensure that the promise of just results made by these procedures are transformed into social reality.

An additional reason for prohibiting corruption follows from the economic consequences of corrupt behaviour.[19] According to the overwhelming opinion in economic theory, corruption has to be fought because the national economy is damaged

18 Cf. the Preamble of the *Criminal Law Convention on Corruption*: "Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society". Similar wording in the Preamble of the Civil Law Convention. Cf. also the Preamble of *Resolution (97) 24*: "Aware that corruption represents a serious threat to the basic principles and values of the Council of Europe, undermines the confidence of citizens in democracy, erodes the rule of law, constitutes a denial of human rights and hinders social and economic development".

19 Cf. the mentioning of the topics "economic development", "competition" in the preambles of the said conventions.

by social costs.[20] Losses in social welfare not only result from the possibility of corrupt participants to delegate their expenditures to the public by means of higher prices or taxes. Moreover, substantial social costs are caused by the distortion of competition: Competition is the main social procedure to coordinate offers and demands in the market and to recompense efforts and innovation, guided by the famous "invisible hand".[21] Functioning competition is not only a concrete result of the legal guarantee of freedom but also a swift mechanism to promote social and economic development. Societies have opted for a market ecomomy because the majority of people believe that this social procedure leads to a maximum of freedom and an increase in welfare. In order to fulfil these expectations the private "self-coordination" by competition, therefore, requires the same protection of its prerequisites as the public procedures in the administrative sector. Corruption – in addtition to cartels and the abuse of dominant market power – is the most effective means in public and private tender to foster the success of the suboptimal and to hamper the success of the better offer. For these normative and economic reasons, competition as a procedure has to be protected against corruption, regardless of the question of whether a public official or a decision-maker in the private sector has been "infected".

As has been seen, the prohibition of corruption in the private sector subserves the protection of procedures and the trust of the participants in the prevalence of the rules and the functioning of the "game". Consequently, solid institutions against corruption ask for a comprehension of corruption that includes the protection of procedures both in the public *and* in the private sector. Distinct to the common definitions of corruption[22] – the "abuse-advantage-approach" and the "interests-

20 Cf. *Center for Democracy and Governance, US Agency for International Development* (ed.), A Handbook on Fighting Corruption, Washington DC, 1999, p. 5: "Corruption also undermines economic development by generating considerable distortions and inefficiency. In the private sector, corruption increases the costs of business through the price of illicit payments themselves, the management costs of negotiating with officials, and the risk of breached agreements or detection. [...] Where corruption inflates the cost of business, it also distorts the playing field, shielding firms with connections from competition and thereby sustaining inefficient firms. Corruption also generates distortions in the public sector by diverting public investment away from education and into capital projects where bribes and kickbacks are more plentiful. Officials may increase the technical complexity of public sector projects to conceal such dealings, thus further distorting investment. Corruption also lowers compliance with construction, environmental, or other regulations; reduces the quality of government service and infrastructure, and increases budgetary pressures on government." According to a dissenting opinion in economics, corruption is a useful mean to speed up decisions in a overextended bureaucracy (*N. Leff*, Economic Development through Bureaucratic Corruption, American Behavioral Scientist 1964, p. 8; cf. *Paul Holden/Jennifer Sobotka*, Corruption: An Economic Perspective, in: Paolo Bernasconi (ed.), Responding to Corruption, Social Defence, Corruption, and the Protection of Public Administration and the Independence of Justice, Napoli 2000, pp. 54, 55).

21 *Adam Smith*, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776, passim.

22 *A. J. Heidenheimer/M. Jonston/V. J. LeVine*, Political Corruption: A Handbook, New Brunswick 1989, pp. 3-15.

violation-approach"[23] – a "procedural approach" is preferable. According to this approach, corruptive behaviour is contoured by the following characteristics: Corruption is the (1) influence (2) by inadequate incentives (3) on procedures within organisational structures (4) in favour of particular interests. Incentives can be called inadequate when they are not or not in this specific manner provided for in the procedure.

D. Structure of this study

Although substantive criminal law was not explicitly the subject matter of the First Evaluation Round, institutions against corruption cannot be described without knowing the basics of the relevant crime provisions against bribery. Therefore it is appropriate that all GRECO Reports start with a short description of the national crime provisions against corruption. Accordingly, the first step in this study must be a comparative analysis of the aims and structure of the core crimes against corruption, not at least because they may already open the view to potential deficiencies (II). This is followed by an analysis of the ways on which the substantive corruption provisions are implemented in practice and how far the Guiding Principles are complied with (III). The third step presents a compilation of national deficiencies as found in the Country Reports and as expressed in various GRECO recommendations and observations (IV). Finally some concluding considerations will be presented (V).

23 According to this theory corrupt behaviour is characterised by the adverse variance from public interests.

II. Core Criminal Law Provisions that Prohibit Corruption

At first glance, the GRECO Reports present a rather homogeneous picture.[24] All countries covered by this study have criminal provisions penalising and sanctioning corruptive conduct in a similar way. At a closer look, however, the various provisions reveal significant differences with regard to their effectiveness; therefore, a more detailed structural analysis of the relevant provisions is advisable.

This inquiry starts with a comparative survey of the core criminal law provisions of the GRECO member states by elucidating both common features and variations in the regulative technique (A). This will help to disclose structural weaknesses in the institutional fight of the criminal law against corruption (B).

A. Comparative overview of the core criminal law of the GRECO Member States

1. Active and passive bribery

In principle, all GRECO member states prohibit active and passive bribery by criminal law. When it comes to the concrete formulation of these prohibitions, however, quite a few differences with corresponding consequences come to the surface.

a) The "subject" of corruption: the public official

A definitional element of the crime provision with substantial consequences for the institutional reach of the prohibition is the human subject of corruption, be it the active giver in the case of active bribery or the addressed recipient in the case of passive bribery.

24 The basis for the following analysis are, in general, the GRECO Reports which either in their appendices or in their descriptive parts, reveal the criminal law provisions in their original wording or summarised. In the case of Malta, the information of the GRECO Report has been complemented by additional sources. For the divergences of the information provided by the GRECO Reports the following analysis renders the names of countries as examples. A complete overview of the information to all GRECO member nations can be found in the appendix of this study.

(i) Statutory-formalistic versus functional notion

Whereas the active briber normally can be anybody, the person bribed is mostly denominated as "public official", thus following a "classical" notion of bribery exclusively guided by the protection of proceedings within the state (or similar public) organisation.

➢ This *status oriented* approach is best expressed by provisions which require a special formal appointment for the qualification as "public official", thus considering the status of the person concerned as the decisive criterion (as it is the case in Estonia, Malta, Norway[25] and, with certain reservations, also Albania[26]). In such a "statutory" concept, the prohibition of corruption appears as consequence of the appointment and, as connected with the person in terms of a "status-public-official", remains valid even if the said person is in fact not (or no more) active in a function with decision power susceptible of corruption.

➢ This contingence of the corruption provisions on a certain status has been given up in other legal systems in favour of a more *functional* notion of the subject of corruption by essentially relying on the function performed by the person concerned rather than by its formal appointment. In this functional approach, a public official can be anybody who performs tasks based on some sort of state (or equally public) authority and is, thus, with regard to its function integrated into the public sector.[27] In this approach, the official status of the person concerned is merely an indicator for the critical question whether he or she performs public tasks. In contrast to a "status-public-official" as dealt with before, persons in question here may be described as "function-public-official". This "approach" is, for instance, mirrored in the jurisprudence of the Dutch Supreme Court when considering a person as public official "when s/he carries out her/his job under the supervision and responsibility of the government and whose work cannot be denied to be of public character in order to fulfil functions of the state and of his bodies".[28]

➢ Between those positions which take either a status- or function-oriented approach, one can also find definitions which, in order to secure a comprehension of public officials as wide as possible, by means of a "reserve norm" supplement the status-definition with functional elements. In these terms the Croatian Criminal Code speaks of "public officials or persons performing official duties in bodies of

25 Although the latter's formulation "any person exercising public functions, whether appointed or elected" (GRECO Report on Norway, para. 7), seems to rely on both a certain status and function.

26 Whereas in the case of active bribery the formulation for the recipient clearly requires an "official holding a state duty or public service" (Arts. 244, 245 Albanian Criminal Code), the formulation of passive bribery appears also open for a "functional" approach when speaking of a "person holding state functions or public service" (Arts. 259, 260 Albanian Criminal Code).

27 E.g., cf. Arts. 28, 29 Polish Criminal Code: "performance of public function" or "person performing public functions"; see also phrases like "who misuses ... his employment, position or function" in the Slovak Republic; similarly in Denmark, Greece, Norway.

28 Cf. GRECO Report on the Netherlands, para. 8 (footnote 2).

the executive, legislative and judicial branch of the State".29 Similar formulations can be found in Denmark, France, Georgia and Germany. The same result can be reached by definitions that are open for being construed in both directions, particularly if their source lies outside of criminal law. If, for instance, a public official is seen in "every person who permanently or temporarily performs his or her duties in the state or local government and who has the right to make decisions binding on other persons",30 it is finally left to the interpretation of extra-criminal norms under which conditions such a right exists.

➢ A truly categorical step beyond tradition is finally taken if any binding to statutory or functional elements of public nature are left behind by simply speaking of *"employee"* instead of public official, as it is the case in Sweden[31] and Romania.[32] In this way, the corruption provisions are easily extended beyond the public into the private sector without a special regulation being required. This is certainly also a safe way for avoiding criminal loopholes which can arise if special corruption norms for the private sector are deemed necessary. Another consequence of this broad approach appears noteworthy: If the corruption prohibition is already based on the employment and/or the exercise of certain (public or private) functions, the status as "public official" loses its otherwise decisive role of making the conduct criminal and, instead, can be used as an aggravating factor, as, for instance, in Slovakia.[33]

(ii) Elected persons as public officials

As important figures within institutions, obviously parliamentarians may easily come under corruptive influence. For this reason it is of central significance for the prohibition of corruption as to whether – aside from executive officials – persons elected into parliaments or similar organs of public representation can be the subject of corruption provisions. In this respect, three approaches can be distinguished:

➢ On the one hand, a clear majority of countries that simply comprise of "public officials", as well as law makers and other parliamentarians of any kind. This applies to Albania, Bulgaria, Croatia, Denmark, England and Wales, Estonia, France, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, „The Former Yugoslav Republic of Macedonia", Moldova, the Netherlands, Norway, Poland,

29 See GRECO Report on Croatia, para. 24.

30 Sect. 316 Latvian Criminal Code.

31 Cf. Chapter 17 Sect. 7 Swedish Penal Code, GRECO Report on Sweden, para. 7.

32 Cf. GRECO Report on Romania, para. 9. Cf. also Art. 347 Croatian Criminal Code according to which "official or responsible person" is to mean both public officials as well as private persons entrusted with particular tasks. Cf. GRECO Report on Croatia, para. 25. The subverdict prevention of corruption law can also be understood in such broad terms.

33 Sect. 160a (2) Criminal Code.

Romania, Slovak Republic, Spain, USA and eventually also Georgia, Sweden and the Czech Republic.[34]

➢ The opposite position, by not criminalising the corruption of elected persons at all, is taken by very few countries only, including Finland and Scotland.[35]

➢ A middle position can be found in countries which, instead of equating parliamentarians with "public officials", subject them to the provisions against corruption by special regulations, as in Germany, Greece, Malta and Portugal, while Cyprus directly implemented the relevant provision of the Criminal Law Convention into its criminal law.

(iii) Foreign public officials

From a transnational perspective it is of particular significance if and to what degree foreign public officials and members of international organisations, parliaments and courts may also be addressees of national provisions against corruption. For that reason the ban of corruption of foreign public officials is provided for by international treaties, as in particular the Criminal Law Convetion on Corruption and the OECD Convention. The fight against border crossing corruption is not only a matter of international necessity: Both a comprehensive and coherent national fight can only be expected if the domestic corruption law is not limited to briberies on one's own territory or if committed by own citizens or against own national public officials, but where bribing of foreign public officials even beyond the own national borders is criminalised. In this respect, full international uniformity cannot be noticed either, although a clear tendency in favour of criminalisation can be observed.

➢ On the one side, there is a group of countries which implemented the mandate of the transnational fight against corruption by penalizing the corruption of foreign public officials, both in form of active or passive bribing, as in Belgium, Croatia, Cyprus, Denmark, Estonia, Hungary, Ireland, "The Former Yugoslav Republic of Macedonia", Malta, the Netherlands, Poland, Slovak Republic.[36]

➢ Less far go those countries which by domestic law merely penalise the active bribing of foreign public officials, as it is the case with Bulgaria, France, Germany, Greece,[37] Iceland, Norway, Portugal, Slovania, Spain, Sweden and USA.

34 The latter one, however, instead of using a personal determination, by referring in a more functional way to "dealing with public interest affairs" (Sect. 160 Czech Criminal Code); cf. GRECO Report on Czech Republic, para. 14 footnote 2.

35 In this part of the territory of the United Kingdom neither statutory law nor common law seems to be applicable to the corruption of parliamentarians.

36 The new Criminal Code of Lithuania extends the criminalisation on foreign public officials, but was not in force at the time of the evaluation, cf. GRECO Report on Lithuania, para. 30.

37 While active and passive bribery of officials of the European Union is prohibited the ban of corruption of (other) foreign public officials is only extended to the active form, cf. GRECO Report on Greece, para. 19.

➢ On the other side, however, are still quite a few countries lacking a transnational extension of their domestic law, as Albania, the Czech Republic, Georgia, Latvia, Moldova and Romania.[38] It has to be stressed that the mere possibility to apply national law on extraterritorial crimes is insufficient as long as the national law, in particualar the term "public official", exclusively covers national public officials only.

b) The "object" of corruption: the undue advantage

Another point relevant for the scope and extension of the criminal prohibition is the object of corruption by which the conduct of a decision maker can be influenced. As to this element of bribery differences exist in two respects in particular.

(i) Tangible goods or intangible advantages

The most striking differences can be observed with regard to the character and qualification of the possible object of corruption: It can either be narrowly restricted by requiring a specific tangible or at least otherwise financial or monetary object (such as a car, money, employment or professional promotion, payment of meals or travels), or by expanding it to any intangible values or advantages (such as public honours or sexual offers). The more broad the concept of undue advantage is, the more comprehensive corruptive influences can be subjected to criminal control. Although the ambiquity of certain national corruption provisions makes it difficult to draw clear lines, three main groups can be noticed:

➢ There is still a remarkable number of countries which require some *tangible* good or economical value as the pertinent object of bribing: Bulgaria, Estonia, Georgia, Spain, and, prior to its new penal code, Lithuania.

➢ In contrast, a growing number of countries, although not always explicitly expressing it in their code, but reportedly employing it in practical jurisprudence, have moved away from a strictly financial oriented notion in favour of also comprising intangible advantages: Albania, Croatia, Czech Republic, Denmark, Germany, Greece, Latvia, Malta, Moldova, Norway, Poland, Portugal and USA.[39]

➢ Less easily to be ascribed to the one or the other group are formulations such as "bribe or other improper reward" (Sweden), "gift and any other advantage"

38 Uncertain is the legal situation in the United Kingdom. The OECD Working Group "was not in a position to determine whether the bribery of foreign public officials came within the statutory or common-law offences", cf. GRECO Report on United Kingdom, para. 14.

39 As examples of how this inclusion of intangible advantages is sometimes performed, see Art. 324 Moldavian Criminal Code 2003 which, by mentioning "services or privileges" in addition to different kinds of "material benefit", obviously intents to cover any type of undue advantage; similar Arts. 228, 229 Polish Criminal Code when speaking of "material or personal benefit".

(Bosnia and Herzegovina, Iceland), "gift or promise" (the Netherlands), or "any benefit whatsoever" (France). These formulations can be interpreted as comprising "intangible advantages" as well, if, by way of teleological interpretation, the protective aims (as described supra I.C) are taken into consideration. This conclusion equally applies to the legislation of Cyprus, Hungary, Ireland, Romania, , Slovak Republic and "the former Yugoslav Republic of Macedonia".

(ii) The recipient of the undue advantage

In this respect, the question is whether the public official whose decision is to be influenced must personally be the recipient of the undue advantage or whether this can also be given to another person, thus influencing the public official indirectly. This issue again is dealt with differently by various countries.

- The traditional approach of requiring that the person to be influenced in his or her decision and the recipient of the advantage must be identical is still followed by a great number of countries, such as Albania, Bosnia and Herzegovina, Croatia,[40] Czech Republic,[41] Estonia, Iceland, Latvia, Moldova, the Netherlands, Poland, Portugal, Romania, Sweden and „the former Yugoslav Republic of Macedonia". Thus, in these countries punishment for corruption requires a connection between the public act and personal gain of the official.
- Meanwhile, however, there seems to be a growing number of countries which do not necessarily require a direct advantage of the official to be influenced in his decision, but where the advantage can also be given to a third person, thus, criminalising "indirect" bribing as well (Bulgaria, Denmark, Germany, Greece, Ireland, Lithuania, Norway, Slovak Republic, Spain, USA, and recently also Cyprus[42]).

40 With regard to this country it should be noted, however, that an official or responsible person can be punishable for the abuse of office and offical authority according to Art. 337 if he or she was influenced by gifts given to a third party; yet, this does not provide full protection against "indirect" bribery because the Article in question is only applicable in case of unlawful acts (in terms of infra II.A.1(d)) of the official.

41 As the wording of relevant Sect. 161 of the Czech Penal Code is rather broad, however, in case of active bribery, by very generally speaking of "offering or promising a bribe", it might perhaps also be construed as comprising advantages given to a third person in order to influence the official in an indirect way.

42 Prior to this amendment, the Cypriot law appeared somehow inconsistent: Whereas Art. 100 of the amended Criminal Code is explicitly covering "any property or benefit of any kind for himself or other person", the Prevention of Corruption Law appears more restrictive by only encompassing advantages given to the "agent" and by restricting it to a "valuable consideration". Therefore, the main progress made by the prevention of corruption law seems to be its extension into the private sector and certain shifts in the burden of proof. This discrepancy seems to have been remedied, however, by the "Law to Ratify the Convention of the Council of Europe for the Penalisation of Corruption".

➢ Between these opposite positions quite a few different middle of the road approaches, leaving this or that gap with regard to the required recipient of the undue advantage, can be observed: Whereas, for instance, Hungary would punish passive bribery only if the public official has been personally the recipient of the advantage, the active briber can also be punishable in the case of a gift being given to a third person.[43] The coverage of corruption appears also incomplete in France and Georgia where an advantage gained by a third person renders a public official punishable for corruption only if the third person had acted as a kind of "intermediary", meaning that in fact the advantage was ultimately to go to the official.[44] Otherwise giving a bribe to a third person is punishable in France only in the case of an "unjustified benefit through a breach of legislative or statutory provisions guaranteeing freedom of access to an equal competition in public tenders and public service delegation".[45] Although the penalisation of such conduct is certainly important, it still cannot be ignored that in this way influencing public proceedings with reference to particular third party interests as, e.g., those of a political party, is not barred by criminal law.

c) The connection between the (offered or granted) advantage and the (intended or performed) official act

Whereas the definitional elements of bribery provisions as considered so far are easily conceivable in their relevance for the prohibition of corruption, a closer look is required for comprehending the special connection which may (or rather may not) be required between the (offered or received) advantage and the (expected or exercised) act of the official. With regard to this issue, in some countries characterised as requiring a so-called "Unrechtsvereinbarung" (in terms of an "agreement of wrongdoing"), mainly two groupings can be identified:

➢ The first main group of countries, in following the probably more traditional approach, requires proof of a somehow subjective-intentional connection between the undue advantage and the act to be performed by the official. In this concept, the aim of the active and passive participants in terms of a mutual exchange of an advantage for an official act must be an integral part of the wrongdoing. This collusive nexus between the actors of a corruption is particularly apparent in provisions which, by way of the definitional element of a "pre-existing pact" (as so far in Luxembourg and France)[46] or a "corruption pact" (as until 1990 in Belgium and

43 Cf. Hungarian Penal Code Sect. 250 on the one hand and Sect. 253 on the other.

44 Cf. Art. 432-11 French Criminal Code; to Georgia see GRECO Report, para. 94.

45 Art. 432-14 French Criminal Code.

46 As so far in Luxembourg and in the case law of France where even the legislation of 30 June 2000 did not bring full clarity in practice; see GRECO Report on France, para. 44.

partially in Germany,[47] Greece,[48] and probably also in the United States[49]), require that the granting of an advantage is part of an explicit or at least conclusive agreement between both sides of the corruption. Even more than some kind of collusion seems required if, as in Slovakia, the bribe must be accepted "in exchange for a misuse", as according to this wording the aim and object of the agreement must be the *quid pro quo* of the advantage and the act. The new legislation of Lithuania, too, could be interpreted in this way.[50] Although not so for "simple bribery", at least for "qualified" corruption an agreement according to which the official act is traded in for a tangible value is also required in Poland.[51]

➢ Within this first main group, a subgroup is formed by those countries which, although not strictly sticking to a special exchange agreement, at least require a subjective-intentional relationship between undue advantage and influence, as expressed in various ways: In some countries the advantage must be given "in or to induce (the public official) to take an action" (as in the case of active bribery in Denmark and Iceland), "for the exercise of his duties" (Germany), "in order to accomplish ... an act" (Romania) or "for the performance of his duties" (Sweden). In other countries the advantage must be intended "for carrying out any action or omission" (as in Spain and similarly in Croatia, Cyprus, France, Georgia, Lithuania, Moldova, Norway, USA, in case of passive bribery also in the Netherlands[52] and partly Albania[53]). This subgroup is furthermore subdivided, however, with regard to the character of the act (to be) influenced by the bribe. Whereas some laws in a more abstract manner speak of "duties" (as Denmark, Germany, Sweden and similarly

47 According to § 299 German Penal Code, at least in the private sector the advantage must be granted as a return favour for a preferential treatment; this can hardly be understood other than the requirement of a "Unrechtsvereinbarung". The same applies for bribery of parliamentarians (§ 108e) and judges (§ 331 [2], 332 [2], 333 [2], 334 [2]), whereas in the main area of corruption in the public sector, due to a change of the German Criminal Code in 1997, the requirement of a "corruption pact" is at least loosened in so far as no proof of a relationship between the advantage and a specific act is required, since granting of advantages for gaining general benevolence of a public official is sufficient.

48 Partial in so far, as a "corruption pact" is merely required for special provisions for elected persons, but not for the general corruption provision (cf. Art. 159 Greek Criminal Code; Art. 12, Law 5227).

49 As the phrase "in return for" in case of passive bribery according to Sect. 201a United States Criminal Code may be interpreted.

50 Compare Art. 282 Lituanian Criminal Code in force with Art. 225 Lithuanian new Criminal Code not in force.

51 Cf. Art. 228 § 4 Polish Criminal Code.

52 In the Netherlands, however, the narrowness of this approach is broadened in so far as Art. 362 Dutch Criminal Code also covers the later acceptance of advantages if done in knowing that it was granted for a prior official conduct.

53 Whereas in this country preparatory bribery activities (like proposal or asking for) seem not to require the connection to a specific official act, for the completion of active and passive bribery according to Art. 245 Albanian Criminal Code (remuneration given to officials) and Art. 260 (receiving a bribe) require an intentional connection ("to have him act or refrain" or "in order to carry out or to avoid carrying out" respectively). Cf. GRECO Report on Albania, paras. 27 ss.

Lithuania),[54] in other countries reference to a more concrete "act/omission" is asked for (as in Croatia, Iceland, Moldova, Norway, Romania and Spain). Correspondingly, where punishment is attached to a broader range of acts in that the granting of an advantage must be merely aimed at any official act, the situation of benevolence in the foreground of concrete official acts is already encompassed. By contrast, where a special connection to a concrete (or at least determinable) official action is required, corruptive gifts or other favours without a concrete return service in mind remain free from punishment. Despite these significant differences the common denominator of this first main group still is that the crime provisions for corruption require some kind of subjective-intentional connection between advantage and act, with the very important and practical consequence that all cases in which the difficult proof of some kind of collusive understanding between the giving and the receiving person cannot be established, fall short of incrimination.

➢ The second main group is less strict and, thus, broadening the corruption prohibition by not requiring any intentional reference to a certain act of the official, but by merely requiring some kind of objective connection between granting the advantage and the official's conduct. This is expressed by formulations such as "in connection with the performance of his duties" (as with passive bribery in Iceland or active bribery in the Netherlands; similar Hungary and Malta), "in respect of any matter or transaction whatsoever" (as in Ireland), or "in connection with the providing of a thing of public interest" (as in the Slovak Republic and similarly in the Czech Republic). Comparably wordings can be found in „the former Yugoslav Republic of Macedonia"[55] and Poland whereas for passive bribery in Denmark the functional connection is drawn as far as to penalise even any receiving of advantages during exercising a public office or function;[56] the same applies for foreground efforts of "asking" or "receiving" a remuneration in Albania.[57] In this group it suffices for the prosecution to prove some connection between (offering, rendering, asking for or receiving) an advantage and the position or function of the official the participants are familiar with, whereas neither a special collusive agreement nor the intended purpose of the advantage must be proven.

d) The legal nature of the influenced action

Irrespective of whether a specific aim of the active briber must be proven or whether an official has received a favour in connection with his position or function (as ana-

54 Similarly broad is the language in Art. 245 Albanian Criminal Code: "Remuneration given to officials holding a public office ... to have him act or refrain from acting on an action connected to his duty or service".

55 This concerns the case that "an official person ... after the official act ... is committed or not committed, requests or receives a present or some other benefit in connection with this ..." (Art. 357(3) „The Former Yugoslav Republic of Macedonia"n Criminal Code).

56 Cf. Sect. 144 Danish Criminal Code.

57 Cf. Art. 259 Albanian Criminal Code.

lysed before), in its essence corruption is directed at a present or future act or omission of an official in exercising his function. Still the question remains whether the influenced conduct of the official can be an action or omission of any kind or whether it must bear the character of some illegality. In this question again different requirements – sometimes even within the same country by distinguishing between different degrees of corruption – can be observed.

➢ At first glance, one might assume that the conduct expected from the public official must be unlawful or must at least lead to a result of the corruptively influenced decision process inconsistent with the law. This view could find support in the assumption that no tangible damage is done if, by employing an undue advantage, the outcome of the official's action would in substance not differ from the result of an uninfluenced decision process. From this point of view, the mere influencing of a proceeding by an undue advantage without a causal distortion of the result may be a violation of certain public duties, but not corruption worth being punished. This is a notion of corruption as defined in the Estonian Criminal Code by penalising as act of corruption "the making of undue or unlawful decisions or performance of such acts, or failure to make reasoned and lawful decisions or perform such acts by an official through the use of his or her official position for receiving income derived from corrupt practises or self-serving purposes".[58] In a similar way, other countries as well appear to employ penal law only where the exertion of influence leads to an irregular decision. This applies to Spain which requires an "unjust act or omission" as well as to Greece where the wording of the bribery provision applies only if the act of the official has been illegal.[59]

➢ In contrast, a larger group of countries aims at a more comprehensive penalisation of corruption by not requiring that the influenced act or omission of the official must be illegal as such. This means that the fight against corruption is not only directed against the prevention of unlawful acts that might be detrimental to a specific person, but that for the sake of integrity in performing public functions the mere influencing of decisions is to be prevented and, if committed, sanctioned. This position is meanwhile taken by Albania, Croatia, Czech Republic, Denmark, Ger-

58 On a closer look, however, this definition in paragraph 1642 (1) of the Estonian Penal Code reveals that it has to be read in connection with a specific act, such as "accepting a bribe"; therefore, the Estonian Penal Code is not as "atypical" as pronounced in the GRECO Report on Estonia, para. 15.

59 Cf. Arts. 235, 236 Greek Penal Code in connection with Art. 2, Law 2802 of 2000. These provisions always require a violation of his (the public official's) duties. Should this wording intend not only to delineate social adequate advantages from "undue advantages" but also to express the idea that the act of the public official must have been unlawful, the Greek Criminal Law also would contain a restrictive understanding of corruption.

many, Iceland, Latvia, Malta, Moldova, the Netherlands, Norway, Poland, Sweden, USA and „the Former Yugoslav Republic of Macedonia".[60]

➢ The opening of the concept of corruption to any conduct of the official influenced by an undue advantage does not mean, however, that the illegality of an official act procured by a bribe is completely irrelevant; for by differentiating with regard to the unlawfulness or the correctness of the influenced conduct as such, many countries make use of creating different degrees of bribery. This again can be accomplished on different ways depending on policy considerations of more technical nature. The great majority of this group of countries would regulate the undue influencing of official conduct as the basic provision that can be aggravated in case of an illegal act or omission by the bribed official as a qualification to be sanctioned with higher punishment (as provided for in Bosnia and Herzegovina, Croatia, France, Germany, Hungary, Malta, Norway, Poland, Portugal, Slovak Republic and "the former Yugoslav Republic of Macedonia"). Just the opposite way is, for instance, taken by the Netherlands, by regulating the corruptive procurement of an unlawful act of the official as the basic provision and by granting mitigation if the influenced conduct was not unlawful as such.[61]

2. Other instruments of the core criminal law relevant to corruption

Beside core criminal provisions against bribery many countries provide additional provisions – partly inside, partly outside the basic penal code – to fight corruption in its foreground and ambit.

a) Trading in influence

Exemplary for preventing the influencing of officials in the foreground of bribery is France, by providing punishment when a person holding a public office or a private individual illegally requests, or, directly or indirectly, consents to any kind of advantages in exchange from misusing his or her actual or imaged influence to procure privileges, employment, contracts or any other favourable decision from a French authority or a government department; to the same extent active trading in influence

60 Although not explicitly, a conceptual distinction between an act to be performed lawfully and to be omitted as otherwise unlawful, can also be found in Art. 338 Georgian Criminal Code when speaking with regard to "performing or not performing this or that action in favour of the bribe-giver that the officer or the person equal thereto *must have or could have* performed by using his official position...".

