



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

**SWEDEN: PHASE 2**

**REPORT ON THE APPLICATION OF THE CONVENTION ON  
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN  
INTERNATIONAL BUSINESS TRANSACTIONS  
AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY  
IN INTERNATIONAL BUSINESS TRANSACTIONS**

*This report was approved and adopted by the Working Group on Bribery in  
International Business Transactions on 21 September 2005.*

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## EXECUTIVE SUMMARY

The Phase 2 Report on Sweden by the Working Group on Bribery evaluates Sweden's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall the Working Group finds that Sweden has made commendable efforts to implement the Convention. Indeed Sweden secured convictions in 2004 for the bribery of World Bank officials, which the defendants are appealing. Nevertheless, some areas could be strengthened, as recommended by the Working Group, such as "corporate liability" (a term here denoting liability of all bodies with legal personality) for the offence of bribery of a foreign public official.

The Phase 2 Report concludes that companies are rarely held liable in Sweden. The Group recommends that Sweden complete, as a matter priority its reform of the system for corporate liability. The reform should in particular include a review of any legal or practical obstacles to imposing corporate fines.

Regarding sanctions in general, the Working Group is particularly concerned that the confiscation of the proceeds of bribery has never been ordered. The Group thus encourages broadening the grounds for confiscation of criminal proceeds, and recommends ensuring that law enforcement and judicial authorities are aware of the role of confiscation in punishing bribers of foreign public officials. Concerning the reporting obligations of auditors, the Group recommends that Sweden require auditors in all cases to report suspicions of bribery of foreign public officials to the board of directors, and consider requiring auditors to report such suspicions to law enforcement authorities.

The Report also highlights a number of positive aspects in Sweden's fight against foreign bribery. For instance, the public and private sectors in Sweden have a high level of awareness that foreign bribery is an offence and bribes are not tax deductible. Indeed, there is awareness that foreign bribery was illegal prior to the implementation of the OECD Convention in Sweden. Sweden recently revised the active foreign bribery offence by adding a category for aggravated offences. Moreover, Sweden has adequate resources for prosecuting foreign bribery cases, and the mechanisms for assigning cases and sharing resources seem efficient.

The Report, which details the findings of experts from Poland and Iceland, was adopted by the OECD Working Group along with recommendations. Within one year of the Group's approval of the Phase 2 Report, Sweden will report to the Working Group on the steps that it will have taken or plans to take to implement the Working Group's recommendations, with a further report in writing within two years. The Report is based on the laws, regulations and other materials supplied by Sweden, and information obtained by the evaluation team during its on-site visit to Stockholm, Sweden. During the five-day on-site visit in January/February 2005, the evaluation team met with representatives of several Swedish government agencies, the private sector and civil society. A list of these bodies is set out in Annex 1 to the Report.

## A. INTRODUCTION

### 1. *On-Site Visit and Methodology*

1. From 31 January to 4 February 2005 Sweden underwent the Phase 2<sup>1</sup> on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group). Pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), the purpose of the on-site visit is to study the structures in place in Sweden to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Sweden's compliance in practice with the Revised Recommendation.

2. The OECD team was composed of lead examiners from Iceland and Poland as well as representatives of the OECD Secretariat.<sup>2</sup> This Phase 2 report takes account of information obtained from Sweden's responses to the Phase 2 questionnaires, interviews during the on-site visit with government experts, company managers, including from bank, insurance, auditing and legal sectors, private sector associations,<sup>3</sup> lawyers, professional auditors, trade unions, NGO and mass media, a review of all the relevant legislation, and independent research conducted by the lead examiners and the Secretariat. (See Annex 1 for details.)

3. During the on-site visit meetings were held with officials from the following ministries and other government-related organisations: Ministry for Foreign Affairs, Ministry of Justice, the Office of the Prosecutor General (including the National Anti-Corruption Unit), the Swedish National Economic Crimes Bureau, Financial Police, Financial Supervisory Authority, Ministry of Industry, Employment and Communications, Ministry of Finance, National Board for Public Procurement, National Board of Trade, Parliamentarians of the Committee on Justice, Swedish Trade Council, Swedish Export Credit Guarantee Board, Swedish Export Credit Corporation, Sida (Swedish International Development Agency), Swedfund, National Council for Crime Prevention, the Commission on Business Confidence, Swedish National Audit Office, and the Supervisory Board of Public Accountants.

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<sup>1</sup> The Phase 1 examination of Sweden took place in October 1999, following the coming into force in July 1999 of the relevant amendments to the Penal Code for the purpose of implementing the Convention. (The purpose of the Phase 1 examination is to assess whether a Party's laws for implementing the Convention and the Revised Recommendation comply with the standards there under).

<sup>2</sup> Iceland was represented by: Jón H. Snorrason, Public Prosecutor, Head of the Economic Crime Unit, National Commissioner of Police. Poland was represented by: Adam Ożarowski, Specialist, Judicial Assistance and European Law Dept., Ministry of Justice; Agnieszka Stawiarz, Prosecutor, Judicial Assistance and European Law Dept., Ministry of Justice; and Małgorzata Mikołajczyk, Head of the EU Assets Control Division, Fiscal Control Office in Łódź. The OECD Secretariat was represented by: Christine Uriarte, Principal Administrator, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; Gwenaëlle Le Coustumer, Administrator, Anti-Corruption Division; and William Loo, Administrator, Anti-Corruption Division.

<sup>3</sup> The International Chamber of Commerce Sweden, Confederation of Swedish Enterprises, Federation of Private Enterprises, Swedish Federation of Trade, and the Swedish Bankers Association.

4. A separate panel was held at the Polish Embassy with economic counsellors from 14 embassies of Parties to the Convention.<sup>4</sup> The purpose of this panel was to gain another point of view on the level of corruption in Sweden and the effectiveness of Sweden's structure and policy for fighting the bribery of foreign public officials.

5. In preparation for the on-site visit the Swedish authorities provided the Working Group with responses to the standard Phase 2 Questionnaire and a supplementary questionnaire containing questions specific to Sweden. The Swedish authorities also submitted translations of relevant legislation. These materials were reviewed and analysed by the OECD team and independent research was performed to obtain non-governmental viewpoints as well. After the on-site visit the Swedish authorities provided further information, including summaries of case law and statistical information.

6. The Phase 2 Report is structured as follows: Part A explains the background and context with regard to Sweden. Part B presents the recent amendments made to the offence of bribery of foreign public officials and analyses the case law on domestic bribery. Part C examines the various factors, which, in the view of the examining team, have a bearing on the effectiveness of the measures available in Sweden for preventing transnational bribery, with an emphasis on awareness raising activities. Part D reviews the functioning of the system for investigating and prosecuting transnational bribery and money laundering offences, with specific reference to features that appear to have a pronounced impact, either positive or negative, on the effectiveness of the overall effort. Part E sets forth the specific recommendations of the Working Group, based on the main conclusions reached by the lead examiners, as to prevention, detection, prosecution and sanctions. It also identifies those matters that the Working Group considers should be followed up as part of the continued monitoring effort.

## 2) *General Observations*

### a) *Swedish Economy*

7. As of the end of 2003, Sweden had a population of just under 9 million, with roughly 1.7 million in the Stockholm Metropolitan Area.<sup>5</sup> The country borders Finland and Norway on land, and Denmark, Russia and the Baltic States at sea.

8. Sweden's economy was the 16<sup>th</sup> largest amongst 30 OECD countries in 2002.<sup>6</sup> As in most other highly developed economies, services contribute the biggest share of total GDP. The public sector accounts for about 30% of all services provided in Sweden. The share of the secondary sector (including manufacturing) in GDP has recovered from its low point in the recession of the early 1990s.<sup>7</sup> The IT sector has grown extremely rapidly and Sweden is now a world leader in investment in information and communications technology. Sweden is home to some highly influential companies in numerous sectors,

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<sup>4</sup> Belgium, Chile, Czech Republic, Denmark, Finland, France, Greece, Hungary, Italy, Mexico, the Netherlands, Poland, Slovenia, Spain and the United States of America.

<sup>5</sup> Statistics Sweden, [www.scb.se](http://www.scb.se); OECD (March 2004), *OECD Economic Surveys: Sweden*, OECD, Paris, p. 7

<sup>6</sup> OECD (2004), *OECD in Figures*, Paris, pp. 12-13; OECD (May 2004), *Main Economic Indicators*, OECD, Paris, pp. 252-255

<sup>7</sup> The Economist Intelligence Unit (2004), *Country Profile – Sweden*, The Economist Intelligence Unit, London, p. 32. Sweden's principal economic activity in 2002 (value added as percentage of GDP) are: (1) services: 70.6% (2) industry: 27.5% (3) agriculture: 1.8% (OECD (May 2004), *Main Economic Indicators*, OECD, Paris, pp. 252-255).

including pharmaceuticals, transport equipment, construction, engineering, telecommunications, electronics, financial services, and retailing. Many of these companies, however, are now foreign-owned or in cross-border co-operations.<sup>8</sup>

9. Sweden has a heavy dependence on international trade. The value of exports and imports of goods amounted to around 46 and 38% respectively of nominal GDP in 2004.<sup>9</sup> The composition of exports has changed from raw materials and semi-manufactures at the end of World War II to items with a high value-added component such as transport equipment, pharmaceutical products and machinery.<sup>10</sup> In 2003, Sweden's major imports were electronics and telecommunication (17%) industrial machinery (12%), road vehicles (11%), food, beverages, tobacco (8.0%) and textiles, clothing, footwear (5.7%). Major exports were industrial machinery (16%), electronics and telecommunication (15%), road vehicles (14%), paper and paper products (8.5%) and pharmaceutical products (6.4%). Its major trading partners are the United States and Western Europe.<sup>11</sup>

10. With respect to foreign direct investment, Swedish companies have invested mainly in the United States, Scandinavia and Western Europe. As of 1999, the major sectors in investment are office machinery, computers, radio, television and communication equipment (42.1%), textile and wood activities (11.0%), petroleum, chemical, rubber and plastic products (7.4%), financial holding companies (6.4%) and insurance and activities auxiliary to insurance (4.7%).<sup>12</sup>

11. Small and medium-sized enterprises (SMEs), which in Sweden are enterprises with fewer than 250 employees, play a significant role in the Swedish economy. At the close of 2002, there were approximately 580 000 SMEs and 1 000 large enterprises in Sweden. Two-thirds of all enterprises were

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<sup>8</sup> The Economist Intelligence Unit (2004), *Country Profile – Sweden*, The Economist Intelligence Unit, London, pp. 42-47

<sup>9</sup> Statistics provided by Sweden.

<sup>10</sup> *ibid.* footnote 8, pp. 48-49

<sup>11</sup> In 2002, the total value of Sweden's imports of goods and services was USD 67.0 bn (current prices and exchange rates), ranking 16<sup>th</sup> out of 30 OECD countries and amounting to 27.8% of GDP. The total value of Sweden's exports of goods and services was USD 82.9 bn (current prices and exchange rates), ranking 15<sup>th</sup> out of 30 OECD countries and amounting to 34.4% of GDP (OECD (May 2004), *Main Economic Indicators*, OECD, Paris, pp. 252-255).

In 2003, Sweden's major import partners in commodities were (USD billion): (1) Germany (11.7), (2) Denmark (5.63), (3) Norway (5.26), (4) United Kingdom (4.96), (5) Netherlands (4.26), (6) Finland (3.50), (7) France (3.40), (8) Belgium (2.65), (9) United States (2.53), (10) Italy (2.21). The major export partners in commodities were (USD billion): (1) United States (8.95), (2) Germany (7.91), (3) Norway (6.45), (4) United Kingdom (6.07), (5) Denmark (4.86), (6) Finland (4.41), (7) France (3.76), (8) Netherlands (3.76), (9) Belgium (3.44), (10) Italy (2.65) (Statistics Sweden, [www.scb.se](http://www.scb.se) (data converted to USD based on interbank exchange rate on 16 November 2004)).

<sup>12</sup> Statistics provided by Sweden. In 2002, outward FDI position was USD 144 bn (11<sup>th</sup> out of 27 OECD countries for which data is available) (OECD (June 2004), *Trends and Recent Developments in Foreign Direct Investment*, OECD, Paris, Table A.3; data converted to US dollars using average exchange rates). In 2000, the top destinations were (USD billion): (1) United States (30.5), (2) Netherlands (20.8), (3) Finland (16.3), (4) Denmark (13.9), (5) Germany (13.1) (OECD (2004), *International Foreign Direct Statistics Yearbook 1990-2001*, OECD, Paris, p. 297, Table 6 and pp. 300-301, Table 8).

solo enterprises that had no employees, while 94% had fewer than 10 employees and 5% had 10-49 employees. The SME sector accounts for 60% of total private employment.<sup>13</sup>

12. Countries in Eastern Europe and the Baltics are increasingly important trade partners and destinations for foreign investment. Swedish companies of all sizes, ranging from telecommunications and engineering to pharmaceuticals, are now very active in these countries.<sup>14</sup> Swedish companies are also increasingly active in China and in official development assistance and export credit.

13. Telecommunications represents a major industry in Sweden. In 2003, electronics and communications comprised the largest category of imports (17% of total imports) and the second largest category of exports (15% of total exports). In addition, Sweden has become one of the world leaders for investing in information and communications technology.<sup>15</sup>

14. Sweden also exports armaments, a sector which is considered one of the top three most corruption prone industries worldwide.<sup>16</sup> According to the Stockholm International Peace Research Institute (SIPRI), in 2000 Sweden was the 15<sup>th</sup> leading exporter of weapons in the world.<sup>17</sup> However this ranking underplays the importance of the defence industry to Sweden's security and defence policy interests. The Swedish Government states, in its 2003 annual report on strategic export controls, that because Sweden does not participate in military alliances, "it is a major security and a defence policy interest to maintain its capability and its development and production capacity in the defence industry sector" and in its "security interests to collaborate with other countries on equipment sales".<sup>18</sup>

15. The Association of Swedish Defense Industries (*Sveriges Försvarsindustriförening*) reports that the Swedish armaments industry employs approximately 27 000 people, with an annual turnover of SEK 37 billion (USD 4 billion).<sup>19</sup> It is estimated that in 2003 the total value of invoiced sales of Swedish military equipment in Sweden and abroad amounted to SEK 114 116 million – an increase of 53% from 2002. The value of actual export deliveries in 2003 is estimated at SEK 9 479 million – an increase of 88% from 2002. Nevertheless, exports of military equipment only constituted 0.79 per cent of Sweden's total exports of goods in 2003. Statistics on the exports of military equipment from Sweden for 2003 indicate that the Nordic countries and the rest of Europe and North America received the largest share of Swedish

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<sup>13</sup> Nutek, the Swedish Business Development Agency, [www.nutek.se](http://www.nutek.se)

<sup>14</sup> In 2003, Sweden's major import partners amongst emerging economies were (USD million): (1) Poland (1 360), (2) China (1 330), (3) Russia (921), (4) Estonia (632), (5) South Korea (489). Major export partners amongst emerging economies were (USD million): (1) China 1 670, (2) Poland (1 260), (3) Russia (1 080), (4) India (585), (5) Turkey (550) (Statistics Sweden, [www.scb.se](http://www.scb.se) (data converted to USD based on interbank exchange rate on 16 November 2004)).

<sup>15</sup> Statistics Sweden ([www.scb.se](http://www.scb.se)); "Country Profile: Sweden" (The Economist Intelligence Unit, 2004, pp 42-43). Also note that Swedish companies hold major interests in the global telecommunications interests, including Ericsson, which now cooperates with Sony (Japan), and Telia, now TeliaSonera, the part-privatised telecoms operated that merged in 2002 with its Finnish counterpart, Sonera.

<sup>16</sup> PCOAD Project: "Preventing Corruption in the Official Arms Trade" (Transparency International, Project Summary – Phase 1, July 2004).

<sup>17</sup> The Norwegian Initiative on Small Arms Transfer (April 2004), Database of Small Arms Production and Transfers ([http://www.nisat.org/default.asp?page=database\\_info/search.asp](http://www.nisat.org/default.asp?page=database_info/search.asp)).

<sup>18</sup> Strategic Export Controls in 2003: Military Equipment and Dual-Use Goods (Ministry for Foreign Affairs, 2004), p. 5.

<sup>19</sup> Ibid, footnote 17.

exports of military equipment. The rest of the exports, in descending order, went to Southeast Asia, Sub-Saharan Africa, South Asia, Central America and the Caribbean, Oceania, South America, the Middle East, Northeast Asia, and North Africa.<sup>20</sup>

16. Historically Sweden has been strongly committed to economic and social development and improving the living conditions of developing countries. This policy has translated into generous levels of Official Development Assistance (ODA) as a percentage of GNP.<sup>21</sup> Since ODA involves a transfer of resources etc. to countries that are generally speaking prone to corruption, it is important to address how Sweden's system for providing ODA prevents and sanctions the bribery of foreign public officials.

17. Given that Swedish companies are very active in foreign markets, and increasingly in some countries and in some industries prone to corruption, and given that Sweden plays a major role globally in official development assistance, it is important that Sweden has in place effective legislative and enforcement structures for combating the bribery of foreign public officials.

b) *Political and Legal System*

18. Sweden is a constitutional monarchy. The legislative branch consists of a 349-seat unicameral *Riksdag* (Parliament) whose members are directly elected by popular vote to four-year terms. The head of government is the elected Prime Minister, who appoints the cabinet. Most ministers are members of *Riksdag*, but politicians without a seat in *Riksdag* and independent experts with no direct political affiliation may also be appointed to serve in government.<sup>22</sup>

19. The *Riksdag* has exclusive jurisdiction to enact criminal laws. The government presents bills, including "preparatory works" that explain the provisions in the bill, to the *Riksdag* for consideration. Once enacted, jurists, academics and practitioners may author "commentaries" on the law. Courts may consult the preparatory works and commentaries when interpreting a law, but they are not bound to follow them.

20. The Swedish judiciary is politically independent. Permanent judges are appointed by the government. There are 62 district courts, six appeal courts and the *Hogsta Domstolen* (Supreme Court). There is also a system of administrative courts that deals with cases involving the public administration. There is no constitutional court, but all courts may ascertain whether a law is in accordance with the Constitution, to which all other laws are subordinate.<sup>23</sup>

c) *Corruption in General*

21. Along with its Nordic neighbours, Sweden has long enjoyed a reputation for having little corruption. It ranked sixth in the Corruption Perceptions Index 2004 prepared by Transparency

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<sup>20</sup> Ibid, footnote 18, including at p. 57. Statistics on the export of dual-use goods are not included.

<sup>21</sup> Statistical Annex of the 2003 Development Co-operation Report (Development Assistance Committee (2003), OECD Annex table 28) ; Sweden : Development Co-operation Review : Summary and Conclusions (OECD, 1996)

<sup>22</sup> U.S. Central Intelligence Agency (2 November 2004), *The World Fact Book*, U.S. Central Intelligence Agency, Washington, D.C.

<sup>23</sup> U.S. Central Intelligence Agency (2 November 2004), *The World Fact Book*, U.S. Central Intelligence Agency, Washington, D.C.; Pettersson, M. (2004), *A Presentation of the Swedish Police Service*, National Police Board (Stockholm), p. 7

International, and it has never ranked lower than sixth since the inception of the Index in 1995. Swedish companies ranked second best in the Transparency International Bribe Payers Index 2002.

22. Nevertheless, corruption does occur in Sweden. For instance, 24 persons were sanctioned for active and passive bribery in 2000, while 15 persons were fined for these offences in 2001.<sup>24</sup>

23. As concerns transnational bribery, Sweden has obtained convictions in one case of bribery of foreign public officials. On 12 January 2004, the Huddinge District Court convicted a Swedish consultant and his accountant for paying kickbacks to two officials of the World Bank in 1998. According to the text of the court judgement, the officials awarded three contracts for projects in Africa to the defendants. The Court dismissed two additional charges that related to additional kickbacks. The prosecution has appealed the dismissal of these two charges, while the defendants have cross-appealed their convictions. A detailed summary of the case can be found in Annex 3.

24. At the time of the on-site visit, six other proceedings were ongoing (including five at a very early stage of investigation). The Swedish authorities had also investigated four cases that led to the termination of the investigation for the following reasons: absence of evidence, lack of mutual legal assistance leading to the impossibility to establish nationality jurisdiction over the acts, and expiry of the statute of limitations. The Swedish authorities were, due to secrecy obligations concerning preliminary investigations, not at liberty to discuss the ongoing cases in detail. Annex 3 provides information about cases involving the bribery of foreign public officials in which Swedish persons and companies are allegedly involved. Since the World Bank case has been adjudicated in the court of first instance, information from publicly available court documents is provided. With respect to the investigations discussed in annex 3, reference is made to press releases in some instances and publicly available official documents in some instances.

## **B. PREVENTION AND AWARENESS**

25. The examining team observed that all the persons interviewed knew that transnational bribery was punishable. In addition, most participants considered that it was already criminalised before the adoption of the 1999 implementing legislation, even though the pre-Convention offence had never been applied to the bribery of a foreign public official before Sweden ratified the Convention. In the view of several participants, the 1999 amendments simply formalised an offence that existed since the 1970s.

26. The Swedish authorities explained that to ensure a continued high degree of knowledge, they have undertaken several initiatives to raise the level of awareness in specific areas such as official development assistance, and towards the private sector. They also reinforced existing preventive measures such as the non-tax deductibility of bribes.

### ***1) Prevention and Awareness within the Public Administration***

#### ***a) No General Policy of Prevention and Awareness Raising***

27. The Swedish authorities have not undertaken any activities on a government-wide basis to raise the level of awareness of public officials concerning the bribery of foreign public officials.<sup>25</sup> Public

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<sup>24</sup> More recently, widely-publicised allegations surfaced in 2003 that employees of a state-controlled monopoly had taken bribes from suppliers in exchange for better promotion of their products.

<sup>25</sup> Note that the proposal from the Government to ratify the OECD Convention was circulated widely for comment, including to many Government authorities, labour unions, business organisations and NGOs.

agencies and services receive general information about newly enacted laws, and that is considered sufficient by most of the officials met. The examining team noticed that only one official who attended the on-site visit was not aware that foreign bribery was an offence in Sweden until shortly before the visit.

28. Anecdotally, one incident is mentioned to demonstrate the need to increase awareness. At the occasion of a visit to Vietnam in March 2004, the background documentation distributed to the Swedish private sector participants referred to a book on how to do business in foreign countries that contained some ambiguous language on corruption in Vietnam.<sup>26</sup> The mistake was revealed in the press and as a consequence, the Ministry for Foreign Affairs sent clear signals to its employees on the responsibility of every one to respect the law.

