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REPORT BY THE CIME: IMPLEMENTATION OF THE CONVENTION ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION

COUNTRY REPORTS
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PREFACE TO COUNTRY REPORTS

(Note by the Secretariat)

1. Article 12 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides for a systematic follow-up to monitor and promote the full implementation of the Convention. The seven country reports that follow were adopted by the Working Group on Bribery in International Business Transactions in the course of the Phase 1 evaluation of Parties’ implementation of the Convention.

2. Phase 1, which began in April 1999, involves an examination of the relevant laws of each Party to determine whether they conform to the requirements under the Convention, whereas Phase 2 will focus on the application of the laws in practice. Phase 1 of the evaluation process is a rigorous peer review process that essentially involves: (i) preparation for consultation in the Working Group, including a reply to a questionnaire by the country being examined, which forms the basis of a provisional review by the Secretariat; (ii) consultation in the Working Group; and (iii) adoption of a report by the Working Group. Each country report contains a review of a country’s relevant laws, and an evaluation, which outlines the principal findings of the Working Group.

3. The Working Group acknowledges the serious commitment and effort of the countries that were evaluated in the Phase 1 examinations. Moreover, all the countries examined co-operated fully in providing an in-depth understanding of their laws and responding to the questions raised by the Group.

4. Questions and comments from the two countries that serve as lead examiners complement the provisional review by the Secretariat. Before the provisional review is transmitted to the Working Group, the country being examined is afforded the possibility to comment on it. Consultation in the Working Group involves two rounds of discussions, which are meant to assist Members in understanding the country’s legal system and approach to implementing the Convention and provide the Group with an opportunity to clarify specific issues. The Working Group concludes the consultation with the adoption of an evaluation, which summarises the steps taken by the country to implement the Convention, targets the specific issues requiring further examination in Phase 2 of the evaluation process and in some cases recommends remedial action. Final reports, which consist of an updated review and the evaluation, are adopted later by written procedure. The Group will follow-up to determine whether remedial action has been taken in specific cases.

5. Each country is examined on its own merits, in the context of its overall juridical system. The review of a country’s relevant laws is primarily conducted without reference to the laws of the other Parties to the Convention. Up to this stage, the Working Group has not undertaken a comparative analysis of the countries. For this reason, the evaluations have not been harmonised to reflect common issues, with the result that an issue identified on one country’s evaluation may have broader application or may differ, to some extent, from the way the same issue was raised, if at all, with respect to another country. As the examination of the countries has progressed over the course of Phase 1, the Working Group has become aware of the need to adapt the process to address certain issues horizontally.
6. The reader is encouraged to consider a country’s report in its entirety to obtain a complete understanding of the issues identified in the evaluation as well as the country’s framework for implementing the requirements under the Convention. A study of all the reports is necessary to gain a meaningful overview of the implementation of the Convention as a multilateral instrument for combating foreign bribery.
ARGENTINA

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues


Convention as a Whole

The Statute on Ethics in the Exercise of Public Office (Law No. 25.188) was enacted in order to implement the Inter-American Convention against Corruption (the OAS Convention), to which Argentina is a party. This legislation amended the Argentine Penal Code (APC), adding article 258 bis, which penalises the active bribery of a foreign public official. In addition, the Argentine authorities are currently preparing an amendment to article 258 bis of the APC (the draft bill) in order to meet the standards of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) as well. The draft bill intends to harmonise its terminology with that of Article 1 of the Convention. The Ministry of Justice and Human Rights and the Anticorruption Office will propose this draft bill to the Congress in the forthcoming ordinary sessions.

Argentina considers the current provisions of the APC on complicity, attempt, jurisdiction, seizure and confiscation, and statute of limitations, as well as those of the accounting regulations to be consistent with the requirements of the Convention. The Argentine authorities are of the opinion that the Statute on Money Laundering (Law No. 25.246) and the Statute on Mutual Legal Assistance and Extradition (Law No. 24.767), which also amended the APC comply with the requirements of Articles 7, 9 and 10 of the Convention.

Pursuant to article 31 of the Argentine Constitution, “treaties with foreign powers” are part of the supreme legislation of Argentina as well as the Constitution and the national laws, and have precedence over provincial constitutions and laws. Pursuant to article 75.22 of the Constitution, treaties take precedence over domestic law. Since the Convention is not included in the treaties which have “constitutional hierarchy”, it ranks above national laws and provincial constitutions and laws, but below the Argentine Constitution and treaties having “constitutional hierarchy”. Also, the Supreme Court decision states that a ratified treaty is precedent to domestic law. Moreover, it states that where the domestic legislation conflicts or is deficient with respect to a treaty, provisions of the treaty are directly applicable provided that

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1 Article 31 makes an exception for this with respect to “the province of Buenos Aires, treaties ratified after the Pact of November 11, 1859”. However, the Argentine authorities state that this exception has no relevance to the application of the Convention in Argentina. According to them, this exception reflects a historical event in Argentina that the province of Buenos Aires ratified this Constitution and formally became a part of Argentina by signing the Pact of November 11, 1859.

2 Such treaties are those on human rights, including the American Convention on Human Rights and the International Pact on Civil and Political Rights.

3 Supreme Court decision, July 7-992- Ekmekdjian, Miguel A.v.Sofovich, Gerardo et al.
they contain sufficiently specific descriptions enabling immediate application. However, since article 18 of the Argentine Constitution requires enacted statutes in their domestic law for the imposition of penalties, the provisions on constituent elements of the offence (i.e. Article1) are not directly applicable. The Argentine authorities state that Commentaries play an important role in Argentine courts as authentic interpretative instruments to the Convention.

In Argentina, judicial decisions are not legally binding on other courts in principle. However, according to the Argentine authorities, in practice, the courts treat Supreme Court decisions as binding.

**ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL**

**General Description of the Offence**

Argentina translates article 258 bis of the APC, which was added by the amendment to establish the offence of bribing a foreign public official, as follows:

> It shall be punished with 1 to 6 years of imprisonment and perpetual special disqualification to hold a public office, whoever offers or gives to a public official from another State, directly or indirectly, any object of pecuniary value, or other benefits as gifts, favours, promises or advantages, in order that the said official acts or refrains from acting in the exercise of his official duties, related to a transaction of economic or commercial nature.

In addition, the draft bill states as follows:

> It shall be punished with 1 to 6 years of imprisonment and perpetual special disqualification to hold a public office, whoever offers or gives to a foreign official, directly or indirectly, for that official or for a third party, any object of pecuniary value, or other benefits as gifts, favours, promises or advantages, in order that the said official acts or refrains from acting in the exercise of his official duties, related to a transaction of economic or commercial nature, whether or not within the official’s authorised competence.

Thus, it would appear that the following three amendments to the current legislation are intended in the draft bill to: (1) broaden the scope of the public official from “a public official from another State” to “a foreign official”; (2) expressly provide for the case of advantages for third parties; and (3) include the act/omission of the public official which is not within his/her authorised competence that the briber intends to induce. Additionally, the draft bill also contains the definition of a “foreign official” (See discussion under 1.1.6 below.).

**General Defences**

The Argentine authorities refer to several general defences provided for in the general part of the APC, which might be applicable to the offence of bribery of a foreign public official under extremely limited circumstances.

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4 Moreover, there is a Supreme Court decision (Felicetti, Roverto, dated 21/12/2000) that referred to the legal weight of the Recommendations of the Interamerican Commission on Human Rights, which states that although they are not legally binding in Argentina, they embody guidelines for the interpretation of the Human Rights Convention.

5 However, where the Court of Appeals issue a decision “en banc”, it binds on lower courts, etc. subject to its jurisdiction.
Firstly, the Argentine authorities refer to the defence that applies to “ignorance or lack of knowledge of the objective elements of the crime” (“mistake of fact”). Secondly, they refer to the defence of “mistake of law”. The Argentine authorities state that this defence could be successfully invoked only where the briber exercised due diligence to know whether the act is prohibited by law. They further state that this defence does not apply even where the offender’s private lawyer wrongly advised him/her that the act would not constitute an offence. Thirdly, they refer to the defence of “necessity”. The Argentine authorities confirm that this defence could not apply where the briber claims that bribing was the only way possible to keep him/her in business. According to them, this defence requires that the offender had no alternative which would result in less damage than the commission of the offence. Thus, since usually there are several alternatives to the commission of the foreign bribery offence, this defence would not apply. Moreover, they confirm that this would not apply to any sort of “economic necessity” (e.g. closing down business) since it cannot cause more damage compared to bribery. In addition, the Argentine authorities confirm that this defence does not apply where the foreign public official solicits a person by telling him/her that he/she wouldn’t get the contract without a bribe, or in which a person is threatened with retribution.

1.1 The Elements of the Offence

1.1.1 any person

Article 258 bis and the draft bill apply to “whoever” gives or offers a bribe to a foreign public official. The Argentine authorities state that this only covers natural persons. The Argentine authorities confirm that there is no category of natural person that is excluded from this scope. However, pursuant to the Argentine Constitution, special procedures apply to certain categories of person when imposing on them criminal liability.\(^6\)

1.1.2 intentionally

The Argentine authorities state that the offence of bribery could be committed only with “deliberate intention” to offer, promise or give a bribe. There is no case law that elaborates further on this. However, according to the Argentine authorities, “deliberate intention” requires knowledge of each element of the offence. Thus, it is necessary that the offender is aware of dealing with a foreign public official, of his/her act of offering, promising or giving, of its consequences, and of the “aim” of the bribe to induce foreign public official’s act/omission. In addition, the Argentine authorities state that any degree of knowledge of each element of the offence is sufficient to give rise responsibility and therefore, “\textit{dolus eventualis}” is applicable to the offence. For instance, where the offender foresees the “consequences” of the bribing act, he/she is punishable.

1.1.3 to offer, promise, or give

Article 258 bis and the draft bill refer to a person who “offers” or “gives” a bribe. However, since the provisions apply to giving of “promises”, it would appear that it also covers a person who “promises” a bribe to a foreign public official. The Argentine authorities confirm that a mere promise of a bribe is covered.

\(^6\) An impeachment process applies to the President, the Vice President, the Ministers, the Chief Cabinet of Ministers and the Supreme Court Justices (articles 53, 59 and 60 of the Constitution). A similar process performed by the Council of the Magistracy and a Jury of Impeachment applies to judges of lower courts (articles 114.5 and 115). With respect to members of the Congress, each chamber (i.e. the House of Representatives, the Senate) is empowered to remove one of its members by a two-thirds vote (article 66).
Moreover, the Argentine authorities confirm that article 258 bis and the draft bill apply irrespective of whether the briber promises/ gives a bribe in response to the solicitation by the foreign public official. However, they further state that the court may take into account such circumstances in determining the penalty.

1.1.4 any undue pecuniary or other advantage

Article 258 bis and the draft bill apply to the giving etc. of (1) any “object” of pecuniary value, and (2) “other benefits” such as “gifts, favours, promises or advantages”. The former one covers pecuniary advantages. The Argentine authorities confirm that “object” and “other benefits” imply all pecuniary and non-pecuniary advantages, tangible and intangible (e.g. intellectual or social advantage). Moreover, they confirm that a promise of all advantages, pecuniary and non-pecuniary, tangible and intangible are covered by “other benefits”.

Article 258 bis and the draft bill do not specifically mention whether the advantage is “undue”.

The Argentine authorities confirm that where the advantage is permitted or required by the written law of the public official’s country, it would not constitute the offence, but where it is neither permitted nor required by the law thereof, it would constitute the offence even if it is not prohibited thereby, in accordance with Commentary 8.

The Argentine authorities confirm that the factors enumerated in Commentary 7, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage, would not be considerations for escaping liability. However, they state that these may be considered as mitigating circumstances.

1.1.5 whether directly or through intermediaries

Article 258 bis and the draft bill apply to bribes given, etc. to a foreign public official, “directly and indirectly”. The Argentine authorities state that this covers the case where the bribe is given etc. to the public official “personally or through intermediaries”. The Argentine authorities confirm that the term “indirectly” covers the case of bribing through an intermediary irrespective of whether or not the intermediary is aware of the briber’s intent. In case where the intermediary is aware of the briber’s intent, he/ she will be held responsible for the offence together with the briber.

1.1.6 to a foreign public official

Article 258 bis of the APC applies to bribes given, etc. to a “public official from another State”. Pursuant to article 77 of the APC, “public official” means “any person exercising a public function on an incidental or permanent basis, whether elected or appointed by appropriate authority”. However, the Argentine authorities confirm that the definition in article 77 applies only to the domestic bribery offences, but not to the foreign bribery offence. Thus, there is no autonomous definition for the term “public official from another State” elsewhere in Argentine law.

However, although the constituent elements of the offence in the Convention (Commentaries) are not directly applicable in Argentina (See the discussion above under “Convention as a Whole”), the Argentine authorities are of the opinion that the court could refer to the definition of “foreign public official” and “foreign country” in the Convention and the Commentaries to interpret article 258 bis, since it contains the term ‘public official of another state’, which corresponds to these terms. Nevertheless, there still remain some issues of concern.
Firstly, since the current provision of the APC was enacted initially in order to implement the OAS Convention, the scope of which is narrower than that of the Convention in respect of the coverage of foreign public official, it may appear uncertain whether the court would apply the definition in the Convention instead of that in the OAS Convention. However, the Argentine authorities states that as (1) the Convention came into force after the OAS Convention, and (2) the Convention is more specific on the issue of transnational bribery, the court would refer to the Convention in accordance with the general principles of “subsequent” and “specificity”. Moreover, the Argentine authorities confirm that in the case where Argentina becomes a party to a future convention with a less specific definition of foreign public official, the OECD Convention would prevail.

Secondly, since the APC establishes the offence of domestic bribery in respect of a judge under separate statutes from those for bribery of a “public official” in general, it is unclear whether judges would be covered by the term “public official”. Argentina confirms that the term “public official” of article 258 bis covers judges.

Finally, the Argentine authorities confirm that, since article 258 bis only refers to public official from “another State”, it does not cover agents, etc. of international organisations and public officials of organised foreign area or entity.

The draft bill applies to bribes given, etc. to a “foreign official”. The draft bill defines the term “foreign official” as follows:

1. any person holding a legislative, administrative, or judicial office of a foreign country, either appointed or elected, at a national or at a local level;
2. any person exercising a public function for a foreign country, including for a public agency or a public enterprise;
3. any official or agent of a public international organisation.

This definition uses the same terminology of the definition in Article 1.4a and b of the Convention. However, there is no definition of terms such as “public function”, “public agency”, “public enterprise”, “public international organisation”, etc. which are defined in Commentaries 12-18. The Argentine authorities state that the court would refer to these Commentaries to interpret these terms.

1.1.7 for that official or for a third party

Article 258 bis of the APC does not expressly refer to third party beneficiaries. The Argentine authorities state that, despite the lack of case law, where the third party is “someone in public official’s intimate circle”, it would be covered by the offence since “it is not difficult to imply that the bribe or its profits would later come back or benefit him”. They further explain that it requires proof of the fact that the advantage is given, etc. to the third party to benefit the public official. Thus, “someone in public official’s intimate circle” is required to be someone who shares patrimony with the public official (e.g. wife, children) or someone who has high level of intimacy with him/her (e.g. mistress, close friends).

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7 Article 1, second paragraph of the OAS Convention states as follows:

“Public official”, “government official”, or “public servant” means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.
Moreover, they confirm that article 258 bis does not cover the case where an advantage goes directly to a third party. This lack of coverage falls short of the standards of the Convention.

In contrast, the draft bill expressly addresses bribes “for that official or for a third party”. It would appear to apply in respect of the giving, etc. a bribe to a foreign public official, for him/her or a third party. The Argentine authorities confirm that a third party could be a legal entity. Argentina confirms that the draft bill covers the case where an advantage goes directly to a third party.

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

Article 258 bis applies where the briber gives, etc. a bribe to the foreign public official, in order that he/she acts or refrains from acting in the exercise of his/her official duties. The Argentine authorities confirm that it does not cover the case where the briber’s intent is to induce the public official’s act/omission which is not within his/her competence but is in relation thereto. This does not meet the standards of the Convention and Commentary 19.

According to the Argentine authorities, it requires proof of law in the public official’s country in order to determine whether a certain act/omission of the public official is in the exercise of his/her official duties.

However, Argentina explains that there is a possibility that the court may interpret the law to cover the case where the briber gives a bribe to a public official to induce him/her to exert his/her influence on another public official which is outside the scope of his/her duties.

The draft bill would, however, expressly apply where the official’s act/omission that the briber intends to induce is “in the exercise of his official duties...whether or not within the official’s authorised competence.” The Argentine authorities confirm that the expression “in the exercise of his official duties” does not introduce additional requirements, but merely addresses that the act/omission should relate to the performance of the official’s duties, in accordance with Article 1.4 c of the Convention and Commentary 19.

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

Both article 258 bis and the draft bill require that the bribe given, etc. to a foreign public official be “related to a transaction of economic or commercial nature”.

The Argentine authorities state that “an interest of an economic nature” is required thereunder. However, they confirm that article 258 bis and the draft bill would apply regardless if the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business, in accordance with Commentary 4.

The Argentine authorities confirm that “related to a transaction of economic or commercial nature” includes the purpose of obtaining or retaining business or other improper advantage. Moreover, it does not require it to be related to “international” business.

The Argentine authorities confirm that there is no exception for facilitation payments.
1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Complicity in the bribery of a foreign public official is established as a criminal offence under the general provisions of the APC.

Article 45 states that the following persons would be punishable by the same penalty as the perpetrator: 1) one who takes part in the commission of a criminal act; 2) one who provides assistance or co-operation without which the offence could not have been committed; and 3) one who directly abets another to commit a criminal act.

Pursuant to article 46, the following persons would be punishable by the penalty which is reduced to one third or a half from that of the full offence: 1) one who co-operates in any form in the commission of a criminal act; and 2) one who gives assistance by carrying out the preceding promise. The Argentine authorities confirm that the former includes all kinds of participation which is not essential, but facilitates the commission of the offence in any way, and thus, article 46 covers incitement, aiding and abetting, direct or indirect co-operation, and authorisation.

The Argentine authorities confirm that these provisions cover all forms of complicity required by the Convention including incitement, aiding and abetting or authorisation.

Thus, it would appear that the act of providing assistance, etc. without which the offence could not have been committed, is punishable by the same penalty as the full offence. Where the assistance, etc. only facilitates its commission, it is punishable under the mitigated penalty.

The Argentine authorities state that accomplices under these provisions are punishable regardless of whether the perpetrator is convicted of the offence.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic officials.

Attempt

An attempt to commit every offence, including the offence of bribing a domestic or foreign public official, is punishable in Argentina under articles 42-44 of the APC. Pursuant thereto, whoever begins the commission of an offence but does not complete it for circumstances beyond his or her will, is subject to the penalty reduced to one third or a half from that of the full offence. According to Argentina, both the case (1) where a briber offers or gives an advantage to a foreign public official, but the foreign public official does not become aware of it, and (2) where a briber offers an advantage to a foreign public official, but he/ she refuses it, constitute completed offences. The Argentine authorities consider a case as an attempt where a briber offers a bribe by mail, but the letter does not reach the public official.

Pursuant to article 43, where the offender “voluntarily desists from performing a crime”, he/she shall be exempted from liability. The Argentine authorities state that this would apply to the case where a briber uses an intermediary to make a promise of a bribe or to deliver the bribe, but “voluntarily” halts the intermediary completing such a task.
Conspiracy

Conspiracy is not punishable under Argentine law. However, pursuant to article 210 of the APC, whoever takes part in an association or a group of three or more people having the purpose of committing an offence would be liable by the mere fact that the person belongs to that association, etc. (concept of “illicit association”). Under this provision, a member of the association, etc. is subject to imprisonment of 3-10 years, and the “head or organiser” is subject to imprisonment of no less than 5 years.

ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

2.1 Criminal responsibility

The Argentine legal system does not establish criminal responsibility of legal persons.

However, the Argentine authorities state that they are currently preparing a draft bill establishing criminal liability of legal persons applicable to every offence including foreign bribery. According to the Argentine authorities, it will be ready to be proposed to the Congress by July 2001.

2.2 Non-criminal responsibility

Under the Argentine legal system there is no specific administrative liability of legal persons for bribery of a foreign public official.

However, the Argentine authorities state that under article 12 of the Charter of the General Inspectorate of Companies (Law No. 22.315), the General Inspectorate of Companies can impose administrative sanctions on entities such as corporations, associations and foundations as well as their directors, syndics, etc. for accounting offences. Penalties thereunder would be warning, publication of warning, or an administrative fine (See below 8.3 “Penalties”). In addition, Argentina states that where the bribery is connected with violation of anti-trust law, customs law, foreign exchange law, tax law, or money laundering law, it is possible to impose a monetary sanction on legal persons concerned. Moreover, they state that under the Charter of the General Inspectorate of Companies and other related laws (e.g. the Law on Business Associations), administrative fines or dissolution is available where the natural person acts beyond the scope of the charter of the company including bribing a foreign public official. The range of the administrative fines thereunder differs according to the category of legal person. For instance, for companies in general, it is up to 6,801.47 Argentine Pesos8 under the Law on Business Associations. For companies which make public offers, it is 1,000-5,000,000 Argentine Pesos under the Act No.17.811. The Argentine authorities are of the opinion that the current Argentine legislation complies with the requirements of the Convention.

However, some issues of concern have been identified. Firstly, fines in connection with the violation of several aforementioned laws could be applicable only where the act in question violates one of these laws. Thus, they are not applicable to the offer or the promise of a bribe. Moreover, this would not allow for imposing sanctions on legal persons for the commission of the offence of foreign bribery in addition to those for these violations. Secondly, although these sanctions are also applicable to domestic bribery cases, Argentina explains that there has been no case where dissolution is applied in connection with

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8 1 Argentine Peso is valued at 1 U.S. dollar.
economic transactions including domestic bribery. Thirdly, the amount of the administrative fine under the Law on Business Associations, etc. is quite low, or is only applicable to very limited category of legal persons. Therefore, it would appear that non-criminal liability under the current Argentine legal system is neither certain nor effective. Thus, together with the lack of criminal responsibility of legal persons, it is not in conformity with the requirements of Articles 2 and 3 of the Convention.

ARTICLE 3. SANCTIONS

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

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

Pursuant to articles 258 and 259 of the APC, a natural person is liable for various forms of bribery of domestic public officials, in consequence of the reverse application of the passive bribery offences to active bribery. Thus, pursuant to articles 258 and 259, each following penalty is applicable to a natural person for the following domestic bribery offences:

1. 1-6 years of imprisonment ("prison") for: (a) the bribery of a public official related to his/her duties, and (b) the bribery of a person in order to unduly exert influence on a public official related to the his/her duties;
2. 2-6 years of imprisonment ("prison") for: (a) the bribery of a judge of the Judicial Power or the Office of the Attorney General for obtaining the issuance of a judgement, etc., (b) the bribery of a person in order to unduly exert influence on a judge of the Judicial Power, etc. for obtaining the issuance of a judgement, etc., and (c) the bribery of 1.(a) and (b) above, where the offender is a public official;
3. 3-10 years of imprisonment ("prison") for the bribery of 2.(a) and (b) above, where the offender is a public official;
4. 1 month-1 year of imprisonment ("prison") for the bribery of a public official where there is no connection between the bribe and the act/omission of the public official. This applies only to the act of offering and giving of a bribe. According to Argentina, the bribe (i.e. “gift”) must be of an "economic significance".

9 See article 256, 258 of the APC.
10 See article 256 bis (first paragraph), 258 of the APC.
11 See article 257, 258 of the APC.
12 See article 256 bis (second paragraph), 258 of the APC.
13 See article 256, 256 bis (first paragraph), 258 of the APC.
14 See article 256 bis (second paragraph), 257, 258 of the APC.
15 See article 259 of the APC.
With respect to foreign bribery, imprisonment (“reclusion”) for 1-6 years and a “perpetual special disqualification to hold a public office” are applicable to a natural person.\textsuperscript{16}

The Argentine authorities state that the significant differences between the two different imprisonment penalties (i.e. “prison” and “reclusion”) are (1) suspension of imprisonment is available only with “prison” of less than 3 years\textsuperscript{17}, and (2) probation including suspension of judicial proceedings is possible only with “prison”.

Pursuant to article 22b of the APC, with respect to both domestic and foreign bribery offences, where the offence is committed “with the aim of monetary gain” a fine up to 90,000 Argentine Pesos\textsuperscript{18} may be imposed in addition to the imprisonment.

While the sanction for foreign bribery is of a more severe nature, the range of sanctions for foreign bribery offence is lower than those of domestic bribery offences (e.g. bribery of a judge, where the offender is a public official)\textsuperscript{19}.

Articles 40 and 41 of the APC provide for guidelines for determining the severity of sanctions in each case. Pursuant thereto, the nature of the act, the means used to perform the act, the danger and the damage caused, purpose of the crime, etc. are factors in determining the sanctions.

### 3.3 Penalties and Mutual Legal Assistance

Pursuant to the International Co-operation in Criminal Matters Act (ICCMA)\textsuperscript{20}, which is applicable where there is no applicable treaty, mutual legal assistance is not conditional upon the length of the term of imprisonment provided for in the criminal law of either Argentina or the requesting state. Argentina confirms that a treaty-based MLA is also not conditional on such requirements.

### 3.4 Penalties and Extradition

Pursuant to article 6 of the ICCMA, which is applicable where there is no applicable treaty on extradition, the offence for which the extradition is requested must constitute an offence subject to a penalty of imprisonment whose average of the maximum term and the minimum term is at least 1 year under the law of both Argentina and the requesting state. In the case of Argentina (i.e. 1-6 year of imprisonment for foreign bribery), the average of the imprisonment sanction for foreign bribery offence is 3.5 years and therefore, fulfills this threshold. The Argentine authorities state that where the imprisonment sanction of the requesting state does not contain the minimum term, the “average” is calculated as half the term of the maximum. In addition, they state that where the requesting state has both fine and imprisonment sanctions for this offence, it is sufficient if the term of the imprisonment meets this requirement.

If the request is for an execution of a sentence, the sentence to be served shall be imprisonment of no less than 1 year at the time of the request.

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\textsuperscript{16} See article 258 bis of the APC.

\textsuperscript{17} See article 26 of the APC.

\textsuperscript{18} 1 Argentine Peso is valued at 1 U.S. dollar.

\textsuperscript{19} However, the imprisonment sanctions for offences such as theft (i.e. 1 month-6 years), fraud (i.e. 1 month-6 years), embezzlement (i.e. 2-10 years) and extortion (i.e. 5-10 years) are comparable to the foreign bribery offence.

\textsuperscript{20} This Act was amended by the Statute on Mutual Legal Assistance and Extradition (Law No 24.767).
According to Argentina, in case of treaty-based extradition, the requirement depends on each treaty, but basically, “the rule of one year” (i.e. the average of the maximum and the minimum terms equal to at least 1 year in both states) applies.

3.5 Non-Criminal Sanctions for Legal Persons

As mentioned above in 2.2, there are no administrative sanctions for legal persons for the offence of bribery of a foreign public official.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

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

**Forfeiture**

Article 23 of the APC, which was amended by Law No.25.188, provides for forfeiture upon conviction, which states:

“The conviction entails the loss in favour of the National State, of the Provinces or the Municipalities, except for the compensation rights from the person affected by the offence or other third parties, of the things used in order to commit the crime and the things or benefits which are the product or advantage of the crime.

If those things are hazardous to public safety, forfeiture should be ordered, notwithstanding the affection of third parties, except their right of compensation, if they acted in good faith.

Whenever the perpetrator or accomplices acted on behalf of someone else, or as organs, members or administrators of a legal entity and the product or the advantage of the offence has benefited the principal or the legal entity, forfeiture will be directed towards them.

When the produce or the advantage of the offence would have benefited a third person for free, forfeiture would be headed towards the said person.

If the forfeited good has any useful or cultural value for any official or public welfare entity, either National, Provincial or Municipal authorities can order the goods to be delivered to these entities. If that is not the case, and the goods have commercial value, these authorities may order them to be sold. If the goods are illicit in nature, destruction must be ordered.”

Pursuant thereto, forfeiture of (1) “things” used in order to commit the crime, and (2) “things” or “benefits” which are the product or advantage of the crime, is possible. The former covers the bribe and the latter covers the proceeds of the bribe in respect of the foreign bribery offence (i.e. active bribery). The Argentine authorities confirm that “things or benefits” in the latter include intangible benefits. Moreover, they confirm that bribes in intangible forms are covered by “things” as long as they are of pecuniary nature.

Where “things” are “hazardous to public safety”, forfeiture is mandatory (second paragraph of article 23). However, Argentina states that “thing .. hazardous to public safety” includes those possessions which are hazardous for public safety, such as fire arms, illegal drugs, etc. and would not include bribes or its proceeds.
The Argentine authorities confirm that forfeiture of other “things” or “benefits” under the first paragraph, which is applicable to bribes and its proceeds in respect of the foreign bribery offence, is also mandatory.

Moreover, they confirm that, forfeiture from the legal entity under the third paragraph (i.e. where the offender or the accomplice acted on behalf of a third party or as “organs, members, or administrators” of a legal entity and if it obtained benefit from the offence), is mandatory. According to them, it is sufficient for applying this forfeiture if the natural person (i.e. the briber) is someone who can represent the company in respect of the transactions in question; he/she does not have to be someone in a high managerial position.

The Argentine authorities state that where forfeiture is not possible for the reason that the bribe or proceeds belong to a third party not involved in the offence, an additional fine up to 90,000 Argentine Pesos (article 22 bis of the APC) may be imposed as a monetary sanction of comparable effect.

**Pre-trial Seizure**

Pursuant to article 231 of the Argentine Code of Criminal Procedure, the judge may order seizure of “objects”, related to crime, subject to confiscation or that could be used as evidence. And in “urgent cases”, the police may take such measures. The Argentine authorities confirm that “objects” covers both the bribe and its proceeds in respect of active bribery. Pursuant to article 518, the judge may order seizure of the “goods” of the defendant, or when appropriate, of “that claimed by civil channels” to guarantee the monetary sanction, civil compensation and costs after the approval of the indictment. Where there is a “risk of delay” such measures are applicable before the approval of the indictment.

Civil remedies may be claimed by a “victim” of the offence (article 29 of APC). According to Argentina, such claims, which take place either in the criminal trial or in the civil court after conviction, may be raised by a competitor who lost business or a contract due to the bribery, or by the company to which the briber belongs if it was forfeited of any property due to the bribery, but was unaware of it.

**3.8 Civil Penalties and Administrative Sanctions**

Pursuant to article 136 of the Regulations for Purchase, Transfer, and Contracting Goods and Services with the State of Argentina (Decree No. 436/2000), any person against whom a “legal action has been brought” for an offence including the one included in the OAS Convention may not enter into a contract with Argentina. According to Argentina, no upper limit for the term of this sanction is provided by law. The Argentine authorities state that it is only applicable to natural persons having been indicted or convicted of the offence. Also, it would appear that it does not apply where the act is outside the scope of the OAS Convention.

**ARTICLE 4. JURISDICTION**

**4.1 Territorial Jurisdiction**

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

Article 1.1 of the APC provides for the rules on territorial jurisdiction. Pursuant thereto, the APC applies to offences (a) which are committed in the territory of Argentina or in the “areas subject to its jurisdiction” and (b) the effects of which will take place in the territory of Argentina or in the “areas subject to its
jurisdiction”. Under Argentine law, “areas subject to its jurisdiction” includes on board an Argentine vessels in the high sea or an Argentine aircraft, etc.

The APC does not expressly elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction. However, the Argentine authorities state that territorial jurisdiction is triggered where the offence takes place “partially” in Argentina. They confirm that any action performed toward the accomplishment of an offence would trigger territorial jurisdiction and a telephone call, fax or e-mail emanating from Argentina would be sufficient.

Argentina explains that with respect to foreign bribery, the “effects” could be the undue benefits or contracts obtained in exchange for the bribe. The Argentine authorities confirm that “effects” take place in Argentina not only where the benefits are sent to Argentina, but also where there are “side effects” in Argentina. For instance, Argentina states that it would trigger territorial jurisdiction in the following cases: (1) where the company which benefited from bribing has a branch office or was established in Argentina, and (2) where the contract obtained in exchange of the bribe is executed in Argentina.

4.2 Nationality Jurisdiction and Additional Jurisdiction

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

The APC does not have nationality jurisdiction which applies generally to offences committed abroad. However, pursuant to article 1.2 of the APC, it applies to offences committed abroad where the offence is committed by “agents or employees of Argentine authorities performing their duties”. The Argentine authorities state that this rule applies where the offence is committed by public officials when they are performing official duties abroad. They confirm that “Argentine authorities” include public agencies or public enterprises.

In addition, Argentina is a party to several treaties21, which, according to Argentina, establishes nationality jurisdiction. However, Argentina confirms that these treaties do not apply to establish jurisdiction over Argentine nationals who commit the offence of bribery of a foreign public official abroad.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Argentine authorities state that there are no provisions on the consultation procedures under the Argentine law. However, they state that consultation with Parties is possible through diplomatic channels. However, Argentina has no experience on this matter.

4.4 Review of Current Basis for Jurisdiction

The Argentine authorities state that the territorial jurisdiction under the Argentine legal system is a comprehensive one that it covers all cases that take place totally or partially in Argentina or bring any consequence thereto.

ARTICLE 5. ENFORCEMENT

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

5.1 Rules and Principles Regarding Investigations and Prosecutions

There are no special rules or principles governing investigations and prosecutions of bribery of foreign public officials. The investigation and prosecution of this crime could be initiated, suspended and terminated in the general circumstances provided for in the APC and the Argentine Code of Criminal Procedure.

The principle of mandatory prosecution prevails in Argentina. Pursuant to article 71 of the APC, all criminal actions “must” be brought ex officio except those that must be brought privately, or “private actions” 22 which are not relevant to the foreign bribery offence. Thus, the bribery of a foreign public official is prosecuted ex officio. The Argentine authorities state that law enforcement officers are obliged to initiate proceedings as soon as they have acknowledged that there is a suspicion with probability that an offence has been committed. In addition, pursuant to article 29 of the Constitutional Law of the Office of the Attorney General (Law No. 24.946), which regulates duties of public prosecutors, proceedings for offences prosecuted ex officio shall be instituted immediately after having been notified of it. In addition, pursuant thereto, the proceedings shall not be suspended, interrupted, or terminated unless provided for by law.

Pursuant to articles 186, 188 and 195 of the Argentine Code of Criminal Procedure, the police, prosecutors and judges may receive a notice of an offence committed. If the police or the judge is notified of it, they must inform the public prosecutor of the circumstances in order that he/ she initiates investigative proceedings. If the prosecutor receives the first notice, he/ she must notify the circumstances to the judge. The Argentine authorities confirm that there is no limitation for persons to notify an offence, upon which prosecutors initiate proceedings 23. Thus, a complaint from a competitor is sufficient as such a notification.

Pursuant to article 59 of the APC, criminal proceedings shall be terminated under following circumstances: 1) the death of the accused, 2) amnesty being granted, 3) expiry of the statute of limitations, and 4) a waiver of the prosecution in private legal actions (not relevant to the offence of bribery). The Argentine authorities confirm that these are the only circumstances under which criminal proceedings could be terminated.

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22 The exceptions under articles 72 and 73 include: 1) minor injuries caused by wilful misconduct or negligence, 2) libel or defamation of character, and 3) unfair competition, as provided in article 159.

23 Argentina states that even an anonymous notice would be sufficient.
However, pursuant to the Argentine Code of Criminal Procedure, where the prosecutor decides that (1) there is no criminal offence involved, or (2) there is no merit for trial, the judge may dismiss the case. On the other hand, where the judge considers there is no criminal offence involved the judge may dismiss the case. Prosecutors can appeal this decision. The Argentine authorities state such proceedings for dismissal could take place at any stage of the investigation and the prosecution.

The Argentine authorities confirm that permission or authorisation of the Attorney General is not required for investigation and prosecution of the foreign bribery offence as well as other offences.

5.2 Considerations such as National Economic Interest

Argentina confirms that any considerations of the factors listed in Article 5 of the Convention are excluded in the investigation and prosecution of cases of bribery since as mentioned above in 5.1, criminal proceedings could be terminated only under the circumstances provided for in article 59 of the APC.

ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Statute of Limitations

Argentine penal law provides for limitations periods for every offence, including bribery, and the length of the periods is related to the penalty provided for each offence. Pursuant to article 62 of the APC, for the foreign bribery offence, the limitation period is identical to that of the maximum term of imprisonment. Therefore, it is 6 years for the foreign bribery offence under article 258 bis. The period starts running as of midnight of the date of the commission of the offence. Where the offence is of continuous nature, it starts to run when it is no longer committed. However, the Argentine authorities confirm that the foreign bribery offence is not of continuous nature. According to them, the offence is committed when the act of offering, promising, or giving a bribe takes place.

Article 67 provides for the suspension and the interruption of the limitation period. Pursuant thereto, it is suspended in case of offences “for which a ruling is petitioned for preliminarily or harmful issues, which must be judged in another case”. The Argentine authorities state that this is relevant, for instance, to family matters where a previous “ruling” by a family judge is required before initiating criminal proceedings, but not to the foreign bribery offence.

It is suspended with respect to offences including the foreign bribery offence, insofaras “any of those who had taken part are performing the duties of a public office”. The Argentine authorities state that “those who had taken part” only applies to the offender, and therefore, with respect to the foreign bribery offence, it would only be applicable where the briber himself/herself is an Argentine public official. In such case,

24 Pursuant to article 336 of the Argentine Code of Criminal Procedure, this includes where the person does not possess criminal capacity and where there is a pardon excuse. Argentina states that pardon excuse is applicable to specific offences such as rape, thefts between relatives, etc. and is not relevant to the foreign bribery offence.

25 See article 348 of the Argentine Code of Criminal Procedure.

26 See articles 82, 180 and 195 of the Argentine Code of Criminal Procedure.
the limitation period does not run (i.e. suspends) while the offender remains a public official. There is no upper limit.

In addition, it is interrupted when another offence is committed or “due to the results of the ruling”. The Argentine authorities state that “the results of the ruling” are legal actions that have direct consequence on the proceedings, for example, interrogation of the indicted and a formal judicial indictment. The limitation period is interrupted for as long as these legal actions are being carried out, following which a new limitation period begins.

**Limitation Period for Investigation**

There is a limitation period for investigation superimposed on the statute of limitations. The limitation period is 4 months for concluding the investigation. However, it may be extended due to the complexity or the importance of the case. The Argentine authorities state that cases of bribery of foreign public officials may be included in those considered as complex and/or important which deserve extension. The Argentine authorities confirm that this deadline period could be extended without upper limit until the expiry of the statute of limitations (i.e. 6 years for foreign bribery). Moreover, they confirm that prosecutors are not obliged to conclude investigations within this deadline period and its expiry does not result in terminating the proceedings.

### 7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

**Money laundering offences**

Articles 277-279 of the APC, which were amended by the Statute on Money Laundering (Law No. 25.246), contain the relevant provisions on money laundering in respect of domestic and foreign bribery. Articles 277 and 278 enumerate acts of money laundering, etc. that are punishable thereunder. The Argentine authorities explain that domestic and foreign bribery offences qualify as predicate offences under articles 277-279. However, these articles do not apply to the perpetrator of the predicate offence (i.e. self-laundering).

Article 277.1 states that:

*Any person that, after a crime has been committed, in which he/she has not taken part, may be condemned to a prison sentence from 6 months to 3 years in the following cases:*
  
  (a) Aiding andabetting another party to avoid investigation by the authorities or hindering the procedures of the latter.
  
  (b) Concealing, altering or removing traces, evidence or instruments of the offence or crime or aiding or abetting the perpetrator or accomplice in concealing, altering or removing these items.
  
  (c) Acquiring, harbouring or concealing money, objects or documents obtained from an offence or crime.
  
  (d) Not reporting a crime or not identifying the perpetrator or accomplice that he/she is already aware has taken place, when such person is bound to bring about criminal prosecution for an offence of this kind.

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27 See article 207 of the Argentine Code of Criminal Procedure.
(e) Securing or aiding and abetting the perpetrator or accomplice to secure the product or benefit of the crime.

The Argentine authorities state that “traces, evidence or instruments of the offence” (article 277.1.b), “money, objects or documents obtained from an offence” (article 277.1.c), and “the product or benefit of the crime” (article 277.1.e) include both the bribe and its proceeds including those in intangible forms, in respect of active bribery.

Pursuant to article 277.2, the penalty would double where the perpetrator commits the offence for obtaining monetary benefits or habitually takes part in committing the offence of concealment.

Pursuant to article 278.1.a, a person who converts, transfers, administers, sells, encumbers or uses money or any kind of goods, which in any manner “stem from a crime” is subject to penalty of imprisonment for 2-10 years and a fine of 2-10 times of the amount of such transactions that disguise the illicit origins of the money, etc. where the total amount of transactions exceeds 50,000 Argentine Pesos. The term of imprisonment would be no less than 5 years where the perpetrator carries out such transactions habitually or as a member of an organisation, etc. that continually commits offences of the same nature. Pursuant to article 278.1.c, where the total amount of such transactions is 50,000 Argentine Pesos or less, he/ she is punishable pursuant to the rules under article 277.2. Pursuant to article 278.2, a person who receives “money or other goods” from any illegal source in order to “use them in operation with an apparently lawful purpose” is liable pursuant to the rules under article 277. The Argentine authorities state that this offence is completed where a person receives the proceeds, etc. for the purpose of “laundering” them through transactions to disguise their origin as legal.

The Argentine authorities state that “stem from a crime” (article 278.1) and “money or other goods from any illegal source” (article 278.3) cover both the bribe and its proceeds including those in intangible forms, in respect of active bribery.

Under article 279.3, where a public official, etc. commits an offence under articles 277 or 278.1, when performing his/ her duties, he/ she is subject to “special disqualification” for 3-10 years in addition to imprisonment, etc.

Despite these provisions, article 279.1 states that where the penalties for the predicate offence are less severe than those for money laundering offences under articles 277-279, the penalties for such acts would be reduced to those of the predicate offence.

The Argentine authorities confirm that under these money laundering offences (articles 277-279), the offender must know that the benefit, etc. has a criminal origin; however, he/ she does not have to know that the benefit, etc. was gained through a specific offence.

Article 277.3 provides for a defence, which exempts the offender from liability, where he/ she commits an act enumerated in articles 277.1 and 278 on behalf of his/ her (1) spouse, (2) relative who does not exceed

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28 The Argentine authorities state that where an act is punishable “under the rules of 277”, articles 277.2 and 277.3 also apply.

29 Thus, it appears that under this rule, the penalty for article 278.1.a would be reduced where the predicate offences are the foreign bribery offence (i.e. imprisonment for 1-6 years) and the domestic bribery offences other than the aggravated one under article 258 second paragraph (i.e. imprisonment for 1-6 years, 2-6 years or 1 month-1 year), and the penalties for articles 277.1, 278.1.c and 278.3 would be reduced where the predicate offence is the mitigated domestic bribery under article 259 (i.e. imprisonment for 1 month-1 year) (See the discussion above in 3.1/ 3.2).
the fourth blood relation or second level kinship, (3) “close friend”, or (4) “person for whom special favour is owed”. This defence is not applicable where the act fulfils article 277.1.e or the purpose of the act is obtaining monetary benefits. The Argentine authorities state that one is deemed a “close friend” where the level of intimacy goes beyond a mere friendship. They state that one is deemed a “person for whom special favour is owed” where there is a situation preceding the offence that drives the offender to act in favour of this person. However, they state that these two are “very peculiar, rare cases”.

The Argentine authorities confirm that articles 277-279 apply regardless of where the bribery takes place. However, article 279.4 states that these provisions are applicable even when the predicate offence was committed outside the “special”30 application of this Code, in the case when it “had also been liable to a sentence in the place it was committed” The Argentine authorities state that article 279.4 requires that the predicate offence constitute an offence in the place it was committed (dual criminality). They confirm that this condition is deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute.

The Argentine authorities confirm that an act of self-laundering is not punishable under Argentine law.

Administrative Sanctions

The Statute on Money Laundering (Law No. 25.246) established the Financial Information Unit31 (FIU), which is in charge of requesting and receiving reports of suspicious transactions from several organisations and persons (e.g. financial entities, insurance companies).

Under this law, the FIU is also empowered to impose administrative monetary sanctions when natural or legal persons fail to inform about suspicious transactions or violate the law32. Moreover, the FIU notifies the Attorney General if it suspects an offence.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

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30 The Argentine authorities state that the term “special” (original term “especial”) is a mistake in the enactment. They are planning to amend the law to correct this term to “territorial” (original term “espacial”).

31 In the previous explanation it was translated “Financial Intellectual Unit”.

32 For instance, pursuant thereto, an administrative fine is imposed on legal persons whose agent committed an act enumerated in article 278.1 of the APC. The fine ranges from 2-10 times the value of the operations involved. Where the agent commits the aforementioned act with negligence or recklessness, the legal person is subject to an administrative fine that ranges from 20-60% of the value of the operations involved.
8.1/ 8.2 Accounting and Auditing Requirements/ Companies Subject to Requirements

Accounting Standards

The Argentine authorities state that the Law on Business Associations (Law No. 19.550) provides the general framework, including accounting standards, which companies have to comply with. Pursuant thereto, entities subject to obligations under this law include: general partnerships, statutory limited partnerships, limited liability companies, corporations, and companies registered abroad that establish branch offices, etc. in Argentina. Moreover, the Code of Commerce provides for accounting requirements applicable to “traders”, which is defined in article 1 as “all natural persons, who, having legal capacity to enter into contracts, exercise on their own acts of commerce, in a manner that becomes an usual profession” and to co-operative associations. Foundations, civil associations, mutual associations and public entities (including state-owned or state-controlled companies) are not subject to the requirements under these laws; however, they are subject to accounting standards or governmental supervision under specific law.

Pursuant to article 120 of the Law on Business Associations, entities subject to this law are obliged to have separate accountings, and to submit them to the relevant bodies provided for in the law. Pursuant to article 3 of the Law No. 22.315, corporations (except the ones controlled by the National Securities Commission), savings and loan companies, limited liability companies, etc. submit financial statements to the General Inspectorate of Companies. Moreover, under the Law on Business Associations, joint stock companies and limited liability companies whose stock capital exceeds 2,100,000 Argentine Pesos must submit annual financial statements, which include a balance sheet, profit and loss account and additional notes33 (articles 62-65). The directors of companies must provide information in the annual report on the company situation34 (article 66). In addition, registered offices of companies must keep copies of the balance sheet, profit and loss account and the statement of the net equity evolution, as well as the additional notes and information and make these documents available to partners and shareholders. Furthermore, “copies of the management”, annual reports and the auditor’s report shall also be available “when appropriate” (article 67).

Under the Code of Commerce, all “traders” must report their transactions and keep commercial accounts in which a true description and clear justification for each transaction are recorded (article 43). Traders must keep “book of original entries” and “inventory and balance sheet” (article 44). All transactions shall be entered in the book of original entries on a daily basis in chronological order and balance sheets must reflect a true and accurate financial situation of the company (articles 45, 51). In keeping books, insertion, deletion and modification of entries, etc. are forbidden (article 54). Books “considered as indispensable” under the Code of Commerce shall be submitted to the Companies Registry of the domicile (article 53).

In addition, Argentine law provides for accounting requirements which are applicable to specific categories of entities. For instance, with respect to insurance companies, there are requirements under the Insurance Companies and their Control (Law No. 20.091) to record and keep books, submit annual report, general balance sheet, profit and loss account, etc. to the supervisory authorities and publish annual balance sheet. With respect to financial entities, under the Statute on Financial Entities (Law No. 21.526) and the regulations, accounting records, books, correspondences, documents and papers of the financial entities

33 Additional notes refer to information including criteria used for valuing goods for sale, changes in the accounting procedures from the previous financial year.

34 Such information would include those such as reasons for substantial variations in the asset and liability entries, and explanations regarding the extraordinary expenses and income and their source.
shall be available for auditing, etc. by officers appointed by the Central Bank of the Argentine Republic, which is the supervisory body of financial entities.

The Argentine authorities confirm that pursuant to these requirements, the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents are prohibited.

Argentina states that financial statements and auditor’s report which are submitted to the public supervisory bodies (e.g. the General Inspectorate of Companies) are publicly available.

**Audits**

The Argentine authorities state that in general, entities are subject to auditing requirements under different legal norms. Some of them are subject to internal audits and some of them are to independent audits or external audits, and also to governmental supervision. For instance, corporations are subject to internal audits and those who fulfil one of the conditions under article 299 of the Law on Business Associations (e.g. operate licenses or public services, have a capital stock exceeding 2,100,000 Argentine Pesos) are also subject to governmental supervision. Mutual associations are subject to internal audits and governmental supervision. Cooperative associations and financial entities are subject to external audits and governmental supervision. In addition, financial statements submitted to the General Inspectorate of Companies (see the discussion above under “Accounting Requirements”) must be accompanied by an opinion of a public accountant duly registered.

According to Argentina, with respect to governmental supervisions, the independence of auditors is guaranteed since the auditors are public officials that have no relationship with the audited entity. With respect to “syndics” (i.e. internal auditors), it is guaranteed indirectly, to the extent that he/she will be liable under the APC (article 300.3, see below 8.3 “Penalties”) if he/she authorises, etc. falsification of the company. In addition, the Law on Business Associations contains some provisions on disqualification in case of conflict of interests. Moreover, the Code of Ethics, which is the regulation for accountants, states that, the professionals have to act always with integrity, veracity, independence and objectivity. It also provides for several norms to avoid conflict of interests. Additionally, the Technical Resolution No. 7 of the Argentine Federation of the Professional Council of Economic Sciences states that external auditors must be independent from the entities being audited. It also provides for some cases of conflict of interests where the independence would not be guaranteed.

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35 The Argentine authorities state that insurance companies and financial entities are subject to these requirements in addition to those under the Law on Business Associations.
36 See the Law on Business Associations.
37 See the Law No. 20.321 and the Decree 721/00.
38 See the Law No. 20.337.
39 See the Law No. 21.526 and the Updated Ordered Text of the Accounting Informative System for Quarterly/Annual Publication.
40 See the Resolution 12/86 from the General Inspectorate of Companies.
41 This code was approved by the Professional Council of Economic Sciences.
42 For instance, the auditor’s fees cannot be subject to the result of the report.
Under the Statute on Money Laundering (Law No. 25.246), professionals whose activities are regulated by the Professional Councils of Economic Sciences are obliged to report to the Financial Information Unity (FIU) any suspicious transactions, irrespective of the amount involved\textsuperscript{43}. In addition, auditors are required to report suspected criminal activities to the management of the entity\textsuperscript{44}. However, management is not obliged to report them to the competent authorities. Additionally, under the Law No. 22.315 the General Inspectorate of Companies can report suspected criminal activities and submit complaints to the police authorities, etc.

8.3 Penalties

Article 12 of the Charter of the General Inspectorate of Companies (CGIC) states that “the General Inspectorate of Companies shall impose penalties on the corporations, associations and foundations, on their directors, syndics or administrators and to every individual or entity that does not fulfil its obligation of furnishing information, provides false data or that in any way, infringes the obligations established by law, the by-laws or regulations, or hinders the performance of their duties.” The Argentine authorities confirm that such penalties are applicable to omissions and falsifications in respect of the books, records, accounts and financial statements in accordance with Article 8.2 of the Convention.

Pursuant to article 13 of the CGIC and article 302 of the Law on Business Associations, penalties for corporations and companies organised abroad which ordinarily conduct business in Argentina would be an administrative fine up to 6,801.47 Argentine Pesos or warning, etc. A fine may also be imposed on their directors and syndics. Pursuant to article 14 of the CGIC, penalties for companies engaged in capitalisation and savings transactions, associations and foundations would be an administrative fine up to 115,438,623 Australes\textsuperscript{45} or warning, etc.

In addition, article 300.3 of the APC states that “imprisonment from 6 months to 2 years shall be imposed on the incorporator, director, administrator, liquidator or syndic of a corporation or operating company or another legal person who, knowingly publishes, certifies or authorises an either false or incomplete inventory, balance sheet, profit and loss accounts, or the related reports, minutes, annual reports, or informs at the shareholders’ meeting, falsely or reluctantly, on material events to assess the company’s financial position, whatever the purpose sought when verifying them may be.”

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

\textsuperscript{43} An administrative fine is imposed for violating such obligation. A fine (ranges from 1-10 times the value of the transaction involved in the offence) is imposed by the FIU.

\textsuperscript{44} Argentina states that if the auditor fails to report suspected criminal activities, he/ she may be prosecuted for “concealment”.

\textsuperscript{45} Approximately, 11,543.86 Argentine Pesos (1 Argentine Peso is valued at 10,000 Australes). 1 Argentine Peso is valued at 1 U.S. dollar.
9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1/9.2 Criminal Matters/ Dual Criminality

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

Argentina may provide mutual legal assistance on criminal matters on the basis of bilateral and multilateral treaties to which Argentina is a party.

In the absence of a treaty, Argentina may provide MLA pursuant to the provisions of the International Co-operation in Criminal Matters Act (ICCMA) on the basis of reciprocity. Pursuant to article 68, MLA shall be provided even where the act for which assistance is requested does not constitute an offence in Argentina (non-requirement of dual criminality). However, where the request for MLA involves coercive measures such as search and seizure, surveillance and wire-tapping, etc., provision of the assistance is conditional upon dual criminality. The Argentine authorities confirm that dual criminality is deemed to exist if the offence for which assistance is sought is within the scope of the Convention.

Argentina confirms that it can provide MLA, including coercive measures, in response to a request concerning criminal proceedings against a legal person for an offence within the scope of the Convention.

The Argentine authorities state that the central authority which decides on the action to be taken in response to a request of MLA is the Ministry of Justice and Human Rights or the Ministry of Foreign Affairs. It transfers the request to the competent authorities after analysing “formal aspects” of the request.

Article 74 of the ICCMA states that should the assistance require the participation of a judge, the Attorney General’s Office shall take part in the legal process. The Argentine authorities state that judicial decisions are usually necessary for providing assistance “in most occasions.”

9.1.2 Non-criminal Matters

Argentina is a party to the Civil Procedure Convention and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which, according to the Argentine authorities, are themselves integrated into part of domestic legislation. The Argentine authorities state that under these legal instruments, Argentina may provide mutual legal assistance for non-criminal proceedings. Moreover, they

46 Argentina is a party to the Inter-American Convention against Corruption, Protocol of Mutual Legal Assistance in Criminal Matters of MERCOSUR and Inter-American Convention on the International Return of Children. In addition, Argentina has concluded bilateral treaties on MLA with Australia, Brazil, Columbia, Hungary, Paraguay, Peru, Spain, Uruguay and U.S.A.

47 The forms of MLA that are available in addition to coercive measures include summoning persons, hearing the accused, witness or expert and providing official information or documents.

48 The same procedure applies to MLA on non-criminal matters.

49 According to Argentina, such decisions include a decision on which means to use to provide certain assistance
state that they may provide MLA on non-criminal matters to countries which are party to neither convention on the basis of ICCMA.

The Argentine authorities state that there is no special requirements for providing MLA to other Parties in relation to non-criminal proceedings against a legal person for the purpose of establishing its liability or imposing on it sanctions for the bribery of a foreign public official. According to Argentina, it is possible to use coercive measures to provide assistance via the decision of a judge.

9.3 Bank Secrecy

Under article 39 of the Law No. 21.526, “institutions shall not disclose information on transactions of their clients. However, it also states that where judges require information regarding “legal matters” in accordance with the relevant legislation, bank secrecy rules may be relaxed in order to provide reports. The Argentine authorities confirm that this covers obtaining information regarding bank accounts such as the account holder’s name and the details of transactions.

The Argentine authorities confirm that “legal matters” include proceedings for providing MLA in relation to non-criminal proceedings against a legal person for bribery as well as in relation to criminal proceedings. In addition, it is also possible to provide information to the General Taxation Bureau for tax purpose where there is a decision of the judge to disclose the information. The Argentina authorities confirm that there are no additional conditions to be met in order for the judge to require such information.

Moreover, Argentina states that the judge may order coercive measures for obtaining information.

10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/ Legal Basis for Extradition

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

Argentina may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral or multilateral treaties, or on the basis of reciprocity under the provisions of the ICCMA where there is no applicable treaty.

The procedure in response to the request for extradition involves the following three steps:

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50 Pursuant to article 2 of the Law No. 21.526, institutions subject to bank secrecy are commercial banks, investment banks, mortgage banks, finance companies, savings and loans corporations for housing or other real property and credit unions.

51 Argentina is a party to Treaty on International Criminal Law, Montevideo, 1889, Inter-American Convention on Extradition, Inter-American Convention against Corruption, Rome Statute of the International Criminal Court and several other multilateral treaties on extradition in respect of other specific offences. In addition, Argentina has concluded bilateral treaties on extradition with Australia, Belgium, Bolivia, Brazil, Chile, Italy, Korea, Netherlands, Paraguay, Portugal, Spain, Switzerland, UK and Ireland, and U.S.A.
1. The Executive Power decides whether to “accept” the request for extradition. Pursuant to article 23 of the ICCMA, it may accept the request where: (i) the crime for which the extradition is requested is punishable with a higher penalty, falls within the jurisdiction of the requesting state but not of Argentina, or (ii) the requesting state is in a better position to obtain evidence of the crime. According to Argentina, this decision is appealable. Argentina states that it determines whether the condition of “higher penalty” is met by comparison between the maximum terms of penalties.

2. The court decides whether to grant extradition pursuant to the conditions set forth in the ICCMA. According to Argentina, this decision is appealable.

3. The Executive Power makes a final decision. Argentina confirms that this decision is also appealable.

In addition, as mentioned above (see 3.4 “Penalties and Extradition”), pursuant to article 6 of the ICCMA, the act for which extradition is sought must constitute an offence subject to certain term of imprisonment in both Argentina and the requesting state. Where the purpose of the extradition is to execute a sentence imposed on the person in question, the sentence to be served shall be imprisonment for no less than 1 year.

Moreover, articles 8, 10 and 11 of the ICCMA provide for circumstances under which extradition shall not be granted. Such circumstances are in particular:

- the offence for which extradition is sought is of a political nature\(^{52}\) (article 8.a);
- the person was prosecuted in the requesting state by a “special committee”\(^{54}\) in contravention of section 18 of the Argentine Constitution (article 8.c);
- there are “special reasons of national sovereignty, security or public order or other interests essential to Argentina” (article 10). Argentina confirms that this does not include protection of national economic interests;
- criminal proceedings or the imposition of the penalty against the person in question is no longer possible under the law of the requesting state (article 11.a);

10.3/10.4 Extradition of Nationals

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

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\(^{52}\) Other circumstances under which extradition shall be refused are: (i) the offence is a military offence, (ii) there is sufficient evidence that extradition is sought for persecution for the reason of political beliefs, nationality, race, gender, etc., or there are grounds to assume that his/ her rights to defence may be endangered for such reasons, (iii) there are grounds to believe that the person may be subject to torture or other inhuman or degrading treatments, (iv) the penalty for the offence for which extradition is sought in the requesting state contains capital punishment and the state does not guarantee such punishment would not be imposed, (v) criminal proceedings have been concluded concerning the same act committed by the same person, (vi) the sentence for the execution of which the extradition is sought was imposed by default judgement and the requesting state does not guarantee to re-open the proceedings for the person in question to guarantee his/ her rights to defence, and (vii) the requesting state does not guarantee that the term of detention during the extradition process would be taken into account when executing the penalty.

\(^{53}\) The Argentine authorities does not consider the bribery of a foreign public official who holds a political office as of “political nature”.

\(^{54}\) According to Argentina, “special committee” refers to “courts ad hoc”, those not included in the established legal order.
Pursuant to article 12 of the ICCMA, where extradition of an Argentine citizen is requested, he/she may choose either to be extradited or to be tried in Argentina unless applicable treaty provides otherwise. Where he/she chooses to be tried in Argentina, extradition shall be denied. However, in that case, he/she shall be tried in Argentina as far as the requesting state co-operates to decline its jurisdiction over him/her and transfers relevant evidence, etc.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

As mentioned above, dual criminality is required for extradition. However, the Argentine authorities consider it to be fulfilled if the offence for which extradition is sought is within the scope of the Convention if the requesting party has implemented the Convention. Moreover, where the requesting party has not implemented the Convention, the Argentine authorities consider it to be fulfilled if the act is unlawful where it occurred, even if under a different criminal statute.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

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

Argentina has not notified of the Secretary-General the responsible authorities.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

TAX DEDUCTIBILITY

Argentina confirms that it has never allowed tax deductibility of bribes. The Income Tax Law, which is applicable to taxation of both natural and legal persons provides for lists of deductible and non-deductible expenses. Neither list expressly refers to bribes. The Argentine authorities state that deductible expenses are only the ones that are enumerated in the Income Tax Law. However, it is not clear from the provisions whether bribes are excluded from the deductible expenses enumerated in the Income Tax Law. In particular:

55 Cited below are the provisions which appear to require clarification on whether or not they could include bribes.

Section 87

The following may also be deducted from the third category income with the limitations provided herein:

a. The expenses and other expenditures inherent to the course of business.

e. The commissions and expenses incurred abroad as mentioned in section 8, to the extent that they are fair and reasonable.

i. The entertainment expenses actually incurred and duly evidenced in up to an amount equivalent to ONE POINT FIFTY (1.50%) of the total amount of remunerations paid to employees in the tax period.
1. “the expenses and other expenditures inherent to the course of business” (section 87.a). The Argentine authorities confirm that bribes are not included therein;

2. “the commissions and expenses incurred abroad as mentioned in section 8 to the extent they are fair and reasonable” (section 87.e). The Argentine authorities state that these are export and import operation expenses, in order to obtain income subject to taxation. They state that since section 8 does not refer to bribes, they are excluded from this;

3. “the entertainment expenses.. up to an amount equivalent to 1.50 % of the total amount of remunerations paid to employees” (section 87.i). The Argentine authorities state that these may include travel, gratuitous receptions or gifts according to article 141 of the “implementing Decree 1344/98”;

4. “gifts to national, provincial and municipal tax authorities and to institutions contemplated in section 20.e” (section 81.c). They state that some terms were translated inappropriately (the precise translations are: “donations or grants” instead of “gifts”, and “treasury” instead of “tax authorities”);

5. “the properly evidenced losses, .. resulting from crimes committed against the taxpayers’ operating assets by their employees, to the extent they were not covered by insurance or compensation” (section 82.d). The Argentine authorities state that this item would not cover bribes. Moreover, they confirm that even in the case where management of a legal entity is unaware of bribery by an employee, the legal entity must firstly sue the employee for damages (or losses) in order to remedy them; it does not allow remedies through tax deduction instead of civil compensation.

As regards these expenses, Argentina confirms that bribes are excluded from their scope. However, no case law has been submitted to support such interpretation. Moreover, there remains some uncertainty as to whether bribes could be deducted if they are disguised as expenses (e.g. the entertainment expenses) and how it would be determined in practice whether certain expenditure is a legitimate commission or a bribe.

Moreover, the Argentine authorities state that under Argentine tax law, only the income from legal activities is taxable. They further state that therefore, it is not possible to deduct bribes neither as net losses from unlawful operations as provided for in section 88.j (“Irrespective of the categories, the following items shall not be deductible: .. j. The net losses resulting from unlawful operations.”), nor as expenses.

