



PHASE 1 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE RUSSIAN FEDERATION

March 2012

This Phase 1 Report on the Russian Federation by the OECD Working Group on Bribery evaluates and makes recommendations on the Russian Federation's implementation and application of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 16 March 2012.

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**RUSSIAN FEDERATION: PHASE 1
REVIEW OF IMPLEMENTATION OF THE CONVENTION AND THE 2009
RECOMMENDATION ON FURTHER COMBATING BRIBERY**

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

1. On 16 May 2007, the OECD Council decided to open discussions with the Russian Federation (hereafter Russia) for accession to the Organisation. The Accession Roadmap, which sets out the terms, conditions and process for the accession of Russia to the OECD, provides that Russia should commit to “full compliance with the requirements of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” [C(2007)103/FINAL].
2. On 8 February 2009, the Government of the Russian Federation formally applied to the OECD Secretary-General to become a full participant in the OECD Working Group on Bribery in International Business Transactions (the “Working Group”, the “Group”, or “WGB”) and to accede to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”). Russia started participating in the Working Group as a full member in June 2011 after the WGB extended an invitation to join in May 2011. Russia deposited its instrument of accession to the Convention with the OECD on 17 February 2012.
3. The present report has been prepared for the purpose of the Phase 1 review of Russia. In accordance with the procedure agreed by the OECD Members of the Working Group on Bribery [DAF/INV/BR(2008)9/REV1], a specific assessment of Russia will subsequently be undertaken for the purposes of OECD accession after the completion of the Phase 2 Review [DAF/INV/BR/ACS(2008)3].

Convention as a Whole

4. On 4 May 2011, Russia enacted legislation intended to bring it into compliance with the Convention in the form of “Amendments to the Criminal Code and the Code of Administrative Offences of the Russian Federation in Relation to the Enhancement of Public Governance in the Area of Counteraction to Corruption” (referred hereafter as Federal law N° 97-FL). The law entered into force on 16 May 2011.
5. According to Russia’s Constitution, all international law and the international treaties of the Russian Federation are part of the Russian domestic legal system and if an international agreement sets norms different from those established by a national law then the norms of the international agreement are applied¹.

1 Article 15.4 of the Constitution states that “*the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied*”.

1. Article 1. The Offence of Bribery of Foreign Public Officials

6. Article 291 of the Criminal Code (CC), as amended in May 2011, makes it an offence to bribe a foreign public official as follows:

Article 291 of the Criminal Code

1. Giving a bribe to a public official, foreign public official or a public official of a public international organisation, personally or through an intermediary - shall be punishable with a fine of fifteen- to thirty-fold amount of the bribe or deprivation of liberty for a term of up to two years with a fine of ten-fold amount of the bribe.

2. Giving a bribe to a public official, foreign public official or a public official of a public international organisation, personally or through an intermediary in a significant amount² - shall be punishable with a fine of twenty- to forty-fold amount of the bribe or deprivation of liberty for a term of up to three years with a fine of fifteen-fold amount of the bribe.

3. Giving a bribe to a public official, foreign public official or a public official of a public international organisation, personally or through an intermediary in exchange for knowingly illegal actions (inaction) shall be punishable with a fine of thirty- to sixty-fold amount of the bribe or deprivation of liberty for a term of up to eight years with a fine of thirty-fold amount of the bribe.

4. Actions stipulated under parts one – three herein, if committed:

a) by a group of persons with prior agreement (collusion) or by an organized group;

b) in a large amount³, - shall be punishable with a fine of sixty-fold to eighty-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of five to ten years with a fine of sixty-fold amount of the bribe.

5. Actions stipulated under parts one - four herein, committed in very large amount⁴ - shall be punishable with a fine of seventy-fold to ninety-fold amount of the fine or deprivation of liberty for a term of seven to twelve years with a fine of seventy-fold amount of the bribe.

Note. The person giving the bribe shall be exonerated of the criminal liability, if such person actively facilitated the detection and/or investigation of the crime and if the bribe was extorted by the public official, or such person after committing the crime has voluntarily reported to the body authorised to initiate criminal proceedings.

1.1 The elements of the offence

1.1.1 any person

7. Natural persons are subject to criminal liability for the offence of foreign bribery under Article 291 CC, whereas legal persons are subject to administrative liability for corruption offences under the provisions of the Code of Administrative Offences (liability of legal persons is discussed in section 2 of this report). Article 19 CC provides that any natural persons who have reached the age of 16 years are subject to criminal responsibility. In addition, the Russian Constitution and federal laws provide for a broad scope of immunities from criminal investigation and proceedings which might prevent investigating or prosecuting persons who may be protected by those immunities. The Working Group believes that this issue may be an obstacle under Articles 1 and 5 and should be further reviewed in the context of Phase 2.

2 i.e. from 25 000 to 150 000 Roubles (*approximately from EUR 600 to EUR 3 600*).

3 i.e. from 150 000 Roubles to 1 million Roubles (*approximately from EUR 3 600 to EUR 25 000*).

4 i.e. more than 1 million Roubles (*approximately EUR 25 000*).

1.1.2 intentionally

8. The rules regarding intent in Russian law are set down in Articles 24 and 25 CC (General Part of the Criminal Code). Article 24 CC states that “*a person who has committed an act intentionally or carelessly shall be deemed to be guilty of a crime*”. Article 25 CC states that “*an act committed with direct or indirect intent shall be recognized as a crime. A crime shall be deemed to be committed with direct intent, if the person was conscious of the social danger of his actions (inaction), foresaw the possibility or the inevitability of the onset of socially dangerous consequences, and willed such consequences to ensue. A crime shall be deemed to be committed with indirect intent, if the person realised the social danger of his actions (inaction), foresaw the possibility of the onset of socially dangerous consequences, did not wish, but consciously allowed these consequences or treated them with indifference*”. The Russian authorities have indicated that Article 291 CC, which establishes criminal responsibility for active bribery by natural persons, implies direct intent.

1.1.3 offer, promise or give⁵

9. Article 291 CC only expressly applies to the giving of a bribe. Based on the Resolution of the Supreme Court of 10 December 2000 on judicial practice in bribery cases (hereafter 2000 Resolution⁶), the domestic bribery offence is considered to be completed from the moment the bribe-taker has taken at least a fraction of transferred valuables. The same Resolution states that where a public official *refused* to take a bribe or a subject of commercial bribery, the bribe-giver or an individual transferring the subject of the bribe or corrupt business practice incurs the liability for an attempt (as defined under Articles 29 and 30 CC, see below) of the crime provided for by Article 291 CC. The same Resolution indicates that where the given *transfer of values failed* due to circumstances beyond control of individuals attempting to transfer or accept the subject of the bribe or the commercial bribery, the deed should be classified as an attempt to take or give a bribe or an unauthorized bonus under corrupt business practice. The Russian authorities have indicated that when a bribe-giver has informed the law enforcement authorities about a demand of a bribe by an official, and the bribe is given under the surveillance of law enforcement authorities (i.e. under controlled delivery), the bribe-taker will not be charged for the act of taking bribe, but for attempting to take a bribe (using the same concept of attempt as defined in Articles 29 and 30 CC). Under the Convention, the bribe-giver has committed a crime regardless of whether an official receives, accepts or rejects the undue advantage.

10. Russia states that the provisions of this report containing the assessment of criminal liability established in the Russian Federation for offer and promise of a bribe do not correspond to the OECD Convention and the Commentaries to it. The criminalisation of these offences in the Russian Federation is made by recognising them as preparation to give a bribe or an attempt to it. The Convention does not

5 The Russian authorities have indicated that in 2010, the total number of criminal cases of corruption focus referred to court amounted to 11,297 (in 2009 – 11,633). According to the Judicial Department of the Supreme Court of the Russian Federation, 2,000 persons were convicted of taking bribes in 2010 and 3,360 of giving bribes (only under 291.1. and 291.2 CC, i.e. under the offence of active bribery before the amendments that were adopted in May 2011). No equivalent statistics were provided on the number of domestic bribery cases that involved legal persons.

6 The Supreme Court studies the judicial decisions of lower courts on various topics and adopts resolutions, which establish recommendations on the interpretation of particular provisions of law for lower courts for uniform application. Courts must strictly follow such recommendations; otherwise, decisions contrary to the recommendations of the Supreme Court might be reversed. To the question of the applicability of the Resolution 2000 to the foreign bribery offence (introduced in 2011), the Russian authorities responded that the Resolution provides some common interpretation of the offence of *bribery giving* in Russia. They further substantiated their position by arguing that the offence set out in Article 291 CC does not conflict with legal provisions on bribery in force at the time of the adoption of the Resolution. The Russian authorities expect a new Supreme Court Resolution to be issued shortly that will take into account the legislative changes occurred in 2011 in relation to foreign bribery.

contain a requirement to criminalise these offences in any different way. The lead examiners and the Secretariat did not make references to specific Articles or paragraphs of the Convention and the Commentaries to it that require to criminalise the offer and promise of a bribe in a different manner that is done in the Russian Federation. The Russian Federation addresses the issue of criminalising these offences in accordance with Article 1 of the Convention and with regard to paragraph 3 of Article 1 of the Commentary to it. In light of the above, the Russian delegation states that it expresses its disagreement not only with the respective provisions of this report, but also with all the conclusions and recommendations that follow these provisions. The Working Group maintains the view that Article 1 of the Convention has consistently been interpreted to require that offering, promising and giving of a bribe should all be treated as completed offences. The Russian legislation on its face does not explicitly cover offers and promises of bribes.

11. With regard to the *promising or offering a bribe*, the Russian authorities consider that although the acts of offering and promising a bribe are not expressly included in the bribery offence under Article 291 CC, they are covered by the notion of attempt (see Article 29 CC⁷) and preparations for a crime on the basis of Article 30 CC⁸. Case law has been provided to illustrate this position⁹. Using the general offences of attempt or preparations for a crime to cover offering or promising a bribe might however not be in full compliance with the Convention that gives equal status to the three modes of bribery (giving, offering, promising), each of them being considered a full, completed offence. Under the Convention, attempt crimes are intended only to complement and not to replace the substantive bribery offences as noted in Article 1.2 of the Convention. This issue will require further analysis in the framework of the Phase 2 evaluation of Russia.

12. Furthermore, under Article 66 CC, Russia imposes light punishments for attempt crimes and preparations for a crime, resulting in criminal penalties that might not be effective, proportionate and dissuasive as required by the anti-bribery Convention¹⁰. Article 30(2) CC further provides that liability will only follow in respect of a “grave” or “especially grave” crime. A “grave” crime is one carrying a maximum penalty between 5 to 10 years’ imprisonment, an “especially grave” crime carries a penalty exceeding 10 years (see Article 15 CC). This would capture the offence under Article 291(3) (which

7 “**Article 29. Complete and Incomplete Offences.** 1. An offence shall be deemed to be complete if the deed committed by the person concerned contains all the elements of the *corpus delicti*, envisaged by this Code. 2. Preparations for an offence and an attempt to commit it shall be deemed an incomplete offence. 3. Criminal responsibility for an incomplete offence shall ensue under the Article of this Code that stipulates responsibility for the complete offence, with reference to Article 30 of this Code”.

8 “**Article 30. Preparations for a Crime and Attempted Crime.** 1. The looking for, manufacturing, or adapting by a person of means or instruments for committing a crime, the looking for accomplices for a crime, the confederacy to commit a crime, or any other intentional creation of conditions to commit a crime shall be deemed a preparation for a crime, unless the crime has been accomplished due to the circumstances outside the control of this person. 2. Criminal liability shall ensue for preparations to commit only a grave or especially grave crime. 3. Intentional actions (inaction) by the person concerned, directed expressly towards the commission of a crime, shall be deemed to be an attempted crime, unless the crime has been accomplished due to the circumstances beyond the control of this person”.

