



**Working Group on Bribery in
International Business Transactions**

Compilation of Recommendations made in The Phase 3 Reports

**Implementation and Application of the Convention
on Combating Bribery of Foreign Public Officials in
International Business Transactions
and the
2009 Recommendations on further Combating
Bribery**

LAST UPDATE DECEMBER 2011

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BULGARIA (MARCH 2011)

Bulgaria has made some efforts to enforce the foreign bribery offence since Phase 2. It obtained one conviction for this offence and prosecuted a second case (though the offender died before the proceedings could be concluded). However, the Working Group notes a lack of awareness of the risks of foreign bribery among public officials and in the private sector, and insufficient priority given to prevention and detection of foreign bribery cases. In addition, although since Phase 2 Bulgaria has enacted legislation creating liability of legal persons for foreign bribery, it has not made any efforts to enforce the law. The Working Group welcomes Bulgaria's commitment to introduce an express denial of the tax deduction of bribes, which will address this serious shortcoming.

The Phase 2 evaluation report on Bulgaria, adopted in 2003, included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations that have been partially implemented or not implemented at the time of Bulgaria's written follow-up report in 2006, the Working Group concludes that: Recommendations 1, 3, 4, 5 and 15 remain partially implemented; and Recommendations 7, 9, and 11 remain not implemented.¹

Against this background, and based on the other findings in this report regarding Bulgaria's implementation of the Convention and 2009 Recommendations, the Working Group: (1) makes the following recommendations to Bulgaria under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice. The Working Group invites Bulgaria to report orally on the implementation of Recommendations 2, 7(a), 8 and 11 within one year of this report (i.e. in March 2012). It further invites Bulgaria to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in March 2013).

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Bulgaria:
 - a) amend its foreign bribery offence to cover all cases of bribery in order that an official act outside his/her authorised competence, and to expressly cover bribes given to third party beneficiaries (Convention Article 1);
 - b) take steps to ensure that judges, prosecutors and investigators are aware that the Penal Code bribery offences cover bribes of a non-material nature (Convention Article 1; 2009 Recommendation III(i)).
2. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Bulgaria substantially amend the regime in the Law on Administrative Offences and Sanctions (LAOS) to ensure that:

¹ See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

- a) there is jurisdiction to prosecute Bulgarian companies when a non-Bulgarian national commits foreign bribery outside Bulgaria (Convention Articles 2 and 4);
 - b) investigations and prosecutions of legal persons for foreign bribery are not affected by the factors described in Article 5 of the Convention, and the full range of investigative tools in the Criminal Procedure Code is available in such cases [Convention Articles 2 and 5; 2009 Recommendation IV and Annex I(D)];
 - c) there is a clear procedural framework that identifies the court with competence to hear proceedings against legal persons, and that does not preclude proceedings against legal persons when proceedings against a natural person are terminated or not commenced due to specified grounds in the Criminal Procedural Code [Convention Article 2; 2009 Recommendation IV and Annex I(D)].
3. Regarding sanctions for foreign bribery, the Working Group recommends that Bulgaria:
- a) ensure that sanctions against natural persons that are imposed in practice are effective, proportionate and dissuasive in all foreign bribery cases (Convention Article 3);
 - b) enact a provision to sanction aggravated foreign bribery to the same extent as aggravated domestic bribery (Convention Article 3);
 - c) increase the maximum penalty available against legal persons in cases where the advantage accruing to the legal person as a result of foreign bribery is not “property”, or if the value of the advantage cannot be ascertained (Convention Article 3).
4. Regarding confiscation, the Working Group recommends that Bulgaria:
- a) streamline its legislation on confiscation, and amend the legislation to expressly cover the confiscation of (i) the bribe from legal persons; and (ii) the indirect proceeds of bribery gained by a briber, and property in the hands of third parties, from natural and legal persons (Convention Article 3);
 - b) take steps to ensure that prosecutors routinely seek confiscation of the bribe, and the direct and indirect proceeds of bribery obtained by a briber (Convention Article 3).
5. Regarding investigations and prosecutions, the Working Group recommends that Bulgaria:
- a) allocate adequate human and financial resources to investigations and prosecutions of foreign bribery against natural and legal persons, including the availability of expertise in forensic accounting and information technology [Convention Articles 2 and 3; 2009 Recommendation IV and Annex I(D)];
 - b) train judges, prosecutors and investigators on investigations and prosecutions of legal persons and complex financial cases, and take steps to ensure that such investigations are conducted whenever appropriate [2009 Recommendation III(i), IV and Annex I (A) and (D)];
 - c) take steps to ensure that its authorities are more proactive when seeking mutual legal assistance [Convention Article 9; 2009 Recommendation XIII(i) and (iii)];
 - d) issue an official written procedure for assigning foreign bribery cases to the various prosecutorial and investigative bodies (Convention Article 5);

- e) maintain statistics as to the number, sources and subsequent processing of foreign bribery allegations and consider ways of publicising information heard by the courts, as described in Phase 2 Recommendation 4 [2009 Anti-Bribery Recommendation III(i)];
- f) put in place a centralised mechanism for the periodic review and evaluation of the enforcement approach and the effectiveness of the enforcement efforts of the different agencies involved in the fight against foreign bribery, as referred to in Phase 2 Recommendation 14 (Convention Articles 1 and 5; 2009 Anti-Bribery Recommendation V).

Recommendations for ensuring effective prevention and detection of foreign bribery

6. Regarding accounting requirements, external audit, internal controls, ethics and compliance, the Working Group recommends that Bulgaria:

- a) introduce effective, proportionate and dissuasive sanctions for false accounting offence, and intensify training and awareness-raising in foreign bribery that targets the accounting and auditing profession (reiterates Recommendation 3 of Phase 2) [Convention Article 8; 2009 Recommendation III(i) and X(A(iii))];
- b) encourage companies to introduce codes of conduct and compliance programmes, as well as to promote the implementation of measures recommended in the “Good Practice Guidance on Internal Controls, Ethics, and Compliance” and clearly allocate responsibility for such promotion (2009 Recommendation X(C) and Annex II).

7. Regarding tax measures, the Working Group recommends that Bulgaria implement its declared intention to:

- a) establish an express legislative provision to prohibit the tax deduction of bribes including those paid to foreign public officials and review its tax law with a view to identifying and removing potential loopholes for hiding foreign bribery as tax-deductible expenses [2009 Recommendation VIII(i)];
- b) provide guidelines and training to tax inspectors as to the types of expenses that constitute bribes to foreign public officials, using the OECD Bribery Awareness Handbook for Tax Examiners [2009 Recommendation VIII(i)].

8. Regarding awareness-raising, the Working Group recommends that Bulgaria:

- a) explicitly address combating bribery of foreign public officials in international business transactions in its anti-corruption policy [2009 Recommendation II and III(i)];
- b) raise awareness of the foreign bribery offence among the relevant ministries and provide regular training about the offence and reporting obligations to officials in government agencies that could play a role in detecting and reporting, including the officials of the Ministry of Foreign Affairs [2009 Recommendation III(i) and IX(ii)];
- c) raise awareness among the private sector of the offence, in co-operation with the Bulgarian SME Promotion Agency and business associations [2009 Recommendation III(i)].

9. Regarding whistleblower protection, the Working Group recommends that Bulgaria consider extending the recently established provision for the protection of whistleblowers who report instances of conflict of interests to cover foreign bribery, or establish another mechanism to ensure that public and

private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary actions. The Working Group further recommends that Bulgaria implement measures to raise awareness about such mechanisms (2009 Recommendation IX(iii)).

10. Regarding official development assistance (ODA), the Working Group recommends that Bulgaria, in the course of developing its ODA policies and procedures, adopt measures to prevent, detect and report foreign bribery in the award and execution of ODA contacts [2009 Recommendation II, IX(i) and IX(ii)].

11. Regarding officially supported export credits, the Working Group recommends that the Bulgaria:

- a) adhere to the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits [2009 Recommendation XII(i)];
- b) introduce measures to inform clients about the legal consequences of foreign bribery, require clients to provide anti-bribery declarations, conduct due diligence in the award process (including through the use of available debarment lists), and report suspicions of foreign bribery in export credit operations [2009 Recommendation XII(i)].

12. Regarding public procurement, the Working Group recommends that Bulgaria introduce a legal provision to allow debarment of legal persons from public procurement, provide guidance to the procurement bodies on due diligence, and consider maintaining a record of natural and legal persons convicted of bribery which could be consulted by contracting authorities (2009 Recommendation XI).

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as the case law and practice develop:

- a) The number of and reasons for cases returned by the courts to the pre-trial authorities [Convention Article 5 and 2009 Recommendation Annex I(D)];
- b) Time taken to conduct preliminary checks when there is sufficient information to commence pre-trial proceedings [Convention Article 5 and 2009 Recommendation Annex I(D)].

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/16/20/47468296.pdf>

CANADA (MARCH 2011)

The Working Group on Bribery welcomes Canada's recent enforcement efforts. Canada has over 20 CFPOA investigations and one ongoing prosecution. Recent progress in investigating CFPOA violations is largely due to the establishment of the RCMP International Anti-Corruption Unit, which has been making substantial efforts to investigate allegations of the bribery of foreign public officials and raise awareness of the offence. Canada is also commended for the enactment of the Criminal Code provision on the liability of legal persons, which covers the bribery of foreign public officials in circumstances analogous to those in the 2009 Recommendation. However, Canada has only completed one prosecution since it enacted its foreign bribery law in 1999. Given the size of Canada's economy and its high-risk industries, the Working Group recommends Canada review its law implementing the Convention and its approach to enforcement to determine why it has only had one conviction to date. Canada's implementation of the Convention is problematic in four important areas – the scope of the foreign bribery offence in the CFPOA, application of sanctions, scope of jurisdiction in the CFPOA, and factors that may be considered in CFPOA prosecution decisions. Moreover, the Public Prosecution Service of Canada has not yet dedicated resources for dealing with the soon expected substantial body of CFPOA prosecutions.

Regarding outstanding recommendations since the Phase 2 written follow-up report in June 2006, the Working Group concludes that Recommendations 4(b) and (d) are now satisfactorily implemented. The Working Group cannot assess whether Recommendation 2 has been satisfactorily implemented until there have been more prosecutions. The Working Group concludes that the following recommendations remain partially implemented: 3(a), and 5 (d), (e) and (f). The following recommendations remain not implemented: 3 (b), 4(c) and 5 (c). Regarding recommendation 5(b), which required further consideration by Canada to amend a particular aspect of the CFPOA, the Working Group now recommends the amendment.

In conclusion, based on the findings in this report on implementation by Canada of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. Due to the significance of the issues raised in this report, the Working Group recommends that Canada report back to it on progress in implementing the recommendations below in October 2011 and provide, in writing, the outcomes of its review of its implementation of the Convention, as described above. This would be followed by the normal oral report within one year of this report (March 2012), and a written follow-up report on all recommendations and follow-up issues within two years (March 2013).

1. Recommendations of the Working Group

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

1. The Working Group recommends that Canada amend the offence of bribing a foreign public official in the CFPOA so that it is clear that it applies to bribery in the conduct of all international business, not just business 'for profit' (Convention, Article 1).
2. The Working Group recommends that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with the Government or

receive any benefit under such a contract, consistent with the domestic bribery offence in the Criminal Code [Convention, Article 3; Commentary 26; 2009 Recommendation XI (i)].

3. The Working Group recommends that Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad (Convention, Article 4.2; Commentary 26; Recommendation V).

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:

- a) Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D);
- b) Ensure that resources for investigating CFPOA cases by the RCMP International Anti-Corruption Teams remain at least at their intended functional levels of six full-time regular RCMP members and a civilian member or public servant for each Team; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D);
- c) Urgently dedicate resources for the soon expected CFPOA prosecution case-load of potentially more than 20 cases; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D);
- d) Take appropriate measures to encourage provincial securities commissions to sanction books and records and other securities violations associated with CFPOA misconduct, and share with the RCMP and other relevant investigative authorities expertise and information about potential CFPOA violations; [Convention, Article 8.2; 2009 Recommendation X. A. (i) and (ii)];
- e) In consultation with the provinces in an effort to ensure consistency of standards throughout Canada: (i) prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include “bribing foreign public officials or of hiding such bribery”; (ii) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement; (iii) consider broadening the prohibitions for participating in audits in order to improve auditor independence; and (iv) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities; [Convention, Article 8]; and
- f) To the extent appropriate and possible in the Canadian legal system, consider options for encouraging voluntary disclosure of CFPOA violations and for cooperating with investigations, which may thereby increase the reporting of violations of the CFPOA [2009 Recommendation III (iv)].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. The Working Group recommends that Canada find an appropriate and effective means for making companies aware of the CFPOA, including the defence for ‘reasonable expenses incurred in good faith’ and the defence for ‘facilitation payments’, and increase efforts to raise awareness of the CFPOA specifically amongst: i) Industries at high risk for bribing foreign public officials, and individuals and companies operating in countries where there is a high risk of bribe solicitation; and ii) municipal and provincial law enforcement authorities, to enable them to spot suspicions of foreign bribery and thus

facilitate reporting to the RCMP International Anti-Corruption Unit [2009 Recommendation III (i), IV, VI (ii), and Annex I, paragraph A].