Section 81

The following may be deducted from the fiscal year’s income, whatever the source of income may be and with the limitations provided herein:

c. Gifts to national, provincial and municipal tax authorities and to institutions contemplated in clause e) of section 20, made under the conditions established by the regulations and up to the FIVE PERCENT (5%) limit of the fiscal year’s net income. The regulations shall also establish the procedure to be followed when the gifts are made by partnerships.

Section 82

The following may also be deducted from the first, second, third and fourth category income, with the limitations provided herein:

4. The properly evidenced losses, in the Tax Authorities’ (DIRECCION GENERAL IMPOSITIVA) opinion, resulting from crimes committed against the taxpayers’ operating assets by their employees, to the extent they were not covered by insurance or compensations.
This explanation raises a doubt as to the taxability of proceeds of a bribe since proceeds of a bribe are derived from an “unlawful” activity of bribery. Argentina confirms that proceeds of a bribe are taxable since despite their criminal origin, proceeds are derived from legitimate activities such as valid contracts. However, there is no provision in the tax law which determines whether certain income producing activities could be “legal” for the purpose of taxation.

Argentina states that Argentine tax authorities are sufficiently empowered to inquire whether a certain expense constitutes a bribe. According to the Argentine authorities, for the tax authorities to refuse the deduction of an expense, it is sufficient that there is a suspicion that it might be a bribe.

In Argentina, public officials, including tax authorities are obliged to report suspected criminal activities to the “judiciary” (article 177 of the APC). Pursuant to the Decree 1162/00, public officials comply with such obligation under article 177 of the APC, if they report suspected criminal activities to the Anticorruption Office, which is in charge of (1) investigation of corruption within public administration, and bringing the case before the court, and (2) improving transparent public management, etc.
EVALUATION OF ARGENTINA

General Remarks

The Working Group commends the Argentine authorities for their excellent co-operation during all stages of the examination. In particular, the Working Group appreciates the thoroughness of Argentina’s responses and timeliness in providing translations of all the relevant legislation.

Argentina made an amendment to the Argentine Penal Code (APC) which establishes under article 258 bis, the offence of bribing a foreign public official, in order to implement the Inter-American Convention against Corruption (the OAS Convention). The Working Group based its evaluation on this existing law and considered that as concerns the specific elements of the offence identified below, it does not fully conform to the standards of the OECD Convention. In particular, the Working Group notes that the existing law lacks an effective liability of legal persons. The Working Group noted that a draft bill has been prepared to specifically implement certain provisions of the Convention, particularly some of the elements of the offence and the definition of foreign public official. It urged the Argentine authorities to introduce its implementing legislation into Congress as soon as possible to address these issues, so as to fully comply with all of the Convention’s requirements. As has been the practice of the Group, it will review the new legislation once it has been enacted.

Specific Issues

1. Elements of the Offence

Article 258 bis of the APC does not address certain elements of the offence of the bribery of a foreign public official and as such does not fully comply with the Convention. These elements are:

(i) Definition of Foreign Public Official

The Group expressed concerns about the possible non-autonomous definition of foreign public official in the existing Argentine law. It noted the explanation of the Argentine authorities that the draft bill would introduce an autonomous definition of foreign public official. In particular, the Group noted that article 258 bis of the APC applies only to the bribery of a public official from “another State”. Therefore, the current Argentine legislation does not criminalise the bribery of agents, etc. of international organisations and public officials of organised foreign area or entity.

(ii) Third Parties

Article 258 bis does not expressly apply to the case where the bribe is for the benefit of a third party. The Argentine authorities explain that, despite the lack of case law, it would cover the case where the third party is “someone in public official’s intimate circle”. They further state that: (1) it requires proof of the fact that the advantage is given, etc. to the third party to benefit the public official. Thus, “someone in public official’s intimate circle” is required to be someone who shares patrimony with the public official or someone who has high level of intimacy with him/her (e.g. mistress, close friends); and (2) it does not cover the case where an advantage goes directly to a third party.

(iii) In order that the official act/ refrain from acting in relation to the performance of official duties

Article 258 bis does not cover the case where the briber’s intent is to induce the public official’s act/ omission which is not within his/her competence, but is in relation thereto. However, Argentina explains...
that there is a possibility that the court may interpret the law to cover the case where the briber gives a bribe to a public official to induce him/her to exert his/her influence on another public official which is outside the scope of his/her duties.

The Argentine authorities acknowledge that these issues are not fully covered by their legislation, but informed the Group that these issues will be addressed once the draft bill is enacted.

2. Responsibility of Legal Persons

The Argentine legal system does not provide for criminal liability of legal persons for the offence of bribery. However, the Argentine authorities explain that Argentine law contains several legal instruments that enable it to impose the following administrative sanctions on legal persons involved in the foreign bribery offence: (1) administrative fines are available where the case is connected with violation of anti-trust law, customs law, foreign exchange law, tax law, or money laundering law; and (2) administrative fines or dissolution is available under the Charter of the General Inspectorate of Companies (or other related laws, such as the Law on Business Associations) where the natural person acts beyond the scope of the charter of the company including bribing a foreign public official. Thus, the Argentine authorities are of the opinion that the current Argentine legislation complies with the requirements of the Convention.

However, some issues of concern have been identified. Firstly, the fines in connection with the violation of several aforementioned laws could be applicable only where the act in question violates one of these laws. Thus, it is not applicable to the offer or the promise of a bribe. Moreover, this would not allow for imposing sanctions on legal persons for the commission of the offence of foreign bribery in addition to those for these violations. Secondly, although these sanctions are also applicable to domestic bribery cases, Argentina explains that there has been no case where dissolution is applied in connection with economic transactions including domestic bribery. Thirdly, the amount of the administrative fine under the Law on Business Associations is quite low (e.g. up to 6,801.47 Argentine Pesos for companies in general, 1 Argentine Peso is valued at 1 U.S. dollar), or is only applicable to very limited category of legal persons (e.g. 1,000-5,000,000 Argentine Pesos for companies which make public offers).

3. Imprisonment sanctions for natural persons

The sanctions under article 258 bis for foreign bribery offences are imprisonment of 1-6 years including perpetual disqualification to hold a public office. With respect to the domestic bribery, the sanctions are imprisonment of 1-6 years for the principal offence, 2-6 years or 3-10 years for the aggravated offences (e.g. bribery of a judge, the offender is a public official). There is no aggravated offence for the foreign bribery. However, the Argentine authorities explain that the imprisonment sanction for the foreign bribery offence is “reclusion” which is a more severe penalty than “prison” which applies to the domestic bribery offences. The significant differences between the two different imprisonment penalties are (1) suspension of imprisonment is available only with “prison” of less than 3 years, and (2) probation including suspension of judicial proceedings is possible only with “prison”.

4. Jurisdiction

Argentina does not establish jurisdiction over its nationals who commit this offence abroad unless they are Argentine public officials. There is no nationality jurisdiction in general with respect to all offences unless provided in treaties. The Working Group noted this conforms to the requirement of Article 4.2 of the Convention. However, the Group recommends that, in light of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue should be examined on a horizontal basis in Phase 2.
5. Tax Deductibility

Argentina states it has never permitted tax deductibility of bribes. Argentine tax law provides for lists of expenses which are deductible and non-deductible. Bribes are not expressly covered by either of them. The Argentine authorities explain that only the income from legal activities is taxable. Therefore, it is not possible to deduct neither “net losses resulting from unlawful operations” (section 88.j) nor the bribes as expenses. No case law has been submitted to support such interpretation.

The Working Group expressed some concerns that bribes might be deducted if they are disguised as: (1) “the expenses and other expenditures inherent to the course of business” (section 87.a), (2) “the entertainment expenses .. up to an amount equivalent to 1.50 % of the total amount of remunerations paid to employees” (section 87.i), which include travel, gratuitous receptions or gifts, and (3) “the properly evidenced losses, .. resulting from crimes committed against the taxpayers’ operating assets by their employees, to the extent they were not covered by insurance or compensation” (section 82.d). In addition, the Working Group remains uncertain how it would be determined in practice whether a certain expenditure is a legitimate commission or a bribe. Therefore, the Group recommends that these issues be monitored in Phase 2.
DENMARK

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Denmark signed the Convention on 17 December 1997. On 30 March 2000, the Danish Parliament passed the necessary amendments to the Danish Criminal Code in order to be able to ratify and implement the Convention. The implementing legislation (Act No. 228 of 4 April 2000) entered into force on 1 May 2000, and the instrument of ratification was deposited with the OECD on 5 September 2000.

Convention as a Whole

The Danish Act No. 228 made active bribery of foreign public officials and officials of international organisations (OECD, EU, NATO, UN, etc.) a criminal offence equivalent to bribery of Danish public officials. Furthermore, passive bribery by foreign public officials and officials of international organisations became a criminal offence on the same terms as those applying to Danish public officials. Responsibility of legal persons (companies, etc.) has been introduced as concerns active bribery in the public and private sector, and the application of the offence of receiving stolen goods (section 284) has been extended to the profits from active and passive bribery of public officials in Danish, foreign and international offices or functions.

Act No. 228 constitutes a general initiative towards strengthening the combating of bribery involving foreign public officials and officials of international organisations, etc. as it implements several conventions on combating bribery, including the OECD Bribery Convention, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, the Joint Action of 22 December 1998 adopted by the Council on the basis of Article K3 of the Treaty on European Union on corruption in the private sector, the European Criminal Law Convention on Corruption, and the Agreement Establishing The Group of States Against Corruption (the GRECO Agreement).

Denmark has a "dualistic" system under which international agreements to which Denmark becomes a party are not automatically incorporated into domestic law. When Denmark wishes to adhere to an international agreement it must, therefore, ensure that its domestic law is in conformity with the agreement in question. It is, however, not disputed that international law, including conventions, is a relevant source of law in Denmark.

An understanding of two very important legislative principles assists in analysing the implementation of the Convention by Denmark. Firstly, Danish criminal legislation is not characterised by lengthy explanations and the presence of details and definitions. Secondly, the travaux préparatoires regarding any given bill are generally used to provide the details not contained in the legislation, and are considered by the courts to carry a high degree of legal weight.

The Danish authorities explain that the Convention has not yet been applied to Denmark’s dependent territories, Greenland and the Faroe Islands. The offence cannot be applied with respect to them until the home-rule authorities have held hearings on the matter. Greenland is currently in the process of revising its Criminal Code and is reviewing the foreign bribery offence as part of this process. The Danish
authorities anticipate that Greenland will have the same offence as Denmark within 2 to 3 years. Since the Faroe Islands are in the process of negotiating independence, it is more difficult to predict when the offence will have been incorporated into their laws.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

Under Danish criminal law, active bribery of persons exercising a public office or function is an offence under section 122 of the Criminal Code. The provision formerly only covered persons exercising a Danish public office or function. The offence of bribery of persons exercising a public office or function now applies irrespective of whether the office or function is Danish, foreign or international. In addition, the previous requirement that the public official commit a breach of duties has been replaced with the term “unlawfully” (ubertigtet).

Section 122 of the Criminal Code reads as follows:

“Any person who unlawfully grants, promises or offers some other person exercising a Danish, foreign or international public office or function a gift or other privilege in order to induce him to do or fail to do anything in relation to his official duties shall be liable to a fine, simple detention or imprisonment for any term not exceeding three years.”

1.1 The Elements of the Offence

1.1.1 any person

Section 122 covers any person irrespective of nationality.

1.1.2 intentionally

According to section 19 of the Criminal Code, only acts committed intentionally are punishable, unless expressly provided otherwise. Pursuant to the Danish authorities, “intent” comprises direct intention, advertent negligence (probability intent) and malice (dolus eventualis).

The Danish authorities point out that expert reports related to the draft Criminal Code 1930 included definitions of “intention”, which clarify that “intention exists when the actor knows that his act will lead to the fulfilment of the requirements of the law for the offence (actus reus), or when he sees the occurrence of the offence as necessary or predominantly probable consequence of the act, or finally when he only sees the occurrence of the offence as possible but would have acted even if he had seen it as certain.”

Although this definition was not incorporated into the Criminal Code, it is the view of the Danish authorities that it serves as a useful summary of what is demanded under Danish law for criminal intention.

1.1.3 to offer, promise or give

Section 122 covers any person who “grants, promises or offers” a bribe to a public official. The Danish authorities confirm that they consider “grants” and “gives” to have the same meaning.
1.1.4 any undue pecuniary or other advantage

Application of Term “Gift or Other Privilege”

Section 122 comprises a “gift or other privilege”. According to the Danish authorities, this term includes both pecuniary and non-pecuniary advantages, such as the promise of personal return services. They state that the travaux préparatoires confirm that the offence is not restricted to the obtaining of a financial gain. However, they are not certain whether favourable publicity would be covered. The Danish authorities confirm that the term “privilege” may be an inaccurate translation of the Danish “fordel”, which is best translated as “advantage”.

Application of Term “Unlawfully”

Section 122 of the Criminal Code applies to any person who “unlawfully grants, promises or offers” a gift, etc. The Danish authorities provide that, in fact, “undue” or “unjustified” is a closer translation to the term in the Danish language (ubertaget). They further provide that it is not an additional requirement that the act or omission of the public official that is sought to be induced involve any breach of duty or that the bribery has any such intent. The travaux préparatoires concerning section 122 provide the following general comment on this aspect of the amendment:

“…it [was] proposed to amend the description of the action of active bribery, deleting the requirement that the gift or the privilege must have been granted, promised or offered to make the public official commit a breach of duty. Instead, an express reservation is inserted to the effect that the bribery is only an offence if it is an “unlawful” grant (promise or offer) of a gift or other privilege. Compared with the present delimitation of the offence of bribery in section 122, the amendment will involve a minor extension of the criminal scope.”

Although there is no case law concerning the interpretation of the term “unlawfully” in relation to bribery, the Danish authorities have explained that an exclusion from the offence of bribing a foreign public official exists in the following circumstances:

1. Usual gifts in connection with anniversaries, resignation, etc.

2. A grant of a gift as a reward for an act already carried out without any advance promise. The Danish authorities confirm that this exclusion only covers “ordinary” (small) gifts that do not involve a risk of affecting the performance of the official duties of the public official. They state that if a gift is an implicit bribe for possible future acts of the foreign public official, an offence is committed.

3. The travaux préparatoires provide for an exception in the following circumstances:

   Even though the actus reus of the proposed amendment is the same as bribery of foreign public officials, etc., as bribery of Danish public officials, it cannot be precluded that in some countries such very special conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark. This might even be imagined although the gratuities may have been granted to make the foreign public official act in breach of his duties. Whether such occurrences are non-criminal (not “unlawful”) must depend on a concrete assessment in each case, including an assessment of the purpose of granting the gratuity.
Denmark explains that this is meant to exclude “small facilitation payments” as contemplated in Commentary 9 on the Convention, and that “small facilitation payments do not—and should not—fall outside the scope of section 122 irrespective of local custom”. It would appear that this exclusion, which is not contained in the law, does not adequately qualify the application of the exception for small facilitation payments especially concerning the relevance of the “situation” in the country of the foreign public official and the absence of limits on the discretionary nature and legality of the reciprocal act of the foreign public official. In addition, it is not clear that the exception would consistently be interpreted in accordance with the Convention in the following respects:

i) Contrary to Commentary 7, the perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage, would appear to be relevant considerations.

ii) The Danish authorities state that, with respect to Commentary 8, an advantage permitted or required by the written law, etc. would “most likely not be considered unlawful”. It is difficult to know with certainty how Commentary 8 will be interpreted by the courts, in view of the lack of a statement in the Danish law with respect to it, and in light of the lack of certainty on the part of the Danish authorities.

The Danish authorities confirm that an offence is committed whether or not the company concerned was the best-qualified bidder or was otherwise a company which could properly have been awarded the business (Commentary 4).

The Danish authorities direct attention to the statement in the travaux preparatoires that the reservations concerning the term “unlawfully” must be interpreted narrowly in accordance with the “underlying convention”.

1.1.5 whether directly or through intermediaries

Section 122 does not expressly apply to bribes through intermediaries and there is no case law that indicates the offence applies in this manner. However, the Danish authorities explain that the offence applies where a person bribes a foreign public official through an intermediary. They are certain that such bribes are covered because of the application of the law on complicity, which provides under section 23 of the Criminal Code that any person who has contributed to the execution of a wrongful act by instigation, advice or action, is liable to a penalty according to the same rules as the principal offender. According to the Danish authorities, complicity may apply both in relation to the planning of the bribery and the actual execution thereof. It is the view of the Danish authorities that it is irrelevant whether the person contributing to the bribery can expect to get a share in the advantage intended to be gained from the bribery. However, the fact that the contributor gets a share may constitute an aggravating circumstance in determining the penalty.

The Danish authorities provide that Danish criminal law does not make specific distinctions between principals, participators and other parties to the crime. Once a crime has been committed, all the involved persons are liable to punishment regardless of how close their participation was to the actus reus, as long as their acts (or omissions) fall within the wording of section 23.

According to the Danish authorities, neither section 122 nor section 23 requires that the foreign public official is aware of the fact the intermediary acts for the (principal) briber.

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1 See section 3.2 below.
1.1.6 to a foreign public official

Section 122 applies to bribes to a person “exercising a Danish, foreign or international public office or function”. None of these persons is defined in the Criminal Code, and a relevant definition does not exist elsewhere in the law. The Danish authorities explain that the relevant terms are defined throughout the travaux préparatoires. For instance, at one point therein the following definition is provided:

The expression “foreign public office or function” aims at public offices or functions in another EU Member State, among others. However, the provision can also be applied in relation to non-members of the European Union. Foreign public offices or functions include persons who exercise a public function for another country, including for a public agency or a public enterprise, cf. Article 1(4)(a) of the OECD Bribery Convention. The term “international public office or function” includes offices and functions with the European Communities, and can therefore be applied in relation to Community officials. Furthermore, the provision can be applied to bribery of EU Commissioners, members of the European Parliament, the European Court of Justice, and the Court of Auditors of the European Communities. The provision can also be applied to other international public offices, for example with the Council of Europe, NATO, the OECD and the United Nations.

The Danish authorities provide that in various other parts of the travaux préparatoires this definition is supplemented, covering various categories of public officials in the following manner:

- The term “public office” includes judges and other staff of the judiciary.
- Employment with the central administration is also included regardless if the employee is involved in making decisions or administrative functions. According to the Danish authorities, the specific nature of the employment or the function is of no importance to the application of section 122.
- The Danish authorities confirm that the term also covers a public agency or a public undertaking. They explain that the term “public agency” includes any central or local government administrative entity. They also explain that the term “public undertaking” includes state enterprises and other publicly owned entities.
- The Danish authorities also confirm that the term “public office” includes all levels and subdivisions of government, from national to local.
- According to the Danish authorities, the term “public function” covers cases where the function is based on election as well as cases where the function is based on contract or service in pursuance of duty. Therefore, members of the Danish Parliament are encompassed by this term. In view of the Danish authorities, the exercise of a “public function” also includes cases where functions are exercised on behalf of the public in undertakings organised as companies engaged in commerce or industry. The Danish authorities confirm that members of local, regional, foreign and supranational Parliaments are covered.

The Danish authorities further provide that the definition of the term “public office”, which is used in several places in the Criminal Code, is the definition generally applied in Danish law. Thus, at least with respect to domestic public officials, the term has a generally understood interpretation. With respect to persons exercising a foreign office under section 122, the Danish authorities explain that in interpreting this term, a court would look at the definition in the travaux préparatoires. Despite the non-autonomous nature of the definition, they are confident that every category of foreign public official covered by the Convention would be covered by section 122.
1.1.7 for that official or for a third party

Section 122 of the Criminal Code does not expressly apply where the advantage is for a third party. The Danish authorities state that the offence applies regardless if the advantage is intended to benefit someone other than the public official (e.g. his/her spouse, children or others). They confirm that the case would be covered where an agreement is reached between a briber and a foreign public official to transmit the bribe directly to a third party. Although there is no case law on this issue, Denmark explains that the academic literature leaves no doubt that the offence covers such cases, and that this interpretation of the law is re-stated in the *travaux preparatoires*.

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

Section 122 requires that the offender induce the public official to do or omit to do anything in relation to his/her official duties. According to the Danish authorities, it is not an additional requirement that the act or omission sought to be induced by the public official will involve any breach of duty or that the offender has any such intent. The Danish authorities further declare that it is of no importance whether the act or omission sought to be induced by the bribe falls within or outside the said public official’s competence.

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

Section 122 is not limited in application to bribes for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business.

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Pursuant to section 23 of the Criminal Code, the penalty provided in respect of an offence applies to every person who has contributed to the execution of the wrongful act by instigation, advice or action. The Danish authorities confirm that any form of complicity, including incitement, aiding and abetting or authorisation, would be covered.

Unless provided otherwise, the penalty for participation in offences that are not punishable more severely than with simple detention may be remitted pursuant to subsection 23(3), if the accomplice only intended to give assistance of minor importance or to strengthen an intention already existing, or where his/her complicity is due to negligence. The Danish authorities clarify that this provision is not applicable in the case of bribery of foreign public officials.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

*Conspiracy*

According to the Danish authorities, Danish criminal law does not include the concept of “conspiracy”.

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**Attempt**

Section 21 of the Criminal Code deals with the attempt to commit an offence, including bribery pursuant to section 122. Accordingly, acts that aim at the promotion or accomplishment of an offence are punishable as attempts when the offence is not completed. Attempts involving complicit acts are also covered by this provision.

Pursuant to subsection 21(2), the punishment prescribed for the offence may be reduced in the case of an attempt, particularly where there is evidence of little strength or persistence in the criminal intention. According to subsection 21(3), unless provided otherwise, an attempt shall only be punishable if a penalty more severe than simple detention is prescribed for the offence.

Pursuant to the Danish authorities, the offence of bribery is accomplished when the bribe is promised or offered to the foreign public official irrespective of whether he or she actually receives the bribe. If the bribe is sent to the foreign public official without prior promise or offer – but never reaches him or her – this constitutes attempted bribery.

2. **ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

2.1 **Criminal Responsibility**

The Danish Criminal Code provides no general authority to punish legal persons for violation of the Criminal Code or other legislation. However, Part 5 of the Criminal Code (sections 25 to 27) contains general supplementary provisions on the criminal responsibility of legal persons, laying down detailed conditions for imposing such responsibility where specific legislation so provides.

Act No. 228 introduced subsection 306(1) into the Criminal Code in order to satisfy Article 2 of the Convention. The Danish authorities provide that this provision provides for the possibility of applying criminal responsibility on legal persons (companies, etc.) under the rules of Part 5 of the Criminal Code in respect of an offence under certain provisions of the Criminal Code, including section 122.

Subsection 306(1) reads as follows:

*Criminal responsibility can be imposed on companies, etc. (legal persons) under the rules of Part 5 in respect of violation of section 122, 289 a or 299(ii), second indent.*

**Discretionary Nature of Criminal Responsibility of Legal Persons**

The responsibility of legal persons under the Criminal Code for an offence contrary to section 122 is discretionary. Moreover, the discretion in this regard is not limited (e.g. by guidelines) under the law. The Director of Public Prosecutions has issued guidelines that provide some relevant rules, although these are not binding on the courts. For instance it shall always be the priority to pursue the legal person and also the natural person if the crime is committed intentionally or involves a person performing a managerial function. The Danish authorities indicate that where criminal liability is applicable under other criminal
statutes, such as the Environmental Code and the Industrial Safety Code, the practice has been to prosecute legal persons as a general rule.

**Standard of Liability**

The Danish authorities indicate that since subsection 306(1) covers crimes that are only punishable when committed intentionally, criminal responsibility of the legal person can only be triggered where one or more (identified) natural persons within the company, etc., have intentionally committed bribery. A prior conviction of the natural person(s) is not necessary. However, during the trial of the legal person, it must be proved that the natural person(s) within the company intentionally committed the crime. The Danish authorities explain that it is generally the case that the legal person and the natural person are tried together in the same proceeding, but it is possible to try the legal person in an independent proceeding. Furthermore, they state that responsibility of the legal person does not preclude the personal responsibility of the natural person who intentionally violated the relevant provisions of the Criminal Code.

The provisions of the Criminal Code that describe the standard of liability for legal persons are contained in Part 5 (sections 25-27) and read as follows:

**Section 25**

A legal person may be punished by a fine, if such punishment is authorised by law or by rules pursuant thereto.

**Section 26**

(1) Unless otherwise stated, provisions on criminal responsibility for legal persons etc. apply to any legal person, including joint-stock companies, co-operative societies, partnerships, associations, foundations, estates, municipalities and state authorities.

(2) Furthermore, such provisions apply to one-person businesses if, considering their size and organisation, these are comparable to the companies referred to in subsection (1) above.”

**Section 27**

(1) Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself.

(2) Agencies of the state and of municipalities may only be punished for acts committed in the course of the performance of functions comparable to functions exercised by natural or legal persons.

With respect to the limit under subsection 26(2) concerning the liability of one-person businesses, the Danish authorities explain that in the comments to the Bill that introduced sections 25 to 27 into the Criminal Code, it is stipulated that the provision only covers individually owned businesses with 10 to 20 employees or more. They confirm that other considerations such as the volume of sales and profits would also be relevant.

Subsection 27(1), which makes criminal responsibility of a legal person conditional upon “a transgression having being committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself”, does not, according to the Danish authorities, restrict the
application of the offence to high level employees and persons with managerial responsibilities. They indicate that the person responsible for the bribe does not have to be formally employed by the legal person, and that a contractual relationship (e.g. an agent) would be sufficient.

With respect to the limit under subsection 27(2) on the liability of “the state and of municipalities”, Denmark states that such entities may only be punished for “crimes committed outside the exercise of public authority”. They confirm that this means that the criminal liability of state-controlled or state-owned entities is only available in relation to entities performing the kind of function normally performed in the private sector (e.g. telecommunications, public transport).

Moreover, Denmark provides that “the legal person may be held responsible even if the employee acted in conflict with explicit instructions from management, but totally abnormal actions exempt the legal person from responsibility”. “Totally abnormal actions” are described as “extreme situations”, that, according to the Danish authorities, are not relevant to the offence of bribing a foreign public official.

2.2 Non-Criminal Responsibility

The Danish authorities confirm that there is no non-criminal responsibility of legal persons concerning bribery of foreign public officials.

3. ARTICLE 3. SANCTIONS

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

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

According to section 122, the punishment for the offence of bribery of public officials is a fine, simple detention or imprisonment for up to 3 years. Simple detention is imposed from seven days to six months. Imprisonment is imposed for 30 days as a minimum. The punishment for the passive bribery of a domestic or foreign public official is, pursuant to section 144, simple detention, imprisonment for up to 6 years or, in mitigating circumstances, a fine. Penalties for other similar offences include a maximum of 8 years of imprisonment for fraud in aggravated circumstances, and a maximum of 4 years of imprisonment for tax fraud.

Act No. 432 of 31 May 2000 abolishes simple detention, and will take effect on 1 July 2001, following which the penalty limits of section 122 of the Criminal Code will be a fine or imprisonment for up to 3 years. At the same time, the minimum period of imprisonment will be reduced from 30 to 7 days. Simple detention was originally considered a more lenient and less stigmatising form of imprisonment. However, over time the difference between the two became less significant.
A fine can be imposed in addition to imprisonment where the perpetrator obtained or intended to obtain, through his/her offence, a gain for himself/herself or another [subsection 50(2) of the Criminal Code]. Fines for violations of the Criminal Code may range from 1 day-fine of 2 DKK\(^3\) to 60 day-fines of an indefinite amount [subsection 51(1)]. The main principle of the day-fine system is that the number of day-fines reflects the seriousness of an offence, while the size of a single day-fine is set according to the economic situation of the offender.

The calculation of fines is based on a day-fine system [s. 51(1) of Criminal Code], which is set according to the nature of the offence and the economic situation of the perpetrator (i.e. average daily earnings, taking into account such factors as capital resources and family responsibilities). Pursuant to the relevant provision, the number of day-fines shall be fixed at not less than 1, and not more than 60. It may in no case be fixed at an amount lower than 2 DKK. Where an offence involved the obtaining of a “considerable economic gain” for the perpetrator or another person, and the application of the day-fines system would not be reasonable, having regard to the amount of the profit that has been or might have been obtained by the offence, pursuant to subsection 51(1), the court may impose a fine other than in the form of day-fines.

**Natural Persons**

Section 80 of the Criminal Code lays down general rules for determining the penalty in relation to natural persons. It gives the details of the aggravating and mitigating circumstances that have to be taken into account when the penalty is determined.

Pursuant to subsection 80(1), consideration must be given to the seriousness of the offence and information concerning the offender’s character, including his/her general personal and social circumstances, his/her conditions before and after the offence and his/her motives for committing it. Pursuant to subsection 80(2), the fact that several persons have committed the offence together must, as a rule, be regarded as an aggravating circumstance.

**Legal Persons**

Pursuant to section 25 of the Criminal Code, the only criminal penalty applicable to legal persons is a fine. According to the Danish authorities, the imposition of fines in cases of corporate responsibility is governed, in principle, by the same rules as those applying to natural persons. In addition to considering the nature of the offence (section 80), special consideration must be given to the offender’s capacity to pay and to the obtained or intended gain or amount saved pursuant to subsection 51(3) of the Criminal Code. The Danish authorities state that this makes it possible to impose a substantially larger fine on a legal person than on a natural person.

**3.3 Penalties and Mutual Legal Assistance**

For the purposes of providing mutual legal assistance, Denmark states that there is no requirement that a specific minimum sentence be imposed for the offence in question except in respect of requests for the provision of certain coercive measures (i.e. 1 ½ years or more for the inspection of a suspect’s person and 6 years or more for a wiretap order or video surveillance in a private place). This is due to a requirement under the Administration of Justice Act (AJA) on coercive investigative measures, which, according to case law, is applied by analogy to requests for mutual legal assistance.

\(^3\) 1US$ = 9.10 DKK
3.4 Penalties and Extradition

Requests for extradition are governed by the Act on Extradition of Offenders [the Extradition Act (udleveringsloven)]. Pursuant to section 3 of the Extradition Act, extradition can, in principle, only be ordered, if, under Danish law, the offence may entail a more severe penalty than imprisonment for 1 year. Since the maximum penalty for bribery of foreign public officials is, pursuant to section 122 of the Criminal Code, imprisonment for 3 years, the Extradition Act thus allows the extradition of persons for the purpose of prosecutions abroad.

3.5 Non-Criminal Sanctions Applicable to Legal Persons for Bribery of Foreign Public Officials

See sections 3.7/3.8 below.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Pre-trial Seizure

Rules on seizure are laid down in Part 74 of the Administration of Justice Act [AJA (retsplejeloven)]. Section 802 governs the availability of seizure from suspects and section 803 governs the availability of seizure from non-suspects. These provisions make it possible to seize when there is reason to presume that the object can serve as evidence or should be confiscated or forfeited.

According to subsection 802(1), any object at the disposal of a suspect may be seized in the following circumstances:

(i) the person in question is reasonably suspected of an offence liable to public prosecution; and
(ii) there is reason to presume that the object may serve as evidence or should be confiscated or forfeited, except in instances covered by subsection 802(2), or where it has been “swindled” from a person who has a right to its return.

Pursuant to subsection 802(2), goods owned by a suspect may be seized, if

(i) the person in question is reasonably suspected of having committed an offence liable to public prosecution; and
(ii) seizure is considered necessary to secure any claim by the public authorities for costs, confiscation or forfeiture, or fines, or an innocent party’s claim for damages.

The Danish authorities point out that the term “object” refers to individualised objects or assets (including the actual proceeds from a criminal act), which need not have an economic value. The term “goods” refers to any property suitable for serving as security for the claims mentioned in subsection (2).

According to subsection 802(3), a suspect’s entire property or part thereof, including any property acquired subsequently by the suspect, can be seized in the following circumstances:

(i) a charge has been laid for an offence for which the potential statutory penalty is imprisonment for 1 year and 6 months, or more; and
(ii) the accused person has evaded prosecution.

Pursuant to subsection 803(1), any object at the disposal of a non-suspect can be seized as part of the investigation of an offence liable to public prosecution if it can reasonably be presumed that it may serve
as evidence, should be confiscated or forfeited or, has been swindled from a person who has a right to its return.

**Confiscation**

Pursuant to section 75, confiscation, upon conviction, of the “proceeds” of bribery is discretionary. The bribe can only be confiscated as proceeds of passive bribery. In addition, there is no requirement that, in accordance with Article 3.3 of the Convention “monetary sanctions of comparable effect” be applied where confiscation cannot be effected. The Danish authorities provide, however, that in practice the general rule is to order confiscation where sufficient evidence is available that a “gain” has been acquired.

The rules on confiscation are included in Part 9 of the Criminal Code (i.e., sections 75 and 76). Where the size of the proceeds has not been sufficiently established, a sum considered to be equivalent to the proceeds may be confiscated. Confiscation may be ordered against any person to whom the proceeds of a criminal act have directly passed. According to circumstances, confiscation may also be ordered against any subsequent acquirer if he/she knew of the connection of the transferred property to the criminal act, or has displayed gross negligence in this respect, or if the transfer to him/her was gratuitous. Confiscation from a subsequent acquirer of the proceeds or of objects can only be imposed, if the acquirer “knew of the connection of the transferred property to the criminal act, or has displayed gross negligence in this respect”. The acquirer must consequently have had knowledge of (or have been grossly negligent with respect to) the criminal act with which the transferred property is connected, but not necessarily with the legal qualification of this act (as bribery).

**3.7./3.8 Civil Penalties and Administrative Sanctions**

According to the Danish authorities, there is the possibility of imposing civil liability (damages) under the general rules of civil law. This also applies in the case of bribery of foreign public officials. Beyond this, Danish law does not provide for civil or administrative sanctions. Changes in this area are currently not being considered.

Furthermore, the Danish authorities refer to the EU public procurement directives on harmonisation of the methods of public procurement of goods, services, construction and building activities and the conclusion of purchase agreements by public utilities. These directives do not contain specific provisions for the exclusion of participants from public procurement procedures in cases of bribery of foreign public officials. They provide, however, that contracting authorities may exclude participants who have been convicted by final judgement of any offence concerning their professional conduct.

Whether, in cases of bribery, this provision will apply is a matter of discretion. The Danish Competition Authority, who is responsible for this area, does not have knowledge of court cases having dealt with this question.

**4. ARTICLE 4. JURISDICTION**

The rules on Danish criminal jurisdiction are laid down in sections 6 to 12 of the Criminal Code. Danish criminal jurisdiction includes acts committed within the territory of the Danish state (section 6), and acts committed abroad by persons having a specified connection with Denmark (section 7).
4.1 Territorial Jurisdiction

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

Pursuant to section 6 of the Criminal Code, Danish territorial jurisdiction applies if the act was committed in the following circumstances:

(a) within the territory of the Danish state;
(b) on board a Danish ship or aircraft, being outside the territory recognised by international law as belonging to any state; or
(c) on board a Danish ship or aircraft, being within the territory recognised by international law as belonging to a foreign state, if committed by persons employed on the ship or aircraft or by passengers travelling on board the ship or aircraft.

According to the Danish authorities, section 6 applies to cases where the entire criminal activity or a part thereof was carried out on Danish territory. The Danish authorities refer to a judgement from the Eastern High Court of 5 October 1989, wherein territorial jurisdiction was established because the defendant had arranged contacts, meeting times and meeting places for the persons involved by telephone from Denmark.

Pursuant to section 9, in cases where the criminality of an act depends on or is influenced by an actual or intended consequence, the act shall be deemed to have been committed where the consequence has taken effect or has been intended to take effect.

According to the Danish authorities, with respect to jurisdiction over legal persons, the crime is considered to have been committed in the jurisdiction where the offence was committed by the relevant natural person. If the criminal responsibility of the legal person is triggered by various acts or omissions attributable to several natural persons, the crime will be considered to have been committed where the actus reus is fulfilled. If the legal person is domiciled in Denmark and the actus reus is fulfilled in another state, but the criminal responsibility is triggered partly by an act or omission in Denmark, the crime might be considered to have also been committed in Denmark (see the report of the Standing Committee on Criminal Law 1289/1995, p. 187-188).

4.2 Nationality and other Extraterritorial Jurisdiction

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

Jurisdiction over Nationals

Pursuant to subsection 7(1), acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state shall be subject to Danish criminal jurisdiction where the act was committed in the following circumstances:
(a) outside the territory recognised by international law as belonging to any state, provided acts of the kind in question are punishable with a sentence more severe than simple detention; or

(b) within the territory of a foreign state, provided that it is also punishable under the law in force in that territory.

The Danish authorities confirm that paragraphs 7(1)(a) and (b) apply to the offence of bribery of a foreign public official. They further confirm that application of the principle of dual criminality under paragraph 7(1)(b) would not cover the following situation: A Danish national bribes a foreign public official from country “B” abroad in country “A”, and in country “A” bribery of a foreign public official is not an offence. (See Commentary 26 on the Convention)

Furthermore, subsection 10(2) of the Criminal Code requires that where the act is subject to Danish criminal jurisdiction, pursuant to section 7 of the Criminal Code, the punishment may not be more severe than that provided for by the law of the territory where the act was committed.

Jurisdiction over Non-Nationals

Pursuant to subsection 7(2), subsection 7(1) shall similarly apply to acts committed by a person who is a national of, or who is resident in Finland, Iceland, Norway or Sweden, and who is present in Denmark.

Pursuant to paragraph 8 (v), Danish criminal jurisdiction also applies, irrespective of the nationality of the perpetrator, to acts committed outside the territory of the Danish state where the act is covered by an international convention pursuant to which Denmark is under an obligation to institute legal proceedings. According to the Danish authorities, one of the purposes of this provision is to satisfy future conventions or other international covenants involving an obligation for Denmark to establish criminal jurisdiction in order to be able to prosecute specified offences. The Danish authorities explain that paragraph 8(v) may serve as a basis for jurisdiction in cases where Denmark is under an international law obligation to establish criminal jurisdiction and such jurisdiction is not available pursuant to the relevant provisions in the Criminal Code.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Danish authorities state that a transfer of proceedings to another country is made pursuant to a recommendation from a prosecutor, according to the principle that a case should be adjudicated in the most expedient jurisdiction.

The transfer of proceedings is made in accordance with the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters. The Transfer Convention was implemented in Danish law by Act No. 252 of 12 June 1975 as amended by section 4 of Act No. 322 of 4 June 1986. As a general rule, a transfer is only possible in relation to countries that have acceded to the Transfer Convention. Pursuant to section 5 of the Act, the Minister for Justice may, however, decide on the basis of reciprocity that the Act shall also be applied in respect of a request for a transfer of proceedings from a country that has not acceded to the convention.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.
It is the view of the Danish authorities that, given the scope of the existing jurisdiction, there is no need to amend the relevant rules.

5. ARTICLE 5. ENFORCEMENT

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

5.1 Rules and Principles regarding Investigations and Prosecutions

The Danish criminal justice system consists of the National Director of Public Prosecutor and six regional district prosecution offices, which are headed by a local chief constable, who is a lawyer. Since the police and the prosecution service are amalgamated at the local level, close co-operation is possible. However, during the investigative stage, the prosecutors do not normally become involved unless a particular legal issue arises, such as the question of applying coercive investigative measures. A national Serious Fraud Office led by a senior prosecutor, handles investigations and prosecutions of the most serious and complicated economic crimes, and, according to the Danish authorities, it might deal with serious corruption offences. The Serious Fraud Office is comprised of a team of investigators and prosecutors specialised in dealing with such issues, and is characterised by close co-operation between the legal specialists and the investigators during the investigative stage.

The rules on investigation and prosecution are contained in the Administration of Justice Act (AJA). These rules apply to the investigation and prosecution of all criminal offences. Thus, no special rules exist for the investigation and prosecution of bribery of foreign public officials. The Danish authorities point out that Danish criminal procedure is based on the principle of discretionary prosecution – not of mandatory prosecution. They state that, however, prosecutors virtually always take action when so warranted by the evidence.

Pursuant to subsection 742(2) of the AJA, the police shall launch an investigation upon the laying of an information (by a victim, a competitor or another) or on its own initiative, where it may reasonably be presumed that a criminal offence liable to public prosecution has been committed.

When the investigation is completed or sufficiently advanced, the prosecutor determines whether, on the basis of the result of the investigation, there is a basis for prosecuting the matter. It follows from section 718 of the AJA that only the prosecutors can bring criminal matters liable to public prosecution before the courts. As long as no preliminary charge has been made in a case during the investigation, the police may decide to terminate the investigation if, for example, the case is deemed not to involve an offence liable to public prosecution or it is deemed impossible to find the offender.

A charge can be withdrawn in full or in part, pursuant to subsection 721(1) of the AJA, in the following circumstances:

- where the charge is groundless;
- further prosecution cannot be expected to lead to a conviction; or
 completion of the case will “entail difficulties”, or costs or trial periods that are not commensurate with the importance of the case and with the potential punishment in the event of a conviction.

Pursuant to subsection 721(2), the competence to withdraw a charge rests with the Chief Constable in cases where the charge has proved groundless. In the other cases, the competence rests with the prosecutor, unless otherwise provided for by the Minister of Justice. The Danish authorities confirm that political considerations are not taken into account in the determination of whether a case shall proceed.

According to subsection 724(1), of the AJA, the suspect and others who may be deemed to have a reasonable interest are notified of a decision to withdraw charges. An appeal concerning such a decision may be lodged with the superior prosecuting authority pursuant to subsection 724(1), third sentence. Where a decision has been made concerning the withdrawal of charges, prosecution of the former suspect may only be continued pursuant to subsection 724(2). This requires a decision by the superior prosecuting authority and the serving of a notice on the person in question within two months from the date of the decision to withdraw the charges. Pursuant to section 102 of the AJA, the time limit for appealing such a decision is 4 weeks after the accused has received notice of the decision. If the appeal is lodged after the time limit, it must be heard if the failure to observe the time limit is considered excusable. The right to appeal rests with persons who are a party to the case (i.e. persons individually and substantially affected by the decision of the prosecution service). According to the Danish authorities, it is not possible to state with certainty, whether a competitor in a bribery case would always be considered individually and substantially affected by a decision not to prosecute.

Part 10 of the AJA (section 95, et seq.) lays down detailed rules governing the prosecuting authority. Pursuant to section 95, the public prosecutors are the Director of Public Prosecutions, the District Public Prosecutors, the Chief Constables (in Copenhagen the Commissioner of the Copenhagen Police), and such persons as are employed to assist these prosecutors in the legal conduct of trials. They are subject to the authority of the Minister of Justice who, pursuant to subsection 98(1), “shall superintend their work” and, pursuant to subsection 98(2), may issue rules concerning the discharge of their duties”. The Danish authorities state that “by tradition, however, the Minister of Justice does not interfere with specific decisions made by the competent prosecutor”, and that “generally” he/she will not be involved in a decision regarding whether to prosecute a case under section 122 of the Criminal Code.

5.2 Considerations such as National Economic Interest

The Danish authorities confirm that investigation and/or prosecution of the bribery of a foreign public official will not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Natural Persons

According to paragraph 93(1)(ii) of the Criminal Code, the statute of limitations is 5 years where the offence is not punishable with a penalty more severe than imprisonment for 4 years. This applies to the offence of bribing a foreign public official, pursuant to section 122, as the maximum penalty for this crime is imprisonment of 3 years.
Legal Persons

Pursuant to paragraph 93(1)(i) of the Criminal Code, the statute of limitations for legal persons is 2 years. This paragraph applies where the only penalty for an offence is a fine or a term of imprisonment of 1 year or less.

The Danish authorities confirm that in applying the concept of dual criminality where a request for mutual legal assistance is received, Denmark would not be able to comply with the request where the statute of limitations for the corresponding offence has expired under Danish law.

Generally

The triggering and suspension of the statute of limitations is regulated by section 94 of the Criminal Code. According to subsection 94(1), the limitations period shall be calculated from the day when the punishable act or omission ceased. Pursuant to subsection 94(2), where liability depends on or is influenced by a consequence that has taken place or any other later event, the period shall be calculated from the occurrence of such consequence or later event. Subsection 94(5) states that the period shall be suspended by any legal proceedings as a result of which the person concerned is charged with the offence.

When formulating the present rules on criminal responsibility of legal persons, the Standing Committee on Criminal Law considered whether to propose a longer limitations period for legal persons (report no. 1289/1995, p. 190-191), and concluded that experience has not demonstrated a need for extending the period in this regard.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Money Laundering Offence: Generally

Section 284 of the Criminal Code, which has been cited by the Danish authorities in relation to the obligation under Article 7 of the Convention, was extended by Act No. 228 to apply to the profits from the active (section 122) and passive (section 144) bribery of public officials in Danish, foreign and international offices or functions. It states as follows:

Any person who accepts or obtains for himself or for others a share in profits acquired by theft, misappropriation of objects found, embezzlement, fraud, computer fraud, breach of trust, extortion, misappropriation of funds, robbery or violation of section 122, section 144, section 289, second sentence, or section 289a and any person who, by hiding the articles thus acquired, by assisting in selling them or in any other similar manner helps to ensure for the benefit of another person the profits of any of these offences, shall be guilty of receiving stolen goods.

(Underlining added to provide emphasis.)

Section 284 is aimed at the accepting or obtaining of a share of profits acquired by one of the offences listed therein (including section 122), and the hiding of articles to ensure the benefit of the profits of such an offence for another person. It does not cover money laundering activities as they are generally understood (i.e. concealing, disguising, converting, transferring or removing from the jurisdiction, the proceeds of criminal conduct in order to avoid prosecution or a confiscation order by a third party as well
as by the perpetrator of the predicate offence). However, the Danish authorities state that this offence is broad enough to capture such activities.

The Danish authorities provide that section 284 is not applicable with respect to passive bribery (section 144) if the bribe is still in the hands of the briber. With respect to active bribery (section 122), the proceeds subject to section 284 consist of the advantage obtained as a consequence of the bribe, but not the bribe itself. Furthermore, such an advantage may have been attained as the result of a promise or an offer of a bribe.

Denmark explains that the profits from active and passive bribery may, according to the circumstances, comprise the gift, etc., received by the public official (or a third party), and the privilege obtained through the bribery by the person giving the bribe. They state that the term “articles” should be replaced with “profits or gains” to more closely correspond to the term used in the Danish language, and confirm that section 284 would apply to the proceeds of criminal conduct where there was not any net gain. Moreover, they state that the application of section 284 is not limited to cases where the predicate offence is connected with Denmark.

According to the Danish authorities, a person is liable under section 284 even if he/she mistakenly assumes the proceeds were derived from an offence other than the actual predicate offence, as long as both the actual and assumed predicate offence are covered by section 284. Criminal responsibility for the attempted receipt of stolen goods is applicable where the defendant intended to commit the offence under section 284, but the predicate offence cannot be proven.

An offence under section 284 is punishable with imprisonment for any term not exceeding 1 year and 6 months (section 285). Where the offence is of a particularly aggravated nature or where a large number of such offences have been committed, the penalty may be increased to imprisonment for any term not exceeding 6 years (section 286). If the offence is of minor importance, the penalty shall be a fine and may – in further mitigating circumstances – be remitted (section 287).

Money Laundering Offence: Legal Persons

Pursuant to subsection 306(2) of the Criminal Code, criminal responsibility can be imposed on legal persons for a violation of section 284 where the violation has “been committed to secure the company, etc., a share in the gain acquired” by a violation of section 122 or 144.

Reporting Obligations on Financial Institutions

The Danish authorities confirm that the Danish Money Laundering Act 1993, which regulates the reporting obligations of banks, insurance companies, investment firms, securities brokers, bureau de change and all branches of foreign credit and financial institutions, applies to the offence of bribing a foreign public official. This legislation concerns issues related to customer identification, record keeping and the reporting of suspicious transactions.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party
provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting Requirements/Companies Subject to Requirements

The Bookkeeping Act applies to commercial and industrial undertakings of any kind established in Denmark regardless of ownership or nature of liability, and to commercial and industrial activities carried out in Denmark by enterprises domiciled abroad. Section 2 of the Bookkeeping Act states that an undertaking conducts commercial or industrial activity if it contributes goods, rights, funds, services etc. for which it normally receives payment. Apart from this, an undertaking conducts commercial or industrial activity if it is regulated by legislation, including the Companies Act, the Act on Private Limited Companies, the Act on Commercial Foundations or the Act on Commercial Enterprises. The Danish authorities confirm that all known forms of undertakings are subject to accounting requirements regardless if they are registered. Enterprises domiciled abroad are considered within the scope of the Bookkeeping Act with regard to their activities in Denmark.

Sections 6, 7 and 9 of the Bookkeeping Act provide the following accounting requirements applicable to the entities described above:

- Undertakings, depending on their nature and scope, shall keep accounting books in accordance with “good bookkeeping practices”. Moreover, the accounting material must be maintained in such a manner to prevent it from being destroyed, removed or corrupted. It shall also be secure against errors and misuse (section 6).
- Transactions shall be promptly recorded and in the order in which they are made. An undertaking, which, due to its nature and scope, cannot record purchases or sales, may instead make recordings on the basis of daily cash balances.
- Every entry must be substantiated by a “voucher” indicating the date and the amount of the transaction.

8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements

Section 6 of the Order on Auditors’ Report (issued pursuant to the Act on State-Authorised Public Accountants and the Act on Registered Public Accountants) states that the auditor must provide information that he/she becomes aware of in the course of an audit, as follows:

- “supplementary information” on facts that “give probable cause to assume that members of management may be liable in damages or under the criminal law for actions or omissions involving the enterprise, associated enterprises, participants in the enterprise, creditors or employees”; and
- information on matters contrary to:
  (i) Parts 28 and 29 of the Criminal Code and the legislation on taxes, charges and subsidies,

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4. Section 1 of the Bookkeeping Act.
5. According to the Danish authorities, best bookkeeping practise is defined as a legal standard in line with other legal standards, e.g. best auditors’ practise, best lawyers’ practise etc. Best bookkeeping practise could also be described as the practise, which at any time is considered as good practise in the field of bookkeeping by skilled and responsible experts.
6. Part 28 and 29 of the Criminal Code contain the “acquisitive offences” (section 276-290, e.g. theft, embezzlement, fraud, blackmail and receiving of stolen goods) and “other offences against property” (section 291-305, e.g. destruction of property, unlawful and bribery in the private sector).
(ii) the corporate or corresponding legislation laid down for the enterprise, or

(iii) the legislation on the presentation of accounts, including rules on bookkeeping and storing of accounting material

In addition, the Danish authorities provide that the auditor is required to indicate any violations of the Bookkeeping Act or the rules concerning safekeeping of vouchers in his/her report. Furthermore there is generally no tax-deductibility for expenses for which vouchers do not exist.

Although an auditor is not required by law to report to the prosecutorial authorities a suspected criminal offence discovered in the course of performing an audit, the auditor’s report is an integral part of the annual account, and is made publicly available by the Commerce and Company Agency.

The Danish authorities explain that all entities subject to the Annual Accounts Act and referred to in other legislation are required to be audited. In their view, this requirement is implicit in sections 61a and 61g of the Annual Accounts Act. Financial Services enterprises and groups above a certain size are subject to an internal as well as an external audit. The internal auditors are independent of the executive management to the extent that they are appointed and dismissed only by the board of directors.

An internal audit must take place according to the audit instructions approved by the board of directors and furthermore according to best auditing practices. Denmark explains that, in accordance with the instructions, the internal audit shall “to a certain extent” be executed in co-operation with the external audit and shall be subject to an external audit.

8.3 Penalties

The Danish authorities affirm that acts contrary to the accounting requirements set forth above shall be subject to a fine or imprisonment up to 1 year.

Section 16 of the Bookkeeping Act provides that "unless other legislation prescribes a more severe penalty, acts contrary to sections 6 to 10 … are punishable with a fine." There is no general limit to these fines, which are decided by a court of justice. According to the Order on Auditors’ Reports, auditors shall be punished for violation of their duties by a fine.

The Danish authorities state that a violation of the Bookkeeping Act, which at the same time involves a violation of section 122 of the Criminal Code, will also be sanctioned by section 122 of the Criminal Code. In section 16 of the Bookkeeping Act it is prescribed that "unless other legislation prescribes a more severe punishment, acts contrary to sections 6 to 10, section 12, paragraph 1- 3, and sections 13 to 15 are punishable with a fine”.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

7. Sections 1 and 1a of the Annual Accounts Act.
In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1/9.2 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance/Dual Criminality

Denmark does not have legislation on mutual legal assistance. The Danish authorities explain that according to case law, the only requirement for MLA is that the request could be carried out in corresponding national Danish criminal proceedings. They confirm that this means they would not be able to provide MLA if, for instance, the statute of limitations for the corresponding offence in Denmark had expired. It also means that the provisions of the Administration of Justice Act on coercive investigative measures are applied by analogy to requests for MLA. When such requests concern the provision of certain coercive measures (i.e. inspection of a suspect’s person and wiretap and video surveillance in private places), the corresponding offence in Denmark must carry a penalty of imprisonment above a certain level (see discussion under 3.3 on “Penalties and Mutual Legal Assistance”).

Moreover, the Danish authorities provide that dual criminality would be deemed to be met to the extent that the requesting country “properly implemented (the Convention) into criminal law”, and they add that this does not involve an abstract evaluation.

The Ministry of Justice is at present drafting guidelines for the treatment by Danish authorities of requests for mutual assistance in criminal matters. The draft will be sent to the Director of Public Prosecutions, the District Public Prosecutors and all police districts. Their purpose includes the streamlining of co-operation in the area of mutual legal assistance in criminal matters. The new guidelines will also deal specifically with requests for mutual assistance in criminal matters concerning bribery of foreign public officials.

9.1.2 Non-Criminal Matters

The Danish authorities confirm that Denmark is able to provide mutual legal assistance to another Party for the purpose of non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. Under Danish law, a distinction is not drawn between administrative and criminal sanctions, in this respect.

9.3 Bank Secrecy

The principle of bank secrecy is established in section 53a of the Act on Commercial Banks and Savings Banks, etc. (consolidated Act no. 658 of 12 August 1999 as amended by Act no. 393 of 30 May 2000), which states as follows:

Members of the board of directors, members of local boards of directors or similar organs, members of the board of representatives in a commercial bank or credit co-operation, auditors and inspectors and their deputies, members of the board of management and other employees may not unlawfully divulge or use confidential information obtained during the discharge of their duties.

(Underlining has been added to provide emphasis.)

8. Denmark has acceded to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and the pertaining Protocol, but the convention has not yet been transposed into Danish law.
The Danish authorities provide that "it is not ‘unlawful’ for a bank or bank employee to divulge confidential information if authorised by other legislation [e.g. a witness or discovery order issued by a court in the course of a criminal investigation according to the Administration of Justice Act [cf. Ss. 170(3) and 804(4)]]. They add that although in theory a Danish court could decide that a bank or bank employee need not make a witness statement or produce documents, etc., if bank secrecy were considered of material importance in the specific case, in practice the only requirement is that the information requested is relevant evidence.

10. ARTICLE 10. EXTRADITION

10.1/10.2/10.5 Extradition for Bribery of a Foreign Public Official/Dual Criminality

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Danish authorities confirm that they consider the Convention a legal basis for extradition in respect of the offence of bribery of foreign public officials, although extradition is not conditional upon the existence of a treaty between Denmark and the relevant foreign country.

Pursuant to the Danish authorities, dual criminality is a requirement for extradition to non-Nordic countries. It is not required that the criminal law of the foreign state contains an offence identical to the Danish provision (e.g. section 122 in the Danish Criminal Code) as long as the conduct in the specific case is covered by a criminal law provision in both Denmark and the foreign state.

Pursuant to section 3, paragraph 2, of the Act on Extradition of Offenders, “extradition for prosecution can only take place if the foreign state has decided that the person in respect of whom extradition is requested must be arrested or imprisoned for the act in question”. According to the Danish authorities, this provision does not imply that the requesting state must intend to detain the accused person pending trial.

Furthermore, subsection 3(5) of the Act on Extradition of Offenders also states that extradition shall not be provided where “it must be presumed owing to special circumstances that the charge...concerning an act for which extradition is requested lacks sufficient evidential basis”. The Danish authorities state that “according to the travaux preparatoires extradition must not take place if there is reasonable doubt as to the guilt of the person in question. It is not an additional requirement that ‘special circumstances’ calls for denying extradition”. They clarify that this means that where the person for whom the request applies provides evidence that raises a reasonable doubt that he/she is guilty of the offence in question, Denmark may require the requesting country to provide further evidence.

9 Subsection 170(3): “The Court may decide that evidence need not be given on certain matters if the witness is under a statutory duty of confidentiality in respect of such matters and the non-disclosure thereof is of material importance”.

Subsection 804(4): “An order for discovery cannot be imposed if such discovery would produce information on matters which the person in question, as a witness, would be precluded or exempted from giving, cf. Sections 169 to 172”.

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10.3 Extradition of Nationals

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

Act No. 27 of 3 February 1960 on the Extradition of Offenders to Finland, Iceland, Norway and Sweden, as amended by Act No. 251 of 12 June 1975 (the Nordic Extradition Act), permits the extradition of a Danish national to another Nordic country if he/she was a resident in the requesting country for 2 years preceding the offence in question. In all other cases, section 2 of the Extradition Act prohibits the extradition of Danish nationals.

The Danish authorities state that, however, since pursuant to sections 7 and 8 of the Criminal Code Denmark has criminal jurisdiction over Danish nationals who have committed criminal offences abroad, where extradition is declined on the basis of nationality the case can be referred to the Danish prosecutorial authorities.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

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

The Ministry of Justice, Slotsholmsgade 10, DK-1216 Copenhagen K, Denmark, has been appointed the competent authority for Denmark.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Danish authorities provide that Act No. 1097 of 29 December 1997 abolishes the possibility to deduct expenses for bribes to foreign public officials “in certain cases”. Section 8D states that “no deduction is granted for expenses for bribes as referred to in section 144 of the Criminal Code to a person employed, appointed or elected for an office or function with legislative, administrative and judicial bodies, whether for Denmark, the Faroe Islands or Greenland or a foreign state, including local authorities or political subdivisions or for an international organisation formed by states, governments or other international organisations.” In the explanatory memorandum to the Act, the OECD Recommendation is referred to as one of the reasons for the amendment.

The Danish authorities provide that Act No. 1097 refers to section 144 (the passive bribery of a foreign public official, etc.) as opposed to section 122 (the active bribery of a foreign public official, etc.) because it is aimed at indicating the type of payment that is not eligible for a tax deduction. They confirm that the expense of giving bribes to all the categories of foreign public officials covered by section 122 is not deductible, although the language in Act No. 1097 describing them does not correspond to the language in section 122.

Moreover, the Danish authorities confirm that a prior conviction by a court for the offence of bribing a foreign public official is not a prerequisite for denying tax deductibility.

10 See also section 4 above.
EVALUATION OF DENMARK

General Remarks

The Working Group appreciates the high level of co-operation of the Danish authorities throughout the examination process; in particular, the openness of their responses and timeliness in providing translations of all requested legislative provisions.

Denmark implemented the Convention, as well as other international instruments, including the European Criminal Law Convention on Corruption, through an amendment to section 122 of the Criminal Code, which applied only to the bribery of domestic public officials prior to the amendment. The new provision retains its application to domestic public officials, and extends its ambit to persons exercising foreign or international public offices or functions. In addition, the previous requirement that the public official commit a breach of duties has been replaced with the term “unlawfully” (uberettiget). The Working Group is of the opinion that overall the relevant Danish laws, including the implementing legislation, conform to the standards under the Convention.

Specific Issues

1. Term “Unlawfully”

Section 122 of the Criminal Code applies to any person who “unlawfully grants, promises or offers” a gift, etc. The Danish authorities have clarified that “undue” or “unjustified” is a closer translation to the term in the Danish language (uberettiget). The Danish authorities explain that this term provides an exclusion from the offence in the following cases: 1. The usual gifts in connection with anniversaries, etc.; 2. A grant of a gift as a reward for an act already carried out without any advance promise, except where the gift is an implicit bribe for possible future acts; and 3. Small facilitation payments. With respect to the exception for small facilitation payments, it is stated in the travaux préparatoires that the assessment of whether a particular offer, etc. involves a small facilitation payment “must take into account the situation in the country in which the public official exercises his office and the purpose of such grant.” It is further stated therein that the case might be covered where the purpose of the gift is to induce the foreign public official to act in breach of his/her duties.

The Working Group appreciates that criminal legislation in Denmark does not traditionally contain details of the application of an offence and that such details are normally provided in the travaux préparatoires, which the courts consider to carry a high degree of legal weight. However, the Group is concerned that the travaux préparatoires themselves do not sufficiently qualify the application of the exception for small facilitation payments, especially concerning the relevance of the “situation” in the country of the foreign public official and the absence of limits on the discretionary nature and legality of the reciprocal act of the foreign public official. The Group’s concerns are partially alleviated by the statement in the travaux préparatoires that the reservations concerning the term “unlawfully” must be interpreted narrowly in accordance with the “underlying conventions”, but since some doubts remained in the detail of the travaux préparatoires, it would be prudent to monitor the application of the law in this regard in Phase 2.

2. Definition of Foreign Public Official

Section 122 applies to bribes to a person “exercising a Danish, foreign or international public office or function”. Although these terms are not defined in the Criminal Code or elsewhere in the law, the travaux préparatoires contain an open interpretation, which appears to capture all the categories of foreign public officials contained in the Convention. The Danish authorities explain that in interpreting section 122 in
this respect, a court would look at the definition in the \textit{travaux preparatoires}, and are confident that there is no chance that a foreign public official covered by the Convention would not be covered under section 122.

The Working Group is satisfied with the explanation of the Danish authorities, but due to the non-autonomous nature of the definition of foreign public official recommends that this issue be monitored in Phase 2.

3. Third Parties

Section 122 does not expressly apply where the advantage is for a third party. The Danish authorities state that section 122 covers cases where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to a third party. Although there is no case law concerning this issue, Denmark explains that the academic literature leaves no doubt that the offence covers such cases, and that this interpretation of the law is re-stated in the \textit{travaux preparatoires}.

The Working Group recommends that this issue is followed-up in Phase 2.

4. Legal Persons

Pursuant to section 306 of the Criminal Code, criminal liability of legal persons for an offence contrary to section 122 is discretionary. There is no guidance in the Criminal Code on the exercise of this discretion, although guidelines issued by the Director of Public Prosecutions do provide some rules, including the rule that it shall always be the priority to pursue the legal person and also the natural person if the crime is committed intentionally or involves a person performing a managerial function. Where criminal liability is applicable under other criminal statutes, such as the Environmental Code and the Industrial Safety Code, the practice has been to prosecute legal persons as a general rule.

The Working Group recommends that the discretionary nature of criminal liability of legal persons is followed-up in Phase 2 to assess how, in practice, the discretion is applied to foreign bribery cases.

5. Sanctions

The penalty of imprisonment for the active bribery of a foreign public official is a maximum of 3 years. The penalty for passive bribery of a foreign public official is a maximum of 6 years. Penalties for other similar offences include a maximum of 8 years for fraud in aggravated circumstances, and a maximum of 4 years for tax fraud.

The Working Group remains concerned that the penalty of imprisonment for active foreign bribery is comparatively weak, and is particularly concerned that for aggravated cases it is not sufficiently effective, proportionate and dissuasive. The Working Group has the same concern with respect to the penalty of a maximum of 1-year for accounting offences in aggravating circumstances.

