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Group of States against corruption

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

(Theme I)

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I. INTRODUCTION

1. Moldova joined GRECO in 2001. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2003) 3E) at its 15th Plenary Meeting (13-17 October 2003) and the Second Round Evaluation Report (Greco Eval II Rep (2006) 1E) at its 30th Plenary Meeting (9-13 October 2006). The aforementioned Evaluation Reports, and the corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) covers the following themes:
 - **Theme I – Incriminations:** Articles 1a and b, 2 to 12, 15 to 17 and 19.1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1 to 6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and – more generally – Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Moldova on 15 and 16 November 2010, was composed of Mr Edmond DUNGA, Head of the Anticorruption Secretariat, Regional Anti-Corruption Initiative (RAI) in Sarajevo (Albania), and Mr Ernst GNAEGI, Head of the International Criminal Law Unit at the Federal Office of Justice (Switzerland). The GET was supported by Mr Michael JANSSEN from GRECO's Secretariat. Prior to the visit, the GET was provided with a comprehensive reply to the Evaluation Questionnaire (Greco Eval III (2010) 14F, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: Ministry of Justice, the Centre for Fighting Economic Crimes and Corruption (CCCEC), the anti-corruption unit of the Public Prosecutor's Office, the Chisinau Court of Appeal, the Supreme Court of Justice and the Ministry of the Interior (police). The GET also met with officials from non-governmental organisations (Anti-Corruption Alliance, Transparency International) and the Academy of Sciences.
5. The present report on Theme I of GRECO's 3rd Evaluation Round on Incriminations was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Moldovan authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Moldova in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of Party Funding - is set out in Greco Eval III Rep (2010) 8E-Theme II.

II. INCRIMINATIONS

Description of the situation

7. Moldova ratified the Criminal Law Convention on Corruption (ETS 173) on 14 January 2004 and the Convention entered into force in respect of Moldova on 1 May 2004 without any reservations. Moldova did however declare that “the provisions of the Convention will not be applicable on the territory effectively controlled by the institutions of the self-proclaimed Transnistrian Republic until the durable settlement of the conflict from this region.” The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) was ratified by Moldova on 22 August 2007 and entered into force in respect of Moldova on 1 December 2007 without any reservations.
8. The Moldovan Criminal Code (hereafter: CC) came into force on 12 June 2003. A number of provisions relating to bribery were amended in 2006 and 2009; the sanctions for active and passive bribery in the public sector were notably increased,¹ the sanctions for trading in influence reduced and a provision on aggravating circumstances concerning private sector bribery introduced.²

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

Definition of the offence

9. Section 324 CC defines *passive bribery* and section 325 CC the offence of *active bribery*. Both sections contain a basic provision (paragraph 1) and provisions for aggravated offences (paragraphs 2 and 3). In addition, when it comes to formulating their observations on the subject, the authorities have based themselves on the Supreme Court of Justice’s explanatory decision no. 5 of 30 March 2009³, pointing out that while these explanations have no binding force for courts, the latter usually comply with them.

Section 324 CC: Passive bribery

- 1) *Any person holding a position of responsibility who has demanded or received offers, money, securities, other goods or material advantages, or who has accepted services, privileges or advantages to which he or she is not entitled for performing, refraining from performing or delaying or facilitating the performance of an act which falls within the scope of his or her authority, or for carrying out an act contrary to his or her duties or for the award of a distinction, a function, a contract of supply or a favourable decision on the part of the authorities, shall be liable to a fine of between 1,000 and 3,000 conventional units and between 3 and 7 years’ imprisonment and shall be disqualified from holding office or from engaging in certain activities for a period of between 2 and 5 years.*

¹ Prison sentences and fines now run consecutively rather than concurrently.

² Section 333, paragraph 3, CC.

³ Supreme Court of Justice explanatory decision no. 5 of 30 March 2009, “on the application of the legislation on criminal liability for active and passive bribery”, published in the Official Gazette of the Supreme Court of Justice, No. 2, 2010. This decision is based on Act No. 789 of 26 March 1996 “on the Supreme Court of Justice”, Section 2e) of which states that the Court “ensures the standardisation of judicial practice, analyses judicial statistics and provides, of its own motion, explanations concerning issues relating to legal practice; such explanations do not involve any interpretation of laws and are not binding on judges”, and Section 16c) of which states that the Plenum of the Court “examines the results of the standardisation of judicial practice and adopts decisions of an explanatory nature”.

- 2) *Where the above-mentioned actions*
 - a) *repealed by Act No. 277 of 18.12.2008*
 - b) *were committed by two or more persons;*
 - c) *were accompanied by extortion of the goods and services referred to in paragraph (1) above;*
 - d) *involve significant amounts,*
the person concerned shall be liable to a fine of between 3,000 and 5,000 conventional units and to between 5 and 10 years' imprisonment and shall be disqualified from holding office or from engaging in certain activities for a period of between 2 and 5 years.
- 3) *Where the actions described in paragraphs (1) and (2) above*
 - a) *were committed by persons holding positions of high responsibility;*
 - b) *involve very significant amounts;*
 - c) *were committed in the interest of an organised gang or a criminal association,*
the person concerned shall be liable to between 7 and 15 years' imprisonment and to a fine of between 1,000 and 3,000 conventional units and shall be disqualified from holding office or from engaging in certain activities for a period of between 3 and 5 years.

Section 325 CC: Active bribery

- 1) *Anyone who has corrupted, either personally or through an intermediary, a person holding a position of responsibility by promising, giving or offering the goods and services specified in section 324 above and for the purposes referred to therein shall be liable to a fine of between 1,000 and 3,000 conventional units and to imprisonment for up to 5 years.*
- 2) *Where the above-mentioned actions*
 - a) *repealed by Act No. 277 of 18.12.2008*
 - b) *were committed by two or more persons;*
 - c) *involve significant amounts,*
the person concerned shall be liable to a fine of between 1,000 and 3,000 conventional units and to between 3 and 7 years' imprisonment.
- 3) *Where the actions described in paragraphs (1) and (2) above:*
 - a) *involve very significant amounts;*
 - b) *were committed in the interest of an organised gang or a criminal association,*
the person concerned shall be liable to a fine of between 1,000 and 3,000 conventional units and to between 6 and 12 years' imprisonment.
- 4) *A person who has promised, offered or supplied goods and services referred to in Art. 324 shall not be criminally liable if those goods and services were extorted from him or her or if that person has turned himself or herself in, without knowing that the criminal investigation authorities were aware of the offence.*

Elements of the offence

"Domestic public officials"

10. The provisions of Moldovan law on bribery use the terms "person holding a position of responsibility" and "person holding a position of high responsibility" – the latter being a sub-group of the former – which are defined in section 123, paragraphs 1 and 2, CC.⁴ The definition of a "person holding a position of responsibility" requires, *inter alia*, that the person be "assigned [...]"

⁴ In this report the term "public official" is used and is to be understood in the sense of "person holding a position of responsibility", unless otherwise specified.

certain rights and obligations with a view to exercising the functions of a public authority or functions related to administrative management or to economic/organisational activities”. According to the authorities, these terms refer to any decision-making public official who can and must take decisions and bear the consequences thereof, such as for example a tax inspector, a police officer, a chief accountant or a chief medical officer in a hospital or in a clinic.

Section 123 CC: Persons holding positions of responsibility

- 1) *“Persons holding positions of responsibility” shall mean persons who in an enterprise, institution or organisation under the authority of the State or local public administration or in a subdivision thereof are assigned, either permanently or temporarily, by law, appointment, election or delegation, certain rights and obligations with a view to exercising the functions of a public authority or functions related to administrative management or to economic/organisational activities.*
- 2) *“Persons holding positions of high responsibility” shall mean persons holding positions of responsibility whose method of appointment or election is governed by the Constitution of the Republic of Moldova and by institutional acts, as well as persons to whom such persons holding positions of responsibility have delegated their powers.*

11. According to the explanations provided in Supreme Court of Justice decision no. 5 (paragraphs 14 to 16), staff in enterprises, institutions or organisations who perform professional or technical functions without at the same time being assigned administrative management or economic/organisational functions, as required by section 123 CC, cannot be prosecuted for taking bribes. Such persons, e.g. teachers, physicians, public accountants, other employees (examples provided by the authorities), may be held criminally liable under section 330 CC on “receipt of illicit rewards by a civil servant” – if they have civil servant status⁵ – or, failing that, under section 256 CC on “receipt of illicit rewards for the performance of a public service”.