6. Further regarding the defence in the CFPOA for ‘facilitation payments’, the Working Group recommends that Canada as soon as possible implement Recommendation VI of the 2009 Recommendation by: i) periodically reviewing Canada’s policies and approach on small facilitation payments; and ii) encouraging companies, including SMEs, to prohibit or discourage the use of such payments in internal controls, ethics and compliance programmes or measures [2009 Recommendation VI; and X. C. (i)].

7. The Working Group recommends that Canada promote compliance programmes or measures specifically targeting the prevention and detection of CFPOA violations in the private sector, including in particular the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation X. C. (i) and (ii)].

8. Regarding the tax treatment of bribes to foreign public officials, the Working Group recommends that Canada:

- a) Provide specific training for tax examiners on whether a payment comes under the defence for reasonable expenses incurred in good faith or facilitation payments, and the detection of foreign bribery by non-profit organisations [2009 Recommendation VIII (i); 2009 Tax Recommendation II]; and
- b) Complete as soon as possible the review of the prohibition against reporting non-tax criminal offences detected in the course of a tax audit, to law enforcement authorities, and identify methods to enable the tax authorities to share information about CFPOA violations, including by considering inclusion of the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties [2009 Recommendation VIII (i); 2009 Tax Recommendation I (ii) and (iii)].

9. Regarding public procurement contracting in Canada, the Working Group reiterates the Phase 2 recommendation that Canada revisit the policies of Public Works and Government Services Canada on dealing with applicants convicted of CFPOA violations. In addition, the Working Group recommends that Canada consider further strengthening CIDA procedures by undertaking due diligence concerning applicants’ declarations about corruption-related convictions [Convention, Article 3.4; Commentary 24; 2009 Recommendation XI (i)].

2. Follow-up by Working Group

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:

- a) Application of the defence of ‘reasonable expenses incurred in good faith’ (Convention, Article 1);
- b) Due to the newness of the provision, application of the Criminal Code provision on the liability of legal persons, including in the following cases: i) the natural perpetrator(s) is (are) not prosecuted and/or convicted under the CFPOA; and ii) the relevant legal person was not created with an expectation of profit, including non-profit and government controlled entities (Convention, Article 2; 2009 Recommendation IV, and Annex 1, paragraph B);
- c) Sanctions imposed on natural and legal persons in CFPOA cases, including confiscation of bribes and the proceeds of bribing foreign public officials (Convention, Articles 3.1 and 3.2);

- d) Coordination in practice of investigations and prosecutions of CFPOA cases involving features of the federal criminal enforcement framework, including the following: i) the RCMP inspector in Ottawa who manages the RCMP anti-corruption programme and provides support to the two RCMP Anti-Corruption teams; ii) the PPSC subject-matter position who works with and advises the RCMP Anti-Corruption teams on ongoing investigations; iii) the DOJ's International Assistance Group and the RCMP's Legal Services Unit, with designated individuals to liaise with the International Anti-Corruption teams; and iv) the Integrated Market Enforcement Teams, which include RCMP investigators, PPSC legal advisors, securities regulators, and law enforcement agencies of local jurisdictions (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D);
- e) Statistics compiled on convictions under the CFPOA, and related omissions and falsifications of book, records and accounts of companies (Convention, Article 3);
- f) Application of the money laundering offence where violations of the CFPOA form the predicate offence (Convention, Article 7);
- g) The efficiency of mechanisms for incoming and outgoing mutual legal assistance regarding cases of bribing foreign public officials (Convention, Article 9.1; 2009 Recommendation XIII); and
- h) The operation of the relatively new Criminal Code offence of retaliation against employees [2009 Recommendation IX (iii)].

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/55/25/47438413.pdf>

FINLAND (OCTOBER 2010)

Finland's efforts in enforcement of the foreign bribery offence since Phase 2 are promising, primarily as a result of experienced and well-resourced investigators. The Working Group commends Finland's proactive approach to international cooperation on asset recovery, and its bilateral anti-corruption work with China and the Russian Federation. However, the Working Group notes with serious concern a general lack of awareness and understanding of the foreign bribery offence in both the public and private sectors in Finland.

The Phase 2 evaluation report on Finland, adopted in May 2002, included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented at the time of Finland's written follow-up report in February 2006, the Working Group concludes that: Recommendations 6 and 8 have been satisfactorily implemented; Recommendation 7 remains partially implemented; and Recommendations 3 and 5 remain not implemented.²

Against that background, and based on the other findings in this report regarding Finland's implementation of the Convention and 2009 Recommendations, the Working Group: (1) makes the following recommendations to Finland under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice. The Working Group invites Finland to report orally on the implementation of Recommendations 2, 4 and 5(a) within one year of this report (i.e. in October 2011). It further invites Finland to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in October 2012).

1. Recommendations of the Working Group

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

1. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Finland provide regular training and establish internal guidance for law enforcement authorities and prosecutors concerning the investigation and prosecution of the foreign bribery offence, including on: (i) the distinction between the non-aggravated and aggravated forms of the active bribery offences in the Criminal Code; and (ii) the scope of application of the active bribery offences to legal persons, including the factors that trigger corporate criminal liability (Phase 2 Evaluation, Recommendation 7; 2009 Recommendation II).

2. Regarding the offence of foreign bribery, the Working Group recommends that Finland amend the definition of foreign public official in § 40:11(4) of the Criminal Code to include a person holding a legislative office in a foreign country [Convention, Article 1(4)(a)].

3. Regarding the limitation period, the Working Group recommends that Finland take action to ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to ensure

² See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

adequate investigation and prosecution, including that mechanisms for extension of the limitation period are sufficient and reasonably available (Convention, Article 6).

4. Regarding false accounting, the Working Group recommends that Finland amend the Criminal Code to expressly provide for corporate liability in respect of the accounting and auditing offences in Chapter 30, as well as for the accounting offences in the Accounting Act (Convention, Article 8; 2009 Recommendation X.A).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding awareness-raising, the Working Group recommends that Finland:

- a) Take urgent steps to raise awareness within the public and private sectors that the bribery offences under § 16:13 and § 16:14 of the Criminal Code include: (i) bribery of a foreign public official, including of a person holding a legislative office in a foreign country; and (ii) bribery through an intermediary, including through a related legal person abroad [Convention, Article 1(1) and 1(4)(a); 2009 Recommendation III(i)];
- b) Take concrete steps to raise awareness of the Convention and the foreign bribery offence in key government agencies, including FINNVERA, MFA, and the Tax Administration [2009 Recommendation III(i)];
- c) Take concrete steps to raise awareness of Finland's framework for combating foreign bribery in the private sector, including within high risk sectors such as the defence industry and with SOEs, SMEs and the legal, accounting and auditing professions [2009 Recommendation III(i)];
- d) Take concrete steps to raise awareness of the responsibility of legal persons for the foreign bribery offence, including amongst SOEs and their auditors [Convention, Article 2; 2009 Recommendation III(i)];
- e) Promote the Good Practice Guidance in Annex 2 of the 2009 Recommendation to all Finnish enterprises, business organisations and professional associations, including through Finnish missions abroad (2009 Recommendation X.C).

6. Regarding the reporting of foreign bribery, the Working Group recommends that Finland introduce appropriate measures to facilitate reporting by public officials to law enforcement authorities of suspected acts of foreign bribery detected in the course of their work [2009 Recommendation III(iv) and IX(ii)];

7. Regarding whistleblower protection, the Working Group recommends that Finland introduce mechanisms to ensure that public and private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action, along with appropriate measures for raising awareness of these mechanisms [2009 Recommendation IX(iii)].

8. Regarding external auditing, the Working Group recommends that Finland:

- a) Take measures to ensure that the significant number of companies released from the obligation to carry out an external audit, following amendments to the Auditing Act, continue to voluntarily submit to an external audit and are aware of the foreign bribery offence and related accounting and auditing offences [Phase 2 Evaluation, Recommendation 5; 2009 Recommendation X.B(i)];

- b) Amend the Auditing Act to require external auditors who discover indications of a suspected act of foreign bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies [Phase 2 Evaluation, Recommendation 3; 2009 Recommendation X.B(iii)];
- c) Consider requiring external auditors who discover indications of a suspected act of foreign bribery to report to competent authorities independent of the company [2009 Recommendation X.B(v)].

9. Regarding taxation, the Working Group recommends that Finland:

- a) Establish clear guidelines for tax inspectors, particularly concerning: (i) the coverage of bribes to foreign public officials as a form of non-deductible expense under section 16 of the Business Tax Act; (ii) how active bribery investigations should be taken into consideration by the Tax Administration; and (iii) on the obligation of officials in the Tax Administration to report cases of suspected foreign bribery to investigative authorities [Phase 2 Evaluation, Recommendation 3; 2009 Recommendation VIII(i); 2009 Tax Recommendations I(i) and II];
- b) Provide guidance to taxpayers on the non-deductibility of bribes to foreign public officials, along with the type of expenses that are deemed to constitute bribes, including gifts and entertainment expenses [2009 Recommendation VIII(i); 2009 Tax Recommendation I(ii)].

10. Regarding official development assistance (ODA), the Working Group recommends that Finland take steps to ensure that: (i) persons applying for ODA contracts be required to declare that they have not been convicted of corruption offences; (ii) due diligence is carried out prior to the granting of ODA contracts; (iii) ODA contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery; and (iv) sub-contractors and contracted local agents be bound by the same prohibition (2009 Recommendation XI).

11. Regarding officially supported export credits, the Working Group Recommends that Finland's export credit agency, FINNVERA, establish formal guidelines concerning: (i) due diligence and enhanced due diligence; (ii) disclosure of credible evidence of bribery to law enforcement authorities; and (iii) the consequences of a client or applicant being the subject of allegations or convictions of bribery, either before or after approving support (2006 Export Credit Recommendation I).

12. Regarding other forms of public advantages, the Working Group recommends that Finland issue guidelines to public procurement authorities to: (i) require consideration of international blacklists during the tender process; (ii) include such listing as a possible basis of exclusion from application for public tenders; (iii) establish mechanisms to verify the accuracy of information provided by applicants, along with enhanced due diligence where appropriate; and (iv) include, within public procurement contracts, termination and suspension clauses in the event of the discovery by procurement units that information provided by the applicant was false, or by reason of the contractor subsequently engaging in bribery during the course of the contract (2009 Recommendations II and XI).

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as case law and practice develops:

- a) Case law concerning the differentiation between aggravated and non-aggravated bribery;
- b) The reliance by Finland on the aggravating feature in § 16:14(1) of the Criminal Code (bribes intended to make an official act in service contrary to his or her duties), in particular whether this

non-autonomous element of the offence causes difficulties in the investigation and prosecution of the offence;

- c) The application of effective, proportionate and dissuasive sanctions against natural and legal persons, in particular concerning: (i) the lapse of sanctions; (ii) the use of provisions on exclusion from competition for public procurement; and (iii) bans on engaging in commercial activities under the Business Prohibition Act;
- d) The confiscation of the instrument of the bribe and its proceeds (or their equivalents), including pre-trial seizure and confiscation measures;
- e) Experience of cooperation with competent authorities in other countries concerning the identification, freezing, seizure, confiscation or recovery of bribes, and the proceeds of bribes, to foreign public officials;
- f) The proposal to introduce a system of plea bargaining in Finland, and any impact this system may have on the investigation and prosecution of foreign bribery cases;
- g) The application of money laundering offences in cases where foreign bribery is the predicate offence;
- h) The adequacy of the monetary thresholds that determine the application of the HILMA information system to public tenders.

Complete Phase 3 Report available at:
<http://oecd.org/dataoecd/59/30/46212643.pdf>

GERMANY (MARCH 2011)

The Working Group on Bribery commends Germany for its visible and significant enforcement efforts that have increased steadily since Phase 2 enabled by the good practices developed within the German legal and policy framework. They were also assisted by the pragmatic approach taken by Germany to prosecute and sanction individuals in foreign bribery cases with a range of criminal offences other than the offence of foreign bribery where it was not possible to establish all the elements of proof required to apply the latter offence, the use of non-prosecution arrangements under 153a CCP and the commendable level of international cooperation shown with other Parties to the Convention. The Working Group remains however concerned that the level of sanctions applied to both legal and natural persons may not always be fully effective, proportionate and dissuasive, and that a limited number of legal persons have so far been held liable and sanctioned in cases of foreign bribery in Germany.