6. Confiscation

Pursuant to subsection 75(1) of the Criminal Code, confiscation of the “proceeds” upon conviction is discretionary. The bribe can only be confiscated as proceeds of passive bribery. Moreover, there is no requirement that “monetary sanctions of comparable effect” be applied where confiscation cannot be effected. The Danish authorities state that, however, in practice the general rule is to order confiscation where sufficient evidence is available that a “gain” has been acquired.
Article 3.3 of the Convention requires each Party to “take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official or property the value of which corresponds to that of such proceeds are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”. Since confiscation is not mandatory, and it is not clear that the fine system is adequate for the purpose of having a comparable effect, the Working Group recommends that this issue be monitored in Phase 2.

7. Nationality Jurisdiction

Under Danish law, in determining whether the requirement of dual criminality is satisfied for the purpose of establishing nationality jurisdiction where there is no territorial connection to Denmark, the offence in question must also be punishable under the law of the place of the commission. The Danish authorities provide that this means that Denmark would not have jurisdiction in the following case: A Danish national bribes a foreign public official from country “B” abroad in country “A”, and in country “A” bribery of a foreign public official is not an offence.

The Working Group recommends that, in light of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue should be reviewed on a horizontal basis in Phase 2.

8. Statute of Limitations for Legal Persons

Pursuant to paragraph 93(1)(i) of the Criminal Code, the statute of limitations for legal persons is 2 years from the day that the act or omission ceased. Thus, the offence must be detected within 2 years of its commission. On the other hand, the corresponding statute of limitations for natural persons is 5 years.

It is the view of the Working Group that due to the secretive nature of acts of corruption, they are often not detected until several years after having been committed. The Working Group feels that a 2-year period is too short. The Group is also concerned that the short limitations period could provide an obstacle to the provision of mutual legal assistance, because in applying the concept of dual criminality it appears that Denmark may not be able to provide MLA if the statute of limitations for the offence in Denmark has expired.

The Working Group recommends that where a state has criminal liability in this respect, the statute of limitations for legal persons should be equivalent to the one for natural persons. In any case the statute of limitations shall be reviewed on a horizontal basis.
FRANCE

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues


Previously, the only relevant criminal offences in France were passive and active corruption involving French persons entrusted with public authority, charged with a public service mission or holding an elected office (Articles 433-1 and 432-11 of the Criminal Code), but not the bribery of foreign public officials in connection with international business transactions. The latter is now also a criminal offence following the adoption of Act No. 2000-595 of 30 June 2000 amending the criminal code and the code of criminal procedure with regard to the fight against corruption (hereafter referred to as “Act of 30 June 2000”). Most of its provisions came into force on 29 September 2000. This Act, which also transposes the Convention of the European Union into French law, amends the Criminal Code—Book IV (Crimes and Misdemeanours Against the Nation, the State and Public Peace) and Title III (Breach of the Authority of the State)—by inserting a new chapter comprising all provisions involving international corruption, and it also amends certain provisions of the Code of Criminal Procedure.

The Convention and the French Legal System

Article 55 of the French Constitution of 4 October 1958 provides that “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.” While international agreements prevail over domestic law in France, they have no direct effect on the domestic legal system, and a law is needed to make the necessary adjustments. For their part, the Commentaries on the OECD Convention have only interpretative value.

1. ARTICLE 1 - THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

In order to meet the requirements of Article 1 of the Convention, France has amended Title III of the Criminal Code by inserting Chapter V, entitled “Breach of the Public Administration of the European Communities, Member States of the European Union, Other Foreign States and Public International Organisations”, comprising three sections: passive corruption, active corruption, and additional penalties and the responsibility of legal persons.

In the interests of clarity, the Government felt that each new article of the Criminal Code should make explicit reference to the convention that it is intended to implement, and come into force at the same time as the reference convention, the conventions each covering different areas of application. Thus - as the recapitulative table shows - there is a provision enacted for the purpose of implementing the OECD Convention (sub-section 2) and another one for the purpose of implementing the Convention of the European Union (sub-section 1).

### Sub-section 1: “Active corruption of officials of the European Communities, officials of Member States of the European Union and members of institutions of the European Communities”

**Art. 435-2:** “In order to implement the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, signed in Brussels on 26 May 1997, the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a Community official or a national official of another Member State of the European Union or a Member of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office is punished by imprisonment for ten years and a fine of FF 1 000 000.

“Is punished by the same penalties the act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above.”

### Sub-section 2: Active corruption of officials of foreign States other than Member States of the European Union and of officials of public international organisations other than institutions of the European Communities”

**Art. 435-3** paragraphs 1 and 2: “In order to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a person entrusted with a public authority, charged with a public service mission or holding an elected office in a foreign State or within a public international organisation in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office to obtain or retain business or other improper advantage in the conduct of international business is punished by imprisonment for ten years and a fine of FF 1 000 000.

“Is punished by the same penalties the act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above.”

**Art. 435-4** paragraphs 1 and 2: “In order to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a judge, juror or any other person holding a judicial office, an arbitrator or an expert appointed either by a jurisdiction or by the parties, or any person assigned by a judicial authority to perform a mission of conciliation or mediation in a foreign State or within a public international organisation in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office to obtain or retain business or other improper advantage in the conduct of international business is punished by imprisonment for ten years and a fine of FF 1 000 000.

“Is punished by the same penalties the act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above.”
The French authorities have made this distinction in order to “transpose the conventions on a strict basis, without going any further, so as not to expose their nationals to any legal risks greater than those to which their partners are liable”. However, only the implementing text of the OECD Convention has come into force.

According to the French authorities, the provisions of the new Articles 435-3 and 435-4 should be seen as general ones, applicable to any foreign public official, irrespective of whether he/she happens to be a Community official or an official of a Member State of the European Union. Consequently, the new Articles 435-3 and 435-4 apply to Community officials and officials of Member States of the European Union as long as the special provisions of Article 435-2 are not applicable to them. When Article 435-2 enters into force, active corruption of a Community official or an official of a Member State of the European Union will become a criminal offence under this special provision, and no longer under the general standard of Articles 435-3 and 435-4.

In other words, although the implementing text of the European Union Convention has not come into force, the French authorities feel that this does not pose a problem inasmuch as the OECD Convention is universal in scope. It therefore also applies in the Union as concerns international business.

The French authorities also state that the titles of the sub-sections have no legal value, and are for information purposes only, serving to identify the various treaties. In addition, the references to the treaties which these provisions transpose into domestic law would facilitate, in due course, the interpretation of these provisions by a national judge.

### 1.1 Elements of the offence

The particular elements of the offence set out in Article 1 of the Convention are covered as follows:

#### 1.1.1 Any person

Under the provisions of the Act of 30 June 2000, all persons, natural or legal, are subject to prosecution for bribing a foreign public official.

#### 1.1.2 Intentionally

While the law does not make reference to intention in its definitions of active corruption, the act is always intentional insofar as Article 121-3 of the Criminal Code specifies that “there is no crime or offence without the intention of committing it”. Intentional misconduct is defined by case law as the will to commit an act knowing that it contravenes criminal law. In contrast, the concept of wilful deception (dolus eventualis), which exists in French law when a person is deliberately placed in danger, does not apply to cases of bribery.

#### 1.1.3 To offer, promise or give

Under the new Articles 435-2, 435-3 and 435-4 of the Criminal Code, the act of “proposing, without right, offers, promises, gifts, presents or advantages of any kind” constitutes the offence of bribery. While the provisions make explicit reference only to the act of proposing, acts of giving, without prior proposal, are covered by Articles 435-3 and 435-4. Indeed, according to the case law of the Cour de Cassation [France’s highest appellate jurisdiction] on the corruption of public officials in France (Article 433-1 of the Criminal Code), bribery results from offers or promises, gifts or presents made with the intention of bribing, irrespective of whether the persons solicited have received verbal or written proposals.

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French legal literature and case law refer to the concept of a “corruption pact” in which there is a meeting of minds between the briber and the recipient of the bribe. The French authorities specify that this pact is not a “contract” setting out the details of how the decision is “bought”, and that it is sufficient that the briber knows that the purpose of his proposal is to buy a decision or an omission, and that the bribed party is aware that he/she will receive an unlawful advantage in return for taking or refraining from the decision.

To date, the Cour de Cassation has considered that the offence of bribery was committed only if the briber’s offer preceded the act of the recipient. Such a prior pact is very difficult to prove, however, because corruption is by its very nature unreported. With the insertion of the words “at any time”, proof of a prior pact will no longer be a condition for proving bribery, and payments made after the fact can be prosecuted directly, and no longer in a roundabout manner, on the grounds of misuse of corporate assets (abus de biens sociaux) for the briber, and of receiving misused corporate assets (recel d’abus de biens sociaux) for the bribed party.

Nevertheless, while the new law eliminates the condition of a pact preceding the official’s act, it would seem that the existence of a pact as a wilful agreement must still be proven. Under Article 427 of the Code of Criminal Procedure, such a “corruption pact” (or, more precisely, “any proposal, without right, at any time, directly or indirectly”) may be established by any means of proof (written evidence, testimony, searches, seizures, expert opinion, etc.). It will therefore be possible to consider the payment of a bribe as an indicator of such a wilful agreement. It should be noted that according to consistent case law of the Cour de Cassation, it is not indispensable for the briber to have succeeded in obtaining acceptance of his/her offer for an offence to have been committed. The French authorities add that, in conformity with legal literature and although case law has not ruled conclusively on the matter, the offence is fully completed by the mere fact that the briber has made a proposal of bribery. It makes little difference, in fact, whether the proposal has had any effect or whether the intended recipient was in fact aware of it, for reasons independent of the intent of the perpetrator. This would be the case where, for instance, the communication has been lost in the post, or an intermediary has not followed through with instructions.

During the parliamentary debates, the question was raised whether acts of corruption committed after the entry into force of the law pursuant to contracts concluded before the entry into force of the law would be prosecuted. The question was also raised whether acts started before the entry into force (e.g. the corruption pact or a partial payment) and continued after that date (e.g. the receipt of the benefit from the foreign public official or the making of a payment by the briber) would be prosecuted. Parliament decided that the courts should determine this issue, taking into account the very nature of the offence of corruption, and the rule of non-retroactivity of the more severe criminal consequences, rather than to include a special provision in the law.

The French authorities are of the opinion that such acts would be covered. They cite a finding of the Cour de cassation that the offence of bribery, committed from the moment the agreement between the briber and the bribed person is concluded, is renewed on each occasion that the agreement is acted upon. The French authorities explain that although this ruling applied to the statute of limitations and not the retroactivity of legislation, the different principles involved, which the courts will have to take into account, are clear. In case where the bribery of a foreign public official was committed before promulgation of the Act of 1999, pp. 10919-10920.

4. “The offence is completed once the accused shall have employed the means specified by law to the end defined therein; accordingly, an offer of a sum of money constitutes not an attempt, which would not be punishable, but the offence of active corruption itself”. Crim. 10 June 1948: Bull. Crim. No. 154; D. 1949. 15, note Carteret; S. 1948. 1. 111, note Rousselet et Patin; Gaz. Pal. 1948. 2. 35.

5. The Carignon case, C. cass., Chambre criminelle, 27 October 1997
30 June 2000, but continues to produce effects after this date, it will be for the court dealing with the substance of the case, under the supervision of the Cour de cassation, to decide the scope of the constitutional principles of French law which are common to all democratic countries.

To propose but also to consent to solicitation

The new Articles 435-2, 435-3 and 435-4 of the Criminal Code cover not only the act of making a proposal etc. (paragraph 1), but also the act of consenting to a foreign public official who at any time, either directly or indirectly, shall have without right solicited a bribe (paragraph 2). In so doing, French lawmakers wanted to penalise not only the briber who “initiates” a bribe, but also the briber who merely “consents” to an official’s request. However the notion of consenting to the solicitation of a foreign public official does not cover the situation where the consent was obtained through blackmail, physical threat, violence, etc. or where a factor such as a state of necessity, constraint or force majeure, is present. According to the French authorities, the request may consist merely of the fact of asking (or soliciting), even if it is not repeated or made insistently. The briber will not be able to argue that he had no other choice or that unlawful pressure was exerted by the public official to justify his/her actions, and will therefore be sanctioned as required by the OECD Convention. Notwithstanding this division into two paragraphs, for the purposes of prosecution it is sufficient to refer to the article itself, without referring to the individual paragraphs.

1.1.4 Any undue pecuniary or other advantage

The new Articles 435-2, 435-3 and 435-4 of the Criminal Code stipulate that active corruption involves the act of proposing “without right, offers, promises, gifts, presents or advantages of any kind whatsoever”.

Pecuniary or other advantages

French law covers offers, promises, gifts, presents or advantages of any kind whatsoever. In addition, the French authorities make clear that the offence is committed regardless of the amount of the payment; there is no exception for facilitation payments.

Undue advantages

According to the Minister of Justice, the term “without right” (sans droit) means that the advantage is neither permitted nor required by any statute or case law currently in force. Some foreign countries do in fact allow an official to receive an advantage, thus considering that a bribery offence is not committed when the advantage is permitted by law or case law. French law therefore applies Commentary 8 of the Convention.

7. Paragraph 7 of the Commentaries on the OECD Convention: “It is also an offence irrespective of, inter alia, ... the alleged necessity of the payment in order to obtain or retain business or other improper advantage.”
8. The advantages may, for example, involve remuneration or sums of money (Crim. 17 November 1955), work performed free of charge (Crim. 4 July 1974 and Crim. 1 October 1984), the promise of sexual relations (T. enfants Sarreguemines, 11 May 1967), debt forgiveness (Cass. Crim 7 September 1935) or provision of supplies at prices well below the normal price (Cass. Crim 6 February 1968).
10. Paragraph 8 of the Commentaries: “It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”
1.1.5 Whether directly or through intermediaries

Under the new Articles 435-2, 435-3 and 435-4 of the Criminal Code, the act of proposing “either directly or indirectly” constitutes an act of bribery.

According to the French authorities, for bribery to be committed, the public official need not be aware of the role of the intermediary. Accordingly, a corruption offence would be committed if a business were to pay a commission to a national political party in order to buy the decision of a public official belonging to that party even if the official in question were unaware of the commission’s existence, provided that when the official acted, or refrained from acting, he/she was aware that it was in return for an unlawful advantage.

Similarly, although case law has not ruled conclusively on the matter, the French authorities consider that a bribery offence would be committed even if the briber were unaware of the role of the intermediary benefiting from the commission, although the briber must know that the purpose of the commission is to buy the public official’s decision. Criminal sentences have thus been handed down in cases where intermediaries were involved in the committing of a related offence (Article 432-12 of the Criminal Code), without regard to the identity of the intermediary.  

The intermediary may be charged with receiving or complicity in active corruption and is liable to the same penalties he/she would incur if convicted of corruption itself.

1.1.6 To a foreign public official

The French implementing legislation, in defining a person who performs a public function in a foreign country, makes a distinction depending on whether or not the public official works for a Member State of the European Union or an institution of the European Union. According to the French authorities, a “foreign State” should be taken to mean all levels and subdivisions of government, from the national to the local level.

Foreign public officials “in order to implement the OECD Convention”

The categories of persons listed in Articles 435-3 and 435-4 of the Criminal Code seem to cover all the categories of “foreign public official” within the meaning of the OECD Convention. The following categories of persons are listed: persons entrusted with a public authority, charged with a public service mission or holding an elected office in a foreign State or within a public international organisation and persons holding a judicial office.

- “Persons entrusted with public authority” should be construed as persons exercising a function of authority, whether that authority be administrative, judicial or military: whether the person’s status is private or public does not matter.

- “Persons charged with a public service mission” should be construed as persons, whether private or public, who, although not entrusted with public authority, perform a public service.

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12. An offence of receiving is constituted if the intermediary knowingly benefited from the commission paid in order to buy the official’s decision. Complicity may be constituted either through aid or assistance intended to facilitate preparation or perpetration of the offence, or through provocation of the offence or the giving of instructions to commit it.
of some sort, on either a temporary or permanent basis, either voluntarily or because they are requisitioned to do so by the authorities. Persons in charge of public or state-controlled companies are covered by this category. However, mere control is not always sufficient, especially if the company operates as a normal commercial undertaking in the competitive sector. In this case, it is necessary to determine on a case-by-case basis whether or not the person in question exercises a public service mission. The French authorities provide as an example the case where a NGO is charged with a public service mission of foreign development assistance.

− “Persons holding an elected office” should be construed as anyone elected to a public assembly or a public body. According to the French authorities, persons with a legislative mandate who have not been elected do not fall into this category, but are covered by the category of “persons entrusted with public authority”, whether that authority be administrative, judicial or military.

− “Persons holding a judicial office” are covered, under the Act of 30 June 2000, by the terms “judge, juror or any other person holding a judicial office, an arbitrator or an expert appointed either by a jurisdiction or by the parties, or any person assigned by a judicial authority to perform a mission of conciliation or mediation in a foreign State or within a public international organisation”.

Although it would seem that the use of the notions of “persons entrusted with public authority” and “persons holding a judicial office” could give rise to problems of interpretation as regards the definition of the judicial authorities, the French authorities are of the opinion that the terms used are sufficiently broad to cover all judicial office situations.

In addition, the French authorities specify that persons not officially performing public functions, such as political party officials in one-party States, are covered if they effectively exercise powers delegated by the government. However, the bribery offence is not committed where advantages are promised or granted to a person in anticipation of his appointment as a public official. Instead, such conduct may be prosecuted as abuse of corporate assets or a violation of legislation on the financing of political parties and electoral campaigns.

Officials of the European Communities, officials of the Member States of the European Union and Members of institutions of the European Communities “in application of the Convention of the European Union”

The new Article 435-2 of the Criminal Code defines acts of active corruption vis-à-vis “a Community official or a national official of another Member State of the European Union or a Member of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities”. The French law does not define these categories of public officials, leaving that to the EU Convention. Contrary to the OECD Convention, the EU Convention does not give an autonomous definition of foreign public official, but rather a definition derived from the definitions of Community official and national State official. However, according to the French


15. According to Cour de Cassation case law, this expression encompasses not only members of the major national bodies (Senate, National Assembly), but also members of local assemblies (regional, departmental and communal) and elected members of public administrative establishments, such as chambers of commerce and industry, chambers of agriculture and chambers of trades (Cass. crim., 8 March 1965).

16. Article 1 of the European Union Convention is devoted to the following definitions:
authorities, if in the European Union the specific provisions of Article 435-2 do not apply to a public official on the ground that he/she does not have the status of “official”, Articles 435-3 and 435-4 would apply instead.

According to the French authorities, referral to the State’s domestic law is not a problem because as the concepts used for transposing the OECD Convention encompass all the categories of persons or officials covered by that Convention, which is the case of the terms used by Articles 435-3 and 435-4 of the Criminal Code and the very broad definitions given them in French law.

1.1.7 For that official or for a third party

Although Articles 435-2, 435-3 and 435-4 of the Criminal Code do not expressly apply where a third party receives the benefit, the French authorities state that it covers the promising etc., of an advantage regardless of the beneficiary. According to the French authorities, although there is no case law on this matter, the law is unambiguous: since it does not specify who must receive the benefit, it does not matter whether it is the official or a third party, or whether it has been given directly to the latter or via the bribed party.

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

Under the new Articles 435-2, 435-3 and 435-4 of the Criminal Code, the offence is committed only if the bribe was offered, etc., in order that the foreign public official “perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office”.

Act “in accordance with his function”

An act in accordance with an official’s function, mission or office is explained by the French authorities as an act that the official is required by statute or regulation (règlements) to perform, or to refrain from performing. This definition encompasses not only acts that the holder of the function, mission or office is required to perform, either alone or together with others, but also those in which he/she participates, while

“(a) ‘official’ shall mean any Community or national official, including any national official of another Member State;
(b) ‘Community official’ shall mean:
  - any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities,
  - any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants.
  Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them;
(c) ‘national official’ shall be understood by reference to the definition of ‘official’ or ‘public officer’ in the national law of the Member State in which the person in question performs that function for the purposes of application of the criminal law of that Member State.
Nevertheless, in the case of proceedings involving a Member State’s official initiated by another Member State, the latter shall not be bound to apply the definition of ‘national official’ except insofar as that definition is compatible with its national law.”
not being able to perform them himself/herself, or those from which the duties of his/her position oblige him/her to refrain. Similarly as the text does not distinguish acts in respect of which an official has discretionary power from those for which the official has a mandatory responsibility, both situations are covered.

**Act “facilitated by his function”**

An act facilitated by an official’s function, mission or office is one, according to the French authorities, that while not arising directly from his/her duties expressly created by statute or regulation (*réglements*), is nonetheless derived from those duties.

The French authorities state that, as a general rule, it will be important for the judge to establish that the act is either part of the function or has been facilitated by it, since this is one of the elements that constitutes the offence. However, this requirement will not hamper criminal proceedings since, by virtue of the principle of the "freedom of proof" in criminal law, the judge alone evaluates the elements, which are presented to him in order to determine whether the prerequisites for the offence are met. He will thus determine, in the light of those elements, whether the act is part of the function or facilitated by it, without being required to refer specifically to the laws and regulations establishing the foreign public official’s duties.

**Trading in Influence**

Trading in influence by national public officials is covered by the same provision of the Criminal Code (Article 433-1) as active corruption, the two offences being very similar. Trading in influence is deemed to exist when a bribe is intended to prompt a French public official to “abuse his actual or presumed influence in order to obtain distinctions, employment, contracts or any other favourable decision from a public authority or administration.” Trading in influence through a foreign public official is not punishable under the new law. However, the French authorities state that the case mentioned in Commentary 19 on the Convention concerning the scope of the definition in Article 1, paragraph 4.c\(^{17}\), would be covered by the offence of corruption.

1.1.9 **In order to obtain or retain business or other improper advantage in the conduct of international business**

The new Articles 435-2, 435-3 and 435-4 of the Criminal Code cover cases in which the aim of the bribe is “obtaining or retaining business or other improper advantage in the conduct of international business.” Corruption may be deemed to exist even if the briber was the lowest bidder.

1.2 **Complicity**

Article 1.2 of the Convention requires the Parties to take measures necessary to establish as a criminal offence complicity in an act of bribery of a foreign public official, including incitement, aiding and abetting, and authorisation.

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\(^{17}\) Commentary 19: “One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.”

\(^{18}\) While Articles 435-3 and 435-4 of the Criminal Code stipulate explicitly that the offence is constituted if its aim is “obtaining or retaining business or other improper advantage in the conduct of international business”, Article 435-2 on the corruption of officials of the European Union has a broader scope, the offence being constituted irrespective of the goal being pursued or the sphere of activity involved.
The rules on complicity, set forth in Articles 121-6 and 121-7 of the new Criminal Code, are general in scope and apply to all offences\textsuperscript{19}. The first paragraph of Article 121-7 defines an accomplice as “the person who, knowingly, through aid or assistance, has facilitated preparations for or the execution of a crime or misdemeanour” (complicity by aid or assistance). The second paragraph defines an accomplice as “the person who by gift, promise, threat, order, abuse of authority or of power shall have provoked an offence or given instructions to commit one” (complicity by incitement). Accomplices are punished in the same way as perpetrators (Article 121-6 of the Criminal Code).

1.3 Attempt and conspiracy

Article 1.2 of the Convention requires each contracting Party to take measures necessary to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own public officials.

Attempt

An attempt to bribe a domestic public official is not a distinct criminal offence in France insofar as, under Article 433-1 of the Criminal Code, the offence of active corruption of a domestic public official is fully and immediately completed once an offer has been made, whether or not it is accepted. For exactly the same reasons, the Act of 30 June 2000 does not specifically establish attempted active corruption of a foreign public official as a distinct criminal offence. The offence of bribing a foreign public official alone makes it possible to prosecute any attempt (see above, 1.1.3).

Conspiracy

Conspiracy, within the meaning of Anglo-Saxon law, is not punishable under French law\textsuperscript{20}.

2. RESPONSIBILITY OF LEGAL PERSONS

Under Article 2 of the Convention, each Party shall take any measures necessary to establish the liability of legal persons for the bribery of a foreign public official. Section 3 of the Act of 30 June 2000 creates an Article 435-6 stipulating that “Legal persons may be held criminally liable, according to the conditions laid down in Article 121-2, for offences defined in Articles 435-2, 435-3 and 435-4”.

Legal entities subject to criminal liability

The scope of criminal liability of legal persons as defined by Article 121-1 of the Criminal Code includes all such persons, whether public or private, for profitable or non-profitable aims, French or foreign, with the exception of the State\textsuperscript{21}.

For their part, local authorities\textsuperscript{22} have criminal liability that is limited to offences committed in the performance of activities that could possibly involve agreements to delegate public services\textsuperscript{23}, irrespective of the form of delegation involved (e.g., concession, etc.).

\textsuperscript{19} Cass. Crim. 21 June 1895.

\textsuperscript{20} Under French law, a conspiracy is constituted by a resolution agreed to between two or more persons to commit a [crime against the integrity of the institutions of the Republic or the national territory] if that resolution is given substance by one or more material acts (Article 412-2, Criminal Code).

\textsuperscript{21} The French authorities deem it inconceivable that the State, which holds a monopoly on the right to punish, could sanction itself. The term of State is understood in the strict sense, and does not encompass either the territorial authorities or public enterprises. Also, the absence of criminal liability of the State has no impact on its civil liability.
Other legal persons, including the other public entities (public establishments, public interest groups, nationalised enterprises, semi-public companies, professional associations) are criminally liable in respect of all their activities. Private legal persons include groups, voluntary or legally constituted, civil and commercial companies, duly registered associations, including religious congregations, foundations, trade unions, political parties and factions, economic interest groups, institutions representing employees and associations of co-owners.

**Meaning of criminal liability**

Under Article 121-2 of the Criminal Code, the criminal liability of legal persons has two features. First, their responsibility is indirect, or derived, insofar as offences attributable to legal persons must have been committed by natural persons. Second, natural persons who are themselves perpetrators or accomplices to the offence cannot be shielded from responsibilities by invoking the responsibilities of a legal person. Consequently, Article 121-2, paragraph 3 stipulates that “the criminal responsibility of legal persons does not preclude that of natural persons who are perpetrators of or accomplices to the same acts”.

**Implementation of the criminal responsibility of legal persons**

There are two conditions for assigning criminal responsibility to legal persons under French law:

1. The offence must *first* have been committed by one or more natural persons constituting either a body or a representative of the legal person. This provision excludes cases in which an offence has been committed by an agent or a subordinate, and it requires that the natural person has been regularly invested with the power to act on the legal person’s behalf. On the other hand, the body or representative is responsible even if the natural person exceeds his/her authority or has not been regularly invested either in this function or with respect to the specific act. It is not however necessary for the body or representative to have been

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22 Local authorities include *communes, départements*, regions and groups thereof, such as associations of *communes*.

23 The idea of delegating public services covers all public service activities that can be performed not only by the public authority, but also by another entity, possibly private.

24. It is not, however, the intention of the law that corporate officers be systematically prosecuted as accomplices (TGI Béthune, 12 November 1996).

25. All legal entities possess at least one deliberative body which takes decisions on the legal entity’s behalf, and which is made up of one or more natural persons upon whom the law or company by-laws confer a particular function in the entity’s organisation, investing them with administrative or executive responsibility.

Representatives are natural persons empowered by law or the by-laws of the legal person to act on its behalf. This concept overlaps in part with that of a body, insofar as most bodies of a legal person are legal representatives thereof. However, there are cases in which representatives of a legal person are not bodies. This is the case, for example, of a provisional administrator, a liquidator of a company or an association, persons possessing a delegation of power within a business and, more generally, anyone to whom the bodies have assigned and given a general mandate to manage and represent the legal person. The concepts of body and representative are interpreted broadly by the courts. For example, the expression body or representative may apply to employees exercising the powers of director-general by delegation (TGI Grenoble, 15 May 1997). The same applies to natural persons who are not members of corporate bodies of a legal person that is also prosecuted, if an objective assessment of the circumstances of the act support the conclusion that it is they that properly wielded the legal person’s decision-making powers with regard to the business in question (Grenoble, 25 February 1998).
convicted of the offence of which the legal person is accused\textsuperscript{26}. On the other hand, the natural person, the body or representative of the legal person, who is the author of the offence of bribery, which is an intentional offence, ought in principle to be identified. That person may be so identified by any means, including on the basis of presumption.

The French authorities specify that in the absence of case law, the legal literature takes the view that the legal person may be held criminally responsible even if the natural person has not been identified assuming, first, that the intentional element of the offence stems from the actual nature of the acts being prosecuted and, second, that there is no doubt that the offence was committed by a body or a representative, of any sort, when it appears for example that the whole commercial strategy of the firm is based on acts of bribery\textsuperscript{27}.

2. The offence must then have been committed on behalf of the legal person. The requirement of a causal link between the legal person and the unlawful act aims to ensure that a legal person is not held liable for acts committed by individuals having a connection therewith if such individuals merely took advantage of the legal or material framework of the legal person to commit offences in their own interest or against the interest of the legal person.

According to the French authorities, an officer who acts in the name of the legal person, and in its interest, must be considered as acting on the legal person’s behalf. Unlawful acts by the representative also incur the criminal responsibility of the legal person if those acts have been committed on its behalf in the broad sense of the term, i.e. in the course of activities intended to advance the organisation, operation or objectives of the grouping invested with legal personality, even if there is no resultant benefit or advantage. The offence may be constituted by a positive act or by a failure to act, in particular when the offence committed by a subordinate was made possible by the absence of the controls normally expected on the part of the body or representative\textsuperscript{28}.

3. SANCTIONS

The Convention requires Parties to establish “effective, proportionate and dissuasive criminal penalties” comparable to the penalties applicable to the bribery of their own public officials. The Convention also requires, in respect of natural persons, that criminal penalties include “deprivation of liberty sufficient to enable effective mutual legal assistance and extradition”.

In any event, the Convention requires each Party to take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions “of comparable effect” are applicable. Lastly, the Convention asks each Party to consider the imposition of additional civil or administrative sanctions.

The Criminal Code’s new provisions for the bribery of foreign public officials impose imprisonment and fines for natural persons found guilty of bribing a public official. They also impose fines.

\textsuperscript{26} Accordingly, a discontinuance for insufficient cause that was granted to a serving mayor did not discharge the criminal responsibility of the town, provided that misconduct directly linked to the accident was established in respect of municipal bodies or representatives. Grenoble, 12 June 1998; \textit{Gaz. Pal. 1998}. 2. 460.

\textsuperscript{27} See Francis Le Gunehec, \textit{Le nouveau droit pénal. Ed. Economica.}

\textsuperscript{28} The offence may consist of negligence attributable to successive mayors of a city, of which they are at once bodies and representatives, in respect of proven negligence on their part in the management of their agents and control of their services, whereas their function gives them the necessary power and means to ensure proper operation of municipal public services for which they bear responsibility (Grenoble, 12 June 1998).
3.1/3.2 Criminal Penalties for Bribery of a Domestic or Foreign Public Official

Primary penalties: deprivation of liberty and fines

Under the Act of 30 June 2000, the prison sentences and fines for natural persons are identical to those imposed in cases of bribery of domestic public officials, i.e. imprisonment for up to ten years and a fine of up to one million French francs. Fines for legal persons are also identical, whether the bribery in question is of a domestic or foreign public official, and up to a limit of FF 5 million. According to the French authorities, a FF 5 million fine is particularly high on the scale of French penalties. It can therefore be considered to be effective, proportionate and dissuasive, especially as the judge can decide, as an additional penalty, to have the proceeds of the offence confiscated (see below, 3.6). The determination of the penalty is a matter solely for the judges, who will take into account the circumstances of the perpetration of the offence and the psychological constitution and personal social circumstances of the perpetrator. When the court orders a fine, the financial resources of the perpetrator are taken into account (article 132-24 of the Criminal Code).

Additional criminal penalties applicable to natural persons

The Act of 30 June 2000 imposes four types of additional criminal penalties on natural persons to deter bribery of foreign public officials: deprivation of rights (civic, civil and family rights for five years or more); possible banishment, in the case of foreigners; professional restrictions (ban for up to five years on performing a public function or the professional or social activity in connection with which the offence was committed); confiscation; and the posting or publication of decisions. The same additional penalties are applicable in the case of bribery of domestic public officials (Article 435-22 of the Criminal Code).

Additional criminal penalties applicable to legal persons

The additional criminal penalties applicable to legal persons for the bribery of a foreign public official are similar to those provided for in respect of bribery of a domestic public official. Under the new Article 433-25 of the Criminal Code, the following additional penalties may be imposed along with a fine:

“2° For a period of no more than five years: a ban on directly or indirectly performing the professional or social activity in connection with which the offence was committed; placement under judicial supervision; closure of one or more establishments of the enterprise having been used to commit the incriminated acts; exclusion from public procurements; ban on public appeals for funds; ban on issuing cheques other than certified cheques and those drawn to withdraw the maker’s funds on deposit; and ban on the use of payment cards” (Article 435-6, paragraphs 4 to 10).

3° Confiscation [see below, 3.6].

4° Posting or publication of the court’s ruling pursuant to Article 131-35.

29 French law provides only for maximum penalties, judges being free to choose the penalty within these limits. The exchange rate at 25 October 2000 was 1 US$ for FF 7.92, or US$ 12.63 (15.24 Euro) for FF 100. Thus, FF 1 million is equivalent to 152 449 Euro or US$ 126 297, and FF 5 million is equivalent to 762 245 Euro or US$ 631 483.

30. Pursuant to Article 131-38 of the Criminal Code, which stipulates that “the maximum rate of fine applicable to legal persons is equal to five times the maximum fine for natural persons under the law instituting the criminal offence.”
A review of case law shows that the court’s first one hundred penalties imposed on legal persons, in cases of bribery of French public officials, consisted essentially of fines, postings, publication and confiscation; to date there has been no exclusion from public procurements or bans on professional activity.\(^{31}\)

### 3.3 Penalties and Mutual Legal Assistance

The Act of 10 March 1927, which governs mutual legal assistance in the absence of an applicable convention, does not make assistance conditional upon the existence of penalties involving the deprivation of liberty for a minimum amount of time. Mutual assistance can therefore be granted whatever the penalties involved.

### 3.4 Penalties and Extradition

Two cases must be distinguished depending on whether or not an extradition treaty is in force:

1. In the absence of an applicable multilateral or bilateral extradition treaty, the conditions for extradition are laid down by the Act of 10 March 1927, on the extradition of foreigners, and particularly Article 4, paragraphs 1 and 2. Extradition may be granted or requested by France if the offence is sanctioned by the requesting State either by a criminal penalty (without a minimum threshold) or a prison sentence of not less than two years.

2. If there is an applicable extradition treaty, the thresholds allowing extradition are set by the treaty. At the present time, none of the treaties to which France is a party requires a threshold greater than two years.

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

#### Seizure

Searches and seizures are only possible for “articles and documents that can help to reveal the truth”. According to the French authorities, this notion covers both the instrument and proceeds of the offence. Search and seizures must be justified by the flagrant nature of the offence\(^{32}\) or ordered by the examining magistrate, which implies that a preliminary investigation has been started (articles 94 and 97 of the Code of Criminal Procedure), or with the consent on the part of the person concerned. Seizure can concern a sum of money (articles 54 and 97 of the Code of Criminal Procedure).

#### Confiscation

Section 3 of the Act of 30 June 2000, on “Additional penalties and the responsibility of legal persons”, provides, in respect of natural and legal persons alike, for “confiscation, as stipulated in Article 131-21, of the instrument that was used or intended to be used to commit the offence, or of the proceeds of the offence, except for items that may be restituted.” According to the French authorities, case law provides a

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32. Art. 54 CPP: “In the event of a flagrant crime, the judicial police officer (...) shall take steps to safeguard clues likely to disappear and anything that can help to reveal the truth. He shall seize the arms and instruments used, or intended to be used to commit the crime, and also everything that appears to be part of the proceeds of the crime”. Art. 56: “If the nature of the crime is such that proof thereof can be obtained by seizing papers, documents and other objects in the possession of the people who would seem to have participated in the crime or to have articles or objects relating to the facts in question, the judicial police officer shall go directly to the domicile of the said people and search the premises, drawing up a report on the results (...).”
very broad interpretation of the notion of proceeds of the offence which can, for example, cover the price of the contract secured as a result of bribery.

According to Article 131-21 of the Criminal Code, if an item has not been seized or is no longer available for seizure, confiscation of equivalent value shall be ordered. Where an amount representative of the value in question cannot be recovered, provisions for imprisonment in default are available; in contrast, the seizure of sums of money prior to a ruling on the sole grounds that it would make it subsequently possible to confiscate proceeds or instruments that were not available for seizure, is not authorised. The instrument of bribery may be confiscated from third persons. The French authorities explain that if the instrument of the offence was fraudulently taken or diverted to the detriment of its rightful owner, the courts will order its restitution to the victim.

3.8 Additional Civil and Administrative Sanctions

In France, bribery is liable to criminal penalties only. On the other hand, some special laws provide for indirect administrative or civil sanctions if a person is sentenced for bribery.

4. ARTICLE 4 - JURISDICTION

4.1 Territorial Jurisdiction

Scope of territorial jurisdiction

Article 4 of the OECD Convention provides that each State has jurisdiction when the offence is committed in whole or in part in its territory. This clause is met by Article 113-2 of the new Criminal Code, which states that “French criminal law is applicable to offences committed in the territory of the Republic. The offence is considered to have been committed in the territory of the Republic when one of the acts constituting the offence took place in this territory.”

The territory of France consists of the metropolis, overseas departments and territories, and territorial collectivities. While the overseas departments are governed by the same laws as the metropolis, this is not the case for the other entities. Article 5 of the Act of 30 June 2000 states that the law is also applicable in New Caledonia and French Polynesia, the Wallis and Fortuna islands and the territorial collectivity of Mayotte. The French authorities point out that it is also fully applicable in the territorial collectivity of St. Pierre et Miquelon, as in the case of the overseas departments. In contrast, Article 5 makes no mention of the French Southern and Antarctic Territories, the French authorities deeming it superfluous, as they consider the said territories do not have any involvement in international trade.

33. TGI Saint-Etienne, 10 August 1994.
34. By extension of the principle of territoriality in criminal law, the taking possession in France of goods of fraudulent origin, by an intermediary acting on behalf of a foreigner residing outside the national territory, is the material element that constitutes the offence of illegal receipt that brings the alleged offence within French criminal jurisdiction (Crim. 1 October 1986). Similarly, if the accused recruited his accomplices in France, this constitutes a constituent element of the offence and the whole offence is considered to have been committed on the territory of the Republic (Tribunal correctionel, Paris, 16 October 1991).
Extension of the principle of territoriality

By extension of the territoriality principle, French criminal law shall be applicable to offences committed in whole abroad if they are connected with, or inseparable from, offences committed in France.

Similarly, under Article 113-5 of the Criminal Code, “French criminal law shall be applicable to whoever is an accomplice in the territory of the Republic of a crime or misdemeanour committed abroad if the crime or misdemeanour is punishable under both French law and the foreign law and if it has been established by a final decision of the foreign court”. The latter provision could make it difficult in practice to proceed against French accomplices, especially when the foreign main perpetrator of the crime or misdemeanour is not tried abroad. On the other hand, the court that is competent to judge the principal offence is competent to try the accomplice, irrespective of nationality and of where the acts of complicity took place. In other words, French courts will be competent to try the foreign accomplice of the French main perpetrator of the offence.

Lastly, in the case of a foreigner employed by a French company, who commits an act of bribery abroad, French criminal law may be applicable if it is established that the foreigner acted on behalf of the French legal person and not on his/her own account. Once it is established that the acts originated in France or that one of the elements constituting the offence was committed in France, prosecution will be initiated not only against the legal person or managers involved, but also against the foreign perpetrator of the act abroad.

4.2 Extra-territorial jurisdiction

4.2.1 Nationality jurisdiction

The OECD Convention provides that the parties that have jurisdiction to prosecute their nationals for offences committed abroad must establish their jurisdiction with regard to the bribery of a foreign public official according to the same principles (active nationality principle).

France establishes jurisdiction to prosecute its nationals for offences of bribery of a foreign public official committed abroad under the general principle set out in Article 113-6 of the Criminal Code whereby “French criminal law is applicable to offences committed by French nationals outside the territory of the Republic if the offence involved is punishable under the law of the country where it was committed”. The prosecution procedure for such offences is set out in Articles 113-9 (non bis in idem principle) and 113-8 of the Criminal Code. “Proceedings may be initiated only at the request of the public prosecutor’s office. They must be preceded by a complaint lodged by the victim or legal successor or by an accusation formally made by the authorities of the country in which the acts took place”. These conditions do not affect the authority of the public prosecutor to decide whether or not to initiate proceedings.

35 The provisions of Article 203 of the Code of Criminal Procedure state: “Offences are connected either when they were committed at the same time by several persons acting together, or when they were committed by different persons, even at different times and in different places, but as a result of prior agreement between the said persons, or when the guilty parties committed one offence in order to obtain the means to commit others, facilitate them, perpetrate them or ensure impunity, or when the articles removed, misappropriated or obtained thanks to a crime or an offence were partly or entirely received as stolen”. According to Cour de cassation case law, these provisions are not restrictive: connexity also extends to cases in which there are close links between the facts - similar to those specially provided for by law (Cass. Crim. 18 August 1987, D. 1988 somm. 194).

36 This would be the case, for example, of bribery committed abroad with the aid of a criminal association formed in France: Crim 23/04/1981, B. No 116.

37 Crim.19 April 1988.
France also establishes jurisdiction over offences, punishable by imprisonment, committed by a French national or a foreigner outside French territory against a French victim (the victim is a French national at the time of the offence, article 113-7 of the Criminal Code). This is passive nationality jurisdiction, which is not required by the Convention.

These two bases of jurisdiction rely on the concept of a victim, either to initiate proceedings (113-6) or to determine the basis of jurisdiction (113-7). However, until recently, case law concerning corruption only recognised as “victim” the State of the public official. If this interpretation was maintained concerning the bribery of foreign public officials, French nationals would be prosecuted for acts of bribery committed abroad only if the State of the corrupted public official or the State where the acts took place intervene. Consequently, passive nationality jurisdiction would not be applicable to cases of bribery of foreign public officials, as the State or the international organisation could not be French. Today, case law seems to extend the status of victim to other persons which would facilitate the exercise of effective active nationality jurisdiction and would allow the exercise of passive nationality jurisdiction.

4.2.2. Non nationality jurisdiction

“In some cases, French courts can establish non-nationality jurisdiction, based on Article 689-1 of the Code of Criminal Procedure, which enables them to prosecute the offender who is on French territory, even temporarily, and irrespective of his/her nationality, that of the victim or the place where the offence was committed,” pursuant to the international Conventions referred to in Articles 869-2 to 689-7 of the Code of Criminal Procedure. The Act of 30 June 2000 adds an article, Article 689-8, for the application of the protocol of the convention on the protection of the European Communities’ financial interests, signed in Dublin on 27 September 1996, and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed in Brussels on 26 May 1997. These provisions do not apply to cases of bribery, which do not harm the financial interests of the European Communities.

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38 In support of this interpretation, the French authorities submitted only one case in which a person other than the State was recognised as having been indirectly injured by corruption: an association of users of the public service of water distribution was recognised as having an actionable claim in a case alleging corruption in the attribution of the corresponding market. The corrupt acts being unjustified price increases. The Court recognised that this resulted in a collective injury for the users (Cass. crim. 8 April 1999).

39 National Assembly, Report by Mr. Jacky Darne, député, on behalf of the Commission on constitutional laws, legislation and general administration of the Republic, on the bill adopted by the Senate, amending the criminal code and the code of criminal procedure with regard to the fight against corruption.

40 These articles cover certain offences which come under: the European Convention on the Suppression of Terrorism, signed in Strasbourg on 27 January 1977; and the agreement between the Member States of the European Communities concerning the application of the European Convention on the Suppression of Terrorism, done in Dublin on 4 December 1979; the Convention on the Physical Protection of Nuclear Material, signed in Vienna and New York on 3 March 1980; the protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, done in Rome on 10 March 1988; the Convention for the suppression of the unlawful seizure of aircraft, signed in the Hague on 16 December 1970, and the Convention for the suppression of unlawful acts against the safety of civil aviation, signed in Montreal on 23 September 1971; the protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, done in Montreal on 24 February 1988.

41 Article 689-8 provides for the prosecution of a” French national or anybody belonging to the French civil service who is guilty of one of the offences listed in article 435-2 of the criminal code or of an offence that harms the financial interests of the European Communities” and “of anybody guilty of the offences listed in article 435-2 of the criminal code or of an offence that harms the financial interests of the European Communities, when these offences are committed against a French national”, without requiring that France’s jurisdiction be established with respect to dual criminality.
4.3 Consultation Procedures

Article 4 of the Convention states that when more than one Party has jurisdiction over an alleged offence, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

In French law there is no formal consultation procedure for resolving the question of competing jurisdictions. The principle of “non bis in idem”, contained in Article 692 of the Code of Criminal Procedure, is simply applied.

A case may be transferred to another State when extradition is refused on the grounds of nationality: the State requesting extradition can ask the other State to submit the case to its competent authorities. Proceedings may also be transferred for the purposes of mutual legal assistance where an accusation has been formally made. This option, which is frequently used, is provided by the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and most of the bilateral treaties signed by France.

4.4 Effectiveness of Jurisdiction

According to the French authorities, case law alone will demonstrate the effectiveness of jurisdiction.

ARTICLE 5- ENFORCEMENT

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

5.1 Rules and Principles Applicable to Investigations and Prosecutions

Investigations and prosecutions in respect the bribery of a foreign public official are conducted in accordance with the rules of the code of criminal procedure. The judicial police, under the supervision of the procureur de la République, is responsible for establishing infringements of the criminal law, gathering proof and finding the perpetrators before a judicial inquiry is opened. Once an inquiry has been opened, the examining judge carries out all the investigations he deems necessary to arrive at the truth, and the judicial police carries out his assignments and defers to his instructions.

French criminal procedure is governed by the principle of prosecutorial discretion: the public prosecutor’s office is free not to initiate a proceeding in respect of an act which bears all the marks of an offence. The prosecutor is solely responsible for deciding whether to bring a prosecution, without interference from the Minister of Justice (Garde des Sceaux). There is thus no obligation on the prosecutor’s office to comply with any criteria or guidelines that might be laid down by a criminal policy circular of the Chancellery. However, the French authorities specify that implementation of the principle of prosecutorial discretion necessarily entails an evaluation of the disturbance to public order caused by the facts at issue, taking into account their seriousness, as measured in particular by the amount of the bribe.

The Act of 30 June 2000 contains several provisions that create a distinct set of rules and principles regarding investigations and prosecutions.

Distinct rules regarding prosecutions

French common law regarding investigations and prosecutions distinguishes between whether part or all of the acts took place in French territory or whether they all took place abroad. In the former case, the law
allows the victim to bring an action, thereby overriding the principle of prosecutorial discretion. In the latter case, Article 113-8 of the Criminal Code states that a prosecution can be brought only by the public prosecutor’s office.

The Act of 30 June 2000 departs from common law. Under the new articles 435-3 and 435-4 of the Criminal Code, prosecutions concerning the bribery of foreign (non-EU) public officials can be initiated solely by the public prosecutors’ office, even if part or all of the acts took place in French territory. In ruling out the possibility of an action being brought automatically by the victim, the legislator wanted to ensure that the conditions for bringing a prosecution were equivalent to those in other Parties, signatories to the Convention, some of which do not allow such actions to be brought. A second reason was to prevent excessive and unwarranted civil actions, despite the mechanisms that exist to prevent such unwarranted actions. Lastly, the French authorities add that the legislator also wished to take account of the high probability that the active corruption of foreign public officials will take place entirely abroad. However, these rules do not apply to offences falling under Article 435-2; the French authorities explain this difference in treatment by the highly integrated character of the legislation of EU Member states, which does not exist within the broader framework of the OECD.

Although this differentiated regime does not seem to comply with Article 5 of the Convention, which provides that investigation and prosecution be conducted in accordance with the rules and principles of each Party, the French authorities consider that on the contrary, Article 5 of the Convention does not require the same prosecution procedure in cases of bribery of national public officials and foreign public officials, but leaves it up to the national law of each Party to determine the procedure to be followed.

Although prevented from bringing an action, the French authorities explain that the victim has two means of recourse. Once proceedings have been initiated, the victim can bring an accessory civil action. Furthermore, anybody who considers themselves a victim can always file a complaint without bringing a civil action. By filing a mere complaint, the victim informs the public prosecutor, the police or the gendarmerie that an offence has been committed, thereby making it possible to open a criminal investigation without violating the principle of prosecutorial discretion.

Under the general rules for civil actions, claims for damages caused by an offence must be brought by the party who personally suffered from the offence, and the damage must be certain, personal and direct. Until now, only the State was considered as the victim of corruption. However the French authorities indicate that recent court decisions have tended to recognise the status of other persons as victims (cf. section 4.2.1.). As far as the French authorities are aware, there is no case law to date to confirm whether a competitor, who has been harmed by loss of a contract, could be considered a victim. Hypothetically, the French authorities are of the opinion that such a case would not be excluded.

Under French law, the burden of proof lies with the prosecutor’s office i.e. the prosecuting party.

Distinct rules regarding the competent court of jurisdiction

Under the law transposing the Convention into French law, the court competent to try cases of bribery of foreign public officials is no longer determined by common law.

42. Presentation of the draft law by the Minister of Justice in: “Senate; Complete minutes. Session of Wednesday 10 November 1999.” Journal Officiel de la République française, No. 83 s (C.R.), 1999, Thursday 11 November 1999, p. 5866; “Report “by the Commission on constitutional laws, legislation, universal suffrage, Regulations and general administration, on the draft law amending the criminal code and the code of criminal procedure with regard to the fight against corruption”; Senate, 42 (1999-2000); Report by the joint Commission responsible for proposing a text on the provisions still under discussion, of the draft law amending the criminal code and the code of criminal procedure with regard to the fight against corruption, 28 March 2000, p.21.
First, the bribery of both European Union and French officials will fall within the responsibility of regional jurisdictional economic and financial poles\textsuperscript{43}, which were created to adapt the law to the complexity of financial and economic crime, and to strengthen the means of combating corruption. New working methods will be introduced: modern logistical means will be available and multidisciplinary teams will be placed at the disposal of specialised courts.

Second, the law introduces a special provision regarding the bribery of foreign public officials outside the European Union. The new article 706-1 of the Criminal Procedure code states that, for the prosecution, investigation and trying of offences listed in articles 435-3 and 435-4 of the Criminal Code, the Paris public prosecutor, examining magistrate and the \textit{Tribunal Correctionnel de Paris} have jurisdiction concurrent with that arising from common law\textsuperscript{44}. The legislator justifies this provision on the ground that, by centralising international corruption cases in Paris, prosecutions will be better harmonised\textsuperscript{45}. Parliament took the view, on the other hand, that this concern was less justified within the European Union.

5.2 Economic, Political or other Considerations

By virtue of recognised discretionary power, only the public prosecutor’s office can institute legal proceedings, and thus prosecution for offences covered by the Convention. According to the French authorities, investigation and prosecution in cases of bribery of a foreign public official may not be influenced by economic, national, political or other considerations, as for any other investigation or prosecution\textsuperscript{46}. However, Article 692-2 of the Criminal Procedure Code states that “judicial authorities that receive a request for mutual legal assistance with regard to international criminal matters and that consider that to act upon it could be prejudicial to the nation’s security, public order or other vital interest of the country, may take the necessary steps to enable the competent authorities to determine the follow-up to be given to the request”\textsuperscript{47}.

Special rules apply to certain persons on account of their functions and status -- Members of Parliament, members of the government, the Head of State and persons with diplomatic and consular immunity. However, they are essentially procedural rules which do not allow the individuals concerned to escape prosecution or sanctions.

\textsuperscript{43.} These jurisdictional poles are provided for by Article 704 of the Code Of Criminal Procedure: “Within the jurisdiction of each court of appeal, one or several \textit{tribunaux de grande instance} are competent in the conditions provided by this Title to prosecute, examine and, in the case of misdemeanours, to judge the following offences in cases which are or would seem to be very complex (…).”

\textsuperscript{44.} Paragraph 2: “When they are competent to prosecute and examine the offences listed in articles 435-3 and 435-4 of the criminal code, the public prosecutor and the Paris examining magistrate are competent throughout the entire national territory.

\textsuperscript{45.} Report by the aforementioned joint Commission, 28 March 2000, p.23.

\textsuperscript{46.} In order to strengthen this principle, draft law No 470 amending the code of criminal procedure, adopted in its first reading by the National Assembly on 29 June 1999 and by the Senate on 26 October 1999, seeks to clarify the relationship between the Ministry of Justice and the public prosecutor’s office, and to strengthen the safeguards for citizens in the event that the case is shelved. Thus, with regard to the relationship between the Ministry of Justice and the public prosecutor’s office, the draft law lays down the principle that the Ministry may not give instructions to the public prosecutor’s office in individual cases. As regards the safeguards given to citizens in the event that a case is shelved, the draft law requires that such decisions should henceforth be supported by the reasons for them, and can be appealed against in the first instance before the procurator-general and in the final instance before a commission of appeal composed of magistrates.
6. **ARTICLE 6 - STATUTE OF LIMITATION**

The statute of limitation for the prosecution of offences is three years (Article 8 of the Criminal Procedure Code), irrespective of whether the offence is committed by a natural person or a legal person. Bribery, being an instantaneous offence, the statute of limitation is considered to run from the day the offence was committed. However, the *Cour de Cassation* has consistently ruled that the offence of bribery, committed from the moment the agreement between the briber and the bribed person is concluded, is renewed on each occasion that the agreement is acted upon. In consequence, the triggering of the statute of limitation is moved forward from the day the bribery agreement was concluded, to the day of the final payment or the day of the last receipt of the advantage that was promised, etc.

The statute of limitation can be interrupted or suspended pursuant to Articles 7 and 8 of the Criminal Procedure Code. It may be interrupted by a prosecution or investigation (cancelling out the time elapsed up to then) and a new three-year period starts to run; it is suspended in the event of a legal impediment to proceedings taking place (examination of a prejudicial question, appeal in cassation, etc.) or by a factual impediment (dementia of the person charged, etc.) in which case, the statute of limitation is merely suspended, and the time that elapsed prior to the suspension is taken into account, without there being any time limit on the interruption or suspension. The French authorities consider that, given these possibilities of interrupting or suspending the statute of limitations, the three-year limitation on the prosecution of offences is not likely to impede prosecutions.

7. **ARTICLE 7 - MONEY LAUNDERING**

Article 7 of the Convention states that each Party that has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

7.1/7.2 **Bribery of French and Foreign Public Officials**

France makes the laundering of the proceeds of any crime or misdemeanour punishable under Article 324-1 of the Criminal Code. The laundering of money from the active corruption of a foreign public official is punishable under the same conditions as the active corruption of a French public official, since they are both offences under the new law. These provisions apply both to the assets and income of the perpetrator of an offence that brought him/her a direct or indirect profit. As the offence of money laundering is distinct from the predicate offence, it matters little whether the active corruption was committed abroad or whether it falls within the jurisdiction of a French criminal court. It should be noted that, under Article 324-9 of the Criminal Code, “legal persons can be declared to be criminally liable, under the conditions provided by Article 121-2, for offences defined in Articles 324-1 and 324-2.”

A bill concerning new economic regulations is currently being examined by Parliament. Title IV of the first part dealing with financial regulation, addresses measures to strengthen the fight against money laundering.

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49. “Laundering is the fact of facilitating, by any means, untruthful justification for the origin of goods or income of the perpetrator of a crime or misdemeanour, from which the latter has benefited directly or indirectly. It is also the fact of assisting the investment, concealment or recycling of the direct or indirect proceeds of a crime or misdemeanour. It is punishable by five years’ prison and a fine of FF 2 500 000.”
8. ARTICLE 8 - ACCOUNTING

8.1 Book-keeping and Accounting Statements

According to the French authorities, all the acts proscribed by Article 8 of the Convention (establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their objects, the use of false documents) are prohibited generally by French accounting law, irrespective of the aim involved. There are no special provisions applicable to cases where such practices are used to bribe a foreign or French public official.

The legislative and regulatory sources of French accounting law are, on the one hand, Articles 8 to 17 of the Commercial Code and the related implementing provisions (Articles 1 to 27 of the amended decree of 29 November 1983) and, on the other, the chart of accounts as resulting from the amended ministerial decree of 27 April 1982, all of which form a consistent whole in the view of the French authorities. In the case of commercial companies, the Act of 24 July 1966 and the related implementing decree of 23 March 1967 lay down rules for drawing up consolidated accounts, disclosure and auditing of annual accounts, the documents that must accompany them, and other accounting information that must be provided.

8.2 Enterprises subject to these Laws and Regulations

Under Article 8 of the Commercial Code, all traders, natural or legal persons, are subject to the rules regarding accounting, pursuant to the Commercial Code. The law of 24 July 1966 applies to commercial companies. Lastly, the chart of accounts, the rules of which are identical to those in the Commercial Code and the Law of 24 July 1966, apply to all industrial and commercial companies.

8.3 Penalties for Omissions or Falsifications


Offences and sanctions provided by the criminal code

• The making and use of forged documents by natural persons is punishable by a prison term of three years, a fine of FF 300 000 (Article 441, paragraph 2) and further penalties provided by Article 441-10 of the Criminal Code (i.e., loss of civic rights, ban on doing business, disqualification from public contracts and confiscation).

• The making and use of forged documents by legal persons is punishable by a fine of FF 1 500 000 and further penalties provided in Article 131-39 of the Criminal Code (i.e. winding-up of the company, ban on engaging in business, judicial supervision, definitive or temporary closing-down, disqualification from public procurements, definitive or temporary ban on soliciting funds from the public, ban on

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50. “Traders are all those who engage in trade as a habitual occupation”, Article 1 of the Commercial Code.
51. Article 1 of the Act of 1966: “The commercial nature of an undertakings is determined by its form and purpose. The following are commercial undertakings by virtue of their form and whatever is their purpose: general partnerships, limited partnerships, limited liability companies and joint stock companies.”
52. “Forged documents is any fraudulent alteration of the truth such as to cause prejudice, by any means whatsoever, be it in writing or any other medium, whose aim or effect is to establish the evidence of a right or a fact with legal consequences.” Article 441-1, paragraph 1.
writing certain types of cheques, confiscation of the assets which were used or intended for committing
the offence, posting or publication of the decision.

Offences and sanctions provided by the Law of 1966:

- Omitting to compile accounting documents -- punishable by a fine of FF 60 000

- Presentation of accounts that do not give a true and fair view -- punishable by a prison term of five
  years and fine of FF 2 500 000 (or one or the other in the case of managers of a SARL - private limited
  liability company).

- Distribution of fictitious dividends -- punishable by a prison term of five years and a fine of FF 2 500
  000 (or one or the other in the case of managers of a SARL).

Offences and sanctions provided by Law No 85-98 of 25 January 1985 in respect of compulsory
reorganisation and the winding up of a company by decision of the courts

- Patrimonial penalties of personal assets placed in compulsory reorganisation

- Criminal penalties for criminal bankruptcy

- Personal sanction: personal bankruptcy

53. Articles 426-1 for limited liability companies (SARL), 464-1 for simplified joint stock companies (SAS)
  and 439-1 for public limited liability companies (SA): “[Managers of SARLs, the chairman or managers of
  SAS, the chairman, directors or managing director of a SA] who have not drawn up an inventory, annual
  accounts and a management report for each year, will be punished by a fine of FF 60 000.”

54. Articles 425-3 for SARL, 437-2 for SA and 464-1 for SAS “[Managers of SARL, the chairman or
  managers of SAS, the chairman, directors or managing directors of a SA] who, even if no dividends were
  paid out, knowingly presented annual accounts which do not give a true and fair view of the trading results
  for the year, the financial situation and assets at the end of this period, with a view to concealing the
  company’s true situation.”

55. Articles 425-2 for SARL, 437-1 for SA and 464-1 for SAS: “[Managers of SARL, the chairman or
  managers of SAS, the chairman, directors or managing directors of a SA] who, in the absence of an
  inventory or by means of a fraudulent inventory, knowingly distributed fictitious dividends.”

56. Article 182 states that “In the event of a legal person being placed in compulsory reorganisation or
  liquidated by decision of the courts, the court can institute proceedings to place in compulsory
  reorganisation any manager, in law or in fact, whether paid or unpaid, who is alleged to have committed
  one of the following: (…) 5. Have kept fictitious accounts or removed accounting documents from the
  company or failed to keep accounts in accordance with statutory requirements; (…) 7. Have kept accounts
  that are manifestly incomplete or irregular in regard of legal requirements. If the legal person is placed in
  compulsory reorganisation or liquidated by court order pursuant to this article, the liabilities shall comprise
  those of the legal person in addition to the personal liabilities.”

57. “In the event of compulsory reorganisation or winding-up proceedings being initiated, the persons
  mentioned in Article 196 who have committed one of the following, are guilty of criminal bankruptcy: (…)  
  2. Have misappropriated or concealed all or part of the debtor’s assets; (…) 4. Have kept fictitious accounts
  or removed accounting documents from the company or the legal person or failed to keep any accounts as
  required by the law. 5. Have kept accounts that are manifestly incomplete or irregular in regard of legal
  requirements.” Criminal bankruptcy is punishable by five years’ prison and a fine of FF 500 000, and by
  seven years’ prison and a fine of FF 700 000 in the case of a manager of a stock brokering company. In
  addition, further penalties are applicable to natural persons (loss of civic, civil and family rights,
  disqualification from public procurement; ban on writing cheques; posting and publication of the decision,
  as well as to legal persons (penalties mentioned in Article 131-19 of the criminal code).
Furthermore, under Article 233, paragraph 2 of the 1966 Company Law, public auditors are bound to “inform the public prosecutor of offences that have come to their knowledge”, at the risk of a term of imprisonment of five years and a fine of FF 120 00.

9. MUTUAL LEGAL ASSISTANCE

The OECD Convention requires each Party, “to the fullest extent possible under its laws and relevant treaties and arrangements”, to provide “prompt and effective legal assistance “ to other Parties for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention and for non-criminal proceedings coming within the scope of the Convention brought by a Party against a legal person. The Convention requires that where dual criminality is necessary for a Party to be able to prove mutual legal assistance, it shall be deemed to exist if the offence for which it is sought is within the scope of the Convention. Finally, the Convention states that a Party may not decline to render mutual legal assistance for criminal matters within the scope of the Convention on the ground of bank secrecy.

9.1 Laws, Treaties and Agreements Permitting Mutual Legal Assistance

In France, mutual legal assistance is based on the following various legal instruments:

- The Convention implementing the Schengen Agreements of 19 June 1990;
- The Convention on Mutual Assistance in Criminal Matters of 20 April 1959. 39 States, including France, have ratified this convention under the aegis of the Council of Europe;
- Bilateral mutual legal assistance agreements;
- The Law of 10 March 1927 on the extradition of foreigners, which lays down the principle of reciprocity, pursuant to which the requesting State must be able to reciprocate, regardless if it has done so in practice (Articles 30 et seq.).

The French authorities state that mutual assistance can also be provided when the liability involved is that of a legal person. They also state that if a request is made, pursuant to a treaty, for mutual legal assistance in a non-criminal administrative proceeding, France may be able to meet the request if it is possible to bring an appeal in particular in a criminal court, in respect of the decision taken by the administrative court.

9.2 Dual Criminality

According to the French authorities, the condition of dual criminality is not always required but some bilateral agreements provide for it, especially for requests for mutual assistance relating to coercive

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58. Under Article 186 of the Law of 25 January 1985, persons declared bankrupt are banned from directing, managing, administering or controlling, directly or indirectly, any commercial undertaking or business activity. In addition to traders, the following persons can be declared bankrupt: tradesmen, farmers, natural persons who are managers in law or fact of legal persons with a business activity, and natural persons who are the permanent representatives of legal persons with such an activity.