Section 330 CC: Receipt of illicit rewards by a civil servant

- 1) *Any civil servant or official of a public institution, enterprise or organisation, with the exception of persons holding positions of responsibility, who has received an illicit reward or certain material advantages for having performed acts or rendered services which fall within the scope of his or her authority shall be liable to a fine of between 200 and 400 conventional units or to up to 2 years’ imprisonment, in each case with or without disqualification from holding office or from engaging in certain activities for a period of up to 5 years.*
- 2) *Where these actions:*
 - a) *(repealed)*
 - b) *involve significant amounts,*
the person concerned shall be liable to a fine of between 400 and 1,000 conventional units or to up to 4 years’ imprisonment, in each case with or without disqualification from holding office or from engaging in certain activities for a period of up to 5 years.

Section 256 CC: Receipt of illicit rewards for the performance of a public service

- 1) *Any employee of an enterprise, institution or organisation who obtains by extortion an illicit reward for the performance of work or the provision of a service in the fields of commerce,*

⁵ Under the “Civil Service and Status of Civil Servants Act”, No. 158 of 4 July 2008, published on 23 December 2008.

food supplies, social services, transport, housing administration, public health or other service, if such work or service is part of the professional duties of the employee, shall be liable to a fine of up to 200 conventional units or to between 120 and 180 hours of community service.

2) *Where these acts:*

a) *(repealed)*

b) *were committed by two or more persons;*

c) *caused significant damage or loss,*

the person concerned shall be liable to a fine of between 200 and 400 conventional units or to between 180 and 240 hours of community service or to up to 2 years' imprisonment.

12. As regards the term “person holding a position of high responsibility”, Supreme Court of Justice decision no. 5 (paragraph 15) states that this refers to article 72, paragraph 3, of the Constitution and covers, *inter alia*, the Speaker and Deputy Speakers of Parliament and members of Parliament, the President of the Republic, the Prime Minister and members of the government, judges, members of the Judicial Service Commission, the Prosecutor General and the prosecutors subordinate to him or her, members of the Court of Auditors, the President and judges of the Constitutional Court, mayors and local elected officials.

“Promising, offering or giving” (active bribery)

13. Section 325 CC uses the terms “promise”, “offer” and “give”.

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

14. Section 324 CC mentions “demanding” and “receiving” offers, money, securities, other goods or material advantages and “accepting” services, privileges or advantages. According to the authorities, the word “demand” corresponds to “request” and “acceptance of a promise” is also covered by these provisions, in accordance with Supreme Court of Justice decision no. 5 (paragraph 3.6) which states that “in order for the offence of passive bribery to be deemed to have been committed, it is sufficient that the person concerned has accepted the promise of these advantages, etc.”.

“Any undue advantage”

15. The element “any undue advantage” is transposed into Moldovan law through the expression “demanded or received offers, money, securities, other goods or material advantages, or who has accepted services, privileges or advantages to which he or she is not entitled”, in section 324, paragraph 1, CC on passive bribery. As regards active bribery, section 325, paragraph 1, CC refers to this same clause. According to the authorities, the aforementioned clause encompasses material and immaterial advantages. Under Supreme Court of Justice decision no. 5 (paragraphs 3.5 and 3.6), “the term “privilege” means an advantage, exemption from an obligation (vis-à-vis the State), conferral of a right or distinction” while “the term “advantage” means a profit (benefit), favour or privilege enjoyed by a person. The advantage need not be of a material nature. Such undue advantages may take the form of unjustified bonuses for those close to the person holding a position of responsibility, holidays, interest-free loans, food and drink, preferential medical treatment or better career prospects.”

16. The authorities informed the GET that the advantage must be “undue”. According to the explanations provided in Supreme Court of Justice decision no. 5 (paragraph 5), “if the guilty party demands or receives without registering it a sum of money constituting a lawful payment or if this sum is greater than the lawful amount, such acts do not constitute a passive bribery offence, but rather abuse of authority or fraud, as the case may be.” Decision no. 5 further states, in paragraph 4, that although the Criminal Code provisions on bribery do not require the advantage to be of a specific value, “the court must have regard to the provisions of section 14, paragraph 2, CC which state that ‘an action or omission which, although it possesses all the formal elements of an act referred to herein, is inconsequential and therefore does not meet the prejudicial degree of an offence shall not be considered an offence’.”⁶

“Directly or indirectly”

17. Whereas section 325, paragraph 1, CC states that active bribery may be committed either directly or “through an intermediary”, section 324 CC makes no such stipulation in relation to passive bribery. The authorities did nevertheless inform the GET that section 324 also covers direct and indirect acts, referring to the explanations provided in Supreme Court of Justice decision no. 5 (paragraph 2.2) which states that “the term ‘receive’ means taking or entering into possession of money or undue advantages supplied by the bribe-giver (or by another person acting on his or her behalf). ‘Receive’ should not be understood as meaning that the money or advantages offered for those services must be taken by the bribe-taker in person.”

“For himself or herself or for anyone else”

18. The provisions on active bribery and passive bribery do not specify whether the advantage must be intended for the public official himself or herself. Referring to Supreme Court of Justice decision no. 5, the authorities indicated that bribery is also deemed to have occurred if the advantage is intended for or given to a third party. Under paragraph 2.2 of this decision, “if the undue advantages in the form of money, other securities (goods) or services were offered to those close to the person holding a position of responsibility or received by them with the consent of the bribe-taker or if the person did not refuse the offers and used his or her official position to favour the bribe-giver, the acts of the person holding a position of responsibility will be categorised as passive bribery, arising from the act of ‘receiving’.” Similarly, paragraph 3.6 of the decision states that “such undue advantages may take the form of unjustified bonuses for those close to the person holding a position of responsibility...”.

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

19. Moldovan law explicitly covers both positive acts and omissions by a public official,⁷ provided that they are “within the scope of his or her authority” or “contrary to his or her duties.” In this respect, the Supreme Court of Justice states in its decision no. 5 (paragraph 6) that “the court must have regard to the fact that the offence of passive corruption is deemed to have been committed if the actions or omissions (...) are within the scope of his or her official powers or are contrary to his or

⁶ Section 15 CC states that the prejudicial degree of the offence is to be determined on the basis of the elements of the offence (objet, objective side, subject and subjective side of the offence). For example, under section 11 of the “Act on the Code of Conduct for Civil Servants” (No. 25 of 22 February 2008, published on 11 April 2008), a civil servant may, by way of exception, accept symbolic gifts according to the rules of courtesy; such civil servants cannot therefore be held criminally liable for receiving symbolic gifts of this kind, unless after receiving them, they commit illegal acts or omissions in the course of their duties.

⁷ See section 324, paragraph 1, CC: “for performing, refraining from performing or delaying or postponing the performance of an action”. As regards active bribery, section 325, paragraph 1, CC refers to this same clause.

her official responsibilities. The court must establish what the person's powers are, and include them in the sentence, with a mandatory reference to the relevant laws and/or administrative acts." The Supreme Court goes on to state, in paragraph 23 of its decision, that "if the person in question demands, receives or accepts goods or advantages to which he or she is not entitled but the acts in favour of the bribe-giver that he or she is required to perform are not within the scope of his or her authority (and he or she cannot exercise that authority), but he or she claims to have the right to perform them or not to perform them, such behaviour must be regarded as fraud (section 190 CC). If the said person insists or implies that he or she has some influence over the public official or that he or she is in a position to influence him or her through a third party, their behaviour shall be considered as trading in influence (section 326 CC)." The authorities added that, should a public official actually perform an act which is not within the scope of his or her duties, he or she may, where appropriate, be held criminally liable under section 328 CC on "Abuse of authority and exceeding official powers".

Section 328 CC: Abuse of authority and exceeding official powers

- 1) *Any person holding a position of responsibility who, by committing acts which obviously exceed the limits of his or her rights and powers under the law, causes substantial damage to the public interest or to the legitimate rights and interests of individuals or legal entities, shall be liable to a fine of between 150 and 400 conventional units or to up to 3 years' imprisonment, in both cases with or without disqualification from holding office or from engaging in certain activities for a period of up to 5 years.*
- (...)

"Committed intentionally"

20. The authorities informed the GET that acts of active bribery and passive bribery can only be committed with intention.

