

DENMARK

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Denmark signed the Convention on 17 December 1997. On 30 March 2000, the Danish Parliament passed the necessary amendments to the Danish Criminal Code in order to be able to ratify and implement the Convention. The implementing legislation (Act No. 228 of 4 April 2000) entered into force on 1 May 2000, and the instrument of ratification was deposited with the OECD on 5 September 2000.

Convention as a Whole

The Danish Act No. 228 made active bribery of foreign public officials and officials of international organisations (OECD, EU, NATO, UN, etc.) a criminal offence equivalent to bribery of Danish public officials. Furthermore, passive bribery by foreign public officials and officials of international organisations became a criminal offence on the same terms as those applying to Danish public officials. Responsibility of legal persons (companies, etc.) has been introduced as concerns active bribery in the public and private sector, and the application of the offence of receiving stolen goods (section 284) has been extended to the profits from active and passive bribery of public officials in Danish, foreign and international offices or functions.

Act No. 228 constitutes a general initiative towards strengthening the combating of bribery involving foreign public officials and officials of international organisations, etc. as it implements several conventions on combating bribery, including the OECD Bribery Convention, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, the Joint Action of 22 December 1998 adopted by the Council on the basis of Article K3 of the Treaty on European Union on corruption in the private sector, the European Criminal Law Convention on Corruption, and the Agreement Establishing The Group of States Against Corruption (the GRECO Agreement).

Denmark has a "dualistic" system under which international agreements to which Denmark becomes a party are not automatically incorporated into domestic law. When Denmark wishes to adhere to an international agreement it must, therefore, ensure that its domestic law is in conformity with the agreement in question. It is, however, not disputed that international law, including conventions, is a relevant source of law in Denmark.

An understanding of two very important legislative principles assists in analysing the implementation of the Convention by Denmark. Firstly, Danish criminal legislation is not characterised by lengthy explanations and the presence of details and definitions. Secondly, the *travaux préparatoires* regarding any given bill are generally used to provide the details not contained in the legislation, and are considered by the courts to carry a high degree of legal weight.

The Danish authorities explain that the Convention has not yet been applied to Denmark's dependent territories, Greenland and the Faroe Islands. The offence cannot be applied with respect to them until

the home-rule authorities have held hearings on the matter. Greenland is currently in the process of revising its Criminal Code and is reviewing the foreign bribery offence as part of this process. The Danish authorities anticipate that Greenland will have the same offence as Denmark within 2 to 3 years. Since the Faroe Islands are in the process of negotiating independence, it is more difficult to predict when the offence will have been incorporated into their laws.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

Under Danish criminal law, active bribery of persons exercising a public office or function is an offence under section 122 of the Criminal Code. The provision formerly only covered persons exercising a Danish public office or function. The offence of bribery of persons exercising a public office or function now applies irrespective of whether the office or function is Danish, foreign or international. In addition, the previous requirement that the public official commit a breach of duties has been replaced with the term “unlawfully” (*uberettiget*).

Section 122 of the Criminal Code reads as follows:

“Any person who unlawfully grants, promises or offers some other person exercising a Danish, foreign or international public office or function a gift or other privilege in order to induce him to do or fail to do anything in relation to his official duties shall be liable to a fine, simple detention or imprisonment for any term not exceeding three years.”

1.1 The Elements of the Offence

1.1.1 any person

Section 122 covers any person irrespective of nationality.

1.1.2 intentionally

According to section 19 of the Criminal Code, only acts committed intentionally are punishable, unless expressly provided otherwise. Pursuant to the Danish authorities, “intent” comprises direct intention, advertent negligence (probability intent) and malice (*dolus eventualis*).

The Danish authorities point out that expert reports related to the draft Criminal Code 1930 included definitions of “intention”, which clarify that “intention exists when the actor knows that his act will lead to the fulfilment of the requirements of the law for the offence (actus reus), or when he sees the occurrence of the offence as necessary or predominantly probable consequence of the act, or finally when he only sees the occurrence of the offence as possible but would have acted even if he had seen it as certain.”

Although this definition was not incorporated into the Criminal Code, it is the view of the Danish authorities that it serves as a useful summary of what is demanded under Danish law for criminal intention.

1.1.3 to offer, promise or give

Section 122 covers any person who “grants, promises or offers” a bribe to a public official. The Danish authorities confirm that they consider “grants” and “gives” to have the same meaning.

1.1.4 any undue pecuniary or other advantage

Application of Term “Gift or Other Privilege”

Section 122 comprises a “gift or other privilege”. According to the Danish authorities, this term includes both pecuniary and non-pecuniary advantages, such as the promise of personal return services. They state that the *travaux préparatoires* confirm that the offence is not restricted to the obtaining of a financial gain. However, they are not certain whether favourable publicity would be covered. The Danish authorities confirm that the term “privilege” may be an inaccurate translation of the Danish “fordel”, which is best translated as “advantage”.

Application of Term “Unlawfully”

Section 122 of the Criminal Code applies to any person who “unlawfully grants, promises or offers” a gift, etc. The Danish authorities provide that, in fact, “undue” or “unjustified” is a closer translation to the term in the Danish language (*uberettiget*). They further provide that it is not an additional requirement that the act or omission of the public official that is sought to be induced involve any breach of duty or that the bribery has any such intent. The *travaux préparatoires* concerning section 122 provide the following general comment on this aspect of the amendment:

“...it [was] proposed to amend the description of the action of active bribery, deleting the requirement that the gift or the privilege must have been granted, promised or offered to make the public official commit a breach of duty. Instead, an express reservation is inserted to the effect that the bribery is only an offence if it is an “unlawful” grant (promise or offer) of a gift or other privilege. Compared with the present delimitation of the offence of bribery in section 122, the amendment will involve a minor extension of the criminal scope.”

Although there is no case law concerning the interpretation of the term “unlawfully” in relation to bribery, the Danish authorities have explained that an exclusion from the offence of bribing a foreign public official exists in the following circumstances:

1. Usual gifts in connection with anniversaries, resignation, etc.
2. A grant of a gift as a reward for an act already carried out without any advance promise. The Danish authorities confirm that this exclusion only covers “ordinary”(small) gifts that do not involve a risk of affecting the performance of the official duties of the public official. They state that if a gift is an implicit bribe for possible future acts of the foreign public official, an offence is committed.
3. The *travaux préparatoires* provide for an exception in the following circumstances:

Even though the actus reus of the proposed amendment is the same as bribery of foreign public officials, etc., as bribery of Danish public officials, it cannot be precluded that in some countries such very special conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark. This might even be imagined although the gratuities may have been granted to make the foreign public official act in breach of his duties. Whether such occurrences are non-criminal (not

“unlawful”) must depend on a concrete assessment in each case, including an assessment of the purpose of granting the gratuity.

Denmark explains that this is meant to exclude “small facilitation payments” as contemplated in Commentary 9 on the Convention, and that “small facilitation payments do not—and should not—fall outside the scope of section 122 irrespective of local custom”. It would appear that this exclusion, which is not contained in the law, does not adequately qualify the application of the exception for small facilitation payments especially concerning the relevance of the “situation” in the country of the foreign public official and the absence of limits on the discretionary nature and legality of the reciprocal act of the foreign public official. In addition, it is not clear that the exception would consistently be interpreted in accordance with the Convention in the following respects:

- i) Contrary to Commentary 7, the perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage, would appear to be relevant considerations.
- ii) The Danish authorities state that, with respect to Commentary 8, an advantage permitted or required by the written law, etc. would “most likely not be considered unlawful”. It is difficult to know with certainty how Commentary 8 will be interpreted by the courts, in view of the lack of a statement in the Danish law with respect to it, and in light of the lack of certainty on the part of the Danish authorities.