59. The Schengen agreements of 14 June 1985 and 19 June 1990 contain provisions on strengthening judicial co-operation through mutual legal assistance, extradition and transmission of the execution of criminal sentences. Thirteen European States signed them: France, Germany, Belgium, Luxembourg, the Netherlands, Italy, Greece, Spain, Portugal, Denmark, Austria, Sweden and Finland. Negotiations are under way with Norway and Iceland. Furthermore, under the Amsterdam Treaty, the United Kingdom and Ireland have the possibility of joining; lastly, countries applying for accession to the European Union will have to apply the Schengen acquis when they join.
measures. It will be presumed to exist if the offence is within the scope of the Convention. The French Garde des Sceaux has stated in debates in the Senate that the condition of reciprocity is systematically met in the European Union.

9.3 Bank secrecy

Under Article 132-22 of the Criminal Code, bank secrecy may not be invoked as a ground for refusing to supply information to the judicial authorities. The French authorities explain that a petition from the magistrate or judicial police officer to the banking institution (and to which the latter is bound to answer) is sufficient to obtain information. In the event of proven or foreseeable difficulties, searches and seizures may also be conducted.

10. ARTICLE 10 - EXTRADITION

10.1 Extradition for the Offence of bribery of a Foreign Public Official

In France, bribery of a foreign public official is an extraditable offence under several types of legal instruments:

- The French Act of 10 March 1927 on extradition, which constitutes the common law of extradition, provides that offences that are punishable under foreign law by a criminal sentence or a lesser sentence of a maximum of at least two years, and sentences of at least two months of prison that have already been handed down, are extraditable. The Act does not allow the extradition of French nationals, persons subject to the jurisdiction of the French courts, and fleeing slaves.

- The European Convention on Extradition of 13 December 1957, which was ratified on 10 February 1986 and entered into force on 11 May 1986. 40 States including France have signed this Convention.

- Bilateral extradition treaties, some of which allow extradition only for a limited number of offences. The French authorities indicate that the offence of bribery of a foreign public official will be added to the list of offences, pursuant to Article 10.1 of the Convention.

10.2 The Convention as the Legal Basis for Extradition

France’s extradition relations are not conditional on the existence of a treaty, since domestic law (Law of 27 March 1927) allows extradition even without a treaty, on the basis of reciprocity.

10.3/10.4 Extradition of Nationals

Extradition of French nationals is not permitted pursuant to the Law of 10 March 1927 on extradition, irrespective of the offence they are alleged to have committed. The French authorities point out that Article

60. Ibid.

61. “The public prosecutor, the examining magistrate or the court handling the case can call on the parties, the administration, financial institutions or any person holding the accused’s funds, to supply financial or tax information that is useful, and they may not refuse on the grounds of secrecy.”

62. France filed a reservation, stating that, “with regard to the persons being prosecuted, extradition will be granted only for offences which are punishable under French law and the law of the applicant State by a penalty or measure involving a deprivation of liberty for a period of at least two years. Regarding more serious penalties than penalties or measures involving a deprivation of liberty, extradition may be refused if such penalties do not exist in the scale of penalties applicable in France.”
6-2 of the European Convention on Extradition and bilateral treaties provide that, in this case, France must, at the request of the applicant party, submit the case to its competent authorities so that legal proceedings can be initiated if there are grounds for doing so. In the absence of a treaty, a formal accusation must have been made by the authorities of the country where the offence was committed for the French authorities to institute legal proceedings (Article 113-8 of the Criminal Code).

10.5 Dual criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional upon the existence of dual criminality, this condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention.

France always makes extradition conditional on the existence of dual criminality.

11. ARTICLE 11 - RESPONSIBLE AUTHORITIES

11.1 Designation of responsible authorities

For the purposes of the consultation provided by Article 4, paragraph 3, the mutual legal assistance provided by Article 9, and extradition as provided by Article 10, requests shall be made and received via diplomatic channels, without prejudice to other arrangements between the Parties.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Revised Recommendation of 1997 urges Member countries to implement promptly the 1996 Recommendation on the tax deductibility of bribes to foreign public officials: [The Council recommends] “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility”. Similarly, the Commentaries on the Convention state that “a full participant also accepts the Recommendation on the tax deductibility of bribes to foreign public officials, adopted on 11 April 1996”.

French tax legislation has been modified to take account of the provisions of the OECD Convention (except New Caledonia, French Polynesia and the territorial collectivity of Mayotte). Article 39-2 bis of the General Tax Code states that, “from the coming into force of the Convention on combating bribery of foreign public officials in international business transactions, sums paid or advantages granted directly or through intermediaries, for the benefit of a public official within the meaning of Article 1 (4) of the said Convention, or of a third party in order that the official acts or refrains from acting in the performance of official duties, with a view to obtaining or retaining business or another improper advantage in the conduct of international business, shall not be deductible from taxable profits”. These provisions came into force on 29 September 2000.

Regarding the exchange of information between the tax administration and the judicial authorities, Article 40, paragraph 2, of the Code of Criminal Procedure provides that “any constituted authority, public officer or official who, in the course of their duties, learns of an offence, is bound to report it immediately to the Public Prosecutor and to forward all the information, records and acts relating thereto”. Tax officials are fully concerned by this obligation. Article L. 101 of the Livre des procédures fiscales lays down a
corresponding obligation on the judicial authority to inform the tax administration of anything that might suggest that tax evasion has been committed\textsuperscript{63}.

In New Caledonia, French Polynesia and the territorial collectivity of Mayotte, the Act of 30 June 2000 is automatically and fully applicable save that, in tax matters. Article 32 of the Amending Finance Act for 1997 is not directly applicable. From a formal standpoint, only an ad hoc text adopted by the assemblies of these territories can explicitly prohibit the tax deductibility of commissions paid to foreign public officials. The French government will endeavour to ensure that these territories adopt texts to that end.

However, the French authorities point out that the tax deductibility of commissions in these jurisdictions is no longer an issue, since the presentation to a tax official of documents substantiating the payment of a commission to a foreign public official, in order to obtain a tax reduction, would result in the application of Article 40 of the code of Criminal Procedure. they state that it is thus highly unlikely that a briber would risk prosecution in order to claim such a deduction in these territories.

\textsuperscript{63} “The judicial authority must communicate to the Finance administration any information that suggests tax fraud has been committed, or any action whose aim or result was to evade tax, whether it be a civil or commercial court, a criminal court or court of summary jurisdiction, and even if the case is eventually dismissed”.

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EVALUATION OF FRANCE

General comments

The Working Group complimented the French authorities on the conscientious way in which they had implemented the Convention in domestic law. It thanked the authorities for having provided detailed replies which had facilitated the review procedure.

In order to meet the requirements of the Convention and the Recommendation, the French Parliament adopted the Act of 30 June 2000 on combating bribery, amending the Criminal Code, the Code of Criminal Procedure and the General Tax Code. The Group is of the opinion that the Act adopted by France generally conforms to the requirements of the Convention. However, certain aspects of the French implementing legislation, listed below, raised concerns as they may affect the effective implementation of the Convention in France. These aspects shall therefore require careful examination in Phase 2.

Specific questions

The definition of foreign public officials

The Working Group noted that French legislation did not adopt the autonomous definition of a foreign public official as provided in Article 1.4.a of the Convention, but took the concept of public official as it exists in French law. As that concept is very broad, the Group considered that it covers the different categories referred to in Article 1.

Elements of the offence

Under French law, the act of "proposing, without right, offers, promises, gifts, presents or advantages of any kind" constitutes the offence of bribery. Although provided for implicitly by the law, it does not explicitly mention the act of giving any undue pecuniary or other advantage.

The Group raised the question whether French courts would pursue an act of giving any undue pecuniary or other advantage that takes place after the entry into force of the legislation, as a result of a corruption pact (meeting of minds between the briber and the recipient of the bribe) entered into before the law’s entry into force. On this point, the French authorities referred to their description of French case law provided for in Section 1.1.3 of the report.

The Group took note of the explanations provided by France but expressed concerns whether existing case law provides, with sufficient certainty, a positive answer to the question raised above. The Group considered that this issue should therefore be carefully monitored during Phase 2.

Criminal responsibility of legal persons

The Working Group noted that the conditions for implementation of the criminal responsibility of legal persons were identical to those provided for in the case of bribery of a French public official. However, in the event of a restrictive interpretation by French courts, those conditions could rule out the criminal responsibility of legal persons when the offence is committed by an employee or a subordinate.

The French authorities recalled that the conditions for implementation of the criminal responsibility of legal persons are flexible and comprehensive enough to encompass numerous situations. They believe that the situations that could give rise to an exclusion of liability would relate to problems of proof and not to a restrictive interpretation of the conditions for implementation of the criminal responsibility of legal persons.

The Group considers that this question should be re-examined in Phase 2.
Jurisdiction

The Working Group noted that French law provides for both territorial jurisdiction and jurisdiction based on nationality, the latter being subject to the condition of dual criminality. In this latter case, proceedings may be initiated only after a complaint has been lodged with the French authorities by the victim or after an accusation made by the authority of the country in which the bribery took place. The Working Group considered that if the term “victim” applies only to the country of the foreign public official, this could restrict the effective exercise of jurisdiction based on nationality.

On this point, the French authorities refer to the details and their description of French case law provided for in paragraph 4.2.1. of the report.

The Group urged France to review its application of nationality jurisdiction in light of Article 4.4 of the Convention.

Rules for instituting prosecutions

Prosecutions concerning the bribery of foreign public officials under the OECD Convention, unlike the case of the bribery of French or EU public officials, can be initiated solely by the public prosecutor’s office, regardless of where the offence took place. This excludes the possibility of an action being brought automatically by the victim, even if the offence was committed in France. The French authorities stated that this provision already exists in French law with regard to offences committed entirely abroad.

The Working Group nevertheless expressed reservations whether this differential treatment complies with the spirit of Article 5. Its impact on the effectiveness of prosecutions will be assessed in Phase 2.

Statute of limitations

The Working Group expressed concerns with regard to the fact that the statute of limitations in France for the bribery of foreign public officials is three years, even though it may be interrupted or suspended. France drew the Group’s attention to the fact that under case-law on “concealed” offences, the statute of limitations only begins to run from discovery of the unlawful acts. The courts have not so far, however, ruled on whether bribery constitutes such an offence.

Article 6 of the Convention provides that an adequate period of time shall be allowed for investigations and prosecutions. The Group noted the explanations by the French Delegation but considered that this matter, already mentioned in previous reviews, constitutes a general problem calling for a comparative analysis of the legal situation in Member countries with a view to ensuring the coherent and effective implementation of the Convention.
ITALY

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Italy signed the Convention on December 17, 1997. It adopted the implementing law on September 29, 2000 (Act N° 300), which was published in the Ordinary Supplement 176-L to the Official Journal of 25 October 2000 n° 250. The law entered into force on 26 October 2000. Italy deposited its instrument of ratification of the Convention on December 15, 2000 with a “Note Verbale” mentioning the legislative delegation mandating the Government to introduce non penal sanctions against legal persons for bribing within eight months from the entry into force of the implementing legislation, that is 26 June 2001.

The implementing law provides an amendment to the Italian Criminal Code by establishing the offence of bribing a foreign public official as well as a passive bribery offence in relation to officials of the European Union. It also contains a Criminal Code amendment providing for the confiscation of the proceeds of certain offences, including the offence of bribing a foreign public official. Moreover, in accordance with Article 11 of the law the Government is due to issue, within eight months from the entry into force of the law, a legislative decree to regulate the administrative responsibility of legal persons and of bodies without legal personality for the commission of the foreign bribery offence, in accordance with the principles and guidelines therein. The legislative decree will be limited in application to bribery offences committed by bodies after the entry into force of the legislative decree.¹

A legislative decree like the one presented in this report has the same force as law (art.77, para 1, of the Italian Constitution). The draft legislative decree, drawn up by the Ministry of Justice was approved on 11 April 2001 by the Council of Ministers and transmitted to the Parliamentary Commissions (the two Justice Commissions of the Chamber of Deputies and Senate of the Republic) for a non-binding opinion. This opinion is mainly given to assess whether the government complied or not with the content of the enabling act, that is Article 11 of the above mentioned Law no 300 of 29 September 2000. The President of the Republic must then issue the decree within the maximum term provided for the enabling statute, that is 26 June 2001. On 3 May 2001, the Italian authorities informed the Working Group that the parliamentary opinion has been issued at the end of April and that the Council of Ministers has approved the final legislative decree on 2 May 2001. According to the Italian authorities, the legislative decree should enter into force after its publication in the Official Journal, which should intervene within a month.

Convention as a Whole

The implementing law authorises the President of the Republic to ratify several international instruments, including the Convention on Combating Bribery of Foreign Public Officials. In addition to the provisions mentioned above, it makes some amendments to the current provisions on jurisdiction in the Criminal Code, and amends a section in the Criminal Code that provides for additional sanctions in certain circumstances for a person convicted of an offence, including the foreign bribery offence. It also contains a provision on the responsible authorities for the making and receiving of requests, etc. pursuant to Article 11 of the Convention.

¹ See: paragraph (m), section 1 of article 11 of the implementing legislation.
The Criminal Code contains existing provisions relevant to the other obligations under the Convention, including the statute of limitations, jurisdiction and money laundering. The Italian Code of Criminal Procedure contains provisions on mutual legal assistance and extradition, and other statutes, including the Italian Civil Code, contain further relevant provisions.

Domestic law provisions enacted in order to implement international obligations such as the OECD Convention must be interpreted in Italy, according to the Italian Supreme Court, in conformity with the relevant international provisions in order that Italy fully complies with international obligations undertaken.

1.1 General Description of the Offence

The implementing legislation amends the Criminal Code by adding article 322-bis, which establishes two basic offences—the passive bribery offence of officials of the European Communities and the active bribery of foreign public officials. Since the Convention is directed at the active bribery of foreign public officials, this review will only assess the provisions in the implementing law related thereto. In this respect, article 322-bis (paragraph 2) provides as follows:

The provisions of articles 321 and 322, first and second paragraphs, shall also apply if the money or other advantages are given, offered or promised:

1. to persons which are referred to in the first paragraph of this article;
2. to persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organisations, when the offence was committed in order to procure an undue benefit for himself or others in international business transactions.

The persons indicated in the first paragraph are assimilated to public officials, when they carry out equivalent functions, and to persons in charge of a public service in all the other cases.

Paragraph 1 of article 322-bis refers to the following persons:

1. the members of the Commission of the European Communities, of European Parliament, of the Court of Justice and of the Court of Auditors of the European Communities;
2. to officials and contracted agents within the meaning of the Staff Regulations of officials of the European Communities or the conditions of employment of agents of the European Communities;
3. any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other agents;
4. to members and employees of bodies created on the basis of Treaties establishing European Communities;
5. to those who, within other Member States of European Union, carry out functions or activities equivalent to those performed by public officials or persons in charge of a public service.

Article 322-bis refers to articles 321 and paragraphs 1 and 2 of article 322, which establish the offences of bribing a domestic public official. In turn, articles 321 and paragraphs 1 and 2 of article 322 refer to

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2 Article 322-bis, paragraph 2 is often referred to simply as article 322-bis in this review when it is clear that the offence of bribing a foreign public official is being discussed (as opposed to passive bribery of officials of the European Union).
passive bribery offences in relation to domestic officials for the determination of the relevant penalties (i.e. article 321 refers to paragraph 1 of article 318, article 319, article 319-bis, article 319-ter and article 320; and paragraphs 1 and 2 of article 322 refer to article 318 and 319, respectively).

While Italian law does not provide for any general defences that would apply in relation to the bribery offence, two specific provisions of the legislation are worth noting.

The first one relates to the fact that art. 321 p.c., referred to by art. 322-bis p.c., provides punishments for the briber but does not refer to art. 318, para. 2 p.c. Therefore, according to the Italian authorities, the legislator has not provided any punishment applying to the person who compensates the public official for an act which he already performed in compliance with his office as, in this case, the person does not receive any advantage as a consequence of his act (v. Cass. 26/6/68, in Mass. Cass. Pen., 1969, 1331).

The public official could, however, be prosecuted for a passive bribery offence.

Similarly, because the offer or the promise of money or other thing of value must be carried out in order to ‘induce’ the public official to perform an act or service in compliance with his office, incitement does not exist if the act was already performed (v. Cass 12/9/96, Balboni, in Riv. pen., 1997, 216).

The question of payments made after performance of duty refers to a situation which is not covered by the Convention. The non coverage of such payments might, however, in practice weaken the effective application of the Convention.

The second provision is that the Italian legislation provides also for the offence of concussion (i.e., extortion made by public official, art. 317 p.c.). According to this article, “A public officer or a person charged with a public service who, by abusing his position or his power, compels or induce anyone to unduly give or promise, to himself or a third person, money or other thing of value, shall be liable to imprisonment for between four and twelve year”. In that particular case only the public official is liable to criminal sanction and not the person who was “obliged” to act consequently. According to the Italian authorities the fundamental element for distinguishing corruption from concussion is the conduct of the public official who, in the latter case, must have determined or insinuated in the passive person a state of fear which influenced or annulled his will in such a way as to compel or induce him to fulfil an undue act in order to avoid serious damages.

The offence of concussion, whereby, for example, the public official, in order to award a contract, has forced a person to make a bribe payment, might then be used as a defence by the alleged briber. However, the concept of “concussione” might weaken the effective application of the Convention in cases of international bribery.

The relevant articles can be divided into two basic categories of offences, and each category is based upon the nature of the act that the foreign public official performs (or omits to perform) in return for the bribe. In the first category the bribe constitutes a payment to a foreign public official for performing acts related to his/her office. In the second category the bribe constitutes a payment to a foreign public official for omitting or delaying acts relating to his/her office or for performing acts in breach of his/her official duties. Higher penalties are available for offences under the second category. A brief outline of the operation of these two categories of offences follows:

1. **The Performance of Acts related to Office**

   (a) This category of offences applies where money or other advantages are offered, promised or given to a public officer or a person in charge of a public service acting in the quality of an employee of a public authority (Giving and promising are criminalised by article 321, and offering and promising are criminalised by paragraph 1 of article 322.). The principle penalty
is imprisonment for a term of between 6 months and 3 years. The penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service where he/she acts in the quality of an employee of a public authority. (see paragraph 1 of article 318 and article 320)

(b) The penalty is increased to between 3 and 8 years of imprisonment where the offence is committed “in favour of or against a party to a civil, criminal or administrative proceeding”. Where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, the penalty is increased to between 4 and 12 years of imprisonment. Where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years, the punishment is increased to between 6 and 20 years. (see article 319-ter)

(c) Where the public official or person in charge of a public service acting in the quality of an employee of a public authority does not accept the offer or promise, the penalty is reduced by one-third. (see the paragraph 1 of article 322)

2. Omissions or Delays of Acts relating to Office, or Performance of Acts in Breach of Official Duties

(a) This category of offences applies where money or other advantages are offered, promised or given to a public official or a person in charge of a public service (Giving and promising are criminalised by article 321, and offering and promising are criminalised by paragraph 2 of article 322.). The principle penalty is imprisonment for a term of between 2 and 5 years. The penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service. (see article 319 and article 320)

(b) The penalty is increased to between 3 and 8 years of imprisonment where the offence is committed “in favour of or against a party to a civil, criminal or administrative proceeding”. Where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, the penalty is increased to between 4 and 12 years of imprisonment. Where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years, the punishment is increased to between 6 and 20 years. (see article 319-ter)

(c) The penalty is increased where the offence concerns the conferring of public offices or salaries or pensions or the making of contracts to which the administration employing the public officer is a party. The legislation does not specify the amount of the increase in this regard. (see article 319-bis)

(d) Where the public official or person in charge of a public service does not accept the offer or promise, the penalty is reduced up to a maximum of one-third upon the discretion of the judge. (see paragraph 2 of article 322)

The elements of these offences and the availability of reductions and increases in penalties in the various circumstances are discussed below under 1.2 on the “Elements of the Offence”.

1.2 The Elements of the Offence

In discussing each of the elements of the foreign bribery offence under article 322-bis it is necessary to refer also to the elements specified under the active domestic bribery offences under article 321 and paragraphs 1 and 2 of article 322, and the relevant passive domestic bribery offences, due to the interconnected framework of these offences, as discussed above under 1.1.
1.2.1 any person

The foreign bribery offence under article 322-bis does not specify to whom it applies. However, the domestic active bribery offence under article 321 applies to “any person” and article 322, which provides a reduction in penalty where a public officer has not accepted an offer or promise, applies to “whoever” makes the offer or promise. The Italian authorities explain that because article 27.1 of the Italian Constitution states that “criminal responsibility is personal”, only natural persons can be criminally liable under Italian law.

With the entry into force of the above-mentioned legislative Decree, legal persons will be punishable by the penal judge for the bribery offence too, but solely with administrative sanctions.

1.2.2 intentionally

In order to determine the relevant intent in respect of the two categories of offences (discussed above), it is necessary to look at the domestic offences. In the case of the first category of offences, the person bribing must intend that the public official or person in charge of public service acting in the quality of an employee of a public authority perform acts related to his/her office. Under the second category of offences, the person bribing must intend that the public official or person in charge of a public service omit or delay an act related to his/her office or act in breach of official duties.

In addition, article 322-bis superimposes a further intentional component on the framework based on the domestic offences where the bribery involves a foreign public official not listed in paragraph 1 of article 322-bis (i.e. an official who is not a member of the Commission of the European Community, etc.). In the cases not listed in paragraph 1 of article 322-bis, the bribe must be intended to “procure an undue benefit” for the briber or others “in international business transactions”.

The intent for the commission of the offence is specific. It consists in the will to give, promise or offer consciously and voluntarily to the public official an amount of money or other utilities/advantages for performing an act of his office or for omitting or delaying an act of his office, or for doing an act contrary to his official duties [v. Cass. 12/4/86, Fevarello, cit., Cass. 1/7/80, Francese, in Riv.pen., 1980, 820].

1.2.3 to offer, promise or give

Article 322-bis expressly applies where money or other advantages are “given, offered or promised”. However, the relevant active domestic bribery offences, which are incorporated by reference into article 322-bis, provide a slight variation to this formulation. Articles 318 and 319 concern the conduct of the public official who receives, for himself or a third party, money or other advantage or an undue payment, or accepts the promise thereof. They establish the penalties for the bribee. Article 321 extends the penalties provided for in said art. 318 and art. 319 to the briber. Art.322 provides for a punishment for the offence of incitement to bribery. Art.322-bis has extended application to foreign public officials only of the offence of incitement to passive bribery provided for by the first and second paragraphs of art.322 c.c.

The first paragraph of 322 provides for incitement to “impropria” corruption (that is the performance by the public official with regard to official acts). The second paragraph provides for incitement to “proppria” corruption (that is the performance, the omission or the delay of an act in breach/contrary to his official duties). These are two independent offences providing cases of attempts at active or passive corruption carried out by a public or private person.
According to Italian authorities, in all cases, the incriminated conduct consists in the offer [that is a spontaneous act of putting the thing or any other advantage at the disposal of another person] or in the promise [that is the future availability of money or any other utilities/advantages]. Since this is an offence relating only to conduct, it is considered completed crime also when the promise is not known or not accepted by the public official [cf. Cass. 14/3/96, Varvarito, in Riv.pen., 1996, 1131; Cass. 12/5/92, Bigoni, in Cass.pen., 1993, 1993; Cass. 12/4/86, Fevarello, in Cass.pen., 1987, 895; Cass. 13/10/81, Argenti, in Cass.pen., 1982, 1747].

Moreover, according to the case law provided by the Italian authorities the offence of incitement is considered as completed crime even if the corrupted/bribed public official is unknown or not identified. Thus, the mere conduct of a lawyer who made generic but repeated requests for information to the persons in charge of the computerisation of data of a Public Prosecutor Office of the district ("Procura distrettuale"), claiming that he was able and willing to "pay a lot", without explaining the reasons and without describing in detail the subject of his own interest has been considered sufficient to complete the offence of incitement to bribery [c.f. Cass. Sez. VI n.21360/98].

The intent for the commission of the offence is specific. It consists in the will to give, promise or offer consciously and voluntarily to the public official an amount of money or other utilities/advantages for performing an act of his office or for omitting or delaying an act of his office, or for doing an act contrary to his official duties cf. Cass. 12/4/86, Fevarello, cit., Cass. 1/7/80, Francese, in Riv.pen., 1980, 820.

It must be noted that where an offer or promise is not accepted the penalty is reduced by up to a maximum of one-third upon the discretion of the judge. It was explained by the Italian authorities that the reason for less serious punishment in that case the one provided for the case of "active" and "passive" bribery in which the acceptance and reception of the bribe by the public official took place is that these latter cases were considered more serious as they affected third parties besides the State itself.

### 1.2.4 any undue pecuniary or other advantage

Article 322-bis, as well as all the interconnected domestic bribery offences, applies to bribes involving "money or other advantages".

Additionally, pursuant to paragraph 1 of article 318 (bribes for performing acts related to the official’s office), the money or other advantages must constitute an "undue payment", and under paragraph 1 of article 322 (offers or promises to induce an official to perform an act related to his/her office where the offer, etc. is not accepted) they must be "unduly" offered or promised. Thus, this notion only applies where the bribe is intended to obtain the performance of an act related to the official’s office. Where the bribe is intended to obtain an omission or delay of an act related to the official’s office or an act in breach of the official’s duty, this requirement does not exist. The Italian authorities state that the notion of "undue payment" means that such payment was not legally due to the administration and/or the public official for the performance of the function.

According to Italian authorities the term “money” includes banknotes, coins, both Italian or of foreign States. The concept of “any other utilities/advantages/assets” includes all what is considered as an utility/advantage for the person, material or only moral, which consists in giving as well as in doing something and which the custom or the common opinion consider as of value [v. Cass. 9/4/98, Clarucci, Riv.pen., 1998, 802; Cass. 4/2/98, Montedoro, Dir.proc.pen., 1998, 433; Cass. 27/2/97, Raimondo, in Riv.pen., 1997, 852; Cass. Sez. Unite 23/6/93, Romano, in Riv.pen., 1997, 852; Cass. Sez. Unite 23/6/93, Romano, in Cass.pen., 1993, 2252]. Similarly, sexual favours are also included in the concept of “other utilities/advantages”, since they represent an utilities/advantages for the public official who obtains the

With regard to the amount of payments and/or of utilities/advantages/assets, the recent case law presented by Italy indicates that offence of corruption is considered as a completed crime even when the amount of money or other presents offered are of low or minimal value. [ cf. Cass. 25/7/97, Cardinale, in G.dir, 1997, n. 37, 81; Cass. 14/3/96, Varvarito, in Cass.pen., 1996, 2184. V. also, before the reform of 1990, Cass. 13/10/81, Argenti, cit. ].

1.2.5 whether directly or through intermediaries

Article 322-bis and the relevant articles on domestic bribery do not expressly provide for cases of bribes made through intermediaries. The Italian authorities explain that bribery that does not involve a direct contact between the public official and the briber is covered where the contact is established through an intermediary, since the agreement between the briber and the public official can be deduced from the facts.3

1.2.6 to a foreign public official

Paragraph 2, subsection 1 of article 322-bis applies to the bribery of the list of persons contained in paragraph 1 of article 322-bis (see list under subsection 1.1 “General Description of Offence”), which includes various categories of officials of the European Communities and “those who, within other Member States of the European Union, carry out functions or activities equivalent to those performed by public officials or persons in charge of a public service”. Paragraph 2, subsection 2 of article 322-bis applies to the bribery of “persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organisations”. Thus, except for the specific European Communities officials contained in the list in paragraph 1 of article 322-bis, article 322-bis does not provide an autonomous definition of foreign public officials. The Italian authorities state that with respect to the non-autonomous categories, the Italian legislators chose to criminalise the bribery of persons executing in another State or in a public international organisation, functions or activities corresponding to those of a public official or of a person charged of a public service under the Italian legislation.

Article 357 of the Criminal Code defines a “public officer” as follows:

357. With regard to criminal law, whoever performs public functions in the legislative, judicial or administrative sector shall be considered a public officer.

In this same regard, any administrative functions shall be considered to be public if they are governed by public law and administrative act and characterised by the expression and manifestation or, the exercise, of the will of the public administration through authoritative powers or certification.

From this definition, it is not clear whether, in accordance with the Convention, certain categories of foreign public officials would be covered, including a person exercising a public function for a public agency or a public enterprise. The definition in article 357 contains restrictions on administrative functions that are much narrower than the requirement under Commentary 12 on the Convention that a “public function includes any activity in the public interest delegated by a foreign country”.

Article 358 defines a “person in charge of a public service” as follows:

358. With regard to criminal law, whoever performs a public service for whatever purpose shall be considered to be in charge of a public service.

Public service shall mean an activity that is governed in accordance with the same modalities as a public function, although in the absence of the power vested in the latter, and excluding the performance of simple ordinary tasks and exclusively manual work.

Although article 358 broadens the ambit of public function by eliminating the restriction under article 357 in relation to “the exercise of the will of the public administration through authoritative powers or certification”, it maintains the restrictions that administrative functions are “governed by public law and actions of authorisation”. Moreover, the exclusion under article 358 of the “performance of simple ordinary tasks and of exclusively manual work” could place a limit on the concept of public function that is not contemplated by the Convention. Moreover, article 358 does not define the subcategory of persons in charge of a public service referred to under article 320 and paragraph 1 of article 322 as acting “in the quality of employees of public authorities”.

However, the Italian authorities have provided a very detailed case-law which appear to cover all the categories of public officials referred to in Article 1 of the Convention. In addition the Italian authorities stress that the Italian tribunals have constantly affirmed that the quality of public official does not require a formal appointment, but focussed on the concrete de facto carrying out of public functions: for this reason, the attribution of said quality will also be made to the so-called “de facto” official, that is to the person who carries out public functions with the consent of the Public Administration, independently of a relationship of steady dependency with the State or the public body, except for the case of usurpation of office ( v. Cass. 24/11/94, Bucci, in Cass. pen., 1996, 1446; Cass. 16/1/91, Susco, in Riv. pen., 1991, 722 ).

In conclusion, the definition of a public official in the Italian legislation appears to cover the different categories referred to in Article 1 paragraph 4 of the Convention.

1.2.7 for that official or for a third party

Article 322-bis does not refer to third party beneficiaries. In addition, the active domestic bribery offences (article 321 and paragraphs 1 and 2 of article 322) do not refer to third party beneficiaries. It is not until working back to the third layer of the offences (i.e. the passive bribery of a domestic public official) that third party beneficiaries are mentioned. These offences (paragraph 1 of article 318 and article 319) apply where a public official receives a bribe “for himself or a third party”.

The Italian authorities stated that the case where a benefit is offered, promised or given directly to a third party was covered by their legislation, as third parties are mentioned in Articles 318 and 319 (dealing with passive bribery) to which Article 322 bis ultimately refers to, through Articles 321 and 322 which cover active bribery of public officials without explicitly mentioning third parties. Therefore it is not necessary to verify whether the public official receives an advantage, when the advantage is given to a third party.

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

As mentioned throughout this review, the framework of the domestic bribery offences, and thus, the offence of bribing a foreign public official, which is based upon those offences, can be divided into two basic categories of offences, and each category is based upon the nature of the act that the foreign public
official performs (or omits to perform) in return for the bribe. The first category applies to the performing of acts related to the foreign public official’s office, and the second category, which is treated as aggravated bribery, applies to omissions or delays of acts relating to the foreign public official’s office or the performance of acts in breach of official duties. As outlined earlier (see 1.1 on “General Description of the Offence”), further provisions provide for increasing or decreasing the penalty for certain acts or omissions. For instance, the penalty is increased pursuant to article 319-ter for acts in favour of or against a party to a civil, criminal or administrative proceeding, and decreased pursuant to paragraphs 1 and 2 of article 322 where the offer or promise is not accepted.

The Italian authorities explain that the misuse of discretionary power by a foreign public official is considered an “act in breach of his/her duties” even where the act is performed in accordance with normal procedures.4

The Italian authorities also explain that in order for an offence to have been committed, it is sufficient that the foreign public official has been endowed with “a non-specific competence” to perform the act, derived from his/her office.5 In other words, it is enough that the public official has a competence which allows him to practically interfere with, or affect the performance of an administrative act affected by bribery [ see Cass. 8/2/94, Bonetto, in Cass. pen., 1995, 1511; Cass. 7/9/93, Cappellari, ced 195523; Cass. 20/5/93, di Tommaso, in Cass. pen., 194, 1840; Cass. 14/11/88, Vattermoli, in Cass. pen., 1989, in Cass. pen., 1989, 1996 ]. They further indicate that some courts have stated that an offence is committed, unless it is absolutely impossible for the public official to perform the act.6

1.2.9/1.2.10 in order to obtain or retain business or other improper advantage/in the conduct of international business

Subsection 2 of paragraph 2 of article 322-bis, which applies to the bribery of public officials within foreign States other than the European Union or public international organisations, carries the qualification that the offence is committed in order to procure an “undue benefit for (the briber) or others in international business transactions”. This qualification does not apply to officials of the European Union.

According to the Italian authorities this qualification covers the retaining of business or other advantage that has already been obtained. In addition the terms “undue benefit” shall be interpreted as also covering the case where the briber was the best qualified bidder or otherwise could have properly been awarded the business.

1.3 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Article 110 of the Criminal Code provides that participants in the same offence shall each be subject to the punishment prescribed pursuant to the offence. In addition, pursuant to article 112, the penalty shall be increased where certain aggravating circumstances are present, such as the participation of 5 or more persons in the offence; the promotion or organisation of collaboration in an offence or the direction of

persons participating in the same offence; or the inducement of persons subject to the offender’s authority to commit an offence. 

The relevant provisions in the Criminal Code do not define the type of participation that qualifies as an offence, therefore it is not evident whether incitement, aiding and abetting, and authorisation are covered. However, the Italian authorities provide that the jurisprudence applies article 110 to any contribution, material or psychological, provided at any stage in the planning, organising and executing of an offence, including the encouragement or reinforcement of the will to commit it.  

1.4 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

1.4.1 Attempt

The Italian authorities indicate that the provision referring to the incitement to bribery (see section 1.2.3 of this Report), covers also those cases which substantially constitute an attempt ( c.f. Cass. 5/1/98, Puppo, cit.). Art.322 p.c. ( referred to by art.322-bis p.c. ), as special provision, prevails on the general provision on attempt provided for in article 56 of the penal code.

1.4.2 Conspiracy

Conspiracy does not exist in Italian law.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

2.1 Criminal Responsibility

The Italian legal system does not establish criminal responsibility of legal persons.

Administrative Responsibility

2.2.1 Generally

Article 11 of the implementing legislation enables the Government to issue, within eight months of the entry into force of the legislation, a legislative decree in order to regulate the administrative responsibility of certain bodies (see below under 2.2.2 on “Legal Entities”) in accordance with the guidelines and principles set out therein.

Pending entry into force of the legislative Decree, this part of the review focuses on the substance of the principles and guidelines contained in article 11. This legislative Decree, once in force, will constitute an

important reform in the legal system in Italy, as it introduces the administrative responsibility for legal persons for bribery of public officials. Until now, fines could be pronounced against companies solely by violations of money laundering legislation.

Paragraph (a), subsection 1 of article 11 states that the government is enabled to issue a legislative decree that provides for the administrative responsibility of legal persons, etc. for the offences set forth in a number of articles in the Criminal Code, including the offence of bribing a foreign public official in article 322-bis and the articles concerning domestic bribery that interconnect with it. The other offences to which the delegation of authority applies also concern actions in relation to public authorities.8

2.2.2 Legal Entities

Subsection 1 of article 11 enables the government to regulate the administrative responsibility of the following types of bodies in accordance with the guidelines and principles set out in article 11:

1. legal persons; and
2. companies, associations, and bodies without legal personality that do not carry out statutory functions (partnerships).

To the extent that administrative responsibility applies to bodies without legal personality that do not carry out constitutional functions, it appears that the responsibility exceeds the requirements under the Convention.

“Legal persons” are defined under subsection 2 of article 11 as “entities endowed with legal personality, excluding the State and other public entities that exercise public powers”. The terms “other public entities that exercise public powers” cover the various levels of local administration (such as regions and municipalities).

According to the Italian authorities these terms must be interpreted narrowly and therefore state-owned and state-controlled companies that exercise public powers are not excluded from the ambit of administrative responsibility. These bodies perform commercial activities and therefore should be treated as a private body even with respect to the administrative responsibility.

2.2.3 Standard of Liability

Paragraph (1)(e) of article 11 provides the following requirements that must be satisfied in order for a body to be administratively liable for the relevant offences:

1. The offence must be committed for the benefit or interest of the body. No offence is committed where the person responsible commits the offence exclusively in his/her own interest or in the interest of a third party.
2. The offence must be committed by a person acting as a representative, director or manager (de facto), a person exercising powers of management and control, or a person subject to the direction or control of one of the aforementioned persons.
3. The offence must be committed through non-compliance with the duties connected with the functions of the responsible person.

8 For example, paragraph 2, subsection 1 of article 640, which concerns cheating for the purpose of obtaining a benefit to the detriment of the State or another public body, and article 640-bis, which concerns aggravated fraud to obtain public funds.
2.2.4 Sanction Related Issues

Paragraph (1)(f) of article 11, reiterates the basic principle in the Convention that penalties shall be “effective proportionate and dissuasive”. This is followed by paragraphs (g) to (z), which provide the specifics of the sanctions as well as other related matters such as confiscation and the statute of limitations. The key features of these provisions are the focus of this part of the review.

Pecuniary Sanctions

The principle penalty is provided for in paragraph (1)(g), which states that an administrative pecuniary sanction shall be between 50 million Lire (24,000 USD) and 3 billion Lire (1,440,000 USD). Paragraph (g) further states that the following factors shall be considered in determining the appropriate fine:
1. The amount of the proceeds of the offence; and
2. The patrimonial and economic conditions of the entity.

Where these two factors are “especially slight”, the fine shall be between 20 million Lire (9,600 USD) and 200 million Lire (96,000 USD).

Article 11 provides two limitations on the amount of the fines shown above. The first limitation is established in paragraph (1)(h), which states that the fine shall not exceed the “social capital or the total assets” of an enterprise. This provision applies in fact only to bodies without legal personality and sets a limit to the fine equivalent to the assets of such entity. The second limitation is established in paragraph (1)(n), which states that the fine shall be reduced by one-third to one-half where the body has adopted “conduct ensuring an effective compensation or restoration with regard to the offence committed”.

Articles 10 and 11 of the legislative Decree provide that the amount of the monetary sanction is mainly determined by the seriousness of the offence and the financial capacity of the enterprise.

Additional Sanctions

Paragraph (1)(l) that will be replaced by Article 9 of the legislative Decree provides for the application of one or more of the following sanctions in addition to a pecuniary sanction in “particularly serious cases”:

1. The closing (temporary or permanent) of the place of business;\(^9\)
2. Suspension or revocation of authorisations, licences or permits instrumental to the commission of the offence;
3. Disqualification (temporary or permanent) from carrying out the activity of the body and possible appointment of another body to carry out the activity where necessary to prevent damage to third parties;
4. Prohibition (temporary or permanent) from dealing with the public administration;
5. Temporary exclusion from obtaining any allowances, funding, contributions or aid, and possible revocation of those already granted;
6. Prohibition (temporary or permanent) from advertising goods and services.
7. Publication of the sentence.

\(^9\) On 24 July 2000, 1000 Italian Lire were valued at 0.48 USD.

\(^{10}\) Article 9 of the draft legislative Decree no longer mentions the dissolution of the place of business.
Paragraph (1)(n) also applies to the non-pecuniary sanctions listed in paragraph (1)(l) and provides for the non-applicability of one or more of them where an enterprise has adopted “conduct ensuring an effective compensation or restoration with regard to the offence committed”.

Paragraph (1)(o) states that the non-pecuniary sanctions in paragraph (1)(l) shall also apply in connection with “provisional measures”.

Paragraph (1)(p) provides for sanctions where a body violates any of the sanctions ordered under paragraph (1)(l). In such a case the natural person who commits the offence is liable to imprisonment for between 6 months and 3 years, and the body is liable to the pecuniary sanction provided in paragraph (1)(g), confiscation (see below) as provided in paragraph (1)(i), or in the most serious cases, the application of one or more of the non-pecuniary sanctions in paragraph (1)(l) that have not already been ordered. The sanctions in paragraph (1)(p) also apply to violations of non-pecuniary sanctions under paragraph (1)(l) that were ordered as provisional measures.

Confiscation

Article 322 ter of the Italian implementing law as well as Paragraph (1)(i) of Article 11 provides for the confiscation of the “proceeds or the price of the offence” or their “equivalent value”. The draft legislative Decree (Article 19) provides for the confiscation of the bribe and the proceeds thereof. The “particularly serious cases” where the additional sanctions described in the previous paragraph apply, refer to offences which procure a substantial profit or which are committed by the chief executive officer. The equivalent value is confiscated when the proceeds cannot be found. Confiscation is a mandatory measure.

Statute of Limitations

Pursuant to paragraph (1)(r), the statute of limitations with respect to the application of administrative sanctions on a body for the commission of an offence is 5 years “from the commission of the offence”. It states further that the relevant provisions in the Civil Code shall regulate suspension of the statute.

Art. 11, para 1(r) make reference to acts which interrupt the course of the period of limitation. According to Italian authorities acts that interrupt prescription include the request of application of provisional/investigative measures. Thus the period of limitation shall run until the judgement becomes final.

Procedural Requirements

Paragraph (1)(q) (Article 36 of the draft legislative Decree on administrative responsibility of the legal persons) states that the administrative sanctions for bodies shall be determined by the judge having jurisdiction over the offence in relation to the natural person (i.e. the criminal courts). It states further that the proceedings in respect of the body shall comply with those provided for natural persons in the Criminal Procedure Code to the extent that they are compatible, and adequate opportunity shall be provided for the body to present a defence.

Italy indicates that for the purposes of liability of the legal person the punishment of imprisonment of the natural person is not considered a necessary requirement. On the contrary, according to Article 37 of the draft legislative Decree, it is possible to proceed against a legal person and to impose sanctions also when the criminal proceedings against the natural person cannot be pursued ( i.e., because of the death of the natural person ).
3. ARTICLE 3. SANCTIONS

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

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

3.1.1/3.2.1 Natural Persons

The penalties are the same for domestic and foreign bribery. The principal penalty depends upon the nature of the act (or omission) for which the bribe is intended.

Where the bribe is offered, promised or given to a public official or a person in charge of a public service acting in the quality of an employee of a public authority to obtain the performance of acts related to the public official’s office, the base penalty is 6 months to 3 years of imprisonment (paragraph 1 of article 318, article 321 and paragraph 1 of article 322). The base is raised to between 3 and 8 years of imprisonment where the offence is committed “in favour of or against a party to a civil, criminal or administrative proceeding”, to between 4 and 12 years where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, and to between 6 and 20 years where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years (article 319-ter). From this base, the penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service where he/she acts in the quality of an employee of a public authority (article 320). The penalty is also reduced by one-third where the public official or person in charge of a public service acting in the quality of an employee of a public authority does not accept the offer or promise (paragraph 1 of article 322).

Where the bribe is offered, promised or given to a public official or a person in charge of a public service to obtain an omission or delay of an act relating to his/her office or the performance of an act in breach of official duties, the base penalty is 2 to 5 years of imprisonment (article 319, article 321 and paragraph 2 of article 322). The base is raised to between 3 and 8 years of imprisonment where the offence is committed “in favour of or against a party to a civil, criminal or administrative proceeding”, to between 4 and 12 years where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, and to between 6 and 20 years where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years (article 319-ter). From this base, the penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service (article 320). The penalty is also reduced by one-third where the public official or person in charge of a public service does not accept the offer or promise (paragraph 2 of article 322). Moreover, the penalty is increased where the offence concerns the conferring of public offices or salaries or pensions or the making of contracts to which the administration employing the public officer is a party (article 319-bis). The legislation does not specify the parameters of the increase in this regard. The Italian authorities confirmed that there is no other sanction besides imprisonment on a natural person for the offence of bribing a foreign public official.
With reference to the increase of punishment, general rules apply in such a case (art. 64 - 69 p.c.). In particular, according to art. 64 (Increase of punishment in the case of a single aggravating circumstance):

“When an aggravating circumstance occurs, and the increase of punishment is not defined by law, the punishment which would be imposed for the offence committed shall be increased by up to one-third. However, the punishment of imprisonment applied as a result of this increase may not exceed thirty years.”

The determination of the penalty, based upon the finding of aggravating and/or mitigating circumstances and their relevant balancing is within the discretion of the judge. The criteria to be applied by the judge are listed in art. 64-69 p.c. as to the interplay of aggravating and mitigating circumstances, and in art. 132-133-bis p.c. as to the taking into account of the objective gravity of the offence and of the subjective conditions of the offender. The judge has to indicate, in the judgement, the specific reasons for the use made of his/her power in this regard.

3.1.2/3.2.2/3.5 Legal Persons

Criminal penalties do not apply to legal persons in the Italian legal system. The administrative sanctions in relation to legal persons for the foreign bribery offence are discussed above (see 2.2.4 on the Administrative Responsibility of Legal Persons).

3.3 Penalties and Mutual Legal Assistance

Article 696 of the Code of Criminal Procedure states that relationships with foreign authorities in respect of criminal law including international letters of request are governed by the international conventions in force in Italy and general international law. It states further that in the absence of provisions in this respect, the Code of Criminal Procedure shall apply.

The Code of Criminal Procedure does not provide for any requirement concerning the penalty of imprisonment with respect to the provision of mutual legal assistance. Italy is not party to any treaties that require a penalty of imprisonment in order to be able to provide Mutual Legal Assistance.

3.4 Penalties and Extradition

Similarly, article 696 of the Code of Criminal Procedure states that extradition is governed by international conventions in force in Italy and general international law, and that in the absence of provisions in this respect the Code of Criminal Procedure shall apply.

The Code of Criminal Procedure does not contain any requirement concerning the penalty of imprisonment in order to be able to provide extradition. However all bilateral conventions to which Italy is a party require a minimum of one year imprisonment for the provision of extradition.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Seizure

The Italian legal system has two forms of seizure: criminal, or probatory, seizure and preventive seizure. Though their objects are equivalent, these two forms of seizure are considerably different as far as their purposes are concerned.
A preventive seizure concerns any item whose availability could favour either the continuation of the consequences of an offence or the commission of other offences, as well as any other item whose confiscation may be ordered.

A probatory seizure is carried out when the evidence of the factual circumstances of an offence is to be acquired, while a preventive seizure plays a role of prevention (in particular, to ensure that the consequences of an offence are not aggravated or prolonged, or other offences are not committed through the items in question).

While a probatory seizure may be carried out by the police (in certain cases) or ordered by a prosecuting attorney, a preventive seizure is ordered by a judge, at the request of a prosecuting attorney (exceptions, however, are always possible in urgent cases, subject to the approval of a judge).

No plans for changes are presently under examination in Parliament. A proposal concerning the management of confiscated properties, when these are business concerns, is being studied in order to avoid that confiscation be prejudicial to both production and employees.

Law no. 109 of 7 March 1996 provides for the management and destination of seized or confiscated assets. One of the characteristics of the Italian penal system is that, in addition to the laws providing for the punishment of crimes, it contemplates special preventive "ante delicto" measures that may be applied prior to, or regardless of, the execution of a crime, on the basis of a presumed threat posed by the relevant person.

The basic law regulating this matter was introduced in Italy in the mid-fifties (Law 1423/1956); it is still in force and covers exclusively preventive measures aimed at the individual person, namely it sets limits to personal freedom (including but not limited to: special police supervision; prohibition of residence; forced residence in a specific town).

In the wake of the 1956 law, subsequent laws have enlarged the original scope so as to include new types of suspect. Thus, it happened that these measures were applied, for instance, to suspected terrorists and, earlier, in the mid-sixties (L. 675/1965) to suspected members of mafia-like criminal organisations.

At the beginning of the 1980s, not only did laws specifically define mafia-like syndicates as such, placing on an equal footing camorra and other crime syndicates pursuing the same objectives and by the same means, but it was also understood that, to fight organised crime in a more effective and aggressive manner, it was necessary to mount an attack on its enormous wealth by applying preventive measures of a financial nature, both provisional (seizure) and final (confiscation), thus expanding the concept of control to include also the financial resources of the suspected mobster (L 646/1982).

In order to cope with third-party registrations of businesses and property, laws were passed to extend probatory and investigation powers over the financial resources of persons linked one way or another to the suspect (for instance spouse, common-law spouse, children etc.) as well as over the natural and legal persons whose assets are freely available to suspects, in whole or in part, directly or indirectly.

Financial-related measures are applied also to people that, even though not considered members of mafia-like organisations, are suspected of being normally engaged in the same illegal activities as those carried out by crime syndicates, such as extortion, usury, money laundering, reinvestment of illegal proceeds and smuggling.
Confiscation

The new article 322 ter provides for confiscation in respect of passive domestic bribery, active domestic bribery, the passive bribery of an official of the European Union and the bribery of a foreign public official under article 322-bis. However, with respect to the bribery of a foreign public official, the new provision only applies where the offence has been committed “as per article 321” (i.e. a gift or promise but not an offer).

The new article 322-ter provides that where “goods representing the proceeds” of the offence of bribing a foreign public official under article 322-bis (para.2) is committed “as per article 321”(i.e. a promise or gift but not an offer) “confiscation shall always be ordered of anything representing the proceeds thereof, unless they belong to a person who has not committed the offence”. It further provides that where such “confiscation is not possible, the confiscation of the goods which the offender has at his disposal shall be ordered for a value corresponding to said proceeds and, nonetheless, not inferior to that of money or other advantages given or promised to a public official…”

In conclusion, pursuant to article 322-ter, upon conviction of the offence of bribing a foreign public official under article 322-bis, confiscation of the bribe and the proceeds of bribing a foreign public official appears to be available as follows:

- The judge shall order the confiscation of “anything that represents the proceeds of the offence” where the bribe was offered to the foreign public official and is not in the possession of a bona fide third party. Where it is not possible to confiscate “goods representing the proceeds” of the offence, and the offence was committed “as per article 321” (i.e. a promise or gift), the judge shall order confiscation of anything of the same value, which are at the offender’s disposal, but not less than the value of money or other advantages given or promised to a public official.

3.8 Additional Civil or Administrative Sanctions

A natural person who is subject to sanctions for the bribery of a foreign public official is also subject to the following civil or administrative sanctions:

1. The Italian law provides for a penalty of not less than 5 years of imprisonment results in permanent disqualification from holding public office. A penalty of not less than 3 years of imprisonment results in a disqualification from holding public office for 5 years.

2. A person sentenced to imprisonment for not less than 6 months for a crime committed either by abusing the powers of his/her office or in breach of official duties shall be temporarily disqualified from holding management positions (see article 32-bis of the Criminal Code).

3. An offence committed in favour of or to the prejudice of business activities or linked to them shall result in a loss of capacity to enter into contracts with the public administration (except in order to obtain necessary services) for between 1 and 3 years (see article 32-ter and 32-quarter11 of the Criminal Code).

4. Pursuant to article 185 of the Criminal Code, any offence gives rise to an obligation to make restitution and pay damages in accordance with the rules of civil law.

5. Article 18 of law no. 88/92 bars registration of an enterprise in the special registry of auditing companies if its administrator is temporarily disqualified or suspended from holding a directing position, or where he/she is convicted of an intentional offence carrying a sentence of

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11 Article 6 of the implementing legislation amends article 32-quater of the Criminal Code to expressly apply to the offence of bribing a foreign public official under article 322-bis.
imprisonment of not less than 1 year or an offence against the public administration (e.g. bribery) carrying a sentence of imprisonment of not less than 6 months.

4. ARTICLE 4: JURISDICTION

4.1 Territorial Jurisdiction

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

Article 6 of the Criminal Code establishes territorial jurisdiction over an offence as follows:

*Whoever commits an offence in the territory of the State shall be punished according to Italian law. An offence shall be deemed committed in the territory of the State when the act or omission, which constitutes it, occurred therein in whole or in part, or when an event which is a consequence of the act or omission took place therein.*

The Italian authorities indicate that by and large the courts have interpreted the partial link requirement to cover each act that facilitates the commission of the offence. Where participants are involved in the commission of the offence, territorial jurisdiction applies where the offence commences abroad and is completed in Italian territory as well as where it is committed wholly abroad with the participation of another person in Italian territory.

The Italian authorities indicated that Italian territory included Italian aircraft and ships.

4.2 Nationality Jurisdiction

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

Italy has jurisdiction over offences committed abroad in certain cases as established in articles 6, 7, 8, 9 and 10 of the Criminal Code. The provisions relevant to the application of jurisdiction over an offence of bribing a foreign public official committed abroad can be summarised as follows:

1. Pursuant to subsection 4 of article 7, Italy has jurisdiction over a citizen or an alien for an offence committed by a public officer in the service of the State by abusing the powers or violating the duties of his/her office. This provision applies regardless if the citizen or alien is found within Italian territory.

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13 Participation in an offence includes incitement and a promise to collaborate, but not the mere determination to commit the act.

2. Pursuant to article 9, Italy has jurisdiction over an Italian national for an offence committed abroad that is not referred to in articles 7, 8 and 9 (essentially non-political crimes other than crimes against the personality of the State and counterfeiting) where the following requirements are met:

   (a) The offender must be within Italian territory.

   (b) The offence must be punishable under Italian law by life imprisonment or at least 3 years of imprisonment. Where the offence is punishable for a shorter period, jurisdiction shall only be applied at the request of the Minister of Justice or upon the application or complaint of the victim.

   (c) Where the offence was committed to the detriment of European Communities or any foreign country\(^\text{15}\) or an alien, jurisdiction shall only be established at the request of the Minister of Justice and only where extradition has not been granted or requested by the country in which the offence was committed.

3. Pursuant to article 10, Italy has jurisdiction over an alien (the Italian authorities have confirmed that non-Italians having their permanent residence in Italy are considered “aliens” under the Criminal Code) for an offence committed abroad that is not referred to in articles 7 or 8 where the following requirements are met:

   (a) The offender must be within Italian territory.

   (b) The crime must be committed to the detriment of the Italian state or an Italian citizen and be punishable under Italian law by life imprisonment or at least 1 year of imprisonment; or it must be committed to the detriment of European Communities\(^\text{16}\) or any foreign country or an alien and be punishable under Italian law by life imprisonment or at least 3 years of imprisonment.

   (c) In the case where the offence was committed to the detriment of the Italian State or an Italian citizen, jurisdiction shall only be established at the request of the Minister of Justice or upon the application or complaint of the victim. Where the offence was committed to the detriment of European Communities or a foreign State or an alien, jurisdiction shall only be established at the request of the Minister of Justice and only where extradition has not been granted or requested by the country in which the offence was committed or by the State to which he/she belongs.

As there are no general guidelines, the Minister exercises his discretionary powers in this regard, taking into account the importance of the fact, the damaging effects caused by the offence, the interest in the matter expressed by individuals and public authorities concerned by the case at issue, etc.

The Italian authorities further explained that dual criminality is not a requirement for establishing jurisdiction over an offence that takes place wholly abroad. As regards the offences committed abroad, the Supreme Court of Cassation stated that the qualification of the criminal cases in issue must exclusively comply with the Italian criminal law, not considering that the judicial system of the State on the territory of which the fact has been committed does not provide for a criminal prosecution of said offence (see Cass. 6 December 1991, in Foro it. Rep., 1992, n. 2653).

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\(^{15}\) Article 9 of the Criminal Code has been amended by adding the language “to the detriment of European Communities” to the previous wording (“to the detriment of a foreign country”) by subsection 1 of article 5 of the implementing legislation.

\(^{16}\) Article 10 of the Criminal Code has been amended by adding the language “to the detriment of European Communities” to the previous wording (“to the detriment of a foreign country”) by subsection 2 of article 5 of the implementing legislation.
4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Italian authorities explained that Italy does not have a formal mechanism for resolving jurisdictional conflicts, and that it is compulsory, according to its legal principles (principle of mandatory prosecution) to exercise jurisdiction in cases where jurisdiction can be taken.

They pointed out that in practice, few problems might arise, as prosecutions of acts committed abroad generally require in Italy, a prior request from the Minister of Justice.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against bribery of foreign public officials, and if it is not, to take remedial steps.

Italy considers that the relevant provisions on jurisdiction comply with the requirements under Article 4 of the Convention.

5. ARTICLE 5. ENFORCEMENT

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

5.1 Rules and Principles Regarding Investigations and Prosecutions

Preliminary Investigations

A preliminary investigation commences when a “notice of crime” is given to the judicial police. The notice of crime can be presented by any person who has knowledge of a crime including the police themselves or the public prosecutor (notice by “denunciation”). It can also be given by someone who in the exercise of a medical profession has rendered assistance in cases that possibly involve the commission of an offence for which prosecution must be automatically initiated (notice by “medical report”). The judicial police are in turn obliged to inform the public prosecutor [article 347 of the Code of Criminal Procedure (CPP)] about the notice of crime, and the public prosecutor is required to enter the notice in the “register of the news of the crime” (article 335 of CCP). The judicial police and the public prosecutor are required to take notice of offences on their own initiative (article 330 of CPP) and provide a notice of crime where this is only a suspicion that an offence has been or is being committed.

Once the public prosecutor receives and registers the notice of crime, he/she must evaluate the evidence to decide on the exercise of a “criminal action”. The criminal action can either involve a request for “filing in the archives” (i.e. the case does not proceed beyond the investigation stage) or a request for an indictment.
Criminal Action

A request for “filing in the archives” is normally made before a judge without a hearing. The public prosecutor makes such a request when it does not appear that there is enough evidence to take the case to trial or on the basis of issues of law, such as where the offence is extinguished by the statute of limitations, the conduct does not constitute a crime, etc. If the judge agrees with the request, he/she pronounces that the notice of crime is “unfounded” and issues an acquittal. Once a “filing in the archives” has been ordered the public prosecutor cannot re-open an investigation without obtaining a “motivated decree” from the judge for a preliminary investigation.

A request for an indictment is made before a judge in a preliminary hearing. A decree ordering a trial is issued by the court where the judge does not order an acquittal. An acquittal is pronounced in the following cases (article 425 of CPP):

1. Where a cause extinguishing the offence exists (e.g. the statute of limitations has expired).
2. A condition for prosecutability has not been satisfied (e.g. request for the prosecution by the Minister of Justice or a complaint by the victim, where required).
3. The conduct in question does not constitute an offence.
4. It is unlikely that there would be a conviction based on the evidence presented.
5. The accused person is not punishable due to a lack of criminal responsibility.

5.2 Considerations such as National Economic Interest

The Italian authorities state that the factors listed in Article 5 of the Convention shall not influence the investigation and/or prosecution of the offence of bribing a foreign public official.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

The Italian authorities provide that the statute of limitations for the offence of bribing a foreign public official under article 322-bis is 10 years. However, pursuant to subsection (4) of article 157 of the Criminal Code, the limitations period is 5 years for offences in which the minimum punishment of imprisonment is less than 5 years, which is the case for all the penalties applicable to the foreign bribery offence, except aggravated bribery that results in another being wrongfully sentenced to a term of imprisonment of more than 5 years (see article 319-ter). In the latter case, the offence is punishable by a term of imprisonment of between 6 and 20 years, and, thus, has a limitations period of 10 years [subsection (3) of article 157].

Pursuant to article 158, the triggering event for the running of the limitations period is as follows:

1. the date of consummation, for a completed offence,
2. the date on which the offender ended his/her activities, for an attempted offence, and
3. the date on which the offence ceased to persist or continue, for a persisting or continuing offence.

17 A hearing is, however, held where the judge denies the request for the filing in the archives or the victim of the offence objects to the filing.
The limitations period shall be **suspended** in the following cases\(^\text{18}\):

1. When the public prosecutor submits the application to prosecute. In this case the limitations period shall recommence the date on which the competent authority grants the application.

2. Where suspension is required by a particular provision of the law. In this case the period shall recommence the date on which the basis for the suspension ceases to exist.

Pursuant to article 160, the limitations period shall be **interrupted** in the following cases:

1. When various acts are taken by the authorities in the pre-trial stage, including an order confirming police custody or detention, interrogation before the public prosecutor or the judge, a summons to appear in court for a summary trial, and an order to stand trial.

2. When the judgement or decree of conviction is made.

Superimposed on the statute of limitations is the deadline for preliminary investigations. Where an investigation concerns an unknown person, within 6 months of having entered the notice of the crime in the register, the public prosecutor must either ask for a filing in the archives because the offender is unknown or request an extension (paragraph 1 of article 415 of the Code of Penal Procedure). There is no limit on extensions where the offender is unknown. Where an investigation concerns a known person, within 6 months of having entered the notice of the crime in the register with the person’s name, the public prosecutor must request an indictment for trial, a filing in the archives or an extension. The deadline is 1 year for “serious offences” or organised crime [subsection (a), paragraph 2 of article 407]. In such cases the limit on an extension is normally 18 months, but in the case of more serious crimes or more complex investigations it may be extended to 2 years (article 407 CPP).

The Italian authorities confirmed that the offence of bribing a foreign official constitutes a “serious offence” for the purpose of determining the deadline and extension for investigations.

They reported that Article 22 of the legislative Decree will regulate the prescription.

### 7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

**Money Laundering Offence**

Article 648-bis of the Criminal Code states that “apart from participation in the [predicate] offence” it is an offence for any person to substitute, transfer or conceal money goods or assets obtained by means of an intentional criminal offence for the purpose of concealing “the fact that the said money, goods or assets are the proceeds of such offences”. It would therefore appear that article 648-bis applies to the laundering of the proceeds of bribing a foreign public official, not the bribe.

The money laundering offence only applies to the person who has laundered the money who may not always be the one who committed the predicate offence.

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\(^\text{18}\) Pursuant to article 161 of the Criminal Code, suspension and interruption of the period of limitation shall apply to every participant in the offence.
The money laundering offence is committed regardless if the person who has laundered the goods, etc. is chargeable or punishable for the predicate offence, and regardless of the presence of the legal conditions for prosecuting the predicate offence (see article 648-bis and paragraph 2 of article 648). The money laundering offence is committed even in relation to proceeds of crime of a predicate offence (i.e., corruption) committed abroad. It follows that in the Italian legal system it is not necessary that the predicate offence (i.e., corruption) is criminal under the laws of the jurisdiction in which it was committed for the money laundering offence to apply, because according to articles 9 and 10 p.c., it is necessary and sufficient that the offence committed abroad by the Italian citizen or by foreign citizen is considered such (even only) by Italian legal system.

The penalty for the money laundering offence is 4 to 12 years of imprisonment and a fine of 2 million (960 USD) to 30 million lire (14,440 USD). The penalty, which is cumulative, shall be increased if the offence is “committed in the course of a professional activity”, and decreased if the goods, etc. are the proceeds of a criminal offence for which the punishment is imprisonment for 5 years or less.

**Reporting Requirements for Financial Institutions**

Article 3 of Decree-Law no. 143 of 3 May 1991, amended by Article 1 of the legislative Decree no 153 of 26 May 1997, provides the reporting requirements for the financial institutions listed in article 4, which includes credit institutions, money brokers, trusts, insurance companies, the Monte Titoli company and intermediaries whose principal activity concerns financial services. Subsection (1) of article 3 requires that the person responsible for the branch, office or other establishment of such a financial institution report to the head office without delay every transaction that leads him/her to believe that the money, etc. is the object of the money laundering offence under 648-bis or the offence of utilising money, etc. of unlawful origin under 648-ter. In turn the head office is required to consider the information, and where the concerns appear founded it is required to transmit the information without delay to the Italian Foreign Exchange Office (Ufficio italiano dei cambi: UIC) before performing the transaction. Pursuant to subsection (4), the UIC is required to carry out the necessary investigations.