29. After the on-site visit, the Ministry for Foreign Affairs issued a Plan of Action concerning the fight against corruption. The Plan includes a wide range of initiatives, including raising awareness of the effects of corruption among Ministry staff, and seeking to ensure that companies subject to bribe solicitations can obtain relevant advice. The Plan has been communicated to all embassies and consulates with diplomatic staff.

b) *The Tax Administration and the Non-tax Deductibility of Bribes*

30. Tax legislation is a particularly good tool for preventing (and detecting) bribery, especially the non-deductibility of bribes as prescribed by the 1996 Recommendation.<sup>27</sup> The Swedish tax law has been modified since Phase 1: the Municipal Income Tax Act (1928:370) was abolished and replaced by the Income Tax Act (1999:1229, *Inkomstskattelagen*, entered into force on 1 January 2000).<sup>28</sup> The change of legislation does not entail any substantive modification of the provision on the non-tax deductibility of bribes. Pursuant to Chapter 9, section 10 of the Income Tax Act “expenditure on bribes or other improper remuneration is not deductible”.<sup>29</sup>

31. The preparatory works to the Income Tax Act specify that pursuant to international commitments, legislation disallowing a deduction for bribes paid to foreign public officials must be implemented, and add that the Swedish law goes further, as it also addresses bribe payments to other persons covered under Chapter 17, section 7 and Chapter 20, section 2 of the Penal Code. The examining team is satisfied that there is no ambiguity on the scope of application of the provision on the non-tax deductibility of bribes.

32. Discussions showed that the exclusion of bribes from deductible expenses was very well known within the private sector and the tax administration, the latter having an obligation to detect and report suspicious deductions (see part C).

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<sup>26</sup> Example of an ambiguous passage: “When you are doing business with government authorities or government owned companies, you sometimes have to pay to complete a deal”.

<sup>27</sup> See the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials adopted by the OECD Council on 11 April 1996.

<sup>28</sup> By means of the Act on the Coming into Force of the Income Tax Act (1999:1230) several other acts were abolished. The new law was applied for the first time in the assessment year 2002.

<sup>29</sup> The wording is similar to the one in the previous law, which was: “Deductions may not be made for expenses for bribery or other improper reward/award.”

c) *The Role of the Accounting and Auditing Rules*

33. Other important preventive tools are the accounting and auditing rules, as indicated in the Convention and the Revised Recommendation.<sup>30</sup> The legal environment concerning accounting and auditing rules is based on the Bookkeeping Act, the Annual Accounts Act, the Companies Act and the Auditors Act, as described in the Phase 1 report, in addition to the international accounting standards adopted by the European Commission. The discussions held during the on-site visit with professional accountants and public agencies working with and supervising them enabled the examining team to determine that the accounting and auditing rules are satisfactory for the purpose of preventing the bribery of foreign public officials.

34. As to the enforcement of these rules, the Swedish authorities were not able to indicate to what extent prosecutions of bribery offences have also involved prosecutions of the related charge of fraudulent bookkeeping, as no such statistics exist.<sup>31</sup> However, according to the decision of the court of first instance in the World Bank case, one of the offenders was convicted for active bribery as well as the aggravated bookkeeping crime (Chapter 11, section 5 of the Penal Code), as some transactions had been incorrectly recorded as income in the account for export services. Moreover all the necessary supporting information was missing. The offence was qualified as “gross” because the sums constituted a large proportion of the turnover and the acts took place systematically to conceal their real purpose.

d) *Public Procurements, Licenses and Privatisation*

35. The Convention and Revised Recommendation contemplate that Parties may ban enterprises that have participated in foreign bribery from participating in public procurement as an administrative sanction.<sup>32</sup>

36. Public procurement in Sweden is governed by the Act on Public Procurement (SFS 1992:1528) (LOU). The Act covers procurement by a wide range of government entities, including the state, government agencies, local authorities and county councils. It also applies to certain undertakings, associations, societies and foundations “which have been established to meet the general interest, provided that these needs are not of an industrial or commercial nature”.<sup>33</sup>

i) *Licensing Arms Exports*

37. In Sweden, the National Inspectorate of Strategic Products (ISP, an independent agency) is responsible for implementing the Military Equipment Act, the Control of Dual-Use Goods and Technical Assistance Act, the UN Chemical Weapons Convention, and relevant ordinances. ISP maintains regular contacts with arms exporters through, for instance, seminars, and exercises control over the arms industry in Sweden by requiring that these companies provide ISP with quarterly reports on their arms export-related activities. In addition, ISP is responsible for issuing licenses for exporting military equipment and

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<sup>30</sup> See article 8 of the Convention and article V of the revised Recommendation of the Council on Combating Bribery in International Business Transactions, adopted on 23 May 1997.

<sup>31</sup> General statistics on accounting offences (as the main offence of a case) show that in 2003 Swedish criminal courts and public prosecutors made 954 verdicts, of which 53 imprisonment sentences were unconditional, and 851 sentences were conditional, mostly in combination with a fine or community service.

<sup>32</sup> Commentary 24 of the Convention and Article VI.(ii) of the 1997 Revised Recommendation

<sup>33</sup> LOU, Chapter 1, sections 2 and 6

dual-use goods.<sup>34</sup> Pursuant to the Military Equipment Act and the Strategic Products Act, ISP is required, on its own initiative, to refer matters of “interest” in principle or for other reasons to the Government for a decision. In turn, the Export Control Council is consulted by the Government before taking decisions on “important licensing applications”.<sup>35</sup>

38. Representatives of the Parliamentary Committee on Justice, who met with the examination team during the on-site visit, explained that it is very important that corruption issues are considered in the context of the decision-making process for arms exports, but that this has not been the tradition in Sweden. According to the Committee a very critical discussion in this respect is ongoing. The examination team also met with a representative of the department in charge of strategic products at the Ministry for Foreign Affairs, who emphasised that the decision-making process for issuing licenses is focused on how the arms will be dealt with in the destination country; in particular that they go to the right destination. He stated that the department does not look at whether applicants have been involved in bribery, or the level of risk of corruption in relation to arms procurement in the destination country. In addition, information about the risk of foreign bribery is not provided to applicants by ISP or any other Government body. The same representative explained that the law in relation to licensing is under review by the Government, but that it is not looking at the issue of corruption.

39. However, the Swedish government has been involved in international efforts to address corruption in the arms trade. In the 2003 annual report on strategic exports, the Swedish Government explains, that it began closely co-operating with Transparency International-UK in 1999, with the goal of combating corruption in the international arms trade. Since 1999 TI-UK and the Swedish Government collaborated on a number of conferences and seminars for the purpose of identifying recommendations concerning arms exports. The two main recommendations are as follows: First, “integrity pacts” should be used by importing countries in defence contracting, and exporting countries should encourage them to do so. The Swedish Government confirms that an “integrity pact” basically involves a clause guaranteeing that no bribes or undue benefits will be demanded or given. Second, the defence industry should develop a framework containing strong anti-corruption provisions.<sup>36</sup> During the on-site visit, the representative of TI-Sweden, which was established in September, 2004, explained that his organisation also plans to work with the Swedish Government on the issue of preventing corruption in arms exports.

### **Commentary**

***The lead examiners recommend that Sweden ensure that the decision-making bodies for providing licenses for exporting military equipment and dual-use goods, consider whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country, and encourage the Swedish defence industry to develop strong anti-corruption measures.***

#### ii) Potential Administrative Sanctions as Preventive Tool

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<sup>34</sup> Control over arms exporters also includes a review of notifications that companies are required to submit to ISP before participating in a tender, signing a contract for the export of military equipment, or co-operating with foreign partners in other ways, as well as a review of notifications of deliveries pursuant to export licenses issued by it.

<sup>35</sup> The Export Control Council, which has ten members, is composed of representatives from all political parties in Parliament. The Inspector-General of Military Equipment is the Head of ISP, and the Ministry for Foreign Affairs and the Ministry of Defence participate in the meetings.

<sup>36</sup> See: Ibid, footnote 18, p. 32; and Preventing Corruption OAT Project: Preventing Corruption in the Official Arms Trade (Transparency International, Project Summary, Phase 1, July 2004).

40. The National Board for Public Procurement (NOU) is responsible for supervising the application of the Act on Public Procurement (LOU).<sup>37</sup> The NOU, however, does not administer public procurement; it merely reviews the actions of government authorities in the procurement process to ensure their compliance with the LOU.

41. According to the NOU, the LOU permits the imposition of bans against suppliers that have engaged in bribery of foreign public officials. It is the position of the NOU that a conviction is “likely” not necessary before a ban on a supplier may be imposed, given that the LOU also permits debarment where a supplier is guilty of grave professional misconduct.<sup>38</sup>

42. Less clear, however, is whether and how bans are imposed in practice. According to the NOU, prior to awarding a contract, the government agency involved will verify the economic and professional ability of a participant by examining its tax filings, licenses to operate, financial statements and documents pertaining to its credit worthiness. There are, however, no procedures to specifically verify whether the participant had previously engaged in bribery. Furthermore, the NOU has not issued guidelines on when a ban may be imposed, though it believes that the individual government agencies that administer procurement have done so. There are no blacklists of companies that are to be banned from participating in public tenders. Bans have never been imposed as a sanction for bribery.

43. Pursuant to the LOU “suppliers” can be banned from participating in public procurement. It is not clear whether debarment from public procurement can be applied to legal persons, given that there is a need for a “conviction” or a finding that the supplier is “guilty”, and “corporate fines” under Chapter 36 of the Penal Code do not constitute a conviction and are not applied upon a finding of guilt. The Swedish authorities explain that there does not appear to be a court decision in which debarment was imposed on a legal person. In any case, according to the NOU, bans can only be indirectly applied to an individual when a court convicts him/her of committing a crime in the course of business. In such a case it is possible for the court to impose a “trading prohibition” on the individual. Such prohibitions are enforced by the company registry and usually prevent an individual from engaging in activities such as becoming a shareholder or board member of a company. A trading prohibition excludes the possibility to run any business activity.

44. In terms of awareness-raising, the NOU has not publicised potential sanctions against individuals or companies which engage in bribery. It also has not raised the awareness of foreign bribery among its own staff, among the staff of the procurement authorities over which it supervises, or the private sector.

45. Another area of activity where debarment could have a preventive effect is the privatisation process. The Swedish government holds stakes in a significant share of the economy, including in 57 state-owned companies. The government does not have a privatisation programme in place for these holdings, nor has it announced plans to establish such a programme in the future. A state-owned company may be sold only after parliamentary approval. Thereafter, the government handles the entire divestment process, including the choice of buyers.

46. As with public procurement, the Swedish government may ban companies that have engaged in bribery from bidding for privatised assets. The government does not, however, inquire whether a

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<sup>37</sup> LOU, Chapter 7 and Chapter 1, sections 1-2

<sup>38</sup> Chapter 1, section 17 of the LOU reads: “A supplier may be excluded from participation in an award procedure if he: [...] 3. has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*, 4. has been guilty of grave professional misconduct and the contracting entity can furnish proof of this circumstance”.

prospective buyer has engaged in bribery in the past. The government also has not issued guidelines on when such bans may be imposed. Bans have never been imposed in the past.

### Commentary

***The lead examiners recommend that Sweden (1) devise procedures to verify whether a participant in public procurement has been convicted of bribery of foreign public officials, (2) consider debarring legal persons subject to corporate fines for bribery of foreign public officials from participating in public procurement, and (3) raise the awareness of the offence of bribery of a foreign public official among the officials of the National Board for Public Procurement.***

e) *Swedish International Development Cooperation Agency (Sida) and Swedfund*

#### *Swedish International Development Cooperation Agency*

47. The Ministry for Foreign Affairs has overall responsibility for overseeing all Swedish development co-operation.<sup>39</sup> The Swedish International Development Cooperation Agency (Sida), which is an independent national agency, was established to manage and implement the official development assistance (ODA) programme pursuant to directives from the Government of Sweden. The Ministry for Foreign Affairs and Sida are integrated into Swedish Embassies for the purpose of managing ODA programmes abroad.<sup>40</sup> Two principal kinds of co-operation programmes are administered by Sida – multilateral and bilateral. The multilateral level involves contributions of various forms made by Sweden to international financial institutions (IFIs) such as the World Bank. Sida may make contributions to IFIs either in the form of Trust Fund Financing, parallel or co-financing, with the funds provided directly by the Ministry for Foreign Affairs. These contributions are regulated by the policies of Sida issued specifically for this purpose, including clauses Sida includes in its agreements with the IFIs. In addition, funds may be provided by the Ministry for Foreign Affairs to replenish soft loan windows. In these cases, the use of the funds is regulated by the policies of the respective IFI. On the bilateral level, Sida provides funds to a co-operation partner, for example a country or a NGO, under a project agreement with the partner. Sida explains that the project agreement states that corruption practices will not be tolerated and that Sida may ask for audits and examinations of procurements and may stop disbursements or even terminate the Agreement if such practices are regarded as serious breaches of the Agreement. Furthermore, the “Sida Procurement Guidelines”, which are annexed to the Agreement, give detailed provisions for ethics in procurement and conflicts of interest, specifically mentioning corrupt practices. The co-operation partner hires a consultant to carry out the services to implement the project, or Sida may contract directly with a

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<sup>39</sup> Until 1997, Sweden was one of the few countries to allocate more than the minimum recommended by the UN of GNP to ODA (0.8-1.1% from 1989-1996), and dedicated more of its share of GNP than any other OECD country. In 1997 Sweden reduced its ODA expenditures to 0.7% as part of its effort to reduce government expenditures. However, recently the Government announced plans to raise the level of ODA back to around 1% of GNP. The major recipients of ODA from Sweden are, in descending order: Sub-Saharan Africa, South and Central Asia, Latin America and Caribbean, Other Asia and Oceania, Europe, and the Middle East and North Africa. [See also Country Profile: Sweden (The Economist Intelligence Unit (2004), London, p.50); Statistical Annex of the 2003 Development Cooperation Report (Development Assistance Committee (2003, OECD Annex table 28); Sweden: Development Cooperation Review: Summary and Conclusions (OECD) 1996).]

<sup>40</sup> Sida employs 600 people at its headquarters in Stockholm and 200 at the field level, integrated in Sweden’s embassies.

consultant, such as a local expert. Contracts are governed by the “Contract for Consulting Services” and “Sida’s Standard Conditions for Short and Long-Term Consulting Services Contracts” respectively.

48. In relation to bilateral funding programmes, the relevant contracts do not contain specific clauses prohibiting the bribery of foreign public officials in relation to the contract, but state that the contract may be terminated if the consultant/contractor has engaged in “corrupt or fraudulent practices” in competing for or in executing the contract. In addition Sida’s “Standard Conditions for Short and Long Term Consulting Services Contracts (2002)” state that the “Consultant...shall abide by the laws and regulations and respect the culture and traditions of the Country”. Similarly, Sida’s “Contract for Consulting Services” between the co-operation partner and the Consultant contains a paragraph prohibiting a Consultant from accepting any trade commission, discount or similar payment in connection with activities pursuant to the Contract, and another paragraph states that the Consultant shall “perform the Services in accordance with the applicable law in the Special Condition of the Contract and with any mandatory legislation in the Country”.

### *Swedfund*

49. Another way in which Sweden contributes to economic growth of poor countries by co-operating in the creation of profitable and sustainable companies is through Swedfund International AB, a state-owned company that offers risk capital and competence for investment in Eastern Europe, Africa, Asia and Latin America. Swedfund invests with strategic partners prepared to share the financial risk with Swedfund by offering risk capital in the form of share capital, loans and guarantees. Swedfund bases its decisions concerning investments on normal business principles, while at the same time giving particular attention to environmental, ethnical and social issues.<sup>41</sup> The main financing instruments used by Swedfund are equity and quasi equity.

50. Sweden states that Swedfund’s “Code of Best Practice” (CBP) refers expressly to, *inter alia*, the OECD Convention, and since it is incorporated by reference into the “Subscription and Shareholders’ Agreement” and the “Loan Agreement”, the bribery of a foreign public official would constitute a violation of the relevant contract.

51. Following the on-site visit, the examination team had the opportunity to review the “Subscription and Shareholders’ Agreement” and the “Loan Agreement”. Pursuant to the former, the Company agrees to conduct its business “in line with” the “Code of Best Practice”, and pursuant to the latter the Borrower “concurs with the principles reflected in” the “Code of Best Practice”. The relevant standard in the “Code of Best Practice” states that “in setting its standards and objectives, Swedfund shall utilize the framework established by international organizations such as (but not limited to)...the OECD Convention...” The lead examiners are not persuaded that, by making reference to this very general language in the “Code of Best Practice”, the contracts import by reference a prohibition against bribing foreign public officials.

### *Commentary*

***The lead examiners recommend that Sida and Swedfund review the standard contracts that they use with their clients in order to ensure that they contain provisions that specifically prohibit the bribery of foreign public officials related to the contracts.***

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<sup>41</sup> See: Swedfund International website – [www.swedfund.se/firstpage.asp?p\\_id=45&top\\_p\\_id=45](http://www.swedfund.se/firstpage.asp?p_id=45&top_p_id=45)

f) *Officially Supported Export Credits and Guarantees*

52. Officially supported export credit and guarantee agencies deal with companies that participate in the international market and thus are able to play an important role in preventing transnational bribery, raising awareness of the Convention and in discovering foreign bribery cases.

53. Sweden provides export credit guarantees to exporters, banks and investors that protect against the risk of credit loss in transactions abroad. Guarantees are available for exports of goods, services, construction works and foreign investments. Such export credit and investment guarantees are administered by the Swedish Export Credits Guarantee Board (EKN).<sup>42</sup>

54. Additionally, Sweden provides export credit financing by providing loans to exporters at rates based on the Arrangement on Officially Supported Export Credits. Export credit financing is administered by the Swedish Export Credit Corporation (SEK).<sup>43</sup> Some, but not all, financing provided by SEK is guaranteed by EKN.

i) *Training and Awareness amongst Staff of Export Credit Agencies*

55. EKN has informed its employees about foreign bribery through meetings. It also requires its employees to read the Convention. Recently, with the assistance of the United Kingdom chapter of Transparency International, EKN held a seminar for its employees on the use of agents' commissions to hide bribes.

56. SEK regularly invites external professionals to meet with and inform its employees about corporate social responsibility including the issue of foreign bribery.

ii) *Efforts to Raise Awareness of Foreign Bribery among Swedish Businesses*

57. EKN has taken measures to improve the prevention and raise the awareness of foreign bribery among its clients through the application process and contract for export credits. Since 2001, the application forms for export credits by EKN require applicants to declare that they or anyone acting on their behalf have not engaged and will not engage in bribery in the subject transaction. If the applicant breaches this declaration, the responsibility of EKN for support may lapse, and the applicant may be responsible for any amounts already paid by EKN under the agreement.<sup>44</sup> The provision applies to transactions of any duration.

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<sup>42</sup> Website of EKN, [www.ekn.se](http://www.ekn.se); Ordinance (SFS 1988:1225) Concerning the Duties of the Swedish Export Credits Guarantee Board; Ordinance (SFS 1990:113) on Export Credit Guarantees; Ordinance (SFS 1987:861) on Investment Guarantees

<sup>43</sup> Ordinance (SFS 1981:665) on State-Supported Export Credit Financing; website of SEK, [www.sek.se](http://www.sek.se)

<sup>44</sup> EKN requires all lenders and exporters who apply for support to sign the following declaration:

The OECD's Export Credit Group (ECG) has agreed to an Action Statement on combating bribery of foreign public officials in international business transactions. According to the agreement EKN and EKN's foreign equivalents shall obtain a declaration from the applicant company.

In the declaration, the company shall state that neither the company, nor anyone acting on its behalf, has been engaged or will engage in bribery or other inappropriate reward for official duties to foreign ministers, members of parliament or public employees in connection with the export transaction that the application refers to.

Therefore we hereby declare

58. EKN has taken additional measures to raise awareness. Shortly after introducing the anti-corruption contractual provisions and declarations in 2001, EKN publicised these measures through an article in its company journal, and through letters to and meetings with its clients. Its web-site also describes these measures. In 2003, EKN sent information to its clients on the OECD Guidelines on Multinational Enterprises and the Swedish Partnership for Global Responsibility.

59. SEK stated that it gives information about its anti-corruption policy on its web site. It has adopted its loan application forms and loan documentation to comply with the Convention. Information in this respect is provided on SEK's website. SEK has also sent the same information to its key clients.

60. The lead examiners are pleased that EKN and SEK have included anti-corruption provisions in their application forms and contracts. They commend the efforts of EKN to prevent and raise the awareness of foreign bribery when these measures were introduced in 2001. Nevertheless, it is important for both agencies to continue their efforts to raise the awareness of foreign bribery among Swedish businesses.

### iii) Sanctions for Foreign Bribery

61. Although EKN and SEK may terminate support if a client is found to have engaged in foreign bribery, they will do so only when the client has been convicted of the crime<sup>45</sup> by a Swedish court or a foreign court whose legitimacy they recognise.<sup>46</sup> In their view, their clients are entitled to a presumption of innocence that may be rebutted only upon a judicial conviction for bribery. Support cannot be withheld on the basis of evidence that a client has bribed a foreign public official, however cogent. EKN and SEK have never denied support on this basis.

62. Furthermore, a decision to withhold support is transaction-specific. EKN and SEK will only withhold support from a transaction that has been found to involve foreign bribery. A client who has engaged in foreign bribery in one transaction is not disentitled to support for other transactions. Neither

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that neither we, nor anyone acting on our behalf, in connection with the export transaction that the application refers to, have been engaged or will engage in bribery or other inappropriate reward as mentioned above,

that we are aware of the fact that EKN's responsibility for the guarantee may lapse, and that already received amounts of compensation including interest thereon from the date of disbursement of such compensation shall be repaid to EKN, if we, or anyone acting on our behalf, have been engaged or will engage in bribery or other inappropriate reward as mentioned above, also

that we will indemnify EKN for all its costs and expenses that will be the consequences of that we, or anyone acting on our behalf, have been engaged or will engage in bribery or other inappropriate reward as mentioned above.

Note that Swedish law penalize bribery *inter alia* in the cases that have been described here, see Chapter 17, section 7 and Chapter 20, section 2 in the Swedish Penal Code.

