



SLOVENIA: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED 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 June 2007.

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EXECUTIVE SUMMARY

The Phase 2 Report on Slovenia by the OECD Working Group on Bribery evaluates and makes recommendations on Slovenia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Report highlights concerns that bribery of foreign public officials in commercial dealings may be tolerated to some extent. The level of awareness in the public and private sectors about the fight against foreign bribery is low, which may be a signal that the priority and commitment given to fighting corruption in Slovenia is declining. In addition, the Commission for the Prevention of Corruption, Slovenia's corruption watchdog, is facing possible abolition. Indeed, the uncertain future of the Commission raises serious questions about who will lead Slovenia's future efforts to raise awareness and prevent foreign bribery. As stated in the Phase 1 Report, the Working Group encourages the Slovenian authorities to support the Commission in its efforts to prevent corruption, including foreign bribery. This recommendation would also apply to any other independent body charged with combating foreign bribery in the future.

Slovenia has established specialised law enforcement units to combat serious economic crimes. However, no cases of foreign bribery have been brought before courts, nor have there been any investigations. Slovenia should ensure that sufficient resources and specialist financial and accounting expertise are provided to police and prosecutors, and ensure they are used at an early stage in the pre-trial procedure in order to enable them to more effectively detect, investigate and prosecute complex economic crimes cases, including foreign bribery offences. Pre-trial procedures should be simplified, streamlined and clarified, and court delays reduced. Police investigations need to be reinforced to ensure that foreign bribery cases cannot be influenced by considerations prohibited under Article 5 of the Convention.

The Report also recommends that Slovenia bolster its efforts to encourage its companies to implement strategies for the prevention and detection of foreign bribery, including the development of more effective internal company controls, standards of conduct, and independent monitoring bodies. Additional efforts are also required to ensure that companies implicated in crimes are actively investigated and prosecuted by authorities. The Slovenian foreign bribery offence broadly meets the standards set by the Convention, but measures are still required to address concerns with regard to bribery for acts not within a public official's authorized competence, bribery through intermediaries, and the range of foreign officials covered.

The Working Group further highlights positive aspects of Slovenia's work to fight foreign bribery. Slovenia has developed a flexible system for dealing with mutual legal assistance. Furthermore, the Slovenian export credit institution is making on-going efforts to comply with the most recent OECD anti-bribery standards. Similarly, the ongoing efforts to fine tune the anti-money laundering reporting system provides a good foundation for the detection of the laundering of funds related to foreign bribery.

The report and the recommendations therein, which reflect findings of experts from Greece and Luxembourg, were adopted by the OECD Working Group on Bribery. Within one year of the Group's approval of the report, Slovenia will make an oral follow-up report on its implementation of the recommendations, and will submit a written report within two years. The report is based on the laws, regulations and other materials supplied by Slovenia, and information obtained by the evaluation team during its five-day on-site visit to Ljubljana in January-February 2007, during which the team met with representatives of the Slovenian public administration, the private sector, civil society and the media.

A. INTRODUCTION

1. On-Site Visit

1. The Phase 2 on-site visit to Slovenia was undertaken by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) from 29 January 2007 to 2 February 2007 in Ljubljana.¹ The purpose of the on-site visit, which was conducted 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), was to study the structures in place in Slovenia to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Slovenia's compliance in practice with the Revised Recommendation.

2. The examining team was composed of lead examiners from Greece² and Luxembourg,³ and representatives of the OECD Secretariat.⁴ During the on-site visit, meetings were held with officials from the Slovenian government (and related bodies) and representatives from civil society, business associations, companies, the legal profession, the judiciary, and the national parliament.⁵ In preparation for the on-site visit, the Slovenian authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained questions specific to Slovenia. The Slovenian authorities also submitted relevant legislation and regulations, case law, statistical information and various government and non-government publications. The examining team reviewed these materials and also performed independent research to obtain non-government viewpoints. It focused on the implementation of the Convention and the Revised Recommendation from the perspective of the Slovenian government, as well as the perspective of civil society and the private sector on the fight against foreign bribery in Slovenia.

3. The examination team appreciates the high level of co-operation of the Slovenian authorities at all stages of the Phase 2 process, ensuring a thorough review of Slovenia's implementation of the OECD Convention and Revised Recommendation. In particular, the staff of the Commission for the Prevention of Corruption, which acted as the Group's contact point throughout this Phase 2 process, made commendable efforts to ensure the smooth running of the on-site visit, assisted in the preparation of a comprehensive agenda for the visit, and made substantial efforts to provide access to all requested participants. Leading up

¹ The Phase 1 Report on Slovenia was adopted by the Working Group on Bribery on 28 February 2005. The purpose of the Phase 1 examination is to assess whether a Party's laws comply with the legal standards set by the Convention. The issues raised by the Group in Phase 1 were followed up in the context of the Phase 2 examination.

² Greece was represented by: Kalliopi Theologitou, Assistant Public Prosecutor, Piraeus Court of First Instance; and Konstantinos Papageorgiou, Special Investigations Service, Ministry of Economy and Finance.

³ Luxembourg was represented by: Luc Reding of the Directorate for Public Safety and Law Enforcement, Ministry of Justice; Lucien Schiltz, Grand Ducal Police; and Fernand Muller, Tax Inspector, Administration of Direct Income Taxes.

⁴ The OECD Secretariat was represented by: Brian Pontifex, Co-ordinator of the Phase 2 Examination of Slovenia, Anti-Corruption Legal Expert, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs (DAF) OECD; Sébastien Lanthier, Administrator - Policy Analyst, Anti-Corruption Division, DAF, OECD; and Olga Savran, Administrator, Anti-Corruption Division, DAF, OECD.

⁵ See attached list of institutions encountered in Annex 1 of this report.

to and following the on-site visit, the Slovenian authorities also responded to many requests for information and documentation. The examination team is grateful to the Slovenian authorities and to all participants met during the on-site visit for their co-operation and openness during the course of discussions.

2. General Observations

a. Economic system⁶

4. Upon achieving its independence from the former Yugoslavia in 1991, Slovenia emerged with a strong economic base, characterised by a well developed and competitive manufacturing sector, a skilled workforce, and well established trade relations with many countries in Western Europe. It is a prosperous nation of 2 million people that continues to experience high income per capita, moderate economic growth, and a strong export performance, further boosted by EU accession in 2004. Moreover, a recent milestone has been the introduction of the euro currency on 1 January 2007, having achieved the necessary economic pre-conditions for adoption.

5. The EU represented the major market for Slovenian exports (67.8% in 2005) and it was also the source for the majority of Slovenian imports (80.9% in 2005). In relation to bilateral trading partners, Germany, Italy, Austria and France are the largest markets for Slovenian exports and these countries also account for the majority of Slovenian imports. Important trade relationships have also been developed with Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and the Russian Federation, which together accounted for approximately 20% of Slovenia's exports in 2005. The strength of Slovenia's export performance has been fuelled by a diversified and robust manufacturing base which produces higher value-added exports such as cars, car components, pharmaceutical products, paper production, chemicals, white goods, and other electrical items. In relation to foreign direct investment (FDI), the inflows of FDI have been relatively low compared to other transition economies, amounting to Euro 662 million in 2004.⁷ As to Slovenian FDI outflow, this has risen rapidly from a modest Euro 45 million in 1999 to Euro 442 million in 2004, marked by a significant level of investment by Slovenian companies in countries predominantly within the region.

6. The full transition to an open, competitive market economy has progressed slowly. In general, economic reforms within Slovenia have been gradual and measured, favouring stability rather than risk upheaval through the introduction of more radical policy measures, including major structural changes to the economy. Indeed, it remains a feature of the economy that a number of Slovenian companies are either state owned or state controlled. This is particularly evident in the banking, insurance, telecommunications, steel, and energy sectors. Overall Slovenia's privatisation programme has been limited. Similarly, changes to the labour market, tax system, and the financial and capital markets have been measured, although the government is expected to advance further reforms in many of these areas in the near future.

b. Political and legal framework

7. Slovenia is a parliamentary republic, with a directly elected President as head of state. The President is elected for five years and a maximum of two terms. The formal functions of the President include acting as head of state in international affairs, and the nomination of key office holders, such as the prime

⁶ Statistics and trends have been taken from: OECD, *Economic Survey: Slovenia* (2006): see www.oecd.org; Economist Intelligence Unit, *Country Profile 2006: Slovenia*; The Economist Intelligence Unit, *Country Report: Slovenia*, August 2006; World Bank, *Country Brief - Slovenia*, September 2006: www.worldbank.org; World Trade Organisation, Trade Profiles, Slovenia: www.wto.org.

⁷ *Country Brief - Slovenia*, World Bank, September 2006: www.worldbank.org

minister and constitutional court judges, which are made subject to the approval of the National Assembly. Legislative authority is vested in the National Assembly (*Drzavni zbor*), it consists of 90 deputies, of which 88 are from constituencies elected by proportional representation, with the remaining two representatives being directly elected from Italian and Hungarian minorities. The upper house is the National Council (*Drzavni svet*) consisting of 40 members, indirectly elected by interest groups of employers, employees, farmers, small businesses, professionals, the non-profit sector, and local interests. Its role is limited to reviewing legislation, although it can propose legislation to be submitted to the National Assembly.

8. Slovenian constitutional principles effectively require courts to consider and apply relevant international conventions (which the state has acceded to or ratified) when interpreting national laws that implement them. Article 8 of the Slovenian Constitution states that: “laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia.” The requirement in Article 8 is applicable to the interpretation and application of the OECD Anti-Bribery Convention. The *Commentaries to the Convention* are not binding in nature, although they do serve as a source for the interpretation and application of the Convention.

c. *Implementation of the Convention and Revised Recommendation*

9. On 3 September 2001, Slovenia was the first non-OECD member country to accede to the Convention. It deposited its instrument of accession and became a Party to the Convention on 6 September 2001. Slovenia first introduced the offence of bribery of foreign public officials in the Slovenian Criminal Code in March 1999, pre-dating its accession to the Convention. Amendments were subsequently enacted in 2004, principally to modify the definition of “officials” within the Criminal Code, and to increase the level of sanctions for the key offences.

10. In general, the lead examiners have formed the view, to the extent possible, that the foreign bribery offence in the Slovenian Criminal Code is broadly in accordance with the standards established under Article 1 of the Convention. Nevertheless, the lead examiners have re-affirmed concerns expressed by the Working Group in Phase 1 about certain elements of the offence and have formed the view that appropriate measures need to be taken by Slovenia to ensure that Article 1 of the Convention has been comprehensively and effectively implemented.

11. This Report also identifies a number of systemic issues related to the implementation of the Convention and Revised Recommendation that require further attention by the Slovenian authorities, including concerns about the need, in relation to foreign bribery and other serious economic crimes to: clarify the respective roles and responsibilities of police, state prosecutors and investigative judges in existing pre-trial criminal procedures; strengthen investigative resources and capabilities so that police and prosecution authorities utilise specialist financial, accounting and other relevant expertise, particularly at the pre-trial investigation stage; address issues related to the low conviction rate for legal persons implicated in a crime; the need to reduce court delays; ensure that sanctions applied in practice are effective, proportionate and dissuasive; take steps to encourage the development and adoption of more effective internal company controls, corporate governance, and standards of conduct in the private sector; and address the poor level of awareness about the offence of foreign bribery in both the public and private sectors. These represent a broad menu of concerns that will be discussed in various parts of this Report.

d. *Corruption overview*

12. The lead examiners have formed the view that the priority and commitment given to fighting corruption in Slovenia has declined in recent years, when the focus should in fact have been sharpened, and the mechanisms for combating it, strengthened. At the on-site visit, a number of participants raised wide ranging concerns about the strength, effectiveness, and even the independence, of some key institutions

within society. These issues are by no means new: other reports by international governmental and non-government organisations, when addressing the subject of corruption and institutional integrity within Slovenia, have highlighted that institutions responsible for enforcement and oversight are weak and that conflicts of interest are a widespread problem. In one such report, it was observed that “these problems may be exacerbated by the small size of the country, a long history of close interaction between the public and private sectors, and the predominance of personal contacts as the means by which institutions function in practice.”⁸ In another, report it was stated that cronyism is a “pervasive problem.”⁹ On-site participants also indicated that while certain steps had been taken in the past to try to address some of these issues they were concerned that the commitment to combating corruption in Slovenia had diminished in recent years.

13. In relation to the Convention, it was pointed out by one academic that there were enough indications to show that Slovenian companies, even if behaving correctly in Slovenia, faced an increased risk of encountering bribery and bribery solicitation when conducting business abroad. Slovenian companies operate in many economies recognised as corruption prone. The companies represented at the on-site visit did not, however, consider foreign bribery a problem. Some members of the academic, legal and accounting professions presented a different viewpoint, suggesting that some Slovenian companies have engaged in certain business practices abroad that could constitute bribery, including the giving of favours or other benefits in order to secure or maintain business or some other advantage. It was argued that this behaviour, because it often did not involve a direct cash payment, was not always understood by companies to constitute bribery, rather it was often characterised as being a natural part of the business relationship. Overall, the lead examiners have concluded that the level of awareness and commitment demonstrated by both Slovenian authorities and the private sector in the fight against foreign bribery is low. Whilst the issue has received some attention by government authorities in Slovenia, greater efforts are required to strengthen the awareness, detection, and prevention of the offence and other obligations under the Convention and Revised Recommendation. With the growth in Slovenian exports, and increased investment and trade by Slovenian citizens and companies in markets where bribery is an acknowledged risk, the need to address the issue of foreign bribery has become more urgent. It is this concern, against the background of other institutional and systemic weaknesses, which forms a major basis of this Report.

e. Cases involving the bribery of foreign public officials

(i) Investigations, prosecutions and convictions

14. At the time of the on-site visit, Slovenia had not recorded any convictions, nor did it have any ongoing or terminated investigations or prosecutions, for the offence of bribery of foreign public officials in the context of international business transactions. Whilst in general, the lead examiners had no reason to doubt the professionalism or dedication of the police, prosecution or judicial authorities, the lead examiners concluded that a number of factors could undermine the realistic prospect of securing a successful conviction for the foreign bribery offence in the future. These concerns are addressed in further detail in sections C.1., C.2., and C.3., of this Report.

(ii) Independent Inquiry Committee into the UN Oil-For-Food Programme

15. The Independent Inquiry Committee into the United Nations Oil-for-Food Programme (IIC) was established in April 2004 through the appointment by the United Nations (UN) Secretary-General of an independent, high-level inquiry to investigate and report on the administration and management of the UN Oil-for-food Programme. On 27 October 2005, the IIC published its fifth and final substantive report (“IIC

⁸ Open Society Institute, *Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy in Slovenia*, 2002, p. 572.

⁹ The Economist Intelligence Unit, *Country Profile: Slovenia 2006*, p. 8.

Report”). The IIC Report focused on the transactions between the former Iraqi government and companies and individuals to whom it chose to sell oil and from whom it bought humanitarian goods. The IIC Report documented a complicated and vast network of alleged illicit surcharges paid to the Iraqi government in connection with oil contracts. It also documented the payment of alleged kickbacks in the form of after-sales-service fees and inland transportation fees in relation to contracts for the sale of humanitarian goods to the Iraqi government. Companies from many countries, including Slovenia, are referred to in the IIC Report, although it is not alleged that all the companies mentioned have been involved or implicated in corrupt transactions.

16. Following the publication of the IIC Report, the UN Secretary-General issued a statement calling on national authorities to take steps to prevent the recurrence of the companies’ alleged activities documented in the Report, and take action, where appropriate, against companies falling within their jurisdiction. The IIC Report only describes the alleged activities, and does not presuppose how national laws would apply to them. With respect to the allegations in the IIC Report concerning Slovenian interests, the lead examiners were informed that the law enforcement authorities have given serious consideration to the IIC Report and a pre-trial investigation was being conducted.

f. The Commission for the Prevention of Corruption

17. In 2006 the Slovenian Parliament enacted legislation which, among other things, provided for the abolition of the Commission for the Prevention of Corruption, one of the principal institutional watchdogs in Slovenia. The Commission was established as an independent authority, pursuant to the 2004 Prevention of Corruption Act, and played an important role in strengthening anti-corruption efforts in Slovenia, including: developing and implementing anti-corruption strategies; increasing and disseminating knowledge about the prevention of corruption; identifying loopholes in legislation; proposing legislative amendments; drawing attention of Slovenian public institutions to the implementation of international obligations in the field of corruption and; serving as a contact point for international co-operation in the field of corruption prevention.

18. Following a constitutional challenge to the law that abolished the Commission, the Constitutional Court temporarily withheld the implementation of the law, enabling the Commission to continue its work. The Constitutional Court handed down its decision on 3 April 2007, invalidating certain provisions of the new law and finding one other important provision, article 3, unconstitutional. Article 3 of the law had sought to vest power in the Parliamentary Commission of the National Assembly to regulate and supervise data on the property and income of public officials. This responsibility had been a core function of the Commission for the Prevention of Corruption. The Court invoked the separation of powers doctrine in the Constitution, to find that the intention to vest this important function in the Parliamentary Commission was unconstitutional. The Court ordered that the National Assembly eliminate this problem within six months. In doing so, the Court stated that there were many ways to make the provision compatible with the Constitution, but noted that if the supervisory function is to be undertaken by a dedicated body, it must be autonomous and independent. In light of this decision the future role, if any, for the Commission for the Prevention of Corruption, remains unclear.

19. Despite this uncertainty the lead examiners noted during the on-site visit, the high level of support within the public sector, private sector and civil society for the work of the Commission for the Prevention of Corruption, including its role in exposing corrupt practices, improving public sector integrity standards, and providing a very visible and prominent vehicle to develop and implement strategies for the prevention of corruption. It was not clear to the lead examiners which body, if any, would undertake these important functions if the Commission is abolished. Moreover, the Commission has become an increasingly important body for the receipt of many complaints and allegations made by Slovenians of corrupt and unethical behaviour by public institutions and officials, matters which the Commission duly refers to law enforcement authorities for consideration (the police estimate that approximately 20% of the corruption complaints it

receives are directly referred from the Commission). In relation to the Convention, the Commission has not yet taken any substantial steps to raise awareness, or to introduce measures to prevent foreign bribery. In that regard, it is regrettable that the national anti-corruption strategy (discussed below) does not specifically address foreign bribery or the Convention. Given the need for Slovenia to take more comprehensive steps to combat foreign bribery the Commission, nonetheless, is well placed to play an important role in strengthening Slovenia's implementation of its international legal obligations under the Convention. The uncertainty around the future of the Commission raises questions about who will lead and co-ordinate Slovenia's efforts in the fight against foreign bribery, in particular with regard to prevention.

3. Outline of Report

20. This Report is structured in four parts. Part A provides background information on the Slovenian economic, legal, and political systems. Part B examines prevention, detection and awareness of foreign bribery in Slovenia. Part C develops issues related to the investigation, prosecution and sanctioning of foreign bribery and related offences. Part D sets out the recommendations of the Working Group and identifies issues for follow-up.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

21. The majority of participants interviewed during the on-site visit expressed the view that corruption was not common in Slovenia. However, many confirmed that corruption was generally understood in a narrow sense, that is, the making of bribe payments through the payment of cash. By contrast, it was suggested that bribery through the provision of other advantages, including the exchange of favours in commercial dealings is often tolerated as a normal business practice in what was described as "a small country where everybody knows each other". Awareness about the negative effects and various manifestations of corruption has, however, increased mostly due to media reporting of scandals, including the alleged involvement of high-level officials in public procurement and post-privatisation corruption cases.

a. Government initiatives to raise awareness

(i) The Anti-Corruption Strategy and Action Plan

22. The national anti-corruption strategy is embodied in the Resolution for the Prevention of Corruption in the Republic of Slovenia, adopted by the Parliament in June 2004. The Commission for the Prevention of Corruption is responsible for the implementation of the Resolution. To this end, in February 2005 the Commission adopted the Action Plan for the Implementation of the Resolution, which contains specific implementation measures. The Resolution and the Action Plan cover a broad range of corruption issues, but they do not address foreign bribery specifically and do not contain any references to OECD Anti-Bribery Convention. Due to the decision to abolish the Commission, taken by the Government in April 2005, the Commission was not able to ensure the implementation of the measures foreseen by the Resolution and the Action Plan. It remains unclear which body will be responsible for the coordination and implementation of these policy documents in the absence of the Commission.

(ii) *Awareness raising and training for public officials*

23. The Commission for the Prevention of Corruption is the main body responsible for awareness raising measures contained in the Action Plan, but so far it has not been able to effectively implement them, due to the decision to abolish the Commission. However, it was evident at the on-site visit that the Commission continued to provide an important contribution to raising awareness through other measures, notably by commissioning and publicising public opinion surveys and through issuing of public opinions. The opinions are issued by the Commission on request from any public or private entity, and provide legally non-binding conclusions about possible unethical behaviour, breaches of codes of conduct, and corruption in specific situations. The Commission has also started preparations for the launching of integrity plans in several public and private agencies, although there are some public agencies, including the Tax Administration, which have already adopted their own integrity projects.

24. On a number of occasions, police, state prosecutors, judges and other public officials took part in expert consultations, meetings and conferences dedicated to various aspects of corruption and economic crime. The Prosecution Service has recently identified financial and economic investigations as the priority area where training was required for its staff; special training activities were organised accordingly. (See also Section C.1.b.iii.)

25. Tax authorities, central and commercial banks as well as the Slovenian Export Credit Bank receive regular professional training, which also covers issues related to corruption and money laundering. The tax authorities were not aware of the OECD Bribery Awareness Handbook for Tax Examiners, and did not receive any training specifically related to prevention and detection of foreign bribery. At the same time, the Export Credit Bank demonstrated good knowledge and practical implementation of the OECD foreign bribery instruments, including the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits. (See also Sections B.3.a.)

26. Diplomats receive training about risks of corruption, as a part of general training, before they are posted abroad. However, this training does not include specific references about the risks of foreign bribery or advice to be given to Slovenian companies operating abroad. Similar measures among authorities responsible for official development assistance (ODA) were only at the planning stage at the time of the on-site visit. (See also Section B.4.a.)

(ii) *Awareness raising and training for the business sector*

27. The Resolution on the Prevention of Corruption requires regular education programmes to be established about the risks of corruption facing the business sector. The Commission for the Prevention of Corruption prepared a series of training seminars for business on corruption issues, but so far they have not been conducted. No other public agencies reported any awareness raising or training activity on bribery which is provided to the business sector. Concerning foreign bribery, the Slovenian authorities argued that due to the lack of such cases there had been no need to develop initiatives for raising awareness about this aspect of corruption.

28. The examiners formed a view that such a low level of awareness and the lack of any government awareness and training raising initiatives for the private sector could pose a serious problem for prevention and detection of foreign bribery, especially in the view of growing activity of Slovenian companies in the neighbouring markets of South Eastern Europe and in Russia.

b. *Private sector initiatives to raise awareness*

29. The government continues to play an important role in the economy, with many companies and some sectors owned by the state. Concerning the private sector, the overall management practice has

reportedly improved; however internal company controls remain a weak area. In this regard the major difficulty to overcome is the challenge presented by the small size of Slovenian companies and of the Slovenian market. In one example, participants from the legal and accounting professions stated that members of internal audit committees and supervisory boards often have to combine several posts, thereby undermining their independence. (See also section B.7.b.)

30. Most business representatives from state-owned and private companies interviewed during the on-site visit rejected the possibility that their companies might be involved in corrupt behaviour in their own country or abroad. However, they were not sure what may constitute foreign bribery, and whether paying for a trip of a foreign official to an expensive resort or giving a luxurious car for the private use of such an official by a Slovenian company was illegal. Many business representatives were, however, aware of the criticism surrounding an old but notorious statement made by a former Slovenian company CEO about the need to accept the “rules of the game” in the country where a company operates.

31. The Resolution on the Prevention of Corruption, developed in cooperation with the Chamber of Commerce of Slovenia, requires the development of a number of preventive measures, such as the introduction of anti-corruption clauses, integrity pacts and certificates, establishment of internal mechanisms for reporting of instances of corruption, and regular education about the risks of corruption in companies. The implementation of these measures is yet to start. The Chamber of Commerce has also developed the Code of Entrepreneurial Culture, which contains two articles on corruption (articles 14 and 40). These aim to prohibit the staff of a company to obtain benefits to the detriment of company through illegal or immoral actions, and to prompt the introduction of anti-corruption clauses in contracts instructing staff to avoid any action which could be related to corruption and obliging them to report to the responsible bodies in the company when such acts are committed by other persons. However, the application of these provisions is voluntary, and no training programmes were offered to companies.

32. The Ljubljana Stock Exchange, the Association of the Supervisory Board Members and the Managers’ Association of Slovenia developed a first version of the Corporate Governance Code in 2004, which was revised in 2005 and 2007. This Code aims to define management principles for public listed joint-stock companies, and covers such issues as independence, conflict of interest, insider information and transparency, and audit committees (see also section B.7.b.). It does not contain any specific references to anti-bribery legislation. According to the Slovenian authorities, the largest Slovenian companies, especially those which are part of multinational enterprises, have developed their own codes of conduct, usually based on international models. However, the lead examiners were not in a position to assess how wide spread was this practice, and if effective compliance mechanisms are put in place to ensure the enforcement of these codes.

Commentary

Awareness about domestic corruption in Slovenia has increased. At the same time awareness about foreign bribery remains very low, both among public officials and within the private sector. To date, special measures to raise awareness about detecting and combating domestic bribery remain only at the planning stage; and no special measures have been proposed or implemented that would target foreign bribery specifically. The lead examiners recommend that Slovenia take steps to implement awareness-raising and training programmes that address foreign bribery in relation to the implementation of the OECD Anti-Bribery Convention across relevant public sector bodies. Slovenian authorities are encouraged to ensure that such programmes are integrated into the Resolution on the Prevention of Corruption and its implementation Action Plan, or any other anti-corruption strategy that is subsequently developed. Moreover, Slovenia should encourage effective coordination and implementation of these measures by the Commission for the Prevention of

Corruption, or any other appropriate, independent body charged with preventing foreign bribery in the future

In relation to the business sector, the lead examiners were disappointed with the low degree of awareness about foreign bribery, and recommend that Slovenian authorities take active steps to raise awareness of business and business associations about the Convention and the potential for liability of legal persons under Slovenian law. The lead examiners also recommend that the responsibility for coordinating awareness-raising and training measures be clearly allocated and strengthened in the future.

