



## **IRELAND: PHASE 2 AND 2BIS**

### **FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 AND 2BIS RECOMMENDATIONS**

#### **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 19 March 2010.

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## SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

### a) *Summary of Findings*

1. In December 2009, Ireland presented its written follow-up report, outlining its responses to the recommendations adopted by the Working Group on Bribery at the time of Ireland's Phase 2 examination in March 2007, and Phase 2bis examination in December 2008. The Working Group welcomed the information provided by the Irish authorities in the course of this exercise and recognised Ireland's efforts to implement the Phase 2 and Phase 2bis recommendations by the Working Group. As concerns the Phase 2 examination, the Working Group considers that Ireland has fully implemented 5 out of the 21 recommendations, while 2 recommendations have been only partially implemented, and 14 recommendations have not been implemented. As concerns the Phase 2bis examination, the Working Group considers that Ireland has partially implemented 1 recommendation out of 8, while 7 recommendations have not been implemented.

2. With respect to raising awareness and providing training on foreign bribery, Ireland has significantly increased its activities within the Irish public sector and created a Senior Officials Compliance Committee to coordinate awareness raising efforts (*Phase 2 recommendation 1a*). Training is provided to the police and prosecution on foreign bribery (*Phase 2 recommendation 3*), and the issue of confiscation has been discussed in meetings of the Senior Officials Compliance Committee, which includes law enforcement authorities (*Phase 2 recommendation 8d*). While Ireland has significantly increased awareness raising within the Irish public sector, the Working Group considered that efforts needed to be maintained as concerns the private sector (*Phase 2 recommendation 1b*, and *Phase 2bis recommendation 1*), in particular by the trade promotion agencies. In this regard, the Irish diplomatic missions also have a part to play. The Working Group also noted that awareness raising efforts within the accounting and auditing profession have been initiated, but that further action is dependent on adoption of the new anti money laundering legislation, and encouraged Ireland to promptly proceed with this intention (*Phase 2 recommendation 1c*).

3. In the area of money laundering, Ireland indicated to the Working Group that, in addition to the 2009 Criminal Justice (Money Laundering and Terrorist Financing) Bill, due to be enacted in early 2010, the current financial crisis will in fact contribute to ensuring that adequate resources are available to Ireland's Financial Intelligence Unit for receiving suspicious transaction reports, and to the Regulatory Authority for enforcing anti money laundering laws and regulations (*Phase 2 recommendation 2c*). The passing of the 2009 Bill should also allow for better collection of statistics on money laundering cases and suspicious transaction reports, as recommended by the Working Group in Phase 2 (*Phase 2 recommendation 7d*). The Working Group is encouraged by these measures, but remains deeply concerned that Ireland has not taken any step to address the issue of the dual criminality exception for the money laundering offence under Irish law, which constitutes a breach of Article 7 of the OECD Anti Bribery Convention (*Phase 2 recommendation 7c*).

4. A major improvement since the Phase 2 concerns the non tax deductibility of bribes. Under section 41 of the Finance Act 2008, Ireland has expressly clarified that bribe payments to foreign public officials are not tax deductible (*Phase 2 recommendation 7a*).

5. With regard to Working Group recommendations to improve the reporting and detection of foreign bribery, Ireland has not yet enacted legislation to protect whistleblowers in the public and private sector reporting suspected instances of foreign bribery (*Phase 2 recommendation 2a*, and *Phase 2bis recommendations 2a* and *2b*). Draft provisions on whistleblower protection are included in the Prevention of Corruption (Amendment) Bill of 2008, but, as of the time of this report, this Bill has yet to be enacted. Government Departments and other public agencies are awaiting the passing of this legislation before setting up reporting procedures for public sector employees, and raising their awareness in this regard (*Phase 2 recommendation 2b*). As concerns detection and reporting by external auditors, two sets of requirements continue to co-exist. Under the Criminal Justice (Theft and Fraud Offences) Act 2001, the external auditor is required to report to law enforcement any suspected offence under that Act. Thus, indications of bribery of a European public official affecting the EU's financial interests would have to be reported. However, such an obligation does not exist under the Prevention of Corruption Act 2001, which covers all other types of foreign bribery offences. Ireland did not indicate that consideration was given at policy level to remove this discrepancy (*Phase 2 recommendation 2d*).

6. The Working Group remains concerned that a number of serious issues identified in Phase 2 and Phase 2bis, relating to the foreign bribery offence, and to the consolidation and harmonisation of this offence, which currently exists in two different foreign bribery statutes, have still not been resolved by Ireland. Two statutes continue to co-exist: the Criminal Justice (Theft and Fraud Offences) Act 2001 concerns bribery of an official from the European Union affecting the EU's financial interests; the Prevention of Corruption Act 2001 concerns all other foreign bribery offences. These two statutes use different terminologies and criteria. The Prevention of Corruption (Amendment) Bill of 2008 aims to address some of the discrepancies identified by the Working Group, although it does not consolidate the two statutes. The Bill was published during the week of the Phase 2bis on-site visit, in June 2008, and, at the time, was due to be enacted by December 2008. However, as of the time of this report, the Bill is still in Parliament, awaiting Committee Stage. Consequently, all Phase 2 and Phase 2bis recommendations concerning the foreign bribery offence are considered not implemented (*Phase 2 recommendations 4, 5a(i),(ii)*, and *(iii)*, *5b*, and *Phase 2bis recommendations 3a(i)*, *(ii)* and *(iii)*, *3b*, *3c*, and *5b*). The Working Group noted the announcement by Ireland that the Bill was scheduled to be presented to the Parliamentary Committee in January 2010, and that it was hopeful the Bill would be passed into law by March 2010. The Working Group encouraged Ireland to promptly proceed with adoption of this legislation, with a view to addressing the Working Group Phase 2 and 2bis recommendations.

7. The Working Group also remains seriously concerned as regards Ireland's legal regime for liability of legal persons. The lack of effective corporate liability for foreign bribery in Ireland, identified in Phase 2 and Phase 2bis, has not been rectified, which poses major issues in terms of compliance with Article 2 of the OECD Anti Bribery Convention (*Phase 2 recommendation 6a*, *8a*, and *Phase 2bis recommendation 4a*). Ireland has also not addressed the issue of coverage of unincorporated legal persons (*Phase 2 recommendation 6b* and *Phase 2bis recommendation 4b*).

8. Concerning the related offence of false accounting, Ireland has not increased sanctions for false accounting offences, as recommended in Phase 2 (*Phase 2 recommendation 7b*). Ireland indicated that publication of the Companies Consolidation and Reform Bill was expected by the end of 2010, and may address the issue of sanctions.

9. Finally, with regard to additional civil and administrative sanctions for foreign bribery, Ireland did not indicate that consideration had been given to this matter (*Phase 2 recommendation 8b*).

**b) Conclusions**

10. Based on the findings of the Working Group on Bribery with respect to Ireland's implementation of its *Phase 2 recommendations*, the Working Group concluded that Ireland has fully implemented recommendations 1a, 2c, 3, 7a, and 8d; that Ireland has partially implemented recommendations 1b and 1c; and that Ireland has not implemented recommendations 2a, 2b, 2d, 4, 5a, 5b, 6a, 6b, 7b, 7c, 7d, 8a, 8b, and 8c. The Working Group further concluded that, as regards the *Phase 2bis recommendations*, Ireland has partially implemented recommendation 1; and that Ireland has not implemented recommendations 2a, 2b, 3a, 3b, 3c, 4a and 4b.

