

## GREECE

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

The Convention was signed on 17 December 1997, ratified by the Greek Parliament on 5 November 1998 and signed by the President of the Republic on 1 December 1998. Greece deposited its ratification instrument with OECD on 5 February 1999.

The implementing legislation, the Act Ratifying the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (below referred to as Act 2656/1998), was passed by the Greek Parliament on 5 November 1998, came into force on 1 December 1998, and was published in Official Gazette No. 265 of that date. The implementing legislation is, under the Greek legal system, a special criminal law. The general provisions of the Criminal Code accordingly apply, except as otherwise provided.

The implementing legislation establishes a specific offence, bribery of foreign public officials, which is sanctioned in Article 2. The new offence adds to the provisions of the general Greek Criminal Code which, in Chapter 12, Articles 235-238, makes bribery an offence under the heading Offences Relating to Official Duties. Article 3 of the Act further criminalises non-compliance with accounting regulations, in particular the establishment of off-the-books accounts, the making of off-the-books transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents, for the purpose of bribing a foreign public official. Finally, Article 5 of the Act establishes administrative penalties for firms in order to overcome the fact that the Greek legal system does not recognise criminal liability for legal persons.

##### The Convention and the Greek legal system

Article 28, para. 1, of the Greek Constitution states that generally accepted rules of international law and international conventions when they have been ratified by an act and have come into effect shall form an integral part of Greek domestic law and shall override any other contrary provision of domestic law. Accordingly, the OECD Convention on combating bribery of foreign public officials in international business transactions, and the commentaries thereon, have become an integral part of Greek domestic law following ratification of the Convention by the Greek Parliament on 5 November 1998, signature by the President of the Republic on 1 December 1998 and entry into force on 15 February 1999 in accordance with Article 15 of the Convention.

The Convention and the Commentaries rank high among statutory instruments, just below the Constitution but above other laws. Accordingly, the provisions of the Convention and the Commentaries override any other contrary provision in domestic law.

#### 1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

In order to meet the requirements of Article 1 of the Convention, Greece has in Article 2 of Act 2656/1998 established a specific criminal offence of 'bribery of a foreign public official'. The structure of the offence's definition is similar to that in the Convention. Article 2, para.1, of Act

2656/1998 provides that 'any person who, in international business transactions, in order to obtain or retain an improper business advantage or any other improper benefit, promises or gives any undue gift or advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of his official duties, or act contrary to his statutory obligations, shall be punishable by imprisonment for not less than one year'.

## **1.1 Elements of the Offence**

The components of the offence set out in Article 1 of the Convention are covered as follows:

### **1.1.1 any person**

Article 2, para.1, of Act 2656/1998 refers to 'any person'. In accordance with the general principles of Greek criminal law, set out in particular in Article 14 of the Criminal Code, by 'any person' is meant the subject of the offence, namely the person who may be the author of that offence. However, given that under Greek law legal persons do not have criminal liability (the principle that *Societas delinquere non potest*), only natural persons are covered by Article 2, para. 1, of Act 2656/1998.

### **1.1.2 intentionally**

Intent is covered by Article 27, para. 1, of the Criminal Code which applies to special criminal laws, and hence to Act 2656/1998. Under the definition there, a person who seeks the occurrence of events which, according to law, constitute a punishable action, acts intentionally. A person who is aware that the acts in question may occur and accepts them also acts intentionally.

Greek criminal law recognises two types or degrees of intent: 'immediate intent' and 'eventual intent'. 'Immediate intent' is present in two cases: (i) when the author of the act premeditates the unlawful outcome, that is to say when he acts with the purpose of securing the objective substance of the offence in full awareness of its component parts; and (ii) when the author of the act does not premeditate the outcome of the offence but expects it as a necessary consequence of his action or omission. 'Eventual intent' is present when the author of the act neither premeditates nor seeks the unlawful outcome but expects that it may occur, as the sole possible consequence of his acts, and proceeds though aware of this eventuality.

According to Greek legal doctrine and case law, eventual intention is sufficient to constitute the subjective substance of the offence of active bribery. Consequently, 'the intentional event' covers not only the case where the author of the act offers, promises or gives an undue gift or advantage to a foreign public official in order that the official act or refrain from acting in relation to the performance of his official duties, or act contrary to his statutory obligations, but also the case where the author of the act does not seek behaviour of that kind from the public official but considers it probable that, following his offer or promise, the public official will act or refrain from acting in relation to the performance of his official duties or will act contrary to his statutory obligations. An act committed through negligence will not, on the other hand, be covered.

### **1.1.3 to offer, promise or give**

Under Article 2, para. 1, of Act 2656/1998, it is a criminal offence to offer, promise or give. It does not matter whether the foreign public official accepts the offer or promise: his mere awareness of the offer or promise is sufficient to meet this component in the view of the Greek authorities.

#### **1.1.4 any undue pecuniary or other advantage**

Article 2, para. 1, of Act 2656/1998 makes a distinction between two kinds of undue advantage: gifts and advantages. As legal doctrine and case law make clear, the notion of gifts covers sums of money or any item or other advantage of pecuniary value. The notion of advantages covers any material or non-material advantage offered or given to a public official. For example, according to statute and case law, advantages may be services offered or provided to a public official without charge, allowing the use of an item (such as a motor vehicle) without any counterpart, giving or offering an interest-free loan or credit to buy goods without a time limitation, offering or giving employment, backing to assist an official's promotion and, more broadly, any item that may meet the person's needs.