61 Cf. Art. 177a Dutch Penal Code.

is punishable when a third party unlawfully offers, directly or indirectly, any kind of advantage to a person holding a public office or to a private individual as described before.[62]

Much greater is the list of those countries, however, which do not have similar provisions against (active or passive) trading in influence, as in the case of Bulgaria, Denmark, Finland, Georgia, Germany, Iceland, Ireland, the Netherlands, Norway. This is not to say that these countries would ignore the phenomenon of "trading in influence" altogether; for, even if not under this label, these countries may still have other general provisions in their penal code by which undue influencing of officials or the abuse of public duties may be punishable, without finding it indicated in the relevant GRECO Reports.

b) Money laundering

The penalisation of money laundering is another device by which corruption can be fought indirectly. For the more it is made difficult to hide money gained by corruption, the more the temptation of bribes loses attraction. Fortunately, meanwhile all GRECO members – with the exception of the Federation of Bosnia and Herzegovina[63] - have implemented anti-money laundering provisions according to international standards.[64] To be sure, however, this attempt of indirectly drying out financial corruption can function only if bribery in all its various forms is integrated as a "predicate offence" into the money laundering provisions.

c) Public procurement

Although not appearing corruptive on its face, the integrity of public administration can also be endangered if the competition in public calls for tenders is impaired by irregular bidding agreements or unlawful disclosure of background circumstances. For this reason it is not surprising that Germany incorporated the prohibition of "anti-competitive arrangements in submissions" (*wettbewerbsbeschränkende Ab-*

62 Cf. Art. 432-11/432-2, 433-1/433-2 French Criminal Code, GRECO Report on France, para. 17. To a certain degree, similar prohibitions can also be found in Albania (GRECO Report, para. 28) and in the new criminal code of Lithuania (Art. 226).

63 Even there, however, corresponding legislation is on the way, cf. GRECO Report on Bosnia and Herzegovina, para. 24.

64 As in particular provided by the 1988 *UN Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (www.incb.org/e/conv/1988/), the 1990 *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS 141, http://conventions.coe.int), the 1991 *European Communities Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering* (Official Journal L 166, 28.6.1991, p. 77), and the *40 Recommendation of the Financial Action Task Force* (www1.oecd.org/fatf)

sprachen bei Ausschreibungen) into the penal code (§ 298) as part of its Law on Fighting Corruption of 1997.[65]

3. Criminalisation of bribery in the private sector

Traditionally, corruption was perceived as a phenomenon in public service. Meanwhile, not least by becoming aware that power and its abuse is also a phenomenon in private economy, more and more countries recognise the need of extending the fight against corruption into the private sector. Probably depending on the awareness of the problem and divergent political views on how to cope with it, different approaches can be observed:

- The traditional position by limiting the penalisation of corruption to the public sector seems still to be upheld by Albania, Bulgaria and Poland. Whereas Bulgaria has meanwhile also criminalised bribery in the private sector,66 the Polish plans of taking the same course by an amendment of the penal code67 seem not to have been realised so far.
- By contrast, the majority of GRECO members have at least in principle extended the criminalisation of corruption to the private sector, as – with differences in details - Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Latvia, Lithuania, „The Former Yugoslav Republic of Macedonia", Malta, Moldova, the Netherlands, Portugal, Romania, Slovak Republic, Slovenia, Sweden as well as penal regulations of the United Kingdom. The legal technique mostly applied for incorporating the private sector into the corruption provisions is the encompassing of any persons entrusted with decision functions as possible subject of corruption. This can be done by simply speaking of any "employee" (as in Sweden and similarly in Croatia) or of a person who "misuses ... his employment, position or function" (Slovak Republic), or by expanding the notion of "public official", as done by Art. 8 Romanian Law on Prevention, Detection and Sanction of Corruption.68 Another legal technique, as practised in Germany, is the creation of a special provision against corruption in the private sector.69
- A third group of countries, although prepared to criminalise corruption in the private sector in principle, is refraining from realising this to the same extent as in the public sector. Examples of a merely partial coverage of the private sector are

65 Therefore, this law would have deserved to be mentioned in the GRECO Report on Germany. Although not going so far, a similar provision can be found in Sect. 401 Norwegian Criminal Code.

66 Compliance Report on Bulgaria, para. 19.

67 GRECO Report on Poland, para. 18, footnote 5.

68 Still it could be doubted, however, whether this provision in fact comprises all levels of employees "from top to the bottom", as supposed by the Explanatory Report (para. 55) to the Criminal law Convention on Corruption.

69 Cf. GRECO Report on Germany, para. 16.

Greece70 and Bosnia and Herzegovina.71 The same applies to some state jurisdictions in the USA which try to encompass corruption in the private sector by other norms not especially designed for corruption. Another example of some (although merely indirect) relevance for bribery in the private sector may be the criminal "breach of duty" according to Sect. 275 Norwegian Criminal Code, which aims at protecting confidence in a certain position and not at the prevention of corruption. A different purpose is also persued by Sect. 149 Czech Criminal Code on "unfair competition": although this provision may also concern corruptive conduct,72 its scope is neither sufficiently determined nor comprehensive enough, since the potential addressees may not realise that bribery is encompassed by this prohibition and the use of bribery in the private sector is not always contingent to a concrete competitive situation. A similar middle course is also taken by Iceland in prohibiting corruption in the private sector by means of "unfair competition", without being supported by a criminal sanction, however.

4. Criminal liability of legal persons

Although this issue will be one of the main topics of the Second Evaluation Round, it was already addressed by most GRECO Reports of the First Evaluation Round. Thus, a first impression of the inclusion of legal persons in the fight against corruption can already be given here. Compared with the elements of criminal corruption dealt with before, it cannot come as a surprise that with regard to the criminal liability of legal persons the legislation of the GRECO members offers a rather heterogeneous picture, due to the fact that the notion of "punishing" a non-natural person is still foreign to certain doctrines of criminal law and a tricky affair of legal policy in many jurisdictions. Therefore at least three main camps can be distinguished:

- On the one hand, those countries which, either ever since or in course of international development, are prepared to hold legal persons criminally liable. This applies to Belgium, Cyprus, Denmark, Finland, France, Ireland, Iceland, Malta, Moldova, the Netherlands, Norway, Portugal, Slovenia, United Kingdom, USA.73

70 At any rate, Greece is penalising "trading in influence", bribery in connection with votes in general meetings of public or private limited companies, passive corruption in the case of rigged sports fixtures (cf. GRECO Report on Greece, para. 19, footnote 13).

71 Cf. GRECO Report on Bosnia and Herzegovina, para. 23. Although this report sees the private sector covered by the corruption provision, this may be questioned: even if, on the one hand, Art. 260 ("forming a prejudicial act") goes beyond "classical" bribery in merely requiring that the forming of a contract is "contrary to the authority vested in him", it is, on the other hand, restricted by requiring proof of a damage.

72 As obviously assumed by GRECO Report on the Czech Republic, para. 18.

73 A limited possibility of fines against legal persons is also provided for by Sweden and, since her entry into the European Union, by Hungary; Lithuania as well is planning criminal liability of legal persons in its draft criminal code.

➢ A similarly large group of countries is still reluctant in applying criminal law on legal persons, including Bosnia and Herzegovina, Bulgaria, Croatia, Georgia, Greece, Latvia, Luxembourg, Romania, Slovak Republic and Spain.

➢ Although rejecting criminal responsibility as well, some countries pursue a middle course made possible by taking administrative offences or similar contraventions of minor weight out of criminal law and by subjecting them to non-punitive sanctions. This is the case with Albania, Czech Republic, Estonia, Germany and in „The Former Yugoslav Republic of Macedonia". Poland, too, could be mentioned here with regard to the ascription of active bribery to a legal person.74

5. Sanctions and other legal consequences of criminally corruptive conduct

Although it may be interesting to learn how corruption is sanctioned by various GRECO members because this could indicate the political importance attached to it, a complete categorisation of the kinds and framework of the different sanction systems is neither possible here nor is it truly necessary. For in order to get a reliable picture, it would not suffice simply to compare the types and ranges of sanctions of one country with those of others since the greater or lesser weight of a sanction attached to corruption cannot be measured without knowing its location within the overall sanction system. Therefore details of sanctioning in the various countries may be found in the individual GRECO Reports and additional surveys.[75] Nevertheless, some general observations appear appropriate.

➢ If compared with crimes against life or limb that are probably punished everywhere with sanctions of the same gravity, the sanctions attached to bribery partly deviate with great variations from country to country. A particularly extreme example may be the maximum punishment up to 12 years in Lithuania and Poland as compared to the maximum penalty of half a year for "simple" active bribery in Norway. That must not mean that Norway would take corruption lightly; for as already mentioned before, as long as this sanction is not seen against the background of the entire Norwegian sanctioning system and not correlated to the criminological significance of corruption in this country, no final evaluation is possible.

➢ Significant differences exist with regard to the legal technique by which *aggravating factors* of bribery should be taken into account. Taking as granted that any legislation will somehow distinguish between active and passive bribery, the further way goes apart in two main directions: The more traditional one, followed by the majority of countries, stays with a method of comprising the main types of bribery in one provision with a sanction of broad range within which it is left to the

74 Cf. GRECO Report on Poland, para. 17.

75 Such as in the survey by *Barbara Huber*, Sanctions against Bribery Offences in Criminal Law, in: Cyrille Fijnaut/Leo Huberts (eds.), Corruption, Integrity and Law Enforcement, The Hague/London/New York 2002, pp. 137, 142 ss.; further cf. the country reports in *Albin Eser/Michael Überhofen/Barbara Huber* (eds.), Korruptionsbekämpfung durch Strafrecht, Freiburg 1997.

court to determine the appropriate punishment according to the gravity of the crime. In the other direction, corruption is already split in different provisions according to aggravating circumstances with differently graduated sanctions attached to it. This method of a basic corruption provision with an additional "qualification" for certain aggravations is followed by Albania, Czech Republic, Estonia, Finland, Georgia, Hungary, Ireland, Latvia, Moldova, the Netherlands, Poland and the Slovak Republic. Qualifying factors may, for instance, be that the bribed official was of particularly high range or a judge (the Netherlands), that it was a repetitive case (Lithuania) or committed by a group (Albania, Estonia, Georgia), or that it caused great damage or procured particularly valuable advantage (Slovak Republic).[76] Most common as aggravating qualification is the case that the conduct of the official in question was not only influenced by a bribe but even unlawful as such.[77]

➢ Beside the "normal" punitive sanctions, as in particular imprisonment and fines, corruption is a type of crime which is hardly efficiently sanctioned if advantages gained by corruption were left to the perpetrator. Therefore most countries, in addition to a penalty, also order the *confiscation or forfeiture* of the values gained or otherwise having been the object of a corruption offence. As the scope and practical implementation of these measures will be dealt with in detail by the Second Evaluation Round, it may suffice here to name those countries which, to a certain extent, already deal with this matter in the GRECO Reports of the First Evaluation Round: Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Latvia, Malta, Moldova, the Netherlands, Norway, Poland, Romania and „the Former Yugoslav Republic of Macedonia".

6. "Negative prescription" - The period of limitation

The periods limiting the prosecution of a crime of corruption differ to a great degree within the GRECO area. This is not surprising, however, since the length of a period of limitation not only depends on the general limitation system of a country but mostly also on the gravity of the crime and/or the sanction provided for. Therefore it would not make much sense to attempt a detailed breakdown of the different periods of "negative prescription" as they may be found in the various GRECO Reports.

One general point, however, seems noteworthy: as the sanctions for corruption used to range within the lower third of the sanctioning framework, it can be con-

76 In this context, the Irish Prevention of Corruption Act 1916 may be noteworthy for providing a higher punishment if "the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with His Majesty or any Government Department or any public body or a subcontract to execute any work comprised in such a contract" (Chapter 64 (1)). This pecularity might go back to the English Prevention of Corruption Act of the same year (cf. GRECO Report on the United Kingdom, para. 13).

77 More to this type of qualification between "simple" and "grave" bribery see supra II.A.1(d) and II.A.5.

cluded that corruption crimes belong to those where the period of limitation passes relatively quickly.[78]

B. National corruption law in relation to the requirements of the Criminal Law Convention on Corruption – Deficiencies and corrections

Apart from legislation,which more or less openly deem a reform of their corruption law as necessary, as in particular the United Kingdom,[79] this descriptive survey so far permits to summarise the present state of the national criminal laws on corruption as basically homogeneous and, to a remarkable degree, also comprehensive. Therefore, new penal provisions may be needed only in few cases. Nevertheless, for improving the institutional efficiency of the penal law, certain details might be optimised. This is to say that the corruption provisions would need improvement less with regard to their "effectiveness in breadth" than to their "effectiveness in depth". The following is to show in which points this might be possible and needed.

1. Completeness in the penalisation of corruptive conduct

Obviously, the institutional efficiency of corruption provisions is substantially reduced if they leave loopholes by not penalising corruptive acts sufficiently comprehensive.

- As an example of possible gaps that may serve the Romanian Criminal Law which penalises the "acceptation of undue advantages" and the "trading in influence", but not its corresponding "active" forms.[80]
- Other loopholes are left open if merely completed acts of "giving/accepting" are penalised, but not yet – as in the case of Georgia – corruptive conduct on the foreground, such as "promising" or "offering" by the active part or "requesting" or "accepting a promise" by the passive part.[81] Gaps of this sort certainly fall short of the requirements in Arts. 2 and 3 Criminal Law Convention on Corruption. Even if the attempt of "giving" and "accepting" is punishable as well,[82] the borderline between the attempts of "giving" or "accepting" still lies behind "promising" or "requesting" the Convention also wants to see punished, and this so for good reasons. If the confidence in the integrity of public service and its members

78 As an example cf. GRECO Report on Norway, para. 10. For criticism to this general observation see infra II.B.10.

79 The Law Commission for England and Wales found the law on corruption "outmoded, uncertain and inconsistent" (GRECO Report on the United Kingdom, para. 14).

80 Cf. GRECO Report on Romania, para. 84. Although Art. 255 deals with active bribery, this remains incomplete because, by referring to Art. 254 only, the case of Art. 256 dealing with undue advantages given after the act is not comprised.

81 Cf. GRECO Report on Georgia, para. 93; similar gaps can be found in the Lithuanian law.

82 As Georgia is referring to.

is to be protected and promoted, this integrity can already be shakened by requests, offers or promises. Also in order to enable bodies and institutions in charge of the fight against corruption to step in as early as possible, not at least to prevent an unlawful official act to occur, the criminal prohibition cannot wait until the damage is done.

2. The notion of the public official

a) Statutory-formalistic or functional notion

Another definitional element of corruption provisions in the public sphere readily open for gaps is the notion of "public official" as perpetrator, particularly if it is understood in a status-oriented way.[83]

Although the wording of Art. 1 (a) Criminal Law Convention on Corruption leaves defining "public official" to the relevant national law, thus not precluding a status-oriented definition if the national legislation deems it appropriate, on the other hand, the Convention does not preclude a functional understanding either, should it not even favour it by referring to the "function" performed by the person in question. At any rate, as a matter of legal policy a functional understanding appears preferable for various reasons.

First, if proceedings shall be protected from being inadequately influenced and if, thus, the exercise of a certain function shall by no means allow the acceptance of any values or advantages, there is no apparent reason why the punishing of such an influence should be dependent on how the office is organised with regard to its status. For the protective purpose of the prohibition of corruption it only matters whether the bribed person is the "player" within the proceeding whom is to be safeguarded. The assumption that it is endangered, can, as a rule, be concluded from the mere fact that the briber grants an advantage just to this person. This will be done not because of his or her status but because of that person's function and influence within the organisational framework. In this perspective, the statutory position cannot be more than an indicator for the finally decisive functional quality of the person concerned.

Second, the irrelevance of the statutory denomination of the person in comparison to his function can also be concluded from the fact that quite a few activities which in former times were considered as state-controlled, now are performed in organisational forms of private law, if they are not totally privatised. Even if the latter case has still to be treated as part of corruption in the private sector (infra II.B.8), with regard to conduct within state and similarly public organisations it cannot make an

83 Cf. supra II.A.1(a).

essential difference whether the bribed decision maker is proceeding according to public or private law or what his/her status is.

Third, although with the opposite result, a status-oriented notion cannot only lead to a restrictive notion of "public official", with the consequence of gaps in the protection against corruption as described before, it can, to the contrary, entail inadequate widening of the provision. For if the status is the decisive criterion, such a person runs the risk of criminal liability even if he or she does not (or no more) exercise a function as decision maker in which he or she could be corruptly influenced. A mainly static determined public official could to an undue extent trust resources of supervising or law enforcement bodies and expose public employees to punishment although they – due to their current function – present no relevant "danger". On the other hand, the exemption from the prohibition of public corruption has to be supplemented by the ban of corruption in the private sector, in order to avoid legal gaps.[84]

Despite this preference for a function-oriented notion it must not be ignored, however, that it also entails a weakness that requires precaution. While public officials are apparently warned of their special responsibilities and duties upon appointment to certain positions, this warning is not as evident in case of exercising a certain function, in particular if it was assumed without an official inauguration, i.e. in "silent" manner or by implicit agreement. To make an employee aware of the duties attached to the exercise of certain functions, including the prohibition of being influenced by any advantages granted from a third person, explicit information and written recognition of these duties are to be called for,[85] perhaps at best by way of a "code of ethics".[86]

b) Foreign public official

For good reasons, the Criminal Law Convention on Corruption in its Arts. 5, 6, 9, 10 and 11 requires the inclusion of bribing foreign officials of different kinds into the corruption prohibitions. Otherwise it would be too easy to arrange corrupt agree-

84 For example, the German Federal Court recently had to decide whether a public official who worked for the former "Deutsche Bundesbahn" (German National Railroad) and who – after the privatisation of the "Bundesbahn" – had been furloughed but formally kept his status and continued his work for the private "Deutsche Bahn AG" is encompassed by the definition of a public official. The court held that contrary to his formal status he did not fulfill his duties for the state but solely worked for the Deutsche Bahn AG on the basis of a private contract and, for this reason, functionally could not be regarded as a public official (cf. *Bundesgerichtshof*, 57 Neue Juristische Wochenschrift 43/2004, p. 3129). Due to the understanding of this term and the postulate of "*nulla poena sine lege*" this result is mandatory, but unsatisfactory when the relevant behavior is not encompassed by the prohibition of corruption in the private sector.

85 If informed about his duties and his criminal liability on this way, the official could also be precluded from invoking mistake of law, as it is – at least to a certain degree – recognised in modern criminal codes as an excuse.

86 Cf. infra III.D.1 .

ments preferably with foreign officials or to transfer them altogether to foreign territory. Therefore, countries that still direct their corruption provisions to own officials only,[87] must be aware that they are not in compliance with the Criminal Law Convention.

3. The undue advantage

Gaps in the coverage of corruption can also emerge from an inappropriately narrow understanding of the "undue advantage" granted in view or in exchange for a favourable conduct of the official.

a) Gaps on account of a tangible understanding of "advantage"

A particularly detrimental deficiency can result from restricting the "advantage" by which the conduct of the official may be influenced to tangible in terms of corporeal objects, money, financial or similar material values, thus, excluding intangible favours or benefits (like honours or sexual offers) from the illicit means by which human behaviour can be influenced, as it is still the case in quite a few national legislations.[88]

This focussing on tangible advantages is misguided for various reasons. First, by failing to appreciate the socio-psychological experience that material goods are nearly one value among others chosen by the rational human being in the pursuit of individual happiness, with the consequence that it is finally a personal question and, thus, a question hardly determined by objective criteria, about what particular possibilities out of a range may influence a person. Second, since decisions are always contingent on individual conditions and preferences of the person concerned, with the consequence that a truly objective decision – as, for instance, in placing an order or employing an applicant – is a mere chimera and perhaps not even an ideal to pursue, it becomes apparent how difficult it is in such borderline areas to use the kind of advantage as a criterion for distinguishing between socially tolerable from criminally reprehensible influencing. Nevertheless, in the final end, there is no getting away from sorting out subjective feelings of sympathy or wishes of harmony, as they are connected with any human interaction, as socially adequate and, thus, not deserving criminal reprehension. This clarification, however, might be better realised with regard to the "undue" or "not undue" character of an advantage[89] rather than by restricting the notion of a reprehensible "advantage" as such to tangible goods or values. Third, seen from the protective aim of the prohibition of corruption,

87 Cf. supra II.A.1(a)(iii).
88 Cf. supra II.A.1(b)(i).
89 As to be seen infra II.B.3(a).

the nature of the advantage is anyhow irrelevant as long as it is capable of exerting improper influencing.

In conclusion, the Criminal Law Convention on Corruption was indeed well-advised to ask for penalising "any (undue) advantage" and, thus, not to exclude intangible values.[90]

b) Ambiguities with regard to the advantage as "undue"

As it has become apparent before, if the "advantage" is to be understood in broad terms, the requirement of the advantage to be "undue" is gaining particular weight for sorting out advantages which may be "due" and, thus, not amount to criminally reprehensible influencing. As commented in the Explanatory Report of the Criminal Law Convention on Corruption, this criterion aims at "excluding advantages permitted by the law or by administrative rule as well as minimum gifts, gifts of very low value or social acceptable gifts".[91] Thus, qualifying an advantage as "undue" serves as a corrective for exempting from the reach of criminal law advantages that are socially adequate and therefore may not be covered by criminal law.

However, the use of such an open term has advantages and disadvantages. On the one hand, as a normative element that is both capable and in need of being more concretely shaped, it offers the possibility to take into consideration divergent developments in society and, thus, to adjust the reach of the prohibition to the conditions and needs of the various legal orders concerned. Consequently, an advantage that in one country may be considered as "undue", in another legal order may appear as socially adequate. With similar flexibility, within the same legal order it will even be possible to adjust the limits of penalisation in a dynamic way to new social developments.[92] Furthermore, it is made possible to use the definitional openness of "undue" for integrating extra-penal norms and, thus, to obtain consistent value judgements within the legal order.[93]

On the other hand, an explicit warning against considering grants in certain areas as a socio-typical phenomenon seems to be appropiate which might be accepted as socially adequate and, thus, not as "undue" in criminal terms. This caution is necessary not only with regard to the acceptance of "additional fees" expected from citi-

90 Cf. Explanatory Report, para. 37 to Arts. 2 and 3 Criminal Law Convention.

91 Explanatory Report, para. 38.

92 As an example may serve the intense discussion in Germany on whether new financing models of state or equivalent public institutions, as in particular research with "*Drittmittel*" (grants by private persons or firms) in state hospitals or universities, should be considered as "undue" advantages if the officials (as, for instance, professors at a state university) are at the same time engaged in business relations with the sponsors. The same problem can arise with regard to private sponsoring of public events or state institutions.

93 In these terms, the German jurisprudence, when construing the criminal prohibition of "anti-competitive arrangements in submissions" (cf. supra II.B.2(c)), takes recourse to the value judgements of unfair trade and competition law, in order to avoid penalising acts which are either permissible according to that law per se or exempted on certain conditions.

zens for raising the officials otherwise insufficient income,[94] but must also be expressed against proposals to tolerate the receipt of minor advantages up to a certain value as not "undue"; for in this way to allow public officials charging some kind of non-punishable "corruption tax" would undermine the citizens' confidence that public fees are owed to the public authority and not contingent on the personal needs or desires of public servants.

Consequently, by filtering advantages with regard to being "undue", loopholes which might undermine the institutional efficiency of the corruption prohibition can be avoided only if the social contingencies taken into consideration are subjected to a normative evaluation the requirements of which are, if necessary, even preserved against reversing social developments. One way of keeping the evaluation of "undue" on the track, and to safeguard it against individual preferences of the official, would be the development of guidelines or codes of ethics, perhaps combined with certain procedural precautions.

c) Personal restrictions – Widening the concept of recipients to third parties

No less indicative than the nature and character of the undue advantage is its addressee. If it is true, as stated before, that proceedings decided upon by human beings are inevitably influenced by individual motivations and conditions, then it is less decisive to whom the advantage has been granted or by whom it has been received, but rather who was, or was to be, influenced by this transfer. This may be in most cases the recipient in person and in his capacity as official; but the official may be no less influenced if the advantage is not directly granted to him, but to a third person. From a protective perspective, as well, it is of secondary importance who is directly gaining from a bribe. For as corruption is not aiming at the protection of property interests, as in case of fraud or other economic crimes, the peculiar wrongdoing of corruption does not lie in the transfer of advantages to a public official, but rather in the possible perversion of a proceeding and the damaging of confidence in the integrity and ability of public service.

Therefore the Criminal Law Convention on Corruption was again well-guided in requiring that undue advantages, not only if given to the public official concerned, but to "anyone else" as well, should be penalised, thus also including advantages granted to political parties or other organisations.[95] Consequently, those legislations which still confine their corruption provision to public officials as recipients and, thus, excluding bribes to third parties[96] are not in compliance with the Criminal Law Convention.

94 As reported from Slovakia and rightly criticised by the GET; cf. GRECO Report on the Slovak Republic, para. 32.

95 Cf. Arts. 2, 3 Criminal Law Convention with Explanatory Report, para. 36.

96 Cf. supra II.A.1(b)(ii).

4. The wrongful connection between advantage and conduct

Another weakening of the corruption prohibition, which, however, is not explicitly addressed by the Criminal Law Convention, can ensue if a specific wrongful connection between the (offered/requested or given/received) advantage and the (expected or influenced) conduct is required, as it is still the case in quite a few national legislations.[97]

➢ Such a counterproductive effect is particularly apparent if the crime definition of bribery requires a "pre-existing agreement" or a "corruption pact". For even if granting an undue advantage in connection with an official act has been proven, this would still not suffice for finding the persons involved guilty if it cannot be proven that the transfer of the advantage was based on some kind of collusive understanding. In fact, such a requirement would expect the prosecution to prove both an active and passive bribery what, consequently, means to prove the unlawfulness of both persons involved in the "corruption pact". In contrast, a mere objective connection would allow to charge a person of active bribery without having to prove the fact that the public official knew that the gift related to a concrete action or his function.

➢ Although less far-reaching, a similar counter-prohibitive effect is still present if a "simple" intentional connection between the (offered/requested or given/received) advantage and the (expected or influenced) conduct of the official is required. This is particularly true if the granting of the advantage must be subjectively related to a concrete act or omission of the official. With such a requirement, cases of so-called "creating benevolence" by way of granting advantages without already having a certain conduct of the official in mind, but with the expectation that the official concerned will return the favour, remain outside the reach of criminal law.

➢ This connection issue can also have a temporal component. If corruption provisions penalise undue advantages only if granted prior to the official's act,[98] the prohibition can be easily circumvented by granting the advantage after the fact. Even if it may be suspected that the transfer after the fact had already been intended prior to it, proving this may be no less difficult than with provisions which explicitly require a "pre-existing corruption pact".

Since with regard to this definitional issue no explicit postulations are made by the Criminal Law Convention, the national legislations seem free to proceed as they see fit. Nevertheless, if the fight against corruption by way of comprehensive prohibitions is to be taken seriously, the national law makers are well advised to no longer insist on the requirement of a collusive connection between advantage and act; instead it should either suffice that the (offered/requested or granted/received) advantage was made in relation to the (general) "duties" or "functions" of the offi-

97 Cf. supra II.A.1(c).

98 As the Irish provision "in respect of any matter or transaction whatsoever, actual or proposed" (Prevention of Corruption Act 1889 and Ethics in Public Office Act 1995) may be understood.

cial concerned. In addition, the foreground of (attempted or completed) bribery should be covered by penalising "trading in influence".[99]

5. Contingency of bribery on the unlawfulness of the official's act

Another gap in prosecuting corruption can result from requiring that the act of the bribed official must be unlawful as such; that means that his decision is unlawful not (only) due to having been bribed but because (additionally) he breached a certain duty or otherwise acted contrary to law as, for instance, by issuing the briber a driving license although he did not fulfil all requirements for it. If, thus, the granting or receiving of an undue advantage as such does not constitute punishable bribery but only if under the influence of the bribery the official is committing an (additional) unlawful act,[100] then the legal interest to be protected is shifted from the correctness of the (uninfluenced) proceeding to the substantive lawfulness of the result. Then, however, the prohibition of bribery would pursue the same aim as the provisions violated by the breach of duty as, for instance, in the case of the unfounded driving license the safety of traffic or, as in case of an illegal tax reduction in return for a gift, the state's fiscal interests. But what is even more detrimental to the efficiency of fighting corruption than this unnecessary doubling of identical legal interests is that the prosecution is not only burdened to prove the transfer of an undue advantage, but also its resulting in a further unlawful act.

Therefore, the Criminal Law Convention on Corruption was again well-guided in leaving it with the (promised/requested or granted/received) undue advantage, and not requiring the commission of a special "breach of duty" in terms of an unlawful act.[101]

This must not preclude, however, that a "breach of duty" in return for an undue advantage may be qualified as an aggravated case of bribery, as is provided for by a number of GRECO members.[102]

6. Trading in influence

Further institutional gaps in the protection against corruptive conduct must be noticed if so-called "trading in influence" is not as sufficiently criminalised as is required by Art. 12 Criminal Law Convention. This is not accomplished if – as, for instance, in Romania – only the receiving or claiming of goods for influencing a

99 Cf. infra II.B.6.

100 As it appears to be required, for instance, in Arts. 419, 420 Spanish Criminal Code and perhaps also Arts. 235, 236 Greek Criminal Code in connection with Art. 2 Law 2802/2000.

101 Cf. Explanatory Report, para. 39.

102 Cf. supra II.A.5.

subordinate is penalised, whereas the (active) promising or giving advantages for such a behaviour is not.[103] For in order to dry out the "market" for influencing, institutional precautions must be made both from the supply and the demand side.

Consistent institutions must not only prohibit direct bribery in a "two-person" scheme, but also the use of influence by public officials on subordinates to achieve results outside the common procedures. Since this "trading in influence" contains a higher degree of injustice than a casual incitement, a special norm is advisable. As still rather few countries do have provisions against "trading in influence",[104] Art. 12 Criminal Law Convention should receive more attention by GRECO members still in delay.