<sup>45</sup> According to the OECD Working Party on Export Credits and Credit Guarantees (2004), *Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – Situation as of end of December 2004*, OECD, Paris, TD/ECG(2004)15, p. 47, prior to a decision to grant support, if EKN has “sufficient evidence of bribery”, EKN will withhold support for the transaction as a matter of practice. At the on-site visit, EKN officials clarified that this statement is incorrect. A conviction for foreign bribery is necessary to withhold support; “sufficient evidence of bribery” will not suffice.

<sup>46</sup> For instance, EKN and SEK will not recognise the judgments of courts that consider factors such as religion in determining whether a foreign public official has been bribed.

agency maintains a blacklist of companies who are ineligible for support because of prior engagement in bribery.

### Commentary

***The lead examiners recommend that (1) Sweden raise the awareness of the offence of bribery of foreign public officials among officials of EKN and SEK, and (2) both EKN and SEK continue their efforts to raise the awareness of foreign bribery among Swedish businesses.***

## 2) ***The Private Sector***

### a) ***General Observations***

63. The examining team is satisfied that most of the Swedish private sector knows that bribery of foreign public officials is an offence. The private sector also appears to be aware of the law that denies the deduction of bribes from taxes. The Government also alerted several business organisations when it amended the Penal Code to fully implement the Convention in 1999. Other representatives of Sweden, however, did not believe that everyone in Sweden is aware of the legislation *per se*. Indeed, several participants at the on-site visit indicated that Swedish companies frequently use local partners for various reasons, including their superior knowledge of the workings of the local bureaucracy. For this reason it is extremely important that companies fully understand the coverage of the offence as concerns bribery through intermediaries.

64. Knowledge that foreign bribery is an offence, however, does not necessarily lead to awareness that Swedish companies may be vulnerable to committing such a crime. According to some parliamentarians, the Swedish public does not see foreign bribery as a pressing concern. A Swedish official acknowledged that many Swedish companies are active in corruption-prone countries, often in high-risk sectors. Many have moved their operations to Eastern European countries, rather than the traditional Nordic and Western Europe markets. Yet, according to this official, foreign bribery does not appear to be a major issue and Swedes rarely hear about it in Sweden. Representatives of two labour unions expressed similar opinions. Also of the same view are Swedish businesses operating in Eastern Europe, the Baltic States and Poland, according to an annual survey conducted by the Swedish Trade Council. The survey, however, covered only the Baltics and did not specifically ask the respondents whether they had been solicited for bribes. The Council also has not received any reports that Swedish businesses have been solicited for bribes by foreign public officials.

65. Other participants at the on-site visit provided a slightly different picture. A representative of the business community added that Swedish companies are “somewhat naïve” and unprepared to deal with the issue of foreign bribery. One official opined that Swedish businesses had been solicited for bribes in certain high-risk countries. Apparently these businesses generally reject the request and either withdraw from the market or seek alternative business partners. One participant stated that his company has indeed decided not to operate in certain markets because of the company’s strict policy against bribery. Another participant suggested that smaller companies are particularly vulnerable to paying bribes because of their competitive disadvantage; in his view, some probably do pay. A third participant referred to media reports in which a company (which was not present at the on-site visit) alleged that it was unable to set up a retail business in an Eastern European country unless it paid bribes to foreign officials. The company apparently disclosed the solicitation to the press and the foreign officials relented.

66. The four companies that attended the on-site visit also had procedures to deal with small facilitation payments. One company strives to minimise such payments, but it allows such payments if they are permissible under the laws of the country in question. Two other companies require all payments to be

substantiated. If an employee is not sure of the legality of a payment, he/she is required to contact his/her business unit and perhaps the company's legal department.

### The Role of the Media

67. The media has the potential to play an important role in raising the awareness of foreign bribery within the private sector. However, opinion was divided over the level of attention that the Swedish media gives to foreign bribery. Almost all participants of the on-site visit agree that domestic corruption receives a great deal of media coverage. Two journalists believe that foreign bribery cases concerning Swedish companies receive the same level of attention. If they find an allegation in the foreign press, they will make enquiries and report it in their newspaper if they deem the allegation to be sufficiently serious. The World Bank case has received a fair amount of media coverage.

68. On the other hand, among the representatives of the business sector at the on-site visit, only one was aware of the World Bank case. Some parliamentarians expressed that there is ample public debate on domestic corruption but little on foreign bribery. The examination team also met several economic counsellors from the embassies of other Parties to the Convention in Stockholm. Many counsellors believed that Swedes take relatively limited interest in information from the foreign media. Finally, when asked about foreign bribery allegations, the two journalists at the on-site visit only referred to the World Bank case and recent allegations originating from Guatemala.

#### b) *Recent and Future Initiatives*

69. Recently, there have been several initiatives both from the public and private sectors that impact on the awareness of foreign bribery in Sweden and the findings of the examining team. The Ministry for Foreign Affairs recently posted a background document on the fight against international corruption on its web site.

70. In March 2002 the Prime Minister launched the Swedish Partnership for Global Responsibility (*Global Ansvar*).<sup>47</sup> By providing a forum for dialogue among the Government, the business sector, labour organisations, and non-governmental organisations, the Partnership hopes to encourage Swedish companies to adhere to the principles of the OECD Guidelines for Multinational Enterprises and the principles of the UN Global Compact. At the time of the on-site visit, the Partnership had offered 27 seminars on a number of topics, including the fight against corruption.<sup>48</sup> These seminars were not specifically devoted to the issue of foreign bribery.

71. In addition to seminars, the Partnership plans to work more closely with Swedish embassies in countries with a significant Swedish presence in the coming months to promote corporate social

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<sup>47</sup> See website [www.ud.se/ga](http://www.ud.se/ga)

<sup>48</sup> As of 1 June 2005 the Partnership has offered 32 seminars and five workshop. Eight of these events have been specifically or partly devoted to corruption: (1) Presentation of Transparency International by Peter Eigen, February in 2003, (2) Presentation of UN Global Compact by Georg Kell in April 2003, (3) Workshop on TI's Business Principles and the ICC's Rules of Conduct, June 2003, (4) Guide to the UN Global Compact presentation by Danish Industries, October 2003, (5) Swedish Business and the UN Global Compact with Georg Kell and representatives of the companies ICA and Skanska, March 2004, (6) The UN Convention and the 10<sup>th</sup> Principle of the UN Global Compact presentation by Francois Vincke ICC, November 2004, (7) The Anti-Bribery Institute's guidelines for companies wishing to develop Codes of Conduct and the Swedish Association of the Pharmaceutical Industry, March 2005, and (8) Seminar "What Do We Know About Corruption" with researchers working with corruption issues, representatives of the National Anti-Corruption Unit and the National Council for Crime Prevention, May 2005.

responsibility (CSR) among Swedish companies and their local business partners. The persons responsible will be instructed to report on a more regular basis on the CSR-related issues, including corruption, in host countries. It has not been specified yet whether these officers will specifically deal with the issue of foreign bribery.

72. The private sector adopted measures to prevent bribery of foreign public officials. The Anti-Corruption Institute, since its establishment in 1923, has continuously engaged in activities to fight corruption. The Institute is a private entity and appears to be held in high regard by the private sector. Recently, the Institute issued guidelines to companies on how to develop policies and guidelines against corruption. The Institute has also published a brochure on “The Use of Benefits to Promote Business Contacts and Relationships”. The Institute has on its web-site guidelines for developing codes of conduct and with links to companies that have codes.

73. The Swedish Commission on Business Confidence was established in 2002 to inquire into the impairment of public confidence in the Swedish business sector and to devise measures to address the problem. Recently, the Commission completed a report on possible measures to combat crimes such as bribery and corruption. Furthermore, a subgroup of the Commission recently prepared a Code of Corporate Governance. The Swedish Stock Exchange is expected to require all listed companies to adopt the Code in the near future. The Code, however, does not directly deal with foreign bribery.

74. The codes of conduct of the major corporations reflect an awareness of bribery. One member of the Swedish business community estimated that roughly half of the companies in Sweden have codes of conduct. The codes of several major companies, which are available on the internet, expressly prohibit bribery, as do those of the four corporations that participated in the on-site visit. These four corporations also rigorously promote and enforce their codes. Most provide training to their employees on the codes and on sensitive issues such as the handling of agents. One company has special measures and programmes for employees who operate in high risk countries.

### **Commentary**

*The lead examiners welcome the recent efforts of the private and public sectors, and recommend that Sweden continue its efforts to make Swedish companies more aware of their exposure to solicitations of bribery by foreign public officials.*

## **C. INVESTIGATION AND PROSECUTION**

### ***1) Responsible law enforcement authorities***

#### ***a) General Organisation of the Prosecution Service and the Police***

75. The Code of Judicial Procedure stipulates that the public prosecutor is in charge of and leads criminal investigations. He or she decides whether coercive measures should be used and whether to arrest a suspect. He or she is also responsible for the prosecution during the trial in court. The Prosecutor-General is the highest prosecutor in the country, and “acts for legal development and guidance for the application of law in the Supreme Court”. The Prosecutor-General is also in charge of the Prosecution Service and works towards legal conformity and consistency in adjudication.

76. Before 2005, the public prosecution system consisted of the Public Prosecution Organisation (i.e. the Office of the Prosecutor-General, six Regional Public Prosecution Authorities and a special public

prosecution organisation, the National Economic Crimes Bureau (ECB)). Local prosecutors in each office were competent to investigate all types of crimes, including foreign bribery.

77. Following a reform on 1 January 2005, responsibility for the day-to-day administration of the Prosecution Service falls to two authorities: the Swedish Prosecution Authority and the National Economic Crimes Bureau. Both authorities are discussed below.

78. The National Police Board, headed by the National Police Commissioner, is the central administrative authority of the police service. The Police is divided administratively into districts that coincide with the country's 21 counties. Each district has a police authority that oversees police work for the district, and usually an Economic Crime Squad and a Crime Investigation Squad.<sup>49</sup> The prosecutorial authorities provide that in foreign bribery cases, the police may conduct an investigation only under the direction of a prosecutor.

*b) The Swedish Prosecution Authority*

79. The Swedish Prosecution Authority is administratively led by the Prosecutor-General and has approximately 1 100 personnel (750 prosecutors) divided into two levels. The central level focuses on supervising and development issues, and consists of the Office of the Prosecutor-General and four Centres of Excellence. At the local level, there are 41 local public prosecution offices that are responsible for operational prosecutorial activities. Local public prosecutors have nationwide competence, but their work normally relates to a specific county. They are competent to investigate all types of crimes, including foreign bribery.

80. At the local level, there are also two national prosecution offices with nationwide competence: the National Anti-Corruption Unit and the National Unit for investigations concerning policemen, prosecutors and judges.

*c) The National Anti-Corruption Unit*

81. In 2003, the Prosecutor-General created the National Anti-Corruption Unit (NACU). The unit initially consisted of three prosecutors but expanded to five prosecutors and one economist in spring 2005.

82. The NACU focuses on corruption and corruption-related crimes nationwide and has recently handled high-profile corruption cases. Since the NACU has the same powers and functions as other public prosecutors, it is also competent in foreign bribery cases.<sup>50</sup> The NACU does not have its own police officers or investigators, and hence it works and co-operates with the local and regional police and national investigators. Subject to the availability of resources, the National Economic Crimes Bureau may also provide financial investigators or accountants to the NACU.

*d) Economic Crimes Bureau*

83. Established in 1998, the National Economic Crimes Bureau (ECB) is led by a Director-General, who is subordinate to the Prosecutor-General in prosecution issues. The ECB has approximately 400

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<sup>49</sup> Police Act, sections 4 and 7; the Ordinance Containing Instructions to the National Police Board, sections 13 – 13d; Swedish National Police Board (November 1999), *The Police Act with Commentary*, Swedish National Police Board, Stockholm, pp. 14 and 19; Petterson, M., (2004), *A Presentation of the Swedish Police Service*, National Police Board, pp. 4-6, [www.polisen.se](http://www.polisen.se)

<sup>50</sup> Responses to Questionnaire, p. 5; Response to Supplemental Questionnaire, p. 2

personnel including prosecutors, police officers, economic investigators (e.g. forensic accountants) and administrative staff.<sup>51</sup> The ECB is responsible for all cases involving tax offences, bankruptcy offences, insider trading or EU fraud. The ECB may also assume responsibility for cases involving corruption, fraud, embezzlement and other similar crimes if they require expertise in taxation, business practices or bookkeeping.

84. The ECB is active mainly in three metropolitan regions (Stockholm, Göteborg and Malmö). It is divided into three departments, each of which is further divided into offices and headed by a prosecutor. A detective superintendent supervises police officers operating under the ECB.<sup>52</sup>

d) *Case Assignment and Co-ordination*

85. There is thus overlapping competence to investigate foreign bribery cases among local prosecutors, the ECB and the NACU. According to the Swedish authorities, the NACU generally handles foreign bribery cases. The ECB, however, will investigate a foreign bribery case that also involves tax offences, bankruptcy offences, insider trading or EU fraud. The ECB may also investigate a foreign bribery case if the investigation calls for expertise in taxation, business practices or bookkeeping. As an exception, local prosecutors may also handle cases concerning minor national bribery offences.

86. When a case involves different types of offences, prosecutors will discuss informally to decide which body will conduct the investigation and prosecution. If the prosecutors cannot reach an agreement, the Prosecutor-General makes the final decision. According to the Swedish authorities, the process works smoothly in practice and the Prosecutor General has never become involved.

e) *Conclusion*

87. The system for prosecuting foreign bribery cases in Sweden appears to be satisfactory and the level of resources adequate. The mechanism for assigning cases and sharing resources is flexible and appears to be efficient.

**Commentary**

*The system for assigning cases and allocating resources in foreign bribery cases has been effective in the short time that it has been implemented. But its longer term effectiveness in combating foreign bribery will be tested when more such allegations come to light, including cases necessitating complex financial analysis, and thus the sharing of resources and a high-level of co-ordination and communication. The system and the extra resources allocated are a favourable indicator of the emphasis placed on combating bribery shown by Swedish Authorities. The lead examiners recommend that the Working Group monitor Sweden's system for assigning cases and allocating resources in prosecutions and investigations of bribery of foreign public officials.*

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<sup>51</sup> Responses to Questionnaire, p. 5; The Swedish National Economic Crimes Bureau, *Combating Economic Crime*, The Swedish National Economic Crimes Bureau, Stockholm

<sup>52</sup> *ibid.*

## 2) *Detection and Reporting*

### a) *Reporting Obligations and Training in the Public Administration*

#### i) Public Officials in General

88. There is no explicit sanctionable obligation for personnel of the public administration to report suspicions of crimes that they may have while performing their official duties. However, most of public officials met during the on-site visit stated that they are subject to a reporting obligation (see below heading iv on Sida). Some public officials referred to the Constitution whereas others referred to “general laws”. None of the public officials knew whether their respective administrations had issued guidelines on what to report and how to report suspicions of crimes, but they generally believed that they would report their suspicions to the police or a prosecutor, after having discussed the matter internally with their superior. For instance, the representative of the National Board for Public Procurement indicated that the Board has not advised its staff to report suspicions of foreign bribery to their superiors or law enforcement authorities, but he believed that Board staff is aware of an obligation to report.

89. In practice, none of the officials met ever reported suspected acts of domestic or transnational bribery or heard about reports made within their administration, except the tax authorities and representatives of the Swedish International Development Cooperation Agency (Sida).

#### ii) The Tax Authorities

90. The tax audit manuals do not specifically address the issue of bribes nor does the IT software used for risk assessment designed to support identification of bribes, but there are plans to introduce an item on bribery awareness. In this context, the inclusion of the Bribery Awareness Handbook developed by the OECD CFA Working Party No. 8 on Tax Avoidance and Evasion in the training material of tax inspectors is under consideration. The representatives of the tax administration nevertheless assured the examining team that tax inspectors had bribery situations in mind when controlling declarations on public relations expenses, sales agents’ commissions, etc.

91. The tax administration does not keep statistics on the number of tax offences linked to bribery. Participants estimate that the number of detected cases is low, but a prominent recent case was mentioned. Discussions on the case were not possible as it is currently under investigation and therefore subject to rules on the secrecy of investigations. Most suspicions of bribe payments investigated by tax inspectors lead to the reporting of the offence of obstructing tax collection, as the tax payer usually does not cooperate with the investigation. The tax inspectors try to obtain as much information as possible and then forward it to the prosecutors, who determine whether a bribery offence was perpetrated. The tax administration representatives indicated that the Secrecy Act does not prevent inspectors from reporting any crime to the prosecutors.

92. There seems to be a high-level of co-operation between tax inspectors and prosecutors in Sweden. The Economic Crime Bureau indicated that the tax administration is its most common source of information, and since 2000 the tax administration assembled a team of 200 tax investigators specially trained to assist prosecutors in their investigations on tax and economic crimes. Tax inspectors can request information from banks, which usually respond within a couple of days and no longer than one week of receiving the request.

93. The tax administration is a party to mutual audit agreements with the tax administrations of Nordic countries and some EU countries, and implements the EU directive on MLA in the tax area.<sup>53</sup> Sweden is also a Party to the joint OECD/Council of Europe Convention on Mutual Assistance in Tax Matters, which in article 22§4<sup>54</sup> allows Parties to the Convention to use foreign sources of information for non tax purposes such as criminal proceedings for bribery under certain conditions.<sup>55</sup> Concerning the exchange of tax information for non-tax purposes under bilateral treaties, the Swedish authorities indicated that they welcome the revised article 26 of the OECD Model Tax Convention and the new Commentary 12.3, which states that “contracting States may wish to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing)”.<sup>56</sup> As of January 2005, no clear policy had been adopted as concerns the negotiation of future treaties. Since then, a new treaty with Poland was ratified in April 2005, which includes new model articles 26 and 27. As concerns re-negotiation of tax treaties, the Swedish authorities consider that it is too lengthy and resource demanding a process to go through for that single purpose.

### Commentary

*The lead examiners welcome the recent ratification by Sweden of the first bilateral tax treaty which includes the new Article 26, since such a provision could enhance the detection and prosecution of foreign bribery globally. The lead examiners also recommend that where appropriate Sweden continue enabling foreign tax authorities to share tax information with law enforcement and judicial agencies regarding foreign bribery offences when negotiating tax treaties.*

iii) The Ministry for Foreign Affairs and Swedish Embassies

94. Since the on-site visit, the Ministry of Foreign Affairs has issued a Plan of Action which includes guidelines to embassies and consulates with diplomatic staff concerning the reporting of offences. The guidelines state that “cases involving direct suspicion of offences committed abroad by Swedish companies or authorities can also be reported directly to the National Anti-Corruption Unit.” The Plan of Action further deals with, *inter alia*, education and other forms of awareness-raising, in particular for employees to be posted in countries where corruption is prevalent. It encourages embassy employees to enhance their

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<sup>53</sup> Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the authorities of the Member States in the field of direct and indirect taxation

<sup>54</sup> Article 22.4: Notwithstanding the provisions of paragraphs 1, 2 and 3, information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use. Information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorisation by the competent authority of the first-mentioned Party.

<sup>55</sup> The following other countries are parties: Azerbaijan, Belgium, Denmark, Finland, Iceland, the Netherlands, Norway, Poland and the United States.

<sup>56</sup> See the new article 26 on exchange of information of the OECD Model Tax Convention and its new commentary 12.3: “if the information appears to be of value to the receiving State for other purposes than those referred to in paragraph 12, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance). However, Contracting States may wish to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing)...”

knowledge about corruption in the countries where they are posted and report, in particular if Swedish companies are involved in corruption.

95. An interesting informal initiative was launched one year ago in Swedish embassies in Africa: embassies are asked to systematically collect information on allegations of bribery, including from the local press, and to report them to the Ministry.

### **Commentary**

***The lead examiners welcome the undertaken and planned initiatives of Sweden to enhance the ability of detection and reporting of foreign bribery offences by embassy personnel.***

***The lead examiners recommend further measures to increase the awareness of foreign representations, including embassy personnel, of corruption issues and the steps that should be taken where credible allegations arise that a Swedish company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Sweden.***

iv) Detection in Activities of Development Assistance

#### *Swedish International Development Cooperation Agency*

96. The Swedish authorities indicate that combating corruption is a strategic priority for Sida during 2005-2007. The representative of the legal department of Sida indicated that he spends approximately 35% of his time investigating corruption-related incidents, although these cases rarely involve suspected bribery by Swedish companies involved in ODA. These investigations are carried out internally at, for instance, the embassy-level, and are usually reported to the relevant manager (e.g. ambassador), who must then evaluate the findings and decide upon the appropriate action. The legal department of Sida, which consists of 15 persons (including lawyers), has at its disposal financial and auditing expertise for the purpose of performing the internal investigations. The legal representative stated that in many instances the manager hands the case over to the local law enforcement authorities, and sometimes the disbursement to the contractor in question is stopped. He added that Sida has heightened its attention to corruption in the last three years. In addition, the recent decision of a Swedish trial court in the World Bank case, now pending before the Court of Appeal, has brought attention to the potential for corruption in the administration of Trust Funds by international financial institutions. As a result of this case, Sida now includes awareness-raising on the bribery of foreign public officials in its meetings with prospective consultants, and is considering whether to continue providing contributions to Trust Funds.

97. Anti-bribery safeguards are built into the procedures of Sida in various ways. Some of these safeguards apply generally to ODA programmes, whereas others are specific to bilateral assistance. Sida's Anticorruption Regulation of May 4, 2001, which was issued in the form of a manual in December 2004,<sup>57</sup> contains background information about corruption and instructions on the actions to be taken when corruption is suspected. The Anticorruption Regulation applies to all Sida employees in Sweden and abroad, as well as Sida's collaborators (through contracts based on the relevant parts of the regulation). The Regulation applies to various activities, including the drawing-up of agreements and contracts, and procurement. The Regulation requires Sida to scrutinise companies, consultants, independent organisations and others who administer Swedish aid funds via Sida's contractual partners, in terms of importance and

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<sup>57</sup> Manual: Sida's Anticorruption Regulation (Sida, Department for Policy and Methodology, December 2004).

risk. Sida is also required to carry out a separate external audit of the contribution if mismanagement or corruption is suspected.