For there to be a criminal offence, Act 2656/1998 adds that the gifts or advantages must be undue. By this, the Greek legal authorities understand gifts or advantages which the public official has no legal claim to obtain or demand following an act performed as part of his official duties. This interpretation is based on the relevant provisions of the Criminal Code and on legal doctrine and case law.

Where written laws or regulations provide for payment for acts by public officials (such as travelling expenses for performing acts outside government offices), offering or promising a gift or advantage is not an offence so long as the gift or advantage does not exceed the value of what the public official is entitled to claim in accordance with Articles 235 and 236 of the Criminal Code and Article 2 of Act 2656/1998. On the other hand, when what is offered or given is more than what is permitted or required by the law or regulation, the advantage will be considered undue and will hence form an offence, as the rulings of Greek courts have regularly confirmed.

#### **1.1.5 whether directly or through intermediaries**

Under Article 2, para. 1, of Act 2656/1998, it is a criminal offence to offer, promise or give, directly or through intermediaries, an undue gift or advantage. For example, the intermediary may be a family member close to the briber (for instance, the husband), a relative of the official, an employee of the firm or else a third party with no connection to the firm but acting on the instructions of the briber, regardless of whether the latter is a director, manager or ordinary staff member.

For active corruption to be established in the meaning of Act 2656/1998, the public official must be aware of the intermediary's role in the bribery. Under the principle of proofs set down in Article 177 of the Code of Criminal Procedure, proof of the foreign public official's awareness of the intermediary's role in offering, promising or giving a bribe may be established by any means not contrary to law. The legality of the means employed to establish proof is a matter for the court to decide.

#### **1.1.6 to a foreign public official**

Article 2 of Act 2656/1998 applies to bribes promised, offered or given to foreign public officials. The Act itself does not define foreign public officials. According to the Greek authorities, if the Act does not do so, it is because the notion of foreign public officials, as provided by article 1 of the Convention, is covered by Article 1 of the Act which makes the Convention an integral part of Greek domestic law. In the interest of clarification, the Hellenic Ministry of Justice has offered to explore the possibility to amend the existing implementing legislation to include a specific reference to the notion of foreign public officials as provided by article 1 of the Convention in Article 2 of the implementing legislation.

According to the Greek authorities, the existing provisions of Greek law, in particular Articles 13, 235, 236 and 263 of the Criminal Code, defining the concepts of public official and official duty, may be taken as supplementing Article 2 of Act 2656/1998:

Article 13, subpara. (a), of the Criminal Code defines public officials in general terms. It provides that “a public official is any person who is legally responsible, even temporarily, for the performance of a public, municipal or communal service or a service by any other public-law legal person”. According to Greek legal doctrine and case law, public officials in the meaning of Article 13 include ministers, judges, members of the armed services regardless of rank, administrative officials without distinction between central government and local authority officials, staff of a public administration, and any holder of an elective office such as members of parliament, prefects, mayors, etc.

Under Article 263a, which supplements Article 13, public officials include mayors, mayors of communes and all persons performing duties permanently or temporarily and in whatever capacity:

- a) in enterprises or agencies belonging to the State, local government agencies or legal persons under public or private law operating concessions, sole or otherwise, to supply water, electricity, heat, power, transport, communications or the mass media;
- b) in banks whose registered office is in Greece, either by law or under their articles of association;
- c) in private-law legal persons established by the State, or by the legal persons mentioned in the subparagraphs above when the founding legal persons have a share in their management or, in the case of a limited company, in their equity, or when the legal persons so established are responsible for the performance of a public service.

A foreign country is any territory outside that of the Greek Republic, as defined by international treaties, the rules of international public law and the rules of domestic law insofar as they are compatible with international law.

#### **1.1.7 for that official or for a third party**

The offence defined in Article 2, para. 1, of Act 2656/1998 applies regardless of whether the offer or promise is made or the pecuniary or other advantage is given for the foreign public official or for any other person.

#### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Article 2 of Act 2656/1998 prohibits payments promised, offered or given to a foreign public official in order that the official act or refrain from acting in relation to the performance of his official duties.

According to legal doctrine and case law, an offence is committed solely when the official acts or refrains from acting in the performance of duties assigned to him by a law, decree, regulation, circular or instruction; it is not committed when an official makes use of his position in excess of his powers. But given that the OECD Convention and the Commentaries thereon are now an integral part of Greek domestic law, Article 1, para. 4, subpara. (c) of the Convention will apply here. This Article states that “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence. According to the Greek authorities, applying the Convention should not raise any problem given that prevailing case law concerns interpretation of a component of a different offence (bribery of a domestic public official) from the one covered by the Convention.

According to the Greek authorities, the provision also extends to acts by a public official with discretionary powers, where the official’s decision is not based on impartiality or justice or where it is contrary to the aims and objectives attaching to the position and powers of the official. Last, no

distinction arises when the bribe is paid, offered or promised for an action that has already been performed or for one still to come: according to the Greek authorities, the law applies in either case once a causal relation has been established between the offer of bribery and the public official's action.

### **1.1.9 in order to obtain or retain business or other improper advantage**

Act 2656/1998 prohibits the payment of bribes in order to obtain or retain improper advantage or any other improper benefit in the context of international business transactions. The Greek authorities state that the preparatory work and the Commentaries on the Convention, in particular Commentary 7, apply here. Accordingly, bribery to obtain or retain business or other improper advantage is an offence even when the enterprise is the best qualified bidder. Bribery in order to gain an advantage that the enterprise could not otherwise receive, such as exemption from compliance with regulatory operating conditions, is also an offence according to the Greek authorities.