The Phase 2 evaluation report on Germany adopted in June 2003 included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented, at the time of Germany's written follow-up report, in December 2005, the Working Group concludes that: recommendation 3 has been partially implemented, recommendation 1 remains partially implemented and recommendation 7 remains not implemented. Of the recommendations that have been deemed "considered" at the time of the written follow-up, recommendation 5.1 has been partially implemented and recommendation 8 is partly not implemented and partly no longer relevant.³

In conclusion, based on the findings in this report, regarding implementation by Germany of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites Germany to report orally on the implementation of recommendations 2, 4 c) and 6 within one year of this report (*i.e.* in March 2012). It further invites Germany to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in March 2013).

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Germany:
 - a) Take any appropriate measures to clarify (i) that the criteria in the Convention and its Commentaries defining a foreign public official are to be interpreted broadly, (ii) that no element of proof beyond those contemplated in Article 1 of the Convention is required and (iii) that, in determining whether a public function was being exercised by a person, elements of information available from foreign authorities are given due consideration [Convention, Article 1; 2009 Recommendation III. (ii) and V.];

³ See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

- b) Ensure, through any appropriate means, that its legal treatment of facilitation payments is clearly defined and that it complies with the requirement of Commentary 9 that such payments be “small” [Convention, Article 1; 2009 Recommendation III. (ii) and VI.(i) and (ii).];
 - c) Encourage companies to prohibit or discourage the use of facilitation payments.
2. Regarding the responsibility of legal persons, the Working Group recommends that Germany further increase the effectiveness of the liability of legal persons including through raising awareness among the prosecuting authorities at the *Länder* level to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently in all *Länder* (Convention, Article 2, Phase 2 Evaluation, recommendation 7).
3. Regarding sanctions, the Working Group recommends that Germany:
- a) Raise awareness among prosecuting authorities on the importance of (i) requiring sanctions against natural persons that are effective, proportionate and dissuasive, including in cases of solicitation, and (ii) making full use of the range of criminal sanctions available in law (Convention, Article 3);
 - b) Compile statistical information on sanctions of natural persons in a manner that differentiates between (i) sanctions imposed for the offence of foreign bribery and for other criminal offences, in particular commercial bribery and breach of trust, (ii) procedures applied (court decision with a full hearing, arrangement under section 153a CCP, penal order under section 407 CCP, or negotiated sentencing agreement under section 257c CCP) (Convention, Article 3);
 - c) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements under section 153a CCP, such as the reasons why they were used in a specific case and the arrangements’ terms (Convention, Article 3);
 - d) Increase the maximum level of the punitive component of administrative fines available in law for legal persons, to a level that is effective, proportionate and dissuasive (Convention, Articles 2 and 3; 2009 Recommendation V.; Phase 2 Evaluation, Recommendation 7);
 - e) Consider making available to courts additional sanctions for legal persons to ensure effective deterrence [Convention, Articles 2 and 3; 2009 Recommendation III.(vii) and XI.(i)].
4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Germany:
- a) Further ensure that judges and prosecutors in those *Länder* with less experience in foreign bribery cases are offered specific training with regard to the technicalities linked to the complexity of the foreign bribery offence in Germany for both natural and legal persons [2009 Recommendation III.(ii) and V.];
 - b) Strengthen its efforts to compile at the federal level, for future assessment, information and statistics relevant to monitoring and follow-up of the enforcement of the German legislation implementing the Convention [Convention, Article 12; 2009 Recommendation III.(ii) and V];
 - c) Clarify the criteria by which the prosecutors may dispense with prosecutions, with a view to provide a uniform application of section 153a CCP [2009 Recommendation III. (ii) and V.; Phase 2 Evaluation, recommendation 8];

- d) Clarify, through any appropriate means, that the “predominant public interest”, provided under subsection 153c(3) among the grounds for dispensing with prosecution, does not include factors contrary to Article 5 of the Convention such as the national economic interest (Convention, Article 5).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding awareness-raising the Working Group recommends that Germany:
- a) Continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence (2009 Recommendation X.C.);
 - b) Strengthen the role of German missions abroad in raising awareness and reporting suspicions of foreign bribery [2009 Recommendation IX (ii)].
6. Regarding whistleblower protection, the Working Group recommends that Germany enhance reporting of suspicions of foreign bribery by company employees, through any appropriate means, e.g. by codifying the protection identified by jurisprudence and disseminating information on such protection [2009 Recommendation, IX (iii) and X.C (v)].
7. Regarding money laundering, the Working Group recommends that Germany:
- a) Amend section 261(9) of the Criminal Code which precludes the simultaneous conviction of a person for money laundering and foreign bribery [Convention, Article 7; 2009 Recommendation III.(ii)];
 - b) Amend its money laundering legislation to include the bribery of foreign and international MPs in the list of predicate offences to money laundering [Convention, Art.7; 2009 Recommendation III.(ii)].
8. Regarding accounting and auditing requirements, the Working Group recommends that Germany consider extending exceptions to auditors’ duty of confidentiality to the reporting of suspected acts of foreign bribery to law enforcement authorities [2009 Recommendation, III.(v) and X.B.(v); Phase 2 evaluation, recommendation 3].
9. Regarding internal controls, ethics, and compliance, the Working Group recommends that Germany continue encouraging companies, especially SMEs, to develop internal controls, ethics and compliance systems (2009 Recommendation, X.C.).
10. Regarding tax measures for combating foreign bribery, the Working Group recommends that Germany:
- a) Clarify the policy on dealing with claims for tax deductions for facilitation payments [2009 Recommendation, VI(i) and VIII(i); 2009 Tax Recommendation I.(ii)];
 - b) Complete its assessment on whether there is a time lag in the performance of tax audits of companies, and take measures, where necessary, to reduce time lags [2009 Tax Recommendation I.(ii); Phase 2 evaluation, recommendation 3].
11. Regarding public advantages, the Working Group recommends that Germany:

- a) Consider establishing a federal register of unreliable companies and improve co-ordination among *Länder* registers (2009 Recommendation II. and XI.);
- b) Issue guidelines to public procurement authorities to take the following measures, where they are not already in place: (i) take international debarment into consideration during the tender process; (ii) take debarment listings as a possible basis for enhanced due diligence of applications for public tenders; (iii) establish mechanisms for the verification, when necessary, of the accuracy of information provided by applicants; (iv) include, within public procurement contracts, termination and suspension clauses in the event of the discovery by procurement units that information regarding compliance with foreign bribery legislation provided by the applicant was false, or by reason of the contractor subsequently engaging in foreign bribery during the course of the contract (2009 Recommendation II. and XI.);
- c) Ensure that ODA-funded contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery and that this prohibition also applies to sub-contractors and contracted local agents (2009 Recommendation XI.).

2. Follow-up by the Working Group

12. The Working Group will follow-up the issues below as case law and practice develop:

- a) Germany's interpretation of the definition of a foreign public official "exercising a public function for a public agency or public enterprise" to ensure it fully implements Article 1 of the Convention [Articles 1 and 4 (a)];
- b) The trend to prosecute and sanction foreign bribery through the offences of commercial bribery (section 299 CC) and breach of trust (section 266 CC) rather than through the offence of foreign bribery (section 334 CC) to ensure that functional equivalence is achieved through these means, in particular with regard to the level of sanction applied for these alternative offences (Convention, Articles 1 and 3);
- c) The use of the new general provision regarding witnesses cooperation under section 46b CC (Convention, Article 5);
- d) The possibility for an individual (i) to negotiate the terms of a "penal order" with the prosecutors (section 407 CCP) or (ii) to enter into negotiated sentencing agreements with the courts (section 257c CCP) to ensure that it follows the principles of predictability, transparency and accountability (Convention, Article 3);
- e) The confiscation of the instrument of the bribe and the proceeds of foreign bribery from both individuals and legal persons, including the quantification of the confiscatory component of administrative fines (Convention, Article 3).

Complete Phase 3 Report available at:
<http://www.oecd.org/dataoecd/5/45/47416623.pdf>

ICELAND (DECEMBER 2010)

The Working Group acknowledges that the major economic and financial crisis facing Iceland has led to an increased focus on economic and financial crime, and welcomes the efforts that Iceland has undertaken to ensure its legislation fully conforms to the OECD Anti-Bribery Convention, following the recommendations made by the Working Group in Phase 2. The Working Group also notes that there have not been any foreign bribery cases in Iceland and that, in terms of publicly available information (notably in the media), there are currently no allegations of bribery of foreign public officials committed by Icelandic individuals or companies. The Working Group is, however, concerned that the current structure and allocation of resources between the different law enforcement authorities may result in inefficiencies and hamper the effectiveness of fighting economic and financial crime in Iceland, including foreign bribery.

The Phase 2 evaluation report on Iceland, adopted in February 2003, included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented at the time of Iceland's written follow-up report in May 2006, the Working Group concludes that: recommendation 6 has been satisfactorily implemented, recommendations 7 and 9 have now been partially implemented; recommendation 1 remains partially implemented; and recommendations 2 and 5 remain not implemented.⁴

Against this background, and based on the other findings in this report regarding Iceland's implementation of the Convention and 2009 Recommendations, the Working Group: (1) makes the following recommendations to Iceland under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice. The Working Group invites Iceland to report orally on the implementation of recommendations 1, 2(a) and 4(a), within one year of this report (i.e. in December 2011). It further invites Iceland to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in December 2012).

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Iceland explicitly cover bribery of officials employed by state-owned and state-controlled companies, and specifically consider this recommendation in drafting its new Bill amending the foreign bribery offence in Iceland's General Penal Code (GPC) (Convention, Article 1; Phase 2 Report, recommendation 9).⁵
2. Regarding sanctions for foreign bribery, the Working Group recommends that Iceland:

⁴ See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

⁵ The OECD anti-bribery instruments (OECD Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation, the 2009 Tax Recommendation, the 2006 Export Credit Recommendation and 1996 DAC Recommendation) can be downloaded from the OECD website: www.oecd.org/daf/nocorruption.

- a) Raise imprisonment sanctions against natural persons for foreign bribery, as provided under section 109 of the GPC, to ensure that they are effective, proportionate and dissuasive (Convention, Article 3.1); and
 - b) Consider the imposition of additional administrative sanctions for legal persons, similar to those applicable to individuals (Convention, Article 3.4).
3. Regarding confiscation of the bribe and proceeds of foreign bribery, the Working Group recommends that Iceland provide training to its prosecutors on the new confiscation regime introduced in 2009, and encourage them to request confiscation in foreign bribery cases, where appropriate [Convention, Article 3.2; 2009 Recommendation III.(i)].
4. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Iceland:
- a) Promptly and seriously proceed with its ongoing reflection on the structure and resource allocation for fighting economic and financial crime in Iceland, to ensure that there are sufficient resources for and effective coordination of the different law enforcement authorities for the investigation and prosecution of economic and financial crimes, including foreign bribery [2009 Recommendation III.(ii) and V.];
 - b) Promptly provide specialised training to law enforcement authorities, including the police, prosecutors and judges, on the investigation and prosecution of foreign bribery [2009 Recommendation III.(ii) and V.];
 - c) Make available, where appropriate, special investigative means, such as interception of communications, video surveillance and undercover operations, in foreign bribery investigations [2009 Recommendation III.(ii) and V].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding awareness-raising, the Working Group recommends that Iceland:
- a) Seriously step up its awareness-raising activities with regard to the private sector, in particular through its Overseas Business Development Department within the Ministry of Foreign Affairs and through Icelandic missions abroad. These should include information on steps to be taken by Icelandic companies confronted with bribe solicitation, and clear instructions on the authorities to whom suspicions of foreign bribery should be reported [2009 Recommendation III.(i)];
 - b) Promote the Good Practice Guidance on Internal Controls, Ethics and Compliance, set out in Annex II to the 2009 Anti-Bribery Recommendation, to Icelandic companies, business organisations and professional associations [2009 Recommendation III.(i) and Annex II]; and
 - c) Concerning auditors, undertake awareness-raising measures with regard to, and promptly provide training on, (i) their reporting obligations to the management of the company, and to law enforcement authorities; (ii) the sanctions for failure to report; and (iii) red flags to detect foreign bribery [2009 Recommendation III.(i) and X.B.(iii) and (v); Phase 2 Report, recommendation 7].
6. Regarding detection and reporting of foreign bribery, the Working Group recommends that Iceland:

- a) Ensure that appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, to law enforcement authorities of suspected acts of foreign bribery detected in the course of their work, and raise awareness of the existence of these reporting channels [2009 Recommendation IX.(ii)];
- b) Establish clearer guidelines for tax inspectors concerning their obligation to report cases of suspected foreign bribery to law enforcement authorities (2009 Tax Recommendation; Phase 2 Report, recommendation 2).