The Danish authorities confirm that an offence is committed whether or not the company concerned was the best-qualified bidder or was otherwise a company which could properly have been awarded the business (Commentary 4).

The Danish authorities direct attention to the statement in the *travaux préparatoires* that the reservations concerning the term “unlawfully” must be interpreted narrowly in accordance with the “underlying convention”.

1.1.5 whether directly or through intermediaries

Section 122 does not expressly apply to bribes through intermediaries and there is no case law that indicates the offence applies in this manner. However, the Danish authorities explain that the offence applies where a person bribes a foreign public official through an intermediary. They are certain that such bribes are covered because of the application of the law on complicity, which provides under section 23 of the Criminal Code that any person who has contributed to the execution of a wrongful act by instigation, advice or action, is liable to a penalty according to the same rules as the principal offender. According to the Danish authorities, complicity may apply both in relation to the planning of the bribery and the actual execution thereof. It is the view of the Danish authorities that it is irrelevant whether the person contributing to the bribery can expect to get a share in the advantage intended to be gained from the bribery. However, the fact that the contributor gets a share may constitute an aggravating circumstance in determining the penalty¹.

The Danish authorities provide that Danish criminal law does not make specific distinctions between principals, participators and other parties to the crime. Once a crime has been committed, all the involved persons are liable to punishment regardless of how close their participation was to the *actus reus*, as long as their acts (or omissions) fall within the wording of section 23.

¹ See section 3.2 below.

According to the Danish authorities, neither section 122 nor section 23 requires that the foreign public official is aware of the fact the intermediary acts for the (principal) briber.

1.1.6 to a foreign public official

Section 122 applies to bribes to a person “exercising a Danish, foreign or international public office or function”. None of these persons is defined in the Criminal Code, and a relevant definition does not exist elsewhere in the law. The Danish authorities explain that the relevant terms are defined throughout the *travaux préparatoires*. For instance, at one point therein the following definition is provided:

The expression “foreign public office or function” aims at public offices or functions in another EU Member State, among others. However, the provision can also be applied in relation to non-members of the European Union. Foreign public offices or functions include persons who exercise a public function for another country, including for a public agency or a public enterprise, cf. Article 1(4)(a) of the OECD Bribery Convention. The term “international public office or function” includes offices and functions with the European Communities, and can therefore be applied in relation to Community officials. Furthermore, the provision can be applied to bribery of EU Commissioners, members of the European Parliament, the European Court of Justice, and the Court of Auditors of the European Communities. The provision can also be applied to other international public offices, for example with the Council of Europe, NATO, the OECD and the United Nations.

The Danish authorities provide that in various other parts of the *travaux préparatoires* this definition is supplemented, covering various categories of public officials in the following manner:

- The term “public office” includes judges and other staff of the judiciary.
- Employment with the central administration is also included regardless if the employee is involved in making decisions or administrative functions. According to the Danish authorities, the specific nature of the employment or the function is of no importance to the application of section 122.
- The Danish authorities confirm that the term also covers a public agency or a public undertaking. They explain that the term “public agency” includes any central or local government administrative entity. They also explain that the term “public undertaking” includes state enterprises and other publicly owned entities.
- The Danish authorities also confirm that the term “public office” includes all levels and subdivisions of government, from national to local.
- According to the Danish authorities, the term “public function” covers cases where the function is based on election as well as cases where the function is based on contract or service in pursuance of duty. Therefore, members of the Danish Parliament are encompassed by this term. In view of the Danish authorities, the exercise of a “public function” also includes cases where functions are exercised on behalf of the public in undertakings organised as companies engaged in commerce or industry. The Danish authorities confirm that members of local, regional, foreign and supranational Parliaments are covered.

The Danish authorities further provide that the definition of the term “public office”, which is used in several places in the Criminal Code, is the definition generally applied in Danish law. Thus, at least with respect to domestic public officials, the term has a generally understood interpretation. With respect to persons exercising a foreign office under section 122, the Danish authorities explain that in

interpreting this term, a court would look at the definition in the *travaux préparatoires*. Despite the non-autonomous nature of the definition, they are confident that every category of foreign public official covered by the Convention would be covered by section 122.

1.1.7 for that official or for a third party

Section 122 of the Criminal Code does not expressly apply where the advantage is for a third party. The Danish authorities state that the offence applies regardless if the advantage is intended to benefit someone other than the public official (e.g. his/her spouse, children or others). They confirm that the case would be covered where an agreement is reached between a briber and a foreign public official to transmit the bribe directly to a third party. Although there is no case law on this issue, Denmark explains that the academic literature leaves no doubt that the offence covers such cases, and that this interpretation of the law is re-stated in the *travaux préparatoires*.

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

Section 122 requires that the offender induce the public official to do or omit to do anything in relation to his/her official duties. According to the Danish authorities, it is not an additional requirement that the act or omission sought to be induced by the public official will involve any breach of duty or that the offender has any such intent. The Danish authorities further declare that it is of no importance whether the act or omission sought to be induced by the bribe falls within or outside the said public official's competence.

1.1.9/1.1.10 in order to obtain or retain business or other improper advantage/in the conduct of international business

Section 122 is not limited in application to bribes for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business.

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

Pursuant to section 23 of the Criminal Code, the penalty provided in respect of an offence applies to every person who has contributed to the execution of the wrongful act by instigation, advice or action. The Danish authorities confirm that any form of complicity, including incitement, aiding and abetting or authorisation, would be covered.

Unless provided otherwise, the penalty for participation in offences that are not punishable more severely than with simple detention may be remitted pursuant to subsection 23(3), if the accomplice only intended to give assistance of minor importance or to strengthen an intention already existing, or where his/her complicity is due to negligence. The Danish authorities clarify that this provision is not applicable in the case of bribery of foreign public officials.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

Conspiracy

According to the Danish authorities, Danish criminal law does not include the concept of “conspiracy”.

Attempt

Section 21 of the Criminal Code deals with the attempt to commit an offence, including bribery pursuant to section 122. Accordingly, acts that aim at the promotion or accomplishment of an offence are punishable as attempts when the offence is not completed. Attempts involving complicit acts are also covered by this provision.

Pursuant to subsection 21(2), the punishment prescribed for the offence may be reduced in the case of an attempt, particularly where there is evidence of little strength or persistence in the criminal intention. According to subsection 21(3), unless provided otherwise, an attempt shall only be punishable if a penalty more severe than simple detention is prescribed for the offence.

Pursuant to the Danish authorities, the offence of bribery is accomplished when the bribe is promised or offered to the foreign public official irrespective of whether he or she actually receives the bribe. If the bribe is sent to the foreign public official without prior promise or offer – but never reaches him or her – this constitutes attempted bribery.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

2.1 Criminal Responsibility

The Danish Criminal Code provides no general authority to punish legal persons for violation of the Criminal Code or other legislation. However, Part 5 of the Criminal Code (sections 25 to 27) contains general supplementary provisions on the criminal responsibility of legal persons, laying down detailed conditions for imposing such responsibility where specific legislation so provides.