The UIC role is not limited to the simple acquisition of further financial information, but it calls for the analysis of the financial aspects of each single transaction in order to provide, in co-operation with the sector’s supervisory authorities (and especially with the Bank of Italy) an added value with respect to their significance. To that effect the UIC is not empowered to decide whether a transaction is to be investigated or not, but to render a technical opinion on it in the light of the data available and the expertise acquired. Subsection (7) states that the transmission of information in accordance with article 3 shall not constitute a breach of confidentiality.

Subsection (8) states that the institutions required to transmit the information pursuant to paragraph (1) and any other person having knowledge of the type of transaction described therein shall only disclose such information in accordance with article 3.

Pursuant to subsection (5), “except in the cases of criminal offences” the failure to transmit information referred to in article 3 is punishable by a pecuniary penalty of up to one-half the value of the transaction. Moreover, pursuant to subsection (6) of article 5, “except in the cases of criminal offences” a breach of the prohibition in subsection (8) of article 3 against transmitting information except in accordance with article 3 is punishable by detention for 6 months to 1 year or a fine of between 10 million (4,800 USD) and 100 million lire (48,000 USD).

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19 The report may also be made to the legal representative or his/her delegate.
8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting Requirements/Companies Subject to Requirements

Article 13 of the Presidential decree 600/73 states that the following entities are obliged to keep account books for fiscal purposes:

(a) companies subject to income tax of legal persons;
(b) public and private bodies other than companies, which are subject to income tax of legal persons, whose exclusive or principal purpose is to carry out commercial activities;
(c) general and limited partnership companies and equivalent companies according to article 5 of Presidential Decree n. 597 of 29/9/73;
(d) natural persons carrying out commercial activities according to article 51 of the said Presidential decree.
(e) natural persons performing arts and professions according to article 9, paragraph 1 and 2, of the Decree sub c);
(f) artists’ and professionals’ associations or companies according to article 5, sub c), of the said Decree;
(g) public and private bodies other than companies that are subject to income tax of legal persons, whose principal or exclusive purpose is not the performance of commercial activities.

Article 18 of the Presidential decree further states that the provisions of the preceding articles are also applicable to the entities that, pursuant to the Civil Code, are not obliged to keep the account books provided for therein. However, companies can keep simplified accounts where their profits do not exceed 360 million lire (173,000 USD) in the case of companies providing services, and 1 billion lire (482,000 USD) in the case of companies exercising different activities.

Article 22 of the presidential decree 600/73 states that for fiscal purposes, accounting books should be kept even after the Civil Code term of ten years (article 2220) until assessment relating to the correspondent taxation period is carried out.

Article 2423 states that in the annual accounts consisting of a balance sheet, the economic account and the integrative note must be drawn up with clarity and represent in a true and correct way the assets, liabilities, financial position and the profits and losses of the company. This principle overrides any other that is incompatible.

Article 2423 bis states that the annual account should be drawn up in accordance with the following principles:
- items should be evaluated on a prudential basis (the “prudential principle”);
- only profits made at the end of the fiscal year may be included;
- incomes shall be listed in the year in which they were gained irrespective of the date of receipt of effective payment;
losses and risks shall be included in the fiscal year in which they were suffered even if they became known after the closing of the year.

8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements

8.1.1.1/ 8.2.1.1 Internal Audits/Companies Subject to Internal Audits

The Italian authorities report that stock and co-operative companies must have an internal auditing body appointed for the first time in the articles of association and then by the meeting of shareholders (articles 2364 and 2400 of the civil code). Auditors are chosen from the members of the Register of Accounts (article 2397) and from the partners of co-operative companies.

The same provisions apply to limited liability companies if the capital is not lower than 200 million lire (96,000 USD) or if the articles of association so provide (article 2488). It is also compulsory to have a board of auditors if for two consecutive fiscal years the limits of article 2435 have been exceeded.20

Duties of the Internal Auditors

The internal auditing body supervises the management of the company and the observance of the law and the articles of association. It also is required to verify the regular keeping of the company’s accounts, whether the balance sheet is consistent with the company’s books and compliance with the rules in article 2426 for the evaluation of company’s assets. The auditors can inspect company’s books without notice and they can request the directors to provide information relating to the company’s business or to specific transactions (article 2403 of the Civil Code).

The Civil Code further states that these duties should be fulfilled with "the diligence of a mandatory”. The auditors are responsible for the truth of their statements. In addition they are responsible in solido with the directors for acts or omissions committed by the latter that would not have occurred had they exercised proper vigilance (article 2407). Moreover, it is stated that the auditors “shall keep secret the facts and the documents of which they have knowledge by reason of their office”.

Corporations with a capital of at least ITL 200 million are required by Civil Code to have a board of internal auditors (statutory auditors – collegio sindacale) ( art. 2397 of Civil Code ). Presidential Decree-Law n. 136 of 31 March 1975 requires companies whose shares are quoted on the stock exchange to have their annual financial statements examined by auditing firms whose names are published on a special roll. The duties of statutory auditor are laid down in the Civil Code:

- the board of auditors controls company’s management, audits the corporation’s accounts, check the items of the balance sheet and income statements against the corporate records, and verifies compliance with the Civil Code requirements for valuation of the corporation’s assets;
- at least every three months the auditors must verify the amount of cash on hand and the existence of securities, whether owned or received by the corporation in pledge as collateral or for safekeeping;

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20 The limits laid down by art. 2435 are the following:
- total assets: 4,700 billion liras;
- revenues form sale and services: 9,500 billion liras;
- average employees: 50 units
the board may from time to time carry out acts of inspection or control;
- auditors must attend directors’ meetings in an advisory role as to whether the directors decisions are within the provision of the Civil Code.

Statutory auditors certify that the reported accounts agree with the accounting records and have been kept in accordance with the law

8.1.1.2/8.2.1.2 External Audits/Companies Subject to Requirements

Companies Subject to External Audits

In addition to internal auditing, listed companies are required to be audited by independent companies specialised in this field.

Duties of the External Auditing Companies

The duties of independent auditing companies are stated in the legislative decree 58/98, which requires them to do the following:

(a) verify that the accounting books are kept orderly and that the management activities are correctly recorded in the books;
(b) verify that the annual budget and the consolidated balance sheet correspond to the account books and to the controls carried out and that they comply with provisions governing them. The auditors have the right to ask the directors for further information. In addition, it is their duty to report "objectionable acts" to the "Commissione Nazionale per le Società e la Borsa" (National Commission for the Societies and the Stock Exchange Market: CONSOB). 21

A further form of control is exercised by Banca d'Italia in respect of companies carrying out banking activities.

8.3 Penalties

Civil Sanctions

Article 2409 of the Civil Code, which is applicable to stock companies and to limited liability companies, provides that if there is a basis for suspicion of serious irregularities in the discharge of the duties of the directors and auditors, "as many members as represent one-tenth of the company's capital can report the facts to the tribunal". In the most serious cases, the tribunal can order the discharge the directors and auditors and appoint a judicial administrator, specifying his powers and the time for which he will hold office.

Penal Sanctions

There are sanctions for providing false information and the unlawful distribution of profits for companies subject to registration. Article 2621 of the Civil Code states that “unless the act constitutes a more serious

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21 CONSOB is an independent body that is responsible for the supervision on quoted share companies, public economic bodies issuing negotiable instruments, companies issuing instruments negotiable at the secondary market. It has the authority to obtain relevant information from such a company and also the identity of the trustees.
offence”, a punishment consisting of imprisonment from 1 to 5 years and of a fine of 2 million (963 USD) to 20 million lire (9636 USD) is imposed on the following persons:

1. promoters, founders, managers and directors, general managers, auditors, and liquidators who in reports, annual accounts, or other information concerning the affairs of the company, fraudulently represent facts that do not correspond to the truth about the formation or the financial condition of the company or who conceal, wholly or in part, facts concerning such condition (paragraph 1 of article 2621);

2. managers and directors and general managers who, in the absence of or contrary to an approved annual accounts, or on the basis of a false annual accounts, in any way collect or pay profits that are fictitious or which cannot be distributed (paragraph 2 of article 2621). Auditors who commit this offence are, except in cases of “participation”, subject to a punishment of imprisonment from 6 months to 3 years and a fine of 200 thousand lire (96 USD) to 2 million lire (963 USD).

In addition, directors and general managers who do not distribute payments on account of dividends in accordance with the annual accounts or in an amount higher than the amount of the profits obtained since the closing of the previous fiscal year shall be liable to the same sanctions. (see article 2621 and article 2433 bis of the Civil Code).

Article 2626 further states that managers, directors, auditors and liquidators who, in violation of a duty imposed on them by law, fail to make a report or a notification to, or a deposit of documents with the office of the register of enterprises within the prescribed time limit, or do it or cause it to be done in an incomplete manner, may be fined with an administrative sanction of between one hundred thousand lire (48 USD) and 2 million lire (963 USD).

False accounting and balance sheets statements are criminally punished by art. 2621 c.c. as to any type of companies and partnerships.

A taxpayer’s failure to comply with his tax obligations may result in administrative and criminal penalties. The regime for tax offences is currently based on the application of a monetary penalty. A new system of criminal tax penalties has been introduced ( Legislative Decree n. 74 of 10 March 2000 ). The same penalties apply for both income taxes and value added tax. If the taxpayer files an untrue return by using fake invoices or other documents on false transactions, the penalty is imprisonment between 18 months and 6 years. In the case the tax evaded does not exceed ITL 300 million, the imprisonment is between 6 months and 2 years. If the untrue return is based on false entries in books and accounts or on other artifices to prevent the appropriate assessment, and (i) the amount of unpaid tax is higher than ITL 150 million and (ii) the amount of undeclared taxable base is higher than 5% of the total taxable base disclosed in the return or, in any event, higher than ITL 3 billion, the penalty is imprisonment between 18 months and 6 years.

In cases other than the above, if the taxpayer wilfully files an untrue return and (i) the unpaid tax is higher than ITL 200 million and (ii) the amount of undeclared taxable base is higher than 10% of the total taxable base disclosed in the return or, in any event, higher than ITL 4 billion, the penalty is imprisonment from 1 to 3 years. If, in order to avoid the payment of taxes, the taxpayers do not file a tax return, the penalty is imprisonment from 1 to 6 years, if the amount of tax evaded exceeds ITL 150 million. The return filed within 90 days from the deadline or not signed or filed on non-standard forms is not regarded as not filed.

22 The Court of Cassation applied this article also in the case of false accounts (See Cass., Sez.V, 21.1.98, Cusani, in Foro italiano, 1998, II, pp.517 ff.)
The issue of fake invoices or other documents relevant for tax purposes, on non-existing transactions is subject to the penalty of imprisonment from 18 months to 6 years. If the aggregate amount indicated in such invoices or documents in the taxable period does not exceed ITL 300 million, the penalty is imprisonment from 6 months to 2 years. The hiding or destruction of books and accounts for the purposes of avoiding taxes is punishable with imprisonment from 6 months to 5 years. All the above penalties do not apply if a taxpayer’s actions conform with an advanced ruling issued by the tax administration.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Pursuant to article 696 of the Code of Criminal Procedure (CCP), “letters of request” can be executed pursuant to international conventions in force in Italy. Italy is a Party to the European Convention on legal assistance in criminal matters (Strasbourg, 1959) and to a number of bilateral treaties. It has therefore a treaty relation with 31 of the 33 signatories of the OECD Convention.

In the absence thereof assistance in criminal matters can be granted pursuant to the relevant provisions in Title III of the CCP.

Title III of the CCP provides for the execution of a letter of request for the purposes of communication, notification and the taking of evidence. Two levels of decision making are required in order for a request to be executed: the Court of Appeal23 in the place where the requested acts are to be carried out and the Minister of Justice. It is presumed that the Minister of Justice would make the final determination.

Pursuant to Title III, the Court of Appeal and the Minister of Justice are required to refuse to grant the execution of a letter of request when certain criteria are met. There is some overlap between the criteria to be followed by both decision-makers with the result that they both “shall not grant” the execution of a letter of request in the following cases:

1. The requested acts are expressly prohibited by law or are in conflict with the fundamental principles of the Italian legal system [subsection (2) of article 723 and subparagraph (5)(a) of article 724].

23 The requirement that the Court of Appeal grant the execution of a letter of request does not apply where, pursuant to article 726, the request concerns a summons of a witness resident or domiciled in the State’s territory.
2. There are reasonable grounds to believe that considerations relating to race, religion, sex, nationality, language, political opinions or personal or social circumstances may negatively affect the trial or its outcome and the defendant does not appear to have freely given his/her consent to the letter of request [subsection (2) of article 723 and subparagraph (5)(c) of article 724].

In addition, the Court of Appeal shall refuse to grant a letter of request where the offence for which the request is sought does not constitute an offence under Italian law (i.e. dual criminality) and the defendant does not appear to have freely given his/her consent to the letter of request [subparagraph (5)(b) of article 724].

The Minister of Justice is also required to refuse to grant execution of a letter of request in the following cases:

1. Where he/she considers that the requested acts would affect the sovereignty, security or other fundamental interests of the State [subsection (1) of article 723].

2. Where the request concerns the summons of a witness, an expert witness or a defendant before the foreign judicial authority and the requesting country does not provide sufficient assurances regarding the “immunity” of that person [subsection (3) of article 723].

Moreover, the Minister of Justice has the discretion to refuse to grant execution where the requesting party does not given sufficient assurances as to reciprocity [subsection (1) and (4) of article 723].

**Mutual legal assistance concerning confiscation and provisional measures.**

Certain changes have been introduced into the Italian Code of Penal Procedure as a result of the ratification of the Strasbourg Convention with law 328/93.

Requests for confiscation made to Italy are carried out in accordance with the first alternative set forth in article 13 of the Convention, i.e. by executing the confiscation order issued by the requesting party.

Moreover, the confiscation of properties of corresponding value, equally not provided for in the Italian system, has been made possible.

A confiscation can be carried out in Italy if the same conditions are fulfilled as those which in general must be fulfilled for the recognition of a foreign judgement (the order to be executed must be irrevocable, it must not be contrary to the fundamental principle of the Italian legal system, in the relevant proceeding there must have been no conditions of race, religion, sex, nationality, language, etc., the dual criminality clause and the "ne bis in idem" principle must be observed, the properties must be confiscable under domestic laws and the right to defence must have been observed).

As before requesting the execution of a confiscation order a State will predictably request first the search and then the seizure of the property to be confiscated, special law provisions have been introduced in this regard.

There are two specific reasons for the rejection of these requests: when the relevant act is contrary to the principles of the legal system or would be prohibited or not allowed by the law, should the proceedings have been started in the State for the same facts; or when the conditions required for a foreign confiscation order to be put into effect do not exist.

To have a confiscation order, a seizure or investigations for purposes of confiscation executed, the relevant request must be sent to the Ministry of Justice which, if it deems it advisable, starts the relevant procedure.
In particular, the Ministry sends the documentation to the competent Public Prosecutor attached to the Court of Appeal who, in turn, asks the Court of Appeal to recognise the confiscation order, or to order the execution of the seizure.

The duration of the seizure, unlike what happens according to domestic laws, is two years from the time of execution (a term that can however be extended for an equal period of time).

Based on the data of the Ministry of justice, from 1 January 1996 to 12 September 1997 a total of 11 requests were received concerning the seizure of assets or valuables held by banks for money-laundering offences.

9.1.2 Non-Criminal Matters

The Italian authorities have confirmed that, following their ratification of the OECD Convention, they will be able to comply with a request carried forward in accordance with Article 9 of the Convention.

9.2 Dual Criminality

Dual criminality is not a general requirement. According to article 723 of the criminal code, MLA is provided to another State even if the conduct concerned is not an offence in Italy, except that the offence for which the foreign State proceeds is contrary to a fundamental principle of the Italian legal system.

The Italian authorities indicate that in addition to the very specific dual criminality requirement that applies to the Court of Appeal’s decision-making authority pursuant to Title III of the CCP (see above under 9.1.1), dual criminality is usually required under the bilateral treaties with non-European countries where coercive measures are requested (e.g. search and seizure)24.

Italy states that, in any case, MLA will be provided where the offence for which it is sought is within the scope of the Convention.

9.3 Bank Secrecy

Italy provides that foreign requests for mutual legal assistance in criminal investigations cannot be denied on the ground of bank secrecy. According to the Italian authorities, such requests do not have to be supported with evidence and requests can be made at an early stage of the proceedings. It is even possible to request information about bank records for so-called “fishing expeditions” to ascertain the existence of bank accounts for the purpose of obtaining evidence or for executing a confiscation order.

Banking secrecy has no basis in statutory provisions, but rests on custom or contractual obligations. Banking secrecy cannot under any circumstance be invoked in criminal proceedings. The law-enforcement authorities may be given the power of obtaining any documents and information from banks and financial institutions in criminal proceedings or investigations under special authorisation from the judicial authorities. Banking secrecy cannot be invoked before the Bank of Italy or the UIC, when acting in their capacity as supervisory authorities. Neither can banking secrecy be invoked before the NSPV of the Guardia di Finanza when conducting law-enforcement activities, when following up on reports of suspicious transactions and, finally, when investigating possible capital flows in and out of the country through unofficial channels.

24 As Italy has not made any reservations provided for in article 5 of the Strasbourg Convention, 1959 on Mutual Legal Assistance in Criminal Matters, a request for MLA thereunder cannot be refused on the ground of dual criminality with the parties thereto.
10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has not such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

Pursuant to article 696 of the Code of Criminal Procedure (CCP), extradition can be executed pursuant to international conventions in force in Italy.

If there is an extradition treaty, then Italy is obliged to extradite the subject, on the condition that the requirements are fulfilled and without prejudice for refusal reasons provided for by the said treaty. If there is no treaty with the requesting State, extradition can be granted pursuant to the relevant provisions in Title II of the CCP. Title II provides for extradition to enforce a judgement in the requesting country and for the purpose of standing trial.

Pursuant to Title II, three layers of decision-making are involved in requests for extradition. First, upon receipt of a request for extradition, the Minister of Justice is required to forward the request to the Court of Appeal, unless of the opinion that the request is to be dismissed [subsection (1) of article 703]. Next, the Court of Appeal decides whether to consent to a request (subsection (1) of article 701), although a decision of the Court of Appeal to consent thereto does not make extradition compulsory (subsection (3) of article 701). Finally, once the Court of Appeal decides in favour of granting extradition, the Minister of Justice makes the final determination (article 708).

The Court of Appeal cannot consent to a request for extradition unless the following criteria are satisfied:

1. Where a final sentence has not been passed, there must be “serious grounds to believe” that the accused person is guilty. Where a final sentence has been passed, the same offence must not be the subject of a pending criminal proceeding or a final judgement in Italy (subsection 1 of article 705).

2. The accused person must not have been and will not be the subject of a proceeding that does not ensure that fundamental human rights are respected [subsection 2(a) of article 705].

3. Enforcement of the judgement for which extradition is requested must not include provisions that conflict with the basic principles of the Italian legal system [subsection 2(b) of article 705]. This would appear to encompass the principle of dual criminality, which the Italian authorities confirm must be met to provide extradition.

4. The offence for which extradition is requested must not be of a political nature. In addition, there must not be grounds to believe that the accused person will be persecuted or discriminated against on account of his/her race, religion, sex, nationality, language, political opinions or personal or social circumstances, or that he/she may undergo a cruel, inhuman or degrading punishment or treatment.

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A decision of the Court of Appeal is not necessary where the person for whom the request concerns consents to the extradition. Such consent must be given in the presence of defence counsel and mentioned in the relevant report. [subsection (3) of article 701].
treatment, or be the subject of another act amounting to a violation of fundamental human rights [paragraph 2(c) of article 705].

5. If the offence for which extradition is sought is punishable by death under the law of the requesting country, sufficient assurance must be provided that the accused will not be sentenced to death, or where the sentence has already been passed, that he/she will not be executed [subsection (2) of article 698].

Pursuant to subsection (1) of article 706, the decision of the Court of Appeal may be appealed before the Court of Cassation by the person for whom extradition is requested, defence counsel, the general public prosecutor or the requesting country.

Once the decision of the Court of Appeal to consent to a request for extradition is final, the Minister of Justice shall decide whether to grant extradition within 45 days of receipt of the report thereof [subsection (1) of article 708]. In making a determination, pursuant to subsection (4) of article 699, the Minister of Justice has the discretion to make extradition conditional upon such further requirements as he/she deems appropriate.

10.3/10.4 Extradition of Nationals

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

Pursuant to article 26 of the Constitution, it is only possible to extradite an Italian citizen pursuant to a treaty.

If there is an extradition treaty, it is compulsory for Italy to extradite an Italian citizen; if there is no treaty with the requesting State, Italy may cooperate in the extradition proceedings in compliance with the principles provided for by Article 697 of the Penal Code.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Italian authorities confirm that in determining whether the requirement of dual criminality is satisfied, the facts upon which the request is based are assessed in order to determine whether the conduct constitutes an offence in Italy. They state that, consequently, dual criminality would be satisfied if the requesting country fulfilled the requirements under the Convention for criminalising the offence of bribing a foreign public official.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.
The Italian authorities have informed the Secretary-General, in his capacity of depositary of the Convention, that the Ministry of Justice, is appointed as the authority responsible for the matters listed in Article 11.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. Tax Deductibility

The Italian authorities explain that the relevant legislation does not provide for the tax deductibility of bribes paid to foreign public officials.

While there is no explicit provision in the tax legislation which provides for the non-tax deductibility of bribes, Italy has already considered that illicit payments may not be deducted as they are not considered to be legitimate business expenses (v. Comm. Trib. Prov. Milano, Sez. 34, 11/11/96, n.111, in Boll. trib. ).

According to the Italian authorities, denial of deductibility is not dependent on a criminal conviction. There is no information whether non deductability applies both to natural and legal persons. There is no information whether communication between tax and judicial authorities is permitted.
EVALUATION OF ITALY

General remarks

The Working Group commended the Italian authorities for their excellent co-operation during all stages of the examination. In particular, delegates thanked the Italian authorities for the comprehensive and informative responses that significantly assisted in the evaluation process.

Italy implemented the Convention by Law n°300 of 29 September 2000, which amended the Penal Code, by adding Article 322bis which establishes the offence of bribing a foreign public official, linking it to the existing domestic offence relating to active and passive corruption, which makes the law complex. The law also adds article 322ter to the Penal Code, providing for confiscation of the bribe and the proceeds or an equivalent value, in order to meet the requirement set by article 3.3 of the Convention.

The Working Group considered in the light of the available documentation and explanations provided by the Italian authorities that Italy’s legislation conforms to the requirements of the Convention. However, certain aspects of the Italian implementing legislation, listed below, have been identified and should be followed up in Phase 2.

Specific issues

1. Third party

Article 322bis of the Italian Penal Code does not directly mention the case where a benefit is offered, promised or given directly to a third party. The Italian authorities stated that this element was covered, as third parties are mentioned in articles 318 and 319 (dealing with passive bribery) to which article 322bis ultimately refers, through articles 321 and 322 which cover active bribery of public officials without explicitly mentioning third parties.

In view of the complexity of the cross-references, the Working Group recommended that this issue be followed up in Phase 2.

2. Payments after performance of duty

In the absence of a prior offer or promise of a bribe, the Italian law does not criminalise the mere act of making a payment after the performance of an act by the foreign public official in compliance with his duties (although a passive bribery offence would be committed by the official).

The Working Group recognised that this situation is not covered by the Convention, and is of the opinion that it should be considered on a horizontal basis at a later stage, to establish whether it may weaken the effective application of the Convention.

3. Exception: abuse of power by the public official (concussione)

The Italian law does not extend criminalisation to the payment (or the offering, promising or giving) of any undue pecuniary or other advantage to a public official in cases covered by article 317 where a public official “takes advantage of his/her functions or power to oblige or induce another to unduly give or promise money or other assets to himself or a third party”. In this case, article 317 provides for the punishment of the public official only. The Italian authorities explained that this implied coercion on the part of the public official and

26. The Italian authorities informed the Group that the Council of Ministers enacted the legislative Decree on 2 May 2001. It will enter into force as soon as it is published in the Official Journal (26 June 2001).
that it was in practice up to the defendant to prove that he/she was the victim of the public official’s behaviour and that this argument has been very rarely invoked successfully.

The Working Group was concerned that any reference to the concept of concussione in cases of international bribery may weaken the effective application of the Convention and will review this matter in Phase 2.

4. Responsibility of legal persons

The Italian legal system had not established a general system of responsibility for legal persons. However, pursuant to Article 11 of the implementing legislation the Government has adopted on 11 April 2001, a draft legislative decree in order to establish administrative responsibility of legal persons for the bribery of domestic or foreign public officials, which has undergone a consultation process before Parliament. The Italian authorities informed the Working Group that Parliament has rendered its (non-binding) opinion and that final adoption of the legislative decree by the Government took place on 2 May 2001.

The Working Group was satisfied that the legislative Decree complies with the requirements of the Convention and intends to follow its practical application in Phase 2 in view of its novelty.

5. Sanctions

The Convention requires each Party to institute “effective, proportionate and dissuasive” criminal sanctions. The Italian law does not provide any pecuniary sanctions (apart from confiscatory measures) for natural persons in the case of bribery of a public official.

The Working Group considered that in addition to deprivation of liberty, the introduction of financial sanctions may constitute a useful additional deterrent. The Italian delegation felt however that the sanctions provided for are adequate and underlined that the monetary sanctions against natural persons are not required by the Convention.

6. Overlapping jurisdictions

The Convention requires that where more than one party has jurisdiction over an offence, they shall (at the request of one of them) consult with a view to determining the most appropriate jurisdiction for prosecution. In so far as Italian prosecutors may not have discretion to refrain from prosecuting where Italian jurisdiction can be taken, the consultations envisaged by the Convention might therefore be of limited value in some cases. The Italian authorities assured the Group that practical problems were unlikely to arise in Italy, as prosecutions of acts committed abroad generally require a prior request from the Minister of Justice. Furthermore, they affirm that jurisdiction of legal persons for bribery acts committed outside Italy exists only according to the above-mentioned Legislative Decree when the State where the acts were committed does not proceed. In any case, this situation is not unique to Italy and may need to be considered on a horizontal basis.
LUXEMBOURG

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal issues


The law seeks partly to update and strengthen the laws against corruption, which had remained unchanged since promulgation of the Criminal Code and which contained obvious shortcomings. It also seems to bring Luxembourg criminal law into line with the standards of public international law that apply in such matters.

The Law of 15 January 2001 amends the Criminal Code, the Code of Criminal Procedure and the Act of 4 December 1967 on income tax. Specifically, in order to meet the requirements of the OECD Convention a new Article 252 has been inserted into the Criminal Code, which makes the laws against corruption in the widest sense applicable to public officials and agents of other States, of the European Communities and of international organisations.

To a large extent, the legislation draws on the new criminal code in France, since the Luxembourg authorities felt that this approach would give courts and lawyers in Luxembourg the advantage of being able to draw on French legal theory and case law. On some points, however, it was deemed preferable to conserve aspects of the current (Belgian) legislation. In other areas, entirely new texts were proposed where there was no existing reference text but which received legislative enactment.

The Convention and the Luxembourg legal system

The Luxembourg authorities state that Luxembourg recognises the principle whereby international law prevails over national law although the Convention is not directly applicable in national law. They also point out that the explanatory report of an international convention does not have statutory force. The Commentaries will help those who have the task of implementing the Convention to understand its precise scope. The Luxembourg authorities thus explained that in case of uncertainties concerning the interpretation of the terminology used in the legislation, the Luxembourg courts will refer to the Convention, and in case of uncertainties concerning the interpretation of the Convention, the courts will

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1 When the bill was being drafted, the Government also took into consideration the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities’ financial interests, signed on 27 September 1996. The Law has been published in the Mémorial of 7 February 2001, page 698 (official journal of the Grand Duchy of Luxembourg).
2 These provisions are therefore liable to further amendment, necessitated by transposition of the Council of Europe and European Union conventions on the fight against corruption.
refer to the explanatory commentaries. As well, in case of contradiction between the terminology used in the legislation and the one of the Convention, the latter prevails.

1. **ARTICLE 1 – THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS**

Luxembourg has opted to extend certain provisions of the Criminal Code to foreign public officials (Article 252). These provisions concern passive bribery and trading in influence (Article 246), active bribery and trading in influence (Article 247), active and passive trading in influence by a private individual (Article 248), passive and active bribery ex post (Article 249), passive and active bribery of the judiciary (Article 250) and intimidation of persons exercising a public function (Article 251). The offences provided for in Articles 247, 249 paragraph 2 and 250 paragraph 2 correspond more particularly to the requirements of Article 1 of the Convention. Bribery is now a crime, rather than a simple offence.

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
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<tr>
<td>Art. 247.</td>
<td>The fact of proposing or giving, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind whatsoever to a person entrusted with, or agent of, public authority or a law enforcement officer or a person charged with a public service mission or holding elected office, for himself or for a third party, in order that such person: 1. performs or refrains from performing an act in accordance with his function, mission or office or facilitated by its function, mission or office; or 2. abuses his actual or presumed influence in order to obtain distinctions, employment, business or any other favourable decision from a public authority or administration, shall be an offence punishable by imprisonment for five to ten years and a fine of LUF 20 000 to 7 500 000.</td>
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<td>Art. 249.</td>
<td>Any person entrusted with or agent of public authority or any law enforcement officer or any person charged with a public service mission or holding elected office who solicits or accepts, without right, directly or indirectly, for himself or for another person, offers, promises, gifts, presents or advantages of any kind whatsoever for having performed or refraining from performing an act in accordance with his function, mission or office or facilitated by his function, mission or office, from any person whatsoever who has benefited from performance or non-performance of such act, shall be liable to imprisonment for five to ten years and a fine of LUF 20 000 to 7 500 000. Any person whatsoever who, under the conditions set forth in paragraph 1, gives in to the solicitations of a person entrusted with or agent of public authority or a law enforcement officer or a person charged with a public service mission or holding elected office, or proposes to him offers, promises, gifts, presents or advantages of any kind whatsoever for himself or for another person, shall be liable to the same penalties.</td>
</tr>
<tr>
<td>Art. 250.</td>
<td>Any member of the judiciary or any other person holding judicial office, or any arbitrator or expert appointed either by a court or by the parties, who solicits or accepts, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind whatsoever, for himself or for a third party, for performing or refraining from performing an act in accordance with his function, shall be liable to imprisonment for ten to fifteen years and a fine of LUF 100 000 to 10 000 000. Any person whatsoever who gives in to the solicitations of a person referred to in the preceding paragraph or proposes to him offers, promises, gifts, presents or advantages of any kind whatsoever for himself or for another person, in order that such person performs or refrains from performing an act in accordance with his function, shall be liable to the same penalties.</td>
</tr>
<tr>
<td>Art. 252.</td>
<td>1. The provisions of Articles 246 to 251 of the present Code also apply to offences involving: - persons entrusted with or agent of public authority or law enforcement officers or persons holding elected office or charged with a public service mission in another State; - Community officials and members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities, in full respect of the relevant provisions of the treaties instituting the European Communities, the Protocol on the Privileges</td>
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4 *Translation Note:* Three categories of offences exist in Luxembourg criminal law according to the seriousness of the offence: minor offences, simple offences and crimes. There are different legal consequences pertaining to each category.
and Immunities of the European Communities, the Statutes of the Court of Justice, and the implementing regulations thereof, with regard to the withdrawal of immunities;
- officials or agents of another public international organisation.

2. The term "Community official" used in the previous paragraph shall mean:
- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities;
- any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants.

Members of bodies set-up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated in the same way as Community officials inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them.

1.1 Elements of the offence

The elements of the offence set out in Article 1 of the Convention are covered as follows:

1.1.1 Any person

There is no immunity specific for corruption cases, but in penal law there are several general categories of immunity. The Grand-Duc is immune from all prosecution and sanctions, the penal laws not being applicable to him. Members of Parliament enjoy temporary immunity for the duration of parliamentary sessions with the exception of gross violations or if permitted by the Chamber of Deputies.

Special rules apply to certain persons on account of their functions and status - members of the government, members of the judiciary and law enforcement officers. However, they are essentially procedural rules, which do not allow the individuals concerned to escape prosecution or sanctions.

1.1.2 Intentionally

According to the Luxembourg authorities, bribery is an intentional offence. General intent is an essential condition of any offence, meaning that the perpetrator freely and consciously commits the offence, unless there is a formal provision to the contrary in the Code or unless it is contradicted by the nature of the offence.\(^5\) However, dolus eventualis through wilful blindness, negligence or recklessness do not apply in cases of bribery.

1.1.3 To offer, promise or give

Terminology

Under Article 247, it is an offence to propose or give (...) offers, promises, gifts, presents or advantages of any kind whatsoever. Articles 249 (bribery ex post) and 250 (bribing members of the judiciary) cover any person who gives in to the solicitations of a public official or proposes to him offers, etc. commits an offence. Three terms are used.

Luxembourg law now provides that the act of proposing a bribe constitutes a completed offence. Luxembourg law uses the concept of a "corruption pact", meaning that the briber and the public official

\(^5\) However, this condition is formally expressed in legislation only in exceptional cases, when it is thought necessary to draw the court's attention to the condition in order to forestall erroneous application of the law; in other cases it is taken as read in the definition of the law and hence also in the judgement of the court which establishes the offence in the terms of the legal definition. Cass. 20 January 1893, P. 3, 20.f
share a common intent. Hitherto, however, neither offence was complete until the pact had been concluded, since the Code referred to "those who have bribed" a public official. Consequently, if steps to conclude such a "pact" were unsuccessful, the only offence would be one of attempted bribery.

This has been modified by the new law. While the new provisions of the Criminal Code still refer to a corruption pact, new Articles 247, 249 and 250 now make it an offence to propose offers to a public official with a view to concluding a corruption pact, even if the proposal is rejected or if the public official was not aware of it. The elements that used to constitute attempted bribery now constitute the completed offence of active bribery.

As regards use of the word "give" in Article 247, the government explained that it seemed appropriate in order to comply with the wording of Article 1, paragraph 1 of the Convention, which reads "to offer, promise or give any undue (...) advantage". However, although the term was included in Article 247, it is not mentioned in Articles 249 and 250. The Luxembourg authorities explained however that the case where the briber pays a bribe without a prior offer or solicitation is covered, as the act of paying a bribe is assumed to be encompassed in the offer.

According to the Luxembourg authorities, the term ‘give” corresponds, by analogy, to the term "give in to the solicitations" used in the definition of the offences of bribery (ex post) and bribing members of the judiciary (Articles 249 and 250). In this case, an individual gives in to a person entrusted with public authority who solicits offers (...) of any kind whatsoever with a view to performing or refraining from performing an act within the meaning of the law. Although previously covered by legal theory and case law, this case was not formally reflected in legislation; it is now mentioned expressly.

The Luxembourg authorities explain that this different terminology is meant to take account of whether the offence has been initiated by the briber or the public official.

The new offence of bribery (ex post)

Luxembourg law makes a distinction between two offences according to whether a bribe is offered before or after the foreign public official has performed or refrained from performing the act, i.e., according to whether the corruption pact is prior or subsequent to the acts of the person receiving the bribe.

Hitherto, a bribery offence required the prior existence of a corruption pact: under Luxembourg criminal law, the corruption pact had to be concluded before the receiver performed or refrained from performing the act to which the pact relates. Such a prior pact is extremely difficult to prove, however, and the opposite situation, in which the beneficiary rewarded a public official for performing or not performing an act ex post, did not constitute an offence. However, such a situation would be aberrant, especially if the value of the reward is significant or if the public official violated his duties in the hope of reward, and was strongly criticised by legal theorists and practising lawyers alike. Article 249 closes the loophole, by creating the offence of bribery ex post: the act or omission on the part of the public official precedes the conclusion of the corruption pact. Bribery ex post establishes the link between the person who performs or refrains from performing the act and the beneficiary. The beneficiary may be the direct recipient of the act

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6 Both proposing and receiving a bribe presuppose "an unlawful agreement, definite and certain", a "pact freely granted". "The law sought to cover an unlawful contract with regard to exercise of a public office, namely subordination of an act in accordance with the office to an advantage offered or promised by an individual and accepted or received by the official. The fraudulent pact is essential to the abuse of office." Citations, respectively, from RIGAUX et TROUSSE, Les Crimes et Délits du Code Pénal, Tome IV, Bruxelles, Bruylant, 1963, p. 279; Répertoire Pratique du Droit Belge, Bruxelles, Bruylant, 1950, Tome VI, V° Forfaiture, No 2 et 3; RIGAUX et TROUSSE, op. cit., p. 290.

7 Commentaries on articles of the bill, document N° 4400 of 22 January 1998. However, if a payment is made after performance or non-performance of the act in execution of a prior promise, the offence is one of "classic" bribery (JCL Pénal, Art.432-11, by André VITU, 11, 1993, No 95).
(for example, a person to whom an authorisation is granted) or a third party (for example, a business rival of a person from whom an authorisation is denied).

Thus, whether or not there is a prior corruption pact (Article 247 or 249), corruption is sanctioned.

1.1.4 Any undue pecuniary or other advantage

Any pecuniary or other advantage

Articles 247, 249 and 250 refer to offers, promises, gifts, presents or advantages of any kind whatsoever, taking up the same terms that are used in French law.

Previously, the law referred to "offers", "promises", "gifts" and "presents" as the consideration of the corruption pact. The new Law of 15 January 2001 adds "any advantages whatsoever" to this list, reflecting the Luxembourg authorities’ wish to include among the things offered in addition to money and material objects, any other advantage whatsoever, whether material, intellectual or social, for the offender or for any other person. The term covers approaches of all kinds, recommendations, favourable interventions, votes, sexual relations, etc.\(^8\).

Undue advantage

The new articles of the Criminal Code relating to bribery do not include the term "undue" contained in the OECD Convention. The result, according to the Luxembourg authorities, is to make so-called "facilitation" payments an offence under Luxembourg law. The Luxembourg authorities considered that including the word "undue" in its domestic legislation would mean that facilitation payments or petty gifts were tolerated. Instead of fighting bribery more effectively, the law would in fact be looking on it more indulgently, since it would accept that certain practices, though harmful, would no longer fall within the scope of the law. Luxembourg considers that this would be a step backward in the fight against bribery and how it is perceived. In the opinion of the Conseil d’Etat, "it would be inconsistent to tolerate facilitation payments while at the same time criminalising other payments because they involved larger sums of money"\(^9\).

On the other hand, Articles 246, 249 paragraph 1 and 250 paragraph 1 relating to passive bribery and Article 247 relating to "classic" active bribery contain the words "without right". According to the Luxembourg authorities, "these terms exclude from the scope of the relevant texts any salary, wage, remuneration, indemnity or advantage legally due, hence formally provided for by statute. In contrast, advantages that do not meet this criterion are not excluded, even if they were tolerated or even accepted by an immediate superior. It is unacceptable, and entirely incompatible with the probity and integrity of public service, for a public official to accept or solicit an advantage in correlation with performance of an act of public service in the absence of any statute entitling him to do so, even with the consent of an immediate superior." The Luxembourg authorities indicate that their legislation thus complies with the requirements of Commentaries 4 and 7.

These terms are not included in Articles 249 paragraph 2 and 250 paragraph 2. However, as Article 249 paragraph 2 refers explicitly to the "conditions set forth in paragraph 1", it may be assumed that the "without right" condition is covered. Article 250 paragraph 2 makes no such reference. However, the Luxembourg authorities consider that while the reference to paragraph 1 is not explicit, it is implicit, and that the element "without right" is covered by article 250 paragraph 2.

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\(^8\) JCL Pénal, op. cit., No 89-90

\(^9\) However, it is clear that the gift has to be offered with the intention to bribe for it to be sanctioned.
1.1.5 Whether directly or through intermediaries

Bribery through intermediaries is explicitly covered in cases of active bribery (Article 247) by inclusion of the words "directly or indirectly". However, that is not the case for the offences of active bribery ex post (Article 249 paragraph 2) or active bribery of members of the judiciary (Article 250), which could pose problems of interpretation.

However, the Government explanatory note explains clearly that this element, which had not been expressly mentioned hitherto, was recognised both in legal theory and in case law. Consequently, its inclusion renders explicit what had previously been implicit and jurisprudential. Whether the words "directly or indirectly" are mentioned or not, bribery through intermediaries is covered in practice. In addition, the Luxembourg authorities indicate that it is not necessary for the intermediary to be close to the official or person offering the bribe, or for the official or the person offering the bribe to be aware of the intermediary’s role. Lastly, the Luxembourg authorities indicate that an intermediary is liable to punishment as an accomplice.

1.1.6 To a foreign public official

Under the terms of Article 1 paragraph 4 of the Convention, a "foreign public official means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation".

New Article 252 extends the provisions relating to bribery to three categories of persons: public officials of other States, Community officials, and the officials or agents of other public international organisations.

Persons entrusted with, or agents of, public authority or law enforcement officers or persons holding elected office or charged with a public service mission in another State

National and foreign public officials are defined in identical terms (Articles 247 and 252). The new Luxembourg law takes up the terms used in French law – "persons entrusted with a public authority, charged with a public service or holding an elected office” – with some modifications. The previous law referred to "any public official or officer, any person charged with a public service"\(^{10}\).

- Persons entrusted with, or agents of, public authority or law enforcement officers: French legal theory defines a person entrusted with public authority as "a person who holds a power of decision and coercion over individuals and things which he manifests in the exercise of permanent or temporary duties and which is vested in him by delegation from the public authorities"\(^{11}\). This broad concept includes representatives of the State and communes (ministers, secretaries of State, members of Cabinet, mayors and councillors), public officials (except for members of the judiciary, expressly covered by new Article 250), public officers (notaries, justice of the peace) and all other persons exercising functions of authority (such as, for example, returning officers and tellers at polling stations)\(^{12}\). A president of the Republic or a sovereign may be classed as a public official and members of the armed forces are regarded as law enforcement officers.

The words “agents of” and “law enforcement officers” have been added to the French terminology in order to clearly encompass both the concept of someone acting on behalf of the public authority and someone carrying out law enforcement.

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\(^{10}\) According to the Luxembourg authorities, the terms used (applicable to both natural persons and legal entities), while not profoundly changing the scope in relation to the legislation previously in force, have the advantage of greater clarity.

\(^{11}\) Government explanatory note to the bill; ref. to JCL Pénal, Art. 432-11, (11.1993) by André Vitu, n° 55

\(^{12}\) Government explanatory note to the bill; ref. to JCL Pénal, Art. 432-11, (11.1993) by André Vitu, n° 57-69
• **Persons holding elected office**: this category is a sub-group of the preceding group\textsuperscript{13}. Its inclusion, which was not therefore logically necessary, shows that the authors of the Law wanted to make the law perfectly clear and comprehensible on this point. The provision refers to members of parliament and municipal councillors. The terms would also apply to the presidents and elected members of professional corporations. Persons who hold legislative office without having been elected fall into the category, not of persons "holding elected office" but of "persons entrusted with public authority", given the nature of their functions.

• **Persons charged with a public service mission**: a person, public or private, charged with a public service mission is one who "without having received a power of decision or coercion deriving from the exercise of public authority, is charged with performing acts or exercising a function whose purpose is to satisfy a general interest"\textsuperscript{14,15}.

• **Members of the judiciary or any other person holding judicial office, or any arbitrator or expert appointed either by a court or by the parties**: Although these terms of Article 250 are not repeated in Article 252, it begins with the words "The provisions of Articles 246 to 251 of the present Code also apply to offences involving [foreign public officials]". As the penalties for bribing a member of the judiciary are more severe, this distinction probably also has to be made where a foreigner is concerned. Concerning the persons encompassed by this category, there is no distinction between judges and prosecutors (which hitherto had not been governed by these special rules)\textsuperscript{16}, between those attached to civil and criminal courts or to administrative jurisdictions, or to ordinary or special courts. The expression "any other person holding judicial office" refers, for example, to associate judges, employers’ and employees’ representatives on employment tribunals, or members of the armed forces sitting in military courts.

The Luxembourg authorities have specified that in order to determine whether or not the person concerned is a foreign public official, the courts should refer to the Luxembourg definitions of public authority, law enforcement and public service mission and not to the definitions in use in the foreign public official’s own country. As the new text is based on French law, the courts may also refer to French case law. The Luxembourg authorities also clarify that the participation of the State in an enterprise operating on a normal commercial basis in a market does not automatically render the law on corruption and trading in influence applicable, unless the person concerned is a State representative who has the status of a State official or public agent. The Luxembourg authorities added that in case of difficulties of interpretation, the courts would refer to the Convention and its commentaries.

The Luxembourg authorities also specify that persons not officially performing public functions, such as political party officials in one-party States, are covered if they exercise a de facto power of decision or coercion delegated by the public authorities. The decisive factor is not the status or capacity of the person concerned but the function they perform, which must be of a public nature. In contrast, a bribery offence is not committed where advantages are promised or granted to a person in anticipation of his appointment as

\textsuperscript{13} Government explanatory note to the bill; ref. to JCL Pénal, Art. 432-11, (11.1993) by André Vitu, n°55

\textsuperscript{14} op. cit., loc. cit., No 55

\textsuperscript{15} This category includes in particular: administrators in bankruptcy and court-appointed liquidators of commercial companies; members of "officially instituted commissions charged with giving opinions to the public authorities or taking decisions themselves about applications, projects or plans that require official authorisation" (op. cit., loc. cit., No 71), such as members of the advisory committee on immigration, the Interministerial Committee for Regional Development, the Tender Commission, etc.; agents of agencies "which are not public administrations within the meaning of the term in administrative law, but bodies that enjoy a greater or lesser degree of managerial autonomy, existing within the different legal entities of the State … or of communes" (op. cit., loc. cit., No 72): examples of this very varied category include the Centre Hospitalier de Luxembourg, the decredere office, the national land consolidation office, the viticultural institute, etc.

\textsuperscript{16} NOVELLES, Droit pénal, Tome III, Bruxelles, Larcier, 1972, No 4254
a public official or to a person who falsely presents himself as performing such a function, though they may fall within the more general scope of trading in influence.

Lastly, "another State", according to the Luxembourg authorities, is any sovereign State other than Luxembourg. This notion seems to be more restrictive than the one of "foreign country" used in the Convention. The Luxembourg authorities explained however that if some difficulties of interpretation on this provision would appear concerning non sovereign territories, the Luxembourg courts would interpret this notion according to the Convention and commentary 18 which defines a foreign country 17.

**European Community officials**

Article 252 paragraph 2 states that "the term "Community official" used in the previous paragraph means:

− any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities;

− any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants.

Members of bodies set-up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated in the same way as Community officials inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them."

This definition is the one contained in the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, signed on 27 September 1996.

**Officials or agents of another public international organisation**

The Luxembourg law specifies public international organisations in order to exclude private international organisations from its scope 18. However, it is not necessary for Luxembourg to be a member of the organisation concerned. The Luxembourg authorities specify that the status of official or agent is determined in accordance with the statute of the international organisation and with the function exercised by the official or agent.

**1.1.7 For that official or for a third party**

A bribery offence is committed whether the briber offers the public official advantages “for himself or for a third party”. In other words, the offence is committed even if the recipient of the advantages proposed or given is not the person to whom the bribe is addressed. This therefore covers the situation where the advantage does not benefit the public official directly but a third party, such as a political party. In addition, the Luxembourg authorities have specified that no link needs to be proved between the public official and the third party, and that it is immaterial whether the advantage has been provided directly to the third party or through the public official 19.

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17 Commentary 18: "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.


19 This additional nuance seems to be entirely consistent with the law as it was and is not therefore really new. The previous law did not state that the advantage had to benefit the public official directly and personally. Nevertheless, it seemed appropriate to draft the legislation in its present form with a view to clarity and legal certainty and in order to forestall any future discussion of its scope.
The Luxembourg authorities state that a beneficiary third party may be punished either for complicity (in so far as he has performed acts which facilitated the preparation or commission of the offence), or for knowingly receiving an object or thing obtained by means of an offence.

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

The Luxembourg legislation covers both aspects – acting or refraining from acting – of the possible involvement of a foreign public official.

More specifically, it refers to acts in accordance with a public official's function, mission or office (Articles 247, 249 and 250) or facilitated by his function, mission or office (Articles 247 and 249), thus taking up the terms used in French law. Under the Luxembourg legislation, trading in influence by a public official is also an offence (Article 247, 2°).

The term "an act in accordance with his function, mission or office" means "an act that the official is required by statute or regulation to perform or to refrain from performing". This concept encompasses acts included in the express attributions of the holder of the function or position, and more generally all those that the discipline of the function requires, even if that discipline results not from statute but merely from a sort of unformulated, albeit certain, code of ethics or practice. It is immaterial whether the public or elected official has the power on his own to perform the act he has agreed to undertake; what matters is that he has disposed of his share in a collective power for valuable consideration. Likewise, it is immaterial that the public official does not have the power himself to perform the act in question, if paving the way for its performance by prior acts falls within his attributions.

As the law makes no distinction between acts for which the official has discretionary power and those for which he does not, both situations are covered.

More specifically, the function of persons holding public office is to issue opinions in assembly, to deliberate and to vote. Their function is also to prepare the deliberations of such assemblies by means of reports. An act in accordance with the office is thus one which relates to these activities and must be distinguished from approaches and interventions facilitated by an elected official's influence with regard to public authorities. In order for a bribery offence to be constituted, the act concerned must be in accordance with the office; approaches and interventions come within the scope of trading in influence.

An act "facilitated by his function, mission or office" is any act which, while not arising directly from his prerogatives expressly granted by statute or regulation, is nonetheless derived from those duties. This is the case, for example, if a junior public official takes advantage of his situation to consult files to which he does not normally have access and cashes in on the information obtained thereby.

Article 250 relating to bribing members of the judiciary makes no provision for acts facilitated by the office. The Luxembourg authorities consider that, as the more stringent provisions of Article 250 cover specific functions, it does not apply to acts facilitated by the office, for which members of the judiciary are liable to the same penalties as any other public official under the terms of Article 247.

According to the Luxembourg authorities, the Luxembourg courts should refer to the rules governing the attributions of the foreign public official in order to establish that the act is either a part of his function or facilitated by it. However, this requirement will not hamper criminal proceedings since, by virtue of the principle of the admissibility of evidence in criminal law, the court is entirely unfettered in its assessment of the evidence brought before it in order to establish whether the prerequisites for the offence are met. The court will therefore determine, in the light of the evidence, whether the act is part of the function or

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20 JCL Pénal, op. cit., No 97 to 105
21 JCL Pénal, op. cit., No 103
22 JCL Pénal, op. cit., No 115 et 107
facilitated by it, without being required to refer strictly to the laws and regulations establishing the foreign public official's duties; the court may also refer to the ethical principles of the public service.

Trading in influence: the Law of 15 January 2001 proposes the introduction into Luxembourg criminal law of the offence of trading in influence. The relevant texts are taken from France's new criminal code. Trading in influence is distinguished from bribery by the objective pursued, namely that the public official "abuses his actual or presumed influence in order to obtain distinctions, employment, business or any other favourable decision from a public authority or administration" (Article 247, 2°).

Unlike bribery, the public official acts not within but outside the framework of his functions. He uses or, more precisely, abuses the credit he possesses (or is believed to possess) as a result of his position in the administration, and also as a result of his friendships with other persons, or the relationships he has formed with officials in other public services. In other words, the offender trades not his function but his status. The influence he claims to have may be "actual or presumed".

The prohibited favours are obtaining "distinctions, employment, business or any other favourable decision from a public authority or administration". The authorities or administrations concerned may be legislative, administrative or judicial.

An offence is committed, although incurring lesser penalties, if a private individual concludes a "pact" of this type with another private individual with a view to abusing his influence for the same ends, or if the latter gives in to the former's solicitations or proposes a "pact" to him.

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

Luxembourg’s legislative provisions on bribery do not mention the purpose or the sphere of activity of bribery specifically. According to the Luxembourg authorities, whatever the objective sought, including to obtain or retain business or other improper advantage, is covered by the legislation. The offence of bribery of a foreign public official is not restricted to obtaining advantages in international business, since the nature of the activity has no bearing on whether or not the facts constitute an offence.

1.2 Complicity

Article 1.2 of the Convention requires the Parties to take the necessary measures to establish complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official as a criminal offence.

Article 66 of the Criminal Code states that "the following shall be punished as the perpetrators of a criminal offence: (i) persons who commit an offence or cooperate directly in committing it; (ii) persons who in any way whatsoever aid or abet those committing an offence if it could not have been committed without their assistance; (iii) persons who, through gifts, promises, threats, abuse of authority or power, plots or deception, directly cause an offence; (iv) persons who, either through speeches in meetings or in public places, or through posters, or through writings, whether printed or not, that are sold or distributed, directly cause an offence to be committed, without prejudice to the last two provisions of Article 1 of the Act of 20 July 1869".

Article 67 of the Criminal Code states that "the following shall be punished as accomplices of a criminal offence: (i) persons who give instructions to commit an offence; (ii) persons who procure weapons, tools or

23 JCL Pénal, Art. 432-11, No 119 à 121.
24 JCL Pénal, op. cit., No 129
25 An example of this case would be if "an individual (A) were to offer consideration to a private person (B) who is friendly with a member of the judiciary (C) so that B intervenes with C in order to have a report of an offence dropped" (JCL Pénal, Art. 433-1 et 43-2, No 28).
any other means used to commit the offence, knowing that they were intended to be used for that purpose; (iii) persons who, except in the cases provided for in Article 66.3, knowingly aid or abet the perpetrator or perpetrators in preparing, facilitating or committing the offence”.

According to the Luxembourg authorities, these provisions should cover incitement and authorisation.

Co-perpetrators incur the same penalty as perpetrators (Article 66), while accomplices incur the penalty immediately below the one they would have incurred if they had been perpetrators (Article 69), namely imprisonment for at least three months in the case of bribery or bribery ex post and for 5 to 10 years in the case of bribing a member of the judiciary. Moreover, the Luxembourg authorities specify that it is not necessary that the offence be committed for the complicity to be punished.

1.3 Attempt and conspiracy

Article 1.2 of the Convention requires each Party to take measures necessary to establish attempt and conspiracy to bribe a foreign public official as criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Attempt

In Luxembourg law, “attempt is an offence when the intent to commit a crime or offence is demonstrated by outward acts that constitute a first step towards committing the crime or the offence and were suspended or proved ineffective only by circumstances beyond the perpetrator's control” (Article 51 of the Criminal Code). Consequently, if the individual voluntarily withdraws his proposal before the public official has accepted or refused it, he has voluntarily desisted and has not committed the offence.

As bribery is a crime, attempted bribery is automatically an offence (this is not the case for an offence). As attempt incurs the penalty immediately below the one for the crime itself, the penalty for attempted bribery is imprisonment for at least three months in the case of “classic” bribery or bribery ex post and for 5 to 10 years in the case of bribing a member of the judiciary.

Conspiracy

Conspiracy, within the meaning of Anglo-Saxon law, is not punishable under Luxembourg law. Conspiracy, in the sense of pertaining to a criminal association or to organised crime, is punishable. These offences would be considered as de facto aggravating circumstances when pronouncing a sentence for corruption.

2. RESPONSIBILITY OF LEGAL PERSONS

Under Article 2 of the Convention, each Party is required to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

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26 In all events, imprisonment for a lesser indictable offence is 5 years at most (Article 15 of the Criminal Code).
27 RIGAUX et TROUSSE, op. cit., p. 312
28 Article 52 of the Criminal Code
29 In all events, imprisonment for a lesser indictable offence is 5 years at most (Article 15 of the Criminal Code).
30 The term “conspiracy” is used in the Luxembourg penal law in the specific context of plots against the Grand-Duc, the Royal family, and the Government. (Articles 101 and following of the Criminal Code).
31 Articles 322 and 324bis of the penal code.
2.1. Criminal liability of legal persons

At present, the Luxembourg legal system does not recognise the criminal liability of legal persons. As criminal liability is personal, under current Luxembourg law, a sentence may be imposed only on the natural person who perpetrates the offence, not on a legal person.

If a criminal offence is committed within the framework of a legal person, the corollary to the adage "societas delinquere non potest" is that the natural persons who by their actions have individually substituted themselves for the commercial company should be regarded as the perpetrators of the offence. These natural persons are liable not as the company’s managing body but as individuals who have committed the unlawful act. The courts therefore have to establish the identity of the natural person by whose fault the fictitious person of the company infringed the criminal law.

In an opinion of 15 February 2000, the Conseil d'Etat found that the text of the bill failed to provide for penalties in accordance with the requirements of Article 3 paragraphs 2 and 4 of the Convention. It therefore stated that "the Convention is thereby not correctly transposed into our domestic law".

The Luxembourg authorities stated that a Justice Ministry working group has been set up to prepare a reform which would introduce the principle of criminal liability of legal persons. The Luxembourg authorities specified that a bill should be presented to Parliament at the end of this year.

2.2. Non-criminal liability of legal persons

According to the Luxembourg authorities, an indirect sanction exists since commercial companies which carry on activities contrary to the criminal law may be dissolved and liquidated. However, the Conseil d'Etat said that, "while it is true that under the terms of Article 203 of the Act of 15 August 1915 on commercial companies as amended the Tribunal d'Arrondissement (district court) may order the dissolution and liquidation of any company which carries on activities contrary to the criminal law, this provision is nonetheless by no means a measure that may be regarded as fully transposing the Convention. Article 18 of the Act of 21 April 1928 on non-profit associations and foundations as amended may contain a similar provision, but the way in which action may be taken against other legal persons, such as public establishments or other associations, does not seem to be given. Furthermore, the sanction of dissolving the legal person concerned may be regarded as inappropriate and disproportionate to the offence committed."

Concluding that Luxembourg law should be supplemented, the Conseil d'Etat made proposals with regard to both introducing the criminal liability of legal persons into Luxembourg law and the various sanctions that could be envisaged for the bribery of foreign public officials.

Luxembourg law does not therefore comply with Articles 2 and 3 of the Convention with regard to legal persons.

3. SANCTIONS

The Convention requires the Parties to establish "effective, proportionate and dissuasive criminal penalties" comparable to the penalties applicable to the bribery of their own public officials. The Convention also requires, in the case of natural persons, that criminal penalties include "deprivation of liberty sufficient to enable effective mutual legal assistance and extradition". In any event, the Convention requires each Party to take such measures as may be necessary to ensure that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that provision is made for monetary sanctions "of comparable effect". Lastly, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

In Luxembourg, the same penalties apply to the bribery of foreign public officials as to the bribery of domestic public officials (Article 252).
3.1 Criminal penalties for bribery of a domestic or foreign public official

3.2 Luxembourg law does not provide for criminal sanctions that would apply to legal persons in the event of bribery of foreign public officials.

As regard natural persons, Articles 247 and 249 provide for imprisonment for five to ten years and a fine of LUF 20 000 to 7 500 000. The law makes a distinction between public officials, whether domestic or foreign, who perform judicial functions and other public officials. The penalties are increased to imprisonment for ten to fifteen years and a fine of LUF 100 000 to 10 000 000 if the offence involves "any member of the judiciary or any other person holding judicial office, or any arbitrator or expert appointed either by a court or by the parties".32

The determination of the sanction within these limits is left to the discretion of the court, and there are no criteria or guidelines other than Article 28 of the Criminal Code which states that the amount of the fine is determined taking into account the circumstances of the offence and the assets and liabilities of the accused. The Cour de Cassation does not control the choice, between these limits, of the level of the sanction applied, and the lower court is not obliged to explain its decision. However, in practice, the court takes into account various factors, including the seriousness of the damage, the repetition and organisation of the offence, the criminal record of the perpetrator, etc..

The criminal courts are authorised to apply lesser penalties than those provided for the offence in law if they consider that there are mitigating circumstances.33 Consequently, the court may reduce a penalty of imprisonment for five to ten years to imprisonment for three months at least, and the minimum fine is decreased to 10,001 francs. In addition, the court can also decide to pronounce only one of the sanctions of imprisonment or fine.35 In this case, the nature of the offence changes: a crime becomes an offence, and decriminalisation has legal consequences. The penal code does not foresee any list of possible mitigating circumstances, their application being left to the discretion of the court. These can be, inter alia, the low gravity of the offence, the absence of a criminal record of the accused person, the repentance and collaboration with the authorities, indeed even the "constraint" exercised by the public official. The Luxembourg authorities indicate that these possibilities, which are not specific to corruption offences, should not be applied to cases of active corruption of foreign public officials foreseen by the Convention, but rather to cases of "small corruption", for example small facilitation payments.

Regardless of the offence (including bribery offences) probationary measures, such as a suspended or conditional sentence, may be accorded.36

3.3 Penalties and mutual legal assistance

The penalties entailing deprivation of liberty are sufficient to permit effective mutual assistance.

Under the terms of Article 5 of the Act of 8 August 2000 on international mutual legal assistance in criminal matters, one of the conditions that the request for assistance must meet is that "the fact on which the request is based must be such as to constitute a criminal offence incurring a penalty of imprisonment for a maximum period of at least one year under Luxembourg law and the law of the State submitting the request".

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32 100 Luxembourg francs are equivalent to 2.47894 euros (2.36 US dollars on 12 January 2001), representing a fine under Articles 247 and 249 of 496 to 185 920 euros.
33 Articles 73 to 79 of the Criminal Code
34 Article 74 of the Criminal Code as amended. In all events, imprisonment for a lesser indictable offence is 5 years at most (Article 15 of the Criminal Code).
35 Article 20 of the Criminal Code.
36 Articles 619 and following of the Code of Criminal Procedure
3.4 **Penalties and extradition**

According to the Luxembourg authorities, pursuant to Article 2 of the European Convention on Extradition of 13 December 1957, persons committing offences punishable by deprivation of liberty for a maximum period of at least one year or by a more severe penalty may be extradited. This provision would cover the penalties provided for by the Luxembourg law.

3.5 **Non-criminal penalties applicable to legal persons in the event of bribery of foreign public officials**

Luxembourg law does not provide for non-criminal penalties applicable to legal persons in the event of bribery of foreign public officials, other than the dissolution of the legal person.

3.6 **Seizure and confiscation of the bribe and its proceeds**

**Seizure**

According to the Luxembourg authorities, instruments as well as proceeds of bribery are covered by the provisions on seizure\(^{37}\). The prosecutor can seize all things and other assets which have been produced by the offence or which have been acquired through the proceeds of the offence.

**Confiscation**

Article 31 of the Criminal Code states that "special confiscation applies to: items that are the object of the offence; items that were used or intended to be used to commit the offence, when they belong to the convicted person; proceeds from the offence or items acquired with the help of the proceeds from the offence". The same Article adds that "the confiscation judgement shall order, should it not be possible to enforce confiscation, a fine that may not exceed the value of the confiscated item. Such fine shall constitute a penalty." Thus, the confiscation of assets belonging to a third party or a legal person is possible only concerning the proceeds, and not the bribe.

Article 32 states that "special confiscation shall always be ordered for a crime", which is the case for bribery. It may be ordered for a simple offence.

The Luxembourg authorities indicate that there are plans to amend Article 31 of the Criminal Code by generalising the possibility of ordering confiscation of equal value.