9 *Criminal Case of the Sakhalin Regional Court of 28 October 2009 No.22-2044 and Moscow Regional Court, 2009, n°4.* For more details about the two cases, see Russia’s answers to the Phase 1 Questionnaire.

10 Article 66 (Imposition of Punishment for an Unfinished Crime) provides the following: “1. In imposing punishment for an unfinished crime, the court of law shall take into account the circumstances, by virtue of which the crime was not brought to completion. 2. The term or the scope of punishment for preparations for a crime may not exceed half the maximum term or scope of the most severe penalty prescribed by the relevant Articles of the Special Part of this Code for the finished crime. 3. The term or extent of punishment for an attempted crime may not exceed three-fourths of the maximum term or scope of the most severe penalty prescribed by the relevant Article of the Special Part of this Code for the finished crime. 4. Neither capital punishment nor deprivation of liberty for life shall be imposed for the preparations for a crime or for an attempted crime”.

carries a maximum penalty of 8 years' imprisonment) and Article 291(4) (which carries a penalty from 5 to 10 years) and Article 291(5) (which carries a penalty from 7 to 12 years). It would not capture the basic bribery offense as set out in Article 291(1) CC (which carries a maximum penalty of 2 years' imprisonment) or giving out of a bribe of a "significant amount" as set out in Article 291(2) CC (which carries a maximum penalty of 3 years' imprisonment). Accordingly, offering or promising a bribe of up to 150 000 Roubles¹¹ except for "knowingly illegal action"¹² is not criminalised. It is the view of the Working Group that the scope of the offence of preparations for a crime under Article 30 CC, which is an integral part of Russia's criminalization of foreign bribery, may be incomplete and unsatisfactory in meeting the requirements of Article 1 of the Convention. This issue also will require further analysis in the framework of the Phase 2 evaluation of Russia.

13. Finally, in relation to incomplete offences, Article 31 CC¹³ allows a defence of voluntary refusal (or defence of abandonment) under certain circumstances. The application of Article 31 CC to cases of voluntary refusal illustrates the problem with relying on Article 30 CC as a secondary means of prohibiting the offer or promise of a bribe, rather than making offers and promises part of the primary offence. This appears to be inconsistent with Article 1 of the Convention, which requires *each* of the alternatives of offering, promising or giving a bribe to be criminalised. As noted above, the Working Group maintains that Russian law should expressly cover offering and promising any bribe in a manner that is equally dissuasive to that applied to the offence of payment of a bribe.¹⁴ It should be noted in this context that the Code of Administrative Offence, in the case of liability of a legal person, has introduced a specific bribery offence that covers the offer or promise of a bribe (see below section 2 ii). This issue will also require further analysis in the framework of the Phase 2 evaluation of Russia.

1.1.4 any material, financial or other benefits

14. The form of a bribe for the active bribery offence is not defined by Article 291 CC. Article 291 CC simply refers to the giving of "a bribe". However, the passive bribery offence under Article 290(1) CC refers to a bribe "*in the form of cash, securities, other property, or rendering such official any services of a pecuniary nature, granting him other proprietary rights in exchange for actions (inaction) in favour of the bribe-giver or persons he represents, if such actions (inaction) are part of the official duties of such public official or else such person, by virtue of his office, can facilitate such actions (inaction), and equally for overall patronage or negligence in office*".

15. The 2000 Resolution states that the form of bribe or commercial bribery, in addition to cash, securities and other assets, may cover benefits or property-related services, which are provided gratis, but

11 Up to EUR 3 600.

12 Article 291.3 CC.

13 "Article 31. Voluntary Refusal to Commit a Crime". 1. *The termination by the person concerned of preparations for a crime or the termination of actions (inaction) directed expressly at the commission of the crime shall be deemed to be a voluntary refusal to commit a crime, if the person was aware of the possibility of carrying out the crime.* 2. *A person shall not be subject to criminal responsibility for a crime if he voluntarily and finally refused to carry out this crime.* 3. *A person who has voluntarily refused to carry out a crime shall be subject to criminal responsibility if the deed performed by him in actual fact contains a different corpus delicti.* 4. *An organizer of a crime or an abettor of a crime shall not be subject to criminal responsibility if these persons have prevented the crime to be carried at by the perpetrator by informing in time the authorities, or by applying other measures. An abettor of a crime shall also not be subject to criminal responsibility if he has taken all due measures in order to prevent the commission of the crime.* 5. *If the actions of the organizer or the abettor, envisaged by the fourth part of this Article, have not resulted in the prevention of the crime by the perpetrator, then the measures taken by them may be recognized by a court of law as mitigating circumstances when imposing punishment."*

14 See, for example, Phase 1 report on Bulgaria. In order to comply with recommendations of the Working Group in Phase 1 Bulgaria extended the offence to offering and promising, whereas previously it only covered giving.

subject to payment for (provision of tourist vouchers¹⁵, renovation of an apartment, construction of a summer cottage, etc.). The 2000 Resolution indicates that under property-related benefits one should understand, in particular, undercharging re-assigned assets, intended for privatization objects, rental payments, interest on bank loans. Although the Russian authorities indicate that such "proprietary rights" cover all non-material/non-pecuniary benefits, including intangible advantages (e.g. advice, data or information, favours, lucrative business opportunities¹⁶, etc.), the Russian legislation on its face falls short of the requirements of the Article 1 of the OECD Convention, according to which the criminal offence should cover "any undue pecuniary or other advantage". The Supreme Court requires that the value is expressed in monetary terms in the court decision, including in the case where the benefits from the bribe are of a non-pecuniary nature. To do so, the Courts may use all sort of methodologies, including having recourse to experts' opinions. The challenges that Courts may face in quantifying the proceeds of bribery that are of a non-pecuniary nature would need to be followed up in Phase 2 (see also Article 3 below).

16. According to the Russian authorities, there is in Russia no exception to the offence for "small facilitation payments", however there is no criminal liability for the "preparation" of a payment less than 150 000 Roubles in order to induce the foreign public official to take an action other than a "knowingly illegal action"¹⁷. The Russian authorities submit that the preparation of a crime is equivalent to "promise". Phase 2 should examine whether they are taken into account in practice¹⁸.

1.1.5 directly or through intermediary

17. Article 291 CC covers "giving of bribe" "through an intermediary" (although the notion of "intermediary" is not defined in the law). The "mediation of bribery" (that covers the act of promising or offering of mediation in bribery) is also an offense, as discussed in Section 1.2 below. The 2000 Resolution states that the courts should take into account the fact that criminal responsibility of the intermediary in bribe taking, depending on specific facts of the case and his (her) role in giving or taking the bribe, incurs solely in the event provided for by Art. 33 CC (i.e. sentences as accomplice of a crime, see Section 1.2 below). The Russian authorities said that the above provisions of the 2000 Resolution do apply to foreign bribery except when superseded by subsequent legislation. However, because as noted, some offences of offering or promising bribes are not adequately covered under Russian law (see Section 1.1.3 above), participation of an intermediary in such offers or promises may also not be covered. This issue will require further analysis in the framework of the Phase 2 evaluation of Russia.

1.1.6 for benefit of foreign public officials

18. Article 290 CC as amended in May 2011 contains an autonomous definition of "foreign public official" that draws on the definition of foreign and international public officials established under Article 2 (a) and (b) of the UN Convention against Corruption. The definition, provided in Note 2 to Article 290 CC, is applicable to the foreign bribery offence by natural persons.

15 Verdict of the Supreme Court in the case of I.A.E of 10 November 2009. For more details about the facts surrounding the case, see Russia's Replies to the Phase 1 Questionnaire.

16 The Russian authorities have provided case law where the benefit of domestic bribery consisted in services for the construction of a cottage in exchange of manipulation of an invitation to tenders in favour of the bribe-giver.

17 See Articles 30(2) and Articles 291(1) and 291(3) CC.

18 See Section VI of 2009 Recommendation.

Article 290. Taking of bribe

1. Taking by a public official, foreign public official or a public official of a public international organisation, personally or through an intermediary, of a bribe in the form of cash, securities, other property, or rendering such official any services of a pecuniary nature, granting him other proprietary rights in exchange for actions (inaction) in favour of the bribe-giver or persons he represents, if such actions (inaction) are part of the official duties of such public official or else such person, by virtue of his office, can facilitate such actions (inaction), and equally for overall patronage or negligence in office - shall be punishable with a fine of twenty-five-fold to fifty-fold multiple of the bribe amount, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of up to three years with a fine of twenty-fold amount of the bribe.

2. Taking by a public official, foreign public official or a public official of a public international organisation of a bribe of a significant amount - shall be punishable with a fine of thirty-fold to sixty-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of up to six years with a fine of thirty-fold amount of the bribe.

3. Taking by a public official, foreign public official or a public official of a public international organisation of a bribe in exchange for illegal actions (inaction) - shall be punishable with a fine of forty- to seventy-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of three to seven years, with a fine of forty-fold amount of the bribe.

4. Actions stipulated by parts one – three herein, committed by a person holding a state public office of the Russian Federation or state public office of a subject of the Russian Federation, and equally by the chief executive of a body of local self-government - shall be punishable with a fine of sixty- to eighty-fold multiple of the bribe amount, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of five to ten years with a fine of fifty-fold amount of the bribe.

5. Actions stipulated by parts one - three herein, provided they were committed: a) by a group of persons with prior agreement (collusion) or by an organized group; b) with extortion of a bribe; c) in large amount, - shall be punishable with a fine of seventy- to ninety-fold amount of the bribe, or deprivation of liberty for a term of seven to twelve years with a deprivation of the right to occupy certain offices or engage in certain activities for a term of up to three years and a fine of sixty-fold amount of the bribe.

6. Actions stipulated by parts one – four herein committed in very large amount - shall be punishable with a fine of eighty- to hundred-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of eight to fifteen years with a fine of seventy-fold amount of the bribe.

Note 1. For purposes of Articles 290, 291 and 291¹ herein, the significant amount of the bribe shall be the amount of cash, value of securities, other property, pecuniary services, other proprietary rights above twenty five thousand roubles; large amount shall be above one hundred fifty thousand roubles, and very large amount shall be above one million roubles.

Note 2. For purposes of Articles 290, 291 and 291¹ herein, the foreign public official shall mean any person appointed or elected to hold a legislative, administrative or judicial position of a foreign country; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and the official of a public international organisation shall be an international civil servant or any other person authorized by such organisation to act on its behalf.

19. The 2000 Supreme Court Resolution provides further guidance on how to establish various categories of officials liable for passive bribery. Such officials include persons who are permanently, temporarily or on a special authority performing the functions of a government official or management and

administrative functions in state bodies. The performance of these functions must be assigned by law, regulation, order or decree of a superior or other responsible official. The Resolution further says that the court must carefully examine which management or administrative functions were performed by the person liable for taking bribe. Officials who did not had the authority for an action (or inaction) in favour of the briber, but by virtue of their office could facilitate such action (inaction) should be liable under Article 290; however, the use of personal relationships, if they are not associated with the position occupied, cannot be regarded as the use of official position. Furthermore, the employees performing professional or technical duties, which do not relate to the management or administrative functions, are not subject of the bribery.