2. Reporting Foreign Bribery Offences and Whistleblower Protection

a. Duty to report crimes to law enforcement authorities

33. Article 145 of the Code of Criminal Procedure requires all state agencies and organisations having public authority to report criminal offences of which they have been informed or have been brought to their notice. Article 145 also states that in submitting crime reports, agencies and organisations must indicate all evidence known to them. Furthermore, the Code of Criminal Procedure includes a general provision enabling any person to report a criminal offence which is liable to public prosecution.¹⁰

34. Article 146(2) of the Code of Criminal Procedure confirms that cases where the failure to report a crime is of itself an offence, are defined by law. In that regard, article 286 defines the offence of “failure to provide information of a crime or a perpetrator of a crime”. According to the second paragraph of this provision, a public official who, in the carrying out of official duties, obtains knowledge of a criminal offence and knowingly fails to report the offence to authorities is liable to imprisonment for up to three years. According to the same provision, such a failure to report by the public official does not constitute an offence if the crime it relates to is not punishable by more than three years imprisonment. This has a direct impact on the reporting of foreign bribery. It would be an offence not to report bribery as defined in article 268(1) of the Criminal Code (bribery to obtain “improper” acts or omissions), since this is punishable by up to five years imprisonment; but failure to report a bribery offence falling under article 268(2) of the Criminal Code (bribery for “proper” acts or omissions) would not constitute an offence since this type of bribery is punishable by up to only three years imprisonment.¹¹ Slovenia indicates that failure by a public official to report a bribery offence falling under article 268(2) of the Criminal Code could nevertheless be punished by an administrative sanction (as failure by a public official to report any criminal offence is also a failure to comply with his/her duties pursuant to article 145 of the Code of Criminal Procedure), or even by a criminal sanction in the most serious cases pursuant to article 261 of the Criminal Code (abuse of office and official duties). However, in the view of lead examiners, the distinction between reporting obligations could result in confusion and even result in the failure to report cases of foreign bribery that should be punished according to law.

35. As Slovenian law-enforcement statistics do not provide data on reporting by public servants or by citizens, the lead examiners inquired whether any reports of suspicions of occurrences of foreign bribery had ever been made pursuant to applicable reporting obligations. None of the officials, including law enforcement officials, present at the on-site visit were aware of any instances where domestic officials reported cases to their supervisors or law-enforcement bodies about bribes promised, offered or given; and there were no cases where competitors or company employees had brought information about a domestic or foreign bribery offence to the authorities. Also, no conclusive information could be obtained on whether

¹⁰ See article 146(1) of the Code of Criminal Procedure.

¹¹ For more on the distinction between bribery for “proper” and “improper” acts and omissions, see section C.4.b.iv. of the Report, and the Phase 1 Report (pp. 3-4; 9-11).

failure to report information on the preparation, the crime, or the perpetrator of bribery had in practice ever led to the imposition of sanctions pursuant to article 286 of the Criminal Code.

b. Whistleblowing and whistleblower protection

36. Slovenian authorities informed the lead examiners that there are no specific whistleblower protection provisions in the Slovenian law that would be relevant to civil servants or to the private sector. The Code of Conduct for Public Officials stipulates that the public administration should ensure that no prejudice is caused to a public official who reports on the breaches of the Code and on suspicions of criminal activity. However, no special measures to promote and enforce this requirement were implemented, and no cases of application of this provision in practice were known to the Slovenian officials interviewed by the lead examiners. Business representatives were not aware of any examples where companies have taken steps to put in place whistleblower mechanisms allowing employees to report suspicious facts that may indicate foreign bribery, or other suspected crimes, without the fear of retaliation (dismissal, overlooked for promotion *etc.*).

Commentary

The lead examiners recommend that Slovenia provide additional guidance to public officials and remind them of their obligation to report instances of bribery of foreign public officials, and issue clear instructions on the reporting procedures and channels to all public officials who may play a role in the detection and prevention of this type of offence or who are most likely to become aware of such activity by virtue of their type of work they perform.

It is also recommended that Slovenia consider taking additional measures for enhancing and promoting whistleblower protection mechanisms for public and private sector employees who report suspicious facts that may indicate foreign bribery, in order to encourage them to report such facts without fear of retaliation.

3. Officially Supported Export Credits

a. Awareness-raising efforts

37. The export credit agency in Slovenia is the SID – Slovene Export and Development Bank (SID Bank).¹² In accordance with the Law on Insurance and Financing of International Business Transactions, the SID Bank provides short and medium term export credit and investment insurance in support of Slovenian exporters. Representatives from the SID Bank stated at the on-site visit that the SID Bank observed the requirements of the 2000 OECD Action Statement of the Working Group on Export Credits and Credit Guarantees (ECG). Although Slovenia is not a member of the ECG, the representatives from the SID Bank indicated that the agency is revising its procedures in the light of the additional measures agreed by the ECG in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits.¹³ As of the time of this review, no formal steps had been taken by Slovenia to adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Credits, as provided in article 3 of this Recommendation.

¹² The official name (in Slovenian) is “SID - Slovenska izvozna in razvojna banka, d.d., Ljubljana”. The agency was formerly called the Slovenian Export Corporation (SEC).

¹³ Article 3 of the 2006 OECD Recommendation encourages non-OECD members who are parties to the Anti-Bribery Convention to adhere to the provisions of the Recommendation.

38. In 2005, the SID Bank adopted an anti-bribery policy that was designed to reduce and eliminate corruption taking into account, among other things, the requirements of the Convention, and offences within the Slovenian Criminal Code. The application form for official export credit support is used as the main tool for implementing the anti-bribery policy, and is made available through a variety of sources, including the SID Bank website. Information about the anti-bribery policy is also conveyed in meetings by the SID Bank with its clients. Applicants are invited to provide a declaration that the parties to the export transaction (the applicant, the exporter, or other parties related to the transaction) have not been engaged in “corruption” as defined in the Prevention of Corruption Act. This declaration is a pre-requisite for obtaining official export credit support. The foreign bribery offence in the Criminal Code is not directly mentioned in the application form, nor is the applicable sanctions under the Code.

39. The SID Bank representatives explained that the reference to the definition of “corruption” in the Prevention of Corruption Act was adopted by the agency because it captured a broader range of criminal conduct than simply confining it to the bribery of foreign public officials. In that regard, the SID Bank pointed out that its procedures apply not just to bribery of public officials (domestic or foreign) but also bribes paid, in the context of international business transactions, to parties within the private sector. It was apparent to the lead examiners that the definition of “corruption” in the Prevention of Corruption Act does not directly incorporate the foreign bribery offence or other Criminal Code offences. The application form, anti-bribery policy, and the terms governing the conditions for official export support include only a general reference to the Criminal Code. The lead examiners also noted that an unintended consequence of relying on the definition of “corruption” in the Prevention of Corruption Act is that the government has enacted legislation to repeal the Act.¹⁴ If the validity of the new law is upheld by the Constitutional Court, this may affect the terminology and definitions relied on by the SID Bank. In other respects the application form does warn that if there is sufficient evidence of corruption in an export transaction, then the SID Bank will refuse or invalidate the export credit cover.

b. Detection of foreign bribery

40. In relation to detection of foreign bribery, SID Bank personnel are required to scrutinise the information provided in the application forms for official support. Apart from the requirement for a declaration and undertaking that parties have not engaged in corrupt behavior in relation to the export transaction, the application form also invites applicants to advise whether the export contract includes agent’s commissions, in particular, in excess of 5% of the contract price. If a commission of this nature is identified, or if it seems excessively high, further scrutiny is required to be given to the application to ensure that there is no credible evidence of bribery. Furthermore, the SID Bank has also adopted some additional indicators, designed to detect foreign bribery (and other corrupt behavior) including, verification of whether applicants/exporters are on the debarment lists of the World Bank etc; ascertaining whether there are any legal proceedings or relevant news or information about corruptive actions involving counterparties of the export contract; ascertain the level of experience of the exporter in doing business or whether the major part of the export contract is executed by subcontractors; ascertain whether the export transaction is linked to tax havens or to a country where there is a high risk of corruption; and whether the business deal was concluded on the basis of a public tender process or through direct negotiations between the parties. The SID Bank has also taken steps to become acquainted with the internal anti-bribery policies, control systems and anti-bribery measures taken by some of the most important of the SID Bank’s client companies.

41. In practice, the SID Bank has not, so far, identified any credible evidence of corruption, including foreign bribery. Many of its clients are in fact other financial institutions (to whom the credit insurance is paid) and not directly with export companies. In terms of volume of business, there were less than 50

¹⁴ The new law is the Law on Incompatibility of Performing a Public Function with Profitable Activities (ZNOJF-1).

transactions concluded in 2006, amounting to approximately EUR 95 million for export insurance and approximately EUR 300 million in investment insurance.

c. *Duty to report bribery of foreign public officials*

42. The SID Bank, whilst it is a private legal entity (a joint stock company), a significant part of its activities are conducted under public authorisation of the Republic of Slovenia, in accordance with the Law on the Insurance and Financing of International Business Transactions. Given that the SID Bank is an authorised institution that acts in the name of, and on behalf of, the Republic of Slovenia (pursuant to the abovementioned Law) it is considered bound by article 145 of the Code of Criminal Procedure to report criminal offences to the state prosecutor. SID Bank procedures require personnel, where credible evidence of bribery is detected, to notify their supervisor, and a member of senior management then files a report with the state prosecutor. No reports related to the offence of foreign bribery have been made to the state prosecutor to date.

Commentary

The SID Bank has introduced important measures that have served to raise awareness about the issue of corruption in export contracts, and the consequences of engaging in such criminal activity. The SID Bank has also adopted a range of additional indicators, which provide a sound basis for detecting potential instances or evidence of foreign bribery in export transactions.

Given that the SID Bank is currently reviewing its procedures and policies in the light of the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, the lead examiners urge that consideration be given to incorporating an express reference to the foreign bribery offence, and the applicable criminal sanctions in the application form for official export credit support; the anti-bribery policy; the general terms governing the conditions for official export support, and information available to applicants on the SID Bank website. The lead examiners also recommend that Slovenia consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, as provided in section 3 of this Recommendation.

4. *Official Development Assistance*

43. Until recently, Slovenia was a recipient of ODA, but is now a donor country. Slovenia is a modest donor, with the total aid budget of USD 34.7 million in 2005, which constituted 0.1% of the Gross National Income. However, its ODA is expected to grow fast, and to double by 2009. Slovenia provides its development aid through bilateral aid programmes as well as through contributions to the EU and UN programmes. The bulk of ODA is destined to the countries of South Eastern Europe and the former Yugoslavia.

44. Up till now, the ODA funds have been disbursed by individual agencies without any centralised management or supervision. The Office for International Development Cooperation and Humanitarian Assistance, established within the Ministry of Foreign Affairs in 2002, was responsible only for collecting information about the ODA flows. The new Law on International Development Cooperation was adopted in 2006 and is expected to come into force in 2007. The Law requires the development of a Slovenian Development Strategy and the introduction of a centralised structure for ODA management.

45. During the on-site visit, a representative of the Ministry of Foreign Affairs also indicated that Slovenia hopes to join the Paris Declaration on Aid Effectiveness in the near future, noting that it had not yet been given the opportunity to do so.

a. Awareness-raising efforts

46. At the time of the on-site visit, no anti-corruption measures for the provision of ODA were prescribed by Slovenian law or applied in practice. Neither the Ministry of Foreign Affairs nor other ministries providing ODA had issued brochures or provided any form of training to raise awareness of their officials and contracting partners about the risks of bribery of foreign public officials in the implementation of aid contracts. Reassurances were given that the Slovenian Development Strategy will include specific measures to raise awareness about foreign bribery in aid financing.

b. Detection of foreign bribery and the duty to report foreign bribery

47. Officials in the Ministry of Foreign Affairs and other ministries providing ODA are bound by the general reporting duty established in both the Criminal Code and the Code of Criminal Procedure (see section B.2.a of the Report). However, no special training was provided to ODA officials related to their obligation to report foreign bribery, no reporting mechanisms were established for them to channel such information to law-enforcement bodies, and there is no requirement for companies delivering ODA to provide anti-corruption declarations. The officials interviewed during the on-site visit did not know of any cases where bribery of a foreign public official was detected in relation to the Slovenian development aid. The Slovenian Development Strategy is expected to include specific measures to facilitate the detection and reporting of foreign bribery.

48. Financial transactions related to ODA are regulated by the Public Procurement Law and the Law on Public Financing, which contain anti-corruption provisions. In addition, the Ministry of Finance plans to introduce a 'black list' of companies involved in corruption, which may also apply to ODA. However, the lead examiners were not able to assess precisely how effectively these measures were applied in ODA practice. For more detail on the public procurement please refer to section C.6.c.ii.

Commentary

In spite of bribery and corruption risks associated with ODA activities, no special anti-corruption measures have been carried out among the Slovenian ODA providers so far. The ongoing development of the recently established ODA system in Slovenia and the plan to elaborate the Slovenian Development Strategy will provide a useful framework to address this important shortcoming. The lead examiners recommend that the Strategy should incorporate specific measures to raise awareness about the risks of foreign bribery among the ODA providers and contractors, and should establish clear mechanisms for detection and reporting of suspicions about bribery of foreign officials in relation to development aid. Consideration should also be given to the introduction of a mechanism for excluding companies previously involved in corruption from future ODA contracts.

5. Foreign Diplomatic Representations

a. Awareness-raising efforts

49. Diplomatic missions abroad can play an important role in enhancing awareness of enterprises that seek advice from the missions about trade and investment issues. They can also be an important source of guidance and support to companies faced with solicitation of bribes. The Slovenian diplomatic corps is still in the early stages of development. According to the officials interviewed during the on-site visit, all diplomats receive training before they are posted to foreign missions. This training includes general information about risks of corruption; however it does not contain any specific references to the Convention or the foreign bribery offence. Slovenian foreign missions do not routinely provide advice or

support to Slovenian companies operating abroad, which might face bribery in the course of international business transactions.

50. The recently established Trade Promotion Agency was identified by officials as a potentially important player in efforts to raise awareness about foreign bribery among Slovenian companies, as it will have direct contact with them. At the time of the on-site visit Agency representatives were expected to soon be posted in certain foreign missions.

b. *Detection of foreign bribery and the duty to report foreign bribery*

51. As with other public officials, diplomats and other officials based in the foreign missions are bound by the general reporting duties and obligations established in the Criminal Code and the Code of Criminal Procedure (see section B.2.a.). The representatives of the Ministry of Foreign Affairs were not aware of any cases where foreign bribery had been detected by a foreign mission or reported back to the Slovenian law-enforcement authorities.

Commentary

Existing foreign missions provide for a unique interface for Slovenian companies operating abroad with their national authorities. The lead examiners consider that the personnel of the Ministry of Foreign Affairs, together with the representatives of the Trade Promotion Agency which are to be located in some of the foreign missions, should be provided with systematic, regular and in-depth training on the foreign bribery offence, the provisions of the Convention, how to recognise indications of foreign bribery and the concrete steps to take if suspicions or indications of foreign bribery should arise. The lead examiners also recommended that a comprehensive awareness raising campaign be conducted in consultation with relevant actors of the private sector in order to inform Slovenian companies about their liability for foreign bribery under Slovenian legislation.

6. The Tax Authorities

a. *Tax treatment of bribes*

52. Slovenia has included an express provision in its tax legislation that classifies bribes as non-deductible expenses for tax purposes. Slovenia recently enacted a new Corporate Income Tax Act, which entered into force on 1 January 2007, replacing the 2005 Corporate Income Tax Act reviewed during Phase 1. The new law applies to all legal persons, as well as natural persons conducting economic activities, pursuant to article 48(2) of the Personal Income Tax Act¹⁵. The 2007 Corporate Income Tax Act includes a provision drafted in exactly the same terms as the 2005 Act, prohibiting the tax deductibility of bribes. Article 30 of the 2007 Corporate Income Tax provides a list of non-deductible expenses, referred to as “non-recognised expenditures for tax purposes”. Included in the list of non-deductible expenses is an item that includes “bribes” and “other forms of material benefit given to natural or legal persons in order to bring about or prevent a certain event which would otherwise not arise, such as in order for a certain action to be performed more quickly or favourably omitted.”¹⁶ The lead examiners were concerned to ensure that the provision would comprehensively cover all bribes contemplated under Article 1 of the Convention. Slovenian authorities have indicated that the prohibition on the deductibility of “bribes” is not limited by

¹⁵ The Personal Income Tax Act (ZDoh-2) also entered into force on 1 January 2007. Article 48(2) of the Personal Income Tax Act provides that: “Regulations on taxation of incomes of legal entities are applied to establishing of incomes and expenditures unless this act provides otherwise.”

¹⁶ The provision in article 30.1(10) reflects an identical provision in article 21 of the former Corporate Income Tax Act in force at the time of the Phase 1 Review in 2005.

the phrase and “other forms of material benefit given to natural or legal persons in order to bring about or prevent a certain event which would otherwise not arise, such as in order for a certain action to be performed more quickly or favourably omitted.” Accordingly, authorities confirmed that a bribe payment from a tax payer who was the best qualified bidder in a foreign tendering process would be classified as a “bribe” and would not be deductible. As explained in Phase 1, authorities also confirmed that “material benefit” includes intangible property such as certificates of stocks, bonds, promissory notes, copyrights and franchises. As there has been no instances so far where tax authorities have detected expense claims related to foreign bribery in Slovenia, the lead examiners have formed the view that the application and effectiveness of this provision should be monitored.

b. Awareness, training and detection

53. In relation to raising the awareness and profile of the Convention with tax inspectors, officials at the on-site visit stated that the Convention is available on the Tax Administration intranet site. However, the guidelines for tax inspectors do not provide any specific information related to the non-deductibility of bribes to foreign public officials. Similarly, tax examiners are not provided with specific training on the Convention. The OECD Bribery Awareness Handbook for Tax Examiners has not so far been used to assist in raising awareness about the techniques used for bribery or the tools to detect and identify bribes, although tax officials present at the on-site visit indicated a strong willingness to examine the Handbook for this purpose.

54. The Slovenian Tax Administration does not have any systematic approach to specifically detect bribes payments to foreign public officials. The general approach is to investigate the various categories of expenses claimed by the taxpayer and the method of payment. Tax officials suggested that, in relation to foreign bribery, this could include expenses and payments relating to a person (such as expenses of tourist travel, hotel accommodation, participation at symposiums, purchase of objects like jewellery, watches, and works of art for personal use). In addition, indirect payments are scrutinised, for example, services to or from offshore companies; payments received for market research, counselling, translations, and studies; and payments of travel expenses to employees (such as daily allowances, allowances for travelling). Taxpayers, in accordance with an administrative procedure in article 76 of the Tax Procedure Act, must submit proof of statements made to the Tax Administration. However, the burden of proving that a particular statement made by the taxpayer is incorrect or untruthful rests with the tax authorities. In the event that an irregularity is detected in the way that a tax audit is conducted, the Tax Administration Services Law enables the tax audit to be re-done. The officials present at the on-site visit were not aware of any instances where bribes paid to a foreign public official had been detected by the Tax Administration.

c. Duty to report bribery of foreign public officials and sharing of information

55. Tax officials confirmed that if information detected in the course of conducting a tax audit gives rise to a suspicion of a criminal offence, for example, bribery or money laundering, Tax Administration personnel are bound by article 145 of the Code of Criminal Procedure to file a report with the state prosecutor. Articles 23 and 26 of the new Tax Procedure Act also provide that the Tax Administration can disclose confidential data to police or state prosecutors, if suspicions of criminal activity are identified.¹⁷ No reports in relation to the foreign bribery offence have been made to the public prosecution authorities to date.

56. In relation to the sharing of information, tax officials indicated that the Tax Administration has access to a broad range of information and data bases, with some information provided automatically. In that regard, the Tax Administration has arrangements to obtain information from a range of key sources,

¹⁷ The new Tax Procedure Act came into force on 1 January 2007.

including the Institute for Pension and Disability Pension Insurance, the Institute for Health Insurance, the Agency for Public Legal Records, the Central Registry of Population, and the Customs Administration. The Tax Administration also receives a range of confidential data, which refer to legal entities and sole traders, on accounts and transactions from banks pursuant to the Tax Procedure Act and the Payment Transactions Act. The Tax Administration may also request confidential data on individuals from banks for its tax purposes. Article 37 of the Tax Procedure Act imposes a duty on banks to provide to the Tax Administration all information about payment transactions. It remains the case, of course, that the tax powers cover information held by Slovenian banks, and there remains a risk that dealings linked to bribery can still be transacted through foreign bank accounts opened by Slovenian companies.

Commentary

The tax legislation in Slovenia expressly provides that “bribes” and “other forms of material benefit given to natural or legal persons in order to bring about or prevent a certain event which would otherwise not arise, such as in order for a certain action to be performed more quickly or favourably omitted”, are non-deductible expenses for tax purposes. As there has been no instances where tax authorities have detected expense claims related to foreign bribery in Slovenia, the lead examiners recommend follow-up to ensure that the non-deductible expense provision in the Corporate Income Tax Act and Personal Income Tax Act can be applied comprehensively to all bribes contemplated under Article 1 of the Convention. The Tax Administration has in place various arrangements for accessing and receiving information and data from financial institutions and relevant government agencies which could be crucial in detecting unlawful conduct, including foreign bribery. In order to further strengthen the ability of tax inspectors to detect bribes, the lead examiners recommend that further steps be taken by the Tax Administration to raise awareness about the Convention, including through training and also the inclusion of information in the guidelines for tax inspectors. In that regard, the OECD Bribery Awareness Handbook for Tax Examiners, preferably translated into Slovenian, could be used to assist strengthen training regimes and raise awareness on practical issues relating to the implementation of the Convention and its related instruments.

7. Accounting and Auditing

a. Accounting standards and training

57. The Slovenian authorities indicate that pursuant to Slovenian fiscal laws, no legal person is exempted from the obligation to keep accounting records or books. Business entities are subject to the accounting requirements of the 2006 Companies Act, which transposes and implements European Community accounting directives and regulations.¹⁸ The Act requires that companies and sole traders keep books of account and make year-end accounts in accordance with the Slovenian Accounting Standards (SAS)¹⁹ or the International Financial Reporting Standards (IAS/IFRS), the latter being mandatory for listed companies, which must compile consolidated financial statements in accordance with the IFRS. The Act further requires that annual reports and consolidated annual reports provide a true and fair presentation

¹⁸ The Act notably requires that the SAS transpose the content of European Community Accounting Directives 78/660/EEC and 83/349/EEC, as amended by Directive 2006/46/EC (dealing in particular with the liability of supervisory boards in drawing up and publishing the annual accounts, the disclosure of transactions between the company and the company's related parties, and the obligation for listed firms to include a corporate governance statement in their annual report).

¹⁹ The SAS – which are issued by the SIA – are very close to the IFRS; and specify that bookkeeping documents must disclose transactions and business events in a credible and fair manner, and that entries in the book of accounts should be based on credible and authentic bookkeeping documents.

of the company and its financial position (for information on accounting offences, please refer to section C.8 of the Report). Some major state-owned and state-controlled companies have branches or subsidiaries in neighbouring countries (for instance in the telecommunication and energy production sectors). Slovenia indicates that such companies must also present consolidated accounts as appropriate, and must comply with the various requirements of the 2006 Companies Act.

58. While the Auditing Act determines the education requirements for auditors, there is no legal authority describing the education, experience or qualifications requirements for accountants. The Slovenian Institute of Auditors (SIA) is in charge of supervising both the accounting and auditing professions (including with regard to standards and training). The SIA offers continual professional training to accountants and auditors, some of which is related to the prevention of fraud and money-laundering. Such training has however never explicitly dealt with issues of bribery prevention and detection.

b. Internal controls, supervisory boards and audit committees

59. The Revised Recommendation asks Working Group Members to encourage the development and adoption of adequate internal company controls and standards of conduct in companies. Effective internal controls systems are known to help enhance the quality of financial reporting and to minimise financial, operational and compliance risks. As such, they have a potential for enhancing firms' capacity to internally detect and prevent fraud that can be related to foreign bribery. These controls can also be set up in combination with programs and measures explicitly promoting internal compliance with applicable laws and ethical standards, such as the ones addressing bribery issues. The Revised Recommendation also asks Working Group Members to encourage the creation by companies of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards. Where they are present, corporate monitoring bodies can have an important role in ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit. A firm's bribery prevention strategy can thus benefit from the presence of a focused and capable corporate monitoring body, provided this firm is committed to the setting up of such a strategy and understands its advantages.

60. On-site visit discussions with companies and professionals revealed that promoting high standards of ethical conduct, for example through codes of conduct and compliance programmes for bribery prevention, was not currently a priority for the management and supervisory boards of Slovenian companies. Also, there were concerns with regard to the quality of internal controls related to international operations: accounting and auditing professionals met during the on-site visit indicated that control by Slovenian companies over foreign branches and subsidiaries, notably the ones established in non-EU countries, was very weak. The situation described to the lead examiners suggested that company internal audit functions were generally underdeveloped, and that there was a lack of leadership from management and supervisory boards for addressing certain risks specific to international activities (such as foreign bribery) or for promoting compliance with high ethical standards. These shortcomings are of concern, and could suggest that Slovenian companies are not yet in a strong position to prevent and detect bribes paid abroad. Also, the lead examiners obtained no sign that companies directly or indirectly controlled by the State and having international operations abroad had performed any better in this field.

61. A broader and related issue is the strength, role and independence of supervisory bodies in Slovenian corporations. The lead examiners were informed that Slovenian corporations have traditionally had highly concentrated ownership structures (which are still often directly or indirectly controlled by the State) and small boards that often lacked genuine independence, and rarely performed their supervisory

function towards the company and management.²⁰ All participants nevertheless agreed that the situation was improving quickly in major Slovenian companies, as board members aim to assert their role, develop their expertise, and comply with evolving standards (notably the Slovenian Code of Corporate Governance²¹) and legislation²². The development of these new standards and statutory requirements, whilst welcome, imposes a heavier burden on regulators to ensure and promote their application in practice.²³ Moreover, on-site visit participants, including regulators, indicated that compliance with the Slovenian Corporate Governance Code by Slovenian listed companies is still generally very poor.²⁴ The lead examiners also note that major state-owned and state-controlled companies (*e.g.* in the telecom and energy production and trading sectors), which constitute some of the most important players of the region in their respective sectors, are not bounded by the Code (as their shares are not traded on the Ljubljana Stock Exchange). During the on-site, auditors pointed out that a notable innovation in the corporate governance of state-owned and state-controlled companies was the recent introduction of a mandatory training for prospective members of their supervisory boards (which are appointed by the State).

62. Within supervisory boards, audit committees independent from management can help bridge the gap between the internal audit function and internal controls on one side, and the external auditor, the supervisory board and shareholders on the other; and thus have the potential to assist firms in meeting commitments to comply with laws and regulations. Until recently, the presence of audit committees in Slovenian companies was uncommon. Through the 2006 Companies Act, their presence has now been made mandatory in joint-stock companies with a one-tier governance system²⁵ the securities of which are traded on the regulated market (or in which the employees exercise their right to co-operation in the company's bodies). The mandatory tasks and composition of audit committees are also clarified.²⁶ However, the 2006 Companies Act makes the presence of an audit committee optional for corporations choosing a two-tier management system (although the 2007 Corporate Governance Code does recommend such corporations to set up an audit committee even in the absence of a mandatory requirement to do so).