7. Regarding whistleblower protection, the Working Group recommends that Iceland ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery, and take steps to raise awareness of these mechanisms [2009 Recommendation IX.(iii)].

8. Regarding detection through anti money laundering systems, the Working Group recommends that Iceland take all necessary measures to ensure that all stakeholders involved in fighting money laundering be adequately made aware that bribery of foreign public officials is a predicate offence to money laundering [Convention, Article 7; 2009 Recommendation III.(i)].

9. Regarding tax measures for combating foreign bribery, the Working Group recommends that Iceland proceed with its intention to disseminate and provide training on the OECD Bribery Awareness Handbook for Tax Examiners to tax inspectors, and extend such dissemination to relevant taxpayers [2009 Recommendation III.(i); 2009 Tax Recommendation].

10. Regarding official development assistance, the Working Group recommends that Iceland's official development agency (i) systematically require anti-corruption provisions in bilateral aid-funded procurement that include both preventive and punitive measures (such as termination of contracts or other civil or criminal actions, where applicable), and (ii) where international business transactions are concerned, and as appropriate, take into consideration applicant companies' internal controls, ethics and compliance programmes or measures [2009 Recommendation X.C.(vi) and XI.(ii); 1996 DAC Recommendation].

11. Regarding public procurement, the Working Group recommends that Iceland (i) develop measures to raise awareness and provide notification to applicants on the foreign bribery offence and the legal consequences under Icelandic law; and (ii) where international business transactions are concerned, and as appropriate, take into consideration applicant companies' internal controls, ethics and compliance programmes or measures [2009 Recommendation X.C.(vi) and XI.(i)].

2. Follow-up by the Working Group

12. The Working Group will follow-up the issues below as case law and practice develops:

- a) The interpretation of the foreign bribery offence under Icelandic law, to ensure that it covers bribery through intermediaries, and the offering, promising or giving of both pecuniary and non-pecuniary advantages;
- b) The application in practice of the corporate liability regime for foreign bribery, notably to ensure that a legal person cannot avoid responsibility for foreign bribery by using intermediaries, including related legal persons;

- c) Whether sanctions for foreign bribery are sufficiently effective, proportionate and dissuasive in practice;
- d) The application in practice of the recently amended anti money laundering legislation and its effect on enforcement of money laundering offences predicated on economic crime; and
- e) Whether Iceland's Export Credit Guarantee Department, "Tryggingardeild Utflutnings" (TRU), if and when its practice develops in the granting of officially supported export credits, takes steps to adhere to the OECD Council Recommendation on Bribery and Officially Supported Export Credits.

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/19/41/46861415.pdf>

ITALY (DECEMBER 2011)

The Working Group on Bribery commends Italy for its significant enforcement efforts, which have increased steadily since Phase 2. These efforts have been enabled by Italy's comprehensive framework for prosecuting the foreign bribery offence, including varied means for sanctioning legal persons for foreign bribery and confiscating proceeds of bribery. The Working Group remains, however, concerned that the vast majority of the cases prosecuted are dismissed as time barred and that the level of sanctions applied to both legal and natural persons may not always be fully effective, proportionate and dissuasive.

The Phase 2 evaluation report on Italy adopted in November 2004 included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented, at the time of Italy's written follow-up report, in December 2005, the Working Group concludes that: recommendation 4 has been implemented, recommendation 1(b) has been partially implemented, recommendations 1(a) and 3 remain partially implemented, recommendation 7(b) that was deemed partially implemented is not implemented, and recommendations 2 and 7(a) remain not implemented.

In conclusion, based on the findings in this report, regarding implementation by Italy of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites Italy to report in writing on the implementation of recommendation 4(f) within six months of this report (*i.e.* in June 2012) and every six months thereafter, if needed. As well, the Working Group invites Italy to report orally on the implementation of recommendations 1(a) and (b), 3(a) and (b) within one year of this report (*i.e.* in December 2012). It further invites Italy to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in December 2013).

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Italy:
 - a) Amend its legislation without delay to exclude the application of *concussione* as a possible defence to foreign bribery; and
 - b) Assess any amendment changing the application of *concussione* as a possible defence to foreign bribery independently of similar amendments dealing with the offence in relation to domestic bribery [Convention, Article 1; 2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 7(a)].
2. Regarding the responsibility of legal persons, the Working Group recommends that Italy take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among the prosecuting authorities throughout the country, to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently and diligently, with a view to avoiding the dismissal of

these cases based on statute of limitations grounds [Convention, Article 2, Phase 2 Evaluation, recommendation 7(b)].

3. Regarding sanctions, the Working Group recommends that Italy:

- a) Consider making available to judges both the imposition of imprisonment and fines in cases of offences of foreign bribery perpetrated by natural persons as a useful additional deterrent [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];
- b) Increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through *patteggiamento* procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];
- c) Strengthen its efforts to compile at the national level, for future assessment, information and statistics on cases concluded and sanctions imposed for the foreign bribery offence in a manner that differentiates between (i) sanctions imposed on natural and legal persons for the offence of foreign bribery and (ii) the procedures applied (court decision with a full hearing, *patteggiamento* or other procedural step), in order to allow Italy to effectively review its laws implementing the Convention and its approach to enforcement [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V, Phase 2 evaluation, follow-up issue 8(e)];

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Italy:

- a) Further develop and deliver a consistent foreign bribery training module to police services that may become involved in investigating foreign bribery cases, in particular to the Guardia di Finanza, and continue to deliver a foreign bribery training module to all prosecutors and judges likely to be involved in foreign bribery cases throughout the country [2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 1(a)];
- b) Use proactive steps to gather information from diverse sources at the pre-investigation stage both to increase sources of allegations and enhance investigations, in addition to having Italian embassies and consular offices report suspicions of crime and acquire information about related legal proceedings in the foreign jurisdictions;
- c) Considering taking the following steps to ensure effective investigations and prosecution: (i) establishing specialised divisions where highly skilled police forces would work together and specialise in foreign bribery as was done for other crimes in Italy; (ii) establishing working groups specialised in the foreign bribery offence within the Public Prosecutor's Offices that are the most likely to be involved in foreign bribery; (iii) raising awareness at national level about the need to prioritise the investigation of foreign bribery offence; and (iv) reinforcing the resources available in PPOs and tribunals to deal with foreign bribery; and [2009 Recommendation III(ii) and V];
- d) Consider the establishment of a national database for all on-going cases, in line with private data protection legislation, with a view to ensure coordination of foreign bribery investigations nationally and to avoid intelligence gaps [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V];

- e) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements reached through *patteggiamento*, such as the reasons why *patteggiamento* was deemed appropriate in a specific case and the terms of the arrangement, in particular, the amount agreed to be paid [Convention, Article 3, Phase 2 evaluation, follow-up issue 8(e)]; and
- f) Urgently (i) take the necessary steps to significantly extend, including for “first time offenders,” the length of the “ultimate” limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means; and (ii) re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals (as extended according to (i) above) [Convention, Article 6, Phase 2 recommendation 7(b)].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Italy (a) in relation to the public sector, further improve training programmes that address foreign bribery, including among foreign embassies abroad, with a view to assist public officials to be alert to instances of foreign bribery; and (b) in relation to the private sector, continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence [2009 Recommendation III(i), IX and X.C.].
6. Regarding reporting suspicions of foreign bribery, the Working Group recommends that Italy (a) continue to remind public officials of their obligation under article 331 CCP to report suspicions of foreign bribery detected in the course of performing their duties to law enforcement; and (b) create and publicize a clear means by which private individuals can report suspicions of foreign bribery [2009 Recommendation IX(ii); Phase 2 evaluation, recommendation 1(b)].
7. Regarding whistleblower protection, the Working Group recommends that Italy (a) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery; and (b) take steps to raise awareness of these mechanisms [2009 Recommendation IX(iii), Phase 2 evaluation, recommendation 2].
8. Regarding money laundering, the Working Group recommends that Italy maintain statistics on (a) sanctions in money laundering cases; (b) the predicate offence for money laundering, with a view to identifying cases where foreign bribery is a predicate offence; and (c) STRs that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].
9. Regarding accounting and auditing requirements, the Working Group recommends that Italy:
 - a) Ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (i) monetary thresholds, (ii) whether the offence is committed in relation to listed or non-listed companies, and (iii) whether the offence causes damage to shareholders or creditors [2009 Recommendation X.A(iii); Phase 2 recommendation 3]; and
 - b) Engage in awareness-raising activities with auditors, including through providing training regarding (i) the detection of indications of suspected acts of foreign bribery; (ii) the obligation under LD 58/1998 to report such acts to company management and criminal law enforcement authorities; and (iii) the legal protections that may be available to auditors who report suspicions of wrongful conduct [2009 Recommendation X.B];

10. Regarding corporate compliance, internal controls and ethics programs, the Working Group recommends that Italy encourage companies, particularly SMEs, (a) to adopt or further develop adequate internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery; and (b) to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programs or measures for preventing and detecting bribery [2009 Recommendation X.C, Annex II].

11. Regarding public procurement, the Working Group recommends that Italy (a) establish mechanisms for verifying, when necessary, information submitted by prospective public contractors, including declarations regarding whether they have been previously convicted for foreign bribery and whether they are listed on IFI debarment lists; and (b) extend the grounds for debarment from public tenders administered by AVCP and other agencies to cover all offences falling within the scope of Article 1 of the Convention, not just those involving EU officials [2009 Recommendation XI(ii)].

12. Regarding export credit, the Working Group recommends that Italy require SACE and CONSIDIP to formalise procedures to be followed by employees for reporting credible evidence of the bribery of a foreign official to law enforcement [2009 Recommendation IX].

2. Follow-up by the Working Group

13. The Working Group will follow up on the issues below as case law and practice develop:

- a) The interpretation by the Italian Supreme Court of Cassation with regard to the definition of foreign public official and the implementation of the principle of “ex officio” ascertainment by the judge of the law of the foreign public official’s country to ensure that is compatible with the requirement of an autonomous definition [Convention, Article 1];
- b) The application of the defence of organisational model available to legal persons under LD 231/2001, articles 6(1) and 7 [Convention, Article 2, 2009 Recommendation IV, Annex I, B];
- c) Whether LD 231/2001 imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery [Convention, Article 2, 2009 Recommendation IV, Annex I, B];
- d) Whether both the bribe and the proceeds of the bribery of a foreign public official are subject to seizure and confiscation in Italy [Convention, Article 3.3];
- e) The status of bills A.S. 733-bis, A.C. 3986 and A.S. 1454, which would criminalise self-laundering [Convention, Article 7];
- f) Whether the methodology for conducting tax audits is adequate in terms of (i) the basis of risks considered when deciding which companies to audit and (ii) the time-lag between audits [2009 Recommendation I(ii)];
- g) The impact of special tax programs, such as tax amnesty programmes, on tax officials’ ability to detect suspicions of foreign bribery [2009 Recommendation III(iii); 2009 Tax Recommendation II; Phase 2 evaluation, recommendation 6];
- h) Implementation of the extension of Italy’s external audit requirements to cover certain non-listed companies [2009 Recommendation X.B];

- i) Italy's ability to extradite an individual (i) where that person raises the *concessione* as a defence to prevent extradition and (ii) where the statute of limitations for the foreign bribery offence has expired in Italy [Convention, Article 10].

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/59/47/49377261.pdf>

JAPAN (DECEMBER 2011)

1. Recommendations of the Working Group

The Working Group on Bribery commends the Japanese authorities for their full cooperation and disclosure throughout the Phase 3 process. Since Phase 2, Japan has made progress on a number of issues. Japan has fully implemented the following recommendations: 1(iv) on raising awareness of foreign bribery in the legal profession and 5(b) on information in the METI Guidelines on ‘small facilitation payments’ and the interpretation of ‘international business transactions’. Progress has been made on implementing recommendation 2(d) on whistleblower protections, and recommendation 5(c) on bribes that benefit third parties has become an issue for follow-up. Recommendation 2(b) on METI’s system for processing allegations of foreign bribery received by it remains partially implemented, as well as 3(a) on compliance with Article 8 of the Anti-Bribery Convention on fraudulent accounting. Progress has been made on the following recommendations from Phase 2bis: Recommendation 1(a) on using non-compulsory investigative measures at the earliest stage, 1(b) on seeking MLA at the earliest possible stage to obtain non-compulsory measures, Recommendation 1(c) on increasing coordination and communication between law enforcement agencies and 1(d) on new investigative measures, which can now be considered partially implemented. Recommendation 2(a) to move the foreign bribery offence from the UCPL—legislation under the responsibility of METI—to the Penal Code has been reconsidered by the Working Group, which considers it unfortunate that the offence is not in the Penal Code, but at this stage has chosen to focus on making concrete recommendations on how to improve METI’s role as the lead ministry on the implementation of the Anti-Bribery Convention.