Sanctions

21. Passive bribery is punishable by a fine ranging from 1,000 to 3,000 conventional units (20,000 to 60,000 Moldovan lei / MDL; approximately €1,300 to €3,900) and imprisonment for between 3 and 7 years, with disqualification from holding office or from engaging in certain activities for a period of between 2 and 5 years. If there are aggravating circumstances, the sentence increases to between 5 and 10 years' imprisonment (where the offence was committed by two or more persons, if it was accompanied by extortion of advantages or involves significant amounts) or between 7 and 15 years' imprisonment, with disqualification from holding office or from engaging in certain activities for a period of between 3 and 5 years (where very significant amounts are involved or where the offence was committed by persons holding positions of high responsibility or in the interest of an organised gang or a criminal association). The authorities explained that under section 126 CC, "significant amounts" currently range from MDL 50,000 to 100,000 (approximately €3,250 to €6,500) and "very significant amounts" are greater than MDL 100,000 (approximately €6,500).
22. Active bribery is punishable by a fine ranging from 1,000 to 3,000 conventional units and by up to 5 years' imprisonment. Where there are aggravating circumstances, the sentence increases to between 3 and 7 years' imprisonment (where the offence was committed by two or more persons or involves significant amounts) or to between 6 and 12 years (where the offence involves very significant amounts or was committed in the interest of an organised gang or a criminal

association). Section 325 CC makes no mention of disqualification from holding office or from engaging in certain activities, but the authorities indicated that under section 65, paragraph 3, CC, such a sanction can nevertheless be applied as an additional penalty provided that “in view of the nature of the offence committed by the guilty party in the course of his or her duties or activities, the court finds that he or she cannot be allowed to retain the right to perform certain duties or to engage in certain activities.”

23. Similar sanctions exist for other comparable criminal offences such as abuse of power or abuse of official position (section 327 CC) or abuse of authority and exceeding official powers (section 328 CC).

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

24. The authorities informed the GET that members of domestic public assemblies are covered by sections 324 and 325 CC which criminalise active and passive bribery involving “persons holding positions of responsibility”. They point out that members of domestic public assemblies possess the status of “persons holding positions of high responsibility”, as defined in section 123, paragraph 2, CC, namely “persons holding positions of responsibility whose method of appointment or election is governed by the Constitution of the Republic of Moldova and by institutional acts, as well as persons to whom such persons holding positions of responsibility have delegated their powers.” In this context, the authorities refer to the explanations provided by the Supreme Court of Justice in decision no. 5 (paragraph 15), according to which this concept covers, *inter alia*, the Speaker and Deputy Speakers of Parliament, members of Parliament and local elected officials. In this connection, they cite a Supreme Court of Justice decision of 28 April 2010 upholding the conviction of an MP for committing a trading in influence offence, in which the MP in question was described as a “person holding a position of high responsibility”. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to the bribery of members of domestic public assemblies. It should be noted that their status as “persons holding positions of high responsibility” constitutes an aggravating circumstance in the case of passive bribery, with the result that the more severe sanctions set forth in section 324, paragraph 3, CC – 7 to 15 years’ imprisonment and a fine ranging from 1,000 to 3,000 conventional units, with disqualification from holding office or from engaging in certain activities for a period of between 3 and 5 years – apply.

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

25. The CC does not contain any provisions explicitly criminalising bribery of foreign public officials. According to the authorities, the general provisions of sections 324 and 325 CC – taken in conjunction with the provisions of section 11 CC on territorial jurisdiction⁸ – could be applied if necessary. If so, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials would also apply to bribery of foreign public officials. There are no court decisions/case law concerning bribery of foreign public officials.

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

26. The CC does not contain any provisions explicitly criminalising bribery of members of foreign public assemblies. According to the authorities, the general provisions of sections 324 and 325 CC – taken in conjunction with the provisions of section 11 CC on territorial jurisdiction – could be applied if necessary. If so, the elements of the offence and the applicable sanctions detailed

⁸ See paragraphs 43 and 44 below.

under bribery of domestic public officials would also apply to bribery of members of foreign public assemblies. There are no court decisions/case law concerning bribery of members of foreign public assemblies.

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

27. Active bribery and passive bribery in the private sector are criminalised under sections 333 and 334 CC. The provisions of section 333 CC deal with passive bribery and at the same time set out the elements common to active and passive bribery; section 334 CC sets out the specific elements and sanctions for active bribery.

Section 333 CC: Taking bribes

1) *A person responsible for a commercial, social or other non-governmental organisation who has taken a bribe in the form of money, securities, other goods or material advantages or accepted services or privileges to which he or she is not entitled for performing or refraining from performing or for delaying or facilitating the performance of an act in the interest of the bribe-giver or persons whom he or she represents provided that such action falls within the scope of the authority of the bribe-taker shall be liable to a fine of between 500 and 1,500 conventional units or to up to 3 years' imprisonment and in both cases shall be disqualified from holding office or from engaging in certain activities for a period of up to 5 years.*

2) *Where the above-mentioned actions*

a) *repealed by Act No.277 of 18.12.2008;*

b) *were committed by two or more persons;*

c) *were accompanied by extortion of the goods and services referred to in paragraph (1) above;*

d) *involve significant amounts,*

the person concerned shall be liable to a fine of between 1,000 and 3,000 conventional units or to between 2 and 7 years' imprisonment and in both cases shall be disqualified from holding office or from engaging in certain activities for a period of between 2 and 5 years.

3) *Where the actions referred to in paragraphs (1) and (2) above:*

a) *involve very significant amounts;*

b) *were committed in the interest of an organised gang or a criminal association, the penalty shall be imprisonment for 3 to 10 years.*

Section 334: Giving bribes

1) *Giving bribes shall be punishable by a fine of between 500 and 1,000 conventional units or by up to 3 years' imprisonment.*

2) *Where the above-mentioned actions*

a) *repealed by Act No. 277 of 18.12.2008;*

b) *were committed by two or more persons;*

c) *involve significant amounts,*

the person concerned shall be liable to a fine of between 1,000 and 2,000 conventional units or to up to 5 years' imprisonment.

3) *Where the actions referred to in paragraphs (1) and (2) above:*

a) *involve very significant amounts;*

b) *were committed in the interest of an organised gang or a criminal association, the penalty shall be imprisonment for 3 to 7 years.*

4) *The person who gave the bribe shall not be criminally liable if the bribe was extorted from him or her or if that person has turned himself or herself in, without knowing that the criminal investigation authorities were aware of the offence.*

Elements of the offence

28. The elements of the offence detailed under bribery of domestic public officials also apply to bribery in the private sector, in accordance with the particular elements listed below, except for certain forms of corrupt behaviour: in contrast to section 324 CC, section 333 CC makes no mention of “requesting” an advantage or of the bribe-taker receiving, accepting or requesting an “offer”; as regards active bribery, section 334 CC mentions only “giving” bribes, whereas section 325 CC also covers “offering” and “promising”, as well as bribery committed through an intermediary.

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

29. Section 333 CC uses the terms “person responsible for a commercial, social or other non-governmental organisation”. According to the definition provided in section 124 CC, such persons have certain rights or obligations “with a view to performing administrative management or economic/organisational functions or activities”. The authorities explained that this concept covers any manager of a commercial company or non-profit-making organisation⁹, the chief accountant, other senior executives and persons responsible for these private legal entities.

Section 124 CC: Person responsible for a commercial, public or other non-governmental organisation

A person responsible for a commercial, social or other non-governmental organisation or of a sub-division of such an organisation shall be a person who, either permanently or temporarily, by appointment, election or delegation, acquires certain rights or obligations with a view to performing administrative management or economic/organisational functions or activities.

“In the course of business activity; In breach of their duties”

30. Section 333 CC does not expressly require the act of bribery to have been committed in the course of business activity, but states that the person acting on behalf of the private sector entity must perform the act “in the interest of the bribe-giver or persons whom he or she represents” and that the action or omission must be “within the scope of the authority of the bribe-taker”.

Sanctions

31. Passive bribery in the private sector is punishable by a fine of between 500 and 1,500 conventional units (MDL 10,000 to 30,000; approximately €650 to €1,950) or up to 5 years’ imprisonment, with disqualification from holding office or from engaging in certain activities for a period of up to 5 years. Where the offence was committed by two or more persons, accompanied by extortion of advantages or involves significant amounts, punishment takes the form of a fine of between 1,000 and 3,000 conventional units (MDL 20,000 to 60,000; approximately €1,300 to €3,900) or 2 to 7 years’ imprisonment, with disqualification from holding office or from engaging in certain activities for a period of between 2 and 5 years; where the amounts involved are very significant or the offence was committed in the interest of an organised gang or a criminal association, the penalty is imprisonment for 3 to 10 years.