Act No. 228 introduced subsection 306(1) into the Criminal Code in order to satisfy Article 2 of the Convention². The Danish authorities provide that this provision provides for the possibility of applying criminal responsibility on legal persons (companies, etc.) under the rules of Part 5 of the Criminal Code in respect of an offence under certain provisions of the Criminal Code, including section 122.

². Subsection 306(2) was introduced for the purpose of applying section 284, which refers to the offences for which it is prohibited to secure a company, etc., a share in a gain acquired by a violation of section 122, 144 or 289a, to legal persons. This provision is discussed below under the part on money laundering.

Subsection 306(1) reads as follows:

Criminal responsibility can be imposed on companies, etc. (legal persons) under the rules of Part 5 in respect of violation of section 122, 289 a or 299(ii), second indent.

Discretionary Nature of Criminal Responsibility of Legal Persons

The responsibility of legal persons under the Criminal Code for an offence contrary to section 122 is discretionary. Moreover, the discretion in this regard is not limited (e.g. by guidelines) under the law. The Director of Public Prosecutions has issued guidelines that provide some relevant rules, although these are not binding on the courts. For instance it shall always be the priority to pursue the legal person and also the natural person if the crime is committed intentionally or involves a person performing a managerial function. The Danish authorities indicate that where criminal liability is applicable under other criminal statutes, such as the Environmental Code and the Industrial Safety Code, the practice has been to prosecute legal persons as a general rule.

Standard of Liability

The Danish authorities indicate that since subsection 306(1) covers crimes that are only punishable when committed intentionally, criminal responsibility of the legal person can only be triggered where one or more (identified) natural persons within the company, etc., have intentionally committed bribery. A prior conviction of the natural person(s) is not necessary. However, during the trial of the legal person, it must be proved that the natural person(s) within the company intentionally committed the crime. The Danish authorities explain that it is generally the case that the legal person and the natural person are tried together in the same proceeding, but it is possible to try the legal person in an independent proceeding. Furthermore, they state that responsibility of the legal person does not preclude the personal responsibility of the natural person who intentionally violated the relevant provisions of the Criminal Code.

The provisions of the Criminal Code that describe the standard of liability for legal persons are contained in Part 5 (sections 25-27) and read as follows:

Section 25

A legal person may be punished by a fine, if such punishment is authorised by law or by rules pursuant thereto.

Section 26

(1) Unless otherwise stated, provisions on criminal responsibility for legal persons etc. apply to any legal person, including joint-stock companies, co-operative societies, partnerships, associations, foundations, estates, municipalities and state authorities.

(2) Furthermore, such provisions apply to one-person businesses if, considering their size and organisation, these are comparable to the companies referred to in subsection (1) above.”

Section 27

(1) Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself.

(2) Agencies of the state and of municipalities may only be punished for acts committed in the course of the performance of functions comparable to functions exercised by natural or legal persons.

With respect to the limit under subsection 26(2) concerning the liability of one-person businesses, the Danish authorities explain that in the comments to the Bill that introduced sections 25 to 27 into the Criminal Code, it is stipulated that the provision only covers individually owned businesses with 10 to 20 employees or more. They confirm that other considerations such as the volume of sales and profits would also be relevant.

Subsection 27(1), which makes criminal responsibility of a legal person conditional upon “a transgression having being committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself”, does not, according to the Danish authorities, restrict the application of the offence to high level employees and persons with managerial responsibilities. They indicate that the person responsible for the bribe does not have to be formally employed by the legal person, and that a contractual relationship (e.g. an agent) would be sufficient.

With respect to the limit under subsection 27(2) on the liability of “the state and of municipalities”, Denmark states that such entities may only be punished for “crimes committed outside the exercise of public authority”. They confirm that this means that the criminal liability of state-controlled or state-owned entities is only available in relation to entities performing the kind of function normally performed in the private sector (e.g. telecommunications, public transport).

Moreover, Denmark provides that “the legal person may be held responsible even if the employee acted in conflict with explicit instructions from management, but totally abnormal actions exempt the legal person from responsibility”. “Totally abnormal actions” are described as “extreme situations”, that, according to the Danish authorities, are not relevant to the offence of bribing a foreign public official.

2.2 Non-Criminal Responsibility

The Danish authorities confirm that there is no non-criminal responsibility of legal persons concerning bribery of foreign public officials.

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 legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention 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.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

According to section 122, the punishment for the offence of bribery of public officials is a fine, simple detention or imprisonment for up to 3 years. Simple detention is imposed from seven days to six months. Imprisonment is imposed for 30 days as a minimum. The punishment for the passive bribery of a domestic or foreign public official is, pursuant to section 144, simple detention, imprisonment for up to 6 years or, in mitigating circumstances, a fine. Penalties for other similar offences include a maximum of 8 years of imprisonment for fraud in aggravated circumstances, and a maximum of 4 years of imprisonment for tax fraud.

Act No. 432 of 31 May 2000 abolishes simple detention, and will take effect on 1 July 2001, following which the penalty limits of section 122 of the Criminal Code will be a fine or imprisonment for up to 3 years. At the same time, the minimum period of imprisonment will be reduced from 30 to 7 days. Simple detention was originally considered a more lenient and less stigmatising form of imprisonment. However, over time the difference between the two became less significant.

A fine can be imposed in addition to imprisonment where the perpetrator obtained or intended to obtain, through his/her offence, a gain for himself/herself or another [subsection 50(2) of the Criminal Code]. Fines for violations of the Criminal Code may range from 1 day-fine of 2 DKK³ to 60 day-fines of an indefinite amount [subsection 51(1)]. The main principle of the day-fine system is that the number of day-fines reflects the seriousness of an offence, while the size of a single day-fine is set according to the economic situation of the offender.

The calculation of fines is based on a day-fine system [s. 51(1) of Criminal Code], which is set according to the nature of the offence and the economic situation of the perpetrator (i.e. average daily earnings, taking into account such factors as capital resources and family responsibilities). Pursuant to the relevant provision, the number of day-fines shall be fixed at not less than 1, and not more than 60. It may in no case be fixed at an amount lower than 2 DKK. Where an offence involved the obtaining of a “considerable economic gain” for the perpetrator or another person, and the application of the day-fines system would not be reasonable, having regard to the amount of the profit that has been or might have been obtained by the offence, pursuant to subsection 51(1), the court may impose a fine other than in the form of day-fines.

Natural Persons

Section 80 of the Criminal Code lays down general rules for determining the penalty in relation to natural persons. It gives the details of the aggravating and mitigating circumstances that have to be taken into account when the penalty is determined.

Pursuant to subsection 80(1), consideration must be given to the seriousness of the offence and information concerning the offender’s character, including his/her general personal and social circumstances, his/her conditions before and after the offence and his/her motives for committing it. Pursuant to subsection 80(2), the fact that several persons have committed the offence together must, as a rule, be regarded as an aggravating circumstance.

³ 1US\$ = 9.10 DKK

Legal Persons

Pursuant to section 25 of the Criminal Code, the only criminal penalty applicable to legal persons is a fine. According to the Danish authorities, the imposition of fines in cases of corporate responsibility is governed, in principle, by the same rules as those applying to natural persons. In addition to considering the nature of the offence (section 80), special consideration must be given to the offender's capacity to pay and to the obtained or intended gain or amount saved pursuant to subsection 51(3) of the Criminal Code. The Danish authorities state that this makes it possible to impose a substantially larger fine on a legal person than on a natural person.