²⁰ A 2004 report by the World Bank Group on accounting and auditing in Slovenia highlights that "the legacy of the Yugoslav accounting system, in which the chief accountant was responsible for the probity of financial statements, can still have an adverse impact: Directors, lacking attention to the task, may not always [duly] review the financial statements or the critical accounting policies and practices applied by the company."

²¹ One of the main objectives of the Slovenian Corporate Governance Code, first introduced in 2004 and revised in 2005 and 2007, was to address the important issue of conflicts of interest in management and supervisory bodies, and to increase the independence and responsibility of the latter.

²² The 2006 Companies Act notably introduced stricter provisions for the appointment of supervisory board members, and laid down the board members' liability to the company for damage arising as a consequence of a violation of their tasks.

²³ For information on the role of the Slovenian Securities Market Agency with regard to breaches of laws and secondary legislation that fall under its jurisdiction or within its area of work, see section C.8 of the Report.

²⁴ Pursuant to the Code, listed companies must provide a public statement of compliance with its requirements, observing the "comply or explain" principle.

²⁵ In Slovenia, a joint-stock company may choose between a two-tier management system by appointing a management board and a supervisory board; or a one-tier management system by appointing a board of directors (consisting of executive and non-executive members) (article 253(2) of the 2006 Companies Act).

²⁶ At least one member of the audit committee must be an appointed independent accounting or finance expert, while other appointed members of the audit committee can only be members of the supervisory board. The tasks of the audit committee include the supervision of the risk management system, the internal audit and the system of internal controls; the determination of the segments to be audited; and the monitoring of the independence, impartiality and effectiveness of the external auditor (article 208 of the 2006 Companies Act).

During the on-site visit, private sector participants indicated that the role of audit committees was still largely misunderstood in Slovenia, including by committee members themselves, and that much remained to be done in this field in spite of the recent developments introduced by the 2006 Companies Act and the 2007 Slovenian Corporate Governance Code.

63. During the on-site visit, suggestions were made by representatives of the accounting and auditing professions that Slovenian companies had engaged in certain business practices abroad that involved the giving of favours or other benefits to secure or maintain business relationships. This underlines the need for the management and supervisory boards' of Slovenian companies to make a clearer commitment to compliance with anti-bribery laws, and to take steps to actively ensure that appropriate controls are in place for the prevention and detection of corruption, including foreign bribery. During the on-site visit, the awareness of management and supervisory boards on these issues was presented as very low, especially when entering markets where they perceived that giving some form of advantage or benefit was a necessary requirement to do business.²⁷ Strengthening the quality of internal control and ethics standards can help prevent and detect bribery occurring at the lower levels of the company, strengthening the role and independence of the supervisory bodies can help prevent the grand or systemic forms of bribery; and both types of controls are mutually reinforcing. But clearly the impact of the development of corporate controls on foreign bribery prevention and detection by Slovenian firms can only be decisive if the perception of the phenomenon changes and if the risk of being prosecuted for foreign bribery becomes more salient.

c. External auditing

64. The annual reports of all large and medium-sized companies, and the annual reports of small companies whose securities are traded on the regulated market, must be examined by an external auditor. The percentage of firms that must undergo an annual external audit of their financial statement is relatively low, because of the large number of micro and small (non-listed) firms in Slovenia.²⁸ A notable development is the fact that some of the thresholds for qualifying as a medium company have been raised by the 2006 Companies Act,²⁹ and as such total the number of firms having an obligation to undergo a statutory audit could be decreasing. In 2006, there were less than 3% of Slovenian companies (*i.e.* approximately 2 000) which were subject to such an audit. State-owned and state-controlled companies established under the Companies Act, some of which have significant transnational business activities, are

²⁷ Auditors indicated that even in a case where they would report a red flag to management on what might be a bribe paid through a fraudulent consultancy contract abroad, the general feeling in both management and the Slovenian public is that such payments are regarded as part of "normal business practice" and legitimate in many neighbouring countries.

²⁸ In 2005, the number of firms with less than 50 employees accounted for 98.5% of all Slovenian companies in 2005. Such companies generated 39.5% of the total revenues, as compared to 38.5% by companies with more than 250 employees, and 22% by companies with between 50 and 250 employees. Source: Slovenia Business Week no. 32 / Statistical Office of the Republic of Slovenia.

²⁹ Pursuant to the article 55 of the 2006 Companies Act, small firms are defined as firms with the three following characteristics: an average number of employees in a financial year not exceeding 50, net sales income that does not exceed 7.3 million euros, and value of assets that does not exceed 3.65 million euros. If for two consecutive business years one of these criteria is not met, the company is considered as being medium or large. The Companies Act previously in force defined a small company as a company meeting at least two of the following criteria: the average number of employees in the last financial year does not exceed 50, net sales revenues in the last financial year are less than 1 billion tolar (4.2 million euros), the value of assets at the end of the financial year does not exceed 500 million tolar (2.1 million euros). Companies with figures above of these were considered medium or large.

included in this share of firms that must have their financial statements audited on an annual basis by a private auditing firm.

(i) *Independence of auditors and supervision of the profession*

65. The independence of external auditors is required by the articles 26 and 27 of the Auditing Act which provide a number of safeguards, and by the International Standards on Auditing (ISA) which are directly used by the Slovenian auditing profession (as translated by the SIA). The 2006 Companies Act also provides that the appointment of an auditor falls within the powers of the general meeting of shareholders, and that a company's obligation to submit to an external audit shall not be considered fulfilled if the auditor declines to issue an opinion. There is no binding requirement on the maximum amount of business that an auditing firm can have with the same client, but the SIA suggests a maximum of 15% (the Slovenian Corporate Governance Code recommends a maximum of 30%). Every audit firm also drafts its own set of guidelines for preserving the independence of its audits. Nevertheless, the lead examiners consider that additional steps could be considered in the future in consultation with the profession to strengthen and preserve the independence of external auditors (e.g. regarding disclosure of the total fees charged by the auditing firm to the audited entity and related companies, or safeguards regarding dismissal and resignation of the auditor).

66. A quality assurance review process of the auditing profession has been set up, over which the SIA has general oversight. Each firm is monitored every five years; and this increases to every three years for firms which audit three or more listed companies per year. The Auditing Act also gives the SIA the power to impose sanctions on auditors and auditing companies that are found to violate auditing rules (including the ISA). Possible sanctions include the imposition of preventive measures and the withdrawal of the auditor's license. Fines ranging from EUR 2 086 to EUR 20 864,³⁰ enforced by courts on proposal of the SIA, can also be imposed on auditing firms and individual certified auditors. The SIA indicates that from 2003 to 2006, 19 certified auditors have been issued a warning and one has seen its licence withdrawn, and 24 auditing companies have been issued an order for elimination of violations. It would seem that fines are rarely applied. A related issue is the fact that the SIA is largely self-regulated by auditors themselves, raising the issue of whether there is a genuine public oversight over the auditing profession in Slovenia.³¹

(ii) *The scope of the audit: Detecting fraud and non-compliance with laws and regulations*

67. While the Auditing Act provides the basic rules regulating the audit profession, the International Standards on Auditing (ISA), as published by the International Federation of Accountants (IFAC) and translated by the SIA, are the standards which lead Slovenian auditors through their work and determine the scope of their audits. ISA 240 (Auditor responsibility to consider fraud in an audit of financial statements) and ISA 250 (Consideration of law and regulations in an audit of financial statements) require the auditor to evaluate risks related to fraud and to the contravention of laws and regulations; with a particular emphasis on the risk of material misstatement in the financial statements. For the purpose of the ISA, fraud is defined broadly as the "use of deception to obtain an unjust or illegal advantage", and could thus include the detection of behaviours linked with bribery. And while the ISA recognise limits in the auditor's capacity and responsibility with regard to fraud detection, they also require that some attention be given to matters that could otherwise be considered inconsequential (e.g. minor fraud by a low level employee) as these can reveal broader problems such as collusion or deficiencies in the internal controls, and state that these should in any case be reported to the appropriate level of management. Finally, the ISA

³⁰ These figures are based on the official exchange rate at the time of the introduction of the Euro.

³¹ At the time of the Phase 2 evaluation there was no framework in place ensuring that non-practitioners and stakeholders (including public regulators such as the Slovenian Securities Market Agency) have an effective role in the oversight, standards and development of the auditing profession.

also states that the auditors' responsibility includes informing those charged with governance and management of any material weaknesses in the design or implementation of internal controls to prevent and detect fraud, and it recommends that the auditor adopt an attitude of professional scepticism in its relations with the company management.

68. An academic met during the on-site visit stated that there were enough indications to show that Slovenian companies – even if behaving correctly in Slovenia – faced an increased risk of encountering bribery and bribery solicitation when conducting business abroad. It should therefore be expected that auditors would conduct a more focused and in-depth assessment of fraud and bribery issues where a company engages in a substantial amount of business abroad. External auditors met during the on-site visit presented another view: they emphasised that the focus of their audit is on financial reporting, systemic weaknesses, and signs that the system could be misused; not on uncovering specific instances of fraud/bribery. They acknowledged, however, that if a possible instance of fraud/bribery is identified in the course of the audit, even if minor, the auditor has the duty to keep inquiring into the issue, as it could reveal broader problems (such enhanced inquiries were presented as very rare). External auditors also stated that they were generally not in a good position to detect large management fraud/bribery within Slovenian companies, as the collusion within the company would often be too strong in such cases for them to be able to pierce through. With regard to foreign bribery in particular, external auditors indicated that bribes paid by Slovenian companies trying to enter new markets may be common, but that uncovering these does not fall within the scope of their regular work (they regarded this as being the task of law enforcement). They further indicated that if companies were more regularly prosecuted for such acts, it would force auditors to change their attitude towards the issue.

69. After the on-site visit, the SIA stated that the major reasons for lack of focus of external auditors on bribery prevention and detection issues are (i) that “fraud and bribery are very difficult to discover”; (ii) the absence, in the ISA, of a “strong obligation” to discover fraud or bribery during an audit; (iii) the absence of a “strong obligation to report outside the company” (see section B.7.d.ii of the Report), and (iv) that the confirmed discovery by an auditor of a case of managerial fraud or other illegal act is “rare because the auditor is not a legal expert and only has to decide to finish the audit engagement or to withdraw from the engagement” in light of the seriousness of the suspected fraud or breach of law. According to the SIA, another major factor to take into consideration is that fraud, bribery or breaches of law (especially with management involvement) rarely end up affecting the audit report as the auditor is normally only able to raise suspicions and not detect actual breaches (and that such suspicions are “not enough to adjust the auditor’s report or to “accuse” management of breaching a law”).³² The lead examiners note that the lack of focus of external auditors on bribery prevention and detection issues could also be influenced by what was described as a lack of concern of the management and supervisory boards of audited companies about these issues (see also footnote 30).

d. The duty to report foreign bribery

(i) External auditors: Reporting within the company structure

70. According to applicable auditing standards (ISA 240 and 250) the external auditor should report to management and/or to corporate monitoring bodies (such as the audit committee or the supervisory board) if they exist and as appropriate (e.g. in case of managerial fraud) when he/she discovers fraud or non-compliance with law (or suspicions thereof). After reporting, an inappropriate response or lack of cooperation by the company can lead to a qualified or adverse opinion or a disclaimer of opinion, by the auditor; or even the withdrawal from the engagement by the auditor (exceptional). In practice, indications of possible foreign

³² These factors were presented as having been expressed by auditors in the context of the monitoring work conducted by the SIA (see section 7.c.i of the Report).

bribery acts discovered in the context of an audit are not subject to such a systematic reporting procedure. Auditors met during the on-site visit indicated that they can sometimes come across suspicious consultancy contracts possibly concealing bribery payments, but that they would usually not consider reporting such suspicions to the management or supervisory board.³³ They indicated that company management in Slovenia will generally consider that entering into such contracts is inevitable to conduct business in certain markets, and that auditors would often not consider that the “irregularities” linked to these contracts reach the materiality threshold for reporting. Auditors nevertheless acknowledged that such suspicions of foreign bribery should ideally always be reported as they can be indicators of broader problems or deficiencies in the internal control system.

71. Pursuant to article 57(3) of the 2006 Company Act, the auditor is liable to the company and to its shareholders for damage caused to them through a violation of the rules on auditing, up to an amount of EUR 150 000 and with no limit if the damage was caused intentionally or through gross negligence. Certain auditors met during the on-site visit did not appear to consider that a failure to report possible instances of bribery to the management or supervisory board, which later causes damage to the company and to its shareholders, would normally trigger the auditor’s liability. After the on-site visit, the SIA emphasized that pursuant ISA 240, a failure to report by the auditor of possible instances of bribery (discovered in the course of its work) to the management or supervisory board – and which later causes damage to the company and to its shareholders – would normally trigger the auditor’s liability (as it would be a breach of ISA auditing rules), and that the comment made during the on-site visit did not represent the general opinion of the auditing profession but was the expression of a personal opinion or the result of a misunderstanding. Also, in SIA’s view, underreporting of suspicions of fraud and bribery by external auditors is not the result of a lack of awareness about their reporting duties, but the result of the impediments to detection described in section 7.c.ii of the Report.

(ii) External auditors: Reporting outside the company structure

72. ISA indicate that the auditor’s professional duty to maintain the confidentiality of client information may preclude reporting fraud to a party outside the client entity; and that the auditor should consider obtaining legal advice to determine the appropriate course of action. Under Slovenian law, the external auditor’s obligation to maintain professional secrecy is laid down both in the Criminal Code (article 153 – professional secrecy) and in the Auditing Act (article 22),³⁴ but where criminal offences are detected this obligation to preserve secrecy is waived (article 22.3(5) Auditing Act). According to the information obtained during the on-site visit, this waiver is not well known, and is not used in practice by auditors for asserting their right to report criminal offences to the appropriate law enforcement authorities. The introduction of a mandatory requirement for auditors to promptly report indications of criminal offences to competent authorities outside the company structure in certain circumstances (e.g. in cases where management and/or a supervisory authority fail to take corrective action within a certain timeframe) has not been considered by the Slovenian authorities.

(iii) Reporting by accountants

73. The obligation of company accountants to maintain professional secrecy is laid down in article 153 of the Criminal Code. It states that “unlawful” disclosure of a secret by a professional is to be punished

³³ During the on-site visit, auditors indicated that in most Slovenian firms, reporting to management or to the supervisory board amounts to the same thing, since the latter generally lack independence from the former (see above subsection “b”).

³⁴ Sanctions that can be imposed on auditing firms and individual certified auditors pursuant to the Auditing Act for a breach of the secrecy obligation include the withdrawal of the auditor’s license, as well as fines ranging from EUR 2086 to EUR 20 864.

by a fine or sentenced up to one year imprisonment. Article 153(2) also provides for a waiver of penalty in cases where disclosure is made for the general good or for some other person's benefit, and where this good or benefit is greater than that of withholding the secret. Article 146 of the Code of Criminal Procedure also provides all persons with the right to report any criminal offences which comes to their knowledge, and article 285 of the Criminal Code even imposes sanctions for non-reporting in certain cases. It states that a sanction of not more than one year imprisonment shall be applied to anyone who knows about the *preparation* of a criminal offence and who fails to promptly inform the competent authorities about it; provided that the punishment for this offence in preparation is more than three years' imprisonment and that the offence is subsequently attempted or perpetrated.³⁵ However, accountants met during the on-site visit considered that the only reporting requirement which is legally binding on them is the obligation to report suspicious transactions in the context of the regime for the prevention of money laundering (see (iv) below) and indicated that company accountants would generally not report offences outside the company.

(iv) *Obligation on accountants and auditors to report suspicions of money laundering*

74. The Law on the Prevention of Money Laundering (LPML) expressly requires the reporting of suspicious transactions by accountants, tax advisors and external auditors (within 3 days of finding indications of money laundering); and each accounting and auditing firm has the responsibility to adopt its own indicators for suspicious transaction reporting. Both the SIA and the Office for Money Laundering Prevention (OMLP) are charged with monitoring the reporting obligations of accountants and auditors with regard to suspicious transactions, and to ensure effective training and guidance. From 2002 to 2006, accounting and auditing companies have made a total of six reports of unusual/suspicious transactions to the OMLP (approx. 1% of the total of reports received). Revealing to the client that information has been forwarded to the OMLP is expressly prohibited, and protection from liability for any damage caused as a result of reporting is expressly provided. Note that there is no obligation to report indications of money laundering or to respond to a request for information from the OMLP if this information was obtained "in the course of ascertaining the legal position for clients... or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings" (article 28b LPLM). There is thus a possibility that in a situation where an accountant would be asked for advice on how to avoid legal proceedings for a bribery act or for the concealment of the bribe or the proceeds of bribery, this accountant could consider that he/she is not under an obligation to report indications of money laundering to the OMLP or to comply with a request for information from the OMLP.

Commentary

The lead examiners recommend that Slovenia take measures to encourage Slovenian companies: (i) to develop and adopt adequate internal company controls and standards of conduct in Slovenian companies, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; (ii) to create, develop and strengthen corporate monitoring bodies, such as audit committees, that are independent of management and that have the effective power and competence to perform their full functions; (iii) to make statements in their annual reports about their strategy to prevent foreign bribery; and (iv) to provide channels for communication by, and protection for, persons who want to report fraud or other illegal acts within the company, or who are not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

³⁵ This obligation to report does not apply to the spouse, parent, child, etc. of the perpetrator (article 285(3) Criminal Code).

The lead examiners also recommend that Slovenia, in consultation with relevant professional associations: (i) take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, notably through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of audited companies about these issues; (ii) require external auditors to report all indications of possible acts of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery has a material impact on the financial statements; (iii) consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities; and (iv) consider whether the criteria requiring certain Slovenian companies to submit to an external audit are adequate in that they ensure that all significant Slovenian companies conducting business internationally with public sector partners submit to such an audit.

8. Money Laundering

a. Draft Law on the Prevention of Money Laundering and Terrorist Financing

75. The Law on the Prevention of Money Laundering – LPML (enacted in 1994, amended in 2001 and 2002) lays down the legal framework for the prevention and detection of money laundering in Slovenia. At the time of the on-site visit, a draft Law on the Prevention of Money Laundering and Financing of Terrorism (AML/FT draft law) was being prepared to replace the LPML; with the main objective of bringing domestic legislation in line with EU Directive 2005/60/EC, the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, and the 40 FATF Recommendations and 9 Special FATF Recommendations. As the AML/FT draft law was not yet in force at the time of the on-site visit,³⁶ the interventions of the participants met during the on-site visit were made on the basis of the LPML, and so are the observations made by the lead examiners in this report. Nevertheless, the Slovenian authorities have provided the examining team with a summary of some of the main innovations which are expected to be introduced by the new law: (i) the extension of reporting obligations to additional entities; (ii) the introduction of a risk-based approach in respect of customer due diligence (CDD), risk being determined on the basis of country risk, customer risk and product risk); and a sharper focus on money laundering linked to politically exposed persons (PEPs), with enhanced CDD measures in respect of PEPs residing in another EU Member State or in a third country.

b. The Office for Money Laundering Prevention

76. The Slovenian financial intelligence unit, the Office for Money Laundering Prevention (OMLP), was established in December 1994 as a constituent body of the Ministry of Finance, but is operationally independent and has a powerful central role in the anti-money laundering system. Staffed with 18 members at the time of the on-site visit, it is the national centre for receiving, requesting, analysing and disseminating data and information received from organisations and others bound under the law to report transactions above a certain limit and suspicious transactions indicating possible money laundering, irrespective of the amount. After analysis of the information received, the OMLP may issue a written order temporarily postponing a transaction (72 hours) if it believes that there are well-founded reasons to suspect money laundering (this measure has been imposed 27 times, and in all but one case the judge subsequently

³⁶ The AML/FT draft law is scheduled to be submitted to the Government for deliberation by the end of February 2007, and to be adopted by the end of May 2007.

issued a freezing order).³⁷ The OMLP may also request that the reporting entities provide information, documentation and data on the statement of assets and bank accounts of suspected persons, and any other information required for the detection of money laundering. Reporting entities must send to the OMLP all the necessary documentation upon request (article 15 LPML). The OMLP is also responsible for overseeing the training of entities with an obligation to report, and also for the training of other State bodies on issues related to the fight against money laundering.

c. Suspicious transaction reporting

(i) Obligations to report, typologies and guidelines

77. The Law on the Prevention of Money Laundering (LPML) establishes extensive obligations for detecting and preventing money laundering: key organisations are required to exercise vigilance before and at the time of receiving, exchanging, keeping, using or dealing in money or property; must appoint compliance officers, adopt an internal regulation on internal control, provide professional training for all relevant employees, and use clear indicators for recognising suspicious transactions (irrespective of the amount). The reporting entities work together with their supervisory bodies and/or the OMLP in developing their own appropriate training and indicators.³⁸ On-site visit discussions revealed that regulatory agencies had so far sought to actively pursue their role in trying to ensure that adequate standards, guidelines and typologies are used by reporting entities. However they note that in this context, with the exception of the new measures targeting PEPs which are included in the AML/FT draft law, no particular efforts have yet been made by the OMLP or by supervisory bodies to ensure that offences of money laundering linked to foreign bribery can be detected and reported by reporting entities (e.g. through the development of specific typologies and guidelines).

78. A comprehensive list of financial institutions and other organisations (see article 2 LPML) are required to report to the OMLP cash transactions exceeding EUR 20 865³⁹ and all suspicious transactions, irrespective of the amount (article 10 LPML).⁴⁰ The Customs administration is also under a requirement to keep information on the transport of cash and securities across the state border, and to report transfers of cash and other negotiable instruments across the border above EUR 12 519 (articles 27, 35 and 37 LPML). Certain professionals and firms (lawyers, law firms, audit companies, independent auditors, and legal or natural persons performing accountancy services or tax advisory services) also have the obligation to notify the OMLP within 3 days if they discover during the performance of their work that there exist reasons for suspicion of money laundering in connection with a transaction or a particular person (article 28 LPML). Upon completion of its investigation of any of the above-mentioned reports, the OMLP provides feedback in writing to the initiator of the report on whether it forwarded the case to the police or Prosecution Service. In addition to their obligation to report suspicious transactions to the OMLP, all reporting entities (financial and non-financial) also have an obligation to meaningfully identify their

³⁷ In urgent cases the order may be issued verbally but the Office is obliged to submit a written order to the organisation the following working day, at the latest.

³⁸ Note that pursuant to article 40 LPML, the Minister of Finance can also prescribe detailed instructions about the manner of conducting internal supervision, the keeping and protection of data, record keeping; as well as the professional training of the staff of organisations, lawyers, law firms, notaries, audit companies, independent auditors and legal or natural persons performing accountancy or tax advisory services. The Minister of Finance may also prescribe the compulsory inclusion of specific indicators on the list of indicators for recognising suspicious transactions.

³⁹ All figures in this paragraph are based on the official exchange rate at the time of the introduction of the euro (1st January 2007).

⁴⁰ A report must also be made in the case of connected several cash transactions, whose total exceeds EUR 20 865 (SIT 5 million).

customers when performing transactions which exceed EUR 12 519 – or irrespective of the amount if the transaction is considered suspicious (article 5(2) and (11), and article 28a LPML).⁴¹

(ii) *Reporting in practice*

79. Data submitted by the Slovenian authorities show that out of the 79 656 automatic “above threshold” transactions submitted to the OMLP in 2004-05, 92% originated from commercial banks. This share of reporting by banks falls to 65% when it comes to transactions reported on the basis that they were suspicious (on a total 229 in 2004-05), with foreign FIUs and Slovenian State agencies respectively accounting for 9% and 14% of such reports. The OMLP has also indicated that since its creation in 1994, it had come across two cases in which the predicate offence was acceptance of bribes (by domestic officials), but that no suspicious transaction reported to the OMLP was ever found to involve money laundering potentially associated with active bribery of foreign public officials.

(iii) *Monitoring compliance; sanctions for non-compliance*

80. Violations of the various obligations of reporting entities regarding prevention and detection discovered by the OMLP are subject to administrative sanctions both for the reporting entity and the natural person responsible for the violation. These sanctions range from a simple demand to remove the violation, to a request for the implementation of appropriate internal controls, to the request for the initiation of administrative proceedings (which can lead to the imposition of a fine up to EUR 125 188⁴² for legal persons). Supervisory bodies are empowered to monitor and enforce reporting requirements. Banks and foreign exchanges offices are supervised by the Bank of Slovenia, participants in the securities market and fund management companies are supervised by the Securities Market Agency, insurance companies are supervised by the Insurance Supervision Agency, and casinos are supervised by the State Office for Gaming Supervision. The supervision of compliance by designated non-financial reporting entities – such as lawyers, accountants, auditors and tax advisors – is under the main supervision of the OMLP itself; but this situation was being discussed and could change with the introduction of the new AML/FT law.

81. In supervising the banking sector, the Bank of Slovenia has the power to conduct on-site inspection and has access to all documents (but these are mostly conducted as part of the general inspection and not necessarily focused on compliance with obligations related to money-laundering prevention). If a supervisory body discovers a violation of the LMPL by reporting entities, it must order the implementation of appropriate control measures and notify without delay the OMLP about the violations discovered. Slovenia has also indicated that administrative sanctions for failure by reporting entities to report suspicious transactions have already been applied in at least two cases. On-site visit discussions, as well as the consultative process leading up to the preparation of the AML/FT draft law, seemed to indicate that the Slovenian authorities are actively seeking to develop the most effective system for ensuring compliance with anti-money laundering obligations and standards, in compliance with relevant international standards.

d. *Exchange of information with other Slovenian government bodies, including law enforcement*

82. The OMLP is required to report in writing to the competent authorities suspicions of money laundering (in connection with a transaction or a certain person) emanating from the information obtained

⁴¹ This *de minimus* threshold – under which thorough identification of the originator is not required *per se* – is higher than the international standard set by the FATF (EUR 1 000) for collecting accurate information on the originator of cross-border wire transfers (revised interpretative notes to FATF Special Recommendation VII). However it would seem that this issue will be addressed by the introduction of the new AML/FT draft law in the course of 2007.

⁴² Figure based on the official exchange rate at the time of the introduction of the euro (1st January 2007).

and its analysis; and submit the necessary documentation.⁴³ The OMLP can also start investigating a case in which a transaction or a particular person raises suspicion of money laundering on the basis of a substantiated written initiative from the court, the Public Prosecution Office, the Slovenian Intelligence and Security Agency, the Bank of Slovenia, the Securities Market Agency, the Insurance Supervision Agency, or the inspectorate bodies of the Ministry of Finance. In addition the OMLP may demand from any state authority or organisations with public authorisation the data, information and documentation which are needed for money laundering detection; as well as the data, information and documentation required for initiating criminal proceedings under this LPML. State authorities and organisations with public authorisation must comply with the request within 15 days (article 19 LPML).