Despite these areas of progress, the Working Group continues to have serious concerns that Japan still does not appear to be actively detecting and investigating foreign bribery cases, and this is likely a major impediment to a more effective enforcement of Japan’s foreign bribery offence. Convictions in only two cases have been obtained in more than 12 years since the foreign bribery offence came into force in Japan—a number that seems very low in view of the size of the Japanese economy. As a result, the Working Group recommends that Japan address this problem urgently and make a written report to the Group on progress in this regard in six months.

In conclusion, based on the findings in this report on the implementation by Japan of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Japan to also report in writing within six months of the report (June 2012) on implementation of Recommendations 2 on confiscation (including information on how the profit is calculated in foreign bribery cases), 4 on investigation and prosecution, and 5 on money laundering; and report orally within one year (December 2012) on implementation of Recommendations 8 on small facilitation payments, 9 on the role of METI and 13 on whistleblower protection; and submit a written follow-up report within two years (December 2013) on all recommendations and follow-up issues. The Working Group also intends to revisit the issue of placement of the foreign bribery offence in the UCPL if enforcement of the offence has not significantly increased by the time of Japan’s written follow-up report in December 2013.

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

1. The Working Group recommends that Japan take appropriate steps according to its legal system to ensure that sanctions imposed on natural and legal persons in practice are sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the Convention.
2. The Working Group recommends that Japan take appropriate steps within its legal system to urgently establish the necessary legal basis for confiscating the proceeds of bribing foreign public officials upon conviction of foreign bribery, to ensure that Japan is in compliance with Article 3.3 of the Convention. (Convention, Article 3.3)
3. The Working Group recommends that Japan find an appropriate way to balance the emphasis on prevention with facilitating enforcement of the foreign bribery offence by the Ministry of Economy, Trade and Industry (METI), or alternatively, that METI increase coordination with relevant ministries and agencies, such as the Ministry of Justice, to achieve this balance. (Convention, Article 5; Commentary 27; 2009 Recommendation, Annex I, para. D)
4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Japan immediately take appropriate steps to actively detect and investigate foreign bribery cases, and the Working Group further recommends that Japan:
 - a) Continue to use non-compulsory investigative measures and seek MLA at the earliest possible stage where appropriate, and provide a progress report to the Working Group in 24 months on consideration by Japan of the use of new investigative techniques for foreign bribery, such as wire-tapping and grants of immunity from prosecution, including through the special advisory body established by the Ministry of Justice to review Japan's criminal justice system;
 - b) Further strengthen the framework for investigating foreign bribery cases by ensuring that special investigative divisions in district prosecutors' offices with special responsibility for economic and financial crimes: i) expressly include foreign bribery within the crimes they cover; ii) are adequately resourced and equipped to detect, investigate and prosecute foreign bribery cases; and iii) coordinate effectively with police and other relevant agencies, including the National Tax Agency and the Securities and Exchange Surveillance Commission; and
 - c) Take appropriate steps to ensure that the law enforcement authorities systematically follow-up with JAFIC, Japan's financial intelligence unit, on how they are utilising information from JAFIC in their foreign bribery investigations. (Convention, Article 5; Commentary 27; 2009 Recommendation V and Annex I, para. D)
5. The Working Group recommends that Japan take urgent steps to adopt the necessary amendments to the Act on Punishment of Organized Crimes and Control of Crime Proceeds (AOCL) to make it an offence to launder the proceeds of bribing a foreign public official. (Convention, Article 7; Commentary 28)
6. The Working Group recommends that Japan continue to conclude MLA treaties, particularly with its trade partners.
7. The Working Group recommends that Japan consider including in its bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows the sharing of tax information by tax authorities with other law enforcement authorities and judicial authorities on foreign bribery. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)

Recommendations for ensuring effective prevention and detection of foreign bribery

8. The Working Group recommends that Japan periodically review its policies and approach on small facilitation payments and urgently take steps to encourage companies to prohibit the use of such payments in their internal company controls, ethics and compliance programmes or measures. (2009 Recommendation, para. VI)

9. The Working Group recommends that Japan strengthen the role of METI in preventing and detecting foreign bribery, by: i) increasing visibility of information on the foreign bribery offence on METI's website, including the METI Guidelines to Prevent the Bribery of Foreign Public Officials, and the foreign bribery 'reporting desk'; ii) more proactively engaging with small- and medium-size enterprises (SMEs), including by more actively promoting the METI Guidelines; iii) clarifying METI's role in providing informal advice on foreign bribery; iv) more actively engaging with companies of all sizes on effective compliance programmes, based on international developments in this area; and (v) assessing the reasons why so far no reports of foreign bribery allegations have been received by the METI 'reporting desk', and establishing clear guidelines on how such reports should be processed and referred to the law enforcement authorities when received. [2009 Recommendation, para. II i), IX i), and X C i)]

10. Regarding Japan's accounting and auditing framework for preventing and detecting foreign bribery, the Working Group recommends that Japan:

- a) Work with the Japanese Institute of Certified Public Accountants (JICPA) and relevant business associations to raise awareness of Japan's foreign bribery offence among the accounting and auditing profession, especially members of the profession that perform accounting and auditing activities for companies that are not subject to the Financial Instruments and Exchange Act (FIEA);
- b) Consider providing clearer guidance on the application of Article 193-3 of the FIEA, including on whether and/or when an external auditor should report suspected acts of foreign bribery to the Financial Services Agency (FSA) and how suspicions that have been reported to the FSA are to be shared with law enforcement authorities, and consider keeping a record of the number of opinions submitted to the FSA related to foreign bribery and how they are resolved; and
- c) Further clarify when a bribe payment to a foreign public official falsely recorded in the books and records incorporated in registration and disclosure documents would be material to a company's financial statements, for the purpose of the application of the offence of making a false statement in registration and disclosure documents. [Convention, Article 8, 2009 Recommendation, para. X A i), iii), and v)]

11. The Working Group recommends that Japan take appropriate measures to ensure the detection by the tax authorities of bribes to foreign public officials concealed under various tax deductible expenses, including 'miscellaneous expenses', and exercise particular care in this respect when auditing tax returns of companies that are not subject to the FIEA. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)

12. The Working Group recommends that Japan consider providing specific training to contact points in overseas missions to help them collect and analyse information on allegations of foreign bribery and respond to questions from Japanese nationals and companies overseas regarding Japan's foreign bribery offence. [2009 Recommendation, para. IX ii), X C i)]

13. The Working Group recommends that Japan update the Working Group on any progress, on which it can publicly report, regarding research by the Consumer Affairs Agency on the effectiveness of

the Whistleblower Protection Act and the number of cases brought to court under the Act and, where possible, the outcomes of these cases. Japan could consider including in this research an analysis of the possible application of the Act to Japanese private-sector employees overseas. [2009 Recommendation, para. IX iii)]

14. The Working Group recommends that Japan take appropriate steps to coordinate the efforts of the Japan Bank for International Cooperation (JBIC) and Nippon Export and Investment Insurance (NEXI) to prevent and detect foreign bribery in international business transactions benefitting from official export credit support and that NEXI and JBIC also raise awareness of the risks of foreign bribery among Japanese companies, especially SMEs. [2009 Recommendation, para. III vii), XII ii); 2006 Recommendation on Bribery and Officially Supported Export Credits, para. 1 (a)]

2. Follow-up by the Working Group

15. The Working Group will follow-up the issues below as case law and practice develops on the implementation of the foreign bribery offence in the UCPL:

- a) Whether in practice the foreign bribery offence covers the case where a bribe has been transferred with the agreement of the foreign public official to a third party, such as a political party, business partner, charity, or family member;
- b) The liability of legal persons for the foreign bribery offence, including whether: (i) a legal person is liable where the bribe is for the benefit of a company related to the legal person from which the bribe emanated; (ii) the liability of legal persons depends upon the conviction or punishment of the natural person who perpetrated the offence; (iii) legal persons are subject to the provision on nationality jurisdiction; and (iv) whether liability of a parent company would be triggered if someone representing it directed or authorised a representative of a foreign subsidiary to bribe a foreign public official; and
- c) New five-year statute of limitations, to ensure that it allows an adequate period for the investigations and prosecution of the foreign bribery offence.

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/59/51/49377330.pdf>

KOREA (OCTOBER 2011)

The Working Group on Bribery recognises that the Korean Government has prosecuted and convicted nine separate cases of foreign bribery since the FBPA came into force in 1999, including three legal persons. However, the majority of these cases involved the bribery of foreign military staff on Korean soil. In addition, three allegations of foreign bribery violations are currently at the pre-investigation stage and one case is under prosecution. The Working Group commends Korea for its high level of cooperation throughout the evaluation process, and the stated commitment of the political level of government to the enforcement of the FBPA.

Regarding outstanding recommendations since Korea's written follow-up report in March 2007, the Working Group notes that the following recommendations from Phase 2 that were not considered fully implemented are now fully implemented: Recommendation 1 on awareness-raising in the public and private sectors; 3(a) on whistleblower protection; 3(b) on the disclosure policies of the Korean International Cooperation Agency (KOICA); and 6(c) on additional non-criminal sanctions. The following recommendations remain not fully implemented: Recommendation 2(a) on reporting by external auditors; 5(a) on the transmission of a bribe directly to a third party beneficiary; and 6(a) on the level of fines applied in practice.

In conclusion, based on the findings in this report on implementation by Korea of the Anti-Bribery Convention and the 2009 Anti-Bribery Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invites Korea to report orally on the implementation of Recommendations 4 and 8 within one year of this report (i.e. October 2012). It further invites Korea to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. October 2013).

1. Recommendations of the Working Group

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

1. Concerning the offence of bribing a foreign public official in the FBPA, the Working Group recommends that Korea:
 - a) Take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime, or the Kaesong Industrial Zone, are covered by the FBPA as the bribery of a foreign public official, or by the Korean Penal Code as the bribery of a domestic public official (Convention, Article 1, Commentary 18);
 - b) Continue to periodically review its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, and consider in its review: i) whether guidelines on the defence would be beneficial, and ii) the practical value of maintaining the defence in Korea [2009 Recommendation VI i)]; and

- c) Encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures [2009 Recommendations, para. VI. (ii)].
2. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Korea raise awareness among law enforcement authorities and the private sector on the liability of legal persons for violations of the FBPA (Convention, Article 2).
 3. Regarding sanctions for the offence of bribing a foreign public official, the Working Group recommends that Korea: i) take appropriate steps according to its legal system to ensure that sanctions imposed in practice on natural and legal persons are effective, proportionate and dissuasive; and ii) make full use of the authority to confiscate the bribe and proceeds where appropriate, and consider whether the complicated nature of the legislation on confiscation has been a hindrance to the effective imposition of confiscation as a sanction (Convention, Article 3.1, 3.3).
 4. Regarding the investigation and prosecution of cases of foreign bribery, the Working Group recommends that Korea:
 - a) Ensure that the investigation records on transnational bribery cases are not destroyed before Korea has had an opportunity to provide a full report on those cases to the Working Group, and that case records are kept for a reasonable period to provide prompt and effective mutual legal assistance to other Parties for proceedings under the scope of the Anti-Bribery Convention (Convention, Articles 9.1, 12);
 - b) Strengthen the new information and intelligence gathering capacity coordinated by the Ministry of Justice, which involves the Ministry of Foreign Affairs and Trade and the Supreme Prosecutor's Office (SPO), by making the Korean Financial Supervisory Commission and the National Tax Service (NTS) part of the new system (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D);
 - c) Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention, Article 5, Commentary 27, 2009 Recommendation, IX. i), Annex I, para. D); and
 - d) Establish clear criteria for requiring the Anti-Corruption and Civil Rights Commission (ACRC) to transfer reports of FBPA violations to the law enforcement authorities, and that such criteria are established as a matter of priority given that a statutory amendment extending whistleblower protections to persons who report FBPA violations came into force on 30 September 2011 (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. The Working Group recommends that Korea take the following steps to improve the prevention and detection of the foreign bribery offence through its anti-money laundering system: i) increase awareness amongst institutions and individuals responsible for making Suspicious Transaction Reports (STRs) of the risk of laundering the proceeds of foreign bribery, including by publishing relevant case studies; ii) take appropriate steps according to its legal system to ensure that financial institutions responsible for making STRs understand the total ownership structure of their corporate customers; and iii) address the potential for conflicts of interest between financial institutions regarding their STR obligations, and their customer corporations that belong to the same enterprise groups as themselves (Convention, Article 7).