**International co-operation regarding seizure and confiscation**

For the purpose of international co-operation regarding seizure and confiscation, Luxembourg signed on 28 September 1992 the Council of Europe Convention of 8 November 1990 on money-laundering, search, seizure and confiscation of the proceeds from crime\(^{38}\).

3.8 **Additional civil, administrative and criminal sanctions**

Article 10 of the Criminal Code provides for disqualification: persons sentenced to imprisonment for more than 5 years, which would normally be the case for bribery, are mandatorily deprived of public titles, grades, functions, positions and offices.

Persons sentenced to imprisonment for five to ten years may lose all or some of the following rights, for life or for ten to twenty years: the right to (i) occupy public functions, positions or offices; (ii) vote, be elected or stand for election; (iii) wear decorations; (iv) be an expert, witness or certifier of official instruments; (v) give evidence, except mere information; (vi) be a member of a family council or occupy

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37 Articles 66 and following of the Code of Criminal Procedure
38 Luxembourg also approved, by the law of 17 March 1992, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
any function in arrangements for the protection of legally incompetent adults or minors (...); (vii) bear or possess arms; (viii) hold school or teach or be employed in an educational establishment (Articles 11 and 12 of the Criminal Code).

Moreover there exist indirect administrative sanctions for corruption, which entails a lack of trustworthiness prejudicial to certain economic activities. Thus, judicial authorities can intervene with the competent authorities in order to revoke a licence or permit in cases where there has been a criminal conviction (example revoking a commercial establishment authorisation, exclusion from participating in public procurements\(^{39}\), etc.). The Luxembourg authorities add that if the natural person convicted is a director of a legal person, this revocation of authorisation could affect the legal person.

### 4. ART. 4 - JURISDICTION

Article 4 of the Convention requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part on its territory, whether or not a national of the said Party is involved. The Convention also requires States which have jurisdiction to prosecute their nationals for offences committed abroad to take such measures as may be necessary to establish their jurisdiction to do so in respect of the bribery of a public official according to the same principles. The Commentaries state that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

#### 4.1 Territorial jurisdiction

Article 7ter of the Code of Criminal Procedure states that "when an act characterising an essential element of an offence has been performed in the Grand Duchy of Luxembourg, the offence shall be deemed to have been committed on the territory of the Grand Duchy of Luxembourg". It is sufficient for an act characterising an essential element of an offence to have been performed in Luxembourg; it is not therefore necessary for an essential element of the offence itself to have been performed on Luxembourg territory\(^{40}\). The example was given of a case of fraud where the act took place abroad and where the victims were also located abroad and the funds where deposited in a Luxembourg bank. As well, the Luxembourg authorities indicate that the transit of a bribe through a Luxembourg banking account is sufficient to establish territorial jurisdiction. Finally, the Luxembourg authorities indicate that complicity that takes place in Luxembourg for facts committed abroad is enough to establish jurisdiction. According to the universality principle, the location of the offence is independent of the place where the offence was completed or the place where the effects were realised.

#### 4.2 Nationality jurisdiction

Pursuant to Article 5 of the Code of Criminal Procedure, "any Luxembourg national who has committed outside the territory of the Grand Duchy a crime in Luxembourg law may be prosecuted and tried in the Grand Duchy. Otherwise, offences referred to in Article 5 are prosecuted only if the accused is found in the Grand Duchy or if the government obtains his extradition" (Article 5, last paragraph).

Dual criminal liability is not required in case of crimes (Article 5 paragraph 1). However, this condition is required for a simple offence, and hence applies to cases where bribery is decriminalised on account of mitigating circumstances (Article 5 paragraph 2)\(^{41}\).

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\(^{39}\) Article 23 paragraph 1 of the Grand Ducal regulation of 27 January 1994 implementing of EEC directives relating to works, supplies and services in Luxembourg law.

\(^{40}\) Conseil d’Etat, opinion of 15.02.00

\(^{41}\) Dual criminality means that the acts have to be punished by the law of the country where they took place, even if under a different criminal statue.
The Luxembourg authorities state that the filing of a complaint or a denunciation is not a precondition for prosecution of the briber. On the other hand, a denunciation by another State does not affect the principle of discretionary prosecution.

4.3 Consultation procedures

Article 4 of the Convention states that when more than one Party has jurisdiction over an alleged offence involving bribery of foreign public officials, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

Article 42 of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters provides for the option of providing information with a view to prosecution if the judicial authorities of one party deem it appropriate for the judicial authorities of another Party to engage proceedings.

The same possibility is found at Article 21 of the 1959 European Convention on Mutual Legal Assistance, ratified by Luxembourg.

Moreover, consultations and eventual transfers of a case to another State with which Luxembourg does not have a treaty relationship may be envisaged under condition of reciprocity. However, such a demand has so far not occurred.

4.4 Effective jurisdiction

The Luxembourg authorities consider that, unless practical problems arise, the basis of Luxembourg’s territorial and nationality jurisdiction is effective in the fight against bribery of foreign public officials.

5. ART. 5 – ENFORCEMENT

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

5.1 Rules and principles applying to investigation and prosecution

Investigations and prosecutions in cases of bribery of a foreign public official are carried out according to the general rules contained in the Code of Criminal Procedure and the Criminal Code.

Consequently, pursuant to the principle of discretionary prosecution, the State Prosecutor’s office has sole authority to decide what action to take when an offence is reported\(^{42}\). However, the Luxembourg authorities specify that implementation of the principle of prosecutorial discretion necessarily entails an evaluation of the disturbance to public order caused by the facts at issue, taking into account their seriousness, as measured in particular by the amount of the bribe.

The State Prosecutor does whatever is necessary to investigate and prosecute criminal offences, or ensures that it is done. It is thus for the State Prosecutor alone, to the exclusion of all other members of the judiciary or even his immediate superiors, to decide to take no further action\(^{43}\). The Prosecutor has to justify its decision to take no further action, and can revoke his decision, in particular if new elements are communicated to him.

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\(^{42}\) The decision of the Prosecutor is final, and there is thus no obligation on the prosecutor’s office to comply with any criteria or guidelines that might be laid down by a criminal policy circular of the Ministry.

\(^{43}\) The prosecutor’s superiors, namely the State Prosecutor General and the Minister of Justice via the State Prosecutor General, can not give orders of non-prosecution.
While only the prosecutor can decide not to take further action, criminal proceedings can be initiated by an injured party on the basis of a complaint, and by the State Prosecutor General or the Minister of Justice via the former through an order of prosecution.

In Luxembourg law, it is up to the plaintiff to establish the grounds of its (criminal or civil) complaint. In applying the general rules of civil procedure, only parties that have suffered direct harm due to an offence may claim damages for such harm. According to jurisprudence, the damage suffered must be certain, personal, and direct. It is not certain whether a competitor who has lost a contract due to bribery of a foreign public official could be considered an injured party but there is no jurisprudence to this effect. Thus, the competitor will be able to initiate the prosecution, even if it not assured that he would be recognised as a victim.

5.2 Economic, political or other considerations

According to the Luxembourg authorities, the independence of the judiciary from the executive and legislative powers ensures that investigations and prosecutions of bribery offences are influenced neither by economic considerations, nor by the possible effects on relations with another State or by the identity of the natural or legal persons concerned.

While the Justice Minister may provide information about offences to the State Prosecutor General and urge him to engage proceedings or refer the matter to the competent court, he cannot under any circumstances order the State Prosecutor to refrain from a given prosecution.

Article 3 of the Act of 8 August 2000 on international mutual legal assistance in criminal matters states that “the State Prosecutor General may refuse mutual legal assistance if the request for assistance is liable to prejudice the sovereignty, security, public policy or other essential interests of the Grand Duchy of Luxembourg (...).” Furthermore, "without prejudice to the provisions of conventions, any request for mutual legal assistance shall be refused if it concerns offences relating to tax, customs or foreign exchange matters under Luxembourg law”. However, if there is a corruption offence independent of the fiscal offence, mutual legal assistance will be provided.

6. ART. 6 – STATUTE OF LIMITATIONS

As bribery of a foreign public official is a crime, criminal proceedings are barred after ten years have elapsed from the day on which the offence was committed\(^{44}\). The delay is interrupted by investigation or judicial proceedings in Luxembourg (Article 637 of the Code of Criminal Procedure). Even if theoretically the statute of limitations can be indefinitely interrupted, the requirement of a reasonable delay laid down in article 6 of the European Convention on Human Rights must be respected.

Previously, according to case law, if the crime was decriminalised because of mitigating circumstances, the offence was deemed to have been a simple offence from the outset and the statute of limitations was reduced from ten to three years. However, it is conceivable that engagement of proceedings may be delayed if the offence does not cause immediate prejudice and it is not in the interest of any of the persons aware of the offence to reveal it, as is the case with bribery or trading in influence. If, in cases where the courts deem that penalties for simple offences are sufficient, criminal proceedings cannot be engaged until three years after the offence was committed.

The law of 15 January 2001 changes this situation, since the statute of limitation is no longer affected by decriminalisation. The Luxembourg authorities considered that this change was particularly important for

\(^{44}\) According to the Luxembourg authorities, the triggering event can be, for example, the date where the corruption pact has been concluded, the date of the last bribe has been given, or the date where the act has been performed by the foreign public official.
the offence of bribery, which is secret by nature and has no direct victim suffering an immediately perceptible prejudice.\textsuperscript{45}

Penalties arising from judgements in criminal cases are barred after twenty years have elapsed from the date of the judgement (Article 635 of the Code of Criminal Procedure).

7. \textbf{ART. 7 – MONEY LAUNDERING}

Article 7 of the Convention states that each Party that has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

7.1 Bribery of Luxembourg and foreign public officials

7.2

The Act of 11 August 1998 introducing organised criminal activity and money laundering as criminal offences into the Criminal Code and amending various special laws extended the list of predicate offences to bribery for the purposes of the application of its money laundering legislation.

Under new Article 506-1 of the Criminal Code, persons who:

1) knowingly facilitate, by any means whatsoever, misleading proof of the origin of goods or income deriving (... from a bribery offence;

2) knowingly assist in the investment, concealment or conversion of the object or direct or indirect proceeds of the offences referred to at paragraph 1;

3) acquire, hold or use the object or direct or indirect proceeds of the offences referred to at paragraph 1 in the knowledge, at the time they received them, that they derived from one of the offences referred to at paragraph 1 or from participation in one of those offences;

4) attempt to commit an offence referred to at paragraphs 1 to 3 above,

are liable to imprisonment for one to five years and a fine of LUF 50 000 to 50 000 000 or one only of those two penalties.

According to the Luxembourg authorities, the money laundering offence applies both to the bribe and the proceeds of bribery.

The Luxembourg authorities note that the reference to the bribery offence in paragraph 1 covers both bribery of a national or foreign public official. Money laundering is also a criminal offence when the predicate bribery offence has been committed in another country. However, the offence must also be a criminal offence in the State where it was committed (Article 506-3 of the Criminal Code).

Lastly, the law extends the mechanism for detecting and preventing money laundering, hitherto limited to the financial sector, to other professions. Under the law, notaries, casinos and similar gaming establishments, and auditors are required "to inform the State Prosecutor promptly and on their own initiative of any fact that has come to their attention which could constitute evidence of money laundering". Notaries are also required to know the identity of the real beneficiary of any transaction relating to the instrument they receive if there is any suspicion of money laundering or when the amount is LUF 500 000 or more.

\textsuperscript{45} The Conseil d’Etat also considered that a complete review of the statute of limitations for criminal offences was necessary in Luxembourg.
8. ART. 8 - ACCOUNTING

8.1 Maintenance of books and records
Luxembourg law contains provisions of a general nature concerning book-keeping that apply to merchants, whether natural or legal persons. In particular, under the terms of Article 8 of the Commercial Code all transactions have to be entered in a single ledger or specialist subsidiary ledgers; consequently, it is not permitted to keep off-the-book accounts that are not taken back into the accounting records.

Under the terms of Article 9 of the Commercial Code, all vouchers must be kept so that, where necessary, recorded transactions can be verified on the basis of accounting records.

The Luxembourg authorities add that Luxembourg criminal law generally prohibits the falsification of business, banking or private documents and the use of false documents in general. There are also specific provisions in Luxembourg company law against false balance sheets.

Moreover, Article 477 of the Commercial Code considers as fraudulent bankruptcy the fact to fraudulently remove, delete, or falsify the content of the books and/or to fraudulently recognise itself as a debtor of undue sums in the balance sheet.

8.2 Companies subject to these laws and regulations
The provisions of the Commercial Code apply to merchants, whether natural or legal persons. The provisions of the Criminal Code regarding false documents apply to any person committing the relevant offence. The provisions of company law apply to commercial companies.

Bodies, administrations and services of the State are subject to the law on State Accounts.

8.3 Penalties for omissions or falsifications
According to the Luxembourg authorities, in the event of failure to comply with the provisions of the Commercial Code, the books may not be represented or relied on in court.

The penalty for falsification of business, banking or private documents is imprisonment for five to ten years.

Likewise, under company law the penalty for presenting a false balance sheet is imprisonment for more than five years or a fine of LUF 200 000 to 1 000 000 (4 957.87 to 24 789.35 euros).

Lastly, Article 489 of the Criminal Code states that a fraudulently bankrupted person is liable to imprisonment for 5 to 10 years.

The Luxembourg authorities also state that companies are required to have their accounts audited. Above a certain threshold, companies are required to use an outside auditor. The Institute of Auditors draws up recommendations concerning the preparation or auditing of accounts. Any irregularities are mentioned in the report that the auditor is required to draw up after completing the audit. The report must be deposited with the commercial register open to the public.

Internal controls are not a statutory requirement under Luxembourg law except in certain regulated sectors. This is the case of banking and other professions in the financial sector since 1998, and of bodies, administrations and services of the State since last year.

46 Recourse to an external auditor is required when an enterprise, for two consecutive exercises, meets two of the following three criteria: a balance sheet of 3.125 millions Euro; a net turn-over of 6.25 millions Euro; 50 full-time employees.

47 Article 252 of the law of 10 August 1915 on business firms, as amended.
9. **ART. 9 – MUTUAL LEGAL ASSISTANCE**

The OECD Convention requires each Party, "to the fullest extent possible under its laws and relevant treaties and arrangements" to provide "prompt and effective" legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention, and for non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. The Convention further establishes dual criminality when that is a condition for mutual legal assistance. Lastly, the Convention requires Parties not to refuse mutual legal assistance for criminal matters on the ground of bank secrecy.

9.1 **Laws, treaties and agreements enabling mutual legal assistance**

In Luxembourg, mutual legal assistance is based on various instruments:

- the Act of 8 August 2000 on international mutual legal assistance in criminal matters;
- the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, approved by Luxembourg by the Act of 26 February 1965, supplemented by a protocol of 11 May 1974 approved by the Act of 20 June 1977 (these texts apply only to relations between the Benelux countries);
- the Convention implementing the Schengen Agreements of 19 June 1990;
- the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. 39 States, including Luxembourg, have ratified the Convention under the auspices of the Council of Europe; Luxembourg has also ratified the additional protocol to the Convention on 2 October 2000, which came into force on 31 December 2000;
- two bilateral treaties on mutual assistance in criminal matters have been concluded, one with Australia on 24 October 1988, approved by an Act of 10 January 1994, the other with the United States, approved by an Act of 23 November 2000.

The Act of 8 August 2000 "applies to requests for mutual assistance in criminal matters whose purpose is to cause a seizure, search or other investigative measure displaying a similar degree of coercion to be conducted in the Grand Duchy, where such request is issued by judicial authorities of States not bound to the Grand Duchy of Luxembourg by an international agreement relating to mutual assistance, judicial authorities of States bound to the Grand Duchy of Luxembourg by an international agreement relating to mutual assistance, unless the provisions of this Act are contrary to those of the international agreement, or an international judicial authority recognised by the Grand Duchy of Luxembourg" (Article 1).

Article 5 sets out the conditions under which mutual assistance may be granted, Article 6 defines the competent authorities for execution of the request, and Article 7 states that "matters of mutual assistance shall be treated as urgent and priority matters. The requested authority shall inform the requesting authority of the state of the procedure and of any delay".

According to the Luxembourg authorities, the international instruments on mutual legal assistance to which Luxembourg is a Party allow prompt and effective mutual legal assistance within the scope of the conventions. In particular, the Luxembourg authorities consider that the absence of criminal liability of legal person in Luxembourg would not prevent mutual legal assistance, so long as a natural person (even if not identified) is also prosecuted.
9.2 Dual criminality

Under the terms of Article 5 of the Act of 8 August 2000, mutual legal assistance is subject to a dual criminality requirement (see point 3.3).

According to the Luxembourg authorities, the elements of the offence do not have to be exactly the same under the laws of both countries. It is sufficient for the matter to be a criminal offence in Luxembourg law, even under a different statute, for mutual assistance to be granted. As bribery is a criminal offence in Luxembourg law, the dual criminality condition is met.

According to the Luxembourg authorities, dual criminality is deemed to exist if the offence for which the assistance is sought is within the scope of the Convention.

9.3 Bank secrecy

According to the Luxembourg authorities, bank secrecy is not a ground for refusing mutual assistance in criminal matters, since article 40 paragraph 1 of the law of 5 April 1993 as modified, provides that the professional concerned has the obligation to supply an answer and to co-operate as fully as possible to all legal requests of the competent authorities. Bank secrecy cannot be relied on against an order from an investigating magistrate, which means that a banker can never assert bank secrecy as a ground for refusing to comply with a request for mutual assistance pursuant to letters rogatory.

Under the terms of the Act of 11 August 1998 introducing organised criminal activity and money laundering as criminal offences into the Criminal Code and amending various special laws, notaries, casinos and similar gaming establishments and auditors are required "give an answer to and co-operate as fully as possible with all legal requests that the law enforcement authorities put to them in the performance of their duties".

10. ART. 10 - EXTRADITION

10.1 Extradition for bribery of a foreign public official

In Luxembourg, bribery of a foreign public official is an extraditable offence under the following laws and legal instruments:

- the Act of 13 March 1870 on the Extradition of Foreign Criminals;
- the European Convention on Extradition of 13 December 1957, Article 2 of which states that extradition may be allowed for offences punishable by a penalty entailing deprivation of liberty for a maximum period of at least one year. 40 States, including Luxembourg, have ratified the Convention;
- the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, which provides for a minimum of 6 months' imprisonment.
- two bilateral treaties on extradition with Australia and the US.
- a bill approving the Convention relating to extradition between Member States of the European Union has been presented to the Parliament for examination.

The Act of 13 March 1870 on the Extradition of Foreign Criminals states that "the Government may deliver to the Governments of other countries, subject to reciprocity, any foreigner detained or charged or convicted by such countries' courts for any offence listed below that has been committed on their territory: (...) for bribery of public officials (Articles 246 to 256)."

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48 Bank secrecy, which is part of the overall professional secrecy incumbent on all professionals in the financial sector, is provided for in Article 41 of the law of 5 April 1993 as amended.
10.2 The Convention as a legal basis for extradition
Luxembourg has stated that it considers the Convention to be a legal basis for extradition between Luxembourg and another Party.

10.3 Extradition of nationals
10.4 Luxembourg does not permit the extradition of its nationals as the law on extradition only refers to foreigners. Moreover, Luxembourg has made a reservation to Article 6 of the 1957 European Convention on Extradition, stating that it will allow neither the extradition nor the transit of its "nationals", meaning persons of Luxembourg nationality as well as foreigners integrated into the Luxembourg community. This reservation reflects long-standing case law.

Whether a foreigner is designated as a “foreigner integrated into the Luxembourg community” is determined taking into account concrete circumstances, such as the length of residency in Luxembourg, and integration of the family, as well as whether the person carries out professional activities.

If extradition is requested by a State with which Luxembourg does not have a treaty on extradition, and where the request is refused on the basis of nationality, the person will be prosecuted in Luxembourg on condition of reciprocity (principle aut-dedere aut-judicare applies) and according to the principle of discretionary prosecution.

10.5 Dual criminality
Article 10.4 of the Convention states that where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention.

Luxembourg makes extradition conditional on the existence of dual criminality pursuant to Article 2 of the European Convention on extradition, which states that "extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party".

As bribery of a foreign public official is an offence punishable under Luxembourg law, the dual criminality condition is met.

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49 "The Government of the Grand Duchy of Luxembourg declares that so far as the Grand Duchy of Luxembourg is concerned, "nationals" for the purposes of the Convention are to be understood as meaning persons of Luxembourg nationality as well as foreigners integrated into the Luxembourg community in so far as they can be prosecuted within Luxembourg for the act in respect of which extradition is requested."

50 Cour 23 January 1878, P. 1, 447. "The Luxembourg Government may surrender to foreign Governments (...) solely if the individual whose extradition is requested is not a Luxembourg national."

51 Article 6.2 of the European Convention on Extradition: "if the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate".
11. ART. 11 – RESPONSIBLE AUTHORITIES

11.1 Designation of responsible authorities

Article II of the Law of 15 January 2001 states that "the Minister whose portfolio includes Justice and the State Prosecutor General, acting within the framework of their respective legal duties, are designated as responsible authorities for the missions referred to in Article 11 of the Convention".

Thus, the competent authority with regard to mutual legal assistance as set forth in Article 9 of the Convention and consultation set forth in Article 4 paragraph 3 is the State Prosecutor General, pursuant to the Act of 8 August 2000 on international mutual assistance in criminal matters; the competent authority with regard to extradition as set forth in Article 10 of the Convention is the Justice Minister52.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The revised Recommendation of 1997 strongly urges Member countries to promptly implement the 1996 Recommendation on the tax deductibility of bribes to foreign public officials: [the Council recommends] "that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility". Similarly, the Commentaries on the Convention state that "in addition to accepting the revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL".

The Law of 15 January 2001 adds a paragraph 5 to Article 12 of the Income Tax Act, as follows: "Without prejudice to the provisions relating to special expenses, the expenses listed below are deductible neither from the different categories of net income nor from the total of net income: (...)

5. advantages of any kind whatsoever and the expenses relating thereto granted with a view to obtaining a pecuniary or other advantage by

- any person entrusted with or agent of public authority or any law enforcement officer or any person charged with a public service mission or holding elected office, either in the Grand Duchy of Luxembourg or in another State;
- Community officials and members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities, in full respect of the relevant provisions of the treaties instituting the European Communities, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice, and the implementing regulations thereof, with regard to the withdrawal of immunities;
- officials or agents of another public international organisation."

Under the terms of this Article, non-deductibility extends not only to bribes but also to all undue advantages. According to the Luxembourg authorities, this wording leaves a measure of discretion to the persons who have to apply the text.

The Luxembourg authorities indicate that there are no exceptions to this provision which is of a general character (d’ordre général). The terms “Without prejudice to the provisions relating to special expenses” is meant to cover expenses which would not be tax deductible but which have otherwise been accepted by the legislator for fiscal policy or other reasons.

The Luxembourg authorities indicate that a false declaration aimed at hiding a request of deductibility of bribes may be an offence of tax fraud and sanctioned by a fine of a maximum of four times the amount of the sum in question.

52 Conseil d’Etat, supplementary opinion of 7 November 2000.
According to the Luxembourg authorities, a prior conviction of corruption is not required to deny tax deductibility of bribes.

Regarding the exchange of information between the tax administration and the judicial authorities, the Luxembourg authorities specified that there was no general principle of communication as it would be incompatible with tax confidentiality\textsuperscript{53}. However, tax confidentiality is less restrictively interpreted in case of a request from a judicial authority such as an investigating magistrate. In any case, communication of fiscal information would be provided exclusively to the judicial authorities on their request or upon the initiative of the tax authorities.

The text refers solely to taxpayers who are natural persons. However, the Luxembourg government indicated, when it tabled this amendment, that according to Article 162 of the Income Tax Act, the provisions of Title I (personal income tax) can apply with regard to determining the income tax liability of enterprises insofar as they are specified by a Grand Ducal regulation. Under the terms of the Grand Ducal regulation of 3 December 1969, paragraphs 2 to 4 of Article 12 of the Income Tax Act apply to enterprises. The regulation therefore has to be supplemented in order to include the new point 5 of Article 12 of the Income Tax Act, so that the non-deductibility of bribes also applies with regard to taxpayers that are legal persons subject to enterprise income tax pursuant to Article 159 of the Income Tax Act.

This Grand Ducal regulation was published in the \textit{Mémorial} of 27 April 2001.

\textsuperscript{53} Confidentiality can be overridden where there is consent by the tax payer, where there is a legal text authorising communication, or in the public interest. These derogations are granted on a case by case basis taking account of the nature of the offence, the mode of execution, and the extent of harm caused.
EVALUATION OF LUXEMBOURG

General comments

The Working Group complimented the Luxembourg authorities on the conscientious way in which they had implemented the Convention in domestic law. Delegates thanked the authorities for having provided complete and detailed replies and for their co-operation, which had facilitated the review process.

In order to meet the requirements of the Convention and the Recommendation, the Luxembourg Parliament adopted the Law of 15 January 200154. This Law amends the Criminal Code, the Code of Criminal Procedure and the Law of 4 December 1967 on income tax.

The Working Group was of the opinion that Luxembourg’s implementing legislation generally meets the requirements set by the Convention, and on some important points, even goes beyond the requirements of the Convention. However, there is a serious loophole in the Luxembourg legislation concerning the liability of legal persons. In addition, some aspects of the Luxembourg legislation might benefit from follow-up during Phase 2 of the evaluation process.

Specific Issues

1. Liability of legal persons

Luxembourg criminal law so far provides for only one general sanction against legal persons, namely the dissolution and liquidation of certain legal persons which carry on activities contrary to the criminal law. In addition, there is no possibility of imposing fines on legal persons. The Working Group considered that this situation falls short of the requirement of the Convention that Parties at least establish effective, proportionate and dissuasive non-criminal sanctions for legal persons, including monetary sanctions, for the offence of bribery of foreign public officials (Articles 2 and 3). Moreover, this may limit the possibilities of confiscation, as well as mutual legal assistance where investigations are against the legal person only.

The Luxembourg authorities stated that a Justice Ministry working group has been set up to prepare a reform which would introduce the principle of criminal liability of legal persons. The Luxembourg authorities indicated that a bill would be presented to Parliament at the end of 2001.

The Working Group noted that Luxembourg failed to correctly transpose the requirements of the Convention on this issue and urged the Luxembourg authorities to implement Articles 2 and 3 of the OECD Convention as soon as possible.

2. Confiscation

During the discussions, doubts were raised whether the provisions on confiscation could be efficiently applied in all cases of bribery covered by the Convention as confiscation of the instruments of bribery is dependent on the condition that the convicted person is the owner of the assets. Confiscation would not be possible therefore when the assets belong to a non-convicted third party or to a legal person. In addition, the Working Group is not certain whether confiscation of the proceeds of corruption when it belongs to a legal person is possible.

The Group encouraged Luxembourg to review the effectiveness of its legislation concerning confiscation, in light of the present evaluation.

54 Law of 15 January 2001 approving the Convention of the Organisation for Economic Co-operation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions and relating to misappropriation, destruction of documents and securities, dishonest receipt of money by a public officer, unlawful taking of interests and bribery and amending other legal provisions
3. Rules for instituting prosecutions

In Luxembourg, the principle of discretionary prosecution applies including with regard to the prosecution of a person whose extradition has been refused on the sole ground that the person is a Luxembourg national. There are no written guidelines on the exercise of this discretion.

The Luxembourg authorities indicated that the discretion of the State Prosecutor is nevertheless limited by the possibility of a prosecution being ordered by his superiors as well as by the filing of a complaint by an injured party. While there is no judicial precedent on this point, Luxembourg confirmed that the competitor who has lost a contract due to bribery of a foreign public official can be considered an injured party and thereby initiate prosecution. In addition, the decision not to prosecute can be revoked at any time by the State Prosecutor’s office.

The Working Group recommended that this issue be followed-up in Phase 2.
NETHERLANDS

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

The Netherlands signed the Convention on December 17, 1997, and deposited the instrument of ratification on January 12, 2001. The Ratification Bill and Implementation Bill were enacted on December 13, 2000 and came into force on February 1, 2001. These Bills have been passed by Parliament in relation to the obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and three other treaties on the control of fraud and corruption 1.

The Dutch authorities explain that the entire Kingdom of the Netherlands, which includes Aruba and the Netherlands Antilles 2, is a signatory to the Convention. However, the Convention is ratified for the Kingdom of the Netherlands in Europe. In the notes on the Ratification Bill (discussed in more detail below), it is provided that “the governments of the Netherlands Antilles and Aruba shall consider whether the Convention shall also apply to their territories”, and that ratification has been extended to them to make “such co-application possible in due course”. The Dutch authorities confirm that Aruba and the Netherlands Antilles intend to implement the Convention in due course.

Convention as a Whole

(i) Obligations under the Convention

The Implementation Bill provides for several amendments to Dutch legislation in order to meet the obligations under the Convention and other international instruments 3. The amendments relevant to the obligations under the Convention are contained in Article I and Article II of the Implementing Bill, and can be very briefly summarised as follows:

- A new article (article 178a) has been added to the Penal Code in order to extend the application of the active bribery offences, which previously only applied to domestic public servants, to “persons in the public service of a foreign state or an international law organisation”, “former public servants” and judges “of a foreign state or an international law organisation”.


2 The Netherlands Antilles comprise two groupings of islands: Curacao and Bonaire are located off the coast of Venezuela; Saba, Sint Eustatius, and Sint Maarten (the Dutch two-fifths of the island of Saint Martin) are situated 800 km to the north.

3 The amendments relevant to the other international obligations include corresponding amendments to the passive bribery offences (see articles 362, 363 and 364 of the Penal Code) for the purpose of implementing the EU Corruption Protocol.
The Dutch authorities provide that certain provisions in the Dutch Constitution are relevant to the relationship between domestic legislation and a treaty. However, these articles (article 93 and 94) relate to the immediate application of treaty provisions that are directly binding on all persons by virtue of their contents, such as the European Convention for the Protection of Human Rights. The obligations under the Convention are addressed to the Parties thereto, and thus the Constitution does not give it immediate effect. For this reason the Netherlands has transcribed the provisions of the Convention into legislation where necessary. The Dutch authorities explain that the Dutch courts would consult the provisions in the Convention in formulating their judgements with respect to, for instance, the application of the term “foreign public official”. However, pursuant to article 15(1) of the Constitution, “other than in cases laid down by or pursuant to an Act of Parliament, no one may be deprived of his liberty”. Thus there remains the question of how restrictively the courts interpret this provision, as it would appear to require that all the elements of an offence for which a term of imprisonment can be imposed be set out in legislation.

The Dutch authorities have provided two sets of explanatory notes on the various amendments to the Dutch legislation; one, which is attached to the copy of the Ratification Bill (notes on the Ratification Bill), and the other, which is attached to the copy of the Implementation Bill (notes on the Implementation Bill). These documents were drafted for the purpose of the parliamentary reading of the Bills, and are applied by the judiciary as one of the principal interpretations of the purpose and scope of the legislation.

The Dutch authorities have also provided references to Supreme Court decisions in relation to various issues under the Convention. They explain that the Dutch legal tradition has been for decisions of the Supreme Court to be binding on the lower courts.

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4 These notes appear to have been prepared by the Minister of Justice, in the case of the Implementation Bill, and the Minister of Justice, Minister of Foreign Affairs and Minister of Economic Affairs, in the case of the Ratification Bill.
1.1 General Description of the Offence

(i) The Offences

Those offences that are relevant to the requirements under Article 1 of the Convention are reproduced below. The amendments that have been made pursuant to the Implementation Bill are indicated in bold.

Article 177 (Bribery of a public servant where there is a breach of duty.)

1. Punished by a prison sentence of not more than four years or a fine of the fifth category shall be:
   1. a person who makes a gift or a promise to a public servant or renders or offers him a service with the intention of inducing him to do or not to do something in violation with the discharge of his duties.
   2. a person who makes a gift or a promise to a public servant or renders or offers him a service as a result of or in reply to something he has done or not done in violation with the discharge of his duties.

2. He may be deprived of the rights referred to in article 28, first paragraph, sub paragraphs 1, 2, and 4.

Article 177a (Bribery of a public servant where there is no breach of duty.)

1. Punished by a prison sentence of not more than two years or a fine of the fourth category shall be:
   1. a person who makes a gift or a promise to a public servant or renders or offers him a service with the intention of inducing him to do or not to do something in the discharge of his duties without violating these duties.
   2. a person who makes a gift or a promise to a public servant or renders or offers him a service as a result of or in reply to something he has done or not done in the discharge of his current or former duties without violating these duties.

2. He may be deprived of the rights referred to in article 28, first paragraph, sub paragraphs 1, 2, and 4.

Article 178 (Bribery of a judge.)

1. A person, who makes a gift or a promise to or renders or offers a service to a judge, with the object of exercising influence on the decision in a case that is before him for judgement, is liable to a term of imprisonment of not more than six years or a fine of the fourth category.

2. Where the gift or promise is made with the object of obtaining a conviction in a criminal case, the offender is liable to a term of imprisonment of not more than nine years or a fine of the fifth category.

3. He may be deprived of the rights referred to in article 28, first paragraph, sub paragraphs 1, 2, and 4.
Article 178a (Application of articles 177, 177a and 178.)

1. Persons in the public service of a foreign state or an international institution will be considered as equivalent to the public servants referred to in articles 177 and 177a.

2. Former public servants are considered as equivalent to the public servants referred to in articles 177, first paragraph, subparagraph 2, and 177a, first paragraph, subparagraph 2.

3. A judge of a foreign state or an international institution is considered as equivalent to the judge referred to in article 178.

(ii) General Defences

Exclusion of Criminal Liability under the Penal Code

The Penal Code provides several defences, including the usual exception to criminal liability for a person suffering from a “mental defect or mental disease” (article 39). The ones that are particularly relevant to the offences under articles 177, 177a and 178 of the Penal Code are discussed here.

Pursuant to article 40, a person is not criminally liable for committing an offence “as a result of a force he could not be expected to resist (overmacht)”. The Dutch authorities explain that this defence addresses the concept of force majeur (“acts of God”), of which there are two types: physical and psychological. The Dutch authorities do not foresee that these defences could be applied in practice to the offence of bribing a foreign public official.

Pursuant to article 40, a person is not criminally liable for committing an offence “as a result of a force he could not be expected to resist (overmacht)”. The Dutch authorities explain that this defence addresses the concept of force majeur (“acts of God”), of which there are two types: physical and psychological. The Dutch authorities do not foresee that these defences could be applied in practice to the offence of bribing a foreign public official.

Article 43.1 of the Penal Code provides a defence where an offence is committed pursuant to an “official order issued by a competent authority”. Pursuant to article 43.2, where the official order is issued without authority, criminal liability is not removed “unless the order was assumed by the subordinate in good faith to have been issued with authority and he complied with it in his capacity as subordinate”. The Dutch authorities confirm that in theory this defence could be applied to the offence of bribing a foreign public official where there is a “connection in public law between the perpetrator and the person giving the order”, but have not found any cases where this defence has been applied to bribery, and consider it highly unlikely or impossible to apply it thereto in practice. This defence is only triggered where the government can formally give the order in question, and in the Netherlands an order to bribe a foreign public official cannot be issued by the government.

Non-Codified General Excuses and Justifications

The Netherlands Supreme Court accepts the absence of blameworthiness (fault) as an excuse in cases where the perpetrator makes a mistake of fact or a mistake of law. The mistake must be reasonable, which means that the excuse does not apply where the perpetrator should have known better. A “mistake of fact” refers to a mistaken assessment of an actual situation where the perpetrator should not have known better. The Dutch authorities explain that a briber could not argue that the person he/she bribed was a


6 Ibid.

7 The Dutch authorities provide that a good example of a mistake of fact is the case where a motorist ignores the order to stop given by a police officer who was not recognisable as such standing at the side of the road, mistaking him/her for a hitchhiker.
foreign public official because people are expected to inform themselves of the identity of persons with whom they do business.

In order to plead a “mistake of law” successfully, the perpetrator must believe that a punishable offence has not been committed. However, the duty to inform oneself of the current regulations applies, and only advice relied upon from a person or body with such a degree of authority that it is reasonable to have relied on his/her advice serves as an excuse.

The Dutch authorities state that these non-codified general excuses are not opposed to Commentaries 7 and 8 of the Convention, as the duty to inform oneself of the law does not enable one to “rely solely on information” gathered on site in the other country. Moreover, the person is expected to have informed himself/herself of whether the act in question is punishable according to Dutch law. The Dutch authorities add that with respect to the foreign bribery offence, the only case in which a mistake of law would apply would be where the perpetrator has been informed by a source with a sufficient degree of authority that the payment in question is required or permitted by the statutory regulations in force in the foreign public official’s country.

1.2 The Elements of the Offence

The review and analysis of the elements of the offences of bribing a foreign public servant is restricted in content to those offences that are covered by the Convention [i.e. articles 177.1(1), 177a.1(1), 178.1 and 178.2]. As articles 177.1(2) and 177a.1(2) address the making of a gift or promise, etc. in return for an act or omission that occurred in the past, they exceed the requirements of the Convention, and, thus, are not discussed in this review.

1.2.1 any person

Articles 177, 177a and 178 of the Penal Code apply to “a person”. Article 51.1 clarifies that criminal offences can be committed by “natural persons” and “juristic persons”.

1.2.2 intentionally

The Dutch authorities provide that the element of intention is implicit in the formulation of the offences. For instance, depending upon the translation, articles 177.1(1) and 177a.1(1) apply where a gift, etc. has been made “with the object of”, “with the intention of” or “for (a public servant) to act” or refrain from acting in the exercise of his/her function, in the breach of his/her official duties. Articles 178.1 and 178.2 also employ the terminology “with the object of”.

The Dutch authorities explain that an offence is committed regardless if the action has an “effect”. It is the intention of the briber to induce an act or omission by the public official that gives an action a criminal nature. For example, the offence is completed where a message has been left on an official’s answering machine containing a promise, but the official has not heard it.

Under Dutch law the requirement of intent does not contemplate the case where a person is wilfully blind to whether the act of offering, etc. money or any other advantage would induce an act or omission by the public official (i.e. the concept of dolus eventualis).
1.2.3 to offer, promise or give

Articles 177.1(1) and 177a.1(1) are based upon the formulation “makes a gift or a promise to a public servant or renders or offers him a service”.8 The latter part (i.e. “renders or offers him a service”) was added by way of amendment through the Implementation Bill. The formulation for article 178.1 is identical, except that the word “judge” has been substituted for “public servant”.9

The previous bribery offences applied only in relation to the making of “a gift or a promise”. In the notes on the Implementation Bill it is stated that the language “renders or offers him a service” was added through the Implementation Bill because practice had shown that the previous language “cannot, or at least, not automatically, be deemed to include the offer (or acceptance) of services”.10 The rationale for this amendment is discussed below (see 1.2.4 on “any undue pecuniary or other advantage”). However, for the purpose of the current discussion, it is necessary to address the issue of whether the language in the Dutch offences covers offers, promises and gifts of any undue pecuniary or other advantage. The new formulation is somewhat confusing, in that the term “offers” only appears in conjunction with “a service”, and the term promise does not appear in conjunction with this term. Clearly, the intent is to cover two categories of advantages, and the Dutch authorities confirm that offers, promises and gifts are covered in respect of both of them. They explain that under Dutch law, the term “promises” has a broad meaning, and is considered to contemplate the notion of offering. Additionally, in a judgement of the Supreme Court (NJ 1916, p. 300) it has been explicitly pronounced that offering falls under the making of a promise.

1.2.4 any undue pecuniary or other advantage

The language used in articles 177.1(1), 177a.1(1) and 178 to communicate the notion of what type of advantage is prohibited does not employ terminology similar in nature to the terminology in Article 1 of the Convention. Only the term “service” conveys the substance of the advantage that is prohibited, and as mentioned above, the legislators chose to add this term to the offences because practice had shown that the previous language (i.e. “makes a gift or a promise”) did not necessarily include the notion of services.11 In the notes on the Implementation Bill, it is indicated that the term “service” would, for example, cover “participation in ‘freebie trips’ providing a holiday bungalow for a ‘soft price’ or offering a Supervisory Board position.”12 The Dutch authorities add that the term “service” was added for linguistic reasons and for the purpose of codifying the law, and that it does not affect the broad scope of the provision.

The Dutch authorities explain that the term “gift” is understood to mean “something that has value for the recipient”, and the term “promise” conveys the same notion but that it will be carried out in the future. Thus, the advantage does not have to consist of money, goods or services, but may be of a non-material nature.

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8 One translation that has been provided uses the following language: “make or offer a promise or gift, or provide or offer a service”. However, the language in the official translation of the Penal Code, as well as another translation provided by the Dutch authorities uses the other language.

9 The Dutch authorities confirm that article 178.2 has been amended in exactly the same way as the other provisions in relation to offering, etc. but that the translation provided did not reflect this fact.

10 See page 10 of the notes on the Implementing Bill.

11 Although, according to the notes on the Implementation Bill (page 9), the Supreme Court held in 1994 (Netherlands Jurisprudence 1994, 673) that this term applies not just to “money, goods or performance” but also to advantages “of a non-material nature, such as the provision of a decoration or the receipt of sexual favours”.

12 See page 10 of the notes on the Implementation Bill.
In the notes on the Implementation Bill it is provided that “bagatelle (trivial) gifts” have not been expressly exempted from the coverage of the offences due to the drafting difficulties that would arise, and doubts that an express exception would create greater transparency.  

It is further stated that if necessary the Department of Public Prosecutions could “take self-steering action” by establishing guidelines in this regard.

Small Facilitation Payments

The Dutch authorities state that although it is not the intention to provide an exclusion from the offence for facilitation payments, under certain circumstances it would be possible to consider not prosecuting a case involving a facilitation payment. They also state that it is the intention of the Department of the Public Prosecutions to issue guidelines for corruption cases, including facilitation payments. These will be drafted according to the standards in the Convention, and although it is not known with certainty how the guidelines will define small facilitation payments, the Dutch authorities expect that they will be described as small payments to low level public officials for the purpose of inducing them to do something that is not in contravention of their public duties, or words to that effect.

1.2.5 whether directly or through intermediaries

Articles 177, 177a and 178 do not expressly apply to bribes made through intermediaries. It was decided that an amendment to this effect was not required. The Dutch authorities state that the term “to make a gift or a promise to a public servant or renders or offers him a service” is intended to be interpreted in a broad, functional sense, and thus the case would be covered where an intermediary receives or transmits the payment or offer or the advantage is paid into an account accessible to the foreign public servant. This was the interpretation that was provided by the Minister of Justice to Parliament during the reading of the Bills, and it has also been accepted in a judgement of the Supreme Court [21 October 1918 (NJ 1918, p. 1128)].

1.2.6 to a foreign public official

Article 178a.1 of the Penal Code extends the meaning of “public servant” in articles 177 and 177a to “persons in the public service of a foreign state or an international institution”. Article 178a.3 extends the meaning of “judge” in article 178 to “a judge of a foreign state or an international institution”. Article 178a extends the application of these offences in the manner described by stating that the various types of foreign public officials referred to are “considered as equivalent” to the ones referred to in the offences themselves.

(i) “Persons in the Public Service of a Foreign State”

The term “persons in the public service of a foreign state” is not defined further in the Penal Code or elsewhere in the law. The Dutch authorities explain that the courts would make an independent judgement about whether a particular person meets this description by considering (1) the concept of a Dutch public official as defined in the Penal Code and the jurisprudence, and (2) the definition in the Convention. The definition of a public official under the law of the foreign public official’s country might also be taken into account in certain circumstances. They emphasise that the definition in the Convention would be the most important interpretative tool, and highlight that the notes drafted for the purpose of the Parliamentary...
reading of the implementing Bill state that the purpose of extending the relevant offences to the bribery of the aforementioned persons is to enable execution of the Convention.

The Dutch authorities provide that the term “public servant” is defined in article 84 of the Penal Code, pursuant to which it applies to “all persons elected to public office in elections duly called under the law” (84.1), “arbitrators” (84.2) and “all personnel of the armed forces” (84.3). In addition, it is stated in the notes on the Implementation Bill that the term “official” has been broadly interpreted in the jurisprudence, and includes persons who are appointed to a public function by public authorities in order to perform part of the duties of the State or its bodies. The notes on the Implementation Bill clarify that “official” includes those who are elected as Members of Parliament and members of municipal councils. Furthermore, the Supreme Court has defined a “public servant” as “one who under the supervision and responsibility of the authorities has been appointed to a function of which the public character cannot be denied with a view to implementing tasks of the state and its organs”.

This explanation would appear to raise two issues. Firstly, since the definitions of domestic public servants are not directly applicable to foreign public servants, the definition of a foreign public official cannot be considered autonomous. Secondly, it is not clear whether in any case all the categories of public officials required to be covered by Article 1.4 of the Convention (other than any official or agent of a public international organisation, which is discussed below) are covered by the offence (e.g. judges and persons exercising a public function for a public enterprise). However, these factors must be balanced with the assurances of the Dutch authorities that the definition in the Convention would be given the most weight.

(ii) “Persons in the public service of an international institution”

The term “persons in the public service of an international institution” differs in one significant aspect from the corresponding term in Article 1.4 of the Convention (i.e. “any official or agent of a public international organisation”) in that it applies to “persons in the public service” as opposed to “any official or agent”. The Dutch authorities indicate that agents of a public international organisation are covered by the formulation in the Penal Code, and reiterate that the definition in the Convention would be considered the most important interpretative tool.

(iii) “A judge of a foreign state or an international institution”

The term “judge of a foreign state or an international institution” appears to correspond in meaning to the term “any person holding a judicial office of a foreign country, whether appointed or elected” contained in Article 1.4 of the Convention. This part of the definition applies specifically to the offence under article 178a of the Penal Code of bribing a judge for the purpose of influencing his/her decision in a case before him/her for judgement, not the broader bribery offences under articles 177 and 177a.

In addition, if the definition under article 84.2 of a domestic “judge” were applied to foreign judges, they would encompass “arbitrators” as well as “those who have jurisdiction in matters of public administration”.

16 See page 11 of the notes on the Implementation Bill.


18 See page 11 of the notes on the Implementation Bill.
1.2.7 for that official or for a third party

Articles 177, 177a and 178 do not refer to third party beneficiaries. In the notes on the Ratification Bill it is stated that an amendment is not required in respect of this element of the offence.\footnote{19} In relation to the passive bribery offence under article 363 of the Penal Code, it is provided that in principle the offence contemplates the case where a third party receives the advantage with the public servant’s knowledge.\footnote{20} This would tend to indicate that the corresponding active bribery offence would cover the case where the advantage is for a third party beneficiary. Moreover, the Dutch authorities confirm that an offence is committed where an agreement is reached between the briber and the foreign public servant to transmit the advantage directly to a third party, because in such a case the official is considered to have received something of value for the purpose of influencing him/her.

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

The relevant offences cover bribes for the purpose of inducing the following acts and omissions, etc.:

1. \textit{Pursuant to article 177.1(1), acts or omissions in breach of a public servant’s official duties.} Depending on the translation, this element is described as acts or omissions in the “exercise of his function, in breach of his official duties”, or acts or omissions “in violation with the discharge of duties”. The Dutch authorities confirm that this offence covers the situation where an official carries out a requested act (or omission) that is contrary to the regulations that apply to him/her. They state that this is in compliance with Commentary 3 (which states that an offence formulated in terms of a breach of duties meets the standard under the Convention if it is understood that every public official has a duty to exercise judgement or discretion impartially and this is an “autonomous” definition not requiring proof of the law of the particular official’s country) when considered together with the offence under article 177a.1(1), which does not require a breach of duties.

2. \textit{Pursuant to article 177a.1(1), acts or omissions in the discharge of a public servant’s duties, without breaching his/her official duties.} This element is described in one translation as acts or omissions “in the exercise of his function, but not in breach of his official duties”. In another translation it is described as acts or omissions “in the discharge of his duties without violating these duties”.

3. \textit{Pursuant to article 178.1, influence over a judge with respect to a decision in a case that is before him/her for judgement and pursuant to article 178.2, influence over a judge for the purpose of obtaining a conviction in a criminal case.} The Dutch authorities confirm that where a judge is bribed in relation to other aspects of his/her duties (e.g. the disbarring of attorneys, prosecutorial or investigatory powers), either article 177.1(1) or article 177a would apply depending on whether a breach of official duties is involved. In addition, they clarify that article 178 addresses omissions on the part of judges (e.g. a decision not to convict) despite the lack of express language in this regard. Moreover, all four categories of acts/omissions are limited by the scope of the duties of the public servant or judge as the case may be. In the case of the breach of duties and no breach of duties related offences, the public servant must be exercising his/her function. The same limitation is implicit in the offences in relation to judges, due to the nature of the acts covered. The Convention requires that the bribery of foreign public officials address acts or omissions “in relation to the performance of official duties”, which

\footnote{19} See page 19 of the notes on the Ratification Bill.\footnote{20} \textit{Ibid.}
is defined under Article 1.4.c as including “any use of the public official’s position, whether or not within the official’s authorised competence”. The Dutch authorities confirm that the purpose of the terms used in the offences in this regard is to make it clear that the offences capture advantages for the purpose of inducing an act or omission in the bribed person’s capacity as an official as opposed to some other capacity (e.g. chairman of a football club).

1.2.9/1.2.10 in order to obtain or retain business or other improper advantage/in the conduct of international business

The Dutch offences are not limited in application to bribes for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business. Thus in this respect the Dutch legislation exceeds the standard under the Convention.

1.3 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

The Penal Code contains two provisions relevant to the issue of complicity; article 47.1(2), which addresses the solicitation of the commission of a crime, and article 48, which designates the persons liable as accessories to a serious offence. Pursuant to article 47.1(2) a person who by means of gifts, promises, abuse of authority, use of violence, etc. provides the opportunity, means or information to commit an offence, intentionally solicits the commission of a crime and is liable as a principal. The Dutch authorities provide that this offence captures the notion of incitement.

Pursuant to article 48.1, an accessory is liable to the maximum penalty prescribed for the serious offence reduced by one-third. Serious offences are contained in Book II of the Penal Code, in which all the relevant bribery offences are set out. The Dutch authorities indicate that “participation” is only punishable where the offence in question is completed or at least a punishable attempt has taken place; however it is not required that the person who commits the principal offence is prosecuted or liable to prosecution.

These provisions would appear to cover incitement, aiding and abetting and authorisation, as required by Article 1.2 of the Convention.

1.4 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

(i) Attempt

Pursuant to article 45.1 of the Penal Code, a punishable attempt occurs “where the perpetrator manifests his intention by initiating the serious offence”. Article 45.2 prescribes a reduction in the maximum principal penalty by one-third in the case of an attempt. Article 46b states that an attempt (or preparation)
to commit a serious offence does not occur where the offence has not been completed due to circumstances dependent on the perpetrator’s will.

The Dutch authorities provide as an example of the application of the provision on attempts to the offences of bribing a foreign public servant, etc. the case where an attempt is made without success to put something into the public servant’s hand.

(ii) Conspiracy

Neither conspiracy to bribe a Dutch public official nor a foreign public official is criminalised under Dutch law. However, pursuant to article 140.1 of the Penal Code, participation in an organisation “that has as its object the commission of serious offences” is punishable by a maximum term of imprisonment of 6 years or a category 5 fine.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

2.1 Criminal Responsibility

The criminal liability of legal persons is established by article 51 of the Penal Code, which the Dutch authorities confirm applies to articles 177, 177a and 178 on foreign bribery.

(i) Standard of Liability

Article 51.2, which establishes the criminal liability of legal persons as well as those who have ordered the commission of the criminal offence and those in control of the unlawful behaviour, states as follows:

Where a criminal offence is committed by a juristic person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable may be imposed:

(1) against the juristic person; or
(2) against those who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour; or
(3) against the persons mentioned under (1) and (2) jointly.

The use of the word “may” in article 51.2 appears to inject discretion at two stages: the institution of criminal proceedings and the application of penalties. Moreover, article 51.2 provides a choice between proceeding against and imposing penalties on either the legal person itself, those who have ordered the commission of the criminal offence and those in control of such unlawful behaviour, or both jointly. A certain degree of discretion would also appear to be involved in making such a choice. However, the Dutch authorities indicate that article 51.2 contemplates the same level of prosecutorial discretion that is available where natural persons are involved.

The Dutch authorities provide that pursuant to article 51.2(2), it is not required that the actual persons in charge or the persons issuing the assignment be formal members of the board, directors or owners of the legal person; someone legally subordinate to the board can be in de facto control. They explain that a “person in charge” is criminally liable where his/her “intentions (are) directed towards the prohibited actions”, where he/she “consciously accepts the considerable possibility that the prohibited acts will take place” or he/she fails to take steps to “prevent the prohibited acts that he/she was competent and reasonably
obliged to take”. According to the Dutch authorities, there are no hard and fast criteria for determining whether a person is in de facto control. The Supreme Court held that a person is considered to be acting as a manager where he/she holds authority or possesses considerable influence over others in the organisation, a part of the organisation or in relation to a certain activity of the organisation (HR 16 June 1981, NJ 1982, 586).

The Dutch authorities explain that the person issuing the assignment is criminally liable where he/she explicitly orders the commission of the criminal act. Moreover, the Supreme Court has ruled in one case that a suggestion by a manager to a subordinate to perpetrate the act was sufficient to trigger liability.

For the “person in charge” or the “person issuing the assignment” to be criminally liable, the legal person must have committed a criminal offence.

With respect to the liability of the legal person pursuant to article 51.2(1), the Dutch authorities explain that the execution of a criminal offence by a natural person that can be imputed to the legal person is usually required. The jurisprudence requires that the legal person (through the manager or principal) accepts the prohibited acts or omissions of the natural person, accepts the chance that the forbidden conduct will occur, or that it accepted similar conduct in the past. Precise identification of the natural person(s) who actually provided the offer, etc. to the foreign public official is not required where it is clear that the conduct was perpetrated for the benefit of the legal entity and the legal entity tolerated or accepted such conduct. The Dutch authorities confirm that the person who actually perpetrates the bribe does not have to be someone with managerial responsibility, and cites a case pertaining to a death by negligence in a hospital in support thereof [Supreme Court (NJ 1988, 981)].

The Dutch authorities indicate that the same rules and regulations regarding seizure and confiscation and enforcement in relation to natural persons are applicable in relation to legal persons.

The Dutch authorities confirm that the criminal responsibility of the legal person or any of the persons covered by article 51.2 does not exclude the liability of a natural person(s) not covered by article 51.2.

(ii) Legal Entities

Article 51.3 states that for the purpose of criminal liability of juristic persons under article 51.2, the “following are deemed to be equivalent to juristic persons”:

- A ship owning firm (rederij).
- Unincorporated associations, such as an unincorporated company (vennootschap zonder rechtspersoonlijkheid).
- A partnership (maatschap).
- Special funds.

The formulation of this provision would seem to indicate that the list of entities clarifies the types of entities, in addition to incorporated entities, that are criminally responsible pursuant to article 51.2.

The Dutch authorities state that the concept of a legal person is primarily interpreted as a civil law term, and provide the relevant sections of the Civil Code on the entities that are considered to possess legal personality. In summary, these include the following:

- The State, provinces, municipalities, water control corporations, all bodies, which pursuant to the Constitution, are empowered to issue regulations, and other bodies “charged with part of the duties of government” pursuant to the law. (Section 1)
• Religious associations and their independent sub-bodies and bodies in which they are united. (Section 2)
• Associations, cooperatives, mutual insurance societies, companies limited by shares, private companies with limited liability and foundations. (Section 3)

The Dutch authorities confirm that state-controlled and state-owned companies are covered. They further explain that with respect to the entities referred to in the Civil Code provisions having regulation-making powers, in particular the State, and other bodies “charged with part of the duties of government”, such entities are not criminally liable for offences “committed within the context of the execution of State duties”, although the case law on this issue is undergoing a “dynamic transition”.

The Dutch authorities indicate that any formal deficiencies in the definition of legal persons do not imply that a particular type of entity is not covered by article 51.2 of the Penal Code. Thus it would appear that the concept of legal person is broadly interpreted under Dutch jurisprudence.

3. ARTICLE 3. SANCTIONS

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

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

3.1.1/3.2.1 Natural Persons/Legal Persons

(i) Generally

The penalties are identical for foreign and domestic bribery and can be summarised as follows:

Pursuant to article 177.1(1) of the Penal Code (i.e. the purpose of the bribe is to obtain a breach of duties), the penalties are:
(a) Natural persons: prison sentence of not more than 4 years or a category 5 fine (100,000 guilders)\(^{21}\). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.
(b) Legal persons: The fine is the same as for natural persons, except that pursuant to article 23.7 it may be increased in certain circumstances (discussed below) to not more than the amount of the next category (1 million guilders).

Pursuant to article 177a.1(1) of the Penal Code (i.e. the purpose of the bribe is not to obtain a breach of duties), the penalties are:
(a) Natural persons: prison sentence of not more than 2 years or a category 4 fine (25,000 guilders). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

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\(^{21}\) On 8 February 2001, 100 Dutch Guilders were valued at 42 US Dollars and Euro 45.
(b) **Legal persons:** In certain circumstances the fine may be increased to not more than the amount of the next category (100,000 guilders).

Pursuant to article 178.1 of the Penal Code (i.e. the purpose of the bribe is to influence a judge’s decision concerning a case before him/her):

(a) **Natural Persons:** prison sentence of not more than 6 years or a category 4 fine (25,000 guilders). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

(b) **Legal Persons:** In certain circumstances the fine may be increased to not more than the amount of the next category (100,000 guilders).

Pursuant to article 178.2 of the Penal Code (i.e. the purpose of the bribe is to obtain a conviction in a criminal case):

(a) **Natural Persons:** prison sentence of not more than 9 years or a category 5 fine (100,000 guilders). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

(b) **Legal Persons:** In certain circumstances the fine may be increased to not more than the amount of the next category (1 million guilders).

In the notes on the Implementing Bill, it is explained that the penalties for an offence under article 177 have been increased for imprisonment from a maximum of 2 to 4 years and for the fine from category 4 to category 5 in order to eliminate the sharp distinction between the penalties for active and passive bribery where a breach of duties is involved. However, to a certain extent the distinction has been maintained in relation to the offences not involving a breach of duty as the fine under article 177a is a category 4 fine, in contrast to the fine under the corresponding passive offence (article 362), which is a category 5 fine.

The following rights can be withdrawn pursuant to article 28.1(1), (2) and (4):

- The right to hold public office or specific offices. [28.1(1)]
- The right to serve in the armed forces. [28.1(2)]
- The right to serve as an advisor before the courts or an official administrator. [28.1(4)]

The penalties for similar offences are quite similar in severity to those applicable to the foreign bribery offences. For instance, the penalty for theft is a term of imprisonment of not more than 4 years or a category 4 fine, the penalty for embezzlement ranges from 3 years of imprisonment and a category 5 fine to 5 years of imprisonment and a category 5 fine. The penalty for false representation in order to obtain an unlawful gain is a maximum of 3 years of imprisonment or a category 5 fine.

The Dutch authorities confirm that a fine and a penalty of imprisonment can be applied cumulatively. They also indicate that in the Netherlands, judges are not bound by guidelines or directives in determining the appropriate penalty.

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22 See page 15 of the notes on the Implementation Bill.
(ii) Issues Specific to Liability of Legal Persons

With respect to the maximum limit of the fines identified above for legal persons, these reflect article 23.7 of the Penal Code, which permits the imposition of a fine up to the maximum limit of the next highest category “where the category defined for the offence does not allow appropriate punishment”. The Dutch authorities explain that the English translation of article 23.7 incorrectly creates the appearance that there is a presumption that the lower level of fine (i.e. the category of fine for natural persons) applies to a legal person, and that in fact the presumption is that the higher category of fine applies.

Article 74a of the Penal Code provides the opportunity to “avoid criminal proceedings” where an accused offers to pay the maximum fine for the criminal offence and comply with other conditions that may be set in accordance with article 74.2 (e.g. the surrender of seized objects). Where an accused offers to pay the fine in a case where article 74a applies, the Public Prosecutor “may not refuse to set the conditions specified in article 74”. This provision applies in the case of a criminal offence “for which no principal penalty other than a fine is prescribed”. However, the Dutch authorities clarify that a legal person could not invoke this provision in respect of an offence under article 177, 177a or 178 because imprisonment is available thereunder in respect of natural persons.

3.3 Penalties and Mutual Legal Assistance

The Dutch authorities state that the term of imprisonment for an offence is only relevant to the provision of mutual legal assistance where a country requests the seizure of documents, which can only be provided where extradition would be available for the offence in question. Pursuant to section 5(1)(a) of the Extradition Act, the availability of extradition is restricted to offences for which a penalty of imprisonment of “1 year or more may be imposed under the law of both the requesting state and the Netherlands”.  

3.4 Penalties and Extradition

Please see the discussion above (3.3 on “Penalties and Extradition”) with respect to the requirement for a penalty of imprisonment of 1 year or more under section 5(1)(a) of the Extradition Act.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

(i) Pre-trial Seizure

Articles 94 and 94a of the Code of Criminal Procedure govern pre-trial seizure, which, according to the Dutch authorities, is discretionary under both provisions.

Pursuant to article 94.1, seizure of “property” may be ordered for the purpose of providing evidence or to demonstrate illegally obtained advantage as referred to in article 36e of the Penal Code. Pursuant to article 94.2, seizure of “property” may be ordered for the purpose of ensuring the availability of property at the time of trial for which “forfeiture” may be ordered.

The discretionary power to seize “property” is also available under article 94a.1 for the purpose of safeguarding the “right of recovery” of a fine upon conviction where there is a suspicion of an “indictable offence” for which a category 5 fine may be imposed. In addition, the discretionary power to seize “property” exists pursuant to article 94a.2 for the purpose of safeguarding the “right of recovery in respect

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23 Article 74.1 is discussed below under 5.1 on “Enforcement”.

24 A discussion on the dual criminality aspect of this requirement is contained below under 9.2 on “Dual Criminality”.
of an order to pay a sum of money to the state by way of deprivation of illegally obtained advantage”, which may be imposed upon conviction.\(^{25}\) The power to seize under article 94a.2 applies where there is a suspicion of an “indictable offence” for which a category 5 fine may be imposed. It is presumed that the term “indictable offence” corresponds to “serious offence”, which describes all the foreign bribery offences under the Penal Code. The Dutch authorities confirm that by restricting these discretionary forms of seizure to offences for which a category 5 fine is applicable, such seizure is not available for offences under article 177a (no breach duty) or article 178.1 (bribery of a judge for purpose of influencing the decision in a case before him/her for judgement). However, they emphasise that despite this limitation, seizure would be available for these offences pursuant to article 94.1 for the purpose of providing evidence of illegally obtained advantage and pursuant to article 94.2 for the purpose of ensuring the availability thereof for the purpose of forfeiture.

For the purpose of seizure under articles 94 and 94a, “property” is defined as “all objects and all property rights”.\(^{26}\) The Dutch authorities clarify that objects include all corporate effects, movables or property of any nature, including an amount of money, and property rights include claims and securities as well as intellectual property rights that provide a corporate benefit. They also clarify that the bribe as well as the proceeds is covered in the notion of objects.

(ii) Confiscation and Forfeiture

Confiscation of “Objects”

The Penal Code provides for “forfeiture” as well as “confiscation”. Forfeiture constitutes a penalty that may be imposed upon conviction for any criminal offence (article 33), whereas confiscation is a measure for seizing objects the uncontrolled possession of which constitutes a violation of the law or public interest (article 36b). The Dutch authorities clarify that confiscation under article 36b is of minor importance in relation to the offence of bribing a foreign public official as possession of the proceeds of the bribe “cannot constitute such a violation”. For this reason, this review focuses on the availability of “forfeiture” as a punishment.