83. Pursuant to article 22(3) LPML, the OMLP must also report to the Public Prosecution Service a few additional suspected (serious) offences – including bribery – which it discovers in the context of the analysis of the reports it receives (irrespective of whether the OMLP finds suspicions of money laundering to be linked with these offences). The examining team was not provided with any data on the number of such cases reported to the public prosecution service, but notes that this provision could potentially constitute a useful source of information for the detection of foreign bribery; provided that the OMLP is made sufficiently aware of the offence.

e. International exchange of information

84. MLA requests linked to money laundering are dealt with directly by the OMLP (article 515 Code of Criminal Procedure). Pursuant to article 21 of the LPML the Office may also, in connection with the prevention and detection of money laundering, request for specific information and documentation from foreign authorities and international organisations. The Office may forward the acquired information and documentation to foreign authorities on their request or upon its own initiative, under the condition of effective reciprocity.⁴⁴ At the time of the on-site visit, international exchange of information by the OMLP had never been in relation to cases of money-laundering related to foreign bribery; and the Slovenian Ministry of Justice had not received a request for mutual legal assistance regarding the offence of money laundering where the predicate offence is the bribery of a foreign public official.

Commentary

Slovenia has made significant efforts for the continuous development of a comprehensive regime for the prevention and detection of money laundering. In this context, the lead examiners encourage Slovenia to carry on diligently with the introduction of a risk-based approach to customer due diligence and enhanced diligence measures in respect of PEPs, as these measures could help in uncovering foreign bribery cases. Improvements could also be made by ensuring that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the OMLP itself, receive appropriate directives and training (including typologies) on the identification and reporting of active bribery and of attempts to conceal bribes and the proceeds of foreign bribery. They also encourage Slovenia to continue its efforts in developing a more efficient system for monitoring the compliance of designated non-financial businesses and professions – including lawyers, accountants, auditors and tax advisors – with anti-money laundering obligations and standards.

⁴³ For statistics on cases forwarded by the OMLP to the State Prosecutor's Office, please refer to section C.7.b. of the report (enforcement of the money laundering offence).

⁴⁴ Prior to forwarding personal data to foreign authorities the Office must also obtain assurance that the country to which the data is being forwarded has a regulated system of personal data protection, and that the foreign authority use the data solely for the purposes stipulated by the LPML.

C. INVESTIGATION, PROSECUTION, AND SANCTIONING OF FOREIGN BRIBERY

1. Institutional Framework

85. In Slovenia, the investigation of bribery of foreign public officials in international business transactions falls primarily within the authority of the police and state prosecutors. In addition, judicial investigations can also be performed by an investigative judge. In relation to the prosecution of foreign bribery cases, state prosecutors are responsible for instituting and conducting criminal proceedings on behalf of the state. The Commission for the Prevention of Corruption, with its functions and powers focused on developing and implementing measures to prevent corruption, is not a law enforcement agency. Accordingly, the Commission's role is not outlined in this part of the Report. The police, the prosecution authority and the courts are profiled below.

a. *The Police*

(i) *General structure*

86. The police in Slovenia are responsible for the investigation of all corruption offences including foreign bribery. The state level General Police Directorate, based in Ljubljana, is headed by the Director-General of Police, who is responsible to the Minister of the Interior. Within this central structure, there is a Criminal Investigation Police Directorate with an Economic Crimes Section that incorporates a special department dedicated to the investigation of corruption offences. This Anti-Corruption Department was established in 2000, and consists of four posts, two of which, at the time of the on-site visit, remained vacant. At the regional level, there are 11 Police Directorates, all of which have a Criminal Investigation Section and an Economic Crime Department. Each of the Economic Crime Departments includes a group of police that have a specialised role in the fight against corruption, consisting of a total of 18 posts.

(ii) *Independence of police investigations*

87. Although unable to point to specific instances, various participants, including members of the legal profession, academics, the media and civil society, stated that police investigations are sometimes exposed to pressure and potential influence by the actions and statements of powerful interests, including members of the government, parliament, business, and the media. This could have a negative impact, sometimes unintentionally, on the independence, rigour and integrity of a criminal investigation. The lead examiners are therefore concerned that investigations of foreign bribery might be improperly influenced by considerations prohibited under Article 5 of the Convention.⁴⁵ Moreover, it was observed by some participants that the pressures brought to bear on professional police officers could explain not only existing vacancies in the Economic Crimes Section of the General Police Directorate, but the previous departure of many capable officers. The lead examiners concluded that further steps may need to be taken to strengthen the independence of police investigations. In response to these concerns, the General Police Directorate have reiterated that its officers work independently in accordance with internal police rules and regulations, and without regard to any improper external influences. Furthermore, it was emphasised that police investigations are conducted pursuant to the Code of Criminal Procedure which requires police to file a report of all investigations with the competent State Prosecutor's Office at the conclusion of a case. According to the

⁴⁵ Article 5 of the OECD Anti-Bribery Convention states, in part, that the investigation (and prosecution) of the bribery of a foreign public official "...shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

General Police Directorate the state prosecutor, on receipt of the police report, is empowered to assess whether the police have carried out all the necessary investigative and procedural actions required by law, and can require other measures be taken.⁴⁶ The General Police Directorate argued that this procedure is in accordance with Article 5 of the Convention.

(iii) *Awareness and training*

88. In general, the level of awareness and training of police in relation to the Convention, and the specific offence of foreign bribery, was assessed by the lead examiners to be low. However, senior police officers from the Economic Crime Department, in attendance at the on-site visit, demonstrated not only an appreciation of the Convention, but also an understanding of the challenges facing police in detecting and combating this type of crime. The lead examiners were also informed that some police officers have taken part in expert consultations, meetings and conferences dedicated to various aspects of corruption and economic crime. However, awareness raising initiatives and training programmes offered to Slovenian police, including those officers working in dedicated anti-corruption roles, did not cover the foreign bribery offence. In further comments, after the on-site visit, the General Police Directorate sought to reassure the lead examiners that the police are striving to train its criminal investigators responsible for dealing with foreign bribery matters and to improve policing through the establishment of personal contacts and police networks internationally. In that regard, an anti-corruption police expert attended the 2007 Fifth Global Forum on Fighting Corruption and Safeguarding Integrity in South Africa, and another investigator has enrolled at an inaugural international summer school for the fight against corruption, organised by Austria's Federal Bureau of Internal Affairs.

b. *The Prosecution Authority*

(i) *General structure*

89. The state prosecutors supervise all corruption investigations, including foreign bribery cases, that are conducted by the police. State prosecutors in Slovenia are also empowered to direct the police or other agencies to initiate and carry out investigations into suspected criminal offences that come to their attention.⁴⁷ In relation to the prosecution of offences, state prosecutors are responsible for instituting and conducting criminal proceedings on behalf of the state, including foreign bribery offences. The prosecution function in Slovenia is a hierarchically organised structure headed by the Prosecutor General. The structure consists of a Supreme State Prosecutor's Office in Ljubljana and 11 District State Prosecutor's Offices across the country. The Supreme State Prosecution Service includes a dedicated Group of state prosecutors ("the Group") established for the prosecution of criminal offences in the sphere of organised crime, specialising in the investigation and prosecution of offences including the trafficking of drugs, humans and weapons, together with money laundering, corruption and other serious offences. The Group consists of seven specialised prosecutors. The Supreme State Prosecutor's Office and the Group, have jurisdiction over the entire territory of Slovenia.⁴⁸ The jurisdiction of the Group is unlikely to be established however, if the criminal conduct was not committed within the framework of an organised criminal association.⁴⁹ In those

⁴⁶ The General Police Directorate state that the Code of Criminal Procedure empowers a state prosecutor to assess whether the police have carried out all necessary actions during the police procedure to ensure successful implementation and adherence to the Code of Criminal Procedure.

⁴⁷ Article 161(2) of the Code of Criminal Procedure enables a prosecutor, having heard rumours about a criminal offence, to request internal affairs agencies (which includes the police) to undertake inquiries with the view to discovering the criminal offence.

⁴⁸ See article 52, State Prosecutor's Office Act of the Republic of Slovenia.

⁴⁹ Article 10 of the State Prosecutor's Office Act of the Republic of Slovenia states that: "...organised crime under this Act shall be considered criminal offences, which are prosecuted *ex officio*, committed within the

circumstances, the relevant District State Prosecutor's Office with jurisdiction would normally conduct the case.

(ii) *Independence of state prosecutors*

90. The legislation regulating the appointment, promotion, and termination of state prosecutors seeks to ensure the independence of state prosecutors. The State Prosecutor's Office is an autonomous body and is headed by the State Prosecutor General. Whilst the government appoints state prosecutors on the proposal of the Minister of Justice, the proposal is made following receipt of the opinion of the State Prosecutorial Council.⁵⁰ State prosecutors are granted life tenure, although cease to hold office, *inter alia*, upon retirement, resignation, incapacity or dismissal (if convicted for a serious offence). In practice, many participants, including members of the legal profession, academics and the media, re-affirmed that state prosecutors had a reputation for acting independently in Slovenia, although disappointment was expressed that this independent status was rarely used to more proactively initiate criminal investigations, an issue discussed in section C.2.a.viii., of the Report

(iii) *Awareness and training*

91. The state prosecutors in attendance at the on-site visit, from the Group and also District State Prosecutor's Offices, demonstrated a clear knowledge and understanding of the foreign bribery offence in the Criminal Code, and the legal requirements that must be satisfied in order to secure a conviction for this type of offence. The Prosecution Service has also recently identified financial and economic investigations as the priority area where training was required for its staff; special training activities were organised accordingly. Nevertheless, the lead examiners were disappointed to learn that the Convention is not covered in existing training programmes offered to state prosecutors in Slovenia. Moreover, there have not been any other initiatives to raise the awareness of state prosecutors about the foreign bribery offence in the Criminal Code nor the obligations of Slovenia under the Convention.

c. *The Courts*

(i) *General structure*

92. The court system in Slovenia consists of the Supreme Court, four courts of appeal, 11 regional courts and 44 district courts. In criminal cases, it is the regional and district courts that are the courts of first instance: District courts are vested with jurisdiction over criminal cases sanctioned by a fine or prison sentence of up to three years, and Regional courts have jurisdiction over other criminal cases.

(ii) *The Investigative Judge*

93. The pre-trial procedure within the Code of Criminal Procedure creates a function for investigative judges to either perform certain investigative acts or a full judicial investigation into alleged criminal conduct. Some law enforcement representatives at the on-site visit suggested that the role and function of the

framework of the organised criminal association with internal rules of operation, which operate in a business fashion and thus as a rule use violence or corruption and with the intention of acquiring unlawful material benefit or social power. These are in particular acts in the areas of money laundering, corruption, production and trafficking in drugs and weapons, trafficking in persons, procuring and prostitution, criminal association and criminal offences with an international element.”

⁵⁰ The State Prosecutorial Council consist of seven members: The State Prosecutor General, the Deputy State Prosecutor General, one member appointed by the Minister of Justice and fours elected prosecutors: article 21, *State Prosecutor's Office Act*.

investigative judge in the pre-trial procedure had acted as an obstacle to the conduct of efficient and effective criminal investigations in Slovenia, due to: the complex web of rules that applied to judicial investigations; and a belief that the standard of proof invoked by investigative judges for the grant of a judicial investigation, was applied too high. An alternative view, voiced by some academics and defence lawyers, contended that investigative judges were not at fault and that any failure in the pre-trial procedure could be explained by weaknesses in the investigation and supervision of cases conducted by police and prosecution authorities. This matter is discussed further in section C.2.a.viii. The function and future role of the investigative judge in the pre-trial procedure is currently under review by a working group established by the Minister of Justice. The working group is preparing amendments to the Code of Criminal Procedure, including to the pre-trial procedure.

(iii) *Independence of the Judiciary*

94. At law, the independence of the judiciary is enshrined within the Constitution of the Republic of Slovenia.⁵¹ The office of judge is given permanent tenure.⁵² Furthermore, members of the judiciary are also afforded certain immunities under the Constitution: judges cannot be held accountable for an opinion expressed during decision-making in court, and if suspected of a criminal offence in the performance of judicial office, the judge may not be detained nor may criminal proceedings be initiated without the consent of the National Assembly. The issue of immunities is discussed further in section C.3.b.ii.

95. In the lead up to EU accession, it was readily acknowledged that Slovenia had made significant progress towards the establishment of an independent and stable judiciary. It was observed in one monitoring report in 2001, that the public and also the political branches within Slovenia generally showed respect for the principle of judicial independence, although more troubling was a persistent lack of public trust expressed in the judiciary.⁵³ This lack of trust was based on persistent attacks made on the judiciary by elements within the media and also parliament. Indeed, the lead examiners were informed of criticisms expressed by some politicians and members of the media on the issue of court delays. In fact one participant in the on-site visit advocated that the permanent tenure of judges should be removed, in order to promote a lift in standards and performance, with the view to eliminating backlogs in the court lists. This option was not supported by others. It is fundamental that court decisions are made according to law, without members of the judiciary fearing retribution or dismissal.⁵⁴ Court delays are not uncommon in many countries, and it remains the steadfast view of the lead examiners that such issues can be addressed without removing important institutional guarantees that help underpin the independence of the judiciary.

(iii) *Awareness and training*

96. The lead examiners encountered suggestions that the judiciary had not fully transitioned and adapted to meet the new challenges that have been faced by the legal system following Slovenia's independence from the former Yugoslavia. This is an issue that extends beyond the ambit of this Report. Since 1991 however, there has been a number of new laws and legal principles adopted that underpin not only Slovenia's independence, but the transition to a more open market economy, and also EU accession. It

⁵¹ See article 125, Constitution of the Republic of Slovenia.

⁵² The permanent status is subject to the retirement age of judges, which is determined by law.

⁵³ See, for example: Open Society Institute 2001, *Monitoring the EU Accession Process: Judicial Independence in Slovenia*, p. 437.

⁵⁴ The Constitution provides a narrow basis for the termination and dismissal of judges, in cases where serious violations of the Constitution or of the law occur, including where a criminal offence is committed by a judge through the abuse of the judicial office. See article 132, Constitution of the Republic of Slovenia.

was evident to the lead examiners that new laws, such as the liability of legal persons, have seen a sharp rise in investigations and indictments in recent years, but only one decision so far handed down by the courts. There have also been complaints by prosecution authorities and legal academics about the lack of consistency and certainty in the application and interpretation of the law by the courts. Although these problems cannot be solely blamed on the courts, the lead examiners have formed the view that measures to enhance the training offered to the judiciary may assist judges to address some of the procedural difficulties and issues of legal inconsistency that have arisen in the past. In relation to specifically raising awareness about the Convention and assisting judges in adjudicating cases of foreign bribery, the lead examiners were informed that some judges had taken part in expert consultations, meetings and conferences dedicated to various aspects of corruption and economic crime. The authorities confirmed however, that training initiatives made available to judges had not covered the Convention to date.

Commentary

The police and prosecution authorities in Slovenia have established specialised units and personnel that are dedicated to combating serious economic crimes, including corruption offences. In strengthening this existing structure, the lead examiners recommend that further steps be taken to ensure that investigations of the foreign bribery offence cannot be improperly influenced by considerations prohibited under Article 5 of the Convention.

The lead examiners are concerned that there is a low level of awareness of the offence of foreign bribery and the Convention within the police, prosecution and judicial authorities. This could hamper the effective enforcement of the Slovenian foreign bribery legislation. It is recommended that training programmes for police, state prosecutors and judges, incorporate more detailed information about the offence of foreign bribery, related offences and the provisions of the Convention.

Further steps are required to reduce court delays within Slovenia, particularly as these may prove a major obstacle to the effective prosecution of foreign bribery and related offences. The lead examiners are concerned to ensure however, that any steps taken should not in turn remove important institutional guarantees that underpin the independence of the judiciary. They therefore recommend that the Slovenian authorities undertake a review of existing pre-trial and trial procedures, with a view to determining whether increased resources are required and whether there are any unnecessary procedural obstacles that could be remedied to address the problems of delay, whilst maintaining the integrity and independence of the judiciary.

2. Investigations

a. Conduct of investigations

(i) Commencement and termination of investigative proceedings

97. Under the Slovenian legal system the police, the prosecution authority and, in many cases, investigative judges, all play crucial roles in the investigation of crimes. All bribery offences are subject to prosecution *ex officio* under Slovenian law. Accordingly, the state prosecutor is required to institute a criminal prosecution if there is a reasonable suspicion that the offence of foreign bribery has been committed. An investigation forms part of the “pre-trial” procedure under the Code of Criminal Procedure.⁵⁵ In circumstances where the grounds exist to suspect that a criminal offence has been committed, the police are bound to take the steps necessary for discovering the perpetrator, including

⁵⁵ See Chapter 15 of the Code of Criminal Procedure.

detecting and preserving evidence, and collecting all information that may be useful for the successful conduct of criminal proceedings. In all cases the police are required to submit a criminal report based on their investigation to the state prosecutor, who, if required, may request additional investigative work to be undertaken by the police.⁵⁶

98. Under the Code of Criminal Procedure, state agencies are required to report criminal offences to the state prosecutor. Similarly, an allegation or information related to foreign bribery, as with any other criminal offence, can be made by members of the public directly to the law enforcement authorities. In circumstances where a crime report is made directly to a court or, more commonly, to the police, this report must be forwarded to the competent state prosecutor.⁵⁷

99. In general, a foreign bribery investigation would utilise the same measures, powers and investigative techniques that are available in relation to other crimes pursuant to the provisions of the Criminal Code and the Code of Criminal Procedure. If the state prosecutor is unable to infer from a crime report whether the criminal allegations are probable, or if the information in the report does not provide a sufficient basis to require investigation, or if the state prosecutor has only heard rumours about a criminal offence, he may request the police to undertake further investigations.⁵⁸ Although bribery offences are subject to mandatory prosecution, the state prosecutor can dismiss a crime report at the investigation stage: if satisfied that no offence was committed; the act is statute barred, amnestied or pardoned; or if no reasonable suspicion exists that the suspect has committed the criminal offence.⁵⁹ The prosecutor must notify the victim of the dismissal of a crime report and the victim can continue the criminal proceedings.⁶⁰

100. An important feature of the Slovenian criminal justice system is the role of the investigative judge. The investigative judge can be used at various stages of the pre-trial procedure. In particular, the state prosecutor may request an investigative judge to perform particular investigative acts in order to supplement existing information before deciding whether to seek a judicial investigation, dismiss a crime report, or start a criminal prosecution.⁶¹ In cases where there is sufficient evidence that a criminal offence has occurred, the prosecutor may request a judicial investigation by an investigative judge or directly file an accusation with the court. The purpose of a judicial investigation is to gather additional evidence and data necessary for deciding whether to bring charges or discontinue proceedings. The investigative judge has to elucidate all the issues before sending the file to the prosecutor. It is then up to the prosecutor to decide if further investigations should take place, an indictment be filed with the court or whether to refrain from prosecuting the case.

101. In cases where the investigative judge performs an investigation, a period of only six months is given to complete the investigation necessary to bring charges or discontinue proceedings. Article 185 of the Code of Criminal Procedure provides that if an investigation is not completed within six months, the investigative judge shall be bound to inform the president of the court of the reasons for this; and the president shall take the necessary steps for the investigation to be brought to a close. The lead examiners consider that this period could be too short, particularly for complex cases, although Slovenian authorities have re-iterated that in practice the president often provides additional time for the investigative judge to

⁵⁶ In accordance with article 148(10) of the Code of Criminal Procedure: the police shall send the state prosecutor a report even if the information gathered provides no basis for a crime report.

⁵⁷ See, in particular, articles 145 and 147 of the Code of Criminal Procedure.

⁵⁸ See article 161(2) of the Code of Criminal Procedure.

⁵⁹ See article 161(1) of the Code of Criminal Procedure.

⁶⁰ See article 60 of the Code of Criminal Procedure.

⁶¹ See articles 165 and 165a of the Code of Criminal Procedure.

finish the investigation. The Slovenian authorities have also highlighted that this six month period has no legal consequences for the case, as it is only intended to guide the investigative judge in his/her work. In relation to the statute of limitations applicable to foreign bribery offences, this issue is discussed in section C.3.d.

(ii) *Ongoing investigations*

102. Law enforcement authorities have confirmed that there have been no foreign bribery investigations initiated in Slovenia to date. The lead examiners noted that many Slovenian companies conduct trade and investment activity with countries that have a high risk of corruption. Given the real potential for this type of crime to be committed, the lead examiners discussed with law enforcement authorities the potential obstacles to investigating foreign bribery offences. Although training and awareness about the Convention was lacking (discussed in section C.1. above) there were also other key areas of concern highlighted during the on-site visit, in particular: the practical difficulties of detecting or obtaining reports from various sources in relation to this type of crime; perceived shortcomings in conducting investigations pursuant to the existing pre-trial procedure; and the lack of specialist expertise available to police and prosecutors in conducting investigations into complex economic crimes. These issues, together with some of the other important capabilities available to law enforcement authorities to conduct foreign bribery investigations, including the use of specialist investigative techniques, the lifting of bank secrecy provisions, and the availability of witness protection measures, are outlined below.

(iii) *Sources of information used for launching investigations*

103. The law enforcement authorities informed the lead examiners that, in practice, an investigation can be instituted on the basis of a variety of potential sources. Investigations are often triggered following the filing of a complaint by a person or an entity, or as a result of information obtained through police intelligence, which authorities identified as yielding very useful information. The police stated that up to 70% of corruption cases in Slovenia have emerged from investigations into other criminal activity and are usually detected using specialist investigative techniques (telephone intercepts *etc.*). There are also instances where one of the parties to a crime, perhaps due to feelings of remorse or in response to pressure to re-offend, reports the circumstances to authorities. The law enforcement authorities indicated that an investigation could be commenced on the basis of information appearing in the media, anonymous tip-offs, or from information referred by other state agencies. In relation to anonymous telephone complaints made to the police, this information was described as often vague and not very reliable. Similarly, it was indicated that allegations reported in the media were not always accurate and rarely proved to be a sufficient basis to launch a formal criminal investigation. The police stressed however, that all complaints and allegations from these key sources are checked.

104. The authorities are not, as a matter of common practice, using incoming MLA requests from abroad as a source of information for determining whether an investigation should be initiated in Slovenia. In general, incoming MLA requests are usually received by the Ministry of Justice and referred directly to the relevant court for execution. The process for handling the requests does not routinely enable police or prosecutors to scrutinise MLA requests.

105. Significantly, an emerging and important source for corruption complaints, are matters received and referred by the Commission for the Prevention of Corruption. In 2006, the Commission accounted for approximately 20% of the corruption complaints received by the police.⁶² Indeed, several participants from within the legal profession, academia, the media and civil society acknowledged that the trusted reputation

⁶² After the on-site visit, the Commission indicated that in the first quarter of 2007 the number of corruption complaints it received and forwarded to the police each month, has dramatically increased.

and high public profile of the Commission could explain the number of complaints and corruption allegations it receives. The police commented that, so far, only a small number of the complaints referred by the Commission had resulted in the filing of criminal charges.

(iv) *Investigative techniques*

106. Slovenian law enforcement authorities can use special investigative techniques for a range of defined criminal offences, including the foreign bribery offence. As mentioned above, the authorities state that these techniques have been used in the investigation of economic crimes, including corruption cases. For instance, in accordance with article 150 of the Code of Criminal Procedure, special investigative techniques are available if there are grounded reasons for suspecting that a particular criminal offence has been committed, is being committed or is being prepared or organised using communications or computer systems where traditional investigative methods will either not permit the gathering of data or could endanger the lives or health of people. The measures are ordered by an investigative judge following a written proposal from the state prosecutor. The investigative judge can order the monitoring of telecommunications through bugging and recording; control of letters and other parcels; and control of the computer systems of banks or other legal entities which perform financial or other commercial activities. Article 155 of the Code of Criminal Procedure provides that the prosecutor may permit measures of “feigned acceptance or giving of gifts or bribes” provided that the police do not incite the offence.⁶³ Under the same conditions, the use of additional tools of secret surveillance in public locations and undercover operations is available, with the authorisation of the investigative judge and/or prosecutor.⁶⁴

107. The authorisation for using special investigative techniques, together with the more intrusive bugging and surveillance techniques, lasts for a period of one month before renewal is required by a judge, one month at a time. The maximum period for use of the specialist measures under article 150 of the Code of Criminal Procedure is six months, and for the more intrusive measures under article 151, it is 3 months.⁶⁵ Slovenian authorities point out that the time limits only apply in cases where there are no new facts or suspected offences established. Nevertheless, in response to criticism that the prescribed time limits may need to be extended, this issue is now being considered by a Working Group under the Ministry of Justice which is preparing changes to the Code of Criminal Procedure. To date, no amendments have been introduced.⁶⁶

(v) *Bank secrecy*

108. The law enforcement authorities informed the lead examiners that bank secrecy requirements could be lifted for the purposes of criminal investigations, and had not acted as an impediment. The Code of Criminal Procedure enables an investigative judge, upon a properly reasoned proposal of a state prosecutor, to order a bank to provide account and transaction information of a suspect or other person, on the basis that the information could represent evidence in criminal proceedings or could be necessary in relation to seizure or confiscation proceedings.⁶⁷ Similarly, powers also exist for the investigative judge to order banks to monitor particular accounts or transactions. Representatives from the police did indicate that the time taken to obtain information sought from financial institutions could sometimes be lengthy, but there was no indication that this delay had frustrated investigations involving corruption or other economic crimes.

⁶³ The prosecutor may also permit measures of feigned purchase.

⁶⁴ See article 149a of the Code of Criminal Procedure.

⁶⁵ See article 152(4) of the Code of Criminal Procedure.

⁶⁶ GRECO, First Round Evaluation: Compliance Report on Slovenia (2003), para 29.

⁶⁷ See article 156 of the Code of Criminal Procedure.

(vi) *Witness protection measures*

109. The Witness Protection Act regulates the conditions and procedures for the protection of witnesses and other persons who are endangered due to co-operation in criminal procedures. The Act entered into force in July 2006. The Slovenian authorities confirmed that the witness protection measures could apply to witnesses in proceedings for the offence of foreign bribery. The Act is designed to provide protection for “endangered persons” in pre-trial procedures and during and after court hearings. The admission of endangered persons into the protection programme is voluntary. It is based on the written consent of the endangered person and the decision of the competent authority. The measures available are determined on the basis of the type, degree and expected duration of the danger and can include: urgent protective measures; the relocation of persons; altered documents; concealment of identity as required for judicial procedures; change of identity; use of video conference and telephone conference for the giving of evidence; and international exchange. There has been no practice to date of using the witness protection measures for bribery offences under article 268 of the Criminal Code.