98. Sida's Anticorruption Regulation creates two areas of uncertainty. First, in the introductory passages (page 2) it states that "corruption" for the purpose of the Regulation means "institutions, organisations, companies or individuals obtaining improper gains by their position in an operation and thereby causing damage or loss".<sup>58</sup> The supply side of bribery is mentioned on the second last page of the manual (i.e. page 23) where it states that as a donor Sida has to look at both sides of corruption - the supply side and the demand side. It is not until this part of the Manual that the OECD Convention is mentioned. The definition of "corruption" also raises confusion because it requires that there has been damage or loss – factors that do not necessarily result from corruption and which would be, in any case, difficult for a Sida employee to ascertain.

99. Another area of uncertainty in Sida's Anticorruption Regulation concerns the reporting chain and protections for those who report suspicions of corruption. The Anticorruption Regulation requires employees to follow "A Guide to Acting on Suspicions of Corruption", which is intended to provide guidance to both management and other staff members of Sida in Sweden and abroad, including local employees at Swedish missions abroad. It requires that suspicions of corruption are reported to "the holder of the right to use the appropriation in question, normally a manager at Sida or a Swedish mission abroad". It states further that where the suspicion pertains to this manager or he/she has a conflict of interest in the matter, the report should be made to "the individual who delegated the right to use the appropriation to its current holder". Sida adds that such reports are decided on a case-by-case basis depending on the level of suspicion and other facts. The reporting obligation is to the superior who has to decide in agreement with the Chief Legal Advisor on further actions. The Guide does not identify at what level or in what circumstances the decision must be taken to report the suspicion to the law enforcement authorities in Sweden and/or abroad. Sida states that there is no mandatory obligation for the agency to report any suspicion on development partners or consultants to the police for investigation in national or international law.

100. The Guide provides ambiguous information about the protections available to an individual who reports. It states that the person's name and information "can usually be kept confidential during the investigation", but if a government agency takes action after the investigation "confidentiality will not be absolute". It states further that "personal protection may also be provided" but does not explain what measures are available or in what circumstances they are provided. Sida representatives explained however that the agency is very effective in communicating to staff its protective and supportive attitudes towards whistleblowers as an important method to safeguard internal integrity and ethics. Furthermore, they stated that the Director General is very clear in her message to staff that it is unacceptable to punish staff for reporting on suspicions of fraudulent behaviour. Physical protection has not so far been necessary but could be provided as a general security measure, normally where embassies are concerned, by the Ministry of Foreign Affairs.

101. The need for clarity concerning the reporting obligations is illustrated by the experience of a Sida official who became suspicious of the handling of Swedish ODA funds by international public officials. He did not initially report his suspicions to the Swedish law enforcement authorities. Instead he reported his suspicions to the international organisation.

### *Swedfund*

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<sup>58</sup> Note that the definition of "corruption" in "A Guide to Acting on Suspicions of Corruption" (Sida, Methods of Development Unit, 2003), covers giving and receiving bribes.

102. The legal advisor from Swedfund explained at the on-site visit that due diligence is performed regarding potential partners for investments. Although Swedfund does not have practical experience concerning the detection of bribery of foreign public officials, she believes that foreign bribery committed by a partner would result in a “spot visit” and the making of a report to the legal department of the local Swedish Embassy.

### **Commentary**

*With respect to the activities of the Swedish International Development Cooperation Agency (Sida), the lead examiners recommend that the Sida Anticorruption Regulation of May, 2001, should be amended to clarify that “corruption” includes the bribery of foreign public officials and that the identification of loss or damage is not necessary to report suspicions of bribery of foreign public officials.*

*Furthermore, the lead examiners recommend that the competent authorities in ODA take steps to ensure an effective system for reporting suspicions of bribery of foreign public officials to law enforcement authorities in Sweden and/or abroad.*

#### v) Detection and Reporting by Export Credit Agencies

103. Since a legal judgment is a prerequisite to withholding support, it is unsurprising that the Swedish Export Credits Guarantee Board (EKN) and the Swedish Export Credit Corporation (SEK) do little to detect whether a client has engaged in foreign bribery. SEK has no measures or policy to investigate whether its clients have or will engage in bribery. EKN stated that, prior to approving support, it conducts “due diligence” whenever there are “indications” of bribery. Yet, it has not issued guidelines to its employees on what amounts to sufficient “indications” of bribery to trigger “due diligence”. Nor has it trained its staff on how to conduct “due diligence”. Not surprisingly, there have been no cases in which “due diligence” was conducted. Apart from the recent seminar on agents’ commissions, it has not trained its staff on how to look for “indications” of bribery. Although it requires its clients to submit financial statements, it does not check the veracity of these documents.

104. In addition, the contracts used by EKN and SEK allow them to audit their clients if they uncover suspicions of bribery after support had been provided. There is, however, no training on how to uncover suspicions. There are also no guidelines on when audits will be conducted. No such audits have ever been conducted.

105. The lead examiners believe that the policy to conduct “due diligence” and audits in appropriate circumstances is commendable. The effectiveness of the policy, however, could be enhanced through appropriate training and guidance to employees.

106. Employees of EKN have no obligation to report suspicions of foreign bribery that arise in the course of performing their official duties. According to representatives of EKN, since their agency is very small, an employee who has such suspicions would inevitably inform his/her superior informally. No foreign or domestic bribery suspicion has ever been reported by an employee of EKN internally to a superior or to a law enforcement agency.

107. In order to combat bribery, SEK’s Code of Conduct stipulates that employees are obligated to report corruption to the company lawyer or the human resources department. SEK employees have never reported suspicions of bribery, whether foreign or domestic, internally to a superior or to a law enforcement authority.

b) *Reporting by the General Public*

108. In Sweden, individuals who are aware of or who suspect a crime are not obliged to report to law enforcement authorities. Participants in the on-site visit had diverging opinions on the propensity of individuals to report to prosecutors or to the police.

i) *Whistle Blowing and Whistleblower Protection in the Private Sector*

109. It appears that at least some Swedish enterprises have mechanisms for whistle blowing (*i.e.* reporting by an insider, such as an employee, of crimes committed by others in an enterprise). Of the four enterprises that attended the on-site visit, two have codes of conduct that ensure complaints by whistleblowers are sent to senior management or an internal audit committee. According to representatives of two labour unions, however, whistle blowing procedures are not common among Swedish enterprises. The Commission on Business Confidence considered but eventually decided against including whistleblower provisions in its Code of Corporate Governance.

110. A whistleblower can also report to bodies outside his/her company. The two union representatives at the on-site visit believe that whistleblowers are more likely to report wrongdoing to his/her union than an employer. The union may then in turn report the matter to the company through its representative on the board of directors. According to two journalists at the on-site visit, an employee may also be better off by disclosing the matter to the media.

111. Despite these avenues for whistle blowing, not very much is known about the prevalence and effectiveness of whistle blowing in the Swedish private sector. One NGO believed that whistle blowing would be more effective if companies did more to encourage it. A prosecutor surveyed active and passive bribery cases in 2000-2002 and concluded that bribery is rarely detected because of whistle blowing.<sup>59</sup> Sweden does not collect statistical information on the number of (domestic or foreign) bribery investigations that resulted from whistle blowing.

112. The apparent lack of whistle blowing, however, does not seem to be due to a lack of protection for whistleblowers from reprisals by their employers. The lead examiners had the impression that such protection is strong in Sweden, even though there is no legislation that specifically deals with the subject. Representatives of two labour unions believed that general labour law and collective agreements provided adequate protection. Furthermore, barring some limited exceptions, a journalist who receives information from a whistleblower is prohibited from revealing the identity of the source.<sup>60</sup>

ii) *Witness Protection*

113. Sweden also offers protection to witnesses in criminal cases, including foreign bribery. Police may provide physical protection in appropriate cases. Witnesses may also be relocated or given new identities if necessary. The prosecution must, however, disclose the identity, but not other personal records such as addresses etc., of all witnesses and their evidence to the accused prior to trial.

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<sup>59</sup> Ministry of Justice (29 December 2004), *Additional Answers from Sweden*, Ministry of Justice, Stockholm, p. 1; van der Kwast, C. (26 June 2003), *Interim Report on Project on Passive and Active Corruption (Receiving and Giving of Bribes)*, Office of the Prosecutor-General, Stockholm

<sup>60</sup> The Freedom of the Press Act, Chapter 3

c) *The Reporting Obligation of Auditors*

114. Despite the potential for detecting business-related offences provided by Sweden's accounting and auditing legislation, auditors apparently have so far not contributed to the detection of instances of bribery.

i) Reporting Possibilities for Internal Accountants

115. The professional auditors met indicated that internal accountants are covered by the obligation of employees to report suspicions they have on the running of the company. In case management does not act to answer the internal accountant's concern, the latter can report his/her suspicions to the external auditor, who will decide whether to report the suspicion to management, and ultimately to the prosecutor.

ii) Reporting Obligations for External Auditors

116. For the moment no case of possible bribery of a foreign public official has been detected through an auditor's report and there are no statistics on the number of suspected crimes reported to prosecutors by auditors. But the profession also noted that none of the possible cases under investigation show an omission of reporting by an auditor.

117. Swedish auditors do not perceive themselves as having an important role in detecting foreign bribery as it is not considered a normal function of the auditing profession. In any case the auditing profession appears well aware of the obligation to report suspicions of bribery. A study by the National Council for Crime Prevention in 2004<sup>61</sup> shows that more than half of the respondents received training relating to the obligation to report suspected offences, either internally within their auditing firm or via the Swedish Association of Auditors (*Revisorsamfundet*).<sup>62</sup> However, the Supervisory Board of Public Accountants<sup>63</sup> does not provide training as it is the obligation of the auditor to obtain and maintain the skills and knowledge required to perform statutory audit. The task of the Board is to ensure that, *inter alia*, through the professional exams and systematic supervisory activities, the auditor complies with the requirements in this respect. With respect to the detection of bribery in the public sector, the National Audit Office, which audits the public accounts, is well-placed to detect possible cases of the passive bribery of Swedish officials and foreign bribery perpetrated by Swedish officials.

118. With respect to auditors' reporting obligations under the Companies Act, an auditor is required to report without undue delay suspicions of foreign bribery perpetrated by a member of the Board of Directors or the Managing Director, to the Board of Directors. No notification is necessary where, for instance, it may be assumed that the Board of Directors would not take any preventive measures. Within two weeks of notifying the Board of Directors, the auditor shall resign from his or her post and report to the prosecutor. Where the auditor does not report to the Board of Directors, he or she shall resign from his or her post and report to the prosecutor. Resignation and notification to the prosecutor are not necessary

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<sup>61</sup> For more information, see the detailed report on the Swedish auditors' attitudes towards the obligation to report suspected offences prepared by the National Council for Crime Prevention in 2004, of which an English summary is available at [www.bra.se/dynamaster/publication/pdf\\_archive/04093030347.pdf](http://www.bra.se/dynamaster/publication/pdf_archive/04093030347.pdf)

<sup>62</sup> This association is one of the two professional organisations existing in Sweden, together with *Föreningen Auktoriserade Revisorer*, but none participated to the in-site visit. They are members of the International Federation of Accountants (IFAC) and play important roles in the development of ethics and standards.

<sup>63</sup> The Supervisory Board of Public Accountants (*Revisorsnämnden*) is the Government Office responsible for the examination of applicants to the profession as well as the supervision of members of the profession.

where the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, or the suspected crime is of minor significance.<sup>64</sup>

119. Questions were raised by the lead examiners concerning the scope of the reporting obligation where the auditor suspects that an employee rather than a managing director or a member of the Board of Directors perpetrated a bribery offence. The auditing professionals met stated that they would still report the offence to management for the following two reasons: First, the offence could cause damage to the company and the auditor has to report all possible damages. Second, the auditor could consider that the offence occurred because the internal management of the company was deficient, which in itself constitutes a breach of Chapter 8, section 2 of the Companies Act (i.e. The Board is responsible for the control of the company.). Section 30 states that when the auditor finds that a member of the board of directors or managing director has acted against the Companies Act, such fact shall be set forth in the auditor's report.

120. Co-operation between external auditors of companies and the public authorities appears to run smoothly. As mentioned, when an auditor reports a crime, he/she has to resign vis-à-vis the company and to co-operate with the prosecutor. As soon as an investigation is opened, the prosecutor can interview the auditor as a witness and the auditor is able to waive professional secrecy obligations. The auditors met also indicated that in practice they co-operate more frequently with the tax authorities on an informal basis for the purpose of verifying whether the audit was performed accurately.

#### Commentary

*The lead examiners recommend that Sweden should require the auditor to report indications of a possible illegal act of bribery to the Board of Directors of the audited entity regardless of who within the company structure perpetrated the offence.*

*In addition the lead examiners recommend that Sweden should consider requiring the auditor to report indications of a possible illegal act of bribery to the competent authorities regardless of i) who within the company structure perpetrated the offence, ii) whether the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, and iii) whether the offence is considered of minor significance.*

#### d) *Commencement of Investigations Ex Officio*

121. At the on-site visit, Sweden stated that a prosecutor has the authority to commence a preliminary investigation into foreign bribery *ex officio*, i.e. without receiving a complaint. The only requirement is that there is a reasonable suspicion that a crime has been committed.<sup>65</sup> Hence, for instance, a prosecutor may commence an investigation if he/she is alerted about a case by the Working Group on Bribery in International Business Transactions, or if he/she comes across allegations in the media.

122. There is, however, no specific system to collect reports of foreign bribery involving Swedish companies and individuals. Hence, some recent foreign bribery allegations against Swedish entities that were only published in the foreign media have gone unnoticed by Swedish prosecutors. This is particularly likely to happen if the allegations are not published in a "major country", according to one journalist.

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<sup>64</sup> See Chapter 20, sections 38-40 of the Companies Act.

<sup>65</sup> See also Code of Judicial Procedure, Chapter 23, section 1.

123. Recent examples show, however, that even media reports from “major countries” may go unnoticed by Swedish authorities. In two separate cases, Swedish prosecutors were initially uninformed of media reports from two “major countries” which alleged foreign bribery by Swedish companies in Costa Rica and the Czech Republic. However, after being alerted to the press allegations during the Working Group on Bribery monitoring process, the Swedish authorities reviewed the reports and later indicated that they will investigate these allegations by gathering evidence through mutual legal assistance procedures from the relevant countries.<sup>66</sup>

124. The lead examiners believe that Sweden can improve the manner in which it handles information from foreign sources. It would be too onerous to require the Swedish Prosecution Service to monitor every information outlet in the world for relevant reports. It is, however, reasonable to request overseas Swedish diplomatic officials to monitor information sources (including the media) in the country in which they are posted.

e) *Detection and Disclosure of Bribery Linked to Money Laundering Cases*

i) Offence of Money Laundering

125. At the time of the Phase 1 examination, Chapter 9, section 6a of the Penal Code concerning the new offence of “money receiving” had recently been introduced (1 July 1999).<sup>67</sup> The following two categories of receiving were moved from the already, and still existing offence of “receiving” in Chapter 9, section 6 to the new one: i). “improperly promotes the opportunity for another to take advantage of property emanating from the proceeds of crime, or the value of such property” (item “1”), and ii) “assists in the removal, transfer, or sale of property which is derived from the proceeds of crime, or takes some similar measure, with the intent of concealing the origin of property” (item “2”). The new and third category is the following: “A person, who, in cases other than those mentioned in the first paragraph, improperly participates in removing, transferring, conveying, or taking other measures with property with the intention to conceal that another person has enriched himself or herself through a criminal act”. The sanction for these offences is imprisonment for up to two years. Where the crime under Chapter 9, section 6a is “gross”, the sanction is imprisonment from six months to six years. The Penal Code does not provide guidance on the circumstances in which the offence of “money receiving” is considered “gross”. Where the offence under Section 6a is “petty” (see section 7a), the sanction is imprisonment up to six months or a fine. (The full text of the offences of “receiving” and “money receiving” under Chapter 9 of the Penal Code is provided in Annex 4 to this report.)

126. In the FATF – VII Annual Report (1995-1996) on Sweden, it is recommended that Sweden “establish a new and separate money laundering offence...which includes as predicate offences all serious offences (including economic crimes), and it should be made clear that the offence extends to cases where the predicate offence was committed in a foreign country”. The Swedish authorities indicate that when introducing the new offence of “money receiving” in 1999, the FATF report was taken into consideration. However, the new offence of “money receiving” maintains the previous constructions. In addition it is still not stated expressly that the offence applies to cases where the predicate offence was committed abroad.

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<sup>66</sup> In a third case (South Africa), Swedish authorities were aware of media reports before the on-site visit. In recent weeks the Swedish authorities reviewed the Swedish jurisdictional links and decided to investigate the case by gathering evidence through mutual legal assistance channels.

<sup>67</sup> The version of the offence of “money receiving”, which is provided in Annex 4, was provided to the Secretariat during the on-site visit but to date the English version of the Penal Code available on the Swedish Government website does not reflect the amendments.

127. With respect to the question of whether the offence of “money receiving” applies where the predicate offence is committed abroad, the Swedish authorities state that the doctrine of “universal applicability” ensures that the money receiving offences apply regardless if the predicate offence is a crime in the country where it takes place. The test is whether the predicate offence amounts to an offence to which the principle of “universal applicability” applies under Swedish law. According to the principle, for certain crimes, including the bribery of a foreign public official, acts committed in a foreign country constitute a crime in Sweden irrespective of whether the conduct is criminalised in the foreign country. The Swedish authorities indicate that the doctrine is based in the Penal Code provisions, which do not restrict the offences to those committed in Sweden. The lead examiners note that leading up to the examination of Sweden by the Working Group there was some uncertainty regarding the legal basis for the application of the money receiving offences where the predicate offence takes place abroad.

128. Statistical information provided by the National Council for Crime Prevention for the years 1999 to 2004 indicate that on average, 5 268 offences of “receiving” and “money receiving” under Chapter 9, sections 6, 6a and 7 of the Penal Code were reported annually.<sup>68</sup> In addition, the 2003 Annual Report of the Financial Intelligence Unit (FIU) states that the number of reports on suspected transactions received by it in 2002 and 2003 was 8 080 and 9 832 respectively. The number of convictions for “receiving” and “money receiving” in 2000 was 1 674, with 394 sentences of imprisonment, 188 sentences of probation, 389 suspended sentences, 42 treatments under the Social Services Act, 381 fines,<sup>69</sup> and 220 waivers of prosecution. The statistical information for the following years is restricted to fines, with 612 fines in 2001, 513 in 2002, and 536 in 2003. The statistical information on fines for 2001 to 2003 is further broken down according to the size of the fines, the vast majority of which were based on the concept of “day-fines” and “summary fines”. “Standardised fines” were imposed in very few cases. According to the 2003 Annual Report of the FIU, 19 sentences for various types of crimes were imposed as a result of reports to the FIU, and these sentences concerned 55 people, who, all together, were sentenced to 103 years and 3 months of imprisonment, with sanctions such as protective supervision, conditional sentences or fines imposed in eight cases.<sup>70</sup> It is not possible to analyse the relevance of the statistics provided by the National Council for Crime Prevention to the concept of money laundering, given that they do not differentiate between the offences of “receiving” and “money receiving” or the concept of money laundering. Such a statistical breakdown is likely not possible in view of the absence of a separate offence of money laundering.

### **Commentary**

***Case law has not confirmed that the principle of “universal applicability” is sufficient for legal action over the offences of money receiving where the predicate offence of bribing a foreign public official takes place abroad. The lead examiners therefore recommend that the application of the offences that cover the concept of money laundering be followed-up in this regard***

#### ii) Money Laundering Reporting

129. The Act on Measures against Money Laundering (1993:768) (AMML) and the Money Laundering Registers Act (1999:163) regulate money laundering reporting in Sweden. According to section 9 of the AMML, the “National Police Board or other police authority designated by the

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<sup>68</sup> The number of reports of “receiving” offences for the years 1999 to 2004 is as follows: 1999: 7 310, 2000: 5 370, 2001: 5 071, 2002: 5 043, 2003: 4 701, and 2004: 4 111.

<sup>69</sup> 123 of these fines were issued by the prosecutor.

<sup>70</sup> See: Ibid, footnote 69.

Government” is responsible for receiving reports in circumstances that may be “indicative of money laundering”. In practice, the Financial Police serve as the Financial Intelligence Unit (FIU). The Financial Police are a division of the Swedish National Criminal Investigation Department – a service within the National Police Board. The representative of the FIU explains that in practice the FIU normally cooperates with the National Economic Crimes Bureau.

130. The most recent amendments to the AMML were made in January 2005. However a translation of the new text was not yet available prior to the on-site visit. As a result, in-depth discussions concerning the substance of the AMML did not take place at that time. Following the on-site visit, the translated text was provided and reviewed by the examination team. In summary, the amendments essentially enhance the money laundering reporting system by clarifying that the AMML applies to “natural and legal persons” (as opposed to “undertakings” prior to the amendments), and by extending the AMML to the following “natural and legal persons”:

- i) Those that operate the following types of businesses: fund businesses under the Investment Funds Act, estate agents (real estate) under the Estate Agents Act, casino games under the Casinos Act (Before January 2005 the Government decision to authorize the arrangement of casinos prescribed requirements similar to those found in the AMML legislation. The Gaming Board is the supervisory authority for lotteries and casinos and before 1 January 2005 they also supervised compliance with the AMML requirements in regard to casinos.), registered or chartered accountants, and professional businesses for advising on taxes.
- ii) Lawyers and associate lawyers at law firms and other independent legal professionals when they conduct specified professional activities (*e.g.* assisting in the implementation of certain transactions on behalf of clients, including the purchase or sale of property or companies, and establishing, operating and managing companies, associations and foundations).
- iii) Natural and legal persons who conduct transactions involving “antiques, art, precious stones, metal, scrap metal or means of transport” in cases where a cash payment is made in an amount of EUR 15 000 or more. Prior to the amendments, these persons and entities were only required to provide information regarding an investigation into money laundering if requested by the FIU.

131. Otherwise, the AMML maintains the previous structure and substance, and in this respect certain issues that arose prior to the amendments remain. Beginning with the provisions on the verification of the identity of customers, section 4a states that it is not necessary to perform an “identity check” “with regard to natural or legal persons conducting (certain) business operations” where the business operations are “established in the European Economic Area, or are established outside the Area if the country has provisions regarding measures against money laundering that correspond to” the relevant EC Directive. The same exception applies to the obligation under section 6 to verify the identity of a party when there are grounds for assuming that he or she is not acting on his or her own behalf. With respect to life insurance companies, section 5 further states that an identity check is not required where payment is made from an account that has been opened at a credit institution established in the European Economic Area. Pursuant to section 7, an identity check must be performed regardless of the exceptions in sections 5 to 6 if there are “grounds for assuming that a transaction may constitute money laundering”.