3.3 Penalties and Mutual Legal Assistance

For the purposes of providing mutual legal assistance, Denmark states that there is no requirement that a specific minimum sentence be imposed for the offence in question except in respect of requests for the provision of certain coercive measures (i.e. 1 ½ years or more for the inspection of a suspect's person and 6 years or more for a wiretap order or video surveillance in a private place). This is due to a requirement under the Administration of Justice Act (AJA) on coercive investigative measures, which, according to case law, is applied by analogy to requests for mutual legal assistance.

3.4 Penalties and Extradition

Requests for extradition are governed by the Act on Extradition of Offenders [the Extradition Act (*udleveringsloven*)]. Pursuant to section 3 of the Extradition Act, extradition can, in principle, only be ordered, if, under Danish law, the offence may entail a more severe penalty than imprisonment for 1 year. Since the maximum penalty for bribery of foreign public officials is, pursuant to section 122 of the Criminal Code, imprisonment for 3 years, the Extradition Act thus allows the extradition of persons for the purpose of prosecutions abroad.

3.5 Non-Criminal Sanctions Applicable to Legal Persons for Bribery of Foreign Public Officials

See sections 3.7/3.8 below.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Pre-trial Seizure

Rules on seizure are laid down in Part 74 of the Administration of Justice Act [AJA (*retsplejeloven*)]. Section 802 governs the availability of seizure from suspects and section 803 governs the availability of seizure from non-suspects. These provisions make it possible to seize when there is reason to presume that the object can serve as evidence or should be confiscated or forfeited.

According to subsection 802(1), any object at the disposal of a suspect may be seized in the following circumstances:

- (i) the person in question is reasonably suspected of an offence liable to public prosecution; and
- (ii) there is reason to presume that the object may serve as evidence or should be confiscated or forfeited, except in instances covered by subsection 802(2), or where it has been "swindled" from a person who has a right to its return.

Pursuant to subsection 802(2), goods owned by a suspect may be seized, if

- (i) the person in question is reasonably suspected of having committed an offence liable to public prosecution; and
- (ii) seizure is considered necessary to secure any claim by the public authorities for costs, confiscation or forfeiture, or fines, or an innocent party's claim for damages.

The Danish authorities point out that the term "object" refers to individualised objects or assets (including the actual proceeds from a criminal act), which need not have an economic value. The term "goods" refers to any property suitable for serving as security for the claims mentioned in subsection (2).

According to subsection 802(3), a suspect's entire property or part thereof, including any property acquired subsequently by the suspect, can be seized in the following circumstances:

- (i) a charge has been laid for an offence for which the potential statutory penalty is imprisonment for 1 year and 6 months, or more; and
- (ii) the accused person has evaded prosecution.

Pursuant to subsection 803(1), any object at the disposal of a non-suspect can be seized as part of the investigation of an offence liable to public prosecution if it can reasonably be presumed that it may serve as evidence, should be confiscated or forfeited or, has been swindled from a person who has a right to its return.

Confiscation

Pursuant to section 75, confiscation, upon conviction, of the "proceeds" of bribery is discretionary. The bribe can only be confiscated as proceeds of passive bribery. In addition, there is no requirement that, in accordance with Article 3.3 of the Convention "monetary sanctions of comparable effect" be applied where confiscation cannot be effected. The Danish authorities provide, however, that in practice the general rule is to order confiscation where sufficient evidence is available that a "gain" has been acquired.

The rules on confiscation are included in Part 9 of the Criminal Code (i.e., sections 75 and 76). Where the size of the proceeds has not been sufficiently established, a sum considered to be equivalent to the proceeds may be confiscated. Confiscation may be ordered against any person to whom the proceeds of a criminal act have directly passed. According to circumstances, confiscation may also be ordered against any subsequent acquirer if he/she knew of the connection of the transferred property to the criminal act, or has displayed gross negligence in this respect, or if the transfer to him/her was gratuitous. Confiscation from a subsequent acquirer of the proceeds or of objects can only be imposed, if the acquirer "knew of the connection of the transferred property to the criminal act, or has displayed gross negligence in this respect". The acquirer must consequently have had knowledge of (or have been grossly negligent with respect to) the criminal act with which the transferred property is connected, but not necessarily with the legal qualification of this act (as bribery).

3.7./3.8 Civil Penalties and Administrative Sanctions

According to the Danish authorities, there is the possibility of imposing civil liability (damages) under the general rules of civil law. This also applies in the case of bribery of foreign public officials.

Beyond this, Danish law does not provide for civil or administrative sanctions. Changes in this area are currently not being considered.

Furthermore, the Danish authorities refer to the EU public procurement directives on harmonisation of the methods of public procurement of goods, services, construction and building activities and the conclusion of purchase agreements by public utilities. These directives do not contain specific provisions for the exclusion of participants from public procurement procedures in cases of bribery of foreign public officials. They provide, however, that contracting authorities may exclude participants who have been convicted by final judgement of any offence concerning their professional conduct.

Whether, in cases of bribery, this provision will apply is a matter of discretion. The Danish Competition Authority, who is responsible for this area, does not have knowledge of court cases having dealt with this question.

4. ARTICLE 4. JURISDICTION

The rules on Danish criminal jurisdiction are laid down in sections 6 to 12 of the Criminal Code. Danish criminal jurisdiction includes acts committed within the territory of the Danish state (section 6), and acts committed abroad by persons having a specified connection with Denmark (section 7).

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Pursuant to section 6 of the Criminal Code, Danish territorial jurisdiction applies if the act was committed in the following circumstances:

- (a) within the territory of the Danish state;
- (b) on board a Danish ship or aircraft, being outside the territory recognised by international law as belonging to any state; or
- (c) on board a Danish ship or aircraft, being within the territory recognised by international law as belonging to a foreign state, if committed by persons employed on the ship or aircraft or by passengers travelling on board the ship or aircraft.

According to the Danish authorities, section 6 applies to cases where the entire criminal activity or a part thereof was carried out on Danish territory. The Danish authorities refer to a judgement from the Eastern High Court of 5 October 1989, wherein territorial jurisdiction was established because the defendant had arranged contacts, meeting times and meeting places for the persons involved by telephone from Denmark.

Pursuant to section 9, in cases where the criminality of an act depends on or is influenced by an actual or intended consequence, the act shall be deemed to have been committed where the consequence has taken effect or has been intended to take effect.

According to the Danish authorities, with respect to jurisdiction over legal persons, the crime is considered to have been committed in the jurisdiction where the offence was committed by the relevant natural person. If the criminal responsibility of the legal person is triggered by various acts or

omissions attributable to several natural persons, the crime will be considered to have been committed where the *actus reus* is fulfilled. If the legal person is domiciled in Denmark and the *actus reus* is fulfilled in another state, but the criminal responsibility is triggered partly by an act or omission in Denmark, the crime might be considered to have also been committed in Denmark (see the report of the Standing Committee on Criminal Law 1289/1995, p. 187-188).

4.2 Nationality and other Extraterritorial Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Jurisdiction over Nationals

Pursuant to subsection 7(1), acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state shall be subject to Danish criminal jurisdiction where the act was committed in the following circumstances:

- (a) outside the territory recognised by international law as belonging to any state, provided acts of the kind in question are punishable with a sentence more severe than simple detention; or
- (b) within the territory of a foreign state, provided that it is also punishable under the law in force in that territory.