20. The application of the 2000 Resolution may raise issues of implementation (i.e. for cases involving the public officials of certain countries, the authorities would have to rely on the opinion of the authorities of the country in question in order to make an informed judgment on whether or not the recipient of the bribe was exercising a public function in the foreign State). Russia should take into account multiple factors in defining the term foreign official, and not solely rely upon the law and regulations of the foreign official's country. This issue will require further analysis in the framework of the Phase 2 evaluation of Russia.

1.1.7 for such officials or any third party

21. Article 291 CC does not refer to third party beneficiaries. However, the passive bribery offence under Article 290(1) CC refers to a bribe "in favour of the bribe-giver or persons he/she represents". The Russian authorities rely on this notion of representation to cover the concept of bribery for the benefit of any third party.

22. On the basis of the 2000 Resolution, the Russian authorities explained that a bribe given to a close relative of an official has been treated as amounting to a bribe to the official¹⁹. It appears that the notion of representation (which is not defined in the law) is not broad enough to cover situations for instance where the bribe goes directly to a charity, political party or legal person with which the public official does not have a relationship (i.e. where there is no legal ties between the foreign official and the third party beneficiary). In similar situations, the Working Group has held the view that third party beneficiaries should be covered by the foreign bribery offence and recommended that this issue be followed up in Phase 2.²⁰

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

23. Article 291 CC contains two active bribery offences. If interpreted in reference to Article 290(1) CC (see above), Articles 291(1) CC and 291(2) CC would apply to a bribe "*for actions (inaction)... within the official duties of such official or if such official due to his/her position may facilitate such actions (inaction)*". Article 291(3) CC applies to a bribe "*for knowingly illegal actions (inaction)*". The 2000 Resolution further addresses this particular issue and requires a link between the bribe and specific actions. The Working Group believes that it should follow up on this issue in Phase 2 to ensure that the crime of foreign bribery applies in such situations when the bribe recipient is acting outside the scope of his officials duties.

19 Verdict of Sverdlovsk Regional Court on 17 February 2010. For more details regarding the case, see Russia's Replies to the Phase 1 Questionnaire.

20 See for example the Phase 1 Evaluation of Italy in the course of which the Working Group, after having noted that the Italian Penal Code did not directly mention the case where a benefit is offered, promised or given directly to a third party, recommended that that this issue be followed up in Phase 2.

24. For the purpose of Article 291(3) CC, Russian authorities explained that the meaning of “*knowingly illegal*” acts or omissions requires a case-by-case assessment. Investigators and prosecutors would need to look at the authorised responsibilities of the foreign official and then determine whether or not the act or omission in question falls within those authorised responsibilities (see the 2000 Resolution). This represents a further non-autonomous element of the offence. When dealing with domestic bribery offences, this does not present too many difficulties. However, in the case of foreign bribery, law enforcement authorities would need to determine what the authorised responsibilities of the foreign public official are. This will rely on information from the country of the foreign public official and will thereby require legal assistance from the foreign country. In cases where local authorities in the foreign country do not want to pursue the matter, such assistance may not be forthcoming and may thereby preclude the enforcement in Russia of the offence. This matter will require further analysis in the framework of the Phase 2 evaluation of Russia. In addition, there are circumstances where a bribe may be paid to an official for that official to take an action that is not illegal, such as to win a contract which the bribe payer would have won even absent the bribe. It is unclear as to whether or not the law would adequately cover such circumstances. This matter will also require further analysis in Phase 2.

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

25. Russian law, as it relates to bribery of public officials, is not restricted to bribes given “in order to obtain or retain business or other improper advantage”²¹: Article 291 CC indeed does not require that the offender acts in order to obtain or retain business or other improper advantage/in the conduct of international business. Russia, in its responses to the Phase 1 questionnaire, provided the example of one case (in the context of domestic bribery) where a company paid a bribe to obtain a contract to which it was entitled and received an administrative fine.

26. Article 163 CC defines extortion as “*the demand that other people's property or their right to property should be transferred, or that other acts of a property nature should be performed under threat of violence or of destruction or damage of other people's property, and also under the threat of dissemination of information that defames the victim or his relatives, or of any other information which may cause substantial harm to the rights or legitimate interests of the victim or his relatives*”. Such provisions are only applicable to natural persons. Supreme Court Resolution 6 of 2000 describes extortion as a request by an official that the bribe be given when accompanied by a threat by the official to prejudice the legitimate interests of the person from whom the bribe is being solicited or in circumstances where a person is forced to give a bribe in order to avoid harmful consequences to his/her legitimate interests. The exact scope of the notions of “harmful consequences” and “damage” as described in the Resolution of the Supreme Court is unclear and appears to provide a rather broad interpretation of “extortion” (the Russian authorities state that for instance the loss of a business opportunity would be damage although this statement has not been further substantiated). It is also uncertain whether such notions are applicable in situations where the threat is targeted at a legal person (i.e. whether economic extortion for instance would be covered). While recognising that the defence of extortion, where it could result in serious consequences such as bodily harm or loss of life, may be a legitimate strategy to combat domestic bribery, the Working Group has previously taken the view that this defence is counter-productive in the context of combating foreign bribery as it can be used to circumvent the obligations under the Conventions and to eliminate liability of the bribe-giver wherever an official solicits the bribe (see, for example, Phase 1 Report on Hungary²²). Given the broad nature of the exemption in Russia, it may pose an obstacle to the effective implementation of the Convention. This issue will require further analysis in the framework of the Phase 2 evaluation of Russia to

21 See, for example, Bulgaria’s legislation as assessed in Phase 1: *Bulgaria – Review of Implementation of the Convention and 1997 Recommendation* (July 1999)

22 In the Phase 1 Report on Hungary, the Working Group recommended that Hungary examine this issue with a view to eliminating the defence.

ensure that the economic extortion defence is not applied too broadly in situations when there is a solicitation of a bribe.

27. With regard to the exemption of “effective regret”, the Russian authorities indicate that the release from criminal liability of the bribe-giver under the circumstances described in the legislative note to Article 291 CC does not void the existence of the *corpus delicti*. A legal person can also still face administrative liability under similar circumstances. In addition, the victim of bribe giving is still entitled to restitution of the bribe. However, it appears that it would be difficult in practice to prosecute legal persons or to confiscate the proceeds from crime in the absence of criminal liability of the bribe-giver. Besides, in similar cases assessed in the course of previous Phases 1 and 2 evaluations, the general feeling of the Working Group has been that the defence of “effective regret” presents a potential for misuse and has such expressed concerns that the application of this defence may lead to a loophole in the implementation of the Convention and related instruments (see Phase 1 Reports on Slovenia and the Slovak Republic and Phase 2 Report on Greece). The Working Group recommends that Russia examine this issue in order to eliminate the defence as it applies to foreign bribery²³.

1.2 Complicity

28. Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”. The law adopted in May 2011 introduced a separate criminal liability for mediation in bribery, also applicable to natural persons. The offence of mediation in bribery is established in a new Article 291¹ CC, which reads as follows:

Article 291¹. Mediation in bribery

1. Mediation in bribery, i.e. direct conveyance of the bribe on instructions from the bribe-giver or the bribe-taker, or facilitation in having the bribe-taker or bribe-giver reach or implement an agreement between the two to take or to give a bribe in a significant amount, - shall be punishable with a fine of twenty- to forty-fold amounts of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of up to five years with a fine of twenty-fold amount of the bribe.

2. Mediation in bribery in exchange for knowingly illegal actions (inaction) or by a person employing his official position - shall be punishable with a fine of thirty- to sixty-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of three to seven years with a fine of thirty-fold amount of the bribe.

3. Mediation in bribery committed:

a) by a group of persons in prior agreement (collusion) or by an organized group;

b) in a large amount, -

shall be punishable with a fine of sixty- to eighty-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of seven to twelve years with a fine of sixty-fold amount of the bribe.

4. Mediation in bribery committed on a very large scale, - shall be punishable with a fine of seventy- to ninety-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years, or deprivation of liberty for a term of seven to twelve years with a fine of seventy-fold amount of the bribe.

23 In the Phase 1 Report on Slovenia, the Working Group encouraged the Slovenian authorities to consider making the necessary changes in relation to bribery of a foreign public official and decided to focus on this issue during the monitoring of Phase 2; in the Phase 1 Report on the Slovak Republic, the Working Group decided to revert to the issue in Phase 2 in order to examine the practical effects of Slovakia’s provision on effective regret.

5. Promise or offer of mediation in bribery - shall be punishable with a fine of fifteen- to seventy-fold amount of the bribe, with a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years or deprivation of liberty for a term of up to seven years with a fine of ten- to sixty-fold amount of the bribe.

Note. The person who mediates in bribery shall be exonerated from the criminal liability provided following the crime such person actively cooperated in the detection and/or prevention of the crime and voluntarily reported the mediation in bribery to the authorities invested with powers to initiate criminal proceedings.

29. Article 291¹ CC criminalises promising or offering of mediation in bribery. However, it identifies an exemption from criminal liability in the case the person who mediated in bribery actively cooperated in the detection and/or prevention of the crime and voluntarily reported the mediation in bribery to the authorities invested with powers to initiate criminal proceedings. The implementation of this separate offence will also require follow up in Phase 2.

30. More general provisions in the Criminal Code are also relevant. Articles 33 to 35 CC cover the responsibility of accomplices to a crime, which include “organizers, instigators, and accessories”. A person who has abetted another person in the commission of a crime (by persuasion, bribery, threat, or by any other means) is deemed to be an instigator (Article 33(4) CC). Article 34(1) CC directs that the level of responsibility to be attributed to accomplices is to be determined by the character and degree of participation in the commission of the crime.

1.3 Attempts and conspiracy

31. Article 1(2) of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of the party. In Russia, Articles 30, 31 and 35 CC govern attempt and conspiracy in a common way for all types of offences. Thus, there is no different treatment with respect to bribery of domestic or foreign public officials. Under Article 29 CC, an attempted crime is an “uncompleted” crime, i.e. deliberate act (inaction) of a person aimed at the commission of a crime. Pursuant to Article 35 CC, a crime is deemed to be committed by a group of persons in a preliminary conspiracy, if the persons took part in it after they had reached an agreement on the joint commission of a crime. Conspiracy is subject to the same penalty for a crime as is applicable to a principal perpetrator. As noted above, there is no criminal liability for the “preparation” of a payment less than 150 000 Roubles in order to induce the foreign public official to take an action other than a “knowingly illegal action”²⁴.

2 Article 2: Responsibility of Legal Persons

32. Russian law establishes administrative responsibility of legal persons for “corruption offences” (Article 14 of Federal Law 273-FZ of 25 December 2008 On Counteracting Corruption and Article 19.28 of the Code of Administrative Offences). Under Article 50 of the Civil Code, the notion of “legal entities” covers both profitable and non-profitable organisations that are either public (state and municipality owned) or private; a legal entity is considered as established from the date when its registration is recorded in the unified state register of legal entities. The Russian authorities indicated that such a definition applies in the context of Federal Law 273-FZ of 25 December 2008 and the Code of Administrative Offences.