11. The Working Group invited Ireland to report orally, within one year after the written follow-up examination (*i.e.* by December 2010), on the implementation of the Phase 2 and 2bis recommendations pertaining to Ireland's corporate liability regime, and to enforcement of the foreign bribery offence, in particular in relation to the Prevention of Corruption (Amendment) Bill 2008.

12. Furthermore, the Working Group expressed its concern that the Prevention of Corruption (Amendment) Bill 2008, which addresses a number of serious issues outlined in the Phase 2 and 2bis recommendations, has still not been discussed or enacted by Parliament. The Working Group noted Ireland's confidence that the Bill would be presented to the Parliamentary Committee in January 2010 and would be adopted by March 2010. Consequently, the Working Group requested Ireland to provide a brief report, during the March 2010 meetings of the Working Group, on the status of the Prevention of Corruption (Amendment) Bill 2008.

## WRITTEN FOLLOW UP TO PHASE 2 AND PHASE 2BIS REPORTS - IRELAND

**Name of country: Ireland**

**Date of approval of Phase 2 Report: 14 March 2007**

**Date of approval of Phase 2bis Report: 11 December 2008**

**Date of information: 19 October 2009**

*Phase 2 is covered under Part I and Phase 2bis is covered in Part II.*

### **PART I: FOLLOW UP TO PHASE 2**

#### ***I.(A) Recommendations for Action in Phase 2***

*Note: For ease of reference, Recommendation 1 of this report corresponds to Paragraph 7 on page 67 of the Phase 2 Report and so on.*

#### **Text of recommendation 1(a):**

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

(a) Promptly take all necessary measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Irish companies operating abroad, including foreign diplomatic representations, trade promotion and development aid agencies [Revised Recommendation I];

#### **Actions taken as of the date of the follow-up report to implement this recommendation:**

##### **Codes of Conduct for Civil Servants: (Department of Finance)**

Civil servants are bound by the Civil Service Code of Standards and Behaviour. This code states that Civil Servants must carry out their work within a framework of law and respect legal constraints. In particular, they must never act in a manner which they know, or suspect, is illegal, improper, or unethical or for which they have no legal authority. They cannot use their official position to benefit either themselves or others with whom they have a personal or business interest. They are also expressly forbidden to seek to influence decisions on matters pertaining to their official positions other than through established procedures.

Clear statements are also included in the Code that civil servants should not receive benefits of any kind, including hospitality, from a third party which might reasonably be seen to compromise their personal judgement or integrity.

Under the terms of a Code of Practice for the Governance of State Bodies issued by the Department of Finance in 2001 and updated in 2009 all public bodies are required to put in place written Codes of Business Conduct, approved by the Board, for their directors and employees.

The Code of Practice includes a suggested Framework Code of Business Conduct which sets out basic objectives such as the establishment of an agreed set of ethical principles; the promotion and maintenance of confidence and trust; and the prevention of development or acceptance of unethical practices.

In addition to these basic objectives the Code sets out a number of fundamental issues of General Principle. Under the heading “Integrity” it is suggested that a Code of Conduct include the following matters –

- management and employees should not be allowed to be involved in outside employment/business interests in conflict or in potential conflict with the business of the body;
- avoidance of the giving or receiving of corporate gifts, hospitality, preferential treatment or benefits which might affect or appear to affect the ability of the donor or the recipient to make independent judgement on business transactions;
- commitment to compete vigorously and energetically but also ethically and honestly;
- conduct of purchasing activities of goods/services in accordance with best business practice;

A statutory Code of Conduct for persons who hold or occupy directorships or positions of employment in public bodies will be put in place by the Department of Finance in the near future. A specific provision similar to that contained in the Civil Service Code which requires Civil Servants never to act in a manner which they know, or suspect, is illegal, improper, or unethical or for which they have no legal authority will be included in the statutory Code of Conduct for persons who hold or occupy directorships or positions of employment in public bodies.

### **Training:**

An Induction Manual developed for new entrants to the Irish Civil Service, published in 2008, devotes a full chapter to Ethics and Standards in Public Office and this manual has been distributed to every Government Department, Office and Agency. The Personnel Officers Network included a presentation on Ethics in Public Office at their Human Resources Information Day Seminar in Dublin Castle in September, 2008 and the Network continues to raise awareness of this issue by keeping it on the agenda for all network meetings.

The Civil Service Training and Development Centre (CSTDC) which is based in the Department of Finance avails of every opportunity to raise awareness of the Ethics in Public Office Acts 1995 and 2001, the Code of Standards and Behaviour for Irish Civil Servants, the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Bill 2008.

The CSTDC includes a module on Ethics in Public Office in the Clerical Officer Training Programme, which is delivered on an ongoing basis in every Government Department and office.

Since December 2008, both the Public Financial Management Training Programme and the Public Procurement Training Programme include training on Ethics in Public Office. Both these courses are delivered cross-departmental on a weekly basis. Attendees are also reminded of their responsibility to

ensure that bodies being grant-aided from their budget are fully aware of the legislation and their responsibility and accountability regarding same

Managing People Training which is delivered cross-departmental on a monthly basis also includes training in this area.

Since January 2009, the Departmental Training Officers Network has put Ethics in Public Office a fixed item on the agenda for all their meetings and members are reminded at every meeting that they are responsible for ensuring that staff within their respective Departments are fully aware of their responsibility and accountability under the legislation.

The **Department of Enterprise, Trade, and Employment** (DETE) have published an information brochure setting out full details of the Convention and the OECD recommendations have been widely distributed to relevant parties,

DETE commissioned Transparency Ireland to provide training for relevant officials, including Department officials and officials in the relevant development Agencies which engage with exporting companies.

The **Department of Foreign Affairs** provided two training modules on the Convention in May, 2009 to staff, including those dealing with development aid programmes, departing on foreign postings. These modules will continue to form part of all pre-posting training sessions. The presentational materials used were also circulated to all Missions abroad.

In the *Handbook on the Economic Work of Missions* which is circulated each year to all Missions attention is drawn to obligations arising from the Convention, under the heading of *Legal and Ethical Issues*. All staff of the Department of Foreign Affairs have been provided with copies of AO Circular No. 09/07 which requests Heads of Mission to ensure that officers involved in the promotion of foreign trade abroad are familiar with the Convention in order for it to be drawn to the attention of Irish companies.

Information for staff on the Convention has also been posted on this Department's website and Intranet with links provided to the Department of Justice, Equality and Law Reform's website.

The booklet on the Convention, produced by the Department of Enterprise, Trade and Employment has also been distributed to Missions abroad.

Also of relevance to this issue is the development and continued enhancement of the website [www.anticorruption.ie](http://www.anticorruption.ie). This site, hosted by the Department of Justice, Equality and Law Reform, endeavours to be a portal from which the public sector, and all elements of the private sector, can draw information in response to questions they may have on the subject of bribery and corruption. As and when changes are required to be made to the content of the site, it will be amended to take account of new information and developments as they occur.

**If no action has been taken to implement recommendation 1(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**



**Text of recommendation 1(b):**

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

(b) Promptly take all necessary action, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery offence among companies, and in particular small and medium size companies, active in foreign markets, and advise and assist companies with regard to the prevention and reporting of foreign bribery; and consider appointing a specific committee in charge of developing and coordinating such awareness raising programmes [Revised Recommendation I];

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The Department of Enterprise Trade and Employment have contacted key stakeholders such as business organisations, chambers of commerce etc. and distributed the brochure on the Convention and OECD recommendations.

In addition the Enterprise Development Agencies such as IDA Ireland, Enterprise Ireland and Shannon Development, which interact regularly with Irish companies have been both given copies of the brochure and given training ( as set out in section 1 above) so that in the key State interaction with individual companies the relevant State officials are able to impress the companies of the importance of this initiative.