The Danish authorities confirm that paragraphs 7(1)(a) and (b) apply to the offence of bribery of a foreign public official. They further confirm that application of the principle of dual criminality under paragraph 7(1)(b) would not cover the following situation: A Danish national bribes a foreign public official from country “B” abroad in country “A”, and in country “A” bribery of a foreign public official is not an offence. (See Commentary 26 on the Convention)

Furthermore, subsection 10(2) of the Criminal Code requires that where the act is subject to Danish criminal jurisdiction, pursuant to section 7 of the Criminal Code, the punishment may not be more severe than that provided for by the law of the territory where the act was committed.

Jurisdiction over Non-Nationals

Pursuant to subsection 7(2), subsection 7(1) shall similarly apply to acts committed by a person who is a national of, or who is resident in Finland, Iceland, Norway or Sweden, and who is present in Denmark.

Pursuant to paragraph 8 (v), Danish criminal jurisdiction also applies, irrespective of the nationality of the perpetrator, to acts committed outside the territory of the Danish state where the act is covered by an international convention pursuant to which Denmark is under an obligation to institute legal proceedings. According to the Danish authorities, one of the purposes of this provision is to satisfy future conventions or other international covenants involving an obligation for Denmark to establish criminal jurisdiction in order to be able to prosecute specified offences. The Danish authorities explain that paragraph 8(v) may serve as a basis for jurisdiction in cases where Denmark is under an

international law obligation to establish criminal jurisdiction and such jurisdiction is not available pursuant to the relevant provisions in the Criminal Code.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Danish authorities state that a transfer of proceedings to another country is made pursuant to a recommendation from a prosecutor, according to the principle that a case should be adjudicated in the most expedient jurisdiction.

The transfer of proceedings is made in accordance with the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters. The Transfer Convention was implemented in Danish law by Act No. 252 of 12 June 1975 as amended by section 4 of Act No. 322 of 4 June 1986. As a general rule, a transfer is only possible in relation to countries that have acceded to the Transfer Convention. Pursuant to section 5 of the Act, the Minister for Justice may, however, decide on the basis of reciprocity that the Act shall also be applied in respect of a request for a transfer of proceedings from a country that has not acceded to the convention.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

It is the view of the Danish authorities that, given the scope of the existing jurisdiction, there is no need to amend the relevant rules.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “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 regarding Investigations and Prosecutions

The Danish criminal justice system consists of the National Director of Public Prosecutor and six regional district prosecution offices, which are headed by a local chief constable, who is a lawyer. Since the police and the prosecution service are amalgamated at the local level, close co-operation is possible. However, during the investigative stage, the prosecutors do not normally become involved unless a particular legal issue arises, such as the question of applying coercive investigative measures. A national Serious Fraud Office led by a senior prosecutor, handles investigations and prosecutions of the most serious and complicated economic crimes, and, according to the Danish authorities, it might deal with serious corruption offences. The Serious Fraud Office is comprised of a team of investigators and prosecutors specialised in dealing with such issues, and is characterised by close co-operation between the legal specialists and the investigators during the investigative stage.

The rules on investigation and prosecution are contained in the Administration of Justice Act (AJA). These rules apply to the investigation and prosecution of all criminal offences. Thus, no special rules exist for the investigation and prosecution of bribery of foreign public officials. The Danish authorities point out that Danish criminal procedure is based on the principle of discretionary prosecution – not of mandatory prosecution. They state that, however, prosecutors virtually always take action when so warranted by the evidence.

Pursuant to subsection 742(2) of the AJA, the police shall launch an investigation upon the laying of an information (by a victim, a competitor or another) or on its own initiative, where it may reasonably be presumed that a criminal offence liable to public prosecution has been committed.

When the investigation is completed or sufficiently advanced, the prosecutor determines whether, on the basis of the result of the investigation, there is a basis for prosecuting the matter. It follows from section 718 of the AJA that only the prosecutors can bring criminal matters liable to public prosecution before the courts. As long as no preliminary charge has been made in a case during the investigation, the police may decide to terminate the investigation if, for example, the case is deemed not to involve an offence liable to public prosecution or it is deemed impossible to find the offender.

A charge can be withdrawn in full or in part, pursuant to subsection 721(1) of the AJA, in the following circumstances:

- where the charge is groundless;
- further prosecution cannot be expected to lead to a conviction; or
- completion of the case will “entail difficulties”, or costs or trial periods that are not commensurate with the importance of the case and with the potential punishment in the event of a conviction.

Pursuant to subsection 721(2), the competence to withdraw a charge rests with the Chief Constable in cases where the charge has proved groundless. In the other cases, the competence rests with the prosecutor, unless otherwise provided for by the Minister of Justice. The Danish authorities confirm that political considerations are not taken into account in the determination of whether a case shall proceed.

According to subsection 724(1), of the AJA, the suspect and others who may be deemed to have a reasonable interest are notified of a decision to withdraw charges. An appeal concerning such a decision may be lodged with the superior prosecuting authority pursuant to subsection 724(1), third sentence. Where a decision has been made concerning the withdrawal of charges, prosecution of the former suspect may only be continued pursuant to subsection 724(2). This requires a decision by the superior prosecuting authority and the serving of a notice on the person in question within two months from the date of the decision to withdraw the charges. Pursuant to section 102 of the AJA, the time limit for appealing such a decision is 4 weeks after the accused has received notice of the decision. If the appeal is lodged after the time limit, it must be heard if the failure to observe the time limit is considered excusable. The right to appeal rests with persons who are a party to the case (i.e. persons individually and substantially affected by the decision of the prosecution service). According to the Danish authorities, it is not possible to state with certainty, whether a competitor in a bribery case would always be considered individually and substantially affected by a decision not to prosecute.

Part 10 of the AJA (section 95, et seq.) lays down detailed rules governing the prosecuting authority. Pursuant to section 95, the public prosecutors are the Director of Public Prosecutions, the District

Public Prosecutors, the Chief Constables (in Copenhagen the Commissioner of the Copenhagen Police), and such persons as are employed to assist these prosecutors in the legal conduct of trials. They are subject to the authority of the Minister of Justice who, pursuant to subsection 98(1), “shall superintend their work” and, pursuant to subsection 98(2), may issue rules concerning the discharge of their duties”. The Danish authorities state that “by tradition, however, the Minister of Justice does not interfere with specific decisions made by the competent prosecutor”, and that “generally” he/she will not be involved in a decision regarding whether to prosecute a case under section 122 of the Criminal Code.

5.2 Considerations such as National Economic Interest

The Danish authorities confirm that investigation and/or prosecution of the bribery of a foreign public official will 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 person involved.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Natural Persons

According to paragraph 93(1)(ii) of the Criminal Code, the statute of limitations is 5 years where the offence is not punishable with a penalty more severe than imprisonment for 4 years. This applies to the offence of bribing a foreign public official, pursuant to section 122, as the maximum penalty for this crime is imprisonment of 3 years.

Legal Persons

Pursuant to paragraph 93(1)(i) of the Criminal Code, the statute of limitations for legal persons is 2 years. This paragraph applies where the only penalty for an offence is a fine or a term of imprisonment of 1 year or less.

The Danish authorities confirm that in applying the concept of dual criminality where a request for mutual legal assistance is received, Denmark would not be able to comply with the request where the statute of limitations for the corresponding offence has expired under Danish law.

Generally

The triggering and suspension of the statute of limitations is regulated by section 94 of the Criminal Code. According to subsection 94(1), the limitations period shall be calculated from the day when the punishable act or omission ceased. Pursuant to subsection 94(2), where liability depends on or is influenced by a consequence that has taken place or any other later event, the period shall be calculated from the occurrence of such consequence or later event. Subsection 94(5) states that the period shall be suspended by any legal proceedings as a result of which the person concerned is charged with the offence.