Whereas Commentary 9 considers that small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of Article 1, para. 1, of the Convention, Greek case law has constantly asserted that such payments, made to induce public officials to perform their functions, constitute an offence<sup>1</sup>. According to the Greek authorities, no conflict should arise between the Commentary and the current practice of Greek courts given that the Convention itself does not exclude small facilitation payments from its definition of prohibited payments. However, should a conflict arise over the interpretation of the Convention and its Commentaries, the prevailing practice of Greek courts indicates that it would be resolved in the accused's favour.

### **1.1.10 in the conduct of international business**

It is a criminal offence in the sense of Article 2, para. 1, of Act 2656/1998, in the conduct of international business, to offer, promise, etc. undue gifts or advantages in order to obtain or retain an improper business advantage or any other improper benefit.

## **1.2 Complicity**

Article 1, para. 2, of the Convention requires Parties to take the steps necessary to criminalise complicity, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official.

Complicity is covered by Article 45 of the Criminal Code, which stipulates that "when several persons jointly commit a punishable act, each one of them shall be punished as the author of that act". Incitement, and aiding and abetting, are covered by Articles 46 and 47 of the Criminal Code. Article 46 covers direct incitement and complicity and provides that "any person who intentionally induces another to commit an unjust action, and any person who intentionally gives direct assistance to the author during performance of the main action, shall be liable to the same penalty as the author himself". Article 47 refers to indirect complicity and provides that "a person who intentionally gives another any assistance whatsoever before or during the performance of an unjust action shall be deemed an accomplice and be punished with a lower penalty". While these three articles (Articles 45, 46, 47 of the Criminal Code) do not explicitly refer to authorisation, their wording is sufficiently broad to cover a person who authorises a bribe, according to the Greek authorities.

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1. See, for example, jurisprudence relating to small payments to harbour pilots or other shipping officials to induce them to perform their functions: *Court of Cassation (AP)*, 1179/1986 plenary session, *Athens Court of Appeal* (159/1982).

### 1.3 attempt and conspiracy

Article 1, para. 2, of the Convention requires each Party to take any measures necessary to establish that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Although attempt is recognised in Greek law, its application to bribery of a public official is not generally recognised by statute and prevailing case law, which considers that since bribery is an formal offence there cannot be an attempt. According to the prevailing view, for active corruption to be proven the promise or offer must have been made, or the undue advantage given, and the public official must be aware of this. Attempts are hence not recognised. But according to a minority view there could be attempts when the promise or offer was made or the undue advantage given, but the public official was not aware of it. That view is based on cases where a letter offering a bribe fails to reach the public official to whom it was sent, and where money sent as a bribe is inadvertently addressed to another recipient.

The Greek Code has no provisions dealing specifically with conspiracy. But 'criminal association' is a similar concept, and Article 187, para. 2, of the Criminal Code provides for imprisonment for a person who agrees with another to commit one or more offences.

## 2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Greek law, including Act 2656/1998, does not establish criminal liability for legal persons. However the absence of criminal liability does not mean that offences can be committed with impunity via corporations, since a director, manager or ordinary staff member may face criminal proceedings<sup>2</sup>. In addition, claims for civil liability can be pursued against private or public law companies, whether or not they perform a public service function. For instance under Articles 71 and 922 of the Civil Code and Articles 104, 105 and 106 of the Civil Code Introductory Act, enterprises may be held to have civil liability for acts or omissions by their managers or staff<sup>3</sup>. But the purpose of actions for civil liability against legal persons is not to punish the person at fault, but to redress the damage suffered by the victim.

Given that civil proceedings are brought separately from criminal ones, the criminal conviction of natural persons is not required in order to invoke the civil liability of an enterprise. However, when criminal proceedings have an essential influence on the subject of the civil proceedings, the civil court is entitled to adjourn hearings until a final criminal verdict is reached, under Article 250 of the Code of Civil Procedure. It should be noted that, in such cases, a criminal ruling which convicts the accused is not binding on the civil court.

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2. In this area, the consistent practice of public prosecutors, when complaints or denunciations are lodged against legal persons without naming natural persons, whose identity may not be known or determined, is to bring proceedings against management, including the chairman and members of the board of directors in the case of a limited company, as *prima facie* offenders.
  3. Article 71 of the Civil Code: 'A corporate body is liable for acts or omissions by management when the said acts or omissions occur in the performance of their duties'. Article 922 of the Civil Code deals with the civil liability of companies for acts or omissions by their employees and auxiliary staff. Articles 104, 105 and 106 of the Introductory Act cover the civil liability of public services and legal persons under public law.

### **3. ARTICLE 3. SANCTIONS**

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject non-natural persons to criminal responsibility, the Convention requires the Party to insure that legal persons are “subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also requires that, for natural persons, criminal penalties include ‘deprivation of liberty’ sufficient to enable effective mutual legal assistance and extradition. The Convention further requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

#### **3.1 Criminal penalties for bribery of a domestic official**

Articles 235 and 236 of the Criminal Code provide for imprisonment of between one and five years for the bribery of domestic public officials. No fine is provided for.

#### **3.2 Criminal penalties for bribery of foreign official**

Persons bribing foreign public officials face the same penalties as for bribing domestic officials, imprisonment for between one and five years (Article 2, para. 1, of Act 2656/1998 ratifying the Convention, together with Articles 235 and 236 of the Criminal Code). Under Greek law the criminal penalties apply only to natural persons, given the absence of criminal liability for legal persons.