The issue of further raising awareness for all sectors of society is a matter which the Senior Officials Compliance Committee (SOCC) addresses. Developments or initiatives happening in or undertaken by one Department can be rapidly disseminated to other interested parties.

**If no action has been taken to implement recommendation 1(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Given the existing comprehensive arrangements which are already in place as noted above, it is not considered necessary to set up a separate Committee to focus on the specific issue as suggested.

**Text of recommendation 1(c):**

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

(c) Work proactively with the accounting and auditing profession to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to include training on foreign bribery in their professional education and training [Revised Recommendation I].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The accountancy bodies are aware of this recommendation, having been active participants in the OECD evaluation process. They consider that this offence would be caught under Anti Money Laundering (AML) requirements. They have undertaken to include specific reference to this in their revised guidance on AML which they intend to issue when the Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009 has been enacted. This Bill was published and initiated in the Irish Parliament in July 2009 and is expected to be enacted in the Autumn session.

The accountancy professions have indicated that training on the revised AML requirements will automatically include this issue. The specific subject matter under consideration by this group will also be highlighted in any articles developed around the revised guidance for use by the profession.

The Irish Auditing and Accounting Supervisory Authority (the statutory body that oversees how accountancy bodies in Ireland regulate and monitor their members) have distributed information pertaining to the offence of foreign bribery to the nine prescribed accountancy bodies under their remit. Therefore this information reached over 24,000 members and over 17,500 students of the accounting and auditing profession.

**If no action has been taken to implement recommendation 1(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 2 (a):**

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland:

(a) Adopt comprehensive measures to protect public and private whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I]

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The revised version of the Code of Practice for the Governance of State Bodies, which issued in June 2009, contains a new provision that requires that the Board of a State body to put in place procedures whereby employees of the State Body may, in confidence, raise concerns about possible irregularities in financial reporting or other matters. These bodies are also responsible for ensuring meaningful follow-up of matters raised in this way.

The Prevention of Corruption (Amendment) Bill 2008 passed second stage in Parliament in Autumn 2008, and is awaiting Committee Stage. This enhancement of legislation is regarded as priority for the Department of Justice, Equality and Law Reform.

The main purpose of the Prevention of Corruption (Amendment) Bill 2008, is to strengthen the law on bribery in relation to foreign public officials, and to give fuller effect to certain provisions of the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions (1997).

The Scheme provides for particular amendments to the Act of 2001, and also contains some other provisions, in order to address, as fully as possible, the recommendations of the OECD Working Group, while having regard to the rules and principles of the Irish legal system and its parameters, in particular as regards the application of jurisdiction.

There is currently a large volume of business being dealt with by Parliament, including special legislation in the area of banking and finance as well as European measures which are required following the approval of the Lisbon Referendum by the Irish people. The urgency of the enactment of Prevention of Corruption (Amendment) Bill 2008 is fully appreciated in view of the importance of the implementation of anti-corruption measures. Every effort is being made to ensure that this Bill is given priority and to ensure that it is passed at the earliest possible opportunity.

#### Content of the Bill

1. The Bill broadens the existing legislation relating to the prevention of corruption, and gives fuller effect to the provisions of the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions (1997), ratified by the State in 2003.
2. The Bill provides new protection for “whistleblowers” which covers employees and other persons who report suspected corruption offences in good faith. Arrangements are being made to amend the current provisions covering protection for “whistleblowers” to take account of the OECD recommendations, including in relation to strengthening of confidentiality measures for persons making such reports, and to facilitate the making of reports locally, by persons based overseas, instead of having to make contact with the authorities in Ireland.
3. The definition of “consideration” as it relates to the corruption offence, has been extended, to make it clear that as well as monetary gain, the conferring of all types of advantage comes within the terms of this offence.
4. In relation to corruption occurring outside the State, jurisdiction for this offence has been substantially extended under the Bill, to cover virtually all persons having a connection with the State, including companies and corporate bodies. Previously, extra-territorial jurisdiction was limited to cases involving Irish office holders or officials.
5. The range of foreign public officials who come within the scope of the legislation has also been extended, to include persons under the direct or indirect control of a foreign government, and agents of a wider sector of international organisations.

**If no action has been taken to implement recommendation 2(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Consultation is ongoing with Parliamentary Counsel and every effort is being made to facilitate enactment of the Bill at the earliest possible opportunity. The special legislation in the financial and banking arena which is currently occupying Parliamentary time was not anticipated when Ireland previously set out the expected timescale for enactment. Similarly, the European legislation being prepared following the passing of the Lisbon Referendum, was not taken into account, when our earlier assessment of the likely

enactment period for the corruption legislation was made, as it was not possible to predict the timing or outcome of these matters.

The Working Group can be assured that the enactment of this Bill is a priority for the Department of Justice, Equality and Law Reform and details of its progress through the legislative process will be reported as the various milestones are reached. It is hoped that this will be completed quickly.

**Text of recommendation 2(b):**

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland:

(b) Establish procedures to be followed by public sector employees, and in particular employees of the Department of Foreign Affairs, and of trade promotion and development aid agencies, for reporting to law enforcement authorities in Ireland credible information about foreign bribery offences that they may uncover in the course of their work, and encourage and facilitate such reporting [Revised Recommendation I]

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The Department of Enterprise, Trade and Employment has made employees of Trade Promotion agencies aware of the procedure to be followed for reporting such information to the authorities.

**If no action has been taken to implement recommendation 2(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

As no statutory protections for whistleblowers currently exist, the adoption of procedures will have to await the passing of the Prevention of Corruption (Amendment) Bill. Pending the enactment of this legislation, it has yet to be decided if procedures in relation to whistleblowers will be incorporated into Codes of Conduct or form the subject matter of a separate circular to staff.

The Department of Foreign Affairs have advised that once the appropriate legislation is in place, they will issue detailed guidelines to all staff, including those dealing with development aid programmes, on the reporting of information on foreign bribery offences. This will build upon and further enhance the training embassy officials have already received.

The commentary relating to the provisions and progress of the Prevention of Corruption (Amendment) Bill also refer to the subject matter here.

**Text of recommendation 2(c):**

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland:

(c) Ensure that the necessary human and financial resources are made available (i) to the FIU for adequately dealing with suspicious transactions reports and forwarding them in due time to the investigative authorities; and (ii) to the Irish Financial Regulator and Self-Regulatory Organisations (non-financial sector) for an adequate enforcement of sanctions for non compliance with AML laws and regulations [Revised Recommendation I]

**Actions taken as of the date of the follow-up report to implement this recommendation:**

If and when additional staff resources are required by the Garda Money Laundering Investigation Unit, the Minister for Finance will decide on the manner in which requirements can best be facilitated. In terms of the Garda Bureau of Fraud Investigation, it is the Garda Commissioner who allocates internal staff resources as determined by overall operational requirements. He can at all times request of the Minister for Justice, Equality and Law Reform that additional Gardai are recruited and this will be addressed in the context of the overall numbers employed in the public service.

The Irish Financial Regulator can request additional resources, including staff, from the Department of Finance and any such request will then be considered by the Minister for Finance.

**If no action has been taken to implement recommendation 2(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 2(d):**

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland:

(d) Require external auditors to report all suspicions 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 would have a material impact on the financial statements, and of whether the suspected offence falls under the Prevention of Corruption Act 2001 or the Criminal Justice (Theft and Fraud Offences) Act 2001; and consider requiring external auditors, where appropriate, to report such suspicions to the competent law enforcement authorities [Revised Recommendation V.B.].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

We have given consideration, as recommended by the OECD in the Phase 2 Report, to requiring external auditors to report suspicions of foreign bribery to competent law enforcement authorities. In view of the

scope of the existing requirements on auditors to report their suspicions of bribery and corruption, it was decided not to make a further specific provision on reporting, which would require auditors to report foreign bribery suspicions.