When formulating the present rules on criminal responsibility of legal persons, the Standing Committee on Criminal Law considered whether to propose a longer limitations period for legal

persons (report no. 1289/1995, p. 190-191), and concluded that experience has not demonstrated a need for extending the period in this regard.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Money Laundering Offence: Generally

Section 284 of the Criminal Code, which has been cited by the Danish authorities in relation to the obligation under Article 7 of the Convention, was extended by Act No. 228 to apply to the profits from the active (section 122) and passive (section 144) bribery of public officials in Danish, foreign and international offices or functions. It states as follows:

Any person who accepts or obtains for himself or for others a share in profits acquired by theft, misappropriation of objects found, embezzlement, fraud, computer fraud, breach of trust, extortion, misappropriation of funds, robbery or violation of section 122, section 144, section 289, second sentence, or section 289a and any person who, by hiding the articles thus acquired, by assisting in selling them or in any other similar manner helps to ensure for the benefit of another person the profits of any of these offences, shall be guilty of receiving stolen goods.

(Underlining added to provide emphasis.)

Section 284 is aimed at the accepting or obtaining of a share of profits acquired by one of the offences listed therein (including section 122), and the hiding of articles to ensure the benefit of the profits of such an offence for another person. It does not cover money laundering activities as they are generally understood (i.e. concealing, disguising, converting, transferring or removing from the jurisdiction, the proceeds of criminal conduct in order to avoid prosecution or a confiscation order by a third party as well as by the perpetrator of the predicate offence). However, the Danish authorities state that this offence is broad enough to capture such activities.

The Danish authorities provide that section 284 is not applicable with respect to passive bribery (section 144) if the bribe is still in the hands of the briber. With respect to active bribery (section 122), the proceeds subject to section 284 consist of the advantage obtained as a consequence of the bribe, but not the bribe itself. Furthermore, such an advantage may have been attained as the result of a promise or an offer of a bribe.

Denmark explains that the profits from active and passive bribery may, according to the circumstances, comprise the gift, etc., received by the public official (or a third party), and the privilege obtained through the bribery by the person giving the bribe. They state that the term “articles” should be replaced with “profits or gains” to more closely correspond to the term used in the Danish language, and confirm that section 284 would apply to the proceeds of criminal conduct where there was not any net gain. Moreover, they state that the application of section 284 is not limited to cases where the predicate offence is connected with Denmark.

According to the Danish authorities, a person is liable under section 284 even if he/she mistakenly assumes the proceeds were derived from an offence other than the actual predicate offence, as long as both the actual and assumed predicate offence are covered by section 284. Criminal responsibility for

the attempted receipt of stolen goods is applicable where the defendant intended to commit the offence under section 284, but the predicate offence cannot be proven.

An offence under section 284 is punishable with imprisonment for any term not exceeding 1 year and 6 months (section 285). Where the offence is of a particularly aggravated nature or where a large number of such offences have been committed, the penalty may be increased to imprisonment for any term not exceeding 6 years (section 286). If the offence is of minor importance, the penalty shall be a fine and may – in further mitigating circumstances – be remitted (section 287).

Money Laundering Offence: Legal Persons

Pursuant to subsection 306(2) of the Criminal Code, criminal responsibility can be imposed on legal persons for a violation of section 284 where the violation has “been committed to secure the company, etc., a share in the gain acquired” by a violation of section 122 or 144.

Reporting Obligations on Financial Institutions

The Danish authorities confirm that the Danish Money Laundering Act 1993, which regulates the reporting obligations of banks, insurance companies, investment firms, securities brokers, bureau de change and all branches of foreign credit and financial institutions, applies to the offence of bribing a foreign public official. This legislation concerns issues related to customer identification, record keeping and the reporting of suspicious transactions.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting Requirements/Companies Subject to Requirements

The Bookkeeping Act applies to commercial and industrial undertakings of any kind established in Denmark regardless of ownership or nature of liability, and to commercial and industrial activities carried out in Denmark by enterprises domiciled abroad.⁴ Section 2 of the Bookkeeping Act states that an undertaking conducts commercial or industrial activity if it contributes goods, rights, funds, services etc. for which it normally receives payment. Apart from this, an undertaking conducts commercial or industrial activity if it is regulated by legislation, including the Companies Act, the Act on Private Limited Companies, the Act on Commercial Foundations or the Act on Commercial Enterprises. The Danish authorities confirm that all known forms of undertakings are subject to accounting requirements regardless if they are registered. Enterprises domiciled abroad are considered within the scope of the Bookkeeping Act with regard to their activities in Denmark.

Sections 6, 7 and 9 of the Bookkeeping Act provide the following accounting requirements applicable to the entities described above:

⁴. Section 1 of the Bookkeeping Act.

- Undertakings, depending on their nature and scope, shall keep accounting books in accordance with “good bookkeeping practices”⁵. Moreover, the accounting material must be maintained in such a manner to prevent it from being destroyed, removed or corrupted. It shall also be secure against errors and misuse (section 6).
- Transactions shall be promptly recorded and in the order in which they are made. [(subsections 7(1) and 7(2)]. An undertaking, which, due to its nature and scope, cannot record purchases or sales, may instead make recordings on the basis of daily cash balances.
- Every entry must be substantiated by a “voucher” indicating the date and the amount of the transaction.

8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements

Section 6 of the Order on Auditors’ Report (issued pursuant to the Act on State-Authorised Public Accountants and the Act on Registered Public Accountants) states that the auditor must provide information that he/she becomes aware of in the course of an audit, as follows:

- “supplementary information” on facts that “give probable cause to assume that members of management may be liable in damages or under the criminal law for actions or omissions involving the enterprise, associated enterprises, participants in the enterprise, creditors or employees”; and
- information on matters contrary to:
 - (i) Parts 28 and 29 of the Criminal Code⁶ and the legislation on taxes, charges and subsidies,
 - (ii) the corporate or corresponding legislation laid down for the enterprise, or
 - (iii) the legislation on the presentation of accounts, including rules on bookkeeping and storing of accounting material

In addition, the Danish authorities provide that the auditor is required to indicate any violations of the Bookkeeping Act or the rules concerning safekeeping of vouchers in his/her report. Furthermore there is generally no tax-deductibility for expenses for which vouchers do not exist.

Although an auditor is not required by law to report to the prosecutorial authorities a suspected criminal offence discovered in the course of performing an audit, the auditor’s report is an integral part of the annual account, and is made publicly available by the Commerce and Company Agency.

The Danish authorities explain that all entities subject to the Annual Accounts Act⁷ and referred to in other legislation are required to be audited. In their view, this requirement is implicit in sections 61a and 61g of the Annual Accounts Act. Financial Services enterprises and groups above a certain size are subject to an internal as well as an external audit. The internal auditors are independent of the executive management to the extent that they are appointed and dismissed only by the board of directors.

5. According to the Danish authorities, best bookkeeping practise is defined as a legal standard in line with other legal standards, e.g. best auditors’ practise, best lawyers’ practise etc. Best bookkeeping practise could also be described as the practise, which at any time is considered as good practise in the field of bookkeeping by skilled and responsible experts.

6. Part 28 and 29 of the Criminal Code contain the “acquisitive offences” (section 276-290, e.g. theft, embezzlement, fraud, blackmail and receiving of stolen goods) and “other offences against property” (section 291-305, e.g. destruction of property, unlawful and bribery in the private sector).