Under Chapter V of the Greek Criminal Code, the court will take account of the gravity of the offence and of the offender’s personality when setting the penalty within the limits set by law. Under Chapter V, Article 79, para. 2, in assessing the gravity of the offence the court will take account of (a) the damage or danger caused by the offence, (b) the nature, type and purpose of the offence, and (c) the gravity of the offender’s intention or negligence. In assessing the personality of the offender the court will take account *inter alia* of his criminal tendencies, basing its view in particular on the motives for the offence, circumstances bearing on his personality, and his conduct during and after commission of the offence (Article 79, para. 3). The ruling must expressly state the grounds for the court’s decision as to sentence (Article 79, para. 4).

#### **3.3 Penalties and mutual legal assistance**

According to the Greek authorities, the measures entailing deprivation of liberty under special criminal Act 2656/1998 and Articles 23 and 236 of the Criminal Code are sufficient for effective mutual legal assistance in the sense of Article 437 (extradition) of the Code of Criminal Procedure.

#### **3.4 Penalties and extradition**

Bribing a foreign public official is deemed to constitute an extraditable offence under Greek law when the established penalty allows extradition under Article 437 of the Code of Criminal Procedure. Imprisonment of between one and five years for natural persons bribing foreign public officials is sufficient to allow extradition under Article 437 of the Code.

### 3.5 Non-criminal sanctions applicable to legal persons

To overcome the fact that Greek law does not criminalise liability of legal persons, the implementing legislation (Article 5) establishes administrative penalties. This regime is, however, applicable only to enterprises and not to all legal persons –such as foundations, associations or other civil bodies- which can be used in the commission of bribery. The Greek authorities are open to reconsider the relevant provisions of the implementing legislation in order to refer to “enterprises and legal persons”.

Administrative penalties applicable to enterprises are based upon the fault of senior management. Article 5 of Act 2656/1998 states that a corporation may, *for offences by management*, incur an administrative fine of up to three times the value of the advantage produced by the offence, a temporary or permanent ban on conducting business, and temporary or permanent disbarment from government procurement<sup>4</sup>. According to the Greek authorities if the sole culprit were an ordinary member of staff, managers could nonetheless be held liable on the principle *culpa in eligendo*, or inadequate or non-existent monitoring of staff by managers.

Proceedings, in Greek administrative courts, with scope for appeal right up to the Conseil d’Etat, which is the top administrative court, can be taken independent of criminal proceedings against the natural persons concerned, so no criminal conviction is required to trigger or complete the proceedings. It follows that when the competent administrative authority (the head of SDOE, the body dealing with economic offences) has sufficient proof that an enterprise, through the fault of its senior management, including their negligence or lack of care, has benefited from any offences punishable under Act 2656/1998, it may impose the administrative penalties provided therein<sup>5</sup>. Given that the ruling by the head of SDOE is an administrative act, due reasons must be included. It should be noted that the ruling by the administrative authority has no influence on the criminal proceedings, in accordance with Article 177 of the Code of Criminal Procedure which provides that the judge has full freedom to assess proof.

### 3.6 Seizure and confiscation of the bribe and its proceeds

Greek law provides for seizure and confiscation of the bribe and its proceeds.

#### *Seizure and confiscation of the bribe*

The wording of Article 2, para. 2, of Act 2656/1998 would seem to indicate that confiscation only of the ‘gifts offered or their value’, and not of the other ‘undue advantages’ in the sense of para.1 of that article, is intended by the Ratifying Act. According to legal doctrine, the gifts offered in the sense of Article 2, para. 2, of Act 2656/1998, which on this point follows the lines of Article 238 of the Criminal Code, are any things given or granted to the public official, in other words not just money but also rights, stocks and shares, personal effects, anonymous letters, etc. and any other thing in the sense of civil law such as real property, a motor vehicle, a watch, food, etc. and any service of pecuniary value or which may be estimated to have pecuniary or monetary value<sup>6</sup>.

While the confiscation of the ‘undue advantage’ does not seem to be intended by Act 2656/1998 ratifying the Convention, it is nonetheless established by Article 76, para. 1, of the Criminal Code

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4. Article 5 of Presidential Decree 218/1996 (Official Gazette 168 A/24 July 1996).

5. In this respect, criminal conviction of an employee of the enterprise will quite certainly be sufficient proof to hold the enterprise liable for administrative purposes.

6. The service may for instance be work, or an act or omission, performed for the official’s benefit (such as cancelling a debt).

which, according to the Greek authorities, may be taken as supplementing Article 2, para. 2, of the Act. The Greek authorities explain that Article 76, para. 1 of the Criminal Code supplements Article 2, para. 2 of Act 2656/1998 because Article 12 of the Criminal Code applies the provisions of the General Part of the Criminal Code, including Article 76, para. 1, to special laws applicable to criminal offences, where the special laws do not contain an express provision to the contrary. Thus, it would appear that although Act 2657/1998 contains an express provision on confiscation that, taken as a whole, could be interpreted as inconsistent with Article 76, para. 1 of the Criminal Code, the Greek authorities believe that because there is not an express provision on the specific sub-issue of the confiscation of “undue advantage”, Article 76, para. 1 can be considered to apply in that regard.

Pursuant to Article 2, para. 2, of Act 2656/1998, confiscation of gifts or their value is mandatory. However, pursuant to Article 76, para. 1, the confiscation of other ‘undue advantages’ is not automatic: for it to be ordered, it is necessary to prove that the undue advantage belonged to the instigator of the bribery or his/her accomplice(s). Thus it would appear that confiscation of the “undue advantage” is not contemplated from a third party who is knowingly in possession thereof (i.e. knowing that the “undue advantage” was derived from the commission of a crime”). According to the Greek authorities, the difference in scope between Article 2, para. 2, of Act 2656/1998 and Article 76, para. 1, of the Criminal Code will be assessed and reviewed in the light of practice.