The existing statutory provisions include section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, where auditors are required to report offences under that Act to the Gardaí. This Act contains a very broad range of offences, for instance dishonestly inducing another person to carry out an act with the intention of making gain or causing loss (section 6), obtaining services by deception (section 7) and a requirement to report money laundering under section 21 of that Act.

The scope of the offence of money laundering was broadened substantially under the Act of 2001, and includes where a person is reckless as to whether property represents the proceeds of “criminal conduct”, meaning conduct which constitutes an indictable offence, and includes “participation in such conduct”. Under section 31(7) (as substituted by section 21 of the Act), criminal conduct - where the conduct occurs outside the State - would constitute such an offence if it occurred within the State and also constitutes an offence under the law of the country or territorial unit in which it occurs, and includes participation in such conduct. It is considered likely that in many cases, the component parts of an offence of foreign bribery will come within the offences under the Criminal Justice (Theft and Fraud Offences) Act, 2001, and thus an auditor would already be subject to the reporting requirement under section 59 of that Act.

In assessing the position in this regard, the provisions of section 194 of the Companies Act 1990, were also taken into account. Section 194(1) of the Act deals with the obligation of auditors in certain circumstances to report the failure by companies/company directors to keep proper books of account to the Companies Registration Office and to the Office of the Director of Corporate Enforcement. Section 194 (5) also requires auditors in certain circumstances to report to the Office of the Director of Corporate Enforcement suspected indictable offences, under the Companies Act.

Thus, if an auditor is of the opinion that a company is failing to keep proper books of account, he or she must serve notice on the company as well as notifying the registrar of companies, who in turn is required to notify the Director of Corporate Enforcement.

By virtue of section 194(5) of the Companies Act 1990, if an auditor comes into possession of information that leads him or her to form an opinion that there are reasonable grounds for believing that the company or its officer or agent has committed an indictable offence under the Companies Acts, the auditor must notify the Director of Corporate Enforcement of the grounds on which the opinion has been formed.

As the obligations in both criminal and civil law on external auditors in relation to suspicions of illegality are already substantial, it is not considered appropriate or necessary to make specific provision in this short amending Bill, for auditors to report foreign bribery to competent law enforcement authorities.

**If no action has been taken to implement recommendation 2(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

See response provided above.

**Text of recommendation 3:**

3. With respect to the investigation and prosecution of foreign bribery offences, the Working Group recommends that Ireland ensure the continuation of provision of intensified training to police officers, prosecutors and judges on foreign bribery, including the practical aspects of bribery investigations and the application of foreign bribery offences to legal persons [Revised Recommendation I].;

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The Office of the Director of Public Prosecution has continued to provide intensive training to members of its staff as previous indicated, on corruption matters (both domestic and the foreign bribery offence) and also associated topics. In March 2009 it hosted a two day conference on Cross-border Fraud and Corruption in Dublin in association with the Prosecution Service of Northern Ireland. This was attended by 130 delegates from prosecution, law enforcement, customs and asset seizing agencies across Europe.

It has also continued to provide training when requested to law enforcement agencies such as An Garda Síochána (Ireland's National Police Service).

An Garda Síochána, the police service of Ireland, provides specialised fraud awareness training to Garda recruits during their initial training and induction as police officers. On appointment to any specialised unit, such as the Garda Bureau of Fraud Investigation, officers receive a far more detailed and specialised training program under the supervision and tutelage of experienced officers and other external specialists. It is important to note that at any stage during an investigation, those involved in enquiries can call upon the expertise of the Garda Bureau of Fraud Investigation.

**If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4:**

4. Concerning jurisdiction, the Working Group recommends that Ireland promptly establish nationality jurisdiction under the Prevention of Corruption (Amendment) Act 2001 as provided under the Criminal Justice (Theft and Fraud Offences) Act 2001 [Convention, Article 4].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

In respect of corruption offences committed outside the State, the Prevention of Corruption (Amendment) Bill makes provision for the extension of jurisdiction for such offences, in particular, by providing that jurisdiction is established where a person commits a corruption offence outside the State, where the benefit or a pecuniary advantage is obtained within the State, or where certain categories of person assist in the commission of the offence. In this regard, it is intended that the categories, who are subject to section 7 of the Prevention of Corruption (Amendment) Act 2001 (relating to corruption occurring outside the State) be

considerably extended, for instance, to include people resident within the State and bodies corporate.

The new provisions mirror equivalent provisions contained in the Criminal Justice (Theft and Fraud Offences) Act 2001, at section 45 therein. While extra-territorial jurisdiction is extraordinary in the Irish context, and Ireland only asserts it in exceptional cases, the extra-territorial jurisdiction provided in the proposed legislation would appear to be wide enough to incorporate the requirements of the Convention. In this regard, it is noted that the requirement under article 4.2 is that a party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

**If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 5(a):**

5. With respect to the implementation of Article 1 of the Convention through the offence of bribing an “agent” under the Prevention of Corruption Act 2001 and the offence of bribing an “official” under the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that, in the context of the ongoing preparation of the Prevention of Corruption (Amendment) Bill, Ireland amend the current statutory framework as follows:

(a) Consolidate or harmonise the offence under the Prevention of Corruption Act 2001 with the one under the Criminal Justice (Theft and Fraud) Offences Act 2001, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including as follows:

- (i) the terminology used to describe the nature of the advantage prohibited from being offered, promised or given,
- (ii) by seriously considering amending the Prevention of Corruption Act 2001 to remove any ambiguity concerning whether the prosecution must prove that the foreign public official was an “agent” and whether the agent-principal fiduciary relationship has been violated,
- (iii) by clarifying the term “corruptly” in the Prevention of Corruption Act 2001, in the absence of clear case law of what the prosecution must prove in this respect,
- (iv) by ensuring that the Attorney-General’s consent under the 1906 Prevention of Corruption Act is not required



**Actions taken as of the date of the follow-up report to implement this recommendation:**

As regards article 1 of the Convention, it is not clear that the application of this article under Irish law requires consolidation or harmonisation of the offences under the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud) Offences Act 2001.

Many of these issues were discussed in detail during the Phase 2 examination in 2007. For instance, in relation to potential problems stemming from an overlap between the Prevention of Corruption (Amendment) Act 2001, and the Criminal Justice (Theft and Fraud) Act 2001, the Director of Public Prosecutions (DPP) advised (at page 48 of the Implementation Report) that if a case came before the DPP which was covered by both statutes, they would deal with the case under the most appropriate statute "having regard to the facts of the particular case", as well as whether a conviction might more easily be obtained under one statute. As indicated in our previous submission to the OECD, it is considered that any overlap between the two offences does not present any difficulty in practical terms

5(a)(i) The terminology being used to describe the nature of "advantage" has been broadened in the legislation, section 2(a) of the Bill, to avoid any ambiguity. The offence of corruption is described in previous legislation as "corruptly giving or offering any gift or consideration" - this description has been broadened to include the giving of an advantage. The words "or advantage" have been added, to clarify that as well as monetary gain, all types of advantage come within the offence.

(ii) Suggested ambiguity in relation to "agent". It is considered that under current legislation, the position is sufficiently clear for practical purposes. The Prevention of Corruption Act 2001 does not require a breach of the agent-principal fiduciary relationship, and the wide ranging list of categories coming within the definition of "agent" in the 2001 Act includes groups where no such agent-principal relationship could exist, such as "a judge in a court in the State", and "any person employed by another". Members of the judiciary in Ireland are wholly independent of the executive and legislative branches of State, and it is not considered that the use of the term "agent" in the wide-ranging list of categories included in the Act causes any difficulty as the meaning is clearly defined in the legislation.