6. The Working Group recommends that Korea take the following steps to improve the prevention and detection of foreign bribery through its accounting and auditing framework: i) consider amending the Board of Audit and Inspection Act to require external auditors to report suspected acts of foreign bribery to competent and independent authorities, such as law enforcement or regulatory authorities; ii) ensure that auditors making such reports reasonably and in good faith are protected from legal action; and iii) encourage awareness-raising and training on the FBPA in the accounting and auditing profession (2009 Recommendation X.B.).

7. Regarding measures in the private sector for preventing and detecting foreign bribery in the private sector, the Working Group recommends that Korea: i) encourage all companies, including SMEs, to adopt adequate internal controls, ethics and compliance programmes and measures, taking into account the Good Practice Guidance in Annex II of the 2009 Anti-Bribery Recommendations; and iii) pursue additional opportunities to raise awareness of the FBPA among SMEs (2009 Recommendation X.C., and Annex II).

8. Concerning tax measures for preventing and detecting foreign bribery, the Working Group recommends that Korea: i) take appropriate steps to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties; ii) encourage the SPO to systematically share information with the NTS about convictions under the FBPA, so that the NTS can review the information for evidence of related tax crimes; iii) provide tax examiners with specific training on detecting FBPA violations; and iv) include bribery in the risk assessment and audit processes of the NTS (2009 Recommendation VIII (i); and 2009 Tax Recommendation).

9. Regarding the prevention, detection and reporting of suspicions of foreign bribery by Korea's two public agencies that provide contracting opportunities, the Working Group recommends that Korea:

- a) Consider applying a more harmonised approach to the anti-bribery guidelines of Korea's officially supported export credit agencies -- Korea Eximbank and K-Sure -- to more effectively implement the 2006 Recommendation on Bribery and Officially Supported Export Credits [2009 Recommendation XI (i) and XII]; and
- b) Consider adopting a systematic approach to providing access to information on companies convicted of corruption, such as through a national debarment register, to facilitate debarment by public contracting agencies of companies convicted of foreign bribery [Convention, Article 3.4, Commentary 24, 2009 Recommendation XI (i)].

10. Regarding the protection of whistleblowers, the Working Group encourages Korea to consider further clarifying that the Act on Protection of Public Interest Whistleblowers now provides protections for those who report suspicions of foreign bribery in any official guidance on the Act, and continue its awareness-raising activities on the Act [2009 Recommendation IX (iii)].

2. Follow-up by the Working Group

11. The Working Group will follow-up the issues below as FBPA case law and practice develop:

- a) Application of the FBPA to cases where the bribe is transmitted directly to a third party, and the application of the law on co-principals and accessories to intermediaries (Convention, Article 1);
- b) How "international business" is interpreted in practice, including whether it covers employment with a foreign government (Convention, Article 1);

- c) Regarding sanctions i) application of the provision in the FBPA that results in no sanctions for a legal person that “has paid due attention or exercised proper supervision to prevent” foreign bribery; ii) application of the revised sentencing guidelines for bribery, including how the profit is determined when calculating fines to be imposed for foreign bribery; and iii) impact on confiscation in foreign bribery cases of the newly established specialised confiscation units in prosecutors’ offices (Convention, Articles 1, 2, 3.1, 3.3);
- d) Whether natural and legal persons are subject to effective, proportionate and dissuasive penalties when cases of foreign bribery are prosecuted under other penal provisions (Convention, Article 3.1);
- e) Provision of MLA by Korea to other Parties to the Anti-Bribery Convention (Convention, Article 9.1); and
- f) Implementation of an amendment to the Commercial Act, due to come into force in April 2012, requiring listed companies to establish “compliance guidelines”, and appoint a “compliance officer” to carry out compliance duties in the guidelines, monitor compliance with the guidelines, and report the results to the board of directors (2009 Recommendation C, and Annex II).

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/59/31/48897608.pdf>

LUXEMBOURG (JUNE 2011)

The Working Group on Bribery congratulates Luxembourg on the significant efforts it has made since Phase 2bis by amending its legislation and altering its practices significantly to achieve compliance with its obligations under the Convention, in particular by introducing criminal liability for legal persons into its system of laws. Nevertheless, the Working Group is still concerned about the lack of sanctions for cases of bribing foreign public officials, and by the fact that only one case likely to constitute a case of bribing a foreign public official is currently being prosecuted, and that this is the first such case since the Convention entered into force in 2001. The Working Group is especially concerned insofar as Luxembourg sees substantial financial flows pass through its businesses and financial institutions, and in this respect receives a large number of requests for mutual legal assistance on the basis of which its broad authority should enable it to trigger investigations and prosecutions to enforce its transnational bribery legislation.

Luxembourg's Phase 2 and Phase 2bis evaluation reports, which were adopted in 2004 and 2008 respectively, included recommendations and questions requiring follow-up (as indicated in Annexes 1 and 2 of this report). Of these recommendations deemed only partially or not implemented at the time of the written follow-up to Luxembourg's Phase 2bis in 2009, Recommendations 13 of Phase 2 and 2c) of Phase 2bis have been implemented, Recommendations 3 (b) and 4 (a) of Phase 2 have been implemented partially and Recommendations 12 et 16 of Phase 2 remain partially implemented.

Consequently, based on this report's conclusions with regard to Luxembourg's implementation of the Convention and 2009 Recommendation, the Working Group: (1) makes the following recommendations to Luxembourg in Part I; and (2) will follow up on the issues identified in Part II. The Working Group invites Luxembourg to present it with an oral report on implementation of Recommendations 1, 2(a) and 4 in one year (*i.e.* in June 2012). It furthermore invites Luxembourg to submit a written follow-up report on all recommendations and follow-up issues in two years' time (*i.e.* in June 2013).

1. Recommendations of the Working Group

Recommendations to ensure the effectiveness of investigations, prosecutions and sanctions with regard to offences involving the bribery of foreign public officials

1. With regard to the transnational bribery offence, the Working Group recommends that Luxembourg use any appropriate means to clarify that no element of proof, beyond those stipulated in Article 1 of the Convention, is required to enforce Articles 247ff of the Penal Code, and in particular that (i) the notion of "without right" that is found, *inter alia*, in Article 247 of the Penal Code, should not be interpreted more restrictively than the notion of "improper advantage" contained in the Convention, and therefore that there is no need to prove that any provision in force in the bribe recipient's country prohibits that recipient from receiving a bribe; and that (ii) the notion of "corruption pact" that was deleted from Article 247 in 2001 does not, in practice, constitute an additional element of proof which prosecuting authorities must seek out in order to prove the offence [Convention, Article 1; 2009 Recommendation, III. ii) and V.].

2. Regarding the liability of legal persons, the Working Group recommends that Luxembourg:

- a) Ensure by all means that the liability system instituted by the Act of 3 March 2010 adopts one of the two approaches described in Annex 1 B) of the 2009 Recommendation concerning the level of managerial authority and the type of act that may cause that liability to be incurred [Convention, Article 2; 2009 Recommendation, Annex 1 B)];
- b) Take all necessary steps to ensure that (i) the system for the liability of legal persons does not limit that liability to cases in which the natural person or persons who committed the offence are prosecuted and found guilty; (ii) the fact that the immediate perpetrator was “coerced” by a foreign public official to pay a bribe in order to win or keep a contract does not cover cases where a bribe is sought and cannot be considered a ground for the non-liability of the legal person; and (iii) the criterion of the “interest” of the legal person does not exclude certain cases of bribery of foreign public officials where a bribe is paid to a foreign public official by a de jure or de facto manager of an enterprise only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first [Convention, Articles 1 and 2; 2009 Recommendation, Annex 1 B)].

3. Regarding sanctions in cases of transnational bribery, the Working Group recommends that Luxembourg re-assesses whether to take the opportunity to (i) amend the law on the liability of legal persons to include exclusion from entitlement to public benefits or aid as a supplementary penalty; and (ii) introduce criminal records for legal persons [Convention, Articles 2 and 3; 2009 Recommendation, III. vii) and XI. i)].

4. Regarding investigations and prosecutions in cases of transnational bribery, the Working Group recommends that Luxembourg:

- a) Pursue the efforts made in obtaining information from banks and financial institutions (Act of 27 October 2010) and from tax authorities (Act of 19 December 2008) so that such information can be obtained even in the absence of a formal referral to an investigating magistrate, thus ensuring in particular full implementation of Phase 2bis Recommendation 3 (b) [2009 Recommendation, III. ii), iii) and iv); VIII. and Annex 1, D];
- b) Further evaluate police investigative powers at the preliminary enquiry stage with a view to extending such powers, as the Working Group had recommended in Phase 2 (Recommendation 12), tailoring the available means and methods of investigation to the need to gather sufficient evidence so that prosecution can be initiated in cases involving bribery of foreign public officials [2009 Recommendation, III. ii), V. and Annex 1, D];
- c) Ensures that the level of resources, training and specialisation provided to the police ensures the effective investigation and prosecution of bribery of foreign public officials [2009 Recommendation, Annex 1, D];
- d) Take the necessary steps to ensure that Luxembourg’s criminal policy (i) clearly identifies the investigation and prosecution of bribery of foreign public officials as a priority; and (ii) emphasises the need to ensure that the appreciation of the level of proof necessary for initiating criminal investigations is not so stringent that it constitutes an obstacle to the investigation of bribery of foreign public officials [Convention, Article V; 2009 Recommendation, Annex 1, D].

Recommendations to ensure effective prevention and detection of transnational bribery

5. Regarding raising public awareness and reporting transnational bribery, the Working Group recommends that Luxembourg:

- a) Take the necessary steps to raise employee awareness, in the private and public sectors alike, of the importance of reporting suspicions of bribery of foreign public officials, as well as of new provisions for the protection of whistleblowers [2009 Recommendation, IX. and III. i)];
- b) Intensify efforts to enhance awareness in the accounting and auditing professions of the importance of detecting and reporting transactions likely to constitute bribery of foreign public officials and related offences, such as accounting offences [2009 Recommendation, III. i), X. A. and X. B.];
- c) Further heighten the awareness of professionals required to report money-laundering suspicions of the predicate offence of bribing foreign public officials [Convention, Article 7; 2009 Recommendation, IX. and III. i)];
- d) Raise awareness of employees of the Luxembourg development co-operation agency and the Office du Ducroire of the new law on the protection of whistleblowers and, as regards the development co-operation agency, the new reporting requirements to which its staff are subject under Article 23 (1) of the Code of Criminal Procedure [2009 Recommendation IX. iii)].

6. Regarding accounting standards, external audit and corporate compliance and ethics programmes, the Working Group recommends that Luxembourg:

- a) Take measures, jointly with the Association of Certified Accountants and the Institute of Company Auditors, to ensure that full use be made of the provisions of Luxembourg legislation implementing Article 8 of the Convention so as to prevent and detect accounting offences relating to the bribery of foreign public officials [Convention, Article 8; 2009 Recommendation, IX., X. and X. A)];
- b) Clarify the obligations of external auditors who discover evidence of bribery of foreign public officials so that they inform the company's managers and, where relevant, supervisory bodies [2009 Recommendation, III. i); X. B iii)];
- c) Consider requiring external auditors to report their suspicions of bribery of foreign public officials to the law enforcement authorities and ensure that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation X. B. (v)];
- d) Promote, jointly with the relevant professional associations, internal control, ethics and compliance programmes or measures in the financial sector and businesses involved in commercial transactions abroad, including distribution of Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance [2009 Recommendation, X. C. i); Annex II].

7. Regarding tax measures to combat bribery, the Working Group recommends that Luxembourg:

- a) Take appropriate steps to increase the intensity and frequency of on-site inspections by the tax authorities [2009 Recommendation, III. iii); 2009 Recommendation on Tax Measures, I. ii) and II.];
- b) Facilitate international exchanges of information in accordance with the 2009 Recommendation of the Council on Tax Measures notably by considering including the option provided for in paragraph 12.3 of the Commentary on Article 26 of the OECD Model Tax Convention in their bilateral tax conventions [2009 Recommendation on Tax Measures, I. iii)];

- c) Do more to raise awareness among its tax authorities of the need to make full use of the new measures made available to them in the 2008 law on inter-agency and judicial co-operation in order to detect illegal transactions linked to bribery of foreign public officials, and to encourage the reporting of such transactions [2009 Recommendation on Tax Measures, I. iii)];
- d) Raise awareness among the tax authorities of the importance of making more stringent use of the administrative sanctions available to them to discourage tax deductibility of expenses likely to constitute bribes [2009 Recommendation on Tax Measures, I. ii); Phase 2 Recommendation 16].