(vii) *Co-ordination and information sharing between investigative authorities*

110. The competence for investigating the offence of foreign bribery could, depending on the case, involve central and regional divisions of the police and of the prosecution authority. Accordingly, the co-ordination, co-operation and sharing of information between these organisations is essential. Article 160a of the Code of Criminal Procedure states that the state prosecutor may set guidelines for police investigative work by giving directions, expert opinions and proposals with the view to detecting a criminal offence and gathering the necessary evidence. In 2004, the government introduced a regulation that sought to lay down the rules for mutual co-operation between the State Prosecutor’s Office and the police.⁶⁸ In that regard, the regulation requires that within three days of receiving a report of criminal activity in relation to certain serious offences (which would include foreign bribery) the police investigator in charge of the case must notify the head of the district state prosecutor’s office. The police are also required to inform the state prosecutor of the data obtained and measures taken by the police in gathering information on the case. After notification, the state prosecutor is given three days to advise and instruct the police officer on how to conduct the pre-trial proceedings. If a case is assigned to the Group of State Prosecutors, the state prosecutor in charge must inform the police unit investigating the case. Failure to adhere to the regulation can ultimately result in the reporting of that fact either to the head of the relevant state prosecutor’s office or to the Director-General of the Police.

111. The lead examiners were informed that the regulation is not reflective of practice and is rarely referred to, or strictly adhered to by law enforcement authorities. In that regard, one criticism was that because of the nature and large number of reported cases handled by police, it was often difficult or impractical to report all matters to prosecutors within the three day notification period. It was clear to the lead examiners that the regulation had been effectively rendered redundant in practice. Indeed, the lead examiners observed that it is the Code of Criminal Procedure which continues to provide the basic legal framework governing the conduct and relationships between police and prosecutors in criminal investigations.

112. In relation to a foreign bribery offence, this would generally be investigated by the economic crime sections of the police, either at a regional level, or more probably within the General Police Directorate, or a combination of both. In serious corruption cases, particularly those that are cross jurisdictional, a working group would usually be created in the General Police Directorate in Ljubljana drawing together officers from the economic crime section, plus other necessary expertise and, if required,

⁶⁸ Article 1, *Regulation concerning co-operation of the state prosecutor’s office and the police in detection and prosecution of perpetrators of criminal acts*, promulgated 10 May 2004 (effective 25 May 2004).

officers from the relevant regional police directorate. In relation to the involvement of prosecutors, the case could be supervised either by the relevant District Prosecutor's Office or, if linked to organised crime, by the Group of State Prosecutors within the State Prosecution Authority in Ljubljana. In general there appeared to be good co-operation between the police and prosecution authorities in Slovenia but, as discussed in section C.2.a.viii, the lead examiners have formed the view that the pre-trial procedures in the Code of Criminal Procedure, and their application in practice, have presented some major obstacles to carrying out effective and well co-ordinated investigations into foreign bribery and other criminal offences.

(viii) *Pre-trial investigations: procedural problems and the standard of proof*

113. For all cases where there is evidence that a criminal offence has occurred, the prosecutor has two options available in order to proceed with the case: (i) to file a request for a judicial investigation with an investigative judge if the evidence is not sufficient for direct indictment; or (ii) directly file an accusation with the court.⁶⁹ If the state prosecutor opts for a judicial investigation, the first procedural step is to submit a formal request for investigation to the investigative judge, accompanied by the crime report and all the documents and records of actions performed in relation to the alleged criminal act. The first task of the judge is to determine whether, in accordance with the requisite standard of proof, there is sufficient evidence that a criminal offence has occurred in order for the judicial investigation to proceed. After examining the documents filed with the court, the judge is required to examine the accused, and can also separately require the accused and the state prosecutor to appear before the judge to make submissions, before a ruling on the grant of a judicial investigation is made. If the investigative judge disagrees with the investigation request, the matter is referred to a panel of judges for further consideration and decision. Either way, if the judicial investigation is instituted then this enables the investigative judge to exercise a wide range of powers to interrogate witnesses, issue orders to obtain documents and conduct searches *etc.* The Code specifies the rights of defence counsel and of the state prosecutor to participate in various stages of the investigation. In essence the judicial investigation was described by one participant as a "mini-trial". Its objective is to gather evidence and data necessary for deciding whether to bring charges or discontinue proceedings. In doing so, the police are required to assist the judge upon request. After the investigative judge determines that a case has been "elucidated" sufficiently, the investigation is terminated and the case file is sent to the prosecutor, who may ask for the investigation to be supplemented, decide to issue an accusation with the court, or decide to refrain from prosecuting the case.

114. In assessing the complex web of rules applicable to judicial investigations, law enforcement authorities indicated that the process was sometimes too convoluted, too time consuming, and the standard of proof required to obtain the grant of a judicial investigation, too high. Some law enforcement authorities suggested that the pre-trial procedure could prove to be an impediment to initiating serious cases of economic crime. A major complaint was that the existing pre-trial procedure imposed an additional layer of court processes designed to formally obtain and assess evidence for the purposes of both seeking and conducting a judicial investigation. This evidence is then required to be reproduced and re-assessed during the main trial. In that regard, the lead examiners agreed that there might be a case for simplifying and streamlining the pre-trial procedures to reduce, to the extent possible, duplication of effort and increase the overall effectiveness and efficiency of criminal investigations.

115. A second complaint expressed by law enforcement authorities is that the standard of proof applied by investigative judges for the simple grant of a judicial investigation was too rigorous. The Code of Criminal Procedure requires a judicial investigation to be granted against a specific person when a "grounded suspicion" exists that the person has committed a criminal offence. In practice however, law enforcement authorities complained that judges often applied a higher standard of proof more applicable to

⁶⁹ The provisions governing judicial investigations are set out in the Code of Criminal Procedure; see Chapter 16 "Investigations".

the main trial. It was indicated that this made it difficult for authorities to assemble the evidence necessary to satisfy the investigative judge, which ultimately could result in the rejection of many applications for investigation, particularly in complex economic crimes. The police and prosecution authorities pointed out that the refusal of a judicial investigation may make it impossible to obtain the necessary information and evidence required for the prosecution case. A Judge of the Supreme Court of Slovenia when asked to comment on these concerns acknowledged that there could be a problem in the application of the “evidentiary threshold” at the pre-trial stage.

116. An alternative perspective was raised by an investigative judge who suggested that the poor prospect of success in obtaining a judicial investigation was often linked to the low quality of case preparation and poor level of documentation presented to the judge by police and prosecutors. Indeed, members of the legal profession and academia supported this observation. It is not uncommon, for example, for the investigative judge to have to deal with an application which is poorly prepared, often characterised by: serious gaps in the crime report conducted by police; a lack of clear supervision, direction and legal analysis by prosecutors; and the submission of a large bundle of unexplained documents, the relevance of which is not always entirely clear. Members of the legal profession pointed out that this problem could be magnified when the matter involves more complex matters, including economic crimes.

117. On a procedural level, a number of academics and members of the legal profession agreed that the Code of Criminal Procedure should be amended to clarify the roles of the police, prosecutors and investigative judges in order to enhance the efficiency of the pre-trial and trial procedure. Moreover, it was advocated that the requirements on prosecutors to more actively direct, supervise and prepare cases under investigation by police, should be strengthened. The intent here is to try and improve the case preparation and the quality and rigour of investigations before an application for a judicial investigation is submitted or an indictment is filed with the court. It was also acknowledged that the police and prosecution authorities often do not utilise the necessary financial and other technical expertise required to thoroughly investigate and prepare a case, a disadvantage that defence lawyers, particularly in the case of economic crimes, rarely confront.

118. The Slovenian authorities have informed the examination team that the Minister of Justice has nominated a working group for the preparation of amendments to the Code of Criminal Procedure which will include amendments to the pre-trial procedure. The amendments are intended to unify the pre-trial procedure to ensure that: (i) it is not divided between a police investigation phase and a judicial investigation phase; and (ii) most of the investigation powers are transferred from the investigative judge to the police and state prosecution service, with the exception of those powers and investigative measures which should be decided by the court. In welcoming the review, the lead examiners caution that simply abolishing judicial investigations may not address key weaknesses in the system. Whilst the proposal to remove a layer of complex procedures could assist, there is a risk that this solution may not address some of the abovementioned shortcomings and practical obstacles which may impede the effective conduct of criminal investigations. The lead examiners, for example, agree that the roles of the police, prosecutors and investigative judges need to be clarified in order to enhance the efficiency of the pre-trial and trial procedure. The argument for prosecutors to be not only empowered, but encouraged to initiate criminal investigations and to more actively direct, supervise and assist in the preparation of cases under police investigation, are persuasive. Furthermore, if the required standard of proof to trigger a judicial investigation is, in practice, applied too high, then this also needs to be addressed. Given the range of strongly held views on the topic of law reform in this area, the lead examiners are inclined to urge Slovenian authorities to ensure that any reforms are conducted in a comprehensive, open and consultative manner.

(ix) *Specialist expertise available to police and prosecution authorities*

119. As mentioned above, another important issue that emerged during the on-site visit is that the police and prosecution authorities require greater resources and capabilities to utilise specialist financial, accounting and other relevant expertise to enable them to more effectively detect, investigate and prosecute complex economic crime cases, including foreign bribery. This policy issue was supported by many participants at the on-site visit, including police, prosecutors, and members of the legal profession. Without it, the fear is that many complex cases will not advance beyond the pre-trial stage, as seems to be the case today. Currently, the only hope is that such cases can satisfy the necessary standard of proof to enable a judicial investigation to take place, as this can then give access to specialists available through the courts. It is quite clear however, that under the current system, and with the lack of available expertise within the police and prosecution authorities, economic crimes, including foreign bribery cases, may have little prospect of being thoroughly investigated, let alone prosecuted.

Commentary

The lead examiners are concerned that the pre-trial procedures in the Code of Criminal Procedure present some major obstacles to the effective investigation of foreign bribery and other criminal offences. In welcoming the government review of the Code, the lead examiners caution that certain reforms, including the abolition of judicial investigations, may not necessarily address key weaknesses in the pre-trial procedure. There are a number of steps that the lead examiners recommend in order to strengthen the existing system, in particular, amend the Code (and any other relevant legislation) in order to: (i) clarify the roles and duties of the police, prosecutors and investigative judges in the conduct of criminal investigations; (ii) require prosecutors to more actively initiate, direct and supervise criminal investigations; and (iii) simplify and streamline the process for obtaining the grant of a judicial investigation and reduce, to the extent possible, the duplication of effort and procedures between the pre-trial and trial phase.

Given the concerns expressed by law enforcement authorities about the high standard of proof applied in practice for the grant of a judicial investigation, this concern should also be reviewed and, if necessary, steps taken to ensure that the evidential burden placed on authorities is not excessive and is being applied in accordance with Slovenian legal principles.

In support of amendments to the pre-trial procedure, the lead examiners recommend that prosecutors should be encouraged to actively initiate, direct and supervise criminal investigations, and that this could be reflected in training programmes and prosecution guidelines.

The law enforcement authorities have had considerable success in using special investigative techniques to gather information and evidence relevant to economic crimes, including corruption cases, and have indicated that they use most of the typical evidentiary sources as a basis for investigating crimes. There are some measures however, that could assist in enhancing current procedures. In that regard, the lead examiners recommend that Slovenian authorities seriously consider extending the maximum time limits for the authorised use of special investigative techniques in criminal investigations. Furthermore, steps should be taken to adapt the existing processes for handling MLA requests to ensure that police or state prosecutors are able to scrutinise incoming MLA requests so as to assess and determine whether a separate investigation should be initiated in Slovenia.

It is also recommended that sufficient resources and capabilities, including specialist financial, accounting and other relevant expertise, is not only made available to police and prosecutors, but is

used at an early stage in the pre-trial procedure, to enable them to more effectively detect and investigate complex economic crimes cases, including foreign bribery offences.

Finally, the lead examiners recommend follow-up to assess whether the six-month period (prescribed in article 185 of the Code of Criminal Procedure) for an investigative judge to perform a judicial investigation is too short, particularly for complex cases. The assessment should include statistics on the number economic crime cases, including corruption cases, where the president of the court has declined to provide additional time, thereby requiring the judicial investigation to be brought to a close.

b. Mutual legal assistance and extradition

(i) Mutual legal assistance

120. The Slovenian system for dealing with incoming mutual legal assistance (MLA) requests from foreign authorities is, for the most part, flexible and responsive. MLA in criminal matters is principally governed in Slovenia by treaties and by provisions within the Code of Criminal Procedure. Slovenia is a party to several MLA treaties including the Council of Europe Criminal Law Convention on Corruption, the 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters with its Additional Protocol, and a number of bilateral treaties.⁷⁰ In relation to civil and commercial matters, MLA is governed by the Code of Civil Procedure in conjunction with treaties or, in the absence of a treaty, based on reciprocity.

121. The Code of Criminal Procedure provides that MLA is possible for those criminal offences for which extradition is provided, that is, only in instances provided for by international treaties binding on Slovenia. The authorities point out that if there is no binding international treaty, the relevant court in receipt of an MLA request would consult with the Ministry of Justice to decide whether to provide assistance. Dual criminality is a necessary requirement for Slovenia to be able to provide MLA. The Slovenian authorities explain that pursuant to article 8 of the Constitution of Slovenia, ratified and published international treaties are directly applicable. Therefore, the Slovenian authorities consider the Convention as a sufficient basis for dual criminality where assistance is sought by another Party in relation to an offence within the scope of the Convention.

122. Slovenian authorities confirmed that coercive and non-coercive measures can be used to respond to MLA requests where necessary, including the service of documents, interrogations, conducting searches of property to recover evidence, seizure, and performance of all investigative acts provided for in the Code of Criminal Procedure. In relation to obtaining confidential information from banks, the Slovenian authorities have stated that due to the direct application of the Convention at law, a court could not decline to render MLA to another Party on the grounds of bank secrecy, in relation to offences within the scope of the Convention. The procedure to obtain bank information on transactions and accounts *etc.* in executing an MLA request is essentially the same as for a domestic investigation and, in particular, it requires an investigative judge, upon application by the state prosecutor, to issue an order for a bank to provide the necessary information.

123. Incoming MLA requests are received and executed by competent judicial authorities (district courts) usually via the Ministry of Justice or, less common, diplomatic channels, the Ministry of Interior, the Office for the Prevention of Money Laundering, or directly. Outgoing MLA requests are made by the judicial authority, either a court or state prosecutor, which requires assistance from abroad. The authorities confirmed

⁷⁰ Bilateral agreements have been concluded with the following states: Algeria, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, France, FYR of Macedonia, Germany, Greece, Hungary, Iraq, Mongolia, Poland, Romania, Russia, Slovak Republic, Spain and Turkey.

at the on-site visit that Slovenia had not received any incoming request for MLA concerning a foreign bribery offence, nor had there been any outgoing request from Slovenia related to the foreign bribery offence in its Criminal Code. Although the lead examiners did not identify any major obstacles in the execution of MLA requests relating to natural or legal persons, some concerns were voiced by law enforcement authorities about obtaining information from financial institutions in a timely manner and in a useful form, although this complaint seemed to reflect a broader frustration about the nature of MLA processes in general, and the potential for delay in obtaining the necessary information, rather than any inherent problem within Slovenia. Nevertheless, law enforcement authorities present at the on-site visit did emphasise that they had sought to develop direct international links with police and judicial authorities abroad, outside of the formal MLA processes, with the view to facilitating the exchange of information and enabling closer co-operation in the investigation of serious crimes.⁷¹ It remains the case however, that MLA continues to be a major mechanism for the formal exchange of information between authorities, in particular, the provision of admissible evidence in criminal matters.

(ii) *Extradition*

124. Extradition from Slovenia can only occur in instances provided for by international treaties binding on Slovenia.⁷² Slovenia is a party to the Council of Europe Extradition Convention and its two protocols, the Framework Decision on the European Arrest Warrant, and to bilateral treaties with five Parties to the Convention⁷³ and other countries.⁷⁴ In the absence of an extradition treaty with another Party to the Convention, Slovenian authorities stated in Phase 1 that the Convention, in conjunction with the Code of Criminal Procedure, would be the basis for extradition upon the decision of the court in individual cases. In that regard, article 8 of the Constitution of Slovenia is cited, as this enables the direct application of treaties within the Slovenian legal system. This position is maintained by Slovenian authorities, irrespective of the operation of article 153(4) of the Constitution of Slovenia which provides that “individual acts and actions of State authorities... must be based on a law or regulation adopted pursuant to a law”. The direct application of the Convention has not been confirmed in practice.

125. The process for extradition is regulated in the Code of Criminal Procedure, unless otherwise provided in an international treaty. There are a number of conditions for extradition prescribed in the Code, including: dual criminality; and the foreign nationality of the offender. In relation to dual criminality, according to the Slovenian authorities, it is deemed to be fulfilled if the criminal offence for which extradition is sought is within the scope of Article 1 of the Convention. As to the nationality of the offender, under its Constitution, Slovenia can only extradite its nationals to another member of the EU.⁷⁵ The Convention requires that where a Party declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national, the Party shall submit the case to its competent authorities

⁷¹ This co-operation between law enforcement and judicial authorities is regularly achieved within the framework of bilateral agreements concluded by Slovenia and another state. Co-operation can also be based on reciprocity.

⁷² This is a requirement within article 521(2) of the Code of Criminal Procedure. Article 530(2) also states that the Minister of Justice shall not permit the extradition of a foreigner if an international treaty with the country demanding extradition does not exist.

⁷³ The extradition treaties concluded with Parties to the Convention are Australia, Bulgaria, Switzerland, Turkey, and the United-States of America.

⁷⁴ Other extradition treaties (non-Parties to the Convention) include Albania, Croatia, FYR of Macedonia, Iraq, Mongolia, Romania, and Russia.

⁷⁵ Article 47 of the Constitution of Slovenia states that: “No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty which...Slovenia has transferred the exercise of part of its sovereign rights to an international organisation.”

for the purpose of prosecution.⁷⁶ The law in Slovenia is not as definitive. Whilst upon the request of a foreign country, Slovenian authorities can prosecute Slovenian nationals (or permanent residents) for a criminal offence committed abroad, the requirement is not mandatory. Nevertheless, authorities maintain that Slovenia does prosecute its nationals in circumstances where extradition is refused.

126. There is a limited discretion for the Minister of Justice to decline to extradite a person requested by a foreign country, except in cases handled under the European Arrest Warrant (where no such discretion exists). In general, the extradition process requires an investigative magistrate to hold an initial hearing and, if necessary, gather further information to determine if there are sufficient grounds for the extradition. The matter is then referred to a panel of three judges for decision. If the court rejects the extradition request, the decision is forwarded to the Ministry of Foreign Affairs, which notifies the foreign authorities of the decision. If the court finds that the conditions for extradition are met, it informs the Minister of Justice, who takes the final decision, except in cases dealt with under the European Arrest Warrant. The Minister may decline extradition if the criminal offence is punishable by up to three years imprisonment or if the foreign country has imposed a sentence for a prison term of up to one year for an offence. It should be noted that this is a more limited discretion afforded to the Minister than in some other Parties to the Convention.

Commentary

Slovenia has a well developed system for dealing with mutual legal assistance (MLA) and extradition requests in criminal matters.

The procedures in place within Slovenia for dealing with incoming MLA requests from abroad appeared flexible and responsive. Although bank secrecy was not identified as a problem in obtaining information to execute MLA requests, there were concerns highlighted by law enforcement authorities about the occasional delay by financial institutions in responding to requisitions for information, and the usefulness of the information provided to authorities.

In relation to extradition, the lead examiners recommend follow-up to ensure that Slovenia does prosecute its nationals in circumstances where extradition is refused, in accordance with Article 10(3) of the Convention; and also to confirm that under Slovenian law, in the absence of an extradition treaty with another Party to the Convention, the Convention in conjunction with the Code of Criminal Procedure, will be the basis for extradition.

3. Prosecution

a. Mandatory prosecution

127. The foreign bribery offence is subject to prosecution *ex officio* under Slovenian law, requiring the state prosecutor to institute a criminal prosecution if there is a reasonable suspicion that the offence has been committed. It is the duty of state prosecutors in Slovenia to file and prosecute criminal charges and perform other procedural acts in criminal proceedings on behalf of the state.

⁷⁶ See Article 10(3) of the Convention.

b. Grounds for precluding or terminating proceedings

(i) Terminating proceedings

128. Despite the principle of mandatory prosecution, there are circumstances available under the Code of Criminal Procedure enabling a state prosecutor to terminate the prosecution case at any stage of the pre-trial procedure. In particular, the prosecutor can dismiss a criminal report submitted by the police at the pre-trial investigation stage if satisfied that no offence was committed, the act is statute barred, amnestied or pardoned, or if no reasonable suspicion exists against the suspect.⁷⁷ The prosecutor can also, following a judicial investigation, refrain from prosecuting on the same grounds. In either case, the injured party must be notified of the decision and the reasons. The victim is entitled to continue the criminal proceedings.

129. In limited situations, the state prosecutor can decide to formally abandon the prosecution in circumstances where the Criminal Code lays down that the court may or must remit the penalty, and the state prosecutor assesses that in view of the actual circumstances of the case a sentence alone without a criminal sanction is not necessary.⁷⁸ The remission of penalty is possible only when it is expressly provided for by the statute. In relation to the foreign bribery offence, article 268(3) of the Criminal Code on the waiver for punishment for “effective regret” is considered a remission of penalty. In that regard, article 268(3) only applies where the perpetrator gives the bribe on the request of the public official, and the perpetrator subsequently reports the offence to authorities before it was discovered (or before knowing the offence was discovered).⁷⁹ The prosecution authorities explained that, in practice, abandonment is used in less serious cases, for example, car accidents. In order to authorise abandonment, one safeguard is that a senior prosecutor must sign off on a request made by a prosecutor in charge of the file. Another safeguard is that the injured party would normally be notified of the decision, and is entitled under article 19 of the Code to continue the proceedings. A senior prosecutor indicated that this provision simply would not be used by prosecutors in cases of foreign bribery, given the seriousness of the offence.

130. The Code of Criminal Procedure also enables prosecutions to be suspended or even transferred into a settlement procedure. In relation to suspension, prosecution authorities stated that this can only be achieved under the Code with the consent of the injured party and the satisfaction of a number of other conditions. Similarly, any proposed settlement with the accused party would require the consent of the injured party. The prosecution authorities re-iterated that these provisions are not used for serious crimes and accordingly would not be appropriate for use in a foreign bribery case. Moreover, as a matter of law, a foreign bribery offence probably would not even technically meet the requirements of the suspension or settlement provisions, due to the absence of an injured party to provide the necessary consent.

(ii) Immunities

131. Under the Slovenian legal system, members of parliament and the judiciary enjoy certain immunities from criminal prosecution. The immunities are enshrined in the Constitution of the Republic of Slovenia. In that regard, deputies of the National Assembly and members of the National Council are immune from criminal liability for any opinion expressed or vote cast at sessions of the Parliament or its working bodies. Similarly, members of the judiciary cannot be held accountable for an opinion expressed during decision-making in court. Slovenian authorities refer to this type of immunity as “professional immunity” which is directly related to the functions of the office holder. In relation to a judge, for example, suspected of a criminal offence in the performance of judicial office (including the acceptance of a bribe in

⁷⁷ See article 161 of the Code of Criminal Procedure.

⁷⁸ See article 163, Code of Criminal Procedure.

⁷⁹ The “effective regret” provision is discussed in section C.4.c.i. of this Report.

relation to a case before the court), the judge may not be detained nor may criminal proceedings be initiated without the consent of the National Assembly.

132. A wider immunity, referred to as “non-professional immunity”, is also available under the Constitution to members of parliament and judges of the Constitutional Court. If this type of immunity is claimed by the office holder, criminal proceedings cannot be initiated without the permission of the National Assembly⁸⁰ or, where relevant, the National Council⁸¹ except where the office holder has been apprehended committing an offence subject to imprisonment in excess of five years. However, even where the office holder has not claimed immunity or has been apprehended committing an offence attracting an imprisonment term exceeding five years, the immunity may still be granted.⁸²

133. The lead examiners are concerned to assess whether the immunities available are too wide and could undermine the credibility and authority of the offices and institutions that they are designed to protect. In criminal cases where immunity applies, a state prosecutor is unable to obtain a court order to conduct an investigation or to present an indictment, without first obtaining the authorisation of the National Assembly or the National Council, and proof thereof.⁸³ However, it was pointed out by state prosecutors that the law did not prevent initial evidence gathering to be undertaken by law enforcement authorities. In practice, state prosecutors indicated that reliance on immunities is quite rare and would not be expected to act as an impediment to foreign bribery proceedings. Indeed, in cases involving parliamentarians, it was stated that the immunity provisions are typically not invoked. Nevertheless, there is a danger that the immunities could impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences.

134. The lead examiners believe that a system based on functional immunity, that is, immunity only in respect of acts carried out in the performance of the officeholder’s duties, would be sufficient to ensure their independence and to protect them from unfounded or malicious prosecutions connected with the carrying out of their duties. In Phase 1, the Slovenian authorities indicated that 20 members of Parliament had formally initiated a process in 2004 for the abolishment of the non-professional immunity in the Constitution. In addition, the Commission for the Prevention of Corruption had prepared a set of guidelines to assist members of Parliament when deciding on the grant of immunities. The guidelines were designed to limit immunities to deeds closely and directly related to the performance of the function of the office holder. At the time of the on-site visit, neither of these initiatives had been successfully implemented, although since then Slovenia has indicated that the guidelines have been adopted by the National Council.

Commentary

The lead examiners recommend that the Slovenian authorities take measures , within the constitutional principles of the state, in order to ensure that immunity from criminal proceedings available to certain designated office holders does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences. These measures could include the adoption of guidelines establishing clear criteria for lifting the immunity of office holders, especially in relation to non-professional immunity.

⁸⁰ The National Assembly is the body responsible for granting immunity to members of the National Assembly and judges. See Constitution of the Republic of Slovenia, articles 83, 134, and 167.

⁸¹ The National Council is the body responsible for granting immunity to members of the National Council. See Constitution of the Republic of Slovenia, article 100.

⁸² See, in particular, article 83(3) of the Constitution of the Republic of Slovenia in relation to deputies of the National Assembly. The same conditions apply to members of the National Council (article 100) and judges of the Constitutional Court (article 167).

⁸³ See, article 136 of the Code of Criminal Procedure.

The powers to suspend, abandon, or settle a criminal prosecution under the Criminal Code should be monitored to ascertain whether these powers are applied in practice to corruption crimes, including foreign bribery cases.

c. Jurisdiction

(i) Territorial jurisdiction

135. The rules for establishing territorial jurisdiction are laid down in articles 10 and 120 of the Criminal Code.⁸⁴ The legal framework on jurisdiction does not explicitly state whether the rules for establishing territorial jurisdiction cover offences only partly committed in Slovenia, but the Slovenian authorities have indicated that jurisdiction may be established when the bribery offence is committed only in part in its territory (for instance where a phone-call or e-mail emanating from Slovenia conveys an offer or promise of a bribe). No supporting case law was available. Note also that permission of the Ministry of Justice of Slovenia is required to establish territoriality jurisdiction in Slovenia after a criminal procedure has already been initiated or discontinued in a foreign country (article 124(1) of the Criminal Code).