The definition in the new Bill has been extended to include persons employed by or acting on behalf of the public administration of states other than Ireland. Within the Bill, the definition of Foreign Public Official is extended to include persons acting on behalf of the public administration of any other state, including a person under the direct or indirect control of the Government of any such state and agents of any international organisation, established by international agreement between states but to which Ireland is not a party.

(iii) Having given further consideration to whether a description of the term "corruptly" would be of assistance, it has been decided that, subject to parliamentary approval, it is intended to provide for an amendment to include a definition of this term, as recommended in the Phase 2 Examination.

(iv) Section 3(2) of the Prosecution of Offences Act 1974 provides for the functions of the Attorney General relating to criminal law previously carried out by him to be carried out by the Director of Public Prosecutions (DPP). Accordingly, as previously advised by the DPP (see page 54 of Report) and discussed previously, at Ireland's evaluation, it is not, in fact, necessary to expressly repeal the requirement in the 1906 legislation, as the Act of 1974 fully addresses the matter.

It is necessary to have regard to the rules of statutory interpretation as they apply. It is not necessary or appropriate to repeal the requirement in the 1906 legislation. This matter has been confirmed previously by the Director of Public Prosecutions.

**If no action has been taken to implement recommendation 5(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 5(b):**

5. With respect to the implementation of Article 1 of the Convention through the offence of bribing an “agent” under the Prevention of Corruption Act 2001 and the offence of bribing an “official” under the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that, in the context of the ongoing preparation of the Prevention of Corruption (Amendment) Bill, Ireland amend the current statutory framework as follows:

(b) Take appropriate steps to ensure that bribery of foreign public officials covers: (i) employees of foreign public enterprises regardless of their legal form, including those under the indirect control of a foreign government(s), and (ii) agents of international organisations to which Ireland is not a party [Convention, Article 1].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

These terms are provided for in the new legislation. While the earlier definition of "agent" (in the Prevention of Corruption (Amendment) Act 2001) included "any person employed by or acting for another", it is noted that the Working Party considered that the definition of "agent" in this legislation as it applied to officials of international organisations was more restrictive than the provisions within the Convention.

This definition has been extended in the Bill, to cover persons employed by or acting on behalf of the public administration of any state, including persons under the direct or indirect control of the government of any such state. Also included in the new provision are agents of international organisations established by international agreement between states to which Ireland is not a party.

**If no action has been taken to implement recommendation 5(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 6(a):**

6. With respect to the liability of legal persons for the offences implementing Article 1 of the Convention under the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that Ireland undertake a review of the relevant law on the criminal liability of legal persons with a view to codifying and clarifying its scope, and that in addition Ireland do the following:

(a) Expand the scope of liability to cover, in addition to bribery committed personally by a senior person (e.g., directors and high managerial agents), bribery committed by a lower level person with the express or implied permission of a senior person.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

General note: Section 11 of the Interpretation Act 1937, provides that the term ‘person’ should be construed as applying to bodies corporate and unincorporated bodies of persons, as well as individuals. Bodies corporate include private, public or statutory companies that are subject to the laws and regulations governing the operation of companies in Ireland.

The Prevention of Corruption (Amendment) Act 2001, confirms that bodies corporate may be liable in relation to offences under the 1889 – 2001 Acts. Section 9 thereof provides that where an offence under those acts is committed by a body corporate, with the ‘consent or connivance of’ or is ‘attributable to any wilful neglect’ on the part of an officer of that body corporate, or a person purporting to so act, then that person, as well as the body corporate, shall be guilty of an offence and liable to be proceeded against and punished in the same way as the body corporate.

The breadth of the common law liability of legal persons is extensive. The scope of the liability of legal persons has expanded in this jurisdiction over time, to meet new situations. Taking into account the legal advice which we have received in relation to this matter, it is considered that any attempt to seek to codify this in legislation, may run the risk of omitting some element and it is more likely to become out of date as the law changes to meet developments in the types of legal bodies and mechanisms for their management.

The advice received is to maintain the common law position, and to allow its evolution rather than to make specific provision in legislation for this. It would appear to be counter-productive to legislate for corporate liability on a sectoral basis, or in a particular instance. If corporate liability is to be given legislative voice, it is our view that it should be done in the same terms for all types of offences for which legal persons may be liable.

We have received specific legal advice to the effect that under Irish law, the acts of the controlling officers of a legal person are viewed as constituting the acts of the legal person itself, so that in the case of some offences (and corruption offences fall within the relevant category) the crimes of a company’s controlling officers are the crimes of the corporation itself.

This is the “identification doctrine” adopted by the House of Lords in *Tesco supermarket Ltd. –v- Natrass* [1972] AC 153, and recognised in Irish law in *Taylor -v- Smith* [1991] IR 142, and *Superwood Holdings Plc – v- Sun Alliance and London Insurance Plc* [1995] 3 IR 30. According to the identification doctrine, the crimes of a legal body’s “controlling mind and will”, i.e. the controlling officers of the legal entity, are identified as one with the corporation.

Under Irish law, a company may be vicariously liable for the criminal acts of its employees or agents, where those acts have been carried out in the course of and within the scope of their employment. This liability arises in the same circumstances as those in which a natural person *qua* employer or principal would be vicariously liable. As can be seen from this brief description of the evolution of the law, the scope of liability of legal persons has expanded over time to meet new situations. The breadth of the common law liability of legal bodies is extensive.

It is considered that any attempt to codify this gradual extension in legislation runs the risk of leaving out some element and, more likely, of becoming out of date as the law changes to meet new developments in the types of legal bodies and mechanisms for their management. The Office of the Attorney General has advised the Department of Justice, Equality and Law Reform, that in their view, the safer approach – and one which is more likely to ensure the liability of legal persons – is to maintain the common law position

and allow its evolution rather than to legislate for it.

Taking these matters into account, as well as the provisions of section 9 of the Prevention of Corruption (Amendment) Act 2001, which have been outlined above, relating to the liability of individuals in respect of offences by corporate bodies, it is considered that it is quite clear that the liability of legal bodies is recognised in the legislation, but without setting this out in the type of detail which could lead us to omit some element, or at least, not use language broad enough to take account of the future evolution of the law.

The advice we have received is that it is not advisable to seek to go any further in legislating for the liability of legal persons with respect to corruption offences, other than is provided in section 9 of the Act of 2001.

**If no action has been taken to implement recommendation 6(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 6(b):**

6. With respect to the liability of legal persons for the offences implementing Article 1 of the Convention under the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that Ireland undertake a review of the relevant law on the criminal liability of legal persons with a view to codifying and clarifying its scope, and that in addition Ireland do the following:

(b) Expressly provide for the liability of unincorporated legal persons [Convention, Article 2].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

See response to 6(a) above. Further consideration may be given to large scale issues of this type at a later stage, however it is not considered appropriate to make any further determination on matters such as liability of legal persons, at this juncture.

**If no action has been taken to implement recommendation 6(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(a):**

7. With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland:

(a) Amend its tax legislation to clarify that bribes to foreign public officials are not tax-deductible; and expressly communicate to tax examiners the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, through the issuance of guidelines or manuals, and training programmes [Revised Recommendation I and IV].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

Section 41 of the Finance Act 2008 is a direct response to the OECD recommendation to prohibit a deduction for tax purposes of illegal payments made to a foreign official. While illegal payments have never been tax deductible, this section explicitly denies a tax deduction in computing the amount of any income chargeable to tax under Schedule D for any payment the making of which constitutes a criminal offence or, in the case of a payment made outside the State, where the payment, if made in the State, would constitute a criminal offence.