8. Regarding international judicial co-operation, the Working Group recommends that Luxembourg reconsider its approach to the possibility of initiating prosecution in Luxembourg of transnational bribery offences brought to the attention of the Luxembourg authorities through mutual legal assistance requests, where Luxembourg also has jurisdiction over the offences committed [Convention, Articles 5 and 7; 2009 Recommendation, XIII. i)].

9. Regarding public benefits, the Working Group recommends that Luxembourg:

- a) Make sure that the integrity code of the Luxembourg development co-operation agency be updated to include an explicit reference to the bribery of foreign public officials, and to the requirement that its staff report any suspicions of such bribery to the prosecuting authorities under Article 23.1 of the Code of Criminal Procedure and the protection of whistleblowers instituted by the new law (2009 Recommendation, IX.);
- b) Take the steps necessary to ensure that public procurement authorities impose stricter enforcement of existing provisions to bolster the integrity of public procurement, and especially of those excluding bids (i) submitted by economic operators that have been convicted of bribery or (ii) appearing on the development banks' exclusion lists (2009 Recommendation, IX. and XI.);
- c) Explore the feasibility of taking measures so that, when deciding to grant contracts and other public benefits, the relevant agencies would use the existence of internal control, ethics and compliance measures as a criterion for those decisions [2009 Recommendation, X. C, vi) and XI. i)].

2. Monitoring by the Working Group

The Working Group will monitor the following aspects, depending on developments in case law and practice, in order to check:

- a) The scope of the exemption from liability in the event of “constraint”, so as to ensure that the exemption does not include the fact that in the event of coercion the immediate perpetrator may have been “coerced” by a foreign public official to pay a bribe in order to obtain or retain a contract;
- b) Employees of public enterprises are covered by Article 247 of the Penal Code;
- c) The level of penalties applicable to natural persons, with a view to ensuring that they are sufficient to be effective, proportionate and dissuasive;
- d) The impact on the dissuasive effect of sanctions of the application of mitigating circumstances, notably in cases of reclassification of the offence of bribing a foreign public official;

- e) The progress of current discussions about the introduction of a plea bargaining procedure, especially as regards its impact on the level of sanctions imposed in practice in this context;
- f) The level of sanctions and the use of confiscation in cases of bribery of foreign public officials, and especially the criminal penalties imposed on legal persons to ensure that they are effective, proportionate and dissuasive;
- g) Implementation of the new provisions contained in Articles 66.2 to 66.5 of the Code of Criminal Procedure, and in particular to the scope of the term “exceptionally” contained in the law in connection with obtaining information from banks and financial institutions;
- h) Efforts to detect and prosecute facts of transnational bribery related to money laundering;
- i) Establishment of statistics on (i) the number of investigations, prosecutions and sentences imposed by jurisdictions in respect of the bribery of foreign public officials and related offences; and (ii) mutual legal assistance requests related to transnational bribery, including the number of requests received and executed.

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/46/61/48270224.pdf>

MEXICO (OCTOBER 2011)

1. Recommendations of the Working Group

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

1. Regarding the offence of foreign bribery, the Working Group recommends that Mexico amend Article 222bis to cover bribes given, offered or promised to a third party beneficiary regardless of whether the beneficiary is determined by a foreign public official [Convention, Article 1(1)].
2. Regarding territorial jurisdiction and the statute of limitations in cases where a bribe is given or sent to a foreign public official in Mexico after it is offered or promised abroad, the Working Group recommends that Mexico review and undertake the necessary changes to rectify any shortcomings. (Convention, Articles 4 and 6).
3. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Mexico amend its Federal Penal Code without delay so that:
 - a) liability may be imposed without the prior identification or conviction of the relevant natural person(s), and without proof that the bribery was committed with the means of the legal person (Convention Article 2);
 - b) state-owned and state-controlled enterprises can be sanctioned for foreign bribery other than by dissolution of the legal person (Convention Article 2); and
 - c) companies incorporated or headquartered in Mexico can be liable for foreign bribery (Convention Article 2).
4. Regarding sanctions for foreign bribery, the Working Group recommends that Mexico, in cases where an offender does not have a net income at the time of the offence or where the net income cannot be ascertained, establish a system allowing a court to impose an appropriate fine after the court gives detailed reasons on why the net income cannot be determined [Convention, Article 3(1) and (2)].
5. Regarding confiscation, the Working Group recommends that Mexico enact appropriate legislation without delay to provide for confiscation of property of equivalent value and confiscation against legal persons, and ensure that the bribe, the proceeds of bribery or their equivalent are routinely confiscated in practice [Convention, Article 3(3)].
6. Regarding the investigation and prosecution of the foreign bribery offence, the Working Group recommends that Mexico:
 - a) give greater priority to the criminal enforcement of its bribery laws, and take steps to ensure that its criminal law enforcement authorities seriously investigate all allegations of foreign bribery (Convention, Article 5);

- b) take further steps to ensure that adequate human and financial resources are devoted to investigating and prosecuting bribery of foreign public officials, including by providing SPOCC prosecutors and SIU investigators with adequate training in foreign bribery and complex financial investigations (Convention, Article 5);
- c) make special investigative techniques available in foreign bribery cases (Convention, Article 5).

7. Regarding mutual legal assistance (MLA), the Working Group recommends that Mexico continue to improve the level and speed of its responsiveness to MLA requests involving foreign bribery-related cases.

8. Regarding money laundering, the Working Group recommends that Mexico develop bribery-related AML measures, including typologies on the laundering of bribes and the proceeds of bribery; train CNBV officials and reporting entities on money laundering predicated on bribery; and train UIF officials on detecting and reporting bribery-related money laundering cases, and on reporting such cases to law enforcement authorities [2009 Anti-Bribery Recommendation IX(i) and (ii)].

9. Regarding false accounting offences, the Working Group recommends that Mexico amend its legislation to increase the maximum sanctions available [Convention, Article 8(2)].

10. Regarding statistics, the Working Group recommends that Mexico maintain statistics on the number of investigations, prosecutions, convictions and sanctions of natural and legal persons for the offences of domestic bribery, foreign bribery, and false accounting (Convention, Articles 3, 5 and 8).

Recommendations for ensuring effective prevention and detection of foreign bribery

11. Regarding accounting and auditing, the Working Group recommends that Mexico encourage the auditing profession to develop courses on foreign bribery; detect foreign bribery; and take the necessary measures, including amendment of CFPP Article 116 and other relevant legislation, to clarify that the reporting obligation in this article overrides any professional obligations of an auditor towards his/her client [2009 Anti-Bribery Recommendation X(B)(i) and (v)].

12. Regarding corporate compliance, internal controls and ethics programmes, the Working Group recommends that Mexico continue to promote corporate compliance measures, with emphasis on Mexican companies, including SMEs, that are active internationally but are not subject to FCPA jurisdiction, and that Mexico measure the impact of these efforts [2009 Anti-Bribery Recommendation X(C)(i) and (ii)].

13. Regarding tax measures to combat foreign bribery, the Working Group recommends that Mexico:

- a) clarify explicitly by law or by any other binding means that bribes to foreign public officials are not deductible for any tax purposes, and verify that a taxpayer who has been found to have committed domestic or foreign bribery has not claimed a tax deduction for bribe payments [2009 Anti-Bribery Recommendation VIII(i)];
- b) improve detection of domestic and foreign bribery cases by analysing why the Strategies for Identifying National and International Bribery have not led to the detection of cases; continuing its regular training programmes for tax auditors and examiners; and including bribery in risk assessments and audits [2009 Anti-Bribery Recommendation VIII(i)].

14. Regarding awareness raising, the Working Group recommends that Mexican foreign embassies and export promotion agencies assist and inform internationally active Mexican businesses to combat foreign bribery [2009 Anti-Bribery Recommendation X(C)(i); Annex II].

15. Regarding whistleblower protection, the Working Group recommends that Mexico enact specific legislation to ensure that public and private sector employees, and auditors who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action, and raise awareness of this measure [2009 Recommendation IX(iii), X(B)(i) and (v)].

16. Regarding public advantages, the Working Group recommends that Mexico:

- a) amend its legislation to make debarment available as a sanction in all cases of foreign bribery in the context of international business, and extend its blacklist to cover enterprises that are determined under Mexican law to have committed foreign bribery [Convention, Article 3(4); 2009 Anti-Bribery Recommendation XI(i)];
- b) ensure that Bancomext stipulate its debarment policy in writing in a specific section of its lending or guarantee contract; extend the anti-corruption declaration in its credit agreement to cover foreign bribery that occurs both before and after the agreement is signed; train its staff on the policies on and procedures for debarment, reporting foreign bribery, and detecting foreign bribery; and require clients to provide further details of agent commissions and fees [2009 Anti-Bribery Recommendation XII(ii)].

2. Follow-up by the Working Group

17. The Working Group will follow up the issues below as case law and practice develops:

- a) The interpretation of “foreign public official” as defined in Article 222bis;
- b) Whether sanctions imposed in foreign bribery cases are effective, proportionate and dissuasive;
- c) Confiscation of the bribe, its proceeds, or their equivalent; and
- d) Anti-corruption measures in Mexico’s ODA programme.

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/60/7/48897634.pdf>

NORWAY (JUNE 2011)

The Working Group on Bribery commends Norway for its visible and significant enforcement efforts, which have steadily increased since Phase 2. These efforts were enabled, in particular, by the specialised and well-resourced law enforcement experts within Økokrim's Anti-Corruption Teams, as well as Norway's proactive approach to investigate and prosecute corruption more generally. The Working Group further commends Norway for its awareness-raising efforts, particularly with regard to the detection and reporting of foreign bribery, and notes that several foreign bribery cases emerged as a result of whistleblower reports. Increased enforcement against companies is also supported by Norway's efficient and effective framework for corporate liability, which has led to the systematic investigation, prosecution and sanctioning of companies involved in foreign bribery. The Working Group notes that confiscation measures have not been relied upon by law enforcement authorities to seize and confiscate the proceeds of bribery potentially gained by the companies.

The Phase 2 evaluation report on Norway, adopted in February 2004 included recommendations and issues for follow-up. In March 2007, at the time of Norway's written follow-up report to Phase 2, the Working Group concluded that all Phase 2 recommendations had been satisfactorily implemented.⁶ Thus, this Phase 3 Report has not had to address any remaining recommendations from Norway's Phase 2 evaluation.

Against this background, and based on the findings in this Report regarding implementation by Norway of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites Norway to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in June 2013).

1. Recommendations of the Working Group

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

1. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Norway continue its efforts to proactively investigate and prosecute cases of foreign bribery (2009 Recommendation II.).
2. Regarding the confiscation of the bribe and proceeds of foreign bribery, the Working Group recommends that Norway make full use of the provisions available under the law to confiscate the proceeds of foreign bribery, where appropriate, including when relying on penalty notices to settle cases out of court [Convention, Article 3.3; 2009 Recommendation III. (ii)].
3. Regarding international cooperation, the Working Group recommends that Norway develop its information system to allow for the collection of data on MLA requests in foreign bribery cases, including on the origin of such requests, and the timeframe for providing responses, with a view to allowing a better assessment of Norway's practice in providing MLA (Convention, Article 9).

⁶ See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

Recommendations for ensuring effective prevention and detection of foreign bribery

4. Regarding accounting and auditing requirements, the Working Group recommends that Norway:
 - a) Expand the reporting obligations under the Auditing Act to require auditors to also report to management circumstances that may trigger the liability of the legal person (and not only the natural persons at senior management level) [2009 Recommendation III. (iv), (v) and X.B.(iii)]; and
 - b) Consider, beyond the current anti-money laundering reporting requirements on proceeds of criminal acts, requiring external auditors to report suspected acts of foreign bribery to external competent authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation III(iv), (v), X.B(v)].
5. Regarding internal controls, ethics and compliance, the Working Group recommends that Norway pursue the important efforts already engaged in the area of corporate liability, and in particular:
 - a) Continue encouraging companies, especially SMEs, to develop internal controls, ethics and compliance systems to prevent and detect foreign bribery [2009 Recommendation X.C.(i), and Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance]; and
 - b) Encourage companies to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance systems for preventing and detecting bribery [2009 Recommendation X.C.(iii), and Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance].
6. Regarding public advantages, the Working Group recommends that Norway consider adopting a systematic approach to allow its public agencies to easily access information on companies sanctioned for foreign bribery, such as through the establishment of a national debarment register [2009 Recommendation XI. (i)].