(ii) Nationality jurisdiction

136. Article 122 of the Criminal Code sets forth the principle of nationality jurisdiction for all offences, subject to a dual criminality requirement (article 124(3) of the Criminal Code). In Phase 1, Slovenia indicated that this requirement was understood broadly (“the perpetrator’s conduct must constitute a criminal offence in the country where it was committed, and not specifically the offence of bribing a foreign public official”). The Slovenian authorities had also indicated that the case would be covered where a bribe is given by a Slovenian national to a public official of country A in country B, where country B does not criminalise bribery of foreign public officials; as long as the bribery of domestic officials is punishable in country B (see also Phase 1 Report, pp.22-23). At the time of the Phase 2 evaluation, there was still no supporting case law of this broad interpretation of the dual criminality requirement. Note also that the Criminal Code is applicable to any foreign citizen who has, in a foreign country, committed a criminal offence against a third country or any of its citizens and has been apprehended in the Republic of Slovenia and is not extradited to a foreign country, provided that the offence concerned is punishable by a prison sentence of at least three years according to the Slovenian Criminal Code. In such cases, the court can not impose a sentence on the perpetrator that is heavier than the sentence prescribed by the law of the country in which the offence was committed (article 123 of the Criminal Code).

(iii) Jurisdiction – legal persons

137. Pursuant to article 3(1) of the Liability of Legal Persons for Criminal Offences Act, Slovenian and foreign legal persons are liable for criminal offences committed in Slovenia. The lead examiners note that here again the issue of the extent of the territorial link needed to allow for this jurisdictional rule to apply remains open. In certain circumstances, Slovenian legal persons can also be found liable for criminal offences committed wholly abroad if these offences are committed “against the Republic of Slovenia, a citizen thereof, or a domestic legal person” (paragraph 2), or “against a foreign state, foreign citizen or foreign legal person” (paragraph 3); although it would seem that these provisions have never been used. Note also that Slovenia has indicated that it had no information on whether a parent company based in Slovenia had ever been prosecuted for acts committed by its foreign based subsidiaries.

⁸⁴ The legal framework on jurisdiction has not changed since Phase 1, and is described in details on pages 22-23 of the Phase 1 Report.

Commentary

The lead examiners recommend that the Working Group follow up on the application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, in particular in cases of proceedings against legal persons.

d. Statute of limitations

138. Pursuant to article 111 of the Criminal Code, the statute of limitations for foreign bribery offences committed for the purposes of obtaining both an “improper act” (article 268(1) of the Criminal Code) or a “proper act” (article 268(2) of the Criminal Code) is 5 years from the day the offence is committed. The statute of limitations may be interrupted and suspended, but the criminal prosecution is absolutely barred when double the limitations period has elapsed (*i.e.* 10 years for foreign bribery) as set out in article 112 of the Criminal Code. It may be interrupted (*i.e.* a new period starts) by any procedural act performed to initiate the criminal prosecution. In relation to suspension of the statute of limitations, authorities have indicated that pursuant to case law, suspension occurs as long as the perpetrator is not identified (since the criminal proceedings can be initiated only against a specific person); immunities apply; or article 179 of the Criminal Procedure Code applies (*e.g.* the accused is unfit for trial due to illness). The Slovenian authorities have reiterated that the applicable limitation periods, taking into account the possibilities for interruptions and extensions, have not presented serious problems in investigating complex crimes; and have indicated that there are no cases where an investigation of fraud or corruption was terminated due to the expiry of a limitation period. For information on issues related to the period for an investigative judge to perform a judicial investigation, see section C.2.a.i.

4. The Offence of Bribery of Foreign Public Officials

a. Background

139. Although it became a Party to the Convention in 2001, Slovenia had already introduced in March 1999 the offence of bribery of foreign public officials in its Criminal Code. This was done by the Slovenian parliament not through the introduction of a new article, but through the extension of the definition of “official” to cover foreign officials in addition to domestic officials. Active bribery of domestic and foreign officials are thus covered by the same article (article 268 of the Criminal Code, Active Bribery), and both types of officials are defined under article 126.2 of the Criminal Code. Additional amendments to the Criminal Code were adopted in 2004 modifying the definition of public officials (notably ensuring that all members of local assemblies and officials from all international organisations are covered), introducing the element of “third party beneficiaries”, and increasing sanctions.

b. Elements of the offence

(i) Definition of a foreign public official

140. The definition of “official” in article 126.2 of the Criminal Code covers domestic public officials in paragraphs 1, 2, 3 and 4; while paragraphs 5, 6 and 7 cover foreign and international officials. Paragraph 5 provides that foreign officials (“a person in a foreign country carrying out legislative, executive or judicial function or any other official duty at any level”) are included in the definition of “official”, on condition that they can be defined in a way that meets the criteria used to define domestic public officials in paragraphs 1, 2 or 3.⁸⁵ Paragraph 1 covers persons holding legislative offices and local and regional

⁸⁵ Paragraph 6 states that international public servants are covered under the same condition, and paragraph 7 covers officials at international tribunals.

members of representative bodies; paragraph 2 covers all persons “carrying out official duties or exercising a public function with state bodies”; and paragraph 3 covers “any other person exercising official duties by authorisation of the law, of by-law or of the contract or arbitration concluded on the basis of the law”.

141. During the on-site visit, prosecutors indicated that they did not expect, in most foreign bribery cases, any major problems in demonstrating that a foreign legislative, administrative or judicial official (or any other person exercising a public function in a foreign state) receiving the bribe is covered by the criteria laid down in paragraphs 1, 2 or 3. The lead examiners acknowledge that the broad criteria used in paragraphs 1, 2 and 3 of article 126.2 of the Criminal Code seem to cover all types of officials defined in Article 1(4) of the Convention. They also note, however, that Slovenia’s definition of the term “official”, unlike the Convention, focuses on functional criteria, not providing a list of offices (except legislative offices), and that paragraph 3 of article 126.2 CC has an explicit reference to the law of the official’s country, as it defines officials on the basis of their duties as authorised by law or contract (the Convention does not foresee the presence of any such explicit reference to the law of the foreign official). More importantly, there is also a concern that officials of non-internationally recognised countries, autonomous territories or separate customs territories (see Commentary 18 and Phase 1 Report, pp.7-9, 38-39) might not be covered by the Slovenian definition of foreign public officials. For example, on-site visit discussions were not conclusive on whether officials from the Kosovo Provisional Institutions of Self-Government are covered.⁸⁶ In addition, the Slovenian authorities have indicated that a person exercising a public function for a foreign public enterprise is covered by the definition only when this enterprise has been delegated public authority by foreign law, and when the act of that person (provided in return of the bribe) is based on an explicit authorisation or obligation of foreign law.⁸⁷ The lead examiners were concerned that this is not consistent with Commentary 14, which provides that persons exercising a public function for “any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence”⁸⁸ are covered by the Slovenian definition of foreign officials.

142. In Phase 1, concerns were also expressed in relation to the fact that in practice, in considering whether the bribed person is a foreign official, a “double test” would have to be fulfilled (*i.e.* conformity with the definition of Slovenian officials and with the foreign domestic definition of officials according to foreign law), entailing a mutual legal assistance request, except where the public nature of the functions exercised by the foreign person is evident. In Phase 2, reassurances were provided by Slovenian prosecutors and private lawyers, who indicated that paragraph 2 could be used as a “catch all” criterion, and that as such mutual legal assistance or proving that the official is considered as such according to the law of his/her own country would not often be necessary. However, a Ministry of Justice official and a judge provided a slightly diverging view: they expected that the law of the foreign official would have to be considered in most cases in order to prove that the criteria laid down in paragraph 1, 2 or 3 are fulfilled. While the lead examiners acknowledge that there is no actual practice surrounding this issue and that this issue is different from the one of having a statutory definition of foreign officials that is explicitly non-autonomous from foreign law, they are concerned that in practice Slovenian prosecutors could be asked to prove that a "double-test" is fulfilled in establishing the status of the bribed person (*i.e.* the conformity with the definition of Slovenian officials and with the foreign domestic definition of officials according to foreign law).

⁸⁶ Note that Slovenia is a significant economic actor in Kosovo (*e.g.* state-controlled Slovenia Telecom became in 2006 the owner of the largest internet operator in Kosovo).

⁸⁷ See the Phase 1 Report, p.8. Persons working in public enterprises are not explicitly covered by the definition of officials provided by article 126(2) Criminal Code.

⁸⁸ This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board. (see Commentary 14)

(ii) *Bribery through intermediaries*

143. Article 268 does not stipulate that the offence may also be committed through intermediaries (as set forth in Article 1 of the Convention). In Phase 1 the Slovenian authorities stated that persons who bribe through intermediaries are punishable under Slovenian law, but no supporting case law could be provided. In the Responses to the Phase 2 Questionnaires, Slovenia indicated that “*there [had been] no such cases*” where a conviction was imposed on a briber that had used an intermediary to commit the offence. Slovenia has also argued that bribery through intermediaries could possibly be covered by article 269a of the Criminal Code (trading in influence); an argument which raises concerns due to the fact that in certain cases the intermediary will simply be a medium for communicating the bribe, not an influence peddler. During the on-site visit, the Slovenian authorities indicated that in such cases the rules on participation in a criminal offence laid down in the general section of the of the Criminal Code could be used to obtain a conviction against the suspected briber, provided that his/her intent is specific enough. The lead examiners are nevertheless concerned that in cases where the intermediary is only an unwitting tool of the briber, it might be impossible to establish that the briber solicited or was complicit to a criminal offence of bribery (which the intermediary has not consciously participated in).

(iii) *Bribery for acts outside of the official’s authorised competence*

144. Article 268 of the Criminal Code only covers bribery for obtaining the performance of acts or omissions by the official “within the scope of his/her official authority”, *i.e.* the performance of acts or omissions that are within the framework of the foreign official’s authorised duties. Article 1 of the Convention is broader in that it covers acts and omissions “in relation to the performance of official duties”, including acts which do not necessarily fall within the precise definition of the official’s authorised competence. Article 1(4)(c) further indicates that this “includes any use of the public official’s position, whether or not within the official’s authorised competence”. The fact that article 268 of the Criminal Code solely addresses bribery committed for the purpose that the public official performs an “official act” reinforces the impression that Article 1 of the Convention is broader, as it does not limit itself to bribery for obtaining “official acts”.⁸⁹

145. There are two clear examples of cases that would be covered by Article 1 of the Convention, but not by article 268 of the Criminal Code: (i) the case where a person gives a payment to a senior official of a foreign government in order that this official use his/her office – although acting outside his/her competence – to make another foreign official award a contract to this person’s company; and (ii) the case where a person gives a payment to a foreign public official to obtain and disclose confidential information from files not located within his department and managed by another foreign public official (*e.g.* information regarding a competitor’s bid). Slovenia has indicated that the former example could be covered by the offence of trading in influence (article 269a of the Criminal Code), while the latter case could constitute an offence of criminal solicitation (article 26 of the Criminal Code) of an offence of abuse of office (article 261 of the Criminal Code) by the foreign public official.⁹⁰

⁸⁹ These issues had already raised concerns in Phase 1, where the Group recommended that these issues be followed up in Phase 2 (pp.10-11, 39).

⁹⁰ Article 26 Criminal Code provides that “anybody who intentionally solicits another person to commit a criminal offence shall be punished as if he himself had committed it”; and that the person soliciting another to commit an offence sentenced with three years’ imprisonment or heavier shall be punished for the criminal attempt even if the solicited offence is never attempted. Paragraph 3 of article 261 Criminal Code provides that “an official who, with the intention of procuring a property benefit for himself or for another, abuses his office or exceeds the limits of his official duties or fails to perform his official duties, whereby such conduct does not constitute any other criminal offence, shall be sentenced to imprisonment for not less than three months and not more than five years”.

146. The lead examiners were not totally convinced by the explanation provided, in particular with regard to the latter case. They note that possible problems could be associated with such an approach, notably with regard to (i) arguments by the defendant that the bribe was solicited by the foreign official, not instigated by the active Slovenian briber, (ii) the possible need to prove that the foreign officials' behaviour in fact constituted an abuse of office in his/her own country, and (iii) the non-availability of the foreign official for investigation.⁹¹ These concerns were echoed by certain lawyers met during the on-site visit, who indicated that prosecuting an individual or a company for having solicited a breach of duty by a public official in the absence of such official is unheard of, and would certainly create practical problems.

147. The fact that article 268 of the Criminal Code is limited to bribery for an act falling within the official duties of the public official also raises the issue of the extent of reliance of the offence on foreign law. Indeed, during the on-site visit and in the Responses to the Phase 2 Questionnaire the Slovenian authorities confirmed that in order to secure a conviction of the active briber in foreign bribery cases, proof from the foreign official's country is required in order to determine what constitutes "the scope [of the public official's] official authority", and to determine whether the act performed by this official constituted an "official act". The lead examiners consider that this is not totally consistent with Commentary 3 of the Convention, which provides that while various legislative approaches can be used to meet the standard of the Convention, it should be "understood that every public official [has] a duty to exercise judgement or discretion impartially" and proving that this person has a duty to exercise judgement or discretion impartially should "not requir[e] proof of the law of the particular official's country".

(iv) *Bribery for "proper" acts/omissions vs. bribery for "improper" acts/omissions*

148. Pursuant to article 268 of the Criminal Code, the offence of foreign bribery is divided into two parts: paragraph 1 lays down the offence of bribery for obtaining an "improper" act or omission (punished with a maximum of 5 years imprisonment and a fine), and paragraph 2 lays down the offence of bribery for a "proper" act or omission (sanctioned from 6 months to 3 years imprisonment, and the applicable fine on legal persons in such cases would also be lower; for more on sanctions see section C.6 of the Report). Under paragraph 1 fall acts of bribery committed in order that an "official performs within the scope of his/her official authority an official act which s/he should not have performed or not to perform an official act which he/she should or could have performed"; while under paragraph 2 fall acts of bribery committed in order that an "official performs within the scope of his or her official authority an official act which he/she should or could perform or not to perform an official act which s/he anyhow may not perform".

149. In an attempt to clarify the distinction between the two types of offences, the Slovenian authorities have indicated that the criteria for determining whether an offence has been committed under paragraph 1 or 2 is whether the act or omission by the public official (within the scope of his/her official authority) is "illegal" or "legal".⁹² Slovenia further explained that bribery for ensuring that a foreign official uses his/her discretionary power to act in a certain manner falls under paragraph 2 (bribery for a proper act/omission).

⁹¹ Note also that article 261 Criminal Code (associated to article 25 or 26 Criminal Code) differs significantly from article 268 Criminal Code in that the applicable level of punishment for article 268 Criminal Code offences depends on whether the advantage obtained from the offence is a property benefit or a non-property benefit.

⁹² In Phase 1, to illustrate the difference between the two paragraphs the Slovenian authorities had cited two actual cases of domestic bribery: a person who bribed an investigative judge to reject a flawless and well-grounded application of the prosecutor for an investigative action was punished under paragraph 1 (improper act/omission); a person who bribed a public official to speed up (within the legal time limits) an otherwise valid and well-grounded application for economic subsidies was punished under paragraph 2 (proper act/omission).

Accordingly, Slovenia has also indicated that a bribe paid by a best qualified bidder in a tender would be punished under the more lenient paragraph 2.

150. The lead examiners note that, while the distinction between bribery for proper and improper act in the domestic context seems well established, in foreign bribery cases this distinction – along with the level of discretion with which the foreign official is empowered to perform “proper” acts – will ultimately be defined by foreign law (during the on-site visit, Slovenian authorities indicated that the qualification of the offence as bribery for a proper or improper act/omission must rely heavily on the particular laws and official documents of the bribed official’s country). Accordingly, the lead examiners consider that there are some uncertainties regarding the application of this distinction in foreign bribery cases. For example, it is somewhat unclear whether a briber could be sanctioned under the harsher paragraph 1 in cases where foreign law does not provide enough safeguards for ensuring that the judgement and discretion of public officials in awarding a contract be exercised impartially. Indeed, in such cases it might be difficult to prove using foreign law that the foreign official performed an “improper” rather than a “proper” act in the context of the award procedure. This raises the issue of whether, contrary to Commentary 3 of the Convention, a reference to foreign law is needed for defining the public official’s duty to exercise judgement or discretion impartially, and of whether the rules differentiating between bribery for proper and improper acts/omissions can be applied with enough consistency in foreign bribery cases to ensure the application sanctions that are effective, proportionate and dissuasive.

Commentary

The lead examiners recommend that Slovenia take appropriate measures to ensure (i) that bribery through an intermediary – including cases where the intermediary is only a unwitting medium for communicating the bribe – constitutes the basis for a foreign bribery offence as defined under Article 1 of the Convention; (ii) that bribery to obtain any use of the foreign official's position – whether or not within the official's authorised competence and whether or not for the purpose of obtaining an “official” act – constitutes the basis for a foreign bribery offence; and (iii) that a reference to foreign law is not needed for defining the foreign official’s duty to exercise judgement or discretion impartially, and accordingly to consider abolishing – insofar as it applies to detecting, investigating, prosecuting and sanctioning foreign bribery – the distinction between bribery for obtaining a “proper” and an “improper” act/omission, as this distinction depends on the definition of the foreign official’s duty and level of discretion as provided under foreign law, and on the strength of the impartiality requirements and safeguards defined therein.

The lead examiners also recommend that the Working Group follow up, as practice develops, on whether the definition of foreign public official covers (i) bribery of employees of foreign public enterprises regardless of their legal form, including those under the indirect control of a foreign government(s), and (ii) persons exercising a public function for any organised foreign area or entity (not just States), such as an autonomous territory.

c. Defences

151. The general part of the Criminal Code (articles 11 to 21) sets forth the general circumstances that exonerate a person from criminal liability or responsibility, including for the offence of bribery (e.g., state of necessity, duress, mistake of law, mistake of facts, etc.). As described in Phase 1, there is no exception for small facilitation payments as such, and courts have never excluded the criminalisation of such payments in cases of bribery of Slovenian officials. Furthermore, Slovenia indicates that small facilitation payments could not be covered by article 14 of the Criminal Code; which provides that “*de minimis* offences” shall not constitute criminal offences.

152. No defence applies specifically to the bribery offence. However article 268(3) of the Criminal Code provides that the briber may be exempt from punishment (on discretion of the judge) when s/he committed the bribery act following bribery solicitation by the official and reported it before it was discovered or before knowing that the offence was discovered. As this provision on “effective regret” primarily concerns the (non-)application of punishment and is not a defence as such, it is treated in the section on sanctions (section C.6.a.iii of the Report).

5. Liability of Legal Persons

a. Establishing liability of legal persons

(i) Legislation

153. Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.” Under the Slovenian legal system, article 33 of the Criminal Code provides that “the liability of a legal person for criminal offences which the perpetrator commits in its name, on its behalf or in its favour shall be provided for by statute.” In furtherance of this requirement, the 1999 Liability of Legal Persons for Criminal Offences Act (“Liability of Legal Persons Act”) was enacted in Slovenia to establish the liability of legal persons under the Act related to a limited list of criminal offences, including the active bribery of domestic or foreign public officials.⁹³

(ii) Definition of legal persons

154. The entities subject to liability under the Liability of Legal Persons Act are “legal persons”. Although the law does not define the concept of “legal person”, it is clear that the Act covers domestic and foreign legal persons, but the Republic of Slovenia and local self-governing communities are expressly excluded from liability under the Act.⁹⁴ The Slovenian authorities, although lacking case law on this point, have indicated that the concept of “legal persons” is to be interpreted broadly. The authorities re-affirmed that domestic legal persons are those established in accordance with national laws that regulate conditions and procedures for establishing different types of legal persons, for example, the Companies Act and the Associations Act. It was stated that all the more common forms of legal entities are covered under the Liability of Legal Persons Act, including unlimited companies, limited partnership companies, joint stock companies, limited liability companies, and also foundations and other non-profit entities. In relation to state-owned and state-controlled entities, authorities confirmed that these are considered “legal persons” for the purposes of the Act and are not excluded from liability.⁹⁵

(iii) Liability of legal persons

155. The Liability of Legal Persons Act establishes the liability of legal persons for certain criminal offences defined under the Act. At the time of the on-site visit, no legal person had been convicted for bribery of a foreign public official, although one conviction had been recorded related to the offence of money laundering. The grounds for liability of a legal person under the Act are linked to the crimes committed by a natural person, although liability is not conditional upon first obtaining a conviction of the

⁹³ See article 5, 1999 Liability of Legal Persons for Criminal Offences Act.

⁹⁴ See article 2, 1999 Liability of Legal Persons for Criminal Offences Act.

⁹⁵ Article 2 of the 1999 Liability of Legal Persons for Criminal Offences Act provides that entities covered by the “Republic of Slovenia” and local and self-governing communities are excluded from liability under the Act. The Slovenian authorities confirmed in Phase 1 that the “Republic of Slovenia” covers state organs, public administration bodies *etc.*, but not state-owned and state controlled companies.

natural person. In fact the legal person can be liable under the Act even if the perpetrator is not held criminally liable for the committed criminal offence. The criminal offences that a legal person can be found liable for under the Act are listed in article 25 of the Act, and it expressly includes the foreign bribery offence in article 268 of the Criminal Code.

156. Article 4 of the Act confirms that the basis of liability of the legal person is linked to the criminal offence committed by the natural person in the name of, on behalf of, or in favour of the legal person. A positive aspect of the approach taken in the Act is that liability is not necessarily confined to the actions of senior management, but is framed to apply to the conduct of all persons (employees, contractors, agents, personnel in a subsidiary company, etc.) that have a relationship with the legal person, and which may be based on the authority, duty and consent to act. Prosecution authorities noted that in most cases, according to practice, the actual perpetrator is either a leading person or an employee in a legal person responsible for the criminal offence.

157. Turning to the grounds of liability for the legal person, article 4 of the Act provides that if the natural person commits a crime covered by the Act, the liability of the legal person will be triggered if:

1. the criminal offence was committed to carry out an illegal resolution, order or endorsement of its management or supervisory bodies;
2. the management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence;
3. it has at its disposal illegally obtained property gains or uses objects obtained through a criminal offence – although a legal person may only be liable for criminal offences committed out of negligence;
4. the management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them.

158. The concepts of “management or supervisory bodies” are general concepts and are intentionally not defined in the Act, with the view to encompassing a broad range of internal arrangements within various company structures. In most cases the terms will include directors, managers and supervisory boards that have the capacity of managing and supervising the activities of the legal person. In Phase 1, the Slovenian authorities indicated that these terms could also cover persons to whom governing executive authority has been delegated (*i.e.* persons empowered to act on behalf of the legal person). The lead examiners noted that the application and scope of the various elements of article 4 have yet to be fully developed and considered by the courts.

159. The Convention requires, in Article 3(1), that legal persons shall be subject to effective, proportionate and dissuasive criminal sanctions for foreign bribery and, pursuant to Article 3(2), in the event that a Party’s legal system does not provide for the criminal responsibility of legal persons, that Party shall ensure that legal persons shall be subject to effective proportionate, and dissuasive non-criminal sanctions, including monetary sanctions. The actual sanctions available under the Act are discussed in section C.6.a.ii., of the Report. However, there are two related articles of the Liability of Legal Persons Act, which caused the lead examiners some concern, article 11 (dealt with in section C.6 a of the Report) and article 28 (dealt with below).

160. Article 28 of the Act states that the prosecutor “may decide not to request the initiation of criminal proceedings against a legal person if the circumstances of the case show that this would not be expedient because the legal person’s participation in the criminal offence was insignificant...”. Although the Slovenian authorities maintain that this exemption must be based on well-grounded reasoning of the prosecutor, the lead examiners share the concerns outlined in Phase 1, that this provision is vague and therefore could potentially unduly restrict the liability of legal persons. No steps have been taken to clarify

the law, nor place clear limits on the interpretation of the term “insignificant”. Legal academics commented that the principle of legality under Slovenian law extends to both natural and legal persons requiring mandatory prosecution. It was acknowledged that article 28 provides the prosecutor with a level of discretion not to initiate proceedings. Participants, particularly from academia, were firmly of the view that this provision had not been widely used by prosecutors, and the problem lay more in the failure to pick up cases and investigate them, rather than dropping cases pursuant to article 28 of the Act.

b. *The investigation and prosecution of legal persons*

161. The Liability of Legal Persons Act establishes the general rule that proceedings against the legal person and the natural person are carried out together. Described in the Act as the “unity of procedure” it requires that a single charge is lodged against the accused legal person and the natural person, and a single judgement is given. The Act does, however, provide that proceedings against a legal person alone can occur where it is not possible to initiate or carry out proceedings against the natural person for reasons specified by law, or when proceedings have already been carried out against the natural person.⁹⁶ Slovenian authorities indicated that if proceedings could not be initiated or carried out against the natural person who perpetrated the offence, due to illness, death or even because the person had taken flight to escape justice, proceedings against the legal person are still possible. In every case, in order to satisfy the requirements of the Liability of Legal Persons for Criminal Offences Act, prosecution authorities must not only identify a natural person that was the actual perpetrator, but have sufficient evidence to show the direct intent of the natural person to commit the crime, before the legal person be held responsible for the crime.

162. In practice, authorities report that only few convictions have been secured under the Liability of Legal Persons Act, despite a significant number of investigations and indictments since its enactment in 1999. The lead examiners did raise concerns as to whether there were possible practical difficulties of investigators in establishing the link between the liability of the legal person and the natural person, particularly if the natural person was not convicted of the criminal offence. A legal academic at the on-site visit disagreed and commented that the explanation for the low number of convictions has arisen from poor awareness and the low priority given to the investigation and prosecution of legal persons. This view was supported by the Ministry of Justice.

163. A worrying aspect however, was that police and prosecutors indicated that there were a large number of cases against legal persons that had not progressed beyond the investigation or indictment stage. Although court delays were often said to be a problem, the priority and capability of law enforcement authorities in investigating legal persons was described by many participants as being at the heart of the problem. In that regard, many members of the legal profession, academia and the judiciary agreed that further efforts are required by Slovenia to raise awareness about the Act with the police and prosecution authorities, to ensure that possible contraventions of the law by legal persons are actively investigated and, where necessary, prosecuted. That said, a more optimistic view was expressed by two legal academics who indicated that the Act was now beginning to come to life, and that as authorities adapted to the new regime, there were many more significant cases starting to come before the courts.

Commentary

Given the low number of convictions for offences involving legal persons since the enactment of the Liability of Legal Persons Act in 1999, and the limited experience of police and prosecution authorities of investigating offences against legal persons, it is recommended that Slovenia take further steps to raise awareness about the Act to ensure that possible contraventions of the law by

⁹⁶ See article 27 of the 1999 Liability of Legal Persons for Criminal Offences Act.

legal persons are actively investigated and prosecuted. This could include the issuance of guidelines to police and prosecutors to assist with the investigation and prosecution of legal persons pursuant to the Act and the provision of further training for police and prosecutors about the operation of the Act.