The Irish Revenue Commissioners have brought *OECD Bribery Awareness Handbook for Tax Examiners (OECD Handbook)* to the attention of their tax auditors. This publication may be accessed via Revenue's website by all Revenue officials and not just those engaged in audit work.

Training provided to Revenue officials includes the subject of non-deductibility of bribes in all audit training programmes, and seminars on the Finance Act 2008 includes the provisions of Section 41.

The Irish Revenue Commissioners has also undertaken the following awareness campaign for tax practitioners:

- At the June 2007 meeting of the Tax Administration Liaison Committee (TALC) Audit Sub-Committee, which is comprised of tax practitioner bodies and Revenue officials. Revenue brought the issue of the non-tax deductibility of bribes to the attention of practitioners. Revenue officials also drew the attention of this sub-committee to Section 41 of the Finance Act 2008 at the April 2008 meeting.
- In September 2007, Revenue officials e-mailed background information on this issue to the members of the TALC Audit Sub-Committee which the practitioner bodies circulated to their members.
- The OECD Handbook may be accessed via Revenue's website.
- Before the end of 2009, Revenue intend to publish an article on the non-tax deductibility of bribes in "*Tax Briefing*" (a technical magazine aimed at tax practitioners) which will be available both in electronic and hard copy format.

**If no action has been taken to implement recommendation 7(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(b):**

7. With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland:

(b) Ensure that false accounting offences are sanctioned in an effective, proportionate and dissuasive manner [Convention, Article 8];

**Actions taken as of the date of the follow-up report to implement this recommendation:**

General paragraph in relation to money laundering

In relation to offences of money laundering, the **Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009**, was published, in early Summer 2009, and the Second Stage debate is scheduled for Parliament in mid-October 2009.

This Bill will enable the transposition of the Third EU Money Laundering Directive (60/2005/EC) into Irish law. It is also intended to ensure compliance with the recommendations of the third mutual evaluation report on Ireland of the Financial Action Task Force, (FATF). The Bill proposes to repeal and re-enact the current anti – money laundering legislation contained in other statutes, principally the provisions relating to money laundering contained in the *Criminal Justice Act 1994*, which is the Act containing most of Ireland’s current anti-money laundering provisions.

The Bill, which consolidates all of Ireland’s anti money laundering legislation, increases the obligations on a wide range of legal persons, including credit and financial institutions, lawyers, accountants, estate agents, trust and company service providers, tax advisers and others in relation to money laundering and terrorist financing.

It contains requirements on the part of designated bodies covered by the legislation, such as Banks, Lawyers, Accountants, Real Estate Agents, and dealers in high value goods, to identify customers, to report suspicious transactions to An Garda Síochána and the Revenue Commissioners and to have specific procedures in place to provide to the fullest extent possible for the prevention of money laundering and terrorist financing.

It provides that the categories of designated bodies in respect of which there are no supervisory or competent authority such tax advisers who are not accountants or solicitors, and dealers in high value goods, that is, those who may receive cash receipts of €15,000 or more, will be monitored for the purposes of compliance with the Bill, by the Department of Justice Equality and Law Reform. The latter category includes people such as car and boat dealers, jewelers, art dealers and others engaged in trades likely to have large cash dealings.

A significant change introduced in this Bill is the requirement for the designated persons covered by the Bill to undertake specific effective customer due diligence measures at the outset of a business relationship and certain other measures during the course of the business relationship.

Furthermore for the first time Private Member’s Gaming clubs are included in the legislation and will be required to comply with all of the requirements of the money laundering and terrorist financing legislation and will be monitored by the Department to ensure compliance. This measure also contains specific provision in relation to keeping statistics and, as indicated above, suspicious transaction reports.

**If no action has been taken to implement recommendation 7(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(c):**

7. With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland:

(c) Amend the double criminality exception for the money laundering offence under section 31(7) of the Criminal Justice Act 1994, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred [Convention, Article 7]

**Actions taken as of the date of the follow-up report to implement this recommendation:**

**If no action has been taken to implement recommendation 7(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

For legal reasons, it is not proposed to end the double criminality requirement as contained in this Recommendation. For instance, there are issues as to the tests that would be needed for evidence in order for the foreign corruption “offence” to be regarded as the predicate offence in money laundering proceedings. There could also be difficulties with the situation where a legal transfer of money into the State is (subsequently) deemed an illegal act, and there are doubts as to whether prosecutions resting on evidence of this nature would be upheld, if challenged on a constitutional basis.

**Text of recommendation 7(d):**

7. With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland:

(d) Maintain more detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether bribery is the predicate offence; and (ii) on suspicious transaction reports that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The Department of Finances' Money Laundering Investigation Unit in conjunction with the Department of Justice, Equality and Law Reform and the Central Statistics Office have participated in an initiative to improve the provision of statistics generally in the context of the implementation of the 3<sup>rd</sup> Money Laundering directive and the forthcoming legislation giving effect to that legislation.

The specific offences referred to here will be captured under the general provisions for the maintenance of statistics in money laundering cases. With regard to paragraph (i) namely, sanctions, it should be noted that An Garda Síochána does not have the sole responsibility for the maintenance for statistics on court outcomes. This issue lies within the ambit of the Courts Service. However where improvements to the collection and dissemination of statistical information can be enacted, the Senior Officials Committee can act as a conduit in order to bring about such changes.

See text in respect of recommendation 7(b) above for additional material.

**If no action has been taken to implement recommendation 7(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(a):**

8. With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland:

(a) Ensure that legal persons are subject to effective, proportionate and dissuasive sanctions for foreign bribery [Convention, Articles 2 and 3];

**Actions taken as of the date of the follow-up report to implement this recommendation:**

As and when sanctions are imposed for cases of bribery and corruption, the Senior Officials Committee can act as a forum for discussing the likely effectiveness and dissuasive nature of sentences imposed by the Courts. It is important to note however that the Judiciary are wholly independent in terms of the manner in which sentences are imposed.

**If no action has been taken to implement recommendation 8(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(b):**

8. With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland:

(b) Consider introducing additional civil or administrative sanctions by the courts for natural and legal persons convicted of foreign bribery [Convention, Article 3]

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The issue of the legal status of legal persons has already been provided. The issue of increasing sanctions can be addressed as time progresses, bearing in mind of course developments in best practice as reported through the Working Group.

**If no action has been taken to implement recommendation 8(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**



**Text of recommendation 8(c):**

8. With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland:

(c) Revisit the policies of agencies such as those responsible for development aid, public procurement, and public-private partnerships, to take due consideration in their contracting decisions of prior convictions for all foreign bribery offences [Convention, Article 3; Revised Recommendation II(vi), and VI (ii) and (iii)]

**Actions taken as of the date of the follow-up report to implement this recommendation:**

1. Current public procurement regulations state that contracting authorities must exclude parties convicted of

- corruption as set out in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union promulgated by Council Act of 26 May 1997
- fraud as set out by the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests
- money laundering as set out in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on preventing the use of the financial system for money laundering
- participation in a prescribed criminal organisation within the meaning of Article 1 of Council Joint Action 98/733/JHA.

2. In addition, contracting authorities may exclude from consideration a party

- who has been found guilty of professional misconduct by a competent authority that is authorised by law to hear and determine allegations of professional misconduct against persons that include the operator, or
- who has committed grave professional misconduct provable by means that the authority can demonstrate.