(i) *Federal Law 273-FZ of 25 December 2008 On Counteracting Corruption*

33. Federal Law 273-FZ of 25 December 2008 establishes basic principles for countering corruption and legal and organisational foundation for preventing and fighting corruption. Article 14 of the Federal Law sets out the principle of liability of legal persons (“*in the event that organization, preparation and*

24 See Articles 30(2) and Articles 291(1) and 291(3) CC.

commitment of corruption offences or offences providing conditions for corruption offences are done on behalf of or in the interests of a legal entity, responsibility measures can be applied to this legal entity in accordance with the legislation of the Russian Federation). Article 1(1) of the Federal Law defines “corruption offences” as including the giving of a bribe which is done on behalf of or in the interests of a legal person. The Russian authorities indicated that this includes the administrative offence under Article 19.28 of the Code of Administrative Offences. Article 14(2) of Federal Law clarifies that the attribution of liability to a legal person does not discharge the natural person’s criminal liability. The inclusion of subparagraph (2) to Article 14 implies that a prior conviction of a natural person is not necessary.²⁵ The examiners suggest that the Working Group follow up on the application of this issue in practice in Phase 2 (see below).

(ii) *Code of Administrative Offences*

34. The system of administrative liability for corruption offences is governed by the Code of Administrative Offences providing for administrative responsibility for actions which could be referred to as corruption. The Code of Administrative Offences sets out that “*legal entities shall be administratively liable, regardless of location, organisational-and-legal form and subordination or other circumstances*” (Article 1.4). Article 2.1 of the same Code establishes the principle of administrative liability of legal persons²⁶. According to the same Article, the imposition of an administrative penalty on a legal entity does not relieve the guilty natural person of *administrative* responsibility for the given offence (the Code does not refer to *criminal* responsibility), and holding a natural person to administrative or criminal responsibility does not relieve the legal entity of administrative responsibility for the given offence. .

35. Article 19.28 of the Code of Administrative Offences as amended in May 2011 sets out a specific bribery offence that consists of “*illegal transfer, offer or promise, on behalf or in the interests of a legal person, to an official²⁷, a person performing managerial functions²⁸ at the commercial or other organization, foreign official or official of a public international organization, of cash, securities, other property, rendering of services of pecuniary nature, granting him proprietary rights in exchange for having this official, person performing managerial functions, foreign official or official of a public international organization committing, in the interests of such legal person, action (inaction) related to their official position*”. Note 3 to Article 19.28 sets out a definition of foreign and international public officials applicable to the foreign bribery offence committed by legal persons. The amended Article 19.28 also includes "offer" and "promise" as prohibited acts. In the opinion of the Russian authorities, the "proprietary rights" referred to in Article 19.28 would cover all non-material/non-pecuniary benefits, including intangible advantages (see Section 1.1.4 above).

36. Article 19.28 of the Code of Administrative Offences seems to cover the situation of a bribe through an intermediary as it refers to bribes, offers, promises, etc. “on behalf or in the interests of a legal

25 Annex 1 to the 2009 Recommendation states that “*member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted*”.

26 “*1. A wrongful, guilty action (omission) of a natural person or legal entity which is administratively punishable under this Code or the laws on administrative offences of subjects of the Russian Federation shall be regarded as an administrative offence. 2. A legal entity shall be found guilty of an administrative offence, if it is established that it had the opportunity to observe rules and norms whose violation is administratively punishable under this Code or under the laws of a subject of the Russian Federation, but it has not taken all the measures that were in its power in order to follow to them. 3. Imposition of an administrative penalty on a legal entity shall not relieve the guilty natural person of administrative responsibility for the given offence, and holding a natural person to administrative or criminal responsibility shall not relieve the legal entity of administrative responsibility for the given offence*”.

27 As defined in notes 1 - 3 to Article 285 of the Criminal Code.

28 As defined in note 1 to Article 201 of the Criminal Code.

person.” As with Article 291 CC, Article 19.28 of the Code of Administrative Offences does not expressly cover the giving of a bribe to a third party. It is also unclear how the 2000 Resolution concerning Article 291 CC would be treated in administrative proceedings and to what extent the interpretation provided by the Supreme Court applies in the context of administrative liability of legal persons. In addition, it remains unclear whether complicity, conspiracy, or incitement would apply in the context of the Code of Administrative Offences. These issues will require further analysis in the framework of the Phase 2 evaluation of Russia.

37. Section XI of the 2009 Recommendation recommends that “Member countries’ laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts (...), enterprises determined to have bribed foreign public officials in contravention of that Member’s national laws”. The public procurement system in the Russian Federation is regulated by Federal Law no. 94-FZ of 21 July 2005 “On placement of orders to supply goods, carry out works and render services for meeting state and municipal needs”. This legal basis establishes rules and procedures aimed at ensuring equal economic conditions on the territory of the Russian Federation when placing public procurements, effective use of budget funds and non-budget funding sources, prevention of corruption and other abuses in the field of public procurements. However, the relevant provisions under this law (Article 11) do not specifically allow the authorities to reject participation of enterprises that have bribed a foreign public official in tenders for public contracts. The Russian authorities state a new law on public procurement is now under consideration.

3. Article 3: Sanctions

38. Article 3 of the Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that, for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1 *Criminal penalties for the bribery of domestic and foreign public officials; and*

3.2 *Effective, proportionate and dissuasive criminal penalties*

(i) *Criminal sanctions applicable to natural persons*

39. Sanctions available for the foreign bribery offence for natural persons under amended Article 291 CC include fines and imprisonment (for a term of up to two years for the less grave foreign bribery offence to a term of seven to twelve years for foreign bribery offences committed in very large amount); temporary prohibition to occupy certain posts and perform certain activities is also available for giving of bribe by a group of persons or in a large amount. Fines for bribery are calculated in relation to the size of the bribe and can be up to 100 times the amount of the bribe, but not more than 500 million roubles (approximately *EUR 12 million*). Sanctions applicable to active foreign bribery are the same as for active domestic bribery. The Russian authorities state that in cases of uncompleted transfer of a bribe for reasons outside the control of the bribe payer (for example if the foreign official refuses the bribe), it is a case of attempted bribery and the amount of the proposed bribe serves to determine the amount of the fine. However, in the case of

attempted crimes, as mentioned above, Russia imposes lighter punishments for unfinished crimes than those applicable for the commission of the offence itself²⁹.

40. This system of sanctions provides for a significant increase of the level of fines for natural persons following the adoption of the Law in May 2011 (the maximum amount of fines for bribery is 500 million roubles (approximately EUR 12 million), compared to a maximum of 1 million roubles (or approximately EUR 25 000) in the previous legislation). Notwithstanding these positive legal developments, two issues of concern remain: first, it may be difficult to establish the amount of undue benefits in a foreign bribery case given that the Law does not address the question of non-pecuniary bribes; second, for natural persons, imprisonment is not a mandatory sanction, including in the case of the most serious bribery offences under Article 291(5) (i.e. in cases where possible sanctions include a fine *or* imprisonment, thus a bribe payer could simply “pay” his way out of jail by paying a fine). The existence of the latter possibility in respect of the most serious offence casts doubts on the effectiveness, proportionality and dissuasiveness of the sanction. It is also unclear whether the natural person would be subject to extradition if they could simply pay a fine. For all these reasons, the practical application and implementation of the new sanctions system will have to be followed up in the context of the Phase 2 report. In particular, given that the value of the bribe determines the amount of the sanction/imprisonment, it will be crucial to assess how the Courts will quantify in practice the amount of the bribe. This is especially important when the bribe is not in the form of money but is in the form of some other intangible benefit (see above).

41. Articles 61 and 63 CC set out mitigating and aggravating features to be taken into account when a court imposes a criminal sanction. In imposing sanctions, the Courts also consider the nature and degree of social danger³⁰. It is not clear when and in what circumstances a given behaviour would turn from being inoffensive (and therefore not punishable) into being socially dangerous in the context of foreign bribery and how the determination of the 'sufficient degree' of social danger would be made in a case of bribery. The Russian authorities indicate that the law enforcement authorities, in particular, contribute to this determination. The Prosecution has rights of appeal against sentence (Article 354 of the Criminal Procedure Code (CPC)). Courts have the authority to impose “conditional conviction”, in which case they may impose a sentence in the form of corrective works, restriction of military service, restriction of liberty, placement in disciplinary military unit, or deprivation of liberty for a term of up to eight years (Article 73 CC). This issue will require further analysis in the framework of Phase 2.

(ii) *Criminal sanctions applicable to intermediary*

42. Article 291¹ CC introduces separate criminal liability for mediation in bribery, whether domestic or foreign. Criminal sanctions applicable to this offence include fines and non-mandatory imprisonment; temporary prohibition to occupy certain posts and perform certain activities is also available for giving of bribe by a group of persons or in a large amount. The maximum term of imprisonment under amended Article 291¹ CC is 12 years. Promising or offering mediation in bribery is punished by a fine of 15 to 70 fold amount of the bribe, with a deprivation of the right to occupy certain activities for a term of up to 3 years or deprivation of liberty up to 7 years with a fine of 10 to 60 fold amount of the bribe. Article 291¹ CC also provides for the possibility of exoneration if the mediator voluntarily reports the mediation to the appropriate law enforcement body and cooperates in the prevention. This provision could provide a strong stimulus to mediators to cooperate and could represent a useful investigative tool.

29 See Article 66 CC.

30 See Article 6 CC: “*Punishment and other legal measures applicable to a person who has committed an offence shall be just, that is, they shall correspond to the character and degree of the social danger of the offence, the circumstances of its commission, and the personality of the guilty party*”.

(iii) *Criminal sanctions applicable to legal persons*

43. As explained above (see section 2), Russian law does not provide for criminal sanctions against legal persons in connection with the offence of bribery. See below for a discussion on non-criminal sanctions.

3.3 *Penalties and mutual legal assistance*

44. Mutual legal assistance may be rendered according to pertinent international treaties to which the Russian Federation is a party. In the absence of international treaties, MLA is provided pursuant to relevant provisions in the Penal Procedure Code and the Criminal Code. The Russian authorities indicate that it is not conditioned to a certain severity of the offence under Russian legislation. There is no indication in the relevant provisions of the Penal Procedure Code (Articles 453 to 459) that mutual legal assistance is dependent on the existence of a deprivation of liberty in relation to the offence of bribery of foreign public officials.

3.4 *Penalties and Extradition*

45. Bribery of a foreign public official constitutes an extraditable offence under Russian law (Article 462 of the Penal Procedure Code (see Section 10.1 below).

3.5 *Non-Criminal Sanctions for Legal Persons*

46. Sanctions available for foreign bribery committed by legal persons include administrative fines and confiscation of property (Article 19.28 of the Code of Administrative Offences). The Law of May 2011 amends part 3 of Article 3.5 on "Administrative fine" and establishes the maximum level of administrative fines applicable to legal persons for violations under Article 19.28 in the amount up to 100 times the value of illegal advantages provided by the legal person. The levels of fines which can be applied as sanction to the legal persons are provided in the new wording of Article 19.28 of the Code of Administrative Offences as follows:

- Giving of illegal advantages for actions (or inactions) related to the official position – is punished by an administrative fine in the amount 3 times the value of the advantages, but not less than 1 million Roubles (approximately EUR 25 000), with confiscation of the advantages;
- Same action in a large amount – is punished by a fine 30 times the advantages, but not less than 20 million Roubles (approximately EUR 500 000), with confiscation of the advantages;
- Same action in a very large amount – is punished by a fine 100 times the advantages, but not less than 100 million Roubles (approximately EUR 2,5 million), with confiscation of the advantages.

47. Note 4 to Article 19.28 establishes the different categories of size of bribes, including large amount - above 1 million Roubles (approximately EUR 25 000), and a very large amount - above 20 million Roubles (approximately EUR 500 000). Thus the maximum sanction for legal persons for giving of bribe to a foreign public official can involve a fine as high as 100 times the bribe but not less than 100 million Roubles (approximately EUR 2, 5 million). There is no fixed maximum amount for fines of legal persons. It is not clear what constitutes the notion of "illegal advantages" as referred to in Article 19.28 of the Code of Administrative Offences, nor how this law would apply to a situation in which the bribe-taker is carrying out an act, i.e., providing an advantage, that is fully within his legal authority.