The lead examiners recommend that, due to the low number of convictions since its enactment in 1999, the Slovenian authorities undertake a review of the Liability of Legal Persons Act to ensure that: (i) the elements required to prove a link between the natural person that perpetrated the crime and the liability of the legal person under the Act have not proven in practice to be too burdensome; and (ii) whether the Act needs to be clarified or amended.

The lead examiners note that article 28 of the Liability of Legal Persons Act gives prosecutors the discretion not to initiate criminal proceedings against a legal person if this would not be expedient where the legal person's participation in the criminal offence was insignificant. The lead examiners consider that potential misuse of this provision, related to uncertain future interpretations of the term "insignificant", could unduly restrict the liability of legal persons. The lead examiners thus recommend that the Working Group follow up on the application of this provision as practice develops.

6. Sanctions for Foreign Bribery Offence

a. Criminal sanctions

(i) Sanctions – natural persons

164. Article 3 of the Convention requires Parties to institute effective, proportionate and dissuasive criminal penalties for the foreign bribery offence, comparable to those applicable to bribery of the Party's own domestic officials. In Slovenia, the principal criminal sanctions applicable to natural persons in cases of active bribery of domestic and foreign officials are identical: imprisonment between one and five years as well as a fine in cases of an "improper" act/omission from the public official (article 268(1) of the Criminal Code); and imprisonment between six months and three years in cases of a "proper" act/omission (article 268(2) of the Criminal Code). Note however that, as described in section C.4.b.iv. of the Report, the behaviours sanctioned under paragraph 1 and paragraph 2 of article 268 of the Criminal Code could differ depending on whether the bribery act is committed at home or abroad, as the determination of whether the public official's act are "proper" or "improper" in a foreign bribery case ultimately depends on the description of this official's tasks and mandate as defined in foreign laws, regulations and contracts. Bribery by the best qualified bidder in a public tender is subject to three years imprisonment, as it falls under the definition of bribery for a "proper" act/omission (article 268(2) of the Criminal Code).⁹⁷

165. Fines are prescribed to sanction offences falling under article 268(1) of the Criminal Code on "improper" acts/omissions (mandatory), and not under article 268(2) of the Criminal Code on "proper" acts/omissions. However, fines could still be discretionarily applied in addition to imprisonment for cases under articles 268(2) of the Criminal Code if the bribery has been committed "out of greed" pursuant to article 36(2) of the Criminal Code (accessory sanction).

166. The limits on the fine are regulated in the general part of the Criminal Code (article 38), and are based on a day-fine system. According to this system, which is based on the average monthly net salary per

⁹⁷ The Slovenian authorities indicate that bribery affecting the terms and conditions of a tender would in all cases fall under the definition of bribery for an "improper" act/omission (article 268(1) of the Criminal Code) and be subject to a maximum sanction of five years imprisonment.

employee in Slovenia, the maximum fine is EUR 368 000 when the offender acts to obtain a “material advantage” (article 38(1) of the Criminal Code), and in all other cases the maximum fine is EUR 88 320.⁹⁸ In fixing the amount of the fine imposed, courts must take into account the perpetrator's daily income (net salary and other incomes) as well as his/her family expenditures. In Phase 1, the Slovenian authorities indicated that, in their view, 99% of the cases of corruption are committed to obtain a material advantage, thus opening up the possibility of punishing these acts with a fine up to EUR 368 000.

167. In the context of this Phase 2 evaluation, no statistical information was provided to the examining team on sanctions imposed for punishing financial or corruption offences; but discussions with lawyers met during the on-site visit raised a number of issues. They indicated (i) that courts very rarely use the possibility under the Criminal Code to impose high fines to sanction any offence committed to obtain a material advantage, (ii) that monetary sanctions were generally underused in practice for the purpose of fighting financial and corruption crimes, and (iii) that the day-fine system was not yet working in practice because it was misunderstood and that the heavy case load of judges has a negative effect on their capacity to impose fines which are effective, proportionate and dissuasive in complex economic crimes cases. Similarly, in a different panel a Supreme Court judge indicated that the importance of imposing fines in sanctioning financial crimes and corruption was not understood by all, and that fines were being very inconsistently applied. He also stated that preference seemed to be given to the imposition of suspended prison sentences and no fines.

168. The court can also bar the perpetrator from performing a professional occupation from 1 to 5 years if, by abusing such a position, activity or function s/he committed a criminal offence and if the court has probable cause to believe that further performance of such an occupation would be dangerous (articles 62(4) and 67 of the Criminal Code). The examining team was not provided with any data of the use of these provisions in sanctioning active bribery. Similarly, pursuant to article 255 of the Companies Act (2006), natural persons convicted of a criminal offence against the economy (or against labour relations and social security, against legal transactions, against property, or against environment, space and natural resources) are temporarily excluded from being board members or managers. However, it would seem that this exclusion might not be applicable for sanctioning bribery offences, as bribery does not figure under the chapter of criminal offences against the economy in the Criminal Code. Note also that foreign citizens convicted for bribery can face deportation from the territory of Slovenia for a period of between 1 and 10 years (articles 34(4) and 40 of the Criminal Code).

(ii) *Sanctions – legal persons*

169. The lead examiners note that, since the entry into force of the of the Liability of Legal Persons Act in 1999, there has been only one conviction of a legal person for a criminal offence (money laundering), and that as such Slovenian judges have only limited experience in sanctioning legal persons. For acts covered by article 268(1) of the Criminal Code (bribery for “improper acts”) – like for all criminal offences punished by over 3 years imprisonment – the fine imposed on a legal person may be between EUR 10 434 and EUR 626 040,⁹⁹ or up to 200 times the amount of the damage caused or proceeds obtained through the criminal offence (articles 13 and 26 of the Liability of Legal Persons Act). For acts covered by article 268(2) of the Criminal Code (bribery for “proper acts”) – like for all criminal offences punished up to 3 years imprisonment – the fine may be between EUR 2089 and EUR 313 020, or up to 100 times the amount of the damage caused or proceeds obtained through the criminal offence (articles 13 and 26 of the Liability of Legal Persons Act). A sanction of expropriation of property or winding-up of a legal person may also be ordered in certain circumstances (articles 14-15 of the Liability of Legal Persons Act).

⁹⁸ Figures are based on an average monthly net salary per employee of 736 EUR (December 2006).

⁹⁹ All figures in this paragraph are based on the official exchange rate at the time of the introduction of the euro (1st January 2007).

In certain circumstances the court may also impose on the convicted legal person a temporary prohibition from carrying out one or more specific commercial activities. A prohibition on any changes of status of the legal entity (which could in effect cause the removal of the convicted legal person from the court register) may also be imposed in order to ensure the effectiveness of a conviction against a legal person.

170. In determining the sentence for a legal person, courts must also consider the economic position of the legal person (article 16 of the Liability of Legal Persons Act). There seems to be no prescribed method or guidance for quantifying the “economic position” or economic power of a legal person. In addition, article 11 of the Liability of Legal Persons Act provides grounds for reducing or withdrawing a sentence against a legal person held liable under the Act. In particular, under paragraph 1, it states that the sentence may be reduced, “if after the committing of a criminal offence the management or supervisory body voluntarily reports the perpetrator”. This provision does not explicitly state the stage of the proceeding at which the perpetrator should be reported for this mitigating factor to be applicable. Grounds for withdrawing a sentence against a legal person, which are laid down in paragraph 2 of article 11, are described in the following section which deals with waivers of punishment.

(iii) *Waivers of punishment*

171. Paragraph 3 of article 268 of the Criminal Code provides that the briber may be exempt from punishment (on discretion of the judge) when s/he committed the bribery act following bribery solicitation by the official and reported it before it was discovered or before knowing that the offence was discovered.¹⁰⁰ This provision concerns the application of punishment and not directly the liability of the briber (*i.e.* a conviction would still be recorded), but the prospect of its application opens up the possibility for the prosecutor to discretionarily desist from starting (or to abandon) prosecution pursuant to article 163 of the Code of Criminal Procedure; although according to Slovenian prosecutors met during the on-site visit article 163 of the Code of Criminal Procedure would not be used in serious economic crime cases. For more on the use of article 163 of the Code of Criminal Procedure, see section C.3.b.i of the Report.

172. During the on-site visit, lawyers, prosecutors and Ministry of Justice officials revealed that the waiver of punishment in article 268(3) of the Criminal Code was very rarely used, and that as such the chances of it being misused were reduced (some participants even considered that the provision should be better publicised, as it could encourage solicited bribers to break the silence about solicitation and corrupt practices, and allow more corruption cases to surface).¹⁰¹ All nevertheless agreed that there was a slight chance of possible misuse of this provision in foreign bribery cases. During the on-site visit, it was also suggested that, while this had certainly not been the intent of the Slovenian parliament, article 268(3) of the Criminal Code was probably not entirely in line with Article 3 of the Convention.

173. While the lead examiners were to a certain extent reassured by on-site visit discussions, they still consider that the presence of this waiver could eventually raise certain concerns in relation to fighting bribery of foreign public officials. They also note that the policy gains that might be achieved by this waiver for crimes involving domestic officials (*i.e.* providing a framework that emphasises the importance of the public official’s probity and that helps in pursuing passive bribery) do not apply for crimes involving foreign public officials. Indeed, the lead examiners consider that even a minimal amount of abuse of this waiver could be problematic for Slovenia’s implementation of the Convention and could foster a sense of impunity for Slovenian individuals and companies conducting international business operations. In Phase

¹⁰⁰ Note also that where this waiver of punishment for effective regret is applied the bribe must be seized from the passive briber and it may be returned to the active briber who reported the offence (article 268(4) Criminal Code).

¹⁰¹ Note that in the Responses (at 9.1) Slovenia did indicate that “there are indications in the statistics that... waiver of the prosecution... has been used in relation to minor bribes at the lower levels of public service”.

1, the Working Group had already expressed concerns that this waiver could be misused, and encouraged the Slovenian authorities to consider modifying it in relation to bribery of a foreign public official. In the Responses to the Phase 2 Questionnaire and in relation to this specific issue, Slovenia indicated that amendments to the Criminal Code are planned for 2007; and that the Ministry of Justice, when preparing the draft law on amendments to the Criminal Code, “the OECD recommendations from the Phase 1 will be studied and implemented”.

Waiver of punishment – legal persons

174. Paragraph 2 of article 11 of the Liability of Legal Persons Act provides that a convicted legal person may be given a waiver of punishment (on discretion of the judge) if after the criminal offence has been committed the management or supervisory body voluntarily and immediately orders the restitution of illegally obtained gains *or* provides indemnification for damages caused through the offence *or* reports information on the grounds for liability for other legal persons.¹⁰² In a manner similar to what was described above and in section C.3.b.i of the Report, the presence of a possibility to apply this waiver also opens up the possibility for the prosecutor to discretionarily desist from starting (or to abandon) prosecution pursuant to article 163 Code of Criminal Procedure (for more on the liability of legal persons, see section C.5 of the Report). The lead examiners are particularly concerned that the waiver could be misused and that it is in breach of Article 3 of the Convention, particularly given that the court upon conviction of a foreign bribery offence could withdraw the legal person’s sentence if the management or supervisory body “reports information on the grounds for liability for other legal persons”. The use of this waiver in practice (and of the criminal liability of legal persons) has not gained enough significance for the lead examiners to be able to assess its impact. Nevertheless, the lead examiners also note that there could be certain practical difficulties in ensuring a consistent and efficient application of this provision in complex economic crimes cases, including foreign bribery. In particular, they consider that the method used by prosecutors and courts to determine and ensure appropriate restitution of gains and indemnification for damages should be monitored.

b. Seizure and confiscation

175. The regime under Slovenian law for seizure and confiscation of the bribe and proceeds of bribery appears to be comprehensive. In the Responses to the Phase 2 Questionnaire, the Slovenian authorities indicated that the situation concerning the practical application of provisional seizure measures – which in the past has been criticised as being ineffective by other organisations (notably the Council of Europe’s GRECO and Moneyval)¹⁰³ – has significantly changed in the recent past and is still improving. They also indicated that innovations were introduced in 2005 to the framework regulating the time limits to the duration of inquiries, investigations and prosecutions in criminal cases where provisional seizure is ordered for securing confiscation of the proceeds of crime (Amendments to the Criminal Procedure Act, Official Gazette of the RS, No. 101/05); which should assist prosecutors in proceeding against financial and corruption offences and in securing confiscation.

¹⁰² The provision could theoretically have certain noteworthy applications in foreign bribery cases. For example, a Slovenian company that bribes a foreign public official in the context of a public tender, and that later goes on to lose that public tender despite having paid a bribe could be provided an incentive to report information on other (foreign) companies in the tender that were also involved in foreign bribery.

¹⁰³ Concerns have notably been expressed regarding a lack of money laundering related confiscation, the unavailability of statistics on confiscation related to other criminal offences, the absence of a simple and quick way in which the police can start the investigation of the corruption cases and arrange the necessary measures, including seizure of proceeds of crime; this being possibly due to a too burdensome and hierarchical decision-making process in the police.

176. Article 220(1) of the Code of Criminal Procedure provides for the provisional pre-trial seizure of objects which must be confiscated under the Criminal Code (or which may prove to be evidence in criminal procedure), including bribes. The police are entitled to seize such objects when executing orders of the court; as well as at the police investigation stage under certain conditions. Article 268(4) of the Criminal Code explicitly provides for the mandatory confiscation of “given” bribes. Confiscation of bribes only promised or offered (but not yet given) could also be ordered pursuant to article 69 of the Criminal Code (confiscation of objects used or intended for use through the committing of a criminal offence). Confiscation in such criminal cases is not mandatory and is determined by the competent court.

177. The provisional pre-trial seizure of the proceeds of crime (including bribery) by the court to secure confiscation is provided by article 502 of the Code of Criminal Procedure. The procedure for search and seizure relating to legal persons does not differ from the one relating to natural persons. Confiscation of the proceeds of active bribery – or of a sum of money equivalent if confiscation cannot be carried out – is mandatory (articles 95-98 of the Criminal Code). If an accurate determination of the amount of the proceeds proves too difficult, the Court must fix an amount using its discretion (article 501 Code of Criminal Procedure). It is also possible to confiscate proceeds that have been transferred to third parties (natural persons) (article 96(2) of the Criminal Code). Criminal proceeds must also be confiscated from a legal person when they have been transferred to it by the perpetrator (natural persons) free of charge or for a sum of money which does not correspond to its actual value (article 98 of the Criminal Code).

178. The only data provided by Slovenia on the use of seizure and confiscation in fighting economic crimes relates to money laundering. In 2004-05, investigations into six cases of money laundering led to the freezing of EUR 4.7 million in suspected illicit proceeds, no amount of which was later seized or confiscated. In the first half of 2006, three money laundering cases led to the seizure of EUR 102 000 in suspected illicit proceeds, no amount of which was confiscated. In a 2006 response to a Moneyval recommendation, the Slovenian authorities confirmed that the comparison of data on temporary seizure and data on finally confiscated property shows that, “at the end of criminal procedures where seizure was ordered subsequent confiscation rarely followed”. However the Slovenian authorities consider that the cause of this problem has largely been addressed by the 2005 amendments of the Criminal Procedure Code, which aim to give a preferential treatment to cases where seizure has been ordered. Slovenia indicates that the Code now provides (i) that courts must rapidly take a decision on the proposal for ordering, extension, amendment or abolition of provisional seizure; and (ii) that if the temporary securing was ordered, the competent authorities in the pre-trial stage must proceed in a particularly rapid manner.

Commentary

The lead examiners note that Slovenia has a significant array of sanctions available for punishing both natural and legal persons that engage in foreign bribery acts. Nevertheless, they recommend that Slovenia take measures to draw to the attention of investigating, prosecutorial and judicial authorities on the importance of applying sanctions which are sufficiently effective, proportionate and dissuasive on natural and legal persons convicted for foreign bribery offences, in particular emphasising the importance of adequate economic sanctions.

They also recommend that the Working Group follow up on the sanctions imposed on natural and legal persons for foreign bribery, in particular fines and the confiscation of the proceeds of bribery, with a view to assess (i) whether the sanctions imposed in practice are sufficiently effective, proportionate and dissuasive, and (ii) whether the legislative measures taken to enhance the efficiency of the seizure and confiscation regime will have the intended effect on the sanctions imposed in complex economic crimes cases, including foreign bribery. They also recommend that the Working Group follow up the use of paragraph 1 of article 11 of the Liability of Legal Persons

Act, which provides ground for reducing a sentence against a legal person where the management or supervisory body reports the perpetrator.

Regarding the waiver of punishment for effective regret the lead examiners – while being somewhat reassured by the limited use in practice of paragraph 3 of article 268 of the Criminal Code – continue to consider it a potential loophole in the effective implementation of the Convention and reiterate the concerns that were raised by the Group in Phase 1.¹⁰⁴ Accordingly, the lead examiners recommend that Slovenia either amend the waiver of punishment in paragraph 3 of article 268 of the Criminal Code to ensure it does not contravene Article 3 of the Convention; or in some other appropriate way ensure that the law does not contravene the Convention, e.g. through issuing prosecutorial guidelines. The lead examiners note that Slovenia has already indicated, in the Responses to the Supplementary Questionnaire, that it would look into this issue in the context of the forthcoming review of the Slovenian Criminal Code.

The lead examiners are also concerned about the waiver of punishment provision laid down in paragraph 2 of article 11 of the Liability of legal Persons for Criminal Offences Act. They consider that this provision could be misused and that withdrawing a sentence against a legal person on the grounds described therein (reporting information on the grounds for liability for other legal persons, or restitution of illegally obtained gains, or providing indemnification for damages caused) challenge the effectiveness of Slovenia’s implementation of Articles 2 and 3 of the Convention (requiring Parties to ensure that legal persons are liable for foreign bribery offences and subject to effective, proportionate and dissuasive sanctions). The concerns of the lead examiners are strengthened by the fact that the possibility to apply this waiver also opens up an option for the prosecutor to discretionarily desist from starting (or to abandon) prosecution pursuant to article 163 Code of Criminal Procedure. Unclear also is the method which would be used to determine and ensure appropriate restitution of illegally obtained gains or indemnification for damages. Accordingly, the lead examiners recommend that Slovenia either amend paragraph 2 of article 11 to exclude its application to the offence of foreign bribery, or in some other appropriate way ensure that the law does not contravene the Convention, e.g. through issuing prosecutorial guidelines.

c. Administrative sanctions

(i) Officially supported export credits

179. The SID – Slovene Export and Development Bank (SID Bank) utilises a range of methods to detect corruption in export transactions when scrutinising applications for official export credit support. If the SID Bank detects credible evidence that bribery is involved in an export transaction, the SID Bank can refuse to approve export credit cover, although this is not a mandatory requirement. In circumstances where support has already been approved, there are no administrative sanctions available to the SID Bank where its personnel manifest a “suspicion” of bribery or even obtain “sufficient evidence” of bribery. If however, there is a conviction for bribery related to an export transaction after support has been approved, then the SID Bank may act to invalidate the cover, deny a claim for indemnification, or in the case of an already indemnified claim, request a refund of all sums provided. In practice there have been no cases to date where the SID Bank has been required to act on the basis of a conviction for foreign bribery or other corruption offence.

¹⁰⁴ In Phase 1, the Working Group had already encouraged the Slovenian authorities to consider making the necessary changes to this waiver of punishment in relation to bribery of a foreign public official.

(ii) *Public procurement*

180. Article 42 of the 2006 Public Procurement Act (ZJN-2) requires contracting entities to exclude from participation in public procurement any candidate or tenderer (natural or legal person) who has been convicted by a final judgment for active bribery. In performing their tasks, contracting entities may request candidates and tenderers to submit a declaration to prove they have never been found guilty of such a criminal offence. Also, if the contracting entity has a reasonable doubt about the personal situation of a candidate or tenderer, it can apply at competent bodies (e.g. the Slovenian Ministry of Justice; or even the competent authorities in a foreign State if the candidate or tenderer is not established in Slovenia) in order to acquire all information deemed necessary concerning its situation. There is a concern that institutional changes within a convicted company (e.g. through mergers, acquisitions, etc.) could in fact allow such companies to circumvent this exclusion procedure.¹⁰⁵

181. According to the information obtained during the on-site visit, exclusion on the basis that the bidder had been convicted in the past for an offence of bribery has yet never been applied; even though this ground for exclusion was also present in the 2004 Public Procurement Act (ZJN-1). Thus some uncertainties remain with regard to the ability of contracting entities to effectively use this measure, and with regard to the effectiveness of this exclusion in practice.

182. In parallel with the possibility of excluding candidates or tenderers on the basis of a past conviction for an offence of active bribery, article 42 of the 2006 Public Procurement Act (ZJN-2) also provides that a candidate or tenderer can be excluded on the ground that it has – with regard to the present or prior award procedures – supplied information seriously and deliberately misrepresenting its economic and financial standing, or has failed to supply required information. Also at the time of the on-site visit the Ministry of Finance was planning to introduce a centralised ‘black list’ of candidates and tenderers (natural and legal persons) having submitted false or misleading information in the context of a tender process; in order to assist contracting entities in the selection/exclusion process. It would thus seem that this blacklist will not directly replace the need to make use of the criminal record for purposes of excluding candidates and tenderers convicted of bribery; but will have a broader scope. However, because this ‘black list’ is not in place yet, it is premature to assess its effectiveness. For example, it is still unclear how the ‘black list’ will deal with subsidiaries of black-listed companies, as well as with black-listed companies that change their status; e.g. through mergers.

(iii) *Privatisation*

183. The sale of state financial means is implemented in accordance of the Public Finance Act and in accordance with the Decree on the Acquisition, Disposal and Management of Physical Assets of the State and Communities. The commission in charge of the procedure of sale is named by the competent minister, and its president is elected by the Minister of Finance. During the on-site visit, the Slovenian authorities have indicated that no consideration has been given to the possibility of excluding convicted bribers from acquiring state-owned companies and assets.

¹⁰⁵ Article 41(3) LLCPOA could provide a tool to deal with this issue, as it states that the court may, on proposal of the state prosecutor or “according to official duty”, prohibit changes of status which would cause the removal of the convicted legal person from the court register.

7. The Money Laundering Offence

a. *Scope of the money laundering offence and associated sanctions*

184. Slovenia uses an “all-crimes approach” pursuant to which all criminal offences, including bribery of Slovenian and foreign public officials, are predicate offences for the purpose of money laundering. The offence of money laundering is defined in paragraph 1 of article 252 of the Criminal Code; the applicable sanction is imprisonment for not more than 5 years. Self-laundering (*i.e.* the laundering of the proceeds by the person who committed the predicate offence) is punishable under the same conditions (paragraph 2). Paragraphs 3 and 4 provide for aggravated sanctions for the laundering of proceeds of considerable value (sanctioned with a maximum of 8 years and a fine) or laundering in the framework of a criminal association. Confiscation of the proceeds is in all cases mandatory (paragraph 6). Slovenia indicates that – except for negligent laundering which is expressly provided in paragraph 5 – for the money laundering offence to be complete the wilfulness and intent to somehow obscure the illegal origin of the proceeds needs to be proven, as the law does not indicate that the intention can be inferred from objective factual circumstances. While a conviction for the predicate offence is not required, Slovenia indicates that jurisprudence still demands identification and proof of specific predicate criminality.

185. The application of the money laundering offence in a situation where the predicate offence occurs abroad has not yet been tested. In the Responses to Phase 2 Questionnaire (11.1.c), Slovenia indicated that where the predicate offence takes place abroad there is no additional requirement of dual criminality that needs to be met. However, in Phase 1 the Slovenian authorities had indicated that “... in that case the dual criminality principle would have to be applied”. Similarly, at the on-site visit the OMLP submitted a note to the examining team describing the money laundering offence, which stated that extraterritoriality of the predicate offence has no impact on the money laundering offence, the only additional “condition” being “the existence of dual criminality”. Thus, according to this information, in proceeding against a case of money laundering of the proceeds of a foreign bribery offence occurring wholly abroad, the demonstration would have to be made of the criminalisation of the predicate offence in both Slovenia and the foreign country where the bribery act occurred. Difficulties could be encountered in fulfilling this requirement in certain cases where the bribery act occurs in a country that is not the country of the foreign public official, as this country might not criminalise bribery of foreign public officials.

b. *Enforcement of the money laundering offence*

186. Despite the presence of comprehensive legislation and an apparently sound preventive framework – and despite 301 money laundering cases forwarded to the police or Public Prosecution Service¹⁰⁶ by the OMLP since 1995 – Slovenia has recorded in 2006 its first final conviction for money laundering (unrelated to bribery).¹⁰⁷ These 301 cases represent 30% of the total investigations initiated by the OMLP since 1995 on the basis of the reports and information it receives from reporting entities (see section B.8 of the Report). More precisely, in 2004-05 the OMLP has initiated over 229 money laundering investigations, 41 of which were eventually forwarded to the state prosecutor, resulting in 26 prosecutions but no convictions.

¹⁰⁶ Depending on how far the OMLP could take its own investigation, it either forwards well-grounded cases to the police or directly to the State Prosecutor’s Office.

¹⁰⁷ One legal person and two natural persons were sanctioned. In the Responses, Slovenia indicated that the sanction applied in this case was deprivation of liberty for two years and a monetary sanction of SIT 1 million (EUR 4 150).

187. Since 1995, the police have forwarded 54 cases against 134 natural persons and 2 legal persons to the Public Prosecution Service due to well-grounded suspicions of money laundering.¹⁰⁸ At the time of the on-site visit, roughly half of these cases were still under police or judicial investigation, or pending final indictment. During the same period, prosecutors have rejected around a quarter of the cases forwarded to them, and first and second instance courts have decided on 8 cases (5 acquittals, 1 case pending appeal, 1 case annulled due to the defendant's death, and 1 final conviction). No case of negligent money laundering has yet been tried. Slovenia further indicates that in 2 of these 54 money laundering cases forwarded to the Public Prosecution Service by the police, the predicate offence was acceptance of bribes by a (domestic) public official (article 267 of the Criminal Code).¹⁰⁹

188. On-site visit discussions confirmed that a very large share of the money-laundering cases forwarded by the OMLP is dismissed at the later stages of the procedure. One of the reasons presented to the examiners was that state prosecutors and judges would lack the resources and competence to deal appropriately with the detailed money laundering cases that are put together by the OMLP. A somewhat differing view presented was that money-laundering cases, as they are being moved up the procedure by the OMLP, police and prosecutors, often lack information about the specific predicate offence. A 2005 report by the Council of Europe suggests that the few number of prosecutions and convictions could be linked to insufficiently resourced and focused law enforcement agencies and a lack of police-generated cases, inadequate asset detection and recovery, evidential difficulties (lack of training and guidance), and the slow speed of the judicial process (lack of judicial training and specialisation). The findings of the lead examiners in the context of this Phase 2 largely confirmed these views.

189. The enforcement statistics and the on-site discussions suggest that there could be real difficulties in securing a money laundering conviction in the absence of a prior conviction for the predicate offence. In Phase 1 Slovenia indicated that a 2004 Supreme Court decision had clarified that such a prior conviction was not necessary, but court practice in this regard is still embryonic. Slovenia had also indicated that in theory it should be sufficient that the person knows that the money derives from an offence, and not from a specific offence, in order to be convicted of money laundering. But as seen above court practice has not sufficiently developed to be able confirm this.