Forfeiture of the Bribe

Forfeiture upon conviction pursuant to article 33 is discretionary\(^{27}\), and pursuant to article 33a it is available in respect of certain “objects” including objects used to commit or prepare the offence [article 33a.1(c)]. It is not available, however, in relation to objects derived from the offence. Thus it would appear that, with respect to active bribery, forfeiture of an object is available in respect of the bribe but not the proceeds of bribing. Article 33a.2 provides for the forfeiture of the objects listed in article 33a.1 when they are in the possession of a person other than the convicted person where either the third person knew of or might reasonably have suspected their illegal purpose or origin, or it has not been possible to ascertain to whom they belong. Contrary to Article 3.3 of the Convention, it does not appear that there is any requirement that where the bribe is not subject to forfeiture (e.g. because it is in the possession of a bona fide third party) that “monetary sanctions of comparable effect are applicable”.

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25 Seizure pursuant to article 94a.2 is also available where there has been a conviction, presumably because confiscation for the purpose of depriving a person of “unlawfully obtained gains” requires, pursuant to article 36e.1, a separate judicial decision.

26 Article 94a.3

27 The power is discretionary due to the language “may be imposed”.

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Deprivation of Unlawfully Obtained Gains

Article 36e.1 of the Penal Code provides the discretionary power\(^{28}\) to order, by “separate judicial decision”, the payment of a sum of money in order to deprive a person convicted of a criminal offence of “unlawfully obtained gains”. The Dutch authorities explain that the purpose of section 36e is to restore the “lawful financial state of affairs” rather than result in an additional punishment.\(^{29}\)

Such an order is only available on application by the Public Prosecutor’s Office upon conviction in relation to any criminal offence. Where there has been no conviction, it is only available for an offence for which a category 5 fine applies. Thus, as in the case of the corresponding provision on pre-trial seizure (article 96a.2 of the Code of Criminal Procedure) where there is no conviction it is not available for offences under article 177a (no breach of duty) or article 178.1 (bribery of a judge for purpose of influencing the decision in a case before him/her for judgement).

It therefore appears that although the proceeds of bribery per se are not subject to forfeiture, the court has the discretion to order the payment of a sum of money in order to restore the briber to his/her pre-bribery financial state. Moreover, the Dutch authorities state that in practice forfeiture of the bribe and the related measure concerning the payment of an amount equivalent to the unlawfully obtained gains are normally applied.

3.8 Additional Civil or Administrative Sanctions

The Dutch authorities provide that pursuant to the Civil Code, legal persons may be dissolved in certain circumstances on application by the Public Prosecutor’s Office. They state that such a remedy would be available, for instance, where activities of a legal person are in conflict with the public order, and confirm that it is conceivable that a legal person that has bribed a foreign public official would fit this case.

Additionally, an injured party can institute an action for civil damages on the ground that an unlawful act has been committed by the legal person during or before the criminal prosecution regarding the act in question. The Dutch authorities consider that it “is not at all unlikely” that an action of this type could succeed with respect to the bribery of a foreign public official with the object of obtaining a competitive advantage in international business.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

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

Article 2 of the Penal Code establishes territorial jurisdiction as follows:

\[
\text{The criminal law of the Netherlands is applicable to any person who commits a criminal offence within the Netherlands.}
\]

\(^{28}\) The power is discretionary due to the language: “may be imposed”.  
\(^{29}\) In calculating the payment to be ordered, court-awarded claims are deducted and obligations imposed by prior decisions to make such payments are taken into account. [articles 36e.6 and 36e.7]
Article 3 clarifies that a criminal offence committed on board a Dutch vessel or aircraft outside of the Netherlands would be covered by Dutch criminal law.

The Dutch authorities explain that territorial jurisdiction applies pursuant to article 2 where an offence takes place in its entirety or in part in the Netherlands. Although there are no provisions in the Penal Code for determining the location of an offence, they explain that the following four points of reference follow from the case law and the academic literature:

1. The location of the physical actions. This principle is particularly useful where the result is not an element of the offence.
2. The place where the instrument has its effect (e.g. poison or a gun).
3. The place where the offence was completed by “occurrence or constitutive consequence”.
4. The tenet of ubiquity, on the basis of all of the above criteria.

The Dutch authorities confirm that in light of a number of recent decisions of the Supreme Court, territorial jurisdiction is established where an offence is committed in the Netherlands as well as abroad, and that, for instance, a telephone call, fax or e-mail emanating from the Netherlands would provide a sufficient nexus.

4.2 Nationality Jurisdiction

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

Pursuant to article 5.1 of the Penal Code, the Netherlands has jurisdiction over criminal offences committed outside the Netherlands by Dutch citizens in the following 2 cases:

1. In respect of any of the serious offences defined under certain articles of the Penal Code. The articles of the Penal Code relevant to the offence of bribing a foreign public official (i.e. articles 177, 177a and 178) are not mentioned here. [article 5.1(1)]
2. In respect of an offence that is considered a serious offence under the criminal law of the Netherlands and is also considered a criminal offence under the laws of the country where the offence was committed. [article 5.1(2)]

It would therefore always be the case that dual criminality would have to be met in order for nationality jurisdiction to be established over an offence under article 177, 177a or 178. The Dutch authorities confirm that the requirement of dual criminality is not strictly interpreted, and that it would be considered to be met where the offence is punishable in both countries, regardless of the formulation of the offence in the other country. They further confirm that nationality jurisdiction “could possibly not be” established over a Dutch national who bribes a foreign public official abroad in a country other than the country for which he/she exercises a public function if only the bribery of a domestic public official is criminalised in that country (and the conduct is not covered by another crime).

30 The most recent of which is: 13 April 1999 (NJ 1999, 538).
31 For the purpose of establishing nationality jurisdiction, whether a person has Dutch citizenship is determined according to the Dutch Nationality Act. Thus it would appear that a Dutch permanent resident would not be considered a citizen for this purpose.
There is no case law indicating whether nationality jurisdiction can be established over legal persons. However, it is the view of the Dutch authorities that a legal person can have nationality, and that a legal person incorporated under Dutch law would have Dutch nationality. In addition, the academic literature indicates that a legal person can be subject to nationality jurisdiction pursuant to article 5 of the Penal Code.

Article 5.2 confirms that nationality jurisdiction applies where the accused person acquires Dutch nationality after having committed the offence.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Pursuant to articles 552t to 552w of the Code of Criminal Procedure, the transfer of criminal proceedings to another country is possible with or without a treaty for “serious offences”. The general principle in either case is that the transfer must be in the interest of the administration of justice. As a rule, a transfer of proceedings may take place with respect to any serious offence where the suspected perpetrator is a foreigner who is not a Dutch resident.

Moreover, where a treaty does not exist between the Netherlands and the requesting state, a transfer is only possible where the requesting state and the Netherlands have jurisdiction under their domestic laws.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against bribery of foreign public officials, and if it is not, to take remedial steps.

It is the view of the Dutch authorities that the Netherlands has sufficient jurisdictional powers to enable adequate action against the bribery of foreign public officials, considering that the territorial and nationality principles have been broadly interpreted.

5 ARTICLE 5. ENFORCEMENT

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

32 The process for transferring proceedings to another state is initiated by a submission by the public prosecutor of a “motivated application” to the Minister of Justice. If he/she accepts the request of the public prosecutor, it is then formally submitted to the authorities of the requested state. A corresponding process applies where the Netherlands is requested by another state to take over proceedings.
5.1 Rules and Principles Regarding Investigations and Prosecutions

(i) Investigation

The police generally initiate a preliminary investigation in response to an indication that a felony has been committed. The police may apply coercive measures\(^{33}\), including arrest and interrogation, upon forming a reasonable suspicion, based on the facts and circumstances, that a person may have committed an offence. Where the police have performed the investigation, they prepare a report, under oath, which is turned over to the prosecutor’s office.\(^{34}\) The Dutch authorities indicate that a case is transferred to these authorities when sufficient evidence has been obtained to justify a decision to prosecute.

Public prosecutors are considered to be State officials belonging to the judiciary and are under the ultimate authority of the Minister of Justice.\(^{35}\) They have the overriding responsibility for detecting offences, and are empowered to instruct the police on the execution of criminal investigations. Moreover, the authority to apply the majority of coercive measures is by law the prerogative of the public prosecutor. The most intrusive coercive measures, such as wiretapping, are under the prerogative of the examining magistrate.

Pursuant to article 12 of the Code of Criminal Procedure, injured parties (i.e. victims) are entitled to file a complaint with the Court of Appeal where a decision has been taken to not prosecute or discontinue the prosecution of a felony.

(ii) Prosecution

Article 167 of the Code of Criminal Procedure delegates the exclusive right of prosecution to the Public Prosecutor’s Office. The Dutch authorities explain that the purpose of this delegation of power “is to prevent criminal proceedings from becoming dependent on political considerations”. They state that although article 167 of the Code of Criminal Procedure “allows” the Public Prosecution to not prosecute on “public interest” grounds, they could not find any jurisprudence indicating that such decisions are influenced by any of the prohibited grounds under Article 5 of the Convention \(^{36}\), and that in fact, the jurisprudence indicates quite the contrary.

The Dutch authorities state that prosecutions are conducted according to the principle of expediency or advisability (\emph{opportunitheitsbeginsel})\(^{37}\). The Public Prosecutor’s Office has broad discretionary powers to dismiss cases. This includes the power to settle cases outside court by use of a “conditional waiver” or “transaction”.\(^{38}\) A “conditional waiver” is given when the prosecutor believes that an alternative to a

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\(^{33}\) Investigative procedures such as the search of premises are performed in accordance with the Code of Criminal Procedure.

\(^{34}\) Aronowitz, Alexis, ‘The Netherlands’, \emph{The World Factbook of Criminal Justice Systems} (U.S. Department of Justice; Bureau of Justice Statistics, 1993). This document was taken from: http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnet.txt

\(^{35}\) Report on the Netherlands, United Nations High Commission for Human Rights (26/02/96). This document was taken from: http://www.asem.org/Documents/UN_Docs/ASEM_Countries/Netherlands.htm

\(^{36}\) i.e. Considerations of national economic interest, the potential effect upon relation with another state or the identity of the persons involved.

\(^{37}\) This is also referred to as the “principle of opportunity” in the academic literature. (e.g. See article by Aronowitz, \emph{Supra}, 34.)

\(^{38}\) Aronowitz, \emph{Supra}, 34.
criminal trial is preferable under the circumstances. Such a waiver could, for instance, be conditional on alcohol or drug treatment, community service, or restitution to the victim. The Dutch authorities confirm that this measure is not provided for under the law, but that it has been accepted in practice for a long time. The state further that it is applied only in the rare case where the measures under article 74 (discussed immediately below) are considered too restrictive.

“Transaction”, governed by article 74 of the Penal Code, and essentially involves the payment of a sum of money by the defendant to avoid criminal proceedings. It can also involve the renunciation of title to or surrender of objects that have been seized and are subject to forfeiture and confiscation, or payment of their assessed value. Moreover, it can involve the payment of the estimated gains acquired from the criminal offence, as well as compensation for any damage caused. Pursuant to article 74.1, it is available in relation to “serious offences” excluding those for which the penalty of imprisonment is more than 6 years. The right to prosecute lapses once the conditions set in a particular case have been met. The Dutch authorities indicate that guidelines on the exercise of the prosecutorial discretion to settle a case under article 74 have been drafted for a wide range of felonies, although up to now no guidelines have been drafted respecting bribery. They explain that when such guidelines are prepared, they will focus on the determination of whether certain “minor” forms of corruption qualify for out-of-court settlements, and in particular, whether the legal process will be served by a public trial.

To counterbalance this broad discretionary power, two methods for obtaining a reversal of the prosecutor’s decision are available: individual appeal (complaint) and ministerial instruction. The Dutch authorities state that under article 12 of the Code of Criminal Procedure, every “interested party” (including a victim) is entitled to appeal to a court the decision of a prosecutor to not prosecute, in which case the prosecutor is required to provide the reasons for his/her decision. Furthermore, the Dutch authorities indicate that the Public Prosecutor’s Office has drafted internal guidelines for prosecuting a number of offences, and intends to draft guidelines for prosecuting cases involving corruption. According to the Dutch authorities, prosecutorial guidelines reduce the risk of a lack of uniformity in the application of prosecutorial discretion in different parts of the country.

It appears that the Minister of Justice has the ultimate authority over the Public Prosecutor’s Office, as pursuant to article 127 of the Law on Organisation of the Judiciary, he/she has the authority to issue general and specific instructions concerning the tasks and competence of public prosecutors. The Dutch authorities state that in practice, the Minister of Justice makes limited use of this power.

Pursuant to article 51 of the Code of Criminal Procedure, an injured party who has suffered direct damage due to a felony may claim damages as a part of the penal process. Direct damage is suffered where a person has been injured by the violation of a legal provision that protects his/her interests. The Dutch authorities state that since the offence of bribing a foreign public official is designed to combat unfair competition, a competitor who has been injured by bribery could make such a claim by joining the

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39 Aronowitz, Supra, 34.
40 Aronowitz, Supra, 34.
41 Pursuant to article 74.2.a of the Penal Code, not less than 5 guilders and not more than the maximum of the statutory fine.
42 See article 74.2.b, c and d.
43 See article 74.2.d.
44 See article 74.2.e.
45 A victim may file a complaint with the Court of Appeal regarding a decision of the public prosecutor to not prosecute (Aronowitz, Supra, 34).
proceedings as an injured party. Moreover, pursuant to article 36f of the Penal Code, the judge in a criminal matter may ex officio order damages incurred by a victim to be paid to the State for his/her benefit.

5.2 Considerations such as National Economic Interest

The Dutch authorities confirm that the factors listed in Article 5 of the Convention shall not influence the investigation and/or prosecution of the offence of bribing a foreign public official. (See discussion under 5.1 above about “public interest”)

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Article 70 of the Penal Code contains the rules prescribing the statute of limitations. The provisions that are relevant to the offences under articles 177, 177a and 178 provide that the “right to prosecute lapses” as follows:

1. After 6 years for serious offences punishable by a fine, detention or imprisonment of not more than 3 years. [article 70(2)]
2. After 12 years for serious offences punishable by a term of imprisonment of more than 3 years. [article 70(3)]

Thus the statute of limitations for offences committed under article 177 (breach of duty) and 178 (bribes to judges) is 12 years, and for offences committed under article 177a (no breach of duty) it is 6 years.

Pursuant to article 71.1, the period of limitation begins to run on the day following the day on which the act in question was committed. Pursuant to article 72.1 “any act of prosecution terminates” the running of the period, provided that the person prosecuted is aware thereof or notice thereof has been served on him/her. Under article 72.2, when a period of limitation terminates, a new one commences. Moreover, article 73 states that suspension of a prosecution for the purpose of resolving a preliminary issue “tolls” (suspending temporarily) the limitations period.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

(i) Money Laundering Offence

The Dutch authorities refer to articles 416 and 417bis, which establish offences of handling stolen property, in respect of the obligation under Article 7 of the Convention. In summary, article 416 applies where the person handling property knows that it was obtained by means of a serious offence, and article 417bis applies where the person handling property “should reasonably have suspected” that it was obtained by means of a serious offence. Both of these offences cover obtaining, having at one’s disposal or transferring such property for the purpose of “pecuniary gain” (articles 416.1.b and 417bis.1.b) as well as in the absence of such a purpose (articles 416.1.a and 417bis.1.a). The offences apply in relation to “property” or “a right in personam or in rem.” The penalty for an offence under article 416.1 is a maximum term of imprisonment of 4 years or a category 5 fine (i.e. 100,000 guilders), and the penalty
under article 417bis.1 is a maximum term of imprisonment of 1 year or a category 5 fine (i.e. 100,000 guilders).

Articles 416.2 and 417bis.2 clarify that the respective punishments also apply where a person “intentionally derives advantage from the proceeds of any property obtained by means of a serious offence” (article 416.2) or “derives advantage from the proceeds of any property where he should reasonably suspect the property to have been obtained by means of a serious offence” (article 417bis.2). The Dutch authorities confirm that articles 416.1 and 417bis.1 address the “acceptance of a share of stolen money” whereas articles 416.2 and 417bis.2 address the “acceptance of goods bought with stolen money”. They state that conversely in respect of the theft of “goods”, articles 416.1 and 417bis.1 address the acceptance of the goods whereas articles 416.2 and 417bis.2 address the “sharing in the proceeds form the sale of the goods”.

According to the Dutch authorities, articles 416.1 and 417bis.1 as well as 416.2 and 417bis.2 apply to all tangible items, including money. They state further that money must, however represent the direct proceeds of the felony. It is the opinion of the Dutch government, that the bribe and the proceeds of bribing a foreign public official are both covered under these provisions in respect of the active bribery of a foreign public official.

The Dutch authorities provide that in order to establish criminal liability for the offences of handling stolen property under article 416 or 417, the court must establish that a felony from which the property was acquired has been committed, although there is no requirement that the perpetrator of the underlying offence is criminally liable for that offence or that prosecution thereof is possible. It is irrelevant whether the “underlying” offence has been committed within the jurisdiction of Dutch criminal law. Moreover, pursuant to articles 416 and 417, the perpetrator of the offence of handling stolen property need only have knowledge or should reasonably have suspected that the property was obtained by a punishable offence; thus knowledge or suspicion of the specific felony is not required. The Dutch authorities confirm that these provisions do not apply to the handling of property by the perpetrator of the predicate offence.

The Dutch authorities indicate that there have been initiatives underway to establish a separate money laundering offence, and that a motion to amend the Penal Code in this connection is due to be debated shortly in the Second Chamber of the Dutch Parliament. It is anticipated that if Parliament adopts the motion, the amendments will be enacted by the end of 2001. The offence will also apply to the perpetrator of the predicate offence (sometimes described as “self-laundering”).

The Dutch authorities are of the view that articles 416 and 417 are sufficient to deal with money laundering activities until the new provisions are in place. They add that the amendments have been drafted in order to meet the requirement of international uniformity, as many countries currently have separate money laundering offences.

(ii) Reporting Requirements for Financial Institutions

Pursuant to article 8 of the Act Respecting the Notification of Unusual Transactions (Financial Services Law), which came into force in February 1994, “anyone who provides financial services on a professional or commercial basis” is required to disclose an “unusual transaction” carried out by a client to the “Disclosure Office”. The Disclosure Office (Meldpunt) is an autonomous department within the Department of Justice, which determines independently whether the conditions for notifying the police
have been met (e.g. whether the information is sufficient to give rise to probable cause).\textsuperscript{46} It investigates a report of an unusual transaction to determine whether it qualifies as “suspicious”, in which case the transaction is referred to the police and judicial authorities. The Dutch authorities explain that the Disclosure Office has independent access to many information networks, including police files, and that under certain circumstances it has the authority to question the financial institutions.

The police cannot rely on information about unusual transactions, without having obtained the information from the Disclosure Office. In addition, they may not act on their own initiative to obtain information from the Disclosure Office. However, they may provide information to the public prosecutor about a transaction along with the request that it be examined by the Disclosure Office along with any information available to the Disclosure Office to determine whether it qualifies as a suspicious transaction.

A transaction is regarded “unusual” if “indicators” (indicatoren) that are specified in a ministerial decree (i.e. Minister of Finance), are present.\textsuperscript{47} The list of indicators is published and reviewed at 6-month intervals, in order to ensure a flexible system for keeping up with the latest money laundering techniques.\textsuperscript{48}

The Dutch authorities explain that the purpose of the Disclosure Office is to stimulate the detection of suspicious transactions. In addition, it acts as a “buffer” between the financial institutions and the police to ensure that the police only receive information about suspicious transactions (i.e. where there is a “substantive reason for believing that a felony has been committed”).

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting Requirements/Companies Subject to Requirements

The Dutch authorities provide that the general regulations concerning accounting requirements are contained in articles 361, 362, et seq. of Book 2 of the Civil Code, and include the following:

- The obligation to draw up annual accounts containing a balance sheet, profit and loss account and notes on the accounts.
- The obligation to draw up the profit and loss account in such a manner as to allow a reasonable judgement with regard to the pattern of income and expenditure of the company.
- The obligation to not adopt and approve the annual accounts before an independent accountant has issued a statement regarding the credibility of the annual account.

Most of the regulations in the Civil Code regarding accounting are based on EU Directives (i.e. 4\textsuperscript{th} Directive 78/660/EC and 7\textsuperscript{th} Directive 83/349/EC). Additionally, further accounting standards are


\textsuperscript{47} \textit{Ibid}, p. 188.

\textsuperscript{48} \textit{Ibid}, p. 204.
Disclosure and publication requirements vary depending on the nature and size of a company. For instance, small\(^{50}\) and medium\(^{51}\) companies are exempted or are not required to provide full disclosure in respect of certain publication requirements (e.g. balance sheet, profit and loss account and management report).\(^{52}\)

The Dutch authorities explain that the requirements contained in articles 361, et seq. apply to “almost all legal forms of Dutch companies” [i.e. private limited liability companies (besloten vennootschap), public limited liability companies (naamloze vennootschap), unincorporated companies (vennootschap onder firma), etc., as well as any association (vereniging) or foundation (stichting), co-operative associations and limited partnerships].

Article 225.1 of the Penal Code prohibits the false preparation or falsification of a document “that is to serve as evidence of any fact, with the object of using it as genuine and unfalsified or of having it used as such by others”. Pursuant to article 225.2, it is an offence for a person to intentionally use a false or falsified document, or intentionally deliver or have it at his/her disposal where he/she knows or should reasonably suspect that it will be used in such a manner. The Dutch authorities state that these provisions cover the fraudulent preparation or fraudulent use of documents with the intent to conceal the fact that a foreign public official has been or will be bribed. In addition, they state that article 225 covers the preparation, etc. of documents where the whole document or a part thereof is falsely prepared, and they confirm that a falsification may involve a change or addition to or an omission from a document.

8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements

The Dutch authorities provide that pursuant to the 4\(^{th}\) and 7\(^{th}\) EU Directives, all companies within the scope of article 361 of the Civil Code are subject to an external audit, with the exception of small companies (article 396) and group companies for which the parent company has issued a declaration of full responsibility in accordance with article 403.

The Dutch authorities state that two accounting organisations (Royal NIVRA and NovAA) have issued regulations for their respective members concerning the obligation on auditors to report suspected fraud or any crime, including the offence of bribing a foreign public official. Pursuant thereto, auditors are required to report possible fraud to management or the supervisory body where it is suspected that management is involved. If the fraud is not addressed following having made the report, the auditor is required to

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49 CAR is a private organisation consisting of business, trade union and banking representatives as well as accountants and auditors.

50 The Dutch authorities provide that a company qualifies as “small” if it meets two of the following criteria: 1. The total value of assets does not exceed NLG 6 million; 2. Turnover does not exceed NLG 12 million; and 3. The average number of employees is less than 50.

51 A company qualifies as “medium” if it meets two of the following criteria: 1. The total value of assets does not exceed NLG 24 million; 2. The turnover is between NLG 12 and 48 million; 3. The average number of employees is between 50 and 250.

withdraw from his/her engagement with the company, and report this to a special police unit (CRI). The report to the police must be filed with the accounts reviewed, and thus is publicly available.

8.3 Penalties

The Dutch authorities provide that an economic offence under article 1.4 of the Economic Offences Act may be considered to have been committed where in violation of article 361, et seq. of Book 2 of the Civil Code, the annual accounts fail to “provide the required insight”. The penalty for an offence under article 1.4 includes a category 5 fine (i.e. 100,000 guilders), complete or partial closure of the company or placement of the company under an administrative order.

The penalty for the offence of false preparation or falsification of a document, etc, under article 225 of the Penal Code (see discussion under 8.1/8.2) is a maximum term of imprisonment of 6 years or a category 5 fine (i.e. 100,000 guilders).53

Furthermore, the Dutch authorities draw attention to article 336 of the Penal Code, which prohibits a trader, director, managing partner or member of the Supervisory Board of a juristic person or a commercial partnership from intentionally disclosing “a false statement, balance sheet, profit and loss account, statement of income and expenditure or false explanations pertaining to such documents” or intentionally allowing such disclosure to take place. The penalty for this offence is a maximum term of imprisonment of 1 year or a category 5 fine (i.e. 100,000 guilders).54

With respect to auditors, the Dutch authorities provide that in addition to the penalties applicable for the relevant crimes (e.g. fraud, embezzlement), they are liable to penalties for a violation of the Disciplinary Rules on Performance and Behaviour issued by the applicable accounting organisations. These penalties are ordered by disciplinary courts that are composed of independent lawyers and members of the profession. Penalties range from a written reprimand to expulsion from the Registry of Accountants. The decisions of these courts are publicly available.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

53 Since pursuant to article 23.7 a legal person may be subject to a fine “of not more than the amount of the next highest category where the category defined for the offence does not allow appropriate punishment”, the fine in this case could be as high as 1 million guilders.

54 Ibid.
(i) Treaty Requirements

The Dutch authorities state that where Dutch law requires the existence of a treaty as a condition for providing mutual legal assistance, Article 9 of the Convention shall form the basis to approve such a request. Pursuant to the Code of Criminal Procedure, the cases for which a request for MLA must be based on a treaty include the following:

1. Requests for information in the possession of the tax department. (article 552m.3)
2. Where a request for MLA concerns an investigation into an offence of a political nature or an offence connected therewith. (article 552m.1)

It also appears that a treaty requirement may exist where financial information is requested (e.g. from the “Disclosure Office”). This is implicit in the comment of the FATF, in the Summary of its Second Round Mutual Evaluation of the Netherlands, that the ability of the Netherlands to provide assistance “would be further strengthened if the requirement of a treaty were removed”. Moreover, the Bureau for International Narcotics and Law (U.S. Department of State) states in the International Narcotics Control Strategy Report, 1998, that the Dutch Ministry of Foreign Affairs has taken the position that the “Disclosure Office” cannot legally exchange information with its FIU counterparts without first negotiating treaties with the various foreign governments. However, the Dutch authorities explain that the Disclosure Office has the “discretion” to exchange information with its financial intelligence counterparts in other countries without a treaty. The Dutch authorities add that information can only be obtained from the Disclosure Office where it has also been reported to the police and judicial authorities in the Netherlands in connection with a suspicious transaction.

The Dutch authorities provide that the Netherlands is a party to several multilateral mutual assistance treaties, including the European Treaty regarding Mutual Legal Aid in Criminal Cases entered into in Strasbourg on the 20th of April 1959, and bilateral treaties (e.g. with the US). Where a treaty is applicable, it generally governs the process for obtaining MLA, and with respect to the substantive issues, articles 552h to 552s of the Code of Criminal Procedure apply.

Pursuant to article 552K.1 of the Code of Criminal Procedure, “every effort shall be made to comply with a request based on a treaty”. Where a request is not based on a treaty or the applicable treaty does not make compliance compulsory, pursuant to article 552K.2, the request shall be met where it is “reasonable” and “unless such compliance would be unlawful or contrary to instructions from the Minister of Justice”. The Dutch authorities confirm that an application for MLA pursuant to the Convention would be treated as an application pursuant to a treaty to which article 552K.1 would apply.

(ii) Requirements under the Code of Criminal Procedure

The circumstances under which a request for MLA “shall not be complied with” include the following: 1. The purpose of the investigation is to punish, etc. a suspect due to his/her nationality, race or religion, etc.

57 The Netherlands is a party to bilateral treaties concerning the provision of mutual legal assistance with countries including the following: U.S., U.K and Northern Ireland, Australia and Canada.
[article 552L.1(a)] 58; 2. Compliance would involve assisting in proceedings that would violate the protection against double jeopardy [article 552L.1(b)]; and 3. The suspect is being prosecuted in the Netherlands in respect of the same offence(s). [article 552L.1(c)]

Additionally, pursuant to article 552m, the cases for which a request may only be granted with the authorisation of the Minister of Justice include the following:

1. Offences of a “political nature” or offences “connected therewith” 59. The Dutch authorities confirm that such an offence refers to a crime against national security or against heads and representatives of friendly states and felonies that interfere with the exercise of constitutional government. They confirm that this qualification has no relevance to the offence of bribing a foreign public official.

2. Requests for information from the tax department. 60

It appears that in all other cases, it is the public prosecutor who receives the request and decides on the action to be taken in response to a request. 61

(iii) Types of MLA Available

Pursuant to article 552h.2 of the Penal Code, the following “shall be deemed to be requests for legal assistance”:

• Requests to carry out or assist in investigations.
• Request to supply documents, files or evidence, or provide information.
• Requests to serve documents on or issue documents to third parties.

Furthermore, article 552i.2 of the Penal Code indicates that coercive measures are also available. Technically speaking, seizure of documents is only available where an offence is extraditable (see discussion under 3.3 “Penalties and Mutual Legal Assistance”), and pursuant to section 51(a)(1) of the Penal Code, extradition is not available with respect to article 178 on the bribery of judges. The Dutch authorities state that, however, this does not present an obstacle to providing the seizure of documents in relation to an offence under article 178, because such an offence is also covered under articles 177 and 177a. Additionally, where a specific treaty is in force between the Netherlands and the requesting country, this coercive measure may be requested by referring to article 178.

9.1.2 Non-Criminal Matters

The Dutch authorities provide that mutual legal assistance can be provided to Parties requesting assistance in relation to non-criminal proceedings against a legal person (e.g. article 49 of the Schengen Agreement and the future EU legal assistance treaty).

58. Where there are grounds to believe that a request fits within this description, it shall be submitted to the Minister of Justice (552L.2).

59. The Minister may only authorise the granting of such a request where it is based on a treaty and after consultation with the Minister for Foreign Affairs (552m.1). Article 552m.2 provides an exception to this requirement where a request is made in relation to terrorist activities.

60. The Minister may only authorise the granting of such a request where it is based on a treaty and after consultation with the Minister of Finance.

61. See articles 552I and 552j.
9.2 Dual Criminality

The Dutch authorities explain that where the seizure of documents is requested, dual criminality is required for the provision of MLA. They state that this requirement does not create an obstacle to the implementation of the Convention. Since this requirement of dual criminality is derived from the law on extradition, it is discussed below in relation to extradition (see 10.5 on “Dual Criminality”).

9.3 Bank Secrecy

The Dutch authorities state that Dutch law does not include any provisions that enable MLA to be denied on the ground of bank secrecy.

Information regarding a “suspicious” transaction can be requested by a Party from the police or the judicial authorities to which the Disclosure Office has already made a report thereof [see discussion above under heading (ii) of “Article 7. Money Laundering”]. Additionally, the Disclosure Office may independently exchange information with its financial unit counterparts in other countries provided that they have comparable responsibilities and that the information is not disclosed to the investigative authorities in the other country without the permission of the Dutch Disclosure Office. Permission shall only be given where the Dutch Disclosure Office has proceeded to transmit the information to the police or judicial authorities in the Netherlands. In all cases, only information about “suspicious” transactions is available.

The Dutch authorities provide that another avenue for obtaining MLA in the form of financial information is to obtain a warrant for the release of documents pursuant to article 552o.1(a) of the Code of Criminal Procedure.

10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”. In the notes on the Ratification Bill, it is stated that since Dutch law requires an extradition treaty in order to be able to extradite, it was necessary to amend section 51a of the Extradition Act (through Article II of the Implementation Bill) in order that the Convention is considered a “relevant treaty”. Section 51a(2) of the Extradition Act lists the treaties pursuant to which extradition can be provided under section 51a(1). This provision has been amended in order that extradition may be granted for “the offences that are criminalised pursuant to articles 177 and 177a of the Criminal Code, in as far as they are covered by the definition contained in Article 1.1 and 1.2 of the Convention”. Thus extradition is not available with respect to article 178 on the bribery of judges; however the Dutch authorities are of the opinion that articles 177 and 177a provide sufficient latitude to meet the obligations under the Convention in this respect. Additionally, where a specific extradition treaty is in force between the Netherlands and the requesting country extradition is available for an offence under article 178.

Section 51a(3) of the Extradition Act states further that where extradition is available under section 51a [i.e. it is available pursuant to a “relevant treaty” listed under section 51a(2)], and “no other extradition
treaty applies\textsuperscript{62}, it shall be effected subject to the provisions of the European Convention on Extradition of 13 December 1957.

Pursuant to section 5 of the Extradition Act, extradition may be granted only for the following purposes:

- **Criminal investigations** instituted by the authorities in the requesting state because of a suspicion regarding an offence for which a term of imprisonment of 1 year or more may be imposed under the law of the requesting state and the Netherlands (dual criminality).\textsuperscript{63} [section 5(1)(a)]
- **Enforcing a term of imprisonment of 4 months or more**\textsuperscript{64} regarding an offence referred to under section 5(1)(a).\textsuperscript{65} [section 5(1)(b)]

The grounds under which extradition shall not be granted pursuant to the Extradition Act include the following: 1. The punishment has been barred by a lapse of time under Dutch law [section 9(1)(e)]; 2. The Minister of Justice believes there are good grounds for believing that the person in question would be prosecuted, etc. on account of his/her religious or political convictions, etc. [section 10(1)]; and 3. The offence has a “political nature” or is “connected therewith” [section 11(1)] [See discussion regarding offences of a political nature above under heading (ii) of 9.1.1 “Criminal Matters”].

The Dutch authorities explain that requests for extradition involve two stages of decision-making: the court and the Minister of Justice. The court of primary process or the Supreme Court decides at first instance on whether to provide extradition. It is only empowered to refuse extradition when there are compelling reasons to do so. Where the court refuses extradition, the Minister of Justice is obligated to also refuse the request. However, where the court decides to grant the request, the Minister has the discretion to refuse the application. A decision of the Minister of Justice to refuse extradition cannot be appealed, whereas the civil courts can provide interim relief where he/she grants extradition.

**10.3/10.4 Extradition of Nationals**

Pursuant to section 4(2) of the Extradition Act, a Dutch national may be extradited where he/she is requested for a criminal investigation and the Minister of Justice is satisfied that there is an adequate guarantee that if a non-suspended custodial sentence is ordered, he/she will be allowed to serve the sentence in the Netherlands. The other conditions for extradition discussed above (see 10.1/10.2) also apply to the determination of whether to extradite a Dutch national.

The Dutch authorities confirm that where extradition is refused on the ground of nationality, the case shall be submitted to the competent authorities for the purpose of prosecution in accordance with Article 10.3 of the Convention.

\textsuperscript{62} The Netherlands is a party to bilateral extradition treaties with Argentina, Australia, Canada, Mexico and the U.S. In addition, it has arrangements with 23 other OECD countries pursuant to the European Extradition Treaty.

\textsuperscript{63} Pursuant to section 6 of the Extradition Act, the minimum period of 1 year does not apply in respect of extradition to Belgium or Luxembourg.

\textsuperscript{64} Pursuant to section 6 of the Extradition Act, the minimum period of 4 months does not apply in respect of extradition to Belgium or Luxembourg.

\textsuperscript{65} Pursuant to section 5(3) of the Extradition Act, where the custodial sentence was given in absentia, extradition shall only be permitted if the person in question has had or will still be given an adequate opportunity to defend himself/herself.
10.5 Dual Criminality

Dual criminality is required under section 5(1)(a) and (b) of the Extradition Act (see discussion above under 10.1/10.2). The Dutch authorities confirm that in accordance with Article 10.4 of the Convention, it shall be deemed to meet if the offence for which extradition is sought is within the scope of Article 1 of the Convention in so far as it is criminalised pursuant to article 177 or 177a of the Penal Code.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

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

The Secretary-General has been notified that the Minister of Justice is the person responsible for the matters listed in Article 11.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

TAX DEDUCTIBILITY

(i) Non-tax deductibility of bribes

Provisions in three pieces of legislation regulate the non-tax deductibility of bribes. With respect to entrepreneurs and employees, it is regulated by the Law on Income Tax of 1964, which was replaced by the Law of Income Tax 2001, as of 1 January 2001. The Dutch authorities indicate that the new text “remains similar” in this regard. In addition, similar provisions are contained in the Law on Wage Tax of 1964, with respect to employees, and the Law on Corporate Tax 1969, with respect to enterprises.

The Dutch authorities provide the following excerpts from the text regarding entrepreneurs in the Law on Income Tax to illustrate how all these provisions operate (the provisions in the other relevant legislation are practically identical):

1. In determining the operating profits, expenses related to the following items are not deductible:
   d. crimes for which the taxpayer irrevocably has been convicted by a Dutch criminal court, including crimes taken into consideration when determining punishment and crimes that Prosecution renounces to prosecute;
   e. crimes with respect to which the taxpayer has met the conditions to prevent criminal prosecution in the Netherlands;

4. As far as the expenses relating to a crime have been deducted in one or more of the five years previous to the year in which the conviction mentioned in paragraph 1, sub d, has turned irrevocable or the conditions referred to in paragraph 1, sub e, have been met, an amount the size of those expenses will be included in the operating profits of the latter year.

66 See article 8a, para. 1, sub c and d, juncto article 8a, para. 5 regarding entrepreneurs; and article 36, para. 1, sub m and n, jucto para. 13 regarding employees.
67 See article 15b, para. 1, sub o and p regarding employees.
68 See article 8, para. 1 regarding enterprises.
69 See article 3.14, para. 1, sub d and sub e, para. 4 and para. 5.
5. As to the application of paragraph 1, sub d en sub e, he who on behalf of the taxpayer has commissioned the crime or actually been in charge of the crime will be put on a par with the taxpayer.

Thus, expenses related to a bribe under article 177, 177a or 178 of the Penal Code would only be non-deductible where there has been a conviction or a settlement by payment of a fine, etc. with the prosecutor to avoid criminal prosecution. Moreover, such a deduction is only prohibited retroactively for up to 5 years following the submission of the expense.

The Dutch authorities explain that the non-deductibility of bribes has been restricted to bribes in relation to which there has been a conviction or an out-of-court settlement because the present system is based upon the notion that it is within the exclusive authority of the criminal courts to determine whether a criminal offence has been committed. They add that the prosecutorial authorities are generally better equipped to obtain evidence of bribery, especially when the bribery has taken place abroad, and that it is easier to obtain mutual legal assistance in criminal matters than in respect of information concerning taxes.

The Dutch authorities explain that the 5-year period for disallowing deductions is customary for an additional assessment under tax law, and that the taxpayer is only obliged to keep tax related data for 7 years. They add that the criminal law provides the possibility of confiscation. In any case, in light of the significantly longer statute of limitations for offences under article 177, 177a and 178 (i.e. 12 years for an offence under article 177 or 178, and 6 years for an offence under article 177a) it appears feasible that certain bribes in relation to which a conviction, etc. is obtained, will in fact be permanently deductible.

(ii) Recent Initiatives

Questions regarding the current tax regime in relation to bribe payments have been raised by Members of Parliament. In response, the State Secretary of Finance informed Parliament in November 2000 of his decision to amend the fiscal law. The Tax Legislation Directorate is currently preparing amendments that will enable the tax authorities to disallow an expense where there is a suspicion that it represents a bribe payment to a foreign public official. This means that a conviction by a criminal court will no longer be a prerequisite for disallowing such a deduction. Instead, a deduction will not be permitted where the tax authority is reasonably convinced that the payment represents a bribe payment. It does, however, appear that the 5-year limitation period for disallowing the tax deductibility of bribes will continue to operate.

(iii) Exchange of Information

The Dutch authorities state that pursuant to article 6.3.3 of an instruction for tax administration, all tax inspectors are obligated to report suspected criminal acts, including the bribery of a civil servant, to the head of the Fiscal Information and Investigation Services, which is obliged to report in turn to the prosecutorial authorities.

Additionally, the Dutch authorities explain that the Netherlands tax administration is “able and willing” to exchange information about bribe payments on the basis of multilateral and bilateral treaties.70

70 The Dutch authorities indicate that the Netherlands has agreements with France and Belgium providing for the intensification of exchange of information, both spontaneous and on request, on fees, commissions, brokers’ fees and other forms of remuneration paid to natural and legal persons.
Evaluation of the Netherlands

General Remarks

The Working Group commends the Dutch authorities for the thoroughness of their written responses at the preliminary stages of the examination and for having provided excellent translations of all the relevant legislation. The Group appreciates the high level of co-operation of the Dutch authorities throughout the examination process.

The Working Group considers that on the basis of the available documentation and explanations given by the Dutch authorities that the Dutch implementing legislation conforms to the standards under the Convention. The Netherlands implemented the Convention by extending the offences under the Penal Code of bribing a domestic public servant and bribing a domestic judge to the bribery of “persons in the public service of a foreign state or an international institution” and “a judge of a foreign state or an international institution” respectively. The implementing legislation also creates a new offence of bribing persons in the public service, etc. where the intent is not to induce a breach of duty, and increases the penalties for bribery where a breach of duty is involved. The Netherlands explains that it has ratified the Convention relatively late due to the desire to produce an omnibus Bill that implements several anti-corruption related international instruments, rather than to take a piecemeal approach to implementing its international obligations in this regard.

The Convention has been signed for the Kingdom of the Netherlands, which includes the part of the Kingdom in Europe, Aruba and the Netherlands Antilles. The instrument of ratification has only been deposited for the part of the Kingdom in Europe, but it remains open to the Kingdom to ratify for Aruba and the Netherlands Antilles when they have passed implementing legislation. These parts of the Kingdom have expressed the intention to implement the Convention. The Working Group encourages the early ratification and implementation of the Convention by the Netherlands Antilles and Aruba.

I. Specific Issues

1. Small Facilitation Payments

The Dutch authorities indicate that prosecutorial discretion could be exercised in order that in certain circumstances it would be possible to not prosecute a case involving a small facilitation payment. It is the intention of the Department of Public Prosecutors to publish guidelines in the near future for corruption cases, including the issue of small facilitation payments. These will be drafted according to the standards in the Convention, and although it is not known with certainty how the guidelines will define small facilitation payments, it is expected that they will be described as small payments to low level public officials for the purpose of inducing them to do something that is not in contravention of their public duties, or words to that effect.

The Working Group recommends that it would be advisable to monitor in Phase 2 the application of prosecutorial discretion in this regard, including the application of the future guidelines.

2. Definition of Foreign Public Official

The Dutch Penal Code does not provide a detailed definition of the term used in the foreign bribery offences to refer to a foreign public official (i.e. a “person in the public service of a foreign state or an international institution”). The Dutch authorities explain that the courts would make an independent judgement about whether a particular person meets this description by considering (1) the concept of a
Dutch public official as defined in the Penal Code and the jurisprudence, which they state is very broad, and (2) the definition in the Convention. The definition of a public official under the law of the foreign public official’s country might also be taken into account in certain circumstances. However, they emphasise that the definition in the Convention would be the most important interpretative tool, and highlight that the notes drafted for the purpose of the Parliamentary reading of the implementing Bill state that the purpose of extending the relevant offences to the bribery of the aforementioned persons is to enable execution of the Convention.

On the basis of the explanations provided by the Dutch authorities, this approach appears to be in line with the Convention. This issue could be revisited in Phase 2.

3. Third Parties

The relevant offences under the Penal Code (articles 177, 177a and 178) do not refer to bribes for a third party. The Dutch authorities state that the case is covered where the advantage is for a third party beneficiary, including the case where an agreement is reached between the briber and the foreign public official to transmit the advantage directly to a third party, because in such a case the official is considered to have received something of value for the purpose of influencing him/her. In addition, they point out that the notes drafted for the purpose of the Parliamentary reading of the Bill support this interpretation.

The Working Group recommends that this issue is followed-up in Phase 2.

4. Level of Monetary Sanctions for Legal Persons

The Working Group discussed whether the level of fines for legal persons is sufficiently effective, proportionate and dissuasive. Pursuant to the Penal Code, the maximum fine for legal persons is 1 million guilders (Euro 450,000) for the aggravated (breach of duty) offence, which is also the maximum fine available for any offence. The maximum fine for the lesser (no breach of duty) offence is 100,000 guilders (Euro 45,000).

The Dutch authorities state that the level of fines should be considered together with other measures that could be applied upon conviction. They state that in practice forfeiture and the related measure concerning the payment of an amount equivalent to the unlawfully obtained gains are normally applied. They also highlight the availability of the sanction of imprisonment for the person in de facto control of the legal person who, for instance, issued the assignment or failed to prohibit the bribery act.

The Working Group recommends that the level of fines be monitored in Phase 2, including the scope of application of the two categories of fines.

5. Nationality Jurisdiction

According to the Dutch authorities the requirement of dual criminality for the establishment of nationality jurisdiction could possibly not be met where a Dutch national bribes a foreign public official abroad in a country other than the country for which the official exercises a public function if only the bribery of a domestic public official is criminalised in that country (and the conduct is not covered by another crime). The Dutch authorities believe however that it would be extremely unlikely for a bribery transaction to occur in these circumstances.

The Working Group recommends that, in view of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue should be reviewed on a horizontal basis in Phase 2.
II. Tax Deductibility

The relevant tax laws do not expressly deny the tax deductibility of bribes to foreign public officials. Instead they deny the tax deductibility of expenses related to “crimes” where there has been a conviction by a Dutch court or a settlement by payment of a fine, etc. with the Dutch prosecutor to avoid criminal prosecution. Further, even where there has been a conviction, a deduction is prohibited retroactively under these statutes for only up to 5 years following the submission of an expense. Thus, in light of the significantly longer statute of limitations for offences under article 177, 177a and 178 (i.e. 12 years for an offence under article 177 or 178, and 6 years for an offence under article 177a) it appears feasible that certain bribes in relation to which a conviction, etc. is obtained, will in fact be permanently deductible. However, pursuant to a tax directive there is an obligation on tax inspectors to report suspected crimes, including the bribery of a civil servant, to the head of the Fiscal Information and Investigation Services, who is obliged to report in turn to the prosecutorial authorities.

On 9 February 2001, the Council of Ministers approved the intention of the State Secretary of Finance to prepare a Bill amending the fiscal treatment of bribes. Pursuant to this Bill, tax officials would be able to refuse the deduction of certain expenses where they are reasonably convinced based on adequate indicators that the expenses consist of paid bribes (in the Netherlands or abroad), thus removing the requirement of a conviction. The Government intends to “make haste” with this process, and the Dutch authorities believe that it is possible that the Bill could be passed by the end of the year.

The Working Group considers that the current situation is not in conformity with the spirit of the 1996 Recommendation on tax deductibility and is not in line with the present situation of the other Parties to the Recommendation. It welcomes the legislative initiative, and urges the Netherlands to make the necessary amendment as soon as possible.
POLAND

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Poland signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD Secretary-General on September 8, 2000. On September 9, 2000, it enacted implementing legislation in the form of the Act of 9 September 2000 on the amendment to the Act –Penal Code, the Act – Code of Criminal Procedure, the Act on Combating Unfair Competition, the Act on Public Orders and the Act –Banking Law, which came into force on February 4, 2001.

Convention as a Whole

To meet the requirements of the Convention, Poland amended several pieces of legislation (listed above in the title of the implementing Act). Poland concluded that a simple extension of the domestic bribery offence would satisfy the requirements of the Convention, and established criminal liability for the active bribery of a foreign public official through an amendment to the Penal Code by adding a new paragraph to article 229. According to Poland, this approach allows the use of the same terminology and interpretations of the domestic bribery offence that have already been developed. Poland also amended provisions of the General Part of the Penal Code on forfeiture in order to satisfy the requirements of the Convention concerning confiscation of the proceeds gained through bribery.

Additionally, to implement the requirement of the Convention to establish the responsibility of legal persons for the offence of bribery, Poland introduced amendments to the Act on Combating Unfair Competition, which establishes administrative responsibility for legal persons by deeming bribery to be an act of unfair competition.

Pursuant to article 87.1 of the Polish Constitution, “ratified international agreements” are one of the legal sources universally binding in Poland. Article 91 states that, a ratified international agreement, after its promulgation in the Journal of Laws, constitutes a part of the domestic legal order, and is directly applicable unless its application depends on the enactment of a statute. Moreover, an international agreement ratified upon a “prior consent granted by statute” has precedence over provisions of a domestic law if they do not reconcile with the agreement. Therefore, it would appear that the Convention has precedence over domestic law in Poland. However, since the Polish Constitution requires statutes in domestic law in order to limit constitutional rights, the provisions on constituent elements of the offence (i.e. Article 1 of the Convention) are not directly applicable.

Under the Polish legal system, judicial decisions are not legally binding on the courts except under certain circumstances¹. However, according to the Polish authorities, in practice, the courts treat Supreme Court decisions as binding.

¹ For instance: 1) it is binding where a valid decision establishes new rights or relationships (art. 8.2 of the Code of Criminal Procedure); 2) where the Appellate Court refers a question of substantial interpretation of law to the Supreme Court, its resolution shall be binding on the Appellate Court (art. 441); and 3) the legal opinion, etc. of the Appellate Court shall be binding on the court to which the case has been remanded for re-examination (art.442).
1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

Poland translates article 229.5 of the Penal Code, which was added by amendment to establish the offence of bribing a foreign public official, as follows:

To the penalties provided for in sections 1-4 respectively shall be subject also the person, who provides or promises to provide a material or personal benefit to a person performing public function in foreign state or in international organisation, in relation to the performance of that function.

Thus, it is necessary to refer to the relevant penalties for domestic bribery contained in articles 229.1-4 in order to determine the penalties for the bribery of a foreign public official. Sections (1) to (4) of article 229, state as follows:

1) Whoever provides a material or personal benefit or promises to provide it to a person performing public functions, in connection with the performance of this function shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

2) In the event that the act is of less significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

3) If the perpetrator of an act prescribed in section 1 acts in order to induce a person performing public functions to breach the law or provides such a benefit to that person for a breach of the law shall be subject to the penalty of deprivation of liberty for a term of between 1 year and 10 years.

4) Whoever provides or promises to provide to the person performing public function, in relation to the performance of that function, a material benefit of a considerable value, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.

Pursuant to article 229, the severity of the penalties for both domestic and foreign bribery cases depends on the nature of the act of the public official that the briber intends to induce in exchange for the bribe, as well as the value of the bribe.

General Defences & Mitigation of Penalty

Articles 28 to 30 provide the general defences pursuant to which a person is exempted from liability for a prohibited act committed in the following circumstances:

1. Being in error as to a circumstance constituting a feature of a prohibited act (article 28.1).
2. With a justified but mistaken conviction that a circumstance has occurred which excludes unlawfulness or guilt (“circumstances excluding guilt” and “circumstances excluding unlawfulness”) (article 29).
3. Being justifiably unaware of the act’s unlawfulness (article 30).

In addition, an offender benefits from an extraordinary mitigation of penalty (articles 29/30) or a less severe penalty (article 28.2) when he/ she commits an offence in the following circumstance:

1. With the justified but mistaken conviction that a circumstance has occurred that constitutes a feature of a prohibited act carrying a less severe penalty (article 28.2).
2. With an unjustified mistaken conviction that a circumstance has occurred that excludes unlawfulness or guilt (article 29).
3. Being unaware of the act’s unlawfulness by mistake not justifiable (article 30).
These defences pertain to the notion of mistake of fact and mistake of law. The Polish authorities do not believe that article 28 would contravene Commentary 4 or 7 of the Convention. In addition, the Polish authorities confirm that article 30 would not contradict Commentary 8 of the Convention since for the advantage to be lawful, it would have to be permitted or required by the written law of the foreign public official’s country, including case law. Furthermore, Poland confirms that ignorance of Polish law including article 229 of the Penal Code would not be covered by these defences or subject to mitigation of penalties.

Where an extraordinary mitigation of penalty applies, the reduction in penalty is made pursuant to the relevant subsection of article 60.6 or article 60.7 of the Penal Code. In the case of the principal offence (article 229.1), the penalty is reduced to a fine or a restriction of liberty, and in the case of the aggravated offences (articles 229.3 and 229.4), it is reduced to a fine, a restriction of liberty, or a deprivation of liberty. In the case of the mitigated offence (article 229.2), the imposition of penalty is renounced or a penal measure is imposed.

1.1. The Elements of the Offence

1.1.1 any person

Article 229.5 applies to “whoever” gives or promises to give a bribe to a foreign public official. Pursuant to article 10 of the Penal Code, only persons who have attained the age of 17 years at the time of the commission of the offence are liable under the Penal Code.

1.1.2 intentionally

The Polish authorities explain that pursuant to article 9.1 in the General Part of the Penal Code, a “prohibited act is committed with intent”, which means that the perpetrator is aware that he/she is providing, promising or offering a material or personal benefit to a person performing a public function and “wants to perform the act”, or with dolus eventualis. However, Poland states that, in practice, dolus eventualis seems to apply only to the aggravated offences.

1.1.3 to offer, promise, or give

Article 229 of the Penal Code only refers to a person who “provides” ("udzielac") or “promises to provide” a bribe and does not expressly cover a person who “offers” a bribe. However, the Polish authorities state that, despite the lack of judicial decisions or other legal authorities in this regard, the term “promises to provide” covers the acts of both promising and offering.

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2 See article 60.6.3 of the Penal Code.
3 See article 60.6.2 of the Penal Code.
4 Penal measures under article 39 sections 2-8 are applicable. These include: 1) an interdiction preventing the occupation of specific posts, the exercise of specific professions or the performance of specific economic activities, 2) an interdiction on driving vehicles, 3) the forfeiture of items, 4) an obligation to redress the damage, 5) a supplementary payment to an injured party or for a public purpose, and 6) pecuniary consideration.
5 See article 60.7 of the Penal Code.
1.1.4 any undue pecuniary or other advantage

Article 229.5 of the Penal Code applies to the providing etc. of “a material or personal benefit” to a foreign public official. There is no definition of this term in the Penal Code. However, according to case law, “material” benefit has a monetary value and covers an increase in assets or reduction of debts. The Polish authorities confirm that all pecuniary advantages, tangible and intangible, real and personal, are covered by this term. They state that in contrast, a “personal” benefit is a benefit that has no monetary value, and improvement of professional status, promotion, limitation of professional duties, facilitating to meet important persons, support to get a post or receive state honours, and teaching a profession could be considered personal benefits. Poland states that where there is a doubt about the nature of the advantage, the decisive factor would be whether it mainly satisfies material or non-material needs. It is notable that article 229.4, which establishes the offence of aggravated bribery, only applies where the bribe involves a “material” benefit.

The Polish authorities confirm that the offence of bribery of a foreign public official applies regardless if the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business (Commentary 4). Also, the Polish authorities confirm that considerations such as the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage (Commentary 7) will not be taken into account in determining the liability. However, according to the Polish authorities, these factors could be taken into account when the court determines the severity of the sanction.

1.1.5 whether directly or through intermediaries

Article 229 does not expressly apply to bribes made through intermediaries. However, Poland states that the general provisions of the Penal Code on complicity apply to punish the briber who bribes through an intermediary. Pursuant to article 18.1 of the Penal Code, the person who has directed the commission of a prohibited act by another person, or who has taken advantage of the subordination of another person to him/her to order that person to commit a prohibited act, is responsible for the act as a perpetrator. Poland states that this would cover the case where an intermediary acts with knowledge and commits the offence himself/herself, as well as where, for example, an intermediary is used for delivering/exchanging information between the briber and the official, or for delivering the advantage.

As article 18.1 only seems to cover cases where a person “directs” or “orders” another person to commit a prohibited act, it would not cover cases where intermediaries are not aware of the intent of the briber to commit an offence. However, the Polish authorities confirm that where the intermediary has no knowledge about the bribe, he/she is only a “tool” and the act is entirely committed by the person using such an intermediary. Thus, Polish law covers bribes made through an intermediary where he/she is not aware of the briber’s intent.

Article 18.1 requires the briber to “direct” another person or “take advantage of the subordination of another person” and “order” such person. This seems to require that the briber exercise control over the intermediary. However, the Polish authorities state that the term “direct” requires that the briber exercise “the factual control” over the intermediary, which means that the briber initiates the action of the intermediary and is able to halt his/her action.

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6 Resolution of the Supreme Court, entire Penal chamber, of 30 January 1980, case VII KZP 41/78: “Material benefit is every increase of property of the person himself/herself or of the third party, or avoidance of a loss, with the only exception for the benefits to which the perpetrator or other person had been entitled in accordance with legal relation existing at the moment of commission of the offence.”
1.1.6 to a foreign public official

Article 229.5 of the Penal Code applies to bribes given to a “person performing a public function in a foreign state or in an international organisation”. The Penal Code does not provide a definition of the term “person performing a public function”, which is identical for both the domestic and foreign bribery offences. However, article 115.13 of the Penal Code, which applies to a number of offences other than the bribery offences, defines the term “public official” as follows:

A public official is:
1) the President of the Republic of Poland;
2) a deputy to the Sejm, a senator, a councillor;
3) a judge, a lay-judge, a state prosecutor, a notary public, a court executive officer [komornik], a professional court probation officer, a person adjudicating in cases of contraventions or in disciplinary authorities operating in pursuance of a law;
4) a person who is an employee in a state administration, other state authority or local government, except when he performs only service-type work, and also other persons to the extent in which they are authorised to render administrative decisions;
5) a person who is an employee of a state auditing and inspection authority or of a local government auditing and inspection authority, except when he performs only service-type work;
6) a person who occupies a managerial post in another state institution;
7) an official of an authority responsible for the protection of public security or an official of the State Prison Service;
8) a person performing active military service.

According to Poland, although Polish law does not provide a definition of a “person performing a public function”, the courts have stated that a “person defined as a ‘public official’ is always performing a public function”. In addition, the Supreme Court states that the offence of passive bribery, which employs the same terminology, could be committed by a public official or by any other person, if this person is performing a public function. The Polish authorities consider that it is therefore clear that the term “person performing a public function” has a broader scope than the definition in article 115.13. Poland states that, with respect to the foreign bribery offence, the same rule would apply. Thus, the court would first examine whether the person in question occupies a post for a foreign state comparable to one of those enumerated in article 115.13, and if so, the person would be considered as a “person performing a public function in a foreign state”. If the person does not fall within this scope, then the court would determine whether he/she performs a “public function”. There is no general definition in the statute or case law for “public function”. However, the Polish authorities explain that a legal doctrine, which consists of an analysis of case law, states that a “person performing a public function” is someone whose activities in a public sphere are regulated by law. They confirm that in determining whether a person is performing a “public function”, the court does not have to refer to the law of the public official’s country.

In addition, although there are certain categories of persons who are excluded from the definition of “public official” under article 115.13 (e.g. an employee of a state administration performing only “service-type work”) or who are not expressly covered thereunder (e.g. a person who exercises a public function for a public agency or a public enterprise), the Polish authorities emphasise that such persons might be covered as a “person performing a public function”. For instance, they state that employees, etc. of a public

7 Resolution of the Supreme Court of 3 June 1970, case VI KZP 27/70
enterprise or a public agency are covered by case law. However, both the statute and case law do not define the term “service type work”. The Polish authorities confirm that a person who issues or influences decisions of the entity cannot be considered as such. However, the Polish authorities are not certain whether secretarial work would fall within the scope of “service-type work”, and in the event it does, whether it would be included in a “public function”. Poland nevertheless believes that the court would interpret the term “public function” broadly enough to cover all the categories of foreign public officials enumerated in the Convention; however, it is up to the judiciary to decide in each case what is covered by a “public function”.

Article 229.5 describes a foreign public official as a person performing a public function “in” a foreign state or “in” an international organisation. Poland confirms that this does not indicate the place of the performance of such function. However, the term “foreign state” and “international organisation” are not defined in the Penal Code.

Poland confirms that a “foreign state” includes all levels and subdivisions of government, from national to local, and any organised foreign area or entity, such as an autonomous territory or a separate customs territory. Also, Poland confirms that an “international organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence.

1.1.7 for that official or for a third party

Article 229.5 of the Penal Code does not expressly refer to third party beneficiaries. Poland states that it is covered pursuant to article 115.4, which defines the term “material benefit” as one for: 1) the person himself; 2) another natural or legal person; 3) an organisational unit not having the status of a legal person; or 4) a group of persons pursuing an organised criminal activity. Article 229.5 applies in respect of the promising, etc. of a “material benefit” to a person performing a public function and this formulation appears to require that the advantage be given, etc. directly (i.e. physically) to the foreign public official, regardless of who it shall benefit. However, the Polish authorities confirm that, despite the lack of judicial decisions, the case where a material benefit goes directly to the third party would be covered. Poland explains that the Polish term “udzielac”, which is translated as “provide”, has a broad meaning covering any form of transfer from one party to another, not limited to a physical transfer of items, and thus, it is not required that the benefit be transferred physically to the foreign public official. However, since article 115.4 only refers to a “material benefit”, the case where a “personal benefit” goes to a third party is not covered.

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

Article 229 of the Penal Code applies to the giving etc. of a bribe, to a person performing public functions in the following three separate cases:

1. Where the bribe is given etc. to him/ her (no act is specified in return for the bribe) [229.1].
2. Where the bribe is given etc. to him/ her in order to induce him/ her to breach the law [229.3].

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8. According to case law (decisions of the Supreme Court or the Appellate Court), a person who directs a state-owned tabacco company, employees of the state-controlled banks, the director of a state hospital, the chairman of the governing board of the private banks which perform activities under articles 46 and 53 of the Banking Law, etc. are included within the scope of a “person performing a public function”. In addition, the Supreme Court decision (judgement of 10.10.1991, case IKZP 21.91) states that a “head of a village” is included therein.
3. Where the bribe is given to him/her for having breached the law [229.3]. Poland confirms that bribes for the purpose of obtaining an omission are also covered. While the first two cases apply to the future acts of the officials, the third case applies to the past acts of officials, and thus is beyond the scope of the Convention.

In the first case, article 229.1 does not expressly require that there be an intention to obtain an act or omission of the official in return for the promise, etc. Poland states it is not required that the bribe be given with the aim that the official acts or refrains from acting in relation to the performance of his/her official duties; however, the advantage shall be given or promised in connection with the performance of his/her public function. Poland confirms that article 229.1 is not limited to the situation where a person bribes a public official in exchange for a specific act or omission, but also covers the case where a person bribes a public official for the purpose of obtaining a “general positive attitude of the official”, which would appear to include creating a more favourable climate for the company, obtaining a generic guarantee of privileges or favours or obtaining political protection.

Poland states that, according to the judicial decisions, the benefit should be provided, etc. to an official for the purpose of obtaining an act/omission in any way connected with his/her public function. They state that this does not require that the official be the only person competent to decide a particular matter, and it is sufficient if it is within his/her duties to give an opinion on the matter. Moreover, Poland confirms that in accordance with Article 1.4c of the Convention, “in relation to the performance of that function” includes any use of the public office’s position, whether or not within the official’s authorised competence. According to Poland, the case where a person bribes a public official in order to obtain confidential information which the official is not authorised to release, but he/she has access to because of the nature of his/her official duties, would be covered thereunder.

In the second case, article 229.3 requires that there be an intention to induce the public official to breach the “law”. Poland states that the intent to induce him/her to breach any provision of the law, including all criminal, administrative and civil laws, is covered.

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

Article 229 of the Penal Code is not expressly limited in application to bribes given etc. “in order to obtain or retain business or other improper advantage in the conduct of international business”. In addition, Poland confirms that the sphere of activity in connection with which bribe is given etc. does not limit the ambit of the offence.

The Polish authorities confirm that there is no exception for small facilitation payments. (See, however, discussion under 3.1/3.2 concerning mitigating circumstances in determining the sanction.)