Seizure of the bribe during the preliminary investigation or at any stage in proceedings is provided for under the clauses of the Code of Criminal Procedure, which apply to offences committed intentionally and hence to the offence of bribing foreign public officials<sup>7</sup>. The Code provides that if seizure is not ordered during the preliminary investigations for some reason (because, for instance, it is not deemed significant), it may be ordered by the court at any stage in proceedings, under Article 263 of the Code. According to consistent case law from lower courts, when the ‘gifts offered’ cannot be confiscated (because they cannot be located, for instance) their value at the time of the court order will be confiscated.

#### *Confiscation and seizure of the proceeds*

Seizure of the proceeds of an offence involving intent is provided for in Articles 258, 259, 260, 261, 263, and 288 of the Code of Criminal Procedure. The Code provides that if seizure is not ordered during the preliminary investigations for some reason (because, for instance, it is not deemed significant), it may be ordered by the court at any stage in proceedings, under Article 263 of the Code.

Article 2, para. 2 of Act 2657/1998 only refers to the confiscation of “gifts offered or their value”. On the other hand, the general confiscation provision in the Criminal Code (Article 76, para. 1) stipulates that the relevant court may order confiscation of the proceeds. The Greek authorities consider that this provision supplements Article 2, para. 2. Thus they believe that the courts would not interpret a provision that expressly refers to the confiscation of gifts offered but not proceeds to be inconsistent with Article 76, para. 1 of the Criminal Code.

Pursuant to Article 76, para. 1 of the Criminal Code, the proceeds may not be confiscated unless, as in the case of an “undue advantage” that has been offered (see above), they are shown to have belonged to the author of the bribery or his/her accomplice(s). Again, it would appear that, pursuant to Article 76, para. 1, confiscation from a third party knowingly in possession of the proceeds is not contemplated. The Greek authorities state that the difference between the regime in Act 2657/1998 and the Criminal Code will be assessed and reviewed in light of practice.

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7. Cf. Articles 258, 259, 260, 261, 263, and 288 of the Code of Criminal Procedure.

### ***Money laundering and confiscation***

Bribery of a foreign public official is a predicate offence for the purposes of application of Greek legislation on money laundering, so confiscation is also possible under Article 2 of the Money Laundering Act<sup>8</sup>.

#### **3.8 Additional civil or administrative sanctions**

In addition to Article 5 of Act 2656/1998, which sets administrative penalties for firms found guilty of bribing foreign public officials, and the civil liability provisions of the Greek Civil Code (see section 3.5 above), Article 61 of the Criminal Code provides that natural persons responsible for bribing foreign public officials may not only be imprisoned but also be deprived of their civic rights for a period of between one and five years.

#### **4. ARTICLE 4. JURISDICTION**

Article 4 of the Convention requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part of its territory, whether or not it involves a national of the said Party. The Convention also requires States Parties which have jurisdiction to prosecute their nationals for offences committed abroad to take such measures as may be necessary to establish their jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. The Commentaries state that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

The Greek legislation includes both territorial and nationality jurisdiction.

##### **4.1 Territorial jurisdiction**

Under Article 5 of the Criminal Code, Greek criminal law applies to all offences committed in whole or in part in its territory, whether the offence is committed by a Greek national or not<sup>9</sup>. Under the combined provisions of Articles 5-16 of the Criminal Code, an extensive physical connection to the bribery act is not required. For example, Greece will establish its jurisdiction over the bribery of a foreign public official if an undue advantage was promised, offered or given in a foreign country and the public official became aware of it in Greek territory. Likewise, Greece will establish its jurisdiction over the bribery of a foreign public official when the offer, promise, etc. transited via Greek postal or telecommunication services. According to the Greek authorities, these provisions mean that the territorial basis for jurisdiction is interpreted broadly in Greece.

##### **4.2 Nationality jurisdiction**

In accordance with Article 6, para. 1, of the Criminal Code Greece has jurisdiction to proceed against its nationals for offences committed abroad when the acts in question are also criminal offences under the law of the foreign country. In accordance with the principle whereby the general provisions of the Greek Criminal Code apply to special criminal legislation, these provisions hence apply also to the bribery of a foreign public official. According to the Greek authorities, the condition of dual criminality is deemed to be met even if the unlawful act in the territory where it is committed is penalised under a different criminal statute.

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8. Article 2, paragraphs 6-10, of Act 2331/1995.

9. Greek ships and aircrafts are considered part of Greek territory, wherever they may be, except when, under international law, they are subject to foreign law.

For the assertion of Greek jurisdiction over offences committed by its nationals abroad, Article 5, para. 3, of the Criminal Code requires a formal complaint or request for prosecution presented to the Greek authorities by another State or by the injured party. Under Articles 43, 47 and 50 of the Code of Criminal Procedure, a prosecutor is bound to bring proceedings immediately once the victim has lodged a complaint, without waiting for an application by the foreign government.

#### **4.3 Consultation procedures**

Article 4 of the Convention states that when more than one Party has jurisdiction over an alleged offence involving bribery of foreign public officials, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution. Greece has no procedures for consultation and possible transfer of a case to another Party which can also establish jurisdiction over an alleged offence of bribery of foreign public officials.

#### **4.4 Effective jurisdiction**

According to the Greek authorities, the current basis for jurisdiction is sufficiently effective in the fight against bribery of foreign public officials.