48. The revised system of sanctions provides for a significant increase of the level of fines for legal persons. However, issues of concern remain: for instance, it may be difficult to establish the amount of undue benefits in a foreign bribery case and the fact that the revised text does not address the question of non-pecuniary bribes. The practical application of the new sanctions system will have to be followed up in the context of Phase 2.

49. In case of legal persons, the Russian authorities have indicated that a finding of administrative responsibility under Article 19.28 of the Code of Administrative Offences will result in mandatory confiscation of the bribe (see Section 3.6 below on the issue of confiscation of the bribe and the proceeds of the bribe).

3.6 *Seizure and Confiscation of the Bribe and its Proceeds*

50. Article 3.3 of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

Criminal seizure

51. Property can be seized only after a criminal action has been initiated and only for the purposes defined in Article 115 CPC, namely a) for securing execution of a criminal judgment in its part pertaining to a civil suit; b) for ensuring compliance with other pecuniary penalties and c) for ensuring potential confiscation of criminal proceeds. Interim measures in respect of physical evidence are allowed with regard to all corruption offences. However, the provisions of the Criminal Code on seizure for the sake of subsequent confiscation (Article 104-1 and 104-2 CC) does not apply in respect of foreign bribery (Article 291 CC), see below.

Confiscation

52. Russian authorities explained that the legal framework for applying measures of confiscation of property is contained in the Criminal Code, the Criminal Procedure Code, the Civil Code, the Arbitrary Procedure Code and in the Code of Administrative Offences of the Russian Federation. Under the Criminal Code, confiscation of the proceeds of corruption is, according to Article 104.1 CC, possible only in respect of crimes provided for in Article 204.3 and 204.4 CC (passive bribery in a profit-making organization), Article 285 CC (Abuse of official powers) and Article 290 CC (Bribe-taking). Bribery of foreign public officials is not one of the enumerated offenses. Under the Criminal Procedure Code, Article 81 foresees a possibility to confiscate (forfeit) "tangible evidence" of crimes “Procedural confiscation” is possible in respect of instrumentalities and proceeds from crime (direct as well as indirect proceeds) for the purpose of being used as evidence in the proceedings. Article 81 CPC is wider than Article 104.1 CC in that it is not limited to the list of offences provided for in the latter Article. According to Article 81 CPC, any object, money, valuables that have been used as the instrument of an offence or retained traces of an offence is to be recognised as physical evidence. The Russian authorities were not in the position to provide examples of cases of confiscation of proceeds and instrumentalities of corruption under Article 81 CPC. According to the Russian authorities, other means under the Civil Code³¹ and the Code of Administrative Offences³² provide for the confiscation of the bribe and its proceeds.

53. The Working Group reviewed these measures but remains concerned about their practical application. The Working Group will examine in Phase 2 the implementation of the existing provisions on

31 Articles 169 and 170, Article 243 and Articles 1102 to 1109.

32 Articles 3.2, 3.3 and 3.7.

confiscation to ensure that measures are available for natural and legal persons to enable the identification, seizure and confiscation of the bribe, its proceeds or their equivalent value in relation to foreign bribery.

3.7 *Monetary Sanctions in Place of Confiscation of Proceeds*

54. The Russian legal system does not provide for monetary sanctions in place of confiscation of proceeds³³.

3.8 *Civil Penalties and Administrative Sanctions*

55. Article 3.4 of the Convention requires each Party to “consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official”. The Russian authorities invoke the existence of a civil penalty under Article 169 of the Civil Code (see Section 3.6 above). Article 291(4) CC (applicable to foreign bribery committed by a group of persons with prior agreement (collusion) or by an organized group in a large amount) provides for a deprivation of the right to occupy certain positions or engage in certain activities for a term of up to 3 years.

4. Article 4: Jurisdiction

4.1 *Territorial Jurisdiction*

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

57. Russia’s Criminal Code categorises offences as either having been committed in the territory of the Russian Federation (Article 11 CC) or outside the boundaries of the Russian Federation (Article 12 CC).

58. Article 11 CC establishes jurisdiction over offences committed in the territory of the Russian Federation, including its airspace, territorial waters, continental shelf and exclusive economic zone (Article 11(2) CC), as well as on flag-bearing vessels or vessels registered to a Russian port. Article 11 CC does not specify whether all or just part of the offence needs to have been carried out within Russian territory for territorial jurisdiction to apply. The Russian authorities indicate that in order to address an issue of liability for an act of international bribery it does not matter where the offence was committed – inside or outside of the territory of the Russian Federation. Further, the judicial practice is based on the assumption that the crime should be considered as committed in the Russian Federation if it started and terminated on the territory of a state as well as when at least a part of a criminal act was committed on its territory, that is when the crime started, continued or was completed on the territory of the Russian Federation. In case of complicity in crime, the crime is considered to be completed in the Russian Federation when the person committed this offence on the Russian territory while other accomplices acted abroad. If the person acted abroad and other accomplices (organizer, instigator or aider) performed their function of participation in this crime in Russia, the acts of the latter are also recognized as committed on the Russian territory.

59. Under Article 11(4) CC, the issue of liability of foreign citizens who enjoy immunity with respect to the penal jurisdiction of the Russian Federation shall be decided in compliance with the norms of international law adopted thereby. This is applicable to cases of diplomatic immunity of foreign citizens in Russia.

33 Question 3.7 asks: “If your legal system does not provide for seizure and confiscation of the bribe, the proceeds of the bribery of a foreign public official, or the property the value of which corresponds to that of such proceeds, describe how your legal system applies monetary sanctions of comparable effect”.

60. According to Article 4.2 of Federal Law 273-FZ of 25 December 2008, foreign legal entities that have civil legal capacity, and are created in accordance with the legislation of foreign countries, international organizations, as well as their branches and representative offices (foreign organisations) are subject to liability in accordance with the legislation of the Russian Federation in cases and in order provided by international agreements of the Russian Federation and Federal laws. The Federal Law 273-FZ of 25 December 2008 implies that territorial jurisdiction can be applied to foreign legal persons that commit foreign bribery in Russian territory, although reference in the law to the existence of international agreements and other Federal laws to exert such a jurisdiction is unclear. Implementation of the provisions of Article 4.2 should be followed-up in Phase 2 (including issues such as the responsibility of parent company for acts of subsidiaries).

4.2 Nationality Jurisdiction

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

62. Article 12 CC establishes extraterritorial criminal jurisdiction over citizens and permanent residents of the Russian Federation who commit, outside of Russia, “a crime directed against the interests of the Russian Federation” (unless they have been convicted in a foreign state (on the principle of non bis in idem). The Russian authorities indicate that such a crime means any crime established in the “Special part” of the Criminal Code (including Chapter 30 on Crimes Against State Power and the Interests of the Civil Service and the Service in Local Self-government Bodies, to which Article 291 CC on foreign bribery belongs). Extraterritorial criminal jurisdiction also applies to foreign nationals and persons who do not reside permanently in the Russian Federation who have committed their crimes outside the boundaries of the Russian Federation, if the crimes run counter to the interests of the Russian Federation and also to cases provided for by international agreement of the Russian Federation, unless in either case the foreign nationals have been convicted in a foreign state and are brought to criminal responsibility in the territory of the Russian Federation. Article 12 CC does not incorporate any direct element of dual criminality, although the notion of being brought to “criminal responsibility in the territory of the Russian Federation” is unclear. The examiners note that a key issue in assessing the provision of nationality jurisdiction in this respect is clarification as to whether a crime runs counter to the “interests of the Russian Federation,” and on what basis, and by whom, such a determination is made. Russia states that as a party to the Convention, it fulfils its obligations taken under this Convention. Therefore the violations of the Convention constitute a violation of the “interests of the Russian Federation”. This issue will be followed up in Phase 2.

63. Under Article 2 of “Federal Law On amendments to the Criminal Code of the Russian Federation and the Code of Administrative Offences of the Russian Federation in Relation to Enhancement of Public Governance in the Field of Countering Corruption” of 20 April 2011, “any person committing an administrative offence outside the Russian Federation shall be subject to administrative liability pursuant to this Code [of Administrative Offences] under the circumstances stipulated by the international treaty of the Russian Federation”. It is unclear what the reference to “the international treaty of the Russian Federation” means. This provision applies to both natural and legal persons committing an administrative offence. No information has been provided by Russia on how nationality jurisdiction over legal persons works in Russia. Given that the issue raises a number of practical questions (e.g. how the nationality of a legal person is determined, pre-existence of jurisdiction over an individual, etc.), it will need to be followed up in Phase 2.

4.3 Consultation Procedures

64. Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution. In Russia, inter-agency co-operation between the Prosecution Service of the Russian Federation and its foreign partners is carried out on bilateral and/or on multilateral basis. In 2009, the Prosecutor General's Office of the Russian Federation had bilateral inter-agency agreements, memoranda of understanding and other arrangements on co-operation with foreign authorities from 31 States. The Prosecutor General's Office of the Russian Federation takes also an active part in the events related to legal co-operation and organized by various international organizations, in particular, the United Nations (UN), the CIS, the Council of Europe, the European Union (EU), the Organisation on Security and Cooperation in Europe (OSCE) and the Shanghai Co-operation Organisation. Russia does not have specific procedures in place concerning consultation with other Parties to the Convention in the event that more than one State has jurisdiction over a foreign bribery offence and, like most Parties to the Convention, deals with the issue of co-operation on an *ad hoc* basis.

4.4 Review of Current Basis for Jurisdiction

65. Article 4.4 requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps. The Russian authorities have not pointed out any specific measures that they intend to take to review the current basis for jurisdiction in Russia.

5. Article 5: Enforcement

5.1 Rules and Principles Regarding Investigations and Prosecutions

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

67. The process of investigation and prosecution of offences in Russia is governed by the Criminal Procedure Code. The investigation and prosecution of corruption offences, including bribery, is the responsibility of several law enforcement and judicial bodies in accordance with the requirements of Federal Law of 12 August 1995 No. 144-FZ On Investigative Activities. The following are the main bodies dedicated to investigating cases of corruption: Ministry of Internal Affairs (MVD); Federal Security Service (FSB); Investigation Committee of the Russian Federation and Federal Drug Control Service. By virtue of an Order of the Prosecutor General’s Office of 1995 (32/199/73/278), the MVD, the FSB and the Tax Police can establish joint investigative and operative teams in complex cases, for example, when there is a need to use data held by different law enforcement bodies.

68. The Investigative Committee of Russian Federation was established as a successor to the Investigative Committee of The Prosecutor of the Russian Federation. It began to operate on 15 January 2011. The Committee is subordinated to the President of Russia and its Acting Chairman is appointed by decree of the latter. The creation of this Committee follows up on an earlier decision to reorganize the Investigative Committee of the Prosecutor General's Office as "an independent federal structure" answering directly to the President. It aims to separate prosecutorial supervisory and preliminary investigative functions, enhance the committee's status and expand its jurisdiction.