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

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9 Although the decision doesn’t refer to this issue, the Supreme Court judgement of 7 November 1994, case WR 1869/94 recognised the following case as bribery: where a drunk driver promises or gives money to a policeman to induce him to refrain from seizing his driver’s licence and bringing the case to court.
Complicity in the bribery of a foreign public official is established as a criminal offence under the general provisions of the Penal Code. Article 18.1 states that the following persons are liable as perpetrators: 1) one who commits an offence together or under arrangement with another person; 2) one who directs the commission of an offence by another person; and 3) one who takes advantage of the subordination of another person to him/her to order that person to commit an offence. The Polish authorities explain that in the first case, an offence is committed where two or more persons commit an offence whereby each one of them commits one or more of the elements thereof jointly or separately. Complicity is punished within the same limits of the full offence.

Article 18.2 provides for the liability of a person who wills (induces) another person to commit a prohibited act, and thus, covers incitement. Article 18.3 establishes liability for aiding and abetting. It states that a person who facilitates by his/her behaviour the commission of an offence, particularly by providing the instrument or means of transport, giving counsel or information, or by failing to prevent the commission of an offence by omitting to perform his/her legal duty, is liable for aiding and abetting. Pursuant to article 19, instigating, aiding and abetting carry the same punishment as the full offence; however, the court may apply an “extraordinary mitigation of punishment”.

The concept of “authorisation” is not expressly covered by Polish criminal law. However, according to Poland, acts of authorisation could be treated in the context of directing the perpetration of the offence, or aiding and abetting, which applies to advising, providing information and facilitating another’s act by not preventing its performance in breach of a particular obligation under the law.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic officials.

**Attempt**

An attempt to commit every offence, including the offence of bribing a domestic or foreign public official, is punishable in Poland under article 13.1 of the Penal Code, which states that “whoever with the intent to commit a prohibited act, directly attempts its commission through his conduct which, subsequently however does not take place, shall be held liable for an attempt.” Poland states that in the context of active bribery, a person who makes an offer of a bribe to a public official, which is not accepted, is responsible not for the attempt, but for the perpetration of the offence itself. In addition, according to Poland, the question of whether an offence includes the case where a bribe is offered, etc. to a foreign public official but the official does not become aware thereof, has not been the subject of a Supreme Court decision. However, one source in the academic literature provides that such a case would constitute an attempt (Roman Goral, Criminal Code, Practical Commentary, Warsaw 1996).

Pursuant to article 14, an attempt is punishable by the same punishment provided for in respect of the full offence.

Pursuant to article 15.1 of the Penal Code, a person who voluntarily abandons the prohibited act or prevents the consequence thereof shall not be subject to the penalty for an attempt. And pursuant to article 15.2, he/ she is subject to an extraordinary mitigation of punishment when he/ she voluntarily attempts to prevent a consequence that constitutes a feature of the prohibited act.

**Conspiracy**

Conspiracy is not covered under the Penal Code.
2. **ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

2.1 **Criminal responsibility**

The Polish legal system does not establish criminal responsibility of legal persons. However, Poland states that it was decided that this issue would be analysed by the Institute of Justice (a scientific institute of the Ministry of Justice) in 2001 with a view to establishing such liability in the near future.

2.2 **Non-criminal responsibility**

**Standard of liability**

Legal persons can be liable for a non-criminal financial penalty under the Act of 16 April 1993 on Combating Unfair Competition (ACUC) for certain acts of unfair competition. Article 22a of the ACUC, which provides for the liability of an “entrepreneur who is not a natural person”, reads as follows:

*An entrepreneur who is not a natural person shall be liable for acts of unfair competition referred to in article 15a, subparagraphs 2-3, pursuant to the provisions of this chapter.*

Article 3 of the ACUC defines the acts of unfair competition. Article 3.1 defines an act of unfair competition generally as an “activity contrary to the law or good practices which threatens or infringes the interest of another party or customer”. In addition, article 3.2 lists specific acts of unfair competition, including “bribery of a person discharging a public function”, which was added by the implementing legislation.

Poland states that the list of unfair competition acts in article 3.2 addresses the most commonly committed acts, and while in the case of acts of unfair competition other than those listed, danger to the interest of the customer or another entrepreneur is required to be proved, in the case of the listed acts, it is presumed that such acts are endangering those interests. Moreover, the overall purpose of the ACUC, as stated in article 1 appears to be the protection of competition in the domestic market, as it governs “the prevention and combating of unfair competition in the economic activity, in particular in industrial and agricultural production, in construction works, trade and services in the interest of general public, entrepreneurs and customers, in particular consumers”. The Polish authorities confirm that the bribery of a foreign public official would be considered an act of unfair competition irrespective of whether or not the interest of a customer or another entrepreneur were threatened or infringed. Moreover, the Polish authorities confirm that despite the purpose of the ACUC, application of the administrative responsibility of legal persons would not be dependent on whether or not the act of the natural person affects domestic competition.

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10 Poland believes that using competition law is the most practical way to implement the obligation under the Convention in respect of legal persons for the following reasons: 1. Polish competition law contains a general definition of an unfair competition act, the scope of which active bribery falls within; 2. The Office for Protection of Competition and Consumers (OPCC), which is designated as the competent authority in the field of competition law as well as anti-monopoly law, has practical experience in conducting proceedings against companies in the field of anti-monopoly law.
Article 15a, which was added by the implementing legislation and gives rise to the responsibility of an “entrepreneur who is not a natural person” for bribery under article 229 of the penal Code, states as follows:

An act of unfair competition consisting of the bribery of a person performing a public function is a conduct specified in article 229 of the Penal Code on the part of a natural person:

1) who is an entrepreneur,
2) acting on behalf of an entrepreneur within the authority to represent him or take decisions on his behalf, or to exercise control over him,
3) acting on behalf of an entrepreneur, upon the consent of a person referred to in subparagraph 2.

Pursuant to article 18, where an act of unfair competition is committed by a natural person belonging to a category mentioned in article 15a.2-3, the entrepreneur whose interest is threatened or infringed may request a remedy, including the “relinquishment” of the prohibited practice and damages for the harm done. And pursuant to article 22d, which was also added by the implementing legislation, where an entrepreneur who is not a natural person is liable under article 22a for an act of unfair competition under article 15a.2-3, the President of the Office for Protection of Competition and Consumers (OPCC) shall order it to pay a fine “in the amount of up to 10% of the revenue in the meaning of the provisions on income tax on legal persons, obtained in the tax year preceding the date of rendering the decision”. The Polish authorities state that article 15a.2 covers persons who are directors, plenipotentiaries or members of a board. Employees or other persons could be covered by article 15a.3. In addition, Poland states that “acting on behalf of an entrepreneur” does not require any “formal connection” between the offender and the entrepreneur. For instance, it covers the situation where an employee who conducts a negotiation or is responsible for a particular contract is authorised by a director to provide, etc. a bribe to an official.

The Polish authorities confirm that effective supervision does not exempt the legal person from liability.

Poland states that the territorial jurisdiction in the proceedings against legal persons for bribery is determined by the criminal jurisdiction over the natural person who fulfils the conditions under article 15a.2-3 of the ACUC. Where there is criminal jurisdiction over such natural person, the proceedings against legal persons under the ACUC would apply.

**Entities subject to liability**

Pursuant to article 2 of the ACUC, for the purpose of the ACUC, “entrepreneurs” are defined as “natural and legal persons and entities without legal personality, which by performing even casually, paid or professional activity participate in economic activity”. The Polish authorities confirm that state-owned and state-controlled entities are covered.

**Proceedings against legal persons**

The responsibility of legal persons under the ACUC is connected to the criminal proceedings in relation to the relevant natural person. Poland states that such proceedings, which are conducted by the President of the OPCC, can be instituted only after the final judgement or other final decision in the criminal

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11 Poland states these categories have been taken from the Second Additional Protocol to the Convention on Protection of the Financial Interests in the European Communities.

12 The remedies under article 18.1 of the ACUC also include: 1) removing the effects of prohibited practices; and 2) handing over unjustified benefits, pursuant to general rules.
proceedings has been taken and the information has been transmitted to the OPCC. Pursuant to articles 22b and 22c of the ACUC, the President of the OPCC is obliged to institute proceedings against the entrepreneur who is not a natural person when “a certified copy of the final judgement together with a certified copy of the dossier of the proceedings” is sent from the court or the prosecutor. Poland confirms that there is no requirement of a motion/ request of injured parties in order to institute the proceedings. Poland also confirms that article 4, which states that “the rights resulting from the provisions of the ACUC shall apply to the foreign natural and legal persons by virtue of the international agreements binding the Republic of Poland or by reciprocity”, only applies to the civil liability of entrepreneurs under the ACUC, and does not affect the proceedings against legal persons for bribery.

The court or the prosecutors are obliged to send a certified copy of the final judgement together with a certified copy of the dossier of the proceedings to the President of the OPCC as follows:

1. In the case of a sentencing for an offence under Article 229 of the Penal Code committed by a person referred to in article 15a, subparagraphs 2-3.
2. If the proceedings in respect of an offence under article 229 of the Penal Code against a person referred to in article 15a, subparagraphs 2-3, may not be conducted due to circumstances which exclude prosecution specified in article 17.1, subparagraphs 5-6 and 8-10 of the Code of Criminal Procedure.

In the first case, “sentencing” only refers to the judgement of a finding of “guilty”. This means, where the criminal proceedings resulted in a final judgement, the proceedings against the legal person would only be initiated if the natural person were convicted under article 229 of the Penal Code.

According to Poland, when the final judgement etc. is sent to the OPCC, the judge and prosecutor are obliged to evaluate whether the natural person who was convicted, etc. of bribery, belongs to one of the categories in article 15a subparagraph 2 or 3. Poland states that the court makes such a decision after the judgement. However, according to Poland, an injured party who acts as a “party” in the criminal trial, can request the court to decide on notification and to conduct evidence proceedings to prove the circumstances under article 15a.2-3 of the ACUC during the course of the trial. Poland states that this decision on notification is issued to the OPCC, and pursuant thereto the OPCC is obliged to institute proceedings against the legal person. However, the President is free to evaluate the evidence and determine whether the necessary conditions establishing an “act of unfair competition” under article 15a.2-3 have been satisfied. Consequently, there cannot be any liability of the legal person under article 22d of the ACUC in the absence of an evaluation by the criminal court or the prosecutor that a person described under article 15a.2-3 was the subject of an offence under article 229 of the Penal Code.

The proceedings against the entrepreneur are conducted in accordance with the Code of Administrative Procedure unless the ACUC provides otherwise. The Code of Administrative Procedure provides for a full-hearing, including oral testimony and, it appears, cross-examination. The Polish authorities state that normally the procedure has been for the President of the OPCC to conduct a process involving written submissions. There were doubts whether this procedure could lead to the imposition of a penalty. However, the Polish authorities explain that (1) where the “parties” (e.g. the legal person) make a request, or the President of the OPCC considers it necessary, a full-hearing would take place; and (2) the evidence can be assessed adequately under the proceedings conducted by written submissions where the criminal

13 Circumstances which exclude prosecution are; (a) the accused is deceased (b) the prescribed statute of limitations has lapsed, (c) the perpetrator is not subject to the jurisdiction of the Polish criminal courts, (d) there is no complaint from an entitled prosecutor, or (e) there is no permission required for prosecuting the act, or no motion to prosecute from a person so entitled, unless otherwise provided by law.
proceedings against the natural person have resulted in a conviction, because findings of the criminal court are binding on the President of the OPCC (article 22c. 3 of the ACUC).

The President of the OPCC can gather evidence and rely on this in the proceedings against the legal person within the restriction mentioned above under article 22c.3 of the ACUC.

The decisions of the President of the OPCC are subject to appeal to the Antimonopoly Court, which is a division of the Regional Court in Warsaw.

Pursuant to article 22d.2 of the ACUC, financial penalty against the entrepreneurs cannot be imposed if a period of 10 years has elapsed since the commission of the act of unfair competition. There are no provisions for the extension of this period.

3. ARTICLE 3. SANCTIONS

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

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

Article 229 of the Penal Code provides for the same penalties in relation to domestic and foreign bribery. For the principal offence (i.e. bribery of a person performing public functions), the punishment is a deprivation of liberty from 6 months to 8 years. For the aggravated offence (i.e. bribery of a person performing public functions in order to induce him/ her to breach the law), the punishment rises to a deprivation of liberty from 1 to 10 years. Where the bribe is of “a material benefit of a considerable value” the punishment rises to a deprivation of liberty from 2 to 12 years. For the mitigated offence, where “the act is of less significance”, the punishment is a fine, a restriction of liberty, or a deprivation of liberty of up to 2 years. Pursuant to the general provisions of the Penal Code, a restriction of liberty ranges from 1 to 12 months and the term of the deprivation of liberty shall not be less than 1 month.

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14 In general, these penalties for bribery offences are comparable to those for offences such as fraud, theft, extortion, and embezzlement.
15 See article 229.1, 229.5 of the Penal Code.
16 See article 229.3, 229.5 of the Penal Code.
17 See article 229.4, 229.5 of the Penal Code.
18 See article 229.2, 229.5 of the Penal Code.
19 See article 34.1.
20 See article 37.1.
A fine shall be imposed in terms of daily rates, which define the number of daily rates to be levied and the amount of each rate. Pursuant to article 33, the number of daily rates ranges from 10 to 360, and the amount of daily rates ranges from 10 to 2,000 PLN. Consequently, the amount of a fine ranges from 100 to 720,000 PLN (approximately, 172,800 U.S. dollars / 187,200 Euros). In determining the daily rate of the fine, the court shall consider the income of the perpetrator, his/her personal situation, family situation, property ownership and earning capacity.

Although the term “considerable value” is not defined in the Penal Code, Poland states that the applicable definition is contained in articles 115.5 and 115.7, which define “property of considerable value” and “considerable damage” respectively, as property or damage with a value at the time of the commission of a prohibited act that exceeds two hundred times the level of the lowest monthly salary. The lowest monthly salary is defined in section 8 of the same article as the “lowest salary of workers” determined on the basis of the Labour Code. Poland states that this amount, which is determined by the Minister of Labour, is currently 700 PLN, and consequently, “a material benefit of considerable value” would be a benefit exceeding 140,000 PLN (approximately, 36,400 U.S. dollars / 33,600 Euros).

Moreover, Poland states that the term “of less significance” refers to very minor cases. Under the Polish Penal Code, a number of offence, such as theft, larceny, etc. use the term “of less significance” for the mitigated offences, and the Supreme Court has established guidelines for determining this, such as the behaviour of the perpetrator, character and size of the damage, time, place and other circumstances of the commission of the offence, degree of guilt, and motivation and purpose of the perpetrator. The Polish authorities state that in the case of bribery, the value of the benefit provided, etc. to a public official, the rank of the official, the kind of act that the briber intends to induce, and the effect or the danger caused would be considerations. They state further that the case where the bribe constitutes a “small facilitation payment” in the meaning of the Convention is likely to be considered as a case “of less significance”. Additionally, Poland states that the case where conditions for the aggravated offence are fulfilled, article 229.2 would not apply. In addition, Poland confirms that article 229.2 would not apply to repeated bribery offences “of less significance”. According to Poland, such a case would be punishable as a principal offence under article 229.1 or an aggravated offence under article 229.4.

In addition, pursuant to article 33.2 of the Penal Code, the court can impose a fine, which ranges from 100 to 720,000 PLN, in addition to the penalty of deprivation of liberty, if the perpetrator has committed the act in order to gain a material benefit or when he/she has gained such a benefit. Poland states that such an additional fine would normally be imposed in cases of bribery.

Article 53 provides guidelines on the imposition of penalties. It provides that the court shall impose a penalty according to its own discretion but within the limits prescribed by law. For instance, the court shall take into account, the motivation and the manner of conduct of the perpetrator, the characteristics and personal conditions of the perpetrator, his/her way of life prior to the commission of the offence and conduct thereafter, his/her efforts to redress the damage, the behaviour of the injured person, the positive results of any mediation between the injured person and the perpetrator or any settlement reached by them in the proceedings before the state prosecutor or the court, the degree of guilt, and the level of social consequences of the act committed.

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21 See article 33.1.
22 On January 22, 2001, 100 PLN (Polish Zlotys) was valued at 24 U.S. dollars (approximately, 26 Euros).
23 See article 33.3 of the Penal Code.
24 Judgement of 9 October 1996, case VKKN 79/ 96
General Provisions for Reduction of Penalty

Articles 60.3 and 60.4 provide for “an extraordinary mitigation of penalty” as follows:

**Article 60.3**

The court shall apply an extraordinary mitigation of the penalty or may even conditionally suspend the execution of the penalty, with respect to a perpetrator who, co-operating with others in the commission of an offence, reveals information pertaining to the persons involved therein or essential circumstances thereof, to the agency responsible for its prosecution.

**Article 60.4**

§ 4. Upon a motion from the state prosecutor, the court may apply an extraordinary mitigation of the penalty or even conditionally suspend the execution of the penalty with respect to a perpetrator, who, irrespective of any explanation provided in his case, revealed and presented to the agency responsible for prosecution, essential circumstances, not previously known to that agency, of an offence subject to a penalty exceeding 5 years deprivation of liberty.

Poland states that these provisions apply to bribery offences as well as other offences under the Penal Code. Poland states that article 60.3 would apply, for instance, in a case where a person who is an employee bribes a foreign public official, is caught by the prosecutorial authorities and reveals to them that the director, etc. authorised the offence, etc. The Polish authorities emphasise that article 60.3 is only triggered where two or more other persons were involved in addition to the perpetrator in question. Where a person who bribes a foreign public official informs the prosecutorial authority of important details of another offence, for which the maximum penalty is deprivation of liberty of more than 5 years, such as time, place and the perpetrator thereof, and if such information is previously unknown to the authority, article 60.4 would apply.

Poland states that Ministry of Justice has found some deficiencies in these provisions, and in order to amend this, a draft law has been submitted to the Parliament. This draft includes adding the requirement in article 60.3 that the information shall be the one previously unknown to the competent authority.

**Additional “Penal Measures”**

In addition to the penalties such as a deprivation of liberty or fine etc., article 39 of the Penal Code provides a set of “penal measures”, which may be imposed on a perpetrator in addition to the penalties applicable to a specific offence. These measures include: 1) a deprivation of public rights, 2) an interdiction preventing the occupation of specific posts, the exercise of specific professions or the performance of specific economic activities, 3) an interdiction on driving vehicles, 4) the forfeiture of items, 5) an obligation to redress the damage, 6) a supplementary payment to an injured party or for a public purpose, 7) pecuniary consideration, and 8) publication of the sentence. Poland states that for both passive and active bribery, suitable measures would be the prohibition from occupying certain posts, performing certain professions or conducting certain economic activities.

**3.3 Penalties and Mutual Legal Assistance**

Polish law does not generally make mutual legal assistance conditional upon the length of the term of imprisonment provided for in the criminal law of either Poland or the requesting state. However, pursuant to the European Convention on Mutual Legal Assistance in Criminal Matters, Poland has reserved the right to refuse a request for the provision of MLA in the form of search and seizure, unless the offence in question is extraditable, and under the relevant instruments a length of imprisonment is a condition for extradition (see below under 3.4).
3.4 Penalties and Extradition

Poland states that the sanctions for all the foreign bribery offences are sufficient to enable extradition. Poland is a party to the European Convention on Extradition and a number of bilateral treaties on extradition. Poland states that according to these instruments, offences for which a penalty of deprivation of liberty for a certain period can be imposed in both the requesting state and in Poland are extraditable. This period is a maximum term of imprisonment of not less than 1 year under the European Convention, and is more than 1 year under some bilateral treaties.  

Where a treaty is not applicable, extradition is possible pursuant to article 604 of the Code of Criminal Procedure, but article 604.2 (5) requires that in the requesting state the offence is subject to a maximum penalty of more than 1 year or that such a penalty has been imposed.

3.5 Non-Criminal Sanctions for Legal Persons

Pursuant to article 22d of the ACUC, legal persons are subject to a non-criminal financial penalty for the bribery of a foreign public official in the amount of up to 10% of the “revenue”, obtained in the tax year preceding the date of the decision of the President of the OPCC. Poland confirms that the “revenue” is calculated on the basis of before tax revenue. Poland states that this penalty has been designed to take into account the size of the economic activity and financial status of the legal person concerned. However, it appears that a company showing no or little revenue in the preceding year would not be liable to a fine, or would be liable to a very low fine despite the amount of its assets. It also appears that a newly established company could escape liability for a fine. It is within the discretion of the President of the OPCC to determine the amount of the financial penalty and there are no guidelines for this.

According to article 22d.6, the financial penalty “shall be payable from the income of the sentenced entrepreneur after tax, or from another form of surplus of revenues over expenditures, diminished by

\[\text{Revenues, subject to paragraphs 3 and 4, are in particular:}\]

1) money received, cash values, including exchange rate differences,

2) the value of free benefits received and in kind revenues, except for benefits connected with the use of fixed assets received by budget funded enterprises, by auxiliary enterprises of budget funded entities, by public utility companies, with the exclusion of local government entities or their unions, from the State Treasury, from local government entities or their unions - for gratuitous management or use,

3) the value, subject to paragraph 4, subparagraph 8, of remitted or time-barred liabilities, including those on account of contracted loans (credits), with the exception of redeemed loans from the Labour Fund,

4) the value of returned liabilities, including loans (credits), which, in accordance with article 16, paragraph 25, have been written off as irrecoverable or accounted for as lost, or for which reserves previously included into the revenue earning costs have been created,

5) in the case of insurers – the amount which constitutes the equivalent of a decrease in the level of technical-insurance reserves created pursuant to separate regulations,

6) in the case of banks – the amount which constitutes the equivalent of the reserve for general risk, created in accordance with the Act of 29 August 1997 – Banking Law (Journal of Laws – Dz.U. No 140, item 939, of 1998 No 160, item 1063 and No 162, item 1118 and of 1999 No 11, item 95 and No 40, item 399), dissolved or used in another manner.
taxes”. This provides for the manner of paying the penalty rather than the level thereof. The Polish authorities confirm that it would not result in a reduction of the actual amount paid.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

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

Forfeiture

The Polish Penal Code provides for the forfeiture of items (article 44), forfeiture of a financial benefit (article 45), and an obligation on a third party to return the benefit to the State Treasury (article 52). In the case of natural persons, all these provisions apply, and in the case of legal persons, only the latter provision applies.

Pursuant to article 44, the court shall forfeit “items directly derived from an offence” (section 1) and may forfeit “items which served or were designed for committing the offence”(section 2). The forfeiture of “items which served or were designed for committing the offence” shall not be applied “if its imposition would not be commensurate with the severity of the offence committed”, and may be subject to a supplementary payment to the State Treasury (section 3). Additionally, if the perpetrator has intentionally prevented the possibility of imposing the forfeiture of items under articles 44.1 or 44.2, the court may impose a monetary sanction of comparable effect. Pursuant to article 45, if the perpetrator obtained – even if indirectly – a “financial benefit” from the commission of an offence, the court may forfeit it or its equivalent (section 1). If the perpetrator obtained a “substantial benefit”, which, according to the Polish authorities means that the benefit exceeds 140,000 PLN, the court shall forfeit it or its equivalent (section2).

In conclusion, it would appear that with respect to active bribery, forfeiture of the proceeds of bribery that are in the form of an “item” is mandatory, forfeiture of a bribe in the form of an “item” is discretionary, and in both cases where forfeiture is not possible, there is discretion to order a monetary sanction of comparable effect. Where the proceeds of bribery are in the form of a “financial benefit”, forfeiture thereof is discretionary unless they are of a “substantial benefit”. A bribe in the form of a “financial benefit” does not appear to be liable to forfeiture in relation to active bribery. There are no guidelines for exercising such discretion. However, Poland states that where the court exercises its discretion it would provide reasons therefor. According to Poland, such discretion is exercised, for instance, where the forfeiture would harm a third party who was not involved in the offence.

The Polish authorities state that “items” under articles 44 cover only material objects and include both movable and immovable properties. Additionally, Poland states that, pursuant to article 115.9 of the Penal Code, which defines a “movable item or chattel”, Polish or foreign currency, other legal tenders, a document which entitles one to receive a pecuniary amount or to specify the obligation to pay a capital amount, interests, a share in profits, or ascertaining participation in a company, are also covered by this term. On the other hand, Poland states that a “financial benefit” is an increase in assets or reduction of debts and covers all things, rights in property, and benefits which have a financial value. Poland states this covers all the benefits that the offender has obtained as a result of the offence, directly and indirectly. Poland states that there is no substantive difference between these two terms, except that the latter one also

27 In both cases, forfeiture is not available where the item is subject to return to the injured party or another entity.
covers benefits obtained indirectly, and confirms that in case of an overlap (i.e. benefits obtained directly from an offence), the mandatory forfeiture under article 44.1 takes precedence. In addition, Poland clarifies that with respect to active bribery, “direct” benefits include all kinds of material benefits derived from the offence including those which arise from the contract that has been obtained in exchange of a bribe. In contrast, “indirect” benefits are those derived from “direct” benefits, including any properties.

The Polish authorities state that forfeiture under article 44 and 45 are possible only upon conviction. However, in addition, forfeiture of “things originating directly from the offence”, “objects designated or used for the commission of an offence”, which would appear to be the bribe and its proceeds of foreign bribery offences may be ordered in the case of discontinuance of the proceedings, etc. under article 100.

Pursuant to article 52, upon sentencing for an offence that brought “material benefits” to a natural, legal person or an organisational unit not possessing the status of a legal person, and was committed by a perpetrator who acted on its behalf or in its interest, the court shall “obligate” the entity that acquired the material benefit, to return it in whole or in part to the benefit of the State Treasury. According to Poland, this is applicable independently from the responsibility of legal persons. However, there are no guidelines for determining whether such an order is to return the benefit in whole or in part.

Pre-trial Seizure

In order to secure property in the event of the imposition of a fine or forfeiture at trial, pursuant to articles 291-293 of the Code of Criminal Procedure, the court, or in the preparatory proceedings, the state prosecutor, may order measures such as the seizure of movables, liabilities and other property rights, and the prohibition of selling and encumbering real estate. Additionally, pursuant to articles 295 and 296, where there are grounds to fear that the suspect might conceal his/her property, provisional seizure is available. The approval of the state prosecutor is required within 5 days following seizure.

3.8 Civil Penalties and Administrative Sanctions

Pursuant to article 19 of the Act on Public Orders, mandatory exclusion from competition for public orders applies to: (a) natural persons who have been convicted of bribery, (b) legal persons in relation to which a member has been convicted of bribery, and (c) entrepreneurs (natural or legal persons) on whom in the 3 year period before the initiation of the proceeding a financial sanction has been imposed under the ACUC for bribery.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

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

Article 5 of the Polish Penal Code contains the relevant provisions on territorial jurisdiction. It states that the “Polish penal law shall be applied to the perpetrator who committed a prohibited act within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which the Republic of Poland is a party stipulates otherwise”28. Pursuant to article 6.2, an offence is deemed to be

28 Poland confirms that “unless an international agreement to which the Republic of Poland is a party stipulates otherwise” is intended to widen the scope of territorial jurisdiction under an international
committed at the place where the offender has acted/omitted or at the place where the criminal consequence has ensued or has been intended to ensue. The Penal Code does not elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction. However, the Polish authorities confirm that a promise of a bribe made by a telephone call, fax, or e-mail emanating from Poland is sufficient to establish territorial jurisdiction. This has never been the subject of a decision of the Supreme Court, but the Polish authorities state that such interpretation is evident from the provision. Furthermore, Poland confirms that a telephone call, etc. made in furtherance of a promise, etc. (e.g. a confirmation of a promise) triggers territorial jurisdiction.

4.2 Nationality Jurisdiction and Extraterritorial Jurisdiction

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

Pursuant to article 109 of the Penal Code, Polish penal law is applicable to Polish citizens for offences committed abroad. However, nationality jurisdiction is concluded upon the recognition of the act in question as an offence “by a law in force in the place of its commission” (article 111.1, dual criminality). In addition, article 111.2 provides that if there are differences between the Polish penal law and the law of the place of commission, the court may take these differences into account in favour of the perpetrator. And article 113 states that “notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements”. The Polish authorities confirm that the requirement of dual criminality under article 111.1 is deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. Moreover, according to the Polish authorities, the requirement of dual criminality is lifted by article 113 in respect of the foreign bribery offence, as the Convention obliges Poland to prosecute the bribery of a foreign public official. Thus, where the offence is committed by a Polish citizen, Poland will always establish jurisdiction. Poland confirms that a permanent resident of Poland is not considered a Polish a “citizen” for the purpose of applying nationality jurisdiction.

In addition, Poland has jurisdiction over an alien in the case of an offence committed abroad where he/she is within the territory of Poland and where his/her extradition is denied29. This jurisdiction is subject to the condition of dual criminality.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

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29 See article 110.2 of the Penal Code. This applies to offences subject to penalty of deprivation of liberty exceeding 2 years. Thus, with respect to foreign bribery offences, this is applicable to both the basic and the aggravated offences.
Poland has concluded a number of bilateral treaties providing for the transfer of criminal proceedings. In the absence of a treaty, the provisions under Chapter 63 of the Code of Criminal Procedure would apply, pursuant to which the Minister of Justice conducts consultations with the competent authority of a state that has instituted criminal proceedings “for the same act against the same person” as in Poland, and if the interest of justice so requires, the Minister transfers or requests to transfer the proceedings.

4.4 Review of Current Basis for Jurisdiction

The Polish authorities state that they did not conduct any special analysis concerning the effectiveness of the jurisdiction principles in the fight against bribery of foreign public officials, as the scope of criminal jurisdiction has not created problems to date.

5. ARTICLE 5. ENFORCEMENT

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

5.1 Rules and Principles Regarding Investigations and Prosecutions

There are no special rules or principles governing investigations and prosecutions of the bribery of foreign public officials. The investigation and prosecution of this offence could be initiated, suspended and terminated in the general circumstances provided for in the Code of Criminal Procedure.

Poland states that the bribery of a foreign public official is prosecuted ex officio as are most offences. In accordance with the “principle of legalism” (mandatory prosecution), prosecutors are obliged to initiate proceedings if there is a reasonable suspicion that an offence has been committed (article 303 of the Code of Criminal Procedure). Pursuant to article 10.1, “the agency responsible for prosecuting offences” is obliged to institute and conduct the preparatory proceedings, and the public prosecutor is obliged to bring and support the charges, with respect to an offence prosecuted ex officio. Poland states that notification of an offence, after which the competent authorities institute the proceedings ex officio, may be filed by any person. Additionally, the Polish authorities confirm that the institution of investigative proceedings is not conditional upon a motion by an injured party in respect of foreign bribery offences.

The Code of Criminal Procedure provides for two different investigative proceedings –“inquiry” and “investigation”— depending on the type of offence. In principle, the offence of bribery of a foreign public official is subject to inquiry. However, it is possible to conduct the proceedings in the form of investigation if the public prosecutor decides that the case is to be dealt with in the form of investigation on account of its importance or complexity. An inquiry is conducted by the police under the supervision of the public prosecutor. In an inquiry, the public prosecutor may request the materials collected during the proceedings be presented to him/ her, issue orders or decisions, change orders or decisions issued by the police, take over any action of legal procedure. In addition, the majority of decisions made by the police during an inquiry are subject to approval by the public prosecutor. On the other hand, an investigation is conducted by the public prosecutor. During an investigation, the public prosecutor may mandate the police to execute certain investigative actions. However, decisions to institute, terminate or not to institute an investigation, bringing charges, etc. are exclusively within the public prosecutor’s competence.

In addition, pursuant to the provisions of Part III of the Code of Criminal Procedure, an “injured person” can participate in the proceedings as a “subsidiary prosecutor” or a “private prosecutor”. The Polish
authorities state that with respect to the foreign bribery offence, a competitor whose interest has been violated or threatened could be an “injured person”. Pursuant to article 54.1, with respect to the foreign bribery offence, a competitor who is an “injured person” may act as a “subsidiary prosecutor” where he/she submits a “statement” to the court to act as a subsidiary prosecutor before the court of first instance and if the court approves him/her as such. Poland states that a subsidiary prosecutor is entitled to take all kinds of actions during the trial as a “party”, such as submitting evidence, appealing a decision of the court, etc. Also, if the public prosecutor terminates, or refuses to initiate the proceedings, a competitor may act as a “private prosecutor” to bring an indictment under certain conditions (See the discussion below in this section.).

Pursuant to article 22.1, when an impediment, which prevents the conduct of proceedings for a lengthy period arises (e.g. when the accused cannot be arrested or cannot participate in the proceedings because of mental disease or other serious illness), the proceedings shall be suspended until such impediment is removed. Poland confirms that circumstances such as (i) the offender is not detected, or (ii) a foreign state to which Poland made a request for MLA has not provided assistance could be grounds for suspension.

Criminal proceedings at all stages, including the pre-trial, shall not be instituted, or if instituted, shall be terminated under certain circumstances enumerated in article 17.1. In particular:

- there is no complaint from an entitled prosecutor (subsection 9);
- permission that is required for prosecuting the act has not been provided, or no motion to prosecute from a person so entitled has been made, unless otherwise provided by law (subsection 10);
- other circumstances precluding such proceedings occur (subsection 11).

The Polish authorities state that subsection 9 of article 17 addresses the situation where an unauthorised person brings the indictment. With respect to the offence of bribery of a foreign public official, which is an offence subject to a public indictment, the situation would be where a private party brings an indictment directly to the court. However, according to the Polish authorities, in such a case, there would be no obstacles for the public prosecutor, etc., after having been notified, to institute investigative proceedings and to conclude them with an indictment. The Polish authorities state that, with respect to foreign bribery offences, subsection 10 applies where the perpetrator is protected by immunity (e.g. diplomats, parliamentarians). In such cases, permission of the organ authorised is required for the prosecution of such offences. With respect to a parliamentarian, a resolution of the Chamber (i.e. Sejm, Senat) to which the parliamentarian belongs is required. The Polish authorities confirm that the institution of investigative proceedings is not conditional upon a motion by an injured party. They further state that subsection 11, which provides for “other circumstances” that would terminate the proceedings, would include the expiry of the limitation period for the investigative proceedings under articles 309 and 310 of the Code of Criminal Procedure (see Article 6 “Statute of Limitations” below).

Pursuant to article 306, a decision to terminate the proceedings may be appealed to the public prosecutor who is more senior to the one who has made such a decision. According to Poland, injured persons, their

30 The other circumstances under article 17.1 are: 1) the act has not been committed, or there have not been sufficient grounds to suspect that it has been committed, 2) the act does not possess the qualities of a prohibited act, or it is acknowledged by law that the perpetrator has not committed an offence, 3) the act constitutes an insignificant social danger, 4) it has been established by law that the perpetrator is not subject to a penalty, 5) the accused is deceased, 6) the prescribed statute of limitations has lapsed, 7) criminal proceedings concerning the same act committed by the same person have been validly concluded or, if previously instituted, are still pending, or 8) the perpetrator is not subject to the jurisdiction of the Polish criminal courts.

31 The Polish authorities confirm that diplomatic immunity is applicable only where the diplomat is serving abroad.
attorneys, the suspect, and the defence counsel are entitled to appeal. Additionally, in the case where the decision to terminate the proceedings is upheld, the court shall then decide the issue. An injured person may bring an indictment to the court as a private prosecutor only where after reversal by a court of a decision not to prosecute, the public prosecutor again decides to terminate proceedings, which decision is upheld by the senior public prosecutor.

Article 320 provides for mediation proceedings between the suspect and the injured party in connection with a “respective motion to the court”. Poland confirms that such proceedings can not be alternative proceedings to criminal proceedings. According to Poland, this provision is relevant to an offence for example, such as assault between neighbours.

Article 335 provides for proceedings for convicting the offender without a trial with his/ her consent. With respect to foreign bribery, this provision is applicable only to mitigated offences under article 229.2 of the Penal Code. Under these proceedings, an extraordinary mitigation of penalty, a penal measure, a remission, or a conditional stay of execution of penalty is applicable.

5.2 Considerations such as National Economic Interest

Poland confirms that the principle of legalism excludes any considerations of the factors listed in Article 5 of the Convention in the investigation and prosecution of all cases, including cases of bribery.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Polish penal law provides for limitation periods for every offence, including bribery, and the length of the periods is related to the penalty provided for each offence. According to Poland, pursuant to article 101.1 of the Penal Code, for the basic type and the aggravated type of domestic and foreign bribery offences, which fall within the scope of article 229.1, 229.3, and 229.4, the limitation period is 10 years (period for an offence subject to the penalty of deprivation of liberty exceeding 3 years). For the mitigated offence, which falls within the scope of article 229.2, the limitation period is 5 years (period for an offence subject to the penalty of deprivation of liberty not exceeding 3 years). The period starts running from the date of commission of the offence. In addition, article 101.3, provides that if the commission depends on the occurrence of a consequence specified in the law, the limitation period starts to run from the date when this consequence has ensued. However, the foreign bribery offence does not fit within the scope of article 101.3.

Pursuant to article 102, if during the limitation period criminal proceedings against the offender have been instituted, the limitation period would be prolonged for an additional 5 years. In addition, pursuant to article 104.1, “the period of limitation does not run, if a provision of law does not permit the criminal proceedings to be instituted or to continue; this however, does not apply to the lack of a motion or a private charge.” However, according to the Polish authorities, article 104.1 addresses the issue of legal obstacles such as immunity, and therefore is not relevant to the bribery offences.

Superimposed on the statute of limitations is the deadline for the investigative proceedings (i.e. inquiry/investigation). Pursuant to articles 310.2 and 310.3 of the Code of Criminal Procedure, an “inquiry”, which, in principle, is relevant to foreign bribery cases, should be completed within 1 month. The state prosecutor who supervises the inquiry may extend this period for up to 3 months. Where the inquiry is not concluded by the expiration of such period, the files of the case shall be referred to the state prosecutor.
The state prosecutor may extend the period for a further prescribed period not exceeding 3 months, or take over the inquiry for investigation. Pursuant to articles 309.2 and 309.3, an “investigation” should be completed within 3 months. “In justifiable cases”, a senior state prosecutor may extend this period for a prescribed term not exceeding 1 year, and “in a particularly justifiable cases”, the Attorney General may extend the period for a prescribed period. There is no upper limit for the extension period granted by the Attorney General.

When the deadline period has expired, the prosecutor should decide whether to bring an indictment or to terminate the proceedings.

The Polish authorities state that such a period functions as an instruction for the investigative authorities and confirm that this would not shorten the limitation period in practice for the following reasons: (1) In practice, an extension would always be granted as far as it is needed due to the complexity of the case; (2) Where there are circumstances which prevent the conclusion of investigative proceedings within the prescribed period (e.g. the offender not detected, waiting for the response of MLA), the investigative authority shall suspend the proceedings until such circumstances are resolved; (3) Even in the event where the extension of the deadline period is rejected before having gathered sufficient evidence for prosecution and the proceedings were terminated therefor, the investigative authorities can re-initiate proceedings against the same person in respect of the same offence, unless in the prior proceedings a charge has been brought which would be tried when the authority has gathered sufficient evidence against the suspect.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Poland has made amendments to article 299 (section 1,2 and 7) of the Penal Code, which provides the offence of money laundering. The amended article 299, which applies to domestic and foreign bribery, states as follows:

1. Whoever accepts, transfers or transports abroad, assists in transfer of ownership or possession of legal tenders, securities or other foreign currency values, property rights or real or movable property, obtained from the proceeds of a forbidden act, or takes any other action which can prevent or make significantly more difficult determination of their criminal origin, or place of deposition, detection, seizure or forfeiture, shall be subject to the penalty of deprivation of liberty for a term of between 6 month and 8 years.
2. The penalty specified in section 1 shall be also imposed on anyone who, being an employee of a bank, financial or credit institution, or other entity required by law to register transactions and persons carrying out transactions, accepts in cash, in violation of a regulations, money or other foreign currency values, transfers or converts them or accepts them in other circumstances arousing justifiable suspicion that they are an objects of an acts referred to in section 1, or performs other services to conceal the criminal origin or to secure them against the seizure.
3. Whoever being responsible in a bank or credit institution for reporting to the board or a financial supervisory authority, carrying financial transaction, fails to do it promptly and in prescribed

32 The amendment was made by The Act of 16 November 2000 on Counteracting Introduction into financial Circulation of Property Values Derived from Illegal or Undisclosed Sources, which will enter into force on 23 June 2001.
form, even though the circumstances raise reasonable suspicion that they involve the source as defined in section 1 shall be subject to the penalty of deprivation of liberty for a term up to 3 years.

4. The penalty specified in section 3 shall be imposed on anyone who being responsible in a bank, financial or credit institution, for appointing a person authorised to receive information referred to in section 3 or imparting this information to an authorised person, fails to comply with regulations in force.

5. Who commits the acts referred to in section 1 or 2, acting together with other persons shall be subject to the penalty of deprivation of liberty for a term between 1 year to 10 years.

6. The same penalty shall be imposed on a perpetrator who, committing the acts defined under section 1 or 2, benefits significantly from this act.

7. In the event of conviction for the offence specified in section 1 or 2, the court shall decree forfeiture of objects originating directly or indirectly from the offence, as well as the benefits derived from the offence or its equivalent, even if these are not the property of the perpetrator. Forfeiture shall not be decreed, completely or partially, if the object, benefit or equivalent thereof is subject to restitution to the injured party or to the other entity.

8. Who had voluntarily revealed to the authority empowered to prosecute offences information regarding persons involved in commission of an offence, circumstances in which it was committed, if this prevented commission of other offence, shall not be liable to punishment for offences specified in section 1 through 4; when the perpetrator made efforts to reveal such information and circumstances, the court shall apply extraordinary mitigation of punishment.

Poland explains that all offences including domestic and foreign bribery offences qualify as predicate offences under article 299.

Although the bribe would be covered as properties, etc. “obtained from the proceeds of a forbidden act” in respect of passive bribery, it is not covered in respect of active bribery. The Polish authorities appear to state that the proceeds of active bribery are covered by article 299. However, they also state that in the context of money laundering “this is not so important because proceeds of the bribery in business transactions usually do not need any ‘laundering’ as they appear in the form of payments for executing contracts etc.” However, the Polish authorities confirm that laundering the gain that is obtained from the contract to provide services, etc. to a government as a result of having bribed a foreign public official is covered under article 299.

Poland states that all offences under article 299 have to be committed with intent. However, offences under sections 2 and 3 would apply where the circumstances in which money, etc. has been accepted raise “justifiable suspicion” as to their origin. In addition, Poland confirms that for the purpose of applying article 299.1, the requirement is only that the offender knows that the property, etc. is derived from a criminal offence and not that he/she knows that it is derived from the specific offence.

The amended article 299.1 applies to the perpetrator of the predicate offence (i.e. self-laundering) as well as a third person.

Section 8 of article 299 provides for a defence for the money laundering offence or an extraordinary mitigation of punishment where a person discloses voluntarily information about money laundering activities in which he/she was involved to the competent authorities. Where the disclosure prevents the commission of the offence, there is no liability, and where the commission of the offence was not prevented, the penalty is reduced.

Poland states that the money laundering provisions apply regardless of where the bribery occurred.
8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1 Accounting and Auditing Requirements

Accounting Standards

Accounting and auditing requirements are regulated in the Act of 29 September 1994 on Accountancy. This act has been drafted to meet the requirements of the International Accountancy Standards and the relevant directives of the European Union. The Polish authorities provide that pursuant to article 4, “entities subject to this act are obliged to apply rules of accountancy properly, ensuring honest and clear presentation of the financial condition, material status, financial result and profitableness of the entity”. This obligation is developed in articles 20-22. Pursuant to article 20, companies and other entities conducting economic activity are obliged to maintain the books and to enter every economic operation performed during the given month. Every operation should be recorded on the basis of proper “source” documents which “ascertain the performance of a given economic operation”. Article 22 states that accounting documents should reflect the true course of the economic operation and be free from accounting errors. Deletions or alterations are “inadmissible”.

Articles 45-48 require companies and other entities conducting economic activity to prepare an annual financial statement and an annual economic activity report. The annual financial statement consists of a balance, profit and loss account, and data not included in a balance and a profit and loss account but necessary to reflect honestly and clearly the financial status, financial result and profitability of the entity concerned. After approval by an independent auditor, financial statements shall be submitted to the court of competent jurisdiction (register division). In addition, Poland states that, pursuant to article 70 of the Act on Accountancy, audit reports including the balance, profit and loss statement, and the certified accountant’s opinion, shall be published.

The Polish authorities confirm that under these rules, it is forbidden to make off-the-books or inadequately identified transactions, record non-existing expenditures, enter liabilities with incorrect identification of their object as well as use false documents.

Audits

Article 64 of the Act on Accountancy requires that an independent auditor examine the financial statement of the following entities: banks and insurance companies, stock companies, investment funds, pension funds, as well as entities that fulfil two or more conditions of the following: (1) employ more than 50 persons, (2) have assets at the year end exceeding 2,500,000 EURO, and (3) net income from the sale of goods and financial operations exceeds 5,000,000 EURO. An auditor shall prepare a report declaring particularly whether the financial statement has been prepared on the basis of properly maintained books, whether it has been prepared in accordance with the provisions of the law and whether it reflects honestly and clearly all information relevant to a proper and complete evaluation of the entity concerned.

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33 This act was amended on 9 November 2000. The new Act entered into force on 1 January 2001.
The independence of auditors is guaranteed by the provisions of the Act on Accountancy. Pursuant thereto, an independent auditor should not be connected with the entity in question as a shareholder or stockholder (including an entity subordinated or dominated by the company), an employee, manager or a board member during last 3 years, or have participated during the last 3 years in keeping the books or the preparation of the financial statement of the entity.

According to article 1.4 of the Law of September 21, 2000, which amended the Act on Certified Accountants and their Self-government Bodies, certified accountants are bound by professional secrecy. However, the Polish authorities confirm that professional secrecy would not be violated by a notification of a suspected offence. Moreover, under the “Conduct of Qualified Auditor’s Profession”, which regulates general principles for auditing financial statements, auditors are obliged to report to the entity’s management suspected criminal activities or irregularities. Furthermore, with respect to entities such as banks, insurance companies, investment funds and pension funds, auditors are obliged to report to the competent state supervisory body (e.g. the State Office of Insurance Supervision) any activity which breaches a law, etc. Pursuant to article 304.2 of the Code of Criminal Procedure, such supervisory bodies are obliged to inform the state prosecutor or the police when they receive information of suspected criminal activity from auditors.

8.2 Companies Subject to Requirements

Poland states that the Act on Accountancy applies to:

- Companies and other legal persons except the State Treasury and the National Bank Of Poland (central bank);
- Natural persons whose net income from selling goods or financial operations for the past year exceeds 800,000 Euro;
- Banks, stock exchanges, trust funds, investment funds, insurance companies, pension funds – regardless of their legal form and income;
- Local municipalities, districts, regions (units of administrative division of the country);
- Entities not having legal personality;
- Foreign natural or legal persons conducting economic activity in the territory of Poland – in relation to that activity;
- Other entities if they are receiving allocations from the state budget or budgets of territorial self-government units.

8.3 Penalties

Article 77.2 of the Act on Accountancy states that, “whoever being responsible in accordance with the provisions of this Act for creation of a financial statement allows to not create such a statement or create thereof in contradiction with the conditions stipulated in the law or to include in this statement dishonest information, shall be subject to a fine or a deprivation of liberty for a period up to 2 years or both.” Pursuant to article 79, whoever being responsible under the law does not submit a financial statement for auditing or publication is subject to the same penalty. Article 60 of the Fiscal Criminal Code states that, “whoever against a obligation does not keep the books of accounts shall be subject to a fine in an amount up to 240 daily rates.” Article 61 states that, “whoever dishonestly keeps the books, shall be subject to a

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34. Auditors are obliged to report suspected criminal activity, etc. to the state supervisory body (i.e. the Banking Supervision Commission) also under the Banking Law.

35. This act was enacted on 10 September 1999 and entered into force on 17 October 1999.
fine in an amount up to 240 daily rates”. (Poland states this fine under the Fiscal Criminal Code ranges from 230 to 2,208,000 PLN.)

In addition, Poland confirms that the falsification of an account document could constitute the offence of forgery under article 270.1 of the Penal Code, subject to a penalty of deprivation of liberty from 3 month to 5 years. If such a falsification results in the loss of tax liabilities, it would constitute a tax criminal offence separately.

The Polish authorities are of the opinion that the penalties for omission and falsification in respect of records and accounts are in accordance with Article 8.2 of the Convention.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1/9.2 Criminal Matters/ Dual Criminality

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

Poland may provide mutual legal assistance on criminal matters on the basis of bilateral and multilateral treaties to which Poland is a party. Poland is a party to the European Convention on Mutual Legal Assistance in Criminal Matters of 1959, and several bilateral treaties.

Poland has reserved the right under the European Convention on Mutual Legal Assistance in Criminal Matters of 1959, to make the provision of MLA in the form of search and seizure conditional on dual criminality, the availability of extradition for the offence in question, and the execution of the request in accordance with Polish law.

In the absence of a treaty, Poland may provide MLA pursuant to the provisions of the Code of Criminal Procedure, which only applies where there is no applicable treaty. Pursuant to article 588.2, assistance

36 According to Poland, Polish Senate (second chamber of Parliament) is currently discussing on the amendment to the Act on Accountancy, which re-introduces “penal responsibility for carrying the books disregarding the provisions of law or entering false data into the books.”

37 Poland has concluded bilateral treaties on MLA with U.S.A and Canada. Poland states that under these bilateral treaties, the standards set by the European Convention are adopted.

38. Pursuant to article 585 of the Code of Criminal Procedure, the forms of MLA that are available include the following: 1) service of documents on persons staying abroad or on agencies having their principal offices abroad; 2) taking depositions of accused persons, witnesses, or experts; 3) inspection and searches of dwellings and persons, confiscation of material objects and their delivery abroad; 4) summoning persons staying abroad to make a personal voluntary appearance before the court or state prosecutor, in order to be examined as a witness or to be cross-examined, and making persons under detention available for the same
shall be refused if the request conflicts with the legal order of Poland (e.g., a request for conducting interrogation using a polygraph) or constitutes an infringement of its sovereignty (e.g., a request for making an arrest in the territory of Poland by a foreign authority). In addition, pursuant to article 588.3, assistance may be refused if:

- the performance of the requested action lies beyond the scope of activity of the court or state prosecutor under Polish law;
- the foreign state in which the letters rogatory have originated, does not guarantee reciprocity in such matters;
- the request is concerned with an act that is not an offence under Polish law (dual criminality).

The Polish authorities state that dual criminality shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention.

Decisions to grant or refuse MLA are made by the competent courts or public prosecutors. A decision of the court to refuse legal assistance may be appealed by the public prosecutor within the framework of the Code of Criminal Procedure. Additionally, a decision of the public prosecutor to refuse assistance may be appealed to the superior public prosecutor.

Poland confirms that it can provide MLA in response to a request concerning criminal proceedings against a legal person on either a treaty or a non-treaty basis.

9.1.2 Non-criminal Matters

The ACUC contains measures to provide mutual legal assistance to the authorities in foreign states in relation to proceedings against a legal person. Pursuant to Article 22f, the President of the OPCC "shall" provide legal assistance in relation to the proceedings against a legal person for the purpose of establishing its liability or imposing on it sanctions for the bribery of a person performing a public function.

Measures of assistance include necessary actions undertaken in administrative proceedings, such as serving documents, hearing witnesses and experts, summoning persons to appear in person, making available files and documents. Coercive measures are not available. Additionally, financial information could be provided if it is not covered by bank secrecy.

Pursuant to article 22f.4 of the ACUC, the President of the OPCC may refuse legal assistance to a foreign state if:

- The requested action would "contravene fundamental principles of the legal order in the Republic of Poland" or "violate its sovereignty." Poland states that this ground has the same effect as the corresponding ground in respect of MLA in criminal matters (see 9.1/9.2 above);
- no agreement stipulating such assistance has been concluded between the Republic of Poland and the state from which the request originates, and that state does not guarantee reciprocity. Poland confirms that the Convention is an "agreement stipulating such assistance".

9.3 Bank Secrecy

Pursuant to article 105.1(2)(b) and (c) of the Banking Law, Poland is "obliged" to provide information "covered by bank secrecy" in relation to a request from a foreign state concerning criminal proceedings against a natural person or an entity (with or without legal personality) if the request is based on an
international treaty. The Polish authorities consider the Convention as a sufficient basis for rendering information covered by bank secrecy. Poland confirms that there are no additional conditions that need to be satisfied in order to grant MLA in respect of information covered by bank secrecy. According to Poland, if there is a criminal proceeding in a requesting state with which Poland has concluded a bilateral or multilateral treaty on MLA including rendering information covered by bank secrecy, the request by the proper authorities fulfilling general conditions is sufficient to grant such assistance.

10. ARTICLE 10. EXTRADITION

10.1 /10.2 Extradition for Bribery of a Foreign Public Official/ Legal Basis for Extradition

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

As mentioned above in 3.4 (“Penalties and Extradition”), Poland may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral / multilateral treaties39, or under the provisions of the Code of Criminal Procedure where there is no applicable treaty. In addition, the Polish authorities state that in the absence of an extradition treaty with another Party, it will consider the Convention as a legal basis for extradition in respect of the offence of bribing a foreign public official.

Requests for extradition are transmitted by the state prosecutor to the Voivodship Court, which shall issue an opinion following the opportunity of the accused make submissions orally or in writing. Where he/ she requests “evidence taking proceedings” based on a “well-founded request”, they “should” be conducted “with respect to the evidence accessible” in Poland (articles 602 and 603 of the Code of Criminal Procedure). The Polish authorities confirm that in the “evidence taking proceedings”, the person whose extradition is sought is not allowed to argue that he/ she is not guilty, and therefore, the requesting state would not have to provide any additional evidence in order to prove the criminal act of the person in question thereunder. According to Poland, such proceedings take place to determine whether extradition could be granted pursuant to Polish law40.

A decision of the Court on whether to extradite shall be referred to the Minister of Justice who shall make the final decision (article 603.5). The decision of the Minister of Justice is not subject to appeal.

Under article 604.1 of the Code of Criminal Procedure, extradition shall be refused if:

- the person whose extradition is sought is a Polish citizen or has the right of asylum in Poland;
- the act for which extradition is sought does not have the features of a prohibited act, the law stipulates that the act does not constitute an offence, or a perpetrator of the act does not commit an offence or is not subject to a penalty;
- the period of limitation has lapsed;
- the criminal proceedings have been validly concluded concerning the same act committed by the same person;

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39 Poland is a party to the European convention on Extradition of 1957. In addition, Poland has concluded bilateral treaties on extradition with U.S.A and Australia. Poland states that under these bilateral treaties, the standards set by the European Convention are adopted.

40. For instance, the “evidence taking proceedings” take place to evaluate whether the human rights of the person in question would be safeguarded (e.g. a fair trial) in the requesting state if extradition is granted.
• the extradition would contravene Polish law

In addition, pursuant to article 604.2, extradition may be refused “in particular”, under the circumstances including the following:

• where pursuant to the law of the requesting state, the offence is subject to the penalty of deprivation of liberty for a maximum term of one year or less, or such a penalty has been actually imposed;
• where the offence for which the extradition is sought is of a political, military or fiscal nature;
• where the requesting state does not guarantee reciprocity in this matter.

The Polish authorities confirm that bribery of a foreign public official who is a political party member could not be considered as a “political” offence and the bribery of a foreign public official could not in general be considered as a “fiscal” offence.

10.3/10.4 Extradition of Nationals

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

As mentioned above, Poland cannot extradite its nationals pursuant to article 604.1 of the Code of Criminal Procedure, and in accordance with article 55 of the Polish Constitution, which prohibits the extradition of Polish nationals.

As mentioned above in 5.1, the Polish prosecutorial authorities are obliged to institute criminal proceedings where there is a reasonable suspicion that an offence has been committed. The Polish authorities consider that a request for extradition creates such a suspicion. Thus, where the nationality is the sole reason for declining a request to extradite a person for the bribery of a foreign public official, the competent authorities in Poland are obliged to institute criminal proceedings against such a person.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

As mentioned above, dual criminality is required for extradition. However, the Polish authorities consider that it shall be deemed to be fulfilled as long as the offence for which extradition is sought is within the scope of the Convention.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

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

Poland has notified the Secretary-General that the Ministry of Justice has been designated as the authority responsible for the matters listed in Article 11. In addition, Poland intends to designate the Office for Protection of Competition and Consumers as the responsible authority for mutual legal assistance in relation to non-criminal proceedings against a legal person after the entry into force of the Act of 9 September 2000, which will take place on February 4, 2001.
B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

Neither the Act on Personal Income Tax (article 2.1.4) nor the Act on Corporate Income Tax (article 2.1.3) explicitly prohibits tax deductibility of the bribe paid to a foreign public official. However, both acts contain an identical provision, which states as follows:

The provisions of this Act shall not apply to the revenues resulting from acts which cannot be a subject matter of a legally effective contract.

The Polish authorities state that the Ministry of Finance interprets this provision as prohibiting the tax deductibility of an expenditure representing a bribe paid to a person performing a public function. However, this explanation raises two issues of concern. Firstly, the provision quoted by the Polish authorities refers to “revenues”, and thus seems to be addressing the taxability of revenues as opposed to the non-tax deductibility of expenditures, in which case the income derived from bribing would not be taxable. Secondly, it is presumed that the provision is interpreted as excluding from the ambit of the Tax Act (revenues) derived from bribing a foreign public official because bribery is illegal, and a contract to perform a criminal act would be an illegal contract and thus unenforceable, hence not “the subject matter of a legally effective contract”. However, an equally plausible interpretation could be that the act from which the revenue is derived is the act (or omission) of the foreign public official, and if his/her act does not involve a breach of law (civil or criminal), the Tax Act would apply.

The Polish authorities state that they interpret the term “revenues” broadly so that it includes both the expense and the income. And thus, the proceeds of a criminal offence are not taxable because of their criminal origin, and the deductibility of the bribe is prohibited for the same reason. However, there is still doubt as to whether this addresses the taxability of the proceeds and the non-tax deductibility of the bribe in respect of foreign bribery cases.
GENERAL REMARKS

The Working Group commends the Polish authorities for their excellent co-operation during all stages of the examination. In particular, the Working Group appreciates the thoroughness of Poland’s responses and timeliness in providing translations of all the relevant legislation.

Poland implemented the Convention through an amendment to article 229 of the Penal Code, which applied only to the bribery of domestic public officials prior to the amendment. The new provision retains its application to domestic public officials, and extends its ambit to persons exercising foreign or international public offices or functions. In addition, Poland created the administrative liability of legal persons for the bribery offence under the Act on Combating Unfair Competition (ACUC). Overall, the Working Group is of the opinion that the relevant Polish laws, including article 229, conform generally to the standards under the Convention. However, the Working Group has focused on the specific issues identified below.

SPECIFIC ISSUES

1. Third Parties

Article 229.5 does not expressly apply to the case where the bribe is for a third party. The Polish law covers the case where a “material benefit” (i.e. pecuniary benefits) goes to a third party by applying a general provision in the Penal Code defining “material benefit”, which addresses several situations including the one where the benefit is for a third party. However, since this provision does not refer to a “personal benefit” (i.e. non-pecuniary benefits), the case where such a benefit goes to a third party is not covered.

The Working Group considers this a gap in the implementation of the Convention and recommends that the Polish authorities take remedial action as soon as possible to cover the case where a “personal benefit” goes to a third party. Poland acknowledges that this issue is not covered by their legislation and informs the Group that they will amend their legislation in order to address this issue.

2. Administrative Responsibility of Legal Persons

Poland establishes the administrative liability of legal persons for the foreign bribery offence within the framework of the Act on Combating Unfair Competition. It is triggered where the natural person who is a director, a member of the board, etc. of the legal person bribes a public official, or where an employee or another person who is authorised by a person holding a high managerial post to bribe a public official. The Working Group is concerned about certain features of this approach as explained in the review report, in particular the requirement, in most cases, of a prior conviction of the natural person, the exclusion of parallel criminal and administrative proceedings, and that sanctions are based on the revenue of the legal person in the preceding year.

The Polish authorities stress that the requirement of the Convention is to establish the liability of legal persons “in accordance with its legal principles”, and is of the opinion that their implementing legislation sufficiently meets the standards under the Convention. In addition, although there is no experience in practice with the administrative liability of legal persons for bribery cases, Poland believes that this would be an effective way to implement the requirements of the Convention.
However, the Working Group expressed doubts whether the standard of effective, proportionate and dissuasive sanctions has been fully met and recommends that this issue should be re-examined in Phase 2 in light of Articles 2 and 3.2 of the Convention.

3. **Forfeiture of the Bribes and its Proceeds**

Under articles 44, 45 and 52 of the Penal Code, forfeiture of a bribe in the form of an “item”, and of the proceeds of bribery in the form of a “financial benefit” is subject to discretion in several different ways. In addition, ordering monetary sanctions of comparable effect is also discretionary. There are no guidelines for the exercise of the discretion to order forfeiture or to order monetary sanctions of comparable effect.

Poland states that where the court exercises its discretion it would provide reasons therefor. According to Poland, such discretion is exercised, for instance, where the forfeiture would harm a third party who was not involved in the offence.

However, the Group noted that the possible exercise of discretion in some cases regarding forfeiture or the application of monetary sanctions of comparable effect may undermine the effective implementation of the Convention. The Group recommends that this matter be followed up in Phase 2.

4. **Tax Deductibility**

Poland states that bribes are non-deductible because the tax legislation does not apply to the “revenues resulting from acts which cannot be a subject matter of a legally effective contract”. Thus it appears that bribes to foreign public officials are not deductible because a contract to perform a criminal act such as bribery would be an illegal contract, and hence cannot be the “subject matter of a legally effective contract”. This raises two concerns: (1) As it refers to “revenues” this may address the taxability of revenues. In such case the non-tax deductibility of a bribe would be irrelevant, as there would be no taxable income to deduct it from. (2) This provision could be interpreted so that the act from which the “revenue” is derived is the act of the foreign public official, and if his/ her act does not involve a breach of law, the tax law would apply and admit the tax deductibility of bribes.

The Polish authorities state that they interpret the term “revenues” broadly so that it includes both the expense and the income. And thus, the proceeds of a criminal offence are not taxable because of their criminal origin, and the deductibility of the bribe is prohibited for the same reason.

The Working Group expressed doubts whether this addresses the taxability of the proceeds and the non-tax deductibility of the bribe in respect of foreign bribery cases. Therefore, the Group recommends that this issue is monitored in Phase 2 in order to confirm whether taxation of the proceeds and prohibition of the deduction of the bribe is possible.
ANNEX - COUNTRIES HAVING RATIFIED THE CONVENTION

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of Deposit of Instrument of Acceptance, Approval or Ratification</th>
<th>Date of Examination by the Working Group</th>
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<tr>
<td>1. Iceland</td>
<td>17 August 1998</td>
<td>October 1999</td>
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<td>3. Germany</td>
<td>10 November 1998</td>
<td>April 1999</td>
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<td>5. United States</td>
<td>8 December 1998</td>
<td>April 1999</td>
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<td>13. Austria</td>
<td>20 May 1999</td>
<td>December 1999</td>
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<td>15. Sweden</td>
<td>8 June 1999</td>
<td>October 1999</td>
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<td>17. Slovak Republic</td>
<td>24 September 1999</td>
<td>February 2000</td>
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<td>18. Australia</td>
<td>18 October 1999</td>
<td>December 1999</td>
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<td>22.</td>
<td>Turkey*</td>
<td>26 July 2000</td>
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<td>32.</td>
<td>Chile*</td>
<td>18 April 2001</td>
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* As of 15 May 2001, these countries have not yet enacted implementing legislation.