⁹ As defined in sections 180 and 181 of the Civil Code, which include associations, foundations and institutions.

32. Active bribery in the private sector is punishable by a fine of between 500 and 1,000 conventional units (MDL 10,000 to 20,000; approximately €650 to €1,300) and up to 3 years' imprisonment. Where the offence was committed by two or more persons or involves significant amounts, the law prescribes a penalty in the form of a fine of between 1,000 and 2,000 conventional units (MDL 20,000 to 40,000; approximately €1,300 to €2,600) or 2 to 5 years' imprisonment; where the amounts involved are very significant or the offence was committed in the interest of a criminal gang or a criminal association, the penalty is 3 to 7 years' imprisonment. Section 334 CC makes no mention of disqualification from holding office or from engaging in certain activities, but according to the authorities, under section 65, paragraph 3, CC, such a sanction can nevertheless be applied as an additional penalty provided that "in view of the nature of the offence committed by the guilty party in the course of his or her duties or activities, the court finds that he or she cannot be allowed to retain the right to perform certain duties or to engage in certain activities."

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

33. The CC does not contain any provisions explicitly criminalising bribery of officials of international organisations. According to the authorities, the general provisions of sections 324 and 325 CC – taken in conjunction with the provisions of section 11 CC on territorial jurisdiction¹⁰ – could be applied if necessary. If so, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials would also apply to bribery of officials of international organisations. There are no court decisions/case law concerning bribery of officials of international organisations.

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

34. The CC does not explicitly criminalise bribery of members of international parliamentary assemblies. According to the authorities, the general provisions of sections 324 and 325 CC – taken in conjunction with the provisions of section 11 CC on territorial jurisdiction - could be applied if necessary. If so, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials would also apply to bribery of members of international parliamentary assemblies. There are no court decisions/case law concerning bribery of members of international parliamentary assemblies.

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

35. The CC does not contain any provisions explicitly criminalising bribery of judges and officials of international courts. According to the authorities, the general provisions of sections 324 and 325 CC – taken in conjunction with the provisions of section 11 CC on territorial jurisdiction - could be applied if necessary. If so, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials would also apply to bribery of judges and officials of international courts. There are no court decisions/case law concerning bribery of judges and officials of international courts.

Trading in influence (Article 12 of ETS 173)

36. Trading in influence is considered a criminal offence under section 326 CC, but only in its passive form.

¹⁰ See paragraphs 43 and 44 below.

Article 326 CC: Trading in influence

- 1) *Any person having or claiming to have some influence over a functionary who deliberately receives or extorts money, securities, other goods or material advantages or accepts services, goods or advantages, either personally or through an intermediary, for his or her own benefit or that of another person, with a view to having the said functionary perform or refrain from performing an act which falls within the scope of his or her authority, irrespective of whether such acts were performed or not, shall be liable to a fine of between 500 and 1,500 conventional units or to up to 5 years' imprisonment.*
- 2) *Where the influence promised has been brought to bear or the desired result has been achieved and if the actions envisaged above:*
 - a) *repealed;*
 - b) *were committed by two or more persons;*
 - c) *involve goods or advantages on a large scale,**the person concerned shall be liable to a fine of between 1,000 and 3,000 conventional units or to between 2 and 6 years' imprisonment.*
- 3) *The person concerned shall be liable to 5 to 10 years' imprisonment and to a fine of between 500 and 1,500 conventional units:*
 - a) *where the actions referred to in paragraphs (1) and (2) involve goods or advantages on an especially large scale;*
 - b) *where the actions referred to in paragraphs (1) and (2) were committed in the interest of an organised criminal gang or a criminal association.*

Elements of the offence

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

37. This provision is transposed into section 326 CC by use of the words: "having or claiming to have some influence over a functionary who deliberately [...] with a view to having the said functionary perform or refrain from performing an act which falls within the scope of his or her authority, irrespective of whether such acts were performed or not". The authorities confirmed that in order to establish that trading in influence occurred, it is not relevant whether the influence was actually exerted or if it led to the intended result; if so, however, such situations constitute aggravating circumstances. The term "improper" is not explicitly transposed into section 326, which requires the person concerned to have or claim to have "some influence".

Other constitutive elements

38. The constitutive elements of bribery offences largely apply with regard to passive trading in influence. However, only "receiving" and "extorting" advantages are mentioned and not request without the element of extortion or acceptance of an offer or promise. Explicit reference is made, however, to indirect commission of this offence and also to third party beneficiaries. As regards the persons referred to in section 326 CC, the latter criminalises trading in influence over "functionaries"; according to the authorities, this concept covers all budget-financed employees, whether or not they are civil servants, including persons holding positions of responsibility.

Sanctions

39. Passive trading in influence is punishable by a fine of between 500 and 1,500 conventional units (MDL 10,000 to 30,000; approximately €650 to €1,950) or up to 5 years' imprisonment. If the influence was actually exerted or if it led to the intended result, the penalties increase in the following aggravating circumstances: where the offence was committed by two or more persons or if significant amounts are involved, the law provides a sanction in the form of a fine ranging from 1,000 to 3,000 conventional units (MDL 20,000 to 60,000; approximately €1,300 to €3,900) or 2 to 6 years' imprisonment; where very significant amounts are involved or if the offence was committed in the interest of an organised gang or a criminal association, the penalty is a fine ranging from 500 to 1,500 conventional units (MDL 10,000 to 30,000; approximately €650 to €1,950) and 5 to 10 years' imprisonment.

Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2, and Articles 2 and 3 of ETS 191) and bribery of foreign arbitrators (Article 4 of ETS 191)

40. Bribery of domestic or foreign arbitrators is not explicitly criminalised. According to the authorities, however, arbitrators are covered by the term "person responsible for a commercial, social or other non-governmental organisation", as defined in section 124 CC, namely a "person who, either permanently or temporarily, by appointment, election or delegation, acquires certain rights or obligations". The term "arbitrator" is defined in the "Arbitration Act"¹¹ as a "natural person elected or appointed by parties to a dispute for the purpose of settling that dispute through arbitration". According to the authorities, the provisions on private sector bribery (sections 333 and 334 CC) therefore also apply to domestic arbitrators, and where appropriate to foreign arbitrators, under section 11 CC on territorial jurisdiction.¹² If so, the elements of the offence and the applicable sanctions detailed under bribery in the private sector would also apply to bribery of domestic arbitrators and, where appropriate, foreign arbitrators. There are no court decisions/case law concerning bribery of domestic or foreign arbitrators.

Bribery of domestic jurors (Article 1, paragraph 3, and Article 5 of ETS 191) and bribery of foreign jurors (Article 6 of ETS 191)

41. Bribery of domestic and foreign jurors is not a criminal offence. The authorities pointed out that there were no domestic jurors in the Moldovan judicial system.

Other questions

Participatory acts

42. Aiding and abetting the commission of all of the above-mentioned criminal offences is criminalised under Moldovan legislation. The same sanctions can be imposed on aiders and abettors as on the principal offender.

Section 41 CC: Participation

Participation shall be the intentional co-operation of two or more persons in the commission of an intentional offence.

¹¹ Act No. 23 of 22 February 2008.

¹² See paragraphs 43 and 44 below.