### **5. ARTICLE.5. ENFORCEMENT**

Article 5 of the Convention requires that investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. It further requires that each Party shall ensure that investigation and prosecution “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

#### **5.1 Rules and principles applying to investigation and prosecution**

The rules and principles applying to investigation and prosecution in the case of bribery of a foreign public official are the same as for any criminal offence or misdemeanour. In accordance with Articles 27, para. 1, of the Code of Criminal Procedure, the State Prosecutor (or the public prosecutor in a court of first instance) brings criminal proceedings on behalf of the State. Once the prosecutor initiates proceedings, the preliminary investigation is conducted by a special body dealing with economic offences (SDOE)<sup>10</sup>.

Article 43 of the Greek Code of Criminal Procedure rules out discretion in launching proceedings. The prosecutor’s office, which is a judicial authority independent of the courts and of the executive, is obliged to initiate proceedings as soon as it has knowledge of an offence. The prosecutor can decide not to proceed with the matter only when, at first sight, the evidence required to establish the offence or the procedural conditions required to prosecute the offence are lacking, or when the complaint or application lacks substantive legal foundation<sup>11</sup>. The prosecutor may also decide to withdraw proceedings, or refrain from launching proceedings, in three cases defined by law: when the act is deemed of no importance, when the accused is serving a prison term for a more serious offence, or where necessary to protect a victim of blackmail<sup>12</sup>. In all cases, the decision not to proceed must be approved by the Prosecutor General in the relevant Court of Appeal.

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10. In accordance with Article 4 of Act 2656/1998 ratifying the Convention.

11. Article 43 of the Code of Criminal Procedure.

12. Articles 44 and 45 of the Code of Criminal Procedure.

## 5.2 Political or economic considerations

According to the Greek authorities, under the Code relating to Courts and Court Officers, investigation and prosecution in the case of bribery of a foreign public official, as for any other offence, cannot be influenced by considerations of national economic interest<sup>13</sup>.

Although there is a general exception under Greek law in case of political offences or offences of such a kind as to disrupt international relations<sup>14</sup>, according to the Greek authorities this exception does not apply to cases of bribery of foreign public officials as, through the direct applicability of the OECD Convention, Article 5 of the Convention supersedes the generally applicable procedural laws and therefore this general exception.

## 6. ARTICLE 6. STATUTE OF LIMITATIONS

The statute of limitations for any offence, including bribery of a foreign public official in international business transactions, is five years under the Greek Criminal Code. The limitation period runs from the date on which the act was committed<sup>15</sup>. The period may be extended by a further three years in certain cases expressly defined by law (Code of Criminal Procedure, Criminal Code, special laws and the Constitution) and also at the time of the hearing which opens as soon as the defendant receives notice from the public prosecutor, on condition that notice is served before the end of the 5-year period<sup>16</sup>.

## 7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires each Party which has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation to do so on the same terms for the bribery of foreign public officials, without regard to the place where the bribery occurred.

### 7.1 Corruption of Greek public officials

Under Act 2331/1995 on the prevention and punishment of legalising the proceeds of criminal activity, bribery of Greek public officials is a predicate offence for the purpose of the application of money laundering legislation<sup>17</sup>. Bribery committed abroad is also a predicate offence to money laundering<sup>18</sup>.

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13. Articles 19 and 24 of Act 1756/1988.

14. According to Court of Cassation case law, a political offence is one committed directly against the State with the intention of overthrowing or changing the system of government : *Court of Cassation 196/1963 and 890/1976*. The Greek authorities interpret offences of such a kind as to disrupt international relations as ones where proceedings may seriously disturb relations relations to the point where diplomatic relations are broken off.

15. Articles 111 and 112 of the Criminal Code.

16. For example, the three-year extension may apply under Articles 62 and 63 of the Constitution dealing with parliamentary immunity, Article 366, para. 2, of the Criminal Code (interlocutory question), or Articles 49, para. 2, (military service by the accused), 77 (doubt over the identity of the accused), 80 (mental illness of the accused), 81 (doubt over the death of the accused) or 338 (proof at a hearing that a significant document on file is a forgery) of the Code of Criminal Procedure.

17. Articles 1 and 2 of Act 2331/1995.

18. Article 1 of Act 2331/1995.

## **7.2 Bribery of foreign public officials**

In accordance to the requirement in Article 7 of the Convention, Greece has introduced a new provision in its domestic law, under which bribery of a foreign public official is a predicate offence for the purpose of the application of its money laundering legislation, without regard to the place where the bribery occurred<sup>19</sup>.

## **8. ARTICLE 8. ACCOUNTING**

### **8.1 Maintenance of books and records**

All the acts prohibited by Article 8 of the Convention (establishing off-book accounts, making off-book or inadequately identified transactions, recording non-existent expenditures, entry of liabilities with incorrect identification of their object, use of false documents) are prohibited by Greek tax legislation, in particular the Accounting Code (Presidential Decree 186/1992). These provisions are now supplemented by the special offence which the Act ratifying the Convention establishes in order to combat the bribery of foreign public officials still more effectively.

### **8.2 Companies subject to these laws and regulations**

All Greek enterprises, whether under public or private law, are subject to accounting legislation with the exception, in accordance with Article 2 of Presidential Decree 186/1992, of small individual retail enterprises with very low turnover, such as butchers, newsagents, cigarette shops and grocers.