2. Follow-up by the Working Group

7. The Working Group will follow-up the issues below as case law and practice develops:
 - a) The application of the foreign bribery offence as litigation further develops to ensure that it covers bribes paid to third parties and bribery through the use of intermediaries, as well as the interpretation of the “impropriety of the advantage” and the application of the trading in influence offence in cases of foreign bribery.
 - b) The responsibility of legal persons in cases of foreign bribery as case law develops, in particular to ascertain how the factors under section 48b of the GCPC are interpreted by the courts in deciding whether to impose a penalty on a legal person.
 - c) The use of penalty notices (or optional penalty writs) in cases of foreign bribery as practice develops, particularly with regard to the development of prosecutorial guidelines or guidance from the courts; and
 - d) The application of the money laundering offence, given the absence of investigations and prosecutions of money laundering based on a predicate offence of foreign bribery.

Complete Phase 3 Report available at:
<http://www.oecd.org/dataoecd/38/59/48286802.pdf>

SWITZERLAND (DECEMBER 2011)

The Working Group on Bribery welcomes the continued efforts by Switzerland to implement the Convention, especially in relation to responses to requests for MLA in foreign bribery cases. In addition, Switzerland also has a proactive policy on the confiscation and restitution of the instrument and proceeds of corruption. The Working Group appreciates the number of criminal proceedings opened for bribery of foreign public officials, but nevertheless notes the low number of convictions for bribery of foreign public officials, of which only two cases fall within the scope of the Convention, since Switzerland joined the OECD Anti-Bribery Convention in 2000.

The Phase 2 Evaluation Report, adopted in 2004, included recommendations and issues for follow-up (as indicated in Annex 1 of this report). Of the eight recommendations considered to have been partially implemented at the time of the Phase 2 Written-Follow Up Report, in 2007, recommendations 3(b), (e) and 4(a) from Phase 2 have been fully implemented; recommendations 1(a), (b), 2(a), 3(c) et 4(b) remain partially implemented.

In conclusion, based on this report concerning Switzerland's implementation of the Convention and the 2009 Recommendation, the Working Group : (1) makes the following recommendations in Part 1 to reinforce the implementation of the Convention; and (2) will follow-up on the issues identified in Part 2. The Working Group invites Switzerland to submit a written report on all recommendations and follow-up issues within two years (i.e. in October 2013).

1. Recommendations of the Working Group

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

1. Regarding criminal liability of legal persons, the Working Group recommends that Switzerland clarify the concept of 'defective organisation' for law enforcement authorities, including by way of specialised training [2009 Recommendation, Annex I, D];
2. Regarding investigations and prosecutions, the Working Group recommends that Switzerland:
 - a) encourage cantons where the Office of the Attorney General remains subject to a public authority, to ensure its autonomy in relation to such authority [Convention, Article 5; 2009 Recommendation, Annex I, D];
 - b) periodically review the resources available to law enforcement authorities in order to effectively combat bribery of foreign public officials [2009 Recommendation, V and Annex I, D];
3. In relation to the use of special procedures and the mechanism for Reparation, the Working Group recommends that Switzerland, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner, the reasons for using that particular procedure, as well as the basis for the decision and the sanctions that were ordered. [Convention, Article 3];
4. Regarding money laundering, the Working Group recommends that Switzerland consider establishing a statutory limitation period for money laundering in connection with the foreign bribery

offence, when it does not amount to aggravated money laundering under article 305^{bis}(2) SCC, that allows sufficient time for investigation and prosecution of such cases [2009 Recommendation, III (ii)];

5. Regarding mutual legal assistance, the Working Group recommends that Switzerland produce more detailed statistics on MLA requests received, sent and rejected, so as to identify more precisely the proportion of those requests that concern bribery of foreign public officials, laundering of the proceeds of foreign bribery, and assets seized, confiscated and returned in the context of MLA, and that it invite the cantons to provide the necessary data to the Central Authority [Convention, Article 9; 2009 Recommendation XIV (vi)];

Recommendations for ensuring effective prevention and detection of foreign bribery

6. Regarding small facilitation payments, the Working Group recommends that Switzerland undertake to periodically review its policies and approach on small facilitation payments in order to effectively combat the phenomenon and encourage companies to prohibit or discourage the use of such payments in ethics programs or other internal policies. [Convention, Article 1, 2009 Recommendation VI];

7. Regarding accounting standards, external audit and corporate compliance programmes, the Working Group recommends that Switzerland:

- a) continue its efforts, including in the context of the current legislative move to reform accounting law, to encourage disclosure by companies, in order to improve the prevention and detection of bribery of foreign public officials [Convention, Article 8; 2009 Recommendation X. A (ii)];
- b) consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and, where appropriate, ensuring that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation X. B (v)];
- c) continue its efforts, in cooperation with business associations, to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms [2009 Recommendation X. C. (i) and (ii)];

8. Regarding tax measures to combat bribery of foreign public officials, the Working Group recommends that Switzerland:

- a) reinforce awareness in the federal and cantonal tax administrations with respect to hidden commissions, detection techniques, and the procedure to be followed in reporting to law enforcement authorities [2009 Recommendation VIII; 2009 Tax Recommendation II];
- b) take appropriate measures to reinforce the intensity and frequency of official on-site inspections of companies susceptible to bribery of foreign public officials [2009 Recommendation VIII; 2009 Tax Recommendation I. ii) et II.];
- c) encourage cantons that do not yet have reporting obligations for their tax officials, to consider putting in place such measures [2009 Recommendation VIII; 2009 Tax Recommendation II].

9. Regarding awareness of the offence of bribery of foreign public officials, the Working Group recommends that Switzerland to continue its efforts, in particular by an even more targeted awareness-raising for SMEs, and an intensified focus on the issue of transnational bribery in the training courses and modules for federal and cantonal employees who could play a role in detecting and reporting acts of bribery [2009 Recommendation III (i) and IX (ii)];

10. Regarding reporting of allegations of foreign bribery, the Working Group recommends that Switzerland:

- a) consider expanding the reporting obligation to employees of federal entities not covered by the federal personnel law, in particular those of the Swiss Export Risk Insurance and FINMA;
- b) encourage the cantons that have not yet adopted such measures to consider instituting them;
- c) inform federal employees explicitly of their obligation to report all instances of corruption, including bribery of foreign public officials, and encourage the cantons to do the same for their own employees subject to such an obligation or for whom there are internal reporting mechanisms [2009 Recommendation IX (i) and (ii)];

11. Regarding whistleblower protection, the Working Group recommends that Switzerland adopt promptly an appropriate regulatory framework to protect private sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds [2009 Recommendation IX (iii)];

12. Regarding public advantages, the Working Group recommends that Switzerland:

- a) take the necessary measures to put in place systematic mechanisms allowing for the exclusion of companies convicted of bribery of foreign public officials in violation of national law from public procurement contracts or contracts funded by official development assistance [2009 Recommendation XI (i)];
- b) to apply a more systematic approach to enhanced due diligence and to the consequences for an exporter or for an applicant if he or she is the subject of bribery allegations or convictions either before or after the approval of the contract, in order to better implement the 2006 Recommendation in practice [2006 Recommendation 1].

2. Follow-up by the Working Group

The Working Group will follow up the issues below as case law and practice develops:

13. The enforcement of corporate criminal liability by law enforcement authorities [Convention Article 2] ;

14. The possibilities offered to the Office of the Attorney-General, (i) to dispose of cases involving the crime of bribing foreign public officials by way of summary punishment order (article 352 ff SCC); (ii) to negotiate with the accused through the simplified procedure (article 358 ff SCC); and (iii) to use the Criminal Code provisions on ‘Reparation’ (article 53) in order to ensure the predictability, transparency and accountability of these three procedures [Convention, Article 3].

15. The penalties applied to natural persons convicted of the offence of bribery of foreign public officials, including by way of summary punishment order and simplified procedure, to ensure that they are effective, proportionate and dissuasive [Convention, Article 3.1];

16. The adequacy of human resources available to the federal and cantonal law enforcement authorities in the area of transnational bribery in the context of the implementation of the new Code of Criminal Procedure [2009 Recommendation, II and Annex I, D];

17. The continued application, by tribunals, of a 15-year limitation period to prosecutions of legal persons to allow an adequate period of time for the investigation and prosecution of the offence of foreign bribery [Convention, Articles 3 and 6];

18. That domestic law allows for the exclusion from public procurement of companies convicted of bribery of foreign public officials in violation of national law [2009 Recommendation, XI i)].

Complete Phase 3 Report available at:

<http://www.oecd.org/dataoecd/59/53/49377354.pdf>

UNITED STATES (OCTOBER 2010)

The Working Group on Bribery commends the United States Government for its visible and high level of support for the fight against the bribery of foreign public officials, including, engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government. The Working Group welcomes the significant enforcement efforts, enabled by the good practices developed within the U.S. legal and policy framework. Indeed, enforcement has increased steadily since Phase 2, and cases have involved various business sectors, and various modes of bribing foreign public officials. Enforcement during this period has also resulted in increasingly significant prison sentences, monetary penalties and disgorgement for the bribery of foreign public officials.

The Working Group notes that all recommendations from Phase 2 that were considered partially or not implemented are now fully implemented (outstanding issues from Phase 2 are identified in Annex 1 to this report). The Working Group notes that the practice of the United States is compliant with the Convention. The U.S. evaluation identified, however, certain areas in which implementation of the Convention and the 2009 Recommendation might be enhanced. In the course of this Phase 3 evaluation, the Working Group has also identified several horizontal cross-cutting issues that affect all the Parties to the Convention.

In conclusion, based on the findings in this report regarding implementation by the United States of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites the United States to report orally on the implementation of Recommendations 2 and 6 within one year of this report (i.e. in October 2011). It further invites the United States to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in October 2012).

1. Recommendations of the Working Group

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

1. Regarding the statute of limitations, the Working Group recommends that the United States ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution (Convention, Article 6).
2. Concerning the foreign bribery offences in the FCPA, for the purpose of further increasing effectiveness of combating the bribery of foreign public officials in international business transactions, the Working Group recommends that the United States:
 - a) In its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, consider the views of the private sector and civil society, particularly on ways of clarifying the ‘gray’ areas identified by them (Convention, Article 1, 2009 Anti-Bribery Recommendation VI.i);

- b) Consolidate and summarise publicly available information on the application of the FCPA in relevant sources, including on the affirmative defence for reasonable and bona fide expenses in recent Opinion Procedure Releases and enforcement actions (Convention, Article 1); and
 - c) revise the Criminal Resource Manual to reflect the decision in U.S. v. Kay, which supports the position of the United States that the 'business nexus test' in the FCPA can be broadly interpreted, such that bribes to foreign public officials to obtain or retain business or 'other improper advantage in the conduct of international business' violate the FCPA (Convention, Article 1).
3. Regarding the use of NPAs and DPAs, the Working Group recommends that the United States:
- a) Make public any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials that arises following the Government Accountability Office 2009 Report (Convention, Article 3); and
 - b) Where appropriate, make public in each case in which a DPA or NPA is used, more detailed reasons on the choice of a particular type of agreement; the choice of the agreement's terms and duration; and the basis for imposing monitors (Convention, Article 3).
4. The Working Group recommends that the United States take appropriate steps to verify that, in accordance with the 2009 Anti-Bribery Recommendation, debarment and arms export license denials are applied equally in practice to domestic and foreign bribery, for instance by making more effective use of the 'Excluded Parties List System' (EPLS) (2009 Anti-Bribery Recommendation XI.i).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. The Working Group recommends that the U.S. pursue additional opportunities to raise awareness with SMEs for the purpose of preventing and detecting foreign bribery (2009 Anti-Bribery Recommendation, III.i).
6. The Working Group encourages the U.S. to raise awareness of the diligent pursuit of books and records violations under the FCPA, including for misreported facilitation payments (Convention Article 8 and 2009 Anti-Bribery Recommendation VI.ii and X.A.iii).
7. In order to enhance the effectiveness of the implementation of the 2009 Anti-Bribery Recommendation of Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the Working Group recommends that the United States clarify the policy on dealing with claims for tax deductions for facilitation payments, and give guidance to help tax auditors identify payments claimed as facilitation payments that are in fact in violation of the FCPA and/or signal that corrupt conduct in violation of the FCPA is also taking place (2009 Anti-Bribery Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions I.i).

2. Follow-up by the Working Group

1. The Working Group will follow-up the detection and prosecution of violations of the bribery provisions of the FCPA by non-issuers, which are not subject to the books and records provisions in the FCPA (2009 Anti-Bribery Recommendation II).

Complete Phase 3 Report available at:
<http://oecd.org/dataoecd/10/49/46213841.pdf>