Section 42 CC: Participants

- 1) *Participants shall be persons who contribute to the commission of an offence as perpetrators, organisers, instigators or accomplices.*
- 2) *Perpetrators shall be persons who have committed an offence either personally or through persons not subject to criminal liability because of their age or non-liability or for other reasons set forth herein.*
- 3) *Organisers shall be persons who have organised the commission of the offence or managed its commission as well as persons who have formed an organised criminal gang or a criminal organisation or managed the activities thereof.*
- 4) *Instigators shall be persons who have instructed another person, by any means whatsoever, to commit an offence.*
- 5) *Accomplices shall be persons who have contributed to the commission of an offence by giving advice and instructions, who have supplied information and the necessary means or have removed certain obstacles to the commission of the offence, persons who have promised in advance to favour the perpetrator of the offence, to hide the instruments or any other means used to commit the offence and to remove all traces of the offence, to hide the proceeds of the crime, and lastly persons who have promised in advance to purchase or dispose of such proceeds.*
- 6) *Participants must have all the characteristics of the subject of the offence.*

Jurisdiction

43. Under the relevant provisions of the general part of the Criminal Code which apply to all criminal offences, jurisdiction is first established over acts committed within the territory of Moldova by Moldovan or foreign citizens or stateless persons (principle of territoriality); see paragraphs 1, 5 and 6 of section 11 CC which also include offences committed in the territorial waters and air space of Moldova, aboard a Moldovan vessel or aircraft while in foreign waters or air space, or aboard a Moldovan military vessel or military aircraft, regardless of the location of such vessel or aircraft. The principle of territoriality also applies if only part of the offence was committed in Moldova, see section 12, paragraph 2, CC.

Section 11 CC: Application of criminal law in space

- 1) *Any person who has committed offences within the territory of the Republic of Moldova shall be held criminally liable in accordance with the present Code.*
- 2) *The present Code shall apply to offences committed abroad by Moldovan citizens or stateless persons ordinarily resident within the territory of the Republic of Moldova.*
- 3) *Offences committed abroad by foreign citizens or stateless persons not resident within the territory of the Republic of Moldova shall be punished in accordance with the present Code if the offences are detrimental to the interests of the Republic of Moldova or to the peace and security of mankind, if they constitute war crimes or if they are mentioned in the international treaties to which the Republic of Moldova is a party, provided that the perpetrators of the offences have not been subjected to punishment in another State.*
- 4) *The criminal law shall not cover offences committed by diplomatic representatives of other States or by other persons who do not come under the criminal jurisdiction of the Republic of Moldova under international treaties.*
- 5) *Offences committed in territorial waters or air space of the Republic of Moldova shall be deemed to have been committed within the territory of the Republic of Moldova. The present Code shall apply to offences committed aboard a Moldovan vessel or aircraft while in foreign waters or air space, unless otherwise stipulated by international treaties to which*

the Republic of Moldova is a party.

- 6) *The present Code shall apply to offences committed aboard a Moldovan military vessel or military aircraft, regardless of the location of such vessel or aircraft.*
- 7) *Criminal penalties for and records of crimes committed outside the Republic of Moldova shall be taken into consideration under the present Code when individualising the penalty for a new crime committed by the same person within the territory of the Republic of Moldova and when settling amnesty issues on terms of reciprocity based on a court decision.*

Section 12 CC: Place of commission of offences under the Criminal Code of Moldova

1) *Offences shall be deemed to have been committed at the place where the prejudicial action (omission) was committed, irrespective of the time when the consequences occurred.*

2) *The place of commission of a transnational offence shall be designated as such if:*

- a) *the offence was committed within the territory of the Republic of Moldova and within the territory of at least one more State;*
- b) *the offence was committed within the territory of the Republic of Moldova but a substantial part of the organisation and control thereof took place in another State and vice versa;*
- c) *the offence was committed within the territory of the Republic of Moldova, with the involvement of an organised criminal gang or a criminal association that is involved in criminal activity in more than one State and vice versa;*
- d) *the offence was committed within the territory of Moldova but had serious consequences in another State and vice-versa.*

44. As regards offences committed abroad, the provisions of section 11 CC establish jurisdiction over, *inter alia*:

- criminal offences committed by Moldovan citizens or stateless persons ordinarily resident in Moldova (paragraph 2);

- criminal offences committed by foreign citizens or stateless persons not resident in Moldova, if the offences are detrimental to the interests of the Republic of Moldova or to the peace and security of mankind, if they constitute war crimes or if they are mentioned in the international treaties to which Moldova is a party, provided that the perpetrators of the offences have not been subjected to punishment in another State (paragraph 3).

According to the authorities, the clause in section 11, paragraph 3, CC “offences committed abroad (...) if they are mentioned in the international treaties to which the Republic of Moldova is a party” also applies to bribery and covers the obligations set forth in Article 17, paragraph 1.b and 1.c, of the Criminal Law Convention on Corruption (ETS 173).

45. The authorities informed the GET that as yet there are no court decisions/case law concerning jurisdiction over bribery offences.

Statute of limitations

46. The period of limitation is determined by the severity of sanctions which can be imposed for the offence in question¹³. Accordingly, the limitation period provided for active and passive bribery offences both in the public and private sectors, as well as for passive trading in influence is 5

¹³ See section 60 CC.

years. If there are aggravating circumstances, as specified in sections 324, paragraph 3, and 325, paragraph 3, CC, the period of limitation increases to 15 years. The period of limitation runs from the time of the commission of the offence until the day when the judgement becomes legally enforceable. If the person commits a further offence, the period of limitation will be calculated for each offence separately.

Defences

47. A special defence is provided for active bribery offences committed in the public or private sector provided that the bribe was extorted from the bribe-giver or the latter turned himself or herself in, “without knowing that the criminal investigation authorities were aware of the offence”.¹⁴ The bribe-giver will in that case be exempt from criminal liability. Explanatory decision no. 5 of the Supreme Court of Justice (paragraph 24) states that the bribe-giver’s confession “must be made by the bribe-giver in person, either verbally or in writing, to the criminal investigation authority, which was unaware of these facts” or to “the public authority, to the heads of the institutions or State organisations where the person who took the bribe performs his or her duties”.

Statistics

48. The authorities have provided the following data on the number of persons accused, brought to justice and convicted for corruption and related offences during the period 2007 - 2010 (June):

Section of the CC	Persons accused				Persons brought to justice				Persons convicted			
	2007	2008	2009	2010 (6 mths)	2007	2008	2009	2010 (6 mths)	2007	2008	2009	2010 (6 mths)
324	207	174	96	113	59	82	36	30	34	41	22	13
325	61	40	31	10	57	23	20	5	35	21	9	1
326	95	112	98	71	62	78	76	46	35	50	59	34
327	223	176	175	99	112	79	64	35	44	43	21	75
328	235	216	215	92	118	109	73	41	36	48	19	13
330									29	11	7	3
256										5	0	2
333	72	21	10	8	12	11	4	1		4	2	1
334	4	8	0	1	0	4	1	0		0	0	0

III. ANALYSIS

49. The Moldovan Criminal Code (hereafter: CC), in force since 2003 and last amended, as regards the provisions on bribery, in 2009, covers passive and active bribery offences committed in the public (sections 324 and 325 CC) and private sectors (sections 333 and 334 CC) as well as passive trading in influence (section 326 CC). The GET identified a number of shortcomings in the existing system as compared with the standards of the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) and its Additional Protocol (ETS 191), which came into force, in respect of Moldova, in 2004 and 2007 respectively. Generally speaking, the offences of bribery and trading in influence lack coherence and clarity, mainly because of the intermingling of provisions inherited from the former Criminal Code with more recent provisions. The authorities based their comments in this respect primarily on the Supreme Court of Justice’s

¹⁴ See sections 325, paragraph 4, and 334, paragraph 4, CC.

explanatory decision no. 5 of 30 March 2009,¹⁵ while at the same time indicating that although these explanations are not binding on the courts, the latter usually comply with them. The GET takes due note of this explanatory decision in its assessment of the relevant provisions, but considers that the actual wording of the legislation on bribery must be unambiguous and a clear, foreseeable, coherent and comprehensive legal framework put in place, in keeping with the Convention.