### **8.3 Penalties for omissions or falsifications**

Persons infringing accounting law and regulations are subject to administrative and criminal sanctions. The criminal sanctions are of three kinds:

- There are first the new ones introduced by Act 2656/1998 ratifying the Convention: when the establishment of off-book accounts, the making of off-book or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents are intended to assist or conceal the bribery of a foreign public official, the offence is punishable by imprisonment for up to three years, or more where other statutory provisions provide<sup>20</sup>.
- In addition to the prison terms introduced by the Act ratifying the Convention combine, two other kinds of sanctions are provided for under tax legislation. When establishing off-book accounts, etc. for the purpose of bribing foreign public officials or of hiding such bribery entails a loss of tax resources for the Greek State, the offence is punishable by one to ten years' imprisonment depending on the scale of the tax evasion<sup>21</sup>. Similarly, a person who issues or accepts false tax documents is liable to imprisonment for a minimum of three months<sup>22</sup>.

Failure to comply with Greek accounting legislation may also lead to substantial administrative sanctions for enterprises, whatever their legal form (incorporated or not):

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19. Article 6 of Act 2656/1998 ratifying the Convention, which supplements Article 1 of Act 2331/1995.

20. Article 3 of Act 2656/1998.

21. Article 17 of Act 2523/1997.

22. Article 19 of Act 2523/1997.

- First, under Article 5 of the Act ratifying the Convention, a company may incur, for infringements by its top management, an administrative fine of up to three times the value of the benefit generated by the infringement, a temporary or permanent ban on conducting business, and temporary or permanent disbarment from public procurement.
- Second, under the Presidential Decree of 4 December 1996, a natural person, or an enterprise (when the person responsible for the infringement is acting as its representative), may be temporarily or permanently disbarred from public procurement<sup>23</sup>.
- Last, under tax legislation an enterprise may be barred from conducting business for up to one month when making false tax documents has resulted in tax evasion totalling more than 80 million Drachma<sup>24</sup>.

## 9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

The OECD Convention requires each Party, “to the fullest extent possible under its laws and relevant treaties and arrangements”, to provide “prompt and effective” legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention, and for non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. The Convention further establishes dual criminality when that is a condition for mutual legal assistance. Last, the Convention requires that Parties shall not decline to render mutual legal assistance for criminal matters on the ground of bank secrecy.

### 9.1 Laws, treaties, arrangements enabling mutual legal assistance

In Greece mutual legal assistance is based on three types of instruments:

- bilateral mutual legal assistance treaties in force with eleven countries (Albania, China, Cyprus, Egypt, Lebanon, Morocco, Romania, former Soviet Union, Syria, Tunisia, former Yugoslavia). A treaty has been signed with Australia, but has not yet been ratified.
- the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.
- the relevant provisions of Greek law, in particular Articles 457-461 of the Code of Criminal Procedure dealing with mutual legal assistance<sup>25</sup>.

There is no legislation specifically covering legal assistance in non-criminal proceedings under the Convention’s provisions on legal persons. The Ministry of Justice, as the competent authority for mutual legal assistance under Article 9 of the Convention (see section 11.1 below), will transmit requests for legal assistance to the competent administrative authorities to be dealt with.

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23. Articles 6, 8 and 39 of Presidential Decree 39/4 of 4 December 1996.

24. Article 19 of Act 2523/1997.

25. Article 457 deals with requests for legal assistance by the Greek authorities to foreign legal authorities (competent authorities, procedures and formalities). Article 458 deals with requests for legal assistance by foreign authorities to the Greek authorities (competent authorities, formalities and procedures, including the right of the Justice Minister to decline to give assistance when, under Articles 437 and 438 of the Code of Criminal Procedure, extradition is not permitted, or permitted only on the conditions laid down in bilateral treaties). Article 459 deals with transfer of an accused person abroad; Article 469 with travel expenses for witnesses and experts; and Article 461 with the transmission of documentary evidence.

## **9.2 Dual criminality**

According to the Greek authorities, dual criminality is not in domestic law a condition for providing legal assistance. In addition, Greece does not require the existence of dual criminality to provide legal assistance within the scope of the 1959 European Convention.

## **9.3 Bank secrecy**

According to the Greek authorities, under Act 2656/1998 ratifying the Convention, bank secrecy will not be invoked to decline to render mutual legal assistance. They will in fact waive secrecy using the procedure laid down in Article 3 of Decree-Law 1059/1971 as amended by Act 1868/1989, which authorises waivers to conduct investigations and identify infringements, following a decision by the competent legal authorities.

Under Article 3 of the said Decree-Law, waivers are authorised by a *Chambre d'Accusation* (section of a Court of Appeals which deals with orders from the examining magistrates) ruling on an application by the competent public prosecutor, the examining magistrate, or the body conducting the preliminary investigation. Waivers are ordered by the court dealing with the substance of the case. Greek law allows no appeal against waiver decisions.

The procedure described above applies, *mutatis mutandis*, to mutual legal assistance: a request will be sent to the Minister of Justice, who will transmit it to the Prosecutor General in the Court of Appeal with jurisdiction over the bank. Provided the file is complete, the Prosecutor General will transmit it to the public prosecutor for an application to the *Chambre d'Accusation* established for the criminal court of first instance. Hearings before the *Chambre d'Accusation* must be preceded by an investigation by the examining magistrate.

## **10. ARTICLE 10. EXTRADITION**

### **10.1 Extradition for bribery of a foreign public official**

Bribery of a foreign public official is deemed to be an extraditable offence under Greek law provided that the statutory sanction allows extradition under Article 437 of the Code of Criminal Procedure. The term of one to five years' imprisonment laid down for bribery of foreign public officials allows extradition under Article 437 of the Code.