Commentary

The lead examiners recommend that Slovenia take measures for ensuring that the money laundering offence can effectively be enforced in cases where the predicate offence is foreign bribery regardless of the place where the bribery occurred, including in a foreign country which is not the country of the bribed foreign public official and where foreign bribery is not criminalised.

The lead examiners also recommend that the Working Group follow up on whether the money laundering offence can effectively be prosecuted (i) in the absence of a prior conviction for the predicate offence of bribery and (ii) where the perpetrator does not know from which specific offence the proceeds were derived.

¹⁰⁸ According to the information obtained during on-site visit discussions, the vast majority of these 54 cases had first been reported to the police by the OMLP.

¹⁰⁹ More common predicate offences underlying these 54 money laundering cases include abuse of economic power (37%), drug trafficking (15%), tax evasion (13%), fraud (9%) and defrauding of creditors (9%).

8. The Offence of False Accounting

190. Slovenian tax law, company law, accounting standards and Criminal Law put extensive accounting obligations on businesses, sole traders and their accountants; and offences in connection with accounting falsifications and omissions – which can also serve to cover up corrupt practices – are liable to penalties.

191. Violations of accounting standards resulting in an incorrect basis for a tax audit can be penalised pursuant to the Tax Procedure Act. Pursuant to articles 31 and 32 of the Tax Procedure Act, taxpayers must keep business accounts and records, tax accounts and keep other records provided by this and other laws for the purposes of taxation. Business accounts and records must be kept in order and correctly and in such a manner as to make the information available for the assessment of tax liabilities.¹¹⁰ Legal persons and private business persons failing to keep or administer business accounts and records adequately for the purpose of taxation can be sanctioned with a fine ranging from EUR 1 600 to EUR 25 000 (article 397 of the Tax Procedure Act). Articles 85 and 86 of the Value Added Tax Act provide for similar bookkeeping obligations on legal persons and sole entrepreneurs – with a special emphasis on a requirement to keep invoices issued and received and on their authenticity. Breaches of these requirements can lead to the imposition of a maximum fine of EUR 125 000 (article 141 of the Value Added Tax Act).

192. The use of invoices or any other accounting documents, records containing false or incomplete information or double invoices – as well as the certification of a book, document or file containing such false information – is a criminal offence pursuant to article 240 of the Criminal Code, sentenced with a maximum of 2 years imprisonment. Pursuant to article 36(2) of the Criminal Code, a fine could also be discretionarily applied in addition to imprisonment if the bribery has been committed “out of greed”. For the accounting offence in article 240 of the Criminal Code to be applicable, it must relate to business books, documents or files which the offender “is obliged to keep under statute or regulations... and which are essential for the operation of business with other legal or natural persons or intended for making decisions concerning economic or financial activities”. In Phase 1 Slovenia indicated that this condition would always be fulfilled in a case of hiding bribery of a foreign public official in the context of international business.

193. The offence applies both to natural and legal persons; although no legal person has ever been convicted on the basis of article 240 of the Criminal Code. Note also that an essential condition for the application of article 240 of the Criminal Code – unlike the provision of the Law on Tax Procedure – is the identification of the natural person who has committed the violation (*i.e.* who intentionally inserted false information or avoided to insert important information). Slovenian police statistics show approximately 500 recorded criminal offences of business-related forgery per year from 2001 to 2004 (Moneyval Report, 2005). No law enforcement body is empowered to enforce accounting rules generally, but since 1 January 2005 and pursuant to the new Misdemeanours Act, the Slovenian Securities Market Agency is empowered to rule on misdemeanours in fast-track proceedings for breaches of laws and secondary legislation that fall under its jurisdiction or within its area of work; such as breaches of the various disclosure requirements of listed joint-stock companies. The examination team was not in a position to assess whether the agency has since proved to have the necessary resources and powers to perform its law enforcement responsibilities effectively (or if monitoring compliance with standards still mainly rests with the external auditors), and whether this development has led to enhanced cooperation with other law enforcement agencies in uncovering more criminal accounting offences. Also, in the course of the Phase 2 process, the lead examiners sought to learn more about the enforcement of accounting offences in practice, including statistics (*cf.* supplementary questionnaire at 49); but the Slovenian authorities did not have any information to submit on the matter (either in terms of administrative or criminal sanctions imposed).

¹¹⁰ In 2002, 364 tax inspectors working in regional offices made 9 542 examinations of legal persons (GRECO 2003).

Commentary

The lead examiners recommend that the Working Group follow up on whether Slovenia can impose administrative and criminal penalties on natural and legal persons for sanctioning accounting omissions and falsifications made to conceal acts of bribery of foreign public officials, including in cases where the proceedings against the foreign bribery offence itself can not be or are not carried out.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Slovenia, the Working Group (1) makes the following recommendations to Slovenia, and (2) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the bribery of foreign public officials

1. With respect to prevention, awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Slovenia:

- a) ensure that measures for the prevention, detection and raising awareness of foreign bribery are included in the national anti-corruption strategy, and encourage effective coordination and implementation of these measures by the Commission for the Prevention of Corruption, or any other appropriate, independent body charged with preventing foreign bribery in the future (Revised Recommendation, Section I);
- b) take measures to raise the level of awareness of the Convention and the foreign bribery offence within the public administration, including more specialised information on foreign bribery in training programmes for police, state prosecutors, judges, the tax administration and agencies that interact with Slovenian companies active in foreign markets (diplomatic representations, and trade promotion, export credit and development aid agencies) (Revised Recommendation, Section I, II and IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);
- c) take active measures to raise awareness among Slovenian business associations and companies, including SMEs, about the Convention, the offence of foreign public officials and the government's intention to enforce it, and the liability of legal persons; and work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and encourage these professions to develop specific training (Revised Recommendation, Sections I, II.iii and V);
- d) in relation to official export credit support, ensure that SID Bank's anti-bribery declarations and policies expressly refer to bribery of foreign public officials, and consider adherence with the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Section I and II).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Slovenia:

- a) remind public officials of their obligation to report instances of bribery of foreign public officials, and issue clear instructions to be followed by employees of export credit, trade promotion and development aid agencies and diplomatic representations on how to recognise indications of

foreign bribery and on the concrete steps to take if suspicions or indications of foreign bribery should arise, including reporting the matter as appropriate to the Slovenian law enforcement authorities (Revised Recommendation, Sections I, II and VI.iii);

- b) take measures for enhancing and promoting whistleblower protection mechanisms for public and private sector employees who report suspicious facts that may indicate foreign bribery, in order to encourage them to report such facts without fear of retaliation (Convention, Article 5; Commentary 27; Revised Recommendation, Sections I and V.C.iv);
- c) introduce a clear requirement for external auditors to report all indications of possible acts of foreign bribery to company management and, as appropriate, to corporate monitoring bodies; consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities; and consider whether the criteria requiring certain Slovenian companies to submit to an external audit are adequate in that they ensure that all significant Slovenian companies conducting business internationally with public sector partners submit to such an audit (Revised Recommendation, Sections I, II.iii and V.B);
- d) take additional measures to encourage Slovenian businesses active in foreign markets (i) to implement adequate internal company controls and standards of conduct, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; (ii) to develop monitoring bodies (such as audit committees) that are effective and independent from management; and (iii) to make statements in their annual reports about their internal compliance programs for the prevention and detection of foreign bribery (Revised Recommendation, Sections I, II.iii and V.C);
- e) with regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the OMLP itself, receive appropriate directives and training (including typologies) on the identification and reporting of information that could be linked to active bribery of foreign public officials (Convention, Article 7; Revised Recommendation, Sections I and II.iv).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Slovenia:

- a) take further steps to ensure that police investigations of the foreign bribery offence cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved (Convention, Article 5; Commentary 27; Revised Recommendation, Section I);
- b) introduce the necessary legislative measures in order to clarify the roles and duties of the police, prosecutors and investigative judges in the conduct of criminal investigations; require prosecutors to more actively initiate, direct and supervise criminal investigations; simplify and streamline the process for obtaining the grant of a judicial investigation and reduce, to the extent possible, the duplication of effort and procedures between the pre-trial and trial phase (Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);
- c) ensure that the evidential burden placed on law enforcement authorities for the grant of a judicial investigation is not excessive; and with regard to court delays, determine whether increased

resources are required or if there are any legal obstacles that could be remedied, without removing important institutional guarantees that ensure the independence of the judiciary (Convention, Articles 5 and 6; Commentary 27; Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);

- d) ensure that sufficient resources and specialist financial and accounting expertise are provided to police and prosecutors and ensure that they are used at an early stage in the pre-trial procedure in order to enable them to more effectively detect, investigate and prosecute complex economic crimes cases, including foreign bribery offences; seriously consider extending the maximum time limits for the authorised use of special investigative techniques in criminal investigations; and adapt the existing processes for handling MLA requests to ensure that police or state prosecutors are able to scrutinise incoming MLA requests so as to assess and determine whether a separate investigation should be initiated in Slovenia (Convention, Articles 5 and 6; Commentary 27; Revised Recommendation, Section I and VII; Annex to the Revised Recommendation, Paragraph 6);
- e) take measures, within the constitutional principles of the state, in order to ensure that immunity from criminal proceedings available to certain designated office holders does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences. These measures could include the adoption of guidelines establishing clear criteria for lifting the immunity of office holders, especially in relation to non-professional immunity (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II).

4. With respect to the offence of foreign bribery, the Working Group recommends that Slovenia:

- a) ensure that all bribes to a foreign public official to obtain any use of the official's position – whether or not within the official's authorised competence and whether or not for the purpose of obtaining an “official” act – constitute the basis for a foreign bribery offence (Convention, Article 1);
- b) ensure that bribery through an intermediary constitutes the basis for a foreign bribery offence (Convention, Article 1);
- c) ensure that a reference to foreign law is not needed for defining the foreign public official's duty to exercise judgement or discretion impartially, and accordingly – for the purpose of the foreign bribery offence – consider abolishing the distinction between bribery for obtaining a “proper” and an “improper” act/omission by the foreign public official, as this distinction depends on the definition of the foreign public official's duty and level of discretion as provided under foreign law, and on the strength of the impartiality requirements and safeguards defined therein (Convention, Articles 1 and 3; Commentary 3).

5. With respect to the liability of legal persons, the Working Group recommends that Slovenia, in relation to the Liability of Legal Persons for Criminal Offences Act:

- a) take further steps to raise awareness of police and prosecutors (e.g. through guidelines and training) about the Act to ensure that possible contraventions of the law by legal persons are actively investigated and prosecuted (Convention, Article 2; Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);
- b) undertake a review of the Act to ensure that the elements required to prove a link between the natural person that perpetrated the crime and the liability of the legal person under the Act are not

obstacles to effective enforcement of the Act (Convention, Articles 2 and 3; Revised Recommendation, Section I).

6. With respect to sanctions for foreign bribery, the Working Group recommends that Slovenia:

- a) take measures to draw to the attention of prosecutorial and judicial authorities on the importance of applying sanctions which are sufficiently effective, proportionate and dissuasive on natural and legal persons convicted for foreign bribery offences, in particular emphasising the importance of adequate economic sanctions (Convention, Article 3; Revised Recommendation, Section I);
- b) either amend the waiver of punishment provision for cases where the briber reports solicitation by the official before the offence is discovered (*i.e.* for effective regret) in paragraph 3 of article 268 of the Criminal Code to ensure it does not contravene the Convention, or in some other appropriate way ensure that the law does not contravene the Convention, *e.g.* through issuing prosecutorial guidelines (Convention, Articles 1 and 3; Revised Recommendation, Section I);
- c) either amend the waiver of punishment provision in paragraph 2 of article 11 of the Liability of Legal Persons for Criminal Offences Act to exclude its application to the offence of foreign bribery, or in some other appropriate way ensure that the law does not contravene the Convention, *e.g.* through issuing prosecutorial guidelines (Convention, Articles 1, 2 and 3; Revised Recommendation, Section I);
- d) consider introducing a mechanism to exclude companies convicted of foreign bribery from performing ODA contracts (Convention, Article 3 Paragraph 4; Revised Recommendation, Section VI.iii).

7. With respect to the offence of money laundering, the Working Group recommends that Slovenia take measures for ensuring that it can effectively be enforced in cases where the predicate offence is foreign bribery regardless of the place where the bribery occurred; (Convention, Article 7; Commentary 28).

2. Follow-up by the Working Group

8. The Working Group will follow up the issues below, as practice develops, in order to assess:

- a) whether bribery of foreign public officials covers (i) bribery of employees of foreign public enterprises regardless of their legal form, including those under the indirect control of a foreign government(s), and (ii) bribery of persons exercising a public function for any organised foreign area or entity, such as an autonomous territory (Convention, Article 1; Commentaries 14 and 18);
- b) whether interpretations of the term “insignificant” in article 28 of the Liability of Legal Persons for Criminal Offences Act (giving prosecutors the discretion not to initiate criminal proceedings against a legal person) unduly restrict the liability of legal persons (Convention, Article 2);
- c) the criminal and administrative sanctions, in particular fines and confiscation, imposed on natural and legal persons for (i) foreign bribery, and (ii) accounting offences (Convention, Articles 3 and 8);
- d) the application of the conditions laid down in paragraph 1 of article 11 of the Liability of Legal Persons for Criminal Offences Act (reducing a sentence against a legal person where the management or supervisory body reports the perpetrator) (Convention, Articles 3 and 8);

- e) the establishment of jurisdiction over legal persons when the offence takes place in part or wholly abroad (Convention, Article 4);
- f) whether the money laundering offence can effectively be prosecuted (i) in the absence of a prior conviction for the predicate offence of bribery, and (ii) where the perpetrator does not know from which specific offence the proceeds were derived (Convention, Article 7);
- g) whether the Convention in conjunction with the Code of Criminal Procedure will provide an adequate basis for extradition in the absence of an extradition treaty with another Party to the Convention (Convention, Article 10);
- h) whether the non-deductible expense provision in the Corporate Income Tax Act and Personal Income Tax Act can be applied comprehensively to all bribes contemplated under Article 1 of the Convention (1996 Recommendation, 1997 Revised Recommendation, section IV).

APPENDIX 1 – LIST OF PARTICIPANTS IN THE ON-SITE VISIT

MINISTRIES AND STATE ORGANS

Ministry of Economy (Directorate for Foreign Economic Relations; Sector for Procurements)

Ministry of Finance (General Tax Administration)

Ministry of Foreign Affairs

Ministry of Justice

Ministry of Interior

Ministry for Public Administration

National Revision Commission for Public Procurement

Office for Protection of Secret Data

Public Agency for Entrepreneurship and Foreign Investments

Securities Market Agency

Slovenian Export Credit Bank

Commission for the Prevention of Corruption

Information Commissioner

Parliamentary Commission based on the Corruption Prevention Act

LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

National Police (Criminal Investigation Directorate – Department for the fight against corruption)

State Prosecution Service (Group of Prosecutors for Organised Crime)

District Public Prosecutor's Office (Ljubljana)

Judge from the Supreme Court

Investigative Judge from the District Court Public Prosecutor's Office (Kranj)

ACCOUNTING AND AUDITING BODIES

Court of Audit

Deloitte revizija d.o.o/ Deloitte d.o.o.

The Slovenian Institute of Auditors

UNIJA Accounting House

PRIVATE SECTOR AND CIVIL SOCIETY

Attorneys at Law Ceferin

Attorney's Office Miro Senica and Attorneys

The Association of Employers of Slovenia

Chamber of Commerce and Industry of Slovenia

BSI (Bank)

NLB (Bank)

National Finance Corporation

SKB Bank

Triglav Insurance Company

Triglav Investments

Association Manager

ELES

Intereuropa

Association of Free Trade Unions of Slovenia

CNVO (NGO)

Education, Science and Culture Trade Union of Slovenia

Kultlab Celje (NGO)

Representatives from the Media

Slovenian Police Union

APPENDIX 2 – LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS

AML/FTLaw on the Prevention of money Laundering and Financing of Terrorism (draft law)

CDD	customer due diligence
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FDI	foreign direct investment
IFRS	International Financial Report Standards
ISA	International Standards on Auditing
LPML	Law on the Prevention of Money Laundering
MLA	mutual legal assistance
NGO	non-governmental organisation
ODA	official development assistance
OMLP	Office for Money Laundering Prevention
PEPs	politically exposed persons
SAS	Slovenian Accounting Standards
SID Bank	SID- Slovene Export and Development Bank
SIA	Slovenian Institute of Auditors

ABBREVIATIONS

Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OECD	Organisation for Economic Cooperation and Development
Revised Recommendation	OECD Revised Recommendation on Combating Bribery in International Business Transactions (1997)
Working Group	OECD Working Group on Bribery in International Business Transactions

APPENDIX 3 – EXCERPTS FROM RELEVANT LEGISLATION

[Unofficial English translation]

CODE OF CRIMINAL PROCEDURE

Article 163

The public prosecutor shall not be obligated to start criminal prosecution, or shall be entitled to abandon prosecution:

1. where the Criminal Code lays down that the court may or must grant remission of penalty to a criminal offender and the public prosecutor assesses that in view of the actual circumstances of the case a sentence alone without a criminal sanction is not necessary;
2. where the Criminal Code provides for a specific offence a fine or imprisonment up to one year and the suspect or the accused, having genuinely repented of the offence, has prevented harmful consequences or compensated for damage and the public prosecutor assesses that in view of the actual circumstances of the case a criminal sanction would not be justified.

CRIMINAL CODE

Article 36. Legality in Imposing of Sentences

[...]

- (2) For criminal offences committed out of greed, a fine may be imposed as an accessory sentence even when it is not expressly prescribed by the statute or in cases where imprisonment and fine are prescribed as alternatives and the court has decided to impose imprisonment as the principal sentence.

Article 38. Fines

- (1) A fine shall be imposed in daily amounts and shall range from a minimum of 5 to a maximum of 360 daily amounts, except for criminal offences committed out of greed, where it may total a maximum of 1500 daily amounts.
- (2) The number of daily amounts shall be fixed by the court in accordance with the general rules on sentencing. The court shall fix the daily amount by taking into account the perpetrator's daily income computed on the basis of three months' net salary and other incomes, as well as with respect to his family expenditure. In fixing the daily amount, the court shall base its decision on data not older than six months.
- (3) In exceptional cases, circumstances relating to the preceding paragraph which are important for fixing the daily amount may be assessed by the court itself.
- (4) The lowest daily amount shall amount to one sixtieth of the last officially published average net salary in the Republic of Slovenia, while the highest shall amount to one third thereof.
- (5) The period of time in which a fine is to be paid shall be specified in the judgment. Such a period may not be shorter than 15 days and not longer than 3 months. Under justifiable circumstances, the court may permit the offender to pay his fine by instalments, where the term of payment shall not exceed 2 years.
- (6) In the event that a fine may not be collected, the court shall enforce it by applying a prison sentence so that each two daily amounts of a fine shall be converted into one day of imprisonment, with the proviso that the so determined term of imprisonment shall not exceed six months.
- (7) If the offender has paid only a portion of his fine, the remaining amount shall be converted into imprisonment, the enforcement of which is to be discontinued upon payment of the remainder.

Article 126

[...]

(2) An official in the present Code may be:

1. a National Assembly deputy, a member of the National Council, or a member of a local or regional representative body;
2. any person carrying out official duties in the state bodies or exercising a public function;
3. any other person performing official duties authorised by a law, by regulations issued pursuant to a law, or by a contract on arbitration signed pursuant to a law;
4. a member of the military appointed under special regulations regarding special criminal offences which involve military personnel but which are not prescribed as criminal offences against military duties.
5. any person who performs a legislative, executive or judicial function or any other official duty in a foreign country and at any level, and who fulfils the conditions from points 1, 2 or 3 of this paragraph;
6. any person who has been given an official position by an international public organisation and who fulfils the conditions from points 1, 2 or 3 of this paragraph;
7. any person who performs a judicial, prosecutorial or other official duty or function in an international court.

Article 240. Forgery or Destruction of Business Documents

(1) Whoever enters false information or fails to enter any relevant information into business books, documents or files which he is obliged to keep under statute or regulations and which are essential for the operation of business with other legal or natural persons or intended for making decisions concerning economic or financial activities, or whoever certifies such a book, document or file containing false information with his signature or renders possible the creation of such a book, document or file, shall be sentenced to imprisonment for not more than two years.

(2) Whoever uses a false business book, document or file as truthful or whoever destroys or hides books, documents or files under the preceding paragraph or substantially damages or renders the same useless, shall be punished to the same extent.

(3) Any attempt to commit the offence under the first or the second paragraph of the present article will be punishable.

Article 252. Money Laundering

(1) Whoever accepts, exchanges, stores, freely uses, uses in an economic activity or in any other manner determined by the law conceals or attempts to conceal by money laundering the true origin of money or property that was, to his knowledge, acquired through the commission of a criminal offence, shall be sentenced to imprisonment for not more than five years.

(2) Whoever commits the offence under the preceding paragraph and is simultaneously the perpetrator of or participant in the criminal offence with which the money or property under the preceding paragraph were acquired shall be punished to the same extent.

(3) If money or property from the first or second paragraph of this article is of considerable value, the perpetrator shall be sentenced to imprisonment for not more than eight years and punished by a fine.

(4) If the offences under the preceding paragraphs have been committed by criminal association for committing such offences, the perpetrator shall be sentenced to imprisonment for not less than one and not more than ten years, and punished by a fine.

(5) Whoever should and could have known that the money or property had been acquired through the commission of a criminal offence, and who commits the offences from the first or third paragraphs, shall be sentenced to imprisonment for not more than two years.

(6) Money and property from preceding paragraphs shall be confiscated.

Article 261. Abuse of Office or Official duties

(1) An official who, with the intention of procuring any non-property benefit for himself or another or of causing damage to another, abuses his office or exceeds the limits of his official duties or fails to perform his official duties, shall be sentenced to imprisonment for not more than one year.

(2) If, by perpetration of the offence, the perpetrator causes substantial damage or seriously encroaches upon the rights of another, he shall be sentenced to imprisonment for not more than three years.

(3) An official who, with the intention of procuring a property benefit for himself or for another, abuses his office or exceeds the limits of his official duties or fails to perform his official duties, whereby such conduct does not constitute any other criminal offence, shall be sentenced to imprisonment for not less than three months and not more than five years.

(4) If, by perpetration of the offence, the perpetrator has acquired a large property benefit which corresponds to his initial intent, he shall be sentenced to imprisonment for not less than one and not more than eight years.

Article 268. Giving of bribes

(1) Whoever promises, offers or gives a reward, a gift or any other benefit to an official either for him/her or for any other person, in order that such official performs within the scope of his/her official authority an official act which he/she should not have performed or not to perform an official act which he/she should or could have performed shall be punished by imprisonment of one to five years and a fine.

(2) Whoever promises, offers or gives a reward, a gift or any other benefit to an official either for him/her or for any other person, in order that such official performs within the scope of his or her official authority an official act which he/she should or could perform or not to perform an official act which he/she anyhow may not perform shall be punished by imprisonment of six months to three years.

(3) The perpetrator of the offences provided for in preceding two paragraphs that gave a reward, a gift or any other benefit on the request of an official and subsequently reported the offence before it was discovered or before knowing that the offence was discovered is criminally liable, but the court may waive the punishment.

(4) The reward, gift or other benefit given shall be confiscated; in the case of the previous paragraph the court may decide to restore them to the person who gave it.

Article 269a. Giving of gifts to secure unlawful intervention

(1) Whoever promises, offers or gives an award, gift or other benefit to another, intended for that person or for another, to induce them to exploit their position or influence and to intervene to ensure that an official act is or is not performed shall be given a prison sentence of up to three years.

(2) Whoever promises, offers or gives an award, gift or other benefit to another, intended for that person or for another, to induce them to exploit their position or influence and to intervene to ensure that an official act that may not be performed is performed, or an official act that must or may be performed is not performed, shall be given a prison sentence of between one and five years.

(3) The perpetrator from the preceding paragraphs who gave the unlawful award, gift or other benefit at the request of the person who unlawfully intervened and who declared the offence before it was uncovered or committed may be exempt from punishment.

(4) Awards, gifts or other benefits given shall be seized in the case from the preceding paragraph and may be returned to the person who gave it.

Article 286. Failure to Provide Information of Crime or Perpetrator

[...]

(2) An official who knowingly fails to submit a report of a criminal offence of which he comes to know during the performance of his official duties and for which the punishment of more than three years' imprisonment is prescribed under the statute, the perpetrator whereof is prosecuted ex officio, shall be sentenced to imprisonment for not more than three years.

[...]

LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES ACT

Article 4. Grounds for the Liability of a Legal Person

A legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of or in favour of the legal person:

1. if the committed criminal offence means carrying out an illegal resolution, order or endorsement of its management or supervisory bodies;
2. if its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence;
3. if it has at its disposal illegally obtained property gains or uses objects gained through a criminal offence;
4. if its management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them.

Article 5. Limits of the Liability of a Legal Person for a Criminal Offence

- (1) Under the conditions under the preceding article a legal person shall also be liable for a criminal offence if the perpetrator is not criminally liable for the committed criminal offence.
- (2) The liability of a legal person does not preclude the criminal liability of natural persons or responsible persons for the committed criminal offence.
- (3) A legal person may only be liable for criminal offences committed out of negligence under the conditions from point 4 of article 4 of this Act. In this case the legal person may be given a reduced sentence.
- (4) If a legal person has no other body besides the perpetrator who could lead or supervise the perpetrator, the legal person shall be liable for the committed criminal offence within the limits of the perpetrator's guilt.

Article 11. General Reasons for Reducing a Sentence or Withdrawal of a Sentence

- (1) If after the committing of a criminal offence the management or supervisory body voluntarily reports the perpetrator, the legal person may be given a reduced sentence.
- (2) If after the committing of a criminal offence the management or supervisory body voluntarily and immediately orders the restitution of illegally obtained gains or provides indemnification for damages caused through the offence or reports information on the grounds for liability for other legal persons, the legal person's sentence may be withdrawn.

Article 13. Fines

- (1) The fine which may be prescribed may not be less than 500 000 toalars or more than 150 million toalars.
- (2) In the case of the legal person's criminal offence having caused damage to another's property, or of the legal person having acquired illegal gains, the highest limit of the fine imposed may be 200 times the amount of such damage or gains.

Article 28. Expediency of Initiation of Proceedings

The state prosecutor may decide not to request the initiation of criminal proceedings against a legal person if the circumstances of the case show that this would not be expedient because the legal person's participation in the criminal offence was insignificant, because the legal person does not have any property or has so little property that this would not even suffice to cover the costs of the proceedings, because bankruptcy proceedings have been initiated against the legal person, or because the perpetrator of the criminal offence is the sole owner of the legal person against which it would be necessary to initiate proceedings.