(i) *Investigation*

69. Incoming crime information is recorded by law enforcement bodies and is reviewed within 10 days or within 30 days where documentary verification is required. Upon review of a crime report, one of the following decisions is taken: (i) to commence criminal proceedings, beginning with a preliminary investigation; (ii) to refuse to commence criminal proceedings; or (iii) to refer the report to another competent authority. Article 140(2) of the Criminal Procedure Code sets out that “the following shall serve as the reasons for the institution of a criminal case: (i) an application on a crime: (ii) giving oneself up; (iii) communication on the committed or the prepared crime, received from other sources. The ground for the institution of a criminal case shall be the existence of the sufficient data, pointing to the signs of a crime”.

70. Before the formal laying of charges, a preliminary investigation must be undertaken (Article 150(1) CPC). Since the entry into force of Federal Law 404-FZ of 2010 “On changes to selected legal acts of the Russian Federation in connection with the improvement of the activity of pretrial investigation authorities”, one single agency is now responsible for investigating cases of foreign bribery: the Investigating Committee of the Russian Federation. Russia has unequivocally designated a body of authority in charge of investigation of international bribery cases.

71. Depending on the classification of the crime, a preliminary investigation takes the form of an inquiry or inquest. Preliminary investigations are categorised as part of criminal proceedings and must be concluded within two months from the date that criminal proceedings are commenced. In a criminal case that is particularly difficult to investigate, the preliminary investigation can be extended to 12 months by the head of the investigative authority of a federal entity or an equivalent head of an investigative authority, or by their deputies. A further extension can only be made in exceptional cases by the head of the investigative body at or under a respective federal executive authority. . Russian authorities state that the delays with implementation of requests for mutual legal assistance are unequivocally a basis for extending the duration of a preliminary investigation. This issue may require further review during the Phase 2.

72. A preliminary investigation can be suspended for any of the following reasons: (i) a person liable to prosecution as the accused has not been identified; (ii) the suspect or accused person has escaped from custody or their whereabouts has not been established; (iii) the whereabouts of the suspect or accused is known, but there is no possibility of their participation in the criminal case; or (iv) the suspect or person is seriously ill (as attested to by a medical certificate), preventing their participation in investigative and any other proceedings.

73. When satisfied that all the investigatory actions in the case have been completed, and that the evidence collected is adequate, the investigator will prepare an investigatory opinion for submission to the prosecution authority. Upon review of the opinion, the prosecution authority will forward the case to judicial authorities or return it to the investigator for further investigation. The Phase 2 evaluation will be an opportunity to explore the issue of the thresholds actually used to launch or terminate criminal proceedings in Russia.

(ii) *Prosecution*

74. According to Article 129 of the Russian Constitution, the Public Prosecution System is a single centralised system in which lower prosecutors are subordinated to higher prosecutors and the Prosecutor General. The Prosecutor General is appointed to, and relieved from, the post by the Council of Federation of the Federal Assembly upon nomination by the President for a five-year term. The prosecution authority is divided into specialised directorates dealing with various issues, such as crime in the customs, transport departments etc.

75. The powers, organisation and working procedure of the prosecution authority are laid down in the law on Public Prosecutions of the Russian Federation. The Public Prosecution System is entrusted with the following main tasks: (i) supervision over the execution of, and compliance with legislation and respect for human rights; (ii) prosecution in court; (iii) representation of the state or citizens in court proceedings; (iv) supervision of the observance of laws by investigative bodies; and (v) supervision of the compliance of the law by the authorities in the execution of judicial decisions in criminal cases and the application of measures of coercion related to the restraint of personal liberty of citizens.

76. The mechanism of cooperation between investigators and prosecutors is defined by the Criminal Procedure Code and detailed in specific departmental regulatory instruments. While the Investigation Committees and investigators are responsible for crime detection and investigation, the main objective of the prosecution authority during investigation is its supervisory function. According to Article 21 of the Law on Public Prosecutions, this implies verifying compliance with the Constitution, legislation and regulations at various levels.

77. The mandate of the prosecution authority with regard to combating corruption is exercised by specialised units (directorates and divisions) of the various Prosecutors' Offices, whether they are located in the districts, the cities or are specialised, such as military prosecutors, depending on their competences provided for by the Federal Law On Public Prosecution System of the Russian Federation. Issues such as the distribution of sensitive corruption cases between the different law enforcement agencies, the independence of law enforcement agencies, the functioning and powers of the Investigative Committee of Russian Federation, the appointment and independence of judiciary, the training of judges and law enforcement bodies could be explored in Phase 2.

(iii) Issue of immunities

78. Under Russian law, there are certain categories of persons that are essentially immune from investigation, arrest and prosecution such as the President of the Russian Federation, members of both Chambers of Parliament, judges, jurors and the Ombudsperson, including local government officials. This immunity is not limited to official acts taken in their role as domestic public officials but applies more broadly to include acts taken before they became public officials or activities outside their official functions. Consequently, this immunity could possibly apply to numerous crimes, including foreign bribery. The procedures for lifting immunities are laid down in Articles 447 to 452 CPC which also establish “special proceedings” and privileges for further categories of officials (namely for former Presidents of the Russian Federation and candidates for the Presidency, candidates for the State Duma, deputies and candidate deputies of legislative (representative) bodies of constituent elements of the Federation, deputies, members and elected officials of elected local government bodies, etc.). “Special proceedings” imply normally the consent of a body/official for the use of coercive measures and for the initiation of criminal proceedings. The procedures for lifting immunities appear to be rather complex and seem to lack proper safeguards against undue considerations. It also remains unclear to what extent immunities prevent the use of specific investigative measures before the formal initiation of the criminal proceedings. The Working Group believes that the issue of immunities raises concerns under Art. 1 (application to “any person”) and 5 of the Convention (in that an investigation or prosecution of foreign bribery cannot be influenced by the identity of the natural person involved), and should be further reviewed in Phase 2.

5.2 Considerations such as National Economic Interest

79. The Russian authorities state that the investigation and prosecution of the bribery of a foreign public official cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural persons involved. However, as discussed above, the role of assessing the “interests of the Russian Federation,” for extraterritorial offenses and the absence of a defined set of criteria on which such a determination is based raises questions as to the

potential impact of improper considerations in that process. This issue should be addressed in more depth in Phase 2.

6. Article 6: Statute of Limitations

Criminal Code

80. The statute of limitations for the active bribery offence under Article 291 CC depends on whether the act of bribery is in respect of acts or omissions that fall within the official's duties (Article 78 CC):

- In the case of crimes of little gravity (which captures the offence under Article 291(1) CC) - the statute of limitations is 2 years.
- In the case of average gravity crimes (which captures the offence under Article 291(2) CC, the statute of limitations is 6 years.
- In the case of grave crimes (which captures the offence under Articles 291(3) and Articles 291(4) CC, the statute of limitations is 10 years.
- In the case of especially grave crimes (which captures the offence under Article 291(5) CC, the statute of limitations is 15 years.

81. The limitation period shall be counted from the day of committing a crime to the time of the entry of a court's judgement into legal force. If a person commits a new crime, then the limitation period for each crime shall be counted independently. The Russian authorities state that under their legislation the statute of limitation periods can be suspended. For instance, under Article 78 of the Russian CC, the statute of limitation can be suspended if a person who committed a crime is trying to avoid investigation or court procedure. They further explain that in this event the statute of limitations is resumed from the time of arraignment of the above mentioned person or his acknowledgement of guilt. It appears that while the statute of limitation for grave and especially grave crimes is sufficient, the two-year threshold for crimes of little gravity, especially if is not suspended or interrupted, is likely too short for an effective enforcement of the foreign bribery offence. In previous Phase 1 evaluations, e.g., Denmark, the Working Group has felt that a 2-year period is too short, and, in the context of Phase 2 evaluations, recommended an increase in the statute of limitations in order to provide sufficient time for the investigation and punishment of foreign bribery offenses (e.g. France and Japan). Following such a recommendation Japan increased its statute to 5 years. This issue will require follow up in Phase 2.

Code of Administrative Offences

82. The Law adopted in May 2011 introduced amendments to Article 4.5 "Statute of limitation of administrative offences" of the Code of Administrative Offences, which determines the statute of limitation as six years since the date of the commission of the violation of the Russian anti-corruption legislation by a legal person. This amendment provides for a significant increase compared to one year under the previous legislation. This issue will be further assessed in Phase 2.

7. Article 7: Money laundering

83. Article 7 of the Convention provides that, if a Party has made bribery of its own public official a predicate offence for the purpose of its money laundering legislation, it shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred. Russia is a member of both the FATF and MONEYVAL. In June 2008, the FATF, the EAG and MONEYVAL jointly assessed the anti-money laundering and counter-terrorist financing measures of the Russian Federation.

Since 2008, both MONEYVAL and the FATF have followed up the progress made by Russia to improve its level of compliance with the FATF Standards.

84. In Russia, money laundering is criminalised by articles 174 CC (money laundering), 174.1 CC (self-laundering) and 175 CC (acquisition of property obtained by crime). Article 174 CC defines money laundering as an act that includes the completion of financial operations and other transactions with monetary funds or property knowingly acquired by other people by criminal means in order to impart legitimacy to their ownership and to conceal the criminal origin of the property. Article 175 CC states that the acquisition or sale of property knowingly obtained in a criminal manner is a punishable offence. The money laundering offence extends to any property and monetary funds. The term monetary fund refers to cash and financial deposits, both in any currency. Other property includes all physical objects and property rights. It is not necessary to convict a person of a predicate offence to prove that property is the proceeds of crime. The Criminal Code does not require this, and law enforcement and the Prosecution Authority seem to work on this basis. Russia follows an “all crimes” approach, i.e. all offences listed in the Criminal Code, including bribery of foreign public officials, are predicate offences for money-laundering.

85. Russian prosecutors may rely upon both direct and circumstantial evidence to prove their case in any criminal prosecution. Article 74 CPC provides that knowledge or intent may be proven by direct evidence, or that it may be inferred from the surrounding circumstances, that is, it may be inferred from objective factual circumstances, such as time and place of the crime and motive of the culprit.

86. There is a wide range of maximum sanctions available for money laundering by natural persons, consisting of increasing fines and terms of imprisonment as the factors surrounding the offence of money laundering become more severe. The elements of the criminal offences of money laundering generally remain unchanged since the last FATF evaluation in 2008³⁴. However, some changes were brought to the Criminal Code in 2010 i.e. the threshold for application of the penalties where money laundering is committed in ‘large amount’ has been changed (from 1 million roubles i.e. approximately EUR 25 000 to 6 million roubles i.e. approximately EUR 150 000). As far as third party money laundering is concerned, the application of the threshold seems to only impact the level of sanctions that are available (as an aggravating feature). However, with regard to self-money laundering, criminal liability seems to only take place above the 6 million roubles threshold. International Conventions and Standards criminalize all instances of money laundering (independently from a threshold). This is a matter to be further considered in Phase 2.

87. Under Russian law, legal persons cannot be held criminally liable for money laundering. Legal persons found to have engaged in money laundering activities can (pursuant to corporate and administrative liability under Article 15.27 of the Code of Administrative Offences) have their licence revoked and ultimately be subject to liquidation through civil court proceedings (on the issue of liability of legal persons, see section 3.5 above).

8. Article 8: Accounting

a) Accounting requirements

88. Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, each Party prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies

34 The FATF report on the Russian Federation judged Russia’s legislative provisions criminalising money laundering largely in accordance with international standards. See the FATF report at <http://www.fatf-gafi.org/dataoecd/31/6/41415981.pdf>

subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

89. Russian accounting standards are set out primarily within Federal Law 129-FZ On Accounting. They prohibit businesses from undertaking operations that are not reflected in the company accounts (Article 8 of the Accounting Law) and require that businesses maintain accurate, written records of accounts with supporting documentation (Article 9 of the Accounting Law). Order 67 N of the Ministry of Finance includes directions on the type of records that must be kept, including book-keeping procedures and a prohibition against amendment of cash journal and banking records. According to the Russian authorities, such provisions apply to all types of companies, including non-listed companies.