### **10.2 Convention as a legal basis for extradition**

At present Greece has bilateral extradition treaties with Albania, Australia, Egypt, Lebanon, the former Soviet Union, Syria, Tunisia, the former colonies of the United Kingdom, the United States, and the former Yugoslavia. Where there is no extradition treaty between Greece and another Party to the OECD Convention, the Convention itself is the legal basis for extradition for bribery of a foreign public official.

### **10.3/ Extradition of nationals**

#### **10.4**

Under Article 438 of the Code of Criminal Procedure, no Greek national may be extradited to a foreign country<sup>26</sup>. In accordance with the Code, the competent Greek authorities will take proceedings against the person accused of the offence.

#### **10.5 Dual criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of Article 1 of the Convention. Greece makes extradition conditional on the existence of dual criminality under Article 2, para. 1, of the European Convention of Extradition. Extradition is conditional on the existence of dual criminality in all bilateral extradition treaties as well. According to the Greek authorities, dual criminality is deemed to exist when the offence for which extradition is sought is within the scope of Article 1 of the Convention.

### **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

In accordance with Article 7 of Act 2656/1998, the competent authority for purposes of consultation, mutual legal assistance and extradition as set out in Articles 3, 9 and 10 of the Convention is the Minister of Justice of the Greek Republic.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

Greece did not allow bribes to foreign public officials to be deductible for tax purposes even before the Act ratifying the Convention was passed in December 1998. Article 31 of Act 2238/1994 (on taxation) states as a general principle that any expenditure not directly related to the business of the enterprise is non-deductible. The same Act expressly lists deductible expenditures, and bribes are excluded.

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26. A ruling by the Court of Cassation has confirmed that this provision of Greek law is in line with the European Convention on Extradition.

## EVALUATION OF GREECE

### General Remarks

The Working Group complimented the Greek authorities for the rapid ratification of the Convention. Delegates thanked the Greek authorities for the comprehensive and informative responses, which significantly assisted in the evaluation process. Greece enacted a special criminal law, the Act Ratifying the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, through which the body of rules of the Convention has been integrated into the Greek legal system. The Act establishes the criminal offence of bribery of a foreign public official, criminalises non-compliance with accounting regulations and establishes administrative penalties for enterprises. Greece has also broadened its money laundering legislation in order to include the offence of bribery of foreign public officials.

Overall, the Working Group was of the opinion that Greece's implementing legislation meets the requirements set by the Convention. There were few areas where the Group expressed doubts that the application of the legislation might affect the effective implementation of the Convention. In addition, there are some issues that might benefit from further discussion during Phase 2 of the evaluation process.

### Specific Issues

#### 1. The Convention as a whole

Questions were raised in general in relation to the meaning of the direct applicability of the Convention in domestic law. These questions concern possible discrepancies and loopholes in the implementation of the Convention in relation to principles and other rules governing similar offences already established in the internal law. The Working Group recommended that this issue be examined horizontally at a future plenary session.

#### 2. The offence of bribery of foreign public officials

##### 2.1 The definition of foreign public official

Greece's implementing legislation does not provide for a definition of foreign public officials. The Greek authorities explained that the notion of foreign public officials is covered by Article 1 of the implementing Act, which makes the Convention an integral part of Greek domestic law. In the interest of clarification, the Greek authorities offered to include a specific reference to the notion of foreign public officials as provided by article 1 of the Convention in Article 2 of the implementing legislation.

#### 3. Responsibility of legal persons

To overcome the fact that Greek law does not criminalise liability of legal persons, the implementing legislation establishes administrative penalties. The Working Group noted that this regime, applicable only to enterprises and not to all legal persons -such as foundations, associations or other civil bodies- which can be used in the commission of bribery may fail to meet the criteria set in Article 2 of the Convention. The Greek authorities stated that they were open to reconsider their legislation in order to refer to "enterprises and legal persons".

Under Article 5 of the Act ratifying the Convention, a corporation may, for offences by management, incur administrative penalties. The Working Group noted that administrative penalties applicable to enterprises are based upon the fault of senior management.

The Working Group was of the opinion that the Greek legislation complies with Article 2 of the Convention. The Group noted that effective implementation of the Convention will depend, in part, on all Parties enacting functionally equivalent thresholds for corporate liability. The Group expressed its view that this issue would benefit from a horizontal analysis of the standards implemented by all Parties to the Convention.

#### **4. Confiscation**

The implementing law provides for the confiscation of “gifts offered or their value” and not other “undue advantages”, and does not provide for the confiscation of the proceeds. The Greek authorities explain that Article 76, paragraph 1 of the Criminal Code, on confiscation, which applies to other “undue advantages” and the proceeds, supplements the implementing law. This, they explain, is due to Article 12 of the Criminal Code, which applies the provisions in the General Part of the Criminal Code to special laws on criminal offences where the special laws do not contain an express provision to the contrary. The Working Group expressed some doubts about the practical application and effectiveness of the sanction of confiscation under the existing regime.

#### **5. Jurisdiction**

The Group noted that the Greek legislation includes both territorial and nationality jurisdiction. The legislation makes the nationality principle dependent upon a complaint or request for prosecution presented to the Greek authorities by another State or by the injured party. This question should carefully be considered in light of art. 4, para. 4 of the Convention.

#### **6. Enforcement**

The Working Group was of the opinion that the general exception under Greek law in case of political offences or offences of such a kind as to disrupt international relations contradict the Convention. The Greek authorities explained that through the direct applicability of the Convention, Article 5 of the Convention supersedes the generally applicable procedural laws and therefore these exceptions do not apply to cases of bribery of foreign public officials.