The measures outlined at 1, which are mandatory and at 2, which are optional, represent measures in place under current regulations implemented during 2005 and 2006. They represent measures deemed most relevant to the conduct of the public procurement function. To the extent that the mandatory provisions at 1 may not cover convictions for ALL foreign bribery offences, consideration would be given (subject to consultation with the Office of the Attorney General) to extend the coverage of these provisions when making future regulations on public procurement or amending the 2005 and 2006 Regulations.

The Department of Finance's Central Public Private Partnership (PPP) Unit has made members of the Interdepartmental Group on PPPs aware of Recommendation 8(c). The Interdepartmental Group comprises representatives of all public service bodies engaged in PPPs. It should be noted that the rules for participation in PPPs are the same as for public procurement more generally and that Contracting Authorities must satisfy themselves in each project that procedures are in accordance with national and EU procurement requirements.

**If no action has been taken to implement recommendation 8(c), please specify in the space below the**

**measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(d):**

8. With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland:

(d) Draw the attention of investigative and prosecutorial authorities to the importance of requesting confiscation as a sanction for foreign bribery [Convention, Article 3].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The Senior Officials Compliance Committee contains representatives from both the law enforcement investigative agency, An Garda Síochána, and the prosecutorial body, the Director of Public Prosecutions Office. Their involvement in the ongoing work of this Committee ensures that the issues which need to be considered when cases are being pursued are kept live. The importance of requesting confiscation as a sanction for foreign bribery is but one of these.

**If no action has been taken to implement recommendation 8(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

*I.(B) Issues for Follow-up by the Working Group in Phase 2*

**Text of issue for follow-up 9(a):**

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

(a) The effectiveness in practice of territorial jurisdiction under Irish law to enable the effective application of the offence under the Prevention of Corruption (Amendment) Act, 2001 [Convention, Article 4];

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

As and when cases of foreign bribery come to be disposed of before the Courts, the Senior Officials Compliance Committee will act as a forum to help ensure that the recommendations of the Working Group are appropriately addressed and that Ireland continues to fully meet its international obligations. The tour de table segment of the Plenary Group will be used to advise members of developments of relevance.

As indicated previously, the Prevention of Corruption (Amendment) Bill 2008, has passed second stage in Parliament, and is awaiting further deliberation by Parliamentary Committee. For this reason, it is not

proposed to elaborate further on legislative change, until the legislation is passed.

**Text of issue for follow-up 9(b):**

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

(b) That considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved shall not influence (i) investigation and prosecution of foreign bribery cases; and (ii) decisions regarding mutual legal assistance or extradition [Convention, Articles 5, 9 and 10];

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

As case law develops, the effectiveness of the legal system in terms of detecting, prosecuting and sanctioning offences can be addressed through the auspices of the Senior Officials Compliance Committee. This Committee, as stated previously, has representatives of the main agencies with responsibility in the various fields for tackling bribery and corruption who work together to ensure a comprehensive, robust and thorough mechanism is in place to counteract the effects of bribery and corruption.

In addition, the independent nature of the Office of the Director of Public Prosecutions ensures that cases are brought before the Courts based on the merits of the particular case in question without extraneous considerations.

**Text of issue for follow-up 9(c):**

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

(c) The level of sanctions, including confiscation, pronounced by the courts in foreign bribery cases to assess whether they are sufficiently effective, proportionate, and dissuasive [Convention, Article 3]; and the sanctions for money laundering imposed in Ireland [Convention, Article 7]

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

As practice and case law develops, we will be happy to report issues of interest back to the working group for information.

**Text of issue for follow-up 9(d):**

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

(d) With respect to auditing standards, whether the threshold for external audit requirements is

adequate in practice to trigger external audit of all companies with substantial overseas operations [Revised Recommendation V.B.]; and the effectiveness of the new provisions regarding internal company controls in the Companies (Auditing and Accounting) Act 2003, once they have entered into force [Revised Recommendation V.C.].

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

As stated in the recommendation, the Working Group will follow-up on the issues identified as practice develops over time. Where there are changes of interest or relevance to the Working Group, these will be brought to the attention of the Plenary Session for information.

This would of course include amended sanctions in any area relating to bribery and corruption.

## **PART II: FOLLOW UP TO PHASE 2bis**

### ***II(A) Recommendations for Action in Phase 2bis***

*Note: For ease of reference, Recommendation 1 of this report corresponds to Paragraph 1 on page 29 of the Phase 2bis Report and so on.*

#### **Text of recommendation 1:**

1. With regard to prevention, awareness raising and training, the Working Group recommends that Ireland continue its efforts to raise the level of awareness on the foreign bribery offence and on the risks that Irish companies may engage in bribery abroad: (i) within the public administration and amongst those agencies that deal with Irish enterprises operating abroad, including trade promotion agencies and Irish diplomatic missions; and (ii) within the Irish business community, including SMEs, engaging in business abroad [Revised Recommendation I].

#### **Actions taken as of the date of the follow-up report to implement this recommendation:**

##### **Codes of Conduct for Civil Servants:**

*An explanation of the measures put in place to comply with this recommendation has already been given in terms of the response to this Recommendation under the section relating to the Phase II report. For ease of reference it is reproduced below.*

Civil servants are bound by the Civil Service Code of Standards and Behaviour. This code states that Civil Servants must carry out their work within a framework of law and respect legal constraints. In particular, they must never act in a manner which they know, or suspect, is illegal, improper, or unethical or for which they have no legal authority. They cannot use their official position to benefit either themselves or others with whom they have a personal or business interest. They are also expressly forbidden to seek to influence decisions on matters pertaining to their official positions other than through established procedures.

Clear statements are also included in the Code that civil servants should not receive benefits of any kind, including hospitality, from a third party which might reasonably be seen to compromise their personal judgement or integrity.

Under the terms of a Code of Practice for the Governance of State Bodies issued by the Department of Finance in 2001 and updated in 2009 all public bodies are required to put in place written Codes of Business Conduct, approved by the Board, for their directors and employees.

The Code of Practice includes a suggested Framework Code of Business Conduct which sets out basic objectives such as the establishment of an agreed set of ethical principles; the promotion and maintenance of confidence and trust; and the prevention of development or acceptance of unethical practices.

In addition to these basic objectives the Code sets out a number of fundamental issues of General Principle. Under the heading “Integrity” it is suggested that a Code of Conduct include the following matters –

- management and employees should not be allowed to be involved in outside employment/business interests in conflict or in potential conflict with the business of the body;

- avoidance of the giving or receiving of corporate gifts, hospitality, preferential treatment or benefits which might affect or appear to affect the ability of the donor or the recipient to make independent judgement on business transactions;
- commitment to compete vigorously and energetically but also ethically and honestly;
- conduct of purchasing activities of goods/services in accordance with best business practice;

A statutory Code of Conduct for persons who hold or occupy directorships or positions of employment in public bodies will be put in place by the Department of Finance in the near future. A specific provision similar to that contained in the Civil Service Code which requires Civil Servants never to act in a manner which they know, or suspect, is illegal, improper, or unethical or for which they have no legal authority will be included in the statutory Code of Conduct for persons who hold or occupy directorships or positions of employment in public bodies.

### **Training:**

An Induction Manual developed for new entrants to the Irish Civil Service, published in 2008, devotes a full chapter to Ethics and Standards in Public Office and this manual has been distributed to every Government Department, Office and Agency. The Personnel Officers Network included a presentation on Ethics in Public Office at their Human Resources Information Day Seminar in Dublin Castle in September, 2008 and the Network continues to raise awareness of this issue by keeping it on the agenda for all network meetings.

The Civil Service Training and Development Centre (CSTDC) which is based in the Department of Finance avails of every opportunity to raise awareness of the Ethics in Public Office Acts 1995 and 2001, the Code of Standards and Behaviour for Irish Civil Servants, the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Bill 2008.