90. Russian authorities explain that Article 18 of the Accounting Law provides that heads of organisations and persons responsible for book-keeping shall bear administrative or criminal liability for failure to keep accounts in accordance with established procedures. However, the Working Group notes that Article 15.11 of the Code of Administrative Offences and Article 120 of the Tax Code only establish liability in respect of gross violations of accounting rules. A “gross violation” is explained to be a distortion of accrued taxes of not less than 10 percent, or the absence of source documents, invoices or books of accounts. Criminal liability for accounting offences is also foreseen in Article 185 CC (in case of abuse of issuance of securities) and Article 199 CC (for evading payment of taxes through knowingly false data). The use of these provisions as well as those in the Tax Code in relation to foreign bribery has not been further substantiated by the Russian authorities. It is unclear whether administrative or criminal liability is imposed upon natural or legal persons who falsify records to conceal foreign bribery. While the Russian authorities believe that all the provisions described above would be sufficient to meet the requirements of Article 8.1 of the Convention, the Working Group remains concerned as to whether they are applicable to foreign bribery. This issue should be followed up in Phase 2.

91. Furthermore, in relation to penalties for false accounting, the Russian authorities explain that different provisions are available. A violation under the Administrative Code entails a fine of between 2 000 and 3 000 Roubles (approximately EUR 50 to 75). The Russian authorities indicate that a violation under the Tax Code entails a fine of 5 000 Roubles (approximately EUR 125), or 15 000 Roubles (approximately EUR 375) in the case of more than one violation in any tax year. If a violation results in an under-representation of the tax base, the Tax Code allows the imposition of a fine between 15 000 Roubles and up to 10 percent of the amount of unpaid tax. Under the Tax Code, a tax offence is an unlawful (in violation of tax legislation) act (action or inaction) of a taxpayer, tax agent or other persons entailing liability under the Tax Code. The Working Group is concerned that these penalties apply to tax offenses and not to foreign bribery, and therefore do not amount to effective, proportionate and dissuasive sanctions for compliance with adequate accounting standards, as required by Article 8(2) of the Convention. In similar situations, the Working Group has recommended, in the context of Phase 1 reviews that the Party to the Convention subject to the review amends its legislation to comply with the Convention.³⁵ This issue will also require further analysis in the framework of the Phase 2 evaluation of Russia.

b) *Auditing and internal company controls*

92. Auditing standards in Russia are primarily regulated by the Federal Law “On Auditing”, enacted in 2008 and that came into force on 1 January 2009. It defines audit services, establishes the rights, obligations and liability of auditors and audit firms, addresses the issues of mandatory audit, confidentiality and independence of auditors and audit firms, and sets forth substantial compliance regulations. In order to conduct audit activities, audit firms and auditors should have membership in a self-regulatory organisation.

35 See, for example, the Phase 1 Report on the Slovak republic in which the Working Group on Bribery, after having considered that the fines for false accounting were comparatively low, invited the Slovak authorities to consider an increase of such fines.

(i) *Requirements to submit to external audit*

93. Publicly listed companies, entities involved in providing credit, insurance companies, investment funds, and entities involved in commodity or stock exchange must submit to an annual audit. Annual audit is also mandatory for companies where revenue for the sale of goods exceeds 50 million Roubles per annum (approximately EUR 1,29 million), or where the total balance sheet assets at the end of the financial year exceed 20 million Roubles (approximately EUR 515 000) (see Article 5(1)(3) of the Accounting Law). The Russian authorities have indicated that all state-owned enterprises are subject to equivalent standards.

(ii) *Auditing standards*

94. The Federal Law on Auditing adopted in 2008 establishes a system of audit that is intended to bring the Russian provisions in the sphere of audit significantly closer to those recognized internationally. Russian standards as set out in the Federal Law for auditing cover the most important audit issues and are generally compared to international practice, following ISA. As of 1 January 2010, the Government had approved 33 Russian standards on auditing (PSAD in their Russian abbreviation).

(iii) *Mechanisms to ensure audits take place*

95. For the purpose of educating auditors in the area of counteracting corruption, including training on differentiation between legal and illegal business payments, on 10 March 2009 the Ministry of Finance issued Order No. 21 in March 2009, which approved the Program of Advanced Training of Auditors “Counteracting Corruption in the Course of Audit Activities”. The implementation of this program should be subject to further attention in Phase 2.

(iv) *Independence of auditors*

96. The independence of auditing firms and auditors is regulated by Article 8 of the Auditing Law, which prohibits the carrying out of an audit in various situations where a conflict of interest may arise including, for example, where the directors of the audit firm are close relatives of the audited entity.

(v) *Reporting or disclosure obligations*

97. The Federal Standard of Auditing No 13 obliges an auditor to inform management and representatives of the owner of the audited entity of any detected distortions. Article 9 of the Auditing Law provides for audit secrecy, which may only be waived by the consent of the audited entity, or in respect of the audit fee or the conclusion of a mandatory audit. The Russian authorities indicated that Paragraph 69 of the Federal Auditing Standard (FAS 5 / 201036) sets out the responsibilities of the auditors during auditing, especially in relation to fraud. If the auditor has identified or suspected dishonest acts, he/she should determine whether he/she is obliged to report on the case or suspicion, especially to the public authority. The FAS highlights the importance of this reporting requirement, especially in relation to specific offences such as money laundering, terrorism financing and the corruption offenses. It states that, in case of doubt, the auditor should consider the need to seek legal advice on this matter. It is however unclear whether auditors are required to report suspected foreign bribery and to which Russian public authority they should turn to in order to seek legal advice in case of doubt and carry out their reporting obligation. The implementation of the reporting obligations should be subject to further consideration in Phase 2.

36 At the time of drafting this report, the federal auditing standards in force were those approved by the Order of the Ministry of Finance of the Russian Federation of 17 August 2010 No. 90N and registered by the Ministry of Justice on 11 November 2010 under No. 18 934.

(vi) *Sanctions for violations*

98. Article 20 of the Auditing Law allows audit firms, under the supervision of the Audit Council, to impose disciplinary measures against individual auditors who act in violation of the Auditing Law. Disciplinary measures include a written warning, a fine, suspension from membership, or expulsion from membership. Implementations of these measures could be followed up in Phase 2.

(vii) *Internal company controls*

99. The Russian authorities have indicated that internal company controls are governed by the Federal Law 115-FZ On the Counteraction of the Legitimization (Laundering) of the Proceeds of Crime and the Financing of Terrorism. These controls are however primarily designed to address the money laundering and terrorist financing risks (and not the detection or prevention of foreign bribery). The Russian regime for internal company controls will be further addressed in the context of the Phase 2 evaluation of Russia.

9. Article 9: Mutual legal assistance

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

9.1 General principles

9.1.1 Criminal Matters

101. Mutual legal assistance (MLA) in Russia is rendered either on the basis of: (i) bilateral or multilateral agreements;³⁷ or (ii) on an ad hoc basis where reciprocity has been observed by the requesting State, or is promised in writing by the requesting State. In the context of counteracting corruption, this principle is reflected in Article 4 of Federal Law 273-FZ On Counteracting Corruption. Russia has over 150 bilateral and multilateral agreements that were concluded at the State, governmental and inter-agency level.³⁸ The Working Group notes that in the past there have been challenges to obtaining MLA in respect to conducting interviews due to Russian law. The Russian authorities indicate that now the OECD Anti-Bribery Convention would be a direct basis for MLA. These issues should be followed up in Phase 2.

102. Legal assistance may be provided by Russia in various forms, including inspections, taking statements, conducting searches, undertaking forensic examinations or seizure of property (see below). The prosecution authority is the central authority co-ordinating the provision of MLA on all criminal cases. Requests for legal assistance must come from a competent authority in the requesting state (as officially certified by the requesting State), and must contain a statement of facts concerning the alleged offence; an explanation of what assistance is sought, why this is necessary, and why the requesting State is unable to obtain the information or evidence; and duly certified court decisions where applicable. Requests must be provided by way of an officially certified Russian translation of the request and supporting materials.

37 Including: the European Convention on Mutual Legal Assistance in Criminal Matters; the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; the Criminal Law Convention on Corruption; the United Nations Convention against Transnational Organized Crime; the United Nations Convention against Corruption; and the Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal Matters.

38 For further analysis, see the FATF description and analysis of Russia’s system for mutual legal assistance at <http://www.fatf-gafi.org/dataoecd/31/6/41415981.pdf>.

103. Article 458 CPC provides the possibility for a criminal case to be sent to a foreign State for prosecution. This will take place where a foreign citizen has committed an offence within Russian territory, but has since left the Russian Federation, and where authorities are unable to undertake procedural actions for a successful prosecution. In such cases, all materials are transferred to the General Prosecutor's Office, who determines whether or not to forward materials to competent authorities abroad.

9.1.2 Non-Criminal Matters

104. In line with Article 5 of the European Convention on Mutual Legal Assistance in Criminal Cases, Russia has reserved the right to execute legal assistance requests concerning the search or seizure of property only if the relevant offence is punishable under the law of the requesting State and the Russian Federation.

105. The Law of May 2011 introduced a new Chapter 29 on "Legal assistance in cases of administrative violations" to the Code of Administrative Offences. This chapter establishes a legal basis for mutual legal assistance in cases involving administrative violations. It contains a series of articles regulating procedures for requesting legal assistance from other states and for providing such assistance when requested from the Russian Federation. Article 29.5 sets out that legal assistance requests in administrative offence cases shall proceed pursuant to the international treaties or on a basis of reciprocity, which is assumed unless otherwise proved. In executing the request for legal assistance provisions of the Code of Administrative Offences shall apply. Should the request ask for the application of the foreign state's procedures, the official executing the request shall apply the laws of this foreign state unless such application contradicts laws of the Russian Federation or cannot be implemented in practice. The handling of MLA requests in criminal and administrative cases will require further review during Phase 2.

9.2 Dual Criminality

106. Dual criminality is not a strict condition for the provision of MLA by Russia, except in relation to extradition (see below). In the absence of mutual recognition of any relevant act as an offence (dual criminality) mutual legal assistance may be provided in the maximum possible degree. According to the Russian authorities, technical differences between legislations of the requesting state and requested state do not seem to be an obstacle for Russia in provision of such assistance.

9.3 Bank Secrecy

107. Pursuant to Article 9(3) of the Convention, a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy.

108. Bank secrecy applies to financial institutions in Russia (Article 26 of the Banking Law). However, the Russian authorities advised that these provisions do not preclude legal assistance in the form of the seizure of financial and bank records, so long as this is subject to a court ruling and so long as this was not prejudicial to the sovereignty and security of Russia. The Russian authorities indicate that the powers of law enforcement authorities to request from financial institutions information based on an open criminal case may be used in the circumstances of MLA. The precise authority for this position is not known. It is also not clear whether this requires a pre-existing case within Russia or whether law enforcement authorities are independently empowered to open an investigation on behalf of a requesting state. The Working Group is of the opinion that bank secrecy may undermine Russia's ability to provide MLA as required by Article 9.3 of the Convention and believe that this issue should be reviewed and followed up in Phase 2.