132. The Swedish authorities indicate that these exemptions are in accordance with relevant EC Directives (91/308EEC and 2001/97EC). For instance, Council Directive 91/308/EEC of 10 June 1991 (see CONSLEG: 1191L0308—28/12/2001) states in article 3.9 that “credit and financial institutions shall not be subject to the identification requirements provided for in this article where the customer is a credit or financial institution covered by this Directive...”. In article 1, a “credit institution” means such an institution as defined in the relevant EC directive as well as “branches” defined in the directive and located in the Community of credit institutions having their head offices inside or outside the Community. A similar definition is provided for a “financial institution”.

133. With regard to the interrelationship between the Money Laundering Registers Act (MLRA) and the AMML, pursuant to section 2 of the MLRA, the natural and legal persons to whom the AMML applies “may keep a money laundering register containing information provided” by them in accordance with section 9, paragraph 2 of the AMML – *i.e.* information provided to the FIU in a suspicious transaction report. Thus such persons are not obligated to keep a record of suspicious transaction reports made by them to the FIU. Nor are they required to keep a record of information that they collected as a result of examining a transaction for which there were suspicions, but the suspicions did not result in the making of a suspicious transaction report.

134. The AMML also raises issues regarding how to reconcile the duty to report suspicious transactions with the duty to maintain professional secrecy and confidentiality. Section 10 of the AMML states that a natural or legal person who makes a suspicious transaction report “may not be held liable for the breach of professional secrecy if the natural or legal person had reason to assume that the information should be provided”. Section 10 then makes reference to “special provisions” in certain laws (*e.g.* the Swedish Companies Act and the Auditing Act) “regarding the liability for accountants in joint stock companies, economic associations, foundations and certain other companies”. It is not clear what is required by an assumption that “the information should be provided”. This might be interpreted as requiring more than that the report is made in good faith. Furthermore, the Auditors Act establishes an obligation of professional confidentiality,<sup>71</sup> and the Companies Act establishes a requirement for auditors to report suspicions of the commission of a crime to the Board of Directors, and in certain circumstances the “prosecutor”, but not the FIU in cases where money laundering is suspected. How these obligations are reconciled in practice with the obligation for accountants to report suspicious transactions under the AMML has not been demonstrated. With respect to the reporting obligation for lawyers, sections 9a and 9b attempt to establish a balance between the obligation of lawyers to uphold solicitor-client privilege and the obligation to report suspicious transactions under section 9.<sup>72</sup> However, one participant in the on-site visit from the legal profession is unsure of how to handle these competing obligations, and feels that more guidance is needed from the Government in this respect.

135. The general impression of the lead examiners is that there has been a high level of co-operation between the FIU and the persons and entities subject to the AMML. A representative of the legal profession states that some reports have been made by lawyers to the FIU, and the FIU has provided feedback concerning those reports. The Tax Authority is also satisfied with the level of co-operation. The Banking Association feels that the banking sector has been well instructed by the FIU concerning the recent amendments to the AMML, and states that the FIU has provided useful feedback on reports made by banks. The Tax Authority states that many cases reported by it to the FIU “have been proceeded with”. Indeed the Ministry of Justice informs that the only money laundering conviction to date that involved bribery as a predicate offence (domestic bribery in the private sector) was detected by the tax authorities. On the other hand, representatives of the banking sector feel that there have been very few convictions in comparison to the number of suspicious reports made to the FIU, and they find this discouraging, in light of the substantial efforts that they are making to comply with the AMML.

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<sup>71</sup> Section 26 of the Auditors Act states that “an auditor may not use information obtained during the course of his or her professional work for his or her own benefit or to the detriment or advantage of another person. Nor may the auditor disclose such information without authorisation”.

<sup>72</sup> For instance, section 9b states that “lawyers and associate lawyers at law firms are not required to provide information under section 9 when this concerns information regarding a client and which they received while assessing their client’s situation”.

136. Statistical information indicates that in 2003<sup>73</sup> the FIU received 9 832 suspicious transaction reports, an increase of 1 752 from 2002. The largest proportion of the increase is attributed to the Stockholm region, which is considered natural given that Stockholm is Sweden's financial centre. The vast majority of the reports (8 820) came from currency exchange companies. Out of the 9 832 reports, 2 257 led to "further measures". In the cases where operational reports or other intelligence led to preliminary investigations, 19 sentences were imposed in 2003.<sup>74</sup> Statistical information provided by the FIU at the on-site visit indicates that in 2004, 9 929 suspicious transactions reports were made to it, and of these 134 operative reports were made to the prosecutorial authorities. The total number of preliminary investigations opened in 2004 was 21, compared to 60 in 2003. A representative of the FIU states that the FIU is "not proud" of the decrease in preliminary investigations in 2003. The representative of the Office of the Prosecutor-General believes that in general the proportion of preliminary investigations to suspicious reports in Sweden is typical globally.

137. The guidelines issued by the Swedish Financial Supervisory Authority,<sup>75</sup> which are currently under review focus on transaction patterns for the purpose of detecting money laundering. To date, the guidelines have not included typologies involving specific predicate offences. However, the representative of the Financial Supervisory Authority states that financial institutions have difficulty connecting money laundering to the predicate offence. It therefore appears that guidelines providing typologies connecting predicate offences to money laundering may be needed to increase the effectiveness of the money laundering system. In particular, given the absence of experience in reporting suspicious transactions linked to the bribery of foreign public officials, the ability to detect such transactions could be significantly enhanced by typologies describing the kinds of transactions that could be indicative of this kind of activity.

### Commentary

*The lead examiners recommend that Sweden analyse the reasons for the low number of investigations and prosecutions compared to the number of suspicious transaction reports, with a view to increasing the effectiveness of the money laundering reporting system for the purpose of detecting and preventing the offence of bribing a foreign public official.*

### 3) *Case Law in an Evolving Legal Framework*

138. As mentioned, the purpose of the 1999 Phase 1 examination of Sweden was to assess whether Swedish laws for implementing the Convention and the Revised Recommendation comply with the standards there under, and the purpose of the Phase 2 examination of Sweden is to assess their application in practice. However, before doing such an assessment, the present report assesses the amendments to the law that occurred since Phase 1.

#### a) *The 2004 Amendments to the Offence of Bribery*

139. The offences of bribery are provided for in the 1962 Swedish Penal Code and have been amended several times. The offence of active bribery is defined and sanctioned in Chapter 17, section 7 of the Penal

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<sup>73</sup> The statistical information for 2003 is found in the "Annual Report 2003: Financial Intelligence Unit".

<sup>74</sup> Further information about the sentences in these cases is provided in the section on the "Offence of Money Laundering".

<sup>75</sup> The Swedish Financial Supervisory Authority supervises and monitors companies operating in financial markets. It is under an obligation to report information on suspected transactions to the FIU according to the AMML.

Code,<sup>76</sup> and the offence of passive bribery in Chapter 20, section 2. The two provisions function in conjunction, as Chapter 17, section 7, covers bribery of employees, and through a cross-reference to Chapter 20, section 2 additional categories of persons.

140. Sweden states that, prior to 1 July 1999, the Swedish provisions on bribery already covered (although not expressly) any foreign public official that would be considered to be an “employee” or a person who, by reason of a position of trust has been given the task of managing another’s legal or financial affairs, independently handling an assignment requiring qualified technical knowledge, or exercising supervision over the management of such affairs. (Compare with the current provision in Chapter 20, Section 2, Paragraph 2, item 5 a, c and d.)<sup>77</sup>

141. On 1 July 1999, in connection with the implementation of the OECD Convention and European Union instruments against corruption, the provisions on bribery were amended to cover other certain categories of foreign public officials, since these categories could not be considered as “employees” etc.

142. The offence was amended again with the ratification and implementation of the Council of Europe Criminal Law Convention against Corruption and its Additional Protocol. In summary, the amendments, which entered into force on 1 July 2004, add new categories of foreign public officials and create a sanction for “gross” (aggravated) active bribery.

143. Finally, Sweden signed the United Nation Convention against Corruption on 9 December 2003. The Ministry of Justice is analysing the Convention in order to determine whether its implementation in Sweden requires further amendments to Swedish legislation. The analysis will not be completed before summer 2005 and therefore no indication can yet be given as to whether the Penal Code will be amended.

i) The Restructuring of the Offence and the Definition of Foreign Public Officials

144. The text of the amended provisions has been reproduced below for a better understanding of the discussions:

**New Chapter 17, section 7**

A person who gives, promises or offers a bribe or other improper reward to an employee or other person defined in Chapter 20, section 2, for that person or for anyone else, for the exercise of official duties, shall be sentenced for bribery to a fine or imprisonment for at most two years.

If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.

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<sup>76</sup> For information, the Swedish Penal Code is divided in Chapters, themselves divided in sections.

<sup>77</sup> The preparatory works to the Government Bill 1998/99:38 (pages 38-39 and 58) state “it is, according to Swedish law, punishable even for a foreign employee to take bribes, just as bribing such an employee”. The Swedish authorities explain that the term “employee” is to be interpreted in a very broad manner and covers private and public officials, irrespective of whether they are employed in Sweden or abroad.

## **New Chapter 20, section 2**

An employee who, for himself or herself or for anyone else, receives, accepts a promise of or demands a bribe or other improper reward for the performance of his duties, shall be sentenced for taking a bribe to a fine or imprisonment for at most two years. The same shall apply if the employee committed the act before obtaining the post or after leaving it. If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.

The provisions of the first paragraph in respect of an employee shall also apply to:

1. a member of a directorate, administration, board, committee or other such agency belonging to the State, a municipality, county council, association of local authorities,
2. a person who exercises an assignment regulated by statute,
3. a member of the armed forces under the Act on Disciplinary Offences by Members of the Armed Forces, etc. (1986:644), or other person performing an official duty prescribed by Law,
4. a person who, without holding an appointment or assignment as aforesaid, exercises public authority,
5. a person who, in case other than stated in 1-4, by reason of a position of trust has been given the task of
  - a) managing another's legal or financial affairs,
  - b) conduct a scientific investigation,
  - c) independently handling an assignment requiring qualified technical knowledge or
  - d) exercising supervision over the management of such affairs or assignment referred to in a, b or c,
6. a minister of a foreign state, member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in 1.
7. a person who, without holding an employment or assignment as aforesaid, exercises public authority in a foreign state or a foreign assignment as arbitrator,
8. a member of supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden is a member, and
9. a judge or official of an international court whose jurisdiction is accepted by Sweden.

145. The 2004 amendments slightly restructure the bribery offences. Most of the persons previously mentioned in Chapter 17, section 7 have been moved to 20, section 2, paragraph 2, new subparagraphs 6 and 7,<sup>78</sup> and Chapter 17, section 7 now covers "an employee or other person defined in Chapter 20, section 2". These formal changes have no impact on the substance of the provisions.

146. Subparagraph 6, introduced in 1999 to implement the European Union Convention against Corruption, previously covered "a member of the European Commission, the European Parliament, or the European Court of Auditors or judges of the European Court of Justice". On 1 July 2004 it was replaced by the new subparagraphs 8 and 9, which implement the Council of Europe Criminal Law Convention against Corruption and expand the coverage to:

- "a member of supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden is a member" (the Swedish authorities explain that a "member" of one of the listed bodies means elected members of such bodies, pursuant to the original Swedish term), and
- "a judge or official of an international court whose jurisdiction is accepted by Sweden".

147. The reasons for the government's proposal as described in the Government Bill 2003/04 are that the provision covered only members of the European Union Parliament, and not members of other assemblies of international organisations to which Sweden is a member as required by article 10 of the

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<sup>78</sup> This concerns "a minister of a foreign state, member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in 1" (subparagraph 6) and "a person who, without holding an employment or assignment as aforesaid, exercises public authority in a foreign state" (subparagraph 7).

Council of Europe Convention (on “members of international parliamentary assemblies”). The Swedish authorities consider that members of international parliamentary assemblies are not covered by article 1.4.a of the OECD Convention, which covers an “official or agent of a public international organisation”, and that consequently subparagraph 8 does not breach the Convention.

148. Article 1.4.a of the OECD Convention states that “foreign public official” includes “any official or agent of a public international organisation”. According to the Swedish authorities, “officials and agents of international organisations” are covered by either the notion “employee” in the first paragraph of Chapter 20, Section 2, or the provision in the second paragraph, subparagraph 5, that is, a person who, by reason of a position of trust has been given the task of managing another’s legal or financial affairs, independently handling an assignment requiring qualified technical knowledge or exercising supervision over the management of such affairs. This is supported by the preparatory works to the Government Bill 1998/99 (page 59). In addition, article 9 of the Council of Europe Criminal Law Convention against Corruption corresponds to article 1.4.a of the OECD Convention on this point.<sup>79</sup>

149. All persons considered as “employees” are covered by the Swedish provisions on active and passive bribery. The Swedish authorities explain that the term “employee” is interpreted in a very broad manner and covers, *inter alia*, any official or agent, irrespective of whether they are employed by an international organisation of which Sweden is a member.

150. However, the lead examiners remain doubtful that foreign public officials, such as members of supervisory or governing bodies of international organisations to which Sweden is not a member,<sup>80</sup> may be assimilated to employees. The examining team considers these persons as officials or agents of international organisations pursuant to article 1.4 of the OECD Convention. Therefore, to be in conformity with the OECD Convention, the provision should not be restricted to organisations, of which Sweden is a member.

151. The 2004 amendments add a new category of persons, namely “a person who, without holding an employment or assignment as aforesaid, exercises ... a foreign assignment as arbitrator” (subparagraph 7). This implements the 2003 Additional Protocol to the Criminal Law Convention on Corruption.

152. Two categories of persons have been deleted: “a member of a directorate, administration, board, committee or other such body attached to” i. a “parish, religious society”, and ii. a “social insurance office”. The deletions should have no bearing on the implementation of the Convention as they were made for purely domestic reasons.<sup>81</sup> However, members of a parish or religious society should be covered as

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<sup>79</sup> Article 9 of the Council of Europe Convention covers “any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents”.

<sup>80</sup> In this specific case, the doubt is reinforced by the statement made in the preparatory works to the 2004 amendments that “the necessary amendments for Sweden to meet the [Council of Europe] Convention should most appropriately be made through an addendum to Chapter 20, section 2 paragraph 2, where members of the assemblies in international and supranational organisations are specifically mentioned. *The provision should also apply to members of control agencies and decision-making bodies in organisations*”.

<sup>81</sup> Concerning members of social insurance offices, the Swedish authorities indicated that the amendment was triggered by a restructuring of the social insurance services: the independent public legal persons have been replaced by a single nationwide authority, the Swedish Social Insurance Agency, which is covered by the notion “body attached to the State” in the same subparagraph.

“employees” in appropriate circumstances or as foreign public officials when they belong to a foreign State where a religious body governs its citizens.<sup>82</sup>

153. The lead examiners noted that the Swedish provisions on corruption cover transnational bribery in the private sector and passive bribery of foreign public officials, and therefore go beyond the requirements of the Convention in these respects.

ii) The Strengthening of Imprisonment Sanctions: the Introduction of Aggravated Bribery

154. The introduction of aggravated active bribery constitutes an innovation in the Swedish Penal Code. After the first paragraph containing the elements of the offence of bribery, a second paragraph has been added: “If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.” Like the already existing aggravated passive bribery offence, the aggravated active bribery provides for a minimum threshold of imprisonment of six months.

155. Several reasons are given in the preparatory works for the decision to create the aggravated bribery offence. First, aggravated passive bribery already existed and the Swedish authorities wanted to make the two sides of corruption punishable with similar sanctions, as they considered that there were no general circumstances indicating that active bribery should be judged less severely than passive bribery. Second, the law implements the Council of Europe Criminal Law Convention which states in article 19.1 that sanctions for natural persons be effective, proportionate and dissuasive. The Swedish authorities indicated in the preparatory works that it might be debatable whether the range of sanctions for active bribery fulfilled this commitment. The Ministry of Justice further indicated that with this amendment it intended to answer the concern expressed by the OECD Working Group in its Phase 1 evaluation of the Swedish law about whether the maximum penalty of two years complies with the requirement of Article 3 paragraph 1 of the Convention that the sanction be effective, proportionate, and dissuasive. The lead examiners are satisfied that the Swedish authorities have answered the concern expressed by the Working Group.

156. The new paragraph 2 does not define or indicate the elements to consider when deciding whether a specific case can be qualified as “gross” or aggravated active bribery. But the notion of “gross” or aggravated crime is not new in the Penal Code as it is already used concerning various other offences. For many offences, however, the Penal Code gives indications on what constitutes “gross” for the particular offence, for instance in the cases of assault, theft, fraud, embezzlement, misuse of office, and falsifying a document.<sup>83</sup> This is not the case concerning active bribery, passive bribery or the bookkeeping crime, among other offences.

157. Sweden indicates that the distinction between bribery and aggravated bribery always depends on the specific circumstances of a case. According to the preparatory works the circumstances to be taken into account would be similar for active and passive bribery, including consideration of the amount of the bribe, whether there has been a systematic recourse to bribery, the size of the advantage received, etc. As far as is known, superior courts have considered the distinction between “simple” and “gross” passive bribery in only a few cases. The following two decisions of the Court of Appeal were provided:

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<sup>82</sup> Commentary 16 to the Convention states that “public authority” may in special circumstances be held by persons not formally designated as public officials.

<sup>83</sup> For instance, in the case of misuse of office, Chapter 20, section 1 of the Penal Code specifies that “in assessing whether the crime is gross, special attention shall be given to whether the offender seriously abused his position or whether the crime occasioned serious harm to an individual or the public sector or a substantial improper benefit.”

- Case 1: The Court found that the bribe concerned a considerable amount of money (SEK 195 000, circa EUR 21 540), that the defendant held a high position (principal administrative officer) with responsibility to represent the State in delicate negotiations on rents, with extensive contacts with authorities and individuals. The Court decided that taken together the circumstances justified a conviction for the gross offence (ref. RH 1996:30).
- Case 2: Another case concerned an individual, who was the head of the credit insurance division of an insurance company and who had received money for the performance of his duties. The Court convicted him of gross passive bribery, due to the amount involved (USD 497 000) and the damage caused (ref. *Svea hovrätt*, DB 56/1994).

158. The lead examiners believe that due to the long tradition of distinguishing between simple and aggravated crimes, the introduction of aggravated bribery should not cause practical problems.

### **Commentary**

*The lead examiners are concerned that, contrary to article 1.4 of the Convention, the amended definition of public officials does not cover members of a supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden is not a member. They therefore urge the Swedish authorities to take the appropriate measures to fill this gap.*

*The lead examiners welcome the 2004 amendments to the offence of active bribery of foreign public officials, especially the introduction of sanctions for aggravated active bribery. However, as no definitive assessment on the effectiveness of such provisions can emerge until court interpretation develops, in particular as regards the distinction between aggravated and simple bribery and the absence of explicit criteria in the Penal Code for their respective application, the lead examiners also recommend that the Working Group follow up this question as case law develops.*

#### *b) The Existing Case Law on Bribery*

159. There has been no conviction in Sweden for bribery of a foreign public official for acts committed after the entry into force of the provisions amended in July 1999, which expanded the categories of foreign public officials. However, Sweden has one conviction for acts of bribery of a foreign public official committed before the entry into force of the implementing legislation, under the offence of bribery of an “employee” (the World Bank case, see annex 3). The case is under appeal. Moreover, by the time of the on-site visit, Sweden was investigating at least two cases that may cover bribery of a foreign public official. (See: Part C on Investigation and Prosecution)

160. As bribery of a foreign public official is defined in the same way as bribery of a Swedish public official (and even as bribery in the private sector), the examining team felt that discussions on case law on bribery in general could assist in assessing the application of the anti-bribery provisions of the Penal Code. The team therefore asked for practical examples confirming the interpretation of the offence given during Phase 1.

161. During the on-site visit, Sweden made clear statements on the types of situations that the offence covers. However, these statements, similar to the ones provided during the Phase 1 process, were based on general knowledge and the preparatory works, as the government authorities were not able to present court decisions during the session specifically dedicated to case law. The preparatory works to bills provide extensive explanations and clarifications for the proposed amendments. The Swedish authorities and lawyers interviewed during the on-site visit explained that, in accordance with Swedish legal tradition,

preparatory works go beyond merely giving explanations to Parliament prior to the adoption of new legislation, but also establish guidelines concerning its interpretation.

162. In addition, practitioners pay particular attention to the Commentaries to the Penal Code. It is not an official document authorised by any Swedish authority, as it is drafted by professors of law and other experts, but it is an important reference for practitioners. They mainly contain historical explanations of the provisions, relevant extracts of the preparatory works, references to case law and theoretical developments. They are particularly useful as concerns provisions of the Code that have been modified several times, such as the offences of active and passive bribery, as they are frequently updated. However, it was not possible to discuss the Commentaries during the on-site visit because the document was not translated until several weeks later. In any case, where relevant the Commentaries are referred to in this respect.

163. The examining team recognised the importance of preparatory works but nevertheless reiterated its request to obtain information on existing case law of domestic bribery to go beyond the theoretical analysis of the offence and assess courts' interpretation of the offence. Information about court decisions was provided orally during the visit and summarised in a document afterwards.

164. The number of bribery cases adjudicated by the courts is small in Sweden. For instance, in 2003 five convictions for active bribery in the public and private sectors were decided by courts, including three fines and two conditional sentences (no acquittal was pronounced) and prosecutions for passive bribery led to three imprisonment convictions and one fine imposed by the prosecutor (no acquittal was pronounced).<sup>84</sup>

165. As the majority of the judgements on active and passive bribery were made in the courts of first instance they cannot be considered to have value as precedents. Only a few of the bribery cases have been decided by the Supreme Court, which is the court that establishes precedents. Before the on-site visit, the Swedish authorities provided the translation of the first instance judgement on the World Bank case. After the on-site visit, the Swedish authorities provided five summaries of cases of bribery of Swedish public officials in order to give concrete examples of cases supporting the interpretation given during the on-site visit.

166. The extracts of case law provided do not cover cases involving intermediaries, third party beneficiaries, or offshore centres. As a consequence, a number of questions that were raised during Phase 1 on the probable interpretation of Chapter 17, section 7 on the active bribery of Swedish or foreign public officials remain. The summaries nevertheless confirm interpretations respecting the following elements of the offence: intent; offer, promise or give; nature of the bribe; acts and omissions; and the exercise of official duties.