7. Corruption in the political sector

A grey area of corruption, not only with regard to its empirical incidence but also to the relevant transparency of the law, still exists in the political sector.[105] This situation is unsatisfactory in particular because the corruption of political representatives is certainly a particularly effective instrument in pursuing their own interests. For this reason, as also declared in Art. 4 Criminal Law Convention on Corruption, filling gaps in the penalisation of corrupting parliamentarians and similar political representatives is of top priority in an effective institutional fight against corruption.

- Loopholes are in particular present in corruption provisions not covering elected persons by the notion of "public official". Thus, if a country, in respecting the principal separation of power, does not want to see the legislature identified with the executive power by treating parliamentarians as (executive) "public officials", it may fill the gap by special provisions for bribing parliamentarians, as is for instance the case in Germany (§ 108 e Criminal Code).
- But even the criminalisation of "buying or selling voting rights" by special provisions can remain fragmentary if the undue advantage must be of tangible nature or of otherwise economic value or, even more so, if a special "corruption pact" or a similar collusive agreement is presupposed.[106] For if an advantage is granted or accepted after the decisive voting act, without proof of a prior corresponding collusion being possible, the criminal prohibition must fail.
- Provisions of that sort also fail to comprise the subornation of general political benevolence by granting advantages without already having a concrete conduct of the parliamentarian in mind, although silently knowing that the person concerned will pursue the interests of the briber when the appropriate time will come.

For these reasons, the Criminal Law Convention on Corruption, when by its Art. 4 obliging the Treaty States "to establish as criminal offence under its domestic

103 Cf. GRECO Report on Romania, para. 84.
104 Cf. supra II.A.2(a).
105 As to the divergent ways of penal provisions with regard to parliamentarians see the survey supra II.A.1(a)(ii).
106 Cf. supra II.A.1(c).

law the conduct referred to in Arts. 2 and 3 [i.e., active and passive bribery], when involving any person who is a member of any domestic public assembly exercising legislative and administrative powers", is well guided in not requiring any qualifications which, as described before, might undermine the efficiency of the penalisation of corruption in the political sector.

8. Corruption in the private sector

As became apparent in the comparative survey,[107] the question as to whether criminal provisions are necessary for fighting corruption in the private sector is still answered quite differently by the various GRECO members. Although some countries are prepared to penalise corruption in the private sector in a similar way as in public affairs, there is still a remarkable number of countries that refrain altogether from providing penal provisions against corruption in the private sector whereas others deem it appropriate to regard private corruption as a phenomenon of economic law to be dealt with in connection with special penal provisions against unfair competition.

These differences in the political evaluation of corruption in the private sector suggest to reflect once more whether the extension of penal law into the private sector, as requested by the Criminal Law Convention (Arts. 7, 8), is indeed necessary as an institutional instrument against corruption. This may appear doubtful as the employment of criminal law, particularly in this area, presupposes a balancing of individual freedom to pursue one's own interests, including economic ones, without being interfered with by prohibitions, on the one hand, and the legal interests to be protected against wrongful impairments, on the other. Thus, the question of criminalising corruption in the private sector depends on whether this social phenomenon is of such gravity as to legitimise the employment of criminal law as the most invasive sanction available.

The Explanatory Report to the Criminal Law Convention enumerates quite a few legal interests deemed to justify the application of criminal law.[108] First, it states that "corruption in the private sphere undermines values like trust, confidence or loyalty, which are necessary for the maintenance and development of social and economic relations". This is supplemented by the assumption that "even in the absence of a specific pecuniary damage to the victim, private corruption causes damage to society as a whole". Furthermore, the protection of "fair competition" is deemed necessary. Finally, the "privatisation process" of formerly public functions is referred to, making it necessary to protect those now privately organised activities against corruption.

107 Cf. supra II.A.3.
108 Explanatory Report, para. 252.

Although the request of the Criminal Law Convention to also penalise corruption in the private sector shall be agreed with in its result, still some caveats may be expressed.

With regard to the interests to be protected, it must be stressed that vague terms like "trust, confidence or loyality", do not pose a solid legitimation for the criminalisation of corruption in the private sector since they do not specify the specific corruption-related dangers for the economy. Compared with this, the procedural approach to corruption (supra I.C) reveals that the prohibition of corruption in the public as well as in the private sector furthers the protection of procedures and the confidence of the participants therein. Legal relations between private persons in a market economy are grounded on an organisational system in which the pursuance of particular interests is tolerated and even fundamental, but limited by the observance of the rules. These rules – due to their abstractness - reduce the complexity of the multitude of conceivable cases and guarantee the general agreeability of the results. The decisive rule in the context of this study is the prohibition of corruptive avoidance of the procedural mechanism vaild for all.

Other reasons mentioned in the Explanatory Report occur as mere reflexes of the protection of procedures and are, consequently, of subordinate importance. As far as the protection of "economy" and "fair competition" is concerned one has to realise that these phenomenona are aggregates of the transactions of the individuals. For this reason, to protect an abstract entity as the "economy" or "competition" requests the protection of the individuals and the procedures they are acting in. Consequently, the prevention of pecuniary damages of enterprises turns out to be a mere reflex of the protection of the procedures as well.

Finally, while the protection of the procedures poses the main legitimacy of the corruption bans in the private sector, the criminalisation of this type of corruption can also be justified by the theory of the "interdependence of orders".[109] According to this theory all social subsystems mutually influence themselves and their respective values and maxims cannot be durably insulated against each other. Therefore it is not possible to effectively combat corruption in one area while tolerating it in another social subsystem. The disturbance of the private economy and its regulating legal order by corruption, thus, has far-reaching consequences for other social systems such as the political sphere and the administration over the medium term. The practical experiences of countries with a disturbed economy exemplify that the ulcer of corruption in the private economy forms metastases in the administration if the very same behavior is not fought consistently in these - narrowly interwoven – social systems.

For these reasons, not to criminalise corruption in the private sector or to simply sanction it by competition law would be a massive weakening of the institutions against corruption.

109 The theory of the "interdependence of orders" was developed by *Walter Eucken*, Grundsätze der Wirtschaftspolitik, 6th ed., Tübingen 1990, pp. 14 ss., 332 ss. This theory requests similar and consistent maxims in all social systems, since the economy, the constitutional and civil order are not only normatively contingent but factually.

9. Sanctions and other legal consequences

The socio-psychological impact of criminalising a certain conduct is not only contingent on the penal provision as such but also on the kind and weight of the sanction attached to it and, in case of a verdict, the concrete sentence. For this reason, corruption must not only be penalised but adequately sanctioned. If the expectancy of punishment is too low, this does not only reduce the institutional effect of the prohibition norm, it rather also has direct influence on the type of corruption a society is exposed to; for the lower the expectancy of punishment, the higher the incentive to a quantitative expansion of corruption in terms of a growing number of cases in which public officials may be inclined to expect or even request a "corruption fee" and vice versa. A high expectancy of punishment, on the other hand, may entail a quantitative reduction of corruption, possibly accompanied, however, with an increase of qualitatively graver cases. For the higher the risk of detection and punishment, the higher the bribe must be in order to be profitable. Although this effect may function as an incentive for particularly massive corruption cases with correspondingly high "corruption yields", the equally rising damages can facilitate detection and prosecution at the same time, for greater social damages can be detected more easily when the non-corrupt ideal result of a transaction is compared with the actual corrupted state.

Therefore, the Criminal Law Convention on Corruption, in its Art. 19 (1), rightly requests "effective, proportionate, dissuasive sanctions and measures".[110] How these should be shaped, however, is left open and will, indeed, hardly be definable in a general way applicable to all national laws concerned.

This may explain that the sanctioning systems of the various GRECO members are far from homogeneous and why the GRECO evaluators obviously did not have the courage to rate the level of corruption sanctions as insufficient[111] or the differentiation between various bribery crimes as inconsistent.[112] At any rate, in general, sanctions for corruption may be called effective, proportionate and dissuasive only if they correspond to sanctions attached to similar domestic crime provisions. A standard of comparison could perhaps be established by the sanctions for economic crimes such as fraud. Although these provisions are to protect property interests against damages resulting from erroneous disposals caused by fraud or other injuries, the motive of aquiring an undue advantage is similar to that in cases of bribery.

To give some examples of sanction regimes that might be counterproductive to the efficiency of corruption provisions, the following instances from GRECO Reports seem illustrative:

110 To the origin of this requirement in the jurisdiction of the Court of Justice of the European Communities in the (Mais)Case 68/86, cf. *Barbara Huber*, Sanctions against Bribery Offences in Criminal Law, in: Cyrille Fijnaut/Leo Hubertus (eds.), Corruption, Integrity and Law Enforcement, The Hague/London/New York 2002, pp. 137, 139.

111 As sporadically done with regard to Denmark (GRECO Report, para. 102).

112 As with regard to Malta (GRECO Report, para. 82).

➢ A substantial weakening of the prohibitive effect, as well as a lack of proportionality of sanctions, may be seen in the differentiation between "accepting bribes" and "accepting illegal presents" if at the same time the latter is privileged by not being punishable with the deprivation of liberty.[113] Such a differentiation can be understood by the parties concerned that the one is more tolerable than the other. Even if a clear borderline between "bribe" and "illegal present" could be drawn at all, the kind and frame of sanction provided for by the provision should be the same for both; this would still leave room for different sentencing in concrete cases according to their level of gravity.

➢ On the other hand, a lack of qualifying certain aggravating circumstances, as in particular corruption in an organised manner, by a provision with higher sanctions,[114] can also be counterproductive. Even if the continuous and organised commission of the same type of crimes could be taken into consideration in its sentencing, explicit aggravation by a qualified provision strengthens the preventive signal and produces additional impulses against corruption.

➢ Furthermore, the strength of sanctioning can be also substantially impaired by a lack of adequate confiscation and/or forfeiture rules. For as long as the parties to a bribery are able to speculate on not losing any advantages, be it the bribe as such or gains procured by the irregular act, they may take the risk of corruption. Therefore, according to the maxim that "crime must not pay", any advantages offered, transferred or procured must be confiscated or forfeited. For this reason, the Criminal Law Convention on Corruption in its Art. 19 (3) rightly expects of its treaty members legislative measures "to confiscate or otherwise deprive instrumentalities and proceeds of criminal offences ... or property the value of which corresponds to such proceeds". It must be noted, however, that the member states of GRECO are under no obligation to provide for the criminal law confiscation of assets as the words "otherwise deprive" allow for their civil fortfeiture also.[115] As this institutional instrument in the fight against corruption will be the object of the Second Evaluation Round, its result may be waited for. One caveat, however, may already be raised here. When it comes to the confiscation of "substitute assets", in particular in cases in which the undue influence was exerted by way of intangible advantages, seizing property that was not involved in the bribery is constitutionally perilous. If it shall nevertheless be confiscated, this can hardly be justified as mere reversion of illegal gains, but must rather be understood as a kind of (additional) punishment, the proportionality of which has to be preserved.

113 As it is the case in Georgia (GRECO Report, para. 97).

114 As noticed in Bulgaria, particularly if compared to the aggravation of money laundering in an organised manner (GRECO Report, para. 26).

115 Cf. Explanatory Report, para. 94 in which this understanding is limited to "substitute assets" while this limitation can not be grounded on the wording of Art. 19 (3) Criminal Law Convention.

10. The period of limitation - "Negative prescription"

As stated in the comparative survey, corruption crimes in most countries belong to the group of crimes with a relatively short period of limitation.[116] On the other hand, as bribery is the type of crime that usually remains undiscovered over a long time, it is astounding to find only relatively few country reports commenting that a quick negative prescription of bribery may impede efficient prosecution.[117] Against this lack of alertness it is to be emphasised that the period of limitation is an integral element of sanctioning which influences conduct in a manner not to be underestimated. For this reason, the call for "proportionate and dissuasive sanction" by the Criminal Law Convention (Art. 19 (1)) must also be observed with regard to the negative prescription since the factual proportionality and dissuation of sanctioning can be undermined if the period of limitation is determined too generously. Although data collected by GRECO Reports are not comprehensive enough for a final evaluation, one must be aware of the assumption that comparatively short periods of limitation can engender a structural deficit in the institutional fight against corruption.

11. Exemption from punishment

Similar to negative prescription, the institutional efficacy of criminal law can also be weakened by conceding mitigation or even the remission of punishment. A peculiar example of this sort can be found in the Portuguese provision that the penalties for active bribery are "specially mitigated, possibly even extending to discharge, if the act was committed with the aim of preventing the official, his spouse [and other relatives, including the person with whom he is cohabiting] from being exposed to the risk of a sentence or a security measure".[118] Exemptions from punishment of this sort are not only invalidating the corruption provision but even undermining the entire criminal justice system: instead of stabilising confidence in its functioning, it is discredited by exempting persons from punishment who attempt to manipulate the proceeding in favour of their own interests.[119]

A particularly ambivalent issue is the possibility of rewarding an (active or passive) briber with mitigation or even discharge if the person concerned voluntarily discloses insider knowledge and, thus, contributes to the prosecution of this and/or other corruption cases. On the one hand, the expectation of such a reward can func-

116 Cf. supra II.A.6.

117 See GRECO Report on France, para. 45, also the criticism in GRECO Report on Croatia, para. 141.

118 Art. 374 in connection with 364 Portuguese Criminal Code (GRECO Report on Portugal appendix I).

119 This criticism is not to say that conflicts of interests or a state of necessity should be completely ignored. But instead of suspending the corruption provision, resort should rather be taken to grounds of justification or excuse.

tion as an incitement to corruptive conduct, if one is clever enough to back out of the affair on time by disclosing one's knowledge to the prosecuting authorities.[120] On the other hand, one has to take into account that the mitigation of or the exemption from punishment is not only to reward return to legality, but may be the only way to bring cases suspicious of corruption to justice. Consequently, if the public confidence in the functioning of proceedings and the efficacy of criminal law is also substantially strengthened by the ability of proving suspected corruption, rewards for disclosure or other devices of plea-bargaining may be acceptable and efficient weapons against corruption.[121]

C. Assessment

Although the comparative analysis of the core criminal law provisions against corruption brought quite a few flaws in various national laws to light, this should not throw into doubt that the network of substantive criminal provisions against corruption, at least with regard to its "effectiveness in breadth", is both rather comprehensive and quite consistent. If nevertheless the various countries surveyed here appear susceptible to corruption to a different degree, the explanation may be found in the prohibitions' differing "effectiveness in depth".

The discrepancies in substantive law, however, may still be not the only explanation for the fact that some countries (including in particular, Albania, Bulgaria, Georgia, Romania and the Slovak Republic) see themselves exposed to a massive corruption problem whereas other countries with a similar – even less developed – norm programme consider themselves as being almost free from this social phenomenon (as, in particular, Finland, Iceland, Ireland, Luxembourg). Causes for such divergent developments may, at first, be traced to the whole social-political situation, in particular to the transition of certain countries from an authoritarian to a democratic state system, governed by rule of law.

Furthermore, factual differences in spite of legal parallelism can also indicate that causes of poor efficiency in the fight against corruption may rather be found on the level of practical implementation of the corruption provisions. This is the question to be turned to in the following.

120 Cf. also the reservations in GRECO Report on Romania, para. 84.
121 Cf. also infra III.A.5.

III. The Practical Implementation of the Anti-Corruption Laws - Status and Deficiencies with Regard to the Guiding Principles 3, 6 and 7 as Reflected by the GRECO Reports

In accordance with Art. 10 (3) of the GRECO Statute, the First Evaluation Round was based on Guiding Principles 3, 6 and 7.[122] Although these topics cannot, of course, cover the phenomenon of corruption in its entirety, they are both fundamental and central enough to impart a basic picture of the procedural implementation of anti-corruption strategies and laws whereby also certain structural deficiencies may be revealed.

As this study is to be understood also as a critical one, rather than merely repeating findings in the GRECO Reports, evaluations made here may differ from observations and recommendations in the GRECO Reports.

Although immunities from investigation, prosecution or adjudication of corruption, as they are rather generously granted by certain countries, dealt with under Guiding Principle 6 (infra C), appear as the perhaps most obvious impairments to the institutional efficiency of penal norms, this analysis will start with the topics of Guiding Principle 3 (infra A) and 7 (infra B) because both are closely related with each other. As far as deficiencies beyond these principles come to light, it appears appropriate to take notice of them as well (infra D).

A. Law enforcement authorities and the effectiveness of means for gathering evidence - Guiding Principle 3

In comparison to formal immunities by which, as will be seen (infra C), the effectiveness of corruption provisions can be thwarted in a rather obvious way, weakening the institutional efficiency of criminal law by organisational deficiencies of the prosecution and other law enforcement bodies is more subtle, although no less persistent. Even though such deficiencies can be of a different nature with regard to corruption, independence and impartiality of the law enforcement bodies are certainly of crucial significance. This explains that GRECO, according to its Guiding Principle 3, expects its member states "to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations". Accordingly, in analysing the GRECO Reports with regard to

122 Cf. supra I.B.

Guiding Principle 3, particular attention has to be given to how the independence and impartiality of the law enforcement bodies and the effectiveness of their instruments are guaranteed or by what kind of insufficiencies they might be impaired.

1. The judicial system

In principle, the independence of judges from directives by other state organs is recognised by all GRECO members. On a closer look, however, it appears that this guarantee can be impaired by structures which allow, or at least are unable to prevent, stimuli on judges and their decisions in a way which faciliates corruption. Among others, in particular three critical points must be mentioned:

- The selection and promotion of judges can be used as means of soliciting "preemptive obedience" or preserving general benevolence. Such worries can arise if judges are appointed by political organs without being guided by clear selection rules and without consulting members of the judiciary (as described and analysed with regard to Malta).[123] This allows to select judges on subjective grounds independent of the candidate's merits and abilities rather than according to objective criteria. This might rise to an interweaving of interests between authority for appointments and promotions and the judge. A similar kind of danger by political and/or partial interests seeping in the selection and promotion of judges may result from the requirement of a positive vote by parliament (as provided for in Slovenia).[124] This can function as a subtle pressure on the judge, if he does not want to spoil his career, to perform his jurisprudence, particularly in politically delicate cases, in prejudiced conformity with the prevailing political system. Similar pressures to conformity can ensue from the way in which judges are evaluated, for example by a credit system that takes into account not only the number of finalised cases, but also suspensions of judgements by superior instances as well as the opinion of superior judges, colleagues and even prosecutors (as, for instance, criticised even within Albania).[125] This is not to say that the career of judges should not be subjected to any evaluation whatsoever. Establishing a catalogue of certain criteria schould not be done for forcing political conformity on the judges but for securing a capable and impartial judiciary. The further question of what qualities should be asked for in such an evaluation catalogue can, of course, not be answered without taking into account the specific domestic situation, in particular with regard to the standard of legal education and the working conditions.
- No less questionable is an election system for judges by which the candidate - comparably to political-parliamentarian election campaigns – is dependent on substantial fund raising for soliciting sufficient votes (as the GET was concerned

123 Cf. GRECO Report on Malta, paras. 34, 92.
124 Cf. GRECO Report on Slovenia, para. 40.
125 Cf. GRECO Report on Albania, paras. 99, 157 ss.

about with regard to the United States of America[126]). Such a system entails the danger that a judge may lose his impartiality – and with him "justicia" her supposed blindness – if he, in advance or afterwards, feels urged to answer the benevolence of sponsors with favourable judgements.

➢ Negative impacts on the institutional efficiency of corruption prohibitions can also result from deficient working conditions within the judiciary. Shortcomings of this sort may not only produce a milieu susceptible for corruption but may also lower the public confidence in the efficacy of the judiciary, followed by the resignation of the public at large and a general deterioration of respect for and loyalty to the law. For this reason, it is quite alarming when the judicial personnel is understaffed and overloaded with a high number of cases and, in addition, is composed of a judgeship not adequately paid (as reported of Croatia[127]). The receptivity of a judge for undue advantages in exchange of a favourable decision must rise even more when the income of a judge of a district court is not enough to support a normal family (as noticed with regard to Albania[128]).

2. The independence of the law enforcement bodies

A position particularly exposed to corruptive temptations within the law enforcement system is the office of the prosecutor, as well as bodies with similar investigative power. These authorities represent the interface between social reality and its criminal evaluation, and thus a point at which influencing the investigation and prosecution of crimes of any kind, including corruption, appears most promising.

For that reason, the independence of prosecutors from inadequate political influence is crucial.[129] This worry over an independent prosecution manifests itself also in various recommendations by organs of the Council of Europe. In similar terms as promulgated in Guiding Principle 3 "to ensure that those in charge of the [...] prosecution and adjudication or corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence", *Recommendation Rec (2000) 19 of the Committee of Ministers to the member states on the role of public prosecution in the criminal justice system* in its Art. 11 requires the states to take care that "public prosecutors are able to perform their professional duties and responsibilities without unjustified interference". More concrete are the *Conclusions*

126 Cf. GRECO Report on the USA, para. 151.

127 See GRECO Report on Croatia, para. 151.

128 Cf. GRECO Report on Albania, para. 100.

129 The need of their independence is particularly stressed by *Carlo Federico Grosso*, Independence of the Judiciary and Judicial Repression of the Phenomenon of Corruption, in: Bernasconi (supra footnote 20), p. 285: "It is clear that since corruption is largely a criminal phenomenon involving politicians, if we have a judiciary that is independent of politics, it is possible, or at least easier, to repress corruption. Conversely, with a judiciary (and in particular a Public Prosecutor) subject to political manipulation, the repression of corruption will be impeded, if not totally frustrated."

of the 4th Conference of the Prosecutors General of Europe in recalling "the need for political authorities to do their utmost to promote public trust on public prosecutors. It further recalled that the latter's functions required the recognition of a formal statute, on the same basis as judges, ensuring, notably in terms of appointments and career, absolute impartiality on the part of all its members and effective safeguards against any partisan interference in the exercise of their tasks".[130] In systems in which the office of the prosecutor is part of the government, the aforementioned Recommendation (2000) 19 in its Art. 13 requires a minimum standard guaranteeing that "the nature and the scope of the powers of the government with respect to the public prosecution are established by law; government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law; where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way; public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received; instructions not to prosecute in a specific case should, in principle, be prohibited". In particular, individual orders are required to be "exceptional" and subjected to an "appropriate specific control with a view in particular to guaranteeing transparency". In cases in which the government has reserved the right to give orders with regard to an individual case, "such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law".[131]

As manifested by these recommendations, politically motivated influencing is the main type of corruption that law enforcement bodies are exposed to. As concerns "classical bribery", as distinct from "political" corruption, law enforcement bodies seem to be affected in no way different from other public authorities and their employees. In view of this situation the GRECO Reports are to be analysed with particular regard to structural deficiencies in the independence of law enforcement authorities from inadequate, as in particular political, influencing.

a) The police

Risks of corruptive impacts on investigative activities of the police must be envisaged from two perspectives:

130 These requirements are also relevant for fighting corruption which, according to No. 11 of the Conclusions of the Conference of the 5th European Conference of Specialsed Services in the Fight against Corruption, "affects precisely, the holders of political and economic power".

131 This general guideline is followed by various procedural recommendations, as "to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution; the duty to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels; to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments".

➢ Due to the hierarchic structure of the police, combined with the (political) responsibility of the superiors, inadequate influencing of investigations is facilitated by an organisational structure in which the police is at the same time the prosecuting authority; this is the case where the police is not only leading the (technical) investigation, but also empowered to decide on "whether" the defendant should be indicted (as in England/Wales, Ireland, for less grave crimes also in Norway and – with restrictions – in Cyprus[132] and Malta[133]). Yet, also in organisational structures in which the police is merely empowered with the investigation without having to decide on the indictment, influencing investigations is not precluded. This is apparent in systems where a minister, acting in a political way by definition, is entitled to give police officers concrete orders (as, for instance, in Albania[134] and Denmark[135]), which holds true no less to supreme political investigators functioning as so-called "political officials" (in terms of being removable for political reasons) like, for instance, the director general of the police in France and the highest police officials in some German states. In the latter case the appointment to and the remaining in these positions depends on political opportunity considerations in which the expected conduct in (politically sensitive) investigations can also be taken into account. In cases of this sort it does not even matter whether the political influence is in fact exercised as long as the decisive police officers may be motivated by "preemptive obedience" to the expected conduct. Therefore the mere fact that decision makers at the top of the hierarchy are acting politically and entitled to influence individual cases, may be considered as a structural weakness in the institutional fight against corruption.

➢ A second entrance for less political than more criminally motivated influencing can result from the structural lack of an external control. This risk for the objectivity of the police can in particular arise in countries in which the police is at the same time the prosecuting authority whose decisions are not exposed to an additional check by a state attorney or examining magistrate. This kind of structure can especially be detrimental to the independence of the police if its investigation concerns a police officer and, thus, is guided by a benevolent "esprit de corps".[136] But also in countries where the police is not at the same time the prosecuting authority, in case of investigations against colleagues said "esprit de corps" can tend to corruptive efforts of impeding the inquiry and leaving suspected crimes unrevealed.[137] Problems of this sort are accumulating, if there are areas in which the police is in-

132 In this country the investigations are in principle led by the police, though in corruption cases directed by the (independent) attorney general (GRECO Report on Cyprus, para. 23); on this way, a higher degree of independence is at least safeguarded with the latter type of crimes, whereas with regard to other types of crime (politically) partial manoeuvring of the investigation by way of the internal hierarchy remains possible.

133 Cf. GRECO Report on Malta, para. 20 ss., 43.

134 Cf., in particular, the influence of the Minister of Public Order (GRECO Report on Albania, para. 152).

135 Cf. GRECO Report on Denmark, para. 41.

136 Cf. also the reflections in GRECO Report on Malta, para. 97.

137 Cf. GRECO Report on the USA, para. 12.

vestigating in an autonomous manner without being formally controlled by a state attorney.[138]

For these reasons, the lack of external leadership and control of internal proceedings is to be considered as a structural weakness susceptible for corruptive perversions of the investigation.

b) The office of the prosecutor

With regard to the status and functions of the prosecutor as well, there is a broad field of various structures allowing inappropriate influence on politically undesirable investigations.[139] This risk can be lower or higher, not the least depending on the degree of independence possessed by the individual state attorney in a given case versus his/her superior(s) and, finally, at the top, the prosecutor general versus political powers such as the government or parliament.

➢ The highest degree of prosecutorial independence – at least from a structural perspective – is guaranteed if the office of the prosecutor is constituted as an organ holding equivalent independence as the judiciary; this, however, is only reported of a minority of countries.[140] This type of – at least formal – independence of the individual state attorney is particularly high if the powers of the prosecutor general are limited to general organisational measures, whereas specific investigations are performed by the individual state attorney independent of any superior orders.[141]

➢ As a rule, however, the office of the prosecutor is structured in form of hierarchy, integrated into the executive branch and, thus, in the final end part of the political power (as in Belgium, Croatia, Denmark, Iceland, Poland, Romania, Spain and – to a certain degree – in France[142] and Germany[143]). This connection between the office of the prosecutor and the political sphere is particularly evident where – as in the USA and in Poland – the Prosecutor General is at the same time Minister of Justice.[144] The structural accessibility for corruptive influencing is particularly great

138 Cf. GRECO Report on the USA, para. 100: "Generally, there is no formal prosecutorial supervision over investigations that do not reach the Grand Jury stage, but, according to the information received by the GET, investigators often consult prosecutors."

139 As an example among others see GRECO Report on „the former Yugoslav Republic of Macedonia", para. 114.

140 As Albania, Cyprus, Finland, Greece and Slovenia.

141 As described of Latvia in the GRECO Report, paras. 44, 53, 58.

142 The French solution may be characterised as a middle course: Although according to the principle of "unity of the national judicial service" the procureurs are responsible to the minister of justice, a political organ (cf. GRECO Report on France, para. 55), there is neither full independence nor full freedom from political influencing.

143 The German situation is similar to that of France; cf. GRECO Report on Germany, para. 31.

144 Cf. GRECO Report on Poland, para. 60, GRECO Report on the USA, para. 50.

if superior political instances – as the Minister of Justice[145] or a politically installed supreme state attorney[146] – have the power of not only issuing general guidelines for the performance of investigations, but may even intervene in individual cases by means of special orders.[147] Such a lack of independence becomes even more apparent when the minister of justice or the superior prosecutor may decide in a specific case whether to prosecute or not.[148]

➢ Although political partiality can be introduced into a criminal investigation by means of orders, this is not the only way in which an investigation can be influenced. More frequent as well as more subtle might be the "preemptive obedience" of subordinate officials in a hierarchic setting. If a certain political influence has *de facto* become noticeable, it can still remain effective even if the superior's power to individual instruction has *de iure* been abolished.[149] Without needing a formal order, hierarchic structures might also be used for exerting influence by discrete phone calls between the political top and the prosecutors in charge and possibly accompanied by internal reorganisations of competences or the seeming "promotion" of a particulary eager investigator to another position. These forms of influencing the course or result of an investigation appear expedient particularly in cases in which not the minister personally but the superior state attorney can intervene in an individual case and where this official is a political appointee. In view of these structural risks of political abuse in systems in which the office of the prosecutor is dependent from politics, public alertness is of vital importance.

➢ For keeping out political influencing from prosecutions to the best extent possible, already the selection and appointment of prosecutors must be performed according to objective criteria guided by professional capabilities and merits rather than by the political convictions of the candidate. This is particularly important in systems in which state attorneys are appointed by the government.[150]

145 Cf. GRECO Report on Denmark, para. 50, GRECO Report on Luxembourg, para. 63, GRECO Report on the Netherlands, para. 39. Cf. also GRECO Report on Norway, para. 29 where not a single minister but the whole cabinet may give orders in single cases although this right seems not to be made use of (GRECO Report, para. 29).

146 GRECO Report on Spain, para. 47.

147 GRECO Report on Denmark, para. 50, furthermore GRECO Report on the Netherlands, para. 39 where such an order, together with the opinion of the Board of Procurators General, has to be sent to parliament.

148 Cf. GRECO Report on France, para. 61 where, despite a legal regulation and voluntary self restraint, the question whether the minister of justice may instruct not to prosecute or to terminate proceedings was subject to discussions until recently.