7. Sections 1 and 1 a of the Annual Accounts Act.

An internal audit must take place according to the audit instructions approved by the board of directors and furthermore according to best auditing practices. Denmark explains that, in accordance with the instructions, the internal audit shall “to a certain extent” be executed in co-operation with the external audit and shall be subject to an external audit.

8.3 Penalties

The Danish authorities affirm that acts contrary to the accounting requirements set forth above shall be subject to a fine or imprisonment up to 1 year.

Section 16 of the Bookkeeping Act provides that "unless other legislation prescribes a more severe penalty, acts contrary to sections 6 to 10 ... are punishable with a fine." There is no general limit to these fines, which are decided by a court of justice. According to the Order on Auditors' Reports, auditors shall be punished for violation of their duties by a fine.

The Danish authorities state that a violation of the Bookkeeping Act, which at the same time involves a violation of section 122 of the Criminal Code, will also be sanctioned by section 122 of the Criminal Code. In section 16 of the Bookkeeping Act it is prescribed that "unless other legislation prescribes a more severe punishment, acts contrary to sections 6 to 10, section 12, paragraph 1- 3, and sections 13 to 15 are punishable with a fine".

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party co-operate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1/9.2 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance/Dual Criminality

Denmark does not have legislation on mutual legal assistance⁸. The Danish authorities explain that according to case law, the only requirement for MLA is that the request could be carried out in corresponding national Danish criminal proceedings. They confirm that this means they would not be able to provide MLA if, for instance, the statute of limitations for the corresponding offence in Denmark had expired. It also means that the provisions of the Administration of Justice Act on coercive investigative measures are applied by analogy to requests for MLA. When such requests concern the provision of certain coercive measures (i.e. inspection of a suspect's person and wiretap and video surveillance in private places), the corresponding offence in Denmark must carry a penalty of imprisonment above a certain level (see discussion under 3.3 on “Penalties and Mutual Legal Assistance”).

⁸. Denmark has acceded to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and the pertaining Protocol, but the convention has not yet been transposed into Danish law.

Moreover, the Danish authorities provide that dual criminality would be deemed to be met to the extent that the requesting country “properly implemented (the Convention) into criminal law”, and they add that this does not involve an abstract evaluation.

The Ministry of Justice is at present drafting guidelines for the treatment by Danish authorities of requests for mutual assistance in criminal matters. The draft will be sent to the Director of Public Prosecutions, the District Public Prosecutors and all police districts. Their purpose includes the streamlining of co-operation in the area of mutual legal assistance in criminal matters. The new guidelines will also deal specifically with requests for mutual assistance in criminal matters concerning bribery of foreign public officials.

9.1.2 Non-Criminal Matters

The Danish authorities confirm that Denmark is able to provide mutual legal assistance to another Party for the purpose of non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. Under Danish law, a distinction is not drawn between administrative and criminal sanctions, in this respect.

9.3 Bank Secrecy

The principle of bank secrecy is established in section 53a of the Act on Commercial Banks and Savings Banks, etc. (consolidated Act no. 658 of 12 August 1999 as amended by Act no. 393 of 30 May 2000), which states as follows:

Members of the board of directors, members of local boards of directors or similar organs, members of the board of representatives in a commercial bank or credit co-operation, auditors and inspectors and their deputies, members of the board of management and other employees may not unlawfully divulge or use confidential information obtained during the discharge of their duties.

(Underlining has been added to provide emphasis.)

The Danish authorities provide that "it is not ‘unlawful’ for a bank or bank employee to divulge confidential information if authorised by other legislation {e.g. a witness or discovery order issued by a court in the course of a criminal investigation according to the Administration of Justice Act [cf. Ss. 170(3) and 804(4)]⁹}". They add that although in theory a Danish court could decide that a bank or bank employee need not make a witness statement or produce documents, etc., if bank secrecy were considered of material importance in the specific case, in practice the only requirement is that the information requested is relevant evidence.

⁹ Subsection 170(3): “The Court may decide that evidence need not be given on certain matters if the witness is under a statutory duty of confidentiality in respect of such matters and the non-disclosure thereof is of material importance”.

Subsection 804(4): “An order for discovery cannot be imposed if such discovery would produce information on matters which the person in question, as a witness, would be precluded or exempted from giving, cf. Sections 169 to 172”.

10. ARTICLE 10. EXTRADITION

10.1/10.2/10.5 Extradition for Bribery of a Foreign Public Official/Dual Criminality

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. 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 the Convention.

The Danish authorities confirm that they consider the Convention a legal basis for extradition in respect of the offence of bribery of foreign public officials, although extradition is not conditional upon the existence of a treaty between Denmark and the relevant foreign country.

Pursuant to the Danish authorities, dual criminality is a requirement for extradition to non-Nordic countries. It is not required that the criminal law of the foreign state contains an offence identical to the Danish provision (e.g. section 122 in the Danish Criminal Code) as long as the conduct in the specific case is covered by a criminal law provision in both Denmark and the foreign state.

Pursuant to section 3, paragraph 2, of the Act on Extradition of Offenders, “extradition for prosecution can only take place if the foreign state has decided that the person in respect of whom extradition is requested must be arrested or imprisoned for the act in question”. According to the Danish authorities, this provision does not imply that the requesting state must intend to detain the accused person pending trial.

Furthermore, subsection 3(5) of the Act on Extradition of Offenders also states that extradition shall not be provided where “it must be presumed owing to special circumstances that the charge...concerning an act for which extradition is requested lacks sufficient evidential basis”. The Danish authorities state that “according to the *travaux préparatoires* extradition must not take place if there is reasonable doubt as to the guilt of the person in question. It is not an additional requirement that ‘special circumstances’ calls for denying extradition”. They clarify that this means that where the person for whom the request applies provides evidence that raises a reasonable doubt that he/she is guilty of the offence in question, Denmark may require the requesting country to provide further evidence.

10.3 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Act No. 27 of 3 February 1960 on the Extradition of Offenders to Finland, Iceland, Norway and Sweden, as amended by Act No. 251 of 12 June 1975 (the Nordic Extradition Act), permits the extradition of a Danish national to another Nordic country if he/she was a resident in the requesting country for 2 years preceding the offence in question. In all other cases, section 2 of the Extradition Act prohibits the extradition of Danish nationals.

The Danish authorities state that, however, since pursuant to sections 7 and 8 of the Criminal Code Denmark has criminal jurisdiction over Danish nationals who have committed criminal offences

abroad¹⁰, where extradition is declined on the basis of nationality the case can be referred to the Danish prosecutorial authorities.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The Ministry of Justice, Slotsholmsgade 10, DK-1216 Copenhagen K, Denmark, has been appointed the competent authority for Denmark.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Danish authorities provide that Act No. 1097 of 29 December 1997 abolishes the possibility to deduct expenses for bribes to foreign public officials “in certain cases”. Section 8D states that “ no deduction is granted for expenses for bribes as referred to in section 144 of the Criminal Code to a person employed, appointed or elected for an office or function with legislative, administrative and judicial bodies, whether for Denmark, the Faroe Islands or Greenland or a foreign state, including local authorities or political subdivisions or for an international organisation formed by states, governments or other international organisations.” In the explanatory memorandum to the Act, the OECD Recommendation is referred to as one of the reasons for the amendment.