10. Article 10: Extradition

10.1 Extradition for Bribery of a Foreign Public Official

109. Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

110. Article 462 CCP permits extradition of a person to a foreign country under certain conditions. In particular, the extradition of a person may take place in the following cases: if the criminal law under the criminal law of the Russian Federation and the criminal law of the requesting State (1) envisages a punishment for the perpetration of these acts in the form of the deprivation of freedom for a term of over one year, or a more severe punishment, when the person is extradited for criminal prosecution; or (2) if the person, with respect to whom an inquiry for the extradition is directed, is sought to serve a sentence issued by a court of the requesting State; or (3) for a term of not less than six months. Foreign bribery is therefore extraditable (see the issue of dual criminality below).

10.2 Legal Basis for Extradition

111. Extradition procedures in Russia are based on a range of key international instruments dealing with extradition, which include among others the relevant universal conventions (Vienna (1988) and Palermo (2000) Conventions, UN Convention against Corruption (2003), European treaties (European Convention on Extradition (1957) and its Additional Protocols (1975, 1978), as well as the CIS Minsk (1993) and Kishinev (2002) Conventions) that Russia is a party to.

112. The Prosecution Authority is the central authority co-ordinating extradition matters. Extradition will be performed on the basis of reciprocity, the general terms and conditions of applicable multilateral and bilateral agreements,³⁹ and Chapter 54 CPC (see, in particular, Article 462 CPC). Requests for extradition must comply with various formal requirements. In the execution of a request for extradition, the standards of the CPC generally apply, however, according to Article 457 CPC the procedural standards of the foreign state can apply, in accordance with international agreements of Russia, on a mutual basis, unless this contradicts the laws and international liabilities of Russia.

113. Article 464 CPC regulates the grounds for refusal to extradite individuals. Refusal of an extradition request is *required* on certain grounds, including if: the person is a Russian citizen; the person has been granted asylum in Russia in connection with possible persecution in the requesting State; the person has already been convicted or acquitted of the equivalent offence in Russia for the same facts; the statute of limitations under Articles 78 and 83 CC has expired or a Russian court has previously denied the extradition request on the basis of the request’s failure to conform to the requirements of the legislation or treaties of the Russian Federation or for the reasons listed below in paragraph 121 and that judgment has passed into legal force.⁴⁰

39 Including, in the case of bribery offences, the United Nations Convention against Corruption; the European Convention on Extradition; and the Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal Cases.

40 Article 463 CPC sets out the conditions for appealing a decision of extradition by a Russian court in order to verify its legality and substantiation. The court shall not discuss the questions, concerning the guilt of the person who has filed the complaint, but shall restrict itself to verifying that the decision on the extradition of the given person is in conformity with the legislation and the international treaties of the Russian Federation.

114. Refusal of an extradition request *may* occur if: the acts that are the subject of the request were committed in Russia; the acts were committed outside Russia but against Russian interests; the prosecution is a private prosecution; if there are reasons to believe that proceedings will not be conducted in compliance with minimum fair trial guarantees under the International Covenant on Civil and Political Rights or the European Convention on Human Rights; or if there are grounds to believe that the person will be subjected to torture or other forms of cruel, inhuman or degrading treatment. The Russian Federation also reserves the right not to extradite persons whose extradition is likely to prejudice its sovereignty, security, public order or its other vital interests. It is not clear what these last grounds for refusing extradition actually consist of and the use the Russian authorities make out of them. This issue will need to be followed up in Phase 2.

10.3/10.4 Extradition of Nationals

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

116. According to Article 61 of the Constitution, Article 13 CC and Article 464 CPC, Russian citizens cannot be extradited to the territory of a foreign state. That said, according to article 12 CC, citizens of Russia and stateless persons with a permanent residence in Russia, who have committed offences beyond the territory of Russia, are criminally liable if the act is considered an offence in the state where it has been committed: if these persons were not convicted in the foreign state, a criminal case can be opened in Russia, investigated using the materials provided by the foreign competent authority, and prosecuted by the Prosecution Authority in accordance with the CPC. In such situations, the materials provided by foreign authorities may be used to the fullest extent possible according to procedures of the CPC relating to MLA. Pursuant to the CPC (Art. 459), Russian nationals accused or suspected of having committed a crime on the territory of a foreign state can be prosecuted in the Russian Federation under Russian law if the competent authorities of that state address a formal request to the Attorney General's Office. It does not appear, however, that there is an obligation to automatically prosecute Russian citizens who cannot be subject to extradition. For example immunity against criminal prosecution would prevent a case from being opened in Russia. Russian law, therefore, does not appear to fully comply with its obligations under the Convention to investigate and prosecute cases against individuals it refuses to extradite on nationality grounds.

117. In the case a Russian citizen has been convicted abroad but the sanction has not been enforced in whole or in part and he/she is on the Russian territory, the Russian courts can have recourse to specific procedures for execution of a sentence passed by the court of a foreign State under Art. 472 CPC. No equivalent provision is provided by the CPC in the case where a Russian national has been charged (but not convicted yet) abroad. In general, the Russian court would issue a decision on the recognition and execution of the foreign State's sentence. However, if a court, when considering a presentation (application) for the transfer of a citizen of the Russian Federation sentenced to deprivation of liberty by a court of a foreign state, comes to the conclusion that the deed for which the citizen of the Russian Federation is convicted is not a crime under the laws of the Russian Federation, or the sentence of the foreign state's court may not be executed by virtue of the expiry of the Russian State limitation period, as well as for any other reason provided for by laws of the Russian Federation or an international treaty of the Russian Federation, it shall issue a ruling on the refusal to recognize the sentence of the foreign state's court. It is not clear what "the other reason provided for by laws of the Russian Federation or an international treaty of the Russian Federation" would mean in practice. The Working Group is of the opinion that Russia should ensure that the application of the principle of "extradite or prosecute", the actual grounds for refusing extradition and the use the Russian authorities make out of them are consistent with the requirement under Article 10 of the Convention. These issues should be followed up in Phase 2.

10.5 Dual Criminality

118. Extradition for criminal prosecution is permissible only if dual criminality exists⁴¹ (see provisions of Article 460 CPC above). Information provided by Russian authorities indicated that technical differences in criminalising the conduct are not an obstacle in this case to executing an extradition request, as is the practice in relation to other forms of MLA. The use made by the Russian Federation of the dual criminality requirements might be an issue for follow-up in Phase 2.

11. Article 11: Responsible authorities

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

120. Requests for extradition and mutual legal assistance may be forwarded to the authorities listed under the relevant sections of the Criminal Procedure Code as follows: Extradition -- The Prosecutor General of the Russian Federation. Mutual Legal Assistance -- The Ministry of Justice of the Russian Federation.

B. IMPLEMENTATION OF THE 2009 RECOMMENDATION

12. Tax deductibility

121. The 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions recommends “that Member countries explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner”, and that “in accordance with their legal systems” they “establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities”.

122. Russia’s Tax Code does not expressly deny the deduction of bribe payments nor does it expressly permit any deductions or tax benefits in connection with bribes. The Tax Code sets out an exhaustive list of grounds upon which tax deductions may be made. It is the Working Group’s opinion that bribe payments could still conceivably be disguised as certain types of deductible expenses or could be hidden in overstated or fictitious expenses. According to the Russian authorities, the established principles of their national legal system would not permit the introduction of an express denial of deductibility of bribes and no specific actions have been taken domestically to bring Russia in compliance with the 2009 Recommendation on tax deductibility. This is a potentially significant issue that should be explored in more depth in Phase 2.

123. There is an obligation for the tax authorities to report violations of tax legislation to the law enforcement authorities, within ten days following the revealing of the relevant circumstances (Article 32, paragraph 3 of the Tax Code). This provision is further developed in the *Instructions on procedure of submitting materials by tax authorities to law enforcement agencies*⁴². The Russian authorities did not provide information on whether specific guidance or training is provided to tax authorities on how to distinguish between legitimate business expenses and illicit payments. This is a matter that could be further considered in Phase 2.

41 As also prescribed by Article 63 of the Constitution.

42 The mentioned Instruction is approved by Order of the Ministry of the Interior Affairs of the Russian Federation (No. 495) and by the Federal Tax Service (No. MM-7-2-347) of 30 June 2009, registered by the Ministry of Justice on September 1, 2009 under No. 14 675.

EVALUATION OF RUSSIA

1. The Working Group commends the Russian authorities for their co-operation during the examination process and recognises their efforts in providing an understanding of their laws.

2. In May 2011, Russia enacted legislation intended to bring it into compliance with the Convention in the form of “Amendments to the Criminal Code and the Code of Administrative Offences of the Russian Federation in Relation to the Enhancement of Public Governance in the Area of Counteraction to Corruption”. The Working Group notes that some concerns remain in Russian legislation regarding certain elements of the offence, the liability of legal persons, confiscation, and non-tax deductibility of bribes and that certain issues will need to be further reviewed during Phase 2 to determine whether there is effective application and enforcement of the Convention.

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

3. Regarding the foreign bribery offence (*Convention Article 1*), the Working Group recommends that Russia:

- a) explicitly and clearly ensure the criminalisation of "offer" and "promise" of a bribe as completed offences in accordance with Convention Article 1;
- b) examine the issue of “effective regret” in order to eliminate the defence as it applies to foreign bribery; and
- c) ensure that bribes in the form of non-pecuniary benefits are appropriately covered by the foreign bribery offence in practice, and this issue should be followed up in Phase 2.

4. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Russia ensure that third party beneficiaries are covered by the foreign bribery offence for legal persons, and this issue should be followed up in Phase 2 (*Convention Articles 1 and 2*).

5. The Working Group considers that the practical implementation of the regime of sanctions as applicable to natural persons has to be followed in Phase 2. The implementation of sanctions against legal persons should also be followed up in Phase 2 (*Convention Article 3*).

6. Regarding confiscation in relation to foreign bribery, the Working Group recommends that Russia ensure that measures are available for natural and legal persons to enable the identification, seizure and confiscation of the bribe, its proceeds or their equivalent value (*Convention Article 3*).

7. In relation to jurisdiction, the Working Group recommends follow-up in Phase 2 on territorial, extraterritorial and nationality jurisdiction (*Convention Article 4*).

8. With regard to the issue of immunity, the Working Group recommends that Russia ensure that any person can be investigated, charged or prosecuted for foreign bribery and that the process for lifting immunity for persons alleged to be involved in foreign bribery is effective and transparent to allow investigation, prosecution and adjudication of the offence (*Convention Articles 1 and 5*).

9. Regarding the statute of limitations, the Working Group recommends follow-up in Phase 2 concerning the existing two-year threshold applicable to foreign bribery offences of lesser gravity (*Convention Article 6*).

10. Regarding international judicial co-operation, the Working Group recommends follow up in Phase 2 concerning the handling of MLA requests in criminal and administrative cases, including dual criminality and where bank secrecy has to be waived (*Convention Article 9*).

Recommendations for ensuring effective prevention and detection of foreign bribery

11. Regarding accounting requirements, the Working Group recommends that Russia take measures to ensure:

- a) the prohibition of omissions and falsifications in respect of books, records, accounts and financial statements for the purpose of bribing foreign public officials or for hiding such bribery (*Convention Article 8.1*); and
- b) the introduction of effective, proportionate and dissuasive sanctions for such omissions and falsifications (*Convention Article 8.2*).

12. Regarding tax measures, the Working Group recommends that Russia explicitly disallow the tax deductibility of bribes to foreign public officials, and establish an effective framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties to the appropriate domestic law enforcement authorities (*2009 Recommendation VIII(i)*).