167. Intent: In the World Bank case, the defendants argued that they had no intention to bribe the World Bank officials, and thought that the money was linked to actual business events. The District Court considered that "they must have realised that there was no other reason for the World Bank employees to want to have contact with them than that they would derive financial gain from the relationship". In addition, taking into account a number of facts, the District Court "regards it as beyond reasonable doubt that the defendants were well aware of what the companies and the accounts were to be used for". The

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In 2000, the numbers of court decisions were twenty for active bribery (including seventeen convictions) and 6 for passive bribery (including 5 convictions). More generally, the Anti-Corruption Institute (*Institutet Mot Mutor*) undertook a census of judgements and found 200 judgements between 1978 and 2000. See Pr. Madeleine Leijonhufvud, Sweden, in *Private Corruption Bribery, A Comparison of National and Supranational Legal Structures*; edited by Gunter Heine, Barbara Huber and Thomas O. Rose; Edition iuscrim; Freiburg im Breisgau, 2003.

Commentaries to the Penal Code confirm that circumstantial evidence would be the guiding factor in determining the state of mind of the defendant.

168. In a 1986 Court of Appeal decision, the defendant argued that his offer “was only an idea that came to his mind” and stated that he at the time did not have in his possession the funds offered. The court did not accept the argument as the offer had been presented to the policeman who had perceived the offer as genuine.

169. Offer, promise or give: The Swedish case law clearly confirms that an offer does not have to be accepted to constitute the full bribery offence. Courts of appeal pronounced several convictions of persons having offered bribes to policemen or maritime inspectors who declined the offer and reported it.

170. The World Bank case confirms that the offence of active bribery is committed regardless if the bribe has been solicited. In all the other cases presented, the briber initiated the bribe transaction.

171. Nature of the bribe: Chapter 17, section 7 prohibits the giving, etc. of “a bribe or other improper reward”. The Swedish authorities explained during Phase 1 and again during the on-site visit that the term “reward” contemplates anything that can be defined as a benefit, including an intangible benefit. A 1999 Court of Appeal decision confirms this interpretation, as the offered bribe took the form of “other gratification”, in this case sexual favours. Bribes also covered goods other than money: in a 1996 District Court judgement, the briber offered liquor and cigarettes to public officials, and in a 1994 Court of Appeal decision, the bribe consisted of an airline ticket.

172. A 1996 Court of Appeal decision however put limits on the definition of bribes, and considered that the offer made by the accused person was not “a promise of an economic value”. In that case a lawyer stated to a policeman: “I might be able to help you some day. One day you might need a damn good lawyer and then you have a good lawyer. We do not always lose on helping each other.” The court considered that the statement was couched in general terms and that the lawyer said nothing about doing anything for free or for a reduced fee, and therefore what was offered was not sufficiently specific to constitute an improper reward. The examining team is concerned that bribes are often informal and sometimes do not involve tangible benefits. The Working Group should therefore carefully monitor the case law on transnational bribery in this regard as it develops.

173. Impropriety of the advantage: In a 1994 Appeal Court decision, a sales manager and a regional manager of a company decided to invite a Swedish public official to a trade fair abroad in which technical innovations for security systems were presented. They stated that it was in line with a general agreement according to which the company was obliged to keep the County Council informed of technical developments in this field. However, the District Court found no such obligation in the agreement. In addition, the Court referred to the administrative rules governing travel for public officials, and determined that if the trip had been made in the course of carrying out his duties, it would have been proper. However, in this case the purpose of the trip was not to promote the company in relation to the County Council. The offer was made directly to the official, who travelled while on vacation, and the County Council was not aware of the trip. In the World Bank case, the District Court noted that “the employees of the World Bank are not permitted to have any private interest in the projects linked to the World Bank”. It is not clear whether the courts required a breach of the administrative rule for an offence to be constituted or just looked to the rules as additional evidence of whether the defendant conduct was improper. However, the Commentaries to the Penal Code do not seem to require a breach of administrative or other rules, since they specify that “liability for active bribery is not excluded even if the act of active bribery has no other intention than to encourage the person being offered the bribe to do their duty”.

174. Amount of the bribe and its impropriety: The Swedish law does not set any limit on the value of the advantage, and case law shows that sanctions have already been imposed in connection with small bribes (around EUR or USD 100). This issue raised comments from representatives of the business sector who considered that the Swedish law was too strict and should provide guidelines on what is a proper gift compared to an improper bribe. However, the examining team found out that these doubts concern mainly private-to-private relations and advantages such as a business lunch or product samples.

175. The Swedish authorities clarified that, even though Commentary 9 to the Convention clarifies that “small facilitation payments” do not constitute an offence under the Convention, they are criminalised in Sweden. . The prosecutors present during the visit indicated that the treatment of such payments would be considered on a case-by-case basis. The requirement that the reward shall be improper means that some small facilitation payments do not constitute bribery. The court shall take all relevant circumstances, *e.g.* the legislation and custom in the foreign public official’s country, into account when deciding if a reward is considered as improper.

176. Bribery through an intermediary: The Swedish authorities presented a case to illustrate bribery through an intermediary: the 1994 Court of Appeal decision mentioned above. Upon a regional manager’s proposal, a sales manager agreed to pay the travel costs of a public official. The regional manager delivered the ticket to the official. The two managers were convicted of active bribery and therefore the Swedish authorities consider that the sales manager bribed the official through the intermediation of the regional manager. The Swedish authorities have not been able to identify a case where the briber used an intermediary as an unwitting tool of the briber. They explain that, according to Swedish law, whether an intermediary is unwitting or not is irrelevant when deciding on the liability of a briber. In either case the briber would be convicted for bribery (if the essential criteria in Chapter 1, Section 7 are met). If an intermediary knowingly takes part in bribery, he or she could be held liable for, *inter alia*, complicity in the bribery offence.

177. Definition of “foreign public official”: The examining team was informed that bribery of foreign public officials was criminalised in Sweden even before 1999, as most foreign public officials were presumed to be “employees” – an apparently generic term in the definition of the offence – or anyone who has been given a task or an assignment as described in paragraph 141. This was supported by all the participants in the on-site visit, including lawyers and representatives of companies. Indeed, in the World Bank case (which is under appeal) the Court used the concept of “employees” and even described the World Bank officials as “foreign private employees” (The facts took place before 1 July 1999 and the court used the provisions of the Penal Code drafted before the entry into force of the implementing legislation.). Also, the Commentaries to Chapter 17, section 7 of the Penal Code state that “as a result of international commitments, including pursuant to the OECD Convention..., criminal liability has been expanded to include active bribery of certain additional categories of persons”. The Commentaries then list all the categories of foreign public officials added since implementation of the Convention by Sweden and state that “to the extent the definition refers to ‘employee’, the Swedish legislation covers what the definition aims at”. In addition, the 1978 Commentaries, which are still valid, state that “employee means...also employees of foreign employers, the employee may be a public official or an employee within the private sector”.

178. Since the provisions on bribery expressly cover specific categories of foreign public officials, the question arose whether the broad category in respect of an “employee” is intended to cover categories of foreign public officials not explicitly mentioned. However, neither the governmental nor non-governmental participants in the on-site visit viewed this as a legitimate concern.

179. Third party beneficiaries: In Phase 1 the Swedish authorities indicated that the language in Chapter 17, section 7 – “for that person or for anyone else” – means that the case is covered where the

briber and the foreign public official enter into an agreement to transmit the bribe directly to a third party in exchange for an act or omission of the foreign public official. However, the Commentaries on Chapter 17, section 7 qualify this position. They state that in such cases “a link of some kind must exist between the recipient of the advantage and the official so the advantage can be considered to favour the official in some way” and “from an objective point of view it should be possible to establish that the link between the official and the recipient of the advantage is so clear that in a sense the official also draws some form of advantage from it” (e.g. the financing of a research project in which the official is involved). According to the Commentaries the case is not covered where, for example, the advantage is transferred to a non-profit organisation with objectives with which the official sympathises.<sup>85</sup>

180. Act or omission: Chapter 17, section 7 does not expressly include omissions but the Swedish authorities had indicated that “the Swedish legislation applies both to actions and omissions”. Several court decisions presented by the Ministry of Justice confirm this interpretation by covering offers of bribes to induce policemen to abstain from reporting traffic offences.

181. The exercise of official duties: In the 1994 Appeal Court decision, the Court pointed out that responsibility for the current offence does not presuppose that the public official has to have a formal authority to make any decisions. It is enough that the public official, through his responsibility for evaluations and presentations, had a direct influence on the decisions of the County Council on security issues. In the World Bank case, the District Court noted that the “task managers and co-financing officers at the World Bank can exercise influence over which consultants are awarded projects assignments and what funds the projects may use”.

182. Rewards: The Commentaries on Chapter 17, section 7 state that although “it is clear that giving or offering typical forms of bribes must not occur”, “when it comes to the question of rewards, the boundaries are more difficult to establish”. The Commentaries further state that “the reward must be improper for liability to be imposed”, and whether this is the case “can sometimes be a delicate question of judgement”. Otherwise the Commentaries on Chapter 17, section 7 provide no guidance on what constitutes an improper or proper “reward”. The Swedish authorities indicate that the Commentaries to Chapter 20, Section 2 provide several pages of guidance on what constitutes an improper or proper “reward”, but translation of this part of the commentaries was not provided to the examining team. Case law on the interpretation of what constitutes such “rewards” has not been provided.

183. Finally, a number of issues explored in the Phase 1 Review concerning the coverage of the offence of bribing a foreign public official have not been confirmed by case law, including (i) the extent of the coverage of bribes for a third beneficiary party; (ii) the coverage by the Swedish legislation of all the foreign public officials covered under article 1.4 of the Convention; (iii) the application of Commentary 16 on *de facto* officials; and (iv) interpretation of the concept of “reward”.

### Commentary

***In light of the small number and above all in light of the nature of the cases on bribery that have been decided by the courts, it is not possible to clearly assess how certain elements of the offence of bribery of foreign public officials, such as the notion of “impropriety”, will be interpreted in practice. The lead examiners therefore recommend that case law be monitored as it develops.***

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The preparatory works state “that an advantage is given to an association or other body with idealistic objectives that the official sympathises with can, in itself, hardly constitute the kind of bribe or other improper reward referred to in the relevant provisions, if the advantage does not favour the official in a more concrete manner.”

c) *The Liability of Legal Persons in Practice*

184. To date, no “corporate fine” has been imposed for a bribery offence in Sweden, whether domestic or foreign, private or public. Chapter 36 of the Penal Code establishes “special legal effects of crime”,<sup>86</sup> including “corporate fines”. Under the Swedish legal system a “corporate fine” is described as a “special legal effect of crime” because legal persons cannot commit an offence. Pursuant to section 7 an “entrepreneur” shall be ordered to pay a “corporate fine” “at the instance of a public prosecutor” in certain circumstances (discussed below). An exception to the offence is provided where “the crime was directed against the entrepreneur or if it would be manifestly unreasonable to impose a corporate fine”. The lead examiners are concerned that, for the reasons discussed below, the system of “corporate fines” may not be sufficiently “effective, proportionate and dissuasive”.

185. Chapter 36, section 7 of the Penal Code states that a “corporate fine” “shall, at the instigation of the prosecutor, be ordered”. The application of section 7 is mandatory.<sup>87</sup> However, the lead examiners question whether this has been the practice. “Corporate fines” have not been applied routinely. Since its founding in July 2003, the NACU has not investigated a legal person, and in respect of the World Bank case, now pending before the Court of Appeal, the prosecutor in charge of the prosecution did not consider proceeding against the relevant legal persons because he believed that in the circumstances of this case the difficulty in estimating the corporate fine did not justify the resource implications. The prosecutor representing the National Economic Crimes Bureau (ECB) has never personally been involved in the investigation of a legal person. In addition, statistical information compiled by the National Council for Crime Prevention (NCCP) substantiates the impression of the lead examiners, although the representative of the NCCP warns that the statistics on legal persons may not be complete. From 1999 to 2004 the number of corporate fines imposed in Sweden was 17, 33, 36, 32, 48 and 29 respectively. (The statistical information is not broken down according to type of crime, and does not indicate the level of fine, whether confiscation was ordered or whether the natural person responsible for the offence was also convicted.) The representative of the Office of the Prosecutor-General feels that the low number of corporate fines might be due to section 10, which provides for the remission or reduction of a corporate fine in certain circumstances,<sup>88</sup> and might warrant modernisation of the corporate fines system.

186. In addition, the overall impression of the non-governmental participants in the on-site visit is that corporate fines are rarely imposed in Sweden. Representatives of the private bar state that the relevant section of the Penal Code is not well known, and they believe that it is rarely applied. Media representatives do not know if it is possible to impose fines on corporations, and the representative of a trade union thinks that it is only possible to apply a corporate fine for environmental and health and safety crimes. The representative of Transparency International-Sweden is of the view that Sweden’s record on prosecuting companies is weak, except as regards money laundering and tax offences. The representative of the Commission on Business Confidence states that generally speaking it is not possible to proceed against companies, and the representative of ICC-Sweden does not believe that corporate fines have been used except in the environmental field. In addition a member of a major Swedish corporation does not

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<sup>86</sup> See title of Chapter: “On Forfeiture of Property, Corporate Fines and Other Special Legal Effects of Crime”. The provisions on “corporate fine” have been in effect since 1986.

<sup>87</sup> At the time the legislation was enacted, the Swedish legislature stated: “It should be noted that the provisions on whether corporate fines should be imposed on legal persons are mandatory. Thus the prosecutor shall ask for a corporate fine if he or she finds the prerequisites are met” (Bill 1985/86, p. 65).

<sup>88</sup> Pursuant to Chapter 36, section 10 of the Penal Code, a corporate fine may be remitted or reduced in the following circumstances: 1. a sanction for the crime is imposed on the entrepreneur or representative of the entrepreneur, 2. the crime involves some other payment liability or special legal effect for the entrepreneur, or 3. this is otherwise called for on special grounds.

know what legislation provides for corporate fines, but believes that they are “toothless” and very seldom used. Many of the participants, governmental and non-governmental alike agree that the biggest deterrent for legal persons is the harm to reputation that results from criminal conduct.

187. Pursuant to section 7 the offence must entail a “gross disregard for the special obligations associated with the business activities” or otherwise be of a “serious kind”, and the entrepreneur must not have done “what could reasonably be required of him for the prevention of the crime”. Such an offence can be either intentional or negligent. Only one case has been provided on the interpretation of these criteria – a decision of the Court of Appeal in 1992 on the application of section 7 to a company involved in a breach of the Chemical Products Act for the hazardous use and storage of waste oil containing Polychlorinated Biphenyls (PCBs). The Chemical Products Act provides fines and imprisonment for persons who with intent or through “gross negligence” violate the Act. The Court of Appeal held that the omissions of the company comprised “gross negligence” in the exercise of business activities, and that the character of the crime was “such that it must be considered to have involved gross disregard for the special obligations associated with the company’s operations”. In addition, given that the company did not heed instructions issued regarding its handling of the waste oil, it could not be considered to have done “what could reasonably be demanded to prevent the crime”. The examining team considers that the rationale of this case, which is based on acts of “gross negligence” punishable under the Chemical Products Act, cannot necessarily be extended to the offence of bribing a foreign public official, which is strictly an intentional offence. The Swedish legislature states that crimes of a “serious kind” include intentional crimes.<sup>89</sup>

188. Regarding the link between proceedings against the legal person and those against the natural person implicated in the offence, the participants in the on-site visit from the various prosecutors’ offices state that, although the legal and natural persons are usually proceeded against together, it is possible to proceed against the legal person independently, including cases where no natural person has been identified, etc. They state that this has occurred at least three times – twice in cases involving environmental crimes, one decided in the lower court and the other in the Court of Appeal (discussed above), and in a third case, decided in a lower court, which involved a violation of safety regulations by a municipality. In the decision of the Court of Appeal, the Court states that, although investigations had not taken place as to the persons in the company directly responsible for the offence, “in view of the importance of avoiding the spread of PCBs or other environmentally hazardous substances, the omission with regard to inspections and follow-up of instructions must be considered to have comprised such gross negligence that liability as stipulated in...the Chemical Products Act applies”.

189. Moreover, the “corporate fine” available under Chapter 36, section 8 of the Penal Code is very low, especially in view of the size and global importance of Swedish companies. It ranges from SEK 10 000 to a maximum of SEK 3 million (EUR 1 000 to EUR 330 000). In addition, Chapter 36, section 4, which establishes the authority to confiscate “financial advantages” derived from “a crime committed in the course of business”, does not appear to have been applied in practice to legal persons for bribery offences. Prosecutors from the National Anti-Corruption Unit (NACU) and the Office of the Prosecutor-

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<sup>89</sup> At the time the legislation was enacted, the Swedish legislature stated: “The legislation addresses breach of the main penal provisions which have been committed in the carrying out of business activities, *e.g.* fraud, receiving and crimes in Chapter 13. The wording that a crime has to be of a serious kind does not mean that the crime has to be gross in cases where there are two different degrees to the crime. In addition, in most cases, breach of the central penal provisions should be considered to be of a serious kind that corporate fine should be imposed as long as the other criteria are met. Similarly, this would be the case when it comes to crimes within the special penal laws (*i.e.* laws not in the penal code) against which imprisonment can be imposed. It should be stressed that the crime can very well be of a serious kind in the meaning of the section if a court considers that a fine is the appropriate penalty in a particular case” (Bill 1985/86, p. 65).

General explain that confiscation from a legal person is available, but that it has never been imposed for bribery offences (whether the legal person was liable for the offence or the legal person was a third party beneficiary). Information concerning the imposition of confiscation to legal persons for other offences, statistical or otherwise, has not been provided.

190. The Swedish authorities inform that the Ministry of Justice is considering a proposal for the reform of the system for corporate fines to increase its effectiveness. In information provided following the on-site visit, the Swedish government confirms that the main proposals are the following: 1. to include “minor offences” in the regime, 2. to extend corporate fines to cases where an offence has been committed by a person in the company holding a leading position or with special supervisory responsibilities, and 3. to increase the maximum fine. During the on-site visit the Ministry of Justice also stated that it is still open to establish the criminal liability of legal persons.

### **Commentary**

***With respect to the liability of and sanctions for legal persons for bribery of foreign public officials, the lead examiners:***

***(a) urge the Swedish government to complete as a matter of priority, its proposal for reforming the system of liability of legal persons, and recommend that this reform (i) review whether there are any legal or practical obstacles to imposing corporate fines and the application of corporate fines, and (ii) increase the maximum fine for foreign bribery to an appropriate level, given the size and global importance of Swedish companies;***

***(b) recommend that Sweden ensure that confiscation of the bribe and the proceeds of bribery shall be applied in practice against legal persons as a sanction for bribery of a foreign public officials; and***

***(c) recommend that Sweden draw the attention of investigating, prosecutorial and judicial authorities (i) the mandatory nature of corporate fines and (ii) the application of corporate fines to intentional crimes.***

***In addition, the lead examiners recommend follow-up of whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been proceeded against, or has not been convicted and/or sanctioned.***

#### ***d) Sanctions***

191. As mentioned earlier in the present report, so far Sweden issued a conviction for acts of bribery of a foreign public official committed before the entry into force of the implementing legislation, under the alternative qualification of bribery of an “employee”. Given that one case does not provide a satisfactory indication of the kinds of sanction that can be expected, and that the case in question is not yet final, the Swedish authorities were requested to provide statistics on the sanctions pronounced in domestic cases. Although the majority of these cases relate to private-to-private corruption or to petty corruption, the data nevertheless have informative value.

#### ***i) Sanctions Applied in Practice***

192. Active bribery may be sanctioned by imprisonment of up to two years or by day fines between 30 and 150, which nominally means at least SEK 450 and at most 150 000 (circ. EUR 50 and 16 500).<sup>90</sup> The sanction of aggravated bribery is imprisonment between six months and six years. According to the Swedish law it is not possible to impose a fine together with the imprisonment sanction for bribery acts.

193. Statistics of convicted persons in 2000 indicate that active bribery in the public and private sectors has been sanctioned by a fine in seventeen cases and a suspended sentence was pronounced in one case. In 2003, fines were pronounced in three cases and a suspended sentence in one case. No imprisonment was pronounced for these two years. Statistics on the fines pronounced by courts or prosecutors indicate the number of day-fines imposed but not the total amount of the fine. (The number of day-fines relates to the seriousness of the offence and the amount of each day-fine relates to the economic situation of the offender).<sup>91</sup>

194. As to the determination of the severity of the penalty, in the first instance judgement concerning the World Bank case, the two Swedish defendants have been sentenced to imprisonment of one year and one year and a half respectively. In determining the sentence the Court took into account the circumstances including the following: the large sums of money involved (bribes of SEK 1 million), which had their origin in funds intended to assist in the construction of infrastructure in developing countries; the risk of exclusion of other consultants in the procurement; and that the criminal activity would likely have continued had the improprieties not been discovered. The Court therefore considered that the sentence should be imprisonment for not less than one year, and that the defendant who had the more active role should be given a longer sentence.

195. The summaries of domestic cases provided by the Swedish authorities do not indicate on which grounds the courts decided on the type and severity of the penalty.

196. Several lawyers present at the on-site visit considered that the level of sanctions is appropriate, especially taking into account the significant damage to reputation that results from media coverage of corruption cases. However, according to several other participants, the media has not taken a significant role in publicising transnational bribery cases (see discussion under B2 a) “The Role of the Media”).

## ii) Availability of Economic Sanctions in Serious Cases

197. Concerning confiscation, it appears from the discussion with the law enforcement authorities during the on-site visit that confiscation has never been applied against a briber.<sup>92</sup> Confiscation has only been applied to the corrupted person. A potential reason identified by the lead examiners for the absence of confiscation of the bribe as an instrument or of the proceeds of active bribery is that prosecutors do not appear to routinely ask for the confiscation, even where the briber gained financial benefit from the crime.

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<sup>90</sup> Pursuant to the general provisions of the Penal Code, fines correspond to a sanction between 30 and 150 day-fines of a unitary value, which is individualised by the courts taking into account the personal circumstance of each defendant, in the limits of between SEK 450 and 1 000. Chapter 25, sections 1 and 2.

<sup>91</sup> In 2001, the nine pronounced fines were distributed as follow: three fines were between 30 and 34 day-fines, three between 35-44 day-fines, two between 45-64 day-fines, one between 64-99 day-fines, and none between 100-150 day-fines. In 2003, the 14 fines were distributed as follows: four between 30-34 day-fines, two between 35-44 day-fines, seven between 45-64 day-fines, one between 65-99 day-fines, and none between 100-150 day-fines.