The CSTDC includes a module on Ethics in Public Office in the Clerical Officer Training Programme, which is delivered on an ongoing basis in every Government Department and office.

Since December 2008, both the Public Financial Management Training Programme and the Public Procurement Training Programme include training on Ethics in Public Office. Both these courses are delivered cross-departmental on a weekly basis. Attendees are also reminded of their responsibility to ensure that bodies being grant-aided from their budget are fully aware of the legislation and their responsibility and accountability regarding same

Managing People Training which is delivered cross-departmental on a monthly basis also includes training in this area.

Since January 2009, the Departmental Training Officers Network has put Ethics in Public Office a fixed item on the agenda for all their meetings and members are reminded at every meeting that they are responsible for ensuring that staff within their respective Departments are fully aware of their responsibility and accountability under the legislation.

The **Department of Enterprise, Trade, and Employment (DETE)** have published an information brochure setting out full details of the Convention and the OECD recommendations have been widely distributed to relevant parties,

DETE commissioned Transparency Ireland to provide training for relevant officials, including Department officials and officials in the relevant development Agencies which engage with exporting companies.

The **Department of Foreign Affairs** provided two training modules on the Convention in May, 2009 to staff, including those dealing with development aid programmes, departing on foreign postings. These modules will continue to form part of all pre-posting training sessions. The presentational materials used were also circulated to all Missions abroad.

In the *Handbook on the Economic Work of Missions* which is circulated each year to all Missions attention is drawn to obligations arising from the Convention, under the heading of *Legal and Ethical Issues*. All staff of the Department of Foreign Affairs have been provided with copies of AO Circular No. 09/07 which requests Heads of Mission to ensure that officers involved in the promotion of foreign trade abroad are familiar with the Convention in order for it to be drawn to the attention of Irish companies.

Information for staff on the Convention has also been posted on this Department's website and Intranet with links provided to the Department of Justice, Equality and Law Reform's website.

The booklet on the Convention, produced by the Department of Enterprise, Trade and Employment has also been distributed to Missions abroad.

Also of relevance will be the development and continued enhancement of the website [www.anticorruption.ie](http://www.anticorruption.ie). This site, hosted by the Department of Justice, Equality and Law Reform, endeavours to be a portal from which the public sector and all elements of the private sector can draw information in response to questions they may have on the subject of bribery and corruption.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 2(a):**

2. With regard to the detection and reporting of the foreign bribery offence, the Working Group recommends that Ireland:

(a) Proceed promptly with its intention to put in place procedures for public sector employees, including staff of Irish diplomatic missions, to encourage and facilitate the reporting of suspected foreign bribery that they may uncover in the course of their work.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

A comprehensive explanation of the measures proposed to comply with this recommendation has already been provided. It is hoped that further substantial progress will be made prior to the Plenary Session in December at which time developments can be brought to the attention of the Working Group.

However, as no statutory protections for whistleblowers currently exist it seems likely that the adoption of procedures will have to await the passing of the Bill referenced in the preceding text.

The Department of Foreign Affairs have advised that once the appropriate legislation is in place, they will issue without any undue delay detailed guidelines to all staff, including those dealing with development aid

programmes, on the reporting of information on foreign bribery offences.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 2(b):**

2. With regard to the detection and reporting of the foreign bribery offence, the Working Group recommends that Ireland:

(b) As concerns legislation on whistleblower protection, proceed promptly with the enactment of whistle blowing provisions as proposed under the Prevention of Corruption (Amendment) Bill 2008. In this regard, Ireland should pursue its intention to: (i) expand the definition of “appropriate persons” to whom communications can be made; and (ii) allow for the confidentiality of such communications, in order to encourage public and private whistleblowers to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I].

**Actions taken as of the date of the follow-up report to implement this recommendation:**

The Prevention of Corruption (Amendment) Bill 2008 which will amend the Prevention of Corruption Act 1906 and the Prevention of Corruption (Amendment) Act 2001, addresses the definition of agent and bribes, expands the scope of nationality jurisdiction, and introduces whistleblower protection provisions. The Bill was published on 10 June 2008 and the evaluation team were given sight of the text of the Bill. However, due to other legislative priorities unforeseen at the time of the Phase 2 bis review it has not been possible to proceed with this legislation quite as quickly as had been hoped.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 3(a):**

3. With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]:

(a) By proceeding promptly with the enactment of the Prevention of Corruption (Amendment) Bill 2008, and pursuing its intention to make changes to the Bill in order to: (i) harmonise the terminology used to describe the nature of the advantage prohibited from being offered, promised or given; (ii) harmonise the scope of nationality jurisdiction for the foreign bribery offence in a manner that does not restrict nationality



jurisdiction; and (iii) clarify the term “corruptly”, in the absence of clear case law of what the prosecution must prove in this respect.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

This matter has already been dealt with in terms of the explanation of the contents and status of the Prevention of Corruption (Amendment) Bill 2008.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 3(b):**

3. With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]:

(b) By amending the Prevention of Corruption Act 2001 to remove reference to the term “agent” in order to avoid any ambiguity concerning whether the prosecution must prove that the foreign public official was an “agent” and whether the agent-principal fiduciary relationship has been violated.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

This matter has already been dealt with in terms of the contents and status of the Prevention of Corruption (Amendment) Bill 2008.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 3(c):**

3. With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]:

(c) By taking the first possible opportunity to consolidate the corruption offences into a single piece of legislation.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

An explanation of the current thinking on this matter has already been provided in the earlier text.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(a):**

4. With regard to the liability of legal persons, the Working Group reaffirms its concern and reiterates its recommendations expressed in Phase 2. The Working Group recommends that Ireland [Convention, Articles 2 and 3]:

(a) Adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

This matter has already been dealt with in comprehensive terms by way of explanation of the contents and status of the Prevention of Corruption (Amendment) Bill 2008.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(b):**

4. With regard to the liability of legal persons, the Working Group reaffirms its concern and reiterates its recommendations expressed in Phase 2. The Working Group recommends that Ireland [Convention, Articles 2 and 3]:

(b) Expressly provide for the liability of unincorporated entities.

**Actions taken as of the date of the follow-up report to implement this recommendation:**

**If no action has been taken to implement recommendation 1, please specify in the space below the**

**measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

This is a recommendation which under the terms of common law upon which the Irish legislative system is built, is already catered for. We therefore continue to believe that separate legislative changes are not required in order to be compliant with the recommendation.

***II.(B) Issues for Follow-up by the Working Group in Phase 2bis***

**Text of issue for follow-up 5(a):**

5. In addition, the Working Group will follow-up, as practice develops:

(a) The application of “reasonable grounds” required to obtain search warrants in the investigation of foreign bribery.

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

This issue arose following a discussion during the Phase 2 bis onsite visit. However it was the content of the specific discussion which ranged across several issues which caused the misunderstanding and not that of the subject of "reasonable grounds" under which a warrant can be applied for.

Categorical assurances were given at the time of the discussion in Dublin, and during the follow-up discussions in Paris during the plenary session, that there was no confusion on the part of the Irish authorities as to the conditions under which a search warrant can be applied for. This matter for our part remains unchanged.

**Text of issue for follow-up 5(b):**

5. In addition, the Working Group will follow-up, as practice develops:

(b) The application of nationality jurisdiction to the bribery of foreign public officials as provided in the Prevention of Corruption (Amendment) Bill 2008.

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The Prevention of Corruption (Amendment) Bill 2008 was published on 10 June 2008 but has not as yet been enacted. Therefore there has been no new developments since the adoption of the report. However as case law develops the matter will be brought to the attention of the Working Group.