149 As found in France: "... the former practice and culture of instructions is still reflected in a certain wait and see attitude on the part of prosecutors, who in some "sensitive" cases apparently try to gauge the views of their superiors as to the advisability of prosecutor" (GRECO Report on France, para. 65).

150 Otherwise it may happen, as reported of „the former Yugoslav Republic of Macedonia" in a certainly very extreme form, that the composition of the public prosecution office is "modified at every important change that occurs in the political system" (GRECO Report on „the former Yugoslav Republic of Macedonia", para. 115).

3. The possibilities of influencing the commencement, continuation or termination of criminal prosecution

Enormous importance for the effective implementation of penal anti-corruption laws lies with the procedural provisions by which the decision range of the prosecutor to pursue the suspicion of corruption or to foreclose or terminate an investigation, is determined. The greater the discretion of the prosecutor, the more easily inappropriate influencing, not only for political reasons but also perhaps for "ordinary" criminal motives, can creep in.

➢ Procedural structures most easily to be used for taking all kinds of considerations into account, including partial or otherwise inappropriate ones, can be found in systems in which the decision on the commencement, continuation or termination of a criminal investigation and prosecution is at the discretion of the prosecutor (as basically in the Czech Republic, France, Ireland, Luxembourg, Moldavia, the Netherlands and the United Kingdom). If this discretion is not bound by certain objective criteria, the prosecutor can hardly be prevented from performing an investigation directed at, and perhaps prejudiced by, his/her subjectively desired result. This "discretionary system" also entails the danger that, particularly in complex and less transparent cases, investigations are terminated too quickly or limited to a seemingly minor core which, in reality, may only be the "tip of the iceberg".[151]

➢ In comparison to this structural availability of broad prosecutorial discretion for corruptive influences, the opposite "mandatory system" appears better safeguarded by obliging the prosecutor in case of sufficient suspicion to investigate and indict (as basically in the procedural systems of Belgium, Denmark, Germany, Spain, Finland, Greece, Hungary, Iceland, Lithuania and many other countries). But this system is also not as safe from corruptive influences as one might assume. In spite of the principal mandate to prosecute irrespective of considerations of opportuneness, there is still room for prosecutorial discretion, beginning with the assessment of whether there is sufficient suspicion for commencing an investigation, and ending with the evaluation whether the evidence suffices for an indictment or whether the investigation should be terminated. If this is even done in form of "plea bargaining", the door is also open for considerations of political suitability.[152]

➢ The more discretion – with certainly different degrees in the aforementioned systems – is left to the prosecutor, the more transparency of the decision making is required. Therefore, if the discretionary system coincides with the inquiry files not being accessible to the public even after the final termination of the case, this may, in fact, result in a public information barrier (as, for instance, in Luxembourg[153] and, in principle, also in Cyprus[154]).

151 Cf. GRECO Report on the Netherlands, para. 90.

152 This danger is particularly not precluded where the prosecution office is hierarchically organised and open for being instructed by the political leadership, especially the minister of justice, as for example in Germany (cf. the recommendation in GRECO Report on Germany, para. 89).

153 Cf. GRECO Report on Luxembourg, para. 69.

➢ Similar reservations are also at place within the "mandatory system" when investigations are in principle performed secretly without informing the public (as, e.g., reported of Greece[155]), since in this way the decisions of the prosecuting authority are also kept from public knowledge and control. With regard to corruption, secrecy attitudes of this kind run the risk of provoking a loss of confidence in the propriatness of public proceeding, thus weakening the legal interest of public confidence which in case of suspected corruption is affected irrespective of whether a proceeding was in fact inappropriately influenced or not.

➢ It is not satisfying either if the decision of not continuing an investigation can be examined only within the hierarchic prosecutorial system without enabling an external control or review. This is, for instance, the case when the decision of the prosecutor general cannot be challenged by a complainant (as in Estonia) or where the termination of an investigation has to be reported merely to the President, without conceding any complaint (as in Malta[156]). In these cases the institutional efficacy of corruption provisions is impaired by the fact that, by denying any remedy, an external control of those decisions is precluded so that corruptive influence can remain undiscovered more easily.

In sum, with regard to the commencement, continuation and termination of criminal investigations, prosecutorial discretion requires transparency and the possibility of external review if the suspicion of inappropriate influencing shall be excluded, thus preserving confidence in the institutional efficacy of corruption provisions.[157]

4. Operational means for gathering evidence

The fight against corruption cannot, of course, be won only by optimising law enforcement bodies and their rules of procedure. No less important are the operative instruments available for prosecuting forces to perform their task. In this respect, however, one has come full circle with the independence and control of prosecuting authorities as described before. For only if these forces can in fact be deemed unaffected by corruption and subjected to efficient control, they should be entrusted with operative means which mean no less than the physical-technical symbols of encroachments on human rights. Therefore, when in the following the lack of certain means and instruments for fighting corruption is noticed, this is to be interpreted as recommending to install them only if the legal system and its factual implementation

154 Although in Cyprus the police files are not public either, leaving it in the decision of the attorney general to disclose investigations according to the – undefined – "public interest", the present Attorney General is prepared voluntarily to inform the parliament and the public on the reasons for terminating an investigation (GRECO Report on Cyprus, paras. 34 ss.).

155 Cf. GRECO Report on Greece, para. 45.

156 Cf. GRECO Report on Malta, para. 44.

157 Cf. Art. 13 Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system.

of the country concerned is already in shape to employ them without having to encounter possible abuse.

As a matter of fact, the investigative means and instruments of the police and the office of the prosecutor quite often do not meet the needs arising in course of clearing up such a "discrete" criminal phenomenon such as corruption, which is characterised by a "dark figure" of unreported crimes and of closed groups of perpetrators and participants. The deficiencies in this area are manifold and are to be kept to the following remarks.

➢ Police powers on the operative level are, in particular, insufficient if any special investigative techniques such as recording, electronic surveillance, interception of communication, bugging and the employment of an "agent provocateur" are precluded by the constitution (as, for instance, in "the former Yugoslav Republic of Macedonia"[158]). More frequent than this extreme bar is the situation that special investigative methods may be allowed in principle, but are *de facto* not applied by the prosecuting authorities (as reported of Latvia[159]) or by the courts (as seems to be the case in Slovenia[160]) or are allowed only for certain types of corruption (as in Croatia[161]) or excluded in case of bribery when not connected to organised crime (as in Poland[162]). Although especially the last mentioned restriction addresses the frequent connection of organised crime and corruption, this can hardly justify to require such a connection as a precondition because by thus making the investigation of "simple corruption" more difficult, the fight against consolidated criminal structures would certainly be weakened. As the existence of organised crime hardly comes to light by normal police investigations, efficient inquiries into corruption of any kind may for the first time reveal indications of criminal organisations.

➢ Most frequent are references to the insufficient legal access to acoustic surveillance. While some countries do not permit phone tapping for detecting corruption at all (like Finland, Germany, Luxembourg, Norway, Sweden) or at least not for active bribery (as Denmark and – conclusively - Albania[163]), other countries allow it on certain conditions only (as Cyprus,[164] Iceland, Malta,[165] Poland[166]). Similar restrictions can also exist with regard to other investigative methods as, for instance,

158 Cf. GRECO Report on "the former Yugoslav Republic of Macedonia", para. 37.

159 Cf. GRECO Report on Latvia, para. 97.

160 Cf. GRECO Report on Slovenia, para. 71.

161 Cf. GRECO Report on Croatia, para. 154.

162 GRECO Report on Poland, para. 86.

163 As special investigative means are applicable only for crimes punishable with deprivation of liberty over 5 years (GRECO Report on Albania, para. 40), active bribery due to its lower punishment is excluded.

164 Where acoustic surveillance, due to constitutional reservations, is made use of in rare cases only (cf. GRECO Report on Cyprus, para. 25).

165 Where the competence to order this technique is restricted to the security service (cf. GRECO Report on Malta, para. 87).

166 By permitting phone tapping only if the investigation is at the same time directed against other qualified crimes (cf. GRECO Report on Poland, para. 86).

with operative "tele surveillance" which in Sweden may be employed only in grave cases of passive bribery.[167]

➢ The employment of undercover agents for investigating corruption is another example of deficiencies: partly due to the lack of clear legal permissions (as in Finland, France, Iceland, Luxembourg), partly because this method of investigation is permitted only in connection with drug trafficking (as in France). Similarly questionable appears the exclusion of anonymous informants just with regard to corruption crimes although otherwise their use is principally allowed (as in Norway[168]).

➢ A further obstacle in the institutional fight against corruption can also result from banking secrecy if access to information on the financial situation of persons involved in corruption investigations is barred (as reported of Croatia[169] and Malta[170]).

Limitations of the above listed sort in a criminal area, which can hardly be cleared up with normal investigative methods, are impairing the institutions in the fight against corruption even if certain encroachments on human rights must be taken into account and all the more kept under legal control. Thus, instead of not applying these extraordinary investigative instruments for fear of abuse at all with the consequence of inefficacy in the institutional fight against corruption, the preferable alternative must be to strengthen and safeguard the independence and loyalty of law enforcement bodies so as to ensure their immunity against the abuse of their powers. This in turn, however, presupposes that these authorities and their officials are themselves not affected by corruption.

5. Means for raising the incentive to co-operate with law enforcement bodies

Considering the fact that corruption is traditionally characterised by collusive co-operation and, as a rule, without a certain natural "victim" being directly involved, special incentives are required, first, to inform law enforcement bodies about one's suspicion of corruptive actions at all and, second, to make witnesses confirm their testimony, if necessary, before court. Addressees of incentives can be personally uninvolved observers of suspicious occurrences, as colleagues of suspected officials, as well as any citizen who learns of a questionable incidence; yet, they can also be participants in a corruptive activity who, for one reason or the other, want to back out. In analysing the GRECO Reports in this respect, the following observations appear noteworthy.

167 Cf. GRECO Report on Sweden, para. 35.
168 Cf. GRECO Report on Norway, para. 40.
169 Cf. GRECO Report on Croatia, para. 101.
170 Cf. GRECO Report on Malta, para. 47.

➢ The most basic precondition for bringing the suspicion of corruption to the knowledge of competent authorities is, particularly for the public at large, to know both to which body and at what place reports or complaints can be made.[171]

➢ As concerns insiders, as a rule, they will disclose knowledge of corruptive actions to law enforcement bodies only if they can be sure that their co-operation is more advantageous than disadvantageous for them. For this reason, Guiding Principle 3 asks for "effective means for gathering evidence [and] protecting the persons who help the authorities in combating corruption". In view of this aim, it is counterproductive if participants in a "corruption pact", prepared to back out, cannot be promised by the prosecuting authorities to expect discharge of this own criminal involvement or at least mitigation to a degree, which would go beyond of what is normally granted in return of cooperative behaviour, after the fact in the sentencing phase (as, for instance, in Germany and Ireland), or when rules for exempting from punishment are in general limited to the area of organised crime (as in Croatia in light of the particular weight of this phenomenon). In need of optimisation are also rules which grant discharge only to the active briber but not for the corrupted recipient (as in Romania and the Slovak Republic). Contrary to this, optimal regulations aimed at revealing covert corruption approach this scene from both the active and passive side. For if the first of the two parties – the active briber or the passive bribed person – can be promised discharge or mitigation in return of early and voluntary uncovering, the awareness of this exclusive possibility can result in uncertainties with regard to the conduct of the counterpart. Speculation on whether the other one may use this advantage, nourishes distrust between the parties and produces rifts in the connection otherwise tied by the mutual advantage and the shared expectation with regard to punishment. For this reason, this uncertainty can result in a "race" for the uncovering and the exclusive exemption or mitigation of punishment. In view of this perspective (based on "game theory"), all legal orders lacking any, or merely granting (personally) limited, chances of reduced punishment deserve improvement.

➢ If witnesses willing to back out are found, they are to be motivated to repeat their testimony in court, with the consequence that their identity might be disclosed. In addition to, or instead of, rewarding devices as discussed before, this may require protection programmes for endangered witnesses. Therefore, the state not only provides insufficient incentives for "drop outs" but also neglects its care for endangered witnesses if efficient witness protection programmes are lacking (as, for instance, in Belgium, Denmark, Finland, France, Georgia, Iceland, Luxembourg, "the former Yugoslav Republic of Macedonia", Norway and – to a certain degree – Croatia[172]). With regard to corruption, the result is more or less the same if witness protection, although provided for in general, is not available in case of corruption crimes (as in Poland[173]) or only in connection with organised crime (as in Ger-

171 Lack and need of information in this respect is, in particular, reported of "the former Yugoslav Republic of Macedonia" (GRECO Report, para. 103).

172 See GRECO Report on Croatia, para. 102.

173 Cf. GRECO Report on Poland, para. 22.

many[174]). Furthermore, the incentive for cooperating with prosecution authorities can also be lessened if it is known to potential addressees of witness protection that these programmes, although legally possible, are in fact only rarely applied by the police (as reported of Lativa[175]).

➢ A delaying effect, which may even prove as totally counteractive to the willingness of disclosing suspected corruption, can result from regulations which forbid public employees to report a suspicion directly to prosecuting authorities and, instead, oblige them to contact the next higher superior (as it is generally required in the Czech Republic and in Germany[176]). Even if such a primacy of internal reporting may be suitable for "normal" individual crimes within a public body, it appears hardly functional with "collusive" crimes like corruption in which mostly more than one official, perhaps even including superiors, are involved. Consequently, if an employee, instead of reporting directly to a neutral external authority, first has to contact his superior, particularly in organisations with an examplary "esprit de corps" like the police, he can be deterred not only for fear of social reprisals but also by the anticipation that his information might anyhow "peter out", with the result that suspicions of internal corruption will not be reported at all or merely in an anonymous – and, thus, for evidence purposes less forcing – manner.[177]

➢ Lowering rather than strengthening the incentive to cooperate with law enforcement authorities can be produced by not notifying the informant about the result of his complaint against a public official (as was observed with regard to members of the judiciary in Malta[178]). Such a lack of transparency can have twofold effects: on the one hand, it can further internal decisions directed at a favourable result, on the other hand, by not disclosing the result of a proceeding, it can promote resignation in the population and weaken the willingness to report suspected corruption.

➢ The question of whether the institutions against corruption are impaired if the police is not supposed to commence an investigation upon an anonymous charge is less clear. For instance it is generally prohibited in Malta[179]. The opposite, however, in terms of a general duty to start an inquiry upon any anonymous report could also have counterproductive effects if, for instance, resources are bound by unfounded information, perhaps even launched for criminal motives. Therefore, instead of using the personal anonymity of the informant onesidedly as inacceptable or still feasible, one should rather rely on the meritorious content of the information and, accordingly, commence or refrain from investigation.

174 Cf. GRECO Report on Germany, para. 89.
175 Cf. GRECO Report on Latvia, para. 110 s.
176 Cf. GRECO Report on Czech Republic, para. 90, GRECO Report on Germany, para. 53.
177 Cf. GRECO Report on Germany, para. 92.
178 Cf. GRECO Report on Malta, para. 94.
179 Cf. GRECO Report on Malta, para. 88.

6. Coordination of the investigation

More than other types of criminality, investigations in a "covered" criminal area, characterised by a high number of unreported crimes and closed criminal circles, require quick and effective co-operation of the forces participating in the investigation. Furthermore, it must be avoided that information "peter out" or that crimes reach the "period of limitation".

For these reasons, improvements are necessary where the jurisdictions of different investigative authorities, as in particular the police, the office of the prosecutor, and the investigating judge, are overlapping. In these cases, poor co-ordination not only leads to a duplication of work in single cases but also overstresses the resources in structural respect.[180] Clear signs of a procedure too complex and thus not optimal are apparent if the coordination between the police and the office of the prosecutor have to be based on "good will", personal connections and even unlucky coincidence rather than on clear rules (as lacking in Croatia and Slovenia[181]). This is not only detrimental to an efficient fight against crime in general, but can also serve as an entry gate for corruptive temptations; the possibility of subsequent inappropriate influencing may even be strengthened by a high susceptibility of police and prosecution authorities for (political) pressure within their hierarchic structure.[182] Similar problems can result from structures in which a comprehensive series of rules for regulating the co-operation between the investigating authorities is lacking, with the consequence that too much room for informal and, thus, uncoordinated and vulnerable arrangements between police and state attorney may remain, as has been observed in the USA.

B. Specialised bodies and means for dealing with corruption - Guiding Principle 7

With regard to the aim, expressed in Guiding Principle 7, "to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks", the analysis of the GRECO Reports reveals various deficiencies.

In general, it may surprise that specialised departments of the police and the public prosecution for fighting corruption may not only be missing in countries known for a low degree of corruption, but also – and perhaps even more – in countries with a high incidence of corruption. When these countries, at the same time, are characterised by a high degree of organisational deficits and a lack of adequate equipment,

180 Cf. GRECO Report on Croatia, para. 88 s.

181 Cf. GRECO Report on Croatia, para. 92, GRECO Report on Slovenia, para. 60.

182 In this respect, the situation in Georgia where no functioning co-operation whatsoever was to notice is in urgent need of improvement (cf. GRECO Report on Georgia, paras. 105, 119). Weaknesses of this sort seem also to exist in in Latvia (GRECO Report, para. 90).

it would appear that the causes for this deplorable state of affairs may be found in the minor importance attached to fighting corruption by the society concerned and, as a result of that, in the weak political will to counter corruption and - last not least – in the lack of the necessary financial resources of some countries.

Some of the more particular deficiencies with regard to the specialisation and resources of law enforcement bodies are the following.

1. Specialisation and resources of the police and the office of the prosecution

The institutional fight against corruption is already hampered in its basic structure if a complex legal, economic and social phenomenon such as corruption is not tackled with sufficient and well educated "manpower".

➢ Problems can start with the lack of specialised departments for investigating corruption, as, for instance, in Greece where all criminal investigations of whatever kind may be led by any policeofficer. This does not only complicate the co-operation of police and state attorney since no special corresponding partner is available, but also impedes a (personal and organisational) centralisation of specific expertise.[183]

➢ As long as special departments for fighting corruption are missing, there seems to be neither the need nor the chance for a specialised professional education in this field, and vice versa. This vicious circle must be broken by the political determination to develop special training programmes for fighting economic crimes, in particular corruption, since efficient investigations in these criminal areas are not possible without specialised police investigators and state attorneys. So far, training programmes of this sort are still exceptional and, if available, need improving.[184] Without adequate training, investigators may fail even in understanding the peculiarities of corruption, as, for instance, expressed in the comment on the situation in the Czech Republic that "the main problems concern the inadequate understanding of some police officers of their powers and the complexity of the issues at stake, particularly when investigations and prosecutions do not concern tangible goods".[185] By no means may high standards of general and special education be lowered in favour of increased employment of personnel.[186]

Theoretical instruction is, of course, not enough, it must be complemented with the practical experience of investigators trained in corruption cases. Since this cannot be built up without a certain degree of specialisation, some countries installed specialised investigation and prosecution teams within the police (like the Czech Republic, Hungary, Latvia, the Netherlands, Norway, Slovak Republic, Spain) or

183 Cf. GRECO Report on Greece, paras. 25, 42. Cf. also GRECO Report on the USA, para. 135. With regard to other weak coordination spots cf. supra III.A.6 with further references.

184 Cf., e.g., GRECO Report on Denmark, para. 47, GRECO Report on the Netherlands, para. 89, GRECO Report on Malta, para. 85.

185 Cf. GRECO Report on Czech Republic, para. 50.

186 Cf. GRECO Report on the USA, paras. 78, 143.

the office of the prosecutor (Croatia, Czech Republic, Denmark, Germany, Hungary, Norway, Slovak Republic, Slovenia, Spain). Other countries still are lagging behind this optimum by not having any specialised or adequately equipped corruption teams within the police and the prosecuting authorities (as reported of Albania,[187] Bosnia and Herzegovina, Cyprus, Estonia, Finland, Georgia, Greece, Latvia, "the former Yugoslav Republic of Macedonia", Malta,[188] the Netherlands, Poland and Sweden), whereas again others pursue a middle course as, for instance, France where schooling in fighting corruption is offered, but, different from other types of economic crimes, no special units for investigating corruption exist.[189] In as far as specialised investigation groups for organised crime or economic crimes may also target corruption (as in Bulgaria, Hungary, "the former Yugoslav Republic of Macedonia" and the Netherlands), their financial and personal resources would partially deserve improvement.[190]

➢ Even if the lack of specialised investigation groups of the police and the office of the prosecutor may be partly offset by special bodies outside the prosecution authorities, this cannot suffice if these external task forces have no investigative powers (as it seems to be the case in Bosnia and Herzegovina[191]) or if they merely have documentation functions. The latter seems to apply to the Permanent Commission against Corruption in Malta which, although performing inquiries into corruption in the public sector, has no right of its own to indict but merely reports to the Minister of Justice who has to decide on further measures, including the right to keep a report secret.[192] Structural schemes of this sort not only fall short of the need of specialised investigating forces but may also ensue that unpleasant investigations are "channelised" and subjected to political disposals.

➢ Certainly, although a positive step in the fight against corruption, the creation of special Tribunals of Inquiry for the investigation of corruptive occurrences in

187 Whereas the police subdivision for fraud and falsification and corruption is equipped with 56 officers (GRECO Report on Albania, para. 70), the newly founded Economic Crime Bureau of the Office of the Prosecutor General does not have specialised state attorneys (GRECO Report, para. 75). Somehow contrary to the existence of special police units, representatives of the judiciary explain the low level of the adjudicated corruption as "a result of insufficient investigations" (GRECO Report on Albania, para. 101).

188 At any rate, Malta possesses an Economic Crime Unit, although only with 28 officers altogether (GRECO Report on Malta, para. 21), which are in charge for a wide range of white collar crime.

189 Cf. GRECO Report on France, para. 35.

190 Bulgaria provides 9 officers for fighting corruption (GRECO Report, para. 54), "the former Yugoslav Republic of Macedonia" speaks of 2 police inspectors (GRECO Report, para. 24), Hungary reserves 16 state attorneys for the entire area of organised crime and corruption (GRECO Report, para. 44); see also the critical recommendation in GRECO Report on the Netherlands, para. 89.

191 Cf. GRECO Report on Bosnia and Herzegovina, para. 17 s.

192 Cf. GRECO Report on Malta, para. 54 ss. Cf. also GRECO Report on France, para. 90 ss. to the Interministerial Task Force for Investigations into Public Work and Supply Contracts and Delegated Public Services (MIEM).

Ireland is hardly optimal if it entails the exclusion of investigations by the office of the prosecutor and thus the risk of losing evidential material.[193]

2. Specialisation of courts

Beside directly influencing the judicial decision making of judges by corruptive means (as described supra III.A.1), the institutional efficacy of corruption prohibitions can also be weakened by organisational shortcomings, as in particular by the fact that courts are not able to handle indicted cases within appropriate time and in a comprehensive manner (as, for instance, observed in Malta[194]). An obvious reason may be that the judiciary is understaffed. But not less detrimental to an efficient fight against corruption may be that the judges who have to deal with corruption cases do not possess the necessary knowledge particularly concerning economics. Different from normal "street corruption", particularly important cases, which due to their public "signal impact" need to be cleared up, are mostly embedded in complex economic occurrencies. For this reason, it appears appropriate, as explicitly recommended by GRECO for the Netherlands, to create specialised panels of judges available to preside over the most complex and serious cases related to economic crime offences,[195] including corruption. In these terms, Germany has installed special chambers for economic crimes, whereas France provides the possibility of transferring the prosecution of corruption to special "economic and financial courts".[196]

On the whole, however, the GRECO Reports leave the impression that the problems of fighting corruption are located more in the pre-trial phase, in particular with the investigation by the police and the prosecutor's office. Furthermore, corruption crimes by nature require high effort in the investigative work in the first instance, whereas specialised qualifications by the trial judges are less vital. Therefore, compared to the need of specialised prosecuting forces in corruption cases, a specialisation of the trial and appeal judges appears less urgent.

C. Immunities with regard to corruption - Guiding Principle 6

The most obvious impairment of the validity of penal norms can result from granting immunity to certain persons or with regard to certain types of crimes. This also applies to corruption crimes in as far as they cannot be prosecuted for reasons of immunity. This concern is also mirrored in the request of Guiding Principle 6 "to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society".

193 Cf. GRECO Report on Ireland, paras. 65-70, 139.
194 Cf. GRECO Report on Malta, para. 95.
195 Cf. GRECO Report on the Netherlands, para. 92.
196 Cf. GRECO Report on France, para. 51 ss.

Immunities, very often based on constitutional recognition, exist probably in all countries of the world, including the GRECO members, though in different scope and shape. Since exclusive protection against criminal prosecution, strictly speaking, contradicts equality before the law, a privilege of this sort in a democracy ruled by law requires legitimisation. This can be rested only on treating the office, and not the office holder as individuum, as privileged, even if this privileging of an office is necessarily attached to an individual person and, thus is, enjoyed by it as well.

In broad terms, any privilege or exemption from punishment and/or criminal proceedings could be understood as "immunity". For reasons of forming coherent groups of different types of immunity, however, some differentiations appear appropriate, in particular for indicating the different scope and range of immunity regulations.[197]

➢ The category of so-called "non-liability-immunity" comprises cases in which not only the prosecution, but even the substantive basis for punishing a person concerned is excluded. This type of immunity which in various countries is also termed as "Indemnität", "irresponsabilité", "insindacabilità", "inviolabilidad" or "freedom of speech" is, as a rule, mostly granted to parliamentarians with regard to opinions expressed or vote casts in parliament. But also heads of state may sometimes enjoy this form of (occasionally also so-called) "absolute immunity".

➢ The so-called "inviolability-immunity" is less far reaching since, as a rule, it merely bars the procedural prosecution while not affectin the question of whether the act should be punished. This "procedural immunity", also known in various countries as "Immunität", "immunidad" or "improcedibilità", may depend on special conditions and/or be granted only during the period of time the person concerned is in office. Although not completely barring a criminal prosecution (indefinitely or for a certain period of time), this kind of immunity can also be seen in the protection of office holders against certain investigative measures, such as pretrial detention or search and seizure.

Considering the impediments that may result from immunities in prosecuting suspected corruption particularly of high-level office holders, this issue found great attention in the GRECO Reports. Whereas in certain respects most countries follow the same approach, in other respects the national differences may be substantial. Key findings include the following:

1. Immunity of the head of state

➢ Except for Norway, Slovenia and the Slovac Republic all nations provide for the immunity of their heads of state.

➢ In monarchies such as Belgium, Denmark, Luxembourg, the Netherlands, Sweden and the United Kingdom, but also in non-monarchistic nations like the

197 To the following cf. also "terminology in the field of immunity". Document prepared by the GRECO Secretariat for the First Evaluation Round (GRECO Eval I (2001) 50E).

Czech Republic,[198] "absolute" non-liability immunity is granted to the head of state. A "quasi-absolute" immunity is granted in Finland where the head of state can only be prosecuted for high treason or crimes against humanity.[199] This extensive privilege results from constitutional traditions and has to be seen in connection with the representative and integrating function of a head of state. Nevertheless, an absolute immunity means by its very nature a weakening of the institutions against corruption. On the other hand, this privilege is concentrated on a single and outstanding person who is accompanied by the attention of the public and the media. The accountability to the public controlled by a free press can in fact compensate the effect of absolute immunity.

➢ All other countries provide for certain forms of a "relative" inviolability-immunity. It is remarkable that in some countries such as Albania, France, Greece, Ireland and Malta the immunity of the head of state is limited to actions performed in the exercise of his/her duty.[200]

2. Immunities for members of the legislative power

Immunity privileges for members of parliament exist in all GRECO member states. As a rule, this is guaranteed in two distinct far reaching forms.

a) Protection of the parliamentarian speech and vote

The connection between person and function in a democratic system is manifested by the protection from criminal prosecution for parliamentary acts. Many countries have regulations according to which parliamentarians cannot be prosecuted for speeches or votes in parliament. The way and scope of guaranteeing this, however, differ:

➢ The most common protection from criminal prosecution rests on "non-liability" immunity by excluding the substantive basis for punishing the parliamentary acts in question (as it is the case in Albania, Belgium, Croatia, Denmark, France, Georgia, Germany, Hungary, Ireland, Latvia, Luxembourg, "the former Yugoslav Republic of Macedonia", Moldova, the Netherlands,[201] Norway,[202] Romania, Slovak Republic, Slovenia, Spain).

198 GRECO Report on the Czech Republic, para. 77.
199 GRECO Report on Finland, para. 75.
200 GRECO Report on Albania, para. 131; GRECO Report on France, para. 106; GRECO Report on Greece, para. 63; GRECO Report on Ireland, para. 115; GRECO Report on Malta, para. 78.
201 Including "ministers, under-secretaries of state and other persons taking part in the deliberation" (GRECO Report on the Netherlands, para. 73).
202 Restricted to "opinion expressed" (GRECO Report on Norway, para. 93).

➢ Other countries would not preclude criminal investigations per se, but would condition it procedurally with the agreement of parliament (as in Estonia, Finland, Poland, Sweden).[203]

Immunities of this kind are hardly questionable since they aim at the democratic function of a parliamentarian rather than his or her person.

b) Additional immunities

Beside the aforementioned office-oriented privileges, in various countries a multitude of regulations can be found which in a democratic system cannot be so easily explained with reference to the parliamentary function of the person concerned. Therefore, if those privileges cannot be reasoned by particular circumstances of the country concerned. They must be considered as privilege of the person; and whereas the protection from criminal prosecution with regard to parliamentarian acts is inherently justified by its function, immunities reaching beyond this purpose require a particular legitimation.[204] Otherwise personal immunities may too easily be used as loopholes in the institutional fight against corruption. This is particularly true with regard to crimes that might as well be committed by "everybody" and, thus, could hardly be considered as committed in the exercise of a parliamentarian's functions. If privileges granted with regard to such crimes cannot otherwise be justified in a satisfactory manner, they can hardly be reconciled with the principle of equality. These reservations concern the following immunities (without wanting to pretend, however, that the countries concerned might not otherwise be able to provide satisfactory reasons for still granting such privileges).