50. The GET notes, firstly, that the terms “person holding a position of responsibility” and “person holding a position of high responsibility” – the latter being a sub-group of the former – are used to determine the possible perpetrators of corruption offences in the public sector.¹⁶ The said terms are defined in section 123, paragraphs 1 and 2, CC¹⁷ which requires, *inter alia*, that the person be “assigned [...] certain rights and obligations with a view to exercising the functions of a public authority or functions related to administrative management or economic/organisational activities”. As for the term “person holding a position of high responsibility”, Supreme Court of Justice decision no. 5 indicates that this refers to article 72, paragraph 3, of the Constitution and covers, *inter alia*, the Speaker and Deputy Speakers of Parliament and members of Parliament, the President of the Republic, the Prime Minister and members of the government, judges, members of the Judicial Service Commission, the Prosecutor General and the prosecutors subordinate to him or her, members of the Court of Auditors, the President and judges of the Constitutional Court, mayors and local elected officials. The GET is satisfied with these explanations and concludes from them that, *inter alia*, bribery of mayors, ministers, judges, prosecutors – as required by Article 1.a of the Convention – as well as members of Parliament and local assemblies – in accordance with Article 4 of the Convention – is a criminal offence.
51. That said, the GET is concerned that the definition of a “person holding a position of responsibility” requires that person to exercise the functions of a public authority or functions related to administrative management or economic/organisational activities. The authorities explained that this concept covers any “decision-making” public official “who can and must take decisions and bear the consequences thereof”. According to the explanations provided by the authorities, by legal practitioners interviewed during the on-site visit and by Supreme Court of Justice decision no. 5, persons who have not been assigned such functions and perform purely professional or technical duties for a public entity, such as, for example, teachers, physicians, public accountants, registrars and other employees, cannot therefore be held criminally liable for bribery offences, but only, where appropriate, for “receipt of illicit rewards by a civil servant” (section 330 CC) – provided that they have civil servant status¹⁸ – or for “receipt of illicit rewards for the performance of a public service” (section 256 CC). In this respect, the GET notes that these last provisions provide for significantly weaker sanctions than the provisions on bribery,¹⁹ that they do not criminalise active forms of such offences (namely giving, offering or promising an advantage) and that they contain several restrictions as compared with the requirements of

¹⁵ Supreme Court of Justice explanatory decision no. 5 of 30 March 2009, “on the application of the legislation on criminal liability for active and passive bribery”, published in the Official Gazette of the Supreme Court of Justice, No. 2, 2010 and based on Sections 2 e) and 16 of Act No. 789 of 26 March 1996 “on the Supreme Court of Justice”.

¹⁶ By contrast, the provisions of section 326 CC on trading in influence use the term “functionary”; see paragraph 61, below.

¹⁷ In this report, the term “public official” is used and is to be understood in the sense of “person holding a position of responsibility”.

¹⁸ Under the “Civil Service and Status of Civil Servants Act”, Act No. 158 of 4 July 2008, published on 23 December 2008.

¹⁹ Accordingly, section 330 CC provides for a fine or imprisonment for up to 2 years or, in aggravating circumstances, up to 4 years (the penalties provided for in section 256 CC are even less onerous), whereas section 324 CC provides, in the case of passive bribery offences, for a fine *and* imprisonment for up to 7 years or, in aggravating circumstances, up to 15 years.

Articles 2 and 3 of the Convention.²⁰ The GET further wishes to point out that section 330 CC is explicitly targeted at “any civil servant or official of a public institution, enterprise or organisation, with the exception of persons holding positions of responsibility” and that it thus shows that bribery offences proper do not apply to all categories of civil servants or other public officials, in contradiction with Article 1(a) of the Convention. The GET accordingly recommends **to take the necessary legislative measures to ensure that active and passive bribery of all categories of public officials (within the meaning of the Criminal Law Convention on Corruption, ETS 173) are criminalised, including bribery of any civil servants covered by the legislation on the civil service and of any public officials who do not exercise the functions of a public authority or functions related to administrative management or economic/organisational activities.**

52. The GET further notes that neither the provisions on bribery nor the provisions defining the terms “person holding a position of (high) responsibility” explicitly mention foreign and international public officials. According to the authorities, the general provisions of sections 324 and 325 CC – taken in conjunction with the provisions of section 11 CC on territorial jurisdiction – could be applied if necessary. The GET observes, however, that everyone it spoke to expressed doubts about this interpretation. In the GET’s view, the failure to explicitly mention foreign and international public officials makes it improbable that the bribery provisions apply to such persons. In this connection, the GET learned that to date, no investigation has ever been undertaken into bribery of foreign or international public officials. In addition, the GET wishes to point out that jurisdiction rules are not relevant to the question of whether foreign or international public officials are covered by the elements of bribery offences. In the light of the above, the GET is convinced that the current legislation needs to be amended to include all foreign and international public officials, so as to remove any uncertainty. The GET accordingly recommends **to take the necessary legislative measures to ensure that active and passive bribery of foreign public officials, members of foreign public assemblies, international officials, members of international parliamentary assemblies and judges and officials of international courts are explicitly criminalised in accordance with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173).**
53. Regarding jurors and arbitrators as perpetrators of corruption offences which are addressed by the Additional Protocol to the Convention, the GET notes that bribery of these categories of persons is not explicitly criminalised and that there are no relevant court decisions. The authorities stated that it was the provisions on private sector bribery – committed by a “person responsible for a commercial, social or other non-governmental organisation”²¹ – that applied to *domestic arbitrators*, understood as meaning a “natural person elected or appointed by parties to a dispute for the purpose of settling that dispute through arbitration”.²² The GET observes, however, that this assessment was not unequivocally confirmed during the on-site visit. Several persons to whom it spoke expressed doubts as to whether bribery of arbitrators could be prosecuted under the Criminal Code, while others argued that the provisions on public sector bribery could be applied. In the absence of clear legal provisions and case law or court decisions on domestic arbitrators, the GET is not convinced that a bribery offence committed by or against such persons could in fact be prosecuted under the Moldovan Criminal Code. With regard to *foreign arbitrators*, the authorities again referred to section 11 CC on territorial jurisdiction. The GET wishes to re-emphasise that jurisdiction rules are not relevant to the question of whether

²⁰ For example, section 330 CC requires a person to have “received [...] material advantages” and thus excludes immaterial advantages or the request of an advantage or acceptance of an offer; section 256 CC, meanwhile, is concerned only with cases where a reward is obtained “by extortion”.

²¹ See sections 333 and 334 CC.

²² See the “Arbitration Act”, No. 23 of 22 February 2008.

certain categories of foreigners are covered by the elements of bribery offences.²³ This same reasoning also applies to *foreign jurors*. As regards *domestic jurors*, the GET notes that the Moldovan judicial system, as it stands, makes no provision for the participation of jurors or lay judges in court proceedings. The GET therefore considers that no measures to ensure the coverage of domestic jurors are required at present, but that they would become necessary if the use of jurors within the meaning of Article 1, paragraph 3, of the Additional Protocol were to be introduced in the future. In view of the above, the GET recommends **to explicitly criminalise active and passive bribery of domestic and foreign arbitrators and of foreign jurors in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191)**.

54. As regards the definition of corruption offences by the Criminal Code, the GET notes that the relevant provisions lack coherence and clarity. This fact was explained by a series of partial amendments to the provisions on corruption. In the firm opinion of the GET, a more comprehensive revision is needed in order to remove any ambiguity or loopholes in the implementation of these provisions. The interpretations provided by the authorities, legal practitioners and observers interviewed during the on-site visit were far from uniform in several respects.
55. Firstly, as to the various forms of corrupt behaviour, section 325 CC uses the terms “promise”, “offer” and “give”, in accordance with the obligations set forth in Article 2 of the Convention. As regards passive bribery, section 324 CC mentions “demanding”, “receiving” and “accepting” an advantage or offer. The authorities explained that the term “demand” is equivalent to “request” and that “acceptance of a promise” is also covered by section 324 CC, as is acceptance of an offer. The GET has no reason to doubt these explanations which tally with the information provided in Supreme Court of Justice explanatory decision no. 5 in this respect. It is not convinced, however, that the wording of section 324 CC fully meets the standards set forth in Article 3 of the Convention, given that it seems to make a distinction according to whether the advantage is of a material or immaterial nature. A strict reading of this provision suggests in fact that “demanding” or “receiving” an advantage (or offer) refers solely to “material” advantages, whereas “acceptance” of an advantage can relate to any service, privilege or advantage. The GET notes that the Supreme Court of Justice does not appear to have recognised this distinction in its explanatory decision, and that the authorities argued that section 324 CC could also apply in cases where a public official had requested or received an immaterial advantage. No convincing explanation was given, however, to support such a view, which was shared by only some of the persons interviewed during the visit. The GET is of the firm opinion that in this core area, bribery law must be unambiguous and in this particular case, therefore, needs to be revised so that there are no loopholes in the legal framework.
56. Secondly, the GET observes that sections 324 and 325 CC do not specify whether the advantage must be conferred on the public official himself or herself or whether it can also be intended for a third party, and that section 324 CC does not expressly provide for the indirect commission, through intermediaries, of passive bribery offences. The authorities stated that all these various scenarios were covered by the existing provisions – in accordance with the statements made by the Supreme Court of Justice in its explanatory decision. There is, however, no case law available to support this point of view. The GET is concerned, moreover, that in contrast to the above-mentioned provisions, section 326 CC explicitly provides for the possibility of a third party beneficiary in cases of passive trading in influence and also explicitly covers the indirect commission of such offences (as does section 325 CC, where the indirect commission of

²³ See paragraph 52, above.

active bribery offences is concerned). The GET wishes to stress how important it is for the sake of consistency and clarity that all corruption offences contain the same basic elements. It is therefore convinced that the legislation applicable to instances of bribery needs to be streamlined in order to cover, without any doubt, the indirect commission of passive bribery offences and also instances involving third party beneficiaries, as stipulated in Articles 2 and 3 of the Convention.