<sup>92</sup> No statistics exist on the imposition of the sanction of confiscation by courts.

198. In addition, during Phase 1, it was indicated that forfeiture may take place pursuant to two different provisions in the Penal Code. First, pursuant to Chapter 36, section 1 of the Penal Code, the “proceeds of a crime” as defined in the Code shall be declared confiscated unless “manifestly unreasonable”. Second, Chapter 36, section 4 provides for the forfeiture of the “value” of “financial advantages” derived by an entrepreneur “as a result of a crime committed in the course of business”, unless the forfeiture is “unreasonable”. The interpretation presented by the Swedish authorities altered in Phase 2, as the proceeds of active corruption are generally not considered proceeds of crime pursuant to section 1. The rules on forfeiture in Chapter 36, Section 1 concern forfeiture of the actual proceeds of crime and include proceeds of passive corruption. Active corruption in itself does not generally result in proceeds in the sense the term is used in Chapter 36, Section 1. However, in cases where there is a direct link between the active corruption and the profit, the perpetrator could commit a crime also when he receives or handles the profit. In such cases the rules on forfeiture in Chapter 36, Section 1 are applicable. The Swedish authorities now submit that the provisions on the forfeiture of financial advantages set out in section 4 could, depending on the circumstances in the specific case, be applicable. No cases have been submitted to demonstrate the practical interpretation of the above provisions.

199. Finally, following the issuance of the Phase 1 report in 1999, a Swedish Commission proposed broadening the grounds for the confiscation of criminal proceeds. According to the proposal, the value of property belonging to a person who has been convicted of specific crimes of a serious nature may be declared forfeited if it is likely that the property is derived from criminal activities. Further, the Council of the European Union has adopted a Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.<sup>93</sup> Work is ongoing to develop new legislation in this field, based on the proposal of the Commission and the Framework Decision.

### **Commentary**

*The lead examiners consider that monetary sanctions are a fundamental deterrent for economic offences such as bribery of foreign public officials in the conduct of international business transactions, and therefore encourage the Swedish authorities to pursue their work in order to broaden the grounds for the confiscation of criminal proceeds.*

*In addition, the lead examiners are of the opinion that in view of the particular circumstances surrounding cases of active bribery of foreign public officials including the unavailability of fines for bribery offences that could be imposed together with imprisonment, the attention of the investigating, prosecutorial and judicial authorities needs to be drawn to the importance of imposing confiscation on the bribers.*

*Finally, given that there has only been one conviction of bribing a person who constituted a “foreign public official” according to the definition under the Convention, the lead examiners recommend that the Working Group monitor the level of sanctions and application of confiscations measures when there has been sufficient practice, in order to ensure that the sanctions handed down by the courts are sufficiently effective, proportionate and dissuasive. In this regard, they invite the Swedish authorities to compile relevant statistical information concerning sanctions imposed by the courts.*

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Pursuant to the Framework Decision 2005/212/JAI, the Member States shall adopt provisions on extended powers of confiscation in instances of organised crime and terrorism. These provisions state that when a serious crime has been committed, the property belonging to the person convicted of that crime should be confiscated if – as one option for the Member States – the court is fully convinced that the property in question has been derived from the criminal activities of the convicted person.

#### 4) *Jurisdiction and International Co-operation*

##### a) *Jurisdiction*

200. In Sweden jurisdiction over the bribery of a foreign public official is established on the basis of the territory of perpetration of the offence, or on the basis of the Swedish nationality or domicile of the offender. In addition, Swedish courts have jurisdiction over Nordic citizens who are present in the Realm and over anyone else, aliens included, who are present in Sweden, where the crime under Swedish law can result in imprisonment for more than six months, which is the case with bribery according to the Convention. With respect to the World Bank case, territorial jurisdiction was established. The Court considered that “it is sufficient that the preparatory stage such as withdrawals from accounts, purchase of travel cheques etc. and the arrangement of money transfers took place in Sweden for the crimes to be judged to have been committed in this country.” This answered an argument by the defence that the prosecutor had not established dual criminality and therefore nationality jurisdiction.

201. Indeed, the Working Group noted in the Phase 1 evaluation that with regard to the issue of nationality jurisdiction, if the offence has been committed in the territory of a foreign state, it will be subject to Swedish jurisdiction provided that the offence is punishable also under the law of the place of commission (dual criminality condition). In light of the requirements of Article 4.4 of the Convention, the Working Group agreed that this issue should be reviewed in Phase 2.

202. Discussions during the on-site visit confirmed that this question might raise problems in practice. To prove that the dual criminality condition is established, the Swedish prosecutors will in most cases need to obtain mutual legal assistance: the testimony of an expert in the foreign country’s penal law or a translation of the foreign law would not be sufficient, and in practice the prosecutors seek to obtain an official answer from the other State, stating that the acts under investigation are criminalised in that country. Therefore, prosecution can be hampered by the lack of co-operation of the foreign country. In practice, the Anti-Corruption Unit indicated that an investigation on a possible act of bribery of a foreign public official has been stopped, because the prosecutor in charge of the case never received any answer to his MLA request and could not prove that the dual criminality requirement was met. The representative of the Ministry of Justice emphasised that no difficulties are anticipated from other members of the European Union. Two other procedures of mutual legal assistance, with Parties to the Convention, were dealt with satisfactorily: Sweden sent an MLA request linked to the World Bank case. The Anti-Corruption Unit has also received MLA requests concerning cases of bribery in other Nordic countries in which Swedish nationals are witnesses and suspects.

203. Moreover, the Commentaries on Chapter 17, section 7 of the Penal Code state that “the requirement concerning dual criminality considerably reduces the possibilities to take legal measures in Sweden against crimes of active bribery committed abroad”. The Commentaries further state that in determining whether dual criminality is established, consideration must be given to whether an act is “improper” in the foreign country, and some countries are “less stringent” in this regard. It may also be that according to local customs, an act may be exempt from criminal responsibility “even if it seemingly falls into the criminal area of active bribery”. Furthermore, the “practice developed in the foreign country” cannot be ignored. Since attitudes vary greatly from country to country on the practice of gift giving, “the practice that has developed in the foreign country” must be considered. According to the discussion in the Commentaries, it appears that various factors other than the legal provisions on bribery *per se* are relevant to the determination of whether dual criminality is established, including the attitude of the foreign law enforcement authorities to the offence and the customs regarding gift-giving in the foreign country.

204. Another point raised by the examining team is the condition that the offender be a Swedish citizen or habitual resident or that the offender be an alien that is present in Sweden, taking into account

that legal persons are not considered as perpetrators of crimes. A foreign perpetrator (not habitually residing in Sweden) committing an act of bribery abroad on behalf of a Swedish company can therefore evade Swedish jurisdiction, at least as long as he or she does not visit Sweden. In this situation, the Swedish company can be subject to a corporate fine only if the foreigner acted under the inducement or order of a Swede (or habitual resident in Sweden) who is him/herself liable for investigation. Therefore Sweden can establish nationality jurisdiction over acts perpetrated abroad by a Swedish company when the instigator of the crime is a Swedish national (or resident, or foreigner present in the realm) who represents the company. Jurisdiction cannot be established over acts perpetrated abroad by a local office of a Swedish company headed by a foreign manager who can act independently from the Swedish offices. This qualifier necessitates the prior identification of an individual perpetrator within the company.

### Commentary

***The lead examiners recommend that the application of nationality jurisdiction, in particular the requirement of dual criminality and the obtaining of information through MLA and other channels to establish dual criminality, be followed-up once there has been sufficient practice.***

***The lead examiners recommend following-up the application of sanctions to Swedish legal persons for the offence of bribing a foreign public official where the offence takes place abroad and is perpetrated by a non-Swedish natural person once there has been sufficient practice. They also recommend that the Working Group monitor the latter issue on a horizontal basis.***<sup>94</sup>

#### b) *Mutual Legal Assistance and Sharing of Information*

205. The Phase 1 review on Sweden indicated that the legislative framework for mutual legal assistance (MLA) was under review at that time in order to take into account the commitments within the European Union. The new law is the *International Legal Assistance in Criminal Matters Act* (2000:562).<sup>95</sup>

206. A request from a foreign country for legal assistance shall be refused if execution of the request would prejudice Swedish sovereignty, involve a risk to national security, or conflict with Swedish general principles of law (*ordre public*) or other essential interests. It may also be refused concerning political or military offences, if a Swedish judgment on the case or a Swedish decision on waiver of prosecution already exists, or where “the circumstances are such that the request should not be granted”. A booklet issued by the Ministry of Justice explains that “one reason for including a general possibility to refuse a request due to other circumstances than those specified was that this was considered to be necessary if a lot of other impediments and preconditions were to be abolished. Another reason is that Sweden provides assistance without requiring an agreement with the requesting state. Thus, the rule must not be interpreted

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<sup>94</sup> Monitoring on a horizontal basis means that this issue may arise among other parties to the Convention. The Working Group is thus recommended to analyse how this issue is dealt with in Sweden and those other parties.

<sup>95</sup> It abrogates two laws mentioned in the Phase 1 report: the Act with Certain Provisions Concerning International Mutual Assistance in the Field of Criminal Cases (1991:435) and the Act on the Use of Coercive Measures at the Request of a Foreign State (1975:295). The Act on Taking Evidence for a Foreign Court (1946:816) now covers only civil cases. The law is available on the internet at: [www.sweden.gov.se/content/1/c6/01/52/68/db667afc.pdf](http://www.sweden.gov.se/content/1/c6/01/52/68/db667afc.pdf)

to imply that Sweden generally will be restrictive when considering requests for assistance.”<sup>96</sup> Finally, if the measure is of a coercive nature, dual criminality is required<sup>97</sup>.

207. The range of legal assistance measures is listed in Chapter 1, section 2, and includes an examination in conjunction with a preliminary investigation in criminal matters, the taking of evidence in court, provisional attachment, seizure and search of premises, interception of telecommunications, etc., provided that the request fulfils several conditions. An important modification brought by the new law is the introduction of a provision specifically dedicated to the lifting of bank secrecy. Chapter 5, section 10 specifically mentions an exemption for banking secrecy “in matters concerning legal assistance relating to examination in conjunction with preliminary investigations in criminal matters or search of premises and seizure”.<sup>98</sup> The Swedish authorities added that the preparatory works to the law state that a foreign preliminary investigation should be put on the same footing as a Swedish preliminary investigation regarding the exemption of bank secrecy. The booklet issued by the Ministry of Justice specifies that “in practice the banks provide information voluntarily upon the request of a prosecutor and this also applies in so far as international requests are concerned. The result is that a formal decision to question a bank official or search bank premises is very rarely required.”

208. Another important clarification brought by the new law is the introduction of provisions specifically dealing with legal persons. Sweden can now provide MLA assistance in relation to criminal proceedings against a legal person.<sup>99</sup> With respect to non-criminal proceedings within the scope of the Convention brought by another Party against a legal person, pursuant to Chapter 1, section 5, Sweden can provide MLA for administrative proceedings to the extent that this is provided for in the applicable international agreement to which Sweden is a party. The Ministry of Justice booklet provides that the OECD Anti-Bribery Convention is considered such an agreement.

209. The new law also revises the contact points for requesting and responding to requests from abroad for MLA. On 3 June 2005, Sweden notified the OECD Secretary-General that the authority

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<sup>96</sup> See the Swedish Rules on International Legal Assistance in Criminal Matters, Ministry of Justice, October 2000: [www.sweden.gov.se/content/1/c6/01/94/00/efb1a717.pdf](http://www.sweden.gov.se/content/1/c6/01/94/00/efb1a717.pdf). The booklet adds that “the purpose of this section is, according to the *travaux préparatoires*, to guarantee that Sweden has the possibility to refuse a request in cases in which it would be offensive, or at least objectionable, to execute it. The section should be applied with great discrimination, e.g. when prosecution in Sweden for a long time has been barred by the statutes of limitation, when the offence in question already has been tried in another state or when a person who is deprived of his liberty does not consent to being transferred to the requesting state. Further, the paragraph makes it possible to take lack of dual criminality into account also in relation to such measures that do not necessarily presuppose dual criminality.”

<sup>97</sup> Dual criminality is no longer required for non-coercive measures. In addition, some coercive acts, when requested by an EU or Nordic country, may be performed despite the absence of dual criminality if the offence is punishable with imprisonment in the requesting state: search of premises, seizure, and transfer of property seized to the requesting country. (Chapter 4, section 20)

<sup>98</sup> The full provision reads: “A person who is under an obligation to observe secrecy according to Chapter 1, section 10, first paragraph of the *Banking Business Act* (1987:617), Chapter 1, section 8, first paragraph of the *Securities Business Act* (1991:981), Chapter 1, section 5 of the *Financing Operations Act* (1992:1610) or Chapter 2 section 19 first paragraph of the *Act on Investment Funds* (2004:46) may nonetheless provide information in matters concerning legal assistance relating to examination in conjunction with preliminary investigations in criminal matters or search of premises and seizure.”

<sup>99</sup> “If another state requests legal assistance in Sweden with a measure in legal proceedings relating to the investigation of or prosecution of a natural or legal person for an offence, the assistance requested shall be provided in accordance with the provisions of this Act.” (Chapter 1, section 3)

responsible for making and receiving such requests, and serving as channel of communication for these matters is the Division for Criminal Cases and International Judicial Co-operation of the Ministry of Justice. The 2000 law facilitates direct contacts between the Swedish courts or prosecutors and foreign counterparts.<sup>100</sup> Direct contacts were already possible with other Nordic countries, and are now possible with European Union countries.<sup>101</sup> Contacts can also occur with other countries upon agreement.

210. With regard to the practice, as earlier mentioned, MLA requests were submitted to foreign authorities by Sweden in at least three cases allegedly involving the bribery of a foreign public official. In one case, the investigation has been stopped, because the prosecutor in charge of the case never received an answer to his MLA request and therefore could not prove that the dual criminality requirement necessary for establishing nationality jurisdiction was met. Sweden also responded to and sent MLA requests regarding the World Bank case. Sweden also responded a MLA request concerning a case of alleged bribery in another Nordic country, in which Swedish nationals are witnesses.

211. The Swedish authorities have not indicated that they have-spontaneously shared information with a foreign country on possible cases of transnational bribery not linked to a formal MLA request.<sup>102</sup> This is because there has not been any information that, in their opinion, could have assisted the receiving authority in initiating or carrying out an investigation, prosecution or judicial proceeding or led to a request for MLA.

#### **Commentary**

*The lead examiners recommend follow-up of the effectiveness in practice of MLA for non-criminal proceedings against legal persons brought by other parties to the Convention, given the newness of the authority for it under the recently enacted MLA Act, and its associated requirements of an international agreement.*

*The lead examiners encourage Sweden to spontaneously share information regarding cases of bribery of foreign public officials with authorities in other countries, when such information might assist the receiving authority in initiating or carrying out an investigation, prosecution or judicial proceeding or lead to a request for MLA.*

#### **5) Prosecution**

##### **a) Reversal of rule of Mandatory Prosecution**

212. Chapter 20, section 6 of the Code of Judicial Procedure establishes the principle of mandatory prosecution. It states that “unless otherwise prescribed, prosecutors must prosecute offences falling within the domain of public prosecution”. Chapter 20, section 7 sets out the circumstances under which prosecutors “may waive prosecution”. The test for waiving prosecution is that “no compelling public or

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<sup>100</sup> The booklet issued by the Ministry of Justice gives the co-ordinates of the Swedish courts and prosecutorial authorities together with information on their territorial jurisdiction. The Anti-Corruption Unit is not part of the list.

<sup>101</sup> If the request is submitted by Sweden, direct contacts are possible with other Nordic countries, if there is an agreement (e.g. Schengen) or if the other state so allows.

<sup>102</sup> See Article VII point i) of the 1997 Revised Recommendation recommends that countries “consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition.”

private interest is disregarded”. However, even if this test is met, one of the following three criteria must also be met: 1. It may be presumed that the offence would not result in a sanction other than a fine; 2. It may be presumed that the sanction would be a conditional sentence and special reasons justify waiver of prosecution; or 3. The alleged offender has committed another offence and no further sanction in addition to the sanction for that offence is needed.

213. The Swedish authorities explain that preparatory works and the Commentary on Chapter 20, section 7 of the Code of Judicial Procedure state that the following circumstances should be taken into consideration in determining whether the public interest requires prosecution: 1. that similar cases should be judged in a similar way (principle of equality); 2. the seriousness of the crime; 3. the suspect’s criminal record; 4. whether seizure and confiscation of property of not an insignificant value can be effected; 5. whether the crime has been commonly committed; and 6. other circumstances concerning the crime.

214. The Penal Code provides an exception to the principle of mandatory prosecution under Chapter 20, section 6 of the Code of Judicial Procedure, and an exception to the rule under Chapter 20, section 7 that prosecutors may only waive prosecution in the circumstances outlined therein. Chapter 17, section 17 of the Penal Code states that where a bribe “has been given to a person who is neither an employee of the State or a local authority nor defined by Chapter 20, section 2, second paragraph, points 1-4 a public prosecutor may only prosecute if the crime is reported for prosecution by the employer or principal of the person exposed to bribery or if prosecution is called for in the public interest”. This exception to mandatory prosecution covers the bribery of employees in the private sector, certain persons in a position of trust, and certain foreign public officials. Thus there is a principle of non-prosecution in certain cases of bribery of foreign public officials unless the criteria in Chapter 17, section 17 of the Penal Code are met, as opposed to the rule under the Code of Judicial Procedure, which establishes the rule of mandatory prosecution unless the criteria under Chapter 20, section 7 are met. The representative of the Ministry of Justice emphasises that it is always in the public interest to prosecute cases involving bribes in the public sector.

215. During the on-site visit, it was stated that the purpose of Chapter 17, section 17 of the Penal Code is to provide a “tiny” exception from the principle of mandatory prosecution for cases of bribery in the private sector. The representative of the Office of the Prosecutor-General explained that safeguards are built into the Swedish legal system to prevent the misuse of this provision. He stated that the Office of the Prosecutor-General looks very closely at the use of Chapter 17, section 17, and that “general instructions” for prosecutors concerning its application have been issued. He was not sure about the exact wording of the “general instructions”, but believed that they establish a presumption of prosecution, which can almost never be deviated from. He also stated that the Commentary on Chapter 17, section 17 on the Penal Code in this regard refers to circumstances of the offence such as whether it is “minor” and the customs in the foreign country.

216. There is a potential for certain cases of foreign bribery to escape prosecution pursuant to Chapter 17, section 17 of the Penal Code in circumstances where prosecution is warranted. This concern arises for two main reasons. First, prosecutors are not required to automatically notify the Prosecutor-General of cases of bribing a foreign public official (which they are required to do, for instance, for diplomatic crimes and terrorist-related offences). This means that the Prosecutor-General will not necessarily have the opportunity to ensure that Chapter 17, section 17 is not misused. Secondly, following the on-site visit the Swedish authorities clarified that the “general instructions” for prosecutors on the application of the “public interest” were abrogated in 1997-98 and are therefore no longer in force. The Swedish authorities have indicated that the Prosecutor-General intends to reissue guidelines concerning the term “public interest”.

b) *Authorisation of Government to establish Nationality Jurisdiction*

217. Pursuant to Chapter 2, section 5 of the Penal Code, another layer of prosecutorial decision-making is required for exercising nationality jurisdiction over any offence under the Penal Code. Pursuant to this provision, prosecution for an offence that occurs outside the territory of Sweden may only be instituted following the authorisation of the Government or a person designated by the Government. The representative of the Office of the Prosecutor-General explains that cases requiring an exercise of nationality jurisdiction are generally referred to the Prosecutor-General, who more or less automatically provides the needed authorisation within one-week. If it is not possible to exercise nationality jurisdiction, it is, according to the representative of the Office of the Prosecutor-General, frequently the case that some connection to the territory of Sweden can be established.

218. The representative of the Office of the Prosecutor-General stated that in certain cases the Prosecutor-General must refer a case to the Government for authorisation, including the case where prosecution might jeopardise relations between Sweden and a foreign country. The request for authorisation is considered by the ministers in their weekly meeting, which is held *in camera*. The representative of the Ministry of Justice stated that there is no risk that the ministers might be influenced by considerations such as the national economic interest or the potential effect of a prosecution upon relations with another state, because of the prohibition to do so under Article 5 of the Convention. However, the lead examiners are concerned that because the rationale for referring a case to Cabinet constitutes one of the prohibited considerations under Article 5 of the Convention, there may be some risk that this consideration could result in the decision to not prosecute a case.

**Commentary**

*In view of the reversal of the rule of mandatory prosecution under the Penal Code for the bribery of foreign public officials, the insufficiency of information in the Commentary on the meaning of “public interest” in the Code of Judicial Procedure, the abrogation of the “General Instructions” to prosecutors on the “public interest”, and the absence of a requirement of automatic notification of the Office of the Prosecutor-General of cases of foreign bribery, the lead examiners recommend that Sweden issue guidelines to prosecutors clarifying that prosecution of the offence of bribing a foreign public official is always required in the public interest subject only to the normal exceptions under Chapter 20, section 7 of the Code of Judicial Procedure. In addition, the lead examiners recommend that effective measures be taken to bring these guidelines to the attention of all prosecutors.*

*With respect to a decision of whether to prosecute a case of bribery of a foreign public official committed outside Sweden, the Working Group recommends that Sweden consider the appropriateness of the requirement of government authorisations to prosecute such cases. Sweden is invited to compile relevant information to assist the Working Group in monitoring this issue.*

## **D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP**

219. Based on its findings on Sweden's implementation of the Convention and the Revised Recommendation, the Working Group makes the recommendations to Sweden under Part 1 and will follow up the issues under Part 2 when there has been sufficient practice in Sweden.

### ***1. Recommendations***

#### ***Recommendations concerning Awareness-Raising, Prevention and Detection of Bribery of Foreign Public Officials***

220. With respect to general measures to raise awareness of, to prevent and to detect bribery of foreign public officials, the Working Group recommends that Sweden:

- (a) continue efforts to make Swedish companies more aware of their exposure to solicitations of bribery by foreign public officials (Revised Recommendation I);
- (b) raise the awareness of the offence of bribery of a foreign public official among public officials, particularly those of the Swedish Export Credit Guarantees Board, the Swedish Export Credit Corporation and the National Board for Public Procurement (Revised Recommendations I and II.v).