➢ Most common are regulations which, regardless of the character of the crime, condition any formal *criminal prosecution* of parliamentarians on the prior performance of a special procedure, as, in particular, the requirement that the immunity of the person concerned must be lifted by parliament (or a special parliamentarian committee) or by the constitutional court. Regulations of this type of inviolability-immunity exist in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic,[205] Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Latvia, Lithuania, Moldova, Poland, Portugal, Slovenia , Sweden and „the former Yugoslav Republic of Macedonia".

➢ Some countries go farther by not even allowing the *commencement of investigative measures* against members of parliamentary assemblies without a prior authorisation by the pertinent assembly (as in Belgium, Lithuania and in the Netherlands). This means that not only concrete measures of criminal prosecution, but even

203 Less clear is the situation in Cyprus (GRECO Report, para. 64) and the United Kingdom (GRECO Report, para. 71).

204 This need was in particular articulated in GRECO Report on the Czech Republic, para. 95.

205 With the additional privilege that, if the lifting of immunity has been denied by parliament, criminal prosecution of the person concerned shall be excluded even beyond the end of the parliamentarian membership (GRECO Report on the Czech Republic, para. 80).

pre-investigations with regard to certain suspicions are depending on the agreement of political bodies. On this way, the neutral public prosecutor, in his capacity as "master of the proceeding", is substituted by a political – and, thus, by definition not neutral – organ. Whether such an organ will be able to fulfil its role in an appropriate manner, may be doubted; for if the public prosecutor is prohibited from any investigations, he will not be able to provide the organ entrusted with the decision on immunity with reliable findings as they are in fact needed as a basis for making the decision on lifting immunity.[206]

➢ Further privileges can consist in that the indictment is put to the discretion of the government or parliament (as in the Netherlands[207]) or of an official who also may decide along political lines (as in Romania[208]). Even if some countries concede exceptions by allowing measures of the prosecuting authorities without the prior lifting of immunity, those exceptions appear too narrow if (as in "the former Yugoslav Republic of Macedonia") it is required that the perpetrator is caught *in flagrante delicto* and that the crime is punishable with more than five years of imprisonment.[209]

➢ Furthermore, the procedure of *lifting immunity* appears deficient in some countries. This is in particular the case where a transparent and regulated procedure is lacking at all (as in "the former Yugoslav Republic of Macedonia" and Moldova[210]); but even an existing procedure can impair the success of investigations and of prospective coercive measures, if the parliamentarian concerned is informed in advance about his immunity being withdrawn so that the proceeding can extend over several days.[211] Such an interval makes targeted investigation more difficult, in particular by enabling the person concerned to take collusive steps to cover up certain facts or even to escape.

➢ Parliamentarians can also be privileged by requiring a special procedure for ordering and executing *coercive measures*, as in particular detention (as, though with differences in scope and detail, provided for in Albania, Belgium, Bosnia and Herzegovina, Denmark, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Lithuania, Luxembourg, Moldova, Romania, Slovak Republic, Spain, Swe-

206 See also the criticism in GRECO Report on the Netherlands, para. 96.

207 Cf. GRECO Report on the Netherlands, para. 74.

208 A close intertwining of criminal prosecution and political interests may be worried about if the criminal prosecution of parliamentarians is only possible on order of the general prosecution service the head of which is dependent on the president and government (cf. GRECO Report on Romania, paras. 35, 76) and, thus, exposed to political influencing.

209 See also the criticism in GRECO Report on "the former Yugoslav Republic of Macedonia", para. 118.

210 GRECO Report on "the former Yugoslav Republic of Macedonia", para. 120, GRECO Report on Moldova, para. 77.

211 Cf. GRECO Report on Hungary, para. 71. Similar problems can arise if the speaker of parliament has to announce the request of the prosecutor general for lifting the immunity of a member of parliament in a plenary session (GRECO Report on Moldova, para. 77), thus, giving the person concerned time and opportunity for a cover-up.

den and „the former Yugoslav Republic of Macedonia").[212] Compared to this broad privilege, Norway provides a much narrower protection against coercive measures by precluding the arrest of a parliamentarian only on his way to parliament and during his presence there.[213] Whereas the Norwegian approach, as evidently serving the protection of parliamentarian functions, appears unquestionable, it is less apparent why most countries grant broader inviolability by requiring a special procedure for all cases of coercive measures. In comparison with ordinary citizens, the privileging character of these procedural precautions favouring the parliamentarian as a person emerges especially with regard to the requirement of an imminent danger of escape or a particular gravity of the suspected crime. For as these are requirements which, as a rule, have also to be complied with for coercive measures against any citizen, considered as sufficient for safeguarding his or her basic rights, additional procedural protection of parliamentarians might not longer be considered as a matter of course but, as a privilege, which in a democracy has to be explicitly justified.

3. Immunities for members of the executive power

Whereas immunities of monarchs and heads of state enjoy a long tradition that was later on also given to members of parliament, immunities for members of the executive power, at least below the level of government, are less common. Consequently, in this respect the various national regulations differ greatly.

- In as far as members of government (ministers or secretaries of state) are concerned, they may enjoy immunity already by virtue of also being members of parliament. If this is the case, there is indeed no reason why they should have less protection from criminal prosecution than any "normal" member of parliament, both with regard to their substantive "non-liability" and their procedural "inviolability". Consequently, in the same range as described with regard to members of the legislative power (supra III.C.2) – though differing to a certain degree in various countries –, members of the government, provided that they are at the same time members of parliament, enjoy immunity.
- A considerable number of countries, however, go further in granting immunity to members of government irrespectively of their being at the same time members of parliament (e.g. Albania, Bosnia and Herzegovina, Croatia, Estonia, Finland, Lithuania, "the former Yugoslav Republic of Macedonia", the Netherlands, Portugal). As the immunity of the executive branch cannot be founded on the functional connection as is characteristic for the role of the legislative power in a democracy governed by rule of law, it is even less a matter of course. Therefore it is all the more questionable whether the institutional efficacy of criminal law, including the prohibition of corruption, may be impaired by subjecting the criminal prosecution of

212 Similar Portugal with regard to Member of the State Council (GRECO Report, para. 82); less clear the legal situation in Cyprus, Estonia, Slovenia and the United Kingdom.

213 GRECO Report on Norway, para. 93.

members of government (as in the Netherlands and Romania) and other members of the executive (like "judicial-police officers" in Luxembourg) to special procedures, as, in particular, requiring the approval of the government (as in Bosnia and Herzegovina and "the former Yugoslav Republic of Macedonia") or of either government or parliament (as in the Netherlands). Particularly in politically undesirable investigations against another member of the government, it may be doubted whether this body musters sufficient independence and impartiality for deciding on lifting immunity.

➢ Similar doubts arise with regard to the intertwining of state powers used to decide along political lines when, in repressing the independent judiciary power, members of the government are not indicted in an ordinary court but rather tried by a special court, which in its majority may consist of members of parliament (as in France[214]). An example of extraordinary far reaching immunities granted to members of the executive can be found in Georgia: In addition to various impeachment requirements, provided by the constitution for certain high-ranking officials (as members of government, the prosecutor general, the chairman of the chamber of control, members of the national board), procedural "inviolability" against arrest, detention as well as house, car or office searches without the consent of the chairman of the Supreme Court, is not only granted to the Prosecutor General, but also to his deputies, the heads of investigation departments in the office of the prosecutor and other members of the general prosecutor board; in addition, several catagories of persons (including heads of local authorities) are also immune from disciplinary liability.[215] The exemption of the members of government and the heads of local authorities from disciplinary responsibility according to the "Law on Conflict of Interests and Corruption in Public Services" is peculiarly remarkable since these persons should be supposed to be the true addressees of this law. Despite recently substantial changes, former regulations of Bosnia and Herzegovina hold another example of an extremely wide scope of immunities, since, in personal respect, immunity was granted to "all officials and other persons employed by or authorised to represent institutions" as well as even extended to "civil action".[216]

➢ The opposite attitude towards immunities is represented by Norway; in strictly restricting immunities of parliament[217] the executive and its members do not enjoy any procedural privileges.[218]

As demonstrated by the restrictive position of Norway, the executive power of a country is not destined to failure if its heads and members cannot enjoy protection from criminal prosecution when suspected of a crime, including corruption. As distinct from and different from the non-liability and inviolability of parliamentarians who in case of criminally suspicious conduct can be ousted from parliament at

214 GRECO Report on France, para. 109.

215 For more details to this rather complex immunity regime cf. GRECO Report on Georgia, paras. 76 ss., 134 ss.

216 For more details cf. GRECO Report on Bosnia and Herzegovina, paras. 88 ss., 143 ss.

217 Cf. supra III.C.2.

218 GRECO Report on Norway, para. 94.

the latest in the next election, members of the executive, as otherwise without independent public control, should not be allowed to shield themselves from criminal prosecution by invoking immunity. This is in particular relevant for the institutional fight against corruption.

4. Immunities for members of the judicial power, including prosecutors

The adjudicating power of the judiciary, as in principle independent of other state powers, appears particularly attractive for pushing through one's own interests by corruptive means. The efficiency of such efforts may be explained by the fact that, as reported of Slovakia, "the judiciary [together with the health care system] is the most corrupted area in the Republic" while at the same time "no judges have been prosecuted for corruption".[219] Therefore, on the one hand, it is necessary to analyse immunity privileges for the judiciary (including the prosecuting authorities), as well with regard to possible weaknesses of the institutions against corruption. *On the other hand, however, to care must be taken of protecting the independence of the judiciary against false accusations*[220] and of maintaing the separation of power which is fundamental for a democracy against criminal investigations by which the functioning of the judicical power could be endangered. This may be the reason for immunities of the judiciary to be found in many countries and in different scope.

➢ Very common, although still not granted everywhere, are immunities enjoyed by members of constitutional courts (as in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Poland, Portugal and Slovenia). While all of these countries provide for an inviolability of these judges, some countries such as Croatia,[221] Hungary[222] and Slovenia[223] grant "non-liability" or "professional" immunity for the vote casted or the opinion expressed in the court. In as far as constitutional courts are entrusted with controlling other state powers, including the competence to examine and invalidate legislative acts, their position comes close to that of other state organs. Consequently, granting members of constitutional courts immunity for the protection of their state organisational function appears legitimate to the same degree as parliamentarians enjoy immunity. To this extent, immunities for members of the judicial power cannot be considered as weakening institutions against corruption.

➢ In contrast to constitutional courts, judges of the ordinary judiciary (including public prosecutors) do not hold a position comparably to members of other state

219 GRECO Report on Slovak Republic, paras. 65, 85.

220 As to relevant experience see GRECO Report on Moldova, para. 79: "... immunity represents an essential protection when carrying out their [the judges'] duties, notably vis-à-vis attempts to destabilise them (false accusations, questioning of their integrity ext.) when dealing with sensitive cases".

221 GRECO Report on Croatia, para. 129.

222 GRECO Report on Hungary, para. 69.

223 GRECO Report on Slovenia, para. 51.

organs as in particular to that of parliaments. Although, on the other hand, their "service for the people" is similar to that of other public officials, their function is still distinct since (ordinary and even more administrative) courts may have the power of controlling acts of the executive. For safeguarding this independent function of courts, many countries have norms by which the criminal prosecution of judges is excluded for the votes casted or the opinions expressed in court ("non-liability")[224] or subjected to special procedures (like, for instance, in Albania, Bosnia and Herzegovina, Croatia, Czech Republic, Georgia, Hungary, Latvia, Moldova, Poland, Portugal, the Slovak Republic, Spain). As a rather unusual regulation Portugal may be mentioned where judges and prosecutors, together with other "holders of political office", are not to be tried by a jury, but rather may enjoy separate trial and "the freedom to amend the witness".[225] It appears strange, however, to exclude the control of professional judges from that of lay judges, otherwise a desired aim of lay participation, just in cases in which external control might be particularly appropriate. In general, judges are privileged in that their detention or indictment must be approved by a special instance, as the Supreme Court (Georgia), the Prosecutor General (Latvia), a so-called Council of Justice (Albania) or a combination of several organs (Moldova[226]). Regulations of this sort will involve corruptive risks only if they are structured in a way that entails the possibility of political influencing, as according to the Czech regulation that "criminal prosecution is subject to the consent of the body which appointed the judge concerned (in case of judges, it is the President of the Republic)".[227] In this way – as in a similar manner also in Hungary[228] and the Slovak Republic[229] –investigations with regard to any crimes are made dependent on the consent of an organ deciding along political lines; this entails the danger that corruptive acts of judges can be "covered up" by improperly motivated approvals or refusals of investigations.

➢ Beside judges, state attorneys as well are granted immunity in some countries (as, in particular, in Croatia, Hungary, "the former Yugoslav Republic of Macedonia", Moldova, Poland, partially in Georgia and, even including judicial police officers who act under the supervision of the public prosecutor, in Luxembourg[230]). This extension can have a rationale at the level of the state in that the office of the prosecutor is part of the judiciary and, thus, state attorneys enjoy the same inviolability as judges (like in Bulgaria). Where state attorneys are not equated with judges,

224 GRECO Report on Croatia, para. 129; GRECO Report on Hungary, para. 69; GRECO Report on Slovenia, para. 51; GRECO Report on Spain, para. 99.

225 GRECO Report on Portugal, para. 84.

226 According to GRECO Report on Moldova, para. 79 criminal proceedings may be instituted against judges solely by the Prosecutor General and with the consent of the Judicial Service Commission and the President of the Republic or – in case of Supreme Court judges – Parliament.

227 GRECO Report on the Czech Republic, para. 82.

228 Here the decision lies with the President "on recommendation from the Office of the National Judiciary Council" (GRECO Report on Hungary, para. 69).

229 GRECO Report on the Slovak Republic, para. 29.

230 Cf. GRECO Report on Luxembourg, paras. 25, 51.

they may be privileged by requiring consent of their superiors to detention (as in Albania and Poland) or by not even allowing them to be held criminally liable before administrative or judicial authorities (as in Poland[231]). To what extent procedural provisos of this kind may be detrimental to the institutional fight against corruption, is difficult to evaluate without further data available. This may explain that the privileges of prosecutors did not find criticism in the GRECO Reports. Nevertheless, one must remain aware of the high attractivness of prosecuting authorities as addressees of corruptive influencing.

➢ Finally, it should not remain unnoticed that numerous countries which did not appear in this categorisation of immunities do not provide noteworthy privileges in criminal investigations or prosecutions, neither to judges nor to public prosecutors. This may encourage less "immunity-free" countries to pursue this more democratic way.

In sum, even if the existence and extent of immunities from investigation, prosecution or adjudication have their own weight in the institutional fight against corruption, their real impact cannot be fully evaluated without taking other – corruption-genic or corruption-resistent – factors into account, such as the stronger or weaker independence of the judicial system or the better or worse equipment of the police and of prosecuting authorities: the higher the capability and impartiality of the personnel entrusted with the investigation, prosecution and adjudication of corruption crimes and the better the procedural structures of the public administration and judiciary, the less risky is a generous granting of immunities, and vice versa. The worst case, of course, would be if procedural structures with a high risk of susceptibility for corrupting influencing coincided with broad immunities endowed to the very same tempted personnel. For this reason, the stronger or weaker corruption resistance of a country's structure should not only be judged with regard to the immunities granted to certain office-holders, but also depends on factors as have been analysed with regard to the basic substantive provisions against corruption (supra II), the Guiding Principle 3 on law enforcement authorities and the effectiveness of means for gathering evidence (supra III.A), Guiding Principle 7 on specialised bodies and means for dealing with corruption (supra III.B). For the same reason other deficiencies revealed in GRECO Reports should be taken notice of as follows.

D. Other deficiencies as reflected by GRECO Reports

More or less in connection with one or the other Guiding Principle, the GRECO Reports reveal various structural weaknesses in the institutional fight against corruption, which have not yet been mentioned before. Without pretending to be exhaustive, some particularly relevant aspects in the fight against corruption should be brought to attention here.

231 GRECO Report on Poland, para. 131.

1. The organisation of the public sector

a) Ensuring knowledge and loyalty to law and professional ethics

Corruptive conduct as a result of a conflict of interests in which entrusted public interests are put second to one's own interests can be fought successfully only with the support of an administration that is bound to law and professional ethics. This presupposes that public officials know what they are expected to do or not to do. In these terms, Guiding Principle 10 asks for "further specification of behaviour expected from public officials by appropriate means, such as codes of conduct". Although this Principle was not yet an object of the First Evaluation Round, some of its reports already reveal deficiencies worth to be noticed and improved.

➢ A lack of even the most basic knowledge expresses not only administrative, but also democratic shortcomings if the administration does not entertain a clear picture of what licenses, authorisations and state subsidies may be required from or granted to citizens, as reported of Slovakia.[232] Since corruption is most economically benefical if the offered "public good" is "stolen" by the public official, as particularly in the way that a license fee is fully led into the pocket of the perpetrator,[233] sources of corruption particularly arise from situations where it is not clear what administrative acts must be "bought" by the citizen. Without clear legal authorisations for encroachments on the rights of the citizen, arbitrariness might not only be masked as publicly authorised, but there is also the danger of furthering a system in which the fee for an administrative act is raised by an "additional fee" for augmenting the income of the official,[234] if not even the whole fee lands in the hands of a corrupt public official.

➢ But even when letting aside such drastic examples, the public sector of any society needs institutional devices that disclose and, in the ideal case, prevent a conflict of interests in the fulfilment of a public task. A precondition of such preventive efforts is that public officials are enabled to inform themselves on their duties with a special "code of conduct". This requirement is not satisfied when general codices of this sort for public officials are completely lacking (as reported of Finland, Georgia, the Netherlands,[235] Norway and the Slovak Republic) or where

232 GRECO Report on the Slovak Republic, para. 33.

233 Cf. *A. Shleifer/R. W. Vishny,* Corruption, 108 The Quarterly Journal of Economics (1993), pp. 599, 603 s.

234 GRECO Report on the Slovac Republic, para. 33.

235 At any rate, however, the Dutch law on civil servants contains some provisions that deal with conflict of interest, as do also special codes of conduct developed by various authorities (GRECO Report on the Netherlands, para. 81).

they are available only for partial areas of the public sector (as in Albania,[236] Croatia, Cyprus, Denmark,[237] Hungary, Latvia and Poland). For giving unambiguous and reliable guidance, codes of conduct must not be limited to general admissions of "lawful behaviour", thus, leaving much room for interpretation, rather must concretely delineate the boundaries of legally permissible actions, particularly in areas of possible conflicts of interest. In accordance with Art. 13 of the *Recommendation No. R (2000) 10 on the Codes of Conduct for Public Officials,*[238] conflicts of interest must be suspected in situations "in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her duties". A remarkable point of this definition is that – in accordance with the protective purpose of corruption prohibitions as defined supra I.C - a critical situation can already be created by the mere suspicion of influencing. Consequently, it cannot be left to the discretion of the public official concerned to define whether and when a conflict of interest must be assumed. For this reason, if an official becomes aware of a situation which, if known to outsiders, might provoke suspicion of a conflict of interest, according to the said recommendation, he or she must be prepared "to avoid such conflicts, disclose to his or her supervisor any such conflict as soon as he or she becomes aware of it". Therefore, it runs counter to this requirement if a public official is not obliged to announce an economic activity to his supervisor prior to taking it up (as criticised with regard to Luxembourg and Romania[239]); for this means that it is left to his or her own assessment, possibly influenced by own interests where a potential conflict of interest may arise.

➢ More difficult to answer is the question of whether public officials should be obliged to disclose their financial situation. Although a declaration of ethics would further transparency also with regard to potential conflicts of interest, a duty of this sort is so far provided in rather few countries as particularly in Hungary,[240] partially in Slovenia[241] and *de jure* in Croatia,[242] whereas the great majority of countries, perhaps with the exception of high ranking office holders, refrain from requiring such a declaration from all civil servants. Interestingly enough, it is not requested by the Criminal Law Convention, the Guiding Principles or the Recommendations on the Codes of Conduct for public officials either, and this indeed for good reasons since the institutional fight against corruption is hardly impaired if a general declaration of assets is not required. For such a general obligation would neither strengthen the prevention nor the detection of corruption in a significant manner. First of all, in

236 Whereas here a general Law on the Rules of Ethics is still in preparation, several codes of conduct are already available for the state supreme audit, state police, judidiciary, advocacy, accountants, medical doctors and nurses (GRECO Report on Albania, para. 43 ss.).

237 Here it is noteworthy that a code of ethics for the police was developed by the Police Trade Union (GRECO Report on Denmark, para. 46).

238 Cf. supra footnote 4.

239 GRECO Report on Luxembourg, para. 59, GRECO Report on Romania, para. 82.

240 GRECO Report on Hungary, para. 19.

241 GRECO Report on Slovenia, para. 44.

242 De facto, however, this duty seems not to be implemented (GRECO Report on Croatia, para. 142).

the case of a specified suspicion of a crime, law enforcement bodies are entitled to check the assets of a suspected perpetrator. For this reason, the obligation to declare assets could solely optimise the preventive institutions against corruption. This does not seem to be very likely since a public official would not pay his proceeds of the corruption into his account and indicate it in his declaration. On the contrary, an obligation to disclose the financial situation would rise the motivation to invest assets in "dark channels". More over, the few *de iure* improvements by declarations of assets could hamper the detection of corruption *in praxi* since the control authorities could easily drown in the sheer mass of declarations to be controlled.

b) Internal supervision

Codes of conduct are of little use if they are not – in terms of "institution" as a unity of norm and implementation – performed in reality and sanctioned, in case of violations,. Therefore, institutions against corruption are impaired when the duty to inform the supervisor of one's intention to take up a new job only exists on paper whilst it is not applied and enforced in practice (as reported of Georgia[243]). Above all, the fight of institutions against corruption can hardly be efficient without an internal supervision programme, at least in areas that are particularly exposed to corruptive influencing. Such a programme must not only allow own inquiries into suspicious situations,[244] but must also take care of consequences and improvements once structural deficiencies within an agency have been revealed.[245]

c) Intra-administrative co-operation

The structures of the administration of modern democracies ruled by law used to be organised according to the principles of subsidiarity and differentiation. On the one hand, this produces an increase of transparency and proficiency of the officials concerned and, thus, a higher democratic legitimisation of administrative acts. On the other hand, however, the advantages of differentiation and delegation have to be paid by higher expenditure of coordination required for the steering and controlling of such complex systems. Thus, modern administrative structures are in danger of not keeping its various parts properly interconnected or of losing working contact with other areas of activity altogether.

➢ This also creates problems for an efficient fight of crime in general and corruption in particular. With special urgency in combating corruption, a quick and precise flow of information is indispensable since crimes of this kind can be recog-

243 GRECO Report on Georgia, para. 107.

244 To deficiencies in this respect see GRECO Report on „The Former Yugoslav Republic of Macedonia", para. 106.

245 As, for instance, reported of the tax administration of Croatia (GRECO Report, para. 116).

nised only at few structural spots. Therefore all depends on recognising these "lucid moments" in order to transmit relevant information and to have them analysed by the competent authorities. If this exchange of information is not performed in an efficient manner, the institutional efficacy of penal norms is necessarily lowered. Furthermore, a lack of knowledge in parts of the administration can ensue inconsistent results when – as reported of the Netherlands – as a consequence of insufficient exchange of information "governmental bodies could grant licenses and subsidies to persons and organisations whose 'honourable' intentions might be questioned".[246]

➢ Need of improvement is also evident if the co-operation at the crucial interface between recognising suspicious financial situations and inquiring the potential criminal background does not function satisfactorily. This is obviously the case if, due to the general economic-political development, a functioning tax administration is yet to be established (as, for instance, observed in the Slovak Republic[247]). Some efforts will also be required if the tax authorities are still to be made sensitive to corruption and wait to be integrated into the fight against it (as diagnosed with regard to Moldova[248]). But even if single units are functioning in principle, the entire system of "fighting corruption" may suffer from a lack of coordination and an insufficient flow of information between tax and finance bodies on the one side and criminal prosecution authorities on the other (as, for instance, reported of Luxembourg and the Slovak Republic).[249] Even where these problems are realised, the political will to attend them, i.e. to start efficient reforms and to allocate sufficient financial means, vaires strongly from one country to the other.[250]

➢ A crucial point discussed in many GRECO Reports in connection with inter- and intra-administrative information is the question of whether public officials should be obliged by law (and perhaps even sanctioned) in cases of non-compliance to report the suspicion of a crime (including bribery) to their superiors or another competent authority. Such a duty of "whistleblowing", however, can have a counterproductive effect on fighting corruption if any deviance of conduct from normalcy is reported as potential corruption, thus, not only exposing innocent officials to unfounded suspicion, but also overburdening the means and resources of police and prosecutors. For avoiding counter-effects of this sort, it would be indispensable

246 In reaction to this experience, the Netherlands established an information and control authority for licenses and subsidies (GRECO Report on the Netherlands, paras. 65 ss).

247 GRECO Report on Slovak Republic, paras. 7, 31.

248 Probably shared by other countries, the situation in Moldova might prove exemplary in that the general duty of tax officials to report suspicious cases to the prosecuting authorities is not enough to forestall that a tax administration, which is neither sensitised to corruption nor formally engaged in the institutional fight against it, remains uninvolved in and disconnected from investigative and prosecutorial activities just like "any normal" public agency (cf. GRECO Report on Moldova, para. 75).

249 Cf. also GRECO Report on Cyprus, para. 83, GRECO Report on the Netherlands, para. 88.

250 As manifested in GRECO Report on Belgium, paras. 37, 46, GRECO Report on Finland, para. 97, GRECO Report on Slovak Republic, para. 76 and GRECO Report on Spain, para. 117.

to clearly define the types of deviances and suspicious circumstances which may give cause to report.

➢ With these preconditions and restrictions in mind, a duty to report one's suspicion of corruption can be an appropriate device of fighting it, as it is provided for in one way or the other for public officials in Albania,[251] Bosnia and Herzegovina,[252] Bulgaria,[253] Croatia,[254] Denmark,[255] Estonia,[256] France,[257] Georgia,[258] Greece,[259] Luxembourg,[260] Portugal,[261] USA[262] and partially in Hungary,[263] „the former Yugoslav Republic of Macedonia",[264] Moldova,[265] the Netherlands,[266] Slovenia,[267] Romania,[268] furthermore as a disciplinary obligation in Poland[269] and as a non-statutory obligation in a Code of Conduct in the United Kingdom,[270] or even for all citizens in Albania[271], Bulgaria[272], Cyprus, [273] Georgia[274], Spain[275] and partially in Bosnia and Herzegovina[276], Croatia,[277] the Netherlands[278], Romania[279] and Slovenia[280]. Such an all-encompassing approach makes clear that reporting suspicious conduct is not only a matter of smooth intra-administrative co-operation but an important component of professional and social obligation.

251 GRECO Report on Albania, para. 48, 83.
252 GRECO Report on Bosnia and Herzegovina, para. 58.
253 GRECO Report on Bulgaria, para. 77.
254 GRECO Report on Croatia, para. 85.
255 GRECO Report on Denmark, para. 64.
256 GRECO Report on Estonia, para. 39.
257 GRECO Report on France, para. 80.
258 GRECO Report on Georgia, para. 69.
259 GRECO Report on Greece, para. 44.
260 GRECO Report on Luxembourg, para. 29.
261 GRECO Report on Portugal, paras. 65, 112.
262 Regarding federal public officials GRECO Report on the USA, para. 22.
263 GRECO Report on Hungary, para. 60.
264 GRECO Report on „the former Yugoslav Republic of Macedonia", para. 65.
265 GRECO Report on Moldova, paras. 67, 77.
266 GRECO Report on the Netherlands, para. 10
267 GRECO Report on Slovenia, para. 43.
268 GRECO Report on Romania, para. 78.
269 In Poland, no legal duty to report cases of corruption exists, but the failure to do so can be interpreted as a breach of duty and cause disciplinary measures, cf. GRECO Report on Poland, para. 88
270 GRECO Report on the United Kingdom, para. 24.
271 GRECO Report on Albania, para. 83.
272 GRECO Report on Bulgaria, para. 77.
273 GRECO Report on Cyprus, para. 23 (footnote 10).
274 GRECO Report on Georgia, para. 69.
275 GRECO Report on Spain, para. 84.
276 GRECO Report on Bosnia and Herzegovina, para. 58.
277 GRECO Report on Croatia, para. 85.
278 GRECO Report on the Netherlands, para. 10.
279 GRECO Report on Romania, para. 78.
280 GRECO Report on Slovenia, para. 43.

➢ From this point of view, it must appear as a deficiency if any duty to report suspicion of a crime is either lacking (as generally in Finland[281] and Norway[282]) or not sufficiently clear (as in Cyprus[283]). Improvements are also needed when duties to inform appear inconsistent (as in the Netherlands[284]) or limited to certain areas (as, for instance, in Germany[285]). The latter way is particularly questionable where police officers (as in Iceland) or, for example, officials of the building and finance administration (as in all countries without a specific duty to report indications of crimes) are exempted from a duty to report.

d) Public procurement

In this area incentives for corruptive influencing are high on both sides: The active briber will prevail over a competitor, the passively bribed has the power to follow this wish and, thus, the possibility of pursuing one's own rent-seeking. A public procurement not only conjures the danger of a classical bribery, with an active and a passive participant; public proceedings are similarly susceptible for submission agreements between bidders. As it is typical for collusions in these cases that the bidder taking second place this time will be rewarded by being the first next time, the inappropriate influencing of the proceeding is to be considered as corruptive. For preventing this, it is necessary to regulate the procedures of public procurement in a transparent, objective and reversible manner. In view of this aim, a considerable number of deficiencies are revealed in the GRECO Reports:

➢ In some countries the whole regulation of public procurement has been found in need of improvement (as particularly in Bosnia and Herzegovina[286]). This can be partly explained by the fact that this legal field is a novel one even for well developed west European countries and all the more difficult to implement in countries in transition. More special deficiencies have been found in lacking resources and insufficient organisation of supervisory bodies (as, for instance, in Albania, Lithuania, Romania and to a certain degree in Sweden)[287] or in the lack of exchange of information on the misconduct of competitors between procurement authorities (as in Germany[288]). Other deficiencies concern the possibility of complaints against intransparent or inappropriately performed procurement proceedings. In this respect, Lithuania has not only problems with finding competent personnel for the control

281 GRECO Report on Finland, paras. 60, 73.
282 GRECO Report on Norway, para. 69.
283 GRECO Report on Cyprus, para. 80.
284 GRECO Report on the Netherlands, paras. 83 s.
285 GRECO Report on Germany, para. 53.
286 GRECO Report on Bosnia and Herzegovina, para. 137. Cf. also the analysis of weaknesses in GRECO Report on Hungary, para. 76.
287 GRECO Report on Albania, para. 113; GRECO Report on Lithuania, para. 108; GRECO Report on Romania, para. 94; GRECO Report on Sweden, para. 127.
288 GRECO Report on Germany, para. 66.

commission, but also burdens the complainant to pay a fee of examination in advance and with losing it in case of failure, thus demotivating the initiations of a control procedure.[289]

➢ But even where the legal provisions for correct procurement proceedings appear satisfactory, their efficient implementation into practice can be impaired if public officials in charge, due to a lack of adequate education, are not able to recognise irregularities in procurement proceedings and, thus, will also miss possible connections with corruption (as observed in Latvia).[290] Other weaknesses can result from the lack of appropriate supervision in public procurement procedures (as observed in Sweden) and of adequate sanctioning programmes if procurement guidelines are violated.[291]

e) Supervisory bodies – Audit authority

According to the principles of checks and balances, public administrations must (also) be under the control of external authorities. This is especially important for administrative areas that, such as license authorities, are particularly susceptible to corruptive influencing.[292] This supervisory function is best safeguarded if exercised by independent bodies as, in particular, audit authorities, which on a more or less regular basis examine fiscal activities of the executive, irrespective of a concrete suspicion of corruption. For not being limited in their scope of examination by the executive authority to be examined and, thus, for not being "kept out" of sensitive areas, independence of audit authorities, comparably to that of courts, is of crucial significance. This requirement is still not satisfactorily implemented everywhere as revealed in some GRECO Reports:

➢ The independence remains incomplete, if, for instance, the terms of employment and pay of municipal auditors lies in the responsibility of the cities' executives (as observed in a German state[293]).

➢ The jurisdiction of the audit authority can additionally, for instance, be inappropriately limited if its examination power ends just where political parties may be involved in financial transactions (as observed of Cyprus[294]).

➢ Further impairments can result from a lack of well trained personnel (Estonia[295]), necessary control tools (Slovak Republic[296]) or technical equipment (Albania[297]). Deficiencies of this sort cannot only entail negative effects on the independ-

289 GRECO Report on Lithuania, paras. 110.
290 GRECO Report on Latvia, para. 112.
291 GRECO Report on Sweden, paras. 123, 127, 128.
292 See GRECO Report on Malta, para. 90.
293 GRECO Report on Germany, para. 101.
294 GRECO Report on Cyprus, para. 46.
295 GRECO Report on Estonia, para. 75.
296 GRECO Report on Slovak Republic, para. 78.
297 GRECO Report on Albania, para. 126.

ence and correctness of the examination[298] but – in connection with short periods of limitation – can also cause undiscovered cases of corruption in public procurement to remain unsanctioned (as observed in France[299]).

2. Funding of political parties

One of the most attractive ways to get one's own particular interests through is the influencing of persons and institutions sitting in the powerhouse of politics.[300] This applies to political parties, including their members in general and parliamentarians in particular. Whereas influencing members of parliament and similar elected representatives is mostly covered by general and/or special bribery provisions (dealt with supra II.A.1(a)(ii)), other forms of "financing of politics" are more difficult to be controlled by criminal law: first, because political sponsoring very often is not (yet) directed to a specific decision favourable for the sponsor; second, because money given to parties is not so easily traceable to a certain act or decision of a public official or a parliamentarian representative. This is not surprising, however, since corruption of and by means of political parties functions differently: by generating benevolence through donations which in turn will influence the political course of the party and/or decisions of public officials or parliamentarians who are either party members themselves or closely connected with or dependent on party members. For these and other reasons, not the least in view of the unequal availability of assets to be donated, it is more and more deemed necessary to take political financing under public control. With which aim and on what way this could be done was recently proclaimed by the Council of Europe in its *Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns.*[301] According to its Art. 1, "the state and its citizen are both entitled to support political parties", whereas "state support should be limited to reasonable contribution", supplemented by Art. 3 which stresses the need "to ensure transparency of donations and to avoid secret donations". Although these recommendations have not yet been available when the First Evaluation Round was started, the GRECO Reports already addressed this issue, however, without going into details. Therefore only a few observations can be made in this respect.

298 Cf. GRECO Report on Estonia, para. 75.

299 GRECO Report on France, para. 138.

300 Cf. to the extent and the problems of "political corruption" GRECO Report on Georgia, para. 29 ("parliamentary mandates are used for lobbying private interests and avoiding responsibility for corruption and other offences"); cf. as well GRECO Report on „the former Yugoslav Republic of Macedonia", para. 99); GRECO Report on Hungary, para. 75; GRECO Report on Spain, para. 14.

301 Cf. http://portal.coe.ge/downloads/REC%20(2003)4.en.pdf.

➢ So far, most GRECO members lack a comprehensive and consistent regulation of political financing (like, for instance, Luxembourg).[302]

➢ Contrary to this, rather comprehensive legislation and donations to parties is, for instance, reported of countries such as the United Kingdom, Ireland and Germany.[303] The legislation in the United States, where private sponsoring is the decisive financial factor of election campaigns, tries to confine the influence of economic power on politics by imposing quantitative limits on the amounts that individuals and political committees may contribute to political parties and by prohibiting contributions from treasury assets of corporations, labour organisations, banks and government contractors.[304] Moreover, the public can form an opinion of the (in-)dependence of their candidates as they are required to file detailed reports on the contribution they receive and have to disclose their personal financial situation at the beginning of their service, thereafter annually, and as well at the end of their service.[305]

➢ Other countries, in order to secure the confidence in the independence of politicians and to avoid conflicts of interests, require the members of parliament and government as well as presidents and councillors or regional and department councils and mayors to disclose their assets and incomes, as in France, to a "Transparency in Public Life Commission".[306]

➢ But even where this or that kind of regulations for political financing exist, the practical implementation can need improvement because, as has been complained particularly in France, the controlling agency has no investigative powers as such, thus, not being able to control the substance and truthfulness of declarations.[307] A merely symbolic function seems to have the duty of Belgian civil servants to submit a list of their offices, duties and professions and to declare their assets, since this act of 1995 is still lacking the necessary instruments for implementation.[308]

302 GRECO Report on Luxembourg, para. 59; similar situation in Croatia (GRECO Report on Croatia, para. 167), Cyprus (GRECO Report on Cyprus, para. 69), Greece (GRECO Report on Greece, para. 67), Iceland (GRECO Report on Iceland, para. 13), and also in France where the normative situation is described as "ramshakle" (GRECO Report on France, para. 14).

303 GRECO Report on Ireland, para. 81; GRECO Report on Germany, para. 57; GRECO Report on the United Kingdom, para. 23.

304 GRECO Report on the USA, para. 26.

305 GRECO Report on the USA, paras. 24, 26.

306 GRECO Report on France, paras. 92 ss.; cf. also GRECO Report on Greece, para. 59; GRECO Report on Estonia, para. 62 ("declaration of economic interests"); GRECO Report on the USA, para. 24.

307 GRECO Report on France, para. 94, footnote 25.

308 GRECO Report on Belgium para. 12; to similar problems see GRECO Report on Estonia, para. 68 ("not working properly"); GRECO Report on Finland, para. 59 ("no regular inspections are made to check the accurancy...and no sanctions are imposed in case of failure to comply with the obligations"); GRECO Report on Moldova, para. 90; GRECO Report on Norway, para. 67.

3. Role of the media – Access to information

An important component in the fight of institutions against corruption is represented by the media. The media guards social and political developments and creates a forum in which the public can discuss topics of concern as for instance political corruption. These functions are, however, linked to essential prerequisites: in an open and pluralistic society the media has to be free from decisive political and economic influence and requires access to information. While restrictive access to official files is an important obstacle for the functioning of the media,[309] transparency favours the necessary scrutiny by the media and the public to an extent that the media and the public prove to be true institutions against corruption. If, as an example, Finland stands out as the least corrupt country in the world, this is not the least due to the active role of the media in searching and disseminating information on mismanagement, irregularities and suspicious activities in society.[310] This important function of the media in the fight against corruption cannot be efficiently realised if it is not given free access to official data and occurrences, though with due respect to the citizens' rights of privacy. In this regard, the Finnish Constitution[311] and sub-constitutional legislation in the USA (especially the "Freedom of Information Act")[312] grant, in principle, the right to obtain access to every single official record with only limited exceptions.[313]

4. Proactive strategies

As it is with any complex social phenomenon, corruption is the type of crime which can hardly be repressed by a simple criminal prohibition; it rather requires a diversified programme of instruments for combating it. Therefore the GRECO Reports had also to deal with the question of a coordinated programme of anti-corruption strategies. As documented in the compilation of GRECO Recommendations and Observations (infra IV), a great deal remains to be done. In particular, the following findings appear noteworthy.

➢ The most basic result is that a considerable number of GRECO member states still lack a coordinated and comprehensively satisfying programme of anti-corruption strategies. This applies to Bulgaria, Finland, Georgia, Greece, Latvia, "the former Yugoslav Republic of Macedonia", the Netherlands, Norway, Poland,

309 Cf. GRECO Report on Lithuania, para. 23.

310 GRECO Report on Finland, para. 15.

311 Art. 12, par. 2 of the Constitution of Finland: "Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings" (GRECO Report on Finland, para. 16).

312 GRECO Report on the USA, paras , 29, 131.

313 Cf. as well the Law on Free Access on Information in Bosnia and Herzegovina, GRECO Report on Bosnia and Herzegovina, para. 86.

Portugal, Slovenia, Spain, Sweden and USA. This may be examplified by the Norwegian evaluation that "cases stemming from the public sector have only been discovered purely by chance by public supervisory bodies, and that some private sector entities prefer to handle possible corruption cases internally".[314] This state of affairs, however, is merely the apparent manifestation of underlying deficiencies.

➢ One of the main reasons for this unsatisfactory situation must be seen in the fact that the authorities questioned by the GRECO Evaluation Team, as well as the public at large, still lack sufficient awareness of the corruption problem. This is particularly true with regard to smaller countries, which see their own society as free from corruption. Very often a small number of investigations is used *per se* as indicating that corruption in general presents "no problem" (as widely assumed in Iceland, Ireland, Luxembourg, the Netherlands); another way of ignoring the problem is not to pay attention to corruptive tendencies in the private sector (as in France[315]). Occasionally, the need of an anti-corruption strategy is even expressly denied (as by Luxembourg). This self-confidence, however, could as well be a fallacy: if not a sufficient number of well trained investigators against corruption is employed, the majority of corruption cases inevitably cannot come to public light,[316] with the consequence that sensitising the public at large cannot be reached. As soon, however, as by way of information on the dangers and phenomona of corruption and proactive efforts of the investigating authorities the public at large have been freed from the "veil of ignorance", the fallacious illusion of domestic non-existence of corruption problems will dwindle and the alertness for indications of corruption will rise.

➢ Lack of public activity against corruption is even more problematic where its existence is neither unknown nor denied, but where, to the contrary, society is reacting with resignation (as reported of the Slovak Republic[317]) or even with tolerance (as it seems to be the case in Albania and Estonia)[318]. Both are worrying indicators of failing general-preventive measures, due to obvious flaws in creating an adequate awareness of the corruption problem within the general population.

➢ The public "veil of ignorance" of the dangers and phenomena of corruption mentioned before, can easily be connected with and traced back to another weakness in the institutional fight against corruption. Much too often empirical data and scientific studies to the potential and/or actual susceptibility of a society for corruption are lacking (as observed with regard to Bulgaria, Croatia, Estonia, France, Georgia, Greece, Ireland, Lithuania, the Netherlands, Norway, Slovenia, Spain). This deficiency is not only weakening the awareness of corruptive symptoms in the public at large, but also prevents the political decision makers from recognising the need of taking action, being caught in the vicious circle in which due to the lack of empirical

314 GRECO Report on Norway, para. 111.
315 GRECO Report on France, para. 104.
316 GRECO Report on the Netherlands, para. 89.
317 GRECO Report on the Slovak Republic, para. 32.
318 GRECO Report on Albania, para. 138, GRECO Report on Estonia, paras. 102, 106; see also GRECO Report on Hungary, para. 74 with reference to certain "remuneration" in the health care sector.

investigations, only a small number of corruption cases will be detected, which, in turn, does not call for bigger resources for gaining and disseminating information. Thus, the assumption that corruption is not an issue presents itself as a discretionary contention. In this vicious circle, smaller and therefore more transparent societies are no less susceptible for circumventing procedural rules and granting privileges (as has been possibly underestimated in Iceland, Ireland or Luxembourg):[319] Furthermore, by not knowing or disclosing the actual number of corruption investigations and indictments, the executive foregoes the chance of counteracting the sometimes prevailing impression of the judiciary deeply being influenced by economic groups and political authorities,[320] and to regain the confidence of the public. For this reason, heeding and attending rather than ignoring the phenomenon of corruption is needed.

319 With far reaching personal familiarity, the chances of persuing own interests outside the rules increases.

320 As, for instance, assumed in GRECO Report on France, para. 10.

IV. Compilation of the GRECO-Recommendations and Observations in the First Evaluation Round

The above documented particular and structural deficiencies constitute the background of national and international efforts to improve institutions against corruption. GRECO has two instruments to further national improvements: *recommendations* (A) with regard to particular points of concern the GRECO members have to comply with and to report on within a given period,[321] and – less formal - *observations* (B) the GRECO members concerned may take into consideration for improvements.

A. Recommendations

In total, the 34 GRECO Reports of the First Evaulation Round adopted so far contain 413 recommendations, swaying between 3 (Iceland) and 25 (Georgia).

Although the individual recommendations strictly reflect the specific situation in the evaluated country, most of them can be abstracted from their national background and transferred to other countries, especially to those which are characterised by comparably social circumstances.

Methodologically, this compilation is organised as follows: first, in order to convey a comparative survey on what recommendations for which country have been made, the recommendations about the same topic contained in the various GRECO Reports have been summarised along the Guiding Principles 3, 7 and 6 (in a similar sequence as analysed in the preceding chapters) as well as supplemented with the names of those countries the relevant recommendations were given to; second, with regard to the contents of the recommendations, as a rule they are quoted in their original terms; third, to avoid redundancies, not every single recommendation which is of the same or comparable content as recommendations already included in the compilation is explicitly listed; fourth, recommendations which reflect national particularities that cannot, under any circumstance, be abstracted and transferred to other countries, appeared as dispensable and therefore are not included here.

321 For details to this recommendation and compliance procedure see Statute of GRECO Art. 15 (6) and the GRECO Rules of Procedure 29 (5) and 30-33.

As to Guiding Principle 3: GRECO recommended with regard to

1. the appointment of judges and prosecutors

➢ to continue the efforts to enhance the merit-based selection of members of judicial bodies at all territorial levels, including the lower ones (Bosnia and Herzegovina); to create clearly defined conditions and examination procedures for the appointment of all new candidates to the Public Prosecution Office and to the Courts valid equally to both prosecutors and judges; to undertake all necessary measures to reduce the risk of any interference in the process of nomination of prosecutors and judges ("the former Yugoslav Republic of Macedonia", with regard to prosecutors also Slovenia);

➢ to use the Commission for the Administration of Justice in its advisiory capacity on appointments to the post concerned in the judiciary, thus contributing to the objectivity of appointments (Malta, and comparably Slovakia).

2. the judiciary

➢ that the reform of the judicial system be carried out as a matter of urgency and that the judiciary strengthens its independence vis-à-vis the political power, and that measures be taken to improve the disciplinary procedure with a view to ensuring impartiality (Slovakia); in order to better guarantee the necessary independence for the judicial bodies responsible for judging corruption offences, the authorities should introduce the legislative reforms to restrict the Minister of Justice's powers to intervene in the supervision of judges, and to provide guarantees with regard to the immovability of the judges at the Supreme Court, without affecting the possibility of placing a time restriction on the post of president or deputy president of this court (Romania);

➢ that the US authorities promote a public policy discussion with the participation of all interested parties, addressing the process of selection of Federal judges with a view to enhancing the efficient functioning of the judicial process (USA);

➢ to reconsider the evaluation system of judges, in order to develop an accountability mechanism of the judges without undue interference with their independence and impartiality (Albania);

➢ to improve the system for supervision of court management and judicial disciplinary proceedings with regard to the need of independence of the judiciary, and to subject the management of the courts to the supervision of an independent and impartial body (Lithuania);

➢ to design and implement a national plan in co-operation with all the stakeholders to address the problem of the overburdening of courts (Croatia); to significantly increase the means allocated to the courts in order to improve their function-

ing (Latvia, Slovakia); to improve the conditions of judges, and to guarantee judges satisfactory legal and financial status (Latvia);

➢ to create a culture of morality in the judiciary notably by adopting a Code of Ethics for judges and increasing internal control among judges and restore the social image of judges by eliminating those judges that are corrupt (Slovakia); to oblige judges to disclose annually their property and income to an appropriate body (Slovakia); to ensure that declaration of assets and background security checks be extended to all judges investigating and adjudicating anti-corruption-unit cases and that the introduction of a requirement for the declaration of assets for all prosecutors and all judges be considered (Croatia);

➢ that, in cases of corruption, where the Commission for the Administration of Justice recommends dismissal [of a judge], the decision be made known to the public, and in cases where the Commission does not recommend dismissal, the complainant is made aware of this decision, and that said Commission makes appropriate changes to the Code of Ethics for the judiciary when the cases before it so warrant (Malta);

➢ to reform the disciplinary senates in order to make them play a more active and objective role and eliminate possible interference and abuses resulting from personal or close contacts between judges and member of the senate (Slovakia);

➢ in order to restore faith of the public in the judicial system, to make efforts to inform the media about successfully handled corruption and other sensitive cases (Bosnia and Herzegovina);

➢ to take the legal and financial measures necessary for the courts to have easy access to the expertise they require and to allow the use of that expertise as evidence before the courts (Bosnia and Herzegovina).

3. the prevention of intimidation

➢ that, in relation to judges, prosecutors and police officers, specific legal measures and appropriate sanctions with regard to intimidation as well as measures to protect physical integrity be elaborated (Slovakia).

4. the independence of the prosecution office

➢ to guarantee that the nature and the scope of the powers of the Government in relation to the prosecution office be established by law, exercised in a transparent way and in accordance with international treaties, national legislation and the general principles of law (Spain); to take particular care to ensure that the financial dependency does not diminish its independence (Spain); to ensure the independence of the prosecution in dealing with corruption cases, avoiding to the largest possible extent risks of undue influences in the exercise of prosecutorial powers (Germany, Estonia); in this context, that authorities should consider removing the political

status of prosecutor generals where it still exists (Germany); to provide additional guarantees to safeguard the professional impartiality of prosecutors, in particular those in a leading position, and to ensure that the cases can only be reassigned on the basis of objective professional criteria (Hungary);

- to undertake the necessary legislative reforms so as to reduce appropriately the Minister of Justice's power of intervention vis-à-vis prosecutors in order to guarantee the necessary independence (Romania); to reconsider the situation that the Minister of Justice may, in principle, intervene in the work of the police and/or the prosecutor in individual cases of corruption during investigation/prosecution (Denmark); to enact legislation confirming the commitments of the current Minister of Justice and the predecessor not to interfere in individual cases (France); to ensure that instructions of a general nature be made public in writing and that instructions to prosecute in a specific case carry adequate guarantees of transparency and equity (Spain); to guarantee that instructions not to prosecute in a specific case, be prohibited in principle or remain exceptional and subject to appropriate specific controls (Spain);
- that measures be taken to ensure that the basis for superior prosecutor's decisions overruling prior decisions made by a prosecutor at a lower level can be controlled (Georgia, Slovakia), for instance, by requiring that the basis for decisions be indicated in writing (Slovakia); to entitle the prosecutors to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received (Spain);
- that the Department of Justice remind State and local authorities that, to the greatest extent possible, practices for the selection of District and State prosecutors should be transparent and that the selection procedure should take account of the need to exclude or restrict the risks of jeopardising the independent and impartial exercise of the prosecutorial functions (USA);
- to undertake the necessary measures to ensure an adequate level of remuneration for prosecutors (Bosnia and Herzegovina, Georgia; Moldova);
- that the obligation to report, on a regular basis, on their financial situation be extended to prosecutors (Croatia, Slovenia, Slovakia);
- to establish fair and objective disciplinary proceedings for prosecutors (Georgia); to ensure that the system of retirement of prosecutors be harmonised with the criteria applied to judges (Hungary).

5. the rights and duties of the public prosecutor

- to strengthen the general competencies of the public prosecutors to direct and supervise the work of the police in preliminary investigation stages and to undertake particular efforts to increase general co-operation between the police and prosecutors (Croatia); to provide the Public Prosecutor with the means to direct the investigations not only in theory but also in practice (Slovenia); in order to strengthen the role of the public prosecutor, to impose upon the police the obligation

to report the case to the Public Prosecutor as soon as there is sufficient indication that a corruption offence could have been committed, and that from this moment onwards, the Police should pursue the investigation under the sole direction and authority of the Public Prosecutor (Slovenia);

- to ensure that the Public Prosecution Service in practice pursue investigations as fully as possible and to enable the prosecution authorities to take an appropriate and fully informed decision on whether to initiate or continue a prosecution (the Netherlands);
- to provide for speedier criminal proceedings and adjudication of cases concerning corruption, when linked to financial-economic crime (Lithuania);
- to adopt guidelines for the application of the discretionary principle in corruption-related cases (Luxembourg, comparably United Kingdom).

6. the police

- to adopt regulations, based on objective criteria, to improve the selection of staff of the Police Force and prevent and sanction nepotism [and] establish a programme aimed at enhancing social standing and the financial and moral value of the work done by the Police Force members and introduce, in the Code of Conduct, a prohibition of corruptive conduct (Slovakia);
- to implement measures to ensure effective monitoring of police actions, including corruption (Latvia); to implement the most effective means of allaying public concern about effective oversight of police actions, including corruption; these could include an expansion of the Police Complaint Authority competence and resources or an independent police complaints authority (United Kingdom);
- to give consideration to whether it is preferable to initiate and carry on, with regard to serious allegations of corruption, parallel criminal police investigations [beside extraordinary quasi-judicial Tribunals of Inquiry] in order to safeguard the necessary evidential material (Ireland);
- to ensure that the organisational structures of the police be reconsidered with a view to establishing a higher degree of organisational autonomy of the police (Albania, Bosnia and Herzegovina, Bulgaria); especially re-consider the situation that the Minister of Justice may, in principle, intervene in the work of the police and/or the prosecutor in individual cases of corruption during investigation/prosecution, in order to avoid risks of undue or improper influence (Denmark);
- to examine the possibility of creating a specialised complaints-unit within the police, which would be surrounded with all the appropriate guarantees of independence (Cyprus); to strengthen the Internal Affairs Division of the police and to gradually extend its jurisdiction to other sectors of public administration (the Ministry of Finance, among others), starting with officials who hold police powers (Greece);
- that the police review and strengthen its current approach to inspection and review to ensure firstly that the learning, which may be identified from corruption

investigations, can be audited as being introduced back into the organisation, and, secondly that points of vulnerability within working practices and processes can be quickly identified and acted upon (Ireland);

➢ to consider the possibility of increasing, within the budgetary restrictions, the salaries of police officers responsible for administration checks and investigations (Romania, Moldova).

7. the incentive for co-operation with the law enforcement bodies

➢ to facilitate the reporting of suspicions of corruption cases by individuals (Czech Republic); that the public should be able to identify those with whom they come in contact (Georgia, "the former Yugoslav Republic of Macedonia") and to be well informed about procedures for making complaints ("the former Yugoslav Republic of Macedonia", Moldova); to implement proper complaints procedures for submitting complaints, advising on the reaction and informing on possible compensation (Georgia);

➢ to provide appropriate safeguards against retaliation for members of the public who lodge complaints about potential cases of suspicious enrichment, including potential cases of corruption (Luxembourg); to adopt measures to enable witness protection to be developed (Belgium, Bosnia and Herzegovina, Czech Republic; Georgia, Luxembourg); to improve the measures already in place for the protection of witnesses and collaborators of justice (Finland); to increase the financial and technical resources provided for the departments responsible for implementing witness-protection and related programs (Moldova); to raise information campaigns on the existence and the possibility of the use of the witness protection programme (Latvia);

➢ to consider the institution of a procedure for interviewing whistle-blowers and other witnesses whose identity is known only to the competent judicial authority ("the former Yugoslav Republic of Macedonia", France, Romania) and therefore to relax the restrictions on the use of anonymous witnesses to the extent permitted by international human-rights obligations (Luxembourg; comparably Georgia).

8. sentence-bargaining

➢ to create further incentives for persons involved in criminal offences who wish to collaborate with justice (Luxembourg); to give further consideration to the existing proposals aiming at allowing the police and/or the prosecution to negotiate agreements on outcome in corruption cases, with the participation of the court, if the suspect or accused person agrees to co-operate with the authorities (Germany); that when granting a certificate exempting a person from criminal proceedings, as provided for by law, such decision should be given in written form, included in the file and, to the extent possible, submitted to public scrutiny (Malta).

9. the co-ordination of the investigation

- that the relation and coordination between the prosecution and the investigation service be reconsidered also in light of the tasks of the law enforcement bodies (Bulgaria); that the simplification of the pre-trial proceedings, by clarifying the respective roles of the investigation judge and the public prosecutor, be pursued (Slovenia); that the authorities streamline the work of the anti-corruption co-ordination bodies by defining their responsibilities, by establishing their respective priorities and tasks to ensure more effective co-operation (Moldova); to promote coordination experience, sharing and circulation of information among different police forces involved in anti corruption investigations (Latvia, comparably Slovakia); that the Criminal Division of the Department of Justice endeavour to devise a method to facilitate the sharing of information between law enforcement agencies in similar corruption matters (USA); to consider the opportunity to establish a system of coordination between existing institutions responsible for the fight against corruption (Latvia); that there should be some streamlining and rationalisation of the functions of the operational and the investigative police and early completion of the merging of the functions of the operational and the investigative police (Czech Republic);
- that, in order to encourage and facilitate effective law enforcement (in particular, the sharing of information), the Criminal Division of the Department of Justice, in training programmes and otherwise, emphasise the critical importance of full co-operation and coordination between prosecutors and investigators as soon as possible after an investigation is initiated (USA).

10. the intra-administrative co-operation and the exchange of information

- that the relevant authorities involve in their anti-corruption efforts public servants by introducing measures aimed at facilitating, at their level, the recognition and whistle-blowing of suspicious acts of corruption (Moldova);
- to support more effective coordination and co-operation among the entities through, for example, co-operation and training, the dissemination of trend analyses and the sharing of information on effective practices (USA);
- to maintain and enhance the co-operation between law enforcement authorities and other State Bodies, agencies and authorities which play a role in the prevention and control of corruption (Denmark); to make a particular effort to convince tax authorities that they have a very important role to play in this connection and encourage them to cooperate in full with the prosecution office (Luxembourg); to organise a system according to which information from different sources that could lead to the detection of corruption would be centralised and treated, in particular reports on suspicions of bidding cartels, complaints about irregularities in tendering procedures, reports of the State Auditor and local auditors, reports from tax

authorities on suspicious declarations of expenses, reports from competition authorities (Finland); to establish a light structure of exchange of information and practice with the participation of the Prosecutor General's Office, the Police, the State Auditor's Office, the auditors of local authorities, public procurement services and tax authorities (Finland, with regard to the tax authorities also Slovakia, Luxembourg, with regard to the Audit Office Belgium, Norway and Greece); to complete interconnection of the various police databases and examine the specific characteristics of Judicial Police work in order to adjust working methods accordingly (Portugal); to create appropriate links between the data-collection systems of the authorities on the understanding, of course, that the sharing of information would be authorised by law and restricted to appropriate cases where the adverse effects of the intrusion of privacy will be counterbalanced by the gravity of the concerns about the risk of corruption (Cyprus); to ensure that the Central Anti-Corruption Office and the service in charge of supervising public tenders as well as other police forces when starting investigation of corruption matters exchange information effectively (Belgium); to make use of the Information Agency on Property and Financial Declarations as a source of information to be used in a pro-active way to detect and investigate possible corruption cases (Georgia); that the interagency unit should be institutionalised and used to put forward solutions for improving the exchange of information (Belgium);

- to establish an obligation on civil servants to report cases of corruption known to them in the exercise of their duties to the authorities in charge of detecting, investigating and prosecuting corruption offences (Ireland; comparably Cyprus, Estonia and Iceland); to clarify the obligation on public servants when and how to report unlawful, improper or unethical behaviour, or behaviour which involves maladministration (Norway); to remind government departments and all government departments and all other public agencies of the existence and content of the general obligation to inform of any offences discovered and take steps to facilitate its use without hindrance in corruption cases (France, comparably Portugal); that measures be taken to ensure that the Ministry of Foreign Affairs complies with the obligation to report suspicion of corruption cases to law enforcement authorities (Slovakia); to consider applying whistle blowing regulations for all public sector entities (the Netherlands); that disciplinary measures should not apply to an official who – in breach of internal reporting duties – reports directly a grounded suspicion of corruption to the police or prosecution (Germany).

11. information held in the private sector

- to undertake measures that the Public Prosecution Service, police forces, develop a strategy to establish a fluid channel of communication with the private sector, and by disseminating information on the results achieved (the Netherlands, comparably Spain);

➢ to make the necessary investment so as to enable access to be had to essential private sources of information and considering the rapid implementation of legal provisions related to the police enabling access to internal databases (Belgium); in particular, that access to information held by telecommunication companies be facilitated through a centralised access system (Belgium);

➢ to extend the powers of the State Revenue Service Corruption Prevention and Control Division to encompass disclosure from banking institutions with regard to information on an individual financial account (Latvia).