57. Thirdly, sections 324 and 325 CC apply only to offences by a public official which fall “within the scope of his or her authority” or are “contrary to his or her duties”. In this respect, the Supreme Court of Justice makes it clear in its explanatory decision that the judicial body must refer to the relevant statutes or administrative acts in order to establish the official powers of the official concerned. Articles 2 and 3 of the Convention, however, refer to acts and omissions by public officials “in the exercise of his or her functions”, thus covering acts and omissions which are made possible by the public official’s position, even if the act or omission is a misuse of that official position. Although the authorities indicated that acts and omissions falling outside the scope of the official’s authority would be prosecuted under other criminal offences such as fraud (section 190 CC), trading in influence (section 326 CC) or abuse of authority and exceeding official powers (section 328 CC), the GET has serious doubts that all instances of bribery within the meaning of Articles 2 and 3 of the Convention would in fact be covered by the aforementioned offences. For it would seem that sections 190 and 326 CC cover only cases where the public official misleads the bribe-giver about his or her authority, and not cases where, for example, he or she actually performs certain acts that are outside the scope of his or her authority; in such cases, section 328 CC might apply, but the latter contains other restrictive elements.²⁴ The GET is therefore of the opinion that the clause “within the scope of his or her authority” adds an – excessively restrictive – extra element to the criminalisation of bribery, which may make prosecution of the offence more difficult.
58. In view of the above, the GET concludes that Moldovan legislation is neither sufficiently consistent nor fully in keeping with the requirements of Articles 2 and 3 of the Convention. Consequently, in the light of the preceding paragraphs, it recommends **to align in a consistent manner the criminalisation of bribery in the public sector, as provided for in sections 324 and 325 CC, with Articles 2 and 3 of the Criminal Law Convention on Corruption (ETS 173), notably in order to ensure that these provisions cover, without any possible doubt, a) the request, receipt or acceptance of advantages, material or immaterial; b) instances of bribery committed through intermediaries or for the benefit of a third party; and c) all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the public official’s authority.**
59. Bribery in the private sector is criminalised in both its passive (section 333 CC) and its active form (section 334 CC). The GET acknowledges that under these provisions, criminalisation is not limited to the involvement of business entities *stricto sensu* but also applies to “social organisations” and “other non-governmental organisations”. That said, the GET noticed several shortcomings that need to be remedied. Firstly, as regards the range of possible perpetrators, sections 333 and 324 CC make reference to “persons responsible” for commercial, social and other organisations. This concept is defined in section 124 CC and refers to persons who “either permanently or temporarily, by appointment, election or delegation, acquire certain rights or obligations with a view to performing administrative management or economic/organisational functions or activities”. The authorities and others interviewed by the GET explained that this arrangement presupposes a certain level of responsibility within the entity concerned, insofar as

²⁴ Among other things, section 328 CC refers only to public officials as possible perpetrators of offences (passive side); in addition, it requires the public official to have caused “substantial damage to the public interest or to the legitimate rights and interests of individuals or legal entities”.

it applies only to managers, chief accountants, other senior executives and responsible persons. In addition, the GET is not convinced that “commercial, social or other non-governmental organisation” covers all private entities, including those with no legal personality, or indeed individuals. By contrast, Articles 7 and 8 of the Convention unambiguously refer to “any persons who direct or work for, in any capacity, private sector entities” without any restrictions as to the functions or responsibilities of the person²⁵ or the legal status of the entity concerned.²⁶

60. A second area of concern in the private sector bribery provisions is related to the different forms of corrupt behaviour. More specifically, sections 333 and 334 CC mention only “giving” and “receiving” advantages and not offering, promising or requesting an advantage, nor accepting an offer or promise, in contrast to Articles 7 and 8 of the Convention. The GET further notes that sections 333 and 334 CC cover only acts “which fall within the scope of the authority” of the person working for the private entity concerned,²⁷ whereas the Convention requires, more broadly, a “breach of their duties”. Lastly, the private sector bribery provisions do not explicitly cover either the indirect commission of the offence (via an intermediary) or third party beneficiaries, in contrast to Articles 7 and 8 of the Convention. The GET refers here to its comments on the public sector bribery provisions which are identical²⁸ in this respect, with one exception.²⁹ In view of the above, the GET recommends **to align the criminalisation of bribery in the private sector, as provided for in sections 333 and 334 CC, with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173), in particular as regards the categories of persons covered, the different forms of corrupt behaviour and the coverage of indirect commission of the offence and of instances involving third party beneficiaries.**
61. Only passive trading in influence is criminalised in section 326 CC. Active trading in influence, i.e. the promising, giving or offering of an undue advantage to the influence peddler, does not therefore constitute an offence under the Criminal Code, in contrast to Article 12 of the Convention. As regards passive trading in influence, the GET is pleased to note that section 326 CC reflects many of the elements contained in Article 12 of the Convention, in particular direct and indirect commission, for the benefit of the influence peddler himself or herself or a third party, irrespective of whether the influence was actually exerted or whether it led to the intended result. That said, the GET noted the following shortcomings. Firstly, as regards the persons targeted by section 326 CC, the GET is concerned that this provision criminalises only trading in influence over “functionaries” (according to the authorities and other persons with whom the GET spoke, this term covers all budget-financed employees, whether they are civil servants or not, including persons holding positions of responsibility), with no mention of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts. Secondly, as regards the different forms of trading in influence, this section covers only the “receipt” and “extortion” of advantages and not the request without extortion or acceptance of an offer or promise. According to the authorities, the term “advantage” could also include “offers” or “promises” but the GET wishes to stress that there is no case law available to support this point of view and that these elements should be included in section 326 CC in order to close any loopholes in the legal framework. Lastly, the GET notes that under this section, the influence must relate to an act

²⁵ Including persons in auxiliary positions and persons such as consultants or commercial agents working for the private entity without having the status of employee: see paragraph 54 of the Explanatory Report on the Criminal Law Convention on Corruption.

²⁶ Including entities with no legal personality and individuals: see paragraph 54 of the Explanatory Report on the Criminal Law Convention on Corruption.

²⁷ As is the case with the provisions on bribery, see paragraph 57, above.

²⁸ See paragraph 56, above.

²⁹ Section 325 CC explicitly criminalises active bribery through an intermediary, in contrast to sections 324, 333 and 334 CC.

“which falls within the scope of the authority” of the public official³⁰ and that it thus adds an – excessively restrictive – extra element to the criminalisation of trading in influence. In view of the above, the GET recommends **(i) to criminalise active trading in influence as a principal offence; and (ii) to align the criminalisation of passive trading in influence with Article 12 of the Criminal Law Convention on Corruption (ETS 173), in particular as regards the categories of persons targeted and the different forms of corrupt behaviour.**