The Danish authorities provide that Act No. 1097 refers to section 144 (the passive bribery of a foreign public official, etc.) as opposed to section 122 (the active bribery of a foreign public official, etc.) because it is aimed at indicating the type of payment that is not eligible for a tax deduction. They confirm that the expense of giving bribes to all the categories of foreign public officials covered by section 122 is not deductible, although the language in Act No. 1097 describing them does not correspond to the language in section 122.

Moreover, the Danish authorities confirm that a prior conviction by a court for the offence of bribing a foreign public official is not a prerequisite for denying tax deductibility.

¹⁰ See also section 4 above.

EVALUATION OF DENMARK

General Remarks

The Working Group appreciates the high level of co-operation of the Danish authorities throughout the examination process; in particular, the openness of their responses and timeliness in providing translations of all requested legislative provisions.

Denmark implemented the Convention, as well as other international instruments, including the European Criminal Law Convention on Corruption, through an amendment to section 122 of the Criminal Code, which applied only to the bribery of domestic public officials prior to the amendment. The new provision retains its application to domestic public officials, and extends its ambit to persons exercising foreign or international public offices or functions. In addition, the previous requirement that the public official commit a breach of duties has been replaced with the term “unlawfully” (*uberettiget*). The Working Group is of the opinion that overall the relevant Danish laws, including the implementing legislation, conform to the standards under the Convention.

Specific Issues

1. Term “Unlawfully”

Section 122 of the Criminal Code applies to any person who “unlawfully grants, promises or offers” a gift, etc. The Danish authorities have clarified that “undue” or “unjustified” is a closer translation to the term in the Danish language (*uberettiget*). The Danish authorities explain that this term provides an exclusion from the offence in the following cases: 1. The usual gifts in connection with anniversaries, etc.; 2. A grant of a gift as a reward for an act already carried out without any advance promise, except where the gift is an implicit bribe for possible future acts; and 3. Small facilitation payments. With respect to the exception for small facilitation payments, it is stated in the *travaux preparatoires* that the assessment of whether a particular offer, etc. involves a small facilitation payment “must take into account the situation in the country in which the public official exercises his office and the purpose of such grant.” It is further stated therein that the case might be covered where the purpose of the gift is to induce the foreign public official to act in breach of his/her duties.

The Working Group appreciates that criminal legislation in Denmark does not traditionally contain details of the application of an offence and that such details are normally provided in the *travaux preparatoires*, which the courts consider to carry a high degree of legal weight. However, the Group is concerned that the *travaux preparatoires* themselves do not sufficiently qualify the application of the exception for small facilitation payments, especially concerning the relevance of the “situation” in the country of the foreign public official and the absence of limits on the discretionary nature and legality of the reciprocal act of the foreign public official. The Group’s concerns are partially alleviated by the statement in the *travaux preparatoires* that the reservations concerning the term “unlawfully” must be interpreted narrowly in accordance with the “underlying conventions”, but since some doubts remained in the detail of the *travaux preparatoires*, it would be prudent to monitor the application of the law in this regard in Phase 2.

2. Definition of Foreign Public Official

Section 122 applies to bribes to a person “exercising a Danish, foreign or international public office or function”. Although these terms are not defined in the Criminal Code or elsewhere in the law, the *travaux preparatoires* contain an open interpretation, which appears to capture all the categories of foreign public officials contained in the Convention. The Danish authorities explain that in

interpreting section 122 in this respect, a court would look at the definition in the *travaux préparatoires*, and are confident that there is no chance that a foreign public official covered by the Convention would not be covered under section 122.

The Working Group is satisfied with the explanation of the Danish authorities, but due to the non-autonomous nature of the definition of foreign public official recommends that this issue be monitored in Phase 2.

3. Third Parties

Section 122 does not expressly apply where the advantage is for a third party. The Danish authorities state that section 122 covers cases where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to a third party. Although there is no case law concerning this issue, Denmark explains that the academic literature leaves no doubt that the offence covers such cases, and that this interpretation of the law is re-stated in the *travaux préparatoires*.

The Working Group recommends that this issue is followed-up in Phase 2.

4. Legal Persons

Pursuant to section 306 of the Criminal Code, criminal liability of legal persons for an offence contrary to section 122 is discretionary. There is no guidance in the Criminal Code on the exercise of this discretion, although guidelines issued by the Director of Public Prosecutions do provide some rules, including the rule that it shall always be the priority to pursue the legal person and also the natural person if the crime is committed intentionally or involves a person performing a managerial function. Where criminal liability is applicable under other criminal statutes, such as the Environmental Code and the Industrial Safety Code, the practice has been to prosecute legal persons as a general rule.

The Working Group recommends that the discretionary nature of criminal liability of legal persons is followed-up in Phase 2 to assess how, in practice, the discretion is applied to foreign bribery cases.

5. Sanctions

The penalty of imprisonment for the active bribery of a foreign public official is a maximum of 3 years. The penalty for passive bribery of a foreign public official is a maximum of 6 years. Penalties for other similar offences include a maximum of 8 years for fraud in aggravated circumstances, and a maximum of 4 years for tax fraud.

The Working Group remains concerned that the penalty of imprisonment for active foreign bribery is comparatively weak, and is particularly concerned that for aggravated cases it is not sufficiently effective, proportionate and dissuasive. The Working Group has the same concern with respect to the penalty of a maximum of 1-year for accounting offences in aggravating circumstances.

6. Confiscation

Pursuant to subsection 75(1) of the Criminal Code, confiscation of the “proceeds” upon conviction is discretionary. The bribe can only be confiscated as proceeds of passive bribery. Moreover, there is no requirement that “monetary sanctions of comparable effect” be applied where confiscation cannot be effected. The Danish authorities state that, however, in practice the general rule is to order confiscation where sufficient evidence is available that a “gain” has been acquired.

Article 3.3 of the Convention requires each Party to “take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official or property the value of which corresponds to that of such proceeds are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”. Since confiscation is not mandatory, and it is not clear that the fine system is adequate for the purpose of having a comparable effect, the Working Group recommends that this issue be monitored in Phase 2.

7. Nationality Jurisdiction

Under Danish law, in determining whether the requirement of dual criminality is satisfied for the purpose of establishing nationality jurisdiction where there is no territorial connection to Denmark, the offence in question must also be punishable under the law of the place of the commission. The Danish authorities provide that this means that Denmark would not have jurisdiction in the following case: A Danish national bribes a foreign public official from country “B” abroad in country “A”, and in country “A” bribery of a foreign public official is not an offence.

The Working Group recommends that, in light of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue should be reviewed on a horizontal basis in Phase 2.

8. Statute of Limitations for Legal Persons

Pursuant to paragraph 93(1)(i) of the Criminal Code, the statute of limitations for legal persons is 2 years from the day that the act or omission ceased. Thus, the offence must be detected within 2 years of its commission. On the other hand, the corresponding statute of limitations for natural persons is 5 years.

It is the view of the Working Group that due to the secretive nature of acts of corruption, they are often not detected until several years after having been committed. The Working Group feels that a 2-year period is too short. The Group is also concerned that the short limitations period could provide an obstacle to the provision of mutual legal assistance, because in applying the concept of dual criminality it appears that Denmark may not be able to provide MLA if the statute of limitations for the offence in Denmark has expired.

The Working Group recommends that where a state has criminal liability in this respect, the statute of limitations for legal persons should be equivalent to the one for natural persons. In any case the statute of limitations shall be reviewed on a horizontal basis.