12. special investigation means

➢ to make more effective use of the existing legislative tools provided to discover and combat corruption and in particular those concerning the use of special investigative technical means in the detection of corrupt behaviour (Latvia);

➢ to make the necessary legislative changes so as to permit the use of procedural means thar are lacking at present, including telephone-tapping in corruption cases and machinery for value based seizure (Belgium; comparably Bosnia and Herzegovina and „the former Yugoslav Republic of Macedonia"); to reconsider the conditions for using special investigative techniques in cases involving serious corruption, keeping in mind the need to respect the principle of proportionality and existing legal safeguards (Albania); to allow for the surveillance of communications in all inquiries into corruption offences (Luxembourg); to extend, as far as possible, the use of special investigative means to cases of corruption, in line with the principle of proportionality and existing safeguards (Croatia, Denmark, Finland, „The Former Yugoslav Republic of Macedonia", Sweden); that the authorities consider the legislation giving police the authority to seek and obtain wiretaps in the investigation of at least serious corruption offences, empowering the judicial authority to authorise wiretap, and to make wiretap evidence admissible in court, in the light of the case law of the European Court of Human Rights (Malta); to extend the possibility of using interception of communications so as to apply to serious corruption offences (Germany);

➢ to give consideration to the need to legislate in order to allow the use of infiltration in corruption cases (France, comparably Poland); to elaborate guiding rules for the use of "special agents", taking full account of the case law of the European Court of Human Rights, in order that the results of this technique are not challenged in court as being contrary to human rights (Slovenia);

➢ to further regulate the use of undercover agents to facilitate co-operation with foreign police forces in the field (Luxembourg);

➢ that the measures which exist in urgent cases for search of other premises be adopted mutatis mutandis to house search (Slovakia).

As to Guiding Principle 7: GRECO recommended with regard to

13. special anti-corruption units

- to consider the formation of an independent specialised anti-corruption investigation unit (Georgia, Latvia, Luxembourg, „the former Yugoslav Republic of Macedonia"), that would centralise and systematically treat relevant information coming from different sources and would ensure that a sufficiently proactive approach is taken towards the detection of corruption (Luxembourg). In particular with regard to Georgia, the following recommendations were made: All law-enforcement and other authorities would be required to report to the specialised corruption unit any suspicions of corrupt behaviour. Cases of corruption, as soon as identified during a preliminary investigation would also be transmitted to the unit, which would continue and deepen the investigation to the extent necessary to bring charges. The creation of this special unit would also allow a better collection and analysis of data relating to corruption and would enable the preparation of accurate statistics to assist future strategy and policy enhancement; to select the Head and staff of the above-mentioned unit with the greatest care to ensure their highest integrity; that the unit be open to independent scrutiny and produces an annual progress report of its activities to be made available to the general public; that the above-mentioned unit should be proactive and have a legal basis for requiring information, assistance and co-operation from all governmental departments and bodies; that the unit should also be empowered to make use of special investigative techniques available in the legal system with due respect to constitutional and legal safeguards and establish close working relations with the specialised unit which is recommended to be created within the Prosecutor's Office;
- to establish or designate a body responsible for the enhancement of country-wide anti-corruption activities, which could also be in charge of international co-operation aspects and research activities on the phenomena, modus operandi and importance of criminal activities, including corruption (Bosnia and Herzegovina);
- that the Permanent Commission on Corruption be empowered to make use of means of compulsion, be given the possibility to appoint, on its own capacity, persons with special knowledge when it is necessary to assist the Commission in its investigations, publish the results of its investigations on its own, without prejudice to pending Court proceedings and be empowered to present its reports before Parliament (Malta);
- to allocate more staff resources to the Interministerial Task Force, and to strengthen the guarantees that when a case is taken up for technical advice (presented anonymously to the Force), it would be reported to the Prosecutor's Office by the requesting body if the Force concluded that there had been embezzlement and to grant the Force the power to decide on its own whether to investigate a case (France).

14. the investigation units of the police

- to enhance modernisation of the police bodies at all territorial levels, especially at the lower levels, with the adequate institutional, legal, awareness-raising and other safeguarding measures (Bosnia and Herzegovina); to develop a criminal investigation department under the supervision of prosecutors and investigative judges (Greece);
- to establish, within this criminal investigation department, units specialising in economic and financial crime including corruption (France, Greece); to develop a specialisation on the problem of corruption within the Police (Bulgaria, Sweden); that the Economic Crime Unit within the Central Criminal Police should also be given a greater specialisation in corruption (Estonia, Finland and Iceland); to form smaller units reporting to the Central Criminal Police in the prefectures with training and equipment to address local corruption offences linked with economic crime (Estonia);
- to ensure that steps are taken with regard to the recruitment of personnel of the Anti-Corruption Office so as to permit persons having training or a specialisation useful to the service to be recruited, whilst making sure that staff mobility within the judicial police is not detrimental to the sound operation of the service (Belgium);
- to enhance the human, material and other means necessary for the police to carry out, to the full, their functions in the fight against corruption (Portugal); to ensure that the special police unit for investigating corruption offences be more appropriately staffed (Czech Republic, Hungary, Slovakia, Slovenia, Spain); to provide the Police Force with the necessary computer equipments to improve the capacity of data processing systems (Slovakia); to ensure that adequate and qualified resources exist in the police to provide a constant and geographically comprehensive warning capability on the incidence of corruption (United Kingdom).

15. the prosecution office

- to study possibilities of increasing the number of prosecutors [and magistrates respectively] and investigating judges (Belgium, Bulgaria, Luxembourg); that the Department of Justice remind State and local officials to take account of the need to provide sufficient resources for prosecutors' offices (USA);
- to envisage the creation of a higher number of prosecutors specialised in economic crime, including corruption (Estonia, Finland, "the former Yugoslav Republic of Macedonia"); to undertake the necessary measures to create, within the Public Prosecution Office, a special section/unit responsible for dealing with corruption and corruption-related offences (Bulgaria, Croatia, Greece, "the former Yugoslav Republic of Macedonia", Georgia);

➢ to maintain and strengthen the prosecution service's specialised unit for fighting organised crime and corruption, by assigning it the necessary extra financial and human resources (Romania, comparably Moldova), especially in terms of specialised staff seconded from other public bodies whose secondment shall be extended in order to ensure more stability (Romania); that one of the existing units within the Prosecutor Generals Office dealing with corruption cases be responsible for training, support and sharing of practice to other units involved in the fight against corruption (Latvia); that the Department of Justice facilitate the participation of an increasing number of practitioners in specialised training on prosecuting corruption cases, including prosecutors from offices where no specialised units for the fight against corruption exist (USA).

16. general and special training of law enforcement bodies

➢ to establish an institutionalised training structure (school of magistrates) for new judges and prosecutors who have passed the selection and to introduce a sound and coherent training curriculum (Estonia); to provide training in investigation for police forces engaged in the fight against corruption in early courses (Czech Republic, comparably Malta), putting emphasis on corruption (Malta);

➢ that the Department of Justice emphasise to Directors of Federal law enforcement agencies the need to maintain, at all levels, including through periods of intense recruitment drives, a rigorous vetting process in order to recruit personnel of the highest standards (USA);

➢ to set up a working group of police, prosecutors, judges and other experts who would design and implement a comprehensive and effective master training plan for the new legislation concerning serious crime, especially corruption (Estonia);

➢ that initial and in-service training of prosecutors and judges particularly in combating economic and financial crimes and related offences such as tax evasion and, more specifically, corruption be stepped up (Moldova); to intensify the initial and in-service training of police officers and public prosecutors with regard to the legal bases and practice of public procurement and to improve their knowledge in this area (the Netherlands); to provide the prosecutors with appropriate education, training and technical equipment as well as preparing internal guidelines and annual education/training for prosecutors of all levels of the Public Prosecution Office ("the former Yugoslav Republic of Macedonia"); that specialised education and training of police, prosecutors and judicial police on corruption and its links to connected crime is arranged (Albania, comparably Bulgaria, Croatia, Georgia, Latvia, Lithuania and the Netherlands, with regard to judges and prosecutors, Poland), in particular on the typologies of corruption, including its international dimensions (Denmark, Hungary, Ireland, Latvia; Sweden; with regard to prosecutors Finland); to make use of international organisations whenever possible (Slovakia);

➢ that efforts be made to raise awareness within the judicial authorities of the seriousness of corruption offences and the specific difficulties related to their detection and the gathering of evidence (Slovenia).

17. the judiciary

➢ to provide the courts with an adequate number of staff (Bulgaria);
➢ that, as a general rule, cases of corruption committed by certain categories of persons, such as police officers or members of judiciary, should be in exclusive competence of the criminal court (Malta);
➢ to take at least some steps to increase specialisation of judges and improve human resources/expertise in the field of complex offences such as corruption (Portugal); to raise the specialisation in corruption cases of some investigating judges and judges hearing cases (Belgium, Estonia); to appoint the judges to court chambers and prosecution office sections which become specialised on corruption (Greece); to consider the possibility to create - within the major district courts – specialised panels of judges who should be available to preside over the most complex and serious cases related to economic crime offences (the Netherlands, Portugal); to take steps, subject to existing budgetary constraints, to establish economic and financial sections in the most important courts, while at the same time strengthening the resources available to the economic and financial sections at the courts of appeal (France).

18. the border police and the custom office

➢ to strengthen the efforts in favour of a modernisation of the border police in terms of premises, training, anti-corruption policies and investigations, management etc (Estonia); to set up training centres for customs officials, to ensure initial and in-service training and to develop a sense of professional ethics (Romania); to allocate the necessary financial and technical resources to the operational directorate of the customs department and to give officers initial and in-service training in regulations and professional conduct (Moldova).

As to Guiding Principle 6: GRECO recommended with regard to

19. the legal framwork of immunities

➢ to review the system of immunities and to make sure that the legal framework is clear, coherent, comprehensive, and understood by practitioners and the public at large (Bosnia and Herzegovina).

20. the list of categories of immunities

- to consider a reduction in the list of categories of officials covered by immunity and/or to reduce the scope of immunity to a minimum (Albania, Bosnia and Herzegovina, Bulgaria, Poland, „the former Yugoslav Republic of Macedonia", Romania), in particular to abolish the immunities provided for the candidates to member of parliament (Georgia).

21. the period of immunity

- to guarantee immunity only for the period of the mandate and to bar the lapse of time set for statutory limitation until the end of immunity (Hungary); to reconsider the fact that the system in place precludes prosecution after the suspect of a criminal offence ceases to be a member of Parliament (Czech Republic).

22. lifting immunity

- to establish guidelines for lifting immunities, containing criteria to be applied, with a view to a uniform application of the rules (Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Latvia, "the former Yugoslav Republic of Macedonia", Moldova, Portugal, Slovenia), ensuring that decisions are based on the merits of the request submitted by the Public Prosecutor (Estonia, Georgia, Latvia, Romania, Slovenia); to avoid to the largest extent possible political or other undue considerations (Czech Republic, Hungary);
- to review the procedure for waiving the immunity of members of parliament and of the government, in order to make it more transparent and easier to apply (Greece);
- to simplify the procedure for lifting the immunity of State officials (Poland);
- to amend the national legislation to ensure that the procedure for deciding on immunities of members of Government is not be carried out by the Government itself ("the former Yugoslav Republic of Macedonia");
- to abolish the requirement of the authorisation of the body concerned where the offender is apprehended *"in flagrante delicto"* (Georgia);
- to reconsider the regulations concerning immunity, with a view to avoiding more than one decision concerning the lifting of the immunity in each case (Lithuania);
- to ensure that in the case of judges, decisions concerning immunity are free from political consideration and based on the merits of the request (Estonia, Latvia, Slovenia).

23. the possibility of evidence being given in court with regard to proceedings in parliament

➢ to exempt corruption offences from the application of Art. 9 of the Bill of Rights (United Kingdom).

As to other reflections in the First Evaluation Round: GRECO recommended with regard to

24. sufficient anti-corruption laws

➢ to speed up the process of reform of the criminal legislation and, through that process, to harmonise the criminal codes and criminal procedure codes to the largest extent possible (Bosnia and Herzegovina);

➢ to continue the efforts in developing an efficient anti-corruption legal framework, in order to avoid, to the extent possible, "legal lacunas" which may be used for corruption purposes (Bulgaria); to increase prescribed punishments (and also extend the statute of limitations) for serious types of corruption and corruption-related offences (Croatia); to prolong the limitation period with respect to offences of corruption in order to allow extra time for investigation in complex cases (Slovakia).

25. speed up the criminal proceedings

➢ to review the investigation procedure for serious offences, including corruption offences, and to examine the best possible way of remedying the problems associated with the possibility of challenging every individual decision of the investigating judge during the investigation phase by providing, for example, for the exercise of the right to appeal at the end of the investigating phase, reconsidering the non-suspensive nature, for purposes of statutory limitations, of appeals filed before the Constitutional Court, in order to avoid procedural abuses aimed at preventing sensitive cases from going to trial (Portugal).

26. a comprehensive pro-active strategy

➢ that the authorities responsible for formulating anti-corruption policies adopt a more proactive approach towards the phenomenon of corruption in order to combat it more efficiently (the Netherlands);

➢ to develop a national programme for the fight against corruption, including preventive and repressive perspectives (Bulgaria, Georgia, Poland, "the former

Yugoslav Republic of Macedonia"), including the development of all the elements (legislative, executive, judicial authority) necessary for reducing opportunities for corruption (Poland, Spain), launching within the law enforcement agencies (notably the police and the prosecution office) and other private and public bodies which could be involved in the anti-corruption policies, a specific anti-corruption plan that should introduce a multi agency focus and more proactive investigative strategies to help preventing and detecting criminal conduct or wrong doing (Ireland);

- to elaborate a proactive anti-corruption policy with the necessary resources within which the inherent potential of, inter alia, the following institutions to prevent and control corruption would be more fully exploited: the Ombudsman, the Competition Authority, the National Audit Office, the Financial Supervisory Authority, the Chamber of Commerce, the Confederation of Employers, the media and others (Iceland);
- to elaborate a comprehensive programme, a series of very specific and measurable objectives and the detailed steps required to achieve them are indicated (Czech Republic); to elaborate a comprehensive programme, including preventive and awareness raising measures, aimed at progressively eliminating the widespread practice of gratuities, rewards or other forms of private remuneration paid to public employees in the healthcare sector and other public service where they found to exist (Hungary); to expand existing programmes and the development of additional endeavours with regard to prevention and detection strategies on corruption (USA);
- to assign the overall coordination of its implementation to a body especially tasked for that purpose (Bulgaria, Croatia, Estonia, Georgia, Greece, Ireland, Lithuania, Portugal, Slovenia) or to entrust a existing body with this responsibility (Lithuania); to clearly identify the bodies in charge of its implementation and coordination with other authorities (Czech Republic); to extend the scope of the Corruption Prevention Council to ensure the effective implementation of its campaign (Latvia); to reinforce the visibility of the subdivision on economic crime within the Ministry of Justice by drawing in officials from the various ministries and departments concerned to encourage genuine dialogue, stimulate joint discussion and develop common approaches based on their respective experience to enhance the interministerial dialogue, nurture communal discussions and develop the emergence of summaries of the various experiences made (France);
- to keep regularly updated and to disseminate compilations of anti-corruption measures adopted (Germany); in the light of these, systems should ensure appropriate follow up of anti-corruption initiatives providing for the possibility for making recommendations for improvements (Greece);
- to improve the resourcing of the fight against corruption (Latvia); to amend the national anti-corruption plan explicitly with a stronger notion of involvement of the civil society and business sector in the implementation of the plan (Albania); to take further steps to ensure the implementation of the Programme and Action Plan and the continuous monitoring of the implementation of the existing legislation in the anti-corruption area; for this purpose, one of the possibilities could be establish-

ing a cross cutting monitoring commission, possibly linked to the parliament, and comprising representatives of the various governmental bodies, civil society and the business community (Czech Republic); to urgently strengthen and improve the application of the Anti-Corruption Act as concerns the control over declaration of interests and other forms of limitation upon conflicting interests the parliamentarian anti-corruption committee should be strengthened in order to carry out its tasks effectively, including the overall monitoring of the Anti-Corruption Act application (Estonia);

➢ that the Department of Justice maintain a regular process for evaluating and assessing the adequacy of Federal investigative and prosecutorial resources directed at Federal, State or local corruption, with a view to ensuring that resources are allocated where needed (USA).

27. raising awareness among public officials and in the society

➢ to enhance the general awareness of corruption in its wider sense, its dangers to society and to the particular sectors which are likely to be affected, associate the public more closely to the authorities' action against corruption, in particular, by better informing it about the measures adopted to counter corruption, and encourage them to co-operate with the law-enforcement authorities in the investigation and detection of these crimes (Czech Republic, Denmark, Hungary, Malta, Moldova, Romania, Slovakia); to enhance the involvement of the media and non-governmental organisations in a coordinated awareness raising campaign (Latvia, Romania, Slovakia); to raise the awareness of public officials, particularly among those more likely to be in contact with corrupt practices, about the need to remain vigilant, report serious suspicions of corruption in accordance with agreed procedures and contribute to the efforts of law enforcement authorities aimed at the detection of corruption offence (Finland, Luxembourg, Spain, Sweden); to strengthen the involvement of civil society and the business sector in the activities of the Anti-Corruption Monitoring Group (Albania); to put in place procedures to support managers to identify, prevent, challenge and deal with corrupt, dishonest and unethical-behaviour - such procedures should include education, training, prevention and enquiry (Georgia, „the former Yugoslav Republic of Macedonia"); to make a particular effort so as to raise awareness with regard to the link between money-laundering and corruption and to establish guidance notes for the recognition of suspicious transactions by accountants and lawyers (Cyprus).

28. safeguarding lawful conduct of public officials

➢ to establish rigorous selection criteria and to conduct robust vetting checks in order to ensure integrity of all those recruited for public service, particularly those called to occupy sensitive positions (Georgia); to consider the introduction of tenure

procedures that will reduce the potential for corruption, in particular for sensitive posts (Georgia);

- to develop ethical codes against corruption for all public officials (Bulgaria, Georgia, Latvia, Lithuania, Poland, Spain, and with respect to Northern Ireland the United Kingdom), preferably including anti-corruption measures, such as reporting indicia of corruption etc., as a complement to legislation (Lithuania), using the Model Code drawn up by the Council of Europe and included in the committee of Ministers Recommendation R(2000) 10 as inspiration (Georgia, Spain); to give the adoption of the Law on Prevention of Conflicts of Interests in Public Service, as well the adoption of a General Code of Conduct for Public Officials, a high priority, and to designate a special body or bodies to ensure the efficient implementation of the obligations prescribed by those documents (Croatia); that all public officials receive training on codes of conduct (Georgia, „the former Yugoslav Republic of Macedonia"); to implement a global training programme aimed at increasing awareness among public officials of all levels (Poland);
- to urgently strengthen and improve the application of the Anti-Corruption Act as concerns the control over declaration of interests (Estonia); to ensure that a system should be established for the declaration of assets and interests of high State officials, including Members of Parliament, the President of the Republic, the Attorney-General and Ministers (Cyprus); that a central mechanism should be created for the registration of interests by senior civil servants and ministers and for recording and investigating complaints (United Kingdom); to ensure that the employer be empowered to check declarations of interests, income and assets or have them checked by an appropriate body (Hungary, comparably Georgia); to promote the full application of the mechanism for the declaration of assets (Greece).

29. a sufficient control mechanism for the public sector

- to ensure an appropriate oversight of the exercise of licensing powers of the Local Councils (Malta); to take measures to eliminate unnecessary licenses and to determine objective and transparent criteria for the granting of licenses, authorisations and state subsidies that remain necessary (Slovakia); to undertake steps towards progressively reducing the scope of discretionary powers of administrative officers, enhancing transparent procedures and abolishing, whenever possible, licensing and authorisation procedures (Poland); to develop stronger transparent and public accountability policies in the public administration to increase governmental efficiency ("the former Yugoslav Republic of Macedonia");
- that all government departments and agencies introduce internal inspection units (Georgia); to provide for the introduction in all departments and agencies of external monitoring councils (Georgia); to create, or to strengthen where they already exist, special departments and inspection bodies responsible for the prevention and examination of internal cases of corruption ("the former Yugoslav Republic of

Macedonia"); to strengthen the internal control mechanisms and capacities within ministerial structures providing them with proper independence and competencies to investigate corruption practices inside their organisations (Croatia).

30. the systematic collection of data and research on corruption

➢ to systematically collect and process in a coherent way data concerning corruption in particular in fields where there are particular corruption problems encountered (Albania, comparably Bulgaria, Georgia, Greece, Ireland, Lithuania, Luxembourg, Portugal, Slovenia, Spain); to ensure more efficient statistical monitoring of corruption and corruption related offences in all spheres of the police, public prosecution offices and the courts on the basis on harmonised methodology, which would enable comparisons among institutions (Croatia); to create a central intelligence database with a view to providing law enforcement and prosecution authorities with an extremely useful tool for a comprehensive approach to the fight against corruption (Poland);

➢ to promote objective research on corruption with a view to developing a precise picture of the situation in the country and in particular institutions (Bulgaria, comparably Croatia, Czech Republic, Estonia, Greece, Ireland, Latvia, Lithuania, „The Former Yugoslav Republic of Macedonia", Moldova, the Netherlands, Norway, Romania, Slovenia), so that anti-corruption initiatives and plans can be targeted more effectively (Moldova).

31. public procurement

➢ to create conditions for transparency and equality in competition, in order to minimise the risk of corruption opportunities in the field of public procurement (Hungary); to develop further rules and regulations to govern public procurement at the State and Entity level (Bosnia and Herzegovina);

➢ to consider improving competition mechanisms at level of local government authorities in order to avoid excessive familiarity between officials and suppliers, leading to direct orders being placed without applying tendering procedures, such as, for instance, collective decision-making procedures, rotation of officials deciding on purchases, specific supervision of contracts concluded directly etc. (Latvia, Sweden); to provide proper training to all those public officials who deal with public procurement activities in the central and local agencies in order to make them aware of regulation in force and ensure that they would be able to assess procedural irregularities in the context of evidencing corruption (Latvia);

➢ to better enforce the rules on public procurement, including in cases which fall below the threshold for EU-wide competition (Germany), and to adopt legislative measures to establish a central register ('blacklist') of companies which have previously been found untrustworthy in bids for public contracts (Germany); pro-

vide for strengthening the independence and specialisation of the Public Procurement Agency (Sweden); to consider assigning to the Government Contracts Committee more powers in order to meet concerns related to the lack of a central authority or body responsible for all public procurement procedures, or to examine the possibility to establish another central and independent body responsible solely with the public procurement procedure (Ireland); to increase both the human and the material resources allocated to the Public Procurement Office in order for it to exercise a strict control over public procurement (Poland);

- to reconsider the complaint procedure within the field of public procurement, in order to make it more efficient and easier to access by the public (Lithuania); to introduce a more independent procedure/authority when it comes to dealing with public procurement (Malta); to considerably strengthen the independence and specialisation of the Public Procurement Agency (Albania, comparably Romania);
- to examine ways of improving the effectiveness of sanctions for noncompliance with applicable public tendering procedures (Sweden); in public procurement matters, to enable the courts to pronounce interlocutory decisions that suspend the tender procedure in the event of an appeal by a bidder on grounds of unlawful exclusion from the consultation or adjudication procedure ("the former Yugoslav Republic of Macedonia");
- to provide that staff, to the extent possible, be given civil servant status and that training be institutionalised and focused on anti-corruption measures (Albania).

32. privatisation

- that transparent and clear rules as well as efficient control mechanisms be established with regard to privatisation (Slovakia).

33. the media and the access to public information

- to promote professionalism and ethical conduct among journalists (Bosnia and Herzegovina);
- to improve the transparency of public authorities, vis-à-vis media and the wider public, through implementation of the legislation on access to public information and documents (Albania, Bosnia and Herzegovina, Hungary, Lithuania), to promote more widely appropriate disclosure mechanisms under the Public Interest Disclosure Act in the public sector (United Kingdom); to make special efforts to promote access by the media to official documents and inform/train the public and public officials about the conditions required to obtain access to public documents and files held by the local and state authorities (Malta); to study ways of reconciling the protection of private life with the need for some public scrutiny over the manner in which closed corruption cases have been dealt with (Luxembourg);

➢ to undertake legislative and administrative reforms in order to guarantee an adequate system of conservation and archiving of the administrative documents and files and to prevent their destruction (Romania).

34. the Ombudsman

➢ to strengthen the role of the Ombudsman institution (People's Advocate) in preventing and combating corruption and raise effectively public awareness of this role of the Ombudsman institution (Albania; Bosnia and Herzegovina, Czech Republic); moreover, to consider allowing the People's Advocate to carry out reviews *ex officio* (Albania).

35. the auditing of public expenditures

➢ to familiarise public decision makers with the purposes of audit (Estonia);
➢ to envisage the introduction of some form of independent audit of departments strictly related to integrity measures which could take the form of a "coordinating council" comprising State officials and NGOs (Georgia);
➢ to submit local governments to appropriate auditing procedures (Sweden);
➢ to extend the powers of the supreme audit office, notably to evaluate and make effective suggestions for improving the management (Slovakia); to provide that the mandate of the audit office should be extended to cover a wider category of public funds, including the political parties (Cyprus); to provide that the State Supreme Audit at the outset of the fiscal year should announce a public statement reflecting the scope and justification for planned activities (Albania);
➢ to give the supreme audit office adequate and predictable budgetary means to plan and fund their intended activities (Albania, Bosnia and Herzegovina); to give the court of auditors adequate staff (Luxembourg); to organise permanent in-house training for these controllers, focussing on the issue of corruption (Poland);
➢ to analyse the functioning of existing earmarked funds in the context of creating opportunities for corruption and to liquidate those funds whose tasks could be achieved in the framework of the general State budget and ensure, especially by way of monitoring, that the functioning funds do not create opportunities for corruption (Poland); to enhance and develop the work of financial controllers controlling public administrations and public enterprises increasing, whenever necessary, their number and ensure that their findings are made public as far as possible (Poland).

36. funding of politics

➢ to extend the system for the registration of the interests of the Members of the House of Commons to cover the exact amount of donations, the interests of all

"key connected persons" and all shareholdings (United Kingdom); to establish a system for the declaration of assets and interests of high state officials, including Members of Parliament, the President of the Republic, the Attorney General and the Ministers (Cyprus);

- to ensure, in the context of the financing of political parties, that effective co-operation between external auditors and the specialised service of the judicial police and/or the competent prosecutors' offices exist (Belgium);
- to ensure that information transmitted by the Parliamentary Commission under the Act on incompatibility of performing public function with business activity to the proper authorities, be followed by effective sanctions against those officials found to be in breach of the law, and that, to this end, the said Commission be informed about the outcome of the procedure undertaken against such officials (Slovenia);
- to consider the possibility of preventing conflicts of interest by placing limitations on the functions of lawyer when a person is elected to the representative's office (Romania).

37. the tax authorities

- to provide tax officials and inspectors with training and guidelines on their possible contribution to the detection of corruptions (Slovenia); to make officials of the Tax Inspectorate aware of the problem and dangers of corruption and their role in fighting it and to take concrete measures to ensure that the initial monitoring directorate performs stricter checks on the activities of tax inspectorate officials (Moldova).

38. Non governmental organisations (NGOs)

- to support more actively, notably with the help of the Central Corruption Prevention Department, private initiatives, by strengthening the links between government preventive activities and such initiatives (France); to organise regular exchanges of information with NGOs to discuss government actions and initiatives against corruption with a view to strengthening co-operation in this field (Poland); to continue co-operation with NGOs in the form of a more structured dialogue at national level (Georgia); to establish, for the purpose of devising a multidisciplinary strategy to combat corruption, channels of contact or even mechanisms for associating NGOs with the definition of policies in the field (Greece); to envisage the introduction of some form of independent audit of departments strictly related to integrity measures which could take the form of a "coordinating council" comprising State officials and NGOs (Georgia).

B. Observations

Besides formal recommendations, the compliance with which the country concerned has to report on within a given period,[322] the GRECO Reports in their analytical parts may also articulate observations about deficiencies in the country concerned. Although these observations are not subjected to the compliance procedure as it is provided for recommendations,[323] they still reflect concerns about the institutional fight against corruption in the relevant country. Furthermore, one should be aware that the distinction between mere observations and binding recommendations is not a clear-cut one and that, thus, the borderline between both might eventually also have to be drawn differently. Therefore, even if a deficiency observed by GRECO did not give rise to a recommendation, the country concerned might consider itself as invited for further improvements. So in order to get a full picture of particular and structural deficiencies in the institutions against corruption, observations made in the analytical parts of GRECO Reports will in the following be similarly compiled as the above-discussed recommendations.

As to Guiding Principle 3: GRECO observed with regard to

1. the prosecution

➢ that continued vigilance against improper interference by the Executive in the prosecution of corruption is required (Iceland); that the State Prosecution Service has a lower degree of independence than the judiciary on account of the rules for appointing and dismissing the State Attorney General and the latter's powers to give instructions to the prosecutor in charge of the specific case (Spain); that it seems necessary to adopt legislative reforms so as to reduce the Parliament's possibility of inappropriate intervention vis-à-vis prosecutors and in particular its power to appoint and dismiss the Prosecutor General and its Deputies ("the former Yugoslav Republic of Macedonia"); that the Prosecutor General has far-going powers with regard to the running of the prosecution service, and that s/he can exert influence over prosecutors' decisions on the merits in individual cases. If this system prevails,

322 Cf. supra I.B.

323 "Observations" are provided for in Rule 28 of the Rules of Procedure but do not underlie a special compliance procedure, different from "recommendations" which are not only mentioned in Art. 15 (6) of the GRECO-Statute but also subjected to a special compliance procedure according to Rules 30, 31 Rules of Procedure. Consequently, the GRECO Plenary in its 14th meeting, after an intensive discussion, decided that the member nations are neither obliged to submit commentaries on observations in their Situation Reports nor will Compliance Reports contain any reference to possible information provided by members in their Situation Reports on the implementation of observations made in the Evaluation Reports (GRECO (2003) 17E.

it would mean for example that a prosecutor's decision to prosecute somebody could be overruled by the Prosecutor General. The independence of individual prosecutors would therefore appear ambiguous; for these reasons, the situation needed to be clarified (Lithuania);

- that the public perception of the Prosecutor General's independence and impartiality would be enhanced if he/she was elected by a qualified majority of votes in Parliament; the same type of majority ought to be required for the Prosecutor General's dismissal (Hungary);
- that it is important that the Public Prosecutor Service, and public officials in general, should be made aware of the problem of corruption in public procurement (the Netherlands);
- that in all corruption related cases the reasons for not instituting or discontinuing criminal proceedings should continue to be recorded in the relevant file with sufficient clarity as a normal practice, and that the authorities could usefully examine whether to confirm the existing practice by adopting standard-setting provisions to that effect (Cyprus, Ireland);
- that it should be ensured that salaries of prosecutors are at an appropriate level in order to dissuade corruption and attract applicant prosecutors (Slovak Republic).

2. the police

- that efforts to change attitudes and behaviour of police officers would prove beneficial in implementing anti-corruption strategies (Latvia);
- that the independence the police seems to enjoy in practice when handling criminal investigations on corruption should be better guaranteed either by specific legal provisions or through adequate institutional safeguards (Ireland);
- that appropriate priority should be given to the investigation of police corruption; to that end, co-operation between the Internal Affairs Unit and the Police units should be strengthened and streamlined with a view to making the investigation of alleged internal corruption more timely, consistent and focused, assisting the Police Board to effectively exercise its oversight powers (Malta).

3. special units

- that this specialised unit should include specialised police officers, experts in the legal and financial and banking fields, experts from the tax administration, etc., and that it should possibly be established as a task force which experts from other fields can join whenever necessary ("the former Yugoslav Republic of Macedonia").

4. the means for gathering evidence

- that the public prosecutor lacks the means to investigate the case with the means (in fact) at his disposal (Slovenia);
- that it is necessary to ensure that the special investigative means can be used in the investigation of serious corruption cases either under existing law or, if this is not possible, by enacting new legislation (Iceland);
- that expression of legislative distaste for anonymous tips could actively discourage the reporting of corrupt activity within a small community (Malta);
- that the Police have no direct access to databases of the tax authorities, although technically it would be possible (Bulgaria);
- that the authorities may wish to re-examine Sect. 163 of the Criminal Code's section on effective repentance with a view to assessing its effect in practice (Czech Republic), because GRECO considers that the proper course for a person, who is offered a bribe, or from whom a bribe is solicited, is to refuse to enter into the corrupt transaction and also to report the approach which has been received.

5. proceedings and the judiciary

- that due to the complexity of pre-trial procedures the role of the police, the public prosecutor and the investigating judge are interwoven to such an extent that there is confusion about the exact role performed by each one of them (Slovenia);
- that the handling of cases of corruption within the existing judicial structures could be considerably improved; that fundamental changes in the composition of the Judiciary might be another possibility for a more efficient criminal justice system (Bulgaria);
- that the authorities could examine the possibility to carry out an audit of the criminal courts in order to identify malfunctions and propose means of speeding up the decision-making process (Malta);
- that the number of corruption cases transmitted to the courts seemed to be quite limited, which could be a token of a criminal justice system, in particular at the investigation and prosecution stages, that lack suitable efficiency (Bulgaria);
- the disparity in the ratio of reported offences and subsequent convictions when police or customs officers are involved on the one hand, and when offences are perpetrated by other persons, on the other hand (Croatia);
- the usefulness of a mechanism that provides, when necessary in order to ensure impartial court proceedings, the possibility for cases to be removed from a given judicial jurisdiction and transferred to another one, with all the requisite guarantees (Greece).

As to Guiding Principle 7: GRECO observed with regard to

6. specialisation of authorities against corruption

- that some degree of specialisation [of prosecutors] also in the district would be a useful follow-up (Albania);
- that the important institutions [of the police and the special anti-corruption office] do not have a common understanding of which offences should be treated as corruption offences (Croatia);
- that the Central Corruption Prevention Department would deserve to be re-asserted as the central body for the prevention of corruption, with an enhanced dialogue with and training within the private sector, the granting of the power to decide whether to publish its reports and of the right to remain informed of the outcome of a file handed over to the courts (France);
- that the Financial and Economic Crime Office should certainly be more actively enrolled in fighting corruption by sensitising its members to this function and specifically including corruption among the economic offences the office is responsible for investigating (Greece);
- that it is desirable that additional training [for the Competition Authority] should take place - preferably in co-operation with the police - to enhance the investigative capacities of the Authority (Iceland).

As to Guiding Principle 6: GRECO observed with regard to

7. immunities of certain persons and organs

- that the competent authorities should consider the possibility to reduce the scope of the immunities of members of parliament, and/or simplify the procedure for lifting their immunity ("the former Yugoslav Republic of Macedonia");
- that the possibility of excluding acts of abuse of office (and in particular passive corruption) from the scope of the procedure reserved for persons enjoying immunity or alternatively simplifying this procedure, facilitating the course of criminal justice (the Netherlands);
- to consider the possibility of excluding acts of corruption from the scope of the immunity granted to Members of Government or alternatively simplifying the procedure for lifting their immunity, facilitating the course of criminal justice when MGs are suspected of having committed a corruption offence in office (Finland).

As to other concerns: GRECO observed with regard to

8. new legislation on corruption

➢ that a clear strategy for implementing new legislation and measures aimed at preventing and combating corruption is lacking ("the former Yugoslav Republic of Macedonia"); that it would be preferable if the "pro-coordination" approach were taken one step further: in its view, for the risk of excessive divergence to be minimised, the central government should consider whether a protocol should be drawn up with the authorities in Scotland and Northern Ireland concerning both the timing and the general approach to any legislation introduced in the United Kingdom in response to international conventions in the field of corruption (United Kingdom).

9. the core criminal law

➢ that corruption of foreign officials or of members of international organisations, international courts, foreign public assemblies and international parliamentary assemblies is not classified as a criminal offence (Romania);

➢ that a narrow concept of corruption hides in itself a danger that certain behaviour will not be perceived as corruption for the reason that the competent authorities in a concrete case cannot prove, for instance, bribery of a public official, but only some other criminal offence related to abuse of power or similar crime (Denmark);

➢ that some tolerance exists vis-à-vis certain forms of bribery, the existence of "grey areas" and the existence of corruption in certain sectors without adequate mechanisms to control it (Estonia).

10. to penalties and limitations

➢ that, with a view to the future, the relevant authorities may wish to consider introducing more dissuasive sanctions to ensure the independence of members of parliament (Germany);

➢ that the maximum penalties for corruption in the private sector (and, to a lesser extent, for active bribery in the public sector) could be called into question in the event of a serious case, even if such acts could be covered by other provisions providing for heavier penalties (Denmark); that the authorities may wish to consider better harmonising the punishment of corruption offences, perhaps by increasing the severity of punishment to reflect greater societal condemnation of corrupt activity, and that they may also wish to increase the limitation period with regard to corruption offences (Malta);

➢ that the authorities should reconsider the system of statutory limitations in order to avoid that prosecution of corruption offences – a complex form of crime, difficult to detect and prove – are regularly abandoned because limitation periods are over (Estonia, Lithuania); that the question of time-bars in corruption cases should be reconsidered in the light of a study (France).

11. to international cooperation

➢ that there is an urgent need to adopt legislation and accede to relevant European legal instruments in order to make mutual legal assistance smoother and faster, and to promote direct contacts between competent national and foreign agencies (Bosnia and Herzegovina);

➢ that the authorities should consider signing and ratifying the European Convention on Transfer of Criminal Proceedings in order to make international co-operation on criminal cases more efficient and that the central authorities should co-ordinate the training of staff at all levels dealing with requests for international co-operation (Poland);

➢ that experience of other countries in fighting corruption – often provided through international organisations – should be disseminated as widely as possible (Albania).

12. safeguarding lawful conduct of public officials

➢ that there seemed to be more reliance on personal relationships among State officials and feelings of mutual trust and confidence than on a sound constitutional approach of "checks and balances", among different State institutions and, which is essential, in the fight against a crime such as corruption (Slovenia);

➢ that it would be appropriate to re-examine the administrative and judicial procedures, which, given the considerable economic interests at state, may increase the likelihood of corruption; this should be done by making the procedures, as well as the reasons of the decision taken, public (Romania);

➢ that it would be appropriate to update the legal framework for disqualification from office currently applicable to members of the various authorities and the civil service, radically limiting the opportunities of private activities which, by their nature, are perceived by the public opinion as being incompatible with the dignity and objectivity that should characterise the exercise of public responsibilities (Romania); that the effectiveness of this rule is weakened by the fact that the rules on disqualification from office applicable to staff in certain authorities and civil servants have not been updated (Romania);

➢ that those carrying out the same functions should as a main rule have the same status [as civil servant] (Bulgaria);

➢ that it would be worth considering whether these measures [action against the risk of corruption, for example the existence of a code of ethics, mobility every 3 years for customs officers, material advantages to motivate the staff] should be extended to other categories of public officials (Poland); that although there is a number of control mechanisms, there is still some room for improvements to strengthen control over all senior public officials (Germany);

➢ that the discussion on anti-internal-corruption measures relating to particular services should take place at the appropriate levels and requires input from various institutions as well as from the public (Lithuania);

➢ that the authorities on which the Supreme Chamber of Control exercises its controlling functions should follow its recommendations, at least when the authority has breached regulations related to the performance of its task (Poland);

➢ that it would be a positive initiative if the competent ministry were to take more active steps in carrying out its responsibilities to promote awareness and issue specific guidelines and training on corruption issues among civil servants and officials (Norway).

13. auditing

➢ that the system of the Audit Office could be improved by having independent procurement supervision for local government as a safeguard against the vulnerability to corruption (Iceland);

➢ that if the Audit Court considers the deadline for its opinion to be too short in view of the importance or the circumstances of the contract, it should be able of its own motion to extend the deadline by issuing a reasoned order to this effect (Greece);

➢ that municipal auditors were not granted the same degree of independence as is enjoyed by Federal and State Courts of Auditors, for example, municipal auditors' terms of employment and pay are the responsibility of the city's executive, and that this situation might be worthy of further consideration (Germany with regard to North Rhine Westphalia).

14. the funding of politics

➢ that the authorities should consider the revision of the legal framework applicable to the financing of political parties as a key element of their anti-corruption strategy and, more particularly, that a more effective monitoring of the resources, property and donations of political parties would be required (Cyprus, Hungary, Iceland);

➢ that it would also be desirable for the Political Party Finance Control Commission to be required, like other state institutions, to report to the public prosecutor any criminal acts that come to its notice, in return, the public prosecutor ought

to notify the department or official supplying the information of the action taken on it (Greece).

15. data and research

- that no comprehensive statistical information on investigated, detected, prosecuted or adjudicated corruption cases was available (Bulgaria, Spain);
- the importance of elaborating a database of statistics concerning international requests from Polish and from foreign authorities (Poland).

16. miscellaneous

- that public entities are not subject to scrutiny by the Administration Inspectorate and secondly that the system for supervising public procurement contracts is complex because responsibility for it is shared among three ministries (Greece);
- that it would be useful to abolish anonymous and numerical accounts (Slovak Republic);
- that sufficient resources should be allocated to the Ombudsman institution in order for these important activities to continue properly (Lithuania).

V. Concluding Considerations

A. Assessment of the GRECO Recommendations and Observations

Having in mind the multitude of diverse national situations, the general coherence of the recommendations is one of the remarkable achievements of GRECO's work. This certainly is a result of the consistent application of the Guiding Principles in GRECO's Plenary Meetings and the coordinating work of the GRECO Secretariat.

However, a closer look reveals few, but nevertheless notable, inconsistencies. Some of them can be explained with national pecularities, requiring a flexible application of the Guiding Principles on the given national situation, sometimes reflecting the unique historic circumstances of nations in a process of transition. These national differences require even more differentiated recommendations when it comes to complex and diversified structures, such as those of the judicial and law enforcement bodies whose particularties contravene a complete comparison. For these reasons fully coherent recommendations would not only be surprising, but would also neglect national pecularities and treat countries as alike, which are in fact embedded in totally different historic backgrounds and social situations.

While this can offer a reasonable explanation for most of the (few) discrepancies, some of them, however, may also reflect an uncertainty with regard to politically sensitive questions, partially caused by the rather vague wording of the Guiding Principles. The latter could be an explanation for diverting recommendations as to the independence of prosecutors from political orders: In one case GRECO solely asks for "reconsidering the situation that the Minister of Justice may intervene in individual cases",[324] while in another case it is recommended "to guarantee that instructions not to prosecute in a specific case, be prohibited in principle or remain exceptional",[325] and in a third case GRECO even insists "to enact legislation confirming the commitments of the current Minister of Justice and her predecessors not to interfere in individual cases".[326] Another field of discrepancies concerns recommendations about the special investigative means: Diverse proposals are made for the "object" of improvement, ranging from the general term of "special investigative means" to "surveillance of communications" and "wire tap". While this finding can be explained with differences in existing national provisions, another aspect might reflect a slight uncertainty as to the desirable legal policy: The question whether such special investigative means should be available for "all corruption cases" or

324 GRECO Report on Denmark, para. 111: recommendation (ii).
325 GRECO Report on Spain, para. 140: recommendation (v).
326 GRECO Report on France, para. 148: recommendation (iii).

only in "cases of serious corruption", is of great importance for balancing human rights and investigative needs.

The scope of immunities proved to be another delicate field, as it not only affects the interests of the "political class", but also reaches in its effects far beyond the subject of corruption while remaining essentially linked to it. It is remarkable that the recommendations are quite coherent, though, in some cases, remaining rather vague: When it is recommended that the immunities shall be "reduced to a minimum", the necessary room for discretion is left to the nations and their particularities. On the other hand, the limited concretisation of Guiding Principle 6, as well as some of the recommendations, prove to be an insufficient guideline to determine both a general view and a concrete scope of immunities.

B. The achievement of GRECO in the international harmonisation of standards

The current state of harmonisation in fighting corruption can be concluded from the number of countries which so far signed and ratified the two relevant conventions of the Council of Europe, the Criminal and the Civil Law Conventions on Corruption.[327] Besides the efforts of the Council of Europe and GRECO, a remarkable contribution for setting worldwide standards has also been made by the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,*[328] whereas the recently proclaimed *UN Convention against Corruption*, although directed at a global harmonisation both with regard to its reach and content, still must be proven by its practical implementation.

This proof in practice has in fact been delivered by GRECO, above all due to its structure and rules, laid down in the various international conventions and the additional procedural instruments.[329] This story of success may be exemplified in three respects:

- Probably the most efficient device in getting things moved is the Compliance Procedure according to which the member states must report on their efforts and accomplishments in complying with the recommendations made by GRECO in

327 With the exception of Spain, the *Criminal Law Convention on Corruption* has been signed by all member states of GRECO, with the ratification pending only in Armenia, France, Georgia, Germany, Greece, Luxembourg and USA (ratification status as of 25/10/2004). With the exception of the Netherlands, Portugal, Serbia and Montenegro, Spain and USA, the *Civil Law Convention on Corruption* has been signed by all GRECO members, with the ratification still pending in Armenia, Belgium, Cyprus, Denmark, France, Germany, Iceland, Latvia, Luxembourg, Norway, the United Kingdom (ratification status as of 25 October 2004).

328 This OECD Convention has so far been ratified by these GRECO member states: Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia (which so far did not enact full implementing legislation), Spain, Sweden, Turkey, United Kingdom and USA (ratification status as of 10 March 2004).

329 Cf. supra I.B.

the various GRECO Reports.[330] By way of this procedure, GRECO can demonstrate whether it fights corruption as "toothless tiger" or as "lion king". Since in the meantime a considerable number of Compliance Reports to the First Evaluation Round have been finalised, thus making the response of the member states to the GRECO Recommendations transparent and public, a first assessment may be ventured: GRECO is, indeed, not "toothless"; its reports reveal that countries in particular need of fighting corruption have become alert and started to bare their teeth. So far, though with some exceptions of "not implemented" recommendations,[331] the vast majority of them were found as "having been dealt with in a satisfactory manner" or even as "implemented satisfactory" (as according to Rule 31 of the Rules of Procedure[332] the highest degree of compliance), or at least as "partially implemented".[333] On this way, GRECO has indeed become a true institution against corruption.

➢ This effectiveness is not occurring by chance, however, but rather is founded in the structure of GRECO. The mechanism provided for by the Council of Europe in form of 20 Guiding Principles and the implementation of GRECO, in combination with the peer review-procedure, ensure that all Member States agree to the compliance procedure in trusting that the mutual pressure for changes is not restricted to themselves but reaches the other countries as well. This mutual confidence in the decisiveness of fighting corruption paves the way for reforms which would hardly succeed on a purely national level for lack of comparably pressures to act. In so far GRECO functions as a supranational catalyst for creating transparency, comparability and finally competition for the best structure of an optimal anti-corruption strategy. This effect is not a matter of course, however, since the states do not act as abstract entities but as democracies where it is lastly for individuals and groups of individuals to decide. Particularly in cases in which rational interests of these decision makers are effected, the resistance against supranational pressure for changes can turn out as particularly persistent. This individualising view to decision processes once more reveals that often the most basic individual interests cause the most complex problems, since they resist even the most refined solutions. This phenomenon, however, can be met solely by means of a transnational competition by which States less willing to reforms and their decision makers are subjected to sustained pressure of justification. This is exactly what is done by GRECO: by way of

330 As to this procedure cf. supra I.B with references to Art. 15 of the GRECO Statute and Rule 31 of the Rules of Procedure.

331 According to the Compliance Reports Georgia has not implemented 7 recommendations and was considered as not be in compliance with the recommendations, Luxembourg has failed to implement 5 recommendations, and both Latvia and the United Kingdom one.

332 Cf. GRECO (2003) 6E Final Rev.

333 As of the 20th Plenary Meeting of September 2004, the Compliance Report of the following countries have been finalised by GRECO, made public and stated at least a partial implementation of the recommendations: Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Latvia, Lithuania, Norway, Poland, Romania, Slovak Republic, Slovenia, Spain, Sweden. For details in which way and what degree the relevant recommendations have been implemented see the individual GRECO Compliance Reports, available by Internet (www.greco.coe.int/evaluations/Default.htm).

the compliance procedure, even the most stubborn preservers of a status quo are to argumentatively oppose a forum of other positions and are, thus, burdened to defend their disregard of seriously fighting corruption.

➢ The working method of GRECO as well proves to be particularly adequate. The broadly conceived evaluation proceeding comprises not merely isolated parts of the corruption problems but is devoted to the social phenomenon in due breadth and depth, though it should be noted that, aside from aspects of law and social science, the economic conditions are also to be taken into consideration, since these are the main driving forces behind corruption. This GRECO method produces a remarkable effect in that it sometimes appears as if the evaluation is creating the reality, which in fact is to be evaluated. This effect is apparent in countries, which only by the very kind of questions put to them by GRECO became aware of the measures necessary for efficiently fighting corruption. Thus, it was not at least due to the exchange of experience between GRECO and the countries concerned that for the first time the specialisation of police, prosecuting authorities and judges for fighting corruption were reflected. This idea of the evaluation preceding the reality to be evaluated can still be taken one step further in that it cannot be ruled out that certain phenomena which so far appeared socially feasible, were only noticed as corruption in course of the GRECO evaluation and accordingly devaluated.

➢ Not the least, social and normative sciences can profit from a "collateral effect" of GRECO: the breadth and depth of the GRECO Evaluation Teams (GET), as well as the regular exchange of experience with representatives of the countries concerned, and finally the GRECO Reports for and the discussion thereof by the GRECO Plenaries provide a unique platform for comparing different national legal systems and state structures. If the materials collected in this evaluation process is carefully analysed, with the accompanying support of the participants in the GRECO evaluation process as "multipliers" in their home countries, the work of GRECO would not only be able to further the harmonisation of anti-corruption strategies but could perhaps also encourage similar comparative efforts in other areas of law and state. In this case, GRECO would have proven as a catalyst for ideas that reach far beyond the fight against corruption and may help the states to optimise their institutions by adopting solutions that stood their test abroad.

C. *Outlook*

The work of GRECO reveals that corruption can affect and does affect both nations in a process of transition and those highly developed. For this reason, three devices appear as important for future efforts of all GRECO member nations:

1. If corruption shall be fought, a society is at first to realise corruption as a social phenomenon. Therefore, an efficient fight against corruption requires a comprehensive approach directed at social awareness.

2. As criminal law can prohibit corruption on paper only, its social effectiveness cannot be accomplished without implementing the relevant norms into practice; therefore, the main weight of efforts must be the practical implementation. As criminal prosecution, by definition, can only extinguish existing fires, without being able to prevent dangerous smouldering, the social system must be preventively safeguarded from corruption rather than by merely reacting with repressive prohibitions. Consequently, optimal institutions against corruption require no less than efficient structures of the state and the law which provide utmost resistance against corruption.

3. Because of the close links of all social systems, corruptive tendencies are to be combated with equal decisiveness on all levels and in each single system: in principle, the same rules must be applied to the administration, the political sphere and the private sector. With view of the increasing development of supranational systems and the progressing internationalisation, an optimal fight against corruption requires an extension of standards beyond national borders.

In view of these needs of an optimal fight against corruption, GRECO with its comprehensive approach has proved as an excellent institution. If the States united in this effort continue this way with determination, then the fight against corruption, despite its complexity and its origin in the *conditio humana,* will not be a hopeless tilt at windmills.

Appendix: Scheme of criminal and procedural provisions

	Al	B	BG	BIH	CRO	CY	CZ	D	DK	E	EW	F	Fin	GEO	GR	HR	Irl	IS	L	LT[1]	LV	N	NL	M	MD	MK	P	PL	RO	S	SK	Slo	UK	US
Subject of corruption																																		
Functional notion	+	?	?	+	+	+	+	+	+	-	-	+	?	-	+	+	+	?	+	-	+	-	+	-	+	+	+	+	+	+	?	+	-
Statutory notion	+	?	?	+	+	-	+	-	+	+	+	+	?	+	-	-	-	?	+	+	+	+	-	+	-	+	+	-	-	-	-	?	-	+
Elected person as public officials	+	?	+	+	+	+	+	-	+	+	+	+	?	+	-	+	+	+	+	+	+	+	+	-	+	+	-	+	+	+	+	?	-[2]	+
Bribery of elected persons as a special offence	-	?	-	+	-	-	?	+	-	-	-	-	-	-	+	-	-	-	-	-	-	+	+	+	-	+	+	-	-	-	-	?	-	+
Foreign officials	-	+	p	p	+	+	-	P	+	P	+	P	+	-	P	+	+	P	+	-	-	P	+	+	-	+	P	+	-	P	+	P	-	P
Object of corruption																																		
Material advantage	+	?	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	?	+	+
Intangible advantage	+	?	-	+	+	+	+	+	+	-	-	+	?	-	+	?	+	+	+	-	+	+	?	+	+	+	+	+	+	+	+	?	-	+
Third persons	-	?	+	-	P	+	P	+	+	+	-	-	?	-	+	P	+	-	-	+	-	+	-	+	-	-	+	-	-	-	+	?	-	+
Connection advantage / goal																																		
Corruption pact	-	-	-	-	-	-	-	-	-	-	-	?	?	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	?	?	P
Intentional connection	P	?	+	+	+	+	-	+	P	+	+	+	?	+	+	-	-	P	+	+	+	+	P	-	+	+	+	-	+	+	P	?	?	+
Objective connection	P	?	-	-	-	-	+	-	P	-	-	-	?	-	-	+	+	P	-	-	-	-	P	+	-	P	-	+	-	-	P	?	?	-
Legal nature of the influenced getion																																		
Illegal	+	?	+	+	+	+	+	+	+	+	+	+	?	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	?	?	+
Illegal + legal	+	?	+	+	+	+	+	+	+	-	+	+	?	+	-	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	?	?	+
Liability/Sanctions																																		
Criminal liability of legal persons	-	+	-	-	-	+	-	-	+	-	-	+	+	-	-	-	+	+	-	-	-	+	+	+	+	-	+	P	-	P	-	+	+	+
Special offences with aggravated sanctions	+	?	-	-	-	-	+	-	-	-	+	-	+	+	-	+	P	-	-	+	+	-	+	+	+	-	-	+	-	-	+	?	?	?
Confiscation	+	+	+	+	+	+	+	+	+	+	?	+	+	?	+	+	P	+	?	?	?	+	+	?	P	+		+	+	?	?	?	+	+
Private sector corruption	-	+	-	P[3]	+	+	-	P	+	+	+	+	+	+	P	+	+	-	?	-	+	-	+	+	-	+	+	-	+	+	+	+	+	P
Trading in influence	P	+	-	+	+	+	+	-	+	+	+	+	-	+	+	+	-	+	+	-	?	-	-	+	+	+	+	-	P	-	+	+	-	+
Money laundering	+	+	+	P	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+

[1] Based on the provisions of the Criminal Code in force at the time of the adoption of the GRECO-Report.
[2] In England and Wales bribery of elected persons is likely to be an common law offence.
[3] Only the Criminal Code of the Federation provides for the criminalization of „Forming a Prejudical Contract" (Art. 260).

	A	B	BE	BI	Cr	C	Cz	D	DI	E	EV	F	Fi	Ge	Gl	HI	Ir	IS	L	LT	LV	N	NL	M	MD	MK	P	PL	RO	S	SK	Slo	UK	US
Immunities																																		
Head of state	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	-	+	+	+	+	+	+	+	+	-	-	+	-
Members of Government and other public officials	+	+	+	-	+	-	-	-	-	-	+	+	+	+	+	-	-	-	+	+	-	-	+	-	P	+	+	+	+	+	-	-	-	-
Non-liability / inviolability for vote/ speech	+	+	+	+	+	?	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Additional inviolability for MP	+	+	+	+	+	+	?	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+	+	P	-
Immunity for judges of Constitutional Courts	+	-	+	+	+	-	+	-	-	+	+	-	-	+	-	+	-	-	-	+	+	-	-	-	?	+	+	+	+	?	+	+	-	-
Immunity for all judges	+	-	+	+	+	-	P	-	-	+	+	-	-	+	-	+	-	-	+	+	+	-	-	-	+	+	P	+	+	+	+	+	-	-
Plea-bargaining/ exemption from penalty	?	-	P	?	P	+	+	-	?	?	+	?	+	+	P	+	-	?	+	+	?	?	?	+	P	+	+	?	P	?	P	?	?	+
Duty of whistle-blowing																																		
All citizens	+	?	P	+	P	+	P	-	?	+	-	-	-	+	+	-	-	-	-	?	?	P	P	?	?	?	?	-	+	?	?	+	?	?
Public officials	+	?	+	+	+	+	?	-	+	+	+	+	-	+	+	P	P	P	+	?	?	-	P	?	P	P	+	-	P	?	?	P	?	+
Code of ethics	P	-	+	-	P	+	?	P	P	P	+	P	-	-	+	P	+	P	-	P	P	-	-	+	P	+	+	P	P	-	-	-	+	+
Special units																																		
Police	-	+	-	-	+	-	+	+	-	+	-	-	-	-	-	+	-	-	-	-	+	+	+	-	-	-	+	-	+	-	+	+	+	+
Prosecution	-	-	-	+	+	-		+	+	+	-	-	-	+	-	+	-	-	-	+	-	+	+	-	+	-	+	-	+	-	+	+	+	+
Prosecution																																		
Discretionary	-	P	-	-	-	+	-	-	-	-	-	+	-	?	-	-	+	-	+	-	-	-	+	+	-	-	-	-	-	-	-	?	+	+
Mandatory	+	P	+	+	+	-	+	+	+	+	+	-	+	?	+	+	-	+	-	+	+	+	-	-	+	+	+	+	+	+	+	?	-	-
Appointment of the PG with decisive participation of the judiciary	-	?	?	+	-	-	-	P	-	-	-	+	-	-	+	-	+	-	-	-	+	-	-	-	-	-	-	-	-	-	-	-	-	-
Organic dependency on government	-	-	-	-	-	-	-	+	+	+	+	+	+	-	-	-	-	+	+	-	-	-	-	-	-	-	-	+	+	+	-	-	?	+
Instruction in concrete case by political leadership	-	+		-	-	-	-	+	+	-	-	+	-	?	P	-	-	-	+	-	-	+	+	-	-	-	-	+	+	-	-	-	?	+
Instructions in concrete case by PG	?	+		-	-	+	?	+	+	+	-	?	+	+	-	+	+	+	?	+	+	?	+	-	+	+	+	+	+	P	+	?	+	+
Witness Protection Program	-	-	-	?	-	+	+	P	-	+	-	-	-	-	?	+	+	-	-	+	+	-	+	+	+	-	+	P	-	+	-	+	+	-
Corruption related data/ research	-	-	-	-	P	-	-	+	?	-	-	-	?	-	-	?	-	?	?	-	+	-	-	?	-	+	+	-	-	?	?	-	?	?

Legend:

AL - Albania
B - Belgium
BG - Bulgaria
BIH - Bosnia-Herzegovina
CRO - Croatia
CY - Cyprus
CZ - Czech Republic
D - Germany
DK - Denmark
E - Spain
EST - Estonia
FIN - Finland
GR - Greece
H - Hungary
IRL - Ireland
IS - Island
L - Luxembourg
LT - Lithuania
LV - Latvia
M - Malta
MD - Moldowa
MK - Macedonia
N - Norway
NL - Netherlands
P - Portugal
PL - Poland
RO - Romania
S - Sweden
SK - Slovakia
SLO - Slowenia
UK -United Kingdom
USA - United States of America

\+ - Rule exists
\- - Rule does not exist
p - Corresponding content is partially provided for.
? - No information in the GRECO-Report

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