62. The sanctions available for bribery under Moldovan law seem to be compatible with the requirements of Article 19, paragraph 1, of the Convention. In their most serious forms – when very significant amounts are involved or if the offence was committed in the interest of an organised gang or a criminal association or, in the case of passive bribery, by persons holding positions of high responsibility – public sector bribery is punishable by imprisonment for up to 12 (active bribery) or 15 years (passive bribery). In addition, the court must impose a fine and, in the case of passive bribery, disqualify the person from holding office or engaging in certain activities for a period of between two and five years. Private sector bribery is punishable by a fine or imprisonment for up to seven years (active bribery) or ten years (passive bribery)³¹ in the most serious cases while passive trading in influence is punishable by fines or imprisonment for up to ten years.
63. Section 325, paragraph 4, and section 334, paragraph 4, CC provide for a special defence which releases the bribe-giver from criminal liability in cases of active bribery in the public as well as the private sector on condition that either the bribe was extorted from the bribe-giver or that the latter turned himself or herself in. During the visit, the GET was able to clarify several specific questions relating to this defence. It emerged from the interviews that in the second case (effective regret, which is less common in practice), the defence may be applied in situations where the bribe-giver reports the offence either before it is discovered or before he or she learns that the offence has already been discovered. Furthermore, the authorities explained that according to the general rules on confiscation of proceeds of crime, in cases of effective regret the bribe is not returned to the bribe-giver but is mandatorily confiscated. Finally, it was indicated that the decision on release from criminal liability is in principle taken by the public prosecutor. If the conditions of the defence are met, the prosecutor may not indict the bribe-giver.
64. The GET takes note of the decision by the authorities to maintain this tool for the purpose of stimulating reporting which, according to several interlocutors, needs to be actively encouraged in Moldova. The GET does, however, have misgivings about section 325, paragraph 4, and section 334, paragraph 4, CC in their present form, in particular about the automatic nature of the defence. There is no possibility for taking into consideration the particular situation at stake by the prosecutor, for example, the motives that the perpetrator may have for reporting the offence and invoking effective regret. In principle, very serious cases of active corruption could go totally unpunished by reference to this defence. The effective regret provision applies in respect of the bribe giver, whether or not the initiative for committing the offence comes from himself or herself; s/he could even act as an instigator and afterwards be exonerated, as a result of having reported the crime. During the on-site visit, certain practitioners acknowledged the risk of abuse of this defence and that in some cases no formal decision had been taken by a public prosecutor. The GET notes that this tool could be misused by the bribe-giver, for example as a means of exerting pressure on the bribe-taker to obtain further advantages, or in situations where a bribery offence is reported long after it was committed, since there is no statutory time-limit (it is even sufficient that the confession occurs after the authorities became aware of the offence, if the informer

³⁰ As is the case with the provisions on bribery, see paragraph 57, above.

³¹ In addition, the offender is disqualified from holding office or from engaging in certain activities for up to 5 years.

ignores this fact). In addition, the GET is concerned that offences can be reported not only to the law enforcement agencies but also to the heads of the public entity where the bribe-taker performs his or her duties. In the light of these misgivings and in the absence of safeguards against misuse of the defence of effective regret in the present context (e.g. immediate reporting of the offence, limitation of the defence of effective regret to cases where the offender was solicited), the GET recommends **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery in the public sector and private sector in cases of “effective regret”**.

65. The jurisdictional principles of territoriality and nationality apply to all corruption-based offences. As regards nationality jurisdiction, section 11, paragraph 2, CC establishes that Moldovan criminal law is applicable to Moldovan citizens and stateless persons residing in Moldova who have committed an offence abroad. In this context, the GET notes, firstly, that Article 17, paragraph 1.b, of the Convention not only establishes jurisdiction for offences committed by nationals abroad but also extends nationality jurisdiction to public officials and members of domestic public assemblies of member States – i.e. not necessarily nationals.³² Secondly, the GET observes that Article 17, paragraph 1c, of the Convention, further requires States to establish jurisdiction over offences *involving* domestic public officials, members of domestic parliamentary assemblies or foreign or international officials who are at the same time nationals of the State in question. These requirements are not fully reflected in section 11, paragraph 2, CC, which generally requires either citizenship of Moldova or residence in Moldova. The authorities made convincing reference, however, to section 11, paragraph 3, CC. According to this provision, jurisdiction is established over criminal offences committed abroad by foreign citizens or stateless persons not resident in Moldova which are “mentioned in the international treaties to which the Republic of Moldova is a party, provided that the perpetrators of the offences have not been subjected to punishment in another State.” The GET has no reason to doubt these explanations, according to which these terms would apply to Moldova’s obligations under Article 17, paragraphs 1.b and 1.c, of the Convention.
66. Finally, the GET was interested to learn that a draft law amending the Criminal Code was being prepared and that, as part of this initiative, some proposals for improving the criminal legislation on bribery might be considered. The GET welcomes this initiative, while emphasising, however, that the relevant (current and future) legislative reforms should be coupled with tangible measures to support their practical implementation. For it emerged from the different interviews held during the on-site visit that the authorities who are to apply the law are not always well versed in the existing legislation (see the paragraphs above) and that its effective application remains a matter of concern, with prosecution and adjudication of corruption offences still being cautious and not as proactive as desirable. Bearing in mind, firstly, the specific situation in Moldova where corruption is perceived as being a worrying phenomenon and, secondly, the forthcoming legal amendments, the GET considers necessary that further efforts be made with regard to the implementation in practice of the provisions on corruption. The GET therefore recommends **to take further measures (specialised training, circulars and other awareness raising initiatives) to ensure that full use is made of the criminal law provisions on the offences of corruption and trading in influence in practice.**

³² The authorities indicated, however, that such cases are inconceivable in Moldova as, under Moldovan law, all public officials, MPs and other elected officials must have Moldovan nationality.

IV. CONCLUSIONS

67. The Moldovan legal framework for the criminalisation of bribery and trading in influence has been amended on several occasions with the aim of aligning the national legislation with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Despite these commendable efforts, several deficiencies remain which need to be addressed. In particular, the concept of “persons holding positions of responsibility” used in the relevant bribery provisions does not cover all civil servants and public employees and does not ensure coverage of foreign and international public officials or foreign jurors and arbitrators. In addition, active and passive bribery offences in the public sector lack consistency and clarity; among other things, they do not take sufficient account of the advantages given or promised to a third party or through an intermediary, or situations where a public official acts outside the scope of his or her official powers. The criminalisation of bribery in the private sector – which does not cover *any* person working in private sector entities – and trading in influence – which is criminalised only in its passive form – reveals several lacunae, partly identical to those identified in the public sector bribery provisions. Moreover, the possibility provided by the defence of effective regret to exempt bribe-givers who voluntarily report the offence should be reviewed in order to limit the risks of abuse. Given the seriousness of the problem of corruption in Moldova, it is crucial to close any loopholes in the legal framework. In this context, the authorities are encouraged to implement their plans, currently under consideration, to amend the offences of bribery and trading in influence, and the present report and its recommendations should be seen as a timely contribution to this reform process.
68. In view of the above, GRECO addresses the following recommendations to Moldova:
- i. **to take the necessary legislative measures to ensure that active and passive bribery of all categories of public officials (within the meaning of the Criminal Law Convention on Corruption, ETS 173) are criminalised, including bribery of any civil servants covered by the legislation on the civil service and of any public officials who do not exercise the functions of a public authority or functions related to administrative management or economic/organisational activities (paragraph 51);**
 - ii. **to take the necessary legislative measures to ensure that active and passive bribery of foreign public officials, members of foreign public assemblies, international officials, members of international parliamentary assemblies and judges and officials of international courts are explicitly criminalised in accordance with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 52);**
 - iii. **to explicitly criminalise active and passive bribery of domestic and foreign arbitrators and of foreign jurors in conformity with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) (paragraph 53);**
 - iv. **to align in a consistent manner the criminalisation of bribery in the public sector, as provided for in sections 324 and 325 CC, with Articles 2 and 3 of the Criminal Law Convention on Corruption (ETS 173), notably in order to ensure that these provisions cover, without any possible doubt, a) the request, receipt or acceptance of advantages, material or immaterial; b) instances of bribery committed through intermediaries or for the benefit of a third party; and c) all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the public official’s authority (paragraph 58);**

- v. **to align the criminalisation of bribery in the private sector, as provided for in sections 333 and 334 CC, with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173), in particular as regards the categories of persons covered, the different forms of corrupt behaviour and the coverage of indirect commission of the offence and of instances involving third party beneficiaries (paragraph 60);**
 - vi. **(i) to criminalise active trading in influence as a principal offence; and (ii) to align the criminalisation of passive trading in influence with Article 12 of the Criminal Law Convention on Corruption (ETS 173), in particular as regards the categories of persons targeted and the different forms of corrupt behaviour (paragraph 61);**
 - vii. **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery in the public sector and private sector in cases of “effective regret” (paragraph 64);**
 - viii. **to take further measures (specialised training, circulars and other awareness raising initiatives) to ensure that full use is made of the criminal law provisions on the offences of corruption and trading in influence in practice (paragraph 66).**
69. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Moldovan authorities to present a report on the implementation of the above-mentioned recommendations by 31 October 2012.
70. Finally, GRECO invites the Moldovan authorities to translate the present report into the national language and to make this translation public.