221. With respect to the prevention and detection of bribery of foreign public officials in the arms export sector, the Working Group recommends that Sweden encourage the Swedish defence industry to develop strong anti-corruption measures, and ensure that the decision-making bodies for providing licenses for exporting military equipment and dual-use goods consider whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country (Revised Recommendations I and II.v).

222. With respect to the role of Swedish foreign representations, including embassy personnel, in preventing and detecting bribery of foreign public officials, the Working Group recommends that Sweden take further measures to increase the awareness of foreign representations of corruption issues and of the steps that should be taken where credible allegations arise that a Swedish company or individual has bribed, or taken steps to bribe, a foreign public official, including encouraging the reporting of such allegations to the competent authorities in Sweden (Revised Recommendation I).

223. With respect to the prevention and detection of bribery of foreign public officials in official development assistance (ODA), the Working Group recommends that:

- (a) the Anticorruption Regulation of May, 2001 of the Swedish International Development Agency should be amended to clarify that "corruption" includes the bribery of foreign public officials and that the identification of loss or damage is not necessary to report suspicions of bribery of foreign public officials, and
- (b) the competent authorities in ODA take steps to ensure an effective system for reporting suspicions of bribery of foreign public officials to law enforcement authorities in Sweden and/or abroad (Revised Recommendation I).

224. With respect to the prevention and detection of bribery of foreign public officials through accounting and auditing, the Working Group recommends that Sweden should:

- (a) require an auditor to report indications of a possible illegal act of bribery to the board of directors of the audited entity regardless of who within the company structure perpetrated the offence (Revised Recommendation V.B.(iii)); and
- (b) consider requiring the auditor to report indications of a possible illegal act of bribery to the competent authorities regardless of (i) who within the company structure perpetrated the offence, (ii) whether the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, and (iii) whether the offence is considered of minor significance (Revised Recommendation V.B.(iv)).

225. With respect to the prevention and detection of bribery of foreign public officials through anti-money laundering measures, the Working Group recommends that Sweden analyse the reasons for the low number of investigations and prosecutions compared to the number of suspicious transaction reports, with a view to increasing the effectiveness of the money laundering reporting system for the purpose of detecting and preventing the offence of bribing a foreign public official (Convention, Article 7; Revised Recommendation I).

#### ***Recommendations Pertaining Investigation of Bribery of Foreign Public Officials***

226. With respect to investigations of bribery of foreign public officials, the Working Group encourages Sweden to spontaneously share information regarding cases of bribery of foreign public officials with authorities in other countries, when such information might assist the receiving authority in initiating or carrying out an investigation, prosecution or judicial proceeding or lead to a request for mutual legal assistance (Revised Recommendations I, II.vii and VII.i).

#### ***Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials***

227. With respect to the offence of bribing a foreign public official, the Working Group recommends that Sweden ensure that the notion of a foreign public official in Chapter 20, section 2 of the Penal Code covers all officials and agents, including those elected, of a public international organisation of which Sweden is not a member (Convention, Article 1(4)).

228. With respect to the liability of and sanctions for legal persons for bribery of foreign public officials, the Working Group:

- (a) urges the Swedish government to complete as a matter of priority, its proposal for reforming the system of liability of legal persons, and recommends that this reform (i) review whether there are any legal or practical obstacles to imposing corporate fines, and (ii) increase the maximum fine for bribery of foreign public officials to an appropriate level, given the size and global importance of Swedish companies;
- (b) recommends that Sweden ensure that confiscation of the bribe and the proceeds of bribery shall be applied in practice against legal persons as a sanction for bribery of a foreign public official; and
- (c) recommends that Sweden draw to the attention of investigating, prosecutorial and judicial authorities (i) the mandatory nature of corporate fines and (ii) the application of corporate fines to intentional crimes (Convention, Articles 2 and 3(2)).

229. With respect to the reversal of the rule of mandatory prosecution for the prosecution of bribery of a foreign public official, the Working Group recommends that Sweden issue guidelines to prosecutors clarifying that prosecution of bribery of foreign public officials is always required in the public interest subject only to the normal exceptions under Chapter 20, section 7 of the Code of Judicial Procedure, and take effective measures to bring these guidelines to the attention of all prosecutors (Convention, Article 5).

230. With respect to a decision of whether to prosecute a case of bribery of a foreign public official committed outside of Sweden, the Working Group recommends that Sweden consider the appropriateness of the requirement of government authorisations to prosecute such cases. Sweden is invited to compile relevant information to assist the Working Group in monitoring this issue (Convention, Article 5).

231. With respect to sanctions for bribery of foreign public officials, the Working Group:

- (a) encourages the Swedish authorities to pursue their work in order to broaden the grounds for the confiscation of criminal proceeds, and recommends that Sweden draw the attention of the investigating, prosecutorial and judicial authorities to the importance of imposing confiscation on the bribers (Convention, Article 3(3));
- (b) recommends that Sweden devise procedures to verify whether a participant in public procurement has been convicted of bribery of foreign public officials, and consider debaring legal persons subject to corporate fines for bribery of foreign public officials from participating in public procurement (Convention, Article 3(4); Revised Recommendations II.v and VI.ii); and
- (c) recommends that the Swedish International Development Cooperation Agency (Sida) and Swedfund review the standard contracts that they use with their clients in order to ensure that they contain provisions that specifically prohibit the bribery of foreign public officials related to the contracts (Convention, Article 3(4); Revised Recommendation II.v and VI.iii).

## ***2. Follow-up by the Working Group***

232. The Working Group shall follow-up the following issues once there has been sufficient practice:

- (a) The operation of the offence of bribery of foreign public officials, including (i) the criteria for determining when bribery is aggravated or simple, (ii) the operation of certain elements of the offence of bribery of foreign public officials, including the notion of “impropriety” (Convention, Article 1);
- (b) Whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been proceeded against, or has not been convicted and/or sanctioned (Convention, Article 2);
- (c) The level of sanctions and application of confiscation measures to offence of bribery of foreign public officials (Convention, Article 3);
- (d) The application of nationality jurisdiction to the offence of bribing a foreign public official, in particular:

- (i) the requirement of dual criminality and the obtaining of information through mutual legal assistance and other channels to establish dual criminality (Convention, Article 4(2)); and
- (ii) the application of sanctions to Swedish legal persons for the offence of bribery of foreign public officials where the offence takes place abroad and is perpetrated by a non-Swedish natural person<sup>103</sup> (Convention, Article 2);
  - (a) The system for assigning cases and allocating resources in prosecutions and investigations of bribery of foreign public officials (Convention, Article 5);
  - (b) Whether and when the offences that cover the concept of money laundering apply where the predicate offence occurs abroad (Convention, Article 7); and
  - (c) The effectiveness in practice of mutual legal assistance for non-criminal proceedings against legal persons brought by other parties to the Convention (Convention, Article 9; Revised Recommendation II.vii).

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The Working Group notes that the latter issue should also be monitored on a horizontal basis.

## ANNEXES

### Annex 1 – Swedish participants to the on-site visit

#### **Ministries and other government related organisations**

- Ministry for Foreign Affairs
- Ministry of Justice
- Office of the Prosecutor General, including the Anti-Corruption Unit
- Swedish National Economic Crimes Bureau
- Financial Police
- Financial Supervisory Authority
- Ministry of Industry, Employment and Communications
- Ministry of Finance
- National Board for Public Procurement
- National Swedish Board of Trade
- Parliamentarians of the Committee on Justice
- Swedish Trade Council
- Swedish Export Credit Guarantee Board
- Swedish Export Credit Corporation
- Swedish International Development Agency (Sida)
- Swedfund
- National Council for Crime Prevention (statistics)
- Commission on Business Confidence
- Swedish National Audit Office
- Supervisory Board of Public Accountants

#### **Civil society**

- Swedish Metal Workers Union
- Swedish Confederation of Professional Employees
- Transparency International Sweden

#### **Private sector**

##### Private Sector Associations:

- International Chamber of Commerce Sweden
- Anti-Corruption Institute
- Confederation of Swedish Enterprises
- Federation of Private Enterprises
- Swedish Federation of Trade
- Swedish Bankers Association

##### Companies:

- Ericsson
- SAAB
- Skandia (internal company lawyer)
- Skanska

##### Banks and insurance companies:

- Danske Bank
- Förenings Sparbanken (Swedbank)
- Handelsbanken
- Nordea
- SEB

##### Legal and Auditing firms:

- KPMG Bohlins
- Öhrlings Pricewaterhouse Coopers
- Mannheimer & Swartling
- Setterwall

Annex 2 – Amendments to Chapter 17, section 7 and Chapter 20, section 2 of the Penal Code entered into force on 1 July 2004

<p><b>Chapter 17, section 7</b>  A person who, to</p> <ol style="list-style-type: none"> <li>1. an employee,</li> <li>2. a person referred to in Chapter 20, section 2,</li> <li><del>3. a minister of a foreign state, a member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in Chapter 20, section 2, second paragraph, point 1, or</del></li> <li><del>4. a person who without holding an employment or assignment as aforesaid, exercises public authority in a foreign state,</del></li> </ol> <p>gives, promises or offers a bribe or other improper reward, whether for himself or any other person, for the exercise of official duties, shall be sentenced for bribery to a fine or imprisonment for at most two years.</p>	<p><b>Chapter 17, section 7</b>  A person who gives, promises or offers a bribe or other improper reward <u>to an employee or other person defined in Chapter 20, Section 2</u>, for that person or for anyone else, for the exercise of official duties, shall be sentenced for bribery to a fine or imprisonment for at most two years.</p> <p><u>If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.</u></p>
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**Chapter 20, Section 2**

An employee who, for himself or herself or for anyone else, receives, accepts a promise of or demands a bribe or other improper reward for the performance of his duties, shall be sentenced for taking a bribe to a fine or imprisonment for at most two years. The same shall apply if the employee committed the act before obtaining the post or after leaving it. If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.

The provisions of the first paragraph in respect of an employee shall also apply to:

1. a member of a directorate, administration, board, committee or other such body attached to the State, or to a municipality, county council, association of local authorities, ~~parish, religious society~~ or social insurance office;
2. a person who exercises an assignment regulated by statute;
3. a person falling under the Law on Disciplinary Offences by Members of the Armed Forces (Law 1994:1811) or other person performing an official duty prescribed by law;
4. a person who, without holding an employment or assignment as aforesaid, exercises public authority,
5. a person who, in a case other than that falling under points 1-4, by reason of a position of trust has been given the task on another person's behalf of managing a legal or financial matter, carrying out a scientific or similar investigation, independently handling an assignment requiring qualified technical knowledge, exercising supervision over the management of the tasks designated in (a), (b) or (c), and

~~6. a member of the European Commission, the European Parliament, or the European Court of Auditors or judges of the European Court of Justice.~~

**Chapter 20, Section 2**

An employee who, for himself or herself or for anyone else, receives, accepts a promise of or demands a bribe or other improper reward for the performance of his duties, shall be sentenced for taking a bribe to a fine or imprisonment for at most two years. The same shall apply if the employee committed the act before obtaining the post or after leaving it. If the crime is gross, imprisonment for at least six months and at most six years shall be imposed.

The provisions of the first paragraph in respect of an employee shall also apply to:

1. a member of a directorate, administration, board, committee or other such agency belonging to the State, a municipality, county council, association of local authorities ~~or social insurance office,~~
2. a person who exercises a assignment regulated by statute,
3. a member of the armed forces under the Act on Disciplinary Offences by Members of the Armed Forces, etc. (1986:644), or other person performing an official duty prescribed by Law,
4. a person who, without holding an appointment or assignment as aforesaid, exercises public authority,
5. a person who, in case other than stated in 1-4, by reason of a position of trust has been given the task of
  - a) managing another's legal or financial affaires,
  - b) conduct a scientific investigation,
  - c) independently handling an assignment requiring qualified technical knowledge or
  - d) exercising supervision over the management of such affaires or assignment in a, b or c,

6. a minister of a foreign state, member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in 1.

7. a person who, without holding an employment or assignment as aforesaid, exercises public authority in a foreign state or a foreign assignment as arbitrator,

8. a member of supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden is a member, and

9. a judge or official of an international court whose jurisdiction is accepted by Sweden.

## Annex 3 – Summary of Cases

### 1. The World Bank Case

*i) The following information is contained in judgment of the Huddinge District Court dated 12 January 2004.*

The defendant K was a consultant in the construction industry, while the defendant F was the accountant of K's company. Both defendants are Swedish nationals. From 1997 to 1999, the defendants allegedly committed bribery in three sets of transactions.

The first set of transactions arose after the defendants met two officials of the World Bank in Washington, D.C. in 1997. The first official, S, was a Task Manager who was responsible for selecting consultants to conduct feasibility studies for projects funded by the Bank. The second official, B, was a Trust Fund Manager for the Bank. He was responsible for approving the use of the Bank's trust funds to hire consultants.

After the meeting, S and B agreed to cause consulting contracts to be awarded by the Bank to the defendants in return for kickbacks. The defendants were eventually awarded three contracts, two relating to projects in Ethiopia and one relating the Kenya Urban Transport Infrastructure Project (KUTIP). The consultants paid S and B over USD 280 000 and USD 140 000 in bribes respectively. One payment was sent to a third party beneficiary. All payments were made in 1998 (*i.e.* before the offence of bribery of a foreign public official had entered into force in Sweden in July 1999).

The second set of transactions was similar to the first. The defendants allegedly paid USD 10 000 plus certain entertainment expenses to R, another Task Manager of the World Bank, in May 1999. The payments were allegedly bribes to obtain consultancy contracts in relation to a Sri Lankan project.

The last set of transactions involved N, the local project manager and representative of the Kenyan government in KUTIP. N allegedly sent funds from the KUTIP project (through an intermediary) to F in Sweden. F then deposited the money into a bank account, from which S withdrew the funds and delivered them to N in Nigeria. S and F each received 10% of the funds for their services. F made two deposits of USD 50 000 each pursuant to this scheme, the second one in August 1999 (*i.e.* after the foreign bribery offence had entered into force in Sweden). The Swedish prosecution alleged that these two payments were bribes paid by F for the benefit of S.

B and S have pleaded guilty in U.S. District Court to wire fraud and conspiracy to bribe a foreign public official. Both have agreed to assist the Swedish authorities.

On 8 November 2002, the defendants were charged with bribery of an "employee" (contrary to Chapter 17, Section 7, and Chapter 20, Section 2 of the Swedish Penal Code) and aiding and abetting another in such a crime (contrary to Chapter 23, Section 4 of the Swedish Penal Code). F was also charged with false accounting (contrary to Chapter 11, Section 5 of the Penal Code).

On 12 January 2004, the Huddinge District Court convicted the defendants for bribing S and B in relation to the first set of transactions described above. F was also convicted of gross false accounting. F was sentenced to one year and six months imprisonment and K was sentenced to one year. The charge relating to R was dismissed, principally because there was no evidence from R before the court. The charge relating to the funds from N was also dismissed because there was no evidence from N, and because it was not clear to the court what crimes have been committed in Nigeria.

*ii) Information provided by the Swedish authorities*

Sweden did not charge the companies which the defendants controlled and through which they operated.

The defendants have appealed their convictions, while the prosecution has cross-appealed the dismissal of the charges involving N and R. The hearing of the appeals is pending.

2. Ongoing proceedings (or cases awaiting a decision to be investigated or not)

i) The Economic Crime Bureau explained that it is investigating a Swedish multinational telecommunications company for paying consultants who would have been used as “middlemen” for the funds in 1998 and 1999. The payments, as expenses, diminish the company’s taxable income and the investigation regards a possible tax offence possibly linked to bribery activities. The Swedish authorities reported that this investigation is continuing.

ii) In 2004, the Swedish press reported allegation in local foreign press of corruption by a Swedish multinational telecommunications company in a Central American country concerning a public contract. The Swedish law enforcement authorities requested assistance from their local embassy to obtain more information.

iii) The press has reported allegations that a British-Swedish consortium in the arms industry paid bribes to officials of an African political party in order to secure a public contract to sell fighter jets to the foreign government. The contract was signed at the end of 1999. The companies have denied the allegations, saying the relevant public authorities have investigated the allegations in 2000-2001 and found no wrongdoing. The Parliament in Sweden has apparently accepted this finding. In recent weeks the Swedish authorities reviewed the Swedish jurisdictional links and decided to investigate the case by gathering evidence through mutual legal assistance channels.

iv) According to media reports, a state-owned company in Central America has voided its public contract with a Swedish multinational company to install a GSM mobile telephone network. The state-owned company made the decision after confirming that the Swedish company paid the travel expenses of two officials of the state-owned company to a third country (which is a party to the Convention) in 2003. The officials were also accompanied by the manager of the local subsidiary of the Swedish company. The Swedish company has denied the allegations. The Swedish authorities enquired into the case in Sweden but have not opened a formal investigation so far. They are planning to request MLA from the foreign country.

v) The press has reported allegations that the chairman of a parliamentary defence committee in a Central European country had received an anonymous call in May 2002. The caller offered to contribute to the chairman’s political party in return for the party’s vote in purchasing fighters jets manufactured by a British-Swedish consortium. The deal ultimately did not go through. The authorities in the Central European country launched an investigation in November 2002. The Swedish authorities enquired into the case in Sweden but have not opened a formal investigation so far. They are planning to request MLA from the Central European country.

vi) On 15 August 2003, the World Bank permanently debarred a Swedish company and its owner for engaging in fraudulent practices relating to its use of Bank Consultant Trust Funds. The funds related to projects in Trinidad and Tobago and the Netherlands Antilles. The Swedish authorities enquired into the case in Sweden but have not found any reason to open a formal investigation so far. The Swedish authorities have not indicated whether further investigations would take place.

3. Terminated investigations (or decision to not open a formal investigation)

i) In 2001, the Swedish authorities closed an investigation into allegations that a minister in an Asian country had been on the payroll of a Swedish telecommunications company. The decision was taken due to a lack of mutual legal assistance from the Asian country, which made it impossible for Sweden to prove the dual criminality necessary to establish nationality jurisdiction over the acts.<sup>104</sup>

ii) According to media articles, a Swedish multinational company allegedly paid bribes to secure a number of tender bids in South-Eastern Europe and an African country. One such bid involved a contract with a state-owned company in South-Eastern Europe to construct a 3G mobile phone network. The Swedish authorities made enquiries in Sweden and concluded that there was no evidence that offences had been perpetrated and therefore there was no need to open an investigation. An investigation taken in the country in which the network was to be constructed led to the same conclusion.

iii) In March 2003, the Economic Crime Bureau took the decision to terminate the investigation in the UNICEF case (1991-1996).<sup>105</sup> The Swedish authorities had been informed since 1996 that the Danish authorities were investigating a case of bribery of a UNICEF official by several Scandinavian nationals. The main suspect was a Norwegian national, but other suspects included some Swedish nationals. In 1998, the Norwegian authorities took over the investigation concerning the Norwegian citizen. The Swedish authorities opened a preliminary investigation into the Swedish citizens in 2001, five years after the Danish authorities started investigating, after a request by the Norwegian authorities. If the crime in question was active bribery, the limitation period had expired. The Swedish investigation therefore tried to prove that the acts could be also defined as complicity to grave disloyalty to a principal, the offence for which the UNICEF official and Norwegian citizen had been convicted in Norway, but the investigation and the facts in the Norwegian judgment did not sufficiently support the allegation that the suspects had the requisite intent for a criminal conviction.

iv) In March 2004, the Director of Prosecutions at the National Anti-Corruption Unit closed a preliminary investigation, since he had insufficient proof to substantiate allegations that a person working for a Swedish company had bribed public officials in an African state concerning a hydropower project.<sup>106</sup>

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<sup>104</sup> This information is contained in an official document provided by the Swedish authorities.

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## **Chapter 9 Section 6**

A person who

1. takes possession of something of which another has been dispossessed by a crime, and does so in such a manner that the nature thereof renders its restitution difficult.

2. procures an improper gain from another's proceeds of crime, or

3. by a demand, transfer or other similar means asserts a claim arising from a crime,

shall be sentenced for *receiving* to imprisonment for at most two years.

A person who, in business activities or as a part of business activities which are conducted habitually or otherwise on a large scale, acquires or receives something which may reasonably be assumed to have been misappropriated from another person by a crime, and does so in such a manner that the nature thereof renders its restitution difficult, shall be similarly sentenced for receiving.

If the crime referred to in the first or second paragraph is gross, imprisonment for at least six months and at most six years shall be imposed. (Laws 1993:297 and 1999:164)

## **Chapter 9 Section 6 a**

A person who

1. improperly promotes the opportunity for another to take advantage of property emanating from the proceeds of crime, or the value of such property,

2. assists in removal, transfer, or sale of property which is derived from the proceeds of crime, or take some similar measure, with the intent of concealing the origin of property

shall be sentenced for *money receiving* to imprisonment for at most two years.

A person who, in cases other than those mentioned in the first paragraph, improperly participates in removing, transferring, conveying, or taking other measures with property with the intention to conceal that another person has enriched himself or herself through a criminal act, shall also be sentenced for money receiving.

If the crime referred to in the first or second paragraph is gross, imprisonment for at least six months and at most six years shall be imposed. (Law 1999:164)

## **Chapter 9, Section 7**

If a crime under Section 6 is considered to be petty, imprisonment for at most six months or a fine shall be imposed for *petty receiving*.

A sentence for petty receiving shall also be imposed on a person who

1. in a case other than that provided for in Section 6, second paragraph, acquires or receives something in such a manner that the nature thereof renders restitution difficult which may reasonably be assumed to have been misappropriated from another person by a crime,

2. in a case as provided for in Section 6, first paragraph, did not realise, but had reasonable cause to assume that a crime was involved, or

3. in a manner as provided for in Section 6 first paragraph 1, participated in the crime whereby property was misappropriated from another and did not realise, but had reasonable cause to assume, that a crime had been committed. (Law 1991:451)

## **Chapter 9 Section 7 a**

If a crime under Section 6 a is considered to be petty, imprisonment for at most six months or a fine shall be imposed for *petty money receiving*.

A sentence for petty money receiving shall also be imposed on a person who

1. in a case as provided for in Section 6 a, first paragraph, did not realise, but had reasonable cause to assume that a crime was involved, or

2. in a case provided for in Section 6 a, second paragraph, did not realise, but had reasonable cause to assume that another person had enriched himself or herself through a criminal act. (